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# Disconnecting the HADOPI and the French graduated response?

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# I. Introduction

# I. Introduction

- **Graduated response / “ three strikes”**  
Repeat illegal file-sharers face 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)

# 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 offer not good enough



# I. Introduction

- **The HADOPI laws**
  - 2007 (Nov.): Olivennes Report
  - 2009 (June): Hadopi I
  - 2009 (Oct.): Hadopi II
  - 2010 (Oct.): First warnings
  - Hadopi III: report (Mission Lescure) due in May 2013
- **A two-pronged approach to curbing piracy**
  - Improving the legal offer for online content
  - Enacting a “graduated response” mechanism

# A) Improving the legal offer for online content

- **Precedent efforts in favor of digital consumers**
  - 2006 Copyright (DADVSI) law and the regulation of DRMs
  - Interoperability requirement
  - Creation of a dedicated body to implement the requirement (ARMT)
  - Now one of the missions of the Hadopi

# A) Improving the legal offer for online content

- Refusal to address the concept of the “global license”
  - Legalize file-sharing, payment of a flat fee, through the extension of the existing private copy levy scheme
  - Created a stir in 2005: Adopted by Lower House, rejected by Senate
  - Unfortunately no proper debate on the legality and opportunity of such scheme
  - Sarkozy stated it would “despoil” artists

# A) Improving the legal offer for online content

- Other missions of the Hadopi to improve legal offer
  - Seen as crucial by the lawmakers and by the Hadopi itself
  - Rarely mentioned
  - Will be described in Part II



# A) Improving the legal offer for online content

- **Associated measures (selected)**
  - End of non-interoperable DRMs for French music catalogue
  - Shortening release windows for movie and TV shows
  - “Do their utmost” to make all media content available on VOD
  - Carte Musique / Music voucher (flopped)
  - Prix unique du livre numérique

## B) Enacting a “graduated response” mechanism

- **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)

## B) Enacting a “graduated response” mechanism

- 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

## B) Enacting a “graduated response” mechanism

- **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
- **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



## **C) The need to balance copyright with other human rights**

The Decisions by the Constitutional  
Council - June and October 2009

# 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

# 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 extends to freedom to access the internet

“In the current state of the means of communication and given the generalized development of [the internet] and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right [of expression] implies freedom to access [the internet]”

# 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



## 2. Legality of the new criminal offences 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. Legality of the new criminal offences 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**
  - Software/ "security devices" to enable subscribers to comply with the obligation (not ready yet)

# 3. Legality of the new criminal offences 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)
  - Means that rightholders have an option:
    - Go after the misdemeanor of copyright infringement
    - Go after the petty offence of breach of obligation to monitor

## 4. Due Process & Privacy

- 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)
  - Procedures approved by the Constitutional Court
  - However, Court struck down provisions regarding possibility to settle damages by means of order



# 4. Due Process & Privacy

- **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. Due Process & Privacy

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

# Criminal provisions of the French IP Code against illegal use of copyright works

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	1 month

# II. The Hadopi



# 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**
  - 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

- **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)

# 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 disconnection by the courts

- **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
- **Suspension of access**
  - Up to one month
  - Subscriber still has to pay internet contract
  - Does not affect multi-service (e.g. triple play)
  - Interdiction to subscribe with another ISP

