

# INTERNATIONAL OBSERVATION

Hadopi has for several years been studying the systems developed by other countries to fight online copyright infringement. Its observation work consists of analysing foreign legislation and regulations and - to whatever extent possible - corroborating this through discussions and contacts developed with the concerned countries. The information reviewed comes from a variety of sources, most frequently in English (legislation, jurisprudence, press articles, telephone discussions with counterparts abroad, etc.), compiled by Hadopi's offices. It has not always been possible to secure equally precise information for each of the countries, due in particular to differences between the legal systems. As a consequence, this document may contain inaccuracies. The information it contains has already been provided to our counterparts, some of which have put it to further use.

Hadopi is now using these data to produce an international comparative outline study of systems developed to fight online copyright infringement. In support of that study, the analyses conducted for each of the countries will be presented hereafter. A chart has been provided offering an overview of all of the systems in a glance.

## AN INTERNATIONAL COMPARATIVE OUTLINE STUDY OF SYSTEMS DEVELOPED TO FIGHT ONLINE COPYRIGHT INFRINGEMENT

Many countries have come to realise the issues at stake in piracy and are working to design innovative systems, taking inspiration from mechanisms developed abroad, while remaining true to their respective legal traditions.

The need to combine a variety of tools to fight piracy is recognised internationally, as the legal proceedings initiated by rights holders are often protracted, costly, and sometimes ill-suited, given the need for swift action in the face of a quickly-spreading illegal offer.

Both in France and internationally, a variety of systems for fighting online copyright infringement have thus emerged, aimed as much at the Internet users who commit acts of copyright infringement via peer-to-peer networks, as at the **websites involved in massive copyright infringement**.

The systems are by no means mutually exclusive and, to the contrary, have proven complementary. The aim, on the one hand, is to raise awareness in "run-of-the-mill" Internet users about respect for intellectual property and the need to finance creation - via messages addressed personally to the users as parties responsible for their Internet access - and, on the other hand, to reach those players that derive their primary source of income from an activity which they know to be illegal. Overall, it can be noted that:

- no system escapes criticism, both for supposed violations of Internet user privacy, and a purportedly manifest lack of effectiveness;
- no charges of sharing or downloading have been recognised as having been made wrongly, except in very rare instances, all duly explained: the recognition and identification technologies used, comparable to those jointly implemented by rights holders, the Rights Protection Commission and Internet Service Providers from the start, have proved entirely reliable.

In fighting copyright infringement run via peer-to-peer networks and aimed at Internet users, graduated notice systems implemented prior to legal action and involving a series of warnings - reiterated in the event of repeat offence - are not uncommon. Several countries have either facilitated the implementation of a private system between Internet Service Providers (ISPs) and rights holders (including Australia, the United States, Ireland and the United Kingdom), or made such a system mandatory by law, for instance subjecting ISPs to specific notification requirements where rights holders have reported instances of copyright infringement (such as Canada, South Korea, New Zealand, Taiwan, and, under still-pending legislation, in Switzerland).

These systems were designed as an alternative (Australia, United Kingdom) or at the very least as a prior step (Canada, France, New Zealand, Switzerland) to legal proceedings against Internet users. Consequently, some of them do not provide for penalties (in particular that of the United Kingdom), while others provide for restrictive measures on subscribers to be implemented by ISPs, in some cases, subject to court supervision, and varying in form (the United States use bandwidth slow-down, pop-up reminders or e-mail notices that appear when subscribers log in, Ireland and Taiwan ask ISPs to suspend Internet access, while others ask the relevant sites to suspend infringing user accounts, in conjunction with the local authority in charge of implementing the system). It should be noted that some systems, like that of France, are furthermore

designed with a strong emphasis on education and awareness-raising, and also include a promotional aspect highlighting the legal content offer (Australia, the United Kingdom and Switzerland).

As regards action taken against **websites involved in massive copyright infringement**, two systems appear to enjoy consensus: the so-called "follow the money" approach, whereby advertising and financial resources to the infringing sites are gradually "dried up" through the combined action of rights holders and advertising and financing intermediaries (this approach, which is often implemented through self-regulation, is used in France, Spain, the United States, Italy and the United Kingdom, and is under discussion in Germany, Australia and Switzerland); and a legal framework of procedures developed at the request of rights holders and which can result in the removal of works or blockage of sites, both implementable by the public authority (in Spain and in Italy).

Within this context, the French model, which combines action on the part of the national authority, recourse to the courts for blocking orders and penalties inflicted under the graduated response procedure, as well as self-regulation under the aegis of the public authorities, stands out for its particular emphasis on respect for the rights and liberties which copyright infringement threatens. The data further show that the possibility of recourse to the public authority offers significant guarantees, especially regarding the protection of Internet users' privacy under the graduated response system and - where action targets sites enabling mass copyright infringement - competition law, reliability and site monitoring further to disciplinary measures implemented by players in the advertising and online payment sectors. In this respect, it emerges that the benefits derived from action on the part of a public authority can be deemed greater than the constraints connected with the said action.

SUMMARY CHART: SYSTEMS DEVELOPED TO FIGHT ONLINE COPYRIGHT INFRINGEMENT TODAY, BY COUNTRY

Action against Internet users sharing works online										
		Germany	Australia	Canada	United States	Ireland	New Zealand	United Kingdom	Switzerland	Taiwan
Prior warning e-mails sent	Type of system		Implementation of graduated warning mechanism under review (from 1 September 2015): Internet users are notified by the ISP in three stages, prior to possible litigation seeking compensation on the part of rights holders	So-called "Notice and Notice" warning system: very minimally-regulated procedure under which the ISP (referred to by the rights holders) send subscribers one or more notices, which may then be used as evidence within the context of copyright infringement proceedings	Very tightly-regulated graduated warning procedure: 3 main stages, each consisting of two steps. The system may vary by ISP.	Graduated warning system by ISPs upon referral from rights holders: procedure details (at least 2 steps); type of penalty specified in each agreement	Graduated warning system: warning issued by ISP in three stages before possible legal action on the part of rights holders to seek compensation	Contemplated warning system: e-mails sent by ISP to subscribers whose IP address has been provided by rights holders. This system is to be implemented by end-2015.	Contemplated gradual warning system: after 2 warnings are sent, the identity of infringing Internet users may be disclosed to rights holders so that legal proceedings can be initiated	Graduated warning systems: warnings sent out at the request of rights holders by the ISPs, prior to disciplinary action
	Legal foundations		Self-regulation subject to legal enforcement: a code has been drafted by ISPs, following consultation with rights holders and consumer associations	2012 Copyright Modernisation Act	2011 Statutory Agreement between ISPs and Rights holders	Via bilateral agreements concluded between ISPs/Rights holders, voluntarily or, barring this and since 2012, further to a legal requirement that may give rise to a court injunction	2011 Act	Private self-regulation	Draft legislation expected to be submitted for prior public consultation in early 2016	July 2009 Act
	Dedicated entity intervenes									
	Penalty may be inflicted			System purely for educational purposes	Rights holders may use the warnings as evidence during litigation	System varies by ISP: restrictive measures may be taken with respect to subscribers (e.g.: band-width slow-down)	Rights holders may initiate legal proceedings claiming compensation Where action under the system has had no effect, the subscriber's Internet connection may be suspended	System purely for educational purposes	The rights holder may request the Internet user's identity with a view toward initiating legal proceedings	Options include termination of Internet service / removal of content
Formal letters demanding compensation sent directly		Distinctive system: Rights holders may request the identity of an IP-address holder in order to serve notice directly to violating Internet users with an injunction to pay the rights holder damages and lawyers' fees (maximal amounts are defined by regulation).		The system is sometimes misused by American companies to demand payment from Internet users directly, via the formal notices.	Concurrent procedure: rights holders may address formal requests for compensation to subscribers					
<p><i>Note: this table does not list the countries that - to the best of our knowledge - have no system specifically aimed at Internet users, e.g., Italy and Spain</i></p>										

