



The compatibility of a Graduated Response System at EU level with the fundamental human rights to privacy, data protection and freedom of expression

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List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
CIL	Copyright Infringement List
CIR	Copyright Infringement Report
CJEU	Court of Justice of the European Union
CNIL	The French Commission for Information and Liberties (Commission Nationale de l'Informatique et des Libertés)
CPD	The HADOPI Authority's Committee of Copyright Protection ("Commission de Protection des Droits")
DADVSI Law	The French implementation of the EU Copyright Directive (Loi n° 2006-961 relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information)
DEA	The UK Digital Economy Act 2010
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EP	European Parliament
EU Charter	Charter of the fundamental rights of the European Union
EU Telecoms Package	The review of the EU Electronic Communications Regulatory Framework
HADOPI Authority	The French "High Authority for the Distribution of Works and Protection of Rights on the Internet" (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur l'Internet)
HADOPI I Law	The 1 st French "Creation and the Internet" Law (Loi n° 2009-669, favorisant la diffusion et la protection de la création sur l'Internet)
HADOPI II Law	The 2 nd French "Creation and the Internet" Law, for the criminal protection of Intellectual Property on the Internet (Loi n° 2009-1311 relative à la protection pénale de la propriété littéraire et artistique sur l'Internet)
IP address	Internet Protocol address

IP rights	Intellectual Property Rights
IPRE Directive	Intellectual Property Rights Enforcement Directive
ISPs	Internet Service Providers
ITRE Committee	Committee of Industry, Trade, Research and Energy
OFCOM	The UK Office of Communications
P2P	Peer-to-Peer

Chapter 1: Introduction

1.1 Background

Intellectual property rights have been protecting the interests of creators since the 19th century, by giving them property rights over their works. Copyright, in particular, grants to the creator of an expressed and original work exclusive rights in order to prevent the unauthorized copying and distribution of the work. From the Gutenberg printing press to the various information spread inventions, the reproduction of works created this need for copyright protection.

Through the years, the ever more increasing technological development and the Internet explosion has rendered the access to and the distribution of copyright-protected works easier, rapid and more inexpensive than ever. In the era of the digital revolution, anyone can have access to an unlimited amount of information: music, movies, books, software, games etc. P2P networks are considered to be the new menace and an issue of great importance for the copyright holders, as illegal downloading and file sharing through these platforms is one of the most widespread ways of online copyright infringement.¹ Furthermore, through the wide dissemination of information and works a new philosophical trend has emerged: *copyism* is a philosophy that promotes the free sharing and copying of information. According to this new doctrine, all knowledge is considered to equally belong to everyone and intellectual property rights - its main and absolute opponent - only restrict the free flow of ideas.²

Under these new circumstances, it has appeared that copyright is hard to be enforced and the traditional laws have been proven ineffective and powerless to combat the new threat of online piracy.³ Illegal downloading through P2P networks has launched heated debates all over the world and has prompted policy makers and copyright holders to rethink copyright

¹ P2P networks have offered an ideal field for the flourishing of illegal file-sharing because of their architecture: after an end-user has downloaded and installed the P2P software, he has the ability to share files in a decentralized manner, directly from other end-users' computers, instead of downloading them from a centralized server. [Danielle Serbin, "The Graduated Response: Digital Guillotine or a Reasonable Plan for Combating Online Piracy?" (2012), 3(3) *Intellectual Property Brief*, p.43

² See "Copyism – the free sharing of ideas and data": <http://www.copyism.org/home>

³ Thierry Rayna and Laura Barbier "Fighting consumer piracy with graduated response: an evaluation of the French and British implementations" (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p. 296-298

protection in cyberspace and seek for new, alternative ways of copyright enforcement in order to find a solution that would decrease or eliminate online copyright infringement.

One of the proposed alternative copyright enforcement measures was the “Graduated Response” system (also known as “three strikes”).⁴ This system promotes the monitoring of the use of the Internet connection. In case copyright infringement is detected and the alleged infringer avoids complying with the warnings that are being sent to him, Internet Service providers can suspend his Internet account. The introduction of ISPs’ responsibility for dealing with copyright enforcement and imposing sanctions directly onto their customers was innovative, as it could by-pass the courts. This new regime was supposed to facilitate online copyright enforcement by disciplining the Internet users who do not behave properly online.⁵

France (Creation and Internet Law 2009) and the UK (Digital Economy Act 2010) were the first EU member states that implemented the Graduated Response system, in quite different ways.

1.2 Problem Description

Despite its innovative and promising character, the Graduated Response system has raised serious concerns regarding its content and has caused a considerable amount of objections and protests against it because of its rather intrusive and strict character. One of the raised issues is the relation between copyright enforcement and the fundamental rights of the Internet users (and alleged infringers). The compatibility of the Graduated Response system with the fundamental rights to privacy, data protection and freedom of expression of the Internet users is seriously contested. Furthermore, the fact that the Internet access suspension is imposed without the guarantees of a judicial authority interferes with the natural freedom of the Internet and the human right of Internet access, if we can qualify it as such. The sanction of the suspension of the Internet connection is also considered to be disproportionate to the aim pursued (the combat of digital piracy).

⁴ Peter K. Yu, “The graduated response” (2010), Drake University Law School Research Paper No. 11-19, 62 *Florida Law Review*, p.1379

⁵ *Ibid*

Should copyright prevail over the above human rights and freedoms? The need to balance the rights of copyright holders and the rights of the Internet users is more than evident. Respecting the principle of proportionality seems to be the key in weighing these conflicting interests. Recital 31 of Directive 2001/29/EC also stresses out that a fair balance between copyright holders and users must be preserved in electronic environments.

For the time being, there is not a unified Graduated Response regime at EU level. However, taking into consideration the failed amendment 138 of the EC Telecoms Package, ACTA and the ongoing review of the Intellectual Property Rights Enforcement Directive, we can conclude that the discussion is still kept alive among the European politicians and such a possibility can come to the forefront. In the present thesis, the Graduated Response system will be posed at an EU level by examining whether it could coexist with the fundamental rights to privacy, data protection and freedom of expression and whether it constitutes a viable solution against online copyright infringement by illegal P2P file sharing.

1.3 Research Question

Having delineated the problem, the central research question is formulated as following:

To what extent would the adoption of a Graduated Response system at EU level as a measure against illegal P2P file sharing be in accordance with the fundamental rights of privacy, data protection and freedom of expression?

In order to answer the central research question, some relevant sub-questions need to be addressed:

- (1) What is the Graduated Response system as a copyright enforcement measure against illegal P2P file sharing?
- (2) What are the similarities and differences between the UK and French approach of the Graduated Response system as a copyright enforcement measure against illegal P2P file sharing?
- (3) What is the effect of these two “Graduated Response” approaches on the fundamental rights of privacy, data protection and freedom of expression?

- (4) Are the Graduated Response measures balanced and in accordance with the principle of proportionality and how are they evaluated as a copyright enforcement measure against illegal P2P file sharing?
- (5) What were the provisions of the failed Amendment 138 of the EC Telecoms Package and ACTA's Digital Chapter? What are the new measures proposed under the review of the Enforcement Directive?
- (6) Is there a trend in the EU that leads towards the adoption of a Graduated Response system and if so would it be a balanced measure between copyright enforcement and the fundamental rights of privacy data protection and freedom of expression?

1.4 Significance

The significance of the present work is expressed by its aim: to shed lights on the issue of the conformity of the Graduated Response system to the fundamental rights of privacy, data protection and freedom of expression at EU level. In this regard, the thesis deals with one of the most crucial issues of copyright enforcement: the need to strike a balance between the rights of copyright holders and the rights of Internet users and how we can achieve such balance.

Furthermore, an extended comparison of the Graduated Response systems in the UK and France is provided, which supports not only the clarification and explanation of the above issues, but also the evaluation of the measures introduced against illegal P2P file sharing.

This research is also of value and relevance as it provides a new foresight of the evolution of the Graduated Response system: it examines whether there is a tendency of adopting such a measure at EU level, by taking into consideration some attempts that have already been made in the EU.

1.5 Methodology

The present thesis adopts a doctrinal research methodology. In order to answer the central question, this research is based on six "benchmarks": the above mentioned sub-questions, which will be illustrated and explained in chapters 2 to 4. Providing an answer to each one of them will gradually lead us to the answer of the central question.

Describing what the Graduated Response system is will be the starting point. Thereafter, following a comparative analysis, the UK and French Graduated Response regimes will be analyzed. These two countries are the first EU member states that implemented the “three strikes” system, in a quite different and controversial way. A comparison between these two different legislations facilitates a deeper understanding of this system and its variations.

The central problem of the copyright enforcement conflict with the fundamental rights to privacy, data protection and freedom of expression that the Graduated Response system carries will be approached by a descriptive and explanatory method. To this end and in order to enlighten the balance issue that occurs, the proportionality principle test is applied in every step of the Graduated Response system. The European Court of Justice has attributed great importance to this balancing issue and has stressed out that a “fair balance” must be struck and that any interpretations made when implementing copyright enforcement measures must not contradict to the “principle of proportionality”.⁶

The findings and outcomes of the above analysis, along with the examination of the provisions of the failed Amendment 138 of the EC Telecoms Package, ACTA’s Digital Chapter, and the measures proposed under the review of the IP Rights Enforcement Directive will provide insight in order to make an assessment on whether there is a tendency of adopting a Graduated Response system at EU level and whether this would be in compliance with the fundamental rights of privacy, data protection and freedom of expression.

In general, the method used in order to answer the main research question and sub-questions consists of a desk study analysis of both primary and secondary sources. The evaluated primary sources include the European Convention of Human Rights, the Charter of Fundamental Rights of the European Union, the UK Digital Economy Act 2010, the French Creation and Internet Law 2009 (“Loi favorisant la diffusion et la protection de la création sur Internet”), the EC Telecoms Package, ACTA and case law of the European Court of Justice. Secondary sources, such as legal scholar books, legal journals, legal research papers and websites relevant to the thesis topic were also used and interpreted.

⁶ Case C-275/06: *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, (2008); Case C-557/07: *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH* [2009]; Case C-70/10: *Scarlet Extended SA v. SABAM* [2011]; Case C-360/10 *SABAM v. Netlog* [2012]

1.6 Thesis Structure

The current introductory chapter describes the problem on which the present thesis is based, along with its relevant background and central research question and sub-questions that will be answered. An overview of the methodology used and the thesis structure follows.

The second chapter firstly explains what the Graduated Response System is, as a copyright enforcement measure against illegal P2P file sharing. Secondly, an overview of the Graduated Response regimes that are applicable in UK and France will be provided, by analyzing the relevant provisions of the “UK Digital Economy Act 2010” and the French “Creation and Internet Law 2009”. Finally, a comparison of the Graduated Response implementations in UK and France follows. As stated in the previous section, the comparison will highlight the variations among these two different regimes and, as a result, the various and different impacts on the fundamental rights of privacy, data protection and freedom of expression.

In the third chapter the significance of the fundamental human rights of privacy, data protection and freedom of expression is addressed and the effect of the UK and French Graduated Response approaches on them. As they constitute fundamental rights of the internet users, another important issue that will be analyzed is whether these two approaches manage to balance the rights of the copyright holders on the one hand and the rights of the Internet users on the other hand. For this purpose, the proportionality test is applied, enshrined with an evaluation of the French and UK Graduated Response regimes.

The fourth chapter discusses whether there is a tendency in the EU that leads toward the adoption of a Graduated Response system at a European level and if so, whether the implementation of a three strikes policy at EU level would be compatible with the fundamental human rights to privacy, data protection and freedom of expression.

Finally, the fifth chapter will present the conclusions, summarize the key findings and answer to what extent the adoption of a Graduated Response system at EU level as a measure against illegal P2P file sharing would be in accordance with the fundamental rights to privacy, data protection and freedom of expression.

Chapter 2: The Graduated Response system in France and the UK

This Chapter first describes and explains the Graduated Response system in general, as a copyright enforcement mechanism against online copyright infringement. Secondly, it analyses and illustrates the Graduated Response system implementation in France and the UK. Finally, the Chapter concludes with a comparison of the French and British regimes, stressing their similarities and differences.

2.1 The Graduated Response System

In an attempt to restrict and control online copyright infringement more effectively, mostly conducted through illegal P2P file sharing, copyright owners realized that the most workable regime should include the assistance of Internet Service Providers (“ISPs”).⁷ They appeared to be the ideal copyright “trustees”, in order to enforce copyright and impose sanctions on their infringing users.⁸

The Graduated Response system is an “alternative copyright enforcement mechanism”⁹ for the protection of the interests of copyright holders, which applies in order to combat internet piracy resulting especially from illegal P2P file sharing. The innovation that this mechanism introduces is based on a type of “obligatory co-operation-alliance” with the ISPs and includes warning notices being sent to the alleged online copyright infringers by the ISPs, after recognizing their involvement in infringing activities through ISPs monitoring, as a warning in order to stop their illegal activity.¹⁰ If they do not abide by the notices, stringent

⁷ Evi Werkers, “Intermediaries in the eye of the copyright storm – A comparative analysis of the Three Strike approach within the European Union” (2011), *ICRI Working Paper No. 4/2011*, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920271, p.3

⁸ Nicolas Suzor and Brian Fitzgerald, “The legitimacy of Graduated Response schemes in copyright law” (2011), 34(1) *U.N.S.W.L.J.*, p.1; Annemarie Bridy, “Graduated Response and the turn to private ordering in online copyright enforcement” (2010), 89 *Or. L. Rev.*, p.81

⁹ Alain Strowel, “Internet piracy as a wake-up call for the copyright law makers – Is the Graduated Response a good reply?” (2009), 1(1) *The WIPO Journal*, p.77

¹⁰ The Graduated Response mechanisms are also known as “three strikes”, because of the fact that the ultimate sanction (most commonly disconnection of the Internet account) takes place usually after three warning notices being sent to the alleged infringers and ignored by them. According to Peter K. Yu, however, the term “Graduated Response” is considered more “accurate”: “Compared to “three strikes,” the term “graduated response” reflects better the fact that ISPs can take action before a user has been “struck” three times. It also recognizes the wide flexibility ISPs have in determining the appropriate sanctions based on the

measures can be imposed, including, among others,¹¹ the suspension or termination of their Internet connection.¹²

The *rationale* behind the ISPs incorporation in the Graduated Response schemes lies on three categories of arguments: 1) their technical contribution to the Graduated Response procedure, 2) the financial interests of the rights holders and 3) the social responsibility of the ISPs.

Firstly, the role of the ISPs in this procedure is crucial and decisive, as identification of the individuals that illegally download copyrighted material is required in order to take legal actions against them. The Internet traffic generated by Internet users is monitored and, when infringing activities are located, alleged infringers can only be identified by the Internet Protocol ("IP") address having been allocated to their computers by the ISPs, in order to have Internet access. An IP address can be used as an identification tool because it is a sequence of numbers that characterizes the virtual location of a particular computer.¹³ Because of the fact that the allocated IP addresses are usually dynamic and changeable, without the involvement of the ISPs it would be impossible to connect a specific IP address to the computer that it has been allocated by them and, consequently, to the Internet subscriber behind it. Only the ISPs have the necessary technical means to make this connection between IP addresses and alleged infringers and, therefore, proceed with the Internet access termination of the repeat offenders that denied abstaining from downloading.¹⁴

Secondly, apart from the above technical contribution, the reasoning behind the assignment of a special role to the ISPs can also be found in a financial argument: the involvement of ISPs constitutes a more affordable way of copyright enforcement for the copyright

number and type of warnings given to users and the severity of their potentially infringing activities." [Peter K. Yu, "The graduated response" (2010), Drake University Law School Research Paper No. 11-19, 62 *Florida Law Review*, p.1379]

¹¹ Other actions that ISPs can take include capping of bandwidth and blocking of sites, portals and protocols.

¹² Alain Strowel, "Internet piracy as a wake-up call for the copyright law makers – Is the Graduated Response a good reply?" (2009), 1(1) *The WIPO Journal*, p.77

¹³ Wan Man Jason Fung and Avnita Lakhani, "Combatting peer-to-peer file sharing of copyrighted material via anti-piracy laws: issues, trends and solutions" (2013), 29(4) *Computer Law and Security Review*, p.385

¹⁴ Jacqueline Klosek and Tamar Gubins, "United States: Combatting piracy and protecting privacy: a European perspective" (2008), available at: <http://www.mondaq.com/unitedstates/x/67534/IT+Internet/Combating+Piracy+And+Protecting+Privacy+A+E+European+Perspective>

holders.¹⁵ For years, the copyright holders have been striving on copyright litigation procedures against P2P software providers, individual file-sharers and ISPs, in order to enforce their copyrights.¹⁶ The fact that the Graduated Response systems offers an immediate ultimate sanction imposed by the ISPs is practically translated into less litigation costs for the copyright holders.¹⁷

Thirdly, the involvement of the ISPs in the Graduated Response schemes is in compliance with their social responsibility. The IFPI has characterized them as the “gatekeepers of the Web”,¹⁸ being liable for the illegal content transmitted through their networks. ISPs, therefore, must constitute part of the copyright enforcement procedures, otherwise it can be alleged that they support these copyright infringing activities, as being profitable for them.¹⁹

The Graduated Response mechanism can be implemented either through direct legislation and public laws that impose responsibilities on ISPs to police their users’ infringements (e.g. France, New Zealand, Taiwan, South Korea and the UK) or through less formal schemes, such as private agreements (contracts) between copyright holders and ISPs (e.g. Ireland, USA), based on “*secondary liability of the latter, that do not include public oversight or appeal mechanisms*”.²⁰ It is generally accepted that the more formal schemes of Graduated Response implementation “*include greater safeguards for due process than do privately negotiated contractual arrangements*”.²¹

Both the French and UK Graduated Response regimes examined in the present thesis constitute formal legislative schemes. The Irish regime, which is the third Graduated

¹⁵ Charn Wing Wan, “Three strikes law: a least cost solution to rampant online piracy” (2010), 5(4) *Journal of Intellectual Property Law and Practice*, p.239

¹⁶ Peter K. Yu, “The graduated response” (2010), Drake University Law School Research Paper No. 11-19, 62 *Florida Law Review*, p.1381-83

¹⁷ *Ibid*; Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.306

¹⁸ IFPI:07 Digital Music Report, International Federation of the Phonographic Industry (2007), available at: <http://www.ifpi.org/content/library/digital-music-report-2007.pdf>, p.3; Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.1-2

¹⁹ Nicolas Suzor and Brian Fitzgerald, “The legitimacy of graduated response schemes in copyright law” (2011), 34(1) *U.N.S.W.L.J.*, p. 3

²⁰ *Ibid*, p. 3-5; Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.2; Eldar Haber, “The French Revolution 2.0: Copyright and the Three Strikes Policy” (2011), 2(2) *Harvard Journal of Sports and Entertainment Law*, p.297

²¹ Nicolas Suzor and Brian Fitzgerald, “The legitimacy of graduated response schemes in copyright law” (2011), 34(1) *U.N.S.W.L.J.*, p.4-5

Response regime in the EU and includes private arrangements between copyright holders and ISPs, is not examined. The reasoning behind this exclusion is two-fold. The first reason is the fact that the Graduated Response implementation in France and the UK through legislation integrates these two regimes into the same “genus”, rendering therefore a comparison between them more appropriate. The second reason relates to the central research question. The examined Graduated Response tendencies at EU level lead towards a harmonization across the EU Member States that can only be accomplished through the enactment of EU legislation. Hence, the choice of France and the UK was considered more connected to the purpose of this thesis.

2.2 The French approach: the HADOPI Law

2.2.1 Origin and Background of the HADOPI regime

France was the first European Member State that passed legislation introducing a graduated response mechanism in order to deter online copyright infringement. The first law was adopted in May 2009 and provided for a public authority that would supervise and administer the warning and sanctions mechanism, named HADOPI (High Authority for the Distribution of Works and Protection of Rights on the Internet).^{22,23} This law (HADOPI I Law)²⁴, however, was rejected by the French Constitutional Council’s decision of 12 June 2009. According to the Council, the exclusive power to enforce sanctions such as the termination of Internet access is only attributed to a judge, not to an administrative body like HADOPI.²⁵ After the revision that followed, the HADOPI I Law only legislates the warning and notification part of the French Graduated Response mechanism.²⁶

²² Trisha Meyer, “Graduated Response in France: The clash of copyright and the Internet” (2012), 2 *Journal of Information Policy*, p.114

²³ The acronym “HADOPI” derives from the original French name “Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur l’Internet”. The term is used for both the laws and the public authority.

