

[FR] Conseil d'Etat Confirms Legality of the HADOPI Decrees

IRIS 2011-10:1/15

*Amélie Blocman
Légipresse*

On 19 October 2011 the Conseil d'Etat rejected the applications brought by the Apple companies and the Internet access provider FDN against the decrees on the organisation and functioning of the high authority for broadcasting works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet - HADOPI). In doing so, the Conseil d'Etat validated the "graduated response" procedure, which it deems to be in compliance with the European Convention on Human Rights. This procedure, set up by the Acts of 12 June 2009 and 28 October 2009 and their implementing decrees, which was the subject of the applications, is an attempt to combat the unlawful downloading of works that are protected by copyright. The first stage of the graduated response is in the hands of the HADOPI, an independent administrative authority responsible for sending warning messages to Internet users using peer-to-peer technology whose IP addresses have been collected by the authorised rights management societies.

The applicant IAP was calling for the cancellation of the Decree of 26 July 2010 on the procedure and the investigation of cases before the HADOPI's committee for the protection of rights. The arrangements at issue lay down the rules for the admissibility of the applications it receives, the establishment of a system for reports by sworn agents, the conditions for hearing Internet users, the procedure for applying to the public prosecutor, the recommendations sent to Internet users, etc. The grounds for the application are that all these disregard the adversarial principle and violate Article 6 of the European Convention on Human Rights. However, the Conseil d'Etat rejected the claims, recalling that the recommendations referred to in the Decree at issue that are sent to Internet users by the HADOPI's committee for the protection of rights do not have the status of a sanction or an accusation; their purpose was firstly to state the facts regarding certain information likely to point to a failure to comply with the user's obligation to secure access to the Internet, and secondly to inform the Internet users concerned, by merely reminding them of the law, of the obligations incumbent on them in application of the provisions of the Intellectual Property Code. Thus, the Conseil d'Etat recalled, these recommendations could not be dissociated from any possible criminal proceedings in court, at which point the person concerned would have the possibility to discuss both the facts to which they refer and the conditions of their being sent. Thus the argument that the HADOPI's

recommendations, by their very nature, could only be made by an authority meeting the requirements of the stipulations of Article 6 of the European Convention on Human Rights was rejected.

The Conseil d'Etat also rejected the application brought against the Decree of 5 March 2010 laying down the method for processing personal data entitled "System for managing measures to protect works on the Internet". The applicants claimed that the procedure for adopting the decree was irregular, because the regulatory authority for electronic communications and the postal service (Autorité de Régulation des Communications Electroniques et des Postes - ARCEP) had not been consulted. However, the Conseil d'Etat held that neither the object of the decree nor the provisions of either the Post and Telecommunications Code or the Intellectual Property Code made consulting ARCEP obligatory. Lastly, the Conseil d'Etat rejected Apple's contesting the decree of 29 December 2009 in the hope of neutralising the powers of the HADOPI, which is also responsible for regulating technical protection (DRM).

Conseil d'Etat, 19 octobre 2011, Société Apple Inc et Société I-Tunes Sarl, n° 339154

<http://www.conseil-etat.fr/fr/selection-de-decisions-du-conseil-d-etat/ce-19-octobre-2011-soci.html>

Conseil d'Etat, 19 October 2011, the company Apple Inc. and the company I-Tunes Sarl, no. 339154

Conseil d'Etat, 19 octobre 2011, French Data Network, n°339279 et n° 342405

http://www.conseil-etat.fr/fr/communiques-de-presse/decrets_hadopi.html

Conseil d'Etat, 19 October 2011, French Data Network, nos. 339279 and 342405

