

Kluwer Copyright Blog

HADOPI hits once again the headlines

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In this period of French presidential campaign, the HADOPI law has become a popular and recurrent topic. Most of the candidates have expressed an opinion (more or less constant) on the future of the law (whether to amend it, replace it, abrogate it or keep it as it is). This blog is certainly not the appropriate forum to discuss their proposals, which are in any case and at this stage more slogans than concrete proposals. However, the HADOPI law and its acronym authority have also made the headlines of specialized information websites for other reasons. One of them concerns the launch of the last stage of the graduated response with the transmission of the first complaints against Internet users to the public prosecutor; another one concerns the publication of a survey by the HADOPI Authority on the exceptions to author's and neighbouring rights.

If the HADOPI Authority is well known for its enforcement role (and in particular for the implementation of the graduated response), it is certainly less known for its role of promotion of lawful use of copyrighted material in the digital environment (see the [different missions](#) of the HADOPI Authority).

Last February, an [online newspaper](#) disclosed that the HADOPI Authority (through its Committee for Protection of Rights) had transmitted the first complaints of Internet users to the public prosecutor. This act has officially started the last stage of the graduated response before a judge can order a suspension of Internet connection. In September 2011, the HADOPI Authority presented its first [activity report](#) and stated that 650.000 Internet users had received a first warning email and 45.000 a second warning ([official letter](#)). Since September, the [volume of warnings](#) has increased a lot. Mid-February, 880.000 warning emails and 68.000 official letters had been sent out. However, the exact number of files transmitted to the public prosecutor is still unknown. Less than [200 files](#) should be concerned.

At this stage, it should be mentioned that the HADOPI law has not set up a specific offence for illegal downloading of copyrighted material (the general provisions contained in the French Intellectual Property Code apply) but has introduced a gross negligence offence for the lack of security means protecting Internet connections and for the lack of diligence in implementing such security means. The graduated response results in finding an Internet user guilty of gross negligence after three warnings. However there is a major issue concerning the concrete applicability of the gross negligence provision.

The evidence of gross negligence only results from the reports drawn up by assigned agents on the basis of the findings (such as the use of an IP address for illegal P2P) gathered by a private company. The lack of diligence will be particularly difficult to establish based on these reports. As a part of the procedure before the HADOPI Authority (more specifically the Committee for Protection of Rights), the defendant can be asked to be heard (Articles R.331-40 and R.331-41 of the French Intellectual Property Code). Some commentators consider that only defendants could, during their hearing before the Committee for the Protection of Rights, disclose the elements necessary to establish the gross negligence offence and therefore recommend them to [remain silent](#). The next steps, i.e. the potential referral of a case to a Court and the possible outcome are eagerly awaited.

As said, the HADOPI Authority is more than an enforcement body and it has recently shown it by publishing on its website a [survey](#) on the effective exercise of the exceptions to author's and neighbouring rights. The questionnaire is part of a [broader project](#) on the exceptions to author's and neighbouring rights to assess whether the development of new digital uses should result in the modification of the definition, nature and scope of exceptions to author's rights.

Under French law, exceptions to author's and neighbouring rights are exhaustively enumerated. The survey makes the inventory of these exceptions in a first section and asks whether their scope should be extended (e.g. whether streaming should be covered under the temporary and transient reproduction exception and under the exception of private communication within the family circle) and how each of the exceptions concretely applies. The second part of the survey deals with the implementation and compensation of the exceptions: the survey reminds that exception to author's rights are subject to the three-step test and asks for an assessment of each of the criteria (certain special cases; no conflict with normal exploitation and no unreasonable prejudice to legitimate interests).

Interestingly, the HADOPI asks in its survey whether an open approach to the exceptions such as the US fair use model could be considered. It is surprising to read such a proposition in the survey, although the fair use model might not be the right norm for an author's right country (see on the issue of fair use in the EU context the [study](#) made by Bernt Hugenholtz and Martin Senftleben).

However the efforts of the HADOPI Authority to launch a discussion on the exceptions to author's rights are laudable, even if there are serious doubts that answers to the survey (submitted before 15 May 2012) will result in a complete change of regime. But to end with a positive thought, this survey could be a first step.

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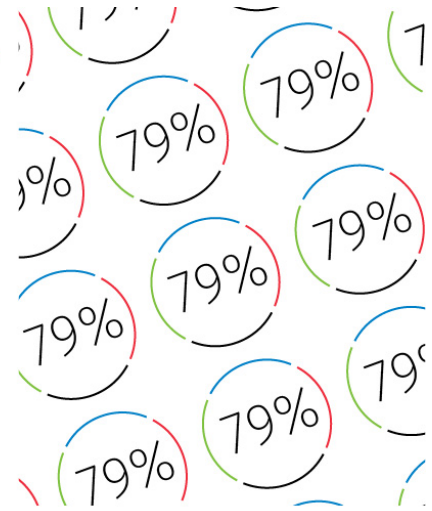
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