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# GRADUATED RESPONSE SYSTEMS "3-strikes" versus "6-strikes"

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#### Annotation

Nowadays peer-2-peer filesharing is a common activity. A lot of citizens in many countries are using these websites every day, because it is fast, easy to use and mostly it is free. However, a lot of contents on these web pages are illegal. If somebody downloads one of these contents, it hurts the interest of the copyright holder, the downloader therefore commits a copyright infringement. The copyright holders expect the protection against these infringements from the state. This is one of the most important reasons why states made steps to prevent illegal downloading and to punish copyright infringers.

Key words: Peer-2-peer filesharing, copyright infringements, graduated response system, 3-strikes, 6-strikes, Hadopi, Copyright Alert System, ISP's

#### Introduction

In my short article, I would like to introduce two different graduated response systems, the French and the US model, because i would like to figure out, which model could work with more efficiency in Hungary. There are a lot of differences between these two systems, but these come from the diverse mentality of the countries. Both of the regulations are quite new, e.g. the US model is effective since 25 February 2013. Henceforth, I am going to present the 3 and the 6 strikes systems.

#### France ("3 strikes")

"The most common form of graduated response is the "three strikes and you're out" model, in which a user's Internet access is suspended by his or her ISP following the receipt of three successive notices of copyright infringement over a set period of time"<sup>179</sup>

ISP's are the Internet Service Providers. They have subscribers, who commit infringements by downloading illegal contents from the filesharing sites.

"The domestic roots of graduated response can be traced back to the DMCA and its "repeat infringer" provision, which conditions an ISP's eligibility for safe harbor from claims of secondary copyright infringement on the ISP's adoption and implementation of a policy that provides for termination of access for repeat infringers." <sup>180</sup>

In this regulation there are two crucial points, which made the use of this rule harder. The first: it was not defined in the statute, who a repeat infringer was <sup>181</sup>; the second: the "courts have been deferential to service providers concerning the substance and form of their individual repeat infringer policies" <sup>182</sup>

After we got to know the roots of graduated response system, we can speak about the French model, the HADOPI, its the name of which is an abbreviation for the name of the French administrative body (the agency's name), which if we would like to translate in English sounds as "the High Authority for the Distribution of Works and the Protection of Rights on the Internet" 1883

"President Sarkozy, who appointed a commission to develop a graduated response policy for France. In 2007, the commission submitted a report proposing the creation of an administrative body to oversee a system of

<sup>&</sup>lt;sup>179</sup> Annemarie Bridy: Graduated Response American Style: 'Six Strikes' Measured Against Five Norms in: Fordham Intellectual Property, Media & Entertainment Law Journal. Vol. 23. No. 1, pp. 1-66 (2012) p.7

id. p. 7-8

<sup>&</sup>lt;sup>181</sup> See: id. p. 8

<sup>182</sup> id. p. 8

<sup>&</sup>lt;sup>183</sup> id. p. 17

warnings and sanctions for repeat infringers. The report was followed in 2008 by the introduction of legislation creating that administrative body, Hadopi "184"

In France the 3 strikes system first functioned as follows: First, the Hadopi sent a warning letter to the copyright infringer, in which they called the attention of the infringer to the illegal activity. If it was not enough, then the second warning was issued as a registered mail to the user. If the infringer did not stop to download illegal contents, then the third strike happened. Here was an important rule. When the infringer gave up copyright infringement for six successive months, then the warnings were deleted, and if there was another infringement then the strikes began again. However, when using the third strike was necessary, then the Hadopi could suspend Internet access for a period of 3-12 months. <sup>185</sup>

This suspension was held unconstitutional. "The French Constitutional Council ruled that a user's Internet access could not be suspended solely on the authority of an administrative body without a court order to comply with the Council's ruling, the Hadopi legislation was promptly amended, and the system was reconfigured to include an accelerated legal proceeding presided over by a judge. "186

After this decision of the Constitutional Council, the system was renewed. Now a court order is indispensable to suspend a subscriber's Internet access. The whole new French graduated response system works according to the following rules:

"An Internet security and content detection company selected by rights owners generates the notices of infringement in the Hadopi system. A notice contains relevant information concerning the alleged infringement: the IP address from which the files were available, the ISP of the alleged infringer, and the date and time of the alleged infringement. The notice is forwarded from the security company to the copyright owner, which then refers the incident to Hadopi. To protect the accused subscriber's privacy, Hadopi forwards the notice to the subscriber without disclosing his or her identity to the copyright owner. If a subscriber is alleged to have infringed on a second occasion within six months of receiving the first notice, Hadopi forwards a second notice. If a third infringement is alleged within a year of the second notice, Hadopi refers the matter to a prosecutor, and a judge can order the subscriber's Internet access to be suspended. If the judge determines that the infringement was the result of a negligent failure on the subscriber's part to secure his or her Internet connection, the suspension is limited to one month. If the judge determines that the infringement was not merely negligent, a one year suspension may be imposed. If the subscriber wants to contest the judge's decision to suspend access, he or she can exercise the right to be heard on appeal. "IST

As we can read above, the basics of the 3 strikes system were maintained, only the third strike was converted into a constitutional form. Very important part of the third step is now, that because a court decision is necessary, there must be a right to appeal, which is included in this system.

