Delineating and Promoting an Online "Legal Offer": A Proper Task for Copyright Legislation?

How Efforts to Tackle Illegal File-Sharing Risk Creating Legal Uncertainty in the Cultural Content Digital Market

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Abstract: Legislations tackling the issue of illegal downloading of copyrighted content, notably those enabling so-called "graduated response" mechanisms, often present and promote the idea of "legal offers", designed to encourage consumers to acquire cultural content legally, as the positive counterpart to their sanctioning provisions. The paper argues that such legal rationales are actually underpinned by ambiguous concepts, bearing underestimated consequences on both practical and theoretical levels. The legislative promotion for the development of so-called "legal" services instills uncertainty in the online market place, thereby affecting online business practices but also the core tenets of copyright law.

Keywords: Copyright, Enforcement, Regulation, File-sharing, Graduated Response, HADOPI Law, Digital market, Legal offer.

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A. Introduction

1 Where copyright regulation and discourse target illegal content as being the main cause of wide-scale online copyright infringement, the development of legal content is often presented as the best solution to turn the tide. Indeed, what better alternative to *illegal* content than *legal* content? However, this seemingly simple pattern is far from being easy. On the contrary, those in charge of identifying what is legal and what is illegal should identify the questions arising from such an approach as perhaps proving to be too Manichean. The legislator has tackled the issue, adopting a questionable method opposing "legal" *versus* "illegal" digital content and related services that lets us predict some of the negative consequences for the development of the cultural content digital market.

2 This questioning is all the more relevant when the legislator is attempting not only to promote but also to delineate so-called "legal offers" of copyrighted online content. In doing so, the copyright legislator is taking the risk of departing from his role while encroaching upon digital market development. This paper proposes to question the "legal" rhetoric used in such legislation as it has developed in some recent laws aiming at influencing Internet users' behaviour.

3 The promotion for "legal" content can be found in legislations supporting "graduated response" solutions, namely in the French law where it is particularly emphasised. "Graduated response" refers to a system of online copyright enforcement that is an alternative to the traditional judicial procedure targeting individual infringers.[1] The system is based on a principle of cooperation between rights holders and Internet Service Providers (ISPs), through which the former can notify the latter of potential infringement by their subscribers and have increasingly severe measures taken against them. The core common measures – which vary according to their different implementations in national laws – consist of issuing an order for ISPs to take steps affecting access to and/or use of the Internet (such as internet bandwidth reduction, blocking internet access or temporarily suspending accounts) on Internet end-users in certain circumstances described by the law. The progressive enforcement process is often referred to as the "three strikes" approach. The French HADOPI Law[2] was one of the first legislations to introduce "graduated response" language in national law. The HADOPI, which stands for "*Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*", is the dedicated body in charge of arbitrating and controlling the implementation of the "graduated response" measures between rights holders and ISPs, up to the communication of the cases subject to litigation to the judge. It is then up to the judicial authority to decide whether to sanction individual infringers.[3]

4 Although this paper does not aim at describing the HADOPI system in detail,[4] the French legal environment offers a specifically relevant basis for analysis about the market promotion counterpart of "graduated response" legislations, which has not triggered much attention in literature so far. Such an analysis shall start with the outline of the legal provisions dealing with the "legal offer", while already questioning their relevance and revealing their ambiguity (B). The reflection shall then be pursued to show how this legislative approach risks affecting online market practices and perverting the task of the copyright legislator (C). It is interesting to note the role of copyright (online) enforcement legislation in this respect, which will lead us to some conclusive remarks about the global context of Internet regulation (D).

B. The promotion for a "legal offer" of cultural content online services: an ambiguous concept

5 Among the main missions of the HADOPI Authority[5] is the "promotion of a legal offer"[6], which holds a strategic position within the copyright enforcement system enabled by the HADOPI legislation. The omnipresence of the "legal offer" concept appears in the explanatory statements of the law: *"[the first part of the provided legislative measures] directly aims at fostering the attractiveness and the resources of offers proposed to the public, notably through referencing and certification, through the shortening of release delays of films in off-line and on demand videos (...)."*[7] Scrutinizing the meaning of the "legal offer" is therefore crucial to understand the "graduated response" model, especially as set out under the French HADOPI Law.

6 The HADOPI legislation aims at promoting a "legal offer" through a certification process for digital services offering copyrighted content (e.g. VOD services, music streaming services). The conditions of certification of online services are outlined in an application Decree adopted in 2010.[8] However, the described certification process (I) does not help clearly define the "legal offer", with some questions already coming up with respect to its implementation in practice. This ambiguity leaves room for an unprecedented legal uncertainty to be borne not only by service providers, but also by rights holders themselves. In this questioning process, one crucial point keeps arising: what is to be understood exactly by "legal offer"? (II).

I. "Legal" provided that "certified"

7 According to the HADOPI Law, the promotion for a "legal offer" shall be achieved through a certification process aimed at allowing Internet users to clearly identify legal online services and at diverting them from "illegal offers". In spite of a detailed description of the certification process (1), the law fails to provide for the necessary elements of interpretation as to the scope and impact of the "labels" granted to the services complying with the given criteria (2).

