



Understanding Society

## TILBURG LAW SCHOOL

### LIABILITY AND EVIDENCE IN CASE OF INFRINGEMENT OF COPYRIGHT ON THE INTERNET A LEGAL COMPARISON BETWEEN BELGIUM AND FRANCE

Date August 2012  
Subject Law & Technology Master's Program  
Faculty Tilburg Institute of Law, Technology and Society

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Second reader Dr. mr. ir. Maurice Schellekens

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*"If we are victorious in one more battle with the Romans,  
we shall be utterly ruined"*

King Pyrrhus of Epirus, in: Plutarch, *The Parallel Lives: Life of Pyrrhus*, p. 417.

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I finally wish to thank my companion, Sophie Donnay, who supported me during the entire process.

### III. Abbreviations, Symbols and Notation

BCA or BBCA = LDA	Belgian Copyright Act - Law on Copyright and Neighboring Rights of June 30, 1994 – Available in English via <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=125150">http://www.wipo.int/wipolex/en/text.jsp?file_id=125150</a>
BIPC	Belgian Intellectual Property Code
Counterfeiting	Belgian and French legal term to refer to copyright infringement
Digital piracy	Copyright infringement of digital media
DRM	Digital Right Management
ECJ	European Court of Justice (now Court of Justice of the European Union)
EU	European Union
FIPC	French Intellectual Property Code (Code de la Propriété Intellectuelle)
	Available in English here: <a href="http://195.83.177.9/code/index.phtml?lang=uk">http://195.83.177.9/code/index.phtml?lang=uk</a>
Hadopi	High Authority for the dissemination of works and the protection of rights on the internet
Hadopi 1	Law 2009-669 of June 12, 2009 promoting the distribution and protection of creative works on the internet (Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 135 Journal Officiel de la République Française [J.O.] [Official Gazette of France] June 13, 2009, p. 9666)
	Unofficial English translation available here: <a href="http://www.laquadrature.net/wiki/HADOPI_translation">http://www.laquadrature.net/wiki/HADOPI_translation</a>
Hadopi 2	Law 2009-1311 relating to the protection of literary and artistic property on the internet through criminal law (Loi n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet, 251 Journal Officiel de la République Française [J.O.] [Official Gazette of France], October 29, 2009, p. 18290)
	Unofficial English translation available here: <a href="http://www.laquadrature.net/wiki/HADOPI_translation">http://www.laquadrature.net/wiki/HADOPI_translation</a>
Illegal file sharing	To be understood here as both downloading (copying) and uploading (offering) copyright-protected content without the required copyright owner's permission
IP	Either Intellectual Property or Internet Protocol
ISP	Internet Service Provider
JORF	Official Gazette of France (Journal Officiel de la République Française)
MB	Official Gazette of Belgium (Moniteur Belge)
Piracy	Most commonly used term to refer to copyright infringement
P2P	Peer-to-peer
RPC = CPD	Rights' Protection Commission (Commission de Protection des Droits)
Squaring the Net	La Quadrature du Net - French citizen advocacy group
TPI = TGI	Tribunal of first instance: Tribunal de Première Instance (Belgium) = Tribunal de Grande Instance (France)
TPM	Technology Protection Measure
E.I.P.R.	European Intellectual Property Review
EJLT	European Journal of Law and Technology
IIC	International review of Industrial property and Copyright law or International review of intellectual property and competition law (1970-2003)
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
JIPLP	Journal of Intellectual Property Law & Practice
M.I.P.	Managing Intellectual Property
QMJIP	Queen Mary Journal of Intellectual Property
R.I.D.P.	Revue Internationale de Droit Pénal
W.I.P.O.J.	WIPO Journal

# Chapter I: Introduction

## SECTION 1. Background

Like the Gutenberg printing press, major information spreading invention made possible to reproduce literacy works, which created a need for copyright protection. The technology turbulence brought by today's computers and the Internet renders inexpensive, easier, and faster the making of copies. This requires a rethinking of the copyright protection and enforcement into the cyberspace, where the balance between the rights of copyright holders and the society at large needs to be adapted. Therefore, efforts were made in order to strike this balance fairly, in which the protection and liability of potential infringer occupy a central role.

Copyright laws and more generally intellectual property laws have been apt to avert counterfeiting and to boost innovation but have been powerless to cope with what is seen as one of the most challenging issue of the digital economy, namely consumer piracy.<sup>1</sup> Indeed, the maxim "what holds offline also holds online" faces huge challenges within the framework of digital copyright. According to the European Publishers Council, copyright law finds its place within this century,<sup>2</sup> although "the transitory nature of cyberspace makes copyright laws easy to break and difficult to enforce."<sup>3</sup> The main idea is well assumed; the solution to prevent online infringement of intellectual property rights may be adequately drafted in the books, but not correctly applied in practice. However its enforcement in the virtual world is not achieved as enforcement authorities are lacking the necessary instruments to successfully implement the relevant regulations.<sup>4</sup> In short, "IP laws exist, but the enforcement is the key issue" and the "onus of enforcement needs to be on all members of the media supply chain".<sup>5</sup>

Nowadays, violation of copyrights on the Internet is a huge problem for the entertainment industry where piracy is one of the most significant menaces. The call for more protection resulted in many new European rules, like the enforcement Directive 2004/48/EC<sup>6</sup> which is under great debate right now, and the now defunct<sup>7</sup> ACTA treaty.<sup>8</sup> Indeed, a major pitfall of the above Directive is that the issue of online infringements is not effectively coped with.<sup>9</sup> Also, copyright holders endeavored in vain to impose technical protection measures to prevent the dissemination of their works. Following from the extensive scale of consumer piracy, the fruitless ability of intellectual property laws to tackle piracy, and the lack of success of technologies seeking to avoid piracy, the necessity to create

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<sup>1</sup> Rayna, T. and Barbier, L., 2010. Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations. *International Journal of Foresight and Innovation Policy*, 6(4), pp. 294-314.

<sup>2</sup> European Publishers Council, 2011. European Commission Recognises Importance of Copyright for Content Creators in Key New Proposals. Available from: <http://www.epceurope.org/presscentre/archive/european-commission-recognises-importance-of-copyright-for-content-creators-in-key-new-proposals.shtml>.

<sup>3</sup> Armstrong, L., 1994. Internet copyrights. *Network Security*, 10, p. 6.

<sup>4</sup> BBC website, 2012. Megaupload file-sharing site shut down. Available from: <http://www.bbc.co.uk/news/technology-16642369>.

<sup>5</sup> Ernst & Young, 2011. Intellectual property in a digital world. Available from: [http://www.forum-avignon.org/sites/default/files/editeur/Secured\\_IP\\_report\\_GB.pdf](http://www.forum-avignon.org/sites/default/files/editeur/Secured_IP_report_GB.pdf), pp. 6 and 22.

<sup>6</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>7</sup> Treaty rejected by the EU on July 4, 2012.

<sup>8</sup> Anti-Counterfeiting Trade Agreement.

<sup>9</sup> Stamatoudi, I., Towards an updated EU Enforcement Directive? Selected topics and problems. Paper presented at the 4th International Conference on Information Law, Thessaloniki, May 20 and 21, 2011. Available from: <http://conferences.ionio.gr/icil2011/>.

special rules regarding consumer piracy has been felt.<sup>10</sup> Innovation, to find out a rapid and massive response to counterfeiting and piracy, was required. Still, at least one commentator believes that to the issue of digital piracy, no solution exists or will ever exist.<sup>11</sup>

## SECTION 2. Problem statement

As correctly held by the jurist Lawrence Lessig at the eG8 conference held in France in 2011, the issue about piracy and counterfeiting is not to know whether copyright protection is needed (because the society does) but which architecture is best to serve the aim of protecting copyright in the digital era, i.e. “whether the architecture of copyright built for the nineteenth century continues to make sense in the twenty-first. And what is the architecture that would make sense in the twenty-first.”<sup>12</sup>

It must be recognized that the issue of an effective copyright enforcement, be it offline or online, which remains up until now unsolved, goes beyond the realm of the law or technique. Henceforth, the problem needs to be approached in a holistic way. In order to adopt such a multidisciplinary perspective, a comprehensive analysis of the problem needs to pay due account to the four modalities of regulation devised by Lawrence Lessig,<sup>13</sup> namely the law, the market, social norms and the architecture or code. Consequently, being trans-legal, trans-technique and even trans-boundary, the issue of the enforcement requires a multidisciplinary answer. Although questions of liability are multidisciplinary in nature and not merely about legal features, the legal modality of regulation is the one that is to be treated by the present thesis. However, the narrow legal perimeter is at several times exceeded by *inter alia* technological arguments as law follows technique as a consequence of the multi-and interdisciplinary aspects of online copyright enforcement.

In this perspective, there exists technical means which can be used as evidence to establish copyright infringement. Concretely, when an Internet user uploads a protected work without the permission of the right holder, the latter can track back the content to the uploader *via* various methods, mainly thanks to the Internet Protocol addresses (IP addresses), or passive systems like fingerprinting or watermarking.<sup>14</sup> With this sort of evidence, two lines of defense are usually held in courts. Firstly, the alleged infringer will expound that the evidence *per se* is not reliable. The first line of defense may be a valid one. Even though it is the case, the evidence only conducts to the IP address/computer or to the licensee. Secondly, the alleged infringer may argue against the relevance of the evidence proving that he did infringe someone else's copyright. Indeed, even though tracing techniques indicate a specified person, it could be argued that the computer owner/licensee was not the person who did the copyright infringement, because someone else committed it (“I did not do it, it was someone else” argument). It could be the outcome of the acts from the alleged infringer's children, friends or from the computer system or network being hacked into, all resulting in the infringement of copyright. In this research, I start from the postulate that the means of evidence is trustworthy and I focus on the liability of the computer owner/licensee.

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<sup>10</sup> Rayna and Barbier, *supra* note 1.

<sup>11</sup> Phillips, J., 2009. ‘Three Strikes’ ... and then?. *Journal of Intellectual Property Law & Practice*, 4(8), p. 521.

<sup>12</sup> Delport, D., 2011. Lawrence Lessig at # EG8: The future was not invited. Available from:

<http://en.wikinoticia.com/Technology/general-technology/85823-lawrence-lessig-at--eg8-the-future-was-not-invited-and-Lessig, L., 2011. Open address of the eG8 Forum Paris-France. Available from: http://www.youtube.com/watch?v=UsJiR-ClkAc.>

<sup>13</sup> Lessig, L., 1999. *Code: and Other Laws of Cyberspace*. New York: Basic Books, p. 123.

<sup>14</sup> Guibault, L., Westkamp, G., Rieber-Mohn, T., Hugenholtz, P.B. *et al.*, 2007. Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Report to the European Commission, DG Internal Market.

The present thesis focuses on the situation in Belgium and France and aims to reveal which nation offers the best protection for the uploaders. This comparison between the Belgian and French legal orders is relevant in the sense that both countries have a long shared history, but which deviated with the enactment of the controversial Hadopi Act. From a legal point of view, those jurisdictions are very similar. Although the Belgian Civil Code found its foundation into the Napoleonic Code of 1804, which is the base of the current French Civil Code, there exists a mutual influence of both systems, which tends to diminish through time.<sup>15</sup> The main attractiveness of the comparison between these two countries is to see when and how their legal approach diverges on the same issue. In addition of sharing a legislative history, Belgium and France are both members of the EU which implemented the relevant copyright legislation and have ratified the Berne Convention for the Protection of Literary and Artistic Works. That is one reason why the laws of these states bear the same general principles while still diverging in many ways.

## SECTION 3. Research question

Following from the problem statement, the central research question is formulated:

*Does Belgian law of liability in case of evidence of online copyright infringements offer a more balanced regime than the one provided for by the French Hadopi graduated response and do these systems fit with the objectives of copyright law in providing a fair balance with the rights of the right holders and users?*

Indeed, copyright law is intended to strike a balance between the interests of creators and users and that balance should be preserved in cyberspace (Directive 2001/29/EC, recital 31).

To answer the central research question the following sub-questions are investigated:

- (1) What is the applicable law of copyright and what does it encompass on the aspects of the infringement and enforcement of copyright within Belgian and French legal frameworks?
- (2) How and by which organizations is the pragmatic enforcement carried out in Belgium and France?
- (3) How is the issue of legality of uploading and downloading dealt with in Belgium and France?
- (4) What are the methods used and evidence needed to prove that a person (Internet user) is guilty of (online) copyright infringement?
- (5) How can an alleged copyright infringer be held liable within civil and criminal law?
- (6) Can or cannot an uploader still be held liable in Belgian law while he/she is not disputing the fact that evidence of copyright violations is found, all pointing out to his/her name or computer. In other words, to what extent can people be responsible when they are not directly involved into the violation of copyright and how can this be proved?
- (7) How can an alleged copyright infringer be protected against the claims of rights holders and the public power?

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<sup>15</sup> Mazeaud, H., 1950. Le Code civil français et son influence en Europe. *Revue internationale de droit comparé*, 2(4), pp. 757-765. Available from: [http://www.persee.fr/web/revues/home/prescript/article/ridc\\_0035-3337\\_1950\\_num\\_2\\_4\\_6015](http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1950_num_2_4_6015). For further information on the influence of French law into Belgium, see: Heirbaut, D. and Gerkens, J.-F., 2010. In the shadow of France: Legal acculturation and legal transplants in the Southern Netherlands/Belgium. Washington: International Academy of Comparative Law, 1(1). Available from: <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/29/28>.

## SECTION 4. Research method

The present thesis adopts a comparative approach of two legal systems; the one of Belgium and the one of France. The interest of the comparative approach resides in the fact that, as expressed by Descartes:

“[...] in any reasoning, it is only by way of comparison that we know the truth precisely [...] broadly speaking, all knowledge which is not obtained through the simple and pure intuition of an isolated thing is obtained by the comparison of two or more things among themselves [...]”.<sup>16</sup>

To answer the central question this research is based on seven benchmarks (civil and criminal liability of uploaders, right to a fair trial, rights of the defense, right to respect for the presumption of innocence, principle of legal certainty and proportionality) which will be illustrated and explained in chapter 3 and 4.

I will first look at Belgian laws, analysis which is my starting point and the basis for the comparative approach. I will then compare them with French laws in order to see whether France offers a better system or not, and all this in order to find out the best solution to the research question. I will not solely search into civil and criminal law, but also use comparisons to similar cases. I will use, among others, a comparison of the aforementioned issue (i.e. liability of uploader) with the traffic enforcement camera (commonly known as speed camera). In this case as well, the same evidence problem arises. When a driver exceeds the speed limit, a picture is taken by the controlling device. On the picture, the focus is given to the license plate numbers, proving information about the identity of the car's owner. This involves that the enforcement authorities have a license plate number but this does not necessarily mean that the license plate holder is the one who breached the road code. I will look into this kind of regulation to see if and how this is being dealt with. Hence, In Real World (IRW) analogies are made using my figurative character, Nicolas.

The question therefore is whether we can equate the liability of the car's owner to the liability of the uploader and Internet access holder. In others words, what are the ways to tackle defenses of the computer owner or user, being that his/her computer was hacked or accessed by his/her children or friends, leading to the offence? At the same time, how to protect the computer owner or user who did not commit the copyright violation?

To this end, the relevant legislations and case-law of the concerned states will be analyzed, highlighting the merits and pitfalls of each regime and revealing the legal regime which offers the best protection for the uploader/infringer. I will focus on the uploading and downloading of audio and audiovisual (mainly music and movies), photographic works and digital books. After the thorough examination of both literature and legislations, conclusions will be drawn.

The method used in order to provide answers to the research question and sub-questions consist of a desk study analyzing both primary and secondary sources. In order to achieve this, an assessment of the primary sources being the case-law, legislation and policy documents was carried out. Secondary sources, such as scholarly books and articles were used and interpreted. All this was done within the frameworks of Belgium and France. I would like to add that the information employed was not confined entirely to the scholastic sphere. As a consequence of the sometimes multidisciplinary

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<sup>16</sup> Descartes, R., 1961. Rules for the direction of the mind. Rule XIV. Liberal Arts Press.

approach of the present thesis, legal practitioners and computer technicians' materials and opinions were respectively looked into and exchanged.

I would like to emphasize on the significance of the present work by expressing the fact that its aim is to shed lights on the interesting but seldom researched issue of the responsibility of the individual uploader. In the past as well as we may see in the future, also the individual downloaders are being traced and prosecuted. In this regard, the present work analyses the possible liability that computer owner or licensee may encounter when the line of defense is not to contest the validity of the evidence gathered against him/her, but to challenge their relevance. This research complements by its value and working language to the currently available legal scholarship written in the English language on the first graduated response scheme implemented within the European Union.

This research is also of value and relevance as it provides new insights into the problematic surrounding the graduated response schemes taking place around the world, not by comparing the different national implementations of such schemes all together, but by comparing one country which implemented a three strikes policy and another one which did not.

Eventually, it is also needed to point out the identified limitations of this thesis. Analyzing the enforcement strategy of the entertainment industry is interesting in many respects. However, the present thesis, partly because analyzing a graduated response scheme, does not search into the issues of the adequacy and interaction of such a scheme with every Internet user's rights. Adequacy with the prerogatives like the right to privacy and personal data, the automaticity of the surveillance which make it difficult to control, freedom of expression and speech, the "threatening" logic underlying the graduated response and the efficiency of the security software, is not assessed in detail or at all. These issues may lead to the question of to what extent it is possible to strike a fair balance between protecting IPRs and consumers' rights. As the French anti-piracy law makes its way, it could be of great value to compare the French Hadopi with other systems of graduated response implemented in other countries and jurisdictions (e.g. New Zealand, South Korea, Taiwan, or the United Kingdom) but only when factual elements of their effectiveness may be collected in those other states, as it is not the case yet.

The present work would also have benefit from the work of Carine Doutrelepont, François Dubuisson, Alain Strowel "Le téléchargement d'œuvres sur Internet: Perspectives en droits belge, français, européen et international",<sup>17</sup> unfortunately not accessible at the time of the writing process.

## SECTION 5. Thesis design

In the second chapter, I will firstly describe the copyright regime applicable in Belgium and France,<sup>18</sup> and then see when copyright infringements occur and how they are punished. Secondly, I will cover the rules in force about the enforcement of copyright in theory and practice in both countries and how they deal with the question of the legality of uploading and downloading. Then, in chapter 3, I will deal with the issue of the liability for copyright infringement in the same states by analyzing the

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<sup>17</sup> Brussels: Larcier, 2012.

<sup>18</sup> For an overview of the legal state of affairs in both countries, see the European e-Justice Portal at respectively [https://e-justice.europa.eu/content\\_member\\_state\\_law-6-be-en.do?member=1](https://e-justice.europa.eu/content_member_state_law-6-be-en.do?member=1) and [https://e-justice.europa.eu/content\\_member\\_state\\_law-6-fr-en.do?member=1](https://e-justice.europa.eu/content_member_state_law-6-fr-en.do?member=1).

substantive civil and criminal rules on liability. The fourth chapter will provide an analysis on the procedural protection of the rights of the uploader which will reveal in which system these rights are the most effectively protected. Finally, the fifth chapter will present the conclusions and summarize the key findings.

## Chapter II: Law of copyright, infringement and enforcement

### SECTION 1. Introduction

The first aim of any copyright law is to protect original works, original in the sense that the work effectively comes from an author, i.e. is novel and not copied, involving creativity. But its second purpose is to distribute intellectual creations in a wider way. It grants the authors with prerogative as regards to their work, where they can prevent their work from being copied, used, modified or communicated without their consent. Copyright law is characterized by the idea/expression dichotomy: what is actually protected is the expression of one's idea, not the idea in itself. In order for copyright to arise, no formality is required: creation of an original piece of work triggers the protection.

Nowadays, the Internet represents a “machine made to copy, and copyright owners need enhanced protection”,<sup>19</sup> while “the effectiveness of a right depends of its effective protection by the courts and tribunals”.<sup>20</sup> As correctly held by Berenboom, “it can be recognized to copyright and neighboring rights the most absolute nature; without an efficient mechanism to sanction the violation, their protection is illusory”.<sup>21</sup>

This chapter aims to discover when an infringement of copyright does occur and is sanctioned. To this aim, the chapter first assesses the basic copyright laws applicable, the limitations and exceptions, the sanctions and the enforcement of copyright, both in Belgium and France.

### SECTION 2. Infringement of copyright and its enforcement

Copyright owner are vested with exclusive rights as to their own original creations. These rights are twofold: moral and economic rights and they must be distinguished.<sup>22</sup> Moral rights may fall under the generic term of attribution and integrity of the work. Regarding economic rights, they can fall within the following five categories:

- (i) right to reproduce the work;
- (ii) right to distribute the work;
- (iii) right to allow derivative works;
- (iv) right to perform the work in public and
- (v) right to communicate the work to the public.

The following two sections describe the relevant legislation into Belgium and France.

#### 1. Belgium

##### 1.1. Applicable copyright regime

In Belgium, the Act on Copyright and Neighboring Rights (LDA) of June 30, 1994,<sup>23</sup> also called hereafter the Belgian Basic copyright Act (BBCA), as amended by the Law of April 3, 1995<sup>24</sup> which

<sup>19</sup> Meyer, S. P., 1998. Intellectual property rights on the internet, *Computer Law & Security Review*, 14 (1), pp. 14-21.

<sup>20</sup> De Visscher, F. and Michaux, B. 2000. *Précis du droit d'auteur et des droits voisins*, Brussels: Bruylants, p. 501.

<sup>21</sup> Berenboom, A. 2008. *Le nouveau droit d'auteur et les droits voisins*, Brussels: Larcier, p. 441.

<sup>22</sup> Coming from the TRIPs and WIPO treaties.

<sup>23</sup> Loi du 30 juin 1994 sur le droit d'auteur et les droits voisins.

<sup>24</sup> Loi du 3 avril 1995 portant modification de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins.

brought only minor variations, by the Law of August 31, 1998<sup>25</sup> transposing the database directive and by the Law of May 25, 2005,<sup>26</sup> which modified the regime of the exceptions, is the relevant law. It encompasses the core principles of the first Belgian Copyright Act.<sup>27</sup> Provisions relating to the civil procedure have been modified by the Act of May 9, 2007 and the criminal provisions had been reinforced by the Act of May 15, 2007. Eventually, the Act of May 10, 2007 gives some precision about the mode of determination of the author and holder of related rights from the judicial point of view and of the evaluation of the suffered prejudice. These Acts implement in Belgian law the Directive 2004/48/EC.<sup>28</sup>

Belgian copyright law protects original works,<sup>29</sup> in the sense that they are stamped by the author's personality and they have to be put into a concrete form, which permits them to be perceptible by the human senses and henceforth communicable to the public.<sup>30</sup> The copyright lasts for seventy years after the author's death (or after the death of the last contributor in case of collective work) or after the first publication.<sup>31</sup>

As stated above, moral and proprietary rights need to be distinguished. Pursuing article 1 para 2 of the LDA, authors enjoy the right to disclose, to respect for their work and to paternity. In the other side, authors have two main exclusive rights. Firstly, the right to reproduce the work, which encompasses the right to allow adaption or translation and the right to rent or lend the work to the public, and secondly the right to communicate the work to the public (art. 1 LDA). The authors have also the exclusive right of distribution of their work to the public, with the limitation of the EU exhaustion doctrine. In addition, the authors have an inalienable resale royalty right (right to follow), providing them with a percentage on the sale price of their work (art. 11 LDA).

## 1.2. Infringement, limitations and exceptions

As the rights of the copyright holder are exclusive, any person exercising them without the author or right holder's consent commits copyright infringement. However, exceptions exist. These allow, among others, the use of copyright protected works into the family circle, the copy of works for private purposes and the "fair use", i.e. the use of works for, *inter alia*, educational or scientific research purposes or for citation and parody.<sup>32</sup>

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<sup>25</sup> Loi du 31 août 1998 transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données (MB 14.11.1998).

<sup>26</sup> Loi du 22 mai 2005 modifiant la loi belge du 30 juin 1994 sur le droit d'auteur et les droits voisins, which is the implementation into Belgian law of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. For further information on the implementation, see: Derclaye, E., 2005. The Belgian Copyright Act finally revamped with the implementation of the Copyright Directive (2001/29): the good, the bad and the ugly. *European Current Law*, 12, pp. 11-15.

<sup>27</sup> Copyright Act of March 22, 1886.

<sup>28</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>29</sup> The LDA does not define *per se* the concept of work (*œuvre*). However, the legal doctrine describes a work as a human creation that cannot be the outcome of blind chance, but rather the fruit of an activity of the mind. See: De Visscher, F. and Michaux, B., 2000. *Précis du droit d'auteur et des droits voisins*. Brussels: Bruylants, p.7, Nos. 4 to 6.

<sup>30</sup> Court of Cassation, 11 March 2005, decision No. C.03.0591.N. (A.M., 2005, p. 396); Masset, A., L'élément moral du délit de contrefaçon en matière de droits d'auteur, note under Criminal tribunal of Verviers (3<sup>rd</sup> chamber), October 4, 1989, *Jurisprudence de Liège, Mons et Bruxelles*, 1990, p. 705.

<sup>31</sup> LDA, Article 2.

<sup>32</sup> LDA, Articles 21 to 23bis.

Obviously, in a claim of infringement, the authorship of the work and its originality need to be shown.

### 1.3. Civil and criminal sanctions<sup>33</sup>

In order to protect these prerogatives, copyright law in general can be enforced by rights holders through two manners. The most commonly used one for a copyright owner is to seek for a civil remedy in civil courts. This action is most of the time carried out by the collecting societies of the rights holders and encompasses injunctions and damages, which respectively aim to stop the infringing activity and to compensate any prejudice suffered. The second way is through criminal law in criminal courts, where specific copyright violations are described as criminal wrongs, allowing the public prosecutor to bring suit against copyright infringers.<sup>34</sup> However, copyright lawsuits have, for a long time, been dealt with civil law. But as already perceived by Trotter Hardi, the “greater deterrence value” of criminal conviction is seen as adequate when copyright violations are for the most part imperceptible and therefore difficult to be discovered by the right holders. These arguments suit very well the Internet situation, where large-scale distribution of electronic materials is made easy.

The LDA provides for the basic principle that “any malicious or fraudulent infringement of copyright and neighboring rights shall constitute an offense of counterfeiting” (Art. 80 indent 1). Penalties are heavy. Indeed, it is further stated that infringer may receive a fine from €600 to €600,000<sup>35</sup> and/or a prison sentence from three months to three years. A court may order to display and/or publish the judgment at the pirate’s expenses and to provide the civil party with the incomes and products seized. In case of a repetition of the offense, the penalties’ minima and maxima are doubled and the shutting down, temporarily or definitively, of the establishment run by the pirate may be ordered. Nevertheless, in order for these sanctions to apply, the plaintiff needs to prove the offense of counterfeiting. To do so, it is needed to establish the violation of the right (material element of the infraction) but also to prove that there exists a malicious or fraudulent intent from the infringer, i.e. for the purpose to harm the author or to obtain a financial advantage (moral element of the infraction); though harder to establish, as it presupposes that a particular intention or maliciousness in the chief of the perpetrator and not merely a lack of awareness of copyright law.<sup>36</sup>

Simply put, rights holders have the possibility to start a civil or a criminal action, which are most of the time carried out by the (copyright) collective management societies. In practice, the injunction (to stop the illegal activity) and the action in reparation are commonly favored.<sup>37</sup> Therefore, the criminal enforcement of copyright is scarcely used, but occurs more frequently than in e.g. the Netherlands.<sup>38</sup> Thus, civil remedies are available to the copyright holders. According to Article 86bis and followings, compensation for any prejudice due to copyright violations (either concerning

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<sup>33</sup> For more information on seizure and criminal repression of the counterfeiting and the reparation of damages in intellectual property law, see: Vanbrabant, B., 2012. *Droits intellectuels: le contentieux (compétence, procédures, sanctions)*. Liège: Anthemis. Commission Université-Palais, vol. 132.

<sup>34</sup> Trotter Hardy, I. 2002. Criminal copyright infringement. *William & Mary Bill of Rights Journal*, 11(1), pp. 305-341.

<sup>35</sup> The law provides for penalties ranging from €100 to €100,000 but these figures have to take account of the additional tithes. This means that the penalties need to be multiplied by a determined coefficient. From January 2012, the coefficient is 6 (loi du 28 décembre 2011 portant des dispositions diverses en matière de justice, *M.B.*, 30 décembre 2011, modifiant la loi du 5 mars 1952 relative aux décimes additionnels sur les amendes pénale).

<sup>36</sup> Decourrière, A., 2008. *La répression de la contrefaçon*. Waterloo: Kluwer.

<sup>37</sup> See *supra* note 36.

<sup>38</sup> Braun, A. and Cornu, E., 2004. *Précis des marques*, 4<sup>th</sup> ed., p. 475.

economic or moral rights) can be sought through damages in money (according to the general rules of civil liability such as Article 1382 and 1383 of the Civil Code), or through an injunction order to deliver the counterfeited goods to the plaintiff or to stop the infringing activity. Besides, Article 86ter provides for measures to neutralize the counterfeited goods. But the most interesting aspect is that this civil action is formed and prepared according to the forms of a summary proceeding<sup>39</sup> (Article 87(1)), which aims at obtaining rapid and executory decisions. It is noteworthy that any interested party may start this proceeding (Art. 87(1) indent 5). The same Article enables a court to deliver a cease-and-desist order to ISPs whose services are exploited by third parties for copyright violations.

Consequently, any breach of copyright, which amounts to a counterfeiting which can be both a civil tort and a criminal offence, entitles the right holder to start a civil proceeding whereas the criminal violation calls for a *dolus specialis*.<sup>40</sup>

## 2. France

### 2.1. Applicable copyright regime

France transposed the international Conventions into national law, which lead to the creation of the French Intellectual Property Code (FIPC). Copyright in France is governed by the Law of March 11, 1957 on the literary and artistic property<sup>41</sup> and the Law of July 3, 1985 on Authors' Rights and on the Rights of Performers, Phonogram and Videogram Producers and Audiovisual Communication Entreprises<sup>42</sup>, both now codified in the FIPC.

As a reminder, an author is any person who creates a work of the mind (*oeuvre de l'esprit*), notwithstanding its genre, form of expression, merit or intended use.<sup>43</sup> The copyright in a work lasts for seventy years *post mortem*,<sup>44</sup> addresses all creative works and provides for the same private copying exception for the family circle. The legality of the downloading was also not crystal-clear but the Hadopi (see *infra*) made downloading illegal. In this respect downloading is seen as an act of reproduction and uploading as a form of "making public". Consequently, uploading and downloading protected materials without right holder's consent constitute a crime even though downloading may benefit from the private copy exception.

The French authors dispose of the moral rights of publication and attribution, to the respect of the integrity of the work, to protection of honor and reputation. Not existing under Belgian law, the French authors have also a right of reconsideration or withdrawal, allowing the authors who assigned their right of reproduction, to make cease the exploitation of their work<sup>45</sup> against indemnification to the assignee, for damage likely caused by the reconsideration/withdrawal.<sup>46</sup>

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<sup>39</sup> "Action comme en référé".

<sup>40</sup> See *supra* note 36.

<sup>41</sup> Loi n° 57-298 du 11 mars 1957 sur la propriété littéraire et artistique. 135 Journal Officiel de la République Française, 14 Mars 1957, p. 2723.

<sup>42</sup> Loi n° 85-660, du 3 juillet 1985 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle. Journal Officiel de la République Française, 4 Juillet 1985.

<sup>43</sup> FIPC, Article L. 111-1:

<sup>44</sup> FIPC, Article L. 123-1.

<sup>45</sup> This right is however limited in the case of a copyright in a software (art. L. 121-7).

<sup>46</sup> FIPC, Articles L. 121-1 to 121-9.

## 2.2. Infringement, limitations and exceptions

Infringement of any of the author's rights amounts to counterfeiting.<sup>47</sup> The reproduction right of the author is limited where the work is used for citation, review, criticism and other scientific purposes. Additionally, the author may not principally forbid the private and free use of a protected work within the family circle and the private copy for non-commercial purposes.<sup>48</sup>

## 2.3. Civil and criminal sanctions

Since its inception, the French copyright law has been oriented to protect the interest of the right holders. The first resort of the rights holders is the possibility to make cease the infringement and then to claim damages, but in the latter, they will face the heavy burden of proof to demonstrate a prejudice into the violating acts, being the online up-or downloading of protected works.<sup>49</sup> In the majority of copyright cases, right holders take legal actions before civil courts.<sup>50</sup>

On the criminal law side, violations of copyright which amount to the misdemeanor of counterfeiting, which is to be understood as any unauthorized use a copyright protected work, lead to the possibility to impose a fine of up to €300,000 (€1.5 million for legal persons) and a prison sentence of a maximum of three years, raised to €500,000 and five years in case of organized crime.<sup>51</sup> The general direction of the IP law goes towards an ever increasing repression, where counterfeiting is a civil wrong which can also be a criminal infraction under specific circumstances.<sup>52</sup>

## 2.4. Special law to enforce copyright online: Hadopi

### 2.4.1. Background information

Pushed by the media undertakings, the peer-to-peer (P2P) system Napster lead the global community to design better antipiracy laws and strategies in order to diminish the repercussions of piracy on the sales.<sup>53</sup> In France, it became clear for the legislator that the offline misdemeanor of counterfeiting was not a proportionate reply to combat its online counterpart, the mass illegal up- and downloads practice (especially of music and movies through P2P). This need of proportion had been expressed by the enactment in 2009 of the Creation and Internet Law<sup>54</sup> (better known as Hadopi law)<sup>55</sup> which set a graduated response scheme. Strowel defines the graduated response as referring to an

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<sup>47</sup> FIPC, Article L. 335-2. For further information of the notion and metamorphosis of counterfeiting, see: Lefranc, D., The metamorphosis of *contrefaçon* in French copyright law. In: Bently, L., Davis J. and Ginsburg, J.C., 2010. Copyright and Piracy - An Interdisciplinary Critique. Cambridge Intellectual Property and Information Law (No. 13).

<sup>48</sup> FIPC, Article L. 122-5.

<sup>49</sup> FIPC, Article L. 331-1-3.

<sup>50</sup> Lefranc, *supra* note 47 at p. 76.

<sup>51</sup> FIPC, Article L. 335.

<sup>52</sup> Le Goffic, C. and Wagner, M., 2009. La pénalisation de la contrefaçon, *Droit penal*, n° 12, déc. 2009, pp. 14-19.

<sup>53</sup> Danaher, B. et al., 2012. The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France. Available from: <http://ssrn.com/abstract=1989240>.

<sup>54</sup> Law No. 2009-669 of June 12, 2009 promoting the distribution and protection of creative works on the Internet.

<sup>55</sup> Although important, the history and the origins of the Hadopi laws are not addressed. See Geiger, C., 2011. Honourable Attempt but (ultimately) Disproportionately Offensive against Peer-to-peer on the Internet (HADOPI) – A Critical Analysis of the Recent Anti-File-Sharing Legislation in France. *IIC*, 42(4), pp. 457-472.; Rees, M., 2012. Des États-Unis à Sarkozy, la préhistoire de l'Hadopi. Available from: <http://www.pcimpact.com/dossier/hadopi-nicolas-sarkozy-sacd-snep/1.htm> and Rees, M., 2008. Riposte graduée : la loi Création et Internet pour les nuls. Available from: <http://www.pcimpact.com/dossier/hadopi-riposte-graduée--/1.htm>.

“alternative mechanism to cope with online infringements (in particular resulting from P2P file sharing). It relies on a form of cooperation with the Internet service providers (ISPs) that goes beyond the classical ‘notice and take down’ approach. Also, it includes an educational notification mechanism for alleged online infringers before stringent measures can be imposed (including, possibly, the suspension of an Internet access account by the ISP). ‘Graduated response’ is thus another way of saying ‘improved ISP cooperation’.”<sup>56</sup>

Although being the first EU Member State to legislate on the tricky issue of online file-sharing, France, before Hadopi, had already endeavored to find out a legal response to this issue, through the so-called DADVSI law.<sup>57</sup> Its central aim is “promoting the dissemination and protection of creative works on the Internet” by fighting against the illegal download and file sharing through P2P. Hadopi is a short name to refer both to this law and to the administrative authority Hadopi.<sup>58</sup> The authority, constituted of a College and a Commission,<sup>59</sup> is created to safeguard copyright online, to encourage the development and use of legal offer for content<sup>60</sup> and to regulate and monitor technical protection measures<sup>61</sup> and is in charge of the implementation of the graduate riposte encompassed in article L. 331-17, al. 1 of the Intellectual Property Code.<sup>62</sup>

On the one hand, the law called “Hadopi law or act” combined in fact two main laws which modified the provisions of the FIPC regarding the penalties applicable to the crime of counterfeiting and added the responsibility for an owner of an Internet connection to monitor it in order to avoid that this connection is being used for copyright infringement purposes: *Creation and Internet Law* (Hadopi 1) and *law relating to the protection of literary and artistic property on the internet through criminal law* (Hadopi 2).

On the other hand, the authority started its activities quite memorably. Indeed, Hadopi, whose mission is to protect the creation, was infringing the copyright by using for its logo a copyrighted typeface!<sup>63</sup> Besides, this authority is vested with the prerogative, not the obligation, to communicate notices to individuals identified through their IP address<sup>64</sup> and to transmit the case to judicial authorities in the event of repeated offense. The authority performs these tasks upon seisin of the creators/right holders<sup>65</sup> of whom the works had been pirated and Hadopi can monitor the Internet for copyright infringement and check with the Internet Service Providers (ISPs) the authenticity of the

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<sup>56</sup> Strowel, A., The ‘Graduated Response’ in France: Is It the Good Reply to Online Copyright Infringements?. In: Stamatoudi, I. A., 2010. Copyright enforcement and the internet. Alphen aan den Rijn: Kluwer Law International.

<sup>57</sup> Law No. 2006-961 August 1, 2006 on copyright and related rights in the information society, *Official Journal*, 3<sup>rd</sup> August 2006, p. 11529. For more information, see: Geiger, C., 2007. The New French Law on Copyright and Neighbouring Rights of 1 August 2006 – An Adaptation to the Needs of the Information Society?. *IIC*, 38(4), pp. 401-428.

<sup>58</sup> Stands for “High Authority for the dissemination of works and the protection of rights on the internet”.

<sup>59</sup> Article L. 331-15, indent 1. For the powers, composition and organization of Hadopi and its functions; see Articles L. 331-12 to L. 331-37 of the FIPC.

<sup>60</sup> This has to be understood as offering legally downloadable and distributable content on the Internet.

<sup>61</sup> In respect of technical protection measures, the Hadopi takes up the job of the former Regulatory Authority for Technical Measures (Autorité de Régulation des Mesures Techniques - ARMT).

<sup>62</sup> FIPC, Article L. 331-13.

<sup>63</sup> For further information, see: Peters, Y., 2010. French Anti-Piracy Organisation Hadopi Uses Pirated Font In Own Logo. Available from: <http://fontfeed.com/archives/french-anti-piracy-organisation-uses-pirated-font-in-ownlogo/> and Champeau, G., 2011. Logo contrefait de l'Hadopi : un conflit enfin résolu. Available from: <http://www.numerama.com/magazine/18799-logo-contrefait-de-l-hadopi-un-conflit-enfin-resolu.html>.

<sup>64</sup> The IP address is a combination of four numbers between 0 and 255 separated with dots which identifies a connection point to the Internet (e.g. computer, server, printer) at a given time.

<sup>65</sup> Rights holders are not *per se* entitled to report copyright infringements. Only the public prosecutor or professional bodies representing and defending the interests of their members (e.g. SACEM or the National Cinematographic Center) may initiate proceedings (FIPC, Article L. 331-24).

information provided. Indeed, only the ISPs can make the link between an IP address and the identity of a subscriber, i.e. put a name on a number. They are obliged to deliver this information upon request from Hadopi. Collaboration between Hadopi/right holders and ISPs is therefore vital to identify infringers and to achieve an accurate and effective enforcement. However, ISPs are reluctant to give away their customers' personal data, as data protection regulations and contractual duties must be respected and because they want to maintain their clientele.

A slight *excursus* is realized to show the Hadopi from a different angle which reveals also why the system is so contested and feared. The Hadopi is often seen as a liberty killer,<sup>66</sup> which fits into the scheme of a wider perspective, where one must be conscious about the fact that countries like France are on the list of countries "under surveillance".<sup>67</sup> France is further characterized by a cyber-censorship and a mass surveillance which are arguably contrary to the fundamental principle encompassing that a person is innocent until proven guilty, where Hadopi is reported as the essential reproach dressed to France in that respect. Indeed, a French blogger interestingly argues that Hadopi is only one step towards the slow Orwellian Internet regulation,<sup>68</sup> where the current Hadopi panopticism over the life of French citizens aims, leads and acts as a deterrent to infringement by having a self-disciplining effect finding its origin into the Hadopi constant surveillance (of P2P networks).<sup>69</sup> Hopefully, at the supranational level, it can be seen that the EU, following its decisions in *Scarlet v Sabam* and *L'Oréal v eBay* cases, considers that general monitoring of the Internet and/or telecommunications has to be forbidden, but the idea of impunity cannot be sustained nor accepted in the digital environment. Many criticisms have been exposed about Hadopi law, notably that it supposedly infringes the net neutrality principle, it may infringe the (human) right to access the Internet, and it involves high costs for the infringers' identification.<sup>70</sup>

The criticism of central interest here is that Hadopi opened up the possibility to engage the liability of Internet connection holders for copyright infringements notwithstanding the fact that their computers or networks could have been hacked into or otherwise misused.

#### 2.4.2. The three strikes procedure in brief<sup>71</sup>

As soon as the infringement is confirmed, i.e. when Hadopi has checked the notice of infringement<sup>72</sup> from the right holder and cross-referred it with the information detained by the appropriate ISP, an email notifying the violation is sent by the authority to the account holder (or I should say may be

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<sup>66</sup> Squaring the Net, 2009. Yet another adoption of liberty killer "three strikes" law in France. Available from: <http://www.laquadrature.net/en/final-adoption-of-liberty-killer-three-strikes-in-france>.

<sup>67</sup> Reporters without borders, 2011. France. Available from: <http://en.rsf.org/france-france-12-03-2012,42071.html>.

<sup>68</sup> Bluetouff's blog, *infra* note 369.

<sup>69</sup> On the Hadopi creating a surveillance society, see: Meyer, T. and Van Audenhove, L., 2010. Graduated response and the emergence of a European surveillance society. *Info - The journal of policy, regulation and strategy for telecommunications*, 12 (6), pp. 69-79.

<sup>70</sup> The three majors ISPs in France claim €2, 5 million for identification costs in 2001 to Hadopi. See: Paquette, E., 2012. Hadopi laisse une ardoise de 2,5 millions d'euros aux télécos. Available from: <http://blogs.lexpress.fr/tic-et-net/2012/02/14/hadopi-laisse-une-ardoise-de-25-millions-deuros-aux-telecos/>.