²⁴ French National Assembly and Senate, LOI n° 2009-669 du 12 Juin 2009, favorisant la diffusion et la protection de la création sur l’Internet.

²⁵ Alexis Koster, “Fighting Internet Piracy: the French experience with the HADOPI Law” (2012), 16(4) *International Journal of Management and Information Systems*, p.328

The French Constitutional Council’s decision is further referred to the next Chapter, as it contributes in the discussion regarding the right to freedom of expression.

²⁶ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p. 148

The imposition of sanctions became the object of a second law (HADOPI II Law)²⁷, relating to the criminal protection of copyright on the Internet, adopted in September 2009 and validated by the French Constitutional Council in October 2009. The HADOPI II Law provides for an expeditious and plain criminal procedure for the repeat copyright infringers on the Internet. The imposition of sanctions, including fines, imprisonment and Internet disconnection, are exclusively done by a criminal judge.²⁸

The introduction of a Graduated Response mechanism in the French legal system had been proclaimed by three “omens”: the CNIL decision, the DADVSI Law and the Oliiviennes agreement.²⁹ The CNIL³⁰ decision, in 2005, rejected the copyright holders’ request for permission in order to monitor P2P networks and identify copyright infringing activities. This decision, however, was negated in 2007 by the French Council of the State.³¹ In 2006, the French implementation of the Copyright Directive of the European Union (DADVSI Law)³² imposed the obligation on ISPs to surveil their networks’ traffic in order to detect copyright infringing activities. Finally, in 2007, under the patronage of the French government, an agreement (Oliiviennes Agreement)³³ was signed between some French ISPs and Record Industry representatives in order to combat illegal file sharing, which included many obligations and characteristics of the Graduated Response mechanism, and was implemented through the HADOPI I and HADOPI II Laws.³⁴

²⁷ French National Assembly and Senate, LOI n° 2009-1311 du 28 Octobre 2009, relative à la protection pénale de la propriété littéraire et artistique sur l’Internet

²⁸ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.148-149

²⁹ Trisha Meyer, “Graduated Response in France: The clash of copyright and the Internet” (2012), 2 *Journal of Information Policy*, p.115

³⁰ The French Commission for Information and Liberties (Commission Nationale de l’Informatique et des Libertés)

³¹ Commission Nationale de l’Informatique et des Libertés, “Surveillance des Réseaux ‘Peer to Peer’: La CNIL Prend Acte de la Décision du Conseil d’Etat” (2007).

³² French National Assembly and Senate, LOI n° 2006-961 du 1 Août 2006 relative au Droit d’Auteur et aux Droits Voisins dans la Société de l’Information

³³ Denis Oliivennes, “Accord pour le Développement et la Protection des Oeuvres et Programmes Culturels sur les Nouveaux Réseaux,” Discours et communiqués, Nov. 23, 2007. The agreement was supervised under the Oliiviennes Commission, named after its chairman Dennis Oliivennes, also President-Director General of FNAC, the largest French retailer of cultural and consumer electronics products. [David J. Brennan, “Quelling P2P infringement – Private American harbours or public French graduations?” (2012), 62(4) *Telecommunications Journal of Australia*, p.55.7]

³⁴ Trisha Meyer, “Graduated Response in France: The clash of copyright and the Internet” (2012), 2 *Journal of Information Policy*, p.114-115; Thierry Rayna and Laura Barbier, “Fighting consumer piracy with graduated response: an evaluation of the French and British implementations” (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p.299-300

The HADOPI Authority's mission is designated by three main objectives: firstly, to promote copyright enforcement on the Internet against the online infringers; secondly, to use the graduated response system as a "pedagogical and educational tool" in order to inform the Internet users about copyright law and illicit activities that take place online and violate it; thirdly, to promote the legal offers of copyrighted works on the Internet as an alternative to Piracy.^{35,36}

The application of the Graduated Response system is promoted by the Committee of Copyright Protection (CPD), a committee within the HADOPI Authority that consists of three judges.³⁷ Since under HADOPI II the Authority does not have the legal right to suspend the Internet connection of alleged infringers anymore, in case an Internet user ignores the two warnings being sent to him and continues to infringe copyright online, the CPD may forward legal proceedings against him at a court. The court is the sole competent legal authority to order the termination of the violator's Internet connection and impose a fine on him.³⁸

2.2.2. Overview of HADOPI Law

The French Graduated Response mechanism, as described by the HADOPI I and II Laws, includes monitoring, warning notices and sanctions. The procedure works as follows:

2.2.2.1. Initiation of the procedure (HADOPI I Law)

Copyright holders monitor Internet traffic.³⁹ In case they locate illegal file sharing activities that constitute copyright infringement, they can notify HADOPI and provide the IP addresses

³⁵ In order to achieve the third goal and stimulate the legal supply and demand of copyrighted works on the Internet, HADOPI grants its own official label ("labellisation"). PUR, the name of the awarded label, stands for "Encouragement of Responsible Usage" (in French). [Alexis Koster, "Fighting Internet Piracy: the French experience with the HADOPI Law" (2012), 16(4) *International Journal of Management and Information Systems*, p.328]

³⁶ *Ibid*; Trisha Meyer, "Graduated Response in France: The clash of copyright and the Internet" (2012), 2 *Journal of Information Policy*, p.115

³⁷ The "Commission for Protection of Rights" ("Commission de Protection des Droits") is an independent body within HADOPI, responsible for the enforcement of the graduated response system. See *Réponse graduée*, HADOPI at <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee> and <http://www.hadopi.fr/la-haute-autorite/la-commission-de-protection-des-droits-presentation-et-missions>

³⁸ Alexis Koster, "Fighting Internet Piracy: the French experience with the HADOPI Law" (2012), 16(4) *International Journal of Management and Information Systems*, p.328

³⁹ Monitoring is performed by "sworn agents of right owners groups (and collecting societies) that have been accredited by the Ministry of Culture". [Alain Strowel, "The graduated response in France: Is it the good reply to online copyright infringements?" in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.149] Example of such a company, specialised in the detection of online copyright infringements, is the TGM (Trident Media Guard). [Thierry Rayna and Laura Barbier, "Fighting consumer piracy

of the infringer, having been obtained through the monitoring process. HADOPI examines the copyright infringement indications and copyright ownership and, if they are confirmed, identifies the individuals concerned.⁴⁰ The identification is based on this IP addresses that copyright holders provide, as HADOPI uses these IP addresses in order to request further relevant data about the infringers from the ISPs.⁴¹

2.2.2.2. Notifications (HADOPI I Law)

Once the requirements of the previous section have been fulfilled, HADOPI can then proceed with sending an educational e-mail, via ISPs, to the owners of the Internet accounts where the infringing activity was detected. This educational e-mail reminds the account holder of the obligation he has to safeguard his Internet account against copyright infringement, the threat of copyright infringement for economy, culture and creation and the legal ways in order to acquire copyrighted works.⁴² The notification does not provide any information on the copyrighted works that were violated, but indicates the date and time of the “*allegedly infringing activities*”, along with the contact details of HADOPI. This facilitates the submission of further considerations of the accused subscriber.⁴³

If, within six months from the receipt of the first notification, illegal file sharing continues to take place by the same Internet account owner, HADOPI can sent a second e-mail and/or a registered letter. This second notification contains the same information as the first one.⁴⁴

2.2.2.3. The last step: suspension of Internet access (HADOPI II Law)

If, within one year, illegal copyright infringing activities by the same Internet account holder are repeating, HADOPI proceeds to further investigation and, after it is completed, drafts a report giving opinion on whether an Internet account suspension should follow.⁴⁵

with graduated response: an evaluation of the French and British implementations” (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p.301]

⁴⁰ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.148; Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.8

⁴¹ Trisha Meyer, “Graduated Response in France: The clash of copyright and the Internet” (2012), 2 *Journal of Information Policy*, p.115

⁴² *Ibid*

⁴³ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.149; Valerie-Laure Benabou, “The Chase: the French insight into the ‘Three Strikes’ system” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.168

⁴⁴ *Ibid*.

HADOPI may, afterwards, transmit the report to the attorney-general, the competent authority to decide upon launching further criminal procedure.⁴⁶ In case criminal procedure is initiated, the judge, after estimating the significance of the copyright breach and the situation of the Internet account owner, can decide to terminate the Internet connection for a period of up to one year.^{47,48} A fine of up to 1500 euro and prison sentence can additionally be imposed. The suspension order can also deprive the subscriber of “*entering into any other Internet subscription agreement, not only with the current ISP, but also with any other ISP during the suspension period*”.⁴⁹ Sanctions can also be imposed in case the Internet account owner is not found guilty of copyright infringement but continuously omits to secure his Internet access (negligence in meeting the “duty to supervise”⁵⁰).⁵¹ In that case, suspension of Internet connection for up to one month may follow, in addition to a fine of up to 1500 euro and prison sentence. ISPs are also accountable and subject to a fine in case they choose not to cooperate.⁵²

This rapid criminal procedure introduced by HADOPI II also offers to the subscribers the right of appeal.⁵³

2.2.2.4. HADOPI III Law

In May 2013, the Lescure report^{54,55} concluded that HADOPI had not reached its goals and had not brought the desirable effects on online copyright infringement. The report, furthermore, suggested that the HADOPI Authority should be abandoned, that the

⁴⁵ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.150

⁴⁶ *Ibid*

⁴⁷ However, the subscriber is still obliged to pay the subscription fees. (*Ibid*)

⁴⁸ *Ibid*

⁴⁹ French Intellectual Property Code L 335-7-1.

⁵⁰ French Intellectual Property Code L 336-3.

⁵¹ David J. Brennan, “Quelling P2P infringement – Private American harbours or Public French graduations?” (2012), 62(4) *Telecommunications Journal of Australia*, p.55.9

⁵² Trisha Meyer, “Graduated Response in France: The clash of copyright and the Internet” (2012), 2 *Journal of Information Policy*, p.116

⁵³ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.151

⁵⁴ The “Lescure report” was a report made by Pierre Lescure, former CEO of Canal+, after request of the French president Hollande. The report’s object was “cultural policy, including the future and role of HADOPI.”

[Rebecca Giblin, “Evaluating graduated response” (2013), available at SSRN:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.9)

⁵⁵ Pierre Lescure, Mission “Acte II de l’exception culturelle” Contribution aux politiques culturelles à l’ère numérique, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION (May 2013) available at: www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescur/index.htm#/1

maximum fine for online copyright infringement should be 60 euros and that the sanction of Internet access termination should be annulled.⁵⁶

The French government rapidly responded to the recommendations of the Lescure report. The presidential decree of the 8th July 2013⁵⁷ abolishes Internet account termination as a sanction in case a subscriber, by negligence, fails to secure his Internet account, but maintains the maximum fine of 1500 euros. Additionally, the Culture Minister announced the abolishment of the HADOPI Authority and the transfer of its responsibilities.⁵⁸ As Rebecca Giblin observes, after evaluating the press comments: *“Although suspension of internet access remains a possible penalty in cases involving proven infringement (rather than failure to secure connections against infringement), it has been suggested that this is only because that particular provision could not be changed by simple decree.”*⁵⁹ So far, however, no legislative initiatives have been launched in France for the abolition of Internet disconnection as a sanction for the proven copyright infringement cases as well.

2.3 The UK approach: the Digital Economy Act 2010

2.3.1 Origin and Background of the DEA 2010 regime

The predecessor of the Graduated Response regime in the UK was *Digital Britain*, a policy document published in 2009. *Digital Britain*⁶⁰ was the outline of the UK's government strategy in order to strengthen the British position as a leading digital economy and society.⁶¹

⁵⁶ Rebecca Giblin, “Evaluating graduated response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.9

⁵⁷ Décret n° 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L. 331-21 du code de la propriété intellectuelle.

⁵⁸ Peter K. Yu, “Digital copyright enforcement measures and their human rights threats” (2013) in Christophe Geiger (ed.), *Human rights and Intellectual Property: from concepts to practice* (Edward Elgar Publishing 2014, forthcoming), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945, p.13
⁵⁹ Rebecca Giblin, “Evaluating graduated response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p. 9-10

⁶⁰ *Ibid*

⁶¹ Digital Britain Final Report (June 2009), available at: <http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>

⁶¹ Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.321-323; Thierry Rayna and Laura Barbier, “Fighting consumer piracy with graduated response: an evaluation of the French and British implementations” (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p.302

Several of the recommendations of the *Digital Britain* report were converted into legislation by the Digital Economy Bill, which was introduced in the House of Lords on 19 November 2009. Some of its most controversial provisions related to the online use of copyrighted works and facilitated copyright enforcement on the Internet. This goal was supposed to be achieved by the participation of ISPs in the battle against online copyright infringement, especially by means of P2P file sharing networks. Later, the Digital Economy Bill's provisions for online copyright enforcement became sections 3 – 18 of the Digital Economy Act 2010.⁶²

2.3.2. Overview of the Digital Economy Act 2010

The UK implementation of the Graduated Response mechanism consists of a system of “Initial” and “Technical” obligations imposed on ISPs (Sections 3-16 of the Digital Economy Act 2010)⁶³ in order to monitor their subscribers’ activities on the Internet.⁶⁴

2.3.2.1 The “Initial Obligations”

Sections 3-4 of DEA define two “Initial Obligations” of ISPs. The first one includes notifying⁶⁵ their subscribers in case ISPs receive a “copyright infringement report”⁶⁶ (CIR) from copyright holders, claiming that the Internet accounts of these subscribers *appears* having been involved in online activities that violate copyright (Section 3 DEA).⁶⁷ A subscriber may be held accountable and receive a notification⁶⁸ not only in case the infringing activity was performed by him, but also in case he seemed to allow another person to commit copyright violation. This permission may be given to another person either directly or indirectly, by

⁶² *Ibid*

⁶³ Sections 3-16 of DEA amended the Communications Act 2003 by introducing the new sections 124A-N. [Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.324]

⁶⁴ These obligations are imposed on any ISP who entirely or mainly provides Internet access services and allocates IP addresses to its subscribers. (Section 16 DEA); Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.19-20; Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.60

⁶⁵ Like HADOPI Law, the notifications being sent also have an educational character. They inform subscribers not only by promoting the importance of respecting copyright law, but also by encouraging them to lawfully acquire copyrighted works online. (Section 3 DEA)

⁶⁶ A “copyright infringement report” describes the alleged copyright infringement and provides the necessary evidence (subscriber’s IP address and time of the infringing activity). (Section 3 DEA)

⁶⁷ Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.62

⁶⁸ The notifications must be sent through postal address (Section 15 Obligations Code) and include description and evidence of the copyright infringement, along with the subscriber’s IP address at the time of the infringement. [*Ibid*, p.63]

simply failing to secure the Internet account so that no one can have access to it. The crucial parameter, however, is what *appears* to the copyright holders: the notifications receivers are the Internet account holders, despite of whether they themselves committed the infringing activities or knew about others' infringing activities. Therefore, the Internet account owner is held liable for any usage that has taken place, either with his permission or not.⁶⁹

The second "Initial Obligation" includes the maintenance of a "copyright infringement list" (CIL) of the repeatedly alleged infringers, who have been notified many times and refuse to abide by the recommendations.⁷⁰ According to Section 4 DEA, these lists "*must not enable any subscriber to be identified*".⁷¹ This record assists copyright holders, in case they request the list, in order to prosecute these subscribers (Section 4 DEA).⁷²

According to Sections 5-6 DEA, an "Initial Obligations Code"⁷³ is required, otherwise the "Initial Obligations" cannot come into effect. The "Initial Obligations Code" will further outline these obligations, in a more detailed way, and establish the implementation processes. The competent authority to supervise the implementation of the Code is OFCOM.⁷⁴ In June 2012, OFCOM indeed published the latest "Initial Obligations Code" draft.⁷⁵ Some of the provisions that can be found in its sections are the following:

⁶⁹ Anne Barron, "Graduated response à L'Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010" (2011), 3(2) *Journal of Media Law*, p.325; Michael Filby, "The Digital Economy Act: Is the DEA DOA?" (2011), 2(2) *European Journal of Law and Technology*, p.202

⁷⁰ Dinusha Mendis, "Digital Economy Act 2010: fighting a losing battle? Why the 'three-strikes' law is not the answer to copyright law's latest challenge" (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.63

⁷¹ Anne Barron, "Graduated response à L'Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010" (2011), 3(2) *Journal of Media Law*, p.324; Rebecca Giblin, "Evaluating Graduated Response" (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.22

In case a copyright holder wants the identity of the subscriber to be revealed in order to prosecute him, he has to apply to court for a "Norwich Pharmacal" order [Dinusha Mendis, "Digital Economy Act 2010: fighting a losing battle? Why the 'three strikes' law is not the answer to copyright law's latest challenge" (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.63]

⁷² Anne Barron, "Graduated response à L'Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010" (2011), 3(2) *Journal of Media Law*, p.324; Rebecca Giblin, "Evaluating Graduated Response" (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.22

⁷³ According to DEA Section 6, the Initial Obligations Code, which constitutes secondary legislation, must be approved by the UK Office of Communications (OFCOM) with the consent of the relevant Secretary of the State.

⁷⁴ Anne Barron, "Graduated response à L'Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010" (2011), 3(2) *Journal of Media Law*, p.308

⁷⁵ Dinusha Mendis, "Digital Economy Act 2010: fighting a losing battle? Why the 'three strikes' law is not the answer to copyright law's latest challenge" (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.63

- Regarding the notification process, the amount of notifications being sent to the alleged infringers is limited to three. The first notification will be sent after a copyright holder submits the first CIR concerning that subscriber. One to six months after the receipt of the first notification and in case another CIR is filed against the same subscriber, the second notification will be sent. The third notification will be sent after the filing of the first CIR against the same subscriber at least one month from the date of the second notification, unless the receipt date of this CIR is at least 12 months after the first CIR filed.⁷⁶
- Regarding the CIL, the record kept by ISPs will include subscribers that have received three notifications within 12 months. A CIL will also integrate any relevant information for the infringing activities of these subscribers, as included in the CIRs sent by the copyright holders.⁷⁷
- Regarding the subscriber appeals,⁷⁸ subscribers have the right to appeal to a body, not necessarily a judicial one, independent of ISPs, copyright holders and OFCOM. This independent body will be established by OFCOM.⁷⁹

2.3.2.2. The “Technical Obligations”

Implementing a system of notification and listing obligations on ISPs appeared to be, at least at first sight, sufficient not only to deter online copyright infringement but also to facilitate the prosecution of repeat infringers. In case, however, the “Initial Obligations” attempt fails,⁸⁰ DEA provides for the imposition of “Technical Obligations”⁸¹ on ISPs at least 12

⁷⁶ Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.328; Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.65

⁷⁷ *Ibid*

⁷⁸ A subscriber appeal, according to Section 16 DEA, is “an appeal by a subscriber on grounds specified in the Code that relates to the making of a CIR, its notification to a subscriber the inclusion of a subscriber in a CIL or any other act or omission in relation to an initial obligation or an initial obligations code”.

⁷⁹ Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.23; Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.67; Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.22

⁸⁰ According to Section 8 DEA, OFCOM must prepare progress reports about copyright infringement by subscribers of Internet access services and the effectiveness of the “Initial Obligations” regime. [Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.31]

months after the implementation of the “Initial Obligations” by the “Initial Obligations Code” (Sections 9-12 DEA).⁸² These technical measures⁸³ that ISPs should enforce against their subscribers who refuse to abide by the notifications include blocking, capping connection speeds, bandwidth-throttling, content identification, filtering and disconnection of the Internet.⁸⁴

The “Technical Obligations” regime requires a Code to be created by OFCOM in order to implement these obligations and bring them into effect (Section 11 DEA). A respective Code requirement is also present in the “Initial Obligations” regime, as it was mentioned in section 2.3.2.1. However, the main difference between the two Codes is the fact that the “Technical Obligations Code” must also provide to the subscribers the right of appeal to the First-tier Tribunal, apart from the right to appeal to the independent body established by OFCOM (Sections 12-13 DEA).⁸⁵

2.3.3 Application so far

The implementation of the Digital Economy Act 2010 has not been completed yet. The latest modified version of the draft “Initial Obligations Code” was released in June 2012 and still has not received parliamentary consent.⁸⁶ Therefore, as long as the “Initial Obligations Code” does not come into effect in order to specifically regulate them, the Initial Obligations imposed on ISPs by the Digital Economy Act 2010 have no power.

