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HADOPI… 3 small suspension points…

The cornerstone of the *"graduated response",* the additional penalty of suspension of access to a public online communication service, introduced by §331-7 and §331-7-1 of the French Intellectual Property Code ("IPC"), has sparked heated debate not only within the French Parliament but also in the European Parliament. New to our legal system, this suspension of access as punishment for unlawful downloading is another step forward in responding to the challenge the advent of the digital age poses to copyright law.

Launched on October 28th last, the "music card"[2] is in line with the government's stated intention of supporting the development of a legal offer of online music and to draw people, specifically young people, to legal sources of music entertainment. A few weeks earlier,[3] the first volley of email warnings was confirmed by the Rights Protection Committee (RPC - *Commission de Protection des Droits*), HADOPI's committee in charge of spearheading implementation of the graduated response. By this coordinated action, HADOPI[4] has started to tackle its two main roles (§L.331-13 IPC): (i) the *"encouragement of the development of the legal offer on the Internet"* and (ii) the "*protection of works to which a copyright or related right is attached against any infringement"*.

The government is effectively attempting to implement a carrot and stick policy through the new measures stemming from the corpus of HADOPI-related laws and regulations.[5] This balance between education and repression is also reflected in the very mechanism implemented to fight against the massive phenomenon of unlawful downloading: the "graduated response".

The rationale of this graduated response, which basically consists in the sending of explanatory and educational messages by HADOPI[6] to Internet users,[7] resides in the dissuasive credibility associated to the systematic and quasi-automatic sanctions it should come to embody. In effect, a HADOPI

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[2] Decree no. 2010-1267 dated October 25, 2010 on the "Digital Card" http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022955961&dateTexte=&categorieLien=id.

[3] http://www.facebook.com/photo.php?fbid=125688354152291&set=a.125688244152302.37382.103826223005171&ref=fbx_album.

4 Introduced by §L.331-12 *et seq.* IPC, HADOPI is an independent administrative authority acting as a watchdog enforcing intellectual property rules on the Internet and the protection of the rights of Internet users, in particular the secrecy of data pertaining to privacy and freedom of communication.

[5] A compilation of the full corpus of legislative and regulatory texts can be found on the HADOPI website at http://www.hadopi.fr/actualites/textes-de-reference.html.

[6] HADOPI (*Haute Autorite pour la diffusion des oeuvres et la protection des droits sur Internet)* is an independent administrative authority in charge of enforcing intellectual property law rules relating to the Internet. In this aim, it can count on a Rights Protection Committee (RPC), staffed by accredited agents authorized to issue warnings in case of unlawful downloads ascertained on an Internet access line.

7 See www.hadopi.fr.

serving in a mere letterbox role would be nothing more than a scarecrow whose warning messages would soon be ignored.

It is to avoid this that the warning mechanism -- although this is not an end *per se* but rather a part of the educational solution and role of HADOPI -- culminates in the penalty of suspension of access. While it can be surmised from the spirit of these rules that this penalty will be legitimately reserved for the most serious, recurrent or harmful unlawful acts, suspension is the cornerstone of this system of repression that aims at adapting the response under criminal law[8] to a massive and widespread phenomenon which is that of the unlawful downloading of protected works.

There is no reason to doubt[9] that the visible implementation of such suspension penalties, combined with ongoing volleys of targeted warnings, will permit initating a healthy process that should culminate in a change in the current perception of unlawful downloading as being a trivial matter, to being a "pointless risk".[10]

To secure this success and to demonstrate the efficiency of the graduated response *à la française,* private players – rightholders, industry defense bodies, Internet access providers – and public players[11] – HADOPI, the courts – will need to take concerted action to ensure the success of a criminalization policy that has already commenced with a recent circular dated August 6, 2010, issed by the Ministry of Justice.[12]

In this study, we propose to focus in particular on the procedural foundations and mechanisms whereby courts acting on the referral of HADOPI, or else by direct referral by rightholders, will be able to apply this new suspension penalty, established by the lawmakers as an additional penalty. Alternatively, based on acts of the same nature,[13] it may be imposed as an penalty for a misdemeanor offense *(sanction à titre contraventionnelle*) to punish the characterized negligence of the holder of the subscription in securing his or her Internet access or else on a tort basis *(sanction à titre délictuel)* to punish copyright infringement.

After having outlined the foundations of the additional penalty of suspension of access on a misdemeanor or tort basis (I), we will explore the three main scenarios in which this new penalty may be imposed and enforced (II).

I. The new additional penalty of suspension of access

New to the French legal system, "*suspension of access to a public online communication service",* viewed as a penalty for unlawful downloading has sparked heated debate not only within the French Parliament[14] but also in the European Parliament.[15] It represents another step forward in

[8] Available here: http://www.textes.justice.gouv.fr/art_pix/JUSD1021268C.pdf.

[9] See in this connection a recent IFOP / Syndicat National de l'Edition Phonographique (SNEP) study, to the question would this type of warning "incite you to turn to legal downloading sites?", 66% of the individuals surveyed reported yes: http://www.ifop.fr/media/poll/1227-1-study_file.pdf.