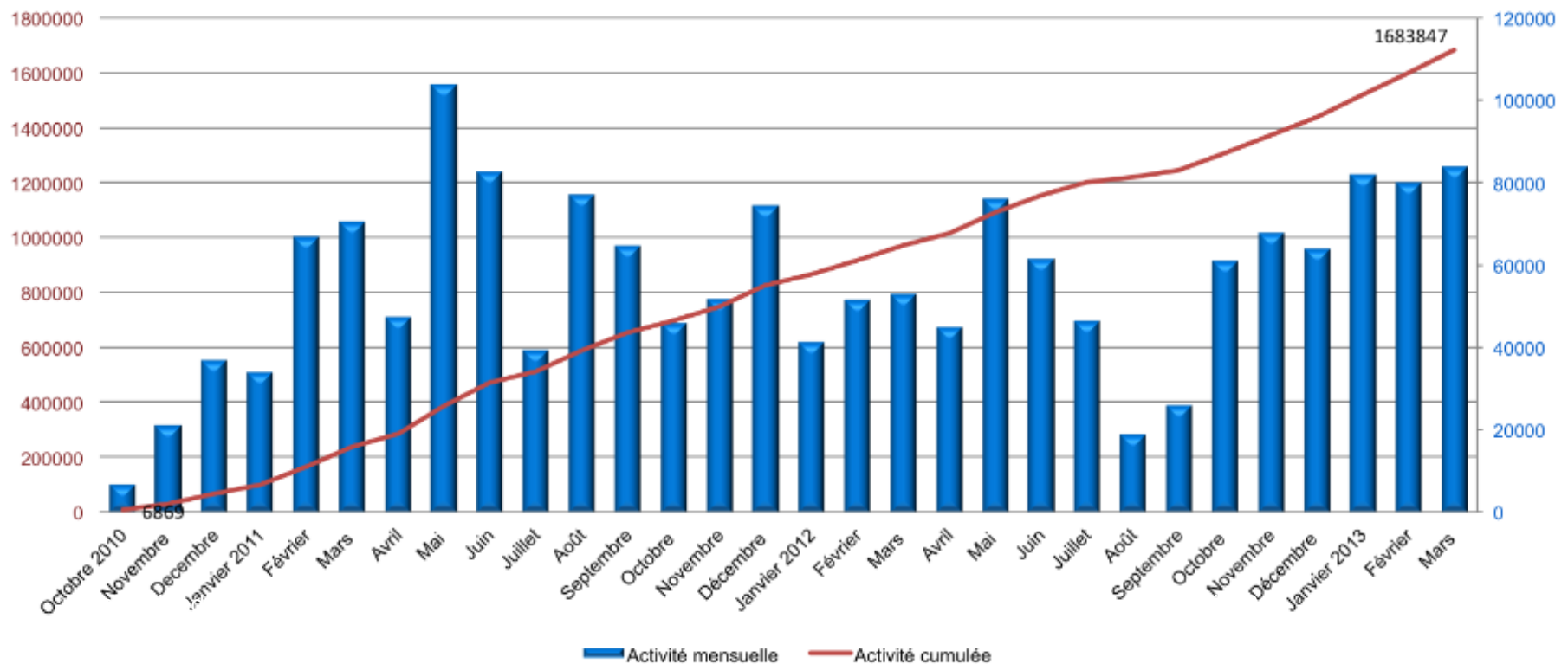


# III. Implementation and efficiency

# A) Implementation (till Mar. 13)