At this point we should ask the question: Does the Hadopi system work? The numbers show that the answer is "yes". After 15 months from the launch of Hadopi "736,000 people have received their first letter, 62,000 their second letter, and 165 their third.... According to numbers estimated by Nielsen Research, P2P file-sharing fell by 26 per cent year on year. IFPI also cites figures from South Korea that suggest 70 per cent of file-sharers cease from copyright infringement on receipt of their first warning letter. Another French study is rather less emphatic, however.

<sup>184</sup> id. p. 18

<sup>185</sup> See: Anne-Sylvie Vassenaix- Paxton: The French Laws << Hadopi #1 & 2 >> slideshow slide 6 http://www.barrysookman.com/2012/10/10/the-french-hadopi-law-its-history-operation-and-effectiveness/ ( last view: 10 lune 2013)

<sup>&</sup>lt;sup>186</sup> Annemarie Bridy: Graduated Response American Style: 'Six Strikes' Measured Against Five Norms in: Fordham Intellectual Property, Media & Entertainment Law Journal. Vol. 23, No. 1, pp. 1-66 (2012) p. 18-19
<sup>187</sup> id, p. 19-20

Ipsos MediaCT suggests that 48 per cent of the age group 15 to 50 say the sanctions have a genuine deterrent effect on their behaviour." 188

#### USA ("6 strikes")

25 February 2013 the Copyright Alert System (CAS) was launched, by the Center for Copyright Information (CCI) in the USA. The US graduated response system is based upon the partnership between ISP's and music, video content owners. There is no administrative agency, maintained from state budget. On the one hand, are the music and video content owners, such as "RIAA and MPAA the Independent Film and Television Alliance (IFTA) and American Association of Independent Music (A2IM). "190", while on the other hand, there are the five largest ISP's: "AT&T. Verizon, Time Warner Cable, Comcast, and Cablevision." 191

Here I have to emphasize, that book and game publishers are not involved in this partnership.

Before I introduce the basics of the US graduated response system, I should make clear the connection between the CCI and the CAS.

"The establishment of CCI is the first order of business addressed in the MOU. As a public-facing entity, CCI is tasked primarily with educating a general audience about copyright law, the problem of online infringement, and legal sources of online content" <sup>192</sup> and "The MOU contains a complete procedural specification for CAS but leaves the operational details to CCI… <sup>193</sup>

After we cleared this part of the system, we can speak about how the strikes come after each other. "At the core of the CAS protocol is an escalating sequence of six warnings, or "copyright alerts," separated by seven-day grace periods. To begin the process, a copyright owner sends a notice of infringement to a subscriber's ISP, which then generates an alert and sends it to the subscriber whose IP address was identified in the notice." 194

"The first two copyright alerts are educational in nature and require no response or action from the subscriber. They explain that copyright infringement is illegal, that there are lawful ways of obtaining copyrighted content, and that users who persist in infringing copyrights will be subject to sanctions. The third and fourth alerts contain sterner language and require the subscriber to acknowledge receipt. The required acknowledgment can occur by means of either a click-through pop-up window or a clickthrough landing page to which the user's browser is diverted. At the acknowledgment stage, the subscriber must indicate that he or she agrees to immediately stop any infringing conduct in which he or she may have been engaged. Sanctions, or "mitigation measures," are not triggered until a fifth alert is sent. The MOU avoids being prescriptive when it comes to sanctions, specifying instead a range of mitigation measures from which ISPs can choose. Such measures include, but are not limited to, a temporary reduction in transmission speed, a temporary step-down in the subscriber's service tier, a temporary redirection to a landing page for completion of a program of copyright instruction, a temporary redirection to a landing page until the subscriber contacts a customer service representative, or a temporary suspension of access. No ISP operating under the MOU is required to suspend access for any subscriber.... In lieu of imposing a mitigation measure with the fifth alert,

<sup>&</sup>lt;sup>188</sup> Andrew Orlowski: Is France's 'three strikes' anti-piracy banhammer working? IFPI says yes. We look at the file-sharer numbers in: The Register, Media, Business <a href="http://www.theregister.co.uk/2012/01/24/hadopi\_working\_yesno/">http://www.theregister.co.uk/2012/01/24/hadopi\_working\_yesno/</a> (last view: 10. June 2013)

<sup>189</sup> See: Bill Rosenblatt: Copyright Alert System Lauches in the U.S. in Fingerprint, Law, Music, Video http://copyrightandtechnology.com/2013/02/ (last view: 10. June 2013)

<sup>191</sup> id.