1. A detailed certification procedure...

8 Under a voluntary basis, providers of cultural content digital services can ask the HADOPI Authority to grant them a certificate ("label") demonstrating that the copyrighted works offered to the public on their services are duly licensed by rights holders. The 2010 Decree[9] provides for a detailed certification procedure for digital service providers who have to file a formal request before the HADOPI Authority. The request has to contain: the list of works included in the concerned service, the access conditions to read and to reproduce the works, an affidavit stating that all works contained in the service are duly licensed by rights holders and an obligation to answer to any demand from the HADOPI Authority to verify the accuracy of the delivered information.[10]

9 All complete request files shall then be published on the HADOPI's website.[11] Rights holders shall be able

to oppose the certification request (within a delay of four weeks from its publication). In case of opposition from rights holders, service providers applying for the label have to either enter into licensing agreements with the complaining rights holders or proceed to withdraw the concerned works (within a maximum delay of two months). In this public procedure, the decision of the HADOPI Authority to award the label must be explicitly delivered (no certification can be inferred from a tacit decision).

10 The Decree further provides for some conditions allowing the narrowing of the scope of the obtained certification. The label is granted for a limited period of time (one year from the publication of the label on the HADOPI's website) and is renewable under the same conditions. The HADOPI Authority can decide to withdraw the label if the service provider does not comply with its obligations, in particular if the copyright licenses have not been obtained as announced (although the procedure offers the service provider the opportunity to justify the situation before the Authority). The infringement of rights on one single work can lead to the withdrawal of the certification for the whole service. These conditions can be considered as guaranteeing the control and review of the certification process, thus preventing the misleading use of labels by online services offering unlicensed content.

2. ... with uncertain scope and impact

11 Although the promotion for a "legal offer" appears as a "positive" aspect of the HADOPI Law to be differentiated from the "graduated response" provisions of the same legislation pertaining to the prevention and the sanctions against illegal file-sharing, it does not suggest favorable developments for copyrighted content providers and users. The concept of "legal offer" and its related certification procedure show the legislator's intention to encourage service providers to undertake a proactive attitude in cooperation with the HADOPI Authority. Nevertheless, in going beyond the claimed education purpose towards users (to divert them from "illegal offers" and from illegal uses),[12] the law fails to give the marks needed to provide legal force and certainty to such an ambitious task.

12 The certification process aims at granting a label of legality to service providers, after due verification through the certification process, who can then hope to attract users and gain an advantage on the market. The HADOPI certification is thus an important investment for professionals taking part in the digital market of cultural content, to such an extent that some rights holders might require service providers to obtain a label before entering into licensing negotiations. This requirement can even be part of the written provisions of the licensing contract, and can even be invoked by investors wishing to secure their assets. As a consequence, the HADOPI certification might create derivative obligations for service providers wishing to succeed in their business.[13] In reality, the "legal offer" certification tends to put additional pressure on online services, thus instilling uncertainty in whether the service will be able to get or keep its label, which is important in its bargaining activity with the rights holders.

13 The certification process raises questions regarding consequences in terms of liability for service providers, but also for the HADOPI Authority itself. Should the Authority reject the label, concluding that all the conditions are not fulfilled, the economic impact may be significant for a service provider looking to integrate the "legal offer" market. It is still uncertain whether the provider facing a certification dismissal is able to complain about the Authority's decision in court (using for instance a competition law defense).

14 The law does not provide for any guidance as to what kind of information shall be given to identify the works as a condition of certification (see above, B.I.1). Nor does it say whether the objection from only one rights holder shall be enough to prevent the delivery of certification if the situation cannot be cleared within the two month delay. This question is far from being merely hypothetical. If a service provider has negotiated licensing contracts with music recording producers, what would happen if collective management societies representing performers oppose the certification? Beyond the certification itself, this also questions the role of the HADOPI Authority, the mission of which is to protect copyright holders (bearing in mind that HADOPI stands for "Haute Autorité pour la diffusion des œuvres *et la protection des droits sur Internet*" – our underlining) and presumably, to take a position when some rights holders complain and oppose a certification request.

15 The certification awarded to some services might be questioned in many situations. In such circumstances, the HADOPI Authority has to somehow take part in the discussion, or at least act as a host or even as an arbitrator in the discussion between the parties. Disagreements about the interpretation of the contracts between service providers and rights holders might add to the complexity of the situation, not to mention the issue pertaining to the possible obligation to disclose some confidential business clauses that might be asked for in order to solve the dispute. Moreover, rights holders might ask for a review of the licensing terms each time the technique of communication evolves, thus submitting the certification process to constant and unpredictable changes. In the end, the initial purpose of better information to the public might not be fulfilled.

