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## Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality

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### ABSTRACT

In their effort to enforce a regulation system on the internet, several countries introduced the graduated response system (otherwise known as 'three strikes and you're disconnected'). Since then, it started gaining popularity all over the world whether in a legislated form or in a form of private agreements between major copyright holders and internet service providers. On an international level, the final version of the *Anti-Counterfeiting Trade Agreement (ACTA)* was published on 3 December 2010. Although it does not directly suggest the application of a graduated response system, it establishes a legal ground on which member states can justify the instauration of such a system.

This paper will discuss the role of the internet service providers in regulating the internet as it is designated by the graduated response system. The tasks entrusted to the providers will then be examined for their accordance with the principle of proportionality. The article will not focus in a particular national legislation, but it will rather provide an analysis of the problematic aspects of the graduated response system using examples of national legislations or accords. The central question is whether fundamental rights are respected by these enforcement measures. Since illegal file sharing has turned from a mere habit to an ideology, the paper will ultimately propose that it would be wise to take a step back not only

from the incessant legislation process but also from the war declared against internet.

## 1. INTRODUCTION

The structure of the Internet promotes sharing, whether this concerns ideas, works of art, or even scientific knowledge. This being contrary to the foundation of intellectual property laws, many repression techniques come to use in order to prevent any online attacks on copyright protected material. [2] The tactics originally deployed consisted of massive lawsuits against individuals and progressed to the use of technical protection measures imposed to protect the copyrighted works. [3] The first major hit to online piracy came from *A&M Records v. Napster, Inc.*, 239 F.3d 1004, the *Napster* case. [4] However, the interest of copyright holders has turned from massive litigation to alternative methods against individual file-sharers. The buzz about the *Napster* case died out long ago but the fact is that the fight against online piracy resembles fighting the Lernaean Hydra from Greek mythology: the sole act of condemning Napster has led to numerous ways of cheating law and thus committing copyright attacks online. [5]

The latest attempt to limit this phenomenon is called graduated response system. [6] Its focus is on internet piracy as a result of the use of peer-to-peer file sharing programs. The main idea of this system is cooperation with the internet service providers in order to establish a 'three strikes and you're out' approach on alleged infringers. [7] It essentially consists of giving the authority to copyright owners to monitor the Internet in order to track down infringers. According to this approach, online users who violate intellectual property rights through peer-to-peer networks receive a warning letter from their ISP for each violation. Provided that they ignore the first two warnings in a period of about a year, they then have to bear the penalties for their actions. Depending on the country and the nature of the system, these penalties vary from fines to internet disconnection and from protocol or site blocking to capping of bandwidth. The debate around the different expressions of the graduated response system is ongoing in countries all over the world. It appears in countries that have chosen or rejected the legislated aspect of the graduated response as a possibility [8] but it also appears in countries that have chosen to apply it in the form of private agreements with the ISPs. [9] The key features of the applicability of these measures lie in the role of the ISPs. Nevertheless, this system will have to be assessed for the proportionality of its measures regarding the purpose it is aiming to achieve. The principle of proportionality is the balance that estimates whether a particular restriction fulfils its goal or whether it exceeds it.

## 2. THE ROLE OF THE ISPS THROUGH THE GRADUATED RESPONSE SYSTEMS

The ISPs hold an essential role in the function of the Internet and the content placed there by users but their liability issues have been a source of controversy since the early 90s. The standard European policy regarding ISP liability is knowledge-based. The *Electronic Commerce Directive* distinguishes three different types of ISP according to their function (mere conduit, caching and hosting) and grants exoneration of liability if there is no 'actual knowledge' of the infringing activities. [10] Even when acquiring knowledge of illegal activities, the hosting ISP has the opportunity to escape liability by taking the appropriate measures to remove the offending content 'expeditiously'. This tactic is known as the 'notice and take down' practice. This rule is not uncontested as there are several cases where the liability of an ISP cannot be limited. Article 11 of the 2004/48/EC Directive on the enforcement of intellectual property rights states that:

'Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC'. [11]

In a recent decision the ECJ ruled that this article must be interpreted as requiring the Member States to ensure that the national courts

'...are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of [intellectual property] rights by users of that marketplace, but also to preventing further infringements of that kind'. [12]

It also demanded that those injunctions must be 'effective, proportionate, dissuasive and must not create barriers to legitimate trade'. [13] However, the ECJ ruled in another decision that national courts could not by injunction order ISPs to put in place an indiscriminate filtering system requiring constant monitoring as it would go against article 15 of the *Electronic Commerce Directive*. [14] According to this article, Member States shall not require intermediaries 'to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity'. [15] Taking into account their enforcement abilities when authorized by court, it is undisputed that ISPs are very well positioned within the Internet structure. [16] One of the main reasons that lead to the proliferation of graduated response systems all over the world is the essential role that ISPs hold in those particular systems.