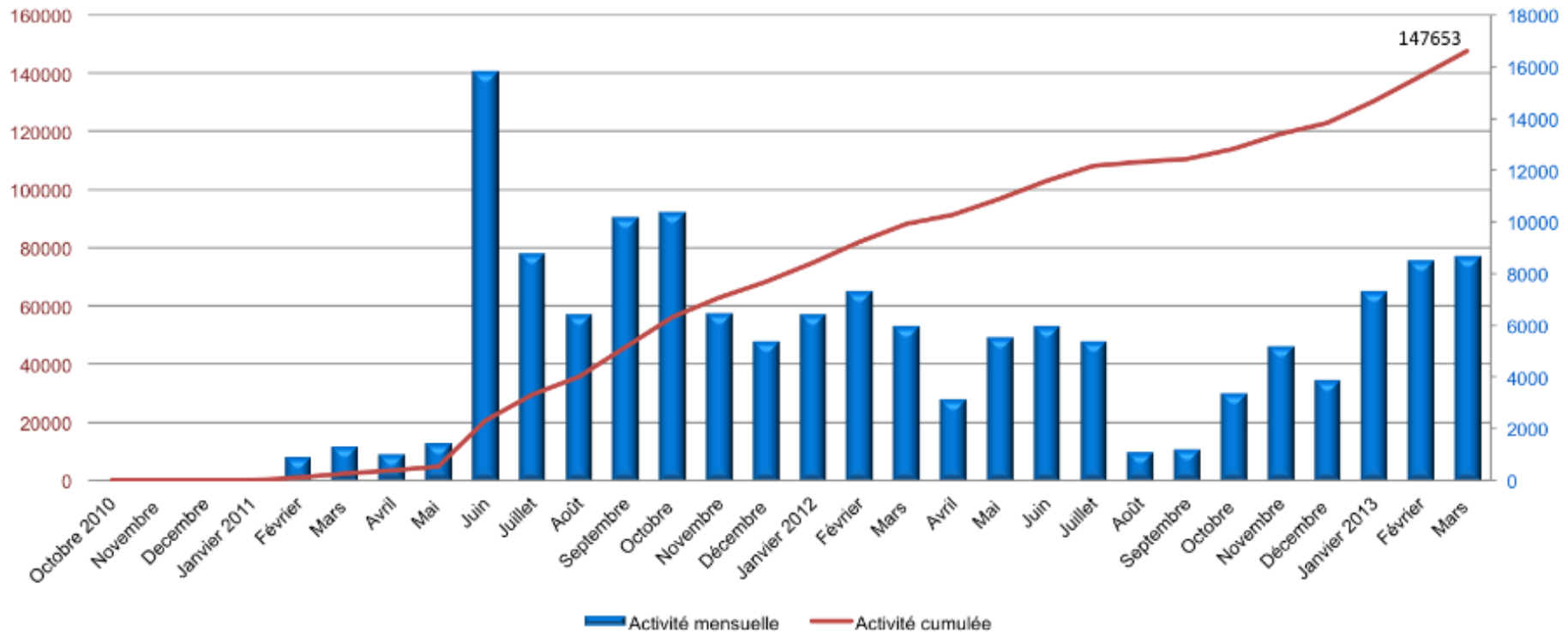
# First Warnings

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



# Second Warnings