16 Whether rights holders may be held liable when contesting a certification is also a question worth mentioning. Should one rights holder oppose a certification, would other rights holders be entitled to argue that this opposition is depriving them from a business opportunity? Would the service provider itself be entitled to a claim for the liability of the complaining rights holder for similar reasons? Such a variety of situations cannot be entirely covered by the HADOPI certification procedure.[14] In the business world, any disappointment can potentially lead to legal action. It would then belong to the judge to determine whether to engage in liability rules, depending on the concerned obligations, infringement conditions, and on the judge's interpretation of the contract (also considering the online market good practices).[15]

17 The interference of the "legal offer" certification system with the market and competition regulation is already tangible. How will such interference occur in practice? The national competition authority may be asked to give its opinion if a service provider claims that the "label" granted to a competitor has been unfairly distributed or disturbs the market rules. A decision from competition authorities on the implementation of copyright "derivative" provisions – as those relating to the certification of "legal offer" services are – can be envisioned and create some indirect consequences on the digital market place. We also have to bear in mind the interest of certain established online services in having this "legal offer" endorsed by the law. Some of them might indeed find in it a way to keep their market predominance or to gain further advantages against their competitors.[16]

18 Besides, the HADOPI certification process involves the creation of conditions adding to the existing French copyright legal framework regarding the protection of works, the obligations of users and the publicity of the information on rights. Indeed, French copyright law grants copyright protection without formalities, infers copyright infringement from material facts, and provides for specific obligations for users of audiovisual works, who must search for information on rights in dedicated public registries. As such, the certification process, albeit voluntary, differs from these existing copyright law provisions and should therefore be interpreted as being part of a system independent from the French Intellectual Property Code.[17] Nevertheless, how such independence shall take place in practice within the whole legal system (of copyright but also of electronic commerce) is a very delicate question to which it is still impossible to give any definite answer.

19 Although all these questions have not been subject to litigation so far, they are already arising in practice. As the HADOPI certification process intends to shape the offering of digital content, the uncertainty of its economic impact and of its implementation in business practice and in court is somehow already embedded within the law. It seems that the consequences of the HADOPI "legal offer" certification system were not fully assessed by the French legislator. As a result, the "legal offer" bears a wider impact than initially intended.

20 It is worth noting that the HADOPI legislation's provisions on the "legal offer" were targeted by the appeal against the "HADOPI 1" Act brought before the French Constitutional Council.[18] The appellants contended that "*by leaving it to a Decree to specify the conditions in which the High Authority can award a label making it possible "to clearly identify the lawful nature" of offers of online communication services, the law gives the High Authority the power to determine discretionarily those offers which, in its opinion, are of a lawful nature*." The Constitutional Council rejected the appellants' argument saying that, "*the awarding of labels attesting to the "lawful nature" of offers of online public communication services is designed solely to facilitate the identification by the public of offers of services respecting intellectual property rights. (...) Leaving it to a Decree to fix the conditions for the awarding of such a label is solely designed to determine the manner in which applications for the award of such a label are to be received and examined by the High Authority. These provisions do not confer any arbitrary authority on the latter*" (Constitutional Council 's decision, § 34).

21 The constitutional judge validated the certification process but did not answer the still crucial question with respect to the role of the HADOPI Authority to "discretionarily" determine which services shall be deemed of lawful nature. Indeed, what is a "legal offer"?

II. The relativity of legality

22 What is "legal"? What is "illegal"? Which of these questions should be answered first? Is illegality defining legality, or shall it be the other way around? This echoes the everlasting query of lawyers. When it comes to sanctioning, shall we rather define what is "lawful", or what is "unlawful"? Shall we start with sanctioning what we do not want, rather than trying to define what we want?[19] This "chicken and egg" situation appears even more complex in the digital environment, where the rapid development of unlawful activities is continuously re-shaping the established legal framework and the boundaries of what shall be deemed "legal".

23 The sanctioning system put in place under the HADOPI legislation chose to target not the act of downloading *per se* but the "default of safeguarding one's internet access."[20] As Internet users are facing prosecution for the default of safeguarding their own Internet access, it is therefore more the lawful *access* to content than the lawful *nature of content* that

should be the issue.[21] What defines what should be deemed "legal" is what users are doing with the content to which they access. The core problem targeted by the "graduated response" is more about legal *uses* than about legal *content*. Because the objective is to curb illegal uses, inciting content providers to enable the development of legal uses through a "legal offer" may appear to be a good idea, in the sense that it helps loosen the sanction system targeting users, thus contributing to balance the "graduated response" system. However, such a balance might only be theoretical given the realities ignored by the legislators.

24 What kind of "legality" is the "legal offer" referring to? Shall it only (mainly?) refer to *licensed* digital services? Whether a service shall be considered as "licensed", how can its legality be absolutely guaranteed? For a service provider, running licensing negotiations with rights holders consists of a succession of contracts subject to varying conditions and unexpected developments. Business practices show that legality cannot be a consistent notion over time, especially in the fast-changing digital environment. Moreover, total legality should imply licenses with *all* rights holders, without any exceptions. Shall a "licensed" music service be meant to have a license with just at least one record company or with all of them, and with all rights holders (authors, performers, publishers) represented by the corresponding collecting societies?

25 The HADOPI system obviously does not help bring more visibility to the fragmentation of rights and of "rights managers", which has been increasing in the online environment during the last decade.[22] With such imprecise guidance on copyright licensing that is supposed to sustain "legal offer" services, uncertainty may even become more acute, with increased legal consequences for digital content providers experiencing the impeding effects of the licensing "minefield".

26 Besides, if there should be any threshold to assess total/partial legality, what should it be? Who shall be entitled to determine the applicable criteria, and on what legal basis? Could it belong to the competence of the HADOPI "independent Authority"? If an independent public authority might be entitled to guide business practices, it should do so on a clear legal basis with objective criteria characterised by generally accepted public interest principles. As regards to the HADOPI, these criteria lack clarity as the Authority's main mission is to guide copyrighted content service providers in their business practice while failing to take due consideration of the digital market realities (as said above and demonstrated in more detail below).

