Briefing on France's Creation and Internet law -DRAFT
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PhD research: The Political Battle for Online Content in the European Union
23 October 2008

The French law on *Creation and Internet* – contracting for surveillance

This law is the foundation stone for graduated response, placing an obligation to control your Internet access onto every user. Whilst it seeks to resolve an economic problem for the French content industries, it raises the question of how far we can go to impose surveillance on Internet users to support *droit d'auteur*.

Project de Loi favorisant la diffusion et la protection de la creation sur l'Internet

(Loi en preparation – law under preparation)
18th July 2008

The French law on Creation and Internet is causing controversy in France, and the politics surrounding it are spilling over to the rest of Europe in the Telecoms Package debate. The law is intended to deal with the spread of freely-available copyright- protected content on the Internet. Whilst the core concept of the so-called "three-strikes" is well-understood outside France, other aspects of the law are not.

This paper gives an overview of this law, which is intended to support the French government's proposals for measures known as 'graduated response' – where people who repeatedly download copyrighted content will be cut off the Internet, after receiving warnings sent via their broadband provider or ISP.

Following a brief outline of the political background to the law, it addresses the issues raised by the law from a civil liberties perspective. It then examines some of the key concepts entailed in the law, namely the obligation to control your Internet access, and it explains how graduated response is grounding of the law in contract, not copyright, law.

It goes on to consider the structure of the public authority overseeing the implementation – the HADOPI – and its agents; and the option for rights-holders to ask for court orders to filter content. It then details some elements that do not appear in the law, and the undertakings of the rights-holders.

Finally, it considers how the Creation and Internet law matches up to the EU review of telecommunications law, known as the Telecoms Package.

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Overview of the law

The French law, known as the law on 'Creation and Internet'[i], is intended to deal specifically with alleged attacks *(atteints* is the actual word used) on copyright and neighbouring rights, committed on public electronic communications networks. In other words, the downloading[ii] of copyrighted music and film via peer-to-peer networks and the posting of copyrighted entertainment content on websites such as YouTube, and social networking sites – the so-called online piracy. However, the law has been widely condemned as being an inappropriate and disproportionate response to the issue, and has also been accused of being unworkable.

The law on 'Creation and Internet' has been drafted on the basis of a document produced in November 2007 by the 'Mission Olivennes', a commission set up for the purpose of looking into copyright enforcement measures, and headed by the former chairman of the French retailer the Fnac, Denis Olivennes. Hence, it is sometimes also known as the 'Olivennes law'.

The principle behind the French law on 'Creation and Internet' is simple. In a situation where you have millions of people accused of breaking the law – which is the position of the French government and the rights-holders - it is a fast, cheap method of applying sanctions. It enables users to be sanctioned using civil law (contract law) whereby they will receive two warnings before being cut off from the Internet for up to one year. Under current law, rights-holders – music, film and broadcast companies - may use the legal system, but going through the courts is time-consuming and costly and reaches only a small percentage of the alleged offenders.

The rights-holders contend that there is a kind of black market in copyrighted content. It is happening on a mass scale via millions of free downloads over peer-to-peer networks, and millions of users on user-generated content sites such as YouTube. This alleged black market in free copyrighted content destroys the commercial value in their products. As it was pointed out to me by the rights-holder lobbyists, it is essential to have a sanction, otherwise people will not stop.

In theory, the 'Creation and Internet' law is about sending a signal to this black market, to make the downloaders understand the wider collective costs of free downloading, using targeted civil sanctions against individuals who have been identified as doing it.

The rights-holders argue that this is a more proportionate response than taking people to court, and they also argue that a majority of people will heed a warnings and stop downloading without the need for any further action. Others argue that when so many people break law, then the law itself is broken, and an alternative means of fixing it is needed.

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Issues concerning the law

The Creation and Internet law claims to balance the rights to property of the content owners against the rights to privacy of the users. This would be appear to take a different approach from copyright law, where it is generally deemed there is a balance between the creator's right to exploit the work, versus the user's right to make use of it.

However, it is also argued that the law contravenes current European privacy and e-commerce law, and this is the reason why the French government and the rights-holder lobbyists are pushing so hard to get changes to telecommunications law, via the Telecoms Package.

It is deemed by many to in fact be disproportionate to the nature of the offence, and an infringement of. fundamental rights. It will allow rights-holders to determine who will be sanctioned, and the basis of the sanction. It takes no account of the complexities of copyright law, with various exceptions which allow for 'fair dealing' in the use of the protected content, which means it won't always be self-evident that an infringement has occurred.

