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# The reform of the HADOPI and of the French graduated response after the Lescure Review

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# Structure

- I. Introduction
- II. The Hadopi
- III. The graduated response
- IV. Implementation and efficiency
- V. My views

# I. Introduction

# I. Introduction

- **Graduated response / “ three strikes”**  
Repeat illegal file-sharers face fines (but no more disconnection) after two warnings
- **HADOPI**: “Haute Autorité pour la diffusion des oeuvres et la protection des droits sur Internet ”  
(High Authority for the dissemination of works and the protection of rights on the internet)
- This is a quick overview, for more information [see my BILETA presentation on Slideshare](#)

# I. Introduction

- **Problem**
  - High level of (low-level) piracy by French internet users
  - The existing criminal law response was ill-suited to address mass piracy
  - The legal services for cultural goods are not good enough

# A) Sarkozy, HADOPI and the graduated response



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Source: [AP/BBC](#)

# 1. The 2006 system



# 1. The 2006 system

- **The existing system: strong but mostly ineffective criminal provisions**
  - Copyright infringement is a misdemeanor
  - It is punishable by 3 years in jail and a fine of €300,000 (£250,000)
  - In practice: low fines and no convictions (only suspended sentences)

# 1. The 2006 system

- **The impossibility to add flexibility to criminal provisions**
  - 2006: Wide consensus (courts, government, parliament) to adapt criminal provisions
  - Proposal: Fines €150 for uploading; €38 for downloading
  - Struck down by the Constitutional court

## 2. The Olivennes Report and the rationale for Hadopi

## 2. The Olivennes Report and the rationale for Hadopi

- **Olivennes Report – November 2007**
- **A two-pronged approach to curbing piracy**
  - Improving the legal marketplace for online content (Very interesting approach, more on BILETA presentation & CREATE research)
  - Enacting a “graduated response” mechanism

## 2. The Olivennes Report and the rationale for Hadopi

- **Postponing solutions based on filtering technology**
  - Olivennes: filtering not ready and may be disproportionate
  - Elysée: industry commits to research and collaborate with telecom and internet companies on filtering

## 2. The Olivennes Report and the rationale for Hadopi

- **A graduated response administered by a dedicated body**
  - Incompatibility of a purely contractual solution left to private parties
  - Privacy concerns
  - Proposal: a dedicated body to warn and disconnect subscribers
  - **Bill proposed**

# 3. Enacting a “graduated response” mechanism

# 3. Enacting a “graduated response” mechanism

- Hadopi I (June 2009) introduces
  1. A new criminal offence for illegal file-sharing
  2. A new criminal offence of gross negligence
  3. The use of summary procedures for copyright infringement
  4. The Hadopi in charge of warning and disconnecting repeat offenders



## 3.1 The new criminal offence for illegal file-sharing

# 3.1 The new criminal offence for illegal file-sharing

- **A specific classification for copyright infringement committed online**
  - Still the misdemeanor of copyright infringement
  - But when it is committed online, the infringer face:
    - €300,000
    - 3 years jail
    - **And 1 year disconnection**

## 3.2 The new criminal offence of gross negligence

- **New obligation to monitor one's internet access**
  - Obligation to ensure that one's internet connection is not used for piracy
  - Broad definition: covers P2P. Streaming (not yet)?
  - Breach of this obligation is a petty offence
  - **Penalties: €1,500 and 1 month disconnection (until July 2013)**
  - Software/ "security devices" to enable subscribers to comply with the obligation (not ready yet)

## 3.2 The new criminal offence of gross negligence

- An arcane distinction creating new avenues for prosecution
  - The distinction between online copyright infringement and breach of duty to monitor is hard to understand = we are talking about the same thing (piracy)
  - Distinction needed to bypass the 2006 decision by Constitutional Court

## 3.2 The new criminal offence of gross negligence

- Means that rightholders have an option:
  - Go after the misdemeanor of copyright infringement
  - Go after the petty offence of breach of obligation to monitor

## 3.3 The use of simplified criminal procedures for copyright infringement

## 3.3 The use of simplified criminal procedures for copyright infringement

- **Single-judge for misdemeanors**
- **Summary procedure**
  - No hearing of the parties
  - Criminal order
  - Lower penalties (no jail sentences)

## 3.4 The Hadopi and the disconnection

- In the initial bill
  - Creation of the Hadopi
  - The Hadopi would be in charge of both the warning phase and the disconnection phase



## 4. The need to balance copyright with other human rights

The Decisions by the Constitutional Council - June and October 2009

# 4.1 Balancing copyright and freedom of expression

# 4.1 Balancing copyright and freedom of expression

- **Copyright as a human right (property)**
  - Beyond doubt in French and EU context
- Interpretation of: 1789 Declaration & European Conv. HR
- Explicit: EU Charter of Fundamental Rights (art. 17-2)
- Fight against piracy is legitimate
- However it must be balance with other rights

# 4.1 Balancing copyright and freedom of expression

- Extension of the Freedom of expression to freedom to access the internet
  - Article 11 of 1789 Declaration HR
  - Court: right of expression implies freedom to access the internet