<sup>71</sup> See articles L. 331-25 and 336-2 of the FIPC. For further information, see: Zhou, H., 2011. Procedural Concerns with the HADOPI Graduated Response Model. Available from: <http://jolt.law.harvard.edu/digest/copyright/procedural-concerns-with-the-hadopi-graduated-response-model>.

<sup>72</sup> Infringement is to be construed according to the Article 11 of the Hadopi law (creating the Article L 336-3 in the FIPC): Art. L. 336-3. – "The owner of access to online public communication services has an obligation to watch that this [Internet] access is not being used for purposes of reproduction, representation, making available or communication to the public of works or objects protected by right of authorship or a related right without permission of copyright holders when it is required as stated in books I and II."

sent, as the Hadopi has no obligation to send warning notices). Then if within six months from the first notice, the same *account* is recognized as being employed to commit another infringement, Hadopi transmits, through both an e-mail and a registered letter, a second notice to the account owner. Last strike is launched if within one year the account is again used for infringement purposes. In this regard, Hadopi can bring the case before a criminal court where a variety of sanctions can be applied, most significantly the suspension of the Internet account<sup>73</sup> may be ordered for a maximum period of one month. As correctly held by Lawrence Lessig, cut off the Internet is a terrible idea and France is on the wrong path to fight the illegal downloading and file-sharing issues<sup>74</sup>. Hopefully, the suspension affects the online public communication services (including the Internet) but not the electronic communications (private correspondence, including emails exchanges).

#### 2.4.3. Hadopi laws: Hadopi 1 and Hadopi 2

##### **Hadopi 1**

The first Hadopi law initially foresaw that Hadopi had the power to shut down the Internet access of the persons who did not fulfill their duty to “monitor” their Internet connection/network (popularly called “three strikes and you're out” rule). However, the French Constitutional Council held that law almost totally unconstitutional.<sup>75</sup> The Council arguments were mainly that the procedure, by providing for a presumed guilt, was against the core French law principle that a person is presumed innocent until proven guilty,<sup>76</sup> that the third strike - Internet disconnection - was a disproportionate sanction in respect of the protection of intellectual property and that the law bereaved Internet users from their human right to Internet access. It also held that the law was in breach of the rights to privacy and free access to online communications of French citizens. It was argued that, by this law, France attempted to establish a “new criminal offense of having access to a digital network (essentially the Internet) and failing to ensure your connection is not used to infringe intellectual property rights”.<sup>77</sup> Nevertheless, an account holder could claim that his Internet connection was secured enough to preclude illegal downloading and file sharing because one of the Hadopi-approved technologies was present (“labeled security means”). In practice, it is arguable whether judges would be willing to criminalize individuals for not securing their Internet connection.

Noteworthy, the length of the suspension of the Internet was initially quite long in case of repeat offence: from three months to one year.

##### **Hadopi 2**

The other main point of tension of the first law related to whether the restriction of Internet access was the prerogative of administration or judicature, i.e. whether such restriction could be ordered by

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<sup>73</sup> For further information see: Mariez, J.-S., 2010. HADOPI... 3 small suspension points.... Available from: <http://www.juriscom.net/documents/pla20110315.pdf>.

<sup>74</sup> Champeau, G., 2009. Lawrence Lessig : couper l'accès Internet, "une idée terrible". Available from: <http://www.numerama.com/magazine/14548-lawrence-lessig-couper-l-acces-internet-une-idee-terrible.html>.

<sup>75</sup> Decision No. 2009-580 DC of June 10, 2009. Available in English from: [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf).

<sup>76</sup> As opposed to Germany, where the principle guilty until proved innocent was applied to a retired woman which was compelled to pay a fine for copyright infringement while not having a computer or a wireless router. See: Anon., 2011. Retired, Computerless Woman Fined For Pirating ‘Hooligan’ Movie. Available from: <http://torrentfreak.com/retired-computerless-woman-fined-for-pirating-hooligan-movie-111222/>.

<sup>77</sup> Fairbairn, S. In: Lucy Trevelyan, “Three Strikes and You're Out” (2009) Intellectual Property And Technology Online Journal (IP & T UK Outlook LexisNexis) 24/8/2009.

an administrative organ or only by a judicial body. Following the censure of the penal parts of the first Hadopi by the Constitutional Council,<sup>78</sup> Hadopi 2<sup>79</sup> was enacted in order to complete the first law and to reintroduce correctly the censured criminal part and was substantially approved by the same Council. This second act provides for supplementary sanctions, namely the momentary disconnection to the Internet, to be added to the “traditional” sanctions for the counterfeiting, being a crime punishable by civil and criminal law. Though this is an option, this disconnection sanction completes the two warning notices, last stage of the graduated riposte, which now can only be imposed by the judicature.<sup>80</sup>

Simply put, the Hadopi 2 was enacted with the aim to reintroduce the repressive section of Hadopi 1 censured by the Constitutional Council. Concretely, from that moment, the administrative body is only in charge for two thirds of the three strikes mechanism, i.e. it only implements the warning system.

The censorship on the Hadopi laws had the pernicious consequence that both Internet users and authors find themselves into an even more deteriorated situation than before, mainly because the sanctions are now tougher for users who face criminal penalties and authors may not claim damages before civil courts as the penal way had been prioritized (see *infra*).

#### 2.4.4. Method used by Hadopi to track down infringers

The focus of the Hadopi laws is not to forbid the illegal downloading *per se* but to stop the illegal file-sharing of copyright protected materials. The latter is made possible in large scale through the use of the P2P protocol. The functioning of P2P involves that each member of the P2P community need to make available some materials they own to the other members in order to be able to acquire new files. Therefore, the Hadopi actually penalizes the persons who exchange protected files through P2P networks, i.e. the making available of these files. The rationale is twofold: technological and legal.

So far, identifying a downloader is not possible without the collaboration of ISPs and the modification of the manner to access the Internet (at least valid for France). What can be identified is the making available of protected files. Therefore, one could think that Hadopi could go phishing by illegally making available copyrighted works through P2P and then pinpoint who downloads these files via the P2P servers. However, although technologically readily accessible, such an endeavor would be against French law which precludes incitement to commit crime.

Hadopi is not the one who carries out the monitoring of illegal exchanges on the major P2P networks. It delegated this task to a private company - Trident Media Guard (TMG) - which has as mission to monitor the exchange of works listed in a repertory.<sup>81</sup> It collects the IP addresses from the P2P networks, and then conveys them to the SCPP (copyright management society, see *infra*) for

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<sup>78</sup> Decision No. 2009-580, *supra* note 75.

<sup>79</sup> Loi No. 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur Internet.

<sup>80</sup> Derclaye, E., 2010. Les réponses graduées française et britannique: des coups d'épée dans l'eau ou des modèles pour le Canada?. *Les Cahiers de Propriété Intellectuelle*, 22(3), pp. 571-592.

<sup>81</sup> For an explanation of the technical collection carried out by TMG, see: Znaty, D., 2012. Rapport d'expertise Hadopi. Available from: <http://www.hadopi.fr/actualites/rapports/publication-du-rapport-dexpertise-de-david-znaty>.

examination. Afterwards, if needed, identification of Internet subscribers is requested from the ISPs. Lastly, all this information is communicated to the Hadopi which can deliver the warning notices.<sup>82</sup>

#### 2.4.5. *Slight excursus: the reliability of the IP address and TMG collection method*

The reliability of using the IP address to track down infringer has been challenged several times. Indeed, the availability of software/techniques such as SeedFuck represented a serious threat and decoy for the Hadopi investigator (TMG) for the accurate collection of IP addresses, which constitutes the principal tool to identify and penalize illegal downloading. Indeed, SeedFuck (torrent poisoning) allows flooding networks/P2P trackers with a tremendous amount of fake IP addresses with the intent to deceive the companies dealing with the monitoring of sharing networks. Therefore, SeedFuck creates a fake traffic data which may lead to a waste of time for monitoring companies for distinguishing the fake from the real, and make the Hadopi job of identifying infringers even harder.<sup>83</sup> Similarly, IPFuck<sup>84</sup> (HTTP poisoning which is a combination of SeedFuck and Modify Headers<sup>85</sup>) shows again the low reliability of the IP address as prove of illegal sharing and downloading, what poses issues on the character of the IP address as personal data.<sup>86</sup> More important, SeedFuck amplifies the chance of mistaken accusations as these fake addresses may use fictitious and actual/spoofed addresses belonging to innocent Internet subscribers. However, this “anti-Hadopi weapon” has been dealt with and is not seen as a non-existent threat anymore for innocent subscribers by the French Ministry of Culture.<sup>87</sup> In effect, the Hadopi investigator now has not only to communicate the IP address but also, among other things,<sup>88</sup> to initiate a downloading on the IP address which has been identified as infringing. In order words, TMG cannot convey any IP address to Hadopi without a segment of the files downloaded via that IP address. Still, SeedFuck remains more a psychological weapon than a technical one.<sup>89</sup>

Nevertheless, although already strongly suggested in a report of 2010<sup>90</sup> by the Commission on Information Technology and Liberties<sup>91</sup> (CNIL), the method of collection of IP addresses used by TMG has not (yet) been approved by an independent expert. Moreover, the report states that the TMG only carries out internal audits made by the copyright collectives. This consequently prospects an

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<sup>82</sup> Auffray, C., 2010. Hadopi : Trident Media Guard sélectionné pour surveiller le P2P. Available from:

<http://www.zdnet.fr/actualites/hadopi-trident-media-guard-selectionne-pour-surveiller-le-p2p-39712516.htm>.

<sup>83</sup> Chicheportiche, O., 2010. Hadopi: Seedfuck va inonder les réseaux P2P de fausses adresses IP. Available from:

<http://www.zdnet.fr/actualites/Hadopi-seedfuck-va-inonder-les-reseaux-p2p-de-fausses-adresses-ip-39750977.htm> and

Champeau, G., 2010. Hadopi : des téléchargements seront initiés pour contrer Seedfuck. Available from:

<http://www.numerama.com/magazine/16060-hadopi-des-telechargements-seront-inities-pour-contrer-seedfuck.html>.

<sup>84</sup> For further information, see: <http://ipfuck.paulds.fr/>.

<sup>85</sup> Mozilla Firefox add-on which “add, modify and filter the HTTP request headers sent to web servers”. See: Hunt, G. *Modify Header*. Available from: <https://addons.mozilla.org/en-US/firefox/addon/modify-headers/> and <http://www.garethhunt.com/modifyheaders/>.

<sup>86</sup> On this point, see: Moiny, J.-F., 2011. Are Internet protocol addresses personal data? The fight against online copyright infringement. *Computer Law & Security Review*, (27) 4, pp. 348-361.

<sup>87</sup> See Assemblée nationale | Question écrite N° 77590 de M. Michel Zumkeller (UMP - Territoire-de-Belfort), Available from: <http://questions.assemblee-nationale.fr/q13/13-77590QE.htm> and Garay, J., 2010. Hadopi: SeedFuck sans risque pour les internautes innocents. Available from: <http://www.generation-nt.com/hadopi-seedfuck-adresse-ip-actualite-1090211.html>.

<sup>88</sup> Other information to be provided: P2P protocol used, date and time of the official report, etc.

<sup>89</sup> Laurelli, O., 2010. Réaction à l'interview de Michel Zumkeller: Seedfuck, c'est juste l'apéritif.... Available from: <http://www.paperblog.fr/3162874/reaction-a-l-interview-de-michel-zumkeller-seedfuck-c-est-juste-l-aperitif/>.

<sup>90</sup> CNIL. 2010. Rapport relatif aux demandes de modification d'autorisation des traitements ayant pour finalité la recherche et la constatation des délit de contrefaçon commis via les réseaux d'échanges de fichiers dénommés "peer to peer". Available from: <http://www.numerama.com/media/Hadopi-TMG-CNIL.pdf>.

<sup>91</sup> “Commission Nationale Informatique et Libertés”, French equivalent of the Belgian Privacy Commission and Dutch DPA.

increased risk of mistaken accusation. But the reliability of TMG was only called into question after a security breach of its servers.<sup>92</sup> Nevertheless, in the absence of an official approval, the Hadopi ordered an expert's report on TMG (*rapport Znaty*)<sup>93</sup>, which claims that the "method of collection of IP addresses is robust and reliable"<sup>94</sup> however this report is seen as lacking of legitimacy and details by some.<sup>95</sup>

A security breach occurred in May 2011 at TMG, certainly due to a human error as the TMG server was left open for everyone to access it.<sup>96</sup> Personal but also very sensitive data relating to the monitoring operation was made available, among others, local physical addresses and a password, what could threaten the effective enforcement of Hadopi law. The two organizations suspended temporarily their relationship, i.e. for several months the monitoring was also suspended as no other company was in charge, and after a positive CNIL's security audit, Hadopi and TMG were relink online.<sup>97</sup>

In December 2011, reliability of the findings derived from an IP address has been challenged again by the case YouHaveDownloaded.com.<sup>98</sup> Indeed, this website<sup>99</sup> was utilized to reveal that many unlawful downloads took place at the Élysée Palace, but also later on, it showed that employees from the Ministry of Culture were, on a regular basis, involved into the piracy of various kinds of content with their desktop computers (everything through P2P). Naturally, the Ministry denied the facts and claimed that the IP addresses caught in downloading were forged as the network used by the Ministry is set in a way which does not allow illegal sharing/downloading and because the YouHaveDownloaded.com site is not to be seen as reliable or comparable to the (kept secret) method used by TMG. If it is true that IP addresses were falsified, this represents only another factual way to circumvent the Hadopi method, proving again the low reliability level of an IP address as unique proof. If not, i.e. that downloads were truly made, it decreases the legitimacy of the government. Although affirming that the Ministry is not to blame, it still carries out internal audits. Consequently, the issue here is that the credibility of the French government has been drastically lowered. Indeed, Hadopi, without even its method being certified, can trigger a judicial proceeding against alleged infringers merely upon its reports, but the same standards do not apply to the French government itself. What has it to fear if it is entirely innocent? In this regard, the government can show how to realize the difficult task of proving a negative.<sup>100</sup>

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<sup>92</sup> Gévaudan, C., 2011. L'Hadopi a confiance en sa « fiabilité ». Available from: <http://www.ecrans.fr/L-Hadopi-a-confiance-en-sa,13785.html>.

<sup>93</sup> Znaty, *supra* note 81.

<sup>94</sup> Rees, M., 2012. Rapport Znaty : la "bourde majeure" de la Hadopi, la colère des ayants droit. Available from: <http://www.pcinpact.com/news/68944-hadopi-rapport-david-znati-bug.htm> and Dorne, M., 2012. La méthode de collecte des adresses IP par TMG est robuste. Available from: <http://korben.info/methode-tmg.html>.

<sup>95</sup> Anon., 2012. Hadopi et TMG : un expert judiciaire nuance l'expertise. Available from: <http://www.numerama.com/magazine/21661-hadopi-et-tmg-un-expert-judiciaire-nuance-l-expertise.html>.

<sup>96</sup> Anon., 2011. French Hadopi "3 Strikes" Anti-Piracy Company Hacked. Available from: <http://torrentfreak.com/french-hadopi-3-strikes-anti-piracy-company-hacked-110514/> and Gévaudan, C., 2011. Hadopi en mode passoire. Available from: <http://www.ecrans.fr/Hadopi-en-mode-passoire,12741.html>.

<sup>97</sup> Kovacs, E., 2011. Hadopi and TGM Relink Online After Data Breach. Available from: <http://news.softpedia.com/news/Hadopi-and-TGM-Relink-Online-After-Data-Breach-229900.shtml>.

<sup>98</sup> Gévaudan, C., 2011. L'Hadopi a confiance en sa « fiabilité ». Available from: <http://www.ecrans.fr/L-Hadopi-a-confiance-en-sa,13785.html> [Accessed 14 March 2012] and Gévaudan, C. 2011. La rue de Valois a la Culture du piratage. Available from: <http://www.ecrans.fr/La-rue-de-Valois-a-la-Culture-du,13775.html>.

<sup>99</sup> <http://www.youhavedownloaded.com/>.

<sup>100</sup> For further information, see: Anon., 2012. Zut Alors! French Government Deny BitTorrent Piracy Allegations. Available from: <http://torrentfreak.com/zut-alors-french-government-denies-bittorrent-piracy-allegations->

To conclude this point, it should be born in mind that the IP address alone cannot be sufficient to prove guilt<sup>101</sup> nor to identify<sup>102</sup> an Internet subscriber/pirate (but merely materialize the infringement). Indeed, in a July 2012 study carried out to provide advice on the way to collect evidence of copyright infringements within the framework of the British graduated response, Clayton recalls that “the ISP is inherently unable to identify the individual [who] has been infringing copyright, whether it is the subscriber or not.” and arrives at the conclusion that “the subscribers will not be able, on a technical level, to determine which computer in a household was used to infringe copyright, or identify the individual at the keyboard”.<sup>103</sup>

The ineffectiveness of other monitoring methods is also presented in a 2008 US study.<sup>104</sup> These arguably undermine the very foundation of the three strikes system adopted by France.

### 3. Concluding remark

Similar copyright protection is afforded to Belgian and French authors where an infringement may lead to heavy penalties, two times superior in Belgium than in France. The enforcement is what differentiates the two countries, one applying traditional ways of enforcement to the Internet and the other one using an independent administrative authority to carry out the online enforcement.

## SECTION 3. The uploading and downloading debate

In our globalized world, the intellectual property infringements constitute an ever growing threat for the international economy and artistic creation. Adding the powerful Internet to this issue, the counterfeiting and piracy are well spread practices in the music, movie and entertainment industry. However, even though, in its recital 9, the Directive 2001/29/EC (Copyright Directive) provides for that a high level of copyright protection is crucial for intellectual creation, it is questionable. Indeed, as argued by the Law Society of Scotland, intellectual creation has a minor utility in the case where its distribution is drastically hindered because of a high threshold of copyright protection.<sup>105</sup>

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120101/?utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed%3A+Torrentfreak+(Torrentfreak)&utm\_content=Google+Reader.

<sup>101</sup> Tribunal de première instance de Guingamp, February 23, 2009. See: Girardeau, A., 2009. L'adresse IP ne suffit pas.... Available from: <http://www.ecrans.fr/L-adresse-IP-ne-suffit-pas,6608.html>.

<sup>102</sup> VPR Internationale v Does 1-1017, Illinois Central District Court, April, 29<sup>th</sup> 2011. See: Anon. 2011. IP addresses alone cannot be used to identify individuals, US judge says. Available from: <http://www.out-law.com/page-11901> ; Cyrille S. v. Sacem, Sdrm, Paris Appeal Court, 12<sup>th</sup> Chamber, February 1, 2010 ; EDRI-Gram. 2010. French Court Says An IP Address Is Not Enough For A User's Identification. Available from: <http://edri.org/edrigram/number8.4/french-court-ip-address>.

<sup>103</sup> Clayton, R., 2012. Online traceability: Who did that?. (Consumer Focus version) Available from: <http://www.consumerfocus.org.uk/publications/online-traceability-who-did-that-technical-expert-report-on-collecting-robust-evidence-of-copyright-infringement-through-peer-to-peer-filesharing>, respectively p. 30 and 5.

<sup>104</sup> Piatek, M. et al. 2008. Challenges and directions for monitoring P2P file sharing networks-or: why my printer received a DMCA takedown notice. Available from: [http://dmca.cs.washington.edu/uwcse\\_dmca\\_tr.pdf](http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf).

<sup>105</sup> The Law Society of Scotland. 2008. EU Commission Green Paper Knowledge in the Copyright Economy: The Law Society of Scotland's Response. Available from: [http://www.lawscot.org.uk/media/30119/2877\\_ip%20-knowledge%20in%20the%20copyright%20economy.pdf](http://www.lawscot.org.uk/media/30119/2877_ip%20-knowledge%20in%20the%20copyright%20economy.pdf).

## 1 Belgium

### 1.1. Legality of uploading and downloading and peer-to-peer issue

Since the implementation of the Copyright Directive into Belgian law,<sup>106</sup> the uploading of copyright protected materials represents undoubtedly an act of communication to the public/reproduction, requiring therefore the consent of the right holder.<sup>107</sup>

Nevertheless, in Belgium, the legality of downloading is quite complex. The downloading issue is only dealt with the Copyright Act (LDA). Concretely, downloading sound or audiovisual works is forbidden if this is done without the author or right holder's consent, consequently infringing the exclusive reproduction right. However, as stated above, exceptions are foreseen by the law. The one of interest here is the private copy exception. For sound and audiovisual works, Article 21 para 5 LDA does not prohibit the reproductions of these works if done within the family circle and solely for it. As in many countries, the counterpart of this exception is the levy applied on blank CD/DVD.<sup>108</sup>

Belgium does not prosecute users who freely download from the Internet. The reason is quite simple: no specific law exists and the LDA does not forbid the downloading of music or movies within the framework of the private copy. Indeed, as simply put by a journalist, where is (if any) the difference between someone recording a TV broadcasted movie and someone else downloading the same movie from the Internet for private use?<sup>109</sup> In other words, individual downloaders and uploaders are generally not pursued before the courts (in the few cases they have been in relation to hyperlinks, the action was based on general liability rules, not copyright infringement).

We need to point out that the private copy exception only stands if the work was legally acquired. The Belgian Copyright Act is, however, far from being clear about the issue of the legality of downloads from unlawful sources. Currently, there is no specific Belgian law organizing the fight against illegal downloads. Nevertheless, illegal downloads and piracy may be criminally punished by the LDA and the Act on the Punishment of counterfeiting and piracy of intellectual property rights of May 15, 2007,<sup>110</sup> but judicial prosecution is scarcely undertaken. Indeed, organizations such as Belgian Anti-Piracy Federation (BAF) do not seek to sue users, but more the ISPs and the uploaders.<sup>111</sup>

Concerning the P2P systems, these are not illegal *per se* as this kind of system allows a faster, easier and cheaper exchange of data among computers. Indeed, as an analogy, prohibiting P2P software would be like prohibiting the photocopy machine because some people use it for illegal purposes and hard/flash drives because some uses it to obtain illegal copies of software and others. P2P systems

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<sup>106</sup> Loi du 22 mai 2005, *supra* note 26.

<sup>107</sup> Kaesmacher, D. and Duez, L., 2005. Modification de la loi belge sur le droit d'auteur. Available from: [http://www.droitbelge.be/fiches\\_detail.asp?idcat=20&id=184](http://www.droitbelge.be/fiches_detail.asp?idcat=20&id=184).

<sup>108</sup> Gérardin, B., 2005. Peer-to-peer: le téléchargement sur la sellette. Available from: [http://www.droitbelge.be/news\\_detail.asp?id=220](http://www.droitbelge.be/news_detail.asp?id=220).

<sup>109</sup> Vandervelde, F. 2009. Illégal, le téléchargement gratuit en Belgique ?. Available from: <http://archives.lesoir.be/?action=nav&gps=695227>.

<sup>110</sup> 15 MAI 2007. - Loi relative à la répression de la contrefaçon et de la piraterie de droits de propriété intellectuelle.

<sup>111</sup> Dumont, M. 2012. Le téléchargement illégal: punissable. Available from: [http://www.lavenir.net/article/detail.aspx?articleid=DMF20120121\\_00108281](http://www.lavenir.net/article/detail.aspx?articleid=DMF20120121_00108281).

do not authorize copyright infringement (e.g. the *Amstrad Electronics plc v The British Phonograph Industry Ltd*<sup>112</sup> case in the UK).<sup>113</sup>

Like the private copy, this is the use of the P2P system by members of the network which determines the (il)legality of it. Without doubt, sharing copyright protected material through P2P networks or *via* the Internet is not legal. However, the download through P2P may be lawful under specific circumstances: when the author authorizes copying and when a file has been legally available, downloading falls under the scope of the private copy, provided that the copied files remain with the family circle.

## 1.2. The government's viewpoint

Currently, there exists two pending legislative bills aiming at combatting illegal downloads, reflecting the view of the government on this debate. The first one, proposed by the Liberal Party, is similar to the Hadopi<sup>114</sup> and originally provided for a graduated response as follow:<sup>115</sup>

Strike 1: upon infringement, a warning email is issued by sworn officials upon identification of an Internet subscriber thanks to the ISPs.

Strike 2: in the event of iteration within six months, the subscriber receives, by a registered letter, a proposal to pay an amount which precludes criminal proceedings (i.e. an administrative fine).

Strike 3: in case of recidivism within two years, a judicial decision may conduct to a fine and a limitation of Internet access.

Strike 4: in case of repeat of offense within three years, a doubled fine and a complete suspension of access to online communication service may be ordered.

The Belgian Hadopi would encompass approximately the same rules as its French equivalent but as shown above, it lays down a four-strike system (instead of three) and would not provide for a suspension of the Internet connection. Additionally it would place a duty on ISPs to freeze access to sites hosting pirated materials<sup>116</sup> and, comparing to the French Hadopi 1, the restriction of the Internet connection, the fines and the stoppage of the Internet access can exclusively be decided by a judicial (and not administrative) court.

However, the public debate, which gave priority to the protection of the users' privacy, in May 2011, lead the author of the proposal to depose an amendment aiming to suppress<sup>117</sup> the criminal part (i.e.

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<sup>112</sup> [1986] F.S.R. 159.

<sup>113</sup> For further information, see: Van den Bulk, P. and Verbiest, T. 2005. Peer-to-Peer: état des lieux en Belgique. Available from: <http://www.droit-technologie.org/actuality-902/peer-to-peer-etat-des-lieux-en-belgique.html>.

<sup>114</sup> Proposition de loi favorisant la protection de la création culturelle sur Internet, Doc. Parl., Sénat, 2010-2011, n° 5-741/1. [Law proposal promoting the protection of cultural creation on the internet], 28 January 2011.

<sup>115</sup> Laurent, P., 2011. A Belgian solution to peer-to-peer: Scylla or Charybdis? The question is still pending.... Available from: <http://kluwercopyrightblog.com/2011/04/10/a-belgian-solution-to-peer-to-peer-scylla-or-charybdis-the-question-is-still-pending/> ; Szafran, E. and Klaeser, T., 2010. Belgium: legislation - copyright - proposed bills - internet regulation. *Computer and Telecommunications Law Review*, 16(5), pp. 111-113.

<sup>116</sup> EDRI-Gram - Number 9.5, 9 March 2011. Available from: <http://www.edri.org/edrigram/number9.5/belgium-four-strikes-law-returns>.

<sup>117</sup> Proposition de loi favorisant la protection de la création culturelle sur Internet, Amendement déposé par R. Miller et F. Bellot le 24 mai 2011, Doc. Parl., Sénat, 2010-2011, n° 5-741/2.

graduated response) of it. But this bill is not buried yet as the amendment needs to be voted.<sup>118</sup> Nevertheless, the citizens group's "Hadopi Mayonnaise",<sup>119</sup> created following the Belgian Hadopi-like proposal, is still fighting hard against such a proposal.

The second legislative bill, proposed by the Green Party, considers a global (blanket) license scheme,<sup>120</sup> though highly contested too. Indeed, this license, which would legalize downloading through the payment of a monthly contribution, would be against the principle of copyright allowing the author to keep a link with the distribution of his work, as argued by Alain Berenboom.<sup>121</sup>

The public opinion is mainly divided between these two fundamentally different bills: the objective of the first is the respect of the (copy)rights whereas the objective of the second is simply monetary. Regarding the second bill, the *Centre de Recherche Information Droit et Société* (CRIDS)<sup>122</sup> recently realized a study to assess the legal mechanisms likely to be able to legitimate the exchanges of works through P2P networks.<sup>123</sup>

On the other side, the Socialist Party proposes to sanction ISPs<sup>124</sup> but also proposes the principle of net neutrality.<sup>125</sup>

### 1.3. The industry's viewpoint

On the other side, the entertainment industry viewpoint, mainly represented by Belgian branch of the International Federation of the Phonographic Industry (IFPI), the Belgian Entertainment Association (BEA) is, as expected, supporting a Hadopi-like legislation.<sup>126</sup> Indeed, BEA considers the global license unfair as it would place legal and illegal downloading on the same level. The focus of the industry in Belgium is more directed to the access providers, as demonstrated by the recent cases of the Luxembourg Court (C-70/10 *Scarlet v SABAM* of 24 November 2011 and C-360/10 *SABAM v Netlog* of 16 February 2012).

### 1.4. The consumer's viewpoint

The consumer organization "Test-Achats/Test-Aankoop", reacting to the EJC's ruling in the case *Scarlet v SABAM*, held that a fair balance between the right to intellectual property on the one hand

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<sup>118</sup> Rees, M., 2012. L'Hadopi belge est loin d'être morte. Available from: <http://www.pcimpact.com/news/69602-belgique-riposte-graduatee-hadopi-miller.htm>.

<sup>119</sup> This group firstly aims to open the dialogue about the Hadopi law. For more information, see: Hadopi Mayonnaise. 2010. HADOPI: non merci. Repression does not lead to creation. Available from: [http://nurpa.be/resources/downloads/NURPA\\_hadopi-non-merci\\_en.pdf](http://nurpa.be/resources/downloads/NURPA_hadopi-non-merci_en.pdf).

<sup>120</sup> Proposition de loi visant à adapter la perception du droit d'auteur à l'évolution technologique tout en préservant le droit à la vie privée des usagers d'Internet, Doc. Parl., Sénat, 2010-2011, n° 5-590/1. [Law proposal to adjust copyright collection to the technological developments while protecting the privacy of internet users], 9 December 2010.

<sup>121</sup> Cited in Denoël, T. 2010. "Internet – Votre avis nous intéresse!". Available from: <http://www.levif.be/info/magazine/articles/printarticle-2454958.htm>.

<sup>122</sup> Research centre of the University of Namur.

<sup>123</sup> Colin, C., 2011. Etude de faisabilité de systèmes de licences pour les échanges d'œuvres sur Internet. Available from: <http://www.crids.eu/recherche/publications/textes/synthese-sacd-scram.pdf>.

<sup>124</sup> Proposition de loi modifiant l'article 87 de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins en ce qui concerne la responsabilité des intermédiaires lors d'atteintes au droit d'auteur et aux droits voisins. DOC 53 1084/001, 19 janvier 2011.

<sup>125</sup> Proposition de loi modifiant la loi du 13 juin 2005 relative aux communications électroniques en vue de garantir la neutralité des réseaux Internet. DOC 53 1467/001. 17 May 2011.

<sup>126</sup> Tanghe, S., 2010. La crise de l'industrie du disque à l'ère des technologies de l'information et de la communication: émergence d'un nouveau modèle pour l'industrie musicale. Available from: [http://www.erickirsch.be/ei\\_secr/crise\\_disque.pdf](http://www.erickirsch.be/ei_secr/crise_disque.pdf).

and the right to privacy and to communicate information and the freedom of enterprise on the other hand was reached by the Court. The organization admits that, in order to preserve creation, copyright needs to be respected, and concedes that worldwide pirating needs to be reprimanded. However, in its point of view, the consumer who downloads for his/her private use must not be criminalized for that.<sup>127</sup> Still, there “exist an increasing fear among the “average” consumers and users of digital cultural products and services to the idea that new laws of a penalizing and repressive nature would be adopted with a view to fight against the phenomenon qualified as piracy of digital and multimedia content”.<sup>128</sup> As correctly held by this organization, “the only true alternative is to create a legal offer which is sufficiently attractive in order to rival free download.”<sup>129</sup> The association is a proponent of a global licence to curb digital piracy and is entirely against the Belgian Hadopi proposed by Senator Miller.<sup>130</sup>

In the same vein, another consumer organisation argues that the consumer is not the one to be held responsible for the illegal downloading made possible on a website. He is not the one to criminalize but that is the persons who incite illegal downloads (e.g. content hosts) and the people seeking financial gains from the counterfeiting that should be prosecuted.<sup>131</sup> Furthermore, as the providers of online content should take responsibility for their acts, so should the consumer when uploading protected material without any authorization.<sup>132</sup>

## 2. France

### 2.1. Legality of uploading and downloading and peer-to-peer issue

In France, the debate of up- and downloading is not focused on the legality or illegality of such acts, issue which remains unsolved,<sup>133</sup> but the debate is emphasized on how to deal with this large-scale problem, especially committed through P2P networks. Although controverted and unresolved, it must be noticed that the act of obtaining a protected work from the Internet is illegal if it is the result of the making available of the work of the mind to the public, infringing upon the right to communicate or if it involves a reproduction from an unlawful source, infringing upon the right of reproduction.<sup>134</sup>

Setting aside the issue of the debate relating to the technical protection measures, the real concern at stake is to discover how to effectively protect works of the mind, issue which is the underlying logic surrounding the debate about the three strikes policy to enforce copyright online. Therefore, conversely, the up-and downloading debate concentrates on the problem as to know whether the private copy exemption necessitates that the copy is created from a legal source or not, as it is

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<sup>127</sup> Anon, 2011. Téléchargements sur internet : pas de filtrage généralisé. Available from: <http://www.test-achats.be/internet/telechargements-sur-internet-pas-de-filtrage-generalise-s743293.htm>.

<sup>128</sup> Translated by author. Test-Achats/Test-Aankoop, Audition « Droit d'auteur –Internet », Commission FINECO, Sénat 11 mai 2011. Available from: <http://fr.scribd.com/doc/68172265/Telechargement-illegal-et-consommateurs>.

<sup>129</sup> See *supra* note 128.

<sup>130</sup> See *supra* note 128

<sup>131</sup> CRIOC, 2010. Les priorités des organisations de consommateurs pour la prochaine législature. Available from: <http://www.crioc.be/files/fr/4928fr.pdf>.

<sup>132</sup> Anon., 2010. Pas de redevance pour le téléchargement illégal. Available from: <http://www.crioc.be/FR/doc/communiques/all/document-4687.html>.

<sup>133</sup> Geiger, C., 2008. Legal or Illegal: That is the Question! Private Copying and Downloading on the Internet. *IIC*, 39 (5), pp. 597-603.

<sup>134</sup> E-mail exchange with André Lucas, Professor at the Faculté de droit et de science politique of the University of Nantes, 26 June 2012.

presumed that most works available on P2P networks have been made available illegally since, like in Belgium, the uploading of protected content is undoubtedly an infringement upon the exclusive right of right holders.<sup>135</sup> The applicability of the private copy exception to the practice of downloading through P2P is further complicated as the French Intellectual Property Code (FIPC) is not talkative about this issue and there is no clear nor consistent case-law on it.<sup>136</sup> However, since December 2011, a new law<sup>137</sup> partly solves the issue as it provides for that if the source is lawful, the copy falls within the exception for private copy and is otherwise reputed to be counterfeited,<sup>138</sup> in contrast with the situation in, for example, the Netherlands.<sup>139</sup> In other words, this law does not solve the issue of private copying in P2P because, as stated above, the P2P is unlawful as it supposes a making available to the public and a reproduction realized, by hypothesis, from an unlawful source.<sup>140</sup>

Therefore, today, the Hadopi and its graduated response, seen as the solution to diminish copyright infringement committed through unlawful downloading and file-swapping which is supported by the creative industry and the former president Nicolas Sarkozy and opposed by the consumers and data protection organizations, governs the downloading debate.<sup>141</sup>

## 2.2. The government's viewpoint

Rights holders and the entertainment sector, pressured and persuaded the French government to assist them into their enforcement campaign and, in 2009, the government enacted a graduated response scheme called Hadopi law, protecting the interests of the rights owners to the detriment of the freedoms of Internet users and citizens. All this with the support of the former president of France, Mr. Sarkozy.

## 2.3. The industry's viewpoint

The creative content industry has been supportive of the introducing of the Hadopi in France.

## 2.4. The consumer's viewpoint

The organization "UFC-Que Choisir" acknowledges that protecting copyright online is a necessity and henceforth counterfeiting and piracy have to be reproved in order to thrive the cultural creation. The group also believes that the only sustainable alternative to free download is to produce a legal offer which is satisfactorily appealing. The association is a proponent of a sort of global licence to impede online piracy and reconcile the authors of creative works with their audience, the consumers. It is

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<sup>135</sup> Geiger, *sura* note 55.

<sup>136</sup> See the Rodez case, French Supreme Court, 30 May 2006, 2006 D., AJ, at p. 1684; High Administrative Council (Conseil d'Etat), 1<sup>st</sup> and 9<sup>th</sup> sub-sections in joint session, 11 July 2008, 2008 D., AJ, at p. 2074.

<sup>137</sup> Law No. 2011-1898 of December 20, 2011 concerning remuneration for private copying, *Official Gazette of France*, December 21, 2011, p. 21546.

<sup>138</sup> Benabou, V.-L., 2011. Hasty legislative amendment to correct French private copying levy. Available from: <http://kluwercopyrightblog.com/2011/12/01/hasty-legislative-amendment-to-correct-french-private-copying-levy/> and Champeau, G., 2011. La loi copie privée pourrait changer la définition de la copie privée. Available from: <http://www.numerama.com/magazine/20686-la-loi-copie-privee-pourrait-changer-la-definition-de-la-copie-privee.html>.

<sup>139</sup> *ACI Adam BV cs v Stichting De Thuiskopie cs*, Court of Appeal of The Hague, November 15, 2010, case number 200.018.226/01 and *FTD v Eyeworks*, LJN: BO3980, Court of 's-Gravenhage, December 15, 2010, case number 200.069.970/01.

<sup>140</sup> E-mail exchange with André Lucas, Professor at the Faculté de droit et de science politique of the University of Nantes, 26 June 2012.

<sup>141</sup> For further information, see: Anon, 2011. Private Copying: French Parliament Downsizes The Public's Rights. Available from: <http://www.laquadrature.net/fr/node/4883>.

flatly opposed to the Hadopi as it stands.<sup>142</sup> Regarding the peer-to-peer issue, the (main) consumer association “UFC-Que Choisir”, advocates to legalize such a way of sharing information.<sup>143</sup>

### 3. Concluding remark

It is quite astonishing to see that, in France, an entire set of complex rules has been created to fight against illegal downloading without first having decided whether this activity is *per se* a wrongful act or not. To remove any discrepancies within the EU, only the EU legislator can take a position as to the nature of downloading and on the applicability of the private copying exception to copies made from an illegal source.

## SECTION 4. Enforcement of copyright in practice

In today's world, authors and other copyright holders face challenges as to protect effectively their rights. Indeed, the Internet, the new technologies and the globalization of the copyright represent even greater challenges to take up. Therefore, the enforcement of copyright is crucial in the information society. This is done in practice by a number of different organizations,<sup>144</sup> being of two main types: organizations fighting against piracy and collective management societies.

It can be already said that both Belgium and France firmly support the interests of the right holders over those of the consumers whereas e.g. the Netherlands provides for the opposite situation.<sup>145</sup>

### 1 Belgium

The three important organizations which carry out the copyright enforcement are the Belgian Entertainment Association (BEA), the Belgian Anti-piracy Federation (BAF) and the Belgian Society of Authors, Composers and Publishers (SABAM) and ultimately the Federal Computer Crime Unit (FCCU).

#### 1.1. Belgian Entertainment Association (BEA)

The mission of the BEA , which is the federation representing the Belgian music, video and video game industry, is mainly the supply of information on the functioning of the Belgian entertainment industry and the protection, in general, of the interest of this industry, but in particular, of the interest of its members.<sup>146</sup>

The BEA's method to research copyright infringements committed online was revealed by the Privacy Commission when it raised concerns about the compatibility of the search of digital piracy with the rules about privacy and data protection.<sup>147</sup> In order to identify the Internet users who share, without

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<sup>142</sup> UFC-Que Choisir, 2009. La loi Création et Internet: une mauvaise solution à un faux problème. Available from: <http://www.quechoisir.org/document/loi-creation-et-internet.pdf>.

<sup>143</sup> Anon., 2005. Législation du peer to peer: du soutien. Available from: <http://www.generation-nt.com/legalisation-du-peer-to-peer-du-soutien-actualite-8343.html>.

<sup>144</sup> For further information, see: For Belgium <http://www.saj.be/fr/visiteurs/lesressources/liens.php#sgd> and for France [http://mediatheque.cite-musique.fr/masc/?INSTANCE=CITEMUSIQUE&URL=/mediacomposite/cim/50\\_Droit\\_et\\_musique/10\\_Dro/40\\_Sprd.htm](http://mediatheque.cite-musique.fr/masc/?INSTANCE=CITEMUSIQUE&URL=/mediacomposite/cim/50_Droit_et_musique/10_Dro/40_Sprd.htm).

<sup>145</sup> Littoz-Monnet, A., 2006. Copyright in the EU: droit d'auteur or right to copy?. *Journal of European Public Policy*, 13(3), pp. 438-455.

<sup>146</sup> See [http://www.belgianentertainment.be/fr/bea\\_over\\_bea\\_doelestellende/](http://www.belgianentertainment.be/fr/bea_over_bea_doelestellende/).

<sup>147</sup> Privacy Commission, Opinion No. 44 / 2001 of November 12, 2001. Available from: [http://www.privacycommission.be/sites/privacycommission/files/documents/avis\\_44\\_2001.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/avis_44_2001.pdf).

authorization, Belgian copyright protected works (*via* P2P networks), the BEA carries out research on P2P websites. Once registered to one system with a pen name, an officer searches into the list of people offering to share precise Belgian works. After having picked up a pen name of the list, the officer initiates the downloading during which he uses a computer program in order to obtain the IP address of the Internet user. Afterwards, the officer asks the ISPs to give the name of the person who used such an address at a precise period of time. Then a warning letter is drafted, sent to both the ISP and the Federal Computer Crime Unit<sup>148</sup> and then the officer requests the ISP to forward the letter to the identified person, enjoining that person to stop the sharing of the identified content and to delete it from the hard drive. If no reaction is seen, the case is sent to the public prosecutor.<sup>149</sup>

## 1.2. Belgian Anti-piracy Federation (BAF)<sup>150</sup>

Originally built in 1985 by Belgian video manufacturers, this not-for-profit company has expanded its activity as to include its current main objective: the struggle against piracy and counterfeiting of music, films and video games. Upfront, it is needed to point out that BAF does not operate like the Hadopi, but like its French equivalent Association for the Fight Against Audiovisual Piracy (see *infra*).

In order to do so, BAF adopts a twofold tactic: information/prevention and legal actions. It gives information about the risks and consequences of illegal downloading, about the means to identify illegal products and so on. More importantly, it may bring legal proceeding against pirates<sup>151</sup> too, i.e. the persons who willfully infringe copyrighted materials, both off - and online, who can be charged with a criminal offense, bearing the risk of prison sentences and elevated financial penalties.