[10] On the genesis of the "graduated response" and agreements signed at the Elysée Presidential Palace in November 2007 popularly known as the "Olivennes Agreements", see Revue Lamy du Droit de l'Immatériel – no. 34 – January 2008, "*Les Accords Olivennes: l'évolution de la protection des œuvres sur les réseaux numérique ou le choix du mode contractual".*

[11] See in this connection, circular dated August 6, 2010: The nature of the HADOPI's roles requires coordination between it and the courts so as to guarantee the consistency of the administrative and criminal law responses to the violation of IP rights via the Internet.

[12] Circular dated August 6, 2010 on the presentation of Acts no. 2009-669 dated June 12, 2009, promoting the dissemination and protection of creation on the Internet, and no. 2009-1311 dated October 28, 2009, on the criminal law protection of literary and artistic property on the Internet, as well as their implementing decrees.

[13] The *Conseil constitutionnel* effectively considered that the breach of the duty to monitor access to an Internet line and the offence of infringement could be based on the same acts, namely *"ascertainment of use of an Internet access in violation of the legislation on copyright and related rights".*

[14] See in particular Report no. 327 (2008-2009) by Senator Michel Thiollière, and Deputy Franck Riester, on behalf of the joint National Assembly/Senate committee, submitted on April 7, 2009 (National Assembly filing number: 1589). Concerning §2 of the government bill: "–

responding[16] to the challenge the advent of the digital age and the development of peer-to-peer sharing networks pose to copyright. Some see in it a source of inspiration[17] while others[18] are observing with interest the introduction of the French system.

The original intent of the French lawmakers was to introduce suspension as an administrative measure.[19] But this decriminalization did not stand up to the analysis made by the *Conseil constitutionnel*, which found it to be incompatible with the freedom of communication proclaimed by §11 of the Declaration of the Rights of Man and the Citizen. Regardless of its legal regime – tort or misdemenor – the penalty of suspension of access will be decided by a court, the sole guardian of individual liberties".[20]

⇨ **Duality of the foundation of the penalty and assessment by the courts**

The new additional penalty of suspension of access is added to the *"Criminal Provisions"* laid down by Chapter V, Title III (Book III) IPC dealing, *inter alia,* with measures to *"sanction"* infringement. §L.335-7 IPC provides that in addition to the penalties alredy incurred,[21] any infringement under §L.335-2,[22] §L.335-3[23] and §L.335-4[24] IPC is punishable by the *"suspension of access to a public online communication service for a maximum period of one year".* The *sine qua non* condition for the application of the new penalty is that the *"offense* [must have been] *committed through a public online communication service"*. This criterion allows casting a broad net around downloading phenomena based on the method of commission. Those attempting to define its boundaries would do well to rely on the notion of *"public online communication"* as defined by §1 IV of Act no. 2004-575 dated June 21, 2004 on trust in the digital economy.[25]

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the National Assembly has also restricted the range of sanctions that can be entered, by getting rid of the possibility opened by the Senate of modulating the access speed of offending subscribers. This solution remains technically very costly to implement by Internet access providers, as representing close to one half of the investment of €70m or so over three years that the *Conseil général des technologies de l'information* has assessed for the implementation of the government bill. Also, its utility in putting an end to piracy is more than dubious, insofar as it is very easy to exchange pirated files using electronic messaging systems. On the issue of sanctions, the Deputies also ruled out the possibility of substituting, even on a temporary and trial basis, a fine to the suspension. Besides the fact that it would have led to introducing a form of "pay to infringe" right, this option would also have been far less dissuasive and pedagogical than suspension of access".

[15] Cf. the European debate on the Telecom Package and "amendment 138" which provided that "no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities […] save when public security is threatened", and in particular http://www.euractiv.com/fr/societe-information/accord-rforme-paquet-tlcoms/article-187073.

[16] In terms of repression, the DADVSI Act already sought to introduce the first legislative adjustments along these lines.

[17] Among the countries currently thinking about a system similar to HADOPI, are: Belgium, Denmark, Sweden, Finland, Korea and Japan.

[18] See in particular: France's Three-Strikes Law for Internet Piracy Hasn't Brought Any Penalties, http://www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html AND "Denmark plans 'three strikes' law while South Korea ups 'one strike' disconnections", Music Week, 08:19 | Wednesday October 27, 2010, http://www.musicweek.com/story.asp?storycode=1043063.

[19] Before being found unconstitutional by the *Conseil constitutionnel*, Act no. 2009-669 dated June 12, 2009 allowed suspension of access to be decided by an administrative authority, namely HADOPI. It indicated that §66 of the Constitution places "individual liberty" under the protection of the judiciary.

[20] See, in this connection, *Cons. const*., decision of Dec. 23, 1983, no. 83-164 DC and more recently Cons. const., decision of Feb. 21, 2008, no. 2008-562 DC.

[21] I.e., 3 years imprisonment and a fine of €300,000.

