Surveillance and regulating code: An analysis of graduated response in France

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Abstract

This paper analyzes a recent policy initiative in France to deter copyright infringement. In 2009, France passed two laws aimed at fighting online piracy through graduated response, a warning & sanction system. Under the graduated response policy, Internet users are monitored and when caught infringing copyright, are repeatedly warned about their illegal actions and ultimately sanctioned through the suspension of Internet access, fines and/or prison sentences. Graduated response depends on surveillance of Internet uses and encourages technological regulation, such as Internet filtering and blocking. In our analysis of the French copyright enforcement policy, we look at the rationales advocated for copyright and the Internet and the argumentation for surveillance and regulation through technology (code). This provides us insight into the rationale and motivations of actors towards copyright infringement, but more broadly also towards society and the Internet. The French approach towards copyright and the Internet focuses on economic rationales and gives priority to copyright over other democratic values, such as freedom of expression, access to knowledge and privacy. We contend that copyright is used as an informational power to gain control over core information processes and graduated response is contributing to an enclosure of the Internet. Surveillance is taken for granted and regulation through code is pursued. The Internet and technology cannot in themselves foster a democratization of society. They can, however, serve as enablers or barriers. We argue that graduated response is creating barriers to free expression, access to knowledge and participation in democratic life. Economic and social functions of copyright and the Internet can coincide, but in the end liberal democratic values should prevail.

Outline

1. Introduction

This paper analyzes a recent policy initiative in France to deter copyright infringement. In 2009, France passed two laws aimed at fighting online piracy through graduated response, a warning and sanction system. Under the graduated response policy, Internet users are monitored and when caught infringing copyright, are repeatedly warned about their illegal actions and ultimately sanctioned through the suspension of Internet access, fines and/or prison sentences. Graduated response depends on surveillance of Internet uses and encourages technological regulation, such as Internet filtering and blocking.

In our analysis of the French copyright enforcement policy, we look at the rationales advocated for copyright and the Internet and the argumentation for surveillance and regulation through technology (code). This provides us insight into the rationale and motivations of actors towards copyright infringement, but more broadly also towards society and the Internet. Analyzing the policy context and identifying the arguments used in the debate helps us understand how the problem was defined, why the policy took on its particular shape and how similar debates can be influenced in the future.

The paper first depicts our theoretical framework. We identify four rationales or underlying principles for copyright and the Internet, and reflect on the balance between protection and exploitation, between economic and societal values that can be found in the copyright and Internet rationales. We also link to literature on surveillance and Internet regulation, stressing the implications that these regulatory means can have for the Internet and society. The second part of the paper concerns the empirical case study of the French online copyright enforcement policy. We first expand on the objectives, procedure and main arguments for/against graduated response, to then analyze how various stakeholders view copyright, the Internet, surveillance and code.

Graduated response deals with much more than copyright, it makes choices about the type of Internet and society we want for the future. The French approach towards copyright and the Internet focuses on economic rationales and gives priority to copyright over other democratic values, such as freedom of expression, access to knowledge and privacy. We contend that copyright is used as an informational power to gain control over core information processes and graduated response is contributing to an enclosure of the Internet. Surveillance is taken for granted and regulation through code is pursued. The Internet and technology cannot in themselves foster a democratization of society. They can, however, serve as enablers or barriers. We argue that graduated response is creating barriers to free expression, access to knowledge and participation in democratic life. Graduated response is an economic approach to copyright and the Internet, aimed at maintaining the hegemonic capitalist order. Economic and social functions can coincide, but in the end liberal democratic values should prevail. Public policy and the economy should lead to more equal, more democratic society.

2. Framework and theory

2.1 Copyright and the Internet

2.1.1 Copyright

Copyright gives creators temporary monopoly rights (so-called economic rights) to reproduce, adapt and make a work of their mind available to the public. It also grants creators certain moral, personality rights, such as the right of attribution and to integrity of a work. Copyright has been around for quite some time (over 300 years!) and has taken different forms in various countries (the most well-known difference is between common law copyright and civil law droit d'auteur models). In this paper, we use the term "copyright" generically, as a means of protecting cultural works. In "Copyright and the public interest", Gillian Davies (2002) identifies four common rationales or underlying principles of copyright:

i.   Natural law

A cultural work is the *fruit of a creator's mind*. According to this first reasoning, the fruit of a person's mind should be considered property, because a person has a similar natural right of property to the fruit of his hands. A cultural work is also viewed as being the *expression of a creator's personality* and thus intrinsically linked to that person. This reasoning provides the basis for moral rights.

ii.   Just reward for labor

If something is worth creating, then it is worth protecting and a creator *deserves remuneration* for his work. This rationale gives copyright a firm economic foundation. It reasons that a creator should be

rewarded for his effort. Similarly, the cultural industry needs to be able to expect a reasonable profit and return on investment to endeavor in the risky business of cultural production and distribution.

iii.   Stimulus to creativity

Remuneration provides a *stimulus to create*, a reason to contribute to science and culture. This reasoning presupposes that creators and the cultural industry need the assurance of protection and remuneration to create. Culture would be less diverse without financial encouragements.

iv.   Social requirements

Finally, a creator should be rewarded not only for his own personal benefit, but also for the benefit of society. Through his creation, he enriches the *national cultural patrimony*. The fourth rationale lays a *responsibility* on creators and the cultural industry to spread their works widely. Copyright is granted in the wider interest of society.

Clearly, the four rationales (especially the second through the fourth) described are interdependent. They provide moral, economic and social reasons for copyright. They also show how a *balance* needs to be found between *protection and exploitation* of copyrighted works. Copyright includes a social responsibility. For this reason, copyright legislation also includes limitations and exceptions to the exclusive rights, such as the right to private copy and use for commentary or research.

