[FR] HADOPI opinion on the exception for making private copies of television programmes

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On 17 September 2014, the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet – HADOPI) published an interesting opinion, further to a referral by two individuals on the exception for making a private copy of television programmes received via an Internet access provider (IAP) or by satellite. One of HADOPI's tasks is to ensure that the technical measures used to protect works do not hamper interoperability and the exercise of exceptions to copyright, such as making a private copy. The complainants argued that it was only possible to record digital-format programmes using the recorder incorporated in the hardware supplied by the IAP or in the satellite receiver and that use of the copies was restricted by technical protective measures, which prevented the interoperability of the recordings made. Thus changing provider, and sometimes even just replacing the receiver, could result in the loss of all recordings made previously.

In its opinion, HADOPI recalled that that the exception for making a private copy of television programmes, as provided for in Articles L. 122-5, L. 211-3, and L. 331-9 of the Intellectual Property Code (Code de la Propriété Intellectuelle – CPI), for which remuneration was paid to compensate for the prejudice suffered by the rightsholders, allowed viewers to make interoperable, storable digital copies for their own private use, including in the event of changing hardware or television services distributor. The intention of the legislator, by specifically protecting the digital copying of television programmes, was to ensure as far as possible the continuity of analogue and digital copies. Honouring this intention therefore meant not placing limits on the possibility of watching privately made copies on different media, as long as the copies continued to be protected against unauthorised use. HADOPI therefore considered that the restrictions on the use of privately made copies of television programmes imposed at the request of the rightsholders were only legal if their purpose was to preserve the compatibility of making a private copy with the demands laid down by the three-stage test resulting from the Bern Convention, which were recalled in Articles L. 122-5 and L. 211-3 of the CPI, particularly where there was a serious risk of private copies infringing copyright and affecting the normal exploitation of the work. Such restrictions, implemented by means of technical protective measures, should theoretically be differentiated according to the risks at issue and according to the

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requests made by the rightsholders. Thus it was for the players in the television sector to apply these principles, by differentiating the protection applied where this was technically possible and did not represent a disproportionate constraint.

On the issue of the need to ensure a degree of interoperability and the possibility of storage for privately made copies, HADOPI felt that, at this stage in its investigation, there was no evidence that the levels of restriction being applied were necessary. Thus, it noted that certain systems for the sale of musical or cinematographic works by definitive downloading from the Internet offered interoperability and storage possibilities that were better than those offered by ADSL or satellite television. According to the opinion, it would appear to be possible to protect works while imposing fewer restrictions on the use of privately made copies.

In conclusion, HADOPI considers the limitations on the interoperability of privately made copies on hardware other than the appliance used to make the recording, and those preventing the storage of copies when changing provider, to be excessive and, therefore, invites ADSL and satellite television operators to offer viewers, within a reasonable timeframe, the possibility of making a private copy of television programmes for durable storage with sufficient interoperability for the private use of the person making the copy. It is nevertheless stressed that providing such a technical arrangement would not have to be free of charge if it required the use of additional means of copying (recorder or back-up copy). Nor would operators be expected to renew the pool of existing receivers. HADOPI also emphasises that it is essential that, in application of Article L. 331-10 of the CPI, precise information should be given regarding the possibilities for using the copies made with each appliance. It now remains to be seen whether the operators will adopt these recommendations.

Hadopi, Avis n° 2014-1 relatif à l'exception de copie privée des programmes télévisés, 11 septembre 2014

http://www.hadopi.fr/sites/default/files/20140911-Avisexception-copiepriveedesprogrammes.pdf

HADOPI, Opinion no. 2014-1 on the exception for making a private copy of television broadcasts, 11 September 2014

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