## 2.1 THE LEGISLATED FORMS

The first effort to legislate the graduated response system took place in France when the '*Loi favorisant la diffusion et la protection de la création sur Internet*' was adopted in 2009. [17] Its innovation, other than the proposed internet disconnection as a form of punishment, included the introduction of an independent authority called HADOPI (*Haute Autorité pour la Diffusion des oeuvres et la Protection des droits sur Internet*). [18] The main role of this authority would be to send the warning messages to alleged infringers and to later decide whether or not it would proceed to disconnect them. The adoption of this law was very troubled and caused much controversy. After the much anticipated decision from the Constitutional Council, the finalized version of HADOPI II came into power. The modified version divides the procedure in two stages: first, the warning stage that authorizes HADOPI to examine the claims of rightholders concerning alleged infringers and send out the warning letters and second, the disconnection stage that can be ordered only by court but gives the right to HADOPI to maintain a list of disconnected subscribers in order to prevent them from subscribing to another internet service provider during the disconnection period.

Other countries followed the French example. In South Korea, for example, a law adopted in 2009 gives the Korean Copyright Commission the liberty to order the local ISPs to disconnect repeat online copyright infringers. [19] The government, however, specified that only uploading users will be susceptible to the penalties of the particular law. Another section authorizes the government to shut down websites that host unauthorized copyrighted content for up to six months if they do not comply after three warning letters. [20]

The British example of the *Digital Economy Act* is more recent. [21] Like the similar aforementioned laws, it imposes general obligations on ISPs to send notification letters to subscribers whose IP address is reported having been used for copyright infringing activities. They also have to keep record of the number of notices being sent to each subscriber and have to be able to send 'infringement lists' to a copyright owner for a specific period if the copyright owner demands it under the condition that these lists do 'not enable any subscriber to be identified'. [22] The Secretary of State can later on direct OFCOM to assess whether the ISPs should take 'technical measures' such as filtering, bandwidth capping or even Internet disconnection against infringers. [23] After a judicial review of the Act on the demand of Britain's biggest ISPs (BT and Talk Talk), the High Court of Justice ruled in favor of the Act dismissing the arguments claiming that certain measures were disproportionate. [24]

## 2.2. THE VOLUNTARY COLLABORATIONS

Even where the graduated response system is not in a legislated form, this does not necessarily mean that it is not being applied in the particular

country. The private agreements between ISPs and major copyright holders are a well established phenomenon in some countries. They represent the shifting of the way of dealing with copyright infringements. In other words, when major rights owners decided to stop pursuing illegal file-sharers with expensive lawsuits they then turned towards ISPs for potential partnerships. The ISPs' interest over such collaborations stems from the problem of congestion that they witness on their networks. In fact, one main reason causing that congestion is the extended use of peer-to-peer programs and so the managing of peer-to-peer traffic concerns not only rights holders, but also ISPs.

In the case of Ireland in particular, although there is not a legislated model for the graduated response, there exists a private agreement between the ISP Eircom and four major copyright holders. [25] [26]. When Eircom settled out of court with Irish Music Association (IRMA) members for the accusation of illegal file sharing by its subscribers, Eircom agreed to implement a graduated response system which would allow alleged infringers to be detected, identified and if necessary, disconnected. [27] The decision to disconnect an alleged infringer is taken only after an Eircom review without the need for a court order. In the United States, these partnerships exist for some years now. For example, ISPs implement filtering technologies to their networks in order to monitor any illegal activities. This is a system used in many universities and colleges. What's more, majors ISPs have taken steps towards a graduated response system and there have been cases where users were disconnected for their illegal actions. This situation applies also in Canada where many ISPs proceed to forwarding warning letters to alleged infringers.