[22] *Any publication of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part (as well as the sale, export or import) of such infringing works shall constitute infringement.*

[23] *Any reproduction, performance or dissemination of an intellectual creation or of software, by any means whatsoever shall constitute infringement.*

[24] *Any fixation, reproduction, communication or making available to the public, or any broadcasting of a performance, phonogram, videogram or a program (as well as any import or export of infringing works or failure to pay the remuneration and deductions attached to the dissemination of the work) shall constitute infringement.*

[25] *"By public online communication is understood any transmission, upon an individual request, of digital data not having the nature of private correspondence, via a means of electronic communication permitting a reciprocal exchange of information between the emitter and the receiver".*

In addition, §**L.335-7-1** IPC provides that, for a duration limited to a maximum of one month, the penalty of suspension under §L 335-7 IPC may be imposed to **punish the *"offense of characterized negligence*** *protecting literary and artistic property on the Internet"* introduced by decree no. 2010-695, dated June 25, 2010. Under **§R.335-5** IPC, persons found guilty of this "5th class misdeameanour" (*contravention de 5ème classe*)[26] may *"in addition, be imposed the additional penalty of suspension of access to a public online communication service"*. This misdeameanour is the corrolary of the duty to monitor access to the Internet introduced by §L. 336-3(1) IPC.[27]

Pursuant to the circular dated August 6, 2010, "*this additional, particularly dissuasive, penalty, may thus be sought in particular for reiterated offenses and for first-time offenders depending on the intrinsic seriousness of the acts"*. When such penalties are sought, the court will have significant leeway when entering their verdict in assessing the principle and the quantum of the penalty. Reflecting the legislative lessons learnt from the finding of inconstitutionality of HADOPI as initially framed,[28] §L.335-7-2 IPC specifies in this respect that the *"duration[29] of the penalty entered must reconcile the protection of intellectual property rights and respect of the right of free expression and communication, in particular from one's home"*. More prosaically, the courts will have to take into account the *"circumstances and the seriousness of the offense"* as well as *"the personality of its perpetrator",* his or her *"professional activity"* and "socio-economic" situation. Lastly, it should be stressed that in some cases at least the courts will have the possibility of imposing the additional penalty of suspension as the main penalty and not only as an additional penalty.

- ⇨ **Implementation of the penalty of suspension and control thereof by HADOPI**

For the enforcement of suspension of access decisions, the law gives HADOPI a prominent role, in particular its Rights Protection Committee (RPC). Informed and a recipient (§R.331-44 and §R.331-45 IPC) of enforceable decisions comprising a penalty of suspension of access, the RPC will have responsibility for implementing such penalties and ensuring due compliance therewith.[30]

A priviledged intermediary of Internet access providers, the RPC will inform the "person whose activity it is to provide access to public online communication services of the suspension penalty imposed against its subscriber" (§R.331-46). In turn, the RPC will itself be informed of the *"date when the suspension period began".*[31] Failing compliance by the access provider with the suspension decision, the RPC (R. 331-46 IPC) will report acts likely to constitute a tort under §L.335-7(6) to the prosecutor's office. The penalty incurred on that basis is a €5,000 fine. Of note is that a specific record base[32] operated by HADOPI should identify guilty subscibers seeking to evade this measure by

[26] As such sanctioned by a fine of €1,500.

[27] Completed by Act no. 2009-1311 dated October 28, 2009, this section now places the holder of the Internet access under a duty to monitor and avoid his or her Internet connection being used for unlawful downloading. Its first indent provides that: "The person holding access to public online communication services is under the duty to ensure that such access is not used for the purposes of reproducing, performing, making available or communicating to the public works or materials protected by copyright or by a related right without the authorization of the rightholders under books I and II, when required". While that duty already appeared in the IPC at §L. 335-12 before the entry into force of Act no. 2009-1311 dated October 28, 2009, *"no sanction was attached to it, and second, its scope of application was narrower since it did not concern either the making available or the communication to the public of works or materials protected by copyright or by a related right"* - see Les Cahiers du Conseil Constitutionnel, CAHIER no.27, Commentary on decision no. 2009-580 DC – June 10, 2009.

[28] Decision of unconstitutionality, June 12, 20009

[29] It should be recalled that the maximum duration incurred is 1 year in tort cases and of only 1 month in misdemeanor cases.

[30] Cf. *supra*.

[31] See also the RPC which transmits information on enforcement of the measure to the automated criminal records – cf. §R.331-46(2).

[32] See **Decree no. 2010-236 dated March 5, 2010 on the automated processing of personal data authorized by §L. 331-29 of the Intellectual Property Code known as the "System for management of digital rights protection measures".**

taking ot a new Internet subscription. Non-compliance with the injunction against taking out a new subscription also constitutes a tort punishable by a fine of €3,750 (§L.335-7-1 IPC) when the additional penalty was entered on an misdemeanor basis. When entered on a tort basis, reference should be made to §434-41, as amended, of the Criminal Code, which lays down the penalties applicable for non-compliance with additional penalties.

