"The ‘Graduated Response’ in France : Is It the Good Reply to Online Copyright Infringement"

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Part II

The 'Graduated Response' in France: Is It the Good Reply to Online Copyright Infringements?

*Alain Strowel**

'Graduated response' refers to an alternative mechanism to cope with online infringements (in particular resulting from P2P file sharing). It relies on a form of cooperation with the Internet service providers (ISPs) that goes beyond the classical 'notice and take down' approach. Also, it includes an educational notification mechanism for alleged online infringers before more stringent measures can be imposed (including, possibly, the suspension of an Internet access account by the ISP). 'Graduated response' is thus another way of saying 'improved ISP cooperation'.[1] Arguably, it can result from a statute, from codes of practices (possibly negotiated under the auspices of a public authority), from cross-industry agreements, or from remedies ordered by a court. The French version of the 'graduated response', as further described below, relies on new legislative measures, and on an administrative body in

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1. For a recent overview of some initiatives on the graduated response, see UK Government, 'Consultation on Legislation to Address Illicit P2P File-Sharing', <www.berr.gov.uk/consultations/page51696.html>, June 2009, 13.

Irini A. Stamatoudi, *Copyright Enforcement and the Internet*, pp. 147–161.

charge of the notification system and of the relation with the ISPs (access providers).

In the first section, we will describe in detail how the French 'graduated response' should work. (The 2009 French laws on the 'graduated response' will not be in effect before Summer 2010). In the second section, we will briefly compare the French 'graduated response' with other alternative enforcement systems for the Internet, such as the systems designed for the abusive registration of domain names. In the third section, we will focus on the suspension of Internet access and discuss whether this ultimate sanction is compatible with the requirements deriving from freedom of expression. We will conclude with an analysis of the new form of access control allowed by the 'graduated response', in addition to the more traditional forms of access control embodied in copyright law, and discuss whether the 'graduated response' is a good or workable reply to Internet piracy.

I. THE FRENCH LAWS ON THE 'GRADUATED RESPONSE'

On 13 May 2009, the first law on the 'graduated response' was adopted in France. However, some of its provisions, such as the one making it possible for a new administrative body (called the 'HADOPI')[2] to impose the suspension or termination of Internet service, were struck down by a 10 June 2009 decision of the Constitutional Council (on this decision, see section III). The revised law of 12 June 2009 (hereafter: the 'HADOPI I Law'),[3] therefore, only implements the warning mechanism of the 'graduated response' system, leaving aside the more far-reaching sanctions. To address those sanctions, another draft law *relating to the criminal protection of copyright on the Internet* was quickly submitted to the French Parliament in July 2009 and adopted on 22 September 2009 (hereafter: the 'HADOPI II Law').[4] On 22 October 2009, the French Constitutional Council issued a decision validating, with one exception,[5] all the provisions of the HADOPI II Law. The HADOPI II Law completes the so-called 'graduated response' by extending an existing simplified criminal procedure to cases of repeated

2. HADOPI stands for 'High Authority for the Diffusion of Works ("Oeuvres" in French) and the Protection of Rights on the Internet.'
3. Law No. 2009-669 of 12 Jun. 2009 favoring the diffusion and protection of creation on the Internet (Official Journal, 13 Jun. 2009).
4. Law No. 2009-1311 of 28 Oct. 2009 relating to the criminal protection of copyright on the Internet (Official Journal, 29 Oct. 2009).
5. The exception relates to a provision which allows the criminal judge in charge of ordering the suspension of Internet access to also award damages to the copyright owner. According to the Constitutional Council, while nothing prevents the adoption of this provision, the Law nevertheless should define the details of this new competence rather than leaving an implementing decree to define them.

online copyright infringement and allowing a criminal judge to impose sanctions, including disconnections and fines, on online copyright infringers.