### **3. THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) AND THE GRADUATED RESPONSE**

When the negotiations for the drafting of the *Anti-Counterfeiting Trade Agreement (ACTA)* started in 2008 on the initiative of Japan and the United States, along started the rumours for its context. The central goal of this agreement was to create a response 'to the increase in global trade of counterfeit goods and pirated copyright protected works'. [28] The secrecy of the procedures, along with the vivid presence of major copyright holders during the negotiations, created a sense of insecurity concerning the possible implementation of a mandatory international graduated response system. These suspicions were not completely unfounded. Although the first draft, released in April 2010, did not describe any measures resembling the graduated response system, it did require ISPs to 'implement a policy to address unauthorized storage or transmission of materials protected by copyright' in order to benefit from the safe harbor provisions. [29] In the same draft the promotion of 'mutually supportive relationships between online service providers and rights holders' was encouraged and thus supporting the opinion that forms of the graduated response system were

indirectly being passed. This draft was obviously not the final one. The official text was published online on December 2010. [30] Phrases such as 'supportive relationships' were replaced by 'cooperative efforts' in order to resolve infringement issues. In addition, the preamble of the agreement clearly states the desire to 'promote cooperation between service providers and rights holders with respect to relevant infringements in the digital environment'.

It is evident that none of the aforementioned articles promote the graduated response system as a mandatory tool for copyright enforcement. Nevertheless, the principle of collaboration between the ISPs and the copyright owners in the ACTA texts may provide the legal ground for official validation of the already existent private cooperation agreements. According to Bridy (2011), the ACTA can act as a means of putting pressure to ISPs in order to collaborate with major copyright holders for using copyright enforcement measures when a direct graduated response system seems to be 'controversial to win legislative approval'. [31]

Supporters of the free movement have also condemned the ACTA, claiming that it can pose serious obstacles in the distribution of free works. They allege that the interdiction of peer to peer software will constitute a serious hit in free distribution. The official position of the free software movement is that the ACTA provisions 'create a culture of surveillance and suspicion, in which the freedom required to produce software is seen as dangerous and threatening rather than creative, innovative and exciting'. [32] Nevertheless, in its latest statement the Electronic Frontier Foundation (EFF) while still expressing doubts over 'new potential obligations for Internet intermediaries' it recognizes that the final ACTA text does not contain any obligation for ISPs to adopt a graduated response system. [33] Finally, the UN Special Rapporteur on freedom of expression Frank LaRue in his report 'on the promotion and protection of the right to freedom of opinion and expression', expressed his doubts concerning the final text of ACTA. [34] He specifically states that '[he] remains watchful about the treaty's eventual implications for intermediary liability and the right to freedom of expression'. [35]

#### **4. GRADUATED RESPONSE AND THE PRINCIPLE OF PROPORTIONALITY**

The appeal to the principle of proportionality in order to verify the conformity of a legislative attempt is not only indispensable but of vital importance. This law doctrine is one of the few world known doctrines having supranational power. One of the most important fields of application of the principle of proportionality lies in the domain of fundamental rights and freedoms. [36] It is in that particular sphere that proportionality receives its current amplitude. In this particular context, the goal of the principle of proportionality is to make sure that the legislator achieved the desirable balance between the imperatives of social order and

the protection of fundamental rights. [37] According to Walter van Gerven (1999),

‘under the ECHR the test operates to find out whether the imposition on the basic right is necessary in a democratic society, and therefore corresponds to a (legitimate) pressing social need for the national measures in question. Under EC law the test operates to establish whether the restriction on the fundamental right of freedom corresponds to the importance of the (legitimate) national aim pursued, and if it necessary for the achievement of that aim.’ [38]

The European Court of Justice (ECJ) as well as the European Court of Human Rights (ECHR) have repeatedly stressed the importance of balancing conflicting fundamental rights by safeguarding other general principles of law, such as the principle of proportionality. [39] In order to make an assessment of the existence of proportionality, the purpose of the imposed measure must be specified. In this case, the purpose of the graduated response system is to prevent copyright infringement, to educate users regarding the illegality of their actions and to communicate to users at least one legal option to download works.

