Internet Society European Chapters Coordinating Council

Brussels, 4 August 2008

Aide Memoire

Subject: **Internet – creative content and "graduated responses"**
- Submission by ISOC-ECC

References: - Communication from the EU Commission, COM (2007) 836 final, 3 January 2008
- Projet de loi favorisant la diffusion et la protection de la création sur internet, République Française, présenté en Conseil des ministres le 18 juin2008.

Summary:

The purpose of this Aide Memoire is to express the comments of European Chapters of the Internet Society with regard to proposed restrictions on access to and use of the Internet, in the name of protection of intellectual property rights. This Aide Memoire has been endorsed by the following ISOC Chapters, members of ISOC-ECC:

France, Poland, England, Germany, Wallonia, Belgium, Romania, Luxembourg, Italy, Bulgaria, Finland, Norway, Spain, Netherlands

Recognising the importance of copyright, some proposed measures go beyond that which would be necessary or effective. In short, the signatories, consider that the proposed French law in particular is a disproportionate response to the stated objectives of the EU Commission's Communication and that the proposed measures and sanctions reflect a lack of understanding as to the nature of the Internet with unfavourable consequences for the use of the Internet for many economic and social purposes. Furthermore, the proposed law focuses on only one aspect of the EU Communication, which also includes issues of availability of content, multi-territory licensing, and the interoperability of digital rights management systems1. ISOC-ECC would be particularly concerned were the Hadopi proposals to be emulated by any other EU, EEA or EFTA Member State, or that they be promoted or endorsed by the EU Commission.

Noting that several aspects of this complex nexus of inter-related issues are currently being debated in the European Parliament, through amendments tabled to the proposed EU telecommunications package, ISOC-ECC may revert to those aspects of proposed EU telecommunications legislation that impinge on the use and development of the Internet.

Background:

Concerns about the protection of intellectual property rights in the digital environment of the Internet, have been widespread and long-standing. These concerns are both commercial and cultural. Notably, downloading of media files is credited with (a) reducing the income of media publishers and (b) undermining the viability of the creative arts in the media, thus prejudicing the livelihood of artists. Most recently, the EU Commission conducted a public consultation during

1 . N.B. For present purposes, this Aide Memoire addresses only the Legal and IPR aspects of the EU Commission's January 2008 Communication, as reflected by the French Hadopi proposal. Other aspects of the EU´s Communication may give rise to further comments from ISOC-ECC, should the need arise

2007 and issued a Communication in January 2008, which initiated a further public consultation, closing on 28 February 2008. The government of France, having promoted in late 2007 a MOU among interested parties known as “Accord pour le développement et la protection des œuvres et programmes culturels sur les nouveaux réseaux” or “Accord Olivennes”, has issued a draft law for creative content on the Internet, colloquially known as the “Hadopi” law.2 These two initiatives are linked since the 2008 EU public consultation referred, under“Legal offers and piracy”, specifically to the French initiative.3

It is not clear that the EU Commission appreicated the risk that the questions raised in the “graduated responses” Communication would come to impinge on the negotiation of the telecommunications package, as was the case in the European Parliament Committee stage in June 2008.

Discussion:

ISOC-ECC members generally support measures that conform to established copyright laws, including protecting users' rights. We consider that legislative and regulatory measures should be neutral between technologies and methods of delivering services. They should not protect existing technologies and business models at the expense of new ones, nor discriminate against innovation.

In this context, the “Hadopi” proposal and its eventual EU ramifications call for the following observations and remarks:

1. The **legal aspects** of the French proposal have already been addressed by ISOC-France and transmitted to the rapporteur of the French Senate for this legislation. See the letter dated 27 June 2008 in Annexe. Indeed, the administrative sanctions proposed in France would reverse the burden of proof regarding file-sharing and copying of media files: an Internet user could be provisionally disconnected on the basis of a suspicion or a denunciation, pending investigation and proof. Furthermore, all the users of a particular Internet connection (whether a company or a family) might be sanctioned, irrespective of which individual user, if any, is suspected of illegal copying of media files.

2. The contemporary evolution of the **digital technology and economy** has given rise to a fundamental change in the nature of information and how it is communicated and used. In this context, the Hadopi law would be quite backward looking. It tends to confirm the widespread concern that the media industries and their representatives have not yet adapted their business and commercial models to the new situation. However, the global reach of the Internet and its continued rapid expansion, energetically promoted by the public authorities in nearly all countries, is the basic fact and context for any understanding of this matter.

3. Specifically, the media industries and the electronics industries have had the opportunity for more than a decade to develop standardised **digital rights management** systems, including benefiting from significant public subsidies to promote DRM in the EU. As the EU Communication indicates, “lengthy discussions among stakeholders did not yet lead to the deployment of interoperable DRM solutions ...”. Indeed, in practice, most digital media is still circulating today

2 . If adopted, the law would create, inter alia, the Haute Autorité pour la diffusion des oeuvres et la protection des driots sur internet ('Hadopi').