⁸¹ Section 10 DEA gives such power to the Secretary of the State.

⁸² Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.65; Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.334

⁸³ A “technical measure” is a measure that a) limits the speed or other capacity of the service provided to a subscriber; b) prevents a subscriber from using the service to gain access to particular material, or limits such use; c) suspends the service provided to a subscriber; or d) limits the service provided to a subscriber in another way (Section 9 DEA).

⁸⁴ Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.334

⁸⁵ Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.67

⁸⁶ Rebecca Giblin, “Evaluating graduated response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p. 20

It is still unclear when the “Initial Obligations Code” will come into effect. The original plan included sending the first notices in early 2011.⁸⁷ According to OFCOM’s rescheduling, however, it is expected to begin in early 2014, 3 years later than envisaged.⁸⁸

2.4 HADOPI and DEA: Identical Twins or Half Siblings?

Having delineated the “warning and sanction” provisions of the HADOPI Laws and the UK Digital Economy Act, this section compares these two regimes, although the Graduated Response system in France has been implemented to a fuller extent compared to the UK. Despite the fact that both French and British regimes belong to the “family” of the Graduated Response systems and may, at first sight, look relatively similar in some points, the analysis of the previous sections has already revealed some clues regarding their differentiation.

Applying a parallel step-by-step examination of the French and UK regimes, the following remarks can be made:

Firstly, both laws implement Internet traffic monitoring by the copyright holders in order to locate infringing activities. They further report these activities either to the HADOPI Authority (French regime) or directly to the ISPs (UK regime).

Both laws also provide for a threshold of three warning notifications being sent by the ISPs to the alleged infringers, before proceeding to further remedies. Whereas in France the actual sender of the notification is the HADOPI Authority and the ISPs are merely the means to accomplish the sending, in the UK the warning messages are sent by ISPs, as this constitutes one of the two “Initial Obligations” imposed on them by the DEA.⁸⁹ In the UK regime, therefore, ISPs are not the mere mediums for notifications sending; they are the competent bodies for carrying out this process.

Regarding the identification of subscribers, the French and UK approaches differ significantly. The HADOPI Law permits the alleged infringers to be identified as soon as

⁸⁷ Michael Filby, “The Digital Economy Act: Is the DEA DOA?” (2011), 2(2) *European Journal of Law and Technology*, p.201

⁸⁸ *Ibid*

⁸⁹ Adrienne Muir, “Online copyright enforcement by Internet Service Providers” (2013), 39(2) *Journal of Information Science*, p.260

HADOPI Authority verifies the copyright infringement implications reported by copyright holders and before sending the first notification. Upon HADOPI's request and based on the subscribers' IP addresses, ISPs reveal further subscribers' personal data to HADOPI. On the contrary, the DEA protects the subscribers' identity. The "Copyright Infringement List" being kept for repeat copyright offenders is "anonymous". In case a copyright holder wants to identify an offender in order to prosecute him, he must apply for a court order.

As far as the sanctions are concerned, which are imposed after ignoring the three warning notifications being sent to the alleged infringers, the two regimes vary in a considerable way. In France, the ultimate sanction for online copyright infringement includes suspension of Internet access after a court order. In the UK, however, at least at this point of the DEA implementation, the ultimate sanction included in the "Initial Obligations" is the inclusion of the repeatedly alleged infringer to a "Copyright Infringement List". The inclusion to a CIL may only lead to "targeted court actions" by copyright holders.⁹⁰ Internet suspension is not part of the "Initial Obligations". It is only expected at a later stage, if necessary, as "Technical Obligations" outline.⁹¹

Alleged infringers that have neglected to safeguard their Internet connection and as a result their Internet account appeared having been involved in online copyright infringing activities are held liable under both regimes. Therefore, both regimes demand from Internet subscribers to safeguard their Internet accounts ("duty to supervise").⁹²

Additionally, both regimes provide for a right to appeal, under different conditions though. In France, the infringer has the right to appeal only a sanction being imposed by a judge, whereas in the UK he can appeal a Copyright Infringement Report. This contrast makes even more obvious the fact that the French Graduated Response system is more "judicial" than the British, as it includes court orders.

⁹⁰ Thierry Rayna and Laura Barbier, "Fighting consumer piracy with graduated response: an evaluation of the French and British implementations" (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p.305

⁹¹ Trisha Meyer, Leo Van Audenhove and Luciano Morganti, "Graduated Response Initiatives in Europe: An analysis of initiatives and stakeholders' discourses" (2009), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996030, p.30; Anne Barron, "Graduated response à L'Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010" (2011), 3(2) *Journal of Media Law*, p.328

⁹² David J. Brennan, "Quelling P2P infringement – Private American harbours or public French graduations?" (2012), 62(4) *Telecommunications Journal of Australia*, p. 55.9

The following table summarizes the above findings:

	FRANCE	U.K.
<i>Traffic monitoring</i>	By the copyright holders. Infringing activities reported to HADOPI Authority	By the copyright holders. Infringing Activities reported to ISPs
<i>Warning notifications</i>	Three, sent by the HADOPI Authority via the ISPs	Three, sent by the ISPs as part of their Initial Obligations
<i>Alleged infringers' identification</i>	Upon HADOPI Authority's request to the ISPs	Only after a prior court order
<i>Ultimate sanction</i>	Internet disconnection	Inclusion to a "CIL" that may lead to prosecution by a copyright holder
<i>Internet account safeguarding</i>	Mandatory, otherwise the Internet subscriber is found guilty of negligence	Mandatory, otherwise the Internet subscriber is found guilty of negligence
<i>Right to appeal</i>	Only a sanction imposed by a judge	Appealing a CIR is possible

Taking all the above into consideration, we can make some more general conclusions: firstly, the French implementation is closer to the classic Graduated Response model, whereas the British implementation introduces a Graduated Response system at two stages. In fact, the HADOPI Law brings into effect Internet access termination from the beginning, whereas the British DEA includes such sanction in "Technical Obligations". "Technical Obligations", which include other technical penalties as well, will be implemented in case the "Initial Obligations" fail to be effective in reducing online copyright infringement. Therefore, for the DEA, Internet access suspension is the last resort and merely a "back-up" plan, as the possibility of prosecution is still included in the "Initial Obligations".⁹³ Secondly, the Graduated Response system has been characterized as a combination of educational and repressive mechanisms. If we accept this double qualification, and after evaluating the above comparative analysis, it is more than obvious to agree that the British regime belongs to the educational part, whereas the French regime belongs to the repressive one.⁹⁴

⁹³ Thierry Rayna and Laura Barbier, "Fighting consumer piracy with graduated response: an evaluation of the French and British implementations" (2010), 6(4) *International Journal of Foresight and Innovation Policy*, p.305

⁹⁴ *Ibid*, p.13; The French Graduated Response approach is also characterised as "restrictive", compared to the British Graduated Response approach which is qualified as more "proactive". [See Trisha Meyer, Leo Van Audenhove and Luciano Morganti, "Graduated Response Initiatives in Europe: An analysis of initiatives and stakeholders' discourses" (2009), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996030, p.29]

2.5 Concluding remark

The Graduated Response system is considered to be an alternative “notifications and sanctions” mechanism, aiming at the elimination of online copyright infringement by monitoring Internet traffic and imposing Internet disconnection, as an ultimate sanction, on the online copyright infringers. The innovative element this system introduces in order to accomplish this goal is a mandatory cooperation between copyright holders and ISPs.

This Chapter analyzed the French and the UK Graduated Response regimes step-by-step. After a comparison among their provisions, it has been proven that these approaches vary significantly. This “exploratory” comparison, however, is further expanded in the next Chapter: it will be given a more evaluative dimension, which will rely on the impact of the HADOPI Laws and the DEA on the fundamental human rights of privacy, data protection and freedom of expression.

Chapter 3: Copyright vs. Privacy, Data Protection and Freedom of Expression

The introduction of the Graduated Response system in France and the UK was a revolutionary and alternative mechanism in order to combat online copyright infringement: not only internet traffic is put under surveillance for the sake of the protection of copyright holders' interests and the detection of copyright infringing activities, but also suspension of the Internet account of the copyright infringers was considered by the legislators to be the best "strike" and the most appropriate sanction to safeguard copyright-protected works.

The HADOPI Laws and DEA, however, seem to neglect taking into consideration a very crucial factor: the fundamental human rights to privacy, data protection and freedom of expression of the Internet users. The "copyright-centered" approach that these laws choose to adopt has, therefore, triggered, apart from heated debates and strong consumers reactions, a big "fundamental human rights" conflict: should copyright prevail over the three above mentioned fundamental human rights? Should we seek copyright enforcement at all costs? Should copyright holders' interests be preserved at the expense of Internet users' privacy, data protection and freedom of expression?

This Chapter examines the effect of the HADOPI Laws and the DEA on the fundamental human rights to privacy, data protection and freedom of expression, evaluates the proportionality of the measures they propose and comments on whether they achieve the "fair balance" required by the case law of the CJEU. The analysis that follows is based on the three steps that the Graduated Response schemes have: 1) Monitoring, 2) IP addresses processing and 3) Internet Disconnection. The first two raise issues with regards to privacy and personal data protection, whereas the third one collides with the right to freedom of expression.

The HADOPI Laws and the DEA constitute different approaches of the Graduated Response system, their impact, therefore, on the previously mentioned fundamental human rights differentiates to a certain extent. These variations facilitate the expanding of the comparison between the French and the UK Graduated Response regimes that has been initiated in the previous chapter and take it one step further.

3.1 The protection of Intellectual Property as a Fundamental Human Right

Article 17(2) EU Charter explicitly attributes to Intellectual Property a “fundamental right” character, by stating that:

“Intellectual Property shall be protected.”

This short and vague instruction is an extension of Article 17(1) EU Charter, which protects Property rights in general:

“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest”

The inclusion of Intellectual Property under Article 17, therefore, aims at shielding it as a form of property.⁹⁵ The guarantees and interference limitations provided for the right to Property in Article 17(1) are also applicable to Intellectual Property.

The historical roots of Article 17 EU Charter can be found in Article 1 of the First Protocol to the ECHR,⁹⁶ which also protects property in general. Case law of the ECtHR has confirmed that Intellectual Property rights such as patents, copyright and trademarks are included under its scope.⁹⁷

Copyright, as an Intellectual Property right, falls within the scope of Article 17(2) EU Charter and constitutes, therefore, a fundamental human right.

⁹⁵ Jonathan Griffiths and Luke McDonagh, “Fundamental Rights and European Intellectual Property Law – The Case of Article 17(2) of the EU Charter” (2011) in C. Geiger (ed.), *Constructing European IP: Achievements and New Perspectives* (Edward Elgar 2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904507, p.5

⁹⁶ Article 1 of the 1st ECHR Protocol states that: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

⁹⁷ See Lawrence R. Helfer, “The New Innovation Frontier? Intellectual Property and the European Court of Human Rights” (2008), 49(1) *Harvard International Law Journal*, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976485 and Ali Riza Çoban, “Protection of property rights within the European Convention on Human Rights” (Ashgate Publishing Ltd. 2004)

3.2 The rights to Privacy and Personal Data Protection

The rights to privacy and personal data protection are inextricably linked, therefore a common examination is considered to be more suitable for the purposes of the present thesis.

The right to privacy as a fundamental right is instituted in Article 8(1) ECHR, which protects the right to respect for private and family life and states that:

*“Everyone has the right to respect for his **private** and family **life**, his home and his **correspondence**.”*⁹⁸

According to Article 8(2) ECHR, however, the right to privacy can be restricted and it provides the grounds for justifying such interference: the restriction imposed must be in accordance with the law and necessary in a democratic society. More specifically:

*“There shall be no interference by a public authority with the exercise of this right **except** such as is **in accordance with the law** and **is necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

Article 8 ECHR also covers personal data protection as an aspect of the right to privacy: it allows individuals to control their personal information.^{99,100} Since the right to personal data protection is covered by Article 8(1) ECHR, the conditions under which it can be limited can

⁹⁸ This article provides not only for a positive obligation of the State, but also for a negative one. On the one hand, the State must respect individuals' privacy or ensure that it is respected among individuals by taking positive actions; on the other hand, the State must abstain from interfering with or infringing individuals' privacy. [Richard Clayton and Hugh Tomlinson, *“Privacy and Freedom of Expression”* (reprinted from *The Law of Human Rights*), (Oxford University Press 2001), p. 46-47]

⁹⁹ Gloria González Fuster and Raphaël Gellert, “The fundamental right of data protection in the European Union: in search of an uncharted right” (2012), 26(1) *International Review of Law, Computers and Technology*, p.73

¹⁰⁰ The ECtHR's interpretation of Article 8 through its case law has confirmed the interrelation between the rights to privacy and personal data protection. In a recent decision, the Court states that *“the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention.”* [ECtHR, *S. and Marper v. United Kingdom*, Judgment of 4 December 2008, (App. No. 30562/04 and 30566/04), par.103]

The CJEU also shares the same view for the first time in the *Promusicae vs. Telefonica* Case, although not explicitly: protection of personal data is an inherent part of the right to private life and has a “fundamental right” status. [CJEU Case C-275/06: *Productores de Música de España (Promusicae) v Telefónica de España SAU*, (2008), par.63]

also be found in Article 8(2) ECHR: any restrictions must be in accordance with the law and necessary in a democratic society.

An explicit and separate recognition of the rights to privacy and personal data protection was introduced in 2000, by the Articles 7 and 8 of the EU Charter.¹⁰¹ Article 7 of the EU Charter on the respect of private and family life repeats in almost the same wording Article 8 of the ECHR:¹⁰²

*“Everyone has the right to respect for his or her **private** and family **life**, home and **communications**.”*

Article 8 of the EU Charter on the protection of personal data provides for:

“§1: Everyone has the right to the protection of personal data concerning him or her.

§2: Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

§3: Compliance with these rules shall be subject to control by an independent authority.”¹⁰³

3.2.1 Copyright vs. Privacy and Personal Data Protection

The main privacy and personal data protection issues that HADOPI and DEA raise concern the process under which online copyright infringing activities are detected and alleged copyright infringers are identified. As it was thoroughly described in the previous chapter,

¹⁰¹ The EU Charter became legally binding on the EU with the entry into force of the Lisbon Treaty, in December 2009, which amended Article 6 TEU. [Fabio Balducci Romano, “The right to the protection of personal data: A new fundamental right of the European Union” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330307, p.3; Gloria González Fuster and Raphaël Gellert, “The fundamental right of data protection in the European Union: in search of an uncharted right” (2012), 26(1) *International Review of Law, Computers and Technology*, p.73]

The CJEU has also conceived these two rights’ autonomy. [CJEU Case C-73/07: *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Satamedia Oy*, (2008); Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, (2008), par.63]

¹⁰² Apart from the same wording with Article 8(1) ECHR, “the meaning and the goal are also the same, in accordance with Article 52(3) of the Charter”. [Fabio Balducci Romano, “The right to the protection of personal data: A new fundamental right of the European Union” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330307, p.2]

¹⁰³ Article 8 EU Charter further establishes the fundamental principles concerning the processing of personal data: fair treatment, processing for specific purposes only, consent by the data subject regarding the processing or processing set out by law; in addition, “the data subject has the right to obtain access to his data from the controller, and to obtain their rectification” [*Ibid*, p.7]

these mechanisms can be found in the HADOPI I Law and the DEA's Initial Obligations under the following concept: Copyright holders monitor Internet traffic and Internet users' activities by the use of special technical means in order to locate infringing activities. In case an infringing activity is detected, they report it either to HADOPI (French Graduated Response approach) or to ISPs (British Graduated Response approach). Along with the copyright infringement report, copyright holders also provide the IP addresses involved in the detected violating activities, which have been obtained through the monitoring techniques. IP addresses constitute a crucial element of the alleged copyright infringers' identification, as ISPs can link them to the relevant Internet account owners, disclose their personal data to the copyright holders and send the warning notifications to these subscribers.

Such monitoring policies and practices are *"highly invasive of the individuals' private sphere"*.¹⁰⁴ The ultimate aim of monitoring measures, once a violating activity is located, is the collection and processing of the alleged infringers' IP addresses.¹⁰⁵ IP addresses are a series of numbers assigned by the ISPs to every Internet access subscriber who wishes to connect to the Internet and they also function as "identifiers": when notified for infringing activity committed via a specific IP address, an ISP can connect the IP address to the subscriber that it had been assigned and disclose his identity. *"By knowing the IP address and the date and time of Connection, ISPs are able to identify the connected computer. Once the connected computer is identified, it is possible to connect it to an Internet user and his/her physical address."*¹⁰⁶ IP addresses constitute, therefore, *"a key in the fight against online copyright infringement to identify infringers"*.¹⁰⁷ According to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, personal data is defined as *"any information relating to an*

¹⁰⁴ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf; Eldar Haber, "The French Revolution 2.0: Copyright and the Three Strikes Policy." (2011), 2(2) *Harvard Journal of Sports and Entertainment Law*, p.317; Peter K. Yu, "Digital copyright enforcement measures and their human rights threats" (2013) in Christophe Geiger (ed.), *"Human rights and Intellectual Property: from concepts to practice"* (Edward Elgar Publishing 2014, forthcoming), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945, p.10

¹⁰⁵ *Ibid*

¹⁰⁶ Alberto J. Cerda Silva, "Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy." (2010), 26 *Am.U.Int'l L. Rev.*, p.618-619

¹⁰⁷ Jean-Philippe Moiny, "Are Internet protocol addresses personal data? The fight against online copyright infringement" (2011), 27(4) *Computer Law and Security Review*, p.348

identified or identifiable natural person".¹⁰⁸ Furthermore, an identifiable person ("data subject") is "one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".¹⁰⁹ Since the subscribers ("data subjects") can be identified indirectly through the IP addresses ("identification number") and since IP addresses are information relating to them and facilitating such identification,¹¹⁰ IP addresses should be considered to be personal data and their processing Personal Data processing.¹¹¹

The Article 29 Working Party shares the same view. In its opinion on data protection issues related to intellectual property rights it is stated that IP addresses collected in order to identify alleged online copyright infringers are personal data to the extent that they are used for intellectual property rights enforcement against a specific person.¹¹² Furthermore, the European Data Protection Supervisor argues that "[t]he three strikes Internet

¹⁰⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [23/11/1995], OJ L281/31, Art.2(a)

¹⁰⁹ *Ibid*

¹¹⁰ As IP addresses only relate to a computer, they do not constitute personal data "*per se*". They have to be combined with other information in order to lead to identification. [Jean-Philippe Moïny, "Are Internet protocol addresses personal data? The fight against online copyright infringement" (2011), 27(4) *Computer Law and Security Review*, p.355-356]

¹¹¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [23/11/1995], OJ L281/39, Art.2(b)

Whereas many argue that personal data is gathered without the consent of the data subjects (Internet users), actually the subscribers have given consent to the ISPs, via the Internet access contracts they have signed. This processing is supposed to fulfill legal purposes. However, despite the fact that consent has been given to ISPs and not to the right holders, Adrienne Muir opines that "[t]he data gathering could be supported by Article 7(f) of the Data Protection Directive, if 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1). It would depend on whether the right to privacy trumps copyright law, or the right to enforce copyright is seen as overriding privacy rights.'" [Adrienne Muir, "Online copyright enforcement by Internet Service Providers." (2013), 39(2) *Journal of Information Science*, p.263]

¹¹² Article 29 Working Party, Working document on data protection issues related to intellectual property rights (WP 104), adopted on 18 January 2005, available at:

http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp104_en.pdf

See also the Working Party's Opinion 4/2007 on the concept of personal data (WP 136), adopted on 20 June 2007, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf

*disconnection policies involve the processing of IP addresses which — in any case under the relevant circumstances — should be considered as personal data”.*¹¹³

3.2.2 Critique: assessing the Proportionality of monitoring and personal data processing policies introduced by HADOPI and DEA

Surveillance measures and processing of personal data, like the above mentioned, that directly violate the rights to Privacy and Personal Data Protection, must not be implemented arbitrarily. These rights are relative and can only be justifiably restricted under the conditions that Article 8(2) ECHR outlines. Any enforcement measure, therefore, that limits the rights to Privacy and Personal Data Protection must fulfill two criteria according to this article: it must be 1) prescribed by law¹¹⁴ and 2) necessary in a democratic society to the legitimate purpose pursued.