**Action against websites involved in massive copyright infringement**

		Germany	Australia	Spain	United States	Italy	United Kingdom	Switzerland	
Action targeting technical intermediaries	System overseen by an authority			The <b>Intellectual Property Commission</b> under the Ministry of Culture implements the notification and withdrawal (adversarial) procedure, upon referral from rights holders and subject to court supervision		<b>AGCOM (regulatory authority)</b> implements the notification and withdrawal (adversarial) procedure, upon referral by rights holders and <b>subject to court supervision</b>			
	Measures available to intermediaries	Rights holders may send notification letters to hosting sites with an injunction to permanently remove specific content, subject to demands and action securing compensation / <b>The judge may order that surveillance measures be implemented targeting specific parties</b>	Draft legislation under preparation so that rights holders may request a <b>site blocking order</b> from the courts, to be implemented by ISPs	The Intellectual Property Commission may demand the <b>permanent removal (subject to fines), blockage, de-referencing or suspension of a domain name.</b> Court action may be sought specifically where forced execution is required.	Voting on the SOPA and PIPA draft legislation was postponed <i>sine die</i> in January 2012, after it was hotly contested by civil society, primarily due to the blocking measures it would have enabled	AGCOM may order, in particular, the <b>removal of works</b> from hosting sites and demand that ISPs implement <b>measures blocking</b> the entire site. The Customs and Finance Guard may also refer cases to the justice system.	The judge may order that a site be <b>blocked</b> under many circumstances. Further to this, <b>agreements are often signed by the ISP and rights holders</b> as to how the sites may be updated, subsequent to the order. In addition, the City of London Police may ask that a <b>domain name be suspended</b> , where a given site has been deemed to be involved in massive copyright infringement.	Draft legislation, expected to provide that sites may be blocked by an administrative authority, will be subject to consultation in early 2016. The ruling can reportedly be appealed before the courts.	
Action aimed at empowering players other than technical intermediaries	Follow the money	Foundation	<b>Self-regulation:</b> alliance between rights holders and online advertising players. The alliance is currently at a stand-still due to investigations being carried out by the competition authorities. The Alliance has drawn up a <b>code</b> setting out the procedure and establishing the definition of websites involved in massive copyright infringement	<b>Self-regulation:</b> a code has been drawn up, but implementation thereof has met with resistance on the part of advertising players.	<b>Legislative:</b> since an October 2014 Act, the Intellectual Property Commission may request that payment and advertising intermediaries terminate commercial activity with copyright infringement sites (possibly subject to heavy fines)	<b>Self-regulation:</b> payment industry players signed agreements in 2011. Advertising players made commitments in 2012 and 2013.	<b>Self-regulation:</b> in June 2014, an agreement was signed by rights holders and advertising players, with the support of the IAB (international association dedicated to the development of interactive advertising)	Under the aegis of the police services in charge of drawing up the list of mass copyright infringement sites ( <i>Infringing Website List</i> ) a <b>cooperation mechanism</b> has been developed with advertising sector players. In addition to <b>gradual removal ("drying-up")</b> measures, it provides for advertising to be replaced by <b>educational messages</b>	<b>Self-regulation:</b> a working group composed of rights holders and government representatives has been formed to reflect on how to best implement a follow-the-money approach, and is expected to join forces with advertising and payment-industry players to ultimately conclude charter agreements
		Intervention on the part of a public authority		A follow-the-money approach implemented by the <b>Intellectual Property Commission</b>	The <b>National Intellectual Property Rights Coordination Center</b> contributes to implementing the procedure, targeting payment intermediaries	The City of <b>London Police</b> have formed a unit dedicated to handling violations of intellectual property law ( <b>Police Intellectual Property Crime Unit - PIPCU</b> )	The follow-the-money working group was formed by the Government.		
<p><i>Note: this table does not list countries that - to the best of our knowledge - have no system specifically addressing sites, e.g., Canada, New Zealand and Ireland</i></p>									

# AN ANALYSIS OF SYSTEMS DEVELOPED TO FIGHT ONLINE COPYRIGHT INFRINGEMENT IN MAIN COUNTRIES

## Germany

Germany does not have a graduated warning system reminding voters of the law. It does, however, take a different form of action toward Internet users who illegally share works via peer-to-peer networks. In addition, it is actively engaged in fighting centralised online services **involved in massive** copyright infringement.

### **Action with respect to Internet users illegally sharing works via peer-to-peer networks**

The German system described hereafter developed from a more traditional approach to anti-copyright infringement, which could be referred to as "compensatory".

As a result, a somewhat singular system has developed across the country.

Rights holders go before the court to ask that the ISP disclose the identity of the IP-address holder who enabled illegal sharing of works via peer-to-peer systems. The purpose of this request is not to initiate legal proceedings, but to make contact with the Internet user, via a lawyer or a specialised company and demand payment of damages or compensation that will prevent legal proceedings.

The formal letters addressed to the Internet user precisely state the amount demanded by the rights holder, which covers - in addition to damages resulting from unauthorised sharing of works - the legal fees borne by the rights holder.

Since October 2013, German law has provided a tighter framework for this form of action, in order to prevent specific forms of misuse, establishing:

- rules as to the content and degree of formality of the said letters;
- an upper limit of €55.30 on the legal fees that may be claimed per case. This system is aimed at putting an end to specific forms of misuse, as expense claims used to amount to as much as €0,000.

In 2013, rights holders sent out 109,000 letters, seeking a total of €0.3 million in compensation. The letters were sent mainly further to instances of film sharing (43.9%), followed by music sharing (22.8%).

In 2013, the average amount requested by rights holders amounted to €29.11; it is estimated that 15% of Internet users who received such letters paid the amount sought.

The first studies conducted in Germany reflect a decline in illegal downloading overall. The study on *Digitale Content Nutzung* conducted in 2011, for instance, shows that the number of people who illegally downloaded content dropped from 4.5 million in 2009 to 3.7 million in 2010.