The principle of proportionality is not just a vague idea. The proportion between the purpose of a restriction and the restriction applied is commonly viewed through the spectrum of three criteria: [40]

- the criterion of appropriateness, which examines whether a measure is suitable for its purpose
- the necessity criterion, which verifies that there were no milder measures that could have been used to achieve the desired purpose [41] and
- the criterion of stricto sensu proportionality, which is the exact verification of the restriction-purpose of the restriction balance. [42]

Before going through the proportionality of the restrictions imposed, it is essential to point out that the arguments in favor of establishing effective enforcement measures against copyright infringing activities should not only consider the economic benefits of culture but the promotion of cultural works in itself. Intellectual property rights are qualified as a human right by the Universal Declaration of Human Rights. All intellectual property systems acknowledge the need to protect a work and its author but the motives of this protection are not only of an economic nature. The protection of intellectual property rights resides also in the need for establishing ‘the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’. [43]

We will now assess the most problematic aspects of the graduated response system by examining their proportionate nature. The most ambiguous restriction that poses proportionality problems is Internet disconnection as a

final punishment after a triple warning by the ISPs. The problem in this case is the qualification of Internet access as a fundamental right. Unfortunately, there is no universal answer. In countries such as Finland, Greece or Spain, broadband Internet is recognized as a basic right whereas in other countries no such provision exists. In a European level, the Recital 4 of *Directive 2002/21 EC on Common regulatory framework for electronic communications network of November 2009* establishes that 'the Internet is essential for education and for the practical exercise of freedom of express and access to information', treating Internet access as a fundamental right. The important question raised here is when it is possible to proceed to an Internet disconnection as a form of punishment in the case of conflicting fundamental rights.

According to article 1.a of the Framework Directive:

'measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law'. [44]

It goes on to clarify that all restrictions imposed to those fundamental rights should be 'appropriate, proportionate and necessary within a democratic society'. In fact, in many cases has the ECJ ruled that fundamental rights can be restricted under certain conditions. The ruling in the *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008] case specifically requires that Member States took '... care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order' and that they must make sure 'that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality'. [45] However, the ECHR in the *KU v Finland* (2009) 48 EHRR case mentions that the fact that the outcome of the balancing exercise may involve an interference with use of the internet does not in itself give rise to any special considerations. [46]

The European Union, by dropping the Amendment 138 of the Telecoms Package, changed its 'no disconnection' policy and replaced it by authorizing a possible disconnection, provided that it is ordered by court. This particular argument was used by the French Constitutional Council to reject the first version of the graduated response HADOPI law which authorized an independent authority to disconnect potential infringers. In countries where the graduated system is instituted through private cooperation, the problem stands even greater. In fact, this 'privatized' graduated system becomes the law outside the legislative process by replacing the role of the judge with an ISP. Given the importance of the



sanction, it seems rather irresponsible to leave it completely to the discretionary power of a private entity when at the same time this very power was refused to an independent administrative authority in the French scenario.

Regarding the matter from the freedom of expression point of view, jurisprudence has concluded that such freedom covers the Internet. [47] In the aforementioned UN Report, the Special Rapporteur qualifies the right to freedom of expression as an 'enabler' of other rights and concludes that 'by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights'. [48] So when the exercise of this fundamental right is affected to its hard core by legislation, this law has to be proclaimed as disproportionate.

The gravity of Internet disconnection as a punishment can vary in a case to case basis. For example, not all places in the same country benefit the abundance of Internet access. The graduated response system established as a fact that when the disconnection takes place, the alleged infringer has alternative Internet connection options. An alternative Internet access is unfortunately not always the case. While the gravity of the punishment will vary according to the infringer's profile, it is evident that the specific conditions that justify a restriction of a fundamental right (in this case freedom of expression and access to information) thus qualifying that restriction as proportionate can contain many variations on a case to case basis.

An innovation of the French graduated response system concerning Internet disconnection is the punishment of the Internet subscriber who did not secure his line, which was ultimately used for illegal file sharing. [49] This constitutes one of the most disproportionate measures because it produces up to one month of internet disconnection as a punishment. The legislator in that case seems to be acting with double standards: on the one hand, ISPs are mostly exonerated of any responsibility when it comes to illegal activities on sites they channel, and on the other hand, individuals are being harshly punished for approximately the same thing. The lack of surveillance of an internet connection by its owner can entail a punishment as harsh as Internet disconnection.