Apart from the ECHR, limitation criteria are also set out by Article 52(1) EU Charter for the rights protected in the EU Charter, which are subject to the general principle of proportionality:

“Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or need to protect the rights and freedoms of others.”

Having commented on the monitoring and personal data processing measures included in HADOPI and DEA and what their impact is on the fundamental rights of Privacy and Data Protection, the discussion now moves to determining what the extent of this impact is. Are the restrictions imposed excessively burdensome? Or are they balanced and justified? Following the provisions of Article 8(2) ECHR and 52(1) EU Charter, in order to proceed with

¹¹³ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 5 June 2010, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:147:0001:0013:EN:PDF>

¹¹⁴ The principle of the rule of law constitutes the basis of any limitation imposed on a right. If the legality requirements are not satisfied, there is no need and no reason to examine proportionality. Legality, however, is not enough. Legitimacy is also required, and it is satisfied by the proper purpose and the means to achieve that purpose which constitutes the limitation basis. [Aharon Barak and Doron Kalir, *“Proportionality: Constitutional Rights and Their Limitations”* (Cambridge University Press 2012), p.107 and 245. See further in this book for the proper purpose components]

this evaluation it is necessary to examine the proportionality of these measures to the aim they pursue.

The conflict between copyright enforcement and the fundamental human rights of privacy and data protection, caused by the monitoring and IP address processing measures of HADOPI and DEA, offer an ideal field for the proportionality principle's application. There are contradicting interests to be reconciled and balanced: on the one hand there are the copyright holders, who strive to protect their intellectual property rights; on the other hand, there is the need to protect the privacy and data protection rights of Internet users, which are threatened by the imposition of the above mentioned copyright enforcement measures.

3.2.2.1. The Proportionality Principle

The Proportionality principle constitutes one of the general principles of EU Law.¹¹⁵ In its most abstract notion, it requires that any measure undertaken must be proportionate to the objectives it pursues and that an individual should not have his freedoms or rights limited beyond the necessary extent for the sake of public or individual interests.¹¹⁶ Under this balancing "accessorial" legal construction, which is used as a methodological tool and is applied when there is a conflict between two rights, we can assess whether the examined measures that cause this conflict achieve a fair balance among them. It also helps us to assess whether a legislative measure imposes a disproportionate restriction on a fundamental right.

In order to establish whether a particular measure or provision is in conformity with the principle of proportionality, it is necessary to conduct the three-pronged test entailed in this principle:¹¹⁷

¹¹⁵ The general principle of proportionality is a legal principle, which can be found both in common law and civil law jurisdictions and which is applied by national and translational courts. *"It is a key organizing principle of contemporary legal thought, and is the example par excellence of the depth of convergence of civil law and common law to a global uniform jus commune, which hybridizes aspects of common law (binding case law) alongside civil law (deductive general principles of law, into which common law fundamental rights are imported/subsumed)".* [Eric Engle, "The history of the general principle of Proportionality: An overview" (2012), 10 Dartmouth Law Journal, also available in SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431179, p.3]

¹¹⁶ Takis Tridimas, *"General Principles of EU Law"* (Oxford University Press 2006), p.136

¹¹⁷ Aharon Barak and Doron Kalir, *"Proportionality: Constitutional Rights and Their Limitations"* (Cambridge University Press 2012), p.245-247, 317-319, 340-343

- 1) The *suitability test*, which refers to the relationship between the means and the end. The means promoted by the examined measure must be *suitable – reasonably likely* to achieve the legitimate objectives pursued by this measure.
- 2) The *necessity test*, which determines whether the examined measure is *necessary* to achieve the legitimate aim pursued in the absence of other less restrictive alternative means capable of producing the same result.¹¹⁸
- 3) The *proportionality “stricto sensu” test*, which evaluates that the examined measure is not excessively burdensome on an individual’s rights or freedoms in relation to the objectives that are intended to be reached.^{119,120}

In general, after conducting the proportionality principle’s test, and in order for the outcome to be in conformity with the proportionality’s requirements, *“the burdens imposed on an individual must not exceed what is necessary to achieve the objectives pursued”*.¹²¹

Trying to assess the proportionality of the monitoring and IP address processing measures introduced by HADOPI and DEA, this three-step test will be followed.

a. Suitability

What the suitability test requires is the appropriateness of the measures (“means”) imposed by the limiting law to the aim pursued (“end”) by this limiting law. It examines the means-end relationship by answering whether the chosen measure is suitable for the achievement of the aim pursued.¹²² It is only required that these measures can rationally promote the fulfillment and the realization of the underlying purpose, without imposing, however, the condition that these measures should be the only ones that lead to the achievement of the purpose. Furthermore, there is no requirement that the measures chosen have to fully accomplish the purpose. Even a partial or inefficient realization of the aim pursued is adequate for the test to be passed. *“Therefore, the requirement is that the legislative means*

¹¹⁸ This test is also known as “the least restrictive alternative test”. [Takis Tridimas, *General Principles of EU Law* (Oxford University Press 2006), p.139]

¹¹⁹ Takis Tridimas, *General Principles of EU Law* (Oxford University Press 2006), p.139

¹²⁰ The ECJ, in practice, does not always distinguish between the second and third test. Furthermore, in some cases, the Court concludes to the compatibility of a measure with the proportionality principle without examining whether less restrictive alternatives exist. Essentially, the Court *“performs a balancing exercise”* between the aims pursued by the examined measure and its impact on individual’s rights and freedoms. (*Ibid*)

¹²¹ *Ibid*, p.140

¹²² Aharon Barak and Doron Kalir, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012), p.303

sufficiently advance the purpose limiting the constitutional right and that there be a fit between the means chosen and the proper purpose."¹²³

- Monitoring

The aim pursued by the HADOPI Laws and the DEA is the protection of copyright holders' Intellectual property rights by the reduction of online copyright infringement, especially committed via illegal P2P file sharing.¹²⁴ Monitoring, conducted by the copyright holders, facilitates in general the tracking and detecting of the allegedly violating activities and suspicious files containing copyrighted works. Monitoring, therefore, passes the suitability test as it is a measure that leads towards the combat against online copyright infringement by detecting these infringing activities.

- IP addresses processing

Regarding the IP addresses processing and the identification capability it offers, first we have to bear in mind that both HADOPI and DEA render the Internet account holders responsible for their accounts and any usage of them that takes place, either permitted by them or not.¹²⁵ Therefore, the linkage of the infringing IP address to the identity of the subscriber to whom this IP address has been allocated by his ISP at the given time and date at least leads to the person nominally connected to this particular Internet connection. This constitutes a first step towards the disclosure of the alleged copyright infringer; therefore it is at least a partial realization of the underlying purpose set out by HADOPI and DEA. Since the purpose is not necessary to be fully or efficiently accomplished but merely advanced, whether the Internet account holder is the actual copyright infringer should not concern us at this stage. IP addresses processing, therefore, passes the suitability test.

¹²³ *Ibid*, p.303 and 305

¹²⁴ "Digital Economy Act 2010 Explanatory Notes" n.106 and "HADOPI Law Explanatory Memorandum" ("Projet de loi favorisant la diffusion et la protection de la création sur internet: Exposé des motifs", Sénat No.405, Sess. Ord. 2007-2008, available at <http://www.senat.fr/leg/pjl07-405.pdf>: "Le présent projet de loi à pour ambition de faire cesser l'hémorragie des œuvres culturelles sur internet et de créer le cadre juridique indispensable au développement de l'offre légale de musique, de films, d'œuvres et de programmes audiovisuels, voire d'œuvres littéraires sur les nouveaux réseaux de communication." – "This bill aims to stop the bleeding cultural works on the internet and create the necessary legal framework for the development of legal offers of music, films, works and audiovisual programs, or to literature works on new communication networks".)

¹²⁵ See Chapter 2, Section 2.4

b. Necessity

According to the necessity test (or “the less restrictive means” test), among all the possible measures promoting the objective of a limiting law, the one that would least limit the affected human rights must be chosen. This practically means that the use of the questioned measures is only required if there are no other hypothetical alternative measures that would satisfy the underlying purpose to the same extent and at the same time restrict the affected human rights in a less harmful way. Human rights should not be limited beyond what is required for the achievement of the limiting law’s purpose. The necessity test therefore requires the smallest limitation possible for the fulfillment of the laws’ purpose. If a less harmful limitation is posed but the purpose’s fulfillment is undermined, then the test fails.¹²⁶

Concerning the interpretation and meaning of the necessity requirement, the EDPS confirms that: *“As concerns the necessity of a specific enforcement measure interfering with one or several fundamental rights, it must first be demonstrated how this measure responds to a pressing need in society. It must furthermore be considered whether **other less intrusive alternatives are available or could be envisaged.**”*¹²⁷

The necessity test, therefore, includes two elements: 1) the existence of hypothetical alternative measure that can promote the aim of the restrictive law as well as, or better than, the measures proposed by the limiting law and 2) the limitation of the affected human right by this hypothetical alternative measure to a lesser extent than the measure used in the limiting law.¹²⁸

- **Monitoring**

Generalised monitoring mechanisms, as these implemented by HADOPI and DEA, are neutral and make no discrimination between innocent or suspicious Internet users. In order to locate illegally downloaded or uploaded files, they affect all individuals who are getting

¹²⁶ Aharon Barak and Doron Kalir, *“Proportionality: Constitutional Rights and Their Limitations”* (Cambridge University Press 2012), p.317-321

¹²⁷ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

¹²⁸ Aharon Barak and Doron Kalir, *“Proportionality: Constitutional Rights and Their Limitations”* (Cambridge University Press 2012), p.323-331

involved into P2P file sharing, irrespective of whether they exchange legal or illegal files. P2P file-sharing, however, is not an unlawful activity per se. By tracking all Internet users in order to detect allegedly copyright infringing activities a large number of innocent persons is affected and put under surveillance.¹²⁹ In *Scarlet Extended* and *Sabam v. Netlog* cases, the CJEU ruled that the installation of a preventing filtering system by an ISP is not a proportionate measure because it does not distinguish between lawful and unlawful content.¹³⁰

Furthermore, the information derived from communications' content monitoring, either from lawful or unlawful activities, can reveal many aspects of a person's self, even of sensitive nature.¹³¹

The generalized character of the monitoring intrusion can also be qualified as excessively burdensome if we take into consideration the fact that monitoring can be imposed to a lesser extent and still retain its capacity of detecting (allegedly) copyright infringing activities. The onerous implications of generalized monitoring even to non-suspicious Internet users can be mitigated by the performance of "targeted" monitoring.

Monitoring a limited number of Internet users' IP addresses suspected of getting involved in significant infringements (e.g. clear cases of major infringements as well as non-significant yet continuous infringements, over a certain period of time) or infringements committed for the purpose of commercial advantage or financial gain provides for a less restrictive alternative, at least for the innocent Internet users. According to the EDPS, the "commercial

¹²⁹ Iryna Ievdokymova, "ACTA and the Enforcement of Copyright in Cyberspace: the impact on privacy" (2013), 19(6) *European Law Journal*, p.776

Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at:

https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

¹³⁰ Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, "Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights" (2013), 21(1) *International Journal of Law and Information Technology*, p.97-98; CJEU Case C-70/10: *Scarlet Extended SA v. SABAM* [2011], CJEU: Case C-360/10 *SABAM v. Netlog* [2012]

Regarding the *Scarlet Extended* case, see also: Angela Daly and Benjamin Farrand, "Scarlet v. SABAM: Evidence of an emerging backlash against corporate copyrights lobbies in Europe?" (2012), available at SSRN:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095295

¹³¹ "What individuals exchange on P2P networks is not only neutral – they may further want to have access to or share music, films and other artistic works that relate to defining aspects of their selves. Scrutinising exchanging files is thus likely to reveal personal information about an individual, which may point, inter alia, to his state of health or sexual orientation-information, which, as *S. and Marper* and *Dungeon* suggest, is at the core of the right to private life." [Iryna Ievdokymova, "ACTA and the Enforcement of Copyright in Cyberspace: the impact on privacy" (2013), 19(6) *European Law Journal*, p.776]

scale” criterion, in particular, is very crucial. Based on it, monitoring should be conducted *“in limited, specific, ad hoc situations where well-grounded suspicions of copyright abuse on a commercial scale exist. This criterion could encompass situations of clear copyright abuse by private individuals with the aim of obtaining direct or indirect economic commercial benefits”*.¹³² The “commercial scale” criterion is also embodied in the IPRE Directive, in Recital 14.¹³³

Another issue that raises concerns is the fact that monitoring in both France and UK is conducted by the copyrights holders (their associations or anti-piracy companies having been assigned for it), which are private parties, and not by a competent public authority.¹³⁴ Monitoring procedures are not guaranteed under the French HADOPI Authority or the UK OFCOM,¹³⁵ the competent authority to supervise the DEA implementation. Especially HADOPI, which has a general supervisory and coordinating role in the French three strikes implementation,¹³⁶ does not provide any safeguards for the monitoring conducted by the copyright holders, whereas it should.¹³⁷ It merely relies on the copyright infringing notices it receives. Therefore, monitoring performance by competent law enforcement authorities is necessary,¹³⁸ at least for guaranteeing the monitoring process and the terms under which it should take place.

¹³² Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

¹³³ *“The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale. This is without prejudice to the possibility for Member States to apply those measures also in respect of other acts. Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end- consumers acting in good faith.”*

¹³⁴ Alain Strowel, “The graduated response in France: Is it the good reply to online copyright infringements?” in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010), p.149; Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.60

¹³⁵ The UK Office of Communications

¹³⁶ In contrast to OFCOM, which does not interfere with the notifications procedure. OFCOM merely supervises the implementation of the Initial and Technical Obligations Codes.

¹³⁷ An example of how imperative is the need for monitoring guarantees is the TGM’s security breach (see <http://arstechnica.com/tech-policy/2011/05/france-halts-three-strikes-ip-address-collection-after-data-leak/> and <http://news.softpedia.com/news/Hadopi-and-TGM-Relink-Online-After-Data-Breach-229900.shtml>)

¹³⁸ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

Taking all the above into consideration, monitoring techniques introduced in HADOPI and DEA fail the necessity test, as there are less restrictive measures such as targeted monitoring along with a public authority's guarantee could produce the desired results.

- IP addresses processing - Identification

The collection of IP addresses by the copyright holders and their linkage to the identity of specific Internet account holders/subscribers after the intermediation of the relevant ISPs constitutes Personal Data processing, as stated in section 3.2.1.

Whereas monitoring procedures are rather similar in the two regimes, in this specific “key” stage of the three-strikes mechanism a significant difference between the French and UK implementation can provide evidence on whether there are less restrictive alternatives of the identification process followed after IP addresses processing. Under the French regime, ISPs reveal subscribers' personal data based on their IP addresses to the HADOPI Authority, upon request of this Authority and in order to proceed with the warning notifications. Under DEA, however, the identity of the alleged infringers is kept secret by the ISPs. An alleged offender is only identified in case a copyright holder wants to prosecute him and has previously obtained a court order for the disclosure of the subscriber's identity.

The UK approach in this field is more protective for the Internet users' privacy and personal data, as the disclosure of an alleged infringer's identity depends on a judicial decision. This element should be present in the French approach as well. Subscribers' data may be revealed after HADOPI Authority's request, but HADOPI is not a Court and its request does not provide the guarantees included in a judicial decision.¹³⁹

IP addresses processing, therefore, as introduced in DEA, passes the necessity test whereas HADOPI fails.

c. Proportionality “stricto sensu” (Balancing)

The last step of the proportionality test is the most important one. According to its requirements, in order for a restriction imposed on a human right to be justifiable, a proper relation should be established between the benefits gained by the fulfillment of the aim pursued and the harm caused to the human right from the measures chosen for the

¹³⁹ The UK approach is also in accordance with Article 8 IPRE Directive, which sets out that ISPs may be ordered by competent judicial authorities for the provision of personal information they hold about alleged infringers.

achievement of this aim. Therefore, what this test essentially requires is a test balancing between benefits and harms.¹⁴⁰ As Barrak stresses, “[i]t also sets up a line which cannot be crossed by the legislator regarding the protection of human rights. It demands that the fulfillment of the proper purpose – by rational means that are least restrictive in achieving the purpose – cannot lead to a disproportionate limitation of human rights”.¹⁴¹

The proportionality *stricto sensu* test finds an ideal field of application when the purpose of the limiting law is the protection of another human right. Any restriction on a human right law must meet this test.¹⁴²

In order to evaluate the proportionality of the monitoring and IP addresses processing measures of HADOPI and DEA, it is important to bear in mind that all countervailing interests (copyright and privacy/data protection) are recognized as fundamental human rights.¹⁴³ The CJEU and the ECtHR have repeatedly stressed through their case law the significance of maintaining a fair balance between conflicting fundamental rights and of respecting the principle of proportionality.¹⁴⁴

Monitoring and IP addresses processing blanket measures are excessively burdensome on individuals as they mostly affect innocent Internet users rather than the actual infringers. Their approach indicates a prevalence of copyright over privacy and data protection. For the sake of copyright enforcement and the protection of the intellectual property rights of the authors, they diminish privacy.¹⁴⁵

¹⁴⁰ Aharon Barak and Doron Kalir, *“Proportionality: Constitutional Rights and Their Limitations”* (Cambridge University Press 2012), p.340

The proportionality *stricto sensu* test differs from the two previous tests (suitability, necessity) as they mainly focus on the relation between the limiting law’s purpose and the means to achieve this purpose. They constitute a means-end analysis and not a balancing process. (*Ibid*, p.344)

¹⁴¹ *Ibid*

¹⁴² *Ibid*, p.342

¹⁴³ As explained in Sections 3.1 and 3.2

¹⁴⁴ CJEU *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06 [2008] par.65-68, CJEU *Lindqvist Case*, C-101/01 [2003], par.82, CJEU *L’Oreal v. eBay* C-324/09 [2011], par.139 and 144 Regarding the Promusicae case, see also: Sylvia Kierkegaard, “ECJ rules on ISP disclosure of subscribers’ personal data in civil copyright cases – Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU (Case C-275/06)” (2008), 24(3) *Computer Law and Security Review*; Kate Brimsted and Gavin Chesney, “The ECJ’s judgment in Promusicae: The unintended consequences – music to the ears of copyright owners or a privacy headache for the future? A comment” (2008), 24(3) *Computer Law and Security Review*; Christopher Kuner, “Data protection and rights protection on the internet: the Promusicae judgment of the European Court of Justice” (2008), 30(5) *European Intellectual Property Review*

¹⁴⁵ Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information*

It has been stated in the previous sections how detrimental generalized monitoring is and how it affects the private life of individuals. Copyright enforcement should not be enforced under such a hard price. Apart from monitoring, however, identification by IP addresses also raises concerns that lead towards its qualification as a disproportionate measure.

Identification by IP addresses is not always an accurate way to detect online copyright infringers,¹⁴⁶ as in the first place, they only indicate machines/computers. Even in case an ISP links an IP address to a specific Internet account, and therefore to the relevant subscriber, this does not mean that he is the actual infringer. The IP address linkage to an individual reveals only *“the person responsible for the account to which the IP address has been allocated”*, who may not always be the actual copyright infringer; the same computer may be used by several people, having acquired access to the Internet connection either licitly or illicitly (e.g. same household members, access through unsecured Wi-Fi, hacking etc).¹⁴⁷ An innocent individual, therefore, may be subject to personal data processing and disclosure, merely because he has an Internet connection subscription on his name and HADOPI and DEA have held him liable for any activities that this Internet account is getting involved into.

