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Three strikes and you are off the Internet

By Doris Estelle Long

The unauthorized “sharing” of copyrighted works through the use of peer-to-peer (P2P) file trading software, such as Grokster, LimeWire and BitTorrent, has had a devastating impact on the music and motion picture industry. According to a report by the French National Assembly in 2007, copyright piracy had caused a 30 percent drop in employment in the music industry and a 40 percent drop in the number of new artists signed. The total impact on the French entertainment sector was estimated to be 1.2 billion Euros with a direct loss of about 5,000 jobs. In the first week of October 2010, a new weapon was launched in the ongoing battle between copyright owners and P2P file traders as an estimated 25,000 end users received notices warning that their “access to the Internet has been used to commit acts ... which could qualify as a criminal violation.” These notices, sent to French end users by “the Authority,” are the first “strike” in a process that could result in the ultimate suspension of Internet access to those unlucky enough to be discovered in three repeat acts of illegal file sharing. More problematic, the use of the draconian penalty of suspension from the Internet after three instances of illegal file trading (“three strikes”) has

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become the new weapon of choice of the copyright community in the international battle over P2P file trading. The initiation of the three strikes process in France this month is only the beginning of what promises to be a protracted and bloody battle over the ultimate balance to be struck between copyright protection and access to the Internet.

P2P file trading, where end users

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“share” music, books, movies and other copyrighted works with one another over the Internet, has changed the face of digital distribution. Through the use of P2P file trading software, end users can locate copies of songs, motions pictures, software and other copyrighted works on the computers of members of the same “network” and obtain free copies of these works, generally in violation of the rights granted authors to control the distribution of their works on the Internet. This digital distribution right has been enshrined in both U.S. copyright law, and in international treaties. Yet since 1999 when the first successful P2P file trading software — Napster — was launched, content industries have been fighting a losing battle against the increasing ease with which their works can be “shared” outside of authorized channels. As copyright industries claim greater economic losses, and efforts to create a business model that could monetize such file trading have faltered, the copyright industries have been pushed to devise more stringent measures to prevent or at least reduce unauthorized file trading. “Hadopi 2,” the French law that established the present three strikes rule, may be one of the most ambitious efforts to date. It is also one of the most

controversial.

Described as a “graduated response” to piracy, in June 2009 Hadopi 1 imposed a new obligation on individual Internet subscribers to ensure that their accounts were not accessed to “reproduce, represent, distribute or communicate to the public” protected copyrighted works on the Internet without authorization. To secure this “duty of supervision,” Hadopi

I established the nine-member Authority, empowered to send electronic notices (recommendations) to end users it had reason to believe had failed this duty. Hadopi I established a “three strikes” warning system. Under the “first strike,” end users receive an electronic notice of their

failure to supervise their account, including a request to implement security tools to prevent such illegal uses in the future. A second breach (“strike”) detected within six months of the first notice results in a second electronic notice. Under Article L331-27, however, if a third breach occurs within a year of this second strike, the Authority is empowered, after an administrative hearing, to sanction the accused subscriber with, among other penalties, suspension of Internet access for a period from two months to a year. During this suspension the subscriber is prohibited from entering into a service contract with any other Internet service provider.

The constitutionality of the imposition of access suspension via administrative proceedings was immediately, and successfully, challenged. In a decision issued June 10, 2009, the French Constitutional Court found that the legislature had “misunderstood the rights of the fundamental character of the rights of freedom of expression and communication” when it imposed such “manifestly disproportionate penalties” on end users. While the court did not go so far as to declare that access to the Internet was a fundamental right, it

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nonetheless emphasized the strong relationship between freedom of expression and Internet access, and held that only a judicial body should have the right to impose suspension.

As a result of this decision, a new bill, referred to as “Hadopi 2,” was introduced in and quickly enacted into the law. Hadopi 2 retained the three strikes process but altered the power of the Authority to impose sanctions directly on Internet users. Instead, such suspensions would be imposed by judges. The basis for such suspensions was expanded to include suspension for up to one year as a “supplementary sentence” for copyright infringement. Article L335-7-2, however, requires the court to take into consideration “the circumstances and gravity of the infraction” and provides that the period of suspension should balance “the protection of intellectual property and freedom of expression.” Under Article L335-7-1, judges may also suspend a

user’s Internet access for up to one month for gross negligence. Such gross negligence occurs if illegal downloads are discovered within one year of an end user receiving a second recommendation from the Authority asking them to implement security tools for their account. Under this new gross negligence standard, account owners might be liable even if they are not themselves engaged in illegal P2P file trading. A subsequent challenge to the Constitutional Court was unsuccessful.

Although Hadopi 2 has so far withstood Constitutional challenge, it is not without its problems. First, is the overriding question of whether on a practical basis any individual can effectively be kept off the Internet. With all of the technological work-arounds available, including obtaining access from ISPs not subject to French law, it is unclear to what extent any individual could effectively be denied Internet access even if the third strike is met. Second, it is still an open question whether access to

the Internet qualifies as a fundamental right that cannot be easily abrogated. Several European countries, including Finland and Estonia, have already recognized such a right, making this new three strikes measure unavailable at present. The European Court of Human Rights has yet to rule on the issue but is certain to do so in the future.

Finally, and most significantly for those of us who do not currently have Internet accounts in France, is the growing interest of copyright owners in implementing a three strikes rule under either domestic or international laws. Countries as diverse as Korea and Great Britain already have some form of the three strikes rule either enacted or under serious condition for inclusion in domestic legislation. What appears to be an issue for French Internet users today may rapidly escalate into one for all of us in the future. The battle over who controls access to the Internet has only just begun.