# 4.1 Balancing copyright and freedom of expression

- **Access to the Internet is not an absolute**
  - Disconnection is allowed
  - It is a proportionate response to piracy
  - (Disconnection for failure to pay)
- **But the disconnection for piracy can only be ordered by a court, not an administrative authority**
  - Warning phase: the HADOPI
  - The sanctions: civil courts

## 4.2 Assessing other HR

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- Legality of the new criminal offences for illegal file-sharing
- Legality of the new criminal offences of gross negligence
- **Due Process - The use of simplified criminal procedures for copyright infringement approved**

## 4.2 Assessing other HR

- **Protection of privacy**
  - Broad approval of the framework
  - Enough protection
  - Especially since Hadopi not in charge of disconnections



## 4.2 Assessing other HR

- **Due Process - Presumption of innocence**
  - Article 9, Declaration of 1789: every man is presumed innocent until proved guilty
  - The bill allowed the Hadopi to disconnect alleged infringers
  - Reversing the burden of proof: the subscriber had to prove he had been victim of a fraud
  - **Struck down by the Court**

## 4.3 Hadopi II – October 2009

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- **Legal framework established**
  - Hadopi created
  - 10+ decrees
  - October 2010: first warning sent

# 5. The Hadopi, its critics and the presidential campaign 2012

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- **Hadopi & Sarkozy**
- First such scheme to implement mass scale anti file-sharing measures = no one likes that (apart from rightholders)
- The pet project of Sarkozy = the pet hate of everyone else (including in his own party)

# 5. The Hadopi, its critics and the presidential campaign 2012



- **Hadopi and the Socialist Party**
  - Manifesto of the Socialist Party for abrogation
  - Part of the anti-Sarkozy platform
  - Limited impact of the overall result



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 CentreFrance

Photo Agnès  
GAUDIN

Source:

[LaMontagne.fr](http://LaMontagne.fr)

# B) Hollande and the Lescure Review



# 1. Complex times



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Francois Hollande, Credits: AFP/FRED DUFOUR, Source [Le Monde, 29/03/2013](#)

# 1. Complex times

- **President Hollande's ambivalence**
  - Even during the campaign
  - Adviser pro-Hadopi
  - His ministers and PS colleagues are more sanguine





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Aurélie Filippetti le 23 mai 2012 (Charles Platiau/Reuters), Source: [Les Inrocks](#)

## 2. Mission Lescure



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Pierre Lescure, Crédits photo : Bertini/Grasset, Source: [Le Figaro](#)

## 2. Mission Lescure



- Released in May 2013
  - Who is Lescure? Canal+ Vivendi
  - Impressive remit
  - Impact of the cultural industries on policy making in general and on the socialist party and Hollande in particular
  - 80 recommendations

## 2. Mission Lescure

- Three main recommendations for the graduated response
  - Graduated response maintained but disconnection removed
  - Fine reduced to €60
  - Hadopi disbanded, its missions transferred to the CSA, the French Media Regulator

# 3. Décret n° 2013-596 du 8 juillet 2013



# 3. Décret n° 2013-596 du 8 juillet 2013

- **Revokes ability to disconnect people guilty of gross negligence**
  - Only one disconnection so far, likely to be the only one
  - Fines up to €1500 remain
  
- **Ability to disconnect online copyright infringers for up to one year remains**

# Criminal provisions of the French IP Code against illegal use of copyright works as of 8 July 2013

Type of Offence		Copyright Infringement	Online Copyright Infringement	Gross Negligence
Classification		Misdemeanour	Misdemeanour	Petty Offence
Warning Phase HADOPI		No	No	Yes
Summary Procedure		No	Yes	Yes
Penalties (Maximum Sentences)	Jail	3 years	3 years	N/A
	Fine	€300,000	€300,000	€1,500
	Internet Disconn.	N/A	1 year	N/A

# II. The Hadopi

# A) Missions

# A) Missions

- **Monitor the level of piracy (and thus its own performance)**
  - How much piracy
  - Factors why people chose piracy over legal (hint: cost is a big factor)
  - What could encourage people to switch to legal

# A) Missions

- **Promote the legal offer / legal services**
  - Assess the breadth and depth of the legal offer
  - Accreditation system: Label Pur (60+)
  - Monitor developments in filtering and fingerprinting technology

# A) Missions

- **Monitoring and regulating DRMs**
  - Missions of the ARMT/ DADVSI law 2006
  - Interoperability
  - Safeguarding the benefit of copyright exceptions
  - Referral from VLC about interoperability between open source player and Sony Blu Ray DRM (Opinion April 2013)
  - Referral by the French National Library on DRMs and Copyright Exceptions (pending)

# A) Missions

- **Protecting copyright online**
  - Implement the preliminary phase of “graduated response”
  - Only for P2P so far. Possibly soon for streaming and direct downloads
  - The reason why the Hadopi is famous
  - Its other missions totally ignored
  - The mission we are going to focus on