Its legal mission is therefore to look for pirates in the real and digital world. In the former, the BAF activity consists essentially in the control of the markets, of the import/export of copied products and others. Less significant, BAF processes any sort of phone, (e-)mail and the like denunciations. Where a possible copyright infringement is detected, BAF files a complaint before the police or customs who will then intervene. However, in our digital age, the Internet sphere is the BAF's highest challenge. Indeed, nowadays, the distribution of copyrighted materials and the downloading of such materials is an easy daily practice. In this regard, the top priority of the organization is to end, or at least contain the acts of the providers of illegal materials. Among other things, BAF monitors on the Internet information susceptible of leading to copyright infringements such as advertisings, websites offering to illegally download music, movies, games, etc. in order to take them out of the net. In this respect, BAF carries out investigation towards the uploaders with the aim to lodge complaint to the relevant authority.

Upon data collected from the organization,<sup>152</sup> the way BAF carries out the research to catch copyright infringers is by hiring private detectives. Then, after investigation and if incriminating information is found, the BAF, as stated above, files a complaint to the police.

The police then, if judged necessary pursing the circumstances of the case, swoop down to the domicile of the alleged infringer, collect intelligences and determine if there is a copyright violation.

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<sup>148</sup> Belgian Federal Police website, FCCU. Available from: [http://www.polfed-fedpol.be/org/org\\_dgj\\_FCCU\\_RCCU\\_fr.php#](http://www.polfed-fedpol.be/org/org_dgj_FCCU_RCCU_fr.php#).

<sup>149</sup> See *supra* note 37.

<sup>150</sup> Information essentially collected from the BAF website [www.anti-piracy.be](http://www.anti-piracy.be).

<sup>151</sup> Piracy denotes the act of copying and/or the distribution of copyright protected works. People engaged in these activities without authorization of the copyright owner are named 'pirates'.

<sup>152</sup> Information collected from a phone interview with Vincent Jadot, lawyer at the BAF.

If it appears to be the case, the cause is brought before a court. A concrete example would be the following. On the internet, some music is offered for sale. The BAF identifies the person offering such music and sees whether he/she has the right to do so. If not, the police raid the alleged infringer. On the infringer premises, any element can be collected in order to identify and prove guilt of that person, such as blank CDs or self-made CD' cases, etc.

In order to assure the efficiency and security of BAF's actions, as one may expect, the methods used by BAF are quite confidential. What came out is that, unlike the Hadopi system, the IP address is only one element among others used to identify infringers.

The principal issue relating to the copyright enforcement in practice for the anti-piracy organization is the slowness of the justice, although Belgium, France and the Netherlands are considered as some of the most reliable justices in the world.<sup>153</sup> Once a complaint is filed, a lot of time is devoted to analyze it. After this analysis, a long period of time can slip by to bring the case before a tribunal. This slowness leads to the fact that it is not obvious for the BAF to be in adequacy/keep pace with technology. As a corollary, the justice overflow represents another issue. Indeed, in many jurisdictions, copyright violations are not necessarily a priority,<sup>154</sup> where courts focus on issues seen as more crucial such as murder. Apart from these issues, the BAF seems to be satisfied with the work it accomplishes.

Consequently, improvements of the BAF procedure is likely to be linked to improvement of the rapidity of the justice and the increasing of the priority of copyright infringement as the Belgian legislation appears to be coherent enough to determine where copyright infractions has been committed.

It is true that Hadopi allows to act more rapidly by the sending of warning notices directly to the alleged infringers and could serve to combat the impunity for copyright violations that is felt in Belgium, but there exists other means to fight this feeling.

### 1.3. Belgian Society of Authors, Composers and Publishers (SABAM)

Although SABAM<sup>155</sup> is not a member of the BAF, the two organizations are working within the framework of a partnership. Created by authors for authors in 1922, the SABAM is a private collective management society whose object is the management, in the largest sense of the word, of all copyrights in Belgium, but also copyrights within other states with which it concluded reciprocity agreements. The role of SABAM is to collect royalties when a work is used or made available to the public and then to redistribute the royalties to the relevant member author(s). In order to do so, the organization documents its authors' works into a repertory it can then protect.

The SABAM, contrarily to its Dutch equivalent Buma/Stemra, is a multidisciplinary authors' society which is involved not only into the music copyright but in all areas which entail copyright.

Like the BAF, the SABAM monitors the Internet in order to find illegal offers of copyright protected works. One example of this practice is the famous *SABAM v Scarlett* case initiated in 2004 in which

<sup>153</sup> Agrast, M., Botero, J., Ponce, A., WJP Rule of Law Index 2011. Washington, D.C.: The World Justice Project.

<sup>154</sup> Still, the computer-related criminality (including copyright) continues to be a priority into the Belgian National Security Plan for 2012-2015.

<sup>155</sup> SABAM stands for Société Belge des Auteurs, Compositeurs et Editeurs and in short "Société d'Auteurs Belge – Belgische Auteurs Maatschappij".

the company lodged a complaint against the ISP Tiscali (which afterwards became Scarlett) for illegal online distribution of copyrighted music, which finally ended up before the ECJ which stated that ISPs cannot be obliged to monitor contents in order to prevent intellectual property rights violations.<sup>156</sup> Another example took place in March of this year; the organization required different public libraries to pay fees for the public reading of books to groups of children.<sup>157</sup>

But the SABAM is relevant in this work because of its impact on the way copyright is respected. Indeed, having a factual monopolistic position, SABAM represents the almighty authority of copyright. Its role and the image it transmits of its activities are therefore crucial for the effective understanding of copyright and the fight against copyright infringements.

However, this bright picture of the SABAM is darkened by the fact that the organization was charged several times with copyright fraud, embezzlement, money laundering and falsification of accounts.<sup>158</sup>

In order to combat the aforementioned lack of transparency and also abuses of dominant position, a law<sup>159</sup> amending the LDA brings, among others, more clarity into the accounts of collecting societies. A step further would be to include a fairness test in relation to the rates of royalties, as recently proposed in the Netherlands.<sup>160</sup>

#### 1.4. Federal Computer Crime Unit (FCCU)

The Federal Computer Crime Unit (FCCU),<sup>161</sup> specialized part of the federal police, is the main body which fight against, as its name suggests, any form of computer-related crimes. Its activities include thus copyright violations. The FCCU is also the organ in charge of the identification of Internet users.<sup>162</sup> Should the police face the problem as to determine who the copyright infringer really is when the identity of the Internet subscriber is already known, all the computers on the premises will be seized. They will be in the hands of highly skillful experts carrying out forensic analyses to find out which computers display evidence of unlawful activities. The FCCU may also use its investigation powers to conduct interviews with the persons concerned or likely to be concerned. The combination of this intelligence leads to the determination of the person(s) who should be taken to court.

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<sup>156</sup> ECJ, Case C-70/10 *Scarlet v SABAM*.

<sup>157</sup> Herbots, K. 2012. Sabam wil geld voor voorleesuurtje in bibliotheek Available from: <http://www.demorgen.be/dm/nl/989/Binnenland/article/detail/1407794/2012/03/13/Sabam-wil-geld-voor-voorleesuurtje-in-bibliotheek.dhtml>.

<sup>158</sup> Udo de Haes, A., 2012. Belgische Buma vervolgd voor fraude en omkoping. Available from: <http://webwereld.nl/nieuws/109561/belgische-buma-vervolgd-voor-fraude-en-omkoping.html> and Anon., 2012. SABAM Charged With Copyright Fraud, Embezzlement, Money Laundering. Available from: <http://torrentfreak.com/sabam-charged-with-copyright-fraud-embezzlement-money-laundering-120218/>.

<sup>159</sup> Loi du 10 décembre 2009 modifiant, en ce qui concerne le statut et le contrôle des sociétés de gestion des droits, la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins [Law modifying, concerning the statut and the supervision of collecting societies, the Law on Copyright and Neighboring Rights of June 30, 1994], Moniteur Belge [Official Gazette of Belgium] December 23, 2009, p. 80461.

<sup>160</sup> See Teterissa, D., 2012. Dutch MPs debate with government on supervision of collecting societies. Available from: <http://www.futureofcopyright.com/home/blog-post/2012/02/28/dutch-mps-debate-with-government-on-supervision-of-collecting-societies.html>.

<sup>161</sup> Belgian Federal Police website, FCCU. Available from: [http://www.polfed-fedpol.be/org/org\\_dgi\\_FCCU\\_RCCU\\_fr.php#](http://www.polfed-fedpol.be/org/org_dgi_FCCU_RCCU_fr.php#).

<sup>162</sup> Brochure of the Federal Computer Crime Unit. Available from: <http://www.polfed-fedpol.be/pub/brochures/pdf/FCCU-FR.pdf>.

## 2. France

In France, in the anti-piracy fight, the Association for the Fight Against Audiovisual Piracy (ALPA) is the French equivalent of the BAF, together with the Société civile des Producteurs Phonographiques (SCPP) to a lesser extent. Bringing more cohesion in the enforcement, the Hadopi fights against any kind of copyright violations.

### 2.1. Association for the Fight Against Audiovisual Piracy (ALPA)

Founded in 1985, the Association for the Fight Against Audiovisual Piracy pursues the same aim as the BAF and uses the same procedure to combat copyright violations (provides the Hadopi with intelligences instead of the police) but focuses its action towards the fight against audiovisual counterfeiting.

### 2.2. French Society of Music Authors, Composers and Publishers (SACEM)

In France, there exist four principal copyright collectives: SACEM, SCPP, SDRM and SPPF. SACEM<sup>163</sup> is the French equivalent of the SABAM. It pursues the same general philosophy since 1850: administered by the authors, composers and publishers, the Society of Music Authors, Composers and Publishers collects the royalties due to the right holders and aims to protect and represent the interests of its members.<sup>164</sup>

Nevertheless, like the SABAM and probably other copyright collective societies around the world,<sup>165</sup> SACEM has been facing issues regarding its fraudulent internal management.<sup>166</sup>

What is more, in reaction to the SACEM's abuses, a foundation was born in 2003 which requested an in-depth reform of the functioning of the organization: the *Foundation Anti-SACEM*.<sup>167</sup>

The aforementioned societies are allowed to track the provision of copyright protected files but only within the framework of file-sharing through P2P. They all chose the same company as Hadopi did to perform this tracking activity: Trident Media Guard.

### 2.3. Central Brigade on the Repression of Artistic and Industrial Counterfeiting (BCRCIA)

With the Hadopi, any Internet account holder are deemed to be the copyright infringer and thus liable of blatant negligence. However, should the actual copyright infringer be a different person than the account holder, the *Brigade* will carry out investigations in order to pursue and convict the

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<sup>163</sup> Société des Auteurs, Compositeurs et Editeurs de Musique - Society of music authors, composers and publishers.

<sup>164</sup> For further information, see: Reillier, F. La Sacem pour les nuls. Available from: <http://www.fredreillier.com/droits-dauteur/la-sacem-pour-les-nuls/>.

<sup>165</sup> See for example the German collecting society GEMA, see: Crijns, K., 2011. German collecting society GEMA faces fraud charges. Available from: <http://www.futureofcopyright.com/home/blog-post/2011/10/03/german-collecting-society-gema-faces-fraud-charges.html> and the Spanish SGAE, see: Horten, M., 2011. Spanish police raid copyright society in fraud probe. Available from: <http://www.ipreality.com/index.php/copyright-business/664-spanish-police-raid-copyright-society-in-fraud-probe>.

<sup>166</sup> See for example: Rees, M., 2010. Un rapport dénonce les coûts tordus des sociétés d'ayants droit. Available from: <http://www.pcinpi.com/news/56327-hadopi-crise-cour-compte-controle.htm> and Berretta, E., 2010. Comment la Sacem se gomfre.... Available from: <http://www.lepoint.fr/actualites-medias/2010-04-10/comment-la-sacem-se-gomfre/1253/0/442942>.

<sup>167</sup> Accessible from: <http://centrebombe.org/anti-sacem.html>.

actual infringer. To do so, the police are able to seize every computer<sup>168</sup> on the premises of the alleged infringer where forensic specialists use their skills to discover which computers were used to commit the offence and then may conduct interviews with potential wrongdoers. The information gathered should be employed to find out the actual infringer(s).<sup>169</sup>

### 3. Concluding remark

Throughout the world, it has been the uploaders who have been the centerpiece of the big entertainment businesses. Indeed, uploaders make protected works available so that others may unlawfully copy them, but it is not the sole reason why they are the focus point in this research. This is mainly due to the fact that downloading is not illegal in all jurisdictions.<sup>170</sup>

In Belgium, the judicial proceedings against the Internet users downloading, without right, protected works of the mind are not very common. Indeed, in practice, it is quite impossible to place a police officer behind each and every computer. Therefore, these proceedings are not targeted towards the casual up-and downloaders but principally towards the “kingpins” and specifically towards the ones who realize a lucrative business out of pirated works, who are even more kept under the surveillance of the Federal Computer Crime Unit (FCCU) and the BAF.<sup>171</sup>

In France, the government decided to overcome this issue of placing police officers behind computers by putting in place the Hadopi observatory, which monitors each and every single steps occurring on P2P networks, with the help of TMG.

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<sup>168</sup> Criminal Code, Article 131-16.

<sup>169</sup> UNESCO, 2009. World Anti-Piracy Observatory – France. Available from: [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/france\\_cp\\_fr.pdf#page=3](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/france_cp_fr.pdf#page=3).

<sup>170</sup> Edwards, L. and Waelde, C., 2005. Online Intermediaries and Liability for Copyright Infringement. Keynote paper at WIPO Workshop on Online Intermediaries and Liability for Copyright, Geneva, April 2005.

<sup>171</sup> Droits Quotidiens, Quels risques à télécharger illégalement sur Internet ?. *En marche*, 3 mai 2012, p. 12.

## Chapter III: Substantive rules on the liability of the uploader

### SECTION 1. Introduction

In the previous chapter, the rules governing copyright law in Belgium and France have been explored. In the present chapter, in order to pave a way to the answer of the research question, the rules about the law of tort in these two countries will be explored. Indeed, before assessing, in the next chapter, in which states the right of the uploaders are best protected, the relevant rules establishing when and how one's liability is engaged need to be investigated and the aim of this chapter is to reveal how can someone be held liable for the act of others. The general and copyright liability under Belgian civil and criminal law is assessed, as well as the remedies against this liability and how the enforcement of the sanctions is carried out.

For the purpose of the present chapter, liability is to be seen as "the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment."<sup>172</sup> The main elements of liability to take into consideration when applied to the Internet are the notions of damage, wrongdoer, conduct (of the wrongdoer), causation (between the conduct and damage) and ground of accountability. Other elements are assessed, namely the burden of proof, the competent court and, in a lesser extent, the applicable law.<sup>173</sup>

To give a clearer view on the issues to be covered by this chapter, In Real World (IRW) analogies are made between my figurative character, Nicolas, who uploads protected content on the Internet, who is speeding on the highway and who is to be found in possession of drugs in his premises and in possession of child pornography on his computer.

Solutions to control access, use, and dissemination of copyrighted materials and of the Internet is still often thought to reside into the machine itself, as suggested more than fifteen years ago by the metaphor of Charles Clark,<sup>174</sup> metaphor which has been quite criticized,<sup>175</sup> wrongfully thought to be a "timeless, boundless, universally applicable practical tool", leading to an erroneous conclusion.<sup>176</sup> As stated above, when an Internet user uploads a protected work without the permission of the right holder, the latter can identify ownership of protected content and track back the content to the uploader *via* active (IP addresses) and passive (digital fingerprinting, watermarking<sup>177</sup>) methods, or even more intrusive technologies such as the Deep Packet Inspection.<sup>178</sup> Nicolas, (alleged) copyright infringer, could argue against the validity of the evidence, proving that he did not infringe someone else's copyright. This would be its first line of defense. However, the present work starts from the postulate that the suspected infringer does not contest the validity of the evidence gathered against him, i.e. the reliability of digital content recognition techniques, but its relevance. This is to say that

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<sup>172</sup> Garner, B. A., 2004. Black's Law Dictionary, 8<sup>th</sup> ed.

<sup>173</sup> Cuijpers, C., Liability and the Internet: Introduction meeting October 3, 2011.

<sup>174</sup> Clark, C., The Answer to the Machine is in the Machine. In: P. Bernt Hugenholtz (ed.), 1998. *The Future of Copyright in a Digital Environment*. The Hague: Kluwer Law International.

<sup>175</sup> Patry, W., "The Answer to the Machine Is in the Machine" Is a Really Bad Metaphor. In: Patry, W., 2012. *How to Fix Copyright*. New York: Oxford University Press ; Geiger, C., 2008. The answer to the machine should not be the machine: safeguarding the private copy exception in the digital. E.I.P.R., 30(4), pp. 121-129.

<sup>176</sup> Patry, *supra* note 175, p. 241.

<sup>177</sup> For more information, see: Schellekens, M., 2011. Digital watermarks as legal evidence. *Digital Evidence and Electronic Signature Law Review*, 8(1), pp. 152-164.

<sup>178</sup> Not yet used in Belgium but in France.

even if right holders trace content back to the infringer/Internet user, he can still argue and be found that he did not commit the reproached offence.

By using the Internet and other information and communication means, the Internet user may be confronted to diverse sort of liabilities, being alternative or cumulative. Beyond the realm of specific liabilities such as in the context of copyright or of the publication of content on a website, the Internet user remains subjected to the common provisions of the administrative, civil, and criminal liability.<sup>179</sup> The present subsections look into the situation in Belgium and France.

In case of infringement of copyright (*contrefaçon*), the civil law provides for that the infringer has primarily to pay damages in order to repair the “social disorder created by such actions”.<sup>180</sup> In case of online copyright infringement, the first line of defense of an alleged infringer would be to argue that he is not to be blamed for the wrongdoing. This argument brings the following question: how to establish the liability of Nicolas, when he argues in such a way?

## SECTION 2. Belgium

### 1. Civil liability<sup>181</sup>

With respect to copyright, this is the general rules of civil liability/tort law (*responsabilité civile*) that are applied. The counterfeiting<sup>182</sup> (*contrefaçon*) is seen as a civil fault provoking a damage which needs to be repaired by the infringer, by virtue of the application of article 1382 of the Civil Code. The aim of the damages is to reestablish the *pristin état*, i.e. restore the prejudiced person into a state where he would be, if the fault would not have been committed. Therefore, damage, a fault and a causal link between the two need to be established to engage one's liability. In the civil procedure, the burden of proof to demonstrate the suffered damage lies on the shoulders of the plaintiff. This standard applies in the same way in the copyright context, but there exists a practical issue in the sense that right holders often keep seeking to establish that there has been a violation of their rights, without (properly) bringing a convincing evidence of the damage suffered and its extent, what could explain the very lax sentences ordered (in comparison with the criminal jurisdictions).<sup>183</sup> The copyright infringer is therefore responsible for the damages he/she caused by his/her inadequate behavior.

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<sup>179</sup> Anon., Responsabilité civile, pénale et administrative. Available from: [http://www.esen.education.fr/fileadmin/user\\_upload/Modules/Ressources/Outils/mot\\_juriste/6-01\\_responsabilite\\_civile.pdf](http://www.esen.education.fr/fileadmin/user_upload/Modules/Ressources/Outils/mot_juriste/6-01_responsabilite_civile.pdf)

<sup>180</sup> Berenboom, A., 2009. Contrefaçon sur l'internet - la réparation du dommage. Available from: <http://www.droit-technologie.org/dossier-182/contrefacon-sur-l-internet-la-reparation-du-dommage.html>. See also Buydens, M., La réparation du dommage en droit de la propriété intellectuelle. In: Vanbrabant, B., 2012. Droits intellectuels: le contentieux (compétence, procédures, sanctions). Liège: Anthemis. Commission Université-Palais, vol. 132.

<sup>181</sup> Information mainly retrieved from: De Page, H., 1997. Traité élémentaire de droit civil belge, Bruxelles: Bruylants and Bocken, H. and De Bondt, W., 2000. Introduction to Belgian Law. Bruxelles: Bruylants.

<sup>182</sup> It has to be noticed that the Act of May 9, 2007 encompasses the principle that the holder of an intellectual property right is given the right to claim for damages in event of counterfeiting, term which needs to be understood as involving that each transgression of the right of the holder amounts to counterfeiting, i.e. including the notions of counterfeited copy, which is an inexact copy of a work of authorship and the pirated copy, which is an exact copy. Accordingly, the term counterfeit relates to fake goods whereas the term piracy relates to the act of reproducing books, movies, music, or other copyrighted works without the permission of the copyright holder (usually for commercial purposes).

Therefore, for the purpose of this thesis, piracy, counterfeiting or *contrefaçon* are used interchangeably in order to express any (online) copyright infringement.

<sup>183</sup> Berenboom, *supra* note 180.

For the purpose of this chapter, the focus is to be given to the *lex Aquilia*. Noteworthy, the principle of non-concurrence of actions, signifying that tortious and contractual liability are distinct and may not be cumulated, is part of the Belgian<sup>184</sup> and French<sup>185</sup> civil liability systems.

## 1.1. General system of the extra-contractual liability

Although a specific rule for copyright liability exists (see *infra*), the rules of tort law are applicable. Each actor of the digital world needs to act as a *bonus pater familia* (i.e. the way a good parent would manage a family). Therefore, as in the offline world, each of them carries a duty of care not to cause damage to others online, relevant to both direct and indirect copyright infringement. The general rule of liability is encapsulated in the statutory provision of Belgian tort law based on fault, being the Article 1382 of the Civil Code,<sup>186</sup> which stipulates that everyone has the obligation to repair the damage caused by his fault to another one.<sup>187</sup> Article 1383 of the same code further condemns, on top of a damaging act, the imprudent or negligent behavior leading to cause damages to others,<sup>188</sup> similar to the notions of contributory or vicarious liability in Anglo-Saxon jurisdictions. According to the applicable system based on tort law, the victim of damage has to prove three elements, namely the existence of a fault, a damage and the causal link between the fault and the damage in the sense that, without the faulty act, the damage would not have occurred in such a way that it concretely occurred. The victim who brings to the civil judge this threefold proof will see his/her damage integrally repaired. In other words, “liability for wrongful acts only arises if causation is established between the fault and the damage.”<sup>189</sup>

### 1.1.1. The fault

The fault is the failure to a standard of behavior (faulty conduct based liability). This standard may be enacted into legal provisions such as the traffic law and any violation leads to a fault. But the fault may also be the failure to a “general duty of care”. In this scenario, it has to be referred to the ideal behavior of an “abstract man” placed into the same factual circumstances (the standard of a *bonus pater familia* usually applies). Therefore, if someone does an act damaging someone else, the question as to know whether a man normally cautious and conscious of the consequences of his acts would have behaved in the same way arises. In this scenario, the fault will be the deviation from the behavior of a normally cautious man. It has to be said that the civil liability supposes that the occurrence of damage would have been foreseeable and that the measures necessary to prevent it had not been adopted.

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<sup>184</sup> Court of Cassation, December 7, 1973 (Muller-Thomson case).

<sup>185</sup> Court of Cassation, (first civil chamber) April 6, 1927.

<sup>186</sup> The statutory basis for tort is to be found in Articles 1382 to 1386 of the Civil Code.

<sup>187</sup> “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” (translation by G. Rouhette, with the assistance of A. Berton, and published on the official website of the French Government, available from: [http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf)).

<sup>188</sup> “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.” (translation by G. Rouhette, with the assistance of A. Berton, and published on the official website of the French Government, available from:

[http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf)).

<sup>189</sup> Smits, J.M., 2006. Elgar Encyclopedia of Comparative Law. Cheltenham-Northampton: Edward Elgar Publishing, p. 112.

The fault may be intentional or non-intentional, while being a positive or negative act (such as the lack of monitoring an internet connection, see *infra*).<sup>190</sup>

#### 1.1.2. The damage

The ground principle is that the compensation needs to put the victim back into the situation where he was before the occurrence of the damage. The damage may qualify as bodily, moral or material and its compensation may occur in nature or by equivalent. When none is possible, the judge needs to opt for the most adequate mode of compensation to repair the prejudice. Most likely, only the material interest of authors will be infringed upon in case of copyright violation online and only damages will compensate them.<sup>191</sup>

#### 1.1.3. The causality link

The damage will have to be repaired only if it has been caused by the fault. This is up to the victim to provide the existence of a link of causality between his/her prejudice and the faulty behavior.

The causal link appreciates *de facto*. Although diverse theories exist as to the appreciation of the causal link, which is left to the Court and tribunals' appreciation, the Belgian case-law, most of the time, applies the "theory of equivalence of conditions", which requires to account for all the faults without which the damage would have not occurred. In applying this theory, the Belgian case-law generally takes into account the proportional gravity of the faults (e.g. the absent-mindedness is to be appreciated differently if it represents the sole cause of the damage or if the damage equally results into the gross fault of a third party).

In the event that several persons contribute to cause damage by their respective faults, there will be a sharing of the liabilities, where each will be responsible for a part of the caused damage. In order to avoid liability, the commonly known extraneous causes of exoneration (which free persons) are applicable (see *infra*).

#### 1.1.4. The burden of proof

The article 1315 of the Civil Code provides for the *actori incumbit probatio* principle, which requires that "a person who claims the performance of an obligation must prove it. Reciprocally, a person who claims to be released must substantiate the payment or the fact which has produced the extinguishment of his obligation."<sup>192</sup> This principle is further expressed in the Judicial Code which obliges each party to bring the proof of the facts it invokes.<sup>193</sup> In other words, the tort action belongs to the claimant (victim) who can bring it before civil courts.

#### 1.1.5. Circumstances under which the accused person may be exonerated

The person to who a faulty act is reproached may defend himself by bringing the proof that the damage had been caused either by the effect of *vis major* (*force majeure* in civil law jurisdictions or *act of God* in common law jurisdictions) or *casus fortuitus* (fortuitous event, being e.g. the fault of the

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<sup>190</sup> For further information, see by analogy: Pierre, P., 2003. La place de la responsabilité objective: Notion et rôle de la faute en droit français. Available from: [http://grerca.univ-rennes1.fr/digitalAssets/268/268674\\_ppierre.pdf](http://grerca.univ-rennes1.fr/digitalAssets/268/268674_ppierre.pdf).

<sup>191</sup> For further information, see: Berenboom, *supra* note 180.

<sup>192</sup> Civil Code, Article 1315. Translation by G. Routhette, with the assistance of A. Berton, and published on the official website of the French Government, available from:

[http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf).

<sup>193</sup> Judicial Code, Article 870.

victim or of a third party) to obviate his liability. The latter causes of exoneration only stand if the event invoked is entirely unpredictable, inevitable and independent of the will of the one who relies on it. Besides, if the fault contributed to the realization of the damage, its perpetrator is entirely responsible.

## 1.2. Special systems

Beside the general liability which requires a person to be responsible for damage he has done (intentionally or by negligence), the citizens are also held responsible for the damages done by the persons towards whom they have to answer for their acts, or by things under their custody. These special systems cover the liability of one's minor children, things, animals, building and the liability of employers and teachers respectively for the acts of their employees and pupils. For the purpose of this section, the first two are relevant and the liability for other persons is broadly similar to the one of the parents upon their infants.

Whereas the general system imposes upon the victim the (difficult) onus to prove a fault in the chief of the perpetrator of the damage, Articles 1384 to 1386bis of the Civil Code provide for more favorable rules at the attention of the victim (e.g. presumption of fault, possibility to sue a more solvent debtor than the author of the fault).

Noteworthy, firstly, there is no general principle of liability for the act of others recognized in the Belgian law or case-law.<sup>194</sup> Secondly, the application of the special systems does not preclude a legal action based upon the general system. Finally, the following no-fault based systems operate independently of the notion of discernment, which does not intervene.

### 1.2.1. Liability of parents of minor children

#### 1.2.1.1. Persons upon who lies liability

According to the law (Article 1384, indent 2 and 5), the fathers and mothers are liable for the damage caused by their minor child, unless they can prove that they could not prevent the wrongful act at the origin of their responsibility.

The presumption of liability lies explicitly on the head of fathers and mothers and does not concern other persons likely to assume custody on the child (e.g. baby-sitter).

#### 1.2.1.2. Conditions under which liability may arise

A minor child is irresponsible from a criminal point of view (except for severe acts by a sixteen years old minor). From a civil perspective, a minor child is not to be always held liable of his acts and thus the plaintiff would need to take legal action against the child's parents, who are civilly liable for the wrongdoings of their children. For the parents to account for the acts of their minor infant, that infant needs to be minor (i.e. aged under eighteen years old)<sup>195</sup> and has committed a fault, in the sense of an act objectively illicit for which the notion of discernment makes no difference.

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<sup>194</sup> Fagnart, J.-L. and Delaunoy, E., *La responsabilité du fait d'autrui: introduction*. Available from: [http://www.droitbelge.be/fiches\\_detail.asp?idcat=36&id=317](http://www.droitbelge.be/fiches_detail.asp?idcat=36&id=317).

<sup>195</sup> Civil Code, Article 488.

### 1.2.1.3. Circumstances under which the accused person may be exonerated

In this case, it is a presumption of fault which lies on the shoulders of parents, which can be reversed (*juris tantum* presumption). There is no need to prove *vis major or casus fortuitus*, but it is necessary to demonstrate the absence of fault or that the fault is not in causal relation with the damage.

Therefore, the only way to avoid liability is to prove that they carried out a proper education and sufficiently attentive surveillance of their child,<sup>196</sup> which is more likely to be assessed on a case-by-case basis. The surveillance aspect is interesting here in the sense that this parental liability answers the line of argument of an alleged copyright infringer. Indeed, parents may escape liability when they accurately demonstrate an adequate surveillance of the activities of the tortfeasor child (as opposed to the Hadopi system where the holder of the Internet access is liable, irrespective of whom really committed the copyright infringement).

### 1.2.2. Liability of the custodians of (defective) things

Article 1384, indent 1 Civil Code provides for that “a person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody”.<sup>197</sup> The last part served as a basis for the elaboration (in the doctrine and case-law) of a theory allowing to engage the liability of the person having a thing under his control, when this thing causes a damage.

#### 1.2.2.1. Persons upon who lies liability

The custodians of things, this is to say the ones who exercise on the thing a power of direction and control (often, that person will be the owner, but it can be anybody else), is liable.<sup>198</sup>

#### 1.2.2.2. Conditions under which liability may arise

The custodian of things may see his liability engaged if certain conditions are met. Firstly, an inanimate material thing,<sup>199</sup> movable or immovable, is needed. Secondly, this thing needs to be affected by a defect, i.e. having an unusual characteristic rendering it dangerous and thus likely to cause prejudice. Finally, the defect must have caused the damage. If the victim establishes these three different elements, the custodian of the thing will be liable.

It remains to be seen if this system could apply in the case of copyright on the Internet. Indeed, it could be argued that the Internet subscriber is the custodian of a thing, the computer, and a defect in it (e.g. lack of sufficient protection against intrusion) could engage its liability as custodian of a defective thing.

#### 1.2.2.3. Circumstances under which the accused person may be exonerated

The fact that the defect was the outcome of a faulty act of a third party or was not detectable does not exonerate the custodian. The only manner to avoid liability is to prove that damage was occasioned by an extraneous event.

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<sup>196</sup> Koelman, C. and Van Lissum, D., 2012. Dialogue et vigilance avant tout. *Budget & Droits*, 221, mars/avril 2012, pp. 40-43.

<sup>197</sup> Translation by G. Rouhette, with the assistance of A. Berton, and published on the official website of the French Government, available from: [http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf).

<sup>198</sup> Court of Cassation, March 25, 1943, *Pasicrisie belge*, 1943, I, p. 110.

<sup>199</sup> Court of Cassation, May 2, 1974, *Pasicrisie belge*, I, p. 246.

### 1.2.3. Special system provided for in article 86bis of the Belgian Copyright Act

Article 86bis para 1 of the BCA provides for a special system of liability which recognizes, in favor of the prejudiced party, a “right to compensation for any prejudice that it suffered from the fact of the infringement of copyright or neighboring rights”.<sup>200</sup> There is no need to prove a fault as the copyright infringement by itself leads automatically to a right to compensation, so that this system has been qualified of “strict liability” for the infringement of copyright, system which is questionable and debated into the legal doctrine.<sup>201</sup> Indeed, this system is dangerous in the perspective of the infringers who can no longer argue that the counterfeiting/piracy is due to a third party while being advantageous for right holders who do not have to prove any fault in the chief of the infringer. In this strict liability system, proving good faith is not exoneratory either.<sup>202</sup>

## 1.3. Copyright enforcement authorities and competent Tribunal or Court

Right holders or the collecting society to which they are affiliated may take legal action against the copyright infringer.

Contrarily to the United Kingdom, there is no Copyright Tribunal in Belgium or in France. Competing competence about matter on copyright and related rights is shared by the Tribunal of First Instance<sup>203</sup> and the Commercial Tribunal. The justice of peace is also competent for matter of which the sum does not exceed €1,860.<sup>204</sup>

## 1.4. Penalties

As already mentioned in chapter 2 in more details, the liability of Nicolas can be engaged in the sense that he has to compensate the damage (counterfeiting) done to the detriment of right holders.

## 1.5. Observations

Following from the above, in order to bring a civil proceeding, the right holders need firstly to have suffered from damage and secondly the causal link between the committed fault and the suffered damage has to be clearly demonstrated. These two requirements render the application of the civil liability really complicated in the case of copyright infringement on the Internet. The latter explains the reason why criminal prosecutions are more preferred and widespread for the enforcement of copyright.

## 2. Criminal liability

Outright, it is worth mentioning that the Belgian criminal law and criminal procedure law dates back from and is still nowadays governed by the Napoleonic Penal code (1810), merely updated in 1867 and by the Code of Criminal Procedure of 1807, modified many times as to look like a true

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<sup>200</sup> Introduced by the Act of May 9, 2007 concerning the civil aspects of the protection of intellectual property rights, implementing in Belgian law Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.

<sup>201</sup> Buydens, M., 2008. Les nouvelles législations dans le domaine de la propriété intellectuelle en 2007: un bref aperçu.

Cahier du Juriste, pp. 2-7 and Léonard, T., Atteintes aux droits subjectifs et responsabilité civile: réflexions suite à l'adoption de la loi du 10 mai 2007 relative aux aspects civils de la protection des droits de propriété intellectuelle. In: Wéry, P., 2007.

Droit des obligations: développements récents et pistes nouvelles, Louvain-la-Neuve, Anthemis.

<sup>202</sup> De Visscher, F. and Michaux, B. 2000. Précis du droit d'auteur et des droits voisins, Bruxelles, p. 521, No. 655.

<sup>203</sup> Tribunal de Première Instance.

<sup>204</sup> UNESCO, 2009. World Anti-Piracy Observatory – Belgium. Available from: [http://www.unesco.org/culture/pdf/belgique\\_cp\\_fr](http://www.unesco.org/culture/pdf/belgique_cp_fr).

“patchwork”.<sup>205</sup> Being the ensemble of rules organizing the response of the State towards crime in its general sense, criminal law bears an educational value. Criminal law lists in a sort of code of good behavior what is permitted and allowed. It expresses the societal response against unlawful conducts.

## 2.1. Criminal law

The criminal liability leads to the punishment of a person who commits an offence, categorized, depending on their seriousness, either as contravention, misdemeanor or crime (*contravention-overtreding, délit-wanbedrijf, crime-misdaad*).<sup>206</sup> Therefore, the one who commits a violation of the criminal provisions is to be held penally responsible and will be subject to sanctions ordered either by the Police Court, the Criminal court or the Court of Assize, respectively.

Two main principles in criminal law are relevant here. Firstly, according to the principle *nullum crimen, nulla poena sine lege*,<sup>207</sup> the criminal liability of someone is engaged as soon as there is a violation of the criminal provision, and the nature of the violation is expressed in terms of seriousness of the facts and of the sanctions. Secondly, the general principle that penalties are personal (principle of the personality of the criminal liability),<sup>208</sup> involves that no-one can be punished for an offence he is not guilty of or on the basis of an irrefragable presumption of guilt.<sup>209</sup> Therefore, contrarily to civil law which recognizes one’s liability for the act of others, there exists no criminal liability for the act of others, i.e. no strict liability in criminal law and this without exception.

This situation may validly be transposed to the case of copyright infringement. However, in this case, the general principle of proportionality<sup>210</sup> could hamper the prosecution initiated by a right holder.

## 2.2. The burden of proof

A large array of various types of evidence is accepted under Belgian criminal procedural law, pursuing the principle of freedom of evidence, meaning that all modes of proofs are admitted upon the personal conviction of judges, under the conditions that the proofs have been legally obtained.<sup>211</sup> In respect of the proof of guilt of a copyright infringement, there is no answer to the argument of Nicolas who declares he did not do anything wrong. Therefore, an analogy has to be made with a “type situation” in criminal law. In criminal law, the following situation is quite common from the point of view of the assessment of the proof. Hard drug is found in Nicolas’s garden or attic. His first defense would be to claim that the drug is not his and that he was even not aware of its presence,

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<sup>205</sup> Jacobs, A. and Masset, A., 2010. Les enjeux de la procédure pénale pour les années à venir. Leçons inaugurales du 19 mars 2010. Available from: [http://www.droit.ulg.ac.be/cms/c\\_281129/lecons-inaugurales-du-19-mars-2010](http://www.droit.ulg.ac.be/cms/c_281129/lecons-inaugurales-du-19-mars-2010).

<sup>206</sup> Criminal Code, Article 1.

<sup>207</sup> “No crime, no punishment without a previous penal law” is enshrined in Article 12, indent 2 and 14 of the Belgian Constitution.

<sup>208</sup> Court of Cassation, May 24, 1995, *Pasicrisie belge*, p. 537 [Cass., 24 mai 1995, *Pas.*, p. 537].

<sup>209</sup> Kuty, F., 2010. Principes généraux du droit pénal belge: Tome II – l’infraction pénale, Volume 2. Larcier, p. 214.

<sup>210</sup> Court of Cassation, November 16, 1994, *Pasicrisie belge*, p. 945; Court of Cassation, February 1, 1995, *Pasicrisie belge*, p. 117 [Cass. 16 novembre 1994, *Pas.*, p. 945; Cass. 1er février 1995, *Pas.*, p. 117].

<sup>211</sup> This principle is not codified (in contrast with France, codified in Article 427 of the Code of Criminal Procedure) but a law proposal aim to codify general principles of criminal law (Proposition de loi insérant, dans le Titre préliminaire du Code de procédure pénale, une deuxième partie concernant les principes généraux de la procédure pénale, Doc. Parl, Sénat, 2010-2011, n° S. 5-627).

Mougenot, D., 2002. Droit des obligations - La preuve. Répertoire notarial, 3<sup>rd</sup> ed, Bruxelles: Larcier, p. 65 and Du Jardin, J., 2003. Belgique, les principes de procédure pénale et leur application dans les procédures disciplinaires. *Revue internationale de droit pénal*, 3 (74), pp. 801-820.

although discovered on his own property. The challenge of the public prosecutor and the justice at large is to know how to establish that the drug found belongs to Nicolas. The situation is summarized by the following case-law of the Court of Cassation,<sup>212</sup> the Belgian Supreme Court:<sup>213</sup>

“In repressive matter, when the law does not establish a special mode of proof, the judge ruling on the merits appreciates *de facto* the conclusive value of the elements upon which he bases his conviction and that the parties had been able to freely contradict. He has the liberty to, notably, to refuse credit to certain declarations and to get some to others, from the moment that he is not unaware of the terms of them, to divide a confession according to its intimate conviction, to appreciate the scope of the declarations done by a co-defendant and to take into consideration all elements that are regularly submitted in front of him and that appear to him as to constitute sufficient elements of proof of guilt, while it could exist in the cause [of action] some elements pointing in the opposite way.”<sup>214</sup>

“In repressive matter, when the law does not establish a special mode of proof, the judge ruling on the merits *de facto* appreciates without appeal the conclusive value of the elements upon which he bases his conviction for which the parties had been able to freely contradict.<sup>215</sup> The judge is compelled to form its conviction from the *de facto* appreciation of the elements of proof that have regularly been submitted in front of him without being bound to such one piece of evidence rather than such another.<sup>216</sup> He has also the liberty to take into consideration all elements that appear to him as to constitute sufficient presumptions of guilt while it could exist in the cause [of action] some elements pointing in the opposite way, notably the lack of clues. The judge ruling on the merits may legally, on the one hand, retain factual elements as constituting a body of grave, precise and corroborating presumptions establishing the guilt and, on the other hand, reject as non-decisive different or contrary elements by the defendant.”

Therefore, in short, since the conclusive value of the evidence is governed by the principle of the freedom of appreciation of the conclusive value of evidence which is brought before the judge, it will be up to the judge to appreciate the evidence. The judge may consider, having regard to the ensemble of the evidence brought, that the explanations of the alleged infringer are devoid of any credibility and that the evidence gathered convince the judge(s) beyond reasonable doubt. Differently put, this is the common law of evidence which applies.

Coming back to Nicolas, the prosecutor who found the drug at Nicolas' place would probably intimately believe that the drug is Nicolas'. He could still argue otherwise but needs to back up his opinion.

Another interesting analogy is the prosecution of the possession of child pornography on the hard drive. The intentional possession of child pornography is a criminal offence. In the scenario analyzed by Stevens and Koops,<sup>217</sup> child pornography is found in odd places on the hard drive: recycle bin,

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<sup>212</sup> Highest court for civil and criminal matters (*Cour de cassation - Hof van Cassatie*). Equivalent of the Dutch Hoge Raad.

<sup>213</sup> Translated by author.

<sup>214</sup> See: Cass., 5 janvier 2000, RG P.99.1085.F, Pas., 2000, n° 7 ; Cass., 23 janvier 2008, RG P.07.1437.F, Pas., 2008, n° 53 ; Cass., 17 décembre 2008, RG P.08.1233F, Pas., 2008, n° 737.

<sup>215</sup> Court of Cassation, September 6, 1971 [Cass., 6 septembre 1971, *Pasicrisie belge*, 1972, I, 12] or [Cass., 6 september 1972, *Arresten van het Hof van Cassatie*, 1972, pp. 12-13].

<sup>216</sup> Franchimont, M., Jacobs, A. and Masset, A., 1989, *Manuel de la procédure pénale*, Liège: Collection scientifique de la Faculté de droit de Liège et Jeune Barreau de Liège, p. 763.

<sup>217</sup> Stevens, L. and Koops, E.J., 2009. *Opzet op de harde schijf: criteria voor opzettelijk bezit van digitale kinderporno. Delikt en Delinkwent*, 39(7), pp. 669-696.

unallocated clusters, temporary Internet files, Media Player's Art Cache, among huge amounts of (P2P) downloads, in the file "your son's" in the folder "My Pictures", or somewhere else argued to be placed by "a hacker". Letting aside the issue of intentional possession, the Dutch Courts rejected the argument of a father alleging that he did not download child pornography but his son did, as this father was not able to provide believable proof of his claim. Also, the so-called "hacker defense" is considered very unlikely in this area of law, unless clear indications of third-party access.