A. The 'Graduated Response' in a Nutshell

The 'graduated response' as defined by the HADOPI I and II Laws includes a two-step notification system and a possible sanction of Internet suspension. It works as follows:

(1) *Initiation of the process* (established in HADOPI I Law): the HADOPI is authorised to receive information about possible online infringements from sworn agents of right owners groups (and collecting societies) that have been accredited by the Ministry of Culture. The HADOPI reviews these alleged instances of copyright infringement and checks whether copyright ownership can be confirmed. The HADOPI then identifies the individuals concerned by requesting subscriber data from ISPs based on the IP addresses of computers that the sworn agents of the right owners group have identified.

(2) *Educational notifications* (established in HADOPI I Law):

(a) *First step:* once the first check concerning a possible infringement and copyright ownership has been completed, the HADOPI (in particular its 'Right Protection Committee') can send, via ISPs, a notification to subscribers that their access should not be misused to make illicit copies of copyright material (see Article L. 331-26, § 1 of the Intellectual Property Code (IPC).[6] The HADOPI notification does not give information on the protected works that might have been infringed, but indicates (i) the date and time of the allegedly infringing acts; and (ii) the contact details of the HADOPI, so that the subscriber can send its observations and/or obtain further information about the protected works involved. The notification also contains some general information, including information about legal offerings of online content and the negative effects of piracy for creators and the copyright industries (see Article L. 331-26, § 3 IPC);

(b) *Second step*: if the HADOPI notes that new infringing acts have been committed within six months of the first notification by the same Internet access subscriber, the HADOPI can send, either electronically or by registered mail, a second notification containing the same information (see Article L. 331-26, § 2 IPC). This

6. The new monitoring obligation for subscribers, including those offering access to third parties (e.g., a university offering Internet access to its students), is imposed by Art. L. 336-3 IPC (see below in the text).

second notification can also enjoin the subscriber to implement a security measure[7] (according to Article L. 331-32 IPC, the HADOPI has the competence to establish a list of adequate security measures);

(3) *Repressive and corrective measures* (established in HADOPI II Law):

(a) *Suspension of Internet access*: the last step of the 'graduated response' mechanism works as follows:

(i) Relying on the information obtained and on the reports detailing what happened during the first steps of the 'graduated response', the HADOPI (and its own sworn agents) will further investigate the case and collect the facts that are likely to constitute an infringement that may be sanctioned by suspension of access. In investigating the facts, the HADOPI may ask the alleged infringer to submit observations; the HADOPI or alleged infringer (who can ask for the assistance of counsel) may also request a hearing. If a hearing is held, an official report of the hearing is delivered to the alleged infringer.

(ii) At the close of its investigations, the HADOPI prepares a summary report, which includes, among other things, the response of the access provider regarding whether an Internet suspension is technically feasible.

(iii) The HADOPI forwards the summary report to the attorney-general, who then must decide whether criminal proceedings should be initiated. The attorney-general can also decide that a complementary investigation is required to establish whether an infringement in fact occurred (for instance by searching for copies of protected works on the computer of the suspected person) or whether the subscriber, by failing to implement 'adequate security measures', was grossly negligent.

If the attorney-general concludes that sufficient proof of a possible infringement exists, he will initiate either the simplified criminal procedure (i.e., before a single criminal judge) or the standard criminal procedure.

(iv) If the criminal procedure is initiated by the attorney-general, the single criminal judge or the standard criminal court has the power to grant the various sanctions that French law provides regarding copyright infringement; he or she may also impose the additional sanction of Internet access suspension. The suspension can be ordered for a maximum of

7. See the description of the procedure in the French government observations submitted on 13 Oct. 2009 to the Constitutional Council.

one year, and can be accompanied by a prohibition against subscribing to a similar service with another provider. The suspension does not affect the obligation for the subscriber to continue to pay subscription fees. A sanction of Internet access suspension of a maximum period of one month can be imposed on a subscriber who has not directly committed the infringing acts, but has shown clear negligence and has not implemented the adequate security measures requested by the HADOPI.

