HADOPI 1 & 2: ANALYSIS AND EVALUATION

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Abstract
The French law on "Creation and Internet", or more commonly known as the "Hadopi 1" Law, passed on June 12, 2009, and its complementary, the "Law for the Protection under Criminal Law of Artistic and Literary Works on the Internet" ("Hadopi 2"), passed on October 28, 2009, were intended to put an end to the illegal distribution of creative works on the Internet and at the same time control the internet access for every user. They introduce the "graduated response", the amelioration of the legal offer and the creation of a public authority overseeing its implementation, the so called "High Authority for the dissemination of works and the protection of rights on the Internet" (*Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet*, H.A.D.O.P.I.). However, the implementation decree of March 5, 2010 on the "specific negligence" aims exclusively at the peer-to-peer networks, leaving out of the criminal framework the direct download and the streaming options. After presenting and analyzing the French laws "Hadopi 1" and "Hadopi 2" the authors discuss the controversial findings of a recent French research of the first months of their application in France and eventually question the achievement of the ultimate goal, which is the protection of the French intellectual property rights on the Internet.
Keywords: Internet, Hadopi Laws (1 & 2), peer-to-peer network, intellectual property rights.

1. Introduction
After turbulent legal procedures and crucial political controversies, the French online copyright infringement legal framework was finally voted on June 12, 2009 and on October 28, 2009 accordingly. The laws on "Creation and Internet", and the "Law for the Protection under Criminal Law of Artistic and Literary Works on the Internet"- have the distinctive names of Laws "Hadopi 1 and 2"- acronym of the public authority ("*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet*"). This was founded by Hadopi 1 in order to ensure their enforcement and in combination with the implementation decrees; it has provided the penal sanctions concerning the regulation and control of the internet access in order to decrease online piracy.
The French *Conseil Constitutionnel* reviewed and declared several articles of the Hadopi 1 Law as being contrary to the French Constitution (Decision Nº 2009-580 DC of June 10, 2009); the October 28, 2009 Law introducing the penal protection of the online artistic works passed in order to complete the legal framework.
Following a brief presentation of the legislative background that led to the voting of the Law, this paper primarily gives a general overview of the law and then it goes on

to analyze the core notions that impose surveillance on French Internet users, such as the "graduated response" procedure, the specific negligence, the legal online content offer, the filtering of the Internet content and the eventual sanctions for the infringers.
Afterwards, it elaborates on the role and competences of the independent public authority and its agents. It continues by considering some of the Law's deficiencies and presents the results of opinion polls showing the dubious effect of its repressive measures on the French Internet users' practices.
Finally, it raises the question of how the liberty of communication of ideas and the liberty of thought, in the form of Internet access as a political freedom-according to the decision of the *Conseil Constitutionnel* of France- can be combined with the rights of intellectual property and specifically the copyright and related rights of the artists and rights holders.

2. Hadopi 1&2: A brief account on the history of the relevant legislation

2.1Preexisting legislation: Main features

The legislative source of the "Hadopi 1 and 2" Laws resides in the European Copyright Directive 2001/29/CE, implemented in the French legal system by the Law on Authors' rights and Related rights in the Information society ("*Droit d' Auteur et Droits Voisins dans la Société de l' Information, DADVSI*") on August 1, 2006 and never fully put into action. This Law intended mainly to deal with the exchange of copyrighted works over peer-to-peer networks, the criminalizing of the circumvention of digital rights management (DRM) protection measures, the rights on resale of works of art and the exceptions to copyright for fair use.

2.2 Hadopi 1 & 2: Preparatory Works

Almost a year later, on July 26, 2007, the French Minister of Culture, Mrs. Christine Albanel, asked Mr. Denis Olivennes, the President and CEO of FNAC, to preside over a committee in order to reach a settlement between the interests of various economic actors; from the professionals of the copyright, the entertainment industry, the Internet Service Providers (ISPs) to various consumer and public organizations. The core of the agreement was to find the possible solutions for developing attractive legal offers for the users and at the same time deter the illegal massive download.
Eventually, on November 2007 the outcome of this work was submitted to the Minister of Culture and Communication, in the form of a Report, entitled "The development and protection of creative works in the new Networks".
Forty-six companies and representing Organizations have so far signed the Report presented by the "Olivennes Committee", also called the "Elysees Agreement", which is ruled by the principles of the graduated response and the improvement of the legal offer. This Agreement was marked as the first common decision between the entertainment and media industry actors to fight against online piracy and to conclude a consensus with the ISPs. At the same time, it constitutes the incentive for the drafting of the "Hadopi 1 and 2" Laws. In fact, in its articles we attest a complete transposition of the terms and spirit existing in the "Olivennes Report".