In our current information society, however, copyright has steadily increased in importance, as information is a valuable economic asset. *Control over information entails power*. In "Intellectual property and European economic constitutional law: the trouble with private informational power", Tuomas Mylly (2008) explains how intellectual property rights can be *a tool for structural and relational power*. Access to information is essential for participation in democracy, but at the same time control over information is necessary to succeed in today's economy. In our information society, intellectual property rights regulate much more than just the cultural industry, they extend to core informational resources, to non-market interactions and the Internet:

> [W]hereas in the industrial society intellectual property rights regulated the relations of authors and publishers and some industrial firms, in the networked information society they increasingly extend to and regulate the core cultural and informational resources, cultural non-market production, and the communication structures necessary for open and pluralistic public spheres, enabling individual autonomy and the existence of a civil society discernible from the capitalist economy. In the networked society technology itself functions as an important regulator of individual and institutional behavior. Intellectual property, in turn, may define who has the power over individual uses and future trajectories of technologies: a single entity, several entities or no individual entity at all (Mylly, 2008, 13).

In our capitalist economy, copyright can be used to control and exclude others. Mylly (2008) contends that some intellectual property conflicts should be interpreted as *a collision between liberal democratic and neoliberal globalist values*, a choice between democratic participation and centralized control. Indeed the consequences of the French copyright enforcement policy stretch much further than the cultural sector. It impacts interactions in society and on the Internet.

2.1.2 Internet

The Internet is a communication medium. Its original purpose was to facilitate communication within the academic and military spheres. In "The Internet Galaxy: reflections on the Internet, business and society," Manuel Castells (2001) explains how the Internet is used for different reasons by four distinct user groups who together build up a distinct Internet culture. They can be interpreted as four rationales for the Internet:

i.   Pursuit of science

The early Internet was the product of shared pursuit of *technological advancement* among computer scientists in the US. The *academics* sought to build a decentralized communication network through building on each others' research and allowing peer-review of one's own research. This first layer of the culture of the Internet is *techno-meritocratic*: merit is based on the contribution to technological discovery and on recognition and respect by other scientists.

ii.   Technological sharing

The second group of users, *hackers*, give the shared pursuit of technological advancement a countercultural twist. Hackers also work on technical aspects of the Internet, but are part of loosely organized networks grounded in society. They are *autonomous* of corporate or institutional assignments. They have a distinct (at times anti-capitalist) worldview of *open access and freedom to create & share knowledge*. Similar to the academic setting, important values are again cooperation and free communication.

iii.   Social interaction and symbolic belonging

The Internet is also a tool to bring likeminded users together to work, discuss and play on common topics. The hackers form a *community* focused on computer programming, but non-technical groups have also adopted the Internet as their means of networking. In this context, it is important to mention that the Internet is widely appreciated as being a potential tool for *democratization*. Users can easily gather and share information with others. The Internet facilitates *bottom-up* and horizontal communication and can also be a medium of *self expression*.

iv.   Entrepreneurship

Finally, the Internet would not have boomed without its take-up by entrepreneurs and the Internet *commerce*. The Internet is essential as a collaboration and distribution medium in our information economy, but is also a commercial space of its own. In this last layer of Internet culture, the capitalist values of *domination* (control) and *profit maximization* are supreme. This entrepreneurship transformed the Internet into a mass-medium. The nature of a network is that the more users and uses there are, the more valuable a network becomes - economically, but also socially.

These four layers of Internet culture build on each other. Characteristics underlying the Internet have been openness (free communication, interoperability), cooperation (requests for comments, consensus), flexibility (best effort, end-to-end approach) and decentralization (maximum autonomy of each node, distributed control).

> The culture of the Internet is a culture made up of a technocratic belief in the progress of humans through technology, enacted by communities of hackers thriving on free and open technological creativity, embedded in virtual networks aimed at reinventing society, and materialized by money-driven entrepreneurs into the workings of the new economy (Castells, 2001, 61).

The fourth rationale of commerce and capitalism can sit ill at ease with the other three technically or socially oriented purposes of the Internet. In this paper and in line with other authors (Foster & McChesney, 2011; Zittrain, 2008; and a critical analysis from Dyer-Witheford, 2002), we contend that an *enclosure and capitalist turn of the Internet* can be observed. Economic and societal functions can coincide, but we argue that the economy should be in function of society rather than the reverse. The rationales of copyright and the Internet illustrate this ideal-type balance. The Internet's potential for democratization, for civic engagement and a counterculture needs to be carefully preserved.

Indeed today's Internet is not necessarily tomorrow's Internet. A technology is shaped by its uses and users, especially by those in powerful positions. Lelia Green (2002) contends that *neither technology or culture are neutral*: they reflect the power of different social groups and the outcomes of competing priorities. The Internet is used and regulated in such a way that maintains the hegemony to fit the interests of the most powerful, the state and industry. However, this does not mean that alternative interpretations and uses aren't possible. It is a matter of structure and agency, a mutual shaping of Internet and society. The following section will elaborate on two types of technological and social regulation common to Internet related policies.

2.2 Surveillance and code

2.2.1 Surveillance

Surveillance is *inherent to information societies*. We monitor and classify information constantly to understand and make sense of the world around us. Both in our personal lives and in our economy, we seek to gather information to calculate and manage risks. Surveillance is often communicated as benign and beneficial for consumers, and consumers allow surveillance for fear of missing out or being excluded. David Lyon (1994, p. 4) claims that "to participate in modern society is to be under electronic surveillance". He also explains, however, that surveillance has two faces, *care and control*, and can be used in an enabling or a constraining way. It gives *relational power* to some groups over

others and, if abused, can reinforce inequality in society. It allows some select groups to monitor the actions of others, endorsing the practices of some, while restraining those of others (Lyon, 2001). Further, Didier Bigo (2006) observes that there has been a *normalization of emergency* since 9/11. Current discourses emphasize threats and advocate exceptional measures of monitoring and control. We are living in a risk society.

In this paper, we view surveillance as a means of regulating the Internet and society. We consider the society as an arena of power struggles and contend that the Internet is increasingly becoming part of the capitalist media system (Mansell, 2004). We argue that surveillance is often applied for the purpose of maintaining the hegemonic economic order and thus takes on the face of control. In the French graduated response policy, private surveillance is endorsed to protect a controlled distribution of cultural works. Copyright is valued higher than free speech or privacy. We seek to raise questions about the type of society and Internet this policy is promoting.

2.2.2 Code

Besides surveillance, technical protection measures are also increasingly used as *means of regulating online behavior*. In his work "Code version 2.0", Lawrence Lessig (2006) explains how a regulatory problem can be dealt with through four means: law, norms, market or code. He argues that in the online environment, *code - the underlying infrastructure or technology*, is often seen as a way to effectively enforce desirable changes in behavior. Restraints can be build into the technology to make certain actions difficult or impossible.