Although Internet disconnection takes place, the subscriber is not exempt from the obligation to pay his monthly dues to the ISP based on the fact that other services are retained such as telephone or television. In the mind of the graduated response system makers, it would appear disproportionate for ISPs to assume such a burden when some services are still being provided normally. This kind of provision can be qualified as complementary punishment where the beneficiary is not the state but the ISP who continues to collect payments even from the disconnected clients. [50] The disproportional nature of such a restriction regarding the goal is manifest. However, the constitutional judges in France refused to invalidate the clause of double penalty (as it is commonly known) in the grounds that

this obligation constitutes neither a penalty nor a measure of a punitive nature. It is based on the fact that the breach of contract is attributable to the subscriber which does not disregard according to them any constitutional requirement. [51]

One should not overlook that the graduated response system is dedicated to its full extent to alleged infringers. So some of the people disconnected can easily be victims of a mechanism gone wrong, resulting in a false accusation. The disconnection of a person's access based solely on an alleged infringement qualifies as disproportionate. In fact, in most systems the opportunity to appeal an accusation is very time-limited and can also cost an individual a lot of money. The UN *Rapporteur* claimed that:

'any legislation restricting the right to freedom of expression [must provide] adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application'. [52]

It is also essential to point out that the so-called 'Internet freedom' provision in the Telecoms Framework underlines that

'a prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective and timely judicial review shall be guaranteed.' [53]

The inversion of the presumption of innocence to the presumption of guiltiness is disproportionate and goes against the aforementioned 'Internet freedom' provision. [54] The last few years there have been many cases of false accusations of copyright infringement. As the European Data Protection Supervisor underlines in an opinion regarding ACTA,

'... the monitoring is likely to trigger many cases of false positives. Copyright infringement is not a straight 'yes' or 'no' question. Often Courts have to examine a very significant quantity of technical and legal detail over dozens of pages in order to determine whether there is an infringement'. [55]

In order to assure that no innocent individuals will be sanctioned, guiltiness should be proved with solid evidence, not only by an IP address collected by a private entity. The conviction needs to be clear of doubts and after having given the accused an equal opportunity to defend his rights. Although the right to a due process has been established, it is highly unlikely for an individual to achieve the reversal of accusations made against him by copyright holders.

The case of false positives brings out concerns regarding data protection. Under graduated response laws, monitoring IP addresses is necessary for the identification of potential infringers. Nevertheless, Internet monitoring causes a feeling of insecurity to users regarding freedom of expression. Once an accusation is made by a right holder and the process starts, the data collected can be conserved for a period even longer than 2 years. In addition, in a case of an internet disconnection, the name of the infringer will be put in a repertoire with all the other suspended users. Every ISP will have the chance to check whether the name of every new potential client figures in that list. The automated process of transfer of personal data to the prosecutor has been authorized in France since March 2011. In fact, after a double warning for a copyright infringement, the personal data regarding the particular infringer will be automatically transferred to the prosecutor. It will, then, be at the prosecution's discretionary power to decide whether to continue the pursuit or not.

The qualification of an IP address as a personal data has caused a lot of controversy. The details of a person that used a particular IP address constitute personal data beyond a shadow of a doubt according to Article 2 (a) of Directive 95/46. At a level of national courts, consensus could not be reached. Case law exists to support the opinion that considers an IP address is a personal data since it can link (directly or indirectly to the identification of a user) as well as the opposite opinion that does not consider an IP address to be personal data. [56] [57] The European Data Protection Supervisor and the Article 29 Working Party have both repeatedly supported the position that IP addresses constitute personal data. They state that since 'an IP address serves as an identification number which allows finding out the name of the subscriber to whom such IP address has been assigned', it is clearly 'relating to' the activities of an identifiable individual (the holder of the IP address), and thus must generally be considered personal data. [58]

The question that arises is whether Member States can mandate ISPs in their national laws to communicate personal data to rightholders in order to prevent copyright infringements and, in that case, what is the role of the principle of proportionality. The ECJ has dealt with that question a number of times lately. In the *Promusicae* ruling, the court stated that the exceptions introduced by article 15(1) of the Directive 2002/58 neither preclude nor compel Member states to introduce laws requiring disclosure of personal data in the context of civil proceedings and in particular in cases concerning an infringement of intellectual property rights. [59] [60] The same argumentation was used for the *LSG- Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2Telecommunication* [2009] ECR I-01227 [61] decision where the court, by giving the same answer as that in the *Promusicae* case, repeated the need for respecting the principle of proportionality in the case of conflicting fundamental rights.