(v) Before ordering the suspension of access, the judge must consider (i) the circumstances and seriousness of the violation; (ii) the infringer's circumstances, including his profession and his economic situation; (iii) the need to respect freedom of expression (see the factors listed in Article L. 335-7-2 IPC). Taking these factors into account, the judge can also define the appropriate duration of the suspension (up to one year). In instances of 'multiple play' subscriptions (i.e., bundled TV, Internet and phone access), the suspension sanction only applies to Internet access.

(b) *Damages and other sanctions*: the criminal judge seized under the simplified procedure is also allowed to rule on damages that the copyright owner can claim (new Article 495-6-1, § 2 of the Criminal Procedure Code). If the attorney-general chooses to initiate the criminal procedure before the standard criminal court ('Tribunal correctionnel'), the criminal court can impose the full panoply of sanctions (including civil damages) for copyright infringements.

(c) *Right of appeal*: The simplified criminal procedure offers similar procedural guarantees as the standard criminal procedure. Among them:

(i) the decision must be well reasoned;

(ii) the decision must be subject to appeal (the defendant has forty-five days to appeal);

(iii) the order will be stayed pending appeal.

B. Data Protection Issues

One of the main constraints in building a workable system in France comes from the rules on data protection. The collection and processing of the Internet addresses (the IP numbers) of users suspected of committing online infringements are covered by the French Data Privacy Law ('Law on Informatics and the Protection of Freedoms' of 6 January 1978). Article 9 of this Law expressly allows some legal entities representing the right owners (in particular the collecting societies) to collect and process the data (the IP addresses) needed to

enforce online copyright. In addition, the HADOPI I Law further provides that the sworn surveyors of collecting societies and of 'properly constituted professional bodies' are allowed to make referrals to the 'Rights Protection Committee' of the HADOPI. As described above, this Committee can then initiate the 'graduated response' by sending online warnings to the subscriber engaging in copyright infringement.

C. A New Monitoring Obligation at the Core of the 'Graduated Response'

The justification for sending warnings to the targeted subscribers (in cooperation with their access provider) lies with a new provision at the core of the French 'graduated response': Article L. 336-3 IPC. This article creates a new statutory obligation for the access subscriber 'to ensure that this [Internet] access is not subject to a use with a view to reproducing, representing, making available or communicating to the public [protected] works'. A breach of this new monitoring obligation justifies a warning even if the subscriber (e.g., an organization such as a school) is not directly infringing on a given copyright. In addition, the HADOPI I Law requires that the new subscription agreements expressly refer to the monitoring obligation (of Article L. 336-3 IPC) and detail the sanctions that can be imposed by the 'Rights Protection Committee', as well as the civil and criminal sanctions commonly provided by copyright law.

D. Cooperation of Access Providers

Implementation of the 'graduated response' system requires the cooperation of the access providers, as they are in charge of forwarding the warnings prepared by the 'Rights Protection Committee' to their clients. The role of the access providers in the 'graduated response' is thus decisive, as, without their cooperation, it would be difficult if not impossible to collect the IP addresses of infringers, or to suspend or terminate Internet access for repeat offenders.

II. COMPARISON BETWEEN THE 'GRADUATED RESPONSE' AND OTHER INTERNET-RELATED ENFORCEMENT SYSTEMS

If copyright is to be preserved in the online world, then a new institutional system for enforcing digital copyright is badly needed. Such an enforcement system should be quick, relatively inexpensive for the parties, easily manageable, and enforceable.