C. Towards a risky business implementation of copyright law?

27 While devising a legal framework to achieve the creative content digital market, lawmakers are introducing new rules of interpretation of the law to be imposed to a wide range of stakeholders, affecting business practices but also the core tenets of copyright law. The concept of "legal offer" introduced in "graduated response" legislations provide for a good illustration of this legislative trend attempting to include some market considerations into substantive law, with some poorly controlled consequences by the legislator.

28 Rights holders shall be recognised as business partners of digital service providers. To put things into pragmatic terms, rights holders supply cultural content to service operators who then provide it to consumers. Despite this reality, the business status of copyright holders is still taboo, especially under copyright law systems focusing on the protection of authors with a distance from the economic world, as is the case under continental copyright law systems and more particularly in France.[23] Nevertheless, whereas this business status of rights holders is far from being recognised, the *droit d'auteur* legislator is throwing himself into a risky business implementation of copyright law without having duly considered the possible consequences. In setting out the "legal offer" certification process, the French legislator has skipped some basic steps that risk hindering the development of cultural content online services.

29 The concept of "legal offer" appears biased by nature. This is the result of an unprecedented combination of copyright law and business considerations affecting each other. The proponents of the HADOPI Law may say that this is for the sake of a more practical and consumer/business-friendly copyright law, and that it is acting toward more responsible and fair digital business practices. However, such assertions might not survive the observation of online market's realities.

30 Despite prevailing difficulties in copyright licensing in the online environment (see above, B.II) revealing a flawed business situation for content providers, the specific business nature of cultural content digital services does not seem to have been taken into due consideration by the legislator. However, to what extent shall this market dimension be taken into account by the copyright legislator? Shaping an online offer, like the "legal offer" provisions of the HADOPI Law claim, is a task that seems to be too ambitious for the national legislator[24] and might go beyond his field of competence.[25]

31 The procedural nature of the "legal offer" as set out by the HADOPI Law's certification process (see

above, B.I) tends to expand to the contractual relationships between digital services and rights holders, thus contradicting the ongoing trend for legal simplification of online commerce.[26] Besides, if some obligations may be imposed on online market actors, they aim more at regulating the existing practices and at bringing legal certainty into the digital business environment than at guiding their actions, especially when it comes to the *content* of the digital market. In strongly prompting online content providers to act in a certain direction – towards a "legal offer" – copyright legislation promotes an intrusive approach into the market sphere, which is doomed to be counter-productive. Indeed, it can be foreseen that the "legal offer" HADOPI label might not even be adapted to the online market place. Some services might obtain the certification but eventually decide to abandon it, some other services might refuse to enter the "legal offer" certification process, and some others might complain about the granting of a label to a competitor... all this rendering the online market environment even less predictably foreseeable to all stakeholders, thus weakening legal certainty and impeding the development of the digital market.

32 Legal online services are said to be suffering from unfair competition from illegal services. To which extent is it a *copyright law* problem? Can E-commerce legislation[27] help to add some complementary elements of interpretation in this respect? It would probably not in the sense that mechanisms such as the "legal offer" tend to isolate copyright law from online market reality. Paradoxically, such intrusion of copyright legislation into the market sphere would thus influence the role of copyright within the global legal apparatus, but not move it towards more economic integration.

33 These considerations can be supported by some expectable consequences flowing from the HADOPI Law certification process. Let us envisage some of them. First of all, the certification procedure shall not be interpreted as imposing new obligations on rights holders. In particular, a service provider shall not be entitled to claim that a rights holder is not allowed to contest the label awarded, arguing that the latter had the possibility to oppose beforehand during the public procedure (see above, B.I).

34 Moreover, a certification should not be used as a defense by infringing services. Nevertheless, one can expect that service providers might be tempted to use their certification as an argument in their favour in case of copyright infringement claims. Should this argument be received in court, this could lead to a reversed interpretation of the rules of evidence and possibly to a revision of the core copyright principles. Copyright infringement, even unintentional, is usually inferred from material facts. However, the presence of a certification might bring some intent elements into the defense of suspected infringers. Indeed, service providers might use their certification as evidence proving that they have been acting to make their service "legal". If a provider claims that it "*did not want to* infringe copyright", on the basis of the granted "HADOPI label", the certification might then be used to build a "negative" defense, calling for positive counter-evidence from rights holders[28].

35 In such conditions, service providers are offered powerful tools to object to copyright infringement claims, thus leaving rights holders in an unprecedentedly weak position.[29] Such consequences might not comply with the original intention of the copyright legislator when drafting the law.

36 This shall be put into perspective with the global trend for a "new" *droit d'auteur"*[30], focusing not on the protection of rights holders but rather on the public deserving to be offered works, and more generally "content". Copyright protection tends to become "negative": the effort of demonstration would no longer be asked from users (or more precisely here, from service providers) but from rights holders themselves, not only in copyright infringement disputes but also within contractual relations. To which extent shall this trend take place, with which guarantees for legal certainty and good business practices?

37 The risk of inverting the copyright legal system thus comes from within the copyright legislation itself, which inserts some flawed language, inducing that self-proclaimed "good" market rules might decide not only what is "illegal", but also what should be deemed "legal". Where "legality" becomes a marketing object, lawyers are entitled to worry.