Until recently, digital rights management (DRM) was a popular means of enforcing copyright of cultural works. However, due to strong consumer opposition to the restrictions, the music industry has started to offer DRM-free music. These technical protection measures are still used for film and publishing. Other possibilities to enforce copyright on the Internet are blocking or filtering of content.

Regulation through code can protect copyrighted work and limit illegal uses of the Internet. However, there are also significant *drawbacks* to using technology to control (Brownsword, 2008; McIntyre & Scott, 2008; and Zittrain, 2008):

i.   Design limitations

The first problem concerns the *limitations* in the technology's *design*, in particular over and under-blocking: some legal uses of the Internet might be limited, while other illegal uses pass by unhindered (this was the case with DRM). In the case of copyright infringement, technical protection measures stop users with limited computer skills, but push the technical savvy user to find work-arounds. As a result the illegality is driven further underground, making it more difficult to detect and deter.

ii.   Societal implications

A second set of issues pertains to *societal effects*. Regulation through technology is pervasive and can be in breach of the *fundamental rights* to privacy and free speech. Blocking and filtering is common in authoritarian societies. Additionally, if the technological restraint is automatized, there is a *loss of human discretion*. The ability for a technology to distinguish between uses is limited to the criteria foreseen in advance. This gives those developing the technological protection measure significant power, but does not provide the flexibility of human (judicial) discretion in its application. Further, technically limiting what users can do on the Internet can lead to a *loss of responsibility*. In the case of online piracy, the moral choice between legal or illegal use of a cultural work would be reduced.

iii.   Internet implications

Finally, an important concern of code as a regulator is related to characteristics of the *Internet*: openness and transparency. Technological restraints tend to be opaque, less observable than other regulatory means. They signal the transition to a *less transparent and privately regulated Internet*. To a large extent control over information means control over the information infrastructure. Consequently, the cultural industry has pleaded strongly for policy measures aiming on increased involvement of the telecommunications industry in fighting online piracy.

This section provided some theoretical underpinnings for analyzing copyright enforcement policies, which we will now apply to the French graduated response policy against online piracy. In the following section, we first expand on the objectives, procedure and main arguments for/against

graduated response, to then analyze in detail how the various stakeholders in the French policy view copyright, the Internet, surveillance and code.

3. Analysis: France

France was the *first European country* to pass legislation in 2009 introducing a graduated response mechanism to deter online copyright infringement: LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Hadopi 1) and LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (Hadopi, 2).

The graduated response mechanism fits within a *wider French framework* to protect copyright on the Internet. In 2006, the French transposition of the European Union copyright directive[1] (DADVSI) introduced an obligation for Internet account holders to monitor their network against copyright infringements. Then, in 2007, the government brokered a multi-stakeholder agreement (Olivennes, 2007) which further laid the basis for graduated response. This agreement was made legally enforceable with Hadopi 1 and 2 in 2009. Arguably, the recently adopted French LOPPSI 2 law[2] which deals with homeland security, has been the next step in the development of a French surveillance regime and its endeavor to regulate the Internet.

Both Hadopi laws were *heavily opposed* by French civil society. The French constitutional council censored the government's proposition to authorize an administrative authority (Hadopi) to suspend Internet access, leading to the second law introducing a simplified judicial procedure. At the level of the European Union, the suspension of Internet access also became a hot topic in the discussions on the telecoms reform. The adoption of the telecoms reform, a package of regulatory changes to telecommunications infrastructure (which initially did not relate to copyright infringement), was held up for several months over a provision on the need for a "prior fair and impartial procedure" with "the right to an effective and timely judicial review" to take measures limiting Internet access or use.[3]

3.1. Objectives

Christine Albanel, minister of culture and communication when the first law proposal was introduced, described the objective of the law "to stop the hemorrhage of cultural works on the Internet and to create the indispensable legal framework for the development of the legal offer of music, films, audiovisual works and programs, even literary works on the new communication networks" (French ministry of culture and communication, 2008, 3). The first French law creates Hadopi (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet), an independent public authority. The second law deals with the expedited judicial procedure for suspending Internet access.

Hadopi has three missions:

i. "To *encourage the development of the legal offer* and to observe the legal and illegal use of works and objects protected by an author's right and related right on the electronic communication networks used for the delivery of public online communication services"

ii. "To *protect these works and objects of infringement* to these rights on the electronic communication networks used for the delivery of public online communication services"

iii. "To *regulate and monitor in the field of measures to technically protect and identify works and objects* protected by an author's right or related right".[4]

Concerning *legal offers*, the first Hadopi law includes provisions to shorten the release windows for audiovisual works and to offer music catalogues free of technical protection measures. Further, Hadopi has developed a labelling scheme to make it easier for Internet users to identify legal offers. The French government has also launched a music card for young people, doubling the amount of credits on a card purchased as an incentive to obtain music legally.

Concerning *technical protection measures*, the first Hadopi law includes provisions for Hadopi to evaluate experimentations in the field of content recognition and filtering. It also stipulates that, at the request of right holders, a judge can order "all measures to prevent or put an end to an infringement of