In the end, the defense of Nicolas that it was not him but someone else may still be more or less plausible, depending on the circumstances of each case and fits between the first and second analogy. But generally the burden of proof was on the defendant to provide evidence that made plausible that it was someone else. *In fine*, the appreciation of the judge and the conviction of a potentially innocent person are very dependent upon the circumstance of the case, the gravity of the actions and the reasonable proofs that can be gathered by the public prosecutor but also brought by the accused.

### 2.3. Copyright enforcement authorities and competent Tribunal or Court

Only the criminal courts are competent to hear about cases of violations of the criminal law and the legal action belongs to the public prosecutor, who does not need to prove anything, the fact merely needs to be objectively unlawful. Pursuing the principle of prosecutorial discretion, public prosecutors are not bound to prosecute every time an offence has been perpetrated and thus may choose, even though the facts reveal that all the features of an offence are existent, to start criminal proceedings or not.<sup>218</sup>

Within the Tribunals of First Instance, the criminal chambers are generally competent to hear copyright cases.<sup>219</sup> The public prosecutor may sue the copyright infringer upon his own initiative or denunciation.

As stated above, the Federal Computer Crime Unit (FCCU) is the main body which fights against computer-related crimes, including copyright violations.

### 2.4. Penalties

As already mentioned in chapter 2, any copyright infringement amounts to the misdemeanor of counterfeiting and is sanctioned to a jail sentence of a period from three months to three years and a heavy fine, if realized with a malicious or fraudulent intent. That intent needs to exist for the sanction to be applicable.

### 2.5. Case-law

Only one recent judgment is cited in order to obtain a better understanding of the potential sanctions that online copyright infringers may face in the current Belgian framework. In March 2012, the criminal chamber of the tribunal of Courtrai had condemned a Belgian Internet user for the upload of tracks of an album of the rock band Kaiser Chief before its official release, as well as for the

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<sup>218</sup> Article 28*quater*, Code of Criminal Procedure.

<sup>219</sup> Code of Criminal Procedure, Article 179.

possession of 1,127 files found after a house-search. For these facts, he has to pay €65,651 for damages to the constituted civil parties (to SABAM, among others) plus a fine of €5,500.<sup>220</sup>

## 2.6. Observations

Liability under Belgian law arises in the context of copyright infringement for civil reparation pursuant to Article 1382 and for encouraging the realization of a wrongdoing, on the ground of the criminal law notion of complicity.<sup>221</sup>

Even though the principles of criminal law are clear, their application remains challenging. Indeed, primarily, the identification of the actual consumer/infringer (or even a plausible infringer) violating IPRs online is technically and legally very problematic to ascertain. Secondly, procedurally, if the committed wrongful act is not supported by the civil party and has not caused any direct damage to anyone, the complaint brought before the public prosecutor is very likely to be dropped.<sup>222</sup>

Noteworthy as well, the parties engaged in a civil procedure are rather symmetrically equal before the civil judge, who aims to arbitrate a situation in which the views of the parties are conflicting. On the other side, the parties engaged in a criminal prosecution are not equal as it opposes the society (represented by the public prosecutor) and the offender. Indeed, in principle, there is no other choice than the society to be right and the offender to be wrong. In this case, the criminal judge verifies first whether the alleged offender is guilty and secondly fixes the penalty according to the circumstances of the case and the personality of the offender.<sup>223</sup>

Lastly, in Belgium, civil and criminal procedures can be cumulated and the sanctions attached, as well as the civil action, are not *per se* a sanction but a compensation of damage. For example, in the case where a person commits an offence which causes damage to another person, the civil and criminal liability of the offender can be engaged. In such a case, the victim may ask for compensation for the damage suffered to the civil judge or to the criminal judge who will rule on the criminal liability of the perpetrator. The legal maxim *le criminel tient le civil en état* (the criminal law suspends the civil), which expresses the supremacy of criminal over civil law in providing for that the civil judge has to wait to craft its decision until the criminal judge has given his own upon the issues of a case, needs to be recalled.<sup>224</sup>

## SECTION 3. France

### 1. Civil and criminal liability

Given that the French civil and criminal liability are very close to the Belgian ones, it is less relevant to merely restate the ground of accountability and this is why it is preferred to focus on the Hadopi

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<sup>220</sup> Anon, 2012. Un Belge condamné à 65 651 euros de dommages-intérêts pour piratage. Available from: <http://www.numerama.com/magazine/21895-un-belge-condamne-a-65-651-euros-de-dommages-interets-pour-piratage.html>.

<sup>221</sup> Sterling, J.A.L., 2008. World copyright law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law : With a Glossary of Legal and Technical Terms, and a Reference List of Copyright and Related Rights Laws Throughout the World. London: Sweet & Maxwell.

<sup>222</sup> Rapport MAPI , 1996. La Pornographie Infantile sur Internet. Available from: <http://www.fundp.ac.be/pdf/publications/39071.pdf>.

<sup>223</sup> Roffin, G., 2002. Notions de responsabilité civile et pénale. Available from: <http://cipglena.free.fr/niveau4/respons/index.htm>.

<sup>224</sup> Principle embodied in Article 4 of Belgian and French Code of Criminal Procedure.

framework. I will then consider that the French legal framework applies *mutatis mutandis*. Nonetheless, a few dissimilarities have been discovered and are therefore briefly mentioned below.

Firstly, France relies on the same principle of the *actori incumbit probatio*, also contained into article 1315 of the Civil Code. Then, as for the liability of custodians of things, France interestingly does not require the things to be defective,<sup>225</sup> broadening the scope of the legal duty of the custodians. Therefore, “the fact that a computer, still being considered as a thing, had provoked towards a third party a material or moral detrimental situation irreparably engages the liability of the custodian”.<sup>226</sup> Further, French civil and criminal procedures can be cumulated and the sanctions attached, as well as the civil action, are not *per se* a sanction but a compensation of damage.

Lastly, the legal maxim *le criminel tient le civil en état* (the criminal law suspends the civil), which expresses the supremacy of criminal over civil law in providing for that the civil judge has to wait to craft its decision until the criminal judge has given his own upon the issues of a case, needs to be recalled.<sup>227</sup> However a French law of 2007<sup>228</sup> deeply alters or even suppresses this maxim and aims primarily for more rapid procedures.

## 2. The Hadopi

The internet challenges all the elements of liability and the Hadopi does not escape from this rule. The Hadopi cope with, as its name suggests, the criminal aspect of the copyright infringement. As it will be sketched *infra*, the French legislator introduced a “specific repressive plan which may lead, at the end of procedure both administrative and criminal, to the suspension of the Internet access of the wrongdoer.”<sup>229</sup> This new regime, aiming at combatting the practice of mass illegal downloads and uploads, goes on top of, or I should say besides, the traditional (civil and criminal) rules for enforcing classic copyright infringements, in the sense that e.g. the civil action and criminal proceeding are still open to the right holder in case of copyright infringement committed online.<sup>230</sup> However, pursuant a new law, right holders are entitled to claim damages through a simplified procedure (see *infra*).<sup>231</sup>

### 2.1. Reminder of the issues at stake

Outright, the regulatory history of Hadopi needs to be born in mind. The French graduated response imposes new sanctions to condemn illegal downloading (focused on P2P exchanges), which represents a violation of literacy and artistic property rights. The French digital rights authority, set

<sup>225</sup> For further information, see: Piret, R., 1958. La responsabilité du fait des choses inanimées en droit français et en droit belge. *Les Cahiers de droit*, 3(6), pp. 152-170 and Borghetti, J.-S., 2010. La responsabilité du fait des choses, un régime qui a fait son temps. *Revue trimestrielle de droit civil*, 1, pp. 1-41.

<sup>226</sup> Translated by author. Thoumyre, L., 1999. L'échange des consentements dans le commerce électronique. *Lex Electronica: Revue électronique du centre de recherche en droit public*, 5(1).

<sup>227</sup> Principle embodied in Article 4 of Belgian and French Code of Criminal Procedure.

<sup>228</sup> Article 20, Law no. 2007-291 of 5 March 2007 seeking to reinforce the equilibrium within criminal procedure, *JO no. 55*, 6 March 2007, p. 4206. For further information, see: Hadda, S., Le criminel ne tient plus le civil en l'état ou la fin d'un adage. Available from: <http://legavox.fr/blog/maitre-haddad-sabine/criminel-tient-plus-civil-etat-5656.htm>.

<sup>229</sup> Translation by author. Chilstein, D., 2010. French National report on Internet Crimes to the 18<sup>th</sup> International Congress of Comparative Law, Washington D.C., p.3.

<sup>230</sup> A confusion may arise as one of the forerunner of the Hadopi (the DADVSI law) provided for penalizing peer-to-peer downloads and uploads by a fine instead of by the offence of counterfeiting, thus avoiding the prison sentence. That law was eventually struck down by the Constitutional Council (Decision N. 2006-540 DC of 27 July 2006).

<sup>231</sup> Article 26, Law no. 2011-1862 of 13 December 2011 on the allocation of litigation and the relief of certain court proceedings, *OJ 289 of 14 December 2011*, p. 21105 [Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles, *JO n° 289 du 14 décembre 2011*, p. 21105.]

up in 2009, sent its first warning letters October 1, 2010<sup>232</sup> and hence representing the actual start of the repressive system, has the responsibility to send the warning notices and *had* the prerogative to impose the suspension of the Internet access of alleged infringers. Indeed, under the empire of Hadopi 1, the authority was able to pronounce by itself the sanction of disconnection of Internet access of suspected copyright infringers. Later on, under Hadopi 2, this sanction could only be ordered by a judicial court, where the administrative body had seen its tasks reduced. This shows the regulatory shift from administrative to criminal law with respect to a part of the rules governing sanctions, and being one of the key changes brought by the legislator after Constitutional Council censorship. In a certain way, the rejudicialization of the graduated response turned the independent administrative authority into a body which prepares the case for the judgment of the criminal judge. On a meta-level, Hadopi represents a shift into the copyright enforcement from private law to public (criminal) law, where right holders, after recognizing that private enforcement and techno-regulation (e.g. DRM technologies) were not as successful as expected, now entrust governments to enhance the respect of their rights.

In pre- and Hadopi era, the legal framework is characterized by the fact that criminal provisions for copyright infringement are seen to be robust but mainly unproductive. Indeed, as already stated above, any person who illegally up-and downloads any content can be convicted to a three-year prison sentence and a penalty of €300,000.<sup>233</sup> However, in practice, few convictions and low pecuniary penalties have been awarded. Moreover, in France, it seemed inconceivable to render more flexible criminal provisions, which has been proved by the failed proposal (eventually set apart by the Constitutional Court from a large consensus among courts, government, parliament) to adjust criminal provisions as to sanction uploading and downloading to a fine of €150 and €38, respectively.<sup>234</sup> The Hadopi came up notably from the acknowledgment of the inflexibility and practical inefficiency of the traditional enforcement system and probably from the argument that “minimal penalties for users to encourage them to use more secure software”,<sup>235</sup> institution which is supposed to strike a balance towards more efficient and acceptable measures for right holders.

In France, the Hadopi has substantially amended the provisions on the enforcement of digital copyright of the Intellectual Property Code. Firstly, the traditional enforcement of copyright violations was mainly assured by French criminal law<sup>236</sup> and the Hadopi revealed a trend to sanction the crime of counterfeiting partly by the use of administrative law.<sup>237</sup> Secondly, the Hadopi law puts in place the so-called graduated response (equivalent of UK and US “three strikes” policies), described by Benabou<sup>238</sup> as a “progressive mechanism of warning of Internet users sharing works without the authorization of holders, leading, if necessary, to the suspension of the connection in

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<sup>232</sup> European Digital Rights, 2010. First Warning Letters Sent By French ISPs Under The Three Strikes System. EDRI-gram - Number 8.19, 6 October 2010. Available from: <http://www.edri.org/edrigram/number8.19/first-email-three-strikes-france>.

<sup>233</sup> FIPC, Article L. 335-2.

<sup>234</sup> Jondet, N., 2010. The French Copyright Authority (Hadopi): The Graduated Response and the Disconnection of Illegal File-Sharers. Available from: <http://ssrn.com/abstract=1664509>.

<sup>235</sup> Barnes, D., 2004. Deworming the Internet. *Texas Law Review*, 83(1), p. 329.

<sup>236</sup> Autorità per le garanzie nelle comunicazioni (Italian Communications Authority), 2010. Il Diritto D'autore Sulle Reti Di Comunicazione Elettronica. Available from: <http://www.agcom.it/default.aspx?DocID=3790>, p. 43.

<sup>237</sup> Lucchi, N., 2011. Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI). *Cardozo Journal of International and Comparative Law*, 19, pp. 645-678.

<sup>238</sup> Benabou, V.-L., 2010. La riposte graduée contre la contrefaçon de masse: de l'alibi pédagogique à la tentation sécuritaire. *Auteurs & Media*, p. 438.

case of recidivism, and punishing the sinner by the same manner with what he sinned with.<sup>239</sup> The Hadopi provides thus for a mechanism for the prevention of piracy. The idea at the inception of the Hadopi to fight piracy was twofold. On the one hand, to develop the online legal offer of copyright protected content in order to render it effortless and inexpensive for consumers to purchase lawfully protected material. On the other hand, to adjust the legal instruments to dissuade illegal file-sharing.<sup>240</sup> Simply put, to first incite consumers to purchase legal content and the second discourage piracy, where the first needs to be up to the challenge for the second to work correctly.

The central provision of Hadopi 1 provided for that an independent administrative authority<sup>241</sup> would be empowered to order the disconnection of repeat copyright wrongdoers. However, pursuant the Constitutional Court decision recognizing the right to access the Internet as a fundamental right (though not absolute as disconnection is permitted), the whole mechanism needed to be adapted by the government (thus modifying its plans) and it then was split in two, as the internet disconnection may solely be ordered by a judicial court and not an administrative one.

Consequently, the French “three strikes and you’re out” policy is framed upon two separate stages, managed by two separate entities. First, the Hadopi administers the “threatening” stage, during which warnings are sent to alleged infringers. After being informed by right holders of infringing activities, the *Haute Autorité* evaluates the facts, names the suspected infringers and delivers, *via* the help of intermediaries, warning letters to the corresponding Internet subscribers. It must be noted that this is not the Hadopi which collects and screens P2P networks to look for (potential) copyright infringements but the right holders (through their collecting societies and the Trident Media Guard company, see *supra*) and the warning notices are not sent by the Hadopi itself but by the relevant ISPs. Second, this is to the civil courts that alleged infringers are taken in case of repeated offence/behavior, judicial courts which can order the sanctions, namely pecuniary penalty and momentary disconnection of their Internet access, upon guilt findings. At the procedural level, the latter sanction may be laid down according to two ways. Firstly, according to the simplified criminal procedure of the penal order (*ordonnance pénale*),<sup>242</sup> which, while allowing the right owners to claim damages, however restrains the protection of consumers as it would decide the case on the sole elements brought by Hadopi and without hearing the defender and motivated decision (appeal possible within forty-five days). In other terms, the procedure is conducted *inaudita altera parte* (without the other party having been heard) and is arguably in conflict with article 6 of the European Convention on Human rights.<sup>243</sup> However, secondly, since the law of 2011 defines what is to be seen as legal or not, the “traditional” criminal procedure may be followed and the public prosecutor, when faced with a supposed online copyright infringement, may take legal action before the criminal court - upon information given away by the right holders or Hadopi. Contrarily to the first above

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<sup>239</sup> Translated by author.

<sup>240</sup> Jondet, *supra* note 234.

<sup>241</sup> FIPC, Article L. 331-12.

<sup>242</sup> Articles 495, para II, 12° of the FIPC and articles 524 and 525 of the Code of Criminal Procedure. Introduced by the Law No. 2011-1862 of 13 December 2011 on the allocation of litigation and the relief of certain court proceedings, *OJ 289 of 14 December 2011*, p. 21105 [Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles, *JO n° 289 du 14 décembre 2011*, p. 21105.].

<sup>243</sup> Ramelet, A., 2011. Hadopi: l'indemnisation des ayants-droits, une méconnaissance grave des principes fondamentaux du droit européen. Available from: <http://adrien.ramelet.over-blog.com/article-hadopi-l-indemnisation-des-ayants-droits-une-méconnaissance-grave-des-principes-fondamentaux-du-dr-79067291.html>.

mentioned procedure, the ruling is to be given still by a single judge, but the debate is adversarial, leading to the presence of the accused and a hearing of the parties of the case.<sup>244</sup>

As stated above, sharers of illegal content could be sentenced to a suspension of their Internet access, only if they do not take corrective measures to end their illegal undertakings after having received two warning letters requesting them to do so.

## 2.2. Persons upon who lies liability

Contrary to the Belgian situation, the aim of the Hadopi is not to go after the holders of (suspected) IP addresses who are not automatically responsible, but to secure the Internet connections in order to avoid online piracy. Henceforth, liability lies upon the holder of an Internet account. However, there is no, up until now, security tools compliant with the requirements of Hadopi as to securing the Internet connection.

Having no effective means to secure the Internet connection, the Hadopi suggests securing the Internet users' computers/networks by the installation of firewalls, antivirus software and other software offering *inter alia* parental control, prohibiting therefore access to specific websites.

## 2.3. Conditions under which liability may arise

### 2.3.1. Monitoring duty of the Internet access

So far, the obligation of surveillance by Internet users of their online access<sup>245</sup> represents the keystone of the Hadopi system. Falling to comply with it amounts to a penal sanction of a maximum of €1,500 (five times higher for legal persons) and *possibly* an Internet disconnection of maximum one month. The legal basis for the latter is the misdemeanor of "blatant negligence"<sup>246</sup> (*négligence caractérisée*) into the security guard/monitoring<sup>247</sup> of the connection, representing the third strike of the French system and coming from Article L. 336-3 of the French Intellectual Property Code, the core provision of the graduated response. This blatant negligence corresponds to a "violation of the duty of care owed by an Internet subscriber to avoid using it for the purpose of copyright infringement. The copyright infringement itself remains to be enforced by the copyright owner in the normal course of things."<sup>248</sup> Put in another way, the Hadopi law provides for a coexistence of two distinct offences: the crime of counterfeiting and the failure to fulfill the obligation of surveillance. Here resides the cunning of the law: the user is not to be accused of having directly up- and downloaded illegal contents, what is already punished of counterfeiting, but he is to be found guilty of not having (sufficiently) monitored/secured its Internet connection and in so doing, of not acting to avert piracy, by not having installed a security mean(s) to secure the Internet access and/or by

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<sup>244</sup> Code of Criminal Procedure, Article 398.

<sup>245</sup> FIPC, Article L. 336-3.

<sup>246</sup> The term *négligence caractérisée* is left open to many possible translations. It could refer to specific, qualified, blatant, or verily gross negligence in the sense that all of these refer to a sort of failure of a duty of care (of one's Internet connection).

<sup>247</sup> Art. L. 336-3 of the IPC: "The owner of access to online public communication services has an obligation to watch that his [Internet] access is not being used for purposes of reproduction, representation, making available or communication to the public of works or objects protected by right of authorship or a similar right without permission of copyright holders when it is required as stated in books I and II."

<sup>248</sup> Phillips, J., 2010. Music and IP conference report: 4. Available from: <http://ipkitten.blogspot.nl/2010/12/music-and-ip-conference-report-4.html>.

falling to be diligent in the realization in practice of the mean(s).<sup>249</sup> The authority therefore reproaches the holder of an online access to be guilty of gross negligence because the Hadopi has no technical mean to know whether or not the ones to whom it sends warning notices are the (real) copyright infringers. The goal of the safeguarding of the Internet connection is to avoid unauthorized use of copyright protected works. In this sense, the Hadopi argues that securing its connection is just like locking its doors: both are necessary to prevent external intrusions.<sup>250</sup>

At the EU level, this administrative duty to monitor its Internet connections, in clear inadequacy with the E-commerce directive<sup>251</sup> and attested by the recent case-law of the ECJ,<sup>252</sup> is different from that of the misdemeanor of counterfeiting (copyright infringement).<sup>253</sup> However, noncompliance does not engage the criminal liability of the Internet subscriber.<sup>254</sup>

### 2.3.2. Scope of the duty

If the subscriber has been hacked or if his children or friends are the real copyright infringer, it does not matter as he will be held, in any case, liable and responsible of negligence, being the owner of the Internet connection and failing to monitor his access and thus he will have to face sanctions. Simply put, this is the liability of the holder of an IP address which is researched, not the actual infringer.

Indeed, based upon the collection of IP addresses to convict Internet users, the accusation-machine Hadopi faces the following valuable argument:

“While Plaintiff has the identifying information of the subscriber, this does not tell Plaintiff who illegally downloaded Plaintiff’s works, or, therefore, who Plaintiff will name as the Defendant in this case. It could be the Subscriber, or another member of his household, or any number of other individuals who had direct access to Subscribers network.”<sup>255</sup>

Indeed, (only) relying upon an IP address to identify an infringer faces great challenges in practice as (i) an IP address permits not the identification of an individual but the identification of an access point of a unique computer at a precise time, machine which can be used by several persons (natural persons such as members of an household or legal persons such as a company through its employees), (ii) the address can be usurped and (iii) the tracking systems may be diverted.<sup>256</sup>

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<sup>249</sup> The definition and modalities of this “blatant negligence” offence is included into Decree No. 2010-695 of June 25, 2010 instituting the offence of specific negligence in the protection of literary and artistic property on the Internet, *JORF n°0146*, June 26, 2010, p. 11536 and Decree No. 2010-872 of July 26, 2010 relating to proceedings before the committee for protection of rights of the High Authority for the dissemination of works and the protection of rights on the Internet, *JORF*, July 26, 2010, p. 13874. It is now embodied in Article R. 335-5 of the FIPC.

<sup>250</sup> Hadopi website. Why secure my internet connection (in French). Available from: <http://www.hadopi.fr/pourquoi-securiser-ma-connexion-internet>.

<sup>251</sup> Article 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L 178*, 17.7.2000, pp. 1-16.

<sup>252</sup> As attested by the recent cases C-360/10 *SABAM v Netlog* of February 16, 2012 and C-70/10 *Scarlet v SABAM* of November 24, 2011.

<sup>253</sup> Decision No. 2009-580 of June 10, 2009, para. 7.

<sup>254</sup> FIPC, Article L. 336-3, indent 3.

<sup>255</sup> Gibbs, B. L., 2011. Cited in Anderson, N., 2011. P2P lawyer: IP address not enough, let me search all PCs in the house. Available from: <http://arstechnica.com/tech-policy/2011/09/p2p-lawyer-ip-address-not-enough-let-me-search-all-pcs-in-the-house/>.

<sup>256</sup> Bem, A., 2010. L’identification d’une personne sur l’internet par son adresse IP. Available from: <http://www.legavox.fr/blog/maitre-anthony-bem/identification-personne-internet-adresse-3008.htm>.

In the same vein, France recognized in 2011 a new misdemeanor of usurpation of identity.<sup>257</sup> This new criminal offence aims at criminalizing the usurpation of personal data. Therefore, as IP addresses may be usurped and may be seen in France as personal data,<sup>258</sup> this new wrongful act (“IP spoofing”) impedes even more the already low reliability of IP address-based evidence (cf. *supra*). Besides, identify substitution, theft and fake identity cases are increasing but are not (yet) regulated.<sup>259</sup>

The underlying issue of IP address-based evidence is that it raises the question as to what is the fate of a person who is mistakenly accused. It is clear, in light of the above, that there is no easy manner to contest the claims and it is eventually up to the defendants to demonstrate their guiltlessness.<sup>260</sup>

One could obviously conclude that the extent of the liability of file-swappers is unknown. However, quite recently, the Rights’ Protection Commission (*Commission de la protection des droits*), organ within the Hadopi, which actually sends the warning messages, designed a legal document titled “the misdemeanor of characterized negligence in the light of the implementation of the graduated response procedure”,<sup>261</sup> describing this new legal offence.

### 2.3.3. Wireless networks

In this respect, it is now clear that the open Wi-Fi (or more generally wireless network) needs now to be (obligatory) secured in order for the Internet subscriber not to be held responsible for others’ wrongdoings. This would potentially terminate the so-called “open Wi-Fi defense”<sup>262</sup> but would unlikely be enforceable in practice. At first sight, this would raise issues in respect of e.g. universities and public spaces offering (usually for free) such a public open Wi-Fi, but would arguably benefit from the rules (mere conduit) enshrined into the E-commerce Directive.<sup>263</sup> But the French government already took the initiative in stating that public Wi-Fi networks could make available only a “white list” of accepted websites.<sup>264</sup> Nonetheless, cases notably in Finland<sup>265</sup> and in the US<sup>266</sup> concluded that open (i.e. not secured) Wi-Fi network owners are not necessarily liable for copyright infringement of others committed through illegal downloads. Indeed, many other individuals than the holder of the Internet connection may be actually responsible for copyright infringements

<sup>257</sup> Article 226-4-1 of the Criminal Code, introduced by the Orientation and programming law for the performance of the internal security called Loppsi 2 [Loi n° 2011-267 du 14 mars 2011 d’orientation et de programmation pour la performance de la sécurité intérieure publiée au Journal Officiel du 15 mars 2011 (rectificatif paru au JO n° 69 du 23 mars 2011)].

<sup>258</sup> The idea of the IP address as personal data is affirmed by the CNIL, contested by the Hadopi and controverted within the French case-law. The uncertainty about the legal status of the IP address could be lightened with the endorsement of a legislative bill which goes in the sense to hold any identifying number to be personal data (draft act No. 81 aiming at better guaranteeing the right to privacy, adopted by the Senate on March 23, 2010).

<sup>259</sup> Anon., 2011. Comment se protéger des usurpations d’identité ?. Available from: [http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/comment-se-protecter-des-usurpations-d-identite-06-10-2011-1381542\\_56.php](http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/comment-se-protecter-des-usurpations-d-identite-06-10-2011-1381542_56.php)

<sup>260</sup> Anon., 2012. Zut Alors! French Government Deny BitTorrent Piracy Allegations. Available from: [http://torrentfreak.com/zut-alors-french-government-denies-bitTorrent-piracy-allegations-120101/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+Torrentfreak+\(Torrentfreak\)&utm\\_content=Google+Reader](http://torrentfreak.com/zut-alors-french-government-denies-bitTorrent-piracy-allegations-120101/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+Torrentfreak+(Torrentfreak)&utm_content=Google+Reader).

<sup>261</sup> Actualités, article JCP G 2012, doctr. 591. Available from: [http://www.lexisnexis.fr/pdf/2012/Etude\\_Hadopi.pdf](http://www.lexisnexis.fr/pdf/2012/Etude_Hadopi.pdf)

<sup>262</sup> McSherry, C., 2011. Open WiFi and Liability for Copyright Infringement: Setting the Record Straight. Available from: <https://www.eff.org/deeplinks/2011/08/open-wifi-and-copyright-liability-setting-record>.

<sup>263</sup> Article 12.

<sup>264</sup> Anderson, N., 2009. French anti-P2P law toughest in the world. Available from: <http://arstechnica.com/tech-policy/2009/03/french-anti-p2p-law-toughest-in-the-world/>.

<sup>265</sup> EDRI, 2012. Finland: Open WiFi Owners Are Not Liable For Copyright Infringement. Available from: <http://www.edri.org/edrigram/number10.10/open-wifi-not-liable-copyright-infringement>.

<sup>266</sup> K-Beech, Inc. v. John Does 1-37, CV 11-3995 (DRH)(GRB), Available from: <http://www.technollama.co.uk/wordpress/wp-content/uploads/2012/05/92100289-K-Beech-Order-and-Report-and-Recommendation-Ordered-5-1-12.pdf>.

realized on that connection; i.e. an IP address is not a sufficient proof for an individual's identification.<sup>267</sup> Hence, the identification of the real infringer is difficult to bring. No matter, the Hadopi "settles" or "circumvents" this kind of issue of identification of the copyright infringer in the fashion that it gives the Internet subscribers a sense of responsibility (and hence sanctions them) when they keep not (or not adequately) securing their domestic open Wi-Fi with a password. This is all done by the imposition of the blatant negligence which holds IP address holders liable for anything which occurs on their connection and makes no difference between who (really) up- or downloads and who does not. These facts bring the interesting (out of scope) question as to know what can be reasonably required from Internet users who cannot be taken to be identic in terms of their abilities with the new technologies and their capacity to manage the security of their computers and online networks (for example, elderly persons or even the digital emigrants).

In a similar vein but in a broader perspective, the holders of Wireless Internet Hotspots are better placed. Indeed, in order to gain access to the Internet through a Hotspot belonging to, for example, McDonald or Hotel Formule 1, the user needs to log in. In such a way, the user temporarily possesses his/her own IP address, which is thus different from the one of the owner of the Internet connection. Therefore, the identified user may be detected and born the sanction delivered for the blatant negligence.<sup>268</sup> However, it remains to be seen to what extent the prosecution will be able to prove such negligence, as it can be seen in the USA, where a private graduated response is planned, that the accusation of blatant negligence for permitting unlawful activities to occur on a wireless network seems to be "untenable".<sup>269</sup>

#### 2.4. The burden of proof

Similar to the car speeding comparison, the liability was originally presumed. Therefore, this was up to the defendant, i.e. the Internet user, to demonstrate that he did not fail to his duty to carry out a proper surveillance of its Internet access. Very beneficial to right holders, this onus implied for alleged infringers to prove a negative (i.e. that something did not occur),<sup>270</sup> seen as a *probatio diabolica* as it is a proof often impossible to establish, as well as imposed a presumption of guilt. After the censorship of the law, the second Act reestablished the balance in the sense that it is now in the hands of the prosecution to demonstrate, in the chief of an Internet access holder, the deficiency in (sufficiently) securing the Internet access, lack which is reprimanded by a contravention of class five for blatant negligence. Put differently, the public prosecutor is in charge of bringing the evidence that an Internet user, flashed by the P2P monitoring society TMG, had not put in place any security means or not in a sufficient manner.<sup>271</sup>

Nevertheless, the proof may be brought by any legal means, for example by providing the reading of the system status, of the Media Access Control (MAC)<sup>272</sup> or IP address of an alleged infringer. However, practically speaking, the only elements of proof the Hadopi may provide to the public

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<sup>267</sup> See Clayton, *supra* note 103.

<sup>268</sup> Pinard, F., 2011. Le contrôle de la connexion Internet par l'utilisateur. La légitimité des atteintes portées par les lois HADOPI et LOPPSI 2. Available from: <http://www.juriscom.net/documents/libpubl20120314.pdf>.

<sup>269</sup> Masnick, M., 2012. Court Says Negligence Claim For Allowing Downloading On Your WiFi Is 'Untenable'. Available from: <http://www.techdirt.com/articles/20120711/02152919658/court-says-negligence-claim-allowing-downloading-your-wifi-is-untenable.shtml>.

<sup>270</sup> Larguier, J., 1953. La preuve d'un fait négatif. *Revue trimestrielle de droit civil*, pp. 1- 48.

<sup>271</sup> Anon, 2010. Hadopi? Not Even Scared!. Available from: <http://www.laquadrature.net/en/hadopi-not-even-scared>.

<sup>272</sup> See: <http://www.techopedia.com/definition/5301/media-access-control-address-mac-address>.

prosecution are the digitally time-stamped reading of the IP addresses collected by TMG or, if the red thread of the Hadopi, being the fear of the punishment, works, the own confessions of alleged users.<sup>273</sup>

## 2.5. Circumstances under which the accused person may be exonerated

Before the censure of the Council of state, three main remedies were available to the alleged infringer. Firstly, as it is still the case, the subscriber can preventively secure his computer and Internet connection by installing systems proposed to him by his ISP or installing software by himself (included in a Hadopi-made list of security systems seen as efficient to protect oneself from lacking to respect the monitoring obligation). Secondly, the original act provided for cases of immunity, namely the case of *force majeure* and the fraudulent access by a third party, unless this fraud was carried out by a person placed under his authority or supervision, therefore excluding this line of argument from the outset. Thirdly, the possibility was offered to appeal the sanctions before a judicial court.<sup>274</sup>

By implementing the new legal duty for subscribers to monitor their Internet connection as to avert the commission of unlawful file-sharing, the Internet users in the post-Hadopi era are liable in any case their internet connection is misused/not secured enough. Indeed, as the first recommendation can recall it, the piracy may have occurred without the access holder's consent or knowledge. Still, in any case, account holders are legally responsible for the use of the access which is made of.<sup>275</sup> If they fail to do monitor, they incur the disconnection of their Internet connection for up to one month, a suspension of their subscription to the Internet up to one year (without the possibility to contract out to another ISP) and in case users subscribe to another service provider, they may face a fine of €3,750.<sup>276</sup> Besides, although the enforcement is not shifting on the shoulders of the ISPs, they may be sanctioned if they fail to suspend the online access upon request of Hadopi.<sup>277</sup> Indeed, ISPs' collaboration is habitually salient to permit right owners to identify infringers, but intermediaries in general are often reluctant to take actions, unless obliged by law or courts to disclose the personal data of their customers; the reasons being the contractual duties, data protection laws and, probably the most important, ISPs are not willing to turn away from their clientele.<sup>278</sup>

These sanctions on top of the "traditional" infringement penalties continue to be potentially of application (see *supra*). An Internet user who is allegedly convicted of blatant negligence may avoid liability if s/he demonstrates that the online access is efficiently secured. Although any means to secure one's access is admissible, practically, the only way to escape this liability<sup>279</sup> (except by the showing of causes of criminal irresponsibility,<sup>280</sup> of legal irregularities or of other legitimate

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<sup>273</sup> Anon, 2011. HADOPI: Point d'étape. Available from: <http://www.laquadrature.net/en/node/4156>.

<sup>274</sup> Rédaction de Net-iris, 2012. Favoriser la diffusion et la protection de la création sur Internet - les lois HADOPI. Available: <http://www.net-iris.fr/veille-juridique/dossier/19972/favoriser-la-diffusion-et-la-protection-de-la-creation-sur-internet-les-lois-hadopi.php>

<sup>275</sup> See the first recommendation of the Hadopi in Appendix VI.

<sup>276</sup> FIPC, Article L. 335-7-1.

<sup>277</sup> FIPC, Article L. 335-7: "The failure by the person whose activity is to offer access to public online communication services to implement the suspension of the access which has been notified to him is punishable by a fine of a maximum of €5,000".

<sup>278</sup> Trevelyan, L., 2009. Three Strikes and You're Out. *IP & T UK Outlook Journal*.

<sup>279</sup> For more information on the defense in court, see: Chéron, A., 2012. 10 clés pour assurer sa défense dans une procédure HADOPI. Available from: <http://www.atlantico.fr/decryptage/10-cles-pour-assurer-defense-dans-procedure-hadopi-telechargement-illegal-antoine-cheron-297234.html?page=0,1>.

<sup>280</sup> Criminal Code, Article 122-1 *sqq*.

grounds<sup>281</sup> of sovereign appreciation<sup>282</sup>) is to show that Hadopi-labelled security software have been used in order to express the good faith in the chief of the accused and thus represents a positive element into the appreciation of the facts by the Hadopi. However, being a great paradox, the Hadopi has not (yet) communicated a list containing those “protection tools” (although software has been devised by service provider Orange<sup>283</sup> and by the company H2ds to secure computers<sup>284</sup> and by the company tibSys to secure wired and wireless networks<sup>285</sup>), one central tenet of the law. Therefore suspected subscriber has, up until now, no clear indication from Hadopi on how to comply with the requirements it enacted. Meanwhile, it is hence very unlikely to hold negligent Internet users without the Hadopi standards of compliance being established as these are needed to be in conformity with the obligation of securing one’s Internet access.

As a matter of fact, within the framework of the YouHaveDownloaded accident (see *supra*), the Ministry of Culture was not able to determine the ways, for the citizens accused by the Hadopi, to be exonerated from liability or to prove their good faith. Indeed, as held by Squaring the Net organization,

“the minister has been perfectly incapable to explain how citizens accused by the Hadopi might prove their good faith: to oppose these immaterial readings of IP is perfectly impossible, and the accused has anyway at no time the opportunity to contest the procedure before the sanction falls. The charging electronic mail, just like the registered letter, does not contain the name of the works allegedly shared. This did not hamper the minister to accuse the addressees of these accusations to be “pirates” and thus to assume that they are guilty.”<sup>286</sup>

## 2.6. Copyright enforcement authorities and competent Tribunal or Court

The enforcement bodies are chiefly the Hadopi and the national police section repression of counterfeiting (*Brigade Centrale pour la répression des contrefaçons industrielles et artistiques*).

The Court of First instance, through its criminal chamber,<sup>287</sup> is competent to hear about copyright disputes. Nonetheless, the contravention of blatant negligence is of the competence of the Police Tribunal.

## 2.7. Penalties

As stated above, the one who have committed the contravention of specific negligence is to be sanctioned to a penal sanction of a maximum of €1,500 (five times this amount for legal persons) and possibly an Internet disconnection for maximum a month can be cumulated. This sanction only finds

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<sup>281</sup> Example: The Internet subscriber was abroad between de reception of the registered letter and the second fraudulent use. However, as this legitimate ground is an exception to the duty to monitor the Internet access, the burden to prove this fact is on the defendant.

<sup>282</sup> Article 1, Decree No. 2012-695 of June 25, 2012 establishing a contravention of blatant negligence protecting the literary and artistic property ion the Internet, *Official Gazette of France No. 0146*, June 26, 2010, p. 11536.

<sup>283</sup> It offered a software for the control of the downloading but withdrawn this offer later on. Available from: <http://www.generation-nt.com/orange-controle-telechargement-blocage-p2p-hadopi-actualite-1036741.html>

<sup>284</sup> Software “ISIS”, deemed to be last year the only security software entirely complying with the Hadopi requirements. Available from: <http://www.numerama.com/magazine/18711-isis-h2ds-seul-logiciel-conforme-aux-specifications-hadopi.html>.

<sup>285</sup> Software “Achiwa”, information available from: <http://www.achiwa.com/>.

<sup>286</sup> Anon, 2009. HADOPI - Albanel passe son oral : 0/20. Available from: <http://www.laquadrature.net/en/hadopi-albanel-passe-son-oral-020>.

<sup>287</sup> Tribunal de Grande Instance.

its roots in the (alleged) blatant negligence of Nicolas, the holder of an Internet account, who did not properly monitored his connection. The Hadopi does not wish to know whether Nicolas was really the infringer or if another person in its circle was responsible for the crime of counterfeiting. The independent authority only cares about the implementation of the contravention of blatant negligence.

It should be kept in mind that the Hadopi system, contrarily to what has been expressed worldwide, is an independent and parallel system which does not replace the “traditional” sanctions for counterfeiting which are still applicable. The single judge has to order an adapted sanction which may be composed of a pecuniary penalty of €300,000, of a three-year jail sentence and of a suspension of the Internet access.<sup>288</sup>

## 2.8. Case-law

Only one recent judgment is cited in order to grasp a better understanding of the potential sanctions that online copyright infringers may face in the pre-Hadopi era.<sup>289</sup> James Climent, a French national, has been convicted in June 2010 for the illegal down- and uploading of about 13 788 files. For this, he has to pay €20,000 for damages to the SACEM and SDRM. Unhappy with the outcome, he filed an (still pending) appeal to the Strasbourg Court.<sup>290</sup>

As a reminder, no case for counterfeiting or for the contravention of blatant has been heard since the enactment of Hadopi.

## 2.9. Observations

It has to be recognized that the sanction of the suspension of the Internet account coupled with a contravention is quite severe. Indeed, as Internet access subscriber, Nicolas is not the owner of the connecting device to the digital world, be it a modem or a set-top box (called *la box* in France). Thus, he has no power of direction on the Internet device, as, not being the proprietor; he has for instance no access to the source code of the *box* and no control over the network infrastructures. Consequently, Nicolas is liable and may be punished for the flows that go through his Internet connection, although being in the same position as an ISP which merely conducts information.

# SECTION 4. Concluding remark

Contrary to the situation in the United States, the entertainment industries in Europe have failed in effectively curbing online piracy by means of civil proceedings. Indeed, those industries have been facing difficulties in suing successfully alleged copyright infringers as robust legal protection of privacy and personal data are in place in the EU. Accordingly, the entertainment sector in Belgium and France sought legal enforcement of IPRs mainly through criminal prosecution (not harmonized at EU level)<sup>291</sup>. Nevertheless, the pursuit of the Internet users in invoking their civil and criminal liability is not an easy task and is not bringing fruitful results. Indeed, as an example, minors, representing

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<sup>288</sup> FIPC, Article L. 335-2.

<sup>289</sup> Decided before the enactment of Hadopi, two cases are of interest in the context of P2P: *SACCEM v Aurélian*, CA Aix-en-Provence, September 5, 2007, (2007) 214 RIDA 346 and *SACEM/SDRM v Oddoz*, CA Versailles, March 16, 2007 (2007) 213 RIDA 370.

<sup>290</sup> Anon, 2010. Film Director Helps Finance Busted File-Sharer’s Legal Battle. Available from: <http://torrentfreak.com/film-director-helps-finance-busted-file-sharers-legal-battle-100914/>.

<sup>291</sup> The proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights in the EU is still pending.

the hugest part of the downloaders, are not prosecutable before a criminal court. In the same vein, the majors have tried to obtain the collaboration of ISPs in their enforcement campaign, querying service providers to set in place technical security means and to release the identity of alleged copyright infringers upon request, but face the reluctance of ISPs to sell out their customers for enforcement purposes. In the wake of this, countries like France, the United Kingdom and New-Zealand have adopted expeditious “three strikes Internet disconnection and you’re out” policies.<sup>292</sup>

Noteworthy, contrary to the traditional criminal liability, the Hadopi blatant negligence (see *supra*) does not require any proof of criminal intention, as it is characterized as a contravention.

What should be born in mind is that the Hadopi is based upon the “strategy of intimidation”, which, through the sending of the recommendations, tries to convince consumers that file-swapping is a bad thing and that is basically what the French authority can accomplish.<sup>293</sup> In other terms, the warning letters are envisioned to educate Internet users rather than punish them, making them actor of the fight against the broader notion of cybercrime in fitting into one of the so-called second-party strategy of victim precaution.<sup>294</sup> Having that said, the logic behind the Hadopi machinery rather fits the paradigm shift believed by Koops<sup>295</sup> to be happening in criminal law. Indeed, the Hadopi is a first resort tool instead of a traditional last resort one and acts more preventively than reactively. In the same vein, the French Copyright Authority relies on public-private partnerships in order to prosecute copyright infringers in cyberspace, in e.g. requesting their identification. It seems sensible to say that, after exhausting unsuccessfully three out of the four modes of regulation developed by Lessig,<sup>296</sup> the copyright enforcement directs itself towards the morality mode by endeavoring to change users’ habits, making downloading a morally bad act.

However, as it has been showed, the legal framework brought by Hadopi encompasses a reactive measure, in opposition of its British counterpart which is more proactive.<sup>297</sup> Indeed, the three strikes approach is perceived as one of the toughest crackdowns on digital piracy. In this respect, it can be asserted that the Hadopi has failed in its educational mission by entering the repressive stage.