A quick and effective dispute resolution system for the Internet already exists: the domain name arbitration system known as the Uniform Dispute Resolution Policy (UDRP) set up by ICANN (the international private body in charge of the basic infrastructure of the Internet). Similar systems exist on the national and regional levels, such as the dispute resolution systems for '.be' or '.eu'. The UDRP is a helpful model for resolving intellectual property disputes on the Internet.[8] This enforcement system is rooted in a web of contracts (between ICANN and the registrars, between ICANN and the private providers of dispute resolution services, between the registrants and the registrars, etc.) that cannot be easily duplicated in the field of copyright. Nevertheless, with respect to online copyright, the Internet access providers can play a pivotal role between the Internet users and an enforcement body, similar to the central role of the domain name registrars in the UDRP system. Where, as in France, a way to combat online piracy has been defined by law, access providers are at the heart of the mechanism; in countries where no legislative push for a new response to copyright piracy exists, the focus is also on access providers and the definition of their obligations and responsibilities towards their clients and the content owners.

The 'graduated response' system shares similar objectives and some characteristics with the UDRP mechanism: the speed of the procedure, its effectiveness (implementation by an intermediary, that is, the registrar or the access provider), the limited cost of the mechanism, at least for the private parties (in comparison with standard court proceedings), the focus on resolving straightforward infringement cases involving rather basic facts, the possibility of an appeal before a judicial court, etc.

However, the 'graduated response' differs from the UDRP in significant ways: (i) the UDRP is an arbitration system for resolving existing disputes (not for educating Internet users), while the 'graduated response' is more focused on the pre-litigation phase and intends primarily to reduce the scale of infringements through an (automated) educational notification mechanism for alleged online infringers; (ii) the UDRP defines an 'arbitration' or alternative administrative procedure before a panel comprising one or more experts, while the 'graduated response' involves a standard court (or administrative) proceeding involving professional judges; (iii) the 'graduated response' is based on a scale of sanctions culminating in the suspension or termination of Internet service, rather than on a panel decision imposing one

8. The UDRP is considered as a model for a streamlined dispute resolution system for online copyright: see M.A. Lemley & R.A. Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation, Public Law and Legal Theory Research Paper No. 525662', <www.ssrn.com>, 2004. See also A. Christie, 'The ICANN Domain Name Dispute Resolution System as a Model for Resolving Other Intellectual Property Disputes on the Internet', *Journal of World Intellectual Property* 5, no. 1, <www.ssrn.com>, January 2002; L. Helfer & Gr. Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy', *William & Mary Law Review* 43 (2001): 141.

unique and final sanction, the transfer of the abusively registered domain name; (iv) the ultimate sanction – suspension of service – is only imposed when the alleged infringer is sufficiently aware that he is acting in an illicit way (after the first warnings); the domain name transfer in turn requires some bad faith that will result from various facts submitted to the panel; (v) the 'graduated response' requires an active role for the access provider, as it is obliged to preserve evidence of repeated infringement (such as users' IP addresses), to enable the proceedings and to terminate the repeat infringers' accounts, while the registrar in the UDRP system is only required to implement the transfer of the domain name at the end of the process;[9] (vi) the 'graduated response' only tackles repeat infringers, while the UDRP-like systems can apply to a first time infringer; and, (vii) the UDRP system for domain names was first set up at global level, while the 'graduated response' has been so far tackled at national level under varying approaches.

The contours of the 'graduated response' system are not yet clear, in part because of its varying versions, but this institutional system is clearly different from the existing law enforcement mechanisms.

III. INTERNET ACCESS IS A FUNDAMENTAL RIGHT ROOTED IN THE FREEDOM OF EXPRESSION

The above-mentioned decision of the French Constitutional Council[10] pointed out two deficiencies of the HADOPI I Law adopted on 13 May 2009: first, the Council ruled that the decision to suspend Internet connection of digital infringers should be made by the courts as opposed to an administrative authority; second, it considered that the rule imputing the infringement to the subscriber of an Internet connection (*versus* the actual user), unless the subscriber can prove the opposite, does not comply with the French constitutional principle of presumption of innocence.

