Legal Issues of the French Law on Creation and Internet (Hadopi 1 and 2)

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ABSTRACT

The French law on “Creation and Internet,” or more commonly known as the “Hadopi 1” Law, passed on June 2009, and its complementary, the “Law for the Protection under Criminal Law of Artistic and Literary Works on the Internet” (“Hadopi 2”), passed on October 2009, were intended to put an end to the illegal distribution of creative works on the Internet and at the same time control the internet access for every user. However, the implementation decree of March 2010 on the “specific negligence” aims exclusively at the peer-to-peer networks, leaving out of the criminal framework the direct download and the streaming options. After presenting and analyzing the French laws “Hadopi 1 & 2,” the authors discuss the controversial findings of a recent French research of the first months of their application in France and eventually question the achievement of the ultimate goal, which is the protection of the French intellectual property rights on the Internet.

Keywords: Creation and the Internet, French Laws, Hadopi Laws (1 & 2), Intellectual Property Rights, Internet, Peer-to-Peer Network

1. INTRODUCTION

After turbulent legal procedures and crucial political controversies, the French online copyright infringement legal framework was finally voted on June 12, 2009 and on October 28, 2009 accordingly. The laws on “Creation and Internet,” and the “Law for the Protection under Criminal Law of Artistic and Literary Works on the Internet”- have the distinctive names of Laws “Hadopi 1 and 2”- acronym of the public authority (“Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet”) (Hadopi, 2009). This was founded by Hadopi 1 in order to ensure their enforcement and in combination with the implementation decrees; it has provided the penal sanctions concerning the regulation and control of the internet access in order to decrease online piracy.

The French Conseil Constitutionnel reviewed and declared several articles of the Hadopi Law as being contrary to the French Constitution (Decision Nº2009-580 DC of June

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Gorniak-Kocikowska (2006) argued that technology, as well as knowledge, can be used for both ethical and unethical purposes. Simply speaking techno-ethics refers to the harmful use of ICT (and especially the Internet) tools, practices and applications.

Hadopi 1 & 2 reflect the ethics governing downloading creation in the Internet and set the rules to combat piracy in a technologically advanced but at the same time anarchic environment. The laws under consideration cope with a techno-ethical environment which expands rapidly.

Following a brief presentation of the legislative background that led to the voting of the Law, this paper primarily gives a general overview of the law and then it goes on to analyze the core notions that impose surveillance on French Internet users, such as the “graduated response” procedure, the specific negligence, the legal online content offer, the filtering of the Internet content and the eventual sanctions for the infringers. Afterwards, it elaborates on the role and competences of the independent public authority and its agents. It continues by considering some of the Law’s deficiencies and presents the results of opinion polls showing the dubious effect of its repressive measures on the French Internet users’ practices.

Finally, it raises the question of how the liberty of communication of ideas and the liberty of thought, in the form of Internet access as a political freedom-according to the decision of the Conseil Constitutionnel of France- can be combined with the rights of intellectual property and specifically the copyright and related rights of the artists and rights holders.

The paper presents and discusses the controversial findings of a recent French research regarding the deployment of “Hadopi 1” and “Hadopi 2” in France. Moreover, it questions the achievement of the ultimate goal, which is the protection of the French intellectual property rights on the Internet. It is organised as follows: the first part presents the Hadopi 1 & 2. The presentation of the Graduated Response or the Three-Strike Procedure, which is a critical part of the legal protection of the French Online copyright Infringement Law, is the main objective of the second part. The third part presents various aspects of Internet security examining issues regarding the online content, the new obligations of online users and the internet crimes. In the fourth part a critical appraisal of the Hadopi 1 & 2 is stated. Finally, the conclusions, as well as, the results of the Hadopi 1 & 2 Laws application are discussed.

2. HADOPI 1 AND 2: A BRIEF ACCOUNT ON THE HISTORY OF THE RELEVANT LEGISLATION

2.1. Hadopi 1 and 2: Overview of the Law

The legislative source of the “Hadopi 1 and 2” Laws resides in the European Copyright Directive 2001/29/CE, implemented in the French legal system by the Law on Authors’ rights and Related rights in the Information society (“Droit d’Auteur et Droits Voisins dans la Société de l’Information, DADVSI”) on August 1, 2006 and never fully put into action. This Law intended mainly to deal with the exchange of copyrighted works over peer-to-peer networks, the criminalizing of the circumvention of digital rights management (DRM) protection measures, the rights on resale of works of art and the exceptions to copyright for fair use (French Republic, Ministry of Culture, 2008).

Almost a year later, on July 26, 2007, the French Minister of Culture, Mrs. Christine Albanel, asked Mr. Denis Olivennes, the President and CEO of FNAC, to preside over a committee in order to reach a settlement between the interests of various economic actors; from the professionals of the copyright, the entertainment industry, the Internet Service Providers (ISPs) to various consumer and public organizations. The core of the agreement was to find the pos-
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