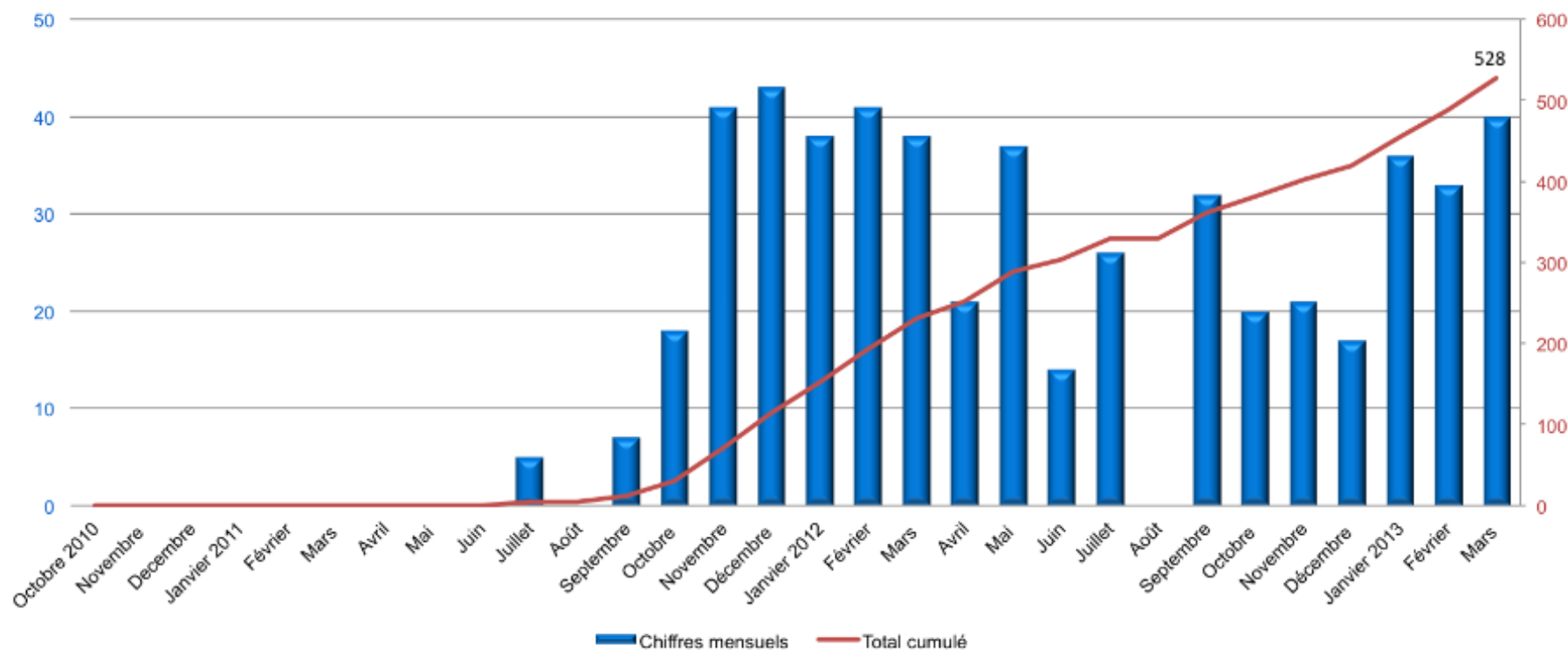
Nombre d'envois de 2ème recommandation depuis octobre 2010 -  
Chiffres en fin de mois