# B) The Institution

## B) The Institution

- **Independent administrative authority**
  - Members from the top French institutions, mostly judiciary
  - Rules to avoid conflict of interest

# B) The Institution

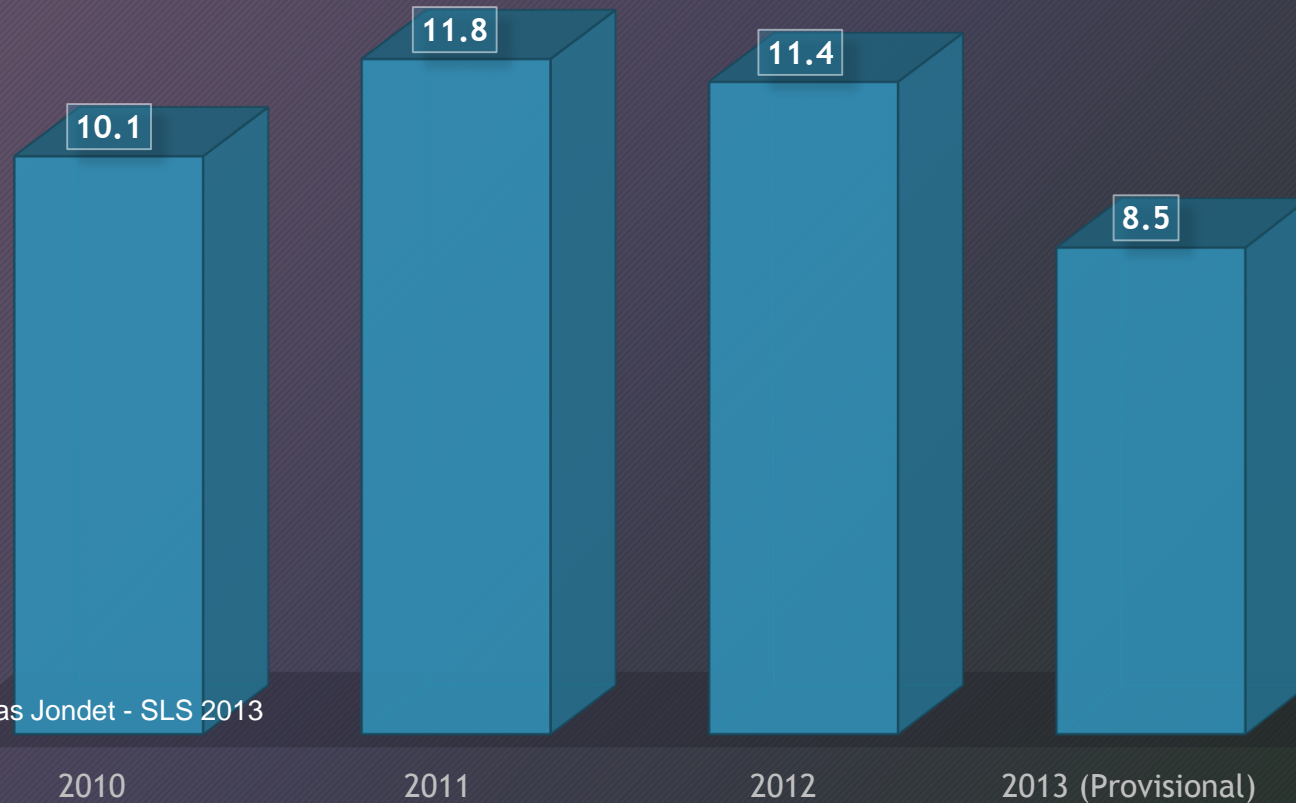
- **Two branches for two missions**
  - Le College : the carrot
  - La Commission de protection des droits (CPD) : the stick
- **Hadopi Labs (discontinued in Dec 2012)**

# B) The Institution

- **Budget**
  - €8.5-12 million a year
  - Financed exclusively by the tax payer
  - Compare with €16 million for the data protection authority (CNIL / 1978)

# Tightening of the budget

## BUDGET OF THE HADOPI (MILLION EUROS)



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# III. The Graduated Response

# A) Evidence collecting and choice of avenue

- **Investigations by rightholders**
  - Traditional requirement of accreditation by the judiciary for investigators (sworn agents)
  - Mass-scale operation must be approved by the Data Protection Authority
  - Tens of thousands of investigations / day
- **Rightholders can put their cases**
  - Straight to the criminal courts
  - Through the HADOPI

## B) Prosecution for “gross negligence” under the graduated response



# 1. The warning phase by the HADOPI

- **The HADOPI examines the facts (swiftly)**
- **Can order ISPs to warn subscriber**
  - The Hadopi gets information from the ISP (which cannot refuse but can get paid)
  - First warning by email
  - Another breach within 6 months = warning in formal letter by recorded mail
  - Another breach: the Hadopi deliberates as to whether the case should go to the courts