Even in case, however, that the actual infringer is hidden behind a specific IP address being processed, we should first assess whether the file-sharing activity that he is accused of is actually copyright infringing. Determining whether copyright infringement occurs, however, is not a question that can be answered by a straightforward “yes” or “no”. This can only be assessed by a Court, which has to evaluate various elements, such as whether the shared

Technology, p.96; Alberto J. Cerda Silva, “Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement jeopardizes the right to privacy” (2010), *26 Am.U.Int’l L.Rev.*, p.610-611; Douwe Korff and Ian Brown, “Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights” (2012), prepared at the request of The Greens/European Free Alliance in the European Parliament, available at: [http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental Rights](http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental_Rights), p.28-29, 30-32

¹⁴⁶ This is more evident in the case of Dynamic IP Addresses, because, unlike static IP addresses, they are not clearly related to a specific subscriber (Adrienne Muir, “Online Copyright Enforcement by Internet Service Providers” (2012), *39 Journal of Information Science*, p.264 and Nicola Lucchi, “Regulation and control of communication: The French Online copyright Infringement Law (HADOPI)” (2011), *19(3) Cardozo Journal of International and Comparative Law (JICL) - Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-07*, p.16-17

¹⁴⁷ Adrienne Muir, “Online Copyright Enforcement by Internet Service Providers” (2012), *39 Journal of Information Science*, p.264-265; Nicola Lucchi, “Regulation and control of communication: The French Online copyright Infringement Law (HADOPI)” (2011), *19(3) Cardozo Journal of International and Comparative Law (JICL) - Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-07*, p.17

material was indeed copyright-protected, which specific rights have been infringed, if there is a “fair use” case, the damages, applicable law etc.¹⁴⁸ Under the French regime, the HADOPI Authority examines to a certain extent the copyright infringement indications and copyright ownership included in the copyright infringement notifications it receives by the copyright holders, but as it has also been stated before, HADOPI is not a Court and its evaluation does not have the validity of a judicial decision. In the UK regime, on the contrary, there is not a similar examination process after the ISPs notification by the copyright holders. Copyright infringement reports in general are mere allegations of infringement and do not constitute proven facts. The justification, therefore, of the disclosure of subscribers’ identities is highly questioned, especially when they are not involved themselves in such activities.

In the *Bonnier* decision, the CJEU ruled that *“an obligation to disclose personal data to copyright holders in civil proceedings is legal, if the national law provides that the order is issued at the request of a copyright holder entitled to act, that there is a clear evidence of an infringement and that the conflicting interests and the principle of proportionality are taken into account”*.¹⁴⁹

Taking all the above into consideration, the monitoring policies and the Internet users’ IP addresses processing in order to reveal their identities constitute highly disproportionate and excessive measures. They both fail the proportionality *stricto sensu* test.

d. Summarizing the outcome of the Proportionality test

The following table presents the findings of the three-step Proportionality test application:¹⁵⁰

¹⁴⁸ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 24 April 2012, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

¹⁴⁹ Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information Technology*, p.96; CJEU Case C-461/10: *Bonnier Audio AB, Earbooks AB, Norstedts Forlagsgrupp AB, Piratforlaget AB, Storyside AB v. PerfectCommunication Sweden AB* [2012]

¹⁵⁰ This table summarizes whether each of the presented measures fulfills the three required tests - components of Proportionality.

Proportionality ¹⁵¹			
Measures	1 st Test (Suitability)	2 nd Test (Necessity)	3 rd Test (Proportionality <i>stricto sensu</i>)
Monitoring (UK and France)	+	-	-
IP addresses processing (France)	+	-	-
IP addresses processing (UK)	+	+	-

Whereas monitoring and IP address processing seem to be suitable measures for the location and identification of alleged copyright infringers, their problematic aspects occur in the very intrusive manner they are performed. The generalized monitoring under the HADOPI Law and the DEA is neither necessary nor proportionate, as it affects not only the suspect Internet users but also the innocent ones. Monitoring could fulfill the criteria for the necessity test if it was more targeted.

Concerning IP address processing, we notice a significant difference between HADOPI and DEA that differentiates the outcome of the necessity test: identification under DEA is performed in a more reluctant way, only after a relevant Court decision and only for the purposes for further litigation by the copyright holders. Therefore, DEA passes the necessity test as it is more protective towards Internet users personal data, whereas HADOPI fails, as personal data are revealed upon HADOPI Authority's request and under no judicial guarantee.

When it comes to balancing, though, neither HADOPI nor DEA pass the proportionality *stricto sensu* test, as they are qualified as excessively burdensome for the individuals' human rights. Apart from the generalized monitoring effects on the private life of (innocent or not) Internet users, which are also present in this step of the proportionality test, identification of the alleged copyright infringers by IP addresses raises serious concerns about its reliability as an identification method. This method only indicates computers and,

¹⁵¹ A "+" indicates that the specific test of this column is passed, whereas a "-" indicates that the test has not been passed.

accordingly, the subscriber of the relevant Internet connection, who may not be involved in infringing activities, though, merely because someone else used his Internet connection. Taking also into consideration the fact that identification takes place without a prior judicial decision verifying the copyright infringement, even the justification of the disclosure of subscribers' identities is highly contested. Under these laws, therefore, copyright prevails over the privacy and data protection rights of Internet users and no fair balance is achieved.

3.3 The right to Freedom of Expression

Having examined the conflict between monitoring and IP address processing measures with the rights to privacy and personal data protection, the discussion now moves to the next fundamental human rights issue dealt with in the present thesis: the compatibility of Internet disconnection under the HADOPI II Law and the DEA (the possible "Technical Obligations" imposition) with the right to freedom of expression.

Freedom of Expression is covered by Articles 10 ECHR and 11 of the EU Charter.

Article 10(1) ECHR states that:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

The EU Charter in Article 11 also provides for:

"§1: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

§2: The freedom and pluralism of the media shall be respected."

This right, therefore, includes both unimpeded receiving and sharing of information and ideas, without frontiers and any deterrents posed by public authorities. Under this concept,

Articles 10(1) ECHR and 11 EU Charter explicitly refer to freedom of information as a manifestation of the freedom of expression.¹⁵²

Under the ECHR, however, freedom of expression is not absolute. According to Article 10(2), the exercise of this freedom can be limited by the state, provided that the restriction is prescribed by law, is necessary¹⁵³ in a democratic society and serves a legitimate aim defined by the Article.¹⁵⁴

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The European Court of Human Rights has characterized freedom of expression as *“one of the basic conditions for the progress of democratic societies and for the development of each individual”*.¹⁵⁵

3.3.1 Copyright vs. Freedom of Expression

Internet disconnection is the ultimate and hardest sanction imposed by the Graduated Response systems in the battle against online copyright infringement. Internet disconnection is entailed in both French and UK regimes, though at different stages of the Graduated Response procedure as it has been implemented so far. In France, where the Graduated Response system has been fully enforced, suspension of Internet access is

¹⁵² To stress out the importance of Freedom of Information, the Commissioner for Information Society and Media in the European Commission has stated in 2007 that: *“Freedom of expression is one of the most fundamental rights of our European Democracies ...”* but *“...without freedom of information freedom of expression often remains meaningless”* [Viviane Reding, Member of the European Commission responsible for Information Society and Media, “The importance of freedom of expression for democratic societies in the enlarged European Union”, European Commission – speech /07/478 (10/07/2007), available at: http://europa.eu/rapid/press-release_SPEECH-07-478_en.htm?locale=en]

¹⁵³ Under the European Court of Human Rights’ case law, the adjective “necessary” implies “a pressing social need”. (Council of Europe, *“Freedom of Expression in Europe: Case-Law Concerning Article 10 of the European Convention on Human Rights”* (Strasbourg, Council of Europe Publishing 2007), p.9

¹⁵⁴ The proportionality of a restriction imposed on freedom of expression to the aim pursued is of utmost importance. *“Any interference disproportionate to the legitimate aim pursued will not be deemed ‘necessary in a democratic society’ and will thus contravene Article 10 of the Convention”*. (Ibid)

¹⁵⁵ ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A No. 24 § 49.

imposed after a court order and under the condition that the subscriber has previously ignored the three warning notifications being sent by the HADOPI Authority to him. In the UK, however, Internet disconnection as an ultimate sanction for online copyright infringement is included in the “Technical Obligations” imposed on ISPs and not in the “Initial Obligations”, whose implementation is expected to begin early 2014. “Technical Obligations” enforcement will only take place if the “Initial Obligations” imposition will be proved to be inadequate in addressing the online piracy problem. Internet disconnection, therefore, under the UK Graduated Response approach is not an applicable measure so far, although it is foreseen in the DEA.

Internet disconnection, however, is more than a punishment. It is rather a denial of the fundamental human right to freedom of expression, as it deprives a person of the option to send and receive information via the most common method of the digital era we are living in: the Internet.

3.3.1.1 The right to Internet Access as an extension of the right to Freedom of Expression

In the digital era, Internet is a fundamental and indispensable source of information, a powerful communication medium and an indispensable tool *“for facilitating active citizen participation in building democratic societies”*.¹⁵⁶ Its infrastructure, therefore, renders it not only a substantial means to exercise the right to freedom of expression and the right to information, as the interrelation between these two rights was highlighted in the previous section, but also an ideal field for the fulfillment of these rights.

Apart from its qualification as a communication and information tool, Internet is also characterized by multi-applicability; it is used by all sorts of people, for various purposes and under any circumstances, as it is considered to be *“a very important part of everybody’s life”*.¹⁵⁷

¹⁵⁶ Frank La Rue, *“Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression”* (2011), A/HRC/17/27, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, par.2

¹⁵⁷ Peter K.Yu, *“The Graduated Response”* (2010), 62 *Fla.Law.Rev.* p.1421-1422; Nicolas Suzor and Brian Fitzgerald, *“The legitimacy of Graduated Response schemes in Copyright Law”* (2011), 34(1) *U.N.S.W.L.J.*, p.7-8; Peter K. Yu, *“Digital copyright enforcement measures and their human rights threats”* (2013) in Christophe Geiger (ed.), *“Human rights and Intellectual Property: from concepts to practice”* (Edward Elgar Publishing 2014, forthcoming), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945, p.13 Career and business development, studies and online courses, leisure time, finances and online banking, shopping, travelling, even governmental public services, are only indicative fields of Internet application (*Ibid*).

The link between freedom of expression and Internet access has also begun to be recognized by Courts. The French Constitutional Council, under its decision on the constitutionality of the HADOPI I Law, highlighted the connection between Internet access and freedom of expression in order to justify why a judge, instead of the HADOPI Authority, must decide upon the Internet access suspension of online copyright infringers. Based on Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789,¹⁵⁸ the judges extended its scope and concluded that this right also includes the freedom to access online networks (e.g. the Internet), given the diffusion of such services and their growing importance to the participation to democratic life and consequently to freedom of expression.¹⁵⁹

Furthermore, according to Commissioner Reding, *"internet access is a fundamental right such as the freedom of expression and the freedom to access information"* and would therefore be protected under the ECHR (art 10) and the EU Charter (art 11).¹⁶⁰

There is currently an ongoing debate on whether Internet Access should be considered a fundamental or constitutional right in itself.¹⁶¹ This discussion extends the scope of the present thesis, however, only through this debate we can recognize how crucial Internet access is for the fulfillment of the right to freedom of expression.

¹⁵⁸ According to Article 11 of the EU Charter: *"The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."*

¹⁵⁹ Nicola Lucchi, "Regulation and control of communication: The French Online copyright Infringement Law (HADOPI)" (2011), 19(3) *Cardozo Journal of International and Comparative Law (JICL)* - Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-07, p.20

¹⁶⁰ Viviane Reding, 'Electronic communications networks, personal data and the protection of privacy' (Debate CRE 05/05/2009-3, Strasbourg 2009) <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20090505&secondRef=ITEM-003&format=XML&language=EN> (introducing amendment 46 of the EU telecoms package).

¹⁶¹ Peter K. Yu, "Digital copyright enforcement measures and their human rights threats" (2013) in Christophe Geiger (ed.), *"Human rights and Intellectual Property: from concepts to practice"* (Edward Elgar Publishing 2014, forthcoming), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945, p.2
There are many tendencies concerning this issue. As Hopkins notices: *"At one extreme are those who would characterize Internet access as a positive fundamental right and therefore argue that governments should be obligated to provide all citizens with Internet access. At another extreme are those who consider protection of Intellectual property rights to be sufficient grounds to abrogate an individual's contractually-limited privilege to access the Internet. In the middle is Amendment 138 EU Telecoms Package, which recognizes Internet access as a secondary, or negative, human right, one that cannot be taken away without prior judicial review."* [Andrew T. Hopkins, "The Right to Be Online: Europe's Recognition of Due Process and Proportionality Requirements in Cases of Individual Internet Disconnections" (2010), 17 *Colum. J. Eur. L.*, p.561]

3.3.1.2 Critique: Is termination of Internet users' accounts a proportionate measure against online copyright infringement?

The purpose of this section is to put the Internet disconnection measure introduced by HADOPI and DEA under a “proportionality” critique. In order to make this evaluation, the three-step test of the proportionality principle, as was presented in section 3.2.2.1, is applied. The “proportion” between the purpose of the restriction (the combat against illegal P2P file-sharing) and the restriction applied (Internet disconnection for the alleged infringers who have ignored the previously sent warning notifications) is viewed through the spectrum of the *suitability*, *necessity* and *proportionality stricto sensu* criteria.¹⁶²

a. *Suitability*

In order to test the means-end relationship between Internet disconnection and online piracy combat and whether this measure is appropriate to put an end to this phenomenon, we have first to assess the causality link between Internet access and online copyright infringement.

Internet, in general, is a legitimate communication facility, which can be lawfully used in numerous ways, as it was previously explained. Its infrastructure, though, also constitutes an ideal platform for the commitment of unlawful activities as well, such as copyright infringing P2P file-sharing. The fact that Internet facilitates them and offers such potential to aspiring perpetrators should not automatically render it a “crime weapon”. The usage of every means clearly depends on the choices of the user. It can be transformed either to a lawful or an unlawful tool, depending only on the Internet users' conduct and behavior.

Internet disconnection as a penalty against repeat online copyright infringing activities is not an appropriate measure because it focuses on the infringers' deprivation of the means that facilitates the illegal file sharing instead of the illegal activity itself. In this way, it combats online copyright infringement only on the condition that the infringer will find no other way to access Internet.¹⁶³ It is a mere denial of a potentially infringing means that neither punishes the infringing activity nor educates the offender. Instead, it rather affects the

¹⁶² Alexandra Giannopoulou, “Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality” (2012), 3(1) *European Journal of Law and Technology*

¹⁶³ Peter K.Yu, “The Graduated Response” (2010), 62 *Fla.Law.Rev.* p.1421

Internet users' capability of benefiting from the other many broader and lawful uses of the Internet.

Let's consider an offline comparable example: A knife can be used either to cut food or to commit a crime (e.g. suicide). Internet disconnection is like punishing the murderer by depriving him of the knives of his household and not giving him the capability even to cut his food.

Furthermore, if the infringer is deprived of his household connection, he will still be able to repeat illegal file-sharing via other alternatives (e.g. freely accessible Wi-Fi networks, Internet access via relatives' or friends' computers, Internet cafes etc.) or after hiding his identity by using anonymous proxy or VPN servers.¹⁶⁴ Under these conditions, this is the most likely result: *"suspension of home subscription, where digital file-sharing is most likely to occur, but with access still available to the individual through other means"*.¹⁶⁵

Therefore, Internet disconnection measures fail the suitability test. The fact that a subscriber chooses to illegally exploit the facilities offered by Internet access does not render Internet disconnection a suitable measure against online copyright infringement.

b. Necessity

Under the necessity test it is assessed whether there are other alternative measures accomplishing the same purpose in a less harmful manner for the fundamental human rights affected. Internet disconnection constitutes a clear-cut infringement of Internet user's right to freedom of expression. Taking also into account the inappropriateness of this measure, as explained in the previous section, less restrictive alternatives do exist.

More "freedom of expression" respectful alternatives instead of the Graduated response system have already been proposed in the literature: the warning notifications are kept, but instead of the Internet disconnection after the ignorance of the third one, the Internet user is charged a fee for every subsequent copyright violating activity. This fee will be shown on the subscriber's monthly bill and then the ISPs will allocate them to the collecting

¹⁶⁴ Andrew T. Hopkins, "The Right to Be Online: Europe's Recognition of Due Process and Proportionality Requirements in Cases of Individual Internet Disconnections" (2010), 17 *Colum. J. Eur. L.*, p.573

¹⁶⁵ *Ibid*

societies.¹⁶⁶ Under this concept, Internet access termination will no longer be necessary. The imposition of a fee as a sanction focuses on the infringing activity instead of cutting the means that facilitated the infringement. Furthermore, this fee system provides the copyright holders financial compensation for their “claimed” losses due to online piracy.¹⁶⁷

Apart from the fee imposing alternative, there are also the already existing alternatives of the conventional civil and criminal penalties for copyright infringement.¹⁶⁸ The fact that targeted or mass litigation is financially burdensome for the copyright holders should be of no relevance. Litigation procedures are less limitative towards the Internet users’ fundamental right to freedom of expression than the sanction of Internet disconnection.

The DEA’s “Initial Obligations” lean towards the litigation direction. In this sense, if their implementation is not only considered as a pre-test for the further implementation of the “Technical Obligations” but instead as a graduated response alternative that includes no Internet disconnection, it can be regarded as a milder measure capable of addressing illegal P2P file-sharing. The ultimate sanction incorporated in the “Initial Obligations” system is the inclusion of the repeatedly alleged infringers to an anonymous “Copyright Infringement List”, which can only lead to the initiation of judicial proceedings by the copyright holders.¹⁶⁹

Internet disconnection, therefore, as the ultimate sanction against illegal P2P file-sharing included in the HADOPI Law and the DEA’s Technical Obligations fails the necessity test. On the contrary, the possibility of litigation that DEA’s Initial Obligations offer passes the necessity test as a milder means capable of achieving the same objective.

¹⁶⁶ Danielle Serbin, “The Graduated Response: Digital Guillotine or a Reasonable Plan for Combating Online Piracy?” (2012), 3(3) *Intellectual Property Brief*, p.51; as it is also stated in the same article: “The ISPs and industry groups (preferably in collaboration with consumer groups) can determine reasonable fees; they might even agree on graduating the fees with each infringing activity.”

¹⁶⁷ *Ibid*

¹⁶⁸ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), 5 June 2010, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:147:0001:0013:EN:PDF>, par.40

¹⁶⁹ Dinusha Mendis, “Digital Economy Act 2010: fighting a losing battle? Why the ‘three-strikes’ law is not the answer to copyright law’s latest challenge” (2013), 27(1-2) *International Review of Law, Computers and Technology*, p.63; Anne Barron, “Graduated response à L’Anglaise: Online copyright infringement and the Digital Economy Act (UK) 2010” (2011), 3(2) *Journal of Media Law*, p.324; Rebecca Giblin, “Evaluating Graduated Response” (2013), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516, p.22

c. *Proportionality stricto sensu (Balancing)*

The last proportionality criterion includes a balancing test among the countervailing interests involved, which examines whether the imposed measure is manifestly disproportionate to the affected human right.

In order to evaluate the proportionality of the Internet disconnection measure, it is important to bear in mind that the conflicting interests are on the one hand the Intellectual property rights of copyright owners and on the other hand the Internet users' right to freedom of expression, both recognized as fundamental human rights as it has been explained in sections 3.1 and 3.3. When in conflict, these fundamental human rights have to be reconciled by striking a fair balance between them. The ruling of the *Promusicae* case specifically require that Member States take "... care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order" and that they must make sure "that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality".¹⁷⁰ The *Promusicae* case was also confirmed in the *LSG v. Tele2* case's ruling.¹⁷¹

Internet disconnection is not a proportionate sanction for online copyright infringement. The graduated response systems seem to ignore the pivotal role of Internet in the digital age and the important role it plays in everyday life.¹⁷² Furthermore, it is more than a deprivation of a means that facilitates online copyright infringement. It is a very severe penalty, a deprivation of an indispensable tool, as it has been explained in section 3.3.1.1.¹⁷³

¹⁷⁰ CJEU Case C-275/06: *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2006]; Alexandra Giannopoulou, "Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality" (2012), 3(1) *European Journal of Law and Technology*

¹⁷¹ CJEU Case C-557/07: *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH* [2009]

¹⁷² Kathy Eivazi, "Is termination of internet users' accounts by an ISP a proportionate response to copyright infringement?" (2012), 28(4) *Computer Law and Security Review*, p.462

¹⁷³ Douwe Korff and Ian Brown, "Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights" (2012), prepared at the request of The Greens/European Free Alliance in the European Parliament, available at: http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental_Rights, p.20-22.