<sup>&</sup>lt;sup>192</sup> Annemarie Bridy: Graduated Response American Style: 'Six Strikes' Measured Against Five Norms in: Fordham Intellectual Property, Media & Entertainment Law Journal. Vol. 23. No. 1. pp. 1-66 (2012) p. 27-28
<sup>193</sup> id. p. 30

<sup>&</sup>lt;sup>194</sup> id. p. 31

the ISP may elect to waive the measure and send a standalone fifth warning alert. The sixth alert, however must be accompanied by some mitigation measure. The mitigation measure can be the same one that was applied with the fifth alert, assuming the sanction was not waived at that stage, or a different one. After the sixth alert has been sent, the ISP has no further obligation to continue sending alerts to the subscriber, but it is required to keep count of any additional notices received from copyright owners concerning that subscriber. At every stage, the system will "reset" for the subscriber if twelve months pass without the receipt of an additional alert.... Before any mitigation measure is imposed, the recipient of a fifth or sixth alert has fourteen days to appeal the alert via a nonjudicial process outlined in the MOU.

In the US 6 strikes there are a lot of differences from the French system. The first was mentioned above, that is based upon a partnership, instead of an organisation founded by the state. The second is the number of the strikes, which means in my opinion, that the 6 strikes system is less strict than the 3 strikes. The third is, that the first two strikes have educational purpose and not punishment, I suppose it is very useful to prevent further infringements, and that should be implemented into the French system as well. Last but not least, in the US system the courts are excluded from the whole process. There is no way to suspend the Internet access of a subscriber, and if any mitigation measure is imposed, the affected person could appeal via a nonjudicial process.

#### Conclusions

In my opinion, copyright infringement is a very controversial territory of the copyright law.

 It is a common activity, which is accepted by the society, but on the other hand it is illegal, hurts the copyright holders' interests.

The holders have a right to protect their contents and they can fully require the protection from the state, or any other way.

- 2. I suppose, the graduated response is a very useful, effective and proportional way to protect the rightholders and decrease illegal downloading activity.
- 3. Both systems, that I examined have advantages and disadvantages. The largest advantage of the French system is, that judiciary way is involved. If the warnings are not enough, then the judge is going to decide the case, and against this decision, the right to appeal is open for the person concerned. However, in this model the educational purpose is missing, which is the largest advantage of the US system. When a warning not just calls attention to stop some activities, but informs the person concerned, why they should stop, this warning could be more effective in time. However, the 6 strikes system has a point, that I can hardly accept: there is no way to go to the court, and have a judicial decision about an infringement.
- 4. In summation when Hungary will launch a graduated response system, I suppose, the French model is a very good basis, with some changes. There could be a 4 strikes system, where the first strike should be a non-formal letter with educational purposes. In this letter everything will be explained about copyright infringement, the next three strikes and anything else, that might seem necessary, like in the US system. The second, third, and fourth steps could be similar to the soulution in France.
- I think, it is essential to establish an administrative body as well, for the purpose of overseeing the observance of respect for copyright.

<sup>195</sup> id. p. 32-33

<sup>196</sup> See more detail: Danielle Serbin: The Graduated Response: Digital Guillotine or a Reasonable Plan for Combating Online Piracy? in:American University Intellectual Property Brief Spring 2012 p. 49 http://www.ipbrief.net/volume3/issue3/IPB Serbin.pdf (last view: 10. June 2013)

## Bibliography

- 1) Annemarie Bridy: Graduated Response American Style: 'Six Strikes' Measured Against Five Norms in: Fordham Intellectual Property, Media & Entertainment Law Journal. Vol. 23. No. 1. pp. 1-66 (2012)

  2) Bill Rosenblatt: Copyright Alert System Lauches in the U.S. in Fingerprint, Law, Music, Video <a href="http://copyrightandtechnology.com/2013/02/">http://copyrightandtechnology.com/2013/02/</a> (last view: 10. June 2013)

  3) Andrew Orlowski: Is France's 'three strikes' anti-piracy banhammer working? IFPI says yes. We look at the file-sharer numbers in: The Register, Media, Business <a href="http://www.theregister.co.uk/2012/01/24/hadopi\_working\_yesno/">http://www.theregister.co.uk/2012/01/24/hadopi\_working\_yesno/</a> (last view: 10. June 2013)

  4) Anne-Sylvie Vassenaix- Paxton: The French Laws <<a href="http://www.barrysookman.com/2012/10/10/the-french-hadopi-law-its-history-operation-and-effectiveness/">http://www.barrysookman.com/2012/10/10/the-french-hadopi-law-its-history-operation-and-effectiveness/</a> (last view: 10. June 2013)
- 5) Danielle Serbin: The Graduated Response: Digital Guillotine or a Reasonable Plan for Combating Online Piracy? in: American University Intellectual Property Brief Spring 2012 p. 49 <a href="http://www.ipbrief.net/volume3/issue3/IPB\_Serbin.pdf">http://www.ipbrief.net/volume3/issue3/IPB\_Serbin.pdf</a> (last view: 10. June