9. Discussing the right sanction for a copyright dispute resolution mechanism (comparable to the transfer remedy in the UDRP model), M.A. Lemley and R.A. Reese note that: 'A copyright system needs a substitute sanction and enforcement mechanism, such (. . .) a reliable way to remove infringing material or the infringer herself from the network' (Lemley & Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation', 166).
10. See Decision No. 2009-580 DC of 10 Jun. 2009 (available at <www.conseil-constitutionnel.fr>). The Constitutional Council is a 'strange animal': not really a Constitutional Court (with the power and the independence of other 'supreme' judges), but a body comprising among others former high level politicians (including former Presidents of France) with the (political?) power to oppose legal provisions adopted by the Parliament that are considered as not compatible with the French Constitution.

A. Freedom of Expression Protects Internet Access

To justify the requirement that a judge (rather than the HADOPI) must decide whether Internet access should be suspended, the Constitutional Council held that only a judge can order the suspension of access to Internet services as the freedom of expression[11] 'covers the freedom to access those services' (§ 12 *in fine* of the Constitutional Council decision). The French constitutional principle of freedom of expression refers literally to 'the free communication of thoughts and opinions'. The inclusion of Internet access under freedom of speech/expression is justified by reference to the actual state of the communication technologies, the broad development of the online public services and the importance of those services for the democratic life and the expression of ideas and opinions (§ 12 of the Constitutional Council decision).

This view on Internet access is almost irrefutable, as Internet is obviously becoming an ever more essential tool for generating and sharing ideas.[12] There are many examples showing that the Internet creates 'unparalleled avenues for social discourse across national and international boundaries. [. . .] Along with facilitating access to information, entertainment content and public services, the Internet constitutes a central means of communication and self-expression in both personal and professional life (email, VoIP, blogs, instant messaging, etc.)'.[13] The role of the Internet in a democratic and open culture has been restated by the European Parliament, which on 26 March 2009, adopted a Recommendation to the Council that states:

> whereas the evolution of the Internet proves that it is becoming an indispensable tool for promoting democratic initiatives, a new arena for political debate (for instance e-campaigning and e-voting), a key instrument at world level for exercising freedom of expression (for instance blogging) and for developing business activities, and a mechanism for promoting digital literacy and the dissemination of knowledge (e-learning); whereas the Internet has also brought with it an increasing number of opportunities for people of all ages to communicate with people from different parts of the world, for example, and has thereby expanded the scope for people to familiarise themselves with other cultures and thus enhance their understanding of other people and cultures;

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11. In France, the freedom of expression is recognized in Art. 11 of the 1789 Declaration of the Human Rights and of the Rights of Citizens. For the purpose of this paper, the European 'freedom of expression' (as protected under the European Convention on Human Rights and various national constitutions) corresponds to the US 'free speech' (as protected by the first amendment).
12. Some French intellectuals commenting on the 2009 Law have however criticized this view, considering that it is the freedom to consume (content) that is now wrongly put at the pinnacle as a human right. See A. Finkielkraut, 'Interview', *Le Point*, 16 Jul. 2009, 31.
13. Extract of the Google submission on TCP Draft ISP Code of Practice of 6 Mar. 2009 filed in New Zealand (available at <www.tcf.org.nz/content/ebc0a1f5-6c04-48e5-9215-ef96d06898c0.cmr>).

> whereas the Internet has also extended the diversity of news sources for individuals as they are now able to tap into the flow of news from different parts of the world.[14]

The Internet is not only an engine for free expression; it is a way to access culture and enhance education. Although freedom of expression does not include a right to access a particular copyrighted work (except in exceptional circumstances),[15] a broad right to access Internet resources generally falls within the freedom of expression[16] and in particular the 'right to receive and impart information and ideas without interference by public authority and regardless of frontiers' (Article 10(1) European Convention on Human Rights or ECHR). The reference to 'regardless of frontiers' is particularly relevant in the Internet context. The existence of a right to access the Internet and its endless forms of discourses can also be derived from decisions of the European Court of Human Rights, which, for instance, has ruled that access to TV programmes through satellite dishes should be guaranteed where no other infrastructure exists and where the satellite transmission is an essential means for a minority group to keep the contact with its community.[17]