Communication, information, studies, business, finances are only indicative fields that are affected. [Kathy

The termination of an Internet account does not touch only the subscriber named in the Internet service provision contract. In fact, it has an impact on all members of a household. *"If one member receives three allegations of infringement - or if three members each receive one allegation - all members risk losing their internet access."*¹⁷⁴ This leads to a broad penalization of not only the copyright infringers, but anyone else living with them.¹⁷⁵

Whereas the most severe copyright infringement derives from large scale commercial distribution of copyrighted works, the graduated response systems seems to be more "individual infringement" orientated, to Internet users who download or upload copyrighted works for personal use or without any financial benefits. The ignorance of the commercial criterion makes the disproportionality of Internet disconnection even more profound and unjustifiable.¹⁷⁶

As a side-effect of Internet disconnection, both HADOPI and DEA place a burden on all Internet subscribers to safeguard their accounts and networks, so that each subscriber is responsible for every activity that his account appears having been involved into.¹⁷⁷ "Someone hacked into my Wi-Fi" constitutes no defense against illegal P2P file-sharing without further evidence.¹⁷⁸ This extravagant rule may impose absolute liability even to innocent subscribers who have no technical training,¹⁷⁹ and verifies not only the difficulty of detecting the actual copyright infringers but also the tendency of the graduated response systems to create offenders, that actually turn out to be the victims of these laws, where the real ones are hard to be found.

Eivazi, "Is termination of internet users' accounts by an ISP a proportionate response to copyright infringement?" (2012), 28(4) *Computer Law and Security Review*, p.462]

¹⁷⁴ Nicolas Suzor and Brian Fitzgerald, "The legitimacy of Graduated Response schemes in Copyright Law" (2011), 34(1) *U.N.S.W.L.J.*, p.10-11

¹⁷⁵ *Ibid*

¹⁷⁶ *Ibid*, p.12-14; Peter K.Yu, "The Graduated Response" (2010), 62 *Fla.Law.Rev.*, p.1427

¹⁷⁷ David J. Brennan, "Quelling P2P infringement – Private American harbours or public French graduations?" (2012), 62(4) *Telecommunications Journal of Australia*, p. 55.9

¹⁷⁸ Andrew T. Hopkins, "The Right to Be Online: Europe's Recognition of Due Process and Proportionality Requirements in Cases of Individual Internet Disconnections" (2010), 17 *Colum. J. Eur. L.*, p.569

¹⁷⁹ *Ibid*; Alexandra Giannopoulou, "Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality" (2012), 3(1) *European Journal of Law and Technology*
"The graduated response scheme contemplated by the Digital Economy Act 2010 (UK) includes a defence if the subscriber can show that he or she was not the person who infringed copyright in relation to an allegation, but the onus of proof rests with the subscriber. Since most households do not keep accurate logs of all internet access by people on the internal network, it is unclear how the subscriber could reasonably prove that he or she was not responsible for an infringement that apparently came from his or her IP address. The subscriber must additionally show that he or she took 'reasonable steps' to prevent infringement using the service, but no guidance is provided as to what exactly this would entail." [Nicolas Suzor and Brian Fitzgerald "The legitimacy of Graduated Response schemes in Copyright Law" (2011), 34(1) *U.N.S.W.L.J.*, p.10-11]

Furthermore, the fact that in France Internet disconnection is imposed after a Court decision provides at least a minimum judicial guarantee, but does not remedy the disproportionality of this measure, as the incurred implications mentioned above remain invariable. Unfortunately, whereas the French Constitutional Court in its assessment of the constitutionality of the HADOPI I Law recognized the right to Internet access as a manifestation of the rights to freedom of expression and speech, it was reluctant in taking a step further. Instead of determining this sanction's disproportionality it limited its judgment on the way Internet disconnection would be implemented.

The precedence of a judicial decision, however, before the suspension of Internet accounts in the French regime should be praised compared to the way Internet disconnection is designed to take place in the UK regime. *"The possibility, even a mere one, that a subscriber's Internet connection could be suspended or slowed down without judicial oversight, is a worrying prospect".*¹⁸⁰ At the same time, though, we have to praise the UK regime for its reluctance in implementing technical measures and keeping them as a last resort solution instead, after having evaluated the effectiveness of the Initial Obligations.

Taking all the above into consideration, Internet disconnection as a measure against online copyright infringement fails the proportionality *stricto sensu* test.

d. Summarizing the outcome of the proportionality test

The following table presents the findings of the three-step Proportionality test application:¹⁸¹

Proportionality ¹⁸²			
Measures	1 st Test (Suitability)	2 nd Test (Necessity)	3 rd Test (Proportionality <i>stricto sensu</i>)
Internet Disconnection in HADOPI	-	-	-
Internet Disconnection in DEA Technical Obligations	-	-	-

¹⁸⁰ Julia Hörnle, "Premature or stillborn? – The recent challenge to the Digital Economy Act." (2012), 28(1) *Computer Law and Security Review*, p.87

¹⁸¹ This table summarizes whether each of the presented measures fulfills the three required tests - components of Proportionality.

¹⁸² A "+" indicates that the specific test of this column is passed, whereas a "-" indicates that the test has not been passed.

Internet disconnection as an ultimate sanction against online copyright infringement is disproportionate. Under HADOPI's and DEA's perspective, copyright seems to prevail over the Internet users' right to freedom of expression and no fair balance is achieved between these conflicting countervailing interests. The severe implications that Internet disconnection brings about under the HADOPI regime are not remedied merely because it is imposed after a Court decision. The fact that the measure of Internet account termination for failure to safeguard your Internet account in France was abolished this summer proves that the disproportionality issues of HADOPI will bring its end very soon. The UK therefore should grab the opportunity from the French experience before taking the next step towards the Technical Obligations implementation.

3.4 Concluding remark

This Chapter illustrated the conflict of the HADOPI Laws and DEA with the fundamental human rights of privacy, data protection and freedom of expression. This collision was evaluated according to the 3-step measures of the Graduated Response systems: monitoring, IP addresses processing and Internet disconnection.

After putting the above mentioned measures under a "proportionality" critique, it has been assessed that they constitute highly disproportionate means to the aim they pursue: the combat against online copyright infringement. Furthermore, this proportionality critique unveiled some further differentiations between the HADOPI and DEA regimes, expanding the comparison that has been initiated in Chapter 2.

The findings of this Chapter are crucial and not mere critical reflections. They constitute the evaluative tools that are being used in the next Chapter, in which the discussion will move to the Graduated Response tendencies at EU level and their compatibility with the fundamental human rights to privacy, data protection and freedom of expression.

Chapter 4: The Graduated Response tendencies at EU level

Following the analysis of the previous Chapter, Graduated Response systems, as implemented in France and the UK, constitute highly disproportionate measures against online copyright infringement. The discussion now moves from the national to the European level.

In the past decade, European policy makers have been under intense pressure to adopt more restrictive copyright legislation in order to combat illegal P2P file-sharing. Currently, there is not a unified Graduated Response regime at EU level. However, if we take a closer look at the provisions of the failed Amendment 138 of the EU Telecoms Package and ACTA's Section 5 on the Enforcement of Intellectual Property Rights in the Digital Environment (hereinafter Digital Chapter), they provide us some guidance in order to assess whether there is a tendency that leads towards the adoption of a Graduated Response system at a European level.

This Chapter discusses how it has been attempted to establish the foundations for the implementation of an EU-wide policy framework that supports the imposition of the Graduated Response regime at EU level and whether that would be compatible with the fundamental rights of privacy, data protection and freedom of expression. Such possibilities have been "slipped in" either via a series of proposed amendments in the Telecoms Package reform, or "disguised" in vague expressions in ACTA's Digital Chapter.

Furthermore, the reform of the Intellectual Property Rights Enforcement Directive is also introduced to the discussion, as it reveals some interesting new inclinations and diversions.

It is important to remind the strong connection and linkage between Chapters 3 and 4, as the findings of Chapter 3 facilitate the evaluation of the Graduated Response tendencies at EU level and their compliance with the fundamental human rights to privacy, data protection and freedom of expression.

4.1 The EU Telecoms Package (Citizens' Rights Directive 136/2009/EC and Better Regulation Directive 140/2009/EC)

"Telecoms Package" was the name given for the review of the European Union Electronic Communications Regulatory Framework, which took place in 2006-2009. The objective of this review was to contemporize and update the 2002 EU Electronic Communications Regulatory Framework (hereinafter Telecoms Package) and to harmonize the way that ISPs and telephone companies operate across the 27 EU Member States.¹⁸³ This update was necessary due to the raise of broadband Internet, as structural regulation and competitive issues among broadband providers should be addressed.¹⁸⁴

The Telecoms Package constitutes a complex legislative piece. After its review, five older 2002 directives were amended by two new directives: the Framework, Access and Authorization directives were amended by the Better Regulation Directive (140/2009/EC),¹⁸⁵ whereas the Universal Services and e-Privacy directives were amended by the Citizens' Rights Directive (136/2009/EC).¹⁸⁶

Despite the fact that the Telecoms Package review was initiated because of the need to proceed with technical alterations, among the significant controversies that were caused during this process were those concerning copyright and net neutrality.¹⁸⁷ In the present

¹⁸³ Monica Horten, "The 'Telecoms Package' and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading" (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.2; Monica Horten, "Where Copyright Enforcement and Net Neutrality collide – How the EU Telecoms Package supports two corporate political agendas for the Internet" (2010), *PIJIP Research Paper no. 17*, American University Washington College of Law, Washington DC, available at: <http://digitalcommons.wcl.american.edu/research/16/>, p.3

¹⁸⁴ *Ibid*; Monica Horten, "The Copyright Enforcement enigma – Internet politics and the Telecoms Package" (Palgrave Macmillan 2012), p.67

¹⁸⁵ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (EC Better Regulation Directive) [18/12/2009] *OJ L337/37*

¹⁸⁶ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Citizens' Rights Directive) [18/12/2009] *OJ L 337/11*

¹⁸⁷ Net neutrality is a founding principle of the Internet which guarantees that telecoms operators do not discriminate their users' communications and remain mere transmitters of information. It ensures that all users, whatever their resources, access the same and whole network. http://www.laquadrature.net/en/Net_neutrality

Chapter we focus on the copyright controversy, as the net neutrality principle falls beyond the scope of this thesis.

4.1.1 Copyright and the Telecoms Package

The controversy over copyright, which managed to overshadow the Telecoms Package reform's true technical purpose, arose because of an attempt to introduce copyright enforcement related measures in order to combat online copyright infringement that could be executed by the ISPs.¹⁸⁸

The imposition of such duties on ISPs was a result of the copyright holders' intense lobbying, which aimed at the implementation of a form of "obligatory cooperation" with the ISPs.¹⁸⁹ This was the only way for the copyright holders to overcome the "mere conduit" principle provided for in Article 12 of the E-Commerce Directive,¹⁹⁰ veiling ISPs with liability immunity for the content they carry.¹⁹¹ It is obvious therefore that the "mere conduit" principle constitutes an obstacle for the realization of the copyright holders' plans.¹⁹² By undermining the "mere conduit" status, it would be easier to establish various ways in which ISPs could be held liable for online copyright infringement,¹⁹³ and *"the entire telecoms framework law [would be] altered to support copyright enforcement"*¹⁹⁴.¹⁹⁵

¹⁸⁸ Monica Horten, "Packaging up Copyright enforcement" (2008), available at the author's website: <http://www.iplegality.com/pdf/monica.horten.telecom.package.copyright.enforcement.091108.pdf>, p.2; Monica Horten, "The 'Telecoms Package' and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading" (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.2

¹⁸⁹ Monica Horten, *"The Copyright Enforcement enigma – Internet politics and the Telecoms Package"* (Palgrave Macmillan 2012), p.84-86, 108-110, 126-127

¹⁹⁰ Monica Horten, "Packaging up Copyright enforcement" (2008), available at the author's website: <http://www.iplegality.com/pdf/monica.horten.telecom.package.copyright.enforcement.091108.pdf>, p.4

¹⁹¹ Under this provision, ISPs are *"a transit system, and like the post office, they carry the traffic, but do not know or care what type of content is contained within the data packets they transmit"*. (*Ibid*, p.8)

¹⁹² Monica Horten, "The 'Telecoms Package' and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading" (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.2

¹⁹³ Monica Horten, "Packaging up Copyright enforcement" (2008), available at the author's website: <http://www.iplegality.com/pdf/monica.horten.telecom.package.copyright.enforcement.091108.pdf>, p.8

¹⁹⁴ Monica Horten, "The 'Telecoms Package' and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading" (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.4

¹⁹⁵ Monica Horten, *"The Copyright Enforcement enigma – Internet politics and the Telecoms Package"* (Palgrave Macmillan 2012), p.86-88

The debates caused were so heated and polarised, that they put the entire Telecoms package review into jeopardy.¹⁹⁶

As Monica Horten notices, *“Taken individually, these amendments do not mandate any explicit measures for copyright enforcement. But when analyzed together, the amendments put in place a foundation stone for online copyright enforcement enabling the sanctioning of users at the say-so of the copyright owners”*.¹⁹⁷ Practically, the ultimate aim of these provisions and amendments was the establishment of a legal basis on which the implementation of a Graduated Response system throughout the European Union would be possible.¹⁹⁸

This debate eventually centered on one single counter-amendment, known as Amendment 138. The outcome was that the Package was forced to go to three readings in the European Parliament because of this amendment. In order to end the conflict, a compromising amendment was drafted, with the agreement of the three European institutions – Parliament, Commission and Council.¹⁹⁹

4.1.2 The Amendment 138

The notorious Amendment 138 was placed on the Telecoms Package agenda, and more specifically on the Better Regulation Directive provisions that amended the Framework Directive (Directive 2002/21/EC). It aimed at preventing the legitimization of a Graduated Response system being part of the European Union legislation and dealing with the

¹⁹⁶ Monica Horten, “Packaging up Copyright enforcement” (2008), available at the author’s website: <http://www.iptegrity.com/pdf/monica.horten.telecom.package.copyright.enforcement.091108.pdf>, p.2 The French Presidency (July – December 2008), along with the UK’s assistance, played a crucial role in this polarization, as they pushed through these legal reforms in order to support their domestic copyright enforcement measures (French Creation and Internet Law and the UK’s Digital Economy Act, which was at drafting process at the moment) [Monica Horten, *“The Copyright Enforcement enigma – Internet politics and the Telecoms Package”* (Palgrave Macmillan 2012), p.118]

¹⁹⁷ *Ibid*

¹⁹⁸ Monica Horten, “The ‘Telecoms Package’ and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading” (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.2; Monica Horten, *“The Copyright Enforcement enigma – Internet politics and the Telecoms Package”* (Palgrave Macmillan 2012), p.88-89

¹⁹⁹ Monica Horten, *“The Copyright Enforcement enigma – Internet politics and the Telecoms Package”* (Palgrave Macmillan 2012), p.174-204

fundamental rights issues posed by this perspective, by incorporating some safeguards for the Internet users.²⁰⁰

The lead committee that dealt with the amendment of the Framework directive was the “Trade and Industry Committee” (ITRE). Its rapporteur was Catherine Trautmann and the ITRE’s report was named after her.²⁰¹ Trautmann Report’s Amendment 138, or Article 8(4g)(a) of the Framework Directive, aimed at acting as a barrier to any Graduated Response schemes by mandating a previous judicial ruling before imposing any sanctions to Internet users.²⁰² The text of Amendment 138 was:

*“[a]pplying the principle that **no restriction may be imposed on the fundamental rights and freedoms of end-users**, notably in accordance with Article 11 of the EU Charter on freedom of expression and information, **without a prior ruling by the judicial authorities, except when dictated by force majeure or by the requirements of preserving network integrity and security, and subject to national provisions of criminal law imposed for reasons of public policy, public security or public morality.**”²⁰³*

The essential meaning of the Amendment was that no restriction could be imposed on the fundamental human rights of Internet users without a prior judicial ruling, a court order. This demand is covered by the right to due process, as outlined in Article 6 ECHR and Article 47 EU Charter. Furthermore, the reference of the Amendment to Article 11 EU Charter clearly implied the right to freedom of expression and the use of the Internet as an essential means for its exercise.²⁰⁴ As the initial Commission’s proposal did not provide for a court

²⁰⁰ *Ibid*, p.157

²⁰¹ Monica Horten, “The ‘Telecoms Package’ and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading” (2008), available at: http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten..28.june.2008.v5.pdf, p.6

²⁰² Monica Horten, “Where Copyright Enforcement and Net Neutrality collide – How the EU Telecoms Package supports two corporate political agendas for the Internet” (2010), *PIJIP Research Paper no. 17*, American University Washington College of Law, Washington DC, available at: <http://digitalcommons.wcl.american.edu/research/16/>, p.16

²⁰³ Monica Horten, “*The Copyright Enforcement enigma – Internet politics and the Telecoms Package*” (Palgrave Macmillan 2012), p.157

²⁰⁴ *Ibid*, p.157 and 198

order requirement,²⁰⁵ the above elements introduced by Amendment 138 were of great importance.

Amendment 138 was adopted by the EP during the First²⁰⁶ and Second Reading²⁰⁷, creating thus an inter-institutional conflict between the EP on the one hand, and the Commission and Council of Ministers on the other. In the Third Reading,²⁰⁸ Amendment 138 and the copyright issues accompanying it had been transformed to the centerpiece of the Telecoms Package debate and the only issue under discussion. Finally, the Amendment 138 was not adopted in its original form. The compromising provision agreed, also known as the “Freedom provision”, is Article 1(3a) of the Framework Directive.²⁰⁹ The Trautmann Report’s Amendment 138 text, which demanded for no restriction imposed on the end-users’ fundamental rights and freedoms *“without a prior ruling by the judicial authorities”*, was turned into *“...shall respect the requirements of a **prior fair and impartial procedure** including the right to be heard of the person or persons concerned and the right to an effective and timely judicial review”*.²¹⁰

The transformation of the explicit reference to “prior court ruling” into the rather vague notion of a “prior fair and impartial procedure”, causes some interpretative issues: the term

²⁰⁵ European Commission’s Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services [13/11/2007] (COD)2007/0247, available at: [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2007/0697/COM_COM\(2007\)0697_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2007/0697/COM_COM(2007)0697_EN.pdf)

²⁰⁶ 24 September 2008

²⁰⁷ 5 May 2009

²⁰⁸ 4 November 2009

²⁰⁹ Article 1(3a) of the Framework Directive (2009/140/EC): *“Measures taken by Member States regarding end-users access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-users’ access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.”* [Monica Horten, *“The Copyright Enforcement enigma – Internet politics and the Telecoms Package”* (Palgrave Macmillan 2012), p.199-200]

²¹⁰ *Ibid*

“procedure” refers to either a judicial or administrative process. Consequently, the Member States have to decide in their national laws what procedure to apply. Whichever one they decide to choose, though, it must encompass the due process principle in the framework of a lawful procedure.²¹¹

4.1.3 Critique: what are the implications of Amendment 138’s failure?

As it has been explained in the previous section, Amendment 138’s objective was to reassure that any sanctions imposed on end-users by the ISPs should have previously been subject to a judicial decision. The Graduated Response systems in which ISPs disconnect Internet users upon right holders’ copyright infringement request are inadmissible without any form of due process, practically a court’s decision.²¹² That was the Graduated Response system “barrier” incorporated in the Amendment: it intended to remind EU Member States of the fundamental human right to due process when a sanction is to be imposed; it also intended to instruct them that they should not enact Graduated Response measures without a prior judicial decision.²¹³

Amendment 138 is in conformity with the French Constitutional Court’s decision on the HADOPI I Law when it examined the Law’s constitutionality: a judge, instead of an administrative body (the HADOPI Authority) must decide upon the Internet disconnection of online copyright infringers. (Chapter 3, Section 3.3.1.1) The failure of the Amendment, therefore, broadens the scope for the implementation of Graduated Response mechanisms, as it renders their imposition possible even after an administrative process, instead of a judicial one. It only provides a safeguard against automated decision making.

The perspective of Graduated Response systems’ implementation at EU level, though, is highly problematic and threatening for the fundamental human rights to privacy, data protection and freedom of expression as set out in the ECHR and the EU Charter. Based on the analysis of Chapter 3, the generalized monitoring techniques for the tracking of copyright infringing activities and the following IP addresses processing in order to link them

²¹¹ *Ibid*, p.200

²¹² Monica Horten, “Packaging up Copyright enforcement” (2008), available at the author’s website: <http://www.iptegrity.com/pdf/monica.horten.telecom.package.copyright.enforcement.091108.pdf>, p.12

²¹³ Monica Horten, “Where Copyright Enforcement and Net Neutrality collide – How the EU Telecoms Package supports two corporate political agendas for the Internet” (2010), *PIJIP Research Paper no. 17*, American University Washington College of Law, Washington DC, available at: <http://digitalcommons.wcl.american.edu/research/16/>, p.16

with the relevant subscriber-alleged infringer are highly invasive to the private sphere and personal data of Internet users. Furthermore, the sanction of Internet disconnection deprives the Internet users of one of the most essential tools in order to freely express themselves by receiving and imparting information. The Graduated Response regimes promote disproportionate and imbalanced measures, as the right-holders interests prevail over the fundamental human rights of Internet users.