1 LOI n° 2006-961 du 1 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information.
2 LOI n° 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieur.
3 DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (consolidated version of 19 December 2009), art. 1(3)a.
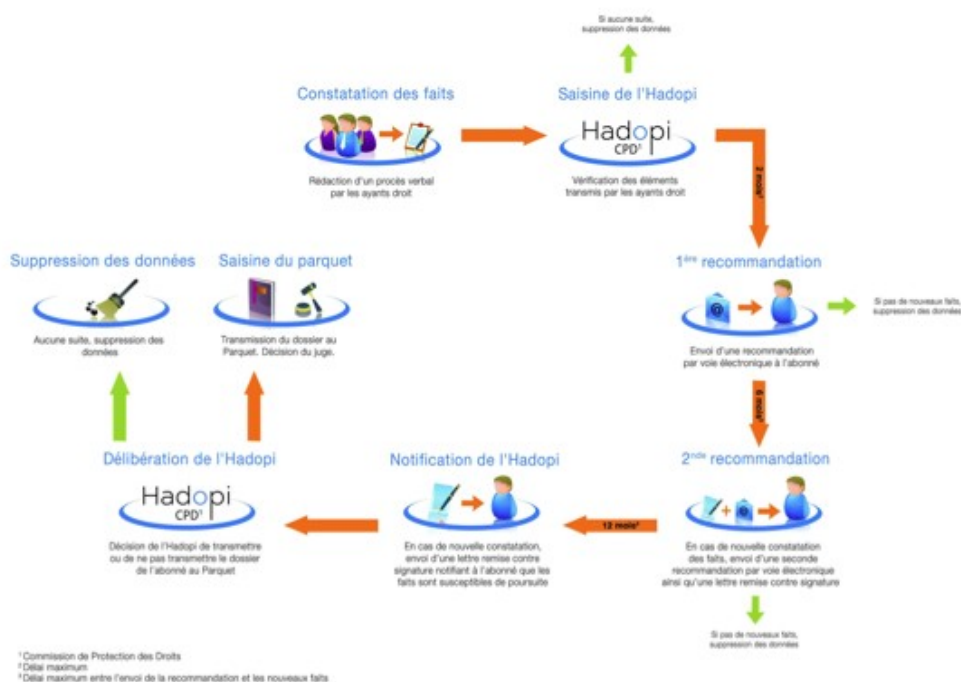4 LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, art. 5.

an author's right or related right against any person likely to contribute to remedy it".[5] Further, Hadopi needs to ensure that digital rights management on works is not used for anti-competitive purposes and does not deprive consumers of the benefit of certain legal exceptions, such as the right to a private copy.

3.2. Procedure

The graduated response mechanism consists of monitoring, warning and sanctions. Right holders *monitor* the activities of Internet users. When they detect illegal file-sharing of copyrighted works, they can notify Hadopi. Based on the IP address provided by the right holders, Hadopi can then decide to send an email to the holders of the account where illegal activity was detected, reminding them of the obligation to secure their Internet access against copyright breaches and stressing the dangers of copyright infringement for the renewal of creativity and the economy of the cultural sector. The *notification* also points them to legal alternatives to obtain copyrighted works and ways to secure their Internet access. In case of renewed detection off illegal file-sharing within six months, account holders can be sent a second email and a registered letter. In case of a third detection within one year, Hadopi can notify account holders that their file will be transferred to the judicial authorities. Through an *expedited criminal procedure*, taking into account the gravity of the breach and the situation of the account holder, a judge can decide to suspend the Internet access for a period up to one year, in addition to a fine and prison sentence. Account holders who are not found guilty of illegal file-sharing but who repeatedly neglected to secure their Internet access risk losing their Internet access for a period up to one month, in addition to a fine and prison sentence. A visualization of the procedure can be found in figure 1.

Figure 1: Graduated response procedure (Hadopi, 2010)

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5 LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, art. 10.

←   3.3. *Arguments for/against graduated response*

In this section, we only present the main arguments for and against graduated response, as the following section goes into detail about the rationales underlying the stakeholder positions. The analysis of the graduated response policy was conducted in two parts. In 2009 a first analysis was made of the policy debate, comparing it with developments in the EU and the UK (Meyer & Van Audenhove, 2010). Then in 2011 a second analysis was made, focusing specifically on the rationales of the stakeholders towards copyright, Internet, surveillance and code (technological protection measures). The methodology and results of this most recent analysis are expounded on in the section 3.4.

The debate on graduated response in France centers on (1) the proportionality of the mechanism - and the balance between copyright and other fundamental rights, (2) its efficiency, and (3) its relation to legal offers. In our analysis, proponents of graduated response were the ministry of culture and communication, president Sarkozy and the cultural industry. The European institutions, the French regulatory authority for electronic communications and post (ARCEP) and the telecommunications and IT industry took a nuanced stance. Opponents were the civil society and the French commission for information and liberties (CNIL).

3.3.1 Proportionality

The ministry of culture and communication, president Sarkozy and the cultural industry stressed the *pedagogical and preventive* character of the mechanism. Graduated response gives Internet users several chances to change their behavior. The suspension of Internet access was also deemed proportionate, because it is an *alternative to the penal provisions* (fine, imprisonment) in copyright law.

The civil society, however, strongly advocated that the law proposals were *"liberticide"* - not respectful of fundamental rights of citizens, in particular the right to freedom of expression and communication, privacy, defense and presumption of innocence. In its decision on Hadopi 1, the French constitutional council agreed that the government's proposal to allow an administrative (rather than a judicial) authority to suspend Internet access was disproportionate considering the exercise of *freedom of expression and communication* is "a condition of the democracy and one of the guarantees of respect for other rights and liberties".[6] Further, in 2005, CNIL refused to allow right holders to monitor P2P networks for copyright enforcement purposes. This decision, however, was overturned by the French council of state in 2007.

3.3.2 Efficiency

The efficiency of graduated response was argued for by referring to various *studies* conducted about *changes in behavior* of Internet users if warned and sanctioned (for example Entertainment Mediareseach and IPSOS referred to in French ministry of culture and communication, 2008, 7). The proponents of graduated response also praised how these laws have stimulated *cooperation* between right holders and Internet service providers.

Opponents of graduated response, however, stressed that technical measures and surveillance can always be *circumvented* and argued that identification on the basis of an *IP address* is *inadequate*. Additionally, they thought the laws were already outdated as Hadopi *only* deals with copyright infringement on *P2P networks*.

3.3.3 Legal offers

In the Hadopi 1 law proposal, graduated response is viewed as creating the necessary legal framework for the development of legal offers. Proponents emphasized that *reducing piracy levels* is a *prerequisite* for legal offers, while opponents advocated a *global license*. A global license is an alternative remuneration model where right holders receive revenue through a tax collected on Internet service providers. Création Public Internet, which brings together two civil society organizations, two cultural industry organizations and the French division of ISOC, believed the legislators and cultural industry should focus on develop a model, such as the global license, which encourages rather than discourages file-sharing.

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6 Décision n° 2009 580 DC du 10 juin 2009. Loi favorisant la diffusion et la protection de la création sur internet, § 15-16.