II. Procedures leading up to the imposition of the additional penalty of suspension

The penalty of suspension of access is the cornerstone of the graduated response as implemented by HADOPI and the judiciary in the context of a coordinated criminal policy. It is the systematic and quasi-automatic imposition of this *"particularly dissuasive"* penalty[33] which, in the spirit of the rules, should ensure the repressive counterweight adapted to the specific handling of the massive phenomenon of unlawful downloading. As previously seen, when entered on an additional basis, this new penalty applies both in tort cases, to infringement committed using a public online communication service (§**L.335-7 IPC**); and in misdemeanor cases, as punishment for characterized negligence in connection with downloading (§**L.335-7 and §R.335-5 IPC)**.

This dual basis invites should lead to three scenarios being considered. To the extent all can lead to the imposition of the penalty of suspension of access by a court, a distinction should be drawn between the graduated response in the strict sense of the term, and more expeditive procedures, organizing the possibility, in infringement cases, of a suspension imposed through simplified criminal procedures, guaranteeing a certain speed of sanction.

- The first, based on the *offense of characterized negligence protecting literary and artistic property on the Internet,* is comprised of three successive stages (or strikes) – 1st HADOPI warning, 2nd HADOPI warning, then suspension order by the court (maximum 1 month) – designed to offer an adapted response both in terms of the penalty incurred and the eased procedural requirements. This misdemeanor penalty targets all acts of unlawful downloadings and pursues a logic of dissuasion, if not education, as regards downloading "for convenience" (A).

- The second is potentially more expeditive. It allows the RPC, upon referral of a report of infringement, to seek, without prior warning, the suspension of a subscriber's Internet access for a maximum period of one year, by forwarding the report to the prosecutor's office. In this scenario, suspension of access may be imposed by a criminal order punishing infringement committed via a public online communication service (B).

- In the third and last scenario[34] the RPC's role will be limited to enforcing suspension decisions that may result from the more traditional implementation of public prosecution following a complaint by a rightholder. Faced with some particularly serious downloading practices – first disclosure of a work for example – this type of appraoch could well make inroads. Righholders concerned by this type of phenomenon would retain the choice of how to qualify the infringement and, as the case may be, of also seeking appropriate redress (C).

[33] Circular dated August 6, 2010, p. 7.
[34] It is noteworthy that the Rights Protection Committee can also act based on information transmitted to it by the Prosecutor's Office (§L.331-24). This possibility has voluntarily been excluded from the scope of this study.

The choice between the two first scenarios will depend on the RPC, which will decide based on the elements of information contained in the referral[35] made by the rightholder. It suffices for the RPC to ascertain, pursuant to §R.331-42, that the the acts brought to its attention are "*liable to constitute the offense under §R. 335-5* [*characterized negligence*] *or the offenses under §335-2, 335-3 and 335-4 IPC* [infringement]."[36] In both cases, a referral will be made to the Prosecutor's Office via the transmission of the *"deliberation by the committee* [RPC] *ascertaining that the acts are liable to constitute an offense".* [37]

Unlike an *"automatic radar",*[38] this referral to the Prosecutor's Office by the RPC is in no way systematic and is up to the assessment of the RPC ,which has a certain measure of leeway in deciding on the *"advisability of prosecution".*[39]

A. Suspension on a misdemeanor basis at the end of the "graduated response" process:

Suspension on a misdemeanor basis is the 3rd and last step in the graduated response process. It was designed by the lawmakers[40] to satisfy the imperatives of requirements imposed by the reality of file sharing in the digital age: ensuring fair legal treatment of a massive phenomenon of unlawful downloading and dissuading downloading "for convenience". The circular dated August 6, 2010 has confirmed that *"This misdemeanor procedure […] should be priviledged for first-time pffenders or for downloading on a limited scale"*. In practice, it is the specificity of the regime applicable to misdemeanour offenses (*contravention*) in evidentiary[41] and procedural terms[42] that should allow absorbing a massive potential volume of offenses.

In misdemeanor cases (§L.335-7 and §R.335-5 IPC), suspension is incurred for a maximum of one month in case of *"characterized negligence"*[43] by the holder of the subscription in securing[44] his or

[35] The conditions under which referrals can be made to the RPC are set forth in §R.331-35 IPC. It should first be stressed that §L331-24 contains an exhaustive list of bodies having the possibility of making a referral to the RPC via sworn and accredited agents pursuant to §L. 331-2. Accordingly, only duly formed trade defense bodies; collecting and distribution of rights societies and the *Centre national de la cinématographie* have standing with the RPC. An individual rightholder does not have any possibility of activating HADOPI directly. The Rights Protection Committee may also act based on information transmitted to it by the Prosecutor's Office. Referrals cannot be made to it based on acts dating back more than six months. §R 331-35 (1) specifies that to be admissible, referrals made to the RPC must indicate the personal data and information mentioned in point 1 of the appendix to decree no. 2010-236 dated March 5, 2010. Two sets of information are required: (i) Information on the acts liable to constitute a breach of the duty defined in §L.336-3 IPC: Date and time of the acts; IP address of the subscribers concerned, Peer-to-Peer Protocol used; Pseudo used by the subscriber; Information on the protected works or materials concerned; Name of the file such as present on the subscriber's computer (as applicable); Internet access provider with whom the access was subscribed. (ii) Information on the agents sworn and accredited under the conditions defined in §L.331-2 IPC: Surname, first names; Date and period of accreditation, date of oath; Bodies (duly formed trade defense, collecting and distribution of rights societies or the *Centre national du cinéma et de l'image animée*) having appointed the agent. In addition to that information, the referral should be accompanied by a *"declaration of honor that the author of the referral has standing to act in the name of the holder of the rights over the protected work or materials concerned".* Upon receipt of the referral, the RPC will acknowledge receipt by electronic mail. If the referral is not processed within 2 months as of that date, HADOPI is required to delete the data transmitted in the referral.