The proportionality of the act of disclosure of personal data will have to be judged in the context of limited, ad hoc situations and according to the

gravity of the infringement. Since there is no clear, binding legal text, it will be difficult to draw the line between copyright protection and the right to privacy. [62] The ECJ ruling of the *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* C 70/10 [2011] case pointed out that although the right to intellectual property is protected in Article 17 (2) of the Charter of Fundamental Rights of the European Union,

‘there is, however, nothing whatsoever in the wording of that provision or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected’.

[63]

The Vice President of the European Commission Viviane Redding, expressing the Commission’s position to a ‘comprehensive data protection reform’ stated that ‘in a world of ever-increasing connectivity, our fundamental right to data protection is being seriously tested’. [64] In the case of private agreements where ISPs are authorized to monitor users’ data by specific contractual clauses, the validity of such an agreement has to be regarded through the spectrum of proportionality. As it is argued by many academics, these types of clauses that authorize extensive information control can be found in highly repressive countries and not in democratic societies. [65] In its Recommendation of 26 March 2009 the European Parliament’s opinion stands at setting ‘limits to the ‘consent’ that can be requested of and extracted from users, whether by governments or by private companies, to relinquish part of their privacy, as there is a clear imbalance of negotiating power and of knowledge between individual users and such institutions’. [66]

## 5. CONCLUSION

According to the latest WIPO study regarding the role and responsibility of Internet intermediaries in the field of copyright, the graduated response system as well as filtering, ‘however justified, may involve considerable overheads in terms of ‘collateral damage’ to user rights, and costs to intermediaries and society’. [67] The importance of finding the right balance between conflicting fundamental rights has been stressed repeatedly. More importantly, there is more to intellectual property than the economical aspect. By mainly putting major copyright holders as well as the collecting societies at the forefront of negotiations, the controversy between the artists and their audience will only grow wider. It is true that the notion of intellectual property varies from country to country but it is essential to remember that the core of creation does not lie only in the economic benefits but also in artistic expression.

The expansion of the graduated response laws and systems come to prove this confusion. It is the protection of artistic expression that has to remain at the center of any legislative evolution. Still, it is not just to use the economic nature of the authors’ rights as a pretext for imposing measures that are on the verge of obstructing other significant citizen rights. It is undoubtedly a

promising step to advance from the traditional litigations to a more elaborate protection system. It proves that decision makers are starting to think outside the box, but still, the work is far from finished. The internet's social power has proven more than once its possibilities and users will not give it up that easily.

At his presentation to the Blue Sky Conference in Queensland, the Director General of the World Intellectual Property Organization Dr Francis Gurry states:

'We need to speak less in terms of piracy and more in terms of the threat to the financial viability of culture in the 21st Century, because it is this which is at risk if we do not have an effective, properly balanced copyright policy.' [68]

Constant legislative changes will not solve the problem of consumer piracy in general but just deter some of the occasional downloaders. Is the timing right for such measures? As Rayna and Barbier (2010) argue, had these measures been taken 10 years ago they would have definitely worked, but nowadays, peer to peer has become a habit, and old habits die hard. [69] It would be wise to take a step back not only from the incessant legislation process but also from the war declared against the Internet. Creative industries have to embrace the new technological ways and use them in order to optimize the distribution of creative content rather than reject and demonize them. It is more likely that the best-fitted solution will present itself not from a legal, but rather from a sociological analysis of the habits of the users.

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[2] "...there is a worldwide consensus that copyright and author's right advance the important goals of authorial autonomy and cultural diversity. The grant to creators of exclusive rights in their works of authorship opens the door not only to reaping revenues from the work but in many cases to earning a livelihood." P. Goldstein, B. Hugenholtz, *International Copyright*, Oxford University Press, 2010, Second edition, p.7

[3] For more information on the "copyright wars", see Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 658-98 (2005)

[4] See *A&M Records v. Napster, Inc.*, 239 F.3d 1004 [2001] explaining how a centralized peer to peer system works. Since its appearance, this particular technology was immediately diabolized by the copyright industry.