3.4. Positions on copyright, the Internet, surveillance and code

3.4.1 Methodology

We selected 82 texts, position papers, press releases and interviews of various stakeholders to analyze their positions on copyright, Internet, surveillance and code (technological protection measures). We chose to specify on these four topics to structure our analysis on the one hand and to get more in-depth insight into the rationales used to discuss copyright and the Internet on the other hand. As surveillance and regulation through code are the principle means proposed to protect copyright in these laws, but have significant consequences for the functioning of the Internet and society, the positions on these regulatory means too deserve closer analysis.

In a first step of the analysis, we read through the documents marking the relevant sections for copyright, the Internet, surveillance and code (when analyzing copyright, we also looked at piracy). In a second step, we used the four rationales for copyright and the Internet (discussed above) to categorize the sections on copyright and the Internet. In a third and final step, we aggregated the results of each section by stakeholder group:

- Government: ARCEP, CNIL, constitutional council, ministry of culture and communication, ministry of justice and liberties, parliament, president Nicholas Sarkozy

- European Union: commissioner Viviane Reding, European commission, council of the European Union, European parilament, MEP Catherine Trautmann, MEP Guy Bono

- Cultural industry: artists/cineasts, APC, ARP, CSDEM, IFPI, Marcel Dorcel, SACD, SACEM, SAMUP, SCAM, SCPP, SNAC, SNEP, SPPF, UNAC, UPFI

- Telecommunications and IT industry: AFA, ASIC, Free

- Civil society: Guilaume Lovet, Jacques Attali, La Quadrature du Net, Patrick Waelbroeck, UFC Que Choisir

The annex to this paper provides the full names and descriptions for the stakeholders. Each section and each stakeholder merit further analysis. In particular, we did not have the opportunity to dig into the reports of the various commissions in the national assembly and senate. At this stage the analysis was also restricted to documents related to Olivennes, Hadopi 1 and 2. We did not look into the decrees which have been published since the adoption of the two laws nor the press releases of the high authority Hadopi.

3.4.2 Copyright and piracy

Copyright

The most recurrent reasoning for copyright in the analyzed texts was *economic* in nature: copyright as a *just reward for labor*. There was a strong concern about the losses of revenue for the cultural industry and artists due to piracy. At the EU level, links were also made with competitiveness and economic growth. The analyzed documents also indicated that copyright is considered an *exception from competition*. The cultural industry and culture need protection from capitalism and cannot function in a competitive market. At the same time, piracy was portrayed as a form of unfair competition.

Hadopi 2 law proposal on graduated response in Hadopi 1: reward for labor and stimulus to creativity

"Le second volet tend à prévenir le pillage des œuvres sur internet, dont l'ampleur dans notre pays sape les fondements mêmes de la diversité culturelle en tarissant les sources de rémunération et de financement des artistes et des industries culturelles." (Ministry of justice and liberties, 2009, p. 3)

Artists' letter to the socialist parliamentarians accusing them of becoming advocates of unbridled capitalism for opposing graduated response

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"Vous étiez la résistance à la déréglementation, à la loi de la jungle et du plus fort qui assassine la diversité culturelle. Vous êtes désormais, par l'effet d'une étrange ironie de l'histoire, les avocats du capitalisme débridé contre les droits des artistes à l'heure du numérique." (Le Monde, 2009)

The economic reasoning was intrinsically linked with cultural diversity and creativity. A just reward for labor was viewed as a prerequisite, a *stimulus for creativity* and legal offers. The French government and cultural industry frequently mentioned *cultural diversity* as a reason for graduated response. They argued that the French *cultural patrimony* was endangered by lack of copyright protection. The civil society, however, argued that culture was being used as a pretext in the debate to defend the status quo of the cultural industry. We would additionally contend that in the Hadopi laws the French government is effectively making a choice for a certain type of culture by not considering alternative cultural production. Their interpretation of cultural diversity does not encourage the creation of non-copyrighted works.

UFC Que Choisir: cultural diversity as a pretext for protecting cultural industry

"En conclusion, l'UFC-Que Choisir dénonce le tour de vis répressif et le manque de lucidité du ministère de la Culture qui, au prétexte de défendre la Culture et sa diversité, se fait systématiquement l'avocat infatigable d'une industrie trop concentrée et peu innovante." (UFC Que Choisir, 2007)

President Sarkozy: art is the highest expression of civilization

"L'art constitue l'expression la plus haute de la civilisation. Il nous revient de faire qu'il existe un internet civilisé." (Présidence de la République, 2009)

Further, references were also made to the property and moral rights of authors in a few documents of the French ministry of culture and communication and cultural industry. In the droit d'auteur tradition, moral rights are the prime example of copyright as a *natural law*, a cultural work is the expression of its author's personality. Considering the strong droit d'auteur tradition in France, we were expecting more reasoning based on the natural right of an author to property. Indirect references were made through the use of the terminology "stealing" and "plundering" to describe copyright infringement.

Piracy

The term most widely used to refer to copyright infringement was *piracy* ("piratage"). All stakeholders, except the civil society used the term. Jacques Attali, a critical French economist and writer, contended that free downloading is not the same as piracy, because cultural works are not material objects. Consequently, he believed it could not be considered *stealing* ("vol", a term used by the cultural industry) either, as others are not deprived of its use because of downloading. In the Hadopi 1 law proposal a distinction was made between ordinary and massive piracy to argue that the penal sanctions for copyright infringement provided in French legislation were inappropriate for the current copyright infringement situation. In this context, it is interesting to remark that a French legal term for copyright infringement, *counterfeiting* ("contrefaçon"), was seldom used by the ministry of culture and communication, although the analyzed documents did show other strong imagery being evoked by the ministry through terminology such as *hemorrhage* ("hemorragie") and *plundering* ("pillage"). Finally, stakeholders also frequently referred to copyright infringement as *illegal, illicit or unauthorized downloading* (téléchargement illégal, illicite, non autorisé). Indeed the French graduated response mechanism only deals with file-sharing and downloading.

3.4.3 Internet

All stakeholders perceived the Internet as *a communication and distribution medium*, for legal and illegal purposes, although this was not always explicitly mentioned. Technical aspects of the Internet were not often referred to, except when discussing technical protection measures (discussed below). The civil society and telecommunications and IT industry also pointed to *characteristics of the Internet* (decentralized, international, open and neutral) which they believe were endangered by graduated response. The rationales of the Internet for *pursuit of science or technological sharing*, however, were *not present* in the analyzed documents.

