

[FR] Peer-to-peer - a Return to Graduated Sanctions

IRIS 2007-4:1/18

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The system of “graduated sanctions” against users and suppliers of peer-to-peer networks, proposed by the Government and adopted by Parliament as part of the DADVSI Act, but later set aside by the Constitutional Council in July 2006 (see IRIS 2006-8: 13), have nevertheless returned. On 3 January 2007 the Minister of Justice sent a circular to principal state prosecutors and magistrates “presenting and commenting on the criminal provisions of the Act of 1 August 2006 on copyright and neighbouring rights in the information society”, concerning in particular the circumvention of protective measures and the supply of means of unlawfully exchanging protected works and objects. The text also sets out guidelines for criminal policy concerning, not only the provisions presented, but also illegal downloading practices. It should be borne in mind that a circular is not legally binding - the text merely gives indications to magistrates, who retain their sovereign powers of assessment.

The text distinguishes between several levels of responsibility, ranging from the editors of peer-to-peer software to users, according to whether they make protected files available via the Internet without authorisation (“uploading”), or download works illegally. According to the circular, “the severity of the punishment exercised against such people ought to be graduated in due proportion”. Thus the text recalls that, by virtue of Article L. 335-2-1 of the Intellectual Property Code introduced by the DADVSI Act of 1 August 2006, an editor who makes exchange software available, or incites people to use it, faces a sentence of “three years of imprisonment and a fine of EUR 300,000”. The circular prescribes that public prosecutors should call for “highly dissuasive sentences” to be passed against such people, as well as appropriate additional penalties (confiscation of income earned from the infringements, closure of the establishment that has committed them, and even a ban on carrying out the activity of editing or distributing software).

The second level, that of making files available (“uploading”), constitutes the offence of counterfeiting under the application of Article L. 335-3 of the Intellectual Property Code. Such behaviour is deemed to be “gravely reprehensible” inasmuch as it takes place upstream and enables a large number of illegal downloads to be made downstream. The circular refers to a graduation of the sanctions inflicted, depending on whether the works made available are more or less recent (i.e. whether: cinematographic works being made available

before their release in cinemas or in the form of videograms which, furthermore, violates the media release schedules; broadcasts made shortly after the commercial release of the work; and works that are not recent, etc).

Lastly, whereas the Constitutional Council had cancelled the provisions of the DADVSI Act aimed at making downloading a petty offence, and therefore one less severely penalised, the circular goes some way towards returning to the text first adopted. According to the text, acts of this kind are “undeniably at a lower level of responsibility”, and penalties of a purely pecuniary nature were “totally suitable”. The corresponding fine could be modulated according to specific aggravating criteria (repeated offending, the number of works downloaded, whether or not media release schedules were observed, etc). Finally, it should be noted that the text emphasises that the exception related to making a private copy could not be claimed with respect to illegal downloading. It now remains to be seen how the magistrates will interpret the text.

Circulaire de présentation et de commentaire des dispositions pénales de la loi n° 2006-961 du 1er août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information et de l’action publique dans le domaine de la lutte contre les atteintes à la propriété intellectuelle au moyen des nouvelles technologies informatiques

<http://www.juriscom.net/documents/circulaire-DAVDSI.pdf>