It is for this reason that the formal letter (directly seeking compensation) has been depicted as a success by rights holders. The system has also come under harsh criticism, however, being perceived as highly intrusive and likened to a form of blackmail. In France, initiatives of this kind have reached their natural limits under the law, specifically as relates to respect for private data<sup>1</sup> and rules of professional conduct for lawyers<sup>2</sup>.

### **Action against centralised online services involved in massive copyright infringement**

Germany, like France, has singled out the revision of hosting sites' status as one of the components central to progressing in the fight against sites enabling mass copyright infringement.

Discussions are being held and recommendations issued about the appropriate liability for hosting sites so that - taking into account the guidelines which the European Commission will issue - a limited liability scheme can be adopted when specific conditions have been met, such as:

- the vast majority of content hosted by the site is illegal;
- the site specifically promotes a form of use prohibited by law;
- the site specifically promotes anonymity for those that put its services to use for illegal purposes;

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<sup>1</sup> Ruling 2004-499 DC of the Constitutional Council of the French Republic, 29 July 2004; EC 23 May 2007, Req. 288149.

<sup>2</sup> One lawyer who implemented this type of action was sanctioned in 2008 by the Paris Bar Association, which temporarily prohibited her from practicing law for a suspendable period of six months.

- the site does not allow rights holders to request the removal of illegal content.

However, systems do exist to take action against hosting sites through pre-litigation and litigation, enabling:

- rights holders to send letters of demand to hosting sites, asking that they remove illegal content and ensure that the said content does not re-appear on their site, subject to payment of a specific fine.
- the court to order, where legal proceedings have been initiated by rights holders against identified hosting sites, surveillance measures aimed at specific parties. Under such measures, the hosting site identifies and prevents illegal activity, to the extent considered proportional and economically bearable. As a consequence, specific sites may now be ordered to implement filtering by key words and maintain surveillance on a reasonable number of links to content which they host<sup>3</sup>.

As regards the follow-the-money approach, since 2012, an alliance has been in place between rights holders and online advertising players, on a self-regulatory basis. The alliance has developed a draft "Kodex" to regulate the system and establish the criteria by which "structurally infringing" sites should be defined<sup>4</sup>, providing also, to an extent, for adversarial procedures in that they allow the targeted sites to respond to allegations of copyright infringement.

The said "Kodex" also calls for the creation of entity composed of representatives of rights holders and advertising-sector players, to implement the system. The alliance is currently at a stand-still however, as the German competition authorities are conducting investigations to determine whether such action on the part of private players from the same sector of activity might constitute a violation of competition law developing, in that they are developing consensus positions on shared concerns.

Concurrent to this, on 10 March 2015, the State Secretary to the Ministry of Culture and Media, Monica Grutters, published a statement of principle on copyright infringement, in which she reasserted that advertising intermediaries should not place advertising on platforms with a "business model" based on copyright infringement.

## Australia

In July 2014, the government published a document known as the *Online Copyright Infringement Discussion Paper* and submitted it for public consultation, suggesting a variety of measures to fight online copyright infringement, such as offering financial incentives to ISPs or requiring that they take specific measures to prevent copyright infringement, e.g., via a graduated response system as part of a broader self-regulation scheme or blockage measures in execution of court rulings.

### Action with respect to Internet users illegally sharing works via peer-to-peer networks

In 2014, the Australian government initiated implementation of a graduated warning mechanism. Toward this end, it encouraged and fostered the creation of a self-regulation system by ISPs and rights holders - prior to any restrictive measures on its part - giving them six months to draw up an "Industry Code" implementing a graduated response mechanism.

On 20 February 2015, the *Communications Alliance*, the membership of which includes telecommunications sector players and, most significantly ISPs, published a draft code. The said Code provides for a warning system (Copyright Notice Scheme) without disciplinary action, and instead designed for educational and awareness-raising purposes, pointing the public to legal alternatives. The draft code drawn up by the Communications Alliance was submitted for public consultation, and drew criticism from a number of players. The Australian Association of Music Publishers suggested lines for improvement, in particular, the implementation of specific sanctions.

The graduated response procedure could be initiated from as early as 1 September 2015. The system would work as follows:

- notifications would be sent by the ISPs, upon receipt of IP addresses from rights holders;
- the system would consist of three notification stages: Education Notice, Warning Notice, Final Notice;
- where no Final Notice is addressed to the subscriber within 12 months following receipt of an Education Notice, the procedure would re-set to zero;
- the notices would contain links to educational content regarding copyright infringement as a violation of the law and legally-provided content;
- upon receiving Final Notice, subscribers would also be informed that their identity may be made available to rights holders upon request. The ISPs would furthermore commit to assisting rights holders in formulating those requests;

<sup>3</sup> BGH, 12/07/2012 Government Order - I ZR 18/11 - Alone in the Dark BGH, and 15/08/2013 Government Order I ZR 80/12 – File – Hosting – Dienst – so-called "Rapidshare" ruling.

<sup>4</sup> A site may be deemed to structurally enable copyright infringement: if it shares counterfeit content or facilitates access to such content (concurrently hosting little or no legal content, offering site functionalities such as search and use of illegal content, incentives to upload via compensation for up-loaders and guaranteed anonymity), and if the party responsible for the site does not remove the content upon request or if the party responsible is not identifiable.

- the subscriber would be able to turn to a public body to contest the proceedings.

Furthermore, a working group known as the *Copyright Information Panel* would be formed, consisting of an Executive Committee of five members, appointed by rights holders, consumer associations and ISPs. The panel would be responsible for such aspects as determining the implementation procedures for graduated response, forming the authority that would rule in the event of contestation from subscribers challenging the grounds for the notice received, administering an awareness-raising site for Internet users, explaining the graduated response system and presenting legal offer.

#### **Action against centralised online services involved in massive copyright infringement**

Currently, there exists no system in Australia specifically dedicated to fighting centralised online services enabling mass copyright infringement.

However, two undertakings deserve note.

The first, extending from the 2014 consultation (*Online Copyright Infringement Discussion Paper*), is a draft amendment to the Copyright Act and was put forth by the government in March 2015. It provides that, upon referral from rights holders, the court may order ISPs to block sites located abroad that engage in or facilitate copyright infringement.

Secondly, since October 2013, in line with the so-called "*follow the money*" approach, a group of rights holders from the music sector, *Music Rights Australia* (MRA), has been working with an association of advertising sector players, the *Audited Media Association of Australia* (AMAA), to raise awareness about how advertising players can unknowingly finance sites that are in infringement of copyright law and about the harm caused by such sites. Ultimately, the aim is to develop a code that would reduce the space for advertisement on such sites.

The code has been drafted but, while agreements have also been signed, resistance appears to remain amongst advertising sector players as to implementation.

## **Canada**

Canada provides both for action aimed at Internet users sharing works illegally on peer-to-peer networks and at centralised services involved in massive copyright infringement.

#### **Action with respect to Internet users illegally sharing works via peer-to-peer networks**

On 2 January 2015, Canada adopted a new warning mechanism known as the "Notice and Notice" system, further to the 2012 Copyright Modernisation Act.

It is a legislative measure based on a self-regulation system, which Canadian ISPs and rights holders have implemented under a voluntary agreement for the past ten years.