2.3. Overview of the Law

The French Hadopi 1 and 2 Laws were conceived and voted in such a way as to put an end to online copyright infringement acts of artistic works and to reinforce the

development of legal offer for artistic content available on the new communication networks. The new articles implemented on the Intellectual Property Code, introduce the "three-strike" procedure in the French legal system, which is based on sending warnings to internet users that have been detected by their ISPs to repeatedly download illegally copyrighted content. The most important point to retain is that in case the subscribers of an internet access breach their obligation to take efficient measures to ensure that this is not used for illegal file sharing, they risk being prosecuted for committing the crime of "specific negligence".
The aforementioned tasks fall within the responsibilities of the Hadopi Authority which can then forward the case to the criminal courts in order for them to decide whether or not to suspend persistent infringers' internet access.

3. The HADOPI Authority

3.1. Role and duties

The "High Authority for the Transmission of Creative works and Copyright protection on the Internet" (HADOPI) is the Independent Public Authority, enacted by the Hadopi 1 Law and took the place of the preceding short-lived Authority introduced by the DADVSI law of 2006, called ARMT [Regulation of Technical Measures Authority] (*Autorité des Régulation des Mesures Techniques*).
Its role can be summarized in the three-fold of prevention, punishment and observation of the copyright infringement. Articles L. 331-12 *et seq.* of the Intellectual Property Code set out thoroughly the Hadopi's missions, which could be analyzed as follows:

1. Enforcement of the legal online content offer and observation of the legal and illegal uses of artistic works on the Internet
2. Protection of the works regarding online copyright infringement acts
3. Regulation of the uses of the technical measures of protection and information.

Consequently, the Hadopi is mainly concerned with protecting copyrighted works on new networks, promoting their legal online use and organizing the technical measures of their protection. Since February, the Authority's powers were significantly reinforced by the last-minute vote of the 151st amendment to the draft Law on Simplifying and Improving the Quality of Laws. Hereinafter, the Authority could finance private or public sector companies to carry out online surveillance and filtering projects. One can't help wondering on the soundness of such a legal provision, which assigns part of the Hadopi's work to external parties, allowing private companies of the entertainment industry to carry out projects with the financial support of the State, and more importantly, when the initial goal was to simplify the legal procedures. Additionally, the engagement of the private sector in the field of monitoring the legal or illegal use of the network sets an interesting problematique, as it affects fundamental freedoms.

3.2. The Hadopi's Administrative Bodies

The Hadopi comprises three (3) principle bodies: the *College*, the *Commission de Protection des Droits* and the *Laboratoires Hadopi*.

- The Hadopi College is the chief administrative body of the Hadopi and consists of nine members appointed jointly by the government (three members), the judicial bodies (three members), the legislative bodies (two members) and the *Conseil Supérieur de la Propriété Littéraire et Artistique* (Superior Council of Artistic and Literary Property, CSPLA), (one member).

According to article L.331-16 CPI, the College is in charge of all duties assigned to the Authority, except for the enforcement of the three-strike procedure. In other words, it administrates the legal online content offer development and certification as well as the security measures certification and regulation.

- The *Commission de Protection des Droits* (CPD, Rights Protection Committee) consists of three magistrates, currently and is responsible for the implementation of the "graduated response" mechanism.
- Hadopi Think-tank Labs, was enacted last February, and is in charge of examining issues arising from the digital technology through open meetings, with a limit of 15 persons per panel, held in Paris. The objective is to elaborate, under the guidance of experts (seven in total), a creative dialogue between different financial agents, citizens, independent specialists and representatives of the Hadopi. This will afterwards be used as food for thought for the members of the Hadopi College and will, eventually, affect the High Authority's actions. The subjects of the workshops held were: the "Digital economy of the Creation", "Internet and Companies", "Networks and techniques", "Online uses" and "Intellectual Property and Internet" and a first evaluation of their works is expected at the beginning of June 2011.

4. The Graduated Response or the Three-Strike Procedure

4.1. Presentation of the mechanism

The legal protection of the French Online copyright Infringement Law would be incomplete without the graduated response procedure; this hybrid regime is divided in two distinct phases. The first phase is conducted by the Hadopi Independent Authority and the second one is in the hands of the Penal Courts. According to article L.335-7 of the Intellectual Property Code, the Penal Judge has the possibility to pronounce in addition to the offense of copyright infringement by means of public electronic communications networks, the additional penalty of suspending the infringer's internet access, on the grounds of committing the newly integrated offense of "characterized negligence".