## 2. The judicial phase

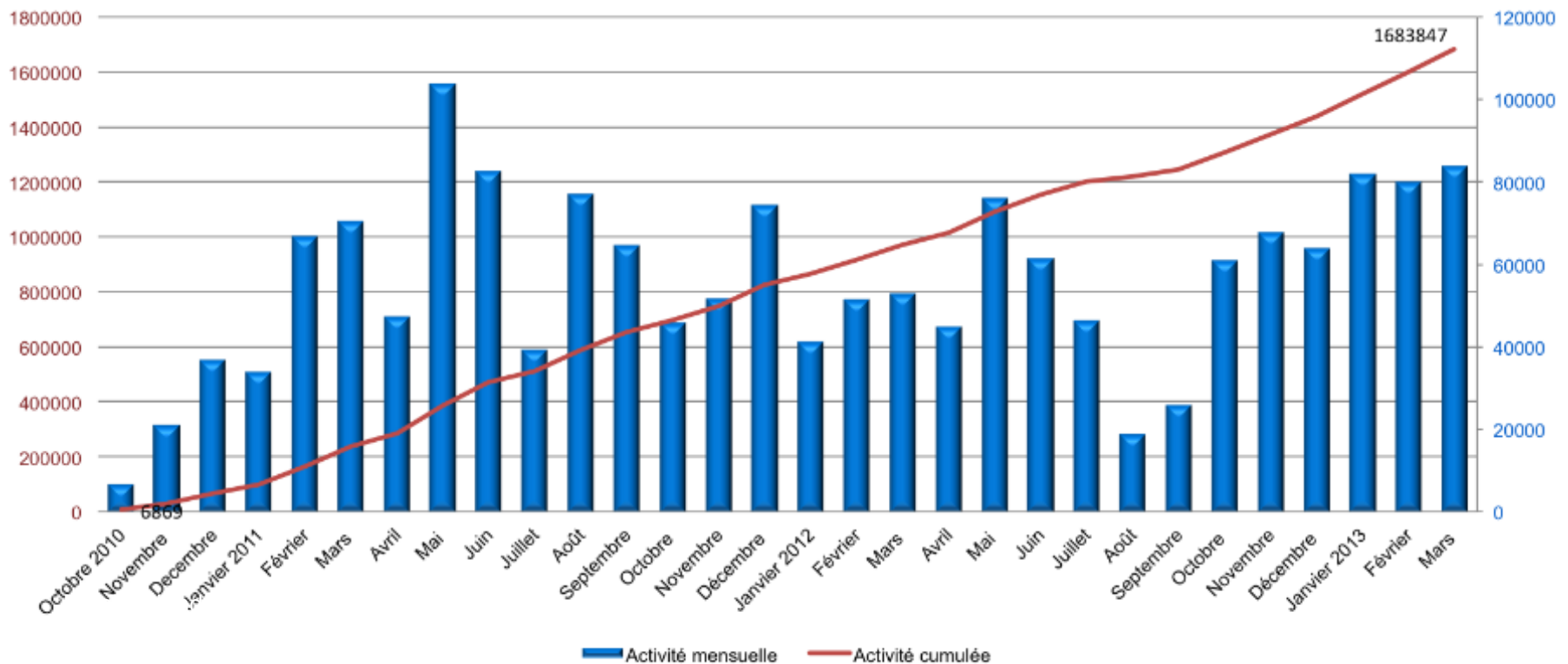
- **Summary procedure**
- **Assessment of the case**
  - Court can assess evidence submitted via Hadopi
  - Judges have been instructed to assume that the evidence is conclusive and not order new investigations
- **Fine**
  - Up to €1500
  - Since July 2013 no more possibility to disconnect