Canadian law now provides that ISPs must send subscribers written notice whenever rights holders file a report. Should they fail to do so, they must provide the rights holder with the reasons for which notice was not sent. Failure to fulfil this requirement subjects violators to a court-imposed fine, which may range from 5,000 to 10,000 Canadian dollars (or €6,654 to €3,312).

However, aside from establishing this requirement, the law does not provide for any specific procedures. Similarly, the system does not directly entail any disciplinary action against the Internet user.

The notices appear to be seen as warnings prior to possible legal action and, as such, if repeated, could be used as evidence in proceedings initiated by rights holders against Internet users on the grounds of copyright infringement.

The notice system continues to be the target of criticism for being largely incomplete, as it neither sets out requirements on content nor provides for disciplinary action, in particular in the event of repeat infringement. The lack of regulation as to content is cited in particular to explain why the system is used by rights holders, especially in America, to directly seek payment from Internet users, on the claim that their liability will otherwise be incurred.

#### **Action against centralised online services involved in massive copyright infringement**

Canada's 2012 Copyright Modernisation Act establishes a distinct scheme regarding sanctions applicable to online copyright infringement professionals, providing that "*it is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service*".

It adds, in this respect, that the court may take into account the following factors in determining whether infringement has taken place:

- whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
- whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

- whether the service has significant uses other than to enable acts of copyright infringement;
- measures taken to limit acts of copyright infringement;
- any benefits the person received as a result of the copyright infringement, and/or the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

The penalties that persons responsible of website involved in massive copyright infringement sites are subject and the compensation due have been, since the 2012 Act, the same as those applicable in the event of counterfeiting for commercial purposes, in other words, more severe and entailing more extensive compensation for rights holders.

Despite the 2012 reform, which instituted the system with respect to Internet users and mass copyright infringement sites, the IIPA<sup>(104)</sup> has requested that Canada be included on the USTR's 2015 *Notorious Markets List*. It asks in particular that Canada implement stronger legislation so that ISPs, hosting providers and other intermediaries cooperate with rights holders to fight online copyright infringement.

## South Korea

A law adopted on 22 April 2009 established an anti-piracy system targeting both the platforms that enable illegal downloading and the Internet users who download from the said platforms. There is no system specifically addressing the peer-to-peer network. It should be emphasised that, in Korea, distribution of cultural content is regulated, and some platforms operate with prior administrative approval (only 95 platforms hold such authorisation).

The system is implemented by the *Korea Copyright Commission* (KCC). Its scope of action extends to the 95 Korean platforms having received prior administrative approval.

Internet users may turn to the KCC when it comes to their attention that files have been illegally placed on one of the 95 relevant platforms.

Internet users file 70 to 80 reports per month via a form on the KCC website, including a screen shot. Internet users are rewarded for, incentivised and educated in detecting illegal content, using gift certificates.

Once the KCC has verified the allegations, it:

- sends notice to the platform to have the relevant content removed (Notice & Take Down);
- and sends a warning to the Internet user that provided the content, indicating that in the event of repeat action, the account could be suspended from the platform for a limited period of time. Three warnings are sent prior to solemn notice. When the fourth stage is reached, disciplinary action may be taken against the infringing user, blocking access to the platform (by blocking the log-in).

The platform is bound by law to cooperate with the KCC by the authorisation granted to it as provider of a public online communication service.

After multiple warnings, the Internet user's account on the content platform may be suspended.

In addition to the "graduated response" system, the KCC may also decide to block illegal sites. Working in conjunction with rights holders, the Commission verifies all files in the database (this process will be automated in the months to come). If more than 70% of these constitute illegally-provided content:

- if the site is foreign, the KCC asks that the Korean authority for audiovisual content on demand block the site;
- if the site is Korean, the KCC requests that the domain name be removed.

In 2014, 44 sites were blocked, following an average case processing time of four months.

## United States

In the United States, the graduated notice system is aimed at educating Internet users who illegally share works via peer-to-peer networks, as well as at taking action against centralised online services involved in massive copyright infringement.

### **Action with respect to Internet users illegally sharing works via peer-to-peer networks**

The American graduated response system, (known as the Copyright Alert System), was designed with the primary purpose of educating and raising awareness about legal alternatives.

Although the system varies by ISP, a representative example is provided by ISP Verizon, which operates in three main stages, each of which consists of two steps:

- In Phase 1, subdivided into Steps 1 and 2, e-mails are sent to subscribers ("educational alerts");
- In Phase 2, subdivided into Steps 3 and 4, subscribers are required to click on pop-up messages to acknowledge receipt of the initial e-mails ("acknowledgement alerts");
- In Phase 3, subdivided into Steps 5 and 6 ("mitigation alerts"), ISPs may, if they so choose (this is not the case with ISP Verizon), implement a restrictive measure against the subscriber (e.g., bandwidth slowdown).

The system is entirely voluntary and operates as a solely private initiative. It is based on a 2011 agreement between the five main ISPs and main rights holders (music and audio-visual).

In effect since February 2013, the system's architecture is as follows:

- the alerts are sent by the ISPs, upon collection and notification of IP addresses by the rights holders;
- a Center for Copyright Information (CCI) covering all rights holders and ISPs coordinates the implementation of the system and of awareness-raising actions;
- From Steps 5 and 6 on, subscribers may challenge the restriction measure prior to its being implemented by the ISP. They do so through a private third-party body, the American Arbitration Association, to which there is no judicial remedy.

The 2011 Agreement will come to term in July 2015. It is expected to be renewed, in particular to involve more rights holders and ISPs in the system. One of the objectives is to implement stronger awareness-raising action, possibly conducted in connection with the public authorities.

The graduated response system's implementation does not prevent rights holders from resorting to other channels, including an approach based more on seeking compensation directly from Internet users. The procedures involved in certain cases have come under criticism, however, and are questionable from the legal standpoint.

On 28 May 2014, the CCI published a mid-way report on the first 10 months of the graduated response system's implementation (March-December 2013): 1.3 million warnings were sent; the majority of the warnings came as part of the Educational phase (72%), with only a minority of the recipients reaching the final Mitigation stage (8%, and only 3% of recipients in the 6th and final stage). The CCI concluded that the experimental system should be confirmed and ramped-up for the following year, with a specific target of multiplying the number of alerts by a factor of two.

In May 2015, the *Internet Security Task Force*, which includes independent American film studios, deemed the system ineffective, condemning in particular the fact that the number of warnings sent by the ISPs per month is subject to a limit.