The gradual response procedure is an educational operation meant to increase the internet users' awareness on the legal use of their internet connection regarding copyrighted artistic works and can be described as follows:

In a first place, the collective rights organizations, the *Centre National de la Cinématographie,* (National Cinematography Center, CNC) or the Public Prosecutor via their affiant agents, send a report to the HADOPI , including, among other details, the IP addresses of the users suspected to illegally download online artistic content (article L. 331-24 CPI). The permission obtained by the "CNIL" (*Commission Nationale de l'Informatique et des Libertés*), the French authority for enforcing the data protection law, includes 25 000 reports per day submitted by the collective rights organizations, the CNC or the Public Prosecutor. In other words, almost 125 000 reports in total are delivered every day to the Hadopi by the rights-holders.

In two months time, the CPD has to check the accuracy of the data received and accordingly, either seek the ISPs for matching the IP addresses to specific subscribers and proceed to the first stage of the procedure (known as "preliminary admonition"), or leave behind the case and delete the data. The task of checking the correctness of the data is assigned by article L.331-21 CPI to special public agents within the Authority. If the information is proven true, an e-mail message is sent to the subscriber informing him of the fact that he failed to monitor his internet connection,

as defined in article L.336-3 CPI, of the exact time that this illegal action took place as well as of the obligation to watch over his internet connection. A mention is also made for the means that protect internet access and the available legal online content offer.
The second phase starts six months following the first e-mail, given that the facts remain the same and a repeated offense is committed by the same subscriber. Then, the Authority re-sends the same e-mail message along with a certified letter of the same content, including the exact date and time of the facts and the contact information for the CPD, in case that the accused wants his observations to be heard but not the precise artistic works protected and being pirated. The first phase of the graduated response mechanism was launched on October 1, 2010 and by the end of December it had reached the total number of 70,000 electronic warnings sent to the internet subscribers found to reproduce, look at and share artistic works protected by the French copyright.
The second one started at the beginning of 2011 at a relatively slow pace of 2,000 messages per day with the ultimate targeted number of 10,000 until the end of the semester. Despite the good will pervading the announcements, the total number will still be significantly smaller than that of 70,000 daily warnings sent by the rights-holders to the Authority. The reason for that is that the computer system of the Hadopi is not yet calibrated to accommodate and process such a large number of data.
Additionally, one should mention the objections expressed by a part of the French parliament; more specifically, the CPD of the Authority was asked to put the second phase of the procedure on ice, as it is "unjust and anti-pedagogic" to proceed to that without having before/ previously put into practice/ action/ applied the legal online content offer.
According to the March 11, 2011 decree, the final stage of the gradual response procedure, takes place with the transmission of the files to the Prosecutor's Office after having sent three consecutive warning notices to the internet users. As the president of the CPD highlighted, this procedure is purely manual, as the Committee's three members study each file separately and draw up and sign respectively a notice about it.
Henceforth, the criminal justice is informed about all the facts that can 'constitute an offense' certified by the Hadopi; two procedures are possible then, either to prosecute the offender for copyright infringement or charge him/her with a level-five fine for breaching the obligation to monitor his internet access.

4.2. The notice recipient's rights

The internet user, receiving for the first time the Hadopi notice by email, is informed through this that he/she can submit his/hers remarks, for instance in case of false allegations or simple questions, either by electronic mail, an automatic form found on the Authority's website or by telephone. Nevertheless, he/she cannot be informed on the nature and the details concerning the artistic works claimed to be downloaded by his personal computer.
According to article L.331-21-1 CPI, on the second phase of the three-strike procedure, in other words, following the second warning and the receipt of the letter, the subscriber has finally the right to negotiate with the Authority. Even if the description of the practical aspects of this right can be regarded at least as vague and unclear, its core could be summarized as follows; the subscriber is summoned by the Authority ("lettre de convocation") and informed about his/her right to be heard. If the internet user desires to exercise this right, he/she will be again summoned by the

Hadopi by letter, in order to fix the details of the official hearing in front of the *Commission de Protection des Droits* (CPD, Rights Protection Committee). A copy of the minutes of this procedure, during which the internet user can be assisted by a counsel not necessarily an attorney, will be handed/ sent to him/her.

4.3. The automatic processing of the personal data

The March 11, 2011 decree modifies/ amends the preexisting March 5, 2010 decree related to the automatic processing of the personal data contained in articles L.331-29 and after of the Intellectual Property Code, called "Management/ administration system for the measures for the online protection of artistic works".

As personal data, we should consider not only the personal information of the subscriber (name, address, e-mail address, phone numbers, IP address, name of the ISP, the subscription's file number), and the information relevant to the illegal acts claimed to be committed (date and hour of the act, nickname and peer-to-peer protocol used, title of the artistic work protected, name of the file existing on the pc of the user) but also the warnings sent by mail or by registered letter by the Authority, the referral/ bringing before the Prosecutor as well as the binding decisions of the Court that order the complementary penalty of suspending the internet access.

