

TELECOMMUNICATIONS, MEDIA & ENTERTAINMENT UPDATE

French Online Copyright Infringement Law Faces Challenges But May Create Business Opportunities

The French online copyright infringement (so-called HADOPI) law was passed on May 13, 2009 by the two assemblies of the French parliament after long and tumultuous debates. Its main purpose is to create an agency, called the HADOPI¹, that will have the power to cut off persistent infringers' Internet access. Technical and legal challenges may delay implementation of the new law. In addition, the most important objective of the HADOPI law is to facilitate development of legal online content offers in France, which will depend in large part on right holders' ability to package and deliver new attractive online content to consumers. The HADOPI law may constitute a business opportunity for service providers in France, but it remains to be seen whether the law will actually contribute to the development of legal content offers.

THREE-STRIKES REGIME

The cornerstone of the new law is an obligation on the subscriber of an Internet access to take measures to ensure that his or her access is not used for illegal file sharing. ISPs have an obligation to propose to their subscribers technical tools that will permit them to satisfy their obligations. If the subscriber activates these tools, he or she will benefit from a safe harbor and will not be subject to the "three strikes" regime discussed below. If the subscriber does not activate the tools and his or her access is used for illegal file sharing, he or she could receive warnings and potentially have his or her Internet access suspended for several months.

Three strikes enforcement. The three strikes process starts at the request of collective rights organizations who gather and transmit to the HADOPI agency the IP addresses of persons uploading or downloading copyrighted content. After this, the agency will ask the ISP to match the IP address to a subscriber and will send a first warning to the email address of the subscriber. The agency may then decide to send a second warning (by registered letter with return receipt if the HADOPI wants to have the possibility to initiate a third step) if a repeated offence is committed within six months following the first step. Finally, in the case of a repeated offence within one year following the second warning, the agency may impose a sanction.

¹ "HADOPI" stands for "Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet", which means High Authority for the distribution of works and protection of rights on the Internet.



Sanctions imposed by the agency: Depending of the nature of the case, the agency may decide to order the disconnection of the Internet access for a period of up to one year, or to order the subscriber to take measures to guarantee that the relevant Internet connection will not be used again for unauthorized file sharing. This second option will be used in cases where the suspension of the Internet access would have harmful consequences (typically, where an employee makes an illegal download and the suspension of the Internet access would impact his/her employer's business). If the agency orders the suspension of the Internet connection, the subscriber will be blacklisted and Internet access providers will be prohibited from providing him/her with a new Internet connection for the time of the suspension. The subscriber has the possibility to enter into a settlement agreement with the agency whereby, in order to reduce the period of the suspension, the subscriber acknowledges the illegal download and agrees not to repeat the offence. The subscriber may put forward one of the three safe harbor defenses provided by the law in order to avoid a sanction: (i) that the subscriber used one of the technical tools approved by the agency to protect his or her connection from illegal file sharing, (ii) that the connection was accessed by a third party in a fraudulent manner or (iii) that there was a case of *force majeure*. The subscriber whose connection has been cut off still has to pay for his/her Internet access. For subscribers with "triple play" broadband connections, only the Internet connection will be interrupted, not the IPTV or telephone service. The subscriber has the right to a full hearing at the agency, and may appeal the agency's decision to a court.

MISCELLANEOUS PROVISIONS

No protection for "tax haven" works: The new law provides that the agency may not levy sanctions against an Internet subscriber if the work illegally downloaded or uploaded belongs to right holders resident in a tax haven country. This provision might affect film or music libraries whose IP rights have been transferred to a low tax jurisdiction.

No filming in cinemas: The new law adds to France's copyright law a sentence confirming that filming a motion picture inside a cinema constitutes copyright infringement.

Copyright of journalists: The new law contains provisions intended to significantly modify the French copyright regime for journalists. Under the new regime, copyright of articles written by journalists will automatically be owned by the employer, unless otherwise provided in the employment agreement. The newspaper will have the right to use the work in any of its publications (either in paper form or on the Internet) for a certain period of time (to be established in collective bargaining agreements). No remuneration other than his/her salary will be due to the journalist. After this period of time, the employer still has the right to exploit the work subject to an additional payment. The journalist will retain the copyright for publication of the work in other media.

CHALLENGES FACING THE NEW LAW

Constitutionality: In debates relating to Europe's new telecoms directives, the European Parliament has stated that only a court order could authorize the termination of an Internet connection because the Internet access is a "fundamental right." Is an Internet connection a fundamental right? The French government says no, and adds that even if it were a fundamental right, case law of the European Court of Justice states that rights can and should be balanced, and that the right to the protection of property is a fundamental right that needs to be balanced with other rights such as the right to privacy or the right to access information.

Another constitutional issue is whether the obligation placed on Internet access subscribers to prevent their connection from being used for copyright infringement places an unreasonable burden on consumers. The Constitutional Court should rule in the next month.

Technical issues: Many French Internet users access Internet via WIFI and may not be aware of the steps needed to secure their WIFI access. Other commentators argue that the law will be useless because the traffic will be encrypted, which will make the detection of unlawful traffic impossible. In addition, the law will not be effective vis à vis streaming services (as opposed to downloading services). The new agency will need to be careful that the implementation of the "three strikes" regime does not push French ordinary Internet users to fraud. An over zealous sanction regime can sometimes have this undesirable effect.

THE DEVELOPMENT OF LEGAL ONLINE CONTENT OFFERS

The "raison d'être" of the new law is to boost innovative and legal download platforms. The three strikes regime is supposed to influence the behavior of mainstream Internet users and push them gently toward attractive, easily accessible, and inexpensive offers for online content. One of the new agency's tasks will therefore be to take measures to encourage stakeholders to make more content available online via inexpensive or free (advertising-based) platforms. One of the obstacles to attractive online content was the six month video window in France. The new law reduces the existing video windows as follows:

DVDs: the law reduces the minimum release window to four months after theatrical release. The law allows parties to increase this period by contract. The period can also be reduced by up to four weeks pursuant to criteria to be developed by the CNC (National Centre of Cinematography).

VOD: If there is no industry-wide agreement on VOD windows within one month after publication of the law, the same 4-month window will apply for VOD. Again, the window can be increased by contract. For free or subscription VOD, a different window may be defined by decree.

OPPORTUNITIES CREATED BY THE LAW FOR SERVICE PROVIDERS

Technical services: Operators who provide illegal content detection tools as well as Internet access security tools may find a good business opportunity under this law.

Content distribution services: The law makes it possible for the agency to deliver “seals of approval” to content distribution services that provide lawful content services to consumers. The law entrusts the CNC with the mission to implement a portal where legal online offers of motion pictures will be referenced.

NEXT STEPS

The law will be reviewed by the French Constitutional Court for compatibility with the French constitution. The government will issue implementing decrees to set up the new agency and define how it operates. The government will initiate a consultation of stakeholders (including telecom operators) in the Fall to find “new sources of funding for the distribution of works on digital networks” and an equitable sharing of those resources among various actors in the value chain. The government hopes that the three strikes system will be up and running by the end of 2009.

About the TME Update

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