### **Action against centralised online services involved in massive copyright infringement**

The United States have been forerunners in acting against sites involved in massive copyright infringement. The nation's "policy" is structured around two main components :

- A list of sites enabling mass copyright infringement: the American government, via the USTR (*United States Trade Representative*) publishes a *Notorious Markets List* each year, identifying those sites across the world that commit or egregiously encourage others to commit acts of trademark or copyright infringement. The list is established for purposes of public information. It is drawn up on the basis of proposals primarily from the relevant industries and further to examination by the USTR. Once the list has been published, the sites found on it sometimes contact the USTR to ask what they need to do in order not to be listed the following year (see below presentation of the USTR's 2014 List).
- A "follow the money" approach, under which payment intermediaries and online advertising players work together to fight copyright infringement:
  - With the support of the Obama administration, rights holders and payment intermediaries signed agreements in May 2011 to take action against both copyright and trademark infringement. Further to these agreements, a secured platform - the International Anti-Copyright Infringement Coalition (IACC) - the members of which are all intellectual property rights holders - was set up to receive reports from rights holders. The Coalition reviews them, then transfers them to the relevant payment intermediary. The IACC also transfers information to a public authority, known as The National Intellectual Property Rights Coordination Center. The relevant intermediary must then contact the site to conduct checks on its lawfulness. A review conducted in 2012 shows that 906 accounts of sites sharing counterfeit content were shut down.
  - On 3 May 2012, online advertising players<sup>5</sup> published a joint statement encouraging the adoption of best practices, so as to prevent advertisers from unwittingly funding or legitimising the activities of sites dedicated to trademark or copyright infringement. In July 2013, a number of advertising platforms<sup>6</sup>, signed the Best Practices Guidelines for Ad Networks to Address Piracy and Copyright Infringement.

### **Overview of USTR and the List**

<sup>5</sup> The Association of National Advertisers and American Association of Advertising Agencies.

<sup>6</sup> Media, Adtegrity, AOL, Condé Nast, Google, Microsoft, SpotXchange, and Yahoo!.

The USTR is a government agency that coordinates commercial policy in the United States and publishes two lists each year:

- One list required by the law, the "Special 301 List", which lists the countries that do not provide effective protection for intellectual property rights;
- and another not required by law, the "Out-of-Cycle Review of Notorious Markets". The latter identifies physical or online merchant sites that facilitate commercial copyright infringement and are detrimental to rights holders. Each year, the USTR issues a public statement to announce that it is going to draw up the list. The public may then submit contributions which are further published on the USTR's website. It then establishes the list, based on criteria that are not public and are subject to variation.

### **The 2014 Out-of-Cycle Review of Notorious Markets published by the USTR on 5 March 2015**

In its overview statement, the USTR reiterates that the list does not purport to be exhaustive and that some markets involve both legal and illegal activity. The USTR explains that some previously-identified markets no longer appear on the list, either because the market has closed, its popularity or significance has diminished, or the prevalence of IPR-infringing goods or services has declined further to voluntary or forced action. The list includes 41 sites and extends as well to mirror sites<sup>7</sup>.

The USTR pays tribute to the positive developments that have occurred since the publication of the 2013 list, following specific measures such as the institution of efficient notification and content withdrawal procedures, effective response to complaints, and agreements signed with rights holders.

The USTR furthermore pays tribute to the action of the Italian fiscal police and public prosecutor, which forced around one hundred sites delivering pirated content to shut down in January 2015. Also noted is the agreement reached between rights holders and advertising industry players in Italy. The USTR commends the publication of the report, "Operational Tools to Prevent and Combat Online Infringement", by Mireille Imbert-Quareta.

For the first time, the list includes domain-name registrars. Under the terms of an agreement between ICANN and the registrars, the latter are required to take action when notified of illicit activity occurring on a website the domain name of which they have registered<sup>8</sup>. Yet, according to the USTR, some registrars reportedly disobey court orders and ignore other requests to similar effect from government enforcement authorities. Some registrars even use their refusal to take action against illegal activity (by duly responding to notifications or following court orders to block or suspend domain names) as a means of commercial advertisement.

The 2014 list stands as follows:

- content sites: Rapidgator.net, Uploaded.net, Zippyshare.com, Ulozto.cz Nowvideo.sx, Movshare.net;
- torrent sharing sites: Cuevana.tv (Storm), Extratorrent.cc, Kickass.to, Torrentz.eu, Bitsnoop.com, Rutracker.org, Yts.re;
- sites containing links to content available for direct download: Baixeturbo.org, Bajui.com, Darkwarez.pl, Free-Tv-video-online.mer;
- sites containing links for direct download and streaming: 4shared.com, Yyets.com;
- social networks: vKontakte.com, Zing.vn;
- a domain name registrar site: Tucows.com;
- others: Gigabytesisemas.com, Catshare.net, Hardstore.com, E-nuc.com, Molten-wow.com;
- a list of countries where physical copyright infringement remains significant (Mexico, India, etc.).

## **Spain**

Spain has no graduated response system. Spanish law does, however, allow rights holders to seek court orders requiring ISPs to disclose the identity of copyright-infringing Internet users with a view toward initiating legal action against the latter for copyright infringement before the civil court.

Spain's legal framework against copyright infringement, initially set out by the 4 March 2011 Act, and modified in October 2014, focuses primarily on fighting centralised online services involved in massive copyright infringement, for which we have statistical data.

The 4 March 2011 Act, known as the Sinde Act, institutes a system, implemented by the Ministry of Culture's Intellectual Property Commission, by which instances of copyright infringement on websites can be reported. Upon noting the presence of copyright-infringing content on a site in violation of intellectual property rules (volume of works) and with sufficient ties to Spain (e.g.: site audience in Spain, language of works distributed, advertisements in Spanish, payment in euros, etc.), rights holders refer to the Intellectual Property Commission.

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<sup>7</sup> E.g.: Movshare Group/Private Layer (operating as Torrents.eu, Torrents.me, Torrentz.ch, Torrents.in, Putlocker.is, Nowvideo.sx, Movshare.net, Bitsnoop.com, Novamov.com, among others).

<sup>8</sup> [https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en?routing\\_type=path](https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en?routing_type=path).

Should the Commission deem the rights holders' claim to be founded, it may order the party responsible for the site to: provide claims to the contrary within 48 hours; take action to ensure that the content is no longer accessible; take action to ensure that the content is permanently removed ("stay-down" order); or discontinue the copyright-infringing activity.

Should further infringement be observed, the Commission may request that the technical intermediaries take any and all action necessary to put an end to the copyright-infringing activity, such as terminating the provision of a specific hosting service, blocking the site, de-referencing the site, or terminating the provision of hosting services overall. However, forced execution of such Commission decisions is subject to court approval.