Monica Horten has stressed that *“Amendment 138 would guarantee that graduated response could not emerge in Europe”*.²¹⁴ Incontestably, Amendment 138 inserted a crucial safeguarding measure that would have restricted any Internet disconnection sanctions having been imposed without any judicial guarantees.²¹⁵ But it offered a mere due process safeguard and nothing more that could actually impede the emergence of Graduated Response systems.

Despite the fact that it referred to the right to freedom of expression, Amendment 138 mainly focused on procedural concerns. By demanding a court decision before a penalty of Internet disconnection could be applied, it posed an obstacle not to the emergence of Graduated Response systems itself, but on their arbitrary imposition. Neither does it prohibit the implementation of surveillance measures by the ISPs.²¹⁶ The rights to privacy, data protection and freedom of expression, therefore, are still at stake. Chapter 3 has proven that these issues stem from the Graduated Response regimes themselves and not the way they are imposed. Whether the sanction of Internet disconnection is an aftermath of a judicial or administrative decision does not remedy the disproportionality of this measure itself and its high restrictiveness towards the right to freedom of expression.

The example of the French Graduated Response regime confirms the above claims. Despite the fact that, after its constitutionality review, the HADOPI II Law demands a court order in order to proceed with Internet disconnection penalties, its fundamental human right issues are not overridden, as it has been revealed in Chapter 3.

²¹⁴ Monica Horten, *“The Copyright Enforcement enigma – Internet politics and the Telecoms Package”* (Palgrave Macmillan 2012), p.158

²¹⁵ Simon Bradshaw and Lilian Edwards, *“Analysis of recent amendments to the EC Telecoms Package: Do they provide a legal basis in Europe for 'Three Strikes and You're Out' anti file-sharing laws?”* (2008), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1300662, p.9;

²¹⁶ Paul de Hert and Vaggelis Papakonstantinou *“The Amended EU Law on e-Privacy and Electronic Communications”* (2011), 29(1) *The John Marshall Journal of Computer and Information Law*, p.142

Conclusively, the weaker (compared to Amendment 138) “Freedom Provision” in Article 1(3a) of the Framework Directive does not exclude the implementation of Three Strikes legal schemes across the EU. It rather establishes the legal basis on which they should be imposed: a prior lawful procedure, either administrative or judicial, as “*a minimum level of protection for individuals*”.²¹⁷ EU Member States are free to legislate such systems within their jurisdictions, if they decide to do so.²¹⁸ This prospect could be possible even in case the Amendment 138 had not failed, as it only restricted the procedure under which Graduated Response schemes could be imposed and not their imposition itself.

4.2 The Anti-Counterfeiting Trade Agreement (ACTA)

Following the Telecoms Package and Amendment 138, the discussion now moves to ACTA. The Anti-Counterfeiting Trade Agreement is a multinational treaty that attempted to establish stronger international standards for intellectual property rights enforcement.²¹⁹ After significant influence by intellectual property related industrial groups, ACTA was a response to the global escalated augmentation of counterfeit products’ trade and the infringement of copyright-protected works. The globally harmonized legal framework that ACTA proposed was considered to offer the necessary means to effectively accomplish these enforcement goals.²²⁰

ACTA was, in a way, imposed by the United States, with the blessing of the European Commission (EC) representing the European Union. The other parties of ACTA are: Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore and Switzerland.²²¹ The

²¹⁷ *Ibid*, p.143

²¹⁸ *Ibid*

²¹⁹ Khaliunaa Garamgaibaatar, “The Anti-Counterfeiting Trade Agreement: Copyrights, Intermediaries and Digital Pirates” (2011), 20 *CommLaw Conspectus*, p.213; Margot E. Kaminski, “An overview and the evolution of the Anti-Counterfeiting Trade Agreement” (2011), 21 *Alb. LJ Sci. and Tech.*, p.386

²²⁰ Monica Horten, “A Copyright masquerade – How corporate lobbying threatens online freedoms” (Zed Books London-New York 2013), p.45-60; Khaliunaa Garamgaibaatar, “The Anti-Counterfeiting Trade Agreement: Copyrights, Intermediaries and Digital Pirates” (2011), 20 *CommLaw Conspectus*, p.200-201; Emily Ayoob, “The Anti-Counterfeiting Trade Agreement” (2010), 28 *Cardozo Arts and Ent. LJ*, p.176; Alberto J. Cerda Silva, “Enforcing Intellectual Property Rights by diminishing privacy: How the Anti-Counterfeiting Trade Agreement jeopardizes the right to privacy” (2010), 26 *Am. U. Int’l L. Rev.*, p.602

²²¹ European Commission, “What ACTA is about”, available at: http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_149003.pdf

As Monica Horten stresses: “ACTA’s backstory reveals how the United States government set up an astonishing international system to export American intellectual property policies to other countries, with the aim of supporting the American entertainment industries.” [Monica Horten, “A Copyright masquerade – How corporate lobbying threatens online freedoms” (Zed Books London-New York 2013), p.41]

formal negotiations were launched in June 2008. Most parties (Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States) signed the agreement in October 2011, whereas Mexico, the European Union (EU) and 22 EU Member States signed on 26 January 2012.²²² Japan was the first party that ratified ACTA and the only one so far.²²³ ACTA is planned to come into force in the countries that will ratify it after ratification by at least six countries. The European Union and its 28 Member States share competency on the subject of this convention. This means that entry into force on its territory requires ratification (or accession) by all states, as well as approval of the European Union.²²⁴ Approval of the European Union demands the consent of the European Parliament and the Council.²²⁵

ACTA has been an extremely contested agreement, that caused heated debates and protests by citizens representing organizations all over the world, not only for its

²²² Margot E. Kaminski, "An overview and the evolution of the Anti-Counterfeiting Trade Agreement" (2011), 21 *Alb. LJ Sci. and Tech.*, p.390; Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, "Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights" (2013), 21(1) *International Journal of Law and Information Technology*, p.92

The 22 EU Member States that signed ACTA were: the UK, Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Poland, Portugal, Romania, Slovenia, Spain and Sweden. [Olivia Solon, "The EU signs up to ACTA, but French MEP quits in protest" (26/1/2012), available at: <http://www.wired.co.uk/news/archive/2012-01/26/eu-signs-up-to-acta>] The ACTA agreement remained open for signature by the negotiating Parties until 1 May 2013. The remaining five EU Member States (Cyprus, Estonia, Germany, the Netherlands and Slovakia) along with Switzerland did not sign ACTA within that deadline. They can thus no longer accede as negotiating Parties. [The Swiss Federal Institute of Intellectual Property: "The Anti-Counterfeiting Trade Agreement", available at: <https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html>]

²²³ Electronic Frontier Foundation, "Japan was the first to ratify ACTA. Will they join TPP next?" (26/10/2012), available at: <https://www.eff.org/deeplinks/2012/10/japan-ratify-acta-will-they-join-tpp-next>; Dave Neal, "Japan ratifies ACTA agreement" (6/9/2012), available at: <http://www.theinquirer.net/inquirer/news/2203330/japan-ratifies-acta-agreement>; Monica Ermert, "ACTA: Will it ever become a valid international treaty?" (13/9/2012), available at: <http://www.ip-watch.org/2012/09/13/acta-will-it-ever-become-a-valid-international-treaty/>

²²⁴ For example, on 3 February 2012, Poland announced the cease of the ratification process as it "had made insufficient consultations before signing the agreement in late January, and it was necessary to ensure it was entirely safe for Polish citizens. [David Meyer, "ACTA's EU future in doubt after Polish pause" (3/12/2012), available at: <http://www.zdnet.com/actas-eu-future-in-doubt-after-polish-pause-3040094978/>] Eventually, on 17 February 2012, the Polish prime minister announced that Poland will not ratify ACTA. ["Poland and Slovenia back away from ACTA" (29/12/2013), available at: <http://www.scotsman.com/news/world/poland-and-slovenia-back-away-from-acta-1-2124655>] On 21 February 2012, a news report noted that "many countries in Europe that have signed the treaty have set aside ratification in response to public outcry, effectively hampering the ratification and implementation of the treaty" [Quinn Norton, "How the European Internet rose up against ACTA" (21/2/2012), available at: <http://www.wired.com/threatlevel/2012/02/europe-acta>

²²⁵ http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/index_en.htm

threatening character towards fundamental human rights, but also for the secret nature of the negotiations under which it was concluded.²²⁶

The signature of the EU and many of its Member States launched widespread protests across Europe as well.²²⁷ On 22 February 2012, the European Commission, perceiving itself to be “*the butt of public anger*”, asked the European Court of Justice to assess whether the ACTA agreement violates the EU's fundamental human rights and freedoms.²²⁸ The EU Commission, however, has recently withdrawn its application.

On 4 July 2012, the European Parliament rejected ACTA.²²⁹

ACTA has raised many concerns, however for the purposes of the present thesis and Chapter the discussion is centered around Article 27 (Enforcement in the Digital Environment) and the perspective of the Graduated Response schemes that it leaves.

4.2.1 ACTA and the Graduated Response system

ACTA's most controversial provisions relate to online copyright enforcement. It is argued to impose disproportional restrictions on the rights and freedoms of Internet users.

ACTA provides legal support for the implementation of Graduated Response mechanisms by establishing a sort of “alliance”.²³⁰ This is firstly expressed in its Preamble, which, among others, refers to the desire of the contracting parties to “*promote cooperation between*

²²⁶ Margot E. Kaminski, “An overview and the evolution of the Anti-Counterfeiting Trade Agreement” (2011), 21 *Alb. LJ Sci. and Tech.*, p.391; Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information Technology*, p.92; Axel Metzger, “A Primer on ACTA: What Europeans should fear about the Anti-Counterfeiting Trade Agreement” (2010), 2 *Journal of Intellectual Property, Information Technology and E-Commerce Law*, p.109

²²⁷ Monica Horten, “*A Copyright masquerade – How corporate lobbying threatens online freedoms*” (Zed Books London-New York 2013), p.107-114

²²⁸ European Commission, “Statement by Commissioner Karel de Gucht on ACTA (Anti-Counterfeiting Trade Agreement)” (22/2/2012), available at: http://europa.eu/rapid/press-release_MEMO-12-128_en.htm; *Ibid*, p.115-118

²²⁹ Monica Horten, “*A Copyright masquerade – How corporate lobbying threatens online freedoms*” (Zed Books London-New York 2013), p.128

²³⁰ Annemarie Bridy, “ACTA and the Specter of the Graduated Response” (2011), 26(3) *Am. U. Int'l L. Rev.*, p.571

service providers and right holders to address relevant infringements in the digital environment”.²³¹

Article 27 of ACTA’s Digital Chapter contains two ways to enforce Intellectual Property rights: 1) Cooperation within business community (Article 27 par.3) and 2) Injunction mechanisms against ISPs in order to disclose identity information of suspected IP rights infringement subscribers (Article 27 par.4).

The Graduated Response related provision lies in Article 27(3), which exactly states that:

*“Each Party shall endeavour to **promote cooperative efforts within the business community** to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party’s law, preserving fundamental principles such as freedom of expression, fair process, and privacy.”*

This language, although it is pretty vague, implicitly refers to government encouraged Graduated Response schemes, either public or private ordering, between ISPs and rights holders.²³² This “cooperation” facilitates the provision to the rights holders by the ISPs identity information about subscribers-alleged infringers. After the identification, the rights holders can request ISPs to terminate the Internet accounts of the alleged infringers.²³³

In order to proceed with our analysis, it should be reminded that the Graduated Response systems comprise of the following steps: 1) Monitoring of Internet traffic to locate IP rights infringing activities, 2) Identification of the alleged infringer based on the IP address participating in the infringing activity, 3) Warnings (usually three) being sent to the alleged

²³¹ Margot E. Kaminski, “An overview and the evolution of the Anti-Counterfeiting Trade Agreement” (2011), 21 *Alb. LJ Sci. and Tech.*, p.393

²³² Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information Technology*, p.95

The first draft versions of ACTA included an explicit reference to three strikes policies in their footnotes, as an indicative solution to combat against copyrighted works’ infringement. These explicit references were removed from the official ACTA versions, however provisions that could form the basis for three strikes implementation were retained. [Alberto J. Cerda Silva, “Enforcing Intellectual Property Rights by diminishing privacy: How the Anti-Counterfeiting Trade Agreement jeopardizes the right to privacy” (2010), 26 *Am. U. Int’l L. Rev.*, p. 631-632];

²³³ *Ibid*, p.633-634, 641; Margot E. Kaminski, “An overview and the evolution of the Anti-Counterfeiting Trade Agreement” (2011), 21 *Alb. LJ Sci. and Tech.*, p.393, 411-412, 440-441; Axel Metzger, “A Primer on ACTA: What Europeans should fear about the Anti-Counterfeiting Trade Agreement” (2010), 2 *Journal of Intellectual Property, Information Technology and E-Commerce Law*, p.109; Annemarie Bridy, “ACTA and the Specter of the Graduated Response” (2011), 26(3) *Am. U. Int’l L. Rev.*, p.561

infringers-subscribers, 4) Possible Internet account termination by the ISPs in case the previous warnings have been ignored.

As it has been repeatedly stated in the present thesis, Graduated Response systems are highly problematic and threatening for fundamental human rights and civil liberties. After examining the HADOPI Laws, DEA and the Freedom provision of the Telecoms Package, their impact on the Internet users' rights to privacy, data protection and freedom of expression has been concluded. ACTA constitutes no exception and if it had not been rejected by the European Parliament, it would be incompatible with both the ECHR and the EU Charter.

The first two Graduated Response steps, monitoring and IP addresses processing, collide with the fundamental rights of privacy and data protection. Generalised monitoring puts Internet and Internet users under surveillance, making no discrimination between innocents or infringers. Furthermore, identification of alleged infringers cannot be done without personal data processing. It is a *sine qua non* step of the Graduated Response mechanisms in order for the copyright violators to be revealed and sanctioned.²³⁴ Authorizing intrusions into Internet users' privacy and the disclosure of their personal data under the pretext of IP enforcement is disproportionate.²³⁵ Concerning the ultimate sanction imposed by ISPs, Internet disconnection is not a mere deprivation of a communications tool. It is a disproportionate restriction of one of the most important means to exercise the right to freedom of expression in the digital age.²³⁶

Despite some explicit references to the rights to "privacy", "freedom of expression" and "fundamental principles" in Article 27(3), ACTA's Graduated Response fails to strike a right

²³⁴ Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, "Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights" (2013), 21(1) *International Journal of Law and Information Technology*, p.96; Douwe Korff and Ian Brown, "Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights" (2012), prepared at the request of The Greens/European Free Alliance in the European Parliament, available at: http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental_Rights, p.30-32

²³⁵ *Ibid*; Alberto J. Cerda Silva, "Enforcing Intellectual Property Rights by diminishing privacy: How the Anti-Counterfeiting Trade Agreement jeopardizes the right to privacy" (2010), 26 *Am. U. Int'l L. Rev.*, p.631-632

²³⁶ Douwe Korff and Ian Brown, "Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights" (2012), prepared at the request of The Greens/European Free Alliance in the European Parliament, available at: http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental_Rights, p.20-22

balance between, on the one hand, the protection of the IP rights and, on the other hand, the safeguarding of Internet users' fundamental rights.²³⁷ Apart from a mere reference to these rights, no further guidance is provided according to international standards. Compliance has to be sought according to each party's domestic Law.²³⁸ Therefore, IP rights' enforcement in ACTA is prioritized over the rights to privacy, data protection and freedom of expression and, even though their notions appear in the text, they end up being simple vague expressions with no practical application.

The rejection of ACTA by the European Parliament on the 4th July 2012 was considered to be a victory of democracy.²³⁹ ACTA's rejection practically means its "death", as at that time it could not be ratified in Europe.²⁴⁰ ACTA's rejection by the EP was a landmark act, as it was the first time that the EP exercised its new powers to reject legislation under the Lisbon Treaty.²⁴¹

4.2.2 ACTA was killed off in Europe, but its ghost has never left

For the time being, ACTA seems to be off the European agenda. At the same time, though, the European Union is negotiating two other transatlantic trade agreements, which may establish the ideal conditions to sneak ACTA in through the back door and impose online repression by implementing hard copyright enforcement rules: TAFTA and CETA.

As it is beyond the scope of the present thesis to extensively analyze the provisions of these treaties, a short reference will be made in order to reveal the tendencies and impacts for Europe and gain insight about what is forthcoming.

²³⁷ Alberto J. Cerda Silva, "Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement jeopardizes the right to privacy" (2010), 26 *Am. U. Int'l L. Rev.*, p.610-611; Douwe Korff and Ian Brown, "Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights" (2012), prepared at the request of The Greens/European Free Alliance in the European Parliament, available at: [http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental Rights](http://act-on-acta.eu/Opinion_on_the_compatibility_of_ACTA_with_the_ECHR_and_the_EU_Charter_of_Fundamental_Rights), p.28-29

²³⁸ *Ibid*

²³⁹ La Quadrature du Net, "ACTA Dossier", <http://www.laquadrature.net/en/ACTA>

²⁴⁰ Monica Horten, "Wow what a scorcher! ACTA slaughtered 478 to 39" (3/7/2012), available at: <http://www.iptegrity.com/index.php/acta/781-wow-what-a-scorcher-acta-slaughtered-478-to-39>

²⁴¹ Monica Horten, "A Copyright masquerade – How corporate lobbying threatens online freedoms" (Zed Books London-New York 2013), p.128; Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, "Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights" (2013), 21(1) *International Journal of Law and Information Technology*, p.94

4.2.2.1 TAFTA (Trans-Atlantic Free Trade Agreement)

TAFTA is a proposed trade agreement between the European Union and the United States concerning various topics: IP rights, medicine access, food safety, investments dispute settlements. The negotiations have been on progress since July 2013 and are likely to continue at least till the end of 2014. From 16 to 20 December 2013, the third round of negotiations will be conducted in Washington.²⁴²

It is noteworthy to mention that MEPs, despite their recent ACTA rejection, have chosen to vote for strengthened IP rights protection in the EU Commission's negotiating mandate for TAFTA. *"All the amendments calling on excluding provisions related to so-called "intellectual property" from TAFTA, as well as those calling for a more sensible approach to copyright and patent enforcement, were rejected".*²⁴³

Furthermore, information derived from leaked documents²⁴⁴ reveals that TAFTA is preparing to attack Internet users' online freedoms. There is high possibility, therefore, that TAFTA can be turned into the new "super-ACTA"²⁴⁵ and include provisions upon which Graduated Response schemes can be based.²⁴⁶

²⁴² La Quadrature du Net, "TAFTA Dossier": <http://www.laquadrature.net/en/TAFTA>

²⁴³ *Ibid*; La Quadrature du Net, "EU Parliament opens the door to copyright repression in TAFTA" (25/4/2013), available at: <http://www.laquadrature.net/en/eu-parliament-opens-the-door-to-copyright-repression-in-tafta>; Glyn Moody, "TAFTA/TTIP: What price transparency?" (2/12/2013), available at: <https://www.techdirt.com/articles/20131128/11324025403/taftattip-what-price-transparency.shtml>

²⁴⁴ "Transatlantic Trade and Investment Partnership negotiations (TTIP) - The Information and Communication Technology (ICT) sector": <http://www.laquadrature.net/files/TAFTA%20-%20The%20Information%20and%20Communication%20Technology%20%28ICT%29%20sector.pdf> This document includes as possible negotiable rules provisions concerning liability of ISPs, E-Commerce and cyber security.

