

Illegal File Sharing

1. Context

The Internet represents a new distribution channel for audiovisual works, which is constantly gaining in popularity and transforming consumption habits. It represents one of the most important challenges facing the cinematographic industry in terms of financing and exploitation for the years to come. The trend in this direction is gaining momentum, as the first installations of very high speed Internet through optic are currently being deployed.

One of the effects of increased broadband Internet penetration in European households is the development and maintenance of P2P networks, newsgroups, and torrents downloading Websites allowing for illegal file sharing practices to proliferate. It has repeatedly been proven that illegal downloading is the fastest growing form of piracy of intellectual property rights.

The main issue affecting the cinematographic industry resides in the current tendency for the public to forego, consciously or not, the concepts of intellectual property in the e-economy. The results are currently being felt, and are seriously putting viable economic models for the production of content in danger. Indeed, the recent fall in revenue from “traditional” distribution channels witnessed in several countries is directly correlated to the rise in illegal file sharing, while legal downloading services are still struggling to reach profitability. It has been published that the French video market loss 7.5% of its value in 2008; close to 30% of its value in four years¹.

2. Telecoms reform

The European Commission proposed to reform the EU Telecoms rules on 13 November 2007. In June 2008, the Council of Telecoms Ministers expressed for the first time its views on the Commission proposals. The European Parliament debated the reform first at Committee level and then on 2 September 2008 in Plenary. The European Parliament voted, in first reading, on the whole reform package in its plenary session on 24 September 2008. In that meeting, the European Parliament accepts amendment 138 against the French "graduated response", one week after the French law is unanimously voted in first reading by the French Senate.

This amendment would require the French government to rethink its graduate response approach, which is favourable to rights-holders.

On the 27th of November 2008, the Council of Ministers dropped the amendment 138 of the Telecoms package.

After rounds of negotiations between the Parliament and the Council of Ministers, The Parliament decided at 407 against 57 to reintroduce the amendment.

The Council of Ministers asked for a 3rd reading in a conciliation phase (please see the attached diagram).

¹ Communication from the “SEV”.

A conciliated text is now the basis for negotiations in which the amendment 138 has been discarded on the basis that the European Parliament has little power over the judicial procedures of Member States under the Treaty of the European Union. Final decision on the text to be submitted to the Parliament for a third reading should occur before the end of October 2009. The Parliament's Conciliation Delegation to the EU Conciliation Committee, with its 27 members of Parliament (MEPs), met last week. Three MEPs also met with the Council last week and will report back to the 27 MEPs on what the Council said. They finally introduced the argument that Internet access could be revoke with prior judicial ruling. Analysts say that the revised version presented by the council have little chances of getting through the parliament as many MPs opposes it, and recognise Internet access as a fundamental right.

The two negotiators in charge of the Telecoms package are Catherine Trautmann (France) and Alejo Vidal Quadras (Spain).

3. Consequences for rights-holders

If the project is accepted, the reassessment would inevitably lead to solutions where perpetrators of illegal file sharing should be condemned in front of tribunal, therefore making the whole process costly for right-holders and much more difficult to implement.

If the project is refused, it would force the French government to reassess the “graduate response” scheme, making it much less efficient to properly fight illegal file sharing.

4. Updated positions of Member States

- 4.1. **France:** The law “Creation et Internet” is a real drama. After being accepted in the National Assembly on a different version than what was accepted by the Senate, it went into review in a “comité de conciliation”. The amended version was then presented back to the National Assembly for a final “procedural” vote. The law was then rejected due to a mobilisation from socialist deputies. The law was then represented on May 12th 2009 and was accepted at the National Assembly. The law forces ISP's to track illegal file sharing on its networks. The law proposes a “Graduate Response” which would send three warnings to the perpetrators of such action, the third warning being associated with a suspension of Internet Access. The keepers of the constitution judged the law non-respectful of the French constitution as the consequences of the procedure could be reached without any judicial proceedings. The project was therefore rejected.

The government therefore amended the text and the National Assembly adopted it on the 22nd of September 2009. The amended version of the project says that the cutting of the Internet access can only be the decision of a judge and not of an independent authority. The keepers of the constitution have yet to approve it, but analysts agree that it should go through.

Meanwhile, on the 08th of October 2009, a 30-year-old man was condemned to pay a deferred fine of 2000 eur after it was demonstrated that he had illegally acquired 1129 films illegally via the web.