Mainly, the pitfall of the Hadopi/cyber version of “three strikes and you’re out”,<sup>298</sup> and probably also true for similar three strikes legislations, is that the warning system relies upon the assumption (or hope) that seventy percent of Internet users, if notified, will change their unlawful behavior.<sup>299</sup> As rightly put by Werkers<sup>300</sup> and later by Patry, the solution to behavioral issues is to find out what is causing the problems taking place, i.e. the latent rationales of disobedience. He further assesses Clark’s metaphor and argues that a major shortcoming of the metaphor is that it “writes out of the equation why human behavior on the Internet is occurring, and falsely suggests that machines can

<sup>292</sup> Anon., 2011. Europe’s “Graduated Response” to Internet piracy. *Berkeley Technology Law Journal*, 26(1), pp. 582-583.

<sup>293</sup> Zimmermann, J. as cited in: Anon., 2011. French downloaders face government grilling. Available from: <http://www.bbc.com/news/technology-14294517>.

<sup>294</sup> Katyal, N. K., 2001. Criminal Law in Cyberspace. *University of Pennsylvania Law Review*, 149, pp. 1003-1114.

<sup>295</sup> Koops, B.-J., 2009. Technology and the Crime Society: Rethinking Legal Protection. *Law, Innovation and Technology*, 1(1), pp. 93-124.

<sup>296</sup> Lessig, L., 1999. Code and other laws of cyberspace.

<sup>297</sup> Meyer, T., van Audenhove, L. and Morganti, L., 2009. Graduated Response Initiatives in Europe: An Analysis of Initiatives and Stakeholder Discourses. Available from: <http://ssrn.com/abstract=1996030>.

<sup>298</sup> Haski, *supra* note 361.

<sup>299</sup> Wiggin, Digital Entertainment Survey 2008. Available from:

[http://marcbresseel.files.wordpress.com/2008/03/digitalentertainmentsurvey2008\\_summaryreport.pdf](http://marcbresseel.files.wordpress.com/2008/03/digitalentertainmentsurvey2008_summaryreport.pdf).

<sup>300</sup> Werkers, E., 2011. Intermediaries in the eye of the copyright storm - A comparative analysis of the three strike approach within the European Union. Available from: <http://ssrn.com/abstract=1920271>.

solve human behavioral problems. Machines, like laws, are created and controlled by humans. The answer to human problems must be solved by humans.”<sup>301</sup> Thus, if the problem to up- and downloading resides in the lack of appealing legal content offer, that offer needs to be developed in a way as to render illegal up- and downloading a useless risk to take, mission that the Hadopi currently does not fulfill. Indeed, as accurately held by Jean Berbinau, member of the College of the Hadopi, “only the development of the legal [content] offer will allow to stamp out the unauthorized appropriation of cultural goods”.<sup>302</sup>

In other words, the Hadopi partly fails to decrease online piracy as its technique is to change people’s behavior towards downloading and file-sharing, whereas, at least in the case of the music industry, file-sharing and sharing in a larger sense is now a component of the social norm, deeply rooted among Internet users; and attempts to curb it by the use of legal norms, like the Hadopi or the US DMCA, are destined to be unsuccessful. Therefore, as argued by Gervais, the industry should consider to look ahead the issue, by accepting and licensing file-sharing, as it could be a valuable business model or, more interestingly, the industry will not be in a position eventually to stop P2P file-swapping.<sup>303</sup>

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<sup>301</sup> Patry, *supra* note 175, p. 243.

<sup>302</sup> Jean Berbinau, as cited in: Rees, M., 2012. Un membre de la Hadopi rêve d'un consensus sur l'intérêt du DPI. Available from: [http://www.pcimpact.com/news/72919-un-membre-hadopi-reve-dun-consensus-sur-interet-dpi.htm?utm\\_source=PCi\\_News\\_letter&utm\\_medium=news&utm\\_campaign=pcimpact](http://www.pcimpact.com/news/72919-un-membre-hadopi-reve-dun-consensus-sur-interet-dpi.htm?utm_source=PCi_News_letter&utm_medium=news&utm_campaign=pcimpact).

<sup>303</sup> Gervais, D. J., 2004. The Price of Social Norms: Towards a Licensing Regime for File-Sharing. *J. Intell. Prop. L.*, 12(1), pp. 39-74.

## Chapter IV: Procedural protection of the uploader

### SECTION 1. Introduction

After a comprehensive insight about the governing legal frameworks of Belgium and France in respect of copyright and the potential liability of infringers violating copyright on the Internet by up- or downloading, this chapter aims at assessing in which states the rights of the uploader-infringer are protected the best.

As we have seen, copying and sharing protected content amount to infringement of copyright and right owners have the prerogative to take legal action against consumers implicated in such unlawful undertaking. They are entitled to receive compensation for the resulting loss of revenue, mainly through action for damages. However, to support their claims, gathering evidence of online infringements may be quite difficult and expensive for right holders as piracy occurs within private places, at the opposite of counterfeiting which needs to publicly happen.

In the same vein, even though right owners are able to identify digital violations, the law (such as data protection) may act as an obstacle on the way to get access to the identity of perpetrators. Likewise, in today's world, access to the Internet by broadband and Wi-Fi leads to the sharing of IP addresses among numerous persons, therefore, envisaging to, at the end, discover the genuine infringer is a utopia (that is the reason why I do not start from that postulate).

All of this to lead to the nerve center being whether Belgium or France best protects the rights of uploaders. Indeed, in jurisdictions in which the burden of proof is upon the head of the public prosecutor, this standard affords a large scope of action for the defense, which eventually leads to no-one being ever found guilty.

One needs to recall that the respect of the rules of procedure is of paramount importance for a (sustainable) democracy. These rules aim primarily to protect the honest people against the arbitrary and abuses of the mighty state.

Classically, the legal protection of citizens through criminal law leans on the supervision by a judge, the necessity to have a trial in court, the proportionality of the punishment and on the Blackstone's ration, being that it is "better that ten guilty persons escape than that one innocent suffer".<sup>304</sup> This chapter frames these aspects of the criminal protection into Belgium and France as follows: the right to a fair trial, the adversarial principle, the rights of the defense, the respect for the presumption of innocence, the principle of legal certainty and the proportionality principle. Those rights are guaranteed at the EU level by the EU Charter of Fundamental Rights (EUCFR), fully binding document since the adoption of the Lisbon treaty.

### SECTION 2. Belgium

#### 1. Introduction

This section will deal on the manner Belgium complies with the aforementioned classical four aspects of criminal protection in the context of online copyright infringements.

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<sup>304</sup> Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769). Book IV, chapter 27.

In order to find any person having committed a wrongdoing on the Internet from one's IP address, a warrant is needed, which is delivered by the public prosecutor or the investigating judge. Once granted, this warrant allows requiring from the ISPs the identification of the owner of an IP address at a specified period of time. The issued warrant needs to contain two elements: the IP address and the date and time of the infraction. Any online service provider has to be able to make a match between an IP address and a natural person and has the duty to keep that information during a certain period of time.<sup>305</sup>

Then, in the aim to detect a copyright violation, there exist various possibilities, among which the technologies of watermarking, Deep Packet Inspection (DPI)<sup>306</sup> and other digital content recognition technologies. Very similar to DPI but more localized, the main one employed is to propose (copyright protected) works on P2P networks and to see who connects to these networks to download the work(s) and catch the IP address of the downloader. Within the context of P2P networks, the IP address, contrarily to the MAC address, may not be falsified if a connection is necessary between two peers (and making the IP address more reliable than the MAC).<sup>307</sup>

## 2. Material rights

See chapter 3 on liability.

## 3. Procedural rights

### 3.1. Right to a fair trial (Art. 47 EUCFR)

Any person has the right to be judge by an independent and impartial judge, within the framework of a fair trial. These rights are guaranteed by the Constitution, backed up by the permanence of the judge and by the separation of powers between branches of government.<sup>308</sup>

### 3.2. Adversarial principle (Art. 47 EUCFR)

The judge will pronounce his decision in application of the law after having heard both parties, respecting the rules of procedure. The accused has the right to oppose any element of a file.

### 3.3. Rights of the defense (Art. 48 EUCFR)

The accused has the right to be informed of the charges upheld against him, to consult the file and to be assisted by a lawyer.

### 3.4. Right to respect for the presumption of innocence (Art. 48 EUCFR)

Keystone of the criminal law and criminal procedure, the presumption of innocence is defined as the "principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence."<sup>309</sup> Following from this, the guilt of the defendant thus has to be established beyond a reasonable doubt.

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<sup>305</sup> Note: precise period of retention is unknown due to the fact that the Data Retention Directive (2006/24/EC) is only partially transposed into Belgian law.

<sup>306</sup> Not yet used in Belgium but in France.

<sup>307</sup> E-mails exchange with Yorkvik Jacqmin, CERT.be, the Belgian national Computer Emergency Response Team.

<sup>308</sup> Belgian Constitution, Articles 151 and 152.

<sup>309</sup> Garner, *supra* note 172.

The public prosecutor needs to overturn this presumption. Like it is the case in any computer crime, the prosecution has to prove (beyond reasonable doubt) who was present on the machine at the moment of the facts (also true e.g. for online child pornography or for the access by an employee of forbidden websites from a company). Therefore, this is up to the prosecutor to prove who is guilty in analyzing the other activities which took place on the computer at the same moment. These activities could be the sending of electronic mails or the use of an account requiring a password (e.g. log in on facebook), which allows to link these events (including the unlawful ones) to a natural person.<sup>310</sup>

### 3.5. Principle of legal certainty (Art. 49 EUCFR)

Crucial precondition for the rule of law, the principle of legal certainty is a recognized standard at national, European and international level. In Belgian law, it is recognized as a general principle of law.<sup>311</sup>

### 3.6. Issue of proportionality (Art. 49 EUCFR)

When applied to the Internet, the sanctions applicable (fine from €600 to €600,000 and/or a prison sentence from three months to three years) to the misdemeanor of counterfeiting are arguably disproportionate, as may attest the case-law briefly analyzed in chapter 3. That state of affairs is at the origin of the debate of the implementation of a Hadopi-like mechanism in Belgium.

### 3.7. Risks of error and collective punishment

Although only talking about the validity of the IP address by incidence, partly approached in chapter 2, it is worth noting that any technology to trace content back bears the risks that the collection of such data allowing the identification of alleged infringers and its connection to ISP subscribers are both very likely to conduct to errors to be realized into the identification of the actual copyright infringers.<sup>312</sup> Indeed, modifying, concealing or usurping one's IP address is rather simple and is within the range of a growing number of Internet users. Therefore, as "Test-Achats/Test-Aankoop" concludes, there is not guarantee as to the reliability of the identification of the infringer from his/her IP address.<sup>313</sup>

As no Hadopi is in place, the prosecution will investigate to find the actual infringer and condemn him for the offence of counterfeiting; henceforth only the identified infringer will bear the costs of his actions.

### 3.8. Concluding remark

In Belgium, the rights of uploaders and consumers at large of the Internet highways are protected in the sense that only the actual copyright infringers, who needs to be identified and prosecuted by rights holders with the associated costs, is to be held responsible. This involves that the Internet users who have not committed any copyright infringing action and holders of an Internet access whose connection is misused for these purposes are not to be frightened of being (wrongfully) convicted.

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<sup>310</sup> See *supra* note 307.

<sup>311</sup> Court of Cassation, March 27, 1992, *Pasicrisie belge*, p. 680.

<sup>312</sup> Edwards, L., 2011. Role and responsibility of the internet intermediaries in the field of copyright and related rights. Available from: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=170839](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170839).

<sup>313</sup> See *supra* notes 128 and 142.

## SECTION 3. France

### 1. Introduction

This section will deal on the manner France complies with the aforementioned classical four aspects of criminal protection in the context of online copyright infringements and their interaction with the Hadopi.<sup>314</sup>

The idea at the inception of the Hadopi to fight piracy was twofold. On the one hand, develop the online legal offer of copyright protected content in order to render it effortless and inexpensive for consumers to purchase lawfully protected material. On the other hand, adjust the legal instruments to dissuade illegal file-sharing.<sup>315</sup> Simply put, to first incite consumers to purchase legal content and second discourage piracy.

In order to find any person having committed a wrongdoing on the Internet from one's IP address, the rights holders monitor online copyright infringements through their collecting societies which order the society TMG to accomplish that mission on P2P networks.

The report issued by TMG needs to contain two elements: the IP address and the date and time of the infraction. Any online service providers have to be able to make a match between an IP address and a natural person and have the duty to keep that information during a certain period of time.<sup>316</sup>

Then, in the aim to detect a copyright violation, TMG places its employees on P2P networks who propose (copyright protected) works and see who connects to these networks to download the work(s) and finally catch the IP address of the downloader. Thereafter, TMG sends the "flashed" IP addresses to the Hadopi which request from ISPs the disclosure of the identifying data of alleged infringers and eventually sends the recommendations to Internet subscribers.

### 2. Material rights

See chapter 3 on liability.

### 3. Procedural rights

In this section, four main principles of French criminal law, namely the right to a fair trial, the adversarial principle, respect for the rights of the defense and respect for the presumption of innocence are assessed.

#### 3.1. Right to a fair trial (Art. 47 EUCFR)

The first Hadopi law provided for (as expressed in chapter 3) the disconnection of the Internet access coupled with sanctions to take place with no supervision of a court or an independent body beforehand, i.e. by the Hadopi on its own. This being highly criticized by the Constitutional Council, the second act of the Hadopi provides for the rejudicilization of the graduated response scheme, therefore partly assuring more impartiality upon the sanctions as the issue of the separation of

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<sup>314</sup> Preliminary Article of the French Code of Criminal Procedure.

<sup>315</sup> Jondet, *supra* note 234.

<sup>316</sup> Data retention of maximum one year in France, Article L. 34-1 –III of the French Post and Electronic Communications Code.

powers between government's branches is left aside. Still, the result of the (first) decision of the Constitutional Council leads the head of the investigating section of the Hadopi, Mireille Imbert Quaretta, to argue that "this procedure, which takes place like any other criminal procedure, is respectful of the right to a fair trial as the latter is exerted before a judge and not before the police or the authorities to which the law has granted powers to enact statements of offence".<sup>317</sup>

To impose the sanction of the suspension of the Internet access, the judge has, beforehand, to take into account the circumstances and the gravity of the breach, the personality of the perpetrator (including his profession and socio-economic situation) and the necessity to have respect for the freedom of expression so as to order the adequate length of the suspension, which cannot exceed one year.<sup>318</sup>

### 3.2. Adversarial principle (Art. 47 EUCFR)

Indeed, very noteworthy, following from the previous principle, the *audi alteram partem* principle,<sup>319</sup> which became a paramount principle of civil, administrative and criminal law through time, is nevertheless at jeopardy. It is neither possible to contest the recommendations sent by Hadopi nor to contest the sanction of suspension before it is pronounced. As stated in chapter 3, the Hadopi may use the "traditional" criminal procedure or an expedited procedure (*in abstentia*) in order to convict alleged copyright infringers; procedure approved by the French Constitutional Council<sup>320</sup> but still overriding the "hear the other side" principle recognized by the French highest courts of law.<sup>321</sup>

The principle to judge a case *via* a penal order reveals that traces of the former Hadopi mechanism remain visible as that sort of fast-track procedure was specifically set up to deal with road contraventions, which represent a mass litigation generating only few issues about evidence and thus are easy to prove and *in fine* to unblock the judicial backlog.

In any case, it appears that the contravention for blatant negligence does not comply with the procedure of the penal order, as it requires the facts to be accurately demonstrated.<sup>322</sup> Nevertheless, as a consequence of the procedural safeguards being reduced, the prison sentence is not allowed.

### 3.3. Rights of the defense (Art. 48 EUCFR)

The accused has the right to be informed of the charges upheld against him, to consult the file, to present his observations and to be assisted by a lawyer.<sup>323</sup> But within the Hadopi, the rights of the defense are an issue.

Firstly, the Internet users do not have the opportunity to contest the first nor the second recommendations issued by Hadopi before a tribunal impartially composed, guarantying the rights of the defense.

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<sup>317</sup> Translated by author. Mireille Imbert Quaretta, quoted in: Rees, M., 2012. La Hadopi a transmis ses premiers dossiers au Parquet. Available from: <http://www.pcinpact.com/news/68918-hadopi-parquet-repressif-procureur-pedagogie.htm>.

<sup>318</sup> FIPC, Article L. 335-7-2.

<sup>319</sup> Usually translated as "hear both sides".

<sup>320</sup> Decision No. 2009-590 DC of October 22, 2009; Decision No. 2002-461 DC of August 29, 2002.

<sup>321</sup> Anon, 2008. Pourquoi la procédure doit-elle être contradictoire?. Available from: <http://www.vie-publique.fr/decouverte-institutions/justice/definition/garanties/pourquoi-procedure-doit-elle-etre-contradictoire.html>

<sup>322</sup> Maître Eolas, 2011. HADOPI: l'opération Usine à gaz continue. Available from: <http://www.maître-eolas.fr/post/2010/06/29/HADOPI-%3A-l-op%C3%A9ration-Usine-%C3%A0-gaz-continue>.

<sup>323</sup> Constitutional Council, Decision No. 88-248 DC of 17 January 1989.

Secondly, the Internet user does not receive any information about the protected content he allegedly up-or downloaded. Henceforth, the issue as to know how a person declared responsible for a given behavior may reasonably defend himself if that person is not aware of the scope of his behavior, i.e. not knowing what to contest, remains unanswered.

Moreover, the Hadopi had in mind that everybody lives in Paris, around its headquarter situated at *rue du Texel*, estimating that it would be able to summon alleged infringers to come (at their own expenses) to the French capital right away; but the reality is different. Indeed, especially in the case where suspected Internet users claim their innocence, users are not keen on travelling to Paris merely to hear the Hadopi statement about what they claim not having done.<sup>324</sup> This reveals, as advanced by the association called “SOS Hadopi”, a distortion of the rights of the defense as the users living close to Paris have the opportunity to defend themselves before the case is forwarded to the criminal judge but the others, living farther, have not that chance if they cannot reach the capital for any reasons. All this to “the fault to a procedure that forgot that France does not come down to Paris”.<sup>325</sup>

Eventually, the right to remain silent is, it is argued, a cornerstone to rattle the equilibrium of the Hadopi and reveals a glimpse of the perversity of the system therein. Indeed, the elements that the Hadopi possesses are not *per se* substantive enough in order to establish the reproached infraction, and Hadopi hence needs to gather supplementary information which is only in the hands of the Internet subscriber/alleged infringer. The Hadopi only possesses the statements of offence reporting the presence of a counterfeiting thanks to an IP address and has nothing to prove the absence of security means or the lack of diligence in their implementation. The legislator allowed the Hadopi to summon the alleged infringer,<sup>326</sup> but did not grant the institution with powers of coercion towards the called person, who remains free to not react to the summons, to not answer peculiar questions or to not express a word. Therefore, and here resides the tricky situation, the subscriber will be convicted if, in a sense, he betrays himself and gives away the information Hadopi needs.<sup>327</sup>

### 3.4. Respect for the presumption of innocence (Art. 48 EUCFR)

As stated above, this principle involves that an individual may not be subject to any incrimination of guilt before having been said so by a tribunal. This paramount standard lies upon the fact that the prosecution, i.e. the public prosecutor, has the burden to prove the guilt of a defendant. This norm finds its original roots within the French Declaration of the Rights of Man and of the Citizen of 1789.<sup>328</sup> This principle restricts in a way the freedom of speech; but more importantly, this standard guarantees to an accused that the doubt will necessarily play in his favor in case of a lack of the prosecutor of an evidential showing of the guilt.<sup>329</sup>

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<sup>324</sup> Rees, M., 2012. Hadopi: le flou perdure pour les abonnés en province. Available from: <http://www.pcimpact.com/news/71374-hadopi-abonnes-province-visioconference.htm>.

<sup>325</sup> Champeau, G., 2011. Hadopi : les abonnés de la province sont-ils moins bien traités ?. Available from: <http://www.numerama.com/magazine/20823-hadopi-les-abonnes-de-la-province-sont-ils-moins-bien-traites.html>.

<sup>326</sup> FIPC, Article L. 331-21-1.

<sup>327</sup> Champeau, G., 2011. Devant l'Hadopi, le silence est la meilleure des défenses. Available from: <http://www.numerama.com/magazine/20964-devant-l-hadopi-le-silence-est-la-meilleure-des-defenses.html>.

<sup>328</sup> Déclaration des droits de l'Homme et du citoyen de 1789, Article 9. Principle later codified into the Code of Criminal Procedure (Preliminary Article, III) and enshrined into Article 6 of the European Convention on Human Rights.

<sup>329</sup> Anon, 2008. Qu'est-ce que la présomption d'innocence?. Available from: <http://www.vie-publique.fr/decouverte-institutions/justice/definition/garanties/qu-est-ce-que-presomption-innocence.html>.

A part of the first Hadopi act originally provided for that was presumed guilty of having miscarried his/her duty to monitor the Internet connection, the Internet user who “allowed” the perpetration of the counterfeiting of a work through his/her ISP.<sup>330</sup> Thus this was up to the Internet users to overturn the presumption of guilt. In this vein, the defense of Nicolas that it was not him but someone else may still be more or less plausible, depending on the circumstances of each case and the evidence of innocence he can bring before courts. But generally the burden of proof to provide evidence that made plausible that it was someone else,<sup>331</sup> was on the defendant, leading to offer a *probatio diabolica*.

Indeed, the first Act allowed, as stated earlier, the condemnation of alleged infringers to be carried by an administrative authority without any (prior) judicial oversight, leading to the “automaticity” of the sanctions upon mere discovery of a potential infringement. This type of situation is commonly seen in road law and thus let open the comparison with the (aforementioned) car speeding example. Having this in mind, the Hadopi mechanism was pictured as to sanction any violation taking place online to be sanctioned automatically, just like when Nicolas got caught speeding on the motorway. The Hadopi proponents often argue that the sanctions should be automatic without prior warning as is the case with the car exceeding the speed limit.

Nevertheless, censured (hopefully) by the French Constitutional Council, this repressive part of the first Act is now transformed as to grant power to judicial bodies to decide whether to prosecute alleged infringers and to impose sanctions, but all this without any sort of automatism, which obviously better protects the presumption of innocence. The second Act was also submitted for revision to the Council. In both decisions, the French court did recall the necessity to pay respect for the presumption of innocence. Therefore, following from the decisions and in order to comply with them, the famous decree, which establishes and defines what the legislator meant by “characterized negligence”, could not have provided for a presumption of guilt upon the holder of an Internet access. In other words, after the censorships by the Constitutional Council, the Hadopi no longer reverses the burden of proof of the blatant negligence. Therefore, it is up to the prosecution to demonstrate that an Internet user did not secure or sufficiently secure his Internet connection. The decree provides for that, as stated earlier, for the infraction to be considered as characterized, first the Hadopi needs to have sent the two warning notices, recalling the necessity to secure the Internet access, and second that, within one year<sup>332</sup> after the issue of the second warning, the connection has to have been used for fraudulent purposes.<sup>333</sup> In other words, Nicolas is not at fault as long as any unlawful up- and downloading has not been recorded, and thus that no recommendation from the Hadopi has been sent to him to put into effect security means, and as long as no new up-or downloading has been recorded within a year from the first notification.<sup>334</sup> However, it must be born in mind that the offence punishing the lack of security into the Internet access shifted from being a misdemeanor and became eventually a contravention. The consequence of this shift results in the

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<sup>330</sup> Dimeglio, A., 2009. Loi Hadopi 1 + 2 = 3 ?. Available from: <http://www.droit-technologie.org/actuality-1282/loi-hadopi-1-2-3.html/>.

<sup>331</sup> This arguably represents the current manner to handle such situation in the Netherlands. See Stevens, L. and Koops, E.J., 2009. Opzet op de harde schijf: criteria voor opzettelijk bezit van digitale kinderporno. *Delikt en Delinkwent*, 39(7), pp. 669-696.

<sup>332</sup> This one-year period of time is very likely to be due to the maximum time of the retention of data which is one year in France.

<sup>333</sup> Féral-Shuhl, Law firm, 2010. Hadopi sanctionne les connexions non sécurisées. Available from: [http://www.feral-avocats.com/fr/nos-publications/articles\\_de\\_presse/557/619.html](http://www.feral-avocats.com/fr/nos-publications/articles_de_presse/557/619.html).

<sup>334</sup> Article R.335-5-II of the FIPC.

inability of Internet subscriber to show any extraneous causes to avert liability; either Nicolas secured is network or not, and the showing of the absence of any characterized negligence is the only way out.

### 3.5. Principle of legal certainty (Art. 49 EUCFR)

“A good law has to be clear enough but should not go too much into details”.<sup>335</sup>

Crucial precondition for the rule of law, the principle of legal certainty is a recognized standard at national, European and international level. In French law, it covers the principles of clarity, intelligibility and accessibility of any law, where the last two are considered as “objectives of constitutional value”.<sup>336</sup> To complete this picture, the law and its legal implications have to be foreseeable.

And yet, as it has been shown throughout the present work, the Hadopi laws and the machinery created therein is far from straightforward. The legislator created a complex system, fueled by the fear of punishment but also by the citizens’ incomprehension. As stated above, more than fifty articles and comments have been written about the Hadopi in order to decode its functioning and many have lost themselves in that endeavor. Furthermore, into the second recommendation issued by Hadopi, the institution “transforms” the law as to make believe the citizens that the voluntary act of *consultation* of pirated works is in breach of the French Intellectual Property Code (see Appendix VII and VIII). Upon these facts, it is reasonable to argue that the Hadopi is neither clear, intelligible nor accessible.<sup>337</sup> In a similar vein, the potential consequences and effectiveness of the laws are not yet known as e.g. the (unforeseeable) impact of the installation of security software on the fundamental freedoms may attest of it. This uncertainty leads the opponents of Hadopi to hold that it will result, in a near future, to a society being constantly monitored, pictured just like the Orwell’s Big Brother.

Therefore, it seems that the lack of clarity, intelligibility, accessibility and its overall intricacy lead to the belief that the Hadopi has diminished the legal certainty, or even is an intrinsic bearer of uncertainty.

### 3.6. Issue of proportionality (Art. 49 EUCFR)

It is often debated by the opponents of the anti-piracy law that the sanctions provided for by the Hadopi do not meet the proportionality of the punishment requirement.

Taken alone, the “masterpiece” of Hadopi, the sanction of the suspension of the Internet connection, is, it is argued, disproportionate to the aim pursued (stop digital piracy) and detrimental to other fundamental freedoms.

However, as expressed in chapter 3, the sole and traditional manner to enforce copyright was to sue or prosecute on the ground of *counterfeiting*, which may lead to a fine of up to €300,000 and a prison sentence of three years. Having acknowledged the lack of success of this threat (and maybe

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<sup>335</sup> Alain Strowel, reminding this lesson from Frank Gotzen, International conference on harmonisation of European IP law, held in honours of Frank Gotzen, Leuven, June 8 2012.

<sup>336</sup> Constitutional Council, Decision No. 2004-499 DC of July 29, 2004; Decision No. 99-421 DC of December 16, 1999.

<sup>337</sup> De Marco, E., 2009. Analyse du nouveau mécanisme de prévention de la contrefaçon à la lumière des droits et libertés fondamentaux. Available from: <http://www.juriscom.net/documents/pi20090604.pdf>.

the disproportionality of the sanctions when apply to offences committed on the Internet), the Hadopi “only” foresees to impose sanctions up to a limit of a fine of €1,500 and additionally the famous one-month sanction of online access disconnection. Under specific circumstances, the sanctions imposed are thus more proportionate in the sense that post-Hadopi, the maximum penalty is 200 times reduced than in the past for the offence of counterfeiting.<sup>338</sup>

In the same vein, Strowel points to factors that weigh in favor of proportionality. Just to name some, the Hadopi directs its action only against repeat offenders, against one’s home Internet access and the suspension or termination of the Internet access may only be pronounced after the sending of two recommendations.<sup>339</sup>

### 3.7. Risks of error and collective punishment

Although only talking about the validity of the IP address by incidence, partly approached in chapter 2, it is worth noting that the three strikes policy, which relies principally upon the harvesting of IP addresses (by right holders) to convict Internet users, bears the risks that the collection of such addresses and its connection to ISP subscribers are both very likely to conduct to errors about the identification of the actual copyright infringers.<sup>340</sup> As an example, in February 2011, an investigation was carried out by the Irish Data Protection Commissioner on the ISP Eircom<sup>341</sup> and concluded that almost 400 Irish Internet users were wrongly accused of having shared copyright protected material pursuing a “minor technical problem”, which is as basic as follows: a software failed to take into account the winter time change in October 2010 and subsequently, Eircom wrongly threatened Internet users with a first strike for the actions of others who had an infringing conduct online from the same IP address either an hour earlier or an hour later.<sup>342</sup>

In a similar vein, the Hadopi encompasses a sort of “collective punishment”,<sup>343</sup> which is the red thread of the present thesis. This is to say that IP addresses merely authenticate Internet subscribers and not the real file-swappers.

### 3.8. Concluding remark

In France, the right of uploaders and consumers using digital networks are very likely to face sanctions. Indeed, there exists three main ways to convict alleged infringers. Firstly, being the underlying idea of the Hadopi machinery (as expressed above), holders of an Internet connection recognize that they are the ones who actually up-or downloaded protected materials. In this scenario, there is no need to carry out any further investigation and criminal proceedings may be started by way of the penal order. Secondly, holders deny having committed such online copyright infringements and do not put in place protection tools. In such a case, further investigation is not necessary either and proceedings for blatant negligence may be taken through the penal order also. Thirdly, if the elements gathered are sufficient to convict someone, an investigation is carried out to

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<sup>338</sup> Bailly, P., 2012. Hadopi : contrefaçon ou juste proportion ?. Available from: <http://blog.lefigaro.fr/philippe-bailly/2012/02/hadopi-contrefacon-ou-juste-proportion.html>

<sup>339</sup> See *supra* note 56.

<sup>340</sup> Edwards, L., 2011. Role and responsibility of the internet intermediaries in the field of copyright and related rights. Available from: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=170839](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170839).

<sup>341</sup> There exists a private graduated response in Ireland between the ISP Eircom and the music industry.

<sup>342</sup> EDRI-Gram. 2011. Irish "Three Strikes" System Investigated By Data Protection Commissioner. Available from: <http://www.edri.org/edrigram/number9.12/irish-dpa-investigates-three-strikes>.

<sup>343</sup> See *supra* note 340.

determine the facts. In the scheme in point, either the holders of the Internet connection are the actual copyright violators or they neglected to secure that connection.<sup>344</sup>

Therefore, French citizens have reasons to be afraid of being faulty convicted, as Internet users who have not breach any copyrighted works and holders of an Internet access whose connection is misused for these purposes, may be held liable anyway.

Finally, even though the Constitutional Council put a great deal of effort into the censorship of Hadopi 1, the rights of the defense, including fair trial, remains Hadopi's major pitfall. Indeed, supposed infringers do not have the opportunity to contest the validity of the recommendations incriminating them as the institution does not allow the issuance of a copy of the statement to the accused, thus violating the Code of Criminal Procedure and the European Convention on Human Rights. Therefore, it is impossible for an alleged infringer to contest what is reproached, as they do not have knowledge of the precise accusations built against them. This refusal is justified by Hadopi on the "hallow" motive that the recommendations do not contain any personal data. Yet, to convey warning notices to specific persons, they need to be identified with the IP address contained into the recommendations. The independent authority estimates that IP addresses are not personal data.<sup>345</sup>

## **SECTION 4. Is the graduated response a good idea?**

Questioning the adequacy of the French anti-piracy law to enforce copyright is relevant here as all eyes are on France, which is contemplated as a "litmus test by other nations hoping to crack down on intellectual property theft."<sup>346</sup>

### **1. From the perspective of the right holders**

The ways to combat digital copyright infringement have, up until now, failed to take up this huge challenge. Definitively, the right holders and the creative content industries see the "three strikes and you are out" policy as an inexpensive and fast-track procedure to contain copyright violations on the Internet in comparison with the costly, chronophagous, hazardous aspects as well as the detrimental media coverage involved in instigating court proceedings directly towards alleged infringers. This repressive scheme is also preferred as it avoids suing the customers, source of the revenues of the creators and creative industries. As a corollary, the graduated response has a greater deterrent power than threatening to sue customers as there are more risks of getting caught.<sup>347</sup>

Another benefit of this reply to digital piracy is that the Hadopi strives for bringing to light an educational aspect as firstly two notices of infringements have to be sent before ordering any sanction, and secondly as the institution enacts code or guide of good conduct on the Internet directed to all users, ranging from the pupils to seniors. In this respect, one mission of Pierre Lescure, former chief executive officer of cable channel Canal + charged to consult upon the Hadopi, could be to prioritize the educational part of the machinery, a little in the sense that it is done by the video-sharing site YouTube. YouTube platform provides for the infringers who did not contest (three)

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<sup>344</sup> Rees, M., 2009. Dossier PC INpact : la loi Hadopi. Available from: <http://www.pcimpact.com/news/53838-hadopi-dossier-pcimpact-loi-riposte-graduée.htm>.

<sup>345</sup> Champeau, G., 2011. L'Hadopi refuse de transmettre leur PV aux abonnés avertis !. Available from: <http://www.numerama.com/magazine/18078-l-hadopi-refuse-de-transmettre-leur-pv-aux-abonnes-vertis.html>.

<sup>346</sup> Colchester, *supra* note 364.

<sup>347</sup> See *supra* note 340.

copyright violations reports to attend a sort of online Copyright School where users, before being authorized to re-use YouTube, must take cognizance of a lecture on copyright and succeed in an evaluation.<sup>348</sup>

Due to the advent of the Hadopi, the rights holders now have three manners to enforce their copyright online: in case of (alleged) infringements, they may firstly refer a case to the civil judge on the ground on the extra contractual liability enshrined in Article 1382 of the Civil Code or for an act of counterfeiting, on the ground of Article 331-1 FIPC. Secondly to the criminal judge on the ground of counterfeiting (Article L. 335-2 to 3) with all the difficulties it generates or thirdly to the Hadopi, for failure of the duty of surveillance being on the head of Internet users, backed up by the official reports realized by the sworn agents.

Nevertheless, there is one main pitfall of the French graduated response: the rights holders are not (yet) entitled to claim any damages. The Hadopi system involves that they have to “sacrifice their remuneration to their thirst for repression”, which is quite paradoxical as their fight is about combating a loss of earnings.<sup>349</sup>

## 2. From the perspective of the consumers

For consumers, the Hadopi and graduated response schemes in general are expensive. Unlike the classical way of enforcing copyright, the costs of enforcement within the framework of the Hadopi are born by the tax-payers.

As expressed above, such repressive schemes are likely to conduct to errors, where, for instance, not guilty persons may be convicted for the wrongdoings of others or have their online identity spoofed.

As rights holders now may freely choose to take action in three ways and due to the non-existence of disposition to preclude the cumulation of penalties, for a same fact, being the uploading of protected works, consumers face the risk of a double penalty; they can be held liable of blatant negligence and then be prosecuted for counterfeiting.

The “three strikes and you are out” regime encompasses the sanction of the Internet disconnection and the absence of “anti-cumulation” rule, which renders the Hadopi framework to be considered as not proportionate to the aim pursued, being to stop or contain digital piracy.

On top of that, worthy of attention but out of scope of the present work, graduated riposte solutions carry out tremendous threats to fundamental rights, mainly freedom of speech and of information.

## 3. Effectiveness, impact and shortcomings of the Hadopi

### 3.1. Effectiveness

To recapitulate, the Hadopi is a sort of watchdog which conveys to the alleged copyright infringers the warnings of the right holders through the ISPs. The whole mechanism is based upon the reliability and the deterrence of the sanction while other legal sanctions can still apply. What makes the Hadopi so interesting into the enforcement of IPRs is that this French digital rights authority

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<sup>348</sup> Pallante, M., 2012. Understanding Copyright – A Life Skill. *WIPO Magazine*, No. 2, April 2012.

<sup>349</sup> Maître Eolas, 2009. La décision HADOPI 2 expliquée à mon stagiaire. Available from: <http://www.maitre-elas.fr/post/2009/10/22/La-d%C3%A9cision-HADOPI-2>.

fights against the free-rider problem (citizens who are continuously downloading copyrighted material without paying for it) in applying the sanction, and most of all, Hadopi holds the ISPs as non-accountable for online piracy. This clearly expresses a shift into the enforcement of IPRs, which goes from ISPs towards holding Internet users liable.

As of 1<sup>st</sup> July 2012, after more than one and a half year of activity (first recommendations sent in September, 2010), the Hadopi sent a first recommendation to 1,090,000 French Internet users. From that amount of people, 99,000 users have received a second warning notice (by registered letter), among whom 314 dossiers are “in process of examination for the third strike”, which signifies that these are currently assessed by the High Authority asking for explanations from suspected users before sending the dossiers to the public prosecutor.<sup>350</sup> According to numbers provided by the French Telecommunications and Posts Regulator about 23,100,000 French people are subscribers to high-speed or very high-speed broadband Internet,<sup>351</sup> this means that 4.7 percent, 0.4 percent and 0.001 percent of them have received one recommendation, two recommendations, or are under “assessment” by the Hadopi, respectively. The last part of the previous sentence reflects that the Hadopi actually assessed the merits of a case by auditing the alleged copyright infringers before forwarding it to the prosecution. The latter is interesting in the sense that it reveals that the French graduated response in practice passes from three to a four strikes policy before a case ends up before a judge (see Appendix IX).

Regarding the effectiveness of the Hadopi framework as a deterrent to digital piracy, the proponents argue that the system is well functioning, relying upon a recent study carried out by US scholars.<sup>352</sup> It argues that cognizance by Internet users of the Hadopi caused the sales of iTunes products to intensify in a proportion of twenty-five percent, suggesting that the awareness of the outcomes of illegal downloading renders more attractive the obtaining of music through the legal content offered, such as the one provided by Apple.

In addition, for the proponents, the performance of the regulation authority is backed up by the low number (314) of alleged infringers being in the third stage. Indeed, Pascal Nègre, head of Universal Music France, declares, about the effectiveness of the graduated response, Hadopi’s figures in support of this, that

“At the end of the day, it happened what had been said from the beginning: out of a million sent e-mails, 95 percent of people stop. People do not want troubles [...] And out of the ones who continue, after receiving the hundred of thousands of registered letters, there is again 90 percent who stop.”<sup>353</sup>

In effect, up until now, no condemnations in response of the unlawful conduct of Internet users have taken place within the Hadopi framework. This is not likely to please the right holders who consider the costs they have to pay for the identification of the flashed IP addresses as to important, although

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<sup>350</sup> Hadopi Newsletter No. 3, July 2012. Available from:

[http://www.hadopi.fr/sites/default/files/page/pdf/Newsletter\\_juillet\\_2012.pdf](http://www.hadopi.fr/sites/default/files/page/pdf/Newsletter_juillet_2012.pdf).

<sup>351</sup> Autorité de régulation des communications électroniques et des postes, 2012. Observatoire trimestriel des marchés de DETAIL des communications électroniques (services fixes haut et très haut débit) en France - 1er trimestre 2012. Available from: <http://arcep.fr/index.php?id=10295&L=-9.9>.

<sup>352</sup> Danaher, *supra* note 53.

<sup>353</sup> Adaptation is mine. Pascal Nègre, as cited in Berne, X., 2012. Pascal Nègre : « il faut fouter un coup sur la gueule » aux récidivistes Hadopi.

the heaviest expenditures of the Hadopi machinery (€11 million in 2012<sup>354</sup>) are supported by the State, i.e. the tax-payers money.<sup>355</sup> In the opinion of the current Minister of Culture, “the Hadopi has not fulfilled its mission of developing the legal [content] offer [i.e. legal downloads]. Financially, 12 million euros a year and 60 officers, that’s expensive to send one million emails. Eventually, the suspension of the Internet access seems to me a disproportionate sanction against the intended aim”.<sup>356</sup> This acknowledgment by the French government of the gargantuan costs, both financial and human, and the inefficacy of the Hadopi, seems to sound its death knell, or at least its in-depth reforming.

Anyway, the Hadopi recently launched the repressive part (and by doing so, stopped the pedagogic part) by sending the first dossiers to the tribunals.<sup>357</sup> The effectiveness of this last phase thus remains to be seen. But one could validly argue that in practice, “judges would be reluctant to criminalize people for not securing their Internet connection”<sup>358</sup> as the judicial backlog is reputed to be worldwide considerable and that judges have better fish to fry.

### 3.2. Impact

Upon this report, some collecting societies strive for an improved graduated response, very similar to the road radar mechanism, where an infraction leads automatically and immediately to a sanction, although not being necessarily the suspension of the Internet connection, with no prior warning.<sup>359</sup> This is the idea of flashing IP addresses of Internet users just like flashing speeding cars. However, the Hadopi has always argued to be against this analogy.

As argued by some, the Hadopi most straightforward impact is that it modified the fashions that people illegally consume the media (music, movies and TV series), resulting from the fear of punishment on which the Hadopi is essentially based.<sup>360</sup> The agency faces a challenging task to keep pace with the fast-changing character of Internet piracy. Indeed, as stated above, the Hadopi currently merely deals with the P2P sharing of content, but downloaders turn themselves towards other ways to gain access to copyright protected content, notably to direct download, streaming of illegal content (nothing is actually downloaded) and maybe worse, to darknets (i.e. black economy). The other salient effect of Hadopi has been to encourage consumers to opt for encryption and other techniques of concealment of one’s IP address, like VPN for example. The uppermost risk in that shift away of P2P is that infringers are impelled to operate “underground”, hence rendering more difficult the mission of the law enforcement authorities which have to cope with graver crimes (e.g. online

<sup>354</sup> Baily, P., 2012. Hadopi : 4% du budget des "AAI" pour la réponse graduée et la valorisation des offres. Available from: <http://blog.lefigaro.fr/philippe-baily/2012/04/hadopi-4-du-budget-des-AAI-pour-la-reponse-graduee-et-la-valorisation-des-offres.html>; Anon., 2012. Hadopi : le président de la Sacem souhaite un radar automatique. Available from: <http://www.zdnet.fr/actualites/hadopi-le-president-de-la-sacem-souhaite-un-radar-automatique-39773397.htm>.

<sup>355</sup> Huet, J., 2009. Le beurre et l’argent du beurre (encore des propos sur le « peer to peer » et sur HADOPI). *Dalloz*, 44, pp. 2939-2941.

<sup>356</sup> Aurélie Filippetti, Minister of Culture, in: Anon., 2012. French culture minister brands controversial copyright anti-infringement rule a waste of money. Available from: <http://www.out-law.com/en/articles/2012/august/french-culture-minister-brands-controversial-copyright-anti-infringement-rule-a-waste-of-money/>; Manenti, B., 2012. Aurélie Filippetti : "Je vais réduire les crédits de l'Hadopi". Available from: <http://obsession.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html>.

