[FR] HADOPI gets moving!

IRIS 2010-9:1/24

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Slowly but surely, with the publication of the implementing decrees for the "HADOPI I" and "HADOPI II" Acts (see IRIS 2010-1:1/23 and IRIS 2009-7:12/20), the High Authority ("HADOPI") is getting into working order, despite the efforts of its detractors. The "HADOPI II" Act of 28 October 2009 gave the criminal courts the task of ordering the suspension of Internet access for an Internet user who fails to comply with the obligation to ensure that access was not used for the illegal circulation of protected works. This is in addition to the offence of "specific negligence", which attracts a penalty in the 5th category, the principle of which is laid down by Article L. 335-7 of the Intellectual Property Code resulting from the HADOPI Act, the definition of which was nevertheless left to the regulatory authority. The Decree of 25 June 2010 has now defined the offence, which is constituted when an Internet access holder has not set up a security system to prevent unlawful downloading. The negligence is also deemed specific if it has failed to implement the system. According to the text, however, the offence can only be constituted if the access holder has received a recommendation from the HADOPI enjoining him/her to secure his/her Internet access and if, within a period of one year following this recommendation, his/her Internet access is used again to unlawfully download or circulate protected works.

At the same time, Decree No. 2010-872 of 26 July 2010 has laid down the rules applicable to the procedure and the investigation of cases before the HADOPI's panel and commission for the protection of rights. Cases may be referred to the HADOPI by the regularly constituted professional defence bodies, the societies for receiving and redistributing royalties, and the CNC. After hearing the Internet subscriber who is being prosecuted for having downloaded protected works without authorisation, the commission decides, by a vote taken with a majority of at least two, that the facts of the case are likely to constitute specific negligence or counterfeiting, and sends its deliberation on to the office of the Public Prosecutor at the appropriate regional court. It informs the commission of its follow-up to the referral. If a penalty is imposed, the commission informs the access provider that the subscriber is to be suspended, and in turn the access provider informs the commission of the date on which it has suspended access.

The access provider FDN applied to the Conseil d'Etat under the urgent procedure for implementation of the Decree of 26 July to be suspended, but the Conseil d'Etat turned down the application on 14 September 2010, on the grounds that none of the arguments put forward were such as to cast serious doubt on the

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legality of the Decree at the present stage. The HADOPI is thus well and truly in working order, even though an application has been made to the Conseil d'Etat for another decree, adopted on 5 March 2010 (on the processing of personal data necessary for implementing the recommendation procedure), to be cancelled. Theoretically, it should therefore be possible to start sending out the first warning e-mails ...

Décret n° 2010-695 du 25 juin 2010 instituant une contravention de négligence caractérisée protégeant la propriété littéraire et artistique sur Internet, JO du 26 juin 2010

http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022392027

Decree No. 2010-695 of 25 June 2010 instituting the offence of specific negligence in the protection of literary and artistic property on the Internet, gazetted (published in the Journal Officiel) on 26 June 2010

Décret n° 2010-872 du 26 juillet 2010 relatif à la procédure devant la commission de protection des droits de la Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet, JO du 27 juillet 2010

http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022518612

Decree No. 2010-872 of 26 July 2010 on the proceedings before the commission for the protection of rights of the High Authority for the Broadcasting of Works and the Protection of Rights on the Internet ('HADOPI'), gazetted (published in the Journal Officiel) on 27 July 2010

Conseil d'Etat (ord. réf.), 14 septembre 2010, Société French Data Network

Conseil d'Etat (urgent procedure), 14 September 2010, the company French Data Network

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