This information is saved / backed up by the Hadopi for fourteen months after having sent the first e-mail notice to the internet user or, in case of a backslider, for twenty one months following the delivery of the registered letter by him/her.

5. The legal online content offer

5.1. What is the legal online content offer?

Apart from its preventive and educational mission, the Authority is also charged with the duty to enforce the diffusion, the wealth and the appeal of authentic artistic content legally existing on the Internet, in other words, the legal online content offer. In order to define it, one must initially present the various ways of digital exchange and download architectures. The "peer-to-peer network" allows a group of computer users with the same networking program to connect with each other and directly access files (such as music, videos, software, photos etc) from one another's hard drives. On the other hand, the "streaming" or "streaming media" is multimedia that is constantly received by and presented to an end-user while being delivered by a streaming provider, so that internet users can, in real time, acquire an artistic work. Finally, through "direct download (DDL)" one can download a file directly from a website via a customer–server architecture, where the entire file is stored on a single file server or in parallel across multiple file servers on a server farm.

The form of the downloading technology is not the crucial element for the distinction of an offer as legal or not, but the permission from the rights-holders to expose their works and make them available to the public.

The legal online content offer refers to all the paid-for content download services, which respect the copyright and the intellectual property rights of their holders by yielding remuneration to the producers, writers, interpreters and others and have either already acquired the necessary license from the rights-holders or are entitled to do so by the law itself. For instance, artists who place their works under free licence automatically allow and authorize their free distribution to the internet users which cannot be prosecuted for the crime of copyright infringement. In fact, it is a way to entice them, on the one hand, to turn towards legal methods of online cultural consumption and to bring in profit to the French musical and cinematic industry by decreasing piracy, on the other.

According to the second paragraph of article L.331-23 CPI, introduced by the HADOPI 1 Law, the Authority can grant its certification, in the form of an "HADOPI" logo, placed in a prominent place on the website in question, to natural persons or corporate bodies that legally provide artistic content through public electronic communication networks. The November 10, 2010 decree introduced article R. 331-47 and following to the Intellectual Property Code which set out the procedure to be followed in order to enter the list, available to all internet users, of HADOPI labeled websites.
More precisely, in addition to the websites and its host's identification data, a list of the works to be included in the legal offer along with the methods applied for their access and reproduction, a statement/ affidavit mentioning that the necessary permission is obtained from the rights-holders and, finally, a commitment to collaborate with the Authority for every further explanation concerning the application must be submitted to the Authority.
The next step for the High Authority is to check whether the file contains the mandatory elements set out/ imposed as guidelines by the application decree no 2011-386 of April 11, 2011, which introduced article D.331-54-1 to the CPI. These can be classified in two distinctive categories; the indicators concerning the promotion and development of the legal online content offer, commercial or not, such as the number of the cultural works protected and the conditions for accessing them and, in a second category, the indicators relevant to the observation of the online use of copyright protected cultural works. In the latter, there are listed not only the categories/ groups of the protected works but also information about the personality of the internet users (age, sex, profession, device used). Then, the Hadopi should publish the application with its registration number on its website, for four weeks, during which the rights-holders can raise any objections relevant to the authorization of use of their artistic works by the website-applicant. In that case, the applicant is informed that he should come to an agreement with the other party within a period of two months. Otherwise, the application is completely or partially suspended for the work(s) in question. If no objections are raised, the HADOPI certification, valid for one year with the possibility of renewal under the same conditions and within three months before its term, is granted to him and cannot be taken away before reaching its renewal procedure the year after. Nevertheless, the Authority reserves for itself the right to suspend it at any moment in case a problem occurs, given that the grantee would express his remarks. Three websites Deezer, Beezik and Videoavolonte have already submitted their application for the Hadopi certification and are published on its website.

5.2. The reference internet portal

Additionally, in the near future, internet users will also have the reference internet portal at their disposal in application of the third paragraph of the article L.331-23 CPI. This will be a service of online communication containing all the legal offers existing for accessing an artistic work on the Web. In the form of an extended web search engine controlled by the Authority and based on the name of the artistic work rather than on the brand sought, it will assist internet users during their research and purchase of a legal artistic offer.

5.3. The «Music Card»

As regards music, the French Ministry of Culture and Communication jointly with retailers and the National Syndicate of Phonographic Edition (Syndicat National de l'Édition Phonographique, SNEP) has already put into work the service of a

government subsidized card, called the «Music Card». Since October 2010, subscribers between 12 and 25 years old can purchase 50 euros worth of music for half price by choosing from a list of platforms and online services associated with the project.
However, the number of music cards actually sold seems to be largely smaller than the one of cards simply activated from the users. At the same time, scruples concerning its effectiveness have been expressed not only by the «Performing Rights Society» (Société des Auteurs, Compositeurs et Editeurs de Musique, SACEM) who underlined the pernicious possible effects for the French orientation list of the internet users towards the legal offer but also from the «French Independent Phonographic Producers Union/ Association» (Union des Producteurs Phonographiques Français Indépendants, UPFI), which noticed that the music card hasn't so far met the expectations of success.