<sup>357</sup> Champeau, G., 2012. Hadopi transmet ses premiers dossiers aux tribunaux! Available from: <http://www.numerama.com/magazine/21634-hadopi-transmet-ses-premiers-dossiers-aux-tribunaux.html>.

<sup>358</sup> Trevelyan, *supra* note 278.

<sup>359</sup> Berne, X., 2012. Hadopi : la SACEM relance l’idée d’une approche radar. Available from: <http://www.pcinpect.com/news/71929-sacem-radar-approche-amende-hadopi.htm>.

<sup>360</sup> See Geiger, *supra* note 135.

child pornography). This expresses the fact that, after more than two years of operation, the Hadopi no longer keeps pace with technology development.<sup>361</sup>

Additionally, worthy of being noted, the Hadopi Act may only operate on the French soil, targeting only one's home Internet access (whereas there exists a large array of means to get access to the Internet, e.g. through mobile devices), what firstly signifies that it can only monitor P2P networks which have their server in France, where the majority of popular P2P systems servers are harvested outside that country, such as eMule, which relies principally on servers located in the United States and the Netherlands.<sup>362</sup> On a meta-level, the issue is as expressed by Cedric Manara, an academic at EDHEC Business School in Paris, who stated that "Hadopi had acknowledged in its report that it can only monitor the activities of people who access the Internet via one of France's five big ISPs".<sup>363</sup> Therefore, to circumvent the Hadopi machinery, one may advise French Internet users to "download films and music onto a remote computer outside of France".<sup>364</sup>

Finally, it must be born in mind that, now, the Hadopi plays a more preventive role than before, and the repression is left to the judicial authorities. Although a law implementing this recognition did not pass through the legislative process in France,<sup>365</sup> one of the merits of the Hadopi is that in a way it permits the recognition of the right to access the Internet as a fundamental right, for which any interference requires the intervention of a judge.

### 3.3. Shortcomings

The main issue in respect to the underlying repressive component of the Hadopi mechanism, the duty to monitor Internet access, is that "security means" for the computer and Internet access are neither available to users nor defined in any decree. Hence, the Hadopi requires to entirely secure one's access, what is in fact impossible to meet for the people at large as no computer or security system may be 100 percent safe.<sup>366</sup> For Squaring the Net, securing the Internet access is entirely an illusion.<sup>367</sup> Thus, the Hadopi imposes a vague monitoring obligation which is to be sanctioned if not respected. Therefore, it is very likely that the judge will have a large power of appreciation.

In the same vein, the manipulation or the wrong installation of security devices are also not covered. Moreover, one implementing decree<sup>368</sup> does not define what is to be understood as "connection", leaving uncertainties as to what precisely needs to be secured. Therefore, one may wonder what constitute the dossiers that keep being conveyed to the justice.<sup>369</sup> Therefore, nobody knows the true

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<sup>361</sup> Haski, F., 2010. France's derisory online piracy strategy. Available from: <http://www.guardian.co.uk/commentisfree/2010/dec/31/french-online-piracy-hadopi>.

<sup>362</sup> Server list for eDonkey and eMule, available from: <http://ed2k.2x4u.de/list.html>.

<sup>363</sup> Conlon, E., 2011. Why France's piracy watchdog is missing teeth. *Managing Intellectual Property* (Oct 2011).

<sup>364</sup> Colchester, M. 2010. All Eyes on France as Officials Enforce New Antipiracy Law. *Wall Street Journal* (10/27/10). Available from: <http://online.wsj.com/article/SB10001424052702303550904575562130775993568.html>.

<sup>365</sup> Rees, M., 2011. L'accès à internet n'est pas un droit fondamental. Available from: <http://www.pcimpact.com/news/66071-hadopi-internet-acces-fondamental-dionis.htm>.

<sup>366</sup> Anon., 2012, Secure Operating System. Available from: <http://www.spamlaws.com/choosing-secure-operating-system.html>

<sup>367</sup> La Quadrature du Net, 2009. HADOPI, « Riposte graduée » : réponse inefficace, inapplicable et dangereuse à un faux problème.

<sup>368</sup> Decree No. 2010-695 of June 25, 2010 instituting the offence of specific negligence in the protection of literary and artistic property on the Internet, *JORF n°0146*, June 26, 2010, p. 11536.

<sup>369</sup> Bluetouff's blog, 2012. HADOPI : son pire échec. Available from: <http://bluetouff.com/2012/02/20/hadopi-son-pire-echec/>.

extent of the liability of an Internet user. Accordingly, in the meantime, the threshold of security is to be assessed on a case-by-case basis, what thus grants a large power of appreciation to the judge.

Furthermore, as asserted by Hadopi's critics,<sup>370</sup> the organization seems to be a massive and expensive bureaucratic "white elephant" or even a huge technocratic labyrinthine and complex system,<sup>371</sup> likely to threaten fundamental freedoms, consuming tax-payer money considerably whereas such money (budget for 2012: €14 millions) could effectively be spent on promoting the creative works on the Internet and compensating the authors, stated aim of Hadopi.<sup>372</sup>

Additionally, from a broader angle, Lessig rightly argues that the Hadopi framework is abortive, as he sees the graduated response in a larger perspective as only beneficial to the actors already in place (incumbents), and for this reason ignores innovation as it prohibits an open, free and neutral Internet which could contribute to the innovation of the ones not yet there (outsiders).<sup>373</sup> More basic, the French economist Jacques Attali held that "we are fighting yesterday's battle... there is no point to Hadopi".<sup>374</sup>

As a final note, contrary to the educational goal of Hadopi, a July study shows that the Hadopi is not well understood by French digital highways users. The main findings are that French users wrongly assumed to know the graduated response and overestimated the Hadopi's breathing space and the likelihood of being detected by its radars.<sup>375</sup>

#### 4. Lessons to be learnt

One needs to be aware of the fact that the Hadopi, it is claimed, is a huge disappointment in its present state. Probably France, being the first country to set a graduated response, built the Hadopi machinery in a too hasty manner, sending recommendations even before determining the ways to secure one's access and favoring the repressive aspect over the setting up of legal offer of content online, still underexploited.

As emphasized *supra*, the behaviors of customers toward up-and downloading change faster than the laws to sanctions such conducts do. Still, it could have been argued at the first sight that, although the Hadopi system is more stringent, the Hadopi provides for one single set of rules and thus the French Internet subscribers are aware of what they are encountering if they up-or download protected content or if their Internet access is not appropriately secured, whereas in Belgium civil and criminal liability the users may either be engaged, letting them unaware of what to expect of the enforcement entities and the justice. However, as expressed above, the Hadopi regime complements and does not substitute itself to the traditional copyright enforcement, be it by civil or criminal law.

In Belgium and other countries having "all eyes on France" to analyze the efficiency of the system in place, the politics will probably drop the idea of implementing a Hadopi-like legislation as, up until

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<sup>370</sup> Haski, *supra* note 361.

<sup>371</sup> Indeed, as Geiger already outlined in 2011, more than fifty articles and comments were published in several journals to decipher the system adopted by French government.

<sup>372</sup> Huet, *supra* note 355.

<sup>373</sup> Delport, see *supra* note 12.

<sup>374</sup> Jacques Attali, as cited in: Dreyfus, N., 2011. France - the Hadopi law, two years after. *E-Commerce Law & Policy*, 13(7), p. 8.

<sup>375</sup> Darmon, E., Pénard, T., Dejean, S. and Suire, R., 2012. Comment l'Hadopi est-elle perçue par les internautes français?. Available from: <http://www.marsouin.org/spip.php?article498>.

now, it does not provide objective, certain and backed up results, at least for the long run. As a result, it still cannot be known whether the graduated response to fight online piracy will turn out to be a standard for copyright enforcement in the digital era. However, a reasonable opinion may still be built up; if the governments want to protect rights holders and the creative industry, they will opt for a Hadopi-like legislation but if they want to protect consumers and the public at large, they will avert any variation of the Hadopi law.

## **SECTION 5. Belgian and French frameworks in a European perspective.**

The European Parliament adopted the position that "a user's Internet access may only be cut off if "necessary within a democratic society" and only after "a prior, fair and impartial procedure" which gives users the opportunity to state their case",<sup>376</sup> i.e. no cutting off of the Internet access without a prior court order.

In this perspective, it is argued that the Hadopi regime and its three steps cannot be upheld, legally speaking, especially in front of the Strasbourg Court. The rationale resides in the fact that the Internet users do not have the opportunity to contest the first nor the second recommendations issued by Hadopi before a tribunal impartially composed, guarantying the rights of the defense. Therefore, it involves that the accused copyright infringer may appeal only when arrived at the third stage of the graduated riposte, i.e. when banned from accessing the Internet and hence living into a digital ghetto. In practice, as held by Pierre Aigrain, arriving at the third strike, if the alleged infringers declare that they were not the authors of the violations (the "I did not do it, it was someone else" argument), the Hadopi institution will simply stop its endeavor to get convicted the infringers, perfectly knowing that the regime would not stand before the Strasbourg Court on the grounds of the right to a fair trial (article 6 of the Convention on Human Rights).<sup>377</sup> As a matter a fact, a French citizen introduced an application to the Court in order to contest the practices of the Hadopi.<sup>378</sup> Aigrain even further states that the Hadopi, when it was under its first revision by the Constitutional Council, should have been censured totally.<sup>379</sup>

Among the countries which adopted a graduated response scheme to combat illegal downloads, probably the best known, except France, is the United Kingdom. What is interesting to see is how the British implemented a three strikes policy. Arguably more balanced, the UK Digital Economy Act<sup>380</sup> (incorporating the riposte policy) from the outset does not consider the (heavy) penalty of the disconnection of detected copyright infringers as a first resort but opts for, among others technical measures and an Internet traffic management, such as the diminution of the users' bandwidth, rendering file-swapping of heavy data more burdensome or even impracticable, and, as last resort, the disconnection of alleged infringers' Internet access. This partly demonstrates a more scalable

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<sup>376</sup> Anon., Telecoms package: strengthening consumer rights and competition. Available from: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20091112BKG64357&language=EN>.

<sup>377</sup> Discussion with Philippe Aigrain at a debate on the intellectual property at the age of the Internet, held at the Free University of Brussels on May 2<sup>nd</sup> 2012.

<sup>378</sup> Pfanner, E., 2010. Film Director Comes to the Defense of a Convicted Internet Pirate. Available from: <http://www.nytimes.com/2010/09/22/technology/22iht-godard.html>.

<sup>379</sup> See *supra* note 377.

<sup>380</sup> 2010, c. 24. In force on 8 June 2010. Applicable in the entire kingdom.

enforcement of the sanctions in the UK.<sup>381</sup> The remodeling of the French Hadopi framework seems to go towards such kind of sanctions which limits Internet access but does not cut it off.

## SECTION 6. Concluding remark

It has to be recognized that a clear answer to the question regarding which country offer the more adequate procedural safeguards is rather complex. Upon the elements expressed above for each countries it seems reasonable to say that the two countries offer a diverging protection of the rights of the Internet users to the detriment of uploaders.

Besides, what is concerning about the French system in place is that it still contains the traces of its original functioning, being to create an independent administrative authority with its own powers of sanction. Thus, even though the criminal judge comes into the game to ascertain the safeguard of procedural rights, that the single judge plays a minimal role within the framework of a fast procedure and decides only upon the evidence gathered by the Hadopi, which leads to qualify the penal judge as a “straw man”.<sup>382</sup>

Therefore, it can be argued that, in light of the above mentioned criteria, Belgium provides for a better procedural protection of the rights of the consumers.

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<sup>381</sup> Edwards, L., 2009. Should ISPs be Compelled to Become Copyright Cops?. Available from:

<http://www.icyte.com/system/snapshots/fs1/3/b/9/6/3b961a19a7bb43d198b34b194af3f1460ac1fbf1/index.html>.

<sup>382</sup> Marino, L., 2010. La loi du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur Internet (dite Hadopi 2). *Recueil Dalloz* 2010, chron. pp. 160-164.

## Chapter V: Summary and conclusions

The present thesis analyzed the extent to which the liability of an alleged copyright infringer on the Internet may be engaged in Belgium. A hypothesis is sketched where a figurative character, Nicolas, does not contest the reliability of the methods and processes used to convict him of copyright infringement, but the legal relevance of the proofs gathered against him. Indeed, practically, when an Internet user uploads a protected work without the consent of the right holder, methods such as IP addresses, fingerprinting or watermarking may be used in order to track the copyrighted material back to the uploader.

For this research, the legal system of Belgium is compared with the French one. In the introduction, it has been showed that, although Belgium and France share a common history and a similar set of rules on copyright law, from 2009, France turned itself towards a more stringent endeavor to combat online copyright infringement, by the enactment of the three strikes policy called “Hadopi”. In the second chapter, I described the copyright regime applicable in Belgium and France, in order to discover when copyright infringements occur and how they are punished. Thereafter, that chapter also covered the rules dealing with the enforcement of copyright both in theory and practice applicable in Belgium and France and how these states handle the question of the legality of uploading and downloading. The third chapter coped with the issue of the liability for copyright infringement in the same countries by analyzing the substantive civil and criminal rules on liability. Eventually, the fourth chapter offered an analysis on the procedural protection of the rights of the uploader, leading to the present chapter which reveals in which system these rights are the most effectively protected.

In the beginning, the following central research question was: *Does Belgian law of liability in case of evidence of online copyright infringements offer a more balanced regime than the one provided for by the French Hadopi graduated response and do these systems fit with the objectives of copyright law in providing a fair balance with the rights of the right holders and users?*

Based on the below seven benchmarks, the comparative assessment between Belgian and French (principally Hadopi) law may be summarized as follows:

### A. From a substantive law standpoint

#### 1. Regarding the civil liability of uploaders

Belgium and France both provide for similar rules regarding tort law which protect an alleged copyright infringer against the accusing party in civil proceedings, as the extra-contractual liability pursuant Article 1382 of the Civil Code needs to be demonstrated by the accuser by the showing of the reunion of a fault, damage and a causality link.

#### 2. Regarding the criminal liability of uploaders

The “traditional” Belgian and French criminal law lay down close concepts which, to a certain extent, protect an alleged copyright infringer against the mighty state, represented by the public prosecutor, in criminal prosecutions where the presumption of innocence obliges the prosecution to establish, beyond reasonable doubts, the culpability of a supposed wrongdoer. However, if we compare the entire Belgian criminal law system only with the French Hadopi, that is where the divide stands. Indeed, as explained throughout this work, the Hadopi is not *prima facie* in place to criminalize the

counterfeiting on the Internet, but to care about the respect of the newly created obligation of any Internet access holder to sufficiently secure that access. Henceforth, in this paradigm, under Belgian law, a supposed infringer may not be held liable when the line of argument is to negate *en bloc* the alleged infringement(s), whereas under French law, he may not escape the liability coming from the duty to monitor one's access that easily, as the Internet access holder is liable for all unlawful activity occurring on his personal network. Therefore, the liability of the French infringer is fully engaged, except if s/he can provide that Hadopi-approved security means were in place and in use at the time of the violation. As expressed above, this mode of evasion from accountability is difficult to meet as, after more than two years being into full capacity, the Hadopi has not yet enacted such a list of methods of security.

### 3. Intermediary conclusion

The rules about the civil and criminal liability of uploaders for copyright infringements are based on the common core principles and are similarly sanctioned in Belgium and France.

## B. From a procedural law standpoint

Both Belgium and France, being EU Member States, need to abide to the provisions set into the EU Charter of Fundamental Rights (EUCFR).

### 1. Right to a fair trial

Belgian's legal system offers the legal safeguards as to comply with the fundamental principle of the right to a fair trial, ensuring the possibility to oppose any claim, to request any information about the nature and the cause of the accusation raised and to be heard within the framework of an adversarial procedure.

On the other hand, French's Hadopi is in breach of this conventional right in many respects. Indeed, the issue resides in the fact that, at no time, the alleged infringer, innocent until proven otherwise, may contest the claim of copyright infringement expressed *via* the Hadopi's recommendations nor can he have access to the supposedly downloaded or uploaded copyright protected contents.

### 2. Rights of the defense

In Belgium, the charges of copyright infringements are available for consultation by the alleged infringer.

Regarding the Hadopi and as a corollary of the above point, it is challenging for a person convicted of infringement to defend himself if that person is not aware of the detail of the charges raised against him.

### 3. Right to respect for the presumption of innocence

This paramount principle is well observed in proceeding involving copyright violations. The public prosecutor bears the burden to prove the occurrence of the unauthorized acts in the chief of the accused.

The Hadopi, after the censorships by the Constitutional Council, no longer reverses the burden of proof of the blatant negligence as it did originally. Therefore, as oppose to what is commonly thought

or argued, it is up to the public prosecutor to demonstrate that an Internet user did not secure or sufficiently secure his Internet connection and not to the alleged infringer to establish compliance.

#### 4. Principle of legal certainty

Belgium is in line with the principle of legal certainty, which is recognized as a general principle of law.

This principle, which foresees that any law needs to be clear, intelligible and accessible, is put at great jeopardy into the Hadopi regime as the laws themselves and the procedure are profoundly understood only by highly skilled lawyers.

#### 5. Proportionality

The Belgian system provides for heavy sanctions (€600,000 and/or a three-year prison sentence) which are not adapted to digital piracy.

At first sight, it seems that the Hadopi provides for more proportionate regime as it is commonly thought that the fine of €1,500 and the suspension of the Internet access replace the classic sanctions (€300,000 and/or a three-year prison sentence). But when we take a closer look, the alleged infringer faces the risk to be found, for the same act, liable for blatant negligence and for counterfeiting; meaning that traditional copyright and Hadopi-made sanctions can be cumulated.

#### 6. Intermediary conclusion

Except for the proportionality issue, it appears that there is little room for discussion to contest the argument that the Belgian procedural framework offers a more balanced approach regarding the protection of the right of the uploader than the Hadopi does, as the latter falls short with ensuring respect with the right to a fair trial, the rights of the defense and the principle of legal certainty.

### C. Final conclusion

The findings demonstrate that the Belgian system, both in theory and in practice and as it stands now, provides the Internet users with a greater protection of both their substantive and procedural rights than the French one. On the other hand, the French Hadopi overrides, in theory, many fundamental rights of the French citizens. However, in practice, the Hadopi has not come to “sanction” Internet users failing to secure their access yet.

Finally, if Nicolas uploads the album “Thriller” of Michael Jackson or the movie “Avatar” of James Cameron, whether he is facing Belgian or French law will impact on his possible line of defense. In Belgian law, he will be able to argue to be the victim of a hacker, his wife or little child to escape from the liability of digital copyright violation for which he is not the actual wrongdoer. But he will need to provide evidence that makes it plausible that it was someone else. So this line of defense is feasible in theory but in practice, especially applied to computer matter, seems to be difficult to adopt. In French law, he will be incapable of arguing anything to defend himself as he wears the heavy burden of the French standard of liability being upon the head of the Internet subscriber. So, in the end, evidence remains very important. However, when we get back to the research question regarding the place where copyright infringers are best protected, it could be said that Belgium favors the

consumers and therefore possible wrongdoers, whereas, in France, the systems offers better protection to the copyright holders.

My intimate opinion is that the Hadopi is a threat to the Internet users and consumers at large, lacking to ensure proper substantive and procedural safeguards of the fundamental rights anyone is entitled to claim, be it at national or European level. Moreover, Hadopi is beyond regular understanding, which is contrary to the aim of any good law respectful of civil liberties and fundamental rights.

To get back to the introducing quote on the cover sheet (King Pyrrhus of Epirus: *"If we are victorious in one more battle with the Romans, we shall be utterly ruined"*), I believe it represents the combat that rights holders undertake when striving for their rights to be respected on the Internet. The victory, if possible for rights holders to achieve, will be at high costs for them, *à la* Pyrrhus, as it has been demonstrated that, filing mass suits against Internet users unlawfully acting on the Internet, is neither a successful attempt nor an efficient deterrent and can even be considered as counter-productive for right holders.

## **Bibliography and references**

### **1. PRIMARY SOURCES**

#### **a. Legislation**

##### **i. European Union**

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, pp. 1-16.

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

##### **ii. Belgium**

The 1994 Computer Programs Act: Law of June 30, 1994 transposing to Belgian Law the European Directive of May 14, 1991 on the Legal Protection of Computer Programs (updated July 17, 2007).

The 1994 Basic Copyright Act: Law of June 30, 1994 on Copyright and Neighboring Rights (as amended by the Law of April 3, 1995).

The 1998 Databases Act: Law of August 10, 1998 transposing into Belgian Judicial Law the European Directive No. 96/9/EC of March 11, 1996 on the Legal Protection of Databases.

Law of August 31, 1998 transposing into Belgian Law the European Directive No. 96/9/EC of March 11, 1996 on the Legal Protection of Databases.

Law of May 22, 2005 transposing into Belgian Law the European Directive 2001/29/EC of May 22, 2001 on the Harmonization of Certain Aspects of Copyright and Neighboring Rights in the Information Society (updated 19 May 2009).

May 15, 2007 - Law on the Punishment of Counterfeiting and Piracy of Intellectual Property Rights (updated February 25, 2011).

Law of December 10, 2009 modifying the Status and the Management of Collective Societies of the Law of June 30, 1994 on Copyrights.

Loi du 28 décembre 2011 portant des dispositions diverses en matière de justice, M.B., 30 décembre 2011, modifiant la loi du 5 mars 1952 relative aux décimes additionnels sur les amendes pénale.

##### **iii. France**

Law No. 2007-291 of March 5, 2007 seeking to reinforce the equilibrium within criminal procedure, OJ 55, March 6, 2007, p. 4206.

Law 2009-669 of June 12, 2009 promoting the distribution and protection of creative works on the internet (Hadopi 1).

Law 2009-1311 relating to the protection of literary and artistic property on the internet through criminal law (Hadopi 2).

Orientation and programming law for the performance of the internal security called Loppsi 2 [Loi n° 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure publiée au Journal Officiel du 15 mars 2011 (rectificatif paru au JO n° 69 du 23 mars 2011)].

Law No. 2011-1862 of December 13, 2011 on the allocation of litigation and the relief of certain court proceedings, OJ 289, December, 14 2011, p. 21105.

Law No. 2011-1898 of December 20, 20th 2011 concerning remuneration for private copying, Official Gazette of France, December, 21th 2011, p. 21546.

### **b. Cases**

Rodez case, French Supreme Court, 30 May 2006.

High Administrative Council (Conseil d'Etat), 1<sup>st</sup> and 9<sup>th</sup> sub-sections in joint session, 11 July 2008.

C-70/10 *Scarlet v SABAM* of 24 November 2011.

C-360/10 *SABAM v Netlog* of 16 February 2012.

## **2. SECONDARY SOURCES**

### **a. Books**

Albert, G.Peter Jr. and Laff, Whitesel & Saret, Ltd. 1999. Intellectual property law in cyberspace. Washington, DC: Bureau of National Affairs.

Albert, G.Peter Jr., 2008. Intellectual property law in cyberspace: Cumulative supplement. Washington, DC: BNA Books, a division of BNA.

Aplin, T., 2011. Intellectual property law: text, cases and materials. Oxford: Oxford University Press.

Bainbridge, D. I., 2010. Intellectual Property. Harlow : Longman Pearson.

Bently, L., Davis J. and Ginsburg, J.C., 2010. Copyright and Piracy - An Interdisciplinary Critique. Cambridge Intellectual Property and Information Law (No. 13).

Bently, L. and Sherman, B., 2004. Intellectual property law. Oxford: Oxford University Press.

Berenboom, A. 2008. *Le nouveau droit d'auteur et les droits voisins*, Larcier, Brussels.

Bently, L., Suthersanen, U. and Torremans, P., 2010. Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace. Cheltenham: Edward Elgar Publishing.

Bocken, H. and De Bondt, W., 2000. Introduction to Belgian Law. Bruxelles: Bruylant.

Bouche, N., 2011. Intellectual Property Law in France. Kluwer Law International.

Bosly, H.-D., 1995. Éléments de droit de la procédure pénale. Louvain: Bruylant.

Braun, A. and Cornu, E., 2004. Précis des marques, 4<sup>th</sup> ed.

Buydens, M., La réparation du dommage en droit de la propriété intellectuelle. In: Vanbrabant, B., 2012. Droits intellectuels: le contentieux (compétence, procédures, sanctions). Liège: Anthemis. Commission Université-Palais, vol. 132.

Buydens, M., 2008. Les nouvelles législations dans le domaine de la propriété intellectuelle en 2007: un bref aperçu. Cahier du Juriste, pp. 2-7 and Léonard, T., Atteintes aux droits subjectifs et responsabilité civile: réflexions suite à l'adoption de la loi du 10 mai 2007 relative aux aspects civils de la protection des droits de propriété intellectuelle. In: Wéry, P., 2007. Droit des obligations: développements récents et pistes nouvelles, Louvain-la-Neuve, Anthemis.

Chilstein, D., 2010. French National report on Internet Crimes to the 18<sup>th</sup> International Congress of Comparative Law, Washington D.C.

Clark, C., The Answer to the Machine is in the Machine. In: P. Bernt Hugenholtz (ed.), 1998. *The Future of Copyright in a Digital Environment*. The Hague: Kluwer Law International.

Collectif d'auteurs, 2009. La bataille Hadopi. In *Libro Veritas*.

Cornish, W., Llewelyn, D. and Alpin, T., 2007. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. Sweet & Maxwell.

Decourrière, A., 2008. *La répression de la contrefaçon*. Waterloo: Kluwer.

Descartes, R., 1961. *Rules for the direction of the mind*. Rule XIV. Liberal Arts Press.

De Page, H., 1997. *Traité élémentaire de droit civil belge*, Bruxelles: Bruylant.

De Visscher, F. and Michaux, B. 2000. *Précis du droit d'auteur et des droits voisins*, Bruylant, Brussels.

Garner, B. A., 2004. *Black's Law Dictionary*, 8<sup>th</sup> ed.

Franchimont, M., Jacobs, A. and Masset, A., 2012. *Manuel de procédure pénale*. Collection de la Faculté de droit de l'Université de Liège.

Kuty, F., 2010. *Principes généraux du droit pénal belge: Tome II – l'infraction pénale, Volume 2*. Larcier.

Lefranc, D., The metamorphosis of *contrefaçon* in French copyright law. In: Bently, L., Davis J. and Ginsburg, J.C., 2010. *Copyright and Piracy - An Interdisciplinary Critique*. Cambridge Intellectual Property and Information Law (No. 13).

Lasser, Mitchel de S.-O.-L'E., 2004. *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*. USA: Oxford University Press.

Lessig, L., 1999, *Code: and Other Laws of Cyberspace*. New York: Basic Books.

Mougenot, D., 2002. *Droit des obligations - La preuve. Répertoire notarial*, 3<sup>rd</sup> ed, Bruxelles: Larcier.

Patry, W., 2012. *How to Fix Copyright*. New York: Oxford University Press.

Pradel, J., 2000. *Droit pénal*. Paris: Cujas.

Pradel, J., 2006. *Manuel de procédure pénale*. Paris: Cujas.

Smits, J.M., 2006. *Elgar Encyclopedia of Comparative Law*. Cheltenham-Northampton: Edward Elgar Publishing.

Stamatoudi, I. A., 2010. *Copyright enforcement and the internet*. Alphen aan den Rijn: Kluwer Law International.

Sterling, J.A.L., 2008. *World copyright law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law : With a Glossary of Legal and Technical Terms, and a Reference List of Copyright and Related Rights Laws Throughout the World*. London: Sweet & Maxwell.

Strowel, A., The 'Graduated Response' in France: Is It the Good Reply to Online Copyright Infringements?. In: Stamatoudi, I. A., 2010. *Copyright enforcement and the internet*. Alphen aan den Rijn: Kluwer Law International.

Trevelyan, L. (2009). Three Strikes and You're Out. *Intellectual Property And Technology Online Journal* (IP & T UK Outlook LexisNexis) 24/8/2009.

Vanbrabant, B., 2012. *Droits intellectuels: le contentieux (compétence, procédures, sanctions)*. Liège: Anthemis. Commission Université-Palais, vol. 132.

World Intellectual Property Organization, 2008. *Introduction to Intellectual Property, Theory and Practice*. The Netherlands: Kluwer Law International.

## b. Journal articles

Anon., 2011. Europe's "Graduated Response" to Internet piracy. *Berkeley Technology Law Journal*, 26(1), pp. 582-583.

Anon., 2011. How three strikes is working. *M.I.P.*, 3 May 2011.

Armstrong, L., 1994. Internet copyrights. *Network Security*, 10, p. 6.

Barnes, D., 2004. Deworming the Internet. *Texas Law Review*, 83(1), p. 329.

Benabou, V.-L., 2010. La riposte graduée contre la contrefaçon de masse : de l'alibi pédagogique à la tentation sécuritaire. *Auteurs & Media*, 5-6, pp. 438-449.

Borghetti, J.-S., 2010. La responsabilité du fait des choses, un régime qui a fait son temps. *Revue trimestrielle de droit civil*, 1, pp. 1-41.

Cédras, J., 2006. Un aspect de la cybercriminalité en droit français: le téléchargement illicite d'œuvres protégées par le droit d'auteur. *Revue internationale de droit pénal*, 3(77), pp. 589-610.

Cervetti, P.-D., 2011. Dossier Spécial: Glose autour des lois HADOPI. *Revue Lamy du Droit de l'Immatériel* 2011, n°67. In particular:

- Catelan, N., La protection pénale du droit d'auteur : une négligence caractérisée ?, pp. 45-54;
- Chavent-Leclère, A.-S, La responsabilité pénale à la lumière des lois « Hadopi », pp. 40-44;
- Heinich, J., La nouvelle obligation de surveillance de sa ligne: nouvelle responsabilité civile ?, pp. 30-39;
- Putman, E., La « preuve par l'adresse IP »: Une vraie question... déjà passée ?, pp. 54-59.

Conlon, E., 2011. Why France's piracy watchdog is missing teeth. *Managing Intellectual Property* (Oct 2011).

Coudert, F. and Werkers, E., 2008. In The Aftermath of the Promusicae Case: How to Strike the Balance?. *International Journal of Law and Information Technology*, 18(1), pp. 50-71.

Derclaye, E., 2005. The Belgian Copyright Act finally revamped with the implementation of the Copyright Directive (2001/29): the good, the bad and the ugly. *European Current Law*, 12, pp. 11-15.

Derclaye, E., 2010. Les réponses graduées française et britannique: des coups d'épée dans l'eau ou des modèles pour le Canada?. *Les Cahiers de Propriété Intellectuelle*, 22(3), pp. 571-592.

Dreyfus, N., 2011. France - the Hadopi law, two years after. *E-Commerce Law & Policy*, 13(7).

Droits Quotidiens, Quels risques à télécharger illégalement sur Internet ?. *En marche*, 3 mai 2012, p. 12.

Du Jardin, J., 2003. Belgique, les principes de procédure pénale et leur application dans les procédures disciplinaires. *Revue internationale de droit pénal*, 3 (74), pp. 801-820.

Dutton, W., 2010. Aiming at Copyright Infringers and Hitting the Digital Economy. *Prometheus*, 28(4), pp. 385-388.

Edwards, L. and Waelde, C., 2005. Online Intermediaries and Liability for Copyright Infringement. Keynote paper at WIPO Workshop on Online Intermediaries and Liability for Copyright, Geneva, April 2005.

Frohlich, A., 2009. Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-Laws Rules?. *Berkeley Technology Law Journal*, 24(2), pp. 851-896.

Geiger, C., 2011. Honourable Attempt but (ultimately) Disproportionately Offensive against Peer-to-peer on the Internet (HADOPI) – A Critical Analysis of the Recent Anti-File-Sharing Legislation in France. *IIC*, 42(4), pp. 457-472.

Geiger, C., 2008. Legal or Illegal: That is the Question! Private Copying and Downloading on the Internet. *IIC*, 39 (5), pp. 597-603.

Geiger, C., 2008. The answer to the machine should not be the machine: safeguarding the private copy exception in the digital. *E.I.P.R.*, 30(4), pp. 121-129.

Geiger, C., 2007. The New French Law on Copyright and Neighbouring Rights of 1 August 2006 – An Adaptation to the Needs of the Information Society?. *IIC*, 38(4), pp. 401-428.

Gervais, D. J., 2004. The Price of Social Norms: Towards a Licensing Regime for File-Sharing. *J. Intell. Prop. L.*, 12(1), pp. 39-74.

Guibault, L., Westkamp, G., Rieber-Mohn, T., Hugenholtz, P.B. *et al.*, 2007. Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Report to the European Commission, DG Internal Market.

Horowitz, K., 2008. Copyright Liability for Those Who Provide the Means of Infringement: In light of the RIAA lawsuits, who is at risk for the infringing acts of others?. *4 Shidler J. L. Com. & Tech.* 8.

Huet, J., 2009. Le beurre et l'argent du beurre (encore des propos sur le « peer to peer » et sur HADOPI). *Dalloz*, 44, pp. 2939-2941.

Katyal, N. K., 2001. Criminal Law in Cyberspace. *University of Pennsylvania Law Review*, 149, pp. 1003-1114.

Kennedy, R., 2011. No three strikes for Ireland (yet): EU Copyright law and individual liability in recent Internet file sharing litigation. *Journal of Internet Law*, 14(11), pp. 15-31.

Kirkwood, R. C., 1997. When should computer owners be liable for copyright infringement by users?. *The University of Chicago Law Review*, 64, pp. 709-730.

Koelman, C. and Van Lissum, D., 2012. Dialogue et vigilance avant tout. *Budget & Droits*, 221, mars/avril 2012, pp. 40-43.

Koops, B.-J., 2009. Technology and the Crime Society: Rethinking Legal Protection. *Law, Innovation and Technology*, 1(1), pp. 93-124.

Larguier, J., 1953. La preuve d'un fait négatif. *Revue trimestrielle de droit civil*, pp. 1- 48.

Le Goffic, C. and Wagner, M., 2009. La pénalisation de la contrefaçon, *Droit pénal*, n° 12, déc. 2009, pp. 14-19.

Lemley, M. A. and Reese, R. A., 2004. Reducing Digital Copyright Infringement Without Restricting Innovation. *Stanford Law Review*, 56(6), pp. 1345.

Littoz-Monnet, A., 2006. Copyright in the EU: droit d'auteur or right to copy?, *Journal of European Public Policy*, 13(3), pp. 438-455.

Lucchi, N., 2011. Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI). *Cardozo Journal of International and Comparative Law*, 19, pp. 645-678.

Mac Sithigh, D., 2009. Law in the Last Mile: Sharing Internet Access Through WiFi. *SCRIPT-ed*, 6(2), pp. 355-376.

Mandal, S. N., 2011. Electronic Infringement of Copyright: A Real Challenge Ahead. *The IUP Law Review*, 1(2), pp. 70-85.

Manta, I., 2011. The Puzzle Of Criminal Sanctions For Intellectual Property Infringement. *Harvard Journal of Law & Technology*, 24(2), pp. 469-518.

Mariez, J.-S. and Gossa, J., 2009. Surveillance et sécurisation : ce que l'Hadopi rate. A propos de la "petite loi" "Création et Internet". *Revue Lamy Droit de l'Immatériel* n° 50, juin 2009, pp. 79-91.

Marino, L., 2010. La loi du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur Internet (dite Hadopi 2). *Recueil Dalloz 2010*, chron. pp. 160-164.

Masset, A., L'élément moral du délit de contrefaçon en matière de droits d'auteur , note under Criminal tribunal of Verviers (3<sup>rd</sup> chamber), October 4, 1989, *Jurisprudence de Liège, Mons et Bruxelles*, 1990, p. 705.

Meyer, S. P., 1998. Intellectual property rights on the internet. *Computer Law & Security Review*, 14(1), pp. 14-21.

Meyer, T. and Van Audenhove, L., 2010. Graduated response and the emergence of a European surveillance society. *Info - The journal of policy, regulation and strategy for telecommunications*, 12 (6), pp. 69-79.

Meyer, T., 2012. Graduated response in France: The clash of copyright and the Internet. *Journal of Information Policy*, 2, pp. 107-127.

Moiny, J.-F., 2011. Are Internet protocol addresses personal data? The fight against online copyright infringement. *Computer Law & Security Review*, (27) 4, pp. 348-361.

Moreno, R., 2012. The Three Strikes and You are Out Challenge, *EJLT*, 3 (1).

Oguer, F., 2011. The Hadopi Act vs. the Global License as a Psychological Game. *Review of European Studies*, 3(1), pp. 79.84.

Pallante, M., 2012. Understanding Copyright – A Life Skill. WIPO Magazine, No. 2, April 2012.

Phillips, J., 2009. 'Three Strikes' ... and then?. *Journal of Intellectual Property Law & Practice*, 4(8), p. 521.

Piret, R., 1958. La responsabilité du fait des choses inanimées en droit français et en droit belge. *Les Cahiers de droit*, 3(6), pp. 152-170.

Rayna, T. and Barbier, L., 2010. Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations. *International Journal of Foresight and Innovation Policy*, 6 (4), pp. 294-314.

Reitz, J.C., 1998. How to do comparative law?. *American Journal of Comparative Law*, 46, pp. 617-636.

Robert, J.-H., 2009. Commentaire de la loi n° 2009-1311du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet. Droit pénal n° 12, déc 2009.

Schellekens, M., 2011. Digital watermarks as legal evidence. *Digital Evidence and Electronic Signature Law Review*, 8(1), pp. 152-164.

Schmitz, S. and Ries, T., 2012. Three songs and you are disconnected from cyberspace? Not in Germany where the industry may 'turn piracy into profit'. *EJLT*, 3 (1).

Stamatoudi, I., Towards an updated EU Enforcement Directive? Selected topics and problems. Paper presented at the 4th International Conference on Information Law, Thessaloniki, May 20 and 21, 2011. Available from: <http://conferences.ionio.gr/icil2011/>.

Stevens, L. and Koops, E.J., 2009. Opzet op de harde schijf: criteria voor opzettelijk bezit van digitale kinderporno. *Delikt en Delinkwent*, 39(7), pp. 669-696.

Ströwel, A., 2009. Internet Piracy as a Wake-up Call for Copyright Law Makers – Is the "Graduated Response" a Good Reply?. *W.I.P.O.J.*, 1, pp. 75-86.

Szafran, E. and Klaeser, T., 2010. Belgium: legislation - copyright - proposed bills - internet regulation. *Computer and Telecommunications Law Review*, 16(5), pp. 111-113.

Tang, G.H., 2010. Is administrative enforcement the answer? Copyright protection in the digital era. *The computer law and security report*, 26(4), pp. 406-417.

Tamura, Y., 2009, Rethinking Copyright Institution for the Digital Age. *W.I.P.O.J.*, 1, pp. 63-74.

Thoumyre, L., 1999. L'échange des consentements dans le commerce électronique. *Lex Electronica: Revue électronique du centre de recherche en droit public*, 5(1).

Trotter Hardy, I. 2002. Criminal copyright infringement. *William & Mary Bill of Rights Journal*, 11(1), pp. 305-341.

Van Audenhove, L., Morganti, L. & Meyer, T., 2009. Graduated response in Europe. An analysis of initiatives and stakeholder discourses. Paper presented at: Telecommunications Policy Research Conference (TPRC), The 37th research conference on communication, information, and Internet policy, Arlington, 25-27 September 2009.

Van der Sloot, B. 2011. Three strikes you're out: de bescherming van auteursrecht op het internet. *AMI (tijdschrift voor auteurs-, media & informatierecht)*, 35 (3), pp. 84-95.

Werkers, E., 2011. Intermediaries in the eye of the copyright storm - A comparative analysis of the three strike approach within the European Union. Available from: <http://ssrn.com/abstract=1920271>.

Wing Wan, C., 2010. Three strikes law: a least cost solution to rampant online piracy. *Journal of Intellectual Property Law & Practice*, 5(4), pp. 232-244.

Winn, J. K. and Jondet, N., 2009. A 'New Deal' for End Users? Lessons from a French Innovation in the Regulation of Interoperability. *William and Mary Law Review*, 51 (2), pp. 547-576.

Wong, S., Altman, E. and Rojas-Mora, J., 2011. *Computer networks*, 55 (2), pp.470-479.

Znaty, D., 2012. Rapport d'expertise Hadopi. Available from: <http://www.hadopi.fr/actualites/rapports/publication-du-rapport-dexpertise-de-david-znaty>.

**c. Internet references**

Actualités, article JCP G 2012, doctr. 591. Available from: [http://www.lexisnexis.fr/pdf/2012/Etude\\_Hadopi.pdf](http://www.lexisnexis.fr/pdf/2012/Etude_Hadopi.pdf)

Agrast, M., Botero, J., and Ponce, A., WJP Rule of Law Index 2011. Washington, D.C.: The World Justice Project. Available from: [http://dosyalar.hurriyet.com.tr/rule\\_of\\_law\\_index.pdf](http://dosyalar.hurriyet.com.tr/rule_of_law_index.pdf).

Anderson, N., 2009. French anti-P2P law toughest in the world. Available from: <http://arstechnica.com/tech-policy/2009/03/french-anti-p2p-law-toughest-in-the-world/>.

Anon., 2012. Hadopi et TMG : un expert judiciaire nuance l'expertise. Available from: <http://www.numerama.com/magazine/21661-hadopi-et-tmg-un-expert-judiciaire-nuance-l-expertise.html>.

Anon., 2012. Hadopi : le président de la Sacem souhaite un radar automatique. Available from: <http://www.zdnet.fr/actualites/hadopi-le-president-de-la-sacem-souhaite-un-radar-automatique-39773397.htm>.

Anon., 2012. SABAM Charged With Copyright Fraud, Embezzlement, Money Laundering. Available from: <http://torrentfreak.com/sabam-charged-with-copyright-fraud-embezzlement-money-laundering-120218/>.

Anon., 2012, Secure Operating System. Available from: <http://www.spamlaws.com/choosing-secure-operating-system.html>.

Anon., 2012. Un Belge condamné à 65 651 euros de dommages-intérêts pour piratage. Available from: <http://www.numerama.com/magazine/21895-un-belge-condamne-a-65-651-euros-de-dommages-interets-pour-piratage.html>.

Anon., 2012. Zut Alors! French Government Deny BitTorrent Piracy Allegations. Available from: <http://torrentfreak.com/zut-alors-french-government-denies-bittorrent-piracy-allegations->

120101/?utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed:+Torrentfreak+(Torrentfreak)&utm\_content=Google+Reader.

Anon., 2011. Comment se protéger des usurpations d'identité ?. Available from: [http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/comment-se-proteger-des-usurpations-d-identite-06-10-2011-1381542\\_56.php](http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/comment-se-proteger-des-usurpations-d-identite-06-10-2011-1381542_56.php).

Anon., 2011. French Hadopi "3 Strikes" Anti-Piracy Company Hacked. Available from: <http://torrentfreak.com/french-hadopi-3-strikes-anti-piracy-company-hacked-110514/>.