It is argued that the law cannot be implemented without mass-scale filtering of Internet content and surveillance of Internet users. Unlike China, Europe doesn't have thousands of Internet police who can manually sift through websites, so it all has to be done through automation.

The rights-holders will put in place systems to identify the content on the web, using technologies which recognise the individual signatures or digital fingerprint of the content. It should be noted that whilst this technology can identify an individual work, it cannot identify whether the user has any rights under copyright law, to use it. For example, parody or fair criticism or educational use.

ISPs will have to scan stored databases of communications traffic data, in order to be able to match the IP address supplied by the rights-holders against a customer (which contravenes current data protection and data retention law). And rights-holders will have the right to get court orders to force ISPs to use automated systems against peer-to-peer filesharers. Users will themselves have to install software with links to the government body in charge.

The Creation and Internet law does not contain a disputes procedure where users could defend allegations and obtain redress in the case of false allegations. It has been labelled 'extremist' by certain lobby groups. It is certainly, on inspection, draconian.

It is arguably also a protectionist law for the French cultural industries – indeed, the explanatory preamble more or less says so.

Obligation to control and graduated response

There was no available civil sanction which fitted the requirement to deal with the mass scale, that is millions of minor infringements. Under the existing French law, the only way to deal with so-called pirates was to use the offence of 'infringement' (contrefacon) under copyright (droit d'auteur) law. This was deemed to be ill-suited to dealing with mass-scale piracy[iii].

The French government - that is the Sarkozy regime – has therefore come up with a new concept called an "obligation to control your Internet access"[iv] . This is the key to the law. All Internet subscribers are expected to monitor their access connection to the Internet, to ensure that it is not used for any infringement of copyright. Infringement is described as the reproduction, communication to the public or making available of copyrighted content.

The legal basis for the sanction of the user is a failure (*manquement*) to control your Internet access. It does not actually rely on the nature of the infringement. It appears to be grounded in contract law rather than copyright law.

The sanction is the termination or suspension of Internet access. The sanction will only be applied after two warnings, on by email and one by recorded post - have been sent to the subscriber. These three steps comprise the so-called "*graduated response*".

The mechanism for implementing this is the user's contract with their Internet service provider (ISP). If the contract states that users must control their Internet access together with the ISP's right to terminate in a case where copyright infringing content is downloaded, then the ISP is within its rights to do so.

Thus, the ISP is mandated to place in the contract with the user, a clause which outlines copyright infringement and the obligation to control, as well as the legal sanctions for failure to control. The ISP will then be entitled to terminate access, if it receives an injunction to do so from the authority overseeing the implementation of the law – known as the High Authority for the diffusion of works and the protection of rights on the Internet [v](HADOPI).

To ensure that ISPs do follow the termination instruction, and to ensure that termination means exactly that, the French law will institute a blacklist of terminated users. ISPs will be fined 5000 Euros if they either fail to terminate within 15 days of receiving the order to do so; or fail to check the blacklist when signing up new customers.

In order to try to make the law more palatable, the French government is saying that the law has an educational (*pedagogique)* value. For this purpose, another requirement has been inserted, which says that the ISPs have to send periodically messages to users, informing them about copyright protection and infringement.

The Creation and Internet law makes another move to tighten the screws on Internet users. In order to make sure they can meet their obligation to control, and they have not

got the excuse that someone else fraudulently used their connection to download, the law states that users must secure their Internet access. Those who have secured their Internet access, using security software, will be exonerated against any allegations of failure to control, in a case where someone hijacks their connection.

It proposes that ISPs must give users a recommended list of security software - recommended by the HADOPI. This is the first sign that the State must approve software before it can go on the market – although the law doesn't say it can't be marketed, in effect, there is no market for it, unless it has this approval. A recent proposal to amend the law, also says that all security software must link to the HADOPI, which will check and update it on a regular basis, in order that it can verify the status of the software in the case where an allegation is made against the user. This has been criticised as government spyware.[vi]

There are no safeguards against false allegations, and no proper dispute procedure. Users may be given an opportunity to negotiate with the Hadopi, but only after the second 'strike' – the registered letter.

Rights-holders as agents

The law puts in place a structure for determining whether a 'failure' has taken place and the identity of the user. At the centre of it is the HADOPI.

The HADOPI is in theory a neutral authority, and the proposed law sets up various rules for its employees. However, that appears to be a bit of window-dressing on the part of the French government – an attempt to make it look good and cover up its true nature. The organisations who will be allowed to make decisions on copyright infringement, and on whose word the Hadopi will act, are the rights-holders.

