

Survey shows that the French graduated response fights online copyright infringement efficiently

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At the end of 2017, HADOPI published an important survey on its activities for the period 2016-2017. It gives interesting and useful information on the graduated response created by the French legislator to fight online infringement directly at the source, by educating internet users and dissuading them from unlawfully downloading and/or sharing (and if possible accessing) works and elements protected by neighbouring rights.

HADOPI is the High Authority for the distribution of Works and the Protection of Rights on the Internet, created by the French legislator in a Decree of 29 December 2009. The authority has several missions: the development of lawful provision of works (e.g. HADOPI has created a website which identifies the platforms where works are lawfully available: <http://www.offrelegale.fr>); the regulation of the implementation of technical protection measures; and the protection of works from infringement, through the graduated response procedure.

The French legislator created an original graduated response system intended to stop the use of an internet access connection for infringing purposes. The provisions and sanctions are controversial in France and have been modified several times. The graduated response, which concerns the liability of internet users, is partly administrative and partly criminal (as the users may be fined). Article L.336-3 IPC provides that a person with access to internet services has an

obligation to ensure that his connection is not used for infringing reproductions or communications to the public. Until the Decree No. 2013-596 of 8 July 2013, the holders of an internet access connection could have their internet access suspended. This is no longer the case. The offence is not qualified as a misdemeanour and the only possible sanction is a simple fine of up to EUR 1,500. The holder of an internet access connection may be sentenced by a court if, without legitimate reason:

- he has not secured his access to the internet (e.g. by restricting access via the Wi-Fi system, thus stopping a neighbour from using the access to download works unlawfully) or has lacked diligence in the implementation of the means to secure the access;
- he has been recommended, by letter and/or email, by the committee of Article 331-25 IPC (HADOPI's '*Commission de protection des droits*') to implement a means of securing access; and
- his access is used for infringing activities within the year following this recommendation.

The procedure is the following: (1) rightholders (collecting societies, record companies, etc.) who have established the existence of unlawful exchanges or downloading on or via certain websites file a case before HADOPI, and the ISPs are asked to identify the holder of the internet subscription; (2) within 2 months HADOPI sends a recommendation by email to the internet user; (3) if the internet user is found to have continued unlawful activities, a second recommendation is sent by email and registered letter; (4) if, within 12 months from the second recommendation, unlawful activities carry on, HADOPI can decide to lodge a complaint with the prosecutor. It must be noted that the internet user can also be sued or prosecuted for copyright infringement.

HADOPI's survey presents statistics that show that this system is efficient, since it is indeed largely dissuasive:

- between 1 October 2010 and 31 October 2017, HADOPI sent 9,427,718 recommendations, and 1,853,323 between 1 November 2016 and 31 October 2017,
- between 1 October 2010 and 31 October 2017, HADOPI sent 846,018 second recommendations, and 160,000 between 1 November 2016 and 31 October 2017,

- between 1 October 2010 and 31 October 2017, 7,886 internet users were found to have continued unlawful activities after the second recommendation, and 2,497 between 1 November 2016 and 31 October 2017,
- 2,146 cases were filed with the prosecutor between 1 October 2010 and 31 October 2017, and 847 between 1 November 2016 and 31 October 2017,
- since the launch of the graduated response, 2,146 files have been sent by HADOPI to the prosecutors for possible prosecution, and 189 sentences have been handed down.

In a country of 67 million people, these figures are quite impressive. In practice, the survey notes that after a first recommendation is sent, HADOPI does not need to follow up on 60% of the cases. Approximately two-thirds of those interviewed (65%), who are exposed to a graduated response procedure, either personally or in their immediate circle, report that they have decreased their illicit consumption following the receipt of a recommendation.

Interestingly (and amusingly), from time to time I personally hear that friends or people I know have received an email from HADOPI, and that they have therefore decided to stop downloading works from unlawful websites. And the figures speak for themselves. Of course, the graduated response is not in itself sufficient to fight online copyright and neighbouring rights infringement, but this survey shows that it is a useful additional enforcement measure.