Anon., 2011. HADOPI: Point d'étape. Available from: <http://www.laquadrature.net/en/node/4156>.

Anon., 2011. IP addresses alone cannot be used to identify individuals, US judge says. Available from: <http://www.out-law.com/page-11901>.

Anon., 2011. Private Copying: French Parliament Downsizes The Public's Rights. Available from: <http://www.laquadrature.net/fr/node/4883>.

Anon., 2011. Retired, Computerless Woman Fined For Pirating 'Hooligan' Movie. Available from: <http://torrentfreak.com/retired-computerless-woman-fined-for-pirating-hooligan-movie-111222/>.

Anon., 2011. Téléchargements sur internet : pas de filtrage généralisé. Available from: <http://www.test-achats.be/internet/telechargements-sur-internet-pas-de-filtrage-generalise-s743293.htm>.

Anon., 2010. Film Director Helps Finance Busted File-Sharer's Legal Battle. Available from: <http://torrentfreak.com/film-director-helps-finance-busted-file-sharers-legal-battle-100914/>.

Anon., 2010. Hadopi? Not Even Scared!. Available from: <http://www.laquadrature.net/en/hadopi-not-even-scared>.

Anon., 2010. Pas de redevance pour le téléchargement illégal. Available from: <http://www.crioc.be/FR/doc/communiques/all/document-4687.html>.

Anon., 2009. HADOPI - Alبانel passe son oral : 0/20. Available from: <http://www.laquadrature.net/en/hadopi-albanel-passe-son-oral-020>.

Anon, 2008. Pourquoi la procédure doit-elle être contradictoire?. Available from: <http://www.vie-publique.fr/découverte-institutions/justice/definition/garanties/pourquoi-procedure-doit-elle-etre-contradictoire.html>.

Anon., 2008. Qu'est-ce que la présomption d'innocence?. Available from: <http://www.vie-publique.fr/découverte-institutions/justice/definition/garanties/qu'est-ce-que-présomption-innocence.html>

Anon., 2005. Législation du peer to peer: du soutien. Available from: <http://www.génération-int.com/legalisation-du-peer-to-peer-du-soutien-actualite-8343.html>.

Anon., Responsabilité civile, pénale et administrative. Available from: [http://www.esen.education.fr/fileadmin/user\\_upload/Modules/Ressources/Outils/mot\\_juriste/6-01\\_responsabilite\\_civile.pdf](http://www.esen.education.fr/fileadmin/user_upload/Modules/Ressources/Outils/mot_juriste/6-01_responsabilite_civile.pdf).

Anon., Telecoms package: strengthening consumer rights and competition. Available from: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20091112BKG64357&language=EN>.

Auffray, C., 2010. Hadopi : Trident Media Guard sélectionné pour surveiller le P2P. Available from: <http://www.zdnet.fr/actualites/hadopi-trident-media-guard-selectionné-pour-surveiller-le-p2p-39712516.htm>

Aurélie Filippetti, Minister of Culture, in: Anon., 2012. French culture minister brands controversial copyright anti-infringement rule a waste of money. Available from: <http://www.out->

[law.com/en/articles/2012/august/french-culture-minister-brands-controversial-copyright-anti-infringement-rule-a-waste-of-money/](http://law.com/en/articles/2012/august/french-culture-minister-brands-controversial-copyright-anti-infringement-rule-a-waste-of-money/).

Autorité de régulation des communications électroniques et des postes, 2012. Observatoire trimestriel des marchés de DETAIL des communications électroniques (services fixes haut et très haut débit) en France - 1er trimestre 2012. Available from: <http://arcep.fr/index.php?id=10295&L=-9.9>.

Autorità per le garanzie nelle comunicazioni (Italian Communications Authority), 2010. Il Diritto D'autore Sulle Reti Di Comunicazione Elettronica. Available from: <http://www.agcom.it/default.aspx?DocID=3790>.

BBC website, 2012. Megaupload file-sharing site shut down. Available from: <http://www.bbc.co.uk/news/technology-16642369>.

Bailly, P., 2012. Hadopi : 4% du budget des "AAI" pour la réponse graduée et la valorisation des offres. Available from: <http://blog.lefigaro.fr/philippe-bailly/2012/04/hadopi-4-du-budget-des-aaи-pour-la-reponse-graduée-et-la-valorisation-des-offres.html>.

Bailly, P., 2012. Hadopi : contrefaçon ou juste proportion ?. Available from: <http://blog.lefigaro.fr/philippe-bailly/2012/02/hadopi-contrefacon-ou-juste-proportion.html>.

Baird, S. A., 2009. Contentious Issues: Copyright Reform in the Age of Digital Technologies. Available from: <http://ssrn.com/abstract=1520161>.

Belgian Federal Police website, FCCU. Available from: [http://www.polfed-fedpol.be/org/org\\_dgi\\_FCCU\\_RCCU\\_fr.php#](http://www.polfed-fedpol.be/org/org_dgi_FCCU_RCCU_fr.php#).

Bem, A., 2010. L'identification d'une personne sur l'internet par son adresse IP. Available from: <http://www.legavox.fr/blog/maitre-anthony-bem/identification-personne-internet-adresse-3008.htm>.

Bem, A., 2009. Loi Hadopi II : La protection pénale de la propriété littéraire et artistique sur Internet. Available from: <http://www.legavox.fr/blog/maitre-anthony-bem/hadopi-protection-penale-propriete-litteraire-1177.htm>.

Benabou, V.-L., 2011. Hasty legislative amendment to correct French private copying levy. Available from: <http://kluwercopyrightblog.com/2011/12/01/hasty-legislative-amendment-to-correct-french-private-copying-levy/>.

Benabou, V.-L., 2009. Glose de la loi favorisant la création et la protection de la creation sur Internet (dite HADOPI). Available from: <http://www.juriscom.net/documents/pla20090807.pdf>.

Berenboom, A., 2009. Contrefaçon sur l'internet - la réparation du dommage. Available from: <http://www.droit-technologie.org/dossier-182/contrefacon-sur-l-internet-la-reparation-du-dommage.html>.

Berne, X., 2012. Hadopi : la SACEM relance l'idée d'une approche radar. Available from: <http://www.pcinpect.com/news/71929-sacem-radar-approche-amende-hadopi.htm>.

Berretta, E., 2010. Comment la Sacem se goinfre.... Available from: <http://www.lepoint.fr/actualites-medias/2010-04-10/comment-la-sacem-se-goinfre/1253/0/442942>.

Bluetouff's blog, 2012. HADOPI : son pire échec. Available from: <http://bluetouff.com/2012/02/20/hadopi-son-pire-echec/>.

Brochure of the Federal Computer Crime Unit. Available from: <http://www.polfed-fedpol.be/pub/brochures/pdf/FCCU-FR.pdf>.

Champeau, G., 2012. Hadopi: petit guide juridique pour les avocats. Available from: <http://www.numerama.com/magazine/21638-hadopi-petit-guide-juridique-pour-les-avocats.html>.

Champeau, G., 2012. Hadopi transmet ses premiers dossiers aux tribunaux! Available from: <http://www.numerama.com/magazine/21634-hadopi-transmet-ses-premiers-dossiers-aux-tribunaux.html>.

Champeau, G., 2011. Devant l'Hadopi, le silence est la meilleure des défenses. Available from: <http://www.numerama.com/magazine/20964-devant-l-hadopi-le-silence-est-la-meilleure-des-defenses.html>.

Champeau, G., 2011. L'Hadopi refuse de transmettre leur PV aux abonnés avertis !. Available from: <http://www.numerama.com/magazine/18078-l-hadopi-refuse-de-transmettre-leur-pv-aux-abonnes-avertis.html>.

Champeau, G., 2011. Hadopi : les abonnés de la province sont-ils moins bien traités ?. Available from: <http://www.numerama.com/magazine/20823-hadopi-les-abonnes-de-la-province-sont-ils-moins-bien-traites.html>.

Champeau, G., 2011. La loi copie privée pourrait changer la définition de la copie privée. Available from: <http://www.numerama.com/magazine/20686-la-loi-copie-privee-pourrait-changer-la-definition-de-la-copie-privee.html>.

Champeau, G., 2011. Logo contrefait de l'Hadopi : un conflit enfin résolu. Available from: <http://www.numerama.com/magazine/18799-logo-contrefait-de-l-hadopi-un-conflit-enfin-resolu.html>.

Champeau, G., 2010. Hadopi : des téléchargements seront initiés pour contrer Seedfuck. Available from: <http://www.numerama.com/magazine/16060-hadopi-des-telechargements-seront-inities-pour-contrer-seedfuck.html>.

Champeau, G., 2009. Lawrence Lessig : couper l'accès Internet, "une idée terrible". Available from: <http://www.numerama.com/magazine/14548-lawrence-lessig-couper-l-acces-internet-une-idee-terrible.html>.

Chéron, A., 2012. 10 clés pour assurer sa défense dans une procédure HADOPI. Available from: <http://www.atlantico.fr/decryptage/10-cles-pour-assurer-defense-dans-procedure-hadopi-telechargement-illegal-antoine-cheron-297234.html?page=0,1>.

Chicheportiche, O., 2010. Hadopi: Seedfuck va inonder les réseaux P2P de fausses adresses IP. Available from: <http://www.zdnet.fr/actualites/Hadopi-seedfuck-va-inonder-les-reseaux-p2p-de-fausses-adresses-ip-39750977.htm>.

Clayton, R., 2012. Online traceability: Who did that?. (Consumer Focus version) Available from: <http://www.consumerfocus.org.uk/publications/online-traceability-who-did-that-technical-expert-report-on-collecting-robust-evidence-of-copyright-infringement-through-peer-to-peer-filesharing>.

Colchester, M. 2010. All Eyes on France as Officials Enforce New Antipiracy Law. Wall Street Journal (10/27/10). Available from: <http://online.wsj.com/article/SB10001424052702303550904575562130775993568.html>.

Colin, C., 2011. Etude de faisabilité de systèmes de licences pour les échanges d'œuvres sur Internet. Available from: <http://www.crids.eu/recherche/publications/textes/synthese-sacd-scam.pdf>.

Conley, C. and Kelson, A., 2005. Parental Liability for Copyright Infringement by Minor Children. Available from: <https://www.eff.org/node/58001>.

Conley, C. and others, 2010. Memo re: Parental Liability for Copyright Infringement by Minor Children. Available from: <https://www.eff.org/document/parental-liability-copyright-infringement-minor-children>.

Crijns, K., 2011. German collecting society GEMA faces fraud charges. Available from: <http://www.futureofcopyright.com/home/blog-post/2011/10/03/german-collecting-society-gema-faces-fraud-charges.html>.

CRIOC, 2010. Les priorités des organisations de consommateurs pour la prochaine législature. Available from: <http://www.crioc.be/files/fr/4928fr.pdf>.

Danaher, B. et al., 2012. The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France. [Online] Available from: <http://ssrn.com/abstract=1989240> [Accessed 21 February 2012].

Darmon, E., Pénard, T., Dejean, S. and Suire, R., 2012. Comment l'Hadopi est-elle perçue par les internautes français?. Available from: <http://www.marsouin.org/spip.php?article498>.

Delport, D., 2011. Lawrence Lessig at # EG8: The future was not invited. Available from: <http://en.wikinoticia.com/Technology/general-technology/85823-lawrence-lessig-at-eg8-the-future-was-not-invited>.

Denoël, T. 2010. "Internet – Votre avis nous intéresse!". Available from: <http://www.levif.be/info/magazine/articles/printarticle-2454958.htm>.

De Marco, E., 2009. Analyse du nouveau mécanisme de prévention de la contrefaçon à la lumière des droits et libertés fondamentaux. Available from: <http://www.juriscom.net/documents/pi20090604.pdf>.

Dimeglio, A., 2009. Loi Hadopi 1 + 2 = 3 ?. Available from: <http://www.droit-technologie.org/actuality-1282/loi-hadopi-1-2-3.html>.

Dorne, M., 2012. La méthode de collecte des adresses IP par TMG est robuste. Available from: <http://korben.info/methode-tmg.html>.

Dumont, M. 2012. Le téléchargement illégal: punissable. Available from: [http://www.lavenir.net/article/detail.aspx?articleid=DMF20120121\\_00108281](http://www.lavenir.net/article/detail.aspx?articleid=DMF20120121_00108281).

EDRI, 2012. Finland: Open WiFi Owners Are Not Liable For Copyright Infringement. Available from: <http://www.edri.org/edrigram/number10.10/open-wifi-not-liable-copyright-infringement>.

EDRi-Gram - Number 9.5, 9 March 2011. Available from: <http://www.edri.org/edrigram/number9.5/belgium-four-strikes-law-returns>.

EDRi-Gram. 2011. Irish "Three Strikes" System Investigated By Data Protection Commissioner. Available from: <http://www.edri.org/edrigram/number9.12/irish-dpa-investigates-three-strikes>.

Edwards, L., 2011. Role and responsibility of the internet intermediaries in the field of copyright and related rights. Available from: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=170839](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170839).

Edwards, L., 2009. Should ISPs be Compelled to Become Copyright Cops?. Available from: <http://www.icyte.com/system/snapshots/fs1/3/b/9/6/3b961a19a7bb43d198b34b194af3f1460ac1fbf1/index.html>.

Ernst & Young, 2011. Intellectual property in a digital world. Available from: [http://www.forum-avignon.org/sites/default/files/editeur/Secured\\_IP\\_report\\_GB.pdf](http://www.forum-avignon.org/sites/default/files/editeur/Secured_IP_report_GB.pdf), pp. 6 and 22.

European Digital Rights, 2010. First Warning Letters Sent By French ISPs Under The Three Strikes System. EDRi-Gram - Number 8.19, 6 October 2010. Available from: <http://www.edri.org/edrigram/number8.19/first-email-three-strikes-france>.

European Publishers Council, 2011. European Commission Recognises Importance of Copyright for Content Creators in Key New Proposals. Available from: <http://www.epceurope.org/presscentre/archive/european-commission-recognises-importance-of-copyright-for-content-creators-in-key-new-proposals.shtml>.

Fagnart, J.-L. and Delaunoy, E., La responsabilité du fait d'autrui: introduction. Available from: [http://www.droitbelge.be/fiches\\_detail.asp?idcat=36&id=317](http://www.droitbelge.be/fiches_detail.asp?idcat=36&id=317).

Féral-Shuhl, Law firm, 2010. Hadopi sanctionne les connexions non sécurisées. Available from: [http://www.feral-avocats.com/fr/nos-publications/articles\\_de\\_presse/557/619.html](http://www.feral-avocats.com/fr/nos-publications/articles_de_presse/557/619.html).

Garay, J., 2010. Hadopi: SeedFuck sans risque pour les internautes innocents. Available from: <http://www.generation-nt.com/hadopi-seedfuck-adresse-ip-actualite-1090211.html>.

Gérardin, B., 2005. Peer-to-peer: le téléchargement sur la sellette. Available from: [http://www.droitbelge.be/news\\_detail.asp?id=220](http://www.droitbelge.be/news_detail.asp?id=220).

Gévaudan, C., 2011. L'Hadopi a confiance en sa « fiabilité ». Available from: <http://www.ecrans.fr/L-Hadopi-a-confiance-en-sa,13785.html>.

Gévaudan, C., 2011. Hadopi en mode passoire. Available from: <http://www.ecrans.fr/Hadopi-en-mode-passoire,12741.html>.

Gévaudan, C. 2011. La rue de Valois a la Culture du piratage. Available from: <http://www.ecrans.fr/La-rue-de-Valois-a-la-Culture-du,13775.html>.

Gibbs, B. L., 2011. Cited in Anderson, N., 2011. P2P lawyer: IP address not enough, let me search all PCs in the house. Available from: <http://arstechnica.com/tech-policy/2011/09/p2p-lawyer-ip-address-not-enough-let-me-search-all-pcs-in-the-house/>.

Girardeau, A., 2009. L'adresse IP ne suffit pas.... Available from: <http://www.ecrans.fr/L-adresse-IP-ne-suffit-pas,6608.html>.

Hadda, S., Le criminel ne tient plus le civil en l'état ou la fin d'un adage. Available from: <http://legavox.fr/blog/maitre-haddad-sabine/criminel-tient-plus-civil-etat-5656.htm>.

Hadopi Mayonnaise. 2010. HADOPI: non merci. Repression does not lead to creation. Available from: [http://nurpa.be/resources/downloads/NURPA\\_hadopi-non-merci\\_en.pdf](http://nurpa.be/resources/downloads/NURPA_hadopi-non-merci_en.pdf).

Hadopi Newsletter No. 3, July 2012. Available from: [http://www.hadopi.fr/sites/default/files/page/pdf/Newsletter\\_juillet\\_2012.pdf](http://www.hadopi.fr/sites/default/files/page/pdf/Newsletter_juillet_2012.pdf).

Hadopi website. Why secure my internet connection (in French). Available from: <http://www.hadopi.fr/pourquoi-securiser-ma-connexion-internet>.

Haski, F., 2010. France's derisory online piracy strategy. Available from: <http://www.guardian.co.uk/commentisfree/2010/dec/31/french-online-piracy-hadopi>.

Heirbaut, D. and Gerkens, J.-F., 2010. In the shadow of France: Legal acculturation and legal transplants in the Southern Netherlands/Belgium. Washington: International Academy of Comparative Law, 1(1). Available from: <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/29/28>.

Herbots, K. 2012. Sabam wil geld voor voorleesuurtje in bibliotheek Available from: <http://www.demorgen.be/dm/nl/989/Binnenland/article/detail/1407794/2012/03/13/Sabam-wil-geld-voor-voorleesuurtje-in-bibliotheek.dhtml>.

Horten, M., 2011. Spanish police raid copyright society in fraud probe. Available from: <http://www.ipreality.com/index.php/copyright-business/664-spanish-police-raid-copyright-society-in-fraud-probe>.

Hunt, G. *Modify Header*. Available from: <https://addons.mozilla.org/en-US/firefox/addon/modify-headers/>.

Jacobs, A. and Masset, A., 2010. Les enjeux de la procédure pénale pour les années à venir. Leçons inaugurales du 19 mars 2010. Available from: [http://www.droit.ulg.ac.be/cms/c\\_281129/lecons-inaugurales-du-19-mars-2010](http://www.droit.ulg.ac.be/cms/c_281129/lecons-inaugurales-du-19-mars-2010).

Jasserand, C., 2012. HADOPI hits again the headlines. Available from: <http://kluwercopyrightblog.com/2012/03/20/hadopi-hits-once-again-the-headlines/>.

Jean Berbinau, as cited in: Rees, M., 2012. Un membre de la Hadopi rêve d'un consensus sur l'intérêt du DPI. Available from: [http://www.pcimpact.com/news/72919-un-membre-hadopi-reve-dun-consensus-sur-interet-dpi.htm?utm\\_source=PCi\\_News\\_letter&utm\\_medium=news&utm\\_campaign=pcimpact](http://www.pcimpact.com/news/72919-un-membre-hadopi-reve-dun-consensus-sur-interet-dpi.htm?utm_source=PCi_News_letter&utm_medium=news&utm_campaign=pcimpact).

Jondet, N., 2010. The French Copyright Authority (Hadopi): The Graduated Response and the Disconnection of Illegal File-Sharers. Available from: <http://ssrn.com/abstract=1664509>.

Kaesmacher, D. and Duez, L., 2005. Modification de la loi belge sur le droit d'auteur. Available from: [http://www.droitbelge.be/fiches\\_detail.asp?idcat=20&id=184](http://www.droitbelge.be/fiches_detail.asp?idcat=20&id=184).

Kovacs, E., 2011. Hadopi and TGM Relink Online After Data Breach. Available from: <http://news.softpedia.com/news/Hadopi-and-TGM-Relink-Online-After-Data-Breach-229900.shtml>.

KULeuven, Belgian Law in English - gids voor juridische opzoeken. Available from: <http://www.law.kuleuven.be/rechtgenoot/> and <http://www.law.kuleuven.be/rechtgenoot/?language=nl&action=home&afdeling=435>.

Laurelli, O., 2010. De la négligence caractérisée... comment avons nous pu en arriver là?. Available from: <http://bluetouff.com/2010/10/12/negligence-caracterisee-comment-avons-nous-pu-en-arriver-la/>.

Laurelli, O., 2010. Réaction à l'interview de Michel Zumkeller: Seedfuck, c'est juste l'apéritif.... Available from: <http://www.paperblog.fr/3162874/reaction-a-l-interview-de-michel-zumkeller-seedfuck-c-est-juste-l-aperitif/>.

Laurent, P., 2011. A Belgian solution to peer-to-peer: Scylla or Charybdis? The question is still pending.... Available from: <http://kluwercopyrightblog.com/2011/04/10/a-belgian-solution-to-peer-to-peer-scylla-or-charybdis-the-question-is-still-pending/>.

Lemieux, T., 2011, Störerhaftung et négligence caractérisée : la responsabilité de l'abonné Internet liée à des actes de contrefaçon dans l'arrêt du 12 mai 2010 du BGH. Available from: <http://m2bde.u-paris10.fr/content/st%C3%B6rerhaftung-et-n%C3%A9gligence-caract%C3%A9ris%C3%A9e-la-responsabilit%C3%A9-de-labonn%C3%A9-internet-li%C3%A9-%C3%A9-%C3%A0-des-ac>.

Lessig, L., 2011. Open address of the eG8 Forum Paris-France. Available from: <http://www.youtube.com/watch?v=UsJiR-ClkAc>.

Maître Eolas, 2011. HADOPI: l'opération Usine à gaz continue. Available from: <http://www.maitre-eolas.fr/post/2010/06/29/HADOPI-%3A-l-op%C3%A9ration-Usine-%C3%A0-gaz-continue>.

Maître Eolas, 2009. La décision HADOPI 2 expliquée à mon stagiaire. Available from: <http://www.maitre-eolas.fr/post/2009/10/22/La-d%C3%A9cision-HADOPI-2>.

Manenti, B., 2012. Aurélie Filippetti : "Je vais réduire les crédits de l'Hadopi". Available from: <http://obsession.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html>.

Mariez, J.-S., 2010. HADOPI... 3 small suspension points.... Available from: <http://www.juriscom.net/documents/pla20110315.pdf>.

Masnick, M., 2012. Court Says Negligence Claim For Allowing Downloading On Your WiFi Is 'Untenable'. Available from: <http://www.techdirt.com/articles/20120711/02152919658/court-says-negligence-claim-allowing-downloading-your-wifi-is-untenable.shtml>.

Mazeaud, H., 1950. Le Code civil français et son influence en Europe. Revue internationale de droit comparé, 2(4), pp. 757-765. Available from: [http://www.persee.fr/web/revues/home/prescript/article/ridc\\_0035-3337\\_1950\\_num\\_2\\_4\\_6015](http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1950_num_2_4_6015).

McSherry, C., 2011. Open WiFi and Liability for Copyright Infringement: Setting the Record Straight. Available from: <https://www.eff.org/deeplinks/2011/08/open-wifi-and-copyright-liability-setting-record>.

Meyer, T., van Audenhove, L. and Morganti, L., 2009. Graduated Response Initiatives in Europe: An Analysis of Initiatives and Stakeholder Discourses. Available from: <http://ssrn.com/abstract=1996030>.

Mireille Imbert Quareta, quoted in: Rees, M., 2012. La Hadopi a transmis ses premiers dossiers au Parquet. Available from: <http://www.pcimpact.com/news/68918-hadopi-parquet-repressif-procureur-pedagogie.htm>.

Paquette, E., 2012. Hadopi laisse une ardoise de 2,5 millions d'euros aux télécoms. Available from: <http://blogs.lexpress.fr/tic-et-net/2012/02/14/hadopi-laisse-une-ardoise-de-25-millions-deuros-aux-telecoms/>.

Peters, Y., 2010. French Anti-Piracy Organisation Hadopi Uses Pirated Font In Own Logo. Available from: <http://fontfeed.com/archives/french-anti-piracy-organisation-uses-pirated-font-in-ownlogo/>

Pfanner, E., 2012. Copyright Cheats Face the Music in France. Available from: <http://www.nytimes.com/2012/02/20/technology/20iht-piracy20.html?pagewanted=all>.

Pfanner, E., 2010. Film Director Comes to the Defense of a Convicted Internet Pirate. Available from: <http://www.nytimes.com/2010/09/22/technology/22iht-godard.html>.

Phillips, J., 2010. Music and IP conference report: 4. Available from: <http://ipkitten.blogspot.nl/2010/12/music-and-ip-conference-report-4.html>.

Piatek, M. et al. 2008. Challenges and directions for monitoring P2P file sharing networks-or: why my printer received a DMCA takedown notice. Available from: [http://dmca.cs.washington.edu/uwcse\\_dmca\\_tr.pdf](http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf).

Pierre, P., 2003. La place de la responsabilité objective: Notion et rôle de la faute en droit français. Available from: [http://grerca.univ-rennes1.fr/digitalAssets/268/268674\\_ppierre.pdf](http://grerca.univ-rennes1.fr/digitalAssets/268/268674_ppierre.pdf).

Pinard, F., 2011. Le contrôle de la connexion Internet par l'utilisateur. La légitimité des atteintes portées par les lois HADOPI et LOPPSI 2. Available from: <http://www.juriscom.net/documents/libpubl20120314.pdf>.

Porlon, S., 2010. HADOPI : risques juridiques liés au téléchargement illégal. Available from: <http://porlonsadry.wordpress.com/2010/10/12/hadopi-risques-juridiques-lies-au-telechargement-illegal/>.

Privacy Commission, Opinion No. 44 / 2001 of November 12, 2001. Available from: [http://www.privacycommission.be/sites/privacycommission/files/documents/avis\\_44\\_2001.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/avis_44_2001.pdf).

Ramelet, A., 2011. Hadopi: l'indemnisation des ayants-droits, une méconnaissance grave des principes fondamentaux du droit européen. Available from: <http://adrien.ramelet.over-blog.com/article-hadopi-l-indemnisation-des-ayants-droits-une-meconnaissance-grave-des-principes-fondamentaux-du-dr-79067291.html>.

Rapport MAPI , 1996. La Pornographie Infantile sur Internet. Available from: <http://www.fundp.ac.be/pdf/publications/39071.pdf>.

Rédaction de Net-iris, 2012. Favoriser la diffusion et la protection de la création sur Internet - les lois HADOPI. Available: <http://www.net-iris.fr/veille-juridique/dossier/19972/favoriser-la-diffusion-et-la-protection-de-la-creation-sur-internet-les-lois-hadopi.php>.

Rees, M., 2012. Hadopi: le flou perdure pour les abonnés en province. Available from: <http://www.pcinpact.com/news/71374-hadopi-abonnes-province-visioconference.htm>.

Rees, M., 2012. L'Hadopi belge est loin d'être morte. Available from: <http://www.pcinpact.com/news/69602-belgique-riposte-graduee-hadopi-miller.htm>.

Rees, M., 2012. Rapport Znaty : la "bourde majeure" de la Hadopi, la colère des ayants droit. Available from: <http://www.pcinpact.com/news/68944-hadopi-rapport-david-znati-bug.htm>.

Rees, M., 2011. L'accès à internet n'est pas un droit fondamental. Available from: <http://www.pcinpact.com/news/66071-hadopi-internet-acces-fondamental-dionis.htm>.

Rees, M., 2010. Un rapport dénonce les coûts tordus des sociétés d'ayants droit. Available from: <http://www.pcinpact.com/news/56327-hadopi-crise-cour-compte-controle.htm>.

Rees, M., 2009. Dossier PC INpact : la loi Hadopi. Available from: <http://www.pcinpact.com/news/53838-hadopi-dossier-pcinpact-loi-riposte-graduee.htm>.

Rees, M., 2008. Riposte graduée : la loi Création et Internet pour les nuls. Available from: <http://www.pcinpact.com/dossier/hadopi-riposte-graduee--/1.htm>.

Reillier, F. La Sacem pour les nuls. Available from: <http://www.fredreillier.com/droits-dauteur/la-sacem-pour-les-nuls/>.

Reporters without borders, 2011. France. Available from: <http://en.rsf.org/france-france-12-03-2012,42071.html>.

Roffin, G., 2002. Notions de responsabilité civile et pénale. Available from: <http://cipglena.free.fr/niveau4/Respons/index.htm>.

Samartzi, V., 2011. On Uploading and Downloading copyrighted works: The potential legality of the users' Interest in engaging in such acts -. The case of the EU and the US paradigm. Available from: [http://conferences.ionio.gr/icil2011/download.php?f=papers/142-samartzi-full\\_text-en-v001.pdf](http://conferences.ionio.gr/icil2011/download.php?f=papers/142-samartzi-full_text-en-v001.pdf).

Squaring the Net, 2009. Yet another adoption of liberty killer “three strikes” law in France. Available from: <http://www.laquadrature.net/en/final-adoption-of-liberty-killer-three-strikes-in-france>.

Tanghe, S., 2010. La crise de l'industrie du disque à l'ère des technologies de l'information et de la communication: émergence d'un nouveau modèle pour l'industrie musicale. Available from: [http://www.erickirsch.be/ei\\_secr/crise\\_disque.pdf](http://www.erickirsch.be/ei_secr/crise_disque.pdf).

Test-Achats/Test-Aankoop, Audition « Droit d'auteur –Internet », Commission FINECO, Sénat 11 mai 2011. Available from: <http://fr.scribd.com/doc/68172265/Telechargement-illegal-et-consommateurs>.

Teterissa, D., 2012. Dutch MPs debate with government on supervision of collecting societies. Available from: <http://www.futureofcopyright.com/home/blog-post/2012/02/28/dutch-mps-debate-with-government-on-supervision-of-collecting-societies.html>.

The Law Society of Scotland. 2008. EU Commission Green Paper Knowledge in the Copyright Economy: The Law Society of Scotland's Response. Available from: [http://www.lawscot.org.uk/media/30119/2877\\_ip%20-knowledge%20in%20the%20copyright%20economy.pdf](http://www.lawscot.org.uk/media/30119/2877_ip%20-knowledge%20in%20the%20copyright%20economy.pdf).

Udo de Haes, A., 2012. Belgische Buma vervolgd voor fraude en omkoping. Available from: <http://webwereld.nl/nieuws/109561/belgische-buma-vervolgd-voor-fraude-en-omkoping.html>

UFC-Que Choisir, 2009. La loi Création et Internet: une mauvaise solution à un faux problème. Available from: <http://www.quechoisir.org/document/loi-creation-et-internet.pdf>.

UNESCO, 2009. World Anti-Piracy Observatory – Belgium. Available from: [http://www.unesco.org/culture/pdf/belgique\\_cp\\_fr](http://www.unesco.org/culture/pdf/belgique_cp_fr).

UNESCO, 2009. World Anti-Piracy Observatory – France. Available from: [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/france\\_cp\\_fr.pdf#page=3](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/france_cp_fr.pdf#page=3).

Van den Bulk, P. and Verbiest, T. 2005. Peer-to-Peer: état des lieux en Belgique. Available from: <http://www.droit-technologie.org/actuality-902/peer-to-peer-etat-des-lieux-en-belgique.html>.

Vandervelde, F. 2009. Illégal, le téléchargement gratuit en Belgique ?. Available from: <http://archives.lesoir.be/?action=nav&gps=695227>.

Werkers, E., 2011. Intermediaries in the eye of the copyright storm - A comparative analysis of the three strike approach within the European Union. Available from: <http://ssrn.com/abstract=1920271>.

Wiggin, Digital Entertainment Survey 2008. Available from: [http://marcbresseel.files.wordpress.com/2008/03/digitalentertainmentsurvey2008\\_summaryreport.pdf](http://marcbresseel.files.wordpress.com/2008/03/digitalentertainmentsurvey2008_summaryreport.pdf).

Zhou, H., 2011. Procedural Concerns with the HADOPI Graduated Response Model. Available from: <http://jolt.law.harvard.edu/digest/copyright/procedural-concerns-with-the-hadopi-graduated-response-model>.

Zimmermann, J. as cited in: Anon., 2011. French downloaders face government grilling. Available from: <http://www.bbc.com/news/technology-14294517>.

## Appendix I: The Hadopi timeline

The following table is a timeline showing chronologically the main events of the French public policy process leading to the creation of the Hadopi (the two laws and the institution).

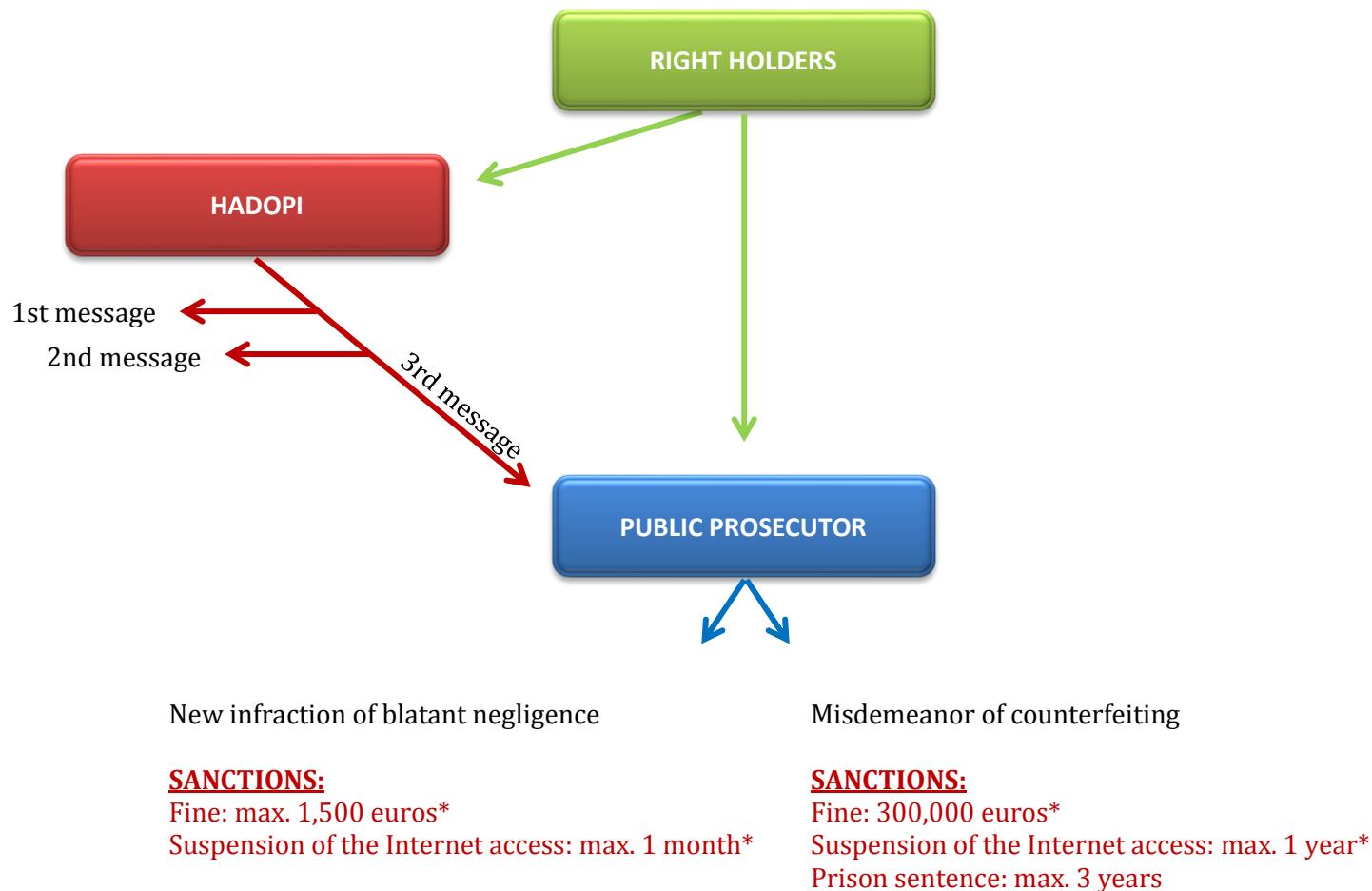
Date	Events
<b>1 August 2006</b>	Foundations of the Hadopi, the law on authors' rights and related rights in the information society known as the DADVSI Act (not explored substantively) is voted. That law appeared to be a failure, what led to the starting point of the graduated riposte, namely the Élysée Agreements.
<b>23 November 2007</b>	Signature of the Élysée Agreements for the Development and Protection of Cultural Works and Programs on the New Network. These are concluded among the Élysée (government), the ISPs and the right holders to combat illegal up-and downloading. This bill was realized under the "mission Olivennes".  For more information, see: <a href="http://www.culture.gouv.fr/culture/actualites/dossiers/internet-creation08/Accords_Fiche_expli(english).pdf">http://www.culture.gouv.fr/culture/actualites/dossiers/internet-creation08/Accords_Fiche_expli(english).pdf</a>
<b>10 April 2008</b>	The European Parliament rejects the graduated riposte.
<b>29 April 2008</b>	Advice (and criticisms) of CNIL (Commission on Information Technology and Liberties) on proposal for government bill promoting the dissemination and protection of creative works on the Internet (Creation & Internet = Hadopi project).
<b>6 May 2008</b>	The Olivennes project is submitted to the Council of State.
<b>28 May 2008</b>	Advice (and criticisms) of ARCEP (French Telecommunications and Posts Regulator) on proposal for government bill.
<b>12 June 2008</b>	Advice of the Council of State on proposal for government bill.
<b>18 June 2008</b>	Submission of the government bill Creation & Internet to the Senate.
<b>24 September 2008</b>	The European Parliament adopts the amendment 138, now 46 of the Telecoms Package (known as "Guy Bono") providing for that "[...] no restriction may be imposed on the rights and freedoms of end-users, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, without a prior ruling by the judicial authorities [...]".
<b>30 October 2008</b>	Adoption of Creation & Internet by the Senate (first reading).

<b>27 November 2008</b>	Comments of the European Commission on the Hadopi (project). Fears are expressed mainly for the generalized filtering and the suspension of the Internet connection.
<b>11-12 March 2009</b>	Examination of Creation & Internet by the National Assembly.
<b>30 March - 2 April 2009</b>	Continuation of the examination by the National Assembly.
<b>7-9 April 2009</b>	Examination of Creation & Internet by Joint Commission (Senate + National Assembly).
<b>9 April 2009</b>	Rejection of Creation & Internet by the National Assembly (first reading).
<b>27 April 2009</b>	Passing of the bill in commission.
<b>12 May 2009</b>	Adoption of Creation & Internet by the National Assembly (second reading; 296 votes for and 233 against).
<b>13 May 2009</b>	Adoption of Creation & Internet by the Senate (second reading; 189 votes for and 14 against).
<b>19 May 2009</b>	Appeal to the Constitutional Council on 11 unconstitutionality complaints.
<b>10 June 2009</b>	Rejection (and censorship) of a substantive part of Creation & Internet by the Constitutional Council.
<b>12 June 2009</b>	Promulgation of the accepted articles of the Creation & Internet government bill: Act No. 2009-669 of 12 <sup>th</sup> June 2009 (Hadopi 1).
<b>24 June 2009</b>	Examination of a new government bill (future Hadopi 2) by the Council of Ministers.
<b>1 July 2009</b>	Examination of Hadopi 2 in the Commission for cultural affairs of the Senate.
<b>9 July 2009</b>	Adoption of Hadopi 2 by the Senate.
<b>16 July 2009</b>	Examination of Hadopi 2 in the Commission for cultural affairs of the National Assembly.
<b>21 - 24 July 2009</b>	Examination of Hadopi 2 in public debates by the National Assembly (first reading).
<b>15 September 2009</b>	Adoption of HADOPI 2 by the National Assembly.
<b>17 September 2009</b>	Examination of Hadopi 2 in Joint Commission.
<b>21 September 2009</b>	Final adoption of Hadopi 2 by the Senate.
<b>22 September 2009</b>	Final adoption of Hadopi 2 by the National Assembly.

<b>28 September 2009</b>	Examination of Hadopi 2 before the Constitutional Council.
<b>22 October 2009</b>	Validation of Hadopi 2 by the Constitutional Council.
<b>28 October 2009</b>	Promulgation of the law: Act No. 2009-1211 of 28 <sup>th</sup> October 2009 (Hadopi 2).
<b>6 May 2010</b>	Appeal by the French Data Network (FDN) and by Squaring the net before the Council of State against decree No. 2010-236 (5 <sup>th</sup> March 2010).
<b>15 September 2010</b>	Council of State rejects the appeal of the FDN and Squaring the net against the decree No. 2010-236 (5 <sup>th</sup> March 2010).
<b>1 October 2010</b>	Sending of the first warnings by e-mail.
<b>February 2011</b>	Sending of the second warnings by e-mail, coupled with a registered letter.
<b>February 2012</b>	Hadopi sends the first files to tribunals (public prosecutors).
<b>July 2012</b>	1,090,000 e-mails sent (first recommendation); 99,000 registered letters sent (second recommendation) and 314 identified people for referral to the courts for possible disconnection. From the enactment of Hadopi in 2009, no one has been disconnected from the Internet.