# Deliberations

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



# Court decisions

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

# B) Efficiency

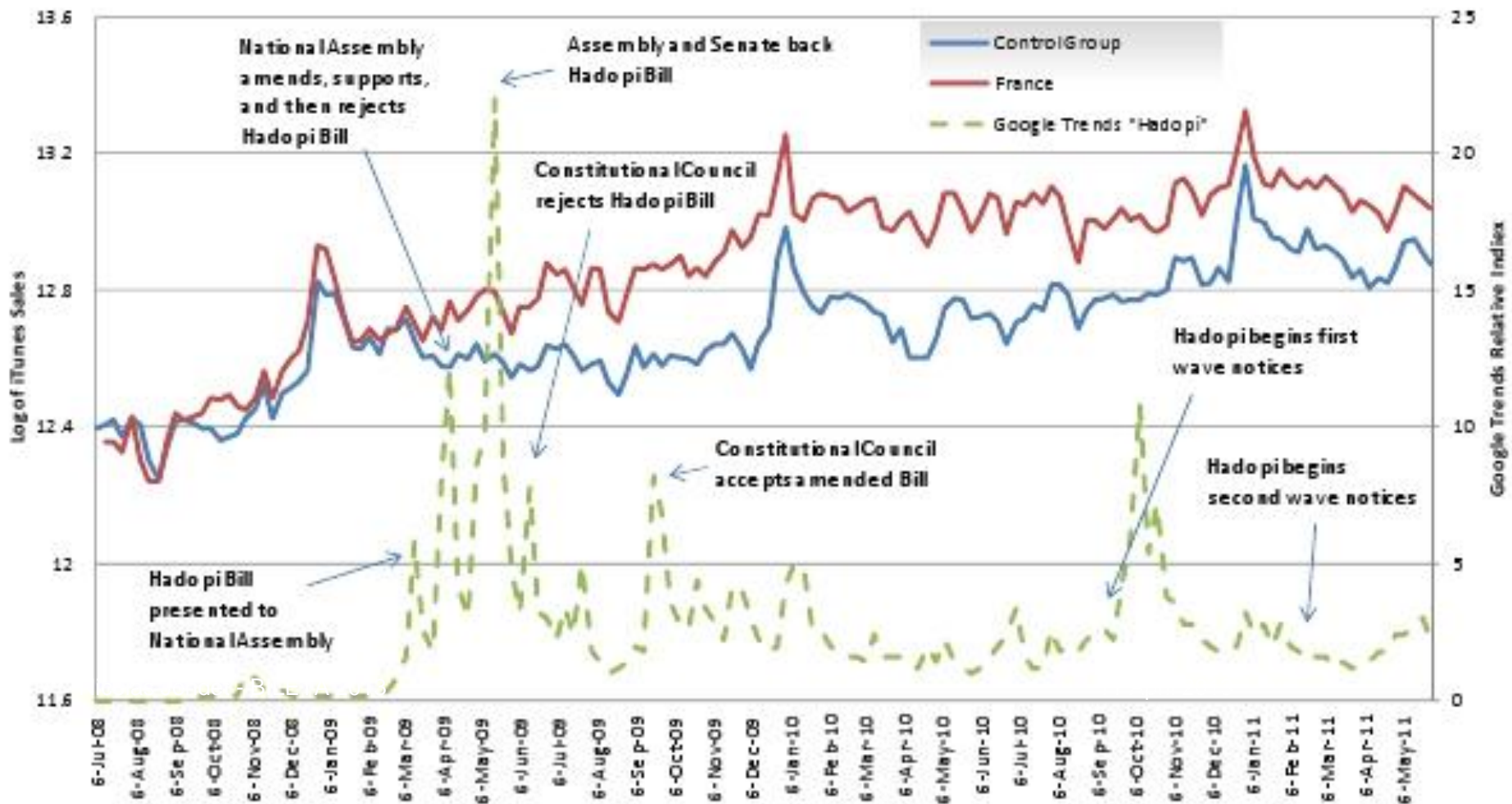
- **The big questions**
  - Does piracy affect sales ?
  - Does Hadopi reduce piracy / improve legal sales ?
- **Question of bias and accuracy**
  - In 2009 studies argued that Hadopi was a failure or a success, long before its implementation
  - Debate on the Recent EU Study over impact of piracy on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