²⁴⁵ La Quadrature du Net, "Trans-Atlantic talks bound to harm freedoms online" (8/7/2013), available at: <http://www.laquadrature.net/en/trans-atlantic-trade-talks-bound-to-harm-freedoms-online>; La Quadrature du Net, "TAFTA: First step towards a super-ACTA" (23/5/2013), available at: <http://www.laquadrature.net/en/tafta-first-step-towards-a-super-acta>

²⁴⁶ Glyn Moody, "ISDS: ACTA by the back door?" (17/10/2013) available at the author's personal blog: <http://blogs.computerworlduk.com/open-enterprise/2013/10/isds-acta-by-the-back-door/index.htm>; Glyn Moody, "European Commission: ACTA is dead, long live ACTA?" (23/10/2013), available at: <https://www.techdirt.com/articles/20131022/07350824965/eu-acta-is-dead-long-live-acta.shtml>

4.2.2.2 CETA (Canada – EU Trade Agreement)

CETA is a trade agreement that has been negotiated since 2009 by Canada and the European Union. Currently, it is in its final stages. It is expected to be signed in the next months.²⁴⁷

Certain CETA chapters deal with the protection of IP. According to some leaked documents, they echo word for word some of the most controversial parts of ACTA: criminal sanctions and repressive copyright clauses are included.²⁴⁸ Like ACTA, therefore, CETA constitutes a major threat to online freedoms and may provide the basis for the imposition of Graduated Response mechanisms.²⁴⁹

4.3 The IPRE Directive review: a new inclination?

Sections 4.1 and 4.2 focused on examining how the Graduated Response system, even though not present at the moment at EU level, is still a menace. It further examined how a legal basis for its implementation already exists through the Telecoms Package or it has been attempted to be part of the EU legal system by the signature of International agreements (ACTA, TAFTA, CETA).

The EU Telecommunications reforms and International trade agreements, though, are not the only means of the EU Policy makers in order to sharpen copyright enforcement measures. The ongoing review of the Intellectual Property Rights Enforcement Directive (Directive 2004/48/EC)²⁵⁰ appears to be the ideal occasion for strict rules violating online freedoms.

Although history has shown that the Three Strikes menace in Europe is never completely off the agenda, the IPRE Directive review seems, at least at the moment, to alter the EU copyright enforcement inclinations, as it seems to move towards another approach.

²⁴⁷ La Quadrature du Net, “CETA Dossier”: <http://www.laquadrature.net/en/CETA>

²⁴⁸ *Ibid*

²⁴⁹ La Quadrature du Net, “Will the Canada-EU Trade Agreement harm our freedoms online?” (20/12/2013), available at: <http://www.laquadrature.net/en/will-the-canada-eu-trade-agreement-harm-our-freedoms-online>; La Quadrature du Net, “ACTA, CETA, TAFTA: Is De Gucht again trying to impose anti-democratic repression?” (7/2/2013), available at: <https://www.laquadrature.net/en/acta-ceta-tafta-is-de-gucht-again-trying-to-impose-anti-democratic-repression>

²⁵⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2/6/2004] *OJ L195/16*

4.3.1 The IPRED review process

In 2011, the EU Commission proposed the revision of the IPRE Directive by stressing the need to adapt it to the new digital era.²⁵¹ Since then, though, little progress has been made. Whereas it was originally planned that the EU Commission proposal would have been submitted in September 2012,²⁵² the process is still at the consultation stage, which ended in April 2013.²⁵³ The results of the consultation proposals have been published on 2 August 2013.²⁵⁴ For the time being, the process has been postponed until 2014.²⁵⁵

Concerning the consultation process, though, there have been many complaints that this consultation call has been written almost entirely from the perspective of the entertainment industry, as the majority of the questions was addressed to rights-holders.²⁵⁶

4.3.2. The policy goals of the EU Commission and a short evaluation

According to the roadmap towards the review of the IPRE Directive that the European Commission has drawn,²⁵⁷ the following policy goals can be distinguished:

- 1) Detailed rules on obtaining information from intermediaries;
- 2) Fast-track and low-cost civil procedures for straightforward infringements;²⁵⁸

²⁵¹ La Quadrature du Net, "Anti-Sharing Directive – IPRED Dossier": <http://www.laquadrature.net/en/anti-sharing-directive-ipred>

²⁵² Roadmap for the Proposal for a revision of the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC), available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2011_markt_006_review_enforcement_directive_i pr_en.pdf

²⁵³ European Commission's website regarding the Enforcement Directive: Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures: http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm

²⁵⁴ *Ibid*; European Commission: "Synthesis of the responses 'Civil Enforcement of Intellectual Property Rights: Public Consultation on the Efficiency of Proceedings and Accessibility of Measures'" (July 2013), available at: http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses_en.pdf

²⁵⁵ Monica Horten, "EU puts IPR enforcement on the back burner" (20/12/2012), available at: <http://www.iplegitimacy.com/index.php/ipred/830>; Monica Horten, "EU Commission re-sets clock for IP enforcement review" (30/4/2012), available at: <http://www.iplegitimacy.com/index.php/ipred/765-eu-commission-re-sets-clock-for-ip-enforcement-review>

²⁵⁶ "Does ACTA live on the EC IPRE Directive?" (2/4/2013), available at: <http://www.infosecurity-magazine.com/view/31565/does-acta-live-on-in-the-ec-ipred-directive/>; Glyn Moody "The great IPRED consultation fiasco" (2/4/2013), available at: <http://blogs.computerworlduk.com/open-enterprise/2013/04/the-great-ipred-consultation-fiasco/index.htm>

²⁵⁷ Roadmap for the Proposal for a revision of the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC), available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2011_markt_006_review_enforcement_directive_i pr_en.pdf

- 3) Actions against websites hosting infringing content;
- 4) Complementary “cooperation measures” between right holders and intermediaries in the form of soft law.²⁵⁹

It can be easily concluded that the EU Commission aspires to combat Intellectual Property rights infringement at many levels this time and it has rather chosen to address this issue by proposing a variation of the same repressive measures that has always been at the forefront.²⁶⁰ Apart from the Graduated Response schemes, which can always be hidden under the pretext of “cooperation”,²⁶¹ as it has been explained in the previous sections, the tendency of adopting a “notice and action” system against websites that host infringing content has emerged. Notice and action systems for copyright enforcement oblige ISPs to block access to illegal or unlawful content uploaded by Internet users, in case a rights holder claims that his rights are violated.²⁶²

“Notice and action” initiatives against ISPs in Europe are most likely to stumble onto the E-Commerce Directive provisions that shield ISPs from liability. However, a reform of the E-Commerce Directive has already been started; it aims at adapting it in order to provide support for the introduction of “notice and action” measures.²⁶³ Therefore, it is very easy to

²⁵⁸ As Monica Horten notices, “Fast-track measures could include blocking injunctions that can be obtained quickly, without a long court process.” [Monica Horten, “EU puts fast-track IPR enforcement on the map” (22/4/2013), available at: <http://www.iplegality.com/index.php/ipred/847-eu-puts-fast-track-ipr-enforcement-on-the-map>

²⁵⁹ Roadmap for the Proposal for a revision of the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC), available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2011 Markt 006 review enforcement directive i pr en.pdf; Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information Technology*, p.102-103

²⁶⁰ La Quadrature du Net, “Copyright: EU Commission invokes crisis to stick to repression” (16/4/2013), available at: http://www.laquadrature.net/en/copyright-eu-commission-invokes-crisis-to-stick-to-repression#footnote1_q8e4qn5

²⁶¹ Monica Horten, “EU puts fast-track IPR enforcement on the map” (22/4/2013), available at: <http://www.iplegality.com/index.php/ipred/847-eu-puts-fast-track-ipr-enforcement-on-the-map>

²⁶² Letter from Article 29 Working Party addressed to the EU Commissioner De Gucht regarding ACTA (15/7/2010), available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010_07_15_letter_wp_commissioner_de_gucht_acta_en.pdf; Irina Baraliuc, Sari Depreeuw and Serge Gutwirth, “Copyright enforcement in the digital age: a post-ACTA view on the balancing of fundamental rights” (2013), 21(1) *International Journal of Law and Information Technology*, p.103

²⁶³ European Commission: Notice-and-Action procedures: http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm; Monica Horten, “EU Notice and Action Directive: It’s on its way” (13/6/2013), available at: <http://www.iplegality.com/index.php/ipred/875>; Monica Horten, “Notice and Action:

conclude the new copyright enforcement inclinations in Europe. The reform of two important EU legal instruments towards the same direction appears to be a very strong weapon in the policy makers' arsenal and it would be extremely interesting to watch the unfolding and outcome of this "battle". "Notice and action" measures may seem to be "softer" than the Graduated Response initiatives, however they can have a great impact on freedom of expression and speech,²⁶⁴ if any content that has been allegedly violating the IP rights of a third party is blocked or removed upon his request without a prior verification process.

4.4 Concluding remark

A unified Graduated Response system has not been implemented so far across the European Union. However, we should keep our reservations for a possible future implementation because the European legal framework offers, or may offer in the future, the basis for its introduction.

The compromising and weaker "Freedom Provision" included in the Telecoms Package offers the legal basis for the adoption of Three Strikes schemes by the EU Member States, under the condition of a prior lawful procedure. The same prospect would be present even if Amendment 138 had not failed, as it merely provided judicial guarantees for Graduated Response measures' imposition instead of completely prohibiting them.

Apart from internal legislation, Graduated Response "threats" have been present in the EU by international agreements as well. ACTA's Digital Chapter and the vague expressions of cooperation within the business industry attempted to "sneak" the possibility of Three Strikes regimes implementation. ACTA's rejection by the EP was regarded as a containment for the spreading of Three Strikes policies in Europe. However, ACTA's ghosts have never left. They are hidden behind TAFTA and CETA, the new negotiated international agreements between EU, US and Canada.

the EU Commission's Damocles moment" (11/7/2013), available at:

<http://www.iplegality.com/index.php/ipred/883-notice-and-action-the-eu-commissions-damocles-moment>

²⁶⁴ Letter from Article 29 Working Party addressed to the EU Commissioner De Gucht regarding ACTA (15/7/2010), available at:

http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010_07_15_letter_wp_commissioner_de_gucht_acta_en.pdf

The Telecoms Package and ACTA are clear-cut cases that evidence the incompatibility of the imposition of Graduated Response systems at EU level with the fundamental rights of privacy, data protection and freedom of expression, as they include excessively burdensome measures against Internet users in order to defend the rights-holders interests. The need to preserve proportionality, a “fair balance” among the above conflicting rights and the Intellectual Property Rights’ protection should be applied in practice, as well, instead of being a mere blessing included in ACTA’s Article 27(3) and the Freedom Provision in the Telecoms Package.

The Graduated Response systems have always been and will continue to be *omnipresent* as an alternative solution concerning the combat of online copyright infringement. However, the IPRE and E-Commerce Directives’ undergoing reform additionally shows an inclination towards “Notice and Action” measures against ISPs, opening new debates and battlefields.

Chapter 5: Summary and Conclusions

The Digital revolution and the rise in popularity of P2P file-sharing have challenged the enforcement of traditional copyright laws, which seem inadequate and ineffective in the fight against online piracy. In order to defend their Intellectual Property rights, copyright holders had to rethink copyright protection on the Internet by designing new ways of copyright enforcement.

The Graduated Response system came as a very promising alternative, incorporating a sort of mandatory cooperation between copyright holders and ISPs: monitoring of Internet traffic, detection of copyright infringing activities, three warning notifications being sent to the alleged infringers and, ultimately, a possible termination of their Internet access account.

Despite its promising and innovative character, though, the Graduated Response system has created much more issues than those it was supposed to resolve. Its compatibility with the fundamental human rights to privacy, data protection and freedom of expression of the Internet users was seriously contested, as it promoted a copyright enforcement model “at all costs”.

The present thesis discussed the extent to which the adoption of a Graduated Response system at EU level would be compatible with the fundamental human rights to privacy, data protection and freedom of expression. This discussion was escalated, as it began from the national level and it ended up with the European level. For this legal research, France and the UK, the first EU Member States that have implemented a legislated Graduated Response mechanism, and the only ones so far, were examined.

Chapter 2

Chapter 2 provided an overview of the Graduated Response regimes applicable in France and the UK. A step-by-step comparative analysis that followed highlighted their similarities and differences. These findings can be summarized as follows:

- Whereas both laws implement Internet traffic monitoring by the copyright holders, in the French regime the CIRs are reported to the HADOPI Authority whereas in the UK regime they are reported directly to the ISPs.

- In France, the actual sender of the warning notifications is the HADOPI Authority; the ISPs are merely the means for the sending. In the UK, though, the ISPs are the competent bodies for this process.
- Regarding the identification of subscribers as alleged copyright infringers, DEA is more protective towards their identity as the CIL is kept anonymous. It only permits identification if a copyright holder has previously obtained a court order. On the contrary, in France, ISPs reveal subscribers' personal information upon the HADOPI Authority's request.
- As far as the sanctions are concerned, Internet disconnection is present in the French regime. In the UK, however, because of the early stage of the DEA implementation, the ultimate sanction is the inclusion of the repeatedly alleged infringers to a CIL. This inclusion may only lead to court actions by the copyright holders.
- The French Graduated Response scheme is more suppressive, whereas the British one is more proactive because it chooses a two-stage implementation and the imposition of technical measures as a last resort solution.

Chapter 3

Chapter 3 examined the effect of the HADOPI Laws and DEA on the fundamental human rights to privacy, data protection and freedom of expression. It also evaluated the proportionality of their measures - monitoring, IP addresses processing and Internet disconnection - and assessed whether they achieve a "fair balance" between copyright enforcement and the above mentioned rights of the Internet users. Each one of these measures was put under a "proportionality" critique, following the three steps of the proportionality test: 1) suitability, 2) necessity, 3) proportionality *stricto sensu*. The proportionality test on HADOPI Laws and DEA, therefore, triggered the emergence of further contrasts between these two Laws. The findings of Chapter 3 can be summarized as follows:

- The main privacy and personal data issues that HADOPI Laws and DEA raise concern the highly invasive monitoring policies for the detection of online copyright infringing activities and the identification of alleged copyright infringers by their IP addresses.
- Monitoring is a suitable measure for the combat against online copyright infringement, as it facilitates the detecting of copyright infringing activities. IP

addresses processing is also a suitable measure, because of the identification capability it offers regarding the alleged copyright infringers.

- The generalized monitoring techniques of Internet traffic fail the necessity test, as they make no discrimination between suspicious or innocent Internet users. Monitoring could be more targeted on IP addresses getting involved into significant infringements or infringements committed for the purpose of commercial or financial gain.

As far as IP addresses processing is concerned, the necessity test results in different outcomes between HADOPI and DEA. Under the French regime the identification of the alleged infringers takes place merely upon HADOPI Authority's request to the relevant ISPs, whereas in the UK the subscribers' identity is protected. It is only revealed after a previous court order had been obtained by a copyright holder who wishes to bring legal actions against the alleged infringers. Therefore, identification as implemented in the DEA passes the necessity test, whereas HADOPI fails.

- Generalized monitoring and IP addresses processing measures are excessively burdensome on individuals, as they mostly affect innocent Internet users. Furthermore, IP addresses processing raise serious concerns about its accuracy as an identification method, as it only indicates computers. As a computer can be used by several persons, the relevant Internet subscriber identified may not be the actual copyright infringer. Additionally, identification takes place without a prior judicial decision on whether the suspicious detected activity actually constitutes copyright infringement. The CIRs are mere allegations of infringement and do not constitute proven facts. The justification, therefore, of the disclosure of the subscribers' identities is highly disputed. As a result, both HADOPI and DEA fail the proportionality *stricto sensu* test.
- Internet disconnection is the ultimate and hardest sanction imposed by the Graduated Response systems. It collides with the fundamental human right to freedom of expression, as it deprives of a person the right to receive and impart information via the most common tool of the digital era: the Internet.
- Internet disconnection as a sanction against repeat online copyright infringing activities fails the suitability test. Internet, in general, is a legitimate communications facility but its infrastructure also constitutes an ideal platform for the commitment

of unlawful activities as well, such as copyright infringing P2P file-sharing. This unlawful use, however, clearly depends on the choices of the Internet user.

Furthermore, Internet disconnection is a mere denial of Internet access and the benefits it can offer, as it neither punishes the infringing activity nor educates the offender, especially when the infringer can find alternative Internet access.

- Internet disconnection fails the necessity test, as there are other less restrictive copyright enforcement alternatives towards the right to freedom of expression, such as a fee imposition by the ISPs or the conventional civil and criminal penalties for copyright infringement. This latter “litigation” approach is implemented in the DEA, by offering to the copyright holders the opportunity to sue the alleged infringers included in the CIL.
- Internet disconnection fails the proportionality *stricto sensu* test as it ignores the important role of the Internet in everyday life and apart from the infringer it may affect other innocent Internet users as well, in case the suspended Internet connection is shared.

Furthermore, it fails to take into consideration the “commercial” criterion and it targets individual infringements instead, the majority of which aims at personal use of the illegally obtained works.

Additionally, both HADOPI and DEA place a burden on every Internet subscriber to safeguard their Internet accounts, otherwise they will be held liable for every activity that their accounts appears having been involved into. This strict rule reveals the tendency of the Graduated Response systems to create offenders when the actual ones are hard to be found.

- The fact that a prior judicial decision is demanded in the French regime before Internet disconnection takes place should be praised compared to the more arbitrary way that Internet disconnection is designed to take place under the UK scheme. The UK scheme, though, has the advantage of being more reluctant in Internet disconnection implementation and keeping it as a last resort measure.

Chapter 4

In Chapter 4, the discussion moved from the national to the European level. It examined the attempts for the establishment of the legal foundations supporting the implementation of a Graduated Response system at EU level. Using the findings of Chapter 3 as evaluative tools,

it also assessed whether that would be compatible with the fundamental human rights to privacy, data protection and freedom of expression.

The reform of the EU Electronic Communications Framework was the first attempt to introduce Graduated Response relative measures. The copyright debate was centered on Amendment 138, which mandated a previous judicial ruling before imposing any sanctions to Internet users in order to safeguard their right to due process. Amendment 138 was not finally adopted. A compromising provision was agreed instead, implying a prior and fair impartial procedure, either administrative or judicial.

The perspective of a Graduated Response system is present in the Telecoms Package, as it creates the legal basis on which the EU Member States can base its implementation in their jurisdictions. The same prospect would be present even if Amendment 138 had been adopted, as it merely aimed at inserting a crucial safeguard and judicial guarantees; if Amendment 138 was adopted, it could not impede the implementation of a Graduated Response system itself, as it mainly focused on procedural concerns. Chapter 3 has already proven, however, that Graduated Response mechanisms are highly problematic and threatening for the fundamental rights to privacy, data protection and freedom of expression.

Following the Telecoms Package, the next Graduated Response imposition attempt was included in ACTA's Digital Chapter, which promoted a sort of cooperation between right holders and ISPs. ACTA raised the same fundamental human rights concerns, as the schemes it promoted were incompatible with the rights of privacy, data protection and freedom of expression. Under ACTA's provisions, copyright enforcement prevails over the previously mentioned rights. After ACTA's rejection by the EP, future developments are expected to be very interesting as the EU is currently negotiating two similar to ACTA agreements: TAFTA and CETA.

Apart from the Telecoms Package and ACTA attempts for a Graduated Response imposition, the current discussions at EU level reveal some different inclinations. The ongoing review of the IPRE Directive appears to be another ideal occasion for strict rules violating online freedoms. However, the European Commission seems to choose this time various repressive measures in order to adapt online copyright enforcement in the new digital era. Apart from

hidden possible Graduated Response initiatives under the pretext of “cooperation”, a new tendency of adopting a “notice and action” scheme against websites that host infringing content has emerged. This combination of “weapons” provides some insight for the new copyright enforcement battles that are about to unfold in the next years.

A lesson to be learnt

Copyright protection in the digital era and especially on the Internet is, incontestably, a very challenging undertaking. Due to the advent of file-sharing and the incompetence of the existing copyright laws to deal with this phenomenon, strengthened digital copyright enforcement measures like the Graduated Response mechanisms have come to the forefront as online copyright enforcement weapons, being escorted by a peculiar characteristic: whereas they are supposed to combat online copyright infringement, they rather result in creating new battlefields.

The present thesis established the incompatibility of a Graduated Response system at EU level with the fundamental human rights to privacy, data protection and freedom of expression. The inherent conflict of these rights with the online copyright enforcement should not be ignored by the policy makers. As long as the Graduated Response systems alienate Internet users and impede the exercise of their fundamental human rights, they will always constitute extremely costly solutions.

Without underestimating copyright enforcement’s significance and the need to preserve the copyright holders’ interests, copyright enforcement at all costs and at the expense of the fundamental human rights to privacy, data protection and freedom of expression is too high a price for Internet users to pay. If online copyright enforcement in the digital era can only be accomplished through the violation of the fundamental human rights to privacy, data protection and freedom of expression of the Internet users, maybe it is about time to completely reform our copyright system.

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