

PRESS RELEASE ON FRENCH INFRINGEMENT REGULATION
Upcoming new anti-piracy law in France

Pursuant to a research conducted by Tera Consultants and Equancy & Co., published November, 19th 2008, the cinema industry lost 605 million Euros, and the music industry lost 369 million Euros in 2007 because of piracy and copyright infringement over the Internet.

French government's response to such scourge is a new bill called "*Loi favorisant la diffusion et la protection de la création sur Internet*" (law promoting the spread and protection of creation on the Internet). The French Senate adopted it on October, 30th 2008. The law should be enacted in March 2009, after the final vote of the *Assemblée Nationale*. The goal of this law is to reduce significantly web piracy and copyright infringement on peer-to-peer networks.

This bill is the result of President Sarkozy's request for the implementation of a plan to save the music and film producing industries. It was handled by the French Culture Minister, Christine Albanel. Fourteen months were necessary to draft this bill. All major actors of the industries, such as Internet service providers, music majors or movie producers, were involved in the drafting process.

One of the observations of the "drafting committee" was that although it may be possible to improve security systems on CDs and DVDs, or even on legally downloaded files, none of this will eradicate piracy as for each anti-piracy device there is a technical solution which some young clever hacker will discover to circumvent such device. Another observation was that French legal texts do already include a large number of

provisions which purpose it to punish the individuals doing illegal downloads.

As a consequence, the legislator elected to challenge the sense of responsibility of all web users with regards to piracy and illegal downloading with four major "novelties" implemented in the French legal arsenal:

1/ Internet access subscribers are targeted.

The legal duties created by this new law are not aimed at web pirates but at all Internet access subscribers. Indeed the latter are expected to protect their Internet access in order to prevent illegal downloading to be completed from such access. Of course, in the event where it is evidenced that the security measures implemented by an Internet user were circumvented, the latter shall not be held liable for any illegal downloading completed from his access.

2/ Right owners shall be liable to watch over their works.

Right owners shall be responsible to collect IP addresses from which illegal downloadings of their protected works are completed. As a result of this provision, right owners are made responsible for the protection of their work.

3/ Creation of the High Authority for the spread of works and the protection of copyright on the Internet (HADOPI).

The enforcement of the new law and the general surveillance of web pirates will be entrusted to the HADOPI, which will also be granted a judiciary competence. Consequently, it is to the HADOPI that right owners will provide the IP addresses from which their works were illegally downloaded. The Authority shall then contact the ISP in order to identify the subscribers corresponding to each IP address.

4/ Creation of the process of “réponse graduée” (gradual response). Such process’ purpose is to educate web users through a progressive sanction scheme. Once the subscriber has been identified, the HADOPI will apply the appropriate sanction as defined by the gradual response scheme: (i) for the first illegal download recorded, a warning e-mail will be sent to the Internet subscriber, (ii) in the event there are further downloads further to the warning e-mail, then a formal notice with acknowledgement of receipt shall be sent to the subscriber, (iii) last but not least, in the event the previous steps failed to discourage the illegal downloads, the HADOPI may suspend the subscriber’s Internet access.

Such suspension may last up to twelve months, during which the subscriber will remain liable to pay his monthly Internet fees. He will be authorised to terminate its Internet access contract, provided he pays the required termination fees. Internet subscribers may negotiate with the HADOPI a reduction of the suspension period.

However, the subscriber, which access has been suspended may not enter into a new Internet access contract with another Internet service provider, as the HADOPI will establish a black list of condemned users. The Internet service providers will be compelled to check this list before any subscription, and refuse to provide the convicted Internet user with a new Internet

access during the suspension period. In the event of a breach of such obligation, they may be fined up to 5.000 Euros.

It is not until the second semester of 2009 that we shall be able to assess the actual results of the enforcement of the new law by the HADOPI. However, it has already been announced that the HADOPI plans to send more than ten thousands warning e-mails to web users per day on the basis of the new law. Moreover, in a world where it is no longer usual to live “unconnected”, it is expected that the suspension of the Internet access could be an efficient threat. It might not be effective, however, against professional downloaders who will certainly find technical and practical means to avoid the control of copyright owners and/or the consequences of the suspension.

Last, several questions remain such as the means that will be used by right owners to collect IP addresses from which illegal downloads are completed (and how such means will coexist with the protection of privacy and personal data), how the HADOPI will use its investigation powers, what sort of contradictory debate may be organised with the subscribers of Internet access, etc. Some of these questions are mentioned in the law, however insufficiently detailed. It will belong to lawyers, consumers associations, the French data protection Authority and all individuals concerned to remain vigilant during the first months of implementation of the law.

By Annabelle RICHARD (richard@ima-avocats.com), Avocat à la Cour and Attorney at Law (New York State), and Guillaume BELLMONT (bellmont@ima-avocats.com), Associate, at Ichay & Mullenex Avocats.

Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

5, rue de Monceau 75008 Paris - France
Tel : +33 1 42 89 19 80
Fax : + 33 1 42 89 14 99
www.ichay-mullenex.fr