38 The most immediate negative impact of the HADOPI certification process lies in its misguided conception of business practices. The changing nature of commercial dealings can be especially problematic in the digital business of audiovisual or musical works. While distinguishing "legal" from "illegal" services implies drawing a line between two categories of services, such a line appears to be blurred by the online market's realities. In a fast-changing technical environment shaping ever-evolving marketing strategies, copyright licensing contractual terms for online exploitation are bound to evolve. Indeed, rights holders usually tend to ask for regular revisions of licensing terms, thus affecting the consistent development of licensed and "legal" services over time (see also above, B.II). However, copyright holders' demands in the context of the digital market do not always win the judge's sympathy, as illustrated in the French *Deezer* case.[31] The dispute opposed the leading digital music platform in France - *Deezer*, owned by *Blogmusik* company, which offered free and paying streaming as well as downloading services - and Universal Music. In this litigation, the service

provider refused the new contractual terms proposed by the record label, who then threatened to end their licensing contract. After *Deezer* continued to exploit Universal's music, the recording company sued the provider for copyright infringement. The court rejected the label's claim, ruling that Universal, the leader in the music market, was putting the economic viability of their service at stake, and was thus found liable for anti-competitive behaviour and abuse of monopoly power (but the case was then settled between the parties by private agreement and did not reach second instance level).

39 This business aspect has been tackled in an agreement between the main stakeholders of the digital music market in France, which intends to regulate the business practice in a more "reasonable" way for all interested parties: creators, recording producers and service providers.[32] The HADOPI certification process might not have any particular positive influences on the usual business practices between content providers and rights holders, each of whom are keeping their suspicions and demands towards one another.[33] This is precisely one of the reasons why the agreement ("*Les 13 engagements pour la musique*") was deemed necessary to improve the environment of copyright licensing negotiations.

40 Therefore, the promotion for a "legal offer" might occur at the expense of the cultural content digital market. Behind some seemingly good intentions, the legislator has sowed the seeds for an unprecedented level of legal, and also economic, uncertainty for copyrighted content digital services.

D. Conclusion

41 Is the "legal offer" likely to change the demand for cultural online content and to divert web users from "illegal offers", as contended by the legislator? Nothing could be less certain, knowing the fast evolution of online services and the wide range of choices being constantly offered to users. "Illegal offers", if concealed behind more attractive "legal offers", are not going to disappear from the Internet landscape.

42 What concrete results have been observed since the HADOPI "legal offer" certification system has been enforced? It seems that the objective of creating a legal alternative to copyright infringing offers has deterred a certain amount of web users from using illegal content.[34] However, whether this asserted deterrent effect shall also have a genuine "legalisation" effect on users' behaviour is far from being certain, as admitted by the HADOPI Authority itself.[35]

43 Will the market offers put an end to illegal file-sharing? More "legal offers" and less successful "illegal offers" might sound like a happy story for copyright protection and for reasonable users who can benefit from a wider range of choice. Despite this positive note, the "legal offer" certification mechanism confirms the trend that argues for a short-sighted legal approach based on only some economic interests. This tends to show how legislation can be used to serve some immediate market purposes, at the expense of long-term reflection on the adaptation of copyright law to the development of wide-scale uses of cultural content online.[36]

44 In a way, the "legal offer" suggests a "lazy" approach, limited to the existing environment, following some short-sighted considerations, while leaving aside the exploration of innovative models. The "legal offer" instills the idea that illegal offers (and more broadly, the idea of online sharing) are a market failure needing to be repaired. Such an approach lacks objectivity and decides too quickly on things that deserve deeper scrutiny.

45 What kind of cultural content online market is encouraged through the "legal offer" concept? The HADOPI Authority contends in its annual report[37] that the success of legal offers has increased, overtaking some popular illegal file-sharing websites (such as MegaUpload). However, these conclusions have to be tempered in the context of an online audiovisual market where the dominant position of a few actors (e.g. Apple's service iTunes) is strengthened, even if some other legal services have managed to break into the national market.[38] Such prevailing market dominance is not contributing to cultural diversity[39] and to the development of competitive innovative services.

46 In including market considerations into copyright law, the legislator tends to acknowledge that solutions can be found outside the usual legal framework. With the promotion for "legal offers", the law gives legislative force to some copyright market incentives. Although this might lead to underestimated consequences affecting the development of the digital market and disturbing the copyright law system, this tends to show that the legislator is looking for a certain balance in copyright enforcement regulation.