The law specifies that the High Authority will use accredited agents, who will be the collecting societies and the organisations representing the rights-holder industries, (that is, SACEM, SNEP) as well as, film and music producers, and the Centre Nationale de Cinematographie (CNC – this is the French equivalent of the UK Film Council[vii].). These organisations – and only these - will have the right to determine who is sanctioned. The High Authority will act on their recommendations, but the law does not say anywhere that their judgement will be scrutinised.

From a civil liberties perspective, this creates a large question-mark against the law. As it is structured for a private form of justice, with no checks and balances to ensure that the user's interests are taken care of.

The ISP is asked to send the messages to the user in order to get around data protection law. However, French data protection law is also being altered so that ISPs can be asked to pass on - via the High Authority – personal data and retained communications data. This data will be passed back to the rights-holder groups, who are acting as 'agents' for the High Authority. It does appear that they will also be passed data retained by the ISPs – this is in breach of the EU data retention directive – but it is something which the

rights-holders have been demanding for some time (including repeat demands in the Telecoms Package which were rejected by the European Parliament.) .

Filtering of Internet content

The law also contains a provision for rights-holders to ask for a court order to force ISPs to filter and block content deemed to be infringing. The order could be applied to "*anyone in a position to stop the infringement happening of prevent its re-occurrence"* (translation of the actual text). "Anyone" is not defined, but presumably it could be applied to an ISP, web hosting company, user-generated content site, or even a search engine or website owner/editor. It does not however, state what grounds the rights-holders must put up, or what kind of evidence they must show. The law was amended by the Senate, but the sense doesn't substantially alter. Instead of 'filter and block,' rights-holders can ask for:[viii] "*all measures needed to warn against or put a stop to an infringement of droit d'auteur or a neighbouring right*" (translation of the actual text).

It would appear that any rights-holder or collecting society can apply to a district court[ix] for a court order to block any Internet content that is deemed to be infringing, and that the block could apply to Internet pages, websites or servers; or transmissions on the network between users and web services and applications. It could therefore be targeted at any company or person involved with the Internet: that would include web hosting companies, companies which operate user-generated content sites, and indeed at all website owners, as well as the network operators and Internet service providers. It could be on any scale, from a one-off against an offending web site, to a mass-scale filtering by the ISP. The most likely target is peer-to-peer filesharing, where techniques such as 'throttling' could be demanded[x].

It raises the issue of secondary liability for copyright infringement, and it appears to be a mechanism to get around the e-commerce directive which says that ISPs must not be given an obligation to monitor.

There are also concerns that such court orders will have implications for vendors of end-user hardware and software[xi]. It will have an especially negative impact on the development of open source software, if, for example, there is a requirement for any implementation within standard end-user products.

The Olivennes report which forms the basis for this requirement, examined a range of measures which included filtering of content on user generated sites and on the network. It outlined in detail the different ways of filtering, including IP, domain and URL blocking, fingerprinting and watermarking for content identification, and network filtering on the carrier level (trunk network) and edge (local loop or residential network).

What is not in the law

- ***No reimbursement for ISPs:*** there is no mention of compensation for the ISP, but the Minister, Christine Albanel, has said in the media (silicon.fr) that she thinks the costs are not significant and therefore there is no requirement

for compensation . There is a cost to the ISP in terms of time and resource to look up the information, and in customer service calls from users, as well as to prepare and transmit emails to users (There is work involved in preparing a mass email broadcast, as well as in preparing legal email warnings to individuals. Email transmission utilises bandwidth).

- ***No obligations on rights-holders:*** there are no checks and balances on the information supplied by the 'agents' (ie the rights-holders) for the sanctioning of users
- ***No checks on filtering applications:*** there are no checks and balances on how rights-holders would determine the basis for an application to the court for filtering or other restriction
- ***No dispute procedure***: there is no dispute procedure or right of appeal for the user, only a right to negotiate a reduced term of suspension
- ***No indemnification for ISPs*** on liability for erroneous accusations of users – eg if rights-holder gets it wrong, or if the time-stamp or other data in the reports on the users is inaccurate. .

Rights-holders undertakings

The HADOPI has an additional duty to oversee the putting in place of so-called legal offers – that is, paid-for content download services. However, the law specifies nothing further (in comparison with several pages of detail about how users are to be dealt with). Reading the Mission Olivennes document, it seems that what was intended was a set of requirements for rights-holders to take action to improve their online offers, that will entice users away from the free, 'pirated' download material. In reality, however, these requirements do not seem to amount to very much.