[5] In Greek mythology, the Lernaean Hydra was an ancient serpent-like water creature that possessed many heads and for each head cut off it grew two more

[6] For an extensive analysis see Peter K. Yu, *The Graduated Response*, *Florida Law Review*, Vol. 62, pp.1373-1430, (2010), available at SSRN: <http://ssrn.com/abstract=1579782> and Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement* (April 16, 2010) . *Oregon Law Review*, Vol. 89, p. 81, 2010, available at SSRN: <http://ssrn.com/abstract=1565038>

[7] Hereinafter ISPs.

[8] Such as France, United Kingdom, South Korea, Germany, Italy, Spain to name a few.

[9] Such as the USA and Ireland

[10] See for example article 14 of the *Electronic Commerce Directive*

[11] Article 11 of the 2004/48/EC Directive on the enforcement of intellectual property rights

[12] *L'Oreal SA v. eBay C- 324/09* [2011]

[13] *L'Oreal SA v. eBay C- 324/09* [2011]

[14] *C- 70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011]

[15] Article 15 of the *Electronic Commerce Directive*

[16] See *Twentieth Century Fox et al v BT* [2011] EWHC 1981, where the court ordered the largest UK ISP to block access to the Newzbin site which was said to be involved in copyright infringing material.

[17] *Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet* (Law No. 2009-669 of June 12, 2009 to Promote the Dissemination and Protection of Creation on the Internet), *Journal Officiel de la République Française [J.O.] [Official Gazette of France]*, June 12, 2009, p. 9666, available online at <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=DDE1A378919D52E!cidTexte=LEGITEXT000020736830&dateTexte=20110622>

[18] High Authority for the Diffusion of Works and the Protection of Rights on the Internet.

[19] *Korean Copyright Act translated in English*, available online at <http://www.moleg.go.kr/english/korLawEng?pstSeq=52683&pageIndex=23>

[20] See article South Korea's "three-strikes" law takes effect, 23 July 2009, available online at <http://www.zeropaid.com/news/86703/south-koreas-three-strikes-law-takes-effect/>

[21] *Digital Economy Act* available online at <http://www.legislation.gov.uk/ukpga/2010/24/contents?view=plain>

[22] Section 124B, *Digital Economy Act*

[23] Section 124G *Digital Economy Act*

[24] *BT & Talk Talk v The Secretary of State for BIS* [2011] EWHC 1021 (Admin)

[25] See Bridy, (2011)

[26] EMI, Sony, Universal and Warner

[27] See *EMI Records & Ors v. Eircom Ltd.*, [2010] IEHC 108

[28] Available online at

[http://www.med.govt.nz/templates/ContentTopicSummary\\_34357.aspx](http://www.med.govt.nz/templates/ContentTopicSummary_34357.aspx)

[29] *Anti-Counterfeiting Trade Agreement (ACTA)*, Consolidated Text prepared for public release, April 2010, cited by Bridy, (2011)

[30] Available online at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>

[31] Bridy, (2011)

[32] <http://www.fsf.org/campaigns/acta/>

[33] <https://www.eff.org/deeplinks/2011/10/acta-signed-8-members-are-we-doomed-yet>

[34] Available online at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.1>

[35] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, p.14.

Available online at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.1>

[36] For a study regarding the application of the principle of proportionality in European Law see Emiliou N., *The principle of proportionality in European Law. A comparative study*, Kluwer Law International, 1996

[37] See Muzny P., 'La technique de proportionnalité et le juge de la convention européenne des droits de l'homme' Presses universitaires d'Aix en Marseille, 2005 and Xynopoulos G., *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité, en France en Allemagne et Angleterre*, LGDJ, 1996

[38] Van Gerven W., 'The effect of proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe in *The Principle of Proportionality in the Laws of Europe*', Hart Publishing Oxford, 1999, p. 37-63

[39] *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008] at 65-68, *Lindqvist*, C-101/01 [2003] at 82, *Ordre des barreaux francophones et germanophone and Others* C-305/05 [2007] at 28, *L’Oreal v eBay* C-324/09 [2011] at 139,144