47 The promotion for a "legal offer" is a landmark legislative step in copyright enforcement regulation, departing from the usual focus on the sanctioning of users and on the blocking of illegal websites. This is to be directly linked with the policy adopted towards ISPs and their role and liability in enabling access to online content. Some national legislations aiming at curbing uses of illegal copyrighted content might prefer insisting on the liability of ISPs to block access to illegal content rather than encouraging a "legal offer."[40] Meanwhile, the European legislator is working on the revision of the E-Commerce Directive (2000/31/EC), and more particularly on the rules

of liability applicable to ISPs.[41] The European Commission's initiative names "illegal content" without further definition.[42]

48 Impeding illegal content and encouraging legal content should be addressed simultaneously. This is what the HADOPI Law attempts to do, in spite of all the flaws presented in this paper. The promotion for a "legal offer" positions itself in a praiseworthy "positive agenda" approach. However, how shall this be implemented within a copyright enforcement system also containing sanctioning measures? The "good" intentions of the HADOPI Law, consisting in the development of a "legal offer" of cultural content, are claimed to guide (to excuse?) the punitive provisions set forth in the same legislation. The ambiguity of the "legal offer" concept is therefore multi-faceted: is the "legal offer" to be considered a goal or a justification for sanctioning measures? Meanwhile, users are indeed perceived as potential infringers targeted by monitoring and/or criminal measures. How shall these two extremes ("positive" and "negative") be conciliated within a same legal instrument? The schizophrenic nature of the law does not allow for the hope for a clear and objective implementation.

49 Such copyright law intrusion into the online market practice illustrates the current evolution of regulation applicable to the Internet, which tends to mirror the blurring of the patterns of the off-line world.[43] The creation of a public authority like the HADOPI to deal with online copyright infringement and with how to shape the cultural content market represents a landmark step – even a turning point - in copyright law, bearing some direct and indirect impact for digital market's stakeholders, including rights holders. A public authority might play a significant role in controlling and "guiding" self-regulation among online market's stakeholders. However, we can question the French legislator's intention in how it is influencing such self-regulation. Indeed, the HADOPI "legal offer" focuses on a certain model of self-regulation where service providers are key players, which paradoxically weaken the rights holders' position. One can wonder whether these far-reaching consequences were deliberately contemplated by the copyright legislator.

50 Despite its public authority denomination, the HADOPI acts as a kind of private substitute for copyright enforcement – the intervention of the judicial authority occurring only at the last stage of the "graduated response" process and under the initiative of the HADOPI – while being endorsed by the legislator and financed by public funds. It thus operates as a new form of self-regulation or "self-help" on the Internet.[44]

51 In fighting illegal downloading and file-sharing, the legislator has paved the way for underestimated legal uncertainty. Copyright enforcement legislations attempting to introduce some so-thought "positive" and "innovative" market-friendly measures tend to blend values, resulting in counter-productive effects. When it comes to curbing wide-scale Internet trends and influencing web users' behaviours, regulators can be tempted to overstep some traditional limits. If this is to characterise the current approach for Internet regulation, it should be driven by long-term considerations going beyond the current market interests and enabling genuine access to culturally diverse online content.

52 As "graduated response" legislations are subject to the influence of different national political contexts, questioning the meaning of online "legal offers" is all the more important when governments tend to abandon their punitive approach and insist more on the "positive" market dimension. The recent statements by the new French government on the progressive cut back in the HADOPI's budget seem to go in that direction.[45]

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1 P. Yu, *The Graduated Response*, Florida Law Review 2010, 62, p. 1373.

2 The HADOPI Law was enacted in two steps (see below, note 7): "HADOPI 1" (June 2009) Act and "HADOPI 2" Act (October 2009).

3 For an analysis on the implications of the HADOPI "graduated response" measures on users, see notably N. Lucchi, *Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)*, Cardozo Journal of International and Comparative Law, 19/2011, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-07, available at http://ssrn.com/abstract=1816287; H. Ranaivoson and A.C. Lorrain, *The Graduated response beyond the copyright balance. Why and how the French HADOPI takes consumers as targets*, Info Journal 2012, Vol 14 No 6, Special Issue: EuroCPR Policies for the Future Internet.

4 For more detail on the HADOPI measures, see for instance P. Sirinelli, *Graduated response and the role of intermediaries: avoiding the Apocalypse or a return to the sources?*, in L. Bently, U. Suthersanen and P. Torremans (eds), *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace, Edward Elgar Pusblishing*, 2010, p. 478; Ch. Geiger, *Honourable Attempt but (ultimately) Disproportionately Offensive against Peer-to-Peer on the Internet (HADOPI) - A Critical Analysis of the Recent Anti-File-Sharing Legislation in France*, IIC, 4/2011, Vol. 42, p. 457.

5 The HADOPI High Authority was created by the HADOPI Law as an independent administrative body. It is composed of two committees: one in charge of implementing the general missions of the Authority and one in charge of the protection of rights and of the "graduated response" process. Its members are appointed by State authorities such as the judicial authority and the Ministry of Culture.

6 Interestingly enough, the promotion of a "legal offer" is the first mission of the HADOPI Authority listed in Art. 331-13 § 1 of the Intellectual Property Code (CPI).

7 Cf. "HADOPI 2" Act, explanatory statements (first and third paragraphs). The French "graduated response" process is set out in two legislative acts and multiple implementing decrees. In June 2009, the so-called "HADOPI 1" Act was passed, which aims at "furthering the diffusion and protection of creation

on the Internet" (Act of 12 June 2009 also called the Creation & Internet Law). Following a censorship decision from the French Constitutional Council (Decision n° 2009-580 DC, 10 June 2009), the "HADOPI 2 Act "on the criminal protection of copyright on the internet" was adopted (Act of 28 October 2009). On the HADOPI legislative process, see Ch. Geiger, *HADOPI ou Quand la Répression Devient Pédagogique. Une Analyse Critique du Dispositif Juridique de Lutte Contre le Téléchargement sur les Réseaux de Pair à Pair*, Dalloz 2011, 11, p. 773; V.L. Bénabou, *Glose de la loi HADOPI ou opération nécessaire de débroussaillage*, Revue Lamy Droit de l'Immatériel 52/2009, p. 63.