3 . Question 10: “Estimez-vous que l'accord récemment signé en France est un example à suivre?”

unprotected, *en claire.*4

Successful DRMS must maintain established rights to use cultural works, such as private copy, quotation, parody etc. The scope of these rights vary from country to country, but it general there are important legal uses of works, which DRMS currently make impossible. Consequently DRMS as presently conceived by the industry are widely rejected by consumers on most markets.

The Hadopi proposal, envisages that DRMs would be withdrawn, relying in future exclusively on legal, administrative and educational measures. That would not be a viable long term solution, either.

4. Disconnecting private households from Internet access on the basis of alleged IPR infringement is a **disproportionate response** to the perceived problem. The Internet has become an essential social and administrative tool for many public and private purposes. Disconnecting households would interfere with and undermine the provision of public services by national and EU administrations and of education by the schools. Such measures would also prejudice the introduction of on-line banking and electronic commerce in general. In the context of EU Internal Market law, an individual Member State is not free to unilaterally interfere with the cross-border provision of electronic services in the manner proposed. Furthermore, many private households are no longer able to operate as full participants in modern society absent their Internet access. 5

Indeed, other essential public services such as electricity and water supply are guaranteed to the general public in almost any eventuality.

The Internet is global. It would appear, furthermore, that competent users, capable of illegally downloading media files, might also be able to identify service providers and servers, outside EU or Member State jurisdiction, and to continue their practices, the national intervention of an Hadopi, notwithstanding.

5. With regard to **the economics** of promoting availability, use and payment for digital content, it would appear that the proposed measures are wide of the mark. We would submit that:

(a) industry estimates of the economic loss from alleged illegal downloading are exaggerated; there is no suggestion that, if such downloading were to be effectively prevented, the users concerned would acquire the same media files (usually music or cinema) at current commercial prices, e.g. on CDs or DVDs.

(b) the current decline in media revenues from the sale of fixed supports can also be attributed to several other factors, notably changes in lifestyle and mobility. Nowadays, young people in Europe spend much less time than they used to listening to a HiFi or watching TV.

(c) Insofar as one of the objectives of digital media policy is to support the incomes of individual artists, the proposed measures are at best an indirect and inefficient way of doing so. In practice, the principal beneficiaries of the proposed measures, sanctioning private copying of media files, would be - if any - the principal publishers and their collecting societies.

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4 . By analogy, although it is always illegal to steal a car, the police and the insurance companies do not look kindly on the victim of a theft if the car has been left . . . unlocked. !

5 . The text of the Hadopi proposal indicates that after the connection has been cut, the ISP would continue to charge the disconnected user for the services no longer provided!

Accordingly we recommend that before any such legal and administrative measures are introduced, the relevant industries envisage alternative business and commercial models taking full account of the contemporary secular transformation of the media arising from digitisation of communications and the Internet. Specifically the promotion of creative digital content is based upon the artists themselves. As currently implemented, copyright, associated licensing and royalties are an inefficient method of supporting artists, particularly new entrants.

6. **Privacy:** The Hadopi system would involve collecting and storing substantial amounts of personal data about subscribers who have been investigated and/or disconnected. The precise legal basis for identifying Internet users that would be targeted and monitored in this context is not yet clear. In any event, the data relating to disconnected subscriber does not necessarily correspond to that of the putative infringing individual. This data would obviously be generally very sensitive, particularly if no infringement has taken place, and be of great value to the collecting societies and to other interested parties. Inadequate protection, loss or misappropriation of such data would be very damaging to the families concerned.

7. ISOC-ECC supports and encourages the **educational aspects** of these proposals. However, we consider that these should be pursued primarily through schools, universities and other educational institutions, supported by appropriate advertising and budgets. It is not effective to associate educational objectives with a repressive, regulatory entity such as an Hadopi, as currently envisaged. In any event, at this late date, it must be recognised that education in this area would now be an up-hill task. A whole generation of young people in Europe has grown up in an environment where much media has for practical purposes been free-to-on-line, whereas the commercial price of the same media on physical supports has not been affordable for the young people concerned. A new business model is called for that enjoys the acquiescence - if not the support - of the media industry's customers.

Conclusion

In the light of our members' broad knowledge and experience of many aspects of the Internet, ISOC-ECC has to conclude – with some regret - that the so-called “Graduated Response” (of which Hadopi would appear to be a precursor) is not an appropriate answer to the perceived problem of illegal downloading of media files6. The proposed measures would not achieve the declared economic objectives; they appear to be technically flawed and are probably legally unenforceable, at least in a non-discriminatory manner. An unacceptably high level of monitoring of individual use of the Internet might be necessary. Should such measures be widely applied they would interfere with several other priority objectives associated with generalised broad-band Internet access and with the EU Internal Market for electronic commerce.

Needless to say, any such measures would quickly become quite unpopular among younger generations of voting citizens and Internet users.