6. Securing Internet Access

6.1. A new obligation to internet users

The new French legislation on copyright also renders the internet users responsible for monitoring their internet access for fraudulent use that can lead to reproducing, communicating to the public or making copyrighted content available. Users, who have successfully proceeded to that, will be exonerated against any allegations of failure to control, in case someone hijacks their connection.
This could be achieved accumulatively by securing the PC itself, mainly with the installation of parental control filters, antivirus, firewall software, and its connection box, with the use of coding and certification management tools for their wireless connection. This type of protection is put into practice by the wireless encryption protocols WEP (Wired Equivalent Privacy), WPA (Wi-Fi Protected Access) and the most avcanced WPA 2.
However, it should be mentioned the revelation, a few months ago, of a fault in the security protocol WPA2, regarded as the safest and most valid among the existing ones, having an implicit impact on the application of this obligation imposed by the law. It is clear that even by taking the necessary precautions and installing the aforementioned software, the users are likely to remain unprotected and quite exposed as far as their legal responsibilities are concerned, without the possibility of defending themselves against an allegation of copyright infringement.

6.2. Software evaluation and labelisation by the Hadopi Authority

The ISPs are entitled to distribute a list of security software to their subscribers recommended by the Hadopi, which constitutes yet a "further guarantee of its effectiveness" according to the formal announcement of the Authority, even if its installation is not mandatory to them.
The December 23, 2010 decree sets the fundamental rules applicable to the evaluation procedure carried out by the Hadopi. According to it, the Authority will grant its certification, in the form of a label, to different kinds of software that secure the internet access by blocking the file sharing that infringes the copyright of artistic works. The software development companies should submit their program to an evaluation centre authorized by the *Agence Nationale de la Sécurité des Systèmes d'Information* (ANSSI, National Agency for the Security of Information Systems), which will then draw up a report. This report will constitute the cornerstone of the Hadopi certification. Along with it, an application file should be submitted, containing the elements that lead to the conclusion that the specific means of securitisation fully

complies with the functional specifications validated by the Authority. Within fourteen months of the application file's receipt, the Hadopi should decide whether or not the software in question could be accredited its label.
After being subjected to public consultation by ISP professionals and organisations of allocation of rights and copyright royalties, held until the end of last October, the document containing the pertinent functional specifications the software in question should meet, will then be published (article L.331-26 CPI). This will serve as a guideline to the internet users for evaluating the conformity of the existing securitisation means of their internet access. Additionally, it will be distributed by the ISPs, in an effort to entice internet users to protect their connection.
Despite the non-mandatory nature of the installation of one of the means listed in this document, the subscriber who will decide to use one "Hadopi" labelled software will gain an asset in the assessment of his/ her file by the CPD in case he/ she is involved in the graduated response procedure and will not be prosecuted for "characterised negligence".

7. The crimes committed

7.1. The copyright infringement via the online communications

The Hadopi Laws tend to approach the classic offence contained in articles L.335-3 and 4 of CPI of copyright infringement in a specific way; in other words as the speculated violation of copyright and related rights, which is now held through public online communication means. Public online communication is defined in article 1 IV of Act no. 2004-575 dated June 21, 2004, related to the digital economy (LCEN), as the transmission of digital data which takes place via an electronic communication process and results in the reciprocal exchange of information between the sender and the receiver, without it being a private correspondence.
More precisely, the procedure to be followed can vary between the single judge option and the criminal order. Consequently, in addition to the main penalty, the penalty of suspending the internet access of the subscriber can also be pronounced (article L.225-7 CPI). The *Conseil Constitutionnel* has underlined that the particular characteristics of this offence, which concern infringements of a larger scale due to the use of public online communication services, lead the legislator to subject its proceedings to special rules [Decision No 2009-590 DC of October 22, 2009, recitals (11) and (16)]. Strangely enough, the same solution was not adopted in the case of DADVSI law and the acts of copyright infringement effected via peer-to-peer software [Decision No 2006-540 DC of July 27, 2006, recitals (63) to (65)], despite the fact that the "larger scale" online communication infringements are mainly carried out through peer-to-peer software.