[36] It should be recalled that the *Conseil constitutionnel* – Decision no. 2009-590 dated October 22, 2009 - effectively considered that a breach of the duty to monitor Internet access and the tort of infringement could rely on the same facts, namely "ascertainment of use of an Internet access in violation of the laws on *copyright and related rights"*.

[37] Cf. §R. 331-42 and §R. 331-43

[38] At the hearing on June 23, 2010 by the Culture and Education Committee of the National Assembly, Mrs. Mireille Imbert-Quaretta stated that the RPC *"is the opposite of an automatic radar"*, stressing that *"the lawmakers have left the decision of the advisability of prosecution up to the RPC"* as an *"independent body"*.

39 Idem.

[40] On the laborious legislative process of building this penalty, see, in particular, M. Vivant, "Au-delà de l'HADOPI, penser la contrefaçon", RLDI 2009/51.

[41] §537 Code of Criminal Procedure.

[42] §524 *et seq.* Code of Criminal Procedure.

[43] According to the circular dated August 6, 2010, the elements constituting a new offense have been *"clearly defined"* by decree no. 2919-695. §R.335-5(I) effectively stipulates that the offense is established as soon as the "the person holding the access to public online

her access to the Internet despite the recommendations made by the Rights Protection Committee (RPC). The imposition of the penalty for this misdemeanour is subject to (§L.335-7-1 and §R.335-5-II IPC) a prior warning given to the holder of the access given in accordance with §L.331-25[45] IPC. Once an unlawful download is ascertained, the first two stages in the graduated response (as detailled above) can be briefly summarized as follows:

-1st stage: the RPC *"can"* send a first "recommendation" email to the subscriber. This first warning will cite the provisions of §L. 336-3 IPC, enjoin the subscriber to comply with the obligation defined therein[46] and warn the latter of the penalties incurred in application of §L. 335-7 (characterized negligence) and §L.335-7-1 (infringement) IPC. It will also inform the subscriber of *"the legal offer of online cultural content"* and of the *"*existence of securization means".[47] This message need not mention the *"content of the protected works or materials concerned by such breach".*[4849]

-2nd stage: in case of renewal, within a period of six months following the sending of the first recommendation, of acts liable to consitute a new breach of the defined duty, the RPC has the possibility of sending a second recommendation. This second warning is not only sent electronically but also in the form of a *"letter delivered against signature of an acknowledgement of receipt or by any other means of a nature to establish proof of the date of presentation of such recommendation".*[50]

The 3rd stage is initiated by the RPC when the two recommendations have proved unsuccessful. It consists in the transmission to the Prosecutor's Office[51] of the dossiers on breaches of the monitoring duty.

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communication services" finds himself "without legitimate cause" in one of the following two situations: (i) *"has failed to put in place a means of securing such access"* or else *(ii) "has failed to use diligence in implementing that means".*

[44] The graduated response scheme voted by the lawmakers relies on a breach of the duty to monitor access to the Internet introduced by §L. 336-3(1) IPC. While this duty, already contained in the IPC at §L. 335-12, hitherto *"lacked any sanction and, moreover, comprised a narrower scope of application since it did not concern either the making available or the communication to the public of works or materials protected by a copyright or a related right*" - see *Les Cahiers du Conseil Constitutionnel,* CAHIER no. 27, Commentary on decision no. 2009-580 DC – June 10, 2009. Completed by Act no. 2009-1311 dated October 28, 2009, this section now places an Internet access holder under the duty to monitor and avoid his or her connection being used for unlawful downloading. Indent 1 provides that: "*The person holding access to public online communication services is under the duty to ensure that such access is not used for the purposes of reproducing, performing, making available or communicating to the public works or materials protected by copyright or by a related right without the authorization of the rightholders under books I and II, when required."*

[45] The circular dated August 6, 2010 states in cut and dry terms: *"As regards prior elements, the requirement of a recommendation by the Rights Protection Committee made in accordance with the provisions of §L.331-25 IPC implies that the person has already been the subject of a first warning, given electronically, following the first acts of downloading ascertained on his or her line, and that that person has subsequently, following the ascertainment of new acts of downloading, been the subject of a second recommendation, this time sent against signature of an acknowledgement of receipt. It is only after these two sets of downloading acts have given rise to successive recommendations that, in the event a third set of unlawful online downloading acts is ascertained, the misdemeanor of characterized negligence can be established".*

[46] Cf. *supra*.

[47] A specific decree on the means available to secure internet connection is still to be published.