This Aide Memoire does not exhaust the issues under discussion in the European Institutions and in the Member States. Accordingly ISOC-ECC and its member Chapters reserves the possibility of returning to further consideration of these matters, particularly from the point of view of developing alternative policy options that address the relationship between Internet users, service providers and rights holders.

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6 . See Annexe: Letter from ISOC-France of 27 June 2008 to the French Senate. http://www.isoc.fr/25-juin-08-audition-devant-le-senat_breve0045.html

Annexe

A l'attention de : Monsieur le Sénateur Michel THIOLLIÈRE

Objet : Projet de loi favorisant la diffusion et la protection de la création sur internet.

Paris, le 27 juin 2008

Monsieur le Sénateur,

Suite à notre audition du 25 juin 2008 à 15h00, nous vous confirmons les points suivants.

À la lecture du projet de loi favorisant la diffusion et la protection de la création sur internet tel qu'il a été présenté au Conseil des ministres le 18 juin 2008, le Chapitre français de l'internet Society (Isoc France) s'inquiète de ce que :

- le mécanisme dit de « riposte graduée » que le projet de loi propose d'introduire dans le Code de la propriété intellectuelle[1] renverse la logique de la répression. Il prévoit en effet la prise d'une sanction administrative pouvant aller jusqu'à la suspension de l'accès à l'internet (article L. 331-25 al. 2), à charge pour l'abonné suspendu de saisir ensuite les tribunaux judiciaires d'un recours en annulation ou en réformation de la décision de sanction (article L. 331-25 al. 5). Cette inversion de logique qui met à la charge de l'abonné l'établissement de son innocence *a posteriori*, par la saisine des tribunaux, nous semble dangereuse ;

- le mécanisme dit de « riposte graduée » qui s'appuie sur une obligation de « sécurisation de la connexion à l'internet » à la charge de l'abonné (article L. 336-3 du Code de la propriété intellectuelle) évacue la contrefaçon et surtout la preuve que celle-ci a bien été effectuée par le titulaire de « l'accès non sécurisé ». En pratique, cela signifie qu'il ne sera pas nécessaire de faire la preuve de ce que l'abonné est l'auteur de la contrefaçon alléguée et, plus encore, qu'il ne sera pas nécessaire de faire la preuve de l'identité de l'auteur de la contrefaçon. L'exposé des motifs glisse, de façon très parlante, de la répression des « internautes pirates » dans la situation actuelle à la répression des « ordinateurs pirates » (sic) dans la situation future. Cet allègement du fardeau de la preuve qui évacue la question de l'identité de l'auteur des faits portant atteinte aux droits protégés au titre de la propriété intellectuelle nous semble dangereux ;

- le mécanisme dit de « riposte graduée » que le projet de loi propose d'introduire sera entièrement financé par l'Etat au travers de la future Haute Autorité alors que les intérêts défendus sont purement privés. L'Etat se substitue ainsi à des personnes dont la carence dans la protection de leurs droits est manifeste aux termes mêmes de l'exposé des motifs du projet de loi. Or aucune mesure similaire n'a été imaginée pour des situations où l'atteinte à l'ordre public du fait du défaut de sécurisation des connexions à l'internet des abonnés est plus directement caractérisée. C'est notamment le cas du spam. Cette faveur envers certains intérêts privés qui les décharge de leur obligation de protéger leurs droits nous semble dangereuse.

Enfin, d'un point de vue purement juridique, nous nous interrogeons sur la pertinence de l'article L. 331-29 alinéa 2 qui dispose que :
« Si [l'abonné] ne se conforme pas à l'injonction qui lui est adressée, la commission de protection des droits peut, à l'issue d'une procédure contradictoire, lui infliger une sanction pécuniaire d'un

montant maximal de 5 000 euros par manquement constaté ».

Si le terme de « manquement » renvoie au manquement à l'obligation de sécurisation de sa connexion par l'abonné (nouvel article L. 336-3 du Code de la propriété intellectuelle), sa consommation s'exécute en un trait de temps. Si ses effets se poursuivent au-delà de l'instant t de la réunion de ses éléments constitutifs, il ne peut donc faire l'objet d'itérations multiples. Partant, de même qu'une personne ne peut voler plusieurs fois une même pomme passé l'acte de vol proprement dit, un abonné ne peut pas commettre plusieurs manquements à son obligation de sécuriser sa connexion une fois le défaut de sécurisation établi. L'article L. 331-29 alinéa 2 appelle donc nos plus entières réserves d'un point de vue strictement formel.

Monsieur Christopher WILKINSON qui a été auditionné avec nous le 25 juin 2008 à 15h00 déposera des commentaires séparés vous confirmant les points qu'il a pour sa part présentés.

Je vous remercie, au nom de l'Isoc France, d'avoir pris le temps de nous entendre et vous prie de croire, Monsieur le Sénateur, à l'expression de nos sentiments distingués,

Charles SIMON
Membre de l'Isoc France

[1] Nouvelle Sous-section 2 de la Section 3 du Chapitre Ier du Titre III du Livre III (articles L. 331-22 et s.).