# IV. Implementation and efficiency

# A) Implementation (till Mar. 13)

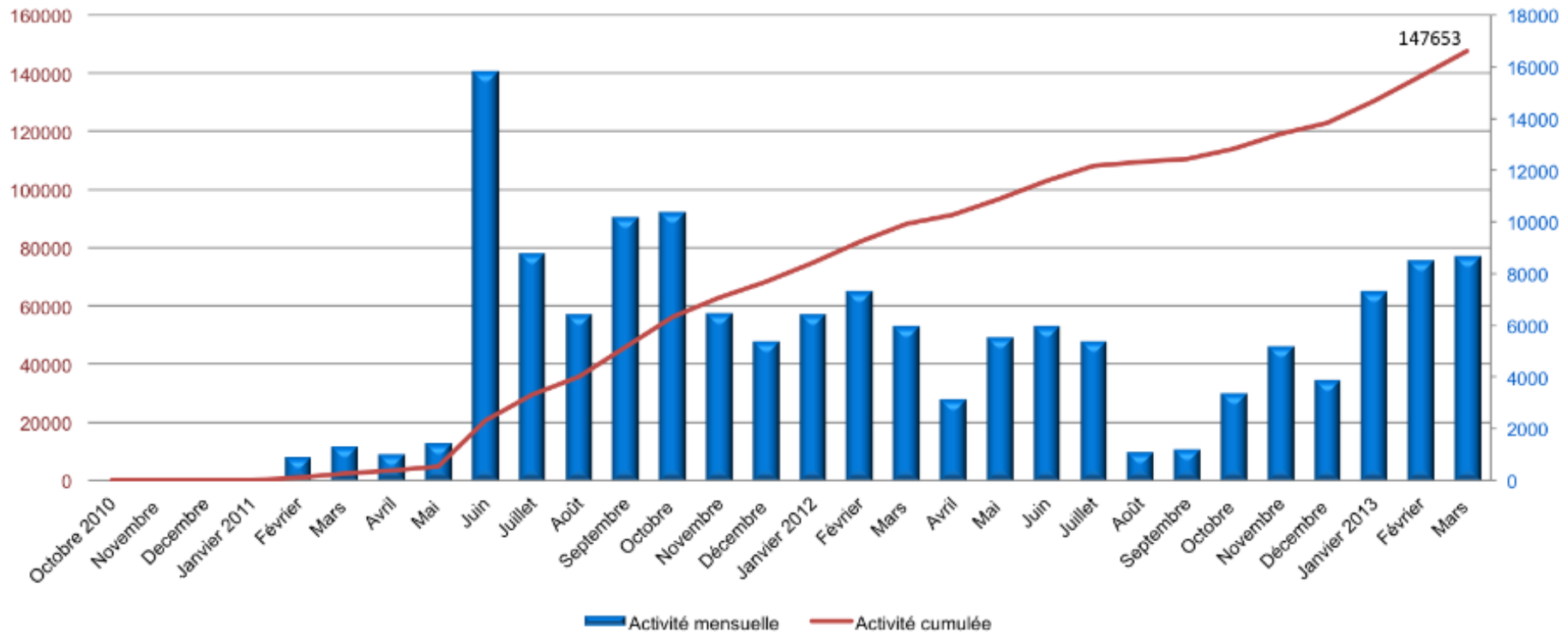
# First Warnings

Nombre d'envois de 1ere recommandation depuis 2010 - Chiffres en fin de mois



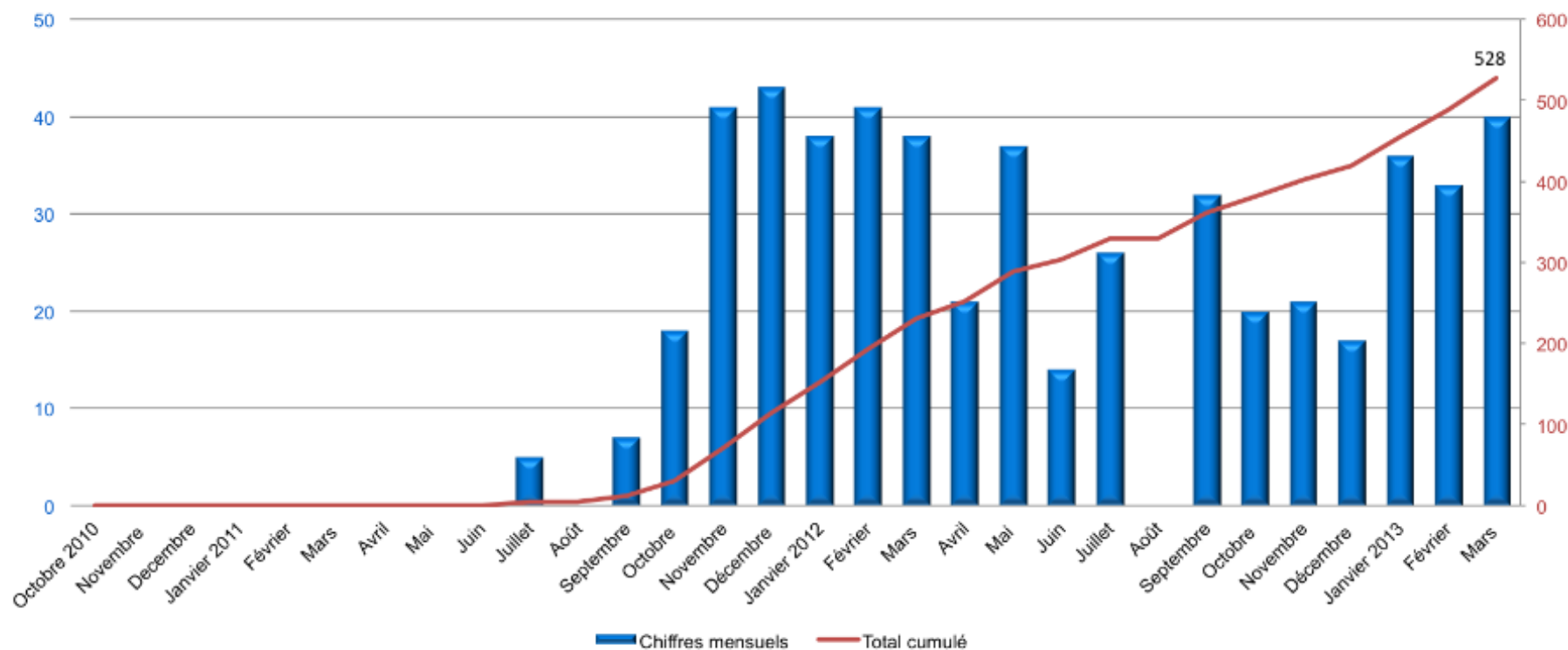
# Second Warnings

Nombre d'envois de 2ème recommandation depuis octobre 2010 -  
Chiffres en fin de mois