B. The Right to Access the Internet, as Protected by Freedom of Expression, Can Be Limited

Like with other forms of expression and communication, limitations on the right of Internet access can be imposed under strict conditions. In Europe, such limitations have to respect the conditions of Article 10(2) ECHR, that is, they must be (i) 'prescribed law'; (ii) 'in the interests' of a legitimate aim, including 'the protection of [. . .] rights of others'; and, (iii) 'necessary in a democratic society'.

The 'necessity' or 'proportionality' criterion is the main hurdle for any statutory limitation to freedom of expression. In its brief analysis, the French Constitutional Council considered the Internet suspension a penalty that could not be imposed by an administrative body because:

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14. European Parliament recommendation of 26 Mar. 2009 to the Council on strengthening security and fundamental freedoms on the Internet (2008/2160(INI)) available at <www.europarl.europa.eu>.
15. See A. Strowel & F. Tulkens, 'Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access', in *Copyright and Free Speech*, ed. J. Griffiths & U. Suthersanen (Oxford: Oxford University Press, 2005), 287.
16. To prohibit Internet access is clearly much more prejudicial than to limit (on the basis of copyright) the access to one particular work (as substitutes for a particular work exist in most cases).
17. *Khurshid Mustafa et Tarzibachi v. Sweden* 16 Dec. 2008 (req. 23883/06) and *Autronic AG v. Switzerland* 22 May 1990 available at <www.echr.coe.int>.

(i) the measure can restrict the Internet access of the subscription owner and of all the other persons benefiting from it (e.g., in an organization), not only of the person who might be directly responsible for the copyright infringement;
(ii) the measure can apply to the freedom to speak and communicate from home; and
(iii) the power of the administrative authority would not be limited to a category of persons but would apply to the whole population.

The European Court of Human Rights would probably support a 'graduated response' scheme, depending on the details and implementation of said scheme. According to the case law of the European Court of Human Rights, a measure limiting freedom of expression should be 'indispensable' in the sense that no other less restrictive measure can achieve the legitimate aim (in this case, protection of copyright and of the authors). This is a tough standard to meet, but, as discussed above, the existing civil and criminal sanctions do not appear sufficient to curb online piracy, thereby justifying an alternative system such as the 'graduated response'. The result of the balancing of interests would also depend on the person affected by the 'graduated response', and his or her professional and personal situation. For example, one can expect that the European Court of Human Rights would not consider the Internet suspension of a journalist's account as indispensable and proportionate, as the European Court is very much opposed to any broad limitation of the free expression of journalists.

Other facts must be taken into account in deciding whether an Internet suspension is a proportionate remedy. For example:

(i) As the Internet suspension comes after two notifications in the French 'graduated response', this weights in favour of proportionality, but the authority implanting the suspension must be sure to communicate correct and complete information regarding the infringing material and the user's behaviour.
(ii) Only repeat infringers are subject to the measure in the French scheme; this also weighs in favour of proportionality.
(iii) The French 'graduated response' largely targets Internet access at home. A person will thus be able to use other access points, whether at work, in Internet coffee shops, through relatives, or by using devices other than a home computer, such as mobile devices with e-mail and browsing capabilities. However, blocking home Internet access could create a real burden for some. At the same time, the wide availability of Internet access through other accounts or devices could mean that the effectiveness of the full 'graduated response' is far from guaranteed.
(iv) In the French scheme, the Internet suspension does not (should not) affect the other telecommunications services, for instance the fixed

line telephone or the TV service in case of a 'triple play' offer, which would weigh in favour of proportionality.