The system instituted in 2011 has come under criticism however, in particular for the slow pace at which procedures advance and the system's ineffectiveness. The October 2014 Act was aimed concurrently at simplifying the administrative procedures so as to shorten processing times, and strengthening the system so as to make it more effective. It now provides that:

- notices are to be published in the Official Journal when the information needed to identify parties responsible for sites is not available. Furthermore, referrals to the Commission may now be filed only once the rights holder has made an attempt to contact the site requesting the removal of infringing content, and has provided the Commission with proof of both the request and its failure to elicit action;
- the Commission's scope of power now extends to referencing sites: indeed, more than content sites, link-sharing sites can be found in Spain and, notwithstanding, are aimed more at the Spanish audience. In order to be targeted, the referencing sites must significantly contribute to violations of intellectual property rights, taking account of audiences in Spain and the volume of protected works or objects to which they facilitate access;
- a "follow-the-money" system is now in place, enabling the Commission to request that payment intermediaries and advertising-sector players cease cooperation with sites that refuse to remove content. The law includes provisions on this point following failed attempts to involve advertising-sector players and payment intermediaries through self-regulation, the said parties refusing to take action with respect to sites that have not been found to engage in copyright-infringement by the court or public authorities. The Commission's aim will be to identify, during preliminary investigations, which payment and advertising bodies are partners to the infringing site. Where payment intermediaries and advertising players fail to terminate their contractual relations with the sites, they are subject to an administrative fine of up to €600,000; sanctions may be scaled up, in particular where sites are found to be repeat offenders:
- : An increase in the severity of penalties taken against websites in the case of repeated infringement.
  - the Commission may pronounce a fine of up to €600,000 following two requests to remove copyright-infringing content, where sites have failed to remove content or where content has re-appeared. The Commission deems as of the present time that fines will be imposed primarily on sites with connections with Spain, i.e., referencing sites. Content sites are expected to be targeted first and foremost by blocking measures.
  - the Commission may, last but not least, seek the suspension of the domain name, where the said name ends in ".es", or another extension within the scope of the Spanish registrar. Thereafter, the domain name shall not be available for use for a period of six months.

From its founding up to January 2015, the Commission received 426 referrals, more than 50% of which were found to be inadmissible on various grounds (e.g.: requests for Internet user identification made on peer-to-peer networks, use of challenged content fell within the scope of an exception to copyright law, copyright-infringing content had already been removed by the time the request was received, etc.). Out of the 219 requests for removal addressed by the Commission, 217 resulted in actual removal of the illegal content, thus bringing the procedure to a close, and 28 actually ceased to operate entirely.

According to the Commission, its action has led to a drop in piracy in Spain. To wit, out of the 250 sites most frequently visited in Spain three years ago, the number of copyright-infringing sites is believed to have decreased, from 29 out of 250 to only 15 today<sup>9</sup>. Furthermore, three years ago, the leading copyright-infringing site ranked 40th in sites most frequently visited, but is now in 71st position.

## Ireland

In Ireland, anti-piracy measures are structured around the implementation of systems jointly coordinated by ISPs and rights holders:

- either through voluntary contracts, where applicable, subject to court supervision;
- or where no prior agreement has been reached, under legal enforcement, as ordered by the court in enforcement of the law.

These measures may be aimed as much at Internet users who share illegal works on peer-to-peer networks as at centralised online services involved in massive copyright infringement.

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<sup>9</sup> Interview with Guervos Maillo Carlos, from the Ministry of Culture's Intellectual Property Commission, February 2015.

### **Action with respect to Internet users illegally sharing works via peer-to-peer networks**

The main ISP, Eircom, and IMRA (*Irish Recorded Music Association*) reached an agreement from as early as 2009, instituting a warning system designed in stages:

- The ISP sends e-mails to subscribers whose IP address has been reported by the IRMA. The mails contain a link to a programme known as Digital File Check, which assists Internet users in checking for and removing from their computers all peer-to-peer software and illegally downloaded works.
- After receiving three warnings, Internet users may be disconnected from the Internet for a period of 7 days to 1 year, in the event of repeat offence.

However, the system stirred controversy in Ireland in 2011, as potentially being in violation of legislation on protection of personal data. Following multiple instances of recourse action, the current contractual system similar to graduated response was ultimately validated by the Irish Supreme Court, on 3 July 2013.

Music majors also initiated legal proceedings against UPC, Ireland's second-largest ISP, in an attempt to have it institute a similar system. The first litigation in 2010 failed, the court deeming that under Irish law, ISPs could not be ordered to institute a gradual response system, in light of positive law and the legal requirements to which ISPs were then subject.

In 2012, however, Ireland's legislative bodies established – under Irish domestic law and at the instigation of European legislative powers – new provisions enabling recourse to the court for orders against a technical intermediary such as an ISP, the services of which are used to infringe upon copyright or neighbouring rights.

Further to one of the measures, rights holders may now ask that judges establish a contractual requirement for ISPs to institute a gradual warning system for Internet users.

One example of this came on 30 March 2015, when the Supreme Court, in response to proceedings initiated by three music majors, ordered the Internet Service Provider UPC to contractually commit to developing a warning system for Internet users in the event of reported violations.

The agreement is, however, subject to a number of limits:

- that the disciplinary action taken against Internet users be preceded by at least two warnings;
- that it be possible to terminate the subscription contracts of Internet users found guilty of repeat infringement;
- that music industry majors should provide for 20% of the costs incurred by ISPs;
- that the number of notifications sent out per month and per ISP does not exceed 2,500.

The ISPs and majors have, for a few years now, adopted varying communications strategies with respect to this system:

- EMI reports the number of notices sent out (29,000 in December 2011), and the number of subscribers said to have received three warnings and had their Internet access cut off for one week (100), or who, in addition, are said to have been permanently cut off from Eircom<sup>10</sup> (12);
- Eircom appears to counter EMI's claims, stating that, in actual practice, no user subscriptions have been suspended since the graduated response system was first implemented<sup>11</sup>.

### **Action against centralised online services involved inmassive copyright infringement**

Similarly, where action against centralised online services involved inmassive copyright infringement is concerned, the system may be pre-defined by contract or ordered by the courts in compliance with requirements set out by the law.

To wit, the IRMA and ISP Eircom had also stated in their agreement -- before the law made any provisions to this end -- that the ISP would comply with and implement blocking measures sought by rights holders where a judge confirmed the soundness of their claim. Such was the case when, on 24 July 2009, the Supreme Court validated the request to have website The Pirate Bay and all related sites blocked by ISP Eircom, based on its contractual commitments.

The copyright law reform instituted in March 2012 extended the system, enabling rights holders to seek court orders for ISPs to block specific sites.

As a result of this, in June 2013, rights holders were able to secure orders for six ISPs to block The Pirate Bay, including UPC and BT Ireland, which had shied away from any agreement up to that point.

## **Italy**

The system in Italy is focused primarily on fighting centralised online services involved inmassive copyright infringement, for which we have some statistical data.

<sup>10</sup> <http://fr.scribd.com/doc/83984745/EMI-Briefing-001>.

<sup>11</sup> <http://www.independent.ie/business/technology/three-strikes-but-not-out-of-eircom-yet-30088323.html>

In Italy, an independent authority founded in 1997, AGCOM, is responsible for regulating and overseeing the electronic communications, audiovisual and publishing sectors. Since 2000, its copyright protection responsibilities have grown in those sectors for which it serves as guarantor and regulator (audiovisual, SMAD and electronic communications).

Decree number 70/2003, in implementation of the Electronic Commerce Directive, provides that AGCOM, like the judicial authorities, may recommend to hosting sites and ISPs any measures deemed fit to prevent or put an end to the harm caused by the content of an online public communication service.