# Study by Danaher et al. (2012)

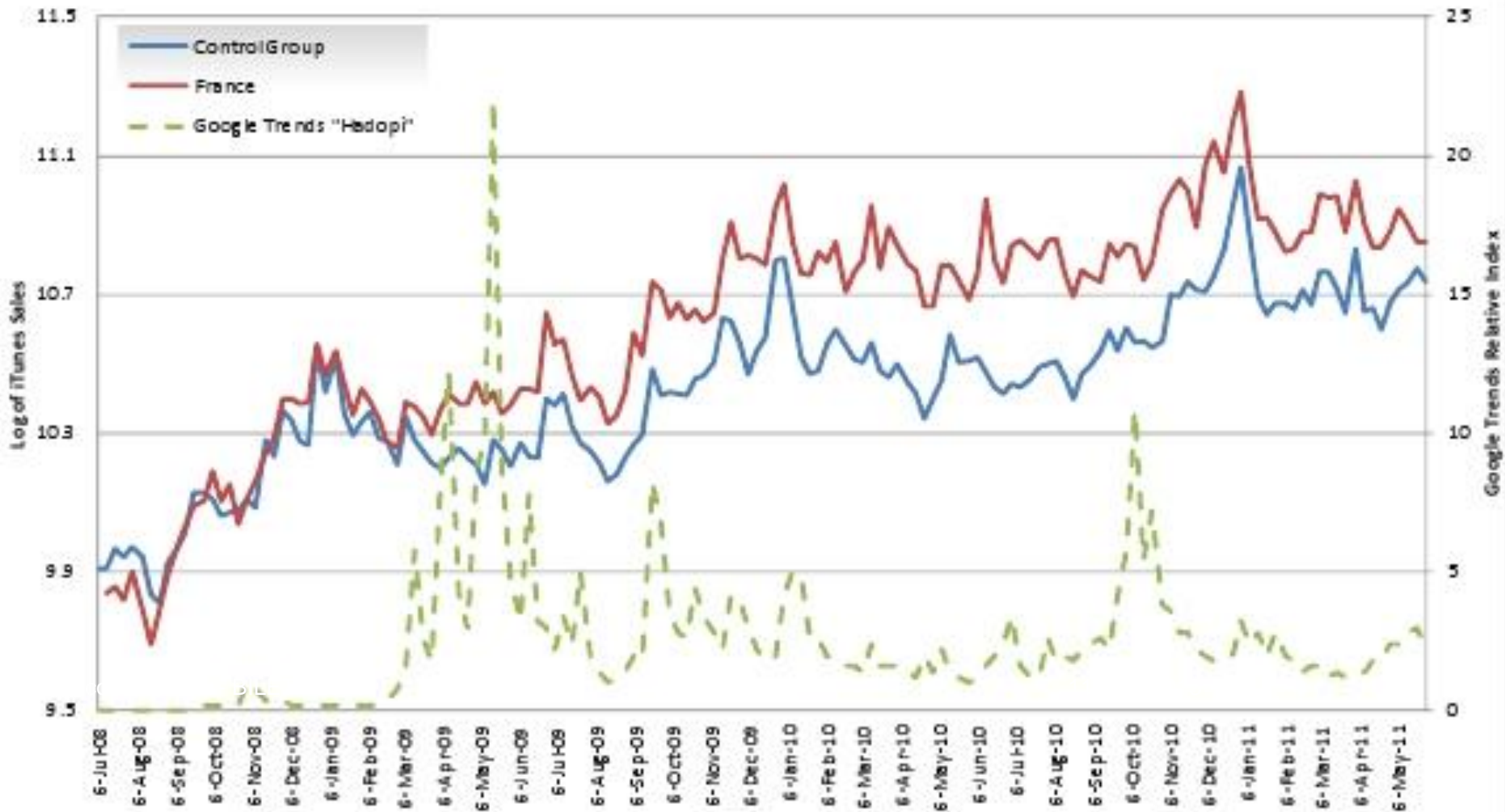
- Danaher et al. (March 2012) The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France, available on SSRN
- **Data**
  - iTunes sales figures for music in France from July 2008 - May 2011 (4 Majors companies)
  - Before the start of Hadopi and start of 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 increased revenues for iTunes due to Hadopi**
  - increase of €4.7 million in annual iTunes track revenues
  - increase of €4.9 million in annual iTunes album sales
  - Increase of €13.8 million per year for the entire music industry.