# Deliberations

Nombre de délibérations relatives à des dossiers de réponse graduée prises depuis 2010



# Court decisions

- 14+ cases brought to the courts
- 4 decisions so far
  - €150 fine
  - Guilty but no penalty (Condamnation sans peine)
  - Discharge (Relaxe)
  - **One disconnection**



# B) Efficiency

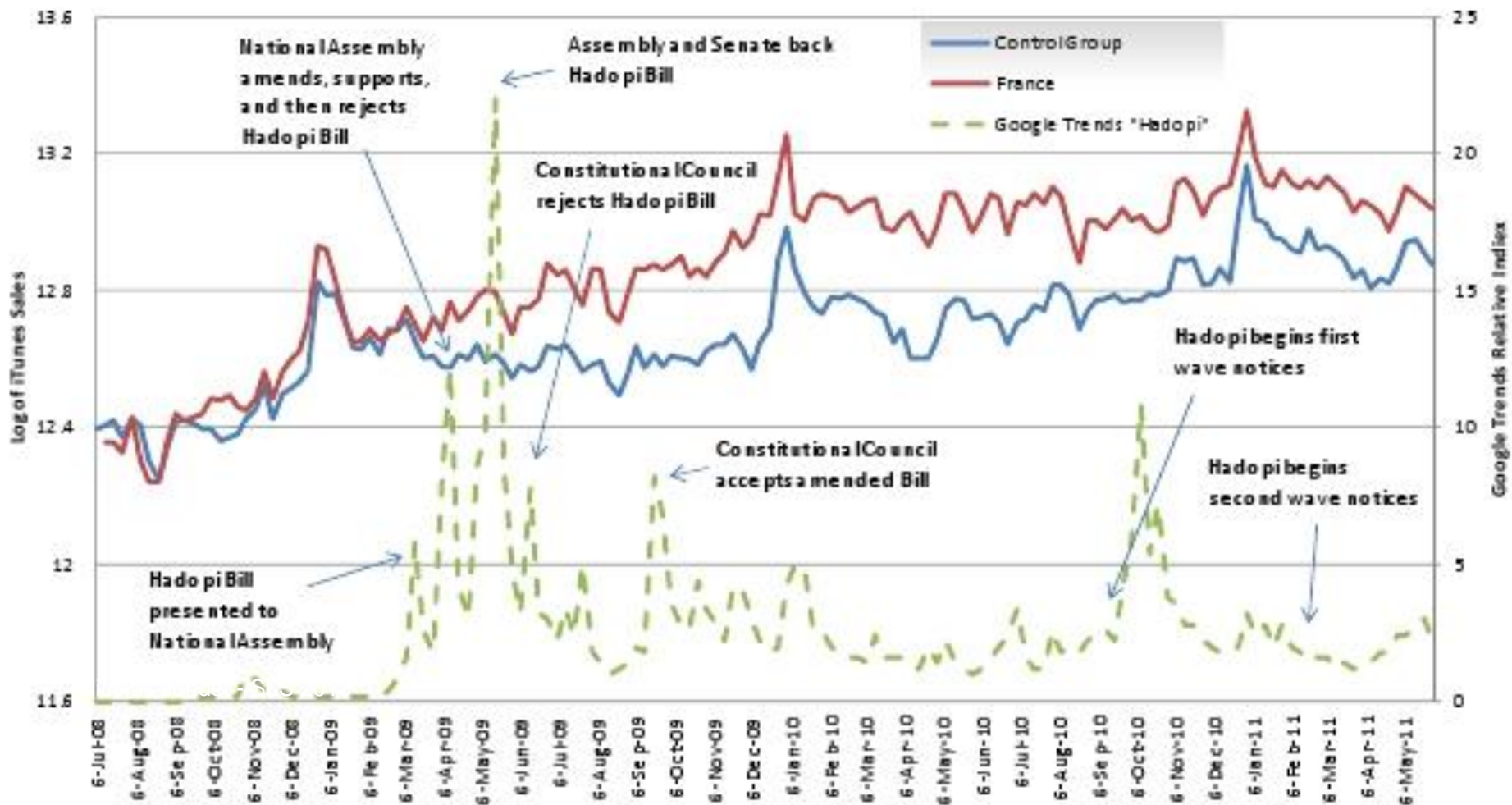
# B) Efficiency

- **The big questions**
  - Does piracy affect sales ?
  - Does Hadopi reduce piracy / improve legal sales ?
- **Question of bias and accuracy**
  - In 2009 studies argued that Hadopi was a failure or a success, long before its implementation
  - Debate on the Recent EU Study over impact of piracy on sales/ Rebuttal by Hadopi