Cineastes and SACD: Internet is an extraordinary tool for culture, exchange and circulation of works

"Bien évidemment, les cinéastes ne sont pas les ennemis d'internet, au contraire. Nous sommes tous des internautes. Mais ce qui est un extraordinaire outil de culture, d'échange et de circulation des œuvres risque de devenir l'instrument de la mort de notre diversité culturelle, si nous ne réussissons pas à lui donner un cadre légal, accepté et respecté." (Films7.com, 2009; SACD, 2009)

Further, the Internet was presented by stakeholders as a tool for *entrepreneurship*, a tool for commerce. All stakeholders relayed that the online environment required changes to the offline business models. The European commission stressed the importance of the Internet for *employment* and *innovation*. The telecommunications and IT industry agreed and emphasized the Internet as a vector for economic growth, an environment with *new profit opportunities*. Some antagonism between the functions of the Internet as a tool for industry on the one hand, and for society on the other hand could be observed, as the quote below illustrates.

> Hadopi 1 law proposal: make consumers understand that the Internet is not only a tool for communication and exchange, but also an efficient and modern tool for commercial distribution

> "D'autre part, la lutte contre le piratage de masse change entièrement de logique : il s'agit de faire comprendre au consommateur qu'internet est désormais, parallèlement à ses fonctions de communication et d'échange, un outil efficace et moderne de distribution commerciale."

> (Ministry of culture and communication, 2008, 6)

It follows that the Internet was also considered a tool for *social interaction and social belonging,* a tool for freedom of expression and access to information. Importantly, the French constitutional council in its decision on Hadopi 1 considered that "*free communication* of thoughts and opinions is one of the most precious human rights: any citizen can thus talk, write and print freely, except in the cases of abuse of this liberty determined by law".[7] The constitutional council continued its reasoning to say that "in the current state of communication means and in view of the general development of online public communication services as well as the importance of these services for the *participation in democratic life and the expression of ideas and opinions*, this right [free communication of thoughts and opinions] implies the freedom to access these [Internet] services".[8] It ruled that considering the importance of the Internet for the exercise of human rights, Internet access could only be suspended by a judge. The European parliament and civil society further stressed the role of the Internet for new *non-commercial content creation and discovery*, indicating the potential of the Internet for the democratization of cultural production, distribution and consumption.

> European parliament: ensuring access to cultural content and avoiding Internet suspension

> "Calls on the Commission to recognise that, as a result of the Internet, traditional ways of using cultural products and services have completely changed and that it is essential to ensure unimpeded access to online cultural content and to the diversity of cultural expressions, over and above that which is driven by industrial and commercial logic, ensuring moreover, fair remuneration for all categories of right holders;"

> Calls on the Commission and the Member States to recognise that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access;"

> (European parliament, 2008: §20 & 23)

Finally and interestingly, most stakeholders perceive the information society and the Internet as *revolutionary and unstoppable*. The Hadopi 1 law proposal compared the current developments in cultural distribution and diffusion to the invention of the *printing press*. This was, however, often accompanied with a discourse on the *dangers* of the Internet. The French ministry of culture and communication, the president and the cultural industry described the Internet as *a jungle, an uncivilized environment where only the fittest survive*. They strongly urged for regulation of the Internet. The European commission and civil society interpreted the reactions of the cultural industry (and government) to the Internet as one driven by *loss of control*. We consider that the discourse of the French government and cultural industry on the need to civilize the Internet seeks to justify control over the medium through surveillance and technical regulation. It is another step in the direction of an enclosed Internet, of a restricted mass-medium comparable to the radio and television—a change which several artists indeed advocated in a letter to the socialist parliamentarians.

> Hadopi 1 law proposal: extraordinary chance for cultural diffusion, unprecedented since the invention of the printing press, but only if intellectual property rights are respected

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7 Décision n° 2009 580 DC du 10 juin 2009. Loi favorisant la diffusion et la protection de la création sur internet, § 15.
8 Décision n° 2009 580 DC du 10 juin 2009. Loi favorisant la diffusion et la protection de la création sur internet, § 16.

"Aujourd'hui, plus d'un Français sur deux a accès à l'internet haut débit. Bien plus qu'un phénomène de société, c'est un véritable tournant qui constitue, pour la diffusion de la culture, une chance extraordinaire, sans précédent depuis l'invention de l'imprimerie. Il est donc désormais possible de faire des réseaux numériques, au bénéfice du consommateur, un véritable outil de distribution de biens dématérialisés, notamment dans le domaine culturel. Cela ne sera toutefois possible que si les droits de propriété intellectuelle sont respectés." (Ministry of culture and communication, 2008, p. 3)

President Sarkozy: it depends on us to show that there is a civilized Internet

"L'art constitue l'expression la plus haute de la civilisation. Il nous revient de faire qu'il existe un internet civilisé." (Présidence de la République, 2009)

Guillaume Lovet: political class driven by lack of control of Internet, the French laws diabolize the Internet

"On a un peu l'impression que la classe politique s'inquiète de l'ampleur que prend Internet, un outil de communication qui par sa structure totalement décentralisée et internationale, échappe à son contrôle. S'il est compréhensible de légiférer sur la question, le problème, c'est que la succession des textes dadvsi, hadopi, et loppsi 2 a tendance à diaboliser le net, sans pour autant apporter des réponses viables à son contrôle. Les mesures prévues par les lois Loppsi ou Hadopi pour contrôler Internet sont en effet relativement inefficaces." (Capital.fr, 2009)

3.4.3 Surveillance and code

Surveillance

In the analyzed documents, only the French commission for information and liberties (CNIL) and the civil society discussed surveillance. Other stakeholders took surveillance *for granted*, which is not unsurprising considering personal surveillance of the network by account holders and private surveillance on P2P networks by right holders were agreed upon before the passing of the Hadopi laws. It does illustrate, however, a *normalization of surveillance* in French society. The French government and the cultural industry argued that graduated response is mostly a proportionate and educational measure as it gives Internet users several chances to change their behavior and seeks to provide an alternative to the harsh penal sanctions. Graduated response and surveillance are *portrayed as tools for care rather than control*.