[48] See §L331-25(3).

[49] This first email is sent *"by the intermediary of the person whose activity it is to offer access to public online communication services having entered into a contract with the subscriber"*. Decree no. 2010-1202 dated October 12, 2010 amending §R.331-37 IPC provides in this respect that: §R.331-37 IPC is completed by the following: "Operators are required to send each of the recommendations respectively mentioned in the first and second indent of §L. 331-25 electronically to the subscriber, within twenty-four hours following its transmission by the Rights Protection Committee."

[50] The content of this second warning message is identical to the first and here too, the RPC will rely on the Internet Access Provider to send the email as well as to identify the postal address of the subscriber, who will also receive a registered letter with acknowledgement of receipt.

[51] Cf. §R. 331-42 and §R. 331-43.

Upon such referral, the Prosecutor's Office will primarily rely on two sets of factors in determining the materiality of the wrongdoing asserted.[52] It is the police court *(juge de police)* that will then decide based on the procedural record and arguments. The first will stem from the referrral made by the righholders. This confirms the care that should be paid to records drawn up by the accredited agents for trade defense bodies. Reference should be made to §R.331-35 IPC in preparing a list of the information that must accompany the referral.[53] The second will stem from the exercise by the RPC and its agents of their judicial police functions.[54] §L.331-21-1 IPC notably provides that it may obtain the observations of "concerned" persons in writing or at a hearing. The RPC wielding no coercive power of summons, these factors will still depend on the goodwill of the persons involved.

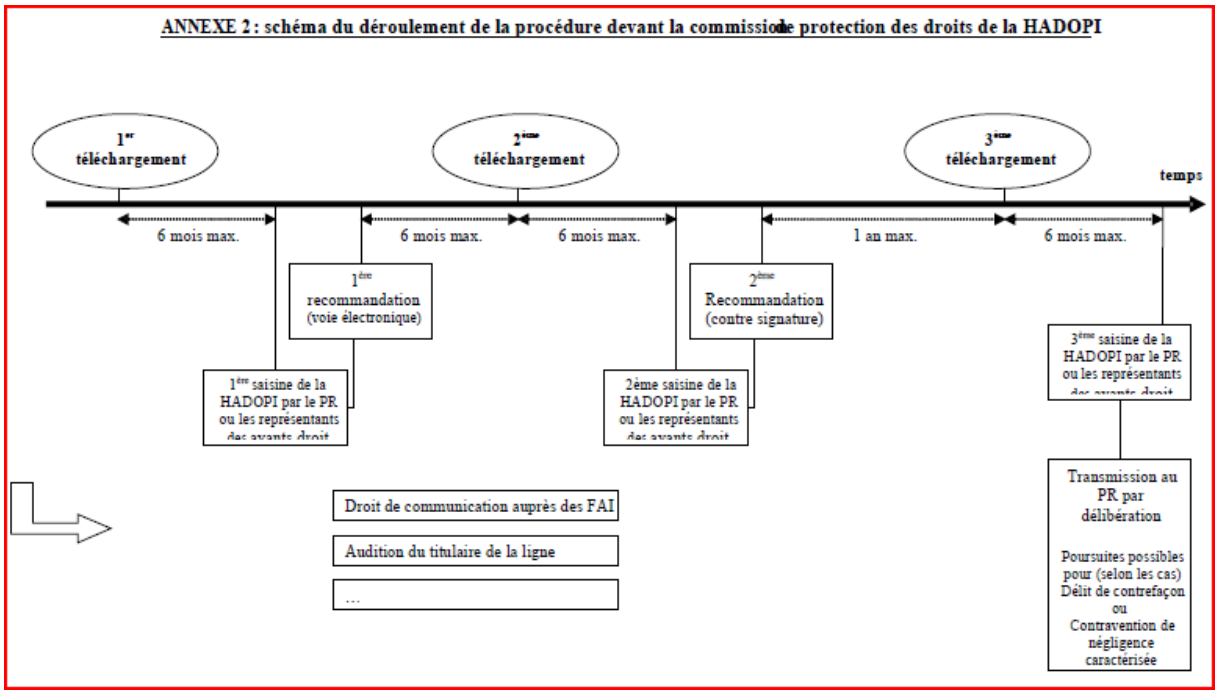
It can be thought that the materiality of the misdemeanor will result from the official reports ascertaining acts of downloading and from the successive recommendations, which shall have remained unheeded, made by the RPC. The misdemeanor offense of negligence will for its part be presumed from such time as the prohibited downloading is established by the official records[55] drawn up by accredited agents.