# 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



# IV. The Future of the Hadopi and the graduated response

# A) The increasingly muddled politics

# 1. Simpler times

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



# 1. Simpler times

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





# 1. Simpler times



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11 April 2013

Photo Agnès  
GAUDIN

Source:

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

## 2. Complex times



## 2. Complex times

- President Hollande not Sure / Ambivalence of Hollande
- Even during the campaign
- Adviser pro-Hadopi





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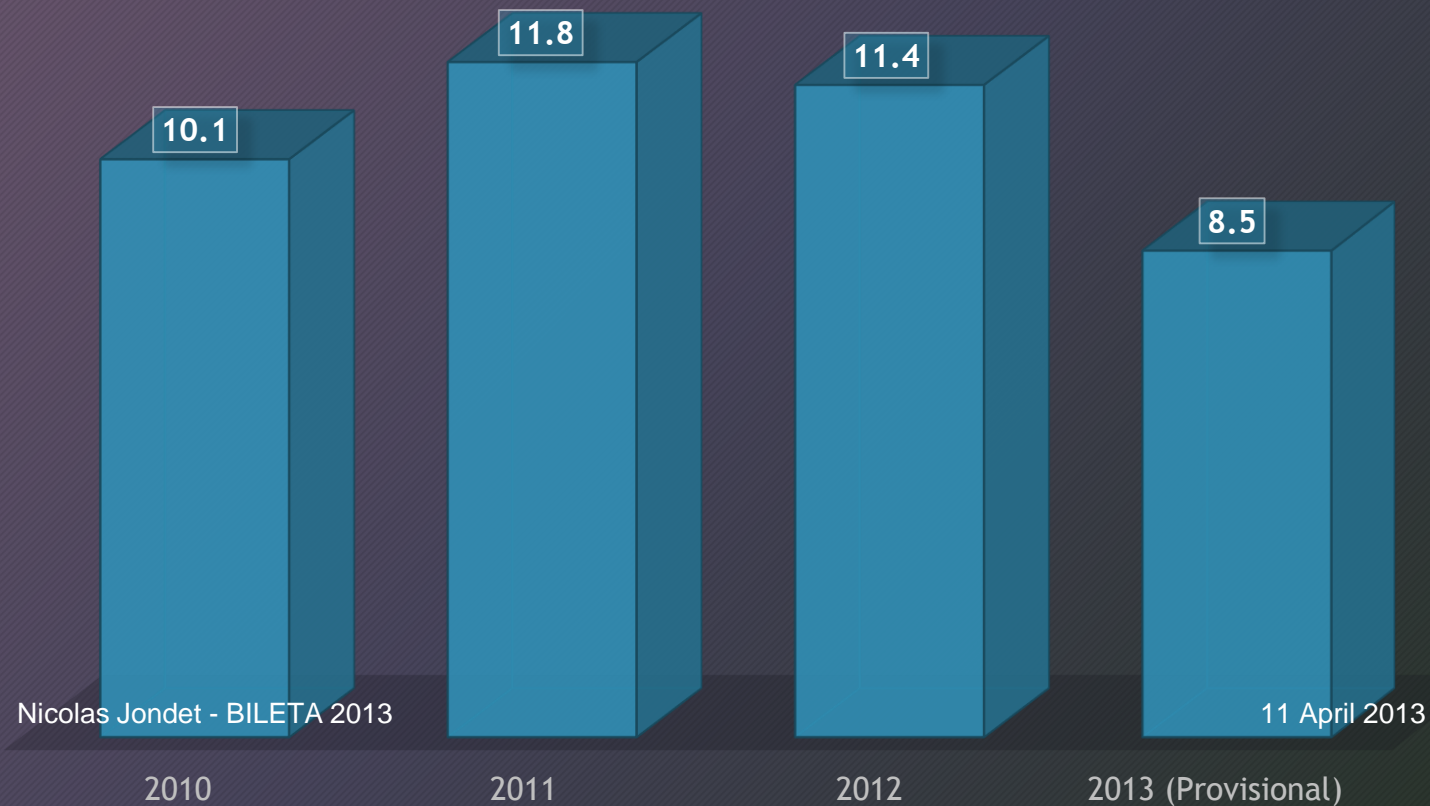
11 April 2013

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



# Tightening of the budget

## BUDGET OF THE HADOPI (MILLION EUROS)



## B) Mission Lescure



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Pierre Lescure, Crédits photo : Bertini/Grasset, Source: [Le Figaro](http://www.lefigaro.fr)

# Mission Lescure

- **Scheduled to be released in May 2013**
  - Who is Lescure? Canal+ Vivendi
  - Impact of the cultural industries on policy making in general and on the socialist party and Hollande in particular
- **Possible outcomes [my speculations]**
  - Suppression of the Hadopi
  - Hadopi stays but disconnection removed, more likely
  - Finding a way to make Tech to finance culture



# V. What I make of it?

# 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** : an inconvenience rather than a “digital guillotine”
- You can still connect elsewhere (work, uni, friends, cafés)
- Seen as a last resort and might never be implemented (too expensive)
- Likely that it would only be a question of the level of fines
- I think disconnection is the most likely thing to be removed from the graduated response, if it is to survive

# 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



## 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) 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

## C) 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

## C) Is it worth it?

- **My other issue: the Government did not drive a hard enough bargain on the behalf of the consumer**
  - 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
  - .....



# Conclusion

- **Graduated response better than often said to be**
  - Seems to have a deterrent effect
  - Might have a positive impact on sales
  - Is less brutal and more Human Right compliant than other systems of enforcement
  - However, too expensive for the Taxpayers to fund alone
  - The state could be more forceful in obtaining gains for the consumers

# Conclusion

- **In my ideal world**
  - The graduated response and the Hadopi would remain
  - The disconnection penalty would disappear
  - The budget of the Hadopi would be financed, at least in part, by media companies which use the system
  - Hadopi would stay for a few more years to see whether it works or not, and whether should be exported
  - State should review all manners of subsidises / regulations in favour of the media industry and digitisation to assess their cost for citizens and benefits for consumers

# Thank you !

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