The French ISP association – the AFA – complained in June 2008 that whilst the pressure on them was increasing – and the demands – the rights-holders were doing nothing. They claim they were promised the opportunity to negotiate business deals with the rights holders and this is not happening[xii].

Under the original Mission Olivennes report, rights-holders were to reduce the release window for French films online, from 7 to 4 months (in practice this isn't a big concession, and may not help the situation, since a part of the problem is that films are released online before they come out in the cinema.) The French music industry was also made to undertake to drop DRM on all music released in France. And the French government was to campaign at EU level for a reduction in value added tax, as applied to creative products and services[xiii].

How the Creation and Internet law matches up to the Telecoms Package

Amendments placed in the Telecoms Package by the European Parliament on 24 September 2008:

- Grounding in contract law: Obligating the ISP to insert into the user's contract 'any restrictions on the use of the service ' (Art 20 (2b)
- Transparency obligations on ISP regarding 'restrictions' (Universal Service, Art.21 (4))

- Mandating that regulators promote 'co-operation' between ISPs and rights holders (Art.33(2a)
- ISPs to transmit information messages on copyright infringements from the regulator to the users
- Permitted processing of traffic data for 'network security' purposes
- Amendments related to restriction and degradation of service, quality of service or network management, which open the way for content filtering and peer-to-peer blocking

Changes in the Council working party compromise proposals, October 2008:

- Deletion of the requirement to re-imburse ISPs for sending messages to users
- Deletion of the statement that ISPs would not be asked to monitor or punish their customers
- Deletion of Framework directive Amendment 138, which demands due process in a court before santions can be applied; and deletion of Universal Service directive Amendment 166 which demands that restrictions on users access to content, applications and services, should be proportionate.
- Addition of text stating that the regulator is entitled to intervene to ensure this co-operation happens, if 'one of the parties' complains.

To discuss the issues raised in this paper, please contact the author. Monica Horten is carrying out PhD research in European communications policy at the University of Westminster. Tel: +44 (0) 1628 672155 Website: www.iptegrity.com

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[i] Full translation: Proposed law, promoting the diffusion and protection of creation on the Internet

[ii] Technically, peer-to-peer users up and download at the same time, and it is also known as 'file-sharing'. From a legal viewpoint, the breach of copyright is in the 'making available' of the content, that is the uploading. However, I have used the word 'downloading' as that is how it is commonly understood.

[iii] Le projet de loi favorisant la diffusion et la protection de la création sur Internet, Expose des motifs, p3

[iv] Article 6, L.336-3

[v] Haute Autorité pour la diffusion des oeuvres et la protection des droits sur Internet (HADOPI)

[vi] *Numerama*, 27 October 2008, Le Senat veut installer un spyware sure tous les ordinateurs http://www.numerama.com/magazine/11170-Le-Senat-veut-installer-un-spyware-sur-tous-les-ordinateurs.html ; Thiolliere report: N° 53 Sénat session ordinaire de 2008-2009; Annexe au procès-verbal de la séance du 22 Octobre 2008; *RAPPORT FAIT au nom de la commission des Affaires culturelles (1) sur le projet de loi favorisant la diffusion et la protection de la création sur Internet*, Par M. Michel Thiollière, Sénateur.

[vii] Article2, . L331-22

[viii] Original text: " toutes mesures propres à prévenir ou à faire cesser une telle atteinte à un droit d'auteur ou un droit voisin". *Projet de loi Adopté le 30 Octobre 2008, Adopté par le sénat Après déclaration d'urgence favorisant la diffusion et la protection de la création sur internet.*

[ix] Tribunal de Grande Instance

[x] 'Throttling' is a surreptitious and automated technique to slow down or stop peer-to-peer transmissions.

[xi] Business Software Alliance (BSA) News release: Review of European telecommunications laws, BSA calls on the Council of the European Union to ensure the security of online users without enacting unworkable requirements affecting the processing of Internet traffic data and warns against the imposition of anti-piracy filtering technologies Brussels, 24 September 2008

[xii] Nicholas D'Arcy, legal counsel, AFA, London July 8 2008, speaking at *ISP Future Content Models and Enforcement Strategies* .

[xiii] Mission confiee a Denis Olivennes, Rapoort au Minstre de la Culture et de la Communication, *Le Developpement et la Protection des Oeuvres Culturelles sur les nouveaux reseaux*, p 25