(v) To ensure that the proportionality requirement is respected, an additional improvement could consist in limiting the broadband of some Internet users, while keeping a minimal access to the more fundamental services such as messaging. In fact, this is already happening, with some access providers monitoring Internet traffic and slowing down suspect data such as BiTorrent packets.[18]

(vi) The measure of Internet suspension will appear more justified as a means of protecting the right of third parties if the contract with the access provider adequately defines the circumstances under which access can be blocked, and specifies repeat infringements can lead to the extreme measure of Internet access restriction. This measure is already commonly provided for in those contracts, but usually applies only when the subscriber does not pay the bill.

All of the foregoing facts and mechanisms to modulate and implement the Internet suspension must be taken into account when assessing whether a particular form of Internet suspension is a proportionate response to fight copyright infringement. Such a measure is not 'per se' incompatible with the freedom to hold opinion and to receive information.

IV. A FEW CONCLUDING REMARKS ON THE 'GRADUATED RESPONSE'

A. Is the 'Graduated Response' a New Form of Access Control?

The French 'graduated response' reflects on the evolving nature of copyright as a form of control. In other contributions,[19] we have supported the view that copyright has *always* been a form of access control, although the way copyright restricts access has evolved as new technologies have appeared and the law responded accordingly. In the early days before the digital era, copyright only allowed control of the *access to tangible copies*, whether through the right of reproduction or through the right of distribution. Balance was achieved through the exceptions designed for this framework of copyright law (e.g., the private copying exception or the 'fair use' exception for the reproduction right, and the exhaustion or 'first sale' rule for the distribution

18. On this, see J. Hughes, 'Copyright Enforcement on the Internet – in Three Acts', draft distributed at the 2009 Fordham Intellectual Property Law and Policy conference to be made available at <www.ssrn.com>.

19. A. Strowel, 'L'émergence d'un droit d'accès en droit d'auteur? Quelques réflexions sur le devenir du droit d'auteur', in *Le droit d'auteur adapté à l'univers numérique*, ed. C. Doutrelepont & Fr. Dubuisson, (Bruxelles: Bruylant, 2008), 61.

right). Once copyright had to respond to the digital challenge, new ways to control access were invented by the legislators. For instance, the 'making available right' and the legal protection of technological protection measures (TPMs) were designed primarily by the 1996 WIPO Treaties and later by the various national implementations in order to control *access to digital works* (rather than access to tangible copies). In this context, the right exceptions to the new layer of protection (i.e., the protection of TPMs) are still unclear. It now appears that the form of access control deriving from copyright rules will once more evolve if the French 'graduated response' is fully applied and becomes a model law for other countries; indeed, according to this new shift in copyright law, regulating *Internet access* is the main issue and is part of the new remedy. Thus, it is no more the access to tangible copies or digital works that is involved, but the access to the Internet as a whole. This, in turn, raises new problems as the friction between the fundamental principle of freedom of expression and copyright becomes even more acute in this context (see discussion above).

B. Is the 'Graduated Response' a Workable Reply that Can Become the Norm?

Support for the 'graduated response' is probably growing worldwide. The traditional copyright industries, at least the major music companies, have been advocating this new approach to fight online piracy. Apart from France, South Korea and Taiwan have already a 'graduated response' in the law.[20] In New Zealand, the implementation of the Copyright Amendment of 2008, which requires ISPs to have a termination policy for repeat infringers, is still under discussion. Spain is considering a second version of a draft law originally released in November 2009. Other countries such as Australia, the UK, and the Netherlands have engaged in ongoing discussions regarding how to move forward. In other countries such as Belgium and Ireland the possibility of more cooperation (and a termination policy) on the part of the access providers is being argued before the courts (the *SABAM v. Tiscali* case in Belgium[21] and