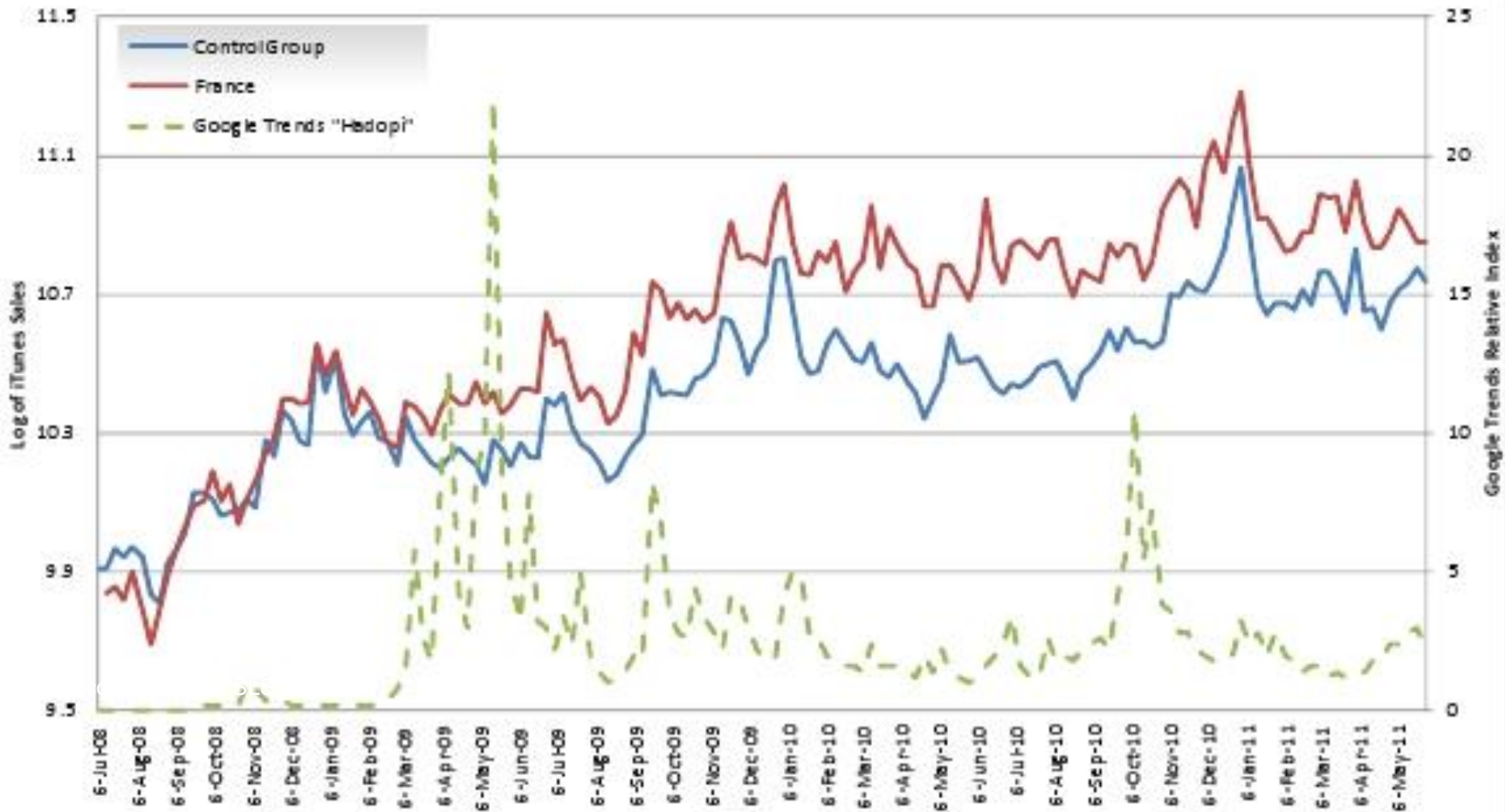
# Study by Danaher et al. (2012)

- Danaher et al. (March 2012) The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France, available on SSRN
- **Data**
  - iTunes sales figures for music in France from July 2008 - May 2011 (4 Majors companies)
  - Before the start of Hadopi and start of court phase
  - Control group (UK, Italy, Spain, Germany, and Belgium)

# Figure 1: iTunes Single Track Unit Sales Trends (4 majors combined), France vs. Control (p.13)



# Figure 2: iTunes Album Unit Sales Trends (4 majors combined), France vs. Control (p.15)



# Study by Danaher et al. (2012)

- Estimated annual increased revenues for iTunes due to Hadopi
  - €4.7 million in track
  - €4.9 million in album
  - €13.8 million per year for the entire music industry (not just the majors).