CNIL originally sanctioned monitoring by right holders as it considered that these practices "led to a massive collection of data and could allow the *extensive and continuous monitoring* of file-sharing networks". Guy Bono, a French MEP from the socialist party, and La Quadrature du Net also made reference to *Orwell's 1984 and the panopticon*. They argued that graduated response would lead to a big brother society, a police state where suspicion is the norm. They sought to oppose surveillance with privacy legislation - with very limited success.

La Quadrature du Net: danger for democracy

"Surveillance généralisée du net, y compris par des acteurs privés, suréférencement obligatoire par les moteurs de recherche de sites "accrédités", mise sous tutelle administrative des hébergeurs et des éditeurs de contenus, filtrage et coupure d'accès sans procès... ces projets dessinent une démocratie qui régresse, un internet ORTF, une société Big Brother. En aucun cas un modèle pour l'Europe."

(La Quadrature du Net, 2008)

Further, there was also a clear sense of *emergency* to be found in the documents. Urgent and exceptional measures were advocated to fight online copyright infringement. The French government made a declaration of urgency for the adoption of Hadopi 1 and invoked an accelerated legislative procedure for Hadopi 2. This corresponds with the motive of the *state of exception* which Didier Bigo contends is part and parcel to the surveillance rhetoric of a state.

Code

Regulation through code was not mentioned frequently in the documents. Hadopi 1 encourages legal offers of music without technical protection measures. The lack of interoperability and transparency in digital rights management (*DRM*) was perceived *negatively* by all stakeholders. The European

Commission also indicated that the shift to *regulation through code* constituted a *paradigm shift* for consumers.

Further, Hadopi 1 includes a provision on experimentation with content identification and filtering technologies and allows a judge to order "all measures to prevent or put an end to an infringement of an author's right or related right against any person likely to contribute to remedy it".[9] The telecommunications and IT industry pointed to the possible conflict of filtering with the rights to access to information and freedom of speech. The civil society elaborated by stating that filtering is *dangerous for innovation and liberties* and entailed the *criminalization of the Internet*. They also argued that technology evolves and thus can always be *circumvented*. Further, concerning graduated response, the civil society and telecommunications and IT industry expressed *concern* about the *preservation* of decentralized, open and neutral *character* of the *Internet*. Thus, although technological regulation did not receive much attention in the discussion surrounding Hadopi 1 and 2, all three sets of reservations about code as a regulator - *design limitations, societal and Internet implications*, were mentioned.

> Jacques Attali: filtering is dangerous because it intrudes on freedom of thoughts, information and navigation
>
> "Dangereuse, tout d'abord, car attentatoire à la liberté, qui irrigue pourtant la création artistique. Hadopi c'est l'édification d'un filtrage de la toile par la Haute autorité, créée à cette fin. La mise en place progressive d'un contrôle des échanges en ligne et, à fortiori, la criminalisation d'internet. Casser la liberté de parole, étouffer l'innovation, voilà quels seront ses effets. Déjà, pour les accès wi-fi publics, la loi prévoit un filtrage limité à une «liste blanche» de sites autorisés. Un cloisonnement de la libre pensée, de la libre information, de la libre navigation, en somme." (Attali, 2009)

4. Conclusion

The French graduated response policy is mainly framed in terms of piracy and copyright. However, in our view graduated response policy is about much more than this.In the process of finding solutions for piracy, fundamental decisions are taken about the type of *Internet and society* we want for the future. In "Graduated response and the emergence of a European surveillance society" (Meyer & Van Audenhove, 2010), we offered three alternative critiques to graduated response.

First, graduated response fits within a *discourse of threats* to copyright, calling for exceptional surveillance and technical measures to regulate Internet and society. It advocates enforcement and control, rather than legal offers and care. Second, graduated response is a form of *social sorting*, prioritizing the rights and interests of some above others. Relational power is granted to the cultural industry by allowing them to monitor the behavior of Internet users. Third, graduated response has a *bias towards regulation through code*, even though regulation through code has significant drawbacks in terms of privacy, free speech, human discretion, responsibility, openness and transparency.

This paper builds on the research discussion by analyzing the rationales of stakeholders towards copyright, the Internet, surveillance and code in detail. It provides the underlying reasoning for the graduated response policy and identifies consequences for the Internet and society. Indeed we discussed how the approach advocated for copyright and the Internet changes the balance of interests between various stakeholders. We also showed how copyright, surveillance and code are embedded in our capitalist order and can be used to create economic and relational power.

The French approach to *copyright* is *economic*, it reasoned that a loss of revenue is a loss of culture. Cultural diversity was highlighted as a motivation for strong copyright enforcement, but it is a narrow interpretation of culture, as no thought was given to new non-commercial cultural production. What's more, the impact of copyright reaches much further than just the cultural sector in our information society. Copyright gives *informational power*, because it allows control over core information processes. Graduated response can be seen as a collision between liberal democratic and neoliberal globalist values.

In the French graduated response policy, the *Internet* is considered as a key communication and distribution medium for *commercial and societal purposes*. Stakeholders acknowledged the importance of the Internet for freedom of expression, access to knowledge and democratic participation, but in the end graduated response values copyright protection higher. The Internet commerce was chosen over the Internet community. Further, in the French copyright enforcement discourse, the Internet was depicted as a *danger* and a jungle. This served to justify taking measures to

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9 LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, art. 10.

regulate the Internet: a civilization of the Internet's content and infrastructure. Technology can be shaped and we argue that graduated response is contributing to an enclosure of the Internet for commercial motives. Surveillance and regulation through code endanger the potential of the Internet for democratization.

The analysis of the French policy also showed a *normalization of surveillance* in French society. Surveillance was taken for granted and the sense of *urgency* with which graduated response was communicated reinforced the discourse of surveillance. Every information society is a surveillance society, but surveillance can be used for care or control. In graduated response, a choice is made for a *suspicion society* and relational power is given to private actors to defend an economic approach to copyright and the Internet.

Finally, there was an *openness* towards *regulation through code*: Hadopi 1 plans experimentation with content identification and filtering technologies and allows a judge to take "all measures to prevent or put an end to an infringement". Some objections were raised to technological regulation, but overall there was little discussion. The Internet and technology cannot in themselves foster a democratization of society. They can, however, serve as enablers or barriers. Graduated response is creating barriers to free expression, access to knowledge and participation in democratic life.

