[FR] HADOPI’s Power of Sanction Censured by the Constitutional Council

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After months of controversy, the Act “promoting the circulation and protection of creation on the Internet” (the HADOPI Act), adopted on 13 May 2009 after long and laborious parliamentary debate, has finally been censured by the Constitutional Council, to which it had been referred by opposition MPs opposed to the text. The Act was designed basically to set up a “graduated response” to the illegal downloading of works on the Internet, and introduced a “High Authority for the circulation of works and the protection of rights on the Internet” (HADOPI), a nine-member independent administrative authority with power to warn and, initially intended to, sanction, to which application is made by sworn agents attached to the societies for gathering and redistributing royalties and by the national cinematographic centre (Centre National de la Cinématographie - CNC). The Act introduces an obligation of vigilance (new Article L. 336-3 of the Intellectual Property Code - CPI), the keystone of the new system, as a result of which all Internet subscribers must ensure that “such access is not used to exploit [a work, a recording or a programme] without the authorisation of the rightsholders where this is required”. Under the Act, failure to comply with this obligation would incur the possibility of the HADOPI sending a “recommendation” by e-mail to the Internet subscriber via its IAP reminding him/her of the obligation of vigilance and the corresponding sanctions. In the event of a second infringement within six months of this e-mail being sent, the HADOPI could send a letter in similar vein to the subscriber by registered mail. Lastly, if the subscriber continued to disregard the obligation of vigilance within a year of this letter being sent, the Act provides for the possibility of the HADOPI “suspending access to the Internet for a period of between two months and one year, combined with the impossibility for the subscriber to subscribe” to a contract with another operator. On 10 June the Constitutional Council found this power of sanction (stopping access) on the part of the HADOPI unconstitutional, on the grounds that freedom of communication and expression implied “nowadays, in the light of the generalised development of the Internet and its importance for participation in democratic life and the expression of ideas and opinions, freedom of access to these on-line communication services“. Thus the HADOPI’s powers as provided for in the legislation could lead to restricting an individual’s exercise of the right to express him/herself and communicate freely. The Constitutional Council decided that access to the Internet could only be cut off by the courts. The Act also provided that its sanctions could only be imposed on the holder of the Internet

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subscription contract, unless that person provided proof of fraud on the part of a third party. The Constitutional Council found this provision contrary to the principle of the presumption of innocence. Withdrawing all power of sanction from the HADOPI Act deals a serious blow to the Government's logic of "decriminalisation". The text, minus its sanction provisions, was promulgated on 13 June 2009. The Minister for Culture explained that the Act would need to be supplemented in order to "give the courts the power to impose appropriate sanctions and more specifically to decide on the temporary suspension of access to the Internet, the principle of which has been validated by the constitutional judge". A new text should therefore be tabled for the Parliament's extraordinary session in July. The Minister said that the HADOPI, now responsible exclusively for the "preventive and educational aspect" of combating on-line piracy (the sending of warning messages), would be set up "within the scheduled timescale", i.e., in September 2009.

Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet

http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&dateTexte=&categorieLien=id

Act No. 2009-669 of 12 June 2009 promoting the circulation and protection of creation on the Internet

Conseil constitutionnel, décision n° 2009-580 DC du 10 juin 2009

http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=F9AFBBC5921747192A067FAF4D811E93.tpdjo03v_3?cidTexte=JORFTEXT000020735682&categorieLien=id

Constitutional Council, Decision No. 2009-580 DC of 10 June 2009

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