[52] On the personal nature of the misdemeanor, the circular recalls that: *"It matters little whether the holder of the line has himself committed the acts of unlawful downloading, this being the essential factor differentiating this misdemeanor from infringement."*

[53] §R 331-35(1) §R 331-35 (1) specifies that to be admissible, referrals made to the RPC must indicate the personal data and information mentioned in point 1 of the appendix to decree no. 2010-236 dated March 5, 2010. Two sets of information are required: (i) Data relating to the acts liable to constitute a breach of the duty defined in §L.336-3 IPC: Date and time of the acts; IP address of the subscribers concerned, Peer-to-Peer Protocol used; Pseudo used by the subscriber; Information on the protected works or materials concerned; Name of the file such as present on the subscriber's computer (as applicable); Internet access provider with whom the access was subscribed and (ii) Information concerning the sworn and accredited agents under the conditions defined in §L.331-2 IPC: Surname, first names; Date and period of accreditation, date of oath; Bodies (duly formed trade defense, collecting and distribution of rights societies or the *Centre national du cinéma et de l'image animée*) having appointed the agent. In addition to that information, the referral should be accompanied by a *"declaration of honor that the author of the referral has standing to act in the name of the holder of the rights over the protected work or materials concerned*".

[54] §L. 331-21-1 gives the RPC judicial police functions and in particular provides that it has the authority to obtain the observations of the persons "concerned" in writing or at a hearing.

[55] §537 CCP: Misdemeanors are proved either by official records or reports, or by witness statements in the absence of official reports or records, or in support thereof. Except where the law otherwise provides, official records or reports drawn up by judicial police officers, agents or assistant agents, or by civil servants or agents entrusted with certain judicial police functions to whom the law has granted the power to establish the existence of misdemeanors, are *prima facie* authentic evidence. Proof of the contrary may only be established in writing or by witnesses.



Source: Circular dated August 6, 2010 on the presentation of Acts no. 2009-669 dated June 12, 2009, promoting the dissemination and protection of creation on the Internet, and no. 2009-1311 dated October 28, 2009, on the criminal protection of literary and artistic property on the Internet, as well as their implementing decrees - NOR : JUSD1021268C

B. Suspension on a tort basis following referral to the Prosecutor's Office by the RPC:

As just seen, the misdemeanor treatment covers the broad spectrum of acts of unlawful downloadings and pursues a dissuasive, if not educational, logic as regards downloading "for convenience". In parallel to such treatment of massive practices, the texts have opportunely provided for implementation of the penalty of suspension of access on a tort basis, which would seem to be reserved for the most deleterious acts of infringement. With no prior warning to the holder of the access and for a maximum period of one year, this suspension will be sought at the initiative of the RPC, which will make a referral to the Prosecutor's Office by way of a deliberation. It may be imposed pursuant to a criminal order in an *ex parte* summary judgment *(ordonnance pénale)* to punish infringement committed though a public online communication service.

The choice of this fast-track procedure – no prior warning requirement – should rely on the content of the official reports transmitted to the RPC. If sufficiently serious, the RPC will decide against qualification as a simple breach of the monitoring duty and for infringement. In this respect, the RPC will have to consider both the nature and the volume of the works for which unauthorized making available has been ascertained. The circular supports this interpretation by enumerating what can be considered as criteria for the "habitual", "massive" or repeated nature of unlawful downloading. It states that "[…] the tort of infringement should be determined and prosecuted in case of reiteration of the habitual and massive acts of downloading from the Internet in violation of the provisions relating to copyright ad related rights". It would thus seem legitimate to propound that beyond a certain threshold, the making available from a given access of an exponential volume of protected works should lead the RPC to set aside a misdemeanour qualification in favor of infringement.

On a procedural level, it should first be specified that the lawmakers introduced the possibility of simplified fast-track processing of infringement offenses committed via a public online communication service by making two changes to the CPP (cf *Act no. 2009-1311 dated October 28, 2009).* The first change, made to §398-1 CCP, was to allow these offenses to be heard by a *"tribunal correctionnel*" sitting in a single judge formation. The new §398-1-10 CCP now covers "the torts (*délits*) laid down in §L.335-2, §L.335-3 and §L.335-4 of the Intellectual Property Code, when committed via a public online communication service". The second change consisting in introducing a §495-6-1[56] so as to allow prosecuting those same offenses under the *ex parte* summary judgement procedure (*ordonnance pénale*). This new section allows application of the "simplified procedure" for summary judgement to copyright infringement torts (§L. 335-2, §L.335-3 and §L.335-4 IPC). Reserved to persons overage, this procedure allows an offense *"to be judged either pursuant to an ex parte order in summary judgment but which only becomes res judicata if the defendant, on whom the order has been notified, does not oppose it within a period of forty-five days".*[57]

Based on these new provisions, the suspension decision will be made by a single judge, deciding on the basis of the evidence produced by the Prosecutor's Office, without the defendant appearing in court.[58] The judge cannot enter a prison sentence in this type of simplified procedure, the maximum penalty in this context being a maximum fine of €300,000 and suspension of Internet access for a period of one year. It should be noted that the suspension measure may be entered as the main penalty.[59]

While these procedures offer, in tort cases, the simplicy and speed already existing in misdemeanor cases, they also have evidentiary requirements for their corrolary and a particularly rigorous investigation process.[60] Here too, the elements of evidence collected by the RPC and the accredited agents based on their judicial police powers will have a key role to play.[61] The *actus reus* element of the infringement may result from official reports ascertaining the downloading of a protected work. As regards the *mens rea* element, we would simply mention the refutable presumption of the bad faith of the defendant accused of infringement.[62] Establishing that the defendant is personally the perpetrator of the tort might prove a thornier matter and require an additional ivestigation or else opting for a misdemeanor qualification. In any case, a court considering that *inter partes* debate is necessary could invite the Prosecutor's Office to use the ordinary proceedings.