- 4.2. **UK:** The Department for Business, Enterprise and Regulatory Reform (BERR) said on the 15th of January 2009 that its consultation on peer-to-peer copyright infringement had attracted polarized responses. The government has long been committed to a rearguard action against illegal file sharing, but has been trying to encourage ISPs and rights holders to agree a voluntary solution. A proposal for a body called the Rights Agency will be at the centre of anti-internet piracy measures. The Rights Agency will be introduced alongside a new code of practice for ISPs and rights holders, to be overseen by Ofcom. As per the report published on the 29th of January, copyright holders will need to collect the IPs of infringers themselves and notify the ISP. The ISP is obliged to log the complaint, then after a certain number of repeat offences, the copyright holder can request to identify the account in a tribunal. The accused will then get a chance to answer the accuser. On the 29th of April, the IP Minister ruled out the 'three strikes' disconnection law.

On the 18th of August 2009, Lord Mandelson, who heads the Department for Business, Innovation and Skills, and whom ultimately is tasked with implementing the recommendations for dealing with illegal file-sharing as outlined in the Digital Britain report (June 2009), which includes giving ISPs the power to disconnect repeat offenders ala a “three-strikes” graduated response system. Recently the British Phonographic Industry (BPI) has collected the IP addresses of 100,000 illegal file sharers in the UK, and has asked BT to restrict their access to the Internet. BT has refused claiming that many of the addresses were inaccurate, and that BPI did not fulfil their obligations under their 12-week trial agreement.

- 4.3. **Denmark:** In February 2008, following a complaint by the International Federation of the Phonographic Industry (IFPI) a Danish court has instructed Tele2, a major ISP in Denmark, to block access to the Pirate Bay website (a torrent tracker). TDC, the largest Danish ISP, decided to follow the example in January 2009 as precaution while Tele2 is appealing the ruling. However, it has been proven that The DNS-level block has actually increased traffic on the Pirate Bay (25 million members) due to the news coverage acting as advertising for the site.
- 4.4. **Germany:** In Germany, ISPs are compelled to give out the names of file sharers "operating on a commercial scale" if a judge rules this way. Seemingly, the federal parliament approved in April 2008 a law, which provides the industry with a new tool to trace Internet users who download music illegally. ISPs will be required to give out the names and addresses of those accused of copyright infringement. However, the procedure comes with a set of stipulations, which cause lawyers to say they might have a boomerang effect on the industry. If found guilty, perpetrators are fined in proportion to their revenues and risk from 3 to 5 years in jail. DigiRights Solution have been communicating in October 2009 on a model in which 25% of copyright infringers that are contacted, rather settle immediately instead of going through with a hefty legal proceeding. With individuals paying more or less 100 euros per download, rather than the possible 500 euros damage cost, DRS claimed that record labels could recover up to 150 times profit than the original track would make.

4.5. Italy: In Italy courts established that criminally liability does not extend to file sharing copyrighted material, as long as it is not done for commercial gain. Ruling on a case involving a copyright holder employed a third party to collect IP addresses of

suspected copyright infringers, the Italian Data Protection Authority ruled in February 2008 that the systematic monitoring peer-to-peer activities for the purpose of detecting copyright infringers and suing them.

4.6. Spain: In Spain the Spanish Supreme Court recently ruled that personal data associated with an IP address could only be disclosed in the course of a criminal investigation or for public safety reasons. File sharing is legal for private use if it is done without any profit purpose. Telefónica recently refused to disclose personal data of its users based on the argument that Spanish law allowed the disclosure of personal data only for criminal prosecutions or matters of public security and national defence. It was back in 2006 that a judge ruled in a illegal downloading case that since there “no talk of money or any other compensation beyond the sharing of material available among various users [then] no offense meriting penal sanction has been committed.” It was announced on the 8th of October that representatives from the Justice, Industry, Interior and Culture ministries would design a legal framework to solve the problem of illegal downloading.

4.7. Norway and Sweden: The ISPs are currently refusing to cooperate in communicating the IP addresses of its clients as no law requires them to do so. The initiators of the Pirate Bay were found guilty in a Swedish court of law of copyright offences, and were sentenced to one year in jail. A group of copyright holders has taken Telenor, a major ISP in Norway to court, for refusing to block the access to the Pirate Bay. The ruling should occur before the end of October 2009.

4.8. Finland: The Finnish government recently announced that they wanted to make Internet access a fundamental right for its citizen and pledge that by July all of Finland citizens should have a access to the Internet through open public wifi up to 1 Mo of connectivity. It is the second country in Europe (following Estonia in 2004) to make the Internet a legal fundamental right and public utility. It plans to extend the connectivity of the public service 100 Mo per second by 2015. A copyright committee has issued a report (“Legislative means for eliminating illicit file-sharing”), which includes a draft law. Stakeholders have until 30 October to comment on it. The committee brought up a new notification procedure that would not include the ‘last strike’ of suspending the repeat infringers’ access to the internet. According to this softer approach the right holders would simply send a notification concerning the detected infringement to the suspected infringer. Finnish law already includes criminal sanctions for illegal file-sharing, including disconnecting the user’s internet connection, but only following a court order.