

The French “Creation and Internet” Bill: An Intelligent Design?

Nicolas Jondet

PhD candidate, University of Edinburgh

GikIII – Oxford Internet Institute

September 2008

Introduction

- The “Creation and Internet” bill will be discussed in November (honest!)
- The bill is often referred abroad as the “three strikes and you’re out” bill.
- The main provision: an administrative authority will have the power to order the disconnection of repeat copyright offenders
- The bill is part of the wider “Elysee Agreement” hammered between the ISPs, the media industry and the French Government

The Olivennes Report

- **Olivennes: then chairman of “La Fnac”**
 - “La Fnac” involved in all aspects of content distribution: sells electronics, computers, CDs, online platform for music and films
 - “La Fnac” started selling DRM-free music, from independent labels, months before Steve Job’s epiphany
- **The wide consultation by Olivennes:**
 - Media companies (music, movie, TV)
 - ISPs, Telecom
 - Consumer groups (UFC...) and Internet advocacy groups
 - Internationally: EMI UK, NBC US, UK officials
- **Conclusions of the report and aim of the agreements:**
 - Improve the legal offer for online products
 - Modify the response to piracy

1. Improving the legal offer

- **The media industry must:**
 - Remove DRMs from French music catalogues
 - Make movies available on Video on demand (VOD) at the same time as DVD
 - Shorten the release windows.
 - “do their utmost” to make all media content available on VOD
- **The French Government must:**

Apply to the EU for an extension of the reduced rate of VAT to all cultural goods; to reduce retail prices
- **Obligations of the industry in force only after the passage of the law on fighting piracy**

2. Modifying the response to piracy

- **The current system: strong but mostly ineffective criminal provisions**
 - Unlawful uploading and downloading of any content is punishable with a 3 years in jail and a €300,000 fine
 - In practice: low fines and no convictions (only suspended sentences)
- **The impossibility to add flexibility to criminal provisions**
 - Wide consensus (courts, government, parliament) to adapt criminal provisions
 - Proposal: uploading €150; downloading €38
 - Struck down by the Constitutional court

The discarded solutions

- **A purely technological solution:** filtering technology, not realistic
- **A contractual solution**
 - The US and UK way: leaving it to private parties (ISPs and media industry)
 - The French interested in the idea of issuing warnings to infringers
 - The privacy issue: such contractual solution was deemed not to be compliant with French Data Protection laws

A “graduated response” implemented by an independent administrative authority

- “Graduated response”, keeping the warning system but with oversight
- Rebranding of the French DRM watchdog into a “High Authority for the dissemination of works and the protection of rights on the internet” (HADOPI)
- Missions of the HADOPI
 - Existing missions: ensuring DRM interoperability; safeguarding the benefit of copyright exceptions
 - New missions: monitor (monthly) and fight piracy

The procedure before the HADOPI

a) The warning phase

- The media industry investigates, collects information on suspected copyright infringers
- The media industry brings a case before the HADOPI
- The HADOPI warns the subscriber he has failed with his “obligation to monitor” his internet access so it is not being used to breach copyright law.
 - First time by email
 - Second time formal letter by recorded mail
- Great hopes that this warning system will have a deterrent effect
- But a renewed failure to respect this monitoring obligation will result in sanctions

The procedure before the HADOPI

b) The sanctions

- Suspension of access for a period of three months to one year, with a ban to subscribe with another operator
- The Hadopi will have to constitute a national directory of subscribers whose contracts have been suspended (the directory will need to be sanctioned by the Data protection authority)
- ISPs will have to check when agreeing to any new contract, that the candidate is not on the list
- The Hadopi will be able to offer the subscriber, by way of settlement, and accepted of his own accord a suspension of a shorter time period, of between one and three months

Remedies for subscribers

- **Prevention**

The subscriber can secure his computer using systems offered to him by his ISP.

The Hadopi will draw up a list of security systems considered as efficient to guard against a failure to respect the monitoring obligation.

- **Cases of immunity**

- force majeure

- fraudulent access by a third party (except if this fraud is carried out by a person placed under his authority or supervision)

- **Appeal the sanctions before the judicial courts**

Conclusion

- Interesting process, wide consultation
- Pro media industry by with privacy safeguards
- Trade-off between media companies and the state acting on behalf of the consumer (Dadvisi; Bill)
- Last request from the media industry? Hard to think of any new measure they could come up with
- Parliamentary debate starts in November