7.2. The characterized negligence; a newly born offense

The characterized negligence is the minor fifth class offence, introduced by the new French copyright protection Laws and described in article R.335-5 CPI. Its description is found in the decrees Nº 2010-695 of June 25, 2010 and Nº 2010-872 of July 26, 2010.
The person who has been found twice guilty of committing acts of reproduction, representation or sharing of copyright protected cultural works via his/her internet connection within a period of maximum sixteen months from the first violation, has received the Authority's notice and recommendations and despite that, hasn't yet installed a method to secure it, is liable for "characterized negligence".

We should clarify at this point that as article L.336-3 CPI imposes, the internet connection holder, otherwise called the subscriber, has the obligation to monitor that it is not used to illegally download copyrighted works and in this framework, he/she shall be prosecuted, even if, in practise, other options are also possible.
By proving that he acted on legitimate motives (*motif légitime*), the subscriber can exempt himself/herself from the penalty. Admittedly, this legal statement lacks precision, but based on a previously published ministerial answer (Answer to the written question No 62873, published on the *Journal Officiel* on May 18, 2010, page 5499) one could assume that it was due to problems of financial or technical nature that the subscriber was prevented from installing a securitisation system altogether to his/her connection, not to mention an efficient one.
Starting with the statement of the alleged offender before the Hadopi CPD, its members will decide with a majority of minimum two votes, if the facts contained in the file constitute the offense of the characterized negligence against the subscriber, in which case, they refer the file to the Prosecutor's Office. Afterwards, they inform the organization of professional defence which is responsible for the initial stages of the procedure (articles R.331-42 and R.331-43 CPI). Following the rules of the criminal procedure, if the Public prosecutor sues the subscriber, the Police Court (*Tribunal de la Police*) is in charge of judging if the offense is actually committed and then impose on the offender the fine of €1,500 and the additional penalty of a month's suspension of his/her internet connection.

7.3 The additional penalty of suspending the internet access
The main point of the graduated response procedure is by far the additional penalty of suspension of one's access to a public online communication service, introduced by articles 331-7 and 331-7-1 of the French Intellectual Property Code. Primarily, the French legislator intended to entrust the pronouncement of this penalty in the form of an administrative measure to the public authority of Hadopi. However, after the constitutional control held by the *Conseil Constitutionnel*, had partially censured the bill of the Hadopi 1 Law, it was made clear that only the court could proceed to that (Decision No 2009-580 of June 10, 2009).
As described above, this additional penalty is imposed not only in the case of the characterized negligence offence, but also in case of copyright infringement via public online communication services.
Consequently, the Court can decide the suspension of the internet connection of the subscriber, considering nevertheless the particular circumstances and the seriousness of the offence as well as the personality, the professional activity and socio-economic status of the person prosecuted (article L. 335-7-2). Thus, it is ensured that the penalty will be proportionate and will successfully combine the protection of intellectual property rights with the freedom of expression and communication. Finally, article L.335-7 paragraph 2 makes a particular provision for the so called "double/ triple play" contracts, which are commercial offers by the operators including television, telephone and Internet services. As far as other services within the same contract are concerned, their provision shall not be influenced by the suspension of the internet access, despite the existence of several technical obstacles that render this operation quite difficult.

Basing the penalty on the grounds of the infringement
According to the new article L.335-7 of the CPI, internet users identified as guilty of the copyright infringement offense effected through public online communication

services (and not only the peer-to-peer software) may be punished with the suspension of their internet connection for maximum one year. Additionally, in order to reinforce the effectiveness of the penalty, the alleged offender is prohibited to proceed to signing another internet services contract, while at the same time, he is obliged to continue paying his/her subscription to the ISP until the termination of the contract. This point has raised considerable controversies and was regarded as contrary to the principle of proportionality, but it was eventually validated by the *Conseil Constitutionnel*, which argued that the contractual breach is imputable to the subscriber, considering mainly that the latter has been informed by the ISP about the infringement hazards. When entered on an offense basis, non-compliance with the additional penalty constitutes an offense punishable by a penalty of two years of imprisonment and a fine of €30,000 (Article 434-41 of the Penal Code).

Basing the penalty on the grounds of the characterised negligence

On a misdemeanour basis, the additional penalty of suspending the internet access for the maximum period of one month can also be imposed to the subscriber guilty of committing the level five offense of the characterised negligence. Besides, the initial inspiration for conceiving the three-strike procedure was to eventually punish the internet connection holder for breaching the obligation to monitor it. Article L.335-7-1 CPI imposes that non-compliance with the injunction for taking up a new subscription also constitutes an offense punishable by a fine of €3,750. Concerning the practical aspects of the penalty, article L.335-7 CPI as described above is applicable.

