

HADOPI : non merci

Repression does not lead to creation



Arguments against the **"Bill favouring protection of the cultural creation on the Internet"** of Mr. David Clarinval and co-signatories.



When, in April 2010, senator Philippe Monfils introduced for the first time in Belgium a bill establishing a “graduated response” against file sharing on the Internet, the citizens advocacy group NURPA spoke out strongly against such a system.

The French HADOPI system has since been put into practice, but with little effectiveness. Elsewhere in Europe and in the world, the entertainment industry deploys huge lobbying efforts targeted to governments in order to impose this costly repressive scheme, a scheme that will do absolutely nothing for cultural creation. Moreover, we can see every day that this industry benefits from a lot of public money and still refuses to look towards the future in order to consider the necessary changes of its business model.

It is not the first time that major music, movie and other similar companies describe themselves as victims. Remember, for example, the well-known “Home Taping is Killing Music” campaign launched during the 1980’s. In 1982, Jack Valenti, then president of the Recording Industry Association of America, said that “the video recorder is as dangerous for American movie producers as the Boston Strangler is for a helpless woman alone at home”.

Since its beginnings, the entertainment business has feared almost every new technology. In 1906, the gramophone would kill musicians. In 1972, the photocopier was supposed to annihilate books. The audiotape and CD burning would totally wipe out musical creation. The video recorder had been created in order to kill the cinema industry. Floppies would destroy software. Today, the Internet is the new bogeyman.

However, musicians keep performing on stage, movie theatres remain full, the traditional book is still successful, music distributed through physical and digital channels continues to generate huge profits and video games are sold more than ever.

This leaflet aims to quickly show why the bill proposed by Mr. Clarinval will do nothing for cultural creation and could even be counterproductive. File sharing supporters do not match the simplistic “digital pirates” stereotype that entertainment industries depict every day. Some of them are even among the best proponents of cultural creation... and are often creators and artists themselves!

"Today we are WITNESSING a GIGANTIC THEFT WHICH IS GENERALIZED AND ORGANIZED"

The comparison of file sharing to theft is still prevalent, and for good reason: This shift in meaning is semantic and very comfortable for the industry since it can portray itself as the victim of Net users' actions. But let us have a look at the definition of the word "theft" according to the Penal Code:

"The felonious taking and removing of personal property with intent to deprive the rightful owner of it"

This term includes thus the notion of taking away the enjoyment depriving someone of the enjoyment of property. However, file sharing does not remove disks from the shelves, does not prevent the screening of a film and does not stop the right holder to enjoy his or her work in any way.

And still, all studies carried out by the entertainment industry to allege that the financial losses are due to file sharing on the Internet are based on this principle. The universally applied methodology for these studies is indeed the following:

1 illegally shared album = 1 lost sale

We will go straight to the point: This statement is false on two counts.

Firstly, nothing guarantees that a person would have bought an album if he or she had not found it on the Internet. Likewise, nothing proves that someone who downloads a film would not have been to the screening or have bought the DVD, and that a person who downloads a video game would have probably abstained from playing it.

Secondly, many of those who share files on the Internet are also the greatest consumers of cultural goods in the legal arena¹. Very often, Internet users download files in order to discover an artist, an album, a movie or a game and if they appreciate it, they buy it in order to support the creator.

"[...] AND PLEASE DON'T COMPARE SHARING TO STEALING - I'VE NOT TOOK ANYTHING OFF YOU, I'M JUST SPREADING LOVE FOR WHAT YOU DO."

Dan BULL - Dear LILY (an open letter to LILY ALLEN)²

1. <http://independent.co.uk/news/uk/crime/illegal-downloaders-spend-the-most-on-music-says-poll-1812776.html>
2. <http://youtube.com/v/HL9-esIM2CY>

“BUYING a CD or a DVD seems ABSURD WHEN THE INTERNET OFFERS THE SAME CONTENT WITHOUT ANY CHARGE”

As we have observed above, the biggest file sharers are also the biggest consumers. This proves that this claim is incorrect. It is false to think that those who engage in file sharing only do so because of the free availability. There exist a multitude of motivations and the desire to discover something new before buying it is a major reason. The times have changed and the consumption practices of cultural goods have evolved. Rather than switching on the radio in order to discover something new, Internet users choose what to discover and then make the decision on whether to purchase the cultural content.

This claim shows a total lack of comprehension of emerging practices. Let's take for example open source software that is made available free of charge most of the time: These projects have costs that are often covered by donations from the community.

Many projects operate in this way. For example, this kind of funding allows the collaborative encyclopedia Wikipedia to thrive. During its fund raising campaign in November 2010, the website collected 16 million dollars donated by 500,000 people¹.