[40] At the famous *Fedesa* case, the ECR held: “The principle of proportionality (...) requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused are not to be disproportionate to the aims pursued”, Case C-331/88 *Fedesa* [1990] ECR I-4023, p. 4063 per curiam; Cases C-133/93, 300/93 & 362/93 *Crispoltoni* [1994] ECR I-4863, p. 4905

[41] Case 157/78 *Valsabbia* [1980] ECR 907

[42] “Enactment, application and enforcement of law do not find purpose in themselves. They are justified by a common commitment to certain basic principles of promotion of human dignity, fundamental rights, welfare and a common understanding of values. The application of law is not an isolated process. (...) It may be that fundamental rights of the citizens are excessively restricted or that, in terms of an abstract commons benefit, more harm s done than that which administration seeks to prevent by its action.” Emiliou (1996) p.99

[43] Article 27 of the Universal Declaration of Human Rights

[44] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (“Citizens’ Rights” Directive).

[45] *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008], at 65-68

[46] *KU v Finland* (2009) 48 EHRR 52 at [49]

[47] For example, the Greek decisions 44/2008 of Court of the First Instance of Rodopi and 27/2009 of the Multimember Court of First Instance of Piraeus

[48] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, p.7 Available online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.1>



[49] Article R335-5 of the French Intellectual Property Code.

[50] Gautier P.-Y., *Propriété littéraire et artistique*, 2010, Presses universitaires de France, p. 836

[51] Benabou V.L., *The Chase: The French Insight into the "Three Strikes" system*, in *Copyright Enforcement and the Internet*, Kluwer Law International, 2010, p. 179

[52] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, p.8 Available online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.1>

[53] See report at <http://arstechnica.com/tech-policy/news/2009/11/eu-adopts-internet-freedom-provision-on-net-cut-offs.ars> cited in Edwards L., *WIPO Report on the "Role and responsibility of Internet intermediaries in the field of copyright and related rights"*, 2011, p. 27, available online at: [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_respc](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_respc)

[54] It is stated in the amendment 46 (ex 138) of the Telecoms Package, which amends Art.1 paragraph 3a) of the Directive 2002/21/EC, that measures restricting fundamental rights "(...) may only be taken with due respect for the principle of presumption of innocence (...)".

[55] Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 2010 O.J. (C 147/6)

[56] *FDPIC v Logistep AG*, Federal Supreme Court of Switzerland, 8 September 2010

[57] *EMI Records & Others v Eircom Ltd* [2010] IEHC 108, High Court of Ireland (Charleton J), 16 April 2010 and *Cyrille S./Sacem*, Sdrm, Cour d' Appel de Paris, 12<sup>ème</sup> ch., pôle 5, Arrêt du 1 février 2010

[58] See Art 29 Working Committee Opinion 4/2007 on the concept of personal data, 20 June 2007, WP 136 and Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 2010 O.J. (C 147/6)

[59] *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008], at 55-56

[60] *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008], at 70

[61] *C-557/07 LSG- Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2Telecommunication*, [2009] ECR I-01227 at 28-29

[62] Stamatoudi I., *Data Protection, Secrecy of Communications and Copyright: Conflicts and Convergences- The example of Promusicae v.*

Telefonica in Copyright Enforcement and the Internet, Kluwer law International, 2010, p.199-231

[63] *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* C 70/10 [2011], at 42-43

[64] Viviane Reding Vice-President of the European Commission, EU Justice Commissioner Building trust in the Digital Single Market: Reforming the EU's data protection rules, Conference organized by the Industry Coalition for Data Protection - American Chamber of Commerce to the European Union Brussels, 28 November 2011- Speech available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/814&format=HTML&aged=0&language=EN&guiLang>

[65] See Ohm P., *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL.L.REV. 1417, 1426 and Yu, (2010)

[66] European Parliament Recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet (2008/2160(INI))

[67] Edwards (2011) at p. 59

[68] Queensland University of Technology, Brisbane, Australia, Blue Sky Conference: Future Directions in Copyright Law by Francis Gurry, Director General, World Intellectual Property Organization available online at [http://www.wipo.int/aboutwipo/en/dgo/speeches/dg\\_blueskyconf\\_11.htm](http://www.wipo.int/aboutwipo/en/dgo/speeches/dg_blueskyconf_11.htm)

[69] See Thierry Rayna & Laura Barbier, *Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations*, 6 Int'l J. Foresight & Innovation Policy 294, 299 (2010)