Consequently, AGCOM is in charge of determining and implementing action against centralised online services enabling massive copyright infringement. Toward this end, on 12 December 2013, it adopted regulations protecting copyright on electronic communication networks, which then went into effect on 31 March 2014.

The regulations institute a new procedure for copyright protection online, by which AGCOM may be referred to directly by rights holders.

When a purported violation is reported, AGCOM informs the relevant site of both the report and the opportunity it has to voluntarily remove the content in question, or file counter-observations within a period of five days. AGCOM also notifies when the procedure begins the intermediaries referred to in the Electronic Commerce Directive (ISPs and hosting sites). Where the hosting site does not remove the content on its own initiative, the case is referred to the College of AGCOM, which has 35 days to investigate it and issue a decision on the request. This time-frame may be re-defined as necessary, the regulations furthermore providing for a shortened procedure in the event of presumed "massive infringement".

The College of AGCOM may decide to either close the case, or confirm the instance of copyright infringement. It may then pronounce three forms of orders, in keeping with the principle of proportionality:

- if the site in question is hosted by a server found on Italian soil, the College may order that the hosting sites remove the works in question; or, in the event of massive infringement, it may order a blocking measure aimed specifically at those works;
- where the server hosting the works is not found on national soil, the College may order the ISPs to block the entire site (DNS or IP).

If the College issues an order to have works removed or a site blocked, it may order that the queries from Internet users relating to those pages or to the blocked site be automatically redirected to an AGCOM message describing the measures taken.

AGCOM may take administrative disciplinary action in the event of failure to comply with those decisions.

AGCOM decisions may be appealed before a court of law.

Other courses of action have been set out with the aim of stepping up the fight against **websites involved in massive copyright infringement**

- A judiciary mode: further to a court procedure alternative to the AGCOM procedure (if court proceedings have been initiated, the proceedings before AGCOM are suspended), the Customs and Finance Brigade (*La Guardia Di Finanza*), under the Ministry of Economy and Finance has powers to investigate, monitor and deter online infringement. It may refer cases to the judicial authorities.
- A procedure implementing the "follow-the-money" approach: in 2014, rights holders in cinema and music signed an agreement with online advertising players, with the support of the IAB. The purpose of the agreement was to enable advertising on illegal sites to be blocked. It is now provided that rights holders may report violations of their rights to a bi-partisan committee composed 50% of rights holders and 50% of IAB members, which in turn transfers the relevant information to online advertising players.

On 29 May 2015, AGCOM reported on its site that it had received 277 requests since the regulation came into effect in 2014, further to which 163 proceedings were initiated. These resulted in 57 decisions by the College of AGCOM, ordering ISPs to implement DNS-blocking of the relevant web-sites, automatically redirecting queries for the blocked pages or site.

As regards the action of the Customs and Finance Brigade, it is said to have also enabled various infringing sites to be blocked. In July 2014, for instance, the Police initiated an operation against the content site "*ddistorage*", on which a court blocking order had been issued.

In late January 2015, further to a complaint filed with the Public Prosecutor of Rome by a television channel, a magistrate authorised the police to block access from inside Italy to 124 copyright-infringing sites, in particular streaming sites.

## New Zealand

At this stage, we do not have information as to the existence of a system designed to fight centralised online services **involved in massive copyright infringement** clearly in infringement of copyright in New Zealand. Below, we describe action taken against Internet users illegally sharing works via peer-to-peer networks.

In 2011, New Zealand adopted legislation enabling action against illegal sharing of files by Internet users on peer-to-peer networks.

Similar to that of France, it is primarily a "gradual response"-type mechanism, structured in three stages.

The procedure appears to be as follows: rights holders may report instances of copyright-infringement to ISPs, which must relay them to infringing Internet users, in the form of "notices".

For this purpose, the ISPs receive financial compensation paid directly by rights holders.

Once three notices have been sent, the litigation phase may be initiated. In other words, the rights holders are entitled to start legal proceedings seeking compensation from this point. The court with jurisdiction on copyright matters may sentence the Internet user to pay damages of up to 15,000 NZ\$ (or approximately €760).

According to our information, the public authorities reserve the right to strengthen the mechanism by instituting possible suspension of Internet access (for a period of six months) as an additional course of disciplinary action, should the warning system prove an inadequate deterrent.

The *Recording Industry Association of New Zealand* ("RIANZ") estimates that 2,766 notices were sent out by ISPs between September 2011 and late April 2012, when the system was first launched. In August 2013, 13 decisions had been handed down, ordering Internet users to pay fines ranging from a symbolic payment to 600 NZ\$ (approximately €90).

## United Kingdom

The United Kingdom has established courses of action aimed at Internet users who illegally share works via peer-to-peer networks, as well as at sites involved in massive copyright infringement.

### **Action with respect to Internet users illegally sharing works via peer-to-peer networks**

In 2010, the *Digital Economy Act* (DEA) provided that, under the aegis of the communications regulation authority OFCOM, ISPs would be required to send notification to subscribers sharing works using peer-to-peer software without authorisation. This mechanism was never instituted, however, for a number of reasons: the law had been ratified by the previous government; the system established financial responsibilities which rights holders challenged; the ISPs complained of not having enough decision-making power over the way in which the procedure was to be implemented, etc.

Today, the Government supports the private initiative *Creative Content UK*, born of a voluntary agreement between rights holders and ISPs.

The system, designed entirely for awareness-raising purposes, includes:

- an awareness-raising campaign, to be implemented in July 2015, in various forms (television or online advertising, games or tools aimed at younger audiences);
- a warning system free of disciplinary action ("*The Voluntary Copyright Alert Programme*") which will be implemented in late 2015.

By virtue of this system, ISPs will send e-mails to subscribers whose IP address has been provided by rights holders. Warnings will potentially contain:

- one or more allegations;
- as well as one or more links to reports of violations, so that Internet users may see to which works the warning refers.

Each ISP shall nonetheless be allowed to determine in detail the content of its mails. It is expected that some ISPs will list, on a web page connected to their services, the list of allegations made, while others may refer Internet users to a dedicated page on the *Creative Content*<sup>12</sup> site, including a template notice.

Parties to the *Voluntary Copyright Alert Programme* hope to send out 2.5 million notices during the first year of the system's operation.

ISPs wish to measure the programme's impact on the legal content offer and reiteration rate. Consequently, it is expected that they will deliberately choose not to send out notices to certain subscribers, in order to assess the degree of behavioural change enabled compared to a group having received notice. Independent experts will conduct research in this regard, using anonymised data (most likely academics).

### **Action against centralised online services involved in massive copyright infringement**

#### **An overview of the system**

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<sup>12</sup> It should be noted that rights holders have developed a joint venture, designed in particular to receive the funds allocated by the government to the *Creative Content* initiative.

The United Kingdom appears to be applying an increasingly stringent criminal policy in the fight against "pirate sites". An English lower court recently sentenced the owners and administrators of one site to 32 and 21 months' prison time respectively.

Similarly, there are many instances of judges ordering ISPs to block sites<sup>13</sup>. Consequently, ISPs and rights holders have had to reach agreements regarding the updating of sites subject to blocking orders (mirror sites, especially), in order to avoid returning to the courts.