The obligation for the ISP to cut off the internet access

Another measure which serves as a safety valve for the efficacy of the implementation of the additional penalty imposed is the obligation of the internet access provider to follow the orders of the Court and suspend the internet connection in question. As soon as the additional penalty of suspending the subscriber ‘s internet access is pronounced, the Hadopi informs the ISP, who must comply with it within fifteen days from the notification, following the orders of article 335-7 paragraph 6 of CPI. Failing compliance, the CPD will report these acts to the prosecutor’s office, as likely to constitute an offense that corresponds to a €5,000 fine.

8. Hadopi 1 & 2: A Critical Appraisal

8.1 The text of the law

Resulting from two laws and several implementation decrees, the French system set against the downloading of cultural works via peer-to-peer networks seems to be rather complicated, costly and difficult to put into practice.

The accumulation of penalties

As already mentioned, the penalty of suspending the subscriber’s internet access can be pronounced either on the misdemeanour basis of the characterized negligence for a maximum period of one month or on the grounds of the copyright infringement via public online communications for a maximum period of one year. Consequently, this creates the possibility of the accumulation of penalties for the subscriber not to mention the procedural issues that also exist. More specifically, the Prosecutor can choose between the Criminal Court, which will proceed with a single judge respecting the rules of the dispute procedure or the simplified and faster procedure of criminal order where the decision is pronounced by the president of the Court without a

previous dispute procedure. In the last case, the only way for the infringer to be heard is by lodging an objection within forty five days from receiving the order from the Court.
Apart from this, the main difficulty lies in finding out whether the downloading via peer-to-peer is illegal or not and consequently, in deciding clearly whether the crime of copyright infringement has reasons to exist altogether.
The criminal system proposed by the Hadopi 1 & 2 Laws is also enriched with the inclusion of two other offences: the breach by the subscriber of the obligation to sign during the suspension period a contract with another internet service provider and the ISPs breach of the obligation to actually suspend the "guilty" internet connection after being notified by the Authority.

The presumption of innocence
In its decision of June 10, 2009 (No 2009-580 DC, point number 18), the *Conseil Constitutionnel* found unconstitutional the part of the Hadopi 1 Law which expected from the internet connection holder and alleged offender to produce elements that could prove that he was victim of fraud of a third party and, consequently, exempt him from being guilty.
Nevertheless, the fundamental elements of the characterised negligence offence still lead one to question who bears the burden of proof of the non-existence of a security mechanism or of the carelessness of the internet connection holder. For instance, in spite of taking the necessary technical measures for securing the internet connection, no one can exclude the possibilities of hacking and pirating the wireless base station. And this will oblige the subscriber to prove that he has not deactivated his protection software and he has been victimized by a hacker, which reverses the burden of proof, by demanding from him/ her to provide evidence which is technically difficult or even impossible to be extracted.
The statements made by the Authority and presented before the Court are principally constituted by IP addresses collected by private companies–agencies and are deprived of substantial legal proving power. Nevertheless, they are regarded as evidence of the crime committed and it is in the hands of the alleged offender to prove his/her innocence. This can be mostly considered as a "presumption of guilt", breaching a fundamental democratic principle and right entrenched in article 9 of the *"Déclaration des Droits de l'Homme et du Citoyen"* of August 26, 1789.

The suspension of the internet connection
We have already mentioned /in this presentation that the right to have internet access is classified as a freedom of communication and thought, thus a political freedom (*Conseil Costitutionnel*, Decision No 2009-580 DC of June 10, 2009). However, the alleged offender of characterized negligence, can be sentenced with a suspension oh his/ her internet access for a period of maximum one year. As a result, we witness the repression of a fundamental freedom so important to one's democratic way of life and expression of ideas and opinions, with the sole aim to punish an offence. The question of the respect of the proportionality and necessity principles concerning the penalties is yet to be answered.
The obligation of the condemned copyright infringer to keep on paying the monthly subscription fees for a service which is no longer offered to him/ her can lead one to the conclusion that a "double penalty" is imposed, which is once more regarded as being against the fundamental principle of proportionality of the penalties.

Finally, there is no exemption from this penalty for the internet connection of companies, universities, local authorities and other organisations once they will be found breaching their obligation of monitoring it or having installed open Wi-Fi networks.

The ISPs participation

The tasks and duties delegated by the Hadopi 1 and 2 Laws to the internet service provider companies demand the thorough work of a large number of state-of-the-art devices and computers but also of working hours on the part of the staff. Besides, the ISP intervenes not only in the phase of the manual identification, at least for the time being, of the IP addresses of the internet connection holders but also in submitting to the Hadopi several of their personal data. It is clear that the application and the realization of this new legislation are mainly within the responsibility of the ISPs and their contribution. But, no provision has been made to reimburse these companies, as according to the Minister of Culture at that time, Mrs. Christine Albanel, the costs were not that significant to justify their compensation.

