As an European Union (“EU”) Member State, France is required to implement EU Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, (commonly known as the “EUCD”). The EUCD, a controversial measure in its own right, represents the EU’s implementation of the 1996 WIPO Copyright Treaty.

The vast majority of EU member states have already implemented the EUCD into national law. However, France, Spain and the Czech Republic have not yet done so. France’s attempts at enacting legislation to implement the EUCD have been fraught with controversy. The DADVSI, which stands for Droit d’Auteur et Droits Voisins dans la Societe de l’Information, or “Author’s Rights and Related Rights in the Information Society,” is a highly controversial proposed legislation that was originally proposed in 20031 and came before the French legislature last year. It is designed to give legal effect to the EUCD under French national law.

Currently moving its way through the legislative process and having been extensively amended,2 DADVSI aims to protect copyrighted content online and digital rights management (“DRM”) mechanisms by criminalizing certain activities, many of which are considered legitimate by many people in France. Because of its potential impact on French society and the software industry, DADVSI has been heatedly debated by people and organizations across the economic and political spectra.

Background

Among other notable provisions, the EUCD requires all EU member states to give appropriate legal protection to DRM techniques and copyrighted digital content. When it was first introduced, the DADVSI was essentially a mere transposition of the DRM provisions contained in the EUCD. However, as the proposed law moved through the legislative process, it has evolved to bear little resemblance to the EUCD.

The draft of DADVSI that was up for consideration in late 2005 would have mandated DRM technical protection methods and criminalized the production of any software that could potentially facilitate the circumvention of copyright protections. In late December of 2005, the French National Assembly voted for the first time on DADVSI. Rather than voting on the proposed legislation, they passed an article that removed the DRM proposal from the draft law and instead opted for the equally controversial global license concept. The global licensing concept attempts to halt peer-to-peer use by increasing monthly Internet access fees from two to six euros, while allowing Internet users the freedom of unlimited peer-to-peer downloading. The global license amendment was retracted from DADVSI in March of 2006, and the DRM protection was put back in place.

The National Assembly approved the amended DADVSI on March 21, 2006.3 DADVSI was then sent to

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the Senate, which adopted a modified version of the draft from the National Assembly on May 10. Next, DADVSI will go before the Mixed Parliamentary Commission, which will consider both the Senate’s and the National Assembly’s drafts and adopt some combination thereof. After that, DADVSI will need to face the Constitutional Court, and then it will be sent for a final parliamentary vote before submitted to the President for his signature. As such, there remains the possibility of additional changes.

ADVSI and Its Controversies

One of the most controversial aspects of the DADVSI concerns the penalties that would be imposed under the measure. Of specific concern have been the provisions of the measure that would criminalize: (i) the production of software that could potentially facilitate the circumvention of copyright protections and (ii) peer-to-peer transferring of copyrighted works. These provisions raise three major issues: (i) the practicality of prohibiting all peer-to-peer transferring activities; (ii) the validity of the long-standing French right to private copying; and (iii) the lack of interoperability, each as further discussed below:

i. Peer-to-Peer Exchange of Copyrighted Digital Data

Opponents of the proposed criminalization of peer-to-peer users have argued that because millions of people in France currently trade files on the Internet, it will be contrary to the commonly accepted culture, as well as plain impractical to enforce such provisions restricting peer-to-peer file trading. DADVSI does not make clear how the government intends to enforce this prohibition against millions of people, who view DRMs as intrusive and contrary to accepted social practices.

ii. The Right to Private Copying

In France, as in many other countries, there is a long tradition of protecting the right to private copying of copyrighted works for personal use. If DADVSI becomes law in its present form or a form similar thereto, then private copying, as the French presently know it, may no be possible. The amended draft adopted by the National Assembly in March of 2006 established an exception to allow for the right to private copying. However, the Senate removed this exception in the draft adopted on May 10, 2006.

iii. Hardware Interoperability

Another concern is DADVSI’s sweeping criminalization of circumvention, or facilitation of the circumvention, of copyright protections, along with the effects of such criminalization on techniques that enhance interoperability among software and devices. The prohibition of any software capable of facilitating copy protection can put many important mainstream software applications in legal limbo, since any development tool or software capable of reading encumbered formats can be said to facilitate DRM circumventions on some level. With maximum penalties of up to 300,000 euros in fine and/or 3 years in prison, this could have a chilling effect on the software industry in France.

In response to concerns, the National Assembly adopted the so-called “interoperability amendment” to DADVSI, which not only allowed to users to break DRM protections in order to make a work interoperable, but also allowed everyone who wants to make her software interoperable with something to demand the technical documentation required to do this under certain conditions. This amendment has elicited strong reactions from DRM providers, especially U.S. companies doing business in France, for it would require digital content bought at any online store to be playable on any hardware.

In addition to the interoperability amendment, the National Assembly also adopted the following provisions in March 2006: (i) allowing the decompilation of DRM mechanisms for purposes of understanding how they function; (ii) allowing users to bypass DRM mechanisms in order to use something in the way it is supposed to be used; (iii) allowing an artist the right to let his work be distributed for free on peer-to-peer networks; (iv) allowing libraries to copy works for non-commercial purposes; and (v) allowing DRM-circumvention software that is made for research or is designed for legal distribution of work.

However, the Senate voted to limit the interoperability amendment in May of 2006, requiring DRM producers to provide their security source code to service providers, computer program publishers and software developers only, as opposed to everyone who requests. The Senate’s draft also creates a new regulatory authority that handles requests for access to DRM information. This new regulatory authority can compel companies to license their exclusive DMR mechanisms to rivals, but only if the protection mechanisms are imposed by the companies without the explicit authorization of the authors of the copyrighted works. Under this provision, a company such as Apple could avoid being forced to license its exclusive file formats if it obtained permission from the artists whose music it sells.

News sources suggest that the Mixed Parliamentary Commission will likely approve a compromised text of
the interoperability amendment that includes a provision allowing companies to avoid sharing DMR information by striking new deals with copyright holders.

Conclusion

If enacted in its present form, or a form similar thereto, DADVSI will have a significant impact on the French society and its economy. It remains to be seen how certain provisions of DADVSI, if enacted, can and will be enforced against millions of people. The controversy that has surrounded DADVSI likely will not end, but instead move from the legislature into the court room. DADVSI is one of the latest, but probably not the last, examples of the ongoing struggle to preserve authors’ proprietary rights while also protecting individual freedoms, all in the face of new technological innovation.

1 A French version of the originally proposed measure is available at the web site of the National Assembly at: <http://www.assemblee-nationale.fr/12/projets/pl1206.asp>.
3 A copy of the version of DADVSI approved by the National Assembly in March 2006 is available at: <http://www.assemblee-nationale.fr/12/ta/ta0554.asp>.
4 In comparison, the Digital Millennium Copyright Act, the key legislation in the United States in this regard, only criminalizes software specifically designed for the purpose of circumventing copyright protections.

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