In September 2013, the City of London Police formed a unit dedicated to intellectual property infringements: The *Police Intellectual Property Crime Unit* (PIPCU) fights violations of intellectual property rights (copyright, as well as trademarks, material goods, or digital goods, with the sole exception of medicines), and more specifically violations committed online.

Within this framework, an agreement has been reached between the PIPCU, rights holders<sup>14</sup> and online advertising players<sup>15</sup>, with a view toward drawing up a list of services enabling mass copyright infringement (*Infringing Website List*) and action taken toward them (*Operation Creative*).

PIPCU has thus drawn up a list of massive copyright-infringement services based on proposals from rights holders and its own investigations. The criteria used are confidential and the list, which has not been published, is available only to parties to the agreement.

It then makes contact with the sites and asks that they cease their illegal activity. Should this fail to elicit a response or in the event of refusal, it may:

- either transfer the name of the service to online advertising players to dry up the site's advertising revenue by cutting off advertising delivery via the said sites. The advertising delivered on the said sites via agreement signatories may also be replaced by educational banners aimed at Internet users (*Project Sunblock*).
- or ask that the registrar with which the site domain is recorded suspend the domain name.

The list is updated once per week. A service provider has been chosen to monitor police action and assess its impact on advertising.

## Metrics

According to the British Recorded Music Industry, piracy in the United Kingdom remains high, with seven million people having visited a site involved in copyright infringement each month in 2013.

The list drawn up by PIPCU is said to include 111 sites at present, as compared to 150 at the start. The decrease is due to a number of factors: some sites have ceased to operate, while others engage in geo-blocking so as to no longer be accessible to Internet users logging in from inside the United Kingdom.

Further to the measures taken by advertising-sector players in the second half 2013, the following variations were observed: a 12% decrease in major brand advertising; a 39% increase in advertising for erotic sites or sites exposing Internet users to malware; nearly 46% of advertisements on the sites were from unknown or un-identified brands which invited Internet users to click and which could potentially expose them to scams.

Lastly, according to a report using a strictly similar methodology for each nation, "*A Profile of Current and Future Audiovisual Audience*" published this year by the European Commission, the United Kingdom has the second-lowest free film download rate in Europe (49%).

## Switzerland

In June 2014, the Swiss Federal Council announced that the Federal Department of Justice and Police (DFJP) was preparing to produce a draft reform of the current copyright law, to be submitted for public consultation in first quarter 2016. The draft text is expected to contain measures aimed at Internet users as well as against centralised online services involved in massive copyright infringement.

### Action with respect to Internet users illegally sharing works via peer-to-peer networks

As positive law stands, Switzerland appears to take minimal repressive action against downloading from illegal sources; if anything, piracy is in fact growing, according to the *International Intellectual Property Alliance* (IIPA)<sup>16</sup>.

Nonetheless, awareness-raising action is being taken by the Federal Institute on Intellectual Property to introduce the public to copyright (information guide, STOP PIRACY association made up of public and private players). For a time, there was discussion about the prospective creation of a public platform for the legal offer; however, the Minister of Justice concluded that such an initiative was more the responsibility of the rights holders.

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<sup>13</sup> Some 100 sites are said to be blocked to date.

<sup>14</sup> The Federation Against Copyright Theft, British Recorded Music Industry, International Federation of the Phonographic Industry – IFPI – and Publishers Association.

<sup>15</sup> The local Internet Advertising Bureau – IAB –, Incorporated Society of British Advertisers and Institute of Practitioners in Advertising.

<sup>16</sup> <http://www.iipa.com/rbc/2015/2015SPEC301SWITZERLAND.pdf>

The announced copyright reform is expected to make it possible for rights holders to request that ISPs send notices to Internet users who illegally share a significant number of works online. Should sharing continue over the year, a second notice could be sent. Following two notices, the Internet user's identity could be disclosed to rights holders, who would then be able to initiate litigation against him.

### **Action against centralised online services involved in massive copyright infringement**

Switzerland does not, as of yet, have regulations specifically dealing with the status of hosting sites and technical intermediaries; the draft law is expected, to a certain extent, to fill that void.

According to our information, Switzerland plans:

to address the status of technical intermediaries, giving priority to two angles:

- instituting a requirement for hosting sites to prevent the re-appearance of content in violation of copyright law ("stay-down") on massive infringing sites;
- self-regulation with respect to complying sites that remove content "accidentally" placed on their online platform (e.g.: YouTube).

to define legislation about blocking: the draft law is expected to enable the public authority (police services already in charge of ordering blockage of child pornography sites, or the Federal Institute on Intellectual Property) to order ISPs to implement blocking measures, under court supervision, with the provision that the said measures are subject to recourse. It is believed that the decision to entrust a public authority with this power was made as a means of speeding up the procedure.

Furthermore, a working group is being formed to explore options for implementing a "follow the money" approach through charters signed for this purpose. The working group was appointed by the State Secretary for the Economy and is, for the moment, composed of rights holders and government representatives. Payment and advertising-sector players are expected to become part of the group at a later time.

## **Taiwan**

The system in existence in Taiwan consists primarily of action aimed at Internet users illegally sharing works via peer-to-peer networks. At this stage, we have no information as to the existence of a system designed to fight centralised online services enabling massive copyright infringement egregiously infringing on copyright in Taiwan.

A graduated warning mechanism enshrined in the law came into effect in July 2009, providing that all technical intermediaries (ISPs, hosting sites, etc.) must:

- forward the notice filed by rights holders to Internet users found sharing illegal works;
- inform Internet users found repeating an offence that their access to the service may be terminated fully or in part;
- effectively remove the unauthorised content.

Internet users appear to have the opportunity to send a "counter-notice", in which event the rights holder must provide proof of copyright infringement, within a period of 10 days. Where this does not occur, the content is returned to the online site within 14 days of receipt of the counter-notice.

This system is distinctive in that it engages the responsibility of one or more technical intermediaries should they fail to send notices to Internet users and/or be not diligent in removing unauthorised content further to rights holders' requests.

However, it appears that no enforcement legislation has been adopted to establish the system's actual implementation procedures in detail; in particular, it is reported that the outlines and scope of technical intermediaries' responsibilities in effectively terminating user accounts are not explicitly set out.

Rights holders in the music industry and one ISP, HiNet, are said to have nonetheless agreed to test the system for six months. It emerged that fewer than 30% of the notifications addressed by rights holders were successfully delivered to subscribers, in particular because Internet users are purportedly not required to provide an e-mail address to the ISPs.

There was discussion as to whether a code of conduct should be signed with the technical intermediaries in order to implement the system. This does not appear to have been the case to date, as a meeting was held in September 2014 under the aegis of the *Taiwan Intellectual Property Office* between the rights holders and technical intermediaries, without any consensus being found. In practice, intermediaries thus presumably do not feel bound by the provisions described here and the system can consequently be described as existing in name only, for lack of action on the part of the intermediaries.