20. See, for example, Chuan Hian Hou, 'Three Strikes and You Are out', *The Straits Times*, 19 Aug. 2009.
21. TPI Brussels, 29 Jun. 2007, *SABAM v. SA Scarlet (ex-Tiscali)* (available at <www.juriscom.net/jpt/visu.php?ID=939>), TPI Brussels, 26 Nov. 2004, *SABAM v. Tiscali and Court of Appeal Brussels*, 28 Jan. 2010, unpublished (the Court of Appeal has asked the ECJ to give a preliminary ruling on whether the European legal framework (E-Commerce Directive, etc.) allows a Member State to authorize a national judge (seized on the basis of Art. 8(3) of the 2001/29 Copyright Directive) to order an access provider to put in place, in abstracto and preventively, without time limitations and at the expense of the access provider, 'a filtering system for all electronic communications, whether incoming or outgoing, transiting by its systems, in particular through the use of P2P software, in order

the Eircom case in Ireland[22]). It is still a bit premature to conclude that the 'graduated response' or some enhanced ISP cooperation model will become the norm. In several countries, more backlash is to be expected before the adoption of new rules or their implementation. The 25 August 2009 announcement in the UK about the adoption of swifter and more flexible measures to tackle unlawful peer-to-peer file sharing[23] has, for instance, prompted strong reactions[24] that might delay the adoption of more robust rules. Where something already exists in the law (e.g., in France), the real implementation of the new rules is still to be watched carefully.

Some commentators remain deeply pessimistic about fighting Internet piracy. In an editorial on the 'graduated response', J. Philips concluded: 'The feasibility of disconnecting a person from the Internet, and any attempt to police and enforce such a ban, smacks the futile (. . .). So what should be done to ease the position of injured copyright owners? Depressingly, in the majority of cases, there is no solution.'[25] I am less negative. First of all, the 'graduated response' is not just about its terminal phase – the termination of Internet accounts. It also relies on an automatic warning system, and we can expect that the warning system will deter some potential infringers. It is probably true that certain savvy users will find ways to remain online despite a ban; however, these users probably constitute a relatively small portion of Internet users. Enforcement does not (and should not) aim at eliminating any infringement; a solution that would eliminate all piracy, if at all possible, would seem dangerous or at least dubious for both individual liberties and technological innovation. The objective of an alternative enforcement model is to raise the *expected* costs of infringing; arguably, the simple prospect of banishment from the Internet would play this role for some Internet users. At the same time the 'graduated response' relies on the view that many file sharers are not really aware of the illicit nature of their conduct and that education will help. I agree to a certain measure. In any case, a bet on the educational effect of the warnings is worth the risk.

Neither the deterrent effect of the ultimate remedy nor the educational impact of the successive notifications will suffice, however. The legal framework (e.g., a legislation-based 'graduated response') can 'change the economics of targeting direct infringers',[26] but that is not enough. Things will only

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to identify on its network the exchange' of illicit files and to block the transfer of those files, either when they are requested or when they are sent).

22. See <www.irishtimes.com/newspaper/breaking/2009/0128/breaking81.htm>.
23. See UK Department for Business Innovation and Skills, 'Announcement', <http://nds.coi.gov.uk>, 25Aug. 2009.
24. See BBC News, 'Anger at UK File-Sharing Policy', <http://news.bbc.co.uk/2/hi/technology/8219652.stm>, 25 Aug. 2009.
25. J. Philips, 'Three Strikes' . . . and Then?', *Journal of Intellectual Property Law & Practice* 4, no. 8 (2009): 521.
26. This is how the objective of an alternative enforcement system for online copyright is defined by Lemley and Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation, Public Law and Legal Theory Research Paper No. 525662', 187).

change if the access providers themselves become more active in policing their clients because they see and reap some benefits. This would be the case if the ISPs are more directly benefiting from value- or content-added services. We remain confident that alternative business models will develop. The role that copyright will play in relation to those new business models is very likely to diminish. As a copyright lawyer, I might feel unpleased about this trend. But if alternative ways for compensating authors are embedded in those new models, there is no reason to worry.