Other financing schemes exist, such as Flattr. Flattr is a micro-payment system launched by Peter Sunde, co-founder of The Pirate Bay². The system allows Internet users to donate money to people for content they appreciate with a minimum of 2 € on their account per month. Internet users only need to click on the Flattr button on the websites in order to support them. Even if this minimum investment seems to be derisory, the accumulation of these micro-payments can lead to a good level of remuneration.



Peter Sunde, co-founder of The Pirate Bay and Flattr (photo by NextConf - CC BY)

Internet users are not, as claimed in the introduction of the draft law, looters and proponents of a “all free of charge” philosophy. Most of them are willing to pay for the content they appreciate³. It is up to the payment options and the forms of distribution to evolve in order to adapt to modern traditions, and not the other way around.

1. <http://silicon.fr/wikipedia-recoit-16-millions-de-dollars-de-500-000-personnes-43557.html>

2. <http://news.bbc.co.uk/2/hi/technology/8512263.stm>

3. <http://rsr.ch/info/les-titres/science-technologie/2850046-internautes-pret-a-payer-pour-des-contenus-en-ligne.html>

“ACCORDING TO A RECENT REPORT BY THE INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI)...”

We are dealing with one of the most serious failings of the draft law that betrays intellectual rigour. Throughout the introduction, the only figures mentioned by the authors of the draft come directly from the entertainment industry itself. We have the right to expect a little more diversity. This is not the case.

The Members of Parliament that signed the draft based their decisions on the figures provided by those who have an interest in obtaining an enactment into law. However, there are many independent studies¹ commissioned by governments or public interest organizations. What is more, the above mentioned figures provided by industry have been questioned by the GAO² (Government Accountability Office) which could not be accused of being in favour of file sharing by default.

It is understandable that industry tries to maintain a business model which is the most profitable at any cost. Even if this means distorting reality, interpreting facts in a biased way and shamelessly defending falsehoods³. It is not easy to understand why the MPs who are representatives of the people fall victim to such simple reasoning.

The draft law does not take into account any divergent voices. However serious they might be. Even worse! It offers no improvement of the situation of artists it claims to defend. They are instrumentalised by industry although internationally reputed⁴ and lesser known⁵ artists question the current system as well as the proposals such as a “graduated response”⁶!

We simply ask that all the information available is taken into account. This is a request for behaviour that should naturally be expected from our representatives. In addition to the interests of the major companies which represent the interests of the artists, the views of civil society and culture must be taken into consideration during the legislative process. Biased data will not result in a fair and equitable law.

1. <http://numerama.com/magazine/11765-les-effets-economiques-et-culturels-du-p2p-sont-extremement-positifs.html> or <http://rieti.go.jp/en/publications/summary/11010021.html> for instance

2. <http://nurpa.be/actualites/2010/04/le-GAO-affirme-que-les-chiffres-du-piratage-sont-contrefaits.html>

3. <http://fr.readwriteweb.com/2008/11/18/a-la-une-rapport-hadopi/>

4. <http://featuredartistscoalition.com/>

5. <http://poptronics.fr/Telechargez-moi-86-artistes-contre>

6. <http://liberation.fr/culture/0101560675-lettre-ouverte-aux-spectateurs-citoyens>

"The French example shows that..."

Adopted on 12 June 2009, the French Creation and Internet law (or HADOPI law) is one of the first European initiatives designed to curb file sharing on the Internet. The present Belgian legislative proposal bears similarities to its "big brother". Among those similar characteristics is the fact that the law was written only on the basis of using figures from the industry alone (disastrous according to its own record even though it is not really a great danger¹), the introduction of a "graduated response" and the lack of a framework to improve the situation of artists.

Many elements in the French law and the Belgian draft law are debatable: the possibility of double penalties², reversing the burden of proof³, the liability for the acts of another person⁴, the identification via the IP address (unreliable data⁵), possible circumvention⁶, ... It can be pointed out that the French model has an enormous impact of such an apparatus on the public finances and not only on the taxpayer ⁷but also the Internet Service Providers⁸.

The text tabled by Mr. Clarinval and co-signatories is a cut-and-paste of the proposal by Mr Monfils and is therefore based on 2-year-old data. Since then, the HADOPI machinery has been set in motion. But what are the results that can be noted?

Firstly, there is indeed a decrease in files shared via peer-to-peer networks, but there is also an increase in the consumption of cultural goods outside the official circuit. The practices have changed as Internet users turn to alternatives such as streaming or direct downloads. Not only is this leading to a system of pure consumption while abandoning a sharing mechanism, but more importantly, many players in these new markets provide offers against payment. The non-profit file sharing culture has taken on the characteristics of a genuine black market⁹.