8 Application Decree adopted on 10 November 2010 (n° 2010-1366, enacted in Art. R. 331-47 to R. 331-54 CPI).

9 See above, note 8.

10 For an analysis of the Decree, see G. Vercken, Revue Lamy Droit de l'Immatériel 66/2010, p. 6.

11 http://www.pur.fr. The "PUR" label standing for "Promotion des Usages Responsables", the acronym sounds like "pure", i.e. "purified" from unauthorized content. The HADOPI webpage dedicated to the certification process, launched in June 2011 with 17 certified services, claims "to reference legal cultural content services, in order to promote responsible behavior amongst consumers in using cultural content". To date, 59 online services have obtained the HADOPI label (information accessed in September 2012).

12 See H. Ranaivoson and A.C. Lorrain 2012.

13 See G. Vercken 2010, p. 7.

14 See G. Vercken, Ibidem.

15 See G. Vercken, Ibidem: these questions can be compared to the liability provision of the 2004 French Act "for trust in the digital economy" – *"Loi pour la confiance dans l'économie numérique", LCEN* – stating in its Art. 6 I-4 that: *"The presentation of a content or of an activity as unlawful with the purpose of obtaining its withdrawal while knowing that this information is inaccurate, is punishable by up to one year in prison and a 15.000 euros fine"*.

16 The stakes are high. On-demand subscription services pay out the majority of revenue to content owners. Combined with the cost of building, maintaining, and marketing the platform, the cost of content requires services to achieve on a large scale in order to be profitable. There is no small-scale success in this part of the audiovisual business.

17 See G. Vercken 2010, p. 8.

18 See aforementioned decision n° 2009-580, § 32 & subsq. (translation available on the French Constitutional Council's website: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf).

19 These questions notably arose during the discussion on the European Telecoms Package, following some controversial amendments referring to "lawful content" which were finally deleted. The directives of the package now refer to "illegal content" (see "Authorization" Directive 2002/20/EC as amended by Directive 2009/140/EC, Annex, A.9).

20 The criminal sanctions provided in the HADOPI Law are based upon the "characterized negligence" related to the legal obligation for one's own secure internet connection. This legal obligation was introduced (in *CPI*, Art. L 336-3) by the 2006 DADVSI Law (*"Loi relative au droit d'auteur et aux droits voisins dans la société de l'information"*, Act of 2 August 2006). An application Decree develops the technical requirement to achieve the so-called "secure" individual network connection by providing a "white" list of technical tools to be recommended to Internet users (Decree of 23 Dec. 2010). The Decree provides for a public certification procedure to be applied to manufacturers of Internet security tools.

21 In the UK, the 2010 Digital Economy Act requires the national communications regulator Ofcom to issue some recommendations about the implementation of the provided online copyright infringement measures (also qualifiable of "graduated response" measures, although different from the ones provided under the French HADOPI Law). Ofcom recently published a draft code for consultation, which includes measures to help inform the public and *promote lawful access* to digital content. It is worth noticing that the UK regulator does not use the term "legal offer" but prefers targeting "more attractive online services to offer their content" (http://stakeholders.ofcom.org.uk/consultations/infringement-notice/?utm_source=updates&utm_medium=email&utm_campaign=copyright-statement-code).

22 This so-called fragmentation of rights and of rights managers could be observed since the European Commission adopted a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/CE), which encouraged more competition between European copyright collecting societies. It resulted in the withdrawal of some categories of rights from collecting societies, which has caused confusion among licensees. On this issue, see for instance J. Drexl, *Competition in the field of collective management: preferring 'creative competition' to allocative efficiency in European copyright law*, in *Copyright law: a handbook of contemporary research*, Paul Torremans (ed.), Edward Elgar Publishing, 2007, p. 255; Th. Riis, *Collecting societies, competition, and the Services Directive*, Journal of Intellectual Property Law & Practice 6/2011, n° 7, p. 482.

23 On the differences between the "copyright" and *"droit d'auteur"* systems, see for instance R. Deazley, M. Kretschmer and L. Bently, *Privilege and Property: Essays on the History of Copyright*, Open Book Publishers, 2010; A. Strowel, *Droit d'auteur et Copyright*, Bruylant & LGDJ, 1993.

24 The European legislator tends to give a particular focus on the market dimension of copyright law by emphasising its implementation in the European Single Market: e.g. European Commission, *Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT*, October 2009: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf. The paper, which calls for an "economically viable single market for digital content" (p. 2), is a clear invitation to think about copyright from an European market perspective. Commissioner Viviane Reding outlined the importance for a *"consumer friendly legal framework for accessing digital content in Europe's single market, while ensuring at the same time fair remuneration of creators"* (p. 2). However, this EU market perspective cannot be transposed into the national legislative environment of European Member States. This gap of perspective between the European and national legislative processes tends to be increased as the national legislator attempts to grasp the market issues – at a national level – without being duly prepared for this task.