Technical deficiencies

As it is further analysed, the Hadopi Laws intend to fight online piracy of cultural works taking place exclusively via the peer-to-peer networks, leaving outside their repressive scope, and the widespread practices of streaming and direct downloading. However, this technology is rapidly evolving and soon-if not already- it may render the Hadopi 1 and 2 obsolete. The experts are dealing with the transformations of the peer-to-peer protocol; for instance, Mr. Bram Cohen, the author of the peer-to-peer BitTorrent protocol, will soon present the "Pheon project", which will distribute live streamed data via a peer-to-peer protocol. In other words, peer-to-peer will be applied in the streaming and it will still not fall within the scope of the Hadopi Laws. Moreover, the widespread existence of technological means for circumventing the law (relay servers abroad, connection coding through satellite connection via ISPs of other countries etc) allows one to deduce that the great number of alleged offenders will be novice users.

8.2 The results of the Hadoi 1&2 Laws application

An important research conducted by the "Marsouin" Laboratory (*Mole Américain sur la Société de l'Information et les Usages d'Internet)* in collaboration with two professors from the CREM (*Centre de Recherche en Économie et Management)* of the Rennes 1 University, almost a year after the passing of the first Hadopi Law, demonstrated that the results were not exactly those expected and aimed to be in the first place.

It was pointed that the internet users hadn't stopped downloading cultural works online after the implementation of the French copyright protection Law. More precisely, only 15% of the persons who have admitted using peer-to-peer networks for illegally downloading works online stopped doing it since its voting. On the contrary, the majority (2/3) of the users accustomed to illegal downloading has opted for alternative methods of piracy, such as streaming or direct downloading. All in all, the total number of "digital pirates" was increased by 27%.

Moreover, a survey by "ComScore", a French company measuring the digital world, proved that the online video market in France has rapidly expanded during the past year. More specifically, the direct download website Megaupload has known a great success, as only in November 2010, 7,4 million of French internet users visited its

website and downloaded cultural content whilst two and a half years before, they had reached the number of only 350,000.
A final remark concerning the results of the "Marsouin" survey could be that half of the online buyers of cultural works are identical to the online pirates who download them from the websites. Consequently, the imposition of the penalty of suspending the internet connection of these users, can only lead to shrinkage of the French cultural content market to an estimated extent of 25%.

Conclusions

To sum up, the 2009 Laws on "Creation and Internet" and "Protection under Criminal Law of Artistic and Literary Works on the Internet" were introduced with the aim to fight online sharing of cultural works by means of internet access control and encouragement of the legal online content offer. The rational for these laws was to resolve the economic problem facing the French artistic industries which experienced great losses from the massive illegal downloading of their works.
The implementation of the Hadopi 1 and 2 Laws and the administration of the procedures therein mentioned, lies in the hands of a public independent authority, called "Hadopi", i.e. *Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet*. It oversees the application of the "graduated response" or else "three-strike" procedure, where internet subscribers who repeatedly download via peer-to – peer networks copyrighted content will have their internet connection cut off, after receiving successive warnings sent by the Authority. Furthermore, the new French copyright protection legal framework created the crime of the "characterized negligence" against the internet connection holder who fails to install and use the technical tools appropriate for its protection. This can lead to the pronouncement of the additional penalty of suspension of the internet connection in question. The right to internet access, judged as fundamental by the *Conseil Constitutionnel* can also be repressed on the grounds of the copyright infringement effected via online public communication.
Another important duty which lies within the authority of Hadopi, is the reinforcement and further development of the legal online content offer and the delivery of "seals of approval" to content distribution services that provide it lawfully to internet users.
The voting of the Hadopi Laws, has created a 'domino effect' in the legislation of other European countries, such as the United Kingdom ("UK Digital Economy Act") and Spain ("Sinde Act", bill currently rejected). Nevertheless, not only does the connection between the illegal downloading and the economic loss of the entertainment business remain to be discovered but also the equilibrium between the rights of the intellectual property protection and those of the access to information should be revised. Additionally, on March 14, 2011 the Loppsi 2 Law *(Loi d' Orientation et de Programmation pour la Performance de la Sécurité Intérieure)* was voted, allowing the internet filtering without a Court decision (article 4) and also the blacklisting and monitoring of the filtered sites by an administrative state controlled authority.
Our suggestion, aligned with the proposals already expressed in France by collective organisations, would be the "global license". This legalises the non-commercial cultural content file sharing with a fair flat-fee payment allocated to the rights holders, proportional to the frequency of the downloading of their works. Thus, this alternative

solution can be regarded as probably more effective, less repressive of the democratic fundamental rights and freedoms and more profitable to the artists.

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