In *future policy debates*, we believe more weight needs to be given to the open, transparent, cooperative and decentralized character of the Internet. Preservation of these characteristics will ensure an Internet to the benefit of society. Graduated response advocates a heavily regulated and privately controlled Internet. Further, more value needs to be given to societal aspects of copyright and the Internet. Graduated response is an economic approach to copyright and the Internet, aimed at maintaining the hegemonic capitalist order. Economic and social functions can coincide, but in the end liberal democratic values should prevail. Public policy and the economy should lead to more equal, more democratic society. Surveillance and regulating code in graduated response have the opposite effect: they grant economic and relational power to a select few, resulting in more inequality and less democracy in society.

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ANNEX

Stakeholder group	Stakeholder	Description	Analyzed documents
Government	ARCEP	"Autorité de Régulation des Communications Electroniques et des Postes" French regulatory authority for electronic communications and post	Advice on Hadopi 1 law proposal
	CNIL	"Commission Nationale de l'Informatique et des Libertés" French commission for information and liberties	Articles on CNIL website
	Constitutional council	Assesses the constitutionality of laws	Hadopi 1 and 2 decisions
	Ministry of culture and communication	Ministry responsible for Olivennes agreement and Hadopi 1 law proposal	Olivennes agreement; Hadopi 1 law proposal; communications on ministry website
	Ministry of justice and liberties	Ministry responsible for Hadopi 2 law proposal	Hadopi 2 law proposal
	Parliament	Senate and house of representatives	Hadopi 1 and 2 laws
	President Nicholas Sarkozy	President of the French republic	Communications on presidency website; letter to European commission president José Manuel Barroso
European Union	Commissioner Viviane Reding	European commissioner for information society and media (2004-2010)	Letter to the French cultural industry
	European commission	Proposes EU legislation and checks it is properly applied across the EU. Works in the interests of the EU as a whole	Communication on creative content online in the single market
	Council of the European Union	National ministers meet to discuss and – together with Parliament – adopt EU laws. Works in the interests of national member states	Conclusions on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment
	European parliament	Members of the European Parliament (MEPs) are directly elected by EU voters. Works in interests of EU citizens	Internet freedom provision of telecoms reform; Resolution on cultural industries in Europe
	MEP Catherine Trautmann	French MEP in the socialist party, rapporteur for telecoms reform	Interview in Le Monde
	MEP Guy Bono	French MEP in the socialist party, rapporteur for cultural industries resolution	Communication on La Quadrature du Net

Stakeholder group	Stakeholder	Description	Analyzed documents
Cultural industry	Artists, cineasts	Pierre Arditi, Juliette Gréco, Maxime Le Forestier, Bernard Murat, Michel Piccoli and 37 cineasts	Letters to the French parliamentarians
	APC	"Association des Producteurs de Cinéma" Association for cinema producers	Communication with UPFI
	ARP	Société civile des Auteurs Réalisateurs Producteurs Society for authors, directors and producers	Communication with SACD on ministry of culture and communication website
	CSDEM	"Chambre Syndicale De l'Edition Musicale" Syndicate for the music production	Communication with SACEM, SNEP, SCPP, UPFI, SPPF, SNAC, UNAC
	IFPI	International Federation of the Phonographic Industry	Communications
	Marcel Dorcel	Pornographic industry	Interview in Le Monde
	SACD	"Société des Auteurs et Compositeurs Dramatiques" Society of authors and drama writers	Communications; communication with ARP on ministry of culture and communication website; communication with SACD
	SACEM	"Société des Auteurs, Compositeurs et Editeurs de Musique" Society of music authors, composers and producers	Communications; communication with CSDEM, SNEP, SCPP, UPFI, SPPF, SNAC, UNAC
	SAMUP	"Syndicat National des Artistes Interprètes et Enseignants de la Musique et de la Danse de France" National syndicate for interpretative artists and teachers of music and dance in France	Communication
	SCAM	"Société Civile des Auteurs Multimedia" Society of multimedia authors	Communication with SACD
	SCPP	"Société Civile des Producteurs Phonographiques" Society of phonographic producers	Communication; communication with SNEP; communication with CSDEM, SACEM, SNEP, UPFI, SPPF, SNAC, UNAC

Stakeholder group	Stakeholder	Description	Analyzed documents
	SNAC	"Syndicat National des Auteurs et des Compositeurs" National syndicate of authors and composers	Communication with CSDEM, SACEM, SNEP, SCPP, UPFI, SPPF, UNAC
	SNEP	"Syndicat National de l'Edition Phonographique" National syndicate of the phonographic production	Communication; communication with SCPP; communication with CSDEM, SACEM, SCPP, UPFI, SPPF, SNAC, UNAC
	SPPF	"Société Civile des Producteurs de Phonogrammes en France" Society of phonographic producers in France	Communication with CSDEM, SACEM, SNEP, SCPP, UPFI, SNAC, UNAC
	UNAC	"Union Nationale des Auteurs et Compositeurs" National union of authors and composers	Communication with CSDEM, SACEM, SNEP, SCPP, UPFI, SPPF, SNAC
	UPFI	"Union des Producteurs Phonographiques Français Indépendants" Union for French independent phonographic producers	Communication; communication with APC; communication with CSDEM, SACEM, SNEP, SCPP, SPPF, SNAC, UNAC
Telecommunications and IT industry	AFA	"Association des fournisseurs d'accès et de services Internet" Association of Internet access and services providers	Communication with Free
	ASIC	"Association des Services Internet Communautaires" Association of Internet community services	Communications
	Free	French telecommunications provider	Communication with AFA
Civil society	Guillaume Lovet	Cybercrime expert	Interview on Capital.fr
	Jacques Attali	French critical economist and writer	Blog posts
	La Quadrature du Net	French digital rights advocacy group	Communications
	Patrick Waelbroeck	French professor in industrial economics and econometrics	Interview on fr.ReadWriteWeb.com
	UFC Que Choisir	French consumer organization	Communications

Stakeholder group	Stakeholder	Description	Analyzed documents
	Création Public Internet	ISOC France, la Quadrature du Net, Pour le cinéma, SAMUP, UFC-Que Choisir Alliance of civil society and cultural industry organizations proposing alternative remuneration model (global license)	Letter to the French parilamentarians; Proposition