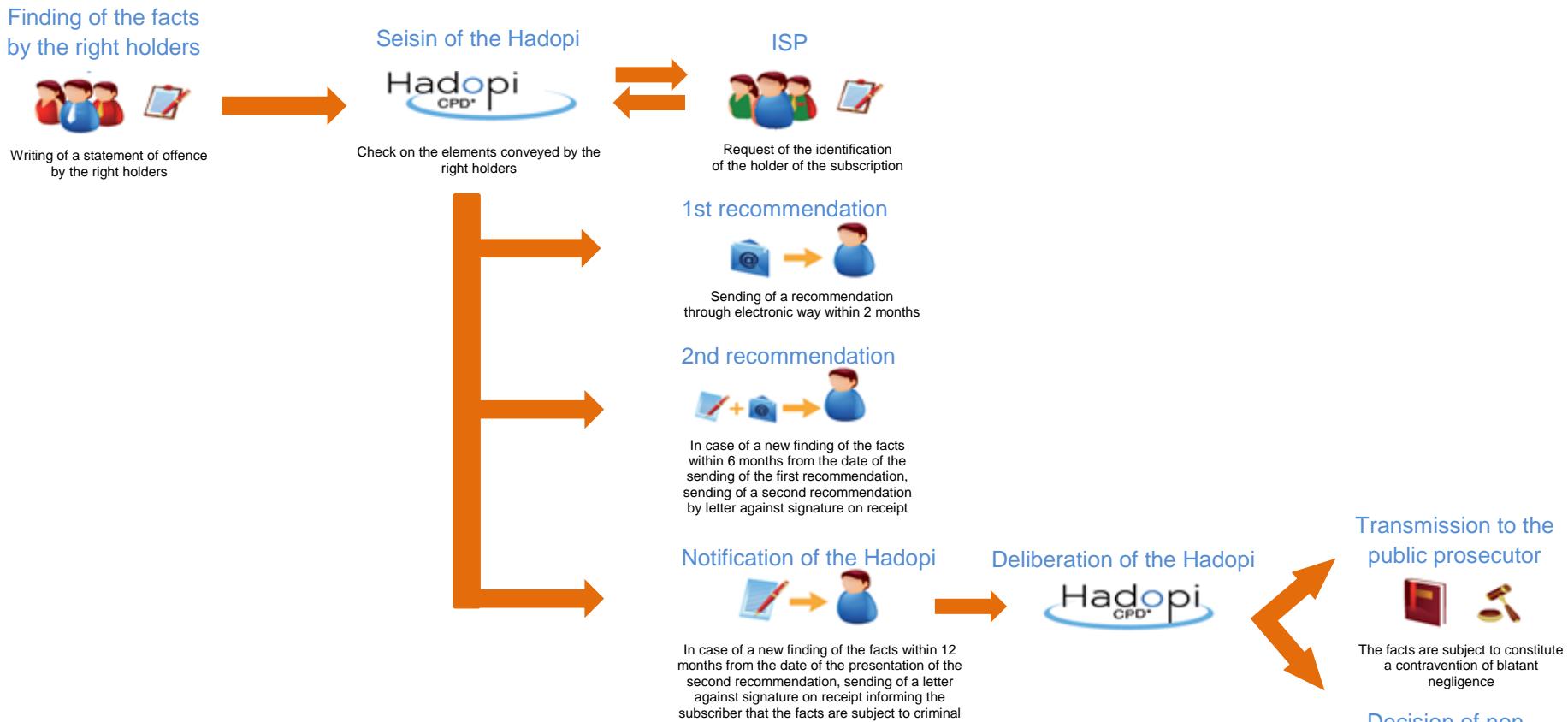
Source: This table is made upon the data deducted from my personal readings, collected on the website of the advocacy group defending the rights and freedoms of citizens on the Internet “Squaring the net” (<http://www.laquadrature.net/en>) and from Meyer, T., van Audenhove, L. and Morganti, L., 2009. Graduated Response Initiatives in Europe: An Analysis of Initiatives and Stakeholder Discourses. Available from: <http://ssrn.com/abstract=1996030>.

## Appendix II: Creation and Internet Act (Hadopi law)



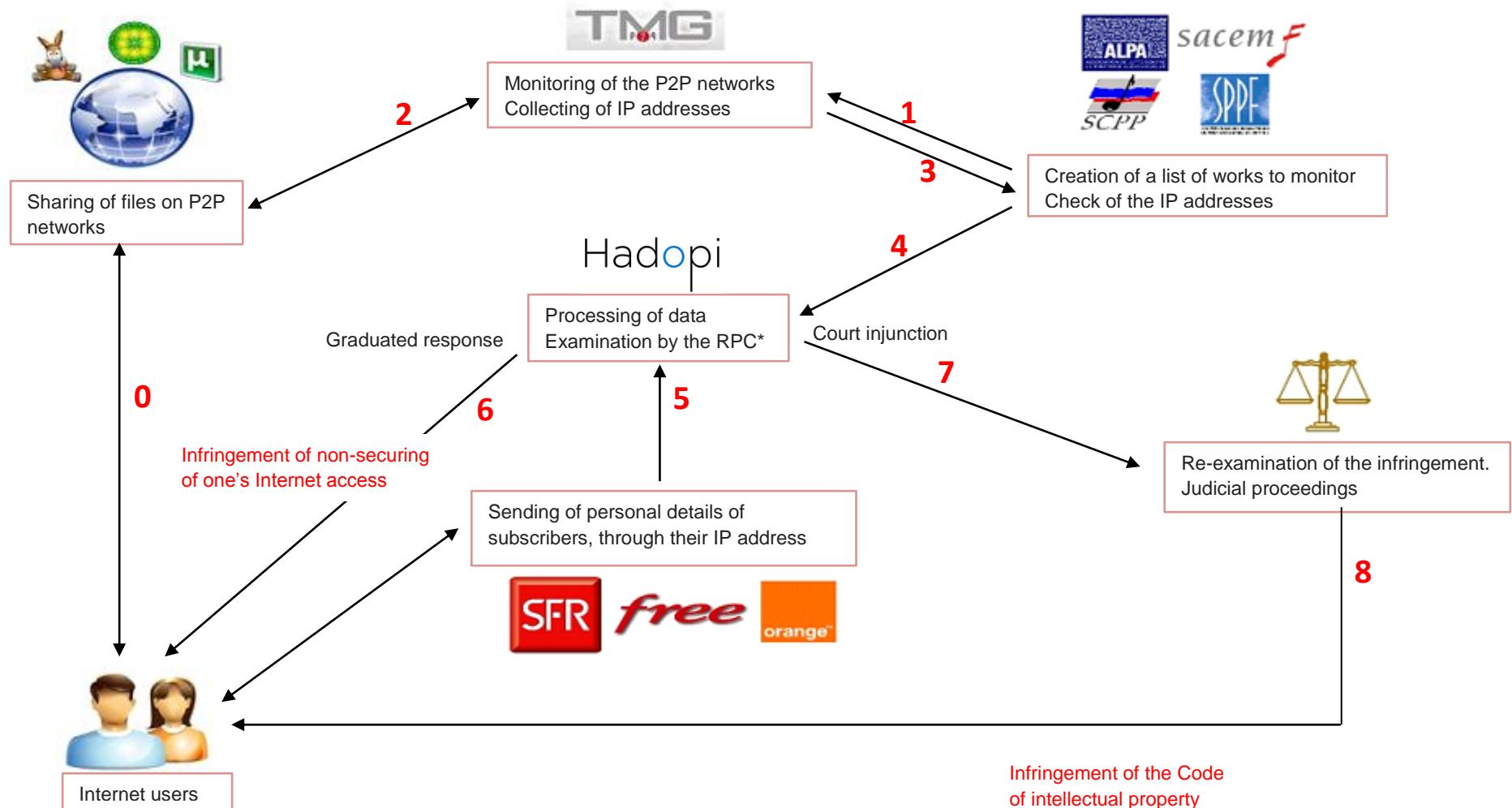
\*Penalties can be cumulated

## Appendix III: The Graduated Response of the Hadopi



Source: Translated by author, available from: <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduée>.

## Appendix IV: Summary of the machinery of the Hadopi



\* Rights' Protection Commission (Commission de protection des droits)

## Appendix V: Hadopi implementation orders

Name of Decree	Date published in the JORF (Journal Officiel)	Purpose
Decree no. 2009-887 of 21 July 2009 taken for the application of Article L. 331-18 of the intellectual Property Code	JORF no. 0168 of 23 July 2009	This decree sets forth the template for the declaration of interests the members take when they are appointed.
Decree of 23 December 2009 on nominating members of the Board and Rights Protection Commission of the High Authority for the circulation of creative works and copyright protection on the Internet	JORF no. 0299 of 26 December 2009	<p>This decree pertains to the nomination of the members of the Board and the Rights Protection Commission.</p> <p>The Board is composed of nine full-fledged members and four substitute members. The Rights Protection Commission is composed of three full-fledged members and three substitute members.</p>
Decree no. 2009-1773 of 29 December 2009 on the organisation of the High Authority for the circulation of creative works and copyright protection on the Internet	JORF no. 0303 of 31 December 2009	<p>This decree stipulates the organisational and operational rules for the Board and the Rights Protection Commission, specifically:</p> <ul style="list-style-type: none"> <li>• issues that must be deliberated by the Board and, if applicable, after the RPC issues its opinion;</li> <li>• the authorities of the High Authority's President and Secretary General; provisions on its staff (hiring practices, clearance for the RPC's sworn agents);</li> <li>• financial and accounting provisions.</li> </ul> <p>It also sets forth the terms for accrediting agents from companies that collect and distribute royalties, professional advocacy groups and the Centre national du cinéma et de l'image animée (National Center of Cinematography and the Moving Image)</p>
Decree of 20 January 2010 on nominating the Chairman of the Rights Protection Commission of the High Authority for the circulation of creative works and copyright protection on the Internet - Mireille Imbert-Quareta	JORF no. 0018 of 22 January 2010	This document pertains to nominating the President of the Rights Protection Commission, Mireille Imbert-Quareta.

<p>Decree no. 2010-236 of 5 March 2010 on automated processing of personal data authorised by Article L. 331-29 of the Intellectual Property Code called the "Management system for measures to protect original works on the Internet"</p>	<p>JORF no. 0056 of 7 March 2010</p>	<p>This document stipulates the implementation methods for the High Authority in automated processing of personal data within the graduated response mechanism.</p> <p>The decree specifies the outcome of the processing, the personal data and data recorded during processing, how long they are archived, the recipients of said data and the people authorized to access them.</p>
		<p>It also sets forth traceability requirements and methods for using clearance and rectification.</p> <p>Lastly, it provides for the processing network with automated processing of personal data used by duly formed professional advocacy groups, companies that collect and distribute royalties, the National Center of Cinematography and the Moving Image as well as digital communications operators and the service providers cited in 1 and 2 of Article 6 in the law of 21 June 2004 on trust in the digital economy.</p>
<p>Decree no. 2010-695 of 25 June 2010 institutes a gross negligence violation to protect literary and artistic property on the Internet.</p>	<p>JORF no. 0146 of 26 June 2010</p>	<p>This text institutes the violation of gross negligence. It pertains to a Class 5 offence that carries a penalty of up to 1,500 euros and an additional sentence of suspension of Internet access for up to one month.</p> <p>Actions that constitute gross negligence are:</p> <ul style="list-style-type: none"> <li>• the subscriber has received a notice by letter delivered against signature to implement an online security solution for his/her connection;</li> <li>• the subscriber's Internet connection was once again used for the purposes of copyright infringement within the year following receipt of this notice;</li> <li>• it appears that without just cause the Internet subscriber has not, "installed an online security solution for this connection" or "lacked diligence in implementing this solution."</li> </ul>
<p>Decree no. 2010-872 of 26 July 2010 on proceedings before the Rights Protection Commission of the High Authority for the circulation of creative works and copyright protection on the Internet</p>	<p>JORF no. 0171 of 27 July 2010</p>	<p>This decree sets forth the procedure applicable to implementing the 'graduated response' by the Rights Protection Commission.</p> <p>It stipulates the admissibility terms for case referrals handed over to the</p>

		<p>RPC and requires technical operators and service providers to respond to requests of identification within set timeframes.</p> <p>It provides for the terms of interaction between the RPC and the subscribers receiving notifications with a view to ensuring their rights are respected during the procedure and inasmuch as possible see that the defendant is respected as well: consideration for remarks, responses to requests for details on the works, a hearing at the request of the RPC or the Internet user.</p> <p>Lastly, it specifies the terms and procedures for the RPC's deliberation process, the transferral of case files to the prosecution and the execution of rulings on Internet suspension.</p>
Decree no. 2010-1057 of 3 September 2010 modifying decree no. 2010-236 of 5 March 2010 on automated processing of personal data authorised by Article L. 331-29 of the Intellectual Property Code called the "Management system for measures to protect original works on the Internet"	JORF no. 0206 of 5 Sept. 2010	This decree supplements the language in the decree of 5 March 2010 to grant the Rights Protection Commission the right to process Internet subscriber case files with a 'virtual' Internet service provider without a dedicated network.
Decree no. 2010-1202 of 12 October 2010 modifying Article R. 331-37 of the Intellectual Property Code	JORF no. 0238 of 13 October 2010	This decree supplements Article R. 331-37 of the Intellectual Property Code by instituting an obligation for Internet service providers to contact their subscribers within 24 hours regarding the notices issued by the Rights Protection Commission. Violation of this provision is subject to a maximum fine of 7,500 euros.
Decree no. 2010-1366 of 10 November 2010 on naming online public communications services offerings and regulating technical measures that protect and identify copyright-protected works and objects	JORF no. 0263 of 13 Nov. 2010	<p>This decree sets forth the terms of granting the label provided for in Article L. 331-23 of the Intellectual Property Code. In particular, it lists the information provided to support applications for certification, provides for the methods of publishing these applications on the High Authority's website and stipulates the terms whereby the rights holders may raise objections.</p> <p>It also sets forth the procedural rules that apply for the mandate to regulate and monitor technical measures to protect and identify copyright-</p>

		protected works and objects (resolution of conflicts in the interoperability of technical measures and the granting of specific copyright exceptions, referral of any issues pertaining to the interoperability of technical measures to the High Authority for review).
Decree no. 2010-1630 of 23 December 2010 on the assessment and naming procedure for security resources intended to prevent the illegal use of a connection to a public online communications network	JORF no. 0299 of 26 Dec. 2010	This decree sets forth the terms by which security programme designers are evaluated by accredited centres to ensure their solutions are compliant with the operational specifications made public by the High Authority and accreditation granted by the High Authority.
Decree no. 2011-264 of 11 March 2011 modifying decree no. 2010-236 of 5 March 2010 on automated processing of personal data authorised by Article L. 331-29 of the Intellectual Property Code called the "Management system for measures to protect original works on the Internet"	JORF no. 0061 of 13 March 2011	<p>This document supplements the decree of 5 March 2010 to address the third phase in the graduated response procedure (penal component).</p> <p>In particular, it stipulates a time period for retaining information (relating to phase 3) and personal data recorded during the processing conducted by the High Authority, the transferral to competent legal authorities of citations containing evidence likely to result in a gross negligence violation or an infringement offence and data processing for the purposes of executing the suspension of service penalty.</p>
Decree no. 2011-386 of 11 April 2011 on the indicators used by the High Authority for the circulation of creative works and copyright protection on the Internet.	JORF no. 0087 of 13 April 2011	This document lists the indicators cited in Article L. 331-23 of the Intellectual Property Code relating to the development of the legal content services, commercial or otherwise, and oversight of the legal or illegal use of works and objects protected by a copyright or a neighbouring right on digital communications networks.

Source: Hadopi: 2010 Activity Report, pp. 22-24. Available from: [http://www.hadopi.fr/sites/default/files/page/pdf/Hadopi\\_Rapportannuel\\_ENG.pdf](http://www.hadopi.fr/sites/default/files/page/pdf/Hadopi_Rapportannuel_ENG.pdf).

## Appendix VI: Table of the infractions and penalties applicable to legal persons

(coming from the Acts Hadopi 1 and 2, and their implementation orders)

Targeted activities	Legal texts	Custodial sentence	Pecuniary penalty	Supplementary penalties
<b>MISDEMEANOR</b> Counterfeiting by the capture of a cinematic or audiovisual work in theaters ("camcording")	FIPC, Art. L. 335-3, indent 3 (art. 8 of the law of June 12, 2009)	3 years	€300,000.00	Supplementary penalties provided for in article L. 335-6 FIPC
		5 years in organized group	€500,000 in organized group	New supplementary penalty of the suspension of the access to an online public communication service for a maximum length of one year, coupled with an interdiction during the same period of time to take out a subscription to another ISP, provided for in the new article L. 335-7 FIPC coming from article 7 of the law of October 28, 2009
<b>MISDEMEANOR</b> Lack of implementation, by an OSP, of the penalty of suspension of the access to an online public communication service	FICPC, Art. L. 335-7 (art. 7 of the law of October 28, 2009)	-	€5,000.00	-
<b>MISDEMEANOR</b> Non-respect of the interdiction to take out another subscription by a person sanctioned by the supplementary penalty of the suspension of the access to an online public communication service during the suspension time, whereas this supplementary penalty had been pronounced in matter of contravention	Art. L.335-7-1 du CPI (art. 8 of the law of October 28, 2009)	-	€3,750.00	-

<b>MISDEMEANOR</b> Non-respect of the interdiction to take out a new subscription to an online public communication service resulting from the supplementary penalty provided in matter of misdemeanor by the article L. 335-7 FIPC	French Criminal Code, Art. 434-41 (art. 11 of the law of October 28, 2009)	2 years	€30,000.00	Seizure of the thing having served to the infraction or being intended to commit it  Interdiction of the civic, civil and family rights no more than 5 years
<b>Class 5 contravention</b> Blatant negligence of the lack of securing the access to online public communication services	Art. R.335-5 (art. 1 of the implementation order of June 25, 2010)	-	€1,500.00	New supplementary penalty of suspension of the access to an online public communication service for a maximum length of one month, pursing the clauses of the article L. 335-7-1 FIPC
<b>Class 5 contravention</b> Lack of reply of a provider of an online public communication service to the Hadopi's officers	FIPC, Art. R.331-38 (art. 1 of the implementation order of July 26, 2010)	-	€1,500.00	-

Source: Translated by author, Available from:  
[http://www.textes.justice.gouv.fr/art\\_pix/JUSD1021268C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSD1021268C.pdf).

## Appendix VII: First recommendation of the Hadopi Translated in English and original in French below



### Recommendation of the Rights' Protection Commission of the High authority for the dissemination of works and the Protection of rights on the Internet.

File No. xxxx

Date: xxxx

Sir, Madam,

**Warning, your Internet access has been used to commit acts, certified by a statement, which may constitute a criminal offence.**

Indeed, your Internet access has been used to make available, reproduce or access cultural works protected by a copyright. This situation makes possible their consultation or their reproduction without authorization of the rights holders. Such consultations or reproductions, commonly named "piracy", constitute a misdemeanor sanctioned by the tribunals.

This use may have taken place without your consent or without you knowing, perhaps even by an uninformed user. Nevertheless, in all cases, *qua* the Internet subscriber, you are responsible by law of the use made thereof\*.

You must indeed make sure that this access is not subject of any fraudulent use, by taking all the precautions needed in order to secure it. This is a legal duty, sanctioned by the tribunals if not observed.

---

#### What are you reproached for?

It is reproached you for a failure of your obligation of surveillance.

Thus, in your case:

- Sworn agents have noticed that on the xxxx one or several copyrighted works were reproduced, consulted or offered for sharing from the Internet access matching the IP address No. xxxxxxxx.
- By that time, this address had been allocated to the company xxxx, your Internet service provider, to:

[name and address]

## What are you facing?

If, notwithstanding this recommendation inviting you to take, as soon as possible, every useful measure and default of implementing, in an effective manner, one or several methods of security of your Internet access, new failures to your obligation of surveillance would be noticed, a contravention for characterized negligence could be established against you. The judicial judge, upon referral of the Hadopi, could then pronounce a suspension of that access as well as, if necessary, a pecuniary penalty.

## What are your rights?

You can obtain details about the consulted works, offered for sharing or reproduced from your Internet access and, if necessary, formulate observations, by contacting the Hadopi:

- By e-mail, using the form available from the following address: [www.hadopi.fr](http://www.hadopi.fr);
- By regular mail, addressed to the Hadopi, Rights' Protection Commission, **4 rue du Texel 75014 PARIS**, using the same form,
- By phone, at the **09 69 32 90 90 (non-surcharged call)**

In that case, you must recall the file number mentioned at the beginning of this message.

## Why protect the authors' right?

Under the seducing guise of gratuitousness, the practices that do not respect the copyright of the works deprive, indeed, the creators of their fair remuneration. They represent a grave danger for the economy of the cultural sector and the survival of the artistic creation relies on it, in all its form, which is at stake. To better conciliate the advantages of the Internet and the respect of creation, we remind you that today online services put forward legal offers that are attractive and respectful of the creators' rights.

## Information

- The role of the Hadopi is not to sanction: when a file justifies it, the Hadopi forwards it to the judge who solely may order a sanction.
- In no case the Hadopi requires a sum of money. Any request in that sense would result from an attempted fraud from malicious people.
- You can consult the site of the Hadopi [www.hadopi.fr](http://www.hadopi.fr) to obtain information about its missions, the applicable mechanism, the legal offer and the methods of security.
- You can also ask for information about the methods of security to your Internet service provider.

Yours sincerely,

The Rights' Protection Committee of the Hadopi

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## Appendices

### Intellectual property code

\* Article L. 336-3 of the intellectual property code:

“Art. L. 336-3. – The owner of the access to online public communication services has an obligation to watch that this access is not being used for purposes of reproduction, representation, making available or communication to the public of works or objects protected by right of authorship or a similar right without permission of copyright holders when it is required as stated in books I and II. “The breaching of the obligation defined in the first paragraph by an access owner has not the effect of involving his criminal responsibility, with the exception of articles L. 335-7 and L. 335-7-1.”

\*\* Article R. 335-5 of the code of intellectual property

I.- Constitutes a characterized negligence, punished of the fine foreseen for the contraventions of the fifth class, the fact, without legitimate ground, for the person holder of an access to online public communication services, when the conditions provided for at II are met:

1° Either of not having put into place a method of security of that access;

2° Or of having lacked of diligence into the implementation of this method.

II.- The provisions of I are applicable only when the following conditions are met:

1° In accordance with article L. 331-25 and into the forms provided for in that article, the holder of the access has been recommended by the rights' protection commission to implement a method of security of his/her access allowing to prevent the repetition of a use of this one to the purposes of reproduction, representation or making available or communication to the public of works or objects protected by right of authorship or a similar right without the authorization of the rights holders when it is required as stated in books I and II;

2° Within one year following the presentation of that recommendation, that access has been again used for the purposes mentioned at 1° of the present II.

III.- The people guilty of the contravention defined at I may, in addition, be sentenced to the complementary penalty of suspension of the access to an online public communication service for a length of maximum one month, in accordance with the measures of the article L. 335-7-1.

### Personal data

Act No. 78-17 of 6 January 1978 on information technology and individual freedom (articles 39 and 40) [French Data Protection Act]

The personal data collected by the Rights' Protection Commission of the Hadopi are recorded into the “system for management of digital rights protection measures”. You benefit from an access right and from a rectification right of this data.

If you wish to exert these rights you can write to the president of the Rights' Protection Commission in joining a copy of an identity document to the above-mentioned address in specifying on the envelope: “access right”.

---

# Hadopi

Haute Autorité pour la diffusion des œuvres  
et la protection des droits sur internet

## Recommandation de la Commission de la Protection des Droits de la Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet (Hadopi)

Dossier n° xxxx

Date : xxxx

Madame, Monsieur,

Attention, votre accès à internet a été utilisé pour commettre des faits, constatés par procès-verbal, qui peuvent constituer une infraction pénale.

En effet, votre accès internet a été utilisé pour mettre à disposition, reproduire ou accéder à des œuvres culturelles protégées par un droit d'auteur. Cette situation rend possible leur consultation ou leur reproduction sans autorisation des personnes titulaires des droits. De telles consultations ou reproductions, appelées couramment « piratage », constituent un délit sanctionné par les tribunaux.

Cette utilisation a pu intervenir sans votre permission ou à votre insu, peut-être même par un usager non averti. Mais dans tous les cas, en tant que titulaire de l'abonnement à internet, vous êtes légalement responsable de l'utilisation qui en est faite\*.

Vous devez en effet veiller à ce que cet accès ne fasse pas l'objet d'un usage frauduleux, en prenant toute précaution pour le sécuriser. C'est une obligation légale, sanctionnée par les tribunaux si elle n'est pas observée\*\*.

### Que vous reproche-t-on ?

On vous reproche un manquement à votre obligation de surveillance.

Ainsi, dans votre cas :

- Des agents assermentés ont constaté que le xxxx une ou plusieurs œuvres protégées étaient reproduites, consultées ou offertes en partage depuis l'accès à Internet correspondant à l'adresse IP n°xxxxxxx.
- Cette adresse avait été attribuée à ce moment par la société xxxx, votre fournisseur d'accès à Internet, à :

[Coordonnées]

### Que risquez-vous ?

Si, en dépit de cette recommandation vous invitant à prendre, dans les meilleurs délais, toute mesure utile et faute de mettre en œuvre, de façon effective, un ou plusieurs moyens de sécurisation de votre accès à Internet, de nouveaux manquements à votre obligation de surveillance venaient à être constatés, une contravention de négligence caractérisée pourrait être constituée à votre égard. Le juge judiciaire, saisi par l'Hadopi, pourrait alors prononcer une suspension de cet accès ainsi que, le cas échéant, une peine d'amende.

### | Quels sont vos droits ? |

Vous pouvez obtenir des précisions sur les œuvres consultées, offertes en partage ou reproduites à partir de votre accès internet et, le cas échéant, formuler des observations, en contactant l'Hadopi :

- par voie électronique, en utilisant le formulaire accessible à l'adresse [www.hadopi.fr](http://www.hadopi.fr) ;
- par courrier postal, adressé à l'Hadopi, Commission de protection des droits, 4 rue du Texel 75014 PARIS, en utilisant le même formulaire ;
- par téléphone, au 09 69 32 90 90 (appel non surtaxé).

Dans ce cas, vous devez obligatoirement rappeler le numéro de dossier mentionné au début de ce message.

### | Pourquoi protéger le droit des auteurs ? |

Sous les apparences séduisantes de la gratuité, les pratiques qui ne respectent pas le droit des auteurs des œuvres privent, en effet, les créateurs de leur juste rétribution. Elles représentent un grave danger pour l'économie du secteur culturel et c'est la survie de la création artistique, sous toutes ses formes, qui est en cause. Pour mieux concilier les avantages d'Internet et le respect de la création, nous vous rappelons que des services en ligne de plus en plus nombreux proposent aujourd'hui des offres légales attractives et respectueuses des droits des créateurs.

### | Informations |

- Le rôle de l'Hadopi n'est pas de sanctionner : lorsqu'un dossier le justifie, l'Hadopi le transmet au juge qui seul peut prononcer une sanction.
- En aucun cas l'Hadopi ne réclame de somme d'argent. Toute demande en ce sens relèverait d'une tentative d'escroquerie de personnes malveillantes.
- Vous pouvez consulter le site de l'Hadopi [www.hadopi.fr](http://www.hadopi.fr) pour obtenir des informations sur ses missions, sur le dispositif applicable, sur l'offre légale et sur les moyens de sécurisation.
- Vous pouvez également demander des informations sur les moyens de sécurisation à votre fournisseur d'accès internet.

Veuillez agréer, Madame, Monsieur, l'expression de mes salutations distinguées.

La Commission de Protection des Droits de l'Hadopi.

## | Annexes |

### Code de la propriété intellectuelle

\*Article L. 336-3 du code de la propriété intellectuelle :

« La personne titulaire de l'accès à des services de communication au public en ligne a l'obligation de veiller à ce que cet accès ne fasse pas l'objet d'une utilisation à des fins de reproduction, de représentation, de mise à disposition ou de communication au public d'œuvres ou d'objets protégés par un droit d'auteur ou par un droit voisin sans l'autorisation des titulaires des droits prévus aux livres Ier et II lorsqu'elle est requise.

« Le manquement de la personne titulaire de l'accès à l'obligation définie au premier alinéa n'a pas pour effet d'engager la responsabilité pénale de l'intéressé, sous réserve des articles L. 335-7 et L. 335-7-1.

\*\* Article R. 335-5 du code de la propriété intellectuelle

I.-Constitue une négligence caractérisée, punie de l'amende prévue pour les contraventions de la cinquième classe, le fait, sans motif légitime, pour la personne titulaire d'un accès à des services de communication au public en ligne, lorsque se trouvent réunies les conditions prévues au II :

1° Soit de ne pas avoir mis en place un moyen de sécurisation de cet accès ;

2° Soit d'avoir manqué de diligence dans la mise en œuvre de ce moyen.

II.-Les dispositions du I ne sont applicables que lorsque se trouvent réunies les deux conditions suivantes :

1° En application de l'article L. 331-25 et dans les formes prévues par cet article, le titulaire de l'accès s'est vu recommander par la commission de protection des droits de mettre en œuvre un moyen de sécurisation de son accès permettant de prévenir le renouvellement d'une utilisation de celui-ci à des fins de reproduction, de représentation ou de mise à disposition ou de communication au public d'œuvres ou d'objets protégés par un droit d'auteur ou par un droit voisin sans l'autorisation des titulaires des droits prévus aux livres Ier et II lorsqu'elle est requise ;

2° Dans l'année suivant la présentation de cette recommandation, cet accès est à nouveau utilisé aux fins mentionnées au 1° du présent II.

III.-Les personnes coupables de la contravention définie au I peuvent, en outre, être condamnées à la peine complémentaire de suspension de l'accès à un service de communication au public en ligne pour une durée maximale d'un mois, conformément aux dispositions de l'article L. 335-7-1.

### Données à caractère personnel

Loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (articles 39 et 40)

Les données à caractère personnel recueillies par la Commission de Protection des Droits de l'Hadopi sont enregistrées dans le

« système de gestion des mesures pour la protection des œuvres sur Internet ». Vous bénéficiez d'un droit d'accès et d'un droit de rectification de ces données.

Si vous souhaitez exercer ces droits vous pouvez écrire à la présidente de la Commission de Protection des Droits en joignant une copie d'une pièce d'identité à l'adresse ci-dessus mentionnée en précisant sur l'enveloppe : « droit d'accès ».

## Appendix VIII: Second recommendation of the Hadopi Translated in English and original in French below



File No. xxxxx

Date: xxxx

Name Forename or corporate name

Address 1

Zip Code City

### Recommendation of the Rights' Protection Commission: second warning

Sir, Madam,

**SECOND WARNING: your Internet access has been anew used to commit acts, certified by a statement, which may constitute a criminal offence.**

You have been the addressee on .....[date]..... of a recommendation inviting you to take every useful measure to avoid that your Internet access is used to make available, reproduce or access cultural works protected by a copyright without authorization of the holders of these rights. Your access has been again used for such purposes.

*Qua* the holder of a subscription to the Internet, you are responsible by law of the use made thereof. You must thus make sure that this access is not subject of any fraudulent use, by taking all the precautions needed in order to secure it. This is a legal duty, sanctioned by the tribunals if not observed.

And yet, Wednesday 12 January 2011 at 10 hours 35, sworn agents recorded that one or several protected works were reproduced, consulted or made available from the Internet access matching the IP address No. xxx.xxx.xxx.xxx. This address had been attributed at that moment by the society XXX, your Internet service provider, to:

Name Forename or corporate name

Address 1

Zip Code City

Email address

The purpose of the present mail is to remind you once again the legal duty which rests with you, by virtue of the article L. 336-3 of the intellectual property code, to watch your Internet access. We remind you that the voluntary conducts of consultation, making available or reproduction of copyright protected works, commonly named "piracy", constitute misdemeanors of counterfeiting sanctioned by tribunals. These practices deprive the creators of their fair remuneration and represent a danger for the artistic creation and the economy of the cultural sector.

If, notwithstanding this recommendation, new failures from your Internet access would be noticed, a contravention for characterized negligence could be established against you. The judicial judge, upon referral of the Hadopi, could then pronounce a suspension of that access as well as, if necessary, a pecuniary penalty.

### What are your rights?

You can obtain details about the consulted works, offered for sharing or reproduced from your Internet access and, if necessary, formulate observations, by contacting the Hadopi:

- By e-mail, using the form available from the following address: [www.hadopi.fr](http://www.hadopi.fr);
- By regular mail, addressed to the Hadopi, Rights' Protection Commission, **4 rue du Texel 75014 PARIS**, using the same form,
- By phone, at the **09 69 32 90 90**

In that case, you must recall the file number mentioned at the beginning of this message.

We remind you that:

- The role of the Hadopi is not to sanction: when a file justifies it, the Hadopi forwards it to the judge who solely may order a sanction.
- In no case the Hadopi requires a sum of money. Any request in that sense would result from an attempted fraud from malicious people.
- You can consult the site of the Hadopi [www\[.\]hadopi\[.\]fr](http://www[.]hadopi[.]fr) to obtain information about its missions, the applicable mechanism, the legal offer and the methods of security.
- You can also ask for information about the methods of security to your Internet service provider.

Yours sincerely,

The Rights' Protection Committee of the Hadopi

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### Appendices

Intellectual property code

\* Article L. 336-3 of the intellectual property code:

“Art. L. 336-3. – The owner of the access to online public communication services has an obligation to watch that this access is not being used for purposes of reproduction, representation, making available or communication to the public of works or objects protected by right of authorship or a similar right without permission of copyright holders when it is required as stated in books I and II. “The breaching of the obligation defined in the first paragraph by an access owner has not the effect of involving his criminal responsibility, with the exception of articles L. 335-7 and L. 335-7-1.”

\*\* Article R. 335-5 of the code of intellectual property

I.- Constitute a characterized negligence, punished of the fine foreseen for the contraventions of the fifth class, the fact, without legitimate ground, for the person holder of an access to online public communication services, when the conditions provided for at II are met:

1° Either of not having put into place a method of security of that access;

2° Or of having lacked of diligence into the implementation of this method.

II.- The provisions of I are applicable only when the following conditions are met:

1° In accordance with article L. 331-25 and into the forms provided for in that article, the holder of the access has been recommended by the rights' protection commission to implement a method of security of his/her access allowing to prevent the repetition of a use of this one to the purposes of reproduction, representation or making available or communication to the public of works or objects protected by right of authorship or a similar right without the authorization of the rights holders when it is required as stated in books I and II;

2° Within one year following the presentation of that recommendation, that access has been again used for the purposes mentioned at 1° of the present II.

III.- The people guilty of the contravention defined at I may, in addition, be sentenced to the complementary penalty of suspension of the access to an online public communication service for a length of maximum one month, in accordance with the measures of the article L. 335-7-1.

#### Personal data

Act No. 78-17 of 6 January 1978 on information technology and individual freedom (articles 39 and 40) [French Data Protection Act]

The personal data collected by the Rights' Protection Commission of the Hadopi are recorded into the "system for management of digital rights protection measures". You benefit from an access right and from a rectification right of this data.

If you wish to exert these rights you can write to the president of the Rights' Protection Commission in joining a copy of an identity document to the above-mentioned address in specifying on the envelope: "access right".

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Dossier n° xxxxxxxxxxxxxxx

Date : xxxx

Nom Prénom ou raison sociale

Adresse 1

Code Postal Ville

## Recommandation de la Commission de la Protection des Droits : deuxième avertissement

Madame, Monsieur,

**DEUXIEME AVERTISSEMENT : votre accès à internet a été de nouveau utilisé pour commettre des faits, constatés par procès-verbal, qui peuvent constituer une infraction pénale.**

Vous aviez été destinataire le ..... d'une recommandation vous invitant à prendre toute mesure utile pour éviter que votre accès internet soit utilisé pour mettre à disposition, reproduire ou accéder à des œuvres culturelles protégées par un droit d'auteur sans autorisation des personnes titulaires de ces droits. Votre accès a été de nouveau utilisé à de telles fins.

En tant que titulaire de l'abonnement à internet, vous êtes légalement responsable de l'utilisation qui en est faite. Vous devez donc veiller à ce que cet accès ne fasse pas l'objet d'un usage frauduleux, en prenant toute précaution pour le sécuriser. C'est une obligation légale, sanctionnée par les tribunaux si elle n'est pas observée.

Or, des agents assermentés ont constaté que le mercredi 12 janvier 2011 à 10 heures 35, une ou plusieurs œuvres protégées étaient reproduites, consultées ou mises à disposition depuis l'accès à Internet correspondant à l'adresse IP xxx.xxx.xxx.xxx. Cette adresse avait été attribuée à ce moment par la société XXX, votre fournisseur d'accès à Internet, à :

Nom Prénom ou raison sociale

Adresse 1

Code Postal Ville

Adresse électronique

Le présent courrier a pour objet de vous rappeler une nouvelle fois l'obligation légale qui vous incombe, en vertu de l'article L336-3 du code de la propriété intellectuelle, de surveiller votre accès à internet. Nous vous rappelons que les comportements volontaires de consultation, mises à disposition ou reproduction d'œuvres protégées par un droit d'auteur, appelés couramment «piratage», constituent des délits de contrefaçon sanctionnés par les tribunaux. Ces pratiques privent les créateurs de leur juste rétribution et représentent un danger pour la création artistique et l'économie du secteur culturel.

Si en dépit de cette recommandation, de nouveaux manquements à partir de votre accès internet venaient à être constatés, une contravention de négligence caractérisée pourrait être constituée à votre égard. Le juge judiciaire, saisi par l'Hadopi, pourrait alors prononcer une suspension de cet accès ainsi que, le cas échéant, une peine d'amende.

## I Quels sont vos droits ? I

Vous pouvez demander des précisions sur les œuvres consultées, mises à disposition ou reproduites à partir de votre accès internet et, le cas échéant, formuler des observations, en contactant l'Hadopi :

- par voie électronique, en utilisant le formulaire accessible à l'adresse [www.hadopi.fr](http://www.hadopi.fr) ;
- par courrier postal, adressé à l'Hadopi, Commission de protection des droits, 4 rue du Texel 75014 PARIS, en utilisant le même formulaire ;
- par téléphone, au 09 69 32 90 90.

Dans ce cas, vous devez obligatoirement rappeler le numéro de dossier mentionné au début de ce courrier.

Nous vous rappelons que :

- Le rôle de l'Hadopi n'est pas de sanctionner : lorsqu'un dossier le justifie, l'Hadopi le transmet au juge qui est seul compétent pour prononcer une sanction.
- En aucun cas l'Hadopi ne réclame de somme d'argent. Toute demande en ce sens relèverait d'une tentative d'escroquerie.
- Vous pouvez consulter le site de l'Hadopi [www.hadopi.fr](http://www.hadopi.fr) pour obtenir des informations sur ses missions, sur le dispositif applicable, sur l'offre légale et sur les moyens de sécurisation.
- Vous pouvez également demander des informations sur les moyens de sécurisation à votre fournisseur d'accès internet.

Veuillez agréer, Madame, Monsieur, l'expression de mes salutations distinguées.

La Présidente de la Commission de Protection des Droits de l'Hadopi

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## I Annexes I

Code de la propriété intellectuelle

Article L. 336-3 du code de la propriété intellectuelle :

- « La personne titulaire de l'accès à des services de communication au public en ligne a l'obligation de veiller à ce que cet accès ne fasse pas l'objet d'une utilisation à des fins de reproduction, de représentation, de mise à disposition ou de communication au public d'œuvres ou d'objets protégés par un droit d'auteur ou par un droit voisin sans l'autorisation des titulaires des droits prévus aux livres Ier et II lorsqu'elle est requise.
- « Le manquement de la personne titulaire de l'accès à l'obligation définie au premier alinéa n'a pas pour effet d'engager la responsabilité pénale de l'intéressé, sous réserve des articles L. 335-7 et L. 335-7-1. »

Article R. 335-5 du code de la propriété intellectuelle

I.-Constitue une négligence caractérisée, punie de l'amende prévue pour les contraventions de la cinquième classe, le fait, sans motif légitime, pour la personne titulaire d'un accès à des services de communication au public en ligne, lorsque se trouvent réunies les conditions prévues au II :

1<sup>o</sup> Soit de ne pas avoir mis en place un moyen de sécurisation de cet accès ;

2<sup>o</sup> Soit d'avoir manqué de diligence dans la mise en œuvre de ce moyen.

II.-Les dispositions du I ne sont applicables que lorsque se trouvent réunies les deux conditions suivantes :

1<sup>o</sup> En application de l'article L. 331-25 et dans les formes prévues par cet article, le titulaire de l'accès s'est vu recommander par la commission de protection des droits de mettre en œuvre un moyen de sécurisation de son accès permettant de prévenir le renouvellement d'une utilisation de celui-ci à des fins de reproduction, de représentation ou de mise à disposition ou de communication au public d'œuvres ou d'objets protégés par un droit d'auteur ou par un droit voisin sans l'autorisation des titulaires des droits prévus aux livres Ier et II lorsqu'elle est requise ;

2<sup>o</sup> Dans l'année suivant la présentation de cette recommandation, cet accès est à nouveau utilisé aux fins mentionnées au 1<sup>o</sup> du présent II.

III.-Les personnes coupables de la contravention définie au I peuvent, en outre, être condamnées à la peine complémentaire de suspension de l'accès à un service de communication au public en ligne pour une durée maximale d'un mois, conformément aux dispositions de l'article L. 335-7-1.

Données à caractère personnel

Loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (articles 39 et 40)

Les données à caractère personnel recueillies par la Commission de Protection des Droits de l'Hadopi sont enregistrées dans le « système de gestion des mesures pour la protection des œuvres sur Internet ». Vous bénéficiez d'un droit d'accès et d'un droit de rectification de ces données.

Si vous souhaitez exercer ces droits vous pouvez écrire à la présidente de la Commission de Protection des Droits en joignant une copie d'une pièce d'identité à l'adresse ci-dessus mentionnée en précisant sur l'enveloppe : « droit d'accès ».

## Appendix IX: Impact assessment of the Hadopi

### ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

Analyse of the graduated response procedures over the period from October 2010 to December 2011 shows that:

Analyse of the graduated response procedures over the period from October 2010 to December 2011 shows that:

**95%**

Source: Hadopi. Data taken from the French Rights Protection Commission's information system, based on 755,015 records of subscribers having received at least one notice, created between 1 October 2010 and 1 December 2011.

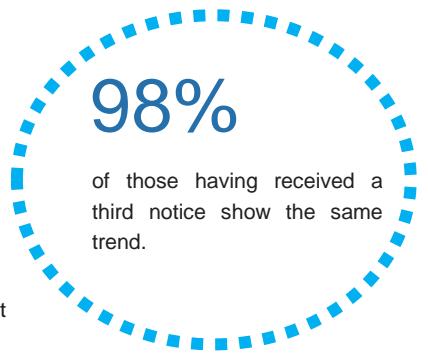
**92%**

of those having received a first-time notice do not give rise to the need for a second notice for illegal behaviour on peer-to-peer networks\*.

**98%**

of those having received a second notice are in the same situation (no further illegal behaviour recorded within the timeframe set out by law).

of those having received a third notice show the same trend.



\* within the timeframe set by law before the following notice is to be issued.

#### Dialogue with Hadopi consolidates the change in behaviour.

Between October 2010 and December 2011, 65,848 people, having been targeted by the graduated response procedure, contacted Hadopi:

**6%**

Source: Hadopi. Data taken from the French Rights Protection Commission's information system, based on 755 015 records of subscribers having received at least one recommendation, between 1/10/2010 and 1/12/2011.

**25%**

of subscribers having received a first-time notice contacted Hadopi.

**71%**

of subscribers having received a second-time notice contacted Hadopi.

of subscribers having reached stage three contacted Hadopi.

Most of the above state that they commit to taking action to secure their access to the Internet or to putting an end to all illegal consumption via peer-to-peer networks.

#### These changes are confirmed by observation data on P2P usage.

In 2011, a wide range of metrics – based on varying methodologies – attests to a drop in P2P and its illegal uses in France.

**-17%**

Source: see following pages.

**-29%**

in audience levels, reports Nielsen.

**-43%**

in audience levels, reports Médiamétrie // NetRatings.

**-66%**

in illegal data sharing, reports Peer Media Technologies.

in illegal data sharing, reports ALPA.

Mesures « User centric »

Mesures « Network centric »

Source: Hadopi, Impact assessment, 27 March 2012, p. 3. Available from: [http://www.hadopi.fr/sites/default/files/page/pdf/note17\\_en.pdf](http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf).

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