25 The legislator's field of competence can change over time, and this is also true for the copyright legislator. However, the latter does not seem to be ready, at least at the present time, to include some market-wise elements going as far as the "legal offer" does.

26 National and international regulation on electronic commerce aims at improving the fluidity of exchanges between online business partners. The legal framework applicable to the digital market place is rather meant to streamline contractual law than clutter up the system with further legal requirements.

27 As for instance the French *"Loi pour la confiance dans l'économie numérique"* (LCEN, mentioned above in note n° 14).

28 A negative fact is difficult to prove, which explains the rule of the French *Code Civil* Art. 1315 providing that anyone claiming for the execution of an obligation has to bring the evidence in court. In the circumstances exposed here, this task would have to be undertaken by rights holders claiming for the infringement of their rights. On these issues, see G. Vercken 2010.

29 This remark is particularly true for "small" rights holders who do not necessarily have the means to assess these risks and to organise themselves to contest the system.

30 See G. Vercken 2010, p. 9: *"un nouveau droit d'auteur sous servitude, préalable, peut-être, d'une inversion du système"; "(...) a constrained droit d'auteur as a possible preamble for an inversion of the system"* (our translation).

31 *Tribunal de grande instance de Paris, Blogmusik v. Universal Music France, Ordonnance de référés*, 5 Sept. 2011.

32 *"Les 13 engagements pour la musique"* (or "13 Commitments for Music"), also called "Rapport Hoog", signed in February 2011 by the main digital music platforms, representatives of performers, of authors and of recording producers, is a soft-law initiative coordinated by the French government. The agreement sets forth 13 "good business practices" committing recording producers to the durability and stability of contracts concluded with service providers.

33 See aforementioned court case *Blogmusik v. Universal Music France*: the music platform used its HADOPI label in their defense, although the court did not base its decision on this argument.

34 This trend has been shown in some studies surveying web users' behaviours in accessing cultural online content. Among those, the HADOPI 2012 Activity Report tends to show that the success of illegal websites tends to decrease in favour of legal offers (http://www.hadopi.fr/sites/default/files/page/pdf/note17.pdf). One of the most objective reports on the issue is the 2011 Columbia University survey-based study on *Copy Culture in the US and Germany*, in which a large numbers of illegal downloaders were said to have altered their behaviour in response to more attractive legal services for acquiring content (http://americanassembly.org/project/copy-culture-us-and-germany).

35 In its 2012 activity report, the HADOPI Authority admits that given the lack of perspective, it is not allowed to draw firm conclusions establishing a real transformation of French web users: *"(...) such analysis are complex because the related conclusions are subject to divergence according to the methods adopted"*. On the issue of assessing wide-scale Internet uses and their evolution in the face of copyright enforcement policies, see notably A. Bridy, *Is Online Copyright Enforcement Scalable?*, Vanderbilt Journal of Entertainment & Technology Law, 13/2011, No. 4, p. 695, available at http://ssrn.com/abstract=1739970. See also J. Poort & P. Rutten, *File Sharing and its Impact on Business Models in Music*, in *Internet Econometrics*, S. Allegrezza & A. Dubrocard (ed.), Palgrave Macmillan, 2012, p. 197.

36 New copyright models have nonetheless been developed by several proposals: e.g. Ph. Aigrain, *Sharing, Culture and the Economy in the Internet Age*, Amsterdam University Press, 2012.

37 See HADOPI 2012 Report, aforementioned in notes 34 and 35.

38 The constant predominance of the iTunes platform on the French online music market since the HADOPI Authority became operational has been outlined in a study conducted by American scholars: B. Danaher, M. Smith, R. Telang, and S. Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France* (January 21, 2012) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240).

39 This encouraged dominance on the cultural online market is triggering criticism, notably from Ph. Aigrain (see above, note 35), citing the "organization of cultural regression" (Ph. Aigrain).

40 As it is the case in Denmark, a draft law recently tabled by the government (in June 2012) privileges a "simplified procedure" to withdraw online illegal content.

41 The EU Commission has announced a "Notice and Action" ("N&A") initiative (June 2012) along with the launch of a related public consultation: http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=noticeandaction.

42 See the glossary of the aforementioned (note 40) EU Commission "N&A" public consultation: *"Illegal content" corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. This directive does not further specify this term. It may be understood in a wide sense so as to include any infringement of applicable EU or national laws and regulations. This could for instance include defamation terrorism related content, IPR infringements, illegal online gambling, child abuse content, misleading advertisements or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation etc."* As said above (B.II, note 19), the European legislator decided to focus on "illegal content" (rather than on "legal content").

43 Such copyright law intrusion into the market field could notably be observed during the discussion of the EU Telecoms Package (aforementioned, note 19), where some "graduated response" provisions were introduced in legal instruments meant to rule on telecommunication operators' activities. Following fierce discussion, these provisions were tempered (see also above, note 19). On this issue, see notably N. Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, Cardozo Journal of International and Comparative Law, 19/2011, p. 645, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756243&rec=1&srcabs=1816287.

44 On Internet regulation, see for instance C. Engel, *The Role of Law in the Governance of the Internet*, Max Planck Institute for Research on Collective Good Preprint No. 2002/13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325362.

45 http://www.lemonde.fr, 14 September 2012, "Aurélie Filippetti livre une nouvelle charge contre la Hadopi".