# Study by Danaher et al. (2012)

- The positive impact on sales of the Hadopi varies according to music genre and sensibility to piracy
  - The greatest impact for Rap and Hip-Hop which are highly sensible to piracy
  - Less so for Rock and Pop (average level of piracy)
  - Negligible for Classical, Christian [???, in France ;-)], Folk and Jazz

# V. *My views*



## IV. My views

- I've always broadly been in favour of graduated response schemes, particularly the French version
- An academic supporting Hadopi is about as rare as a Nessie sighting
- I've also had a Windows Phone since 2011, what can I say?



**ONE MAN  
WOLFPACK**

## IV. My views

- Not as bad as it sounds
- Successful in deterring P2P, but not all piracy
- Cost and who foots the bill and what do taxpayers gets in exchange is my main concern
- The Pros and Cons of disbanding the Hadopi and transferring the graduated response to the French media regulator (CSA)



**ONE MAN  
WOLFPACK**

A) Not as bad as it sounds

# A) Not as bad as it sounds

- The product of a long, brutal yet healthy debate
  - In the French and EU Parliament, since 2007
  - Constitutional approval on Human Rights
  - Debate in society: La Quadrature (“French EFF”); Pirate Party
  - Many Godwin points on both side
  - Very serious concerns: Bourreau-Guggenheim, pressure on employees / freedom of speech

# A) Not as bad as it sounds

- Disconnection was an inconvenience rather than a “digital guillotine”
  - You can still connect elsewhere (work, uni, friends, cafés)
  - Was seen as a last resort and very expensive to implement
  - Predictably disconnection was removed from the graduated response (but still there for online copyright infringement)

# A) Not as bad as it sounds

- Arguably better than other forms of punishment
  - Compare to Statutory damages (Jamie Thomas / Joel Tenenbaum)
  - Thousands of forced (and sometimes unjustified) settlements
  - Also better than Jail sentences

# A) Not as bad as it sounds

- **My concerns**
  - People have not been told what would constitute a secure connection
  - How to secure their connection
  - Which tools to use (under which certification)  
Hadopi was meant to do that

## B) Better than other “Three Strikes” elsewhere



## B) Better than other “Three Strikes” elsewhere

- **South Korea**

Ministry of Culture orders disconnection  
(French model prior to the decision of  
Constitutional Court)

- **NZ/ US**

- **UK and Irish three strikes**

- Private parties deal with the system
- Less HR compliant

# C) Does it work?

## C) Does it work?

- **Short answer: yes**
- The mission of the Hadopi is currently limited to tackling P2P
- The argument that the Hadopi was obsolete from the outset disproved by the nearly 80K first warnings sent every month (P2P still relevant)
- The fact that so few cases eventually go to the courts is a sign of success, not of failure = the lower the percentage, the better
- P2P is down & Sales of online products are up

## C) Does it work?

- **Longer answer: it's more complicated than that**
  - Correlation is not necessarily causation (more studies like that of Danaher et al. needed)
  - P2P is being replaced by streaming
  - But Hadopi is looking into streaming (only a decree needed) and going through ISPs an option
  - Legal services are still not good enough

# D) Is it worth it?

## D) Is it worth it?

- Is the price right? The French system as the “Rolls Royce” of three strikes
  - Expensive / High maintenance
  - Good compliance with HR
  - Attempt to address needs of consumers

## D) Is it worth it?

- Who foots the bill? What do you get in exchange[My main issue]
  - Expensive for ISPs but they have the funds and also many have an interest in content protection as distributors of such content (see Vivendi; Orange...)
  - Expensive for the Tax payer
  - Argument that rightholders should foot part of the bill, especially if it increases revenues as much as some studies suggest

## D) Is it worth it?

- **My other issue: the Government did not drive a hard enough bargain on behalf of consumers**
  - Benefit of e-book pricing debatable
  - Windows release time still not consumer friendly
  - Various state-financed digitisation projects benefit private companies but still have to bear benefit for consumers
  - No Netflix in France (see CREATE project).....
  - Maybe will change with the implementation of Lescure



# E) Merging the Hadopi into the CSA

# E) Merging the Hadopi into the CSA

- **Will be spun as the demise of Sarkozy's Hadopi**
  - A manifesto promise
  - Spin can only go so far
- **Will set the graduated response in stone**
  - CSA is long established and powerful authority
  - Generally speaking it is hard to take away missions from strong authority
  - What about the budget? Any increase / decrease?

# E) Merging the Hadopi into the CSA

- **Risks**
  - Less scrutiny than with the small Hadopi, watchdogs who are instrumental in maintaining the balance might lose interest
  - Very difficult to get rid off, if becomes less necessary
  - Budget will remain funded only by taxpayers
  - What about Hadopi's mission of promoting legal services?

# Conclusion

- **French Graduated response useful experiment**
  - Seems to have a deterrent effect
  - Might have a positive impact on sales
  - Is less brutal (esp. now that no disconnection) and more Human Right compliant than other systems of enforcement
  - However, too expensive for the Taxpayers to fund alone
  - Generally, the state could be more forceful in obtaining gains for the consumers
  - Idea to transfer to CSA will be debated as many would rather have the GR dropped altogether

Thank you !

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