If we then analyse the figures of the income received by legal downloads it becomes clear that they did not benefit from the law at all. The figures show that they are on the increase but follow the curve of the years before - which is normal for a developing technological solution¹⁰. The educational content of the law, which is used to sell it to those who are reluctant, is underdeveloped. The process of labelling the legal offer has not advanced and the only action carried out was a distribution of leaflets at road tolls and shopping facilities in the area of Bordeaux¹¹.

Despite an annual budget of 12 million Euros, not counting the investments required by law and those being borne by the ISPs, the result is zero and even counter-productive. The French example testifies to that: the "graduated response" is a system doomed to failure.

1. <http://pcinpact.com/media/ufc-parlement-081210.pdf>

2. Two actions, one civil and one criminal, could be pursued simultaneously and each one leads to a conviction.

3. <http://pcinpact.com/actu/news/49176-presomption-culpabilite-responsabilite-hadopi-albanel.htm>

4. Indeed, only the Internet access holder should be worried, no matter who is the person that actually used his Internet access to share files.

5. http://lemonde.fr/technologies/article/2010/05/03/usurpation-d-identite-telechargement-la-fiabilite-de-l-adresse-ip-mise-en-cause_1345814_651865.html

6. <http://pcinpact.com/actu/news/49616-hadopi-wifi-ufc-huissier-constat.htm>

7. <http://linformaticien.com/actualites/id/9092/budget-hadopi-12-millions-en-2011-pour-civiliser-internet.aspx>

8. http://lemonde.fr/technologies/article/2009/03/10/hadopi-des-mesures-couteuses-pour-les-fai_1165686_651865.html

9. <http://marsouin.org/spip.php?article345>

10. <http://pcinpact.com/media/comment-valuer-l-effet-d-hadopi---note-ufc.pdf>

11. <http://pcinpact.com/actu/news/61629-hadopi-tract-bordeaux-salle-arcade.htm>

FURTHER ELEMENTS FOR REFLECTION ...

"This is all about blocking the so-called "broadband" which makes downloads extremely difficult and discourages the guilty subscriber intending to use this technique. However, this limitation leaves other uses of the Internet intact."

This claim highlights the unfamiliarity of the authors with technology. The Internet is not limited to the web or emails. A great number of perfectly legal applications require broadband connections.

For instance, what of the users of online games or web professionals, not to mention users of legal download platforms that are far from being incompatible with file-sharing! We are not even talking about the discomfort of a narrowband connection. We invite the promoters of this draft to subscribe to a 56kbps connection in order to find out that the technology has evolved to a point that makes this kind of use painful.

An entire family, an independent professional or a company can be penalized for the actions of a single individual at a time when the use of the Internet is becoming more and more indispensable for the search of job opportunities, administrative processes and school enrolments. Contrary to what the draft pretends, it will lead to a widening of the digital divide.

"The conditions and limits of exchanges thus should form the object of negotiations between the collecting societies and the Internet service providers."

These kinds of negotiations are taking place outside of all democratic control and are already happening on a European level. This creates an unacceptable threat to freedom and net neutrality. We are aware that those negotiations are inevitable but it is essential that they are taking place in a democratic framework and respect citizens' rights, including net users' rights.

"The global license truly contributes to expropriate creators of their work"

Any consideration for or against the global license put aside, this statement is simply wrong. In addition to the actual sales and the public use of the work, copyright continues to prevail due to a distribution model within the framework of the law similar to private copying, while the public use of the work is still subject to the author's moral right and royalties.

This short overview cannot, obviously, provide a complete list of the reasons why the NURPA collective fight M. Clarival and his co-signatories' draft law. Since 2010 and the time of the draft of M. Monfils, the arguments remain the same. These arguments grew in legitimacy as we witnessed the French counterpart's failure unfold.

Despite what the promoters of this draft law are describing, we are not "pirates"! We are lovers of art and culture, and like many authors we think that it should be approached differently, it is more than just a commodity. Instead of a rushed legislation which is far from solving the problem and threatens to worsen the situation, we wish for a concertation process that isn't restricted to representatives of industry and large entertainment enterprises.

This process should include them, of course, but their voices should not be louder than those of the authors, whether under contract to the industry or independent, and of course of citizens surfing the Internet. The Internet is a formidable breeding ground for innovation and promotion -for authors- as well as for a great number of enterprises and individuals. Trying to "civilize" the Internet or curb its sharing possibilities is in no way a solution to the existential problems of a stagnating industry.

We think it is possible to get together and to come to a solution, instead of a futile attempt to counter technological advances made possible by the Internet.

What we ask for, is to face the future and enjoy its possibilities without anyone being left behind. This is why a dialogue would be the only valid solution.

Don't hesitate to contact NURPA via our website (<http://nurpa.be>), on Twitter (@NURPAbe), by e-mail (contact@nurpa.be) or by phone (+32 4 87 69 69 22).



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