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[56] *"The misdemeanors provided by §L.335-2, §L.335-3 and §L.335-4 IPC, when committed via a public online* communication service, can also be the subject of the simplified procedure for an order in summary judgment (*ordonnance pénale*) provided in this section."

[57] *Les Cahiers du Conseil Constitutionnel*, Cahier no. 28, Commentary on decision no. 2009-590 DC dated October 22, 2009.

[58] The defendant can in all cases file an opposition against the order to assert his or her rights (§495 through §495-6).

[59] §495-1(2): "The *président* shall adjudicate without prior debate through a criminal order in summary judgment of dismissal or of a fine as well as, if applicable, one or more additional penalties incurred, it being possible to impose them as the main penalty".

[60] The simplified procedure can only be followed when the inquiry has established *"the matters of which the defendant is accused and has obtained enough information about the defendant's personality, in particular his income and expenses to allow the penalty to be determined"* - §495 CCP.

[61] It should be noted that the circular dated August 6, 2010 discourages the opening of an additional investigation and encourages the Prosecutor's Office to work on the sole basis of the elements provided by the RPC: "In a dual objective of ensuring the speed of the criminal response and ensuring that the new system does not clogging up the police and gendarmerie services, a second investigation by those services should be avoided when the elements provided by HADOPI suffice to characterize the misdemeanor of characterized negligence by a holder of a line and to ensure the adversarial nature of the proceedings. Also, under §409 CCP, official reports (*procès-verbaux*) drawn up in application of §L.331-21-1 IPC are *prima facie* authentic evidence.

[62] See in particular, *Cass. crim., May 9, 1891: Bull. crim. 1891, no. 110.*

C. Suspension on a tort basis following a complaint by the Prosecutor's Office:

At the initiative of a rightholder or of a trade defense body empowered to represent its members at law, suspension of acces on a tort basis could result from a simple complaint. Outside the RPC and HADOPI, this type of procedure may remain occasional. Yet there are several reasons why it should be considered.

First, a complaint might be suited to the specificity of certain offenses, such as the first publication of a work on peer-to-peer networks. This notion can be defined as the first making available on a peer-to-peer network of a work that has not yet been the subject of a first disclosure to the public or else of a work that, although already marketed, has never been made available on such sites without the rightholder's authorization. This type of piracy can also result, for example, from leaks within distribution or promotion channels. In such case, it is easy to understand the role and the decisive responsibility of the person who first allows the massive downloading of that work by thousands, if not millions, of Internet users. For the rightholder concerned, what is involved is a practice to be curbed and dissuaded in priority. Also, the first making available of a work on a peer-to-peer network is doubtless especially prejudicial in that it appears as the matrix of an exponential number of copies that will subsequently be downloaded without authorization. In this respect, the complaint can be completed by claims seeking an award of damages. It should be recalled that, contrary to what the lawmakers had sought to introduce[63] through Act no. 2009-1311 dated October 28, 2009, the summary judgment procedure does not allow the courts to adjudicate on concomittant claims in damages. Lastly, it can be stressed that any rightholder who can evidence holding such rights in due course or body in charge of representing his or her interests at court, is entitled to "regularize" a complaint filed. In contrast, referrals to HADOPI can only be made by the bodies restrictively enumerated.[64]

The complaint should be supported by any findings or reports necessary to establish the type of infringement involved and its method of perpetration involving a public online communication service. It can also usefully recall the penalties incurred: 3-year prison sentence, fine of €300,000 and suspension of access for a maximum period of one year. At the request of the Prosecutor's Office, the judge may also decide to apply the additional penalty of suspension, the enforcement of which is left up to HADOPI.[65]

Depending on the seriousness, nature and volume of the offenses, the new provisions stemming from the corpus of HADOPI laws and regulations offer rightholders procedures that are adapted, in terms of speed and simplicity, to the phenomenon of online downloading. The penalty of suspension of access shows, both in substantive terms – dual basis – and in procedural terms, a flexibility such that its recurrent application can be expected. Whether this penalty is entered after the "graduated response" stages have been followed or directly via fast-track proceedings, the result should be a strong and responsible criminal policy reflecting the societal, cultural and economic stakes involved. Acceptance of this repressive aspect will surely be as decisive as its educational aspect in winning the

[63] Following the vote by Parliament, §6 of the government bill contained a novel provision allowing a victim to request the court to rule, by the same order in summary judgment, on his or her claim in damages. This provision was, however, stricken down by the *Conseil Constitutionnel* in decision no. 2009-590 dated October 22, 2009. As a result, a civil party seeking damages will have to follow the provisions of §495 CCP and bring an action before the *tribunal correctionnel*.
[64] Cf. *infra*.
[65] §L335-7(5).

broadest possible adherence to forms of consumption that are clearly new but which will inelectably have to recognize the value of the creators of intellectual and artistic property.