PDGB avocats

July 2009

à la une

Intellectual Property / IT / Medias Department

HADOPI SPECIAL EDITION : "Creation on Internet": And what now …. ?

Called upon by the Socialist Party Deputies to rule on the "Creation on Internet" law, the Constitutional Council reviewed the law as adopted by the French Senate and finally delivered its decision on June 10, 2009.

The June 10, 2009 decision of the Constitutional Council n°2009-580 contests a large portion of the step by step response procedure, but does not however strike down the essence of the « Creation on Internet» law. Indeed its application fortunately goes beyond the "non legal and now frustrated procedure" by which subscribers' internet access should be merely suspended.

And what about sanctions?

Still nevertheless, the disapproval of the Constitutional Council only concerns the central aspect of the « Creation on Internet » law. Let us remind here that the law envisaged that the Commission for the Protection of Rights depending on the HADOPI (High Authority for the Diffusion of Arts and the Protection of (Copy) Rights on Internet - in some cases without the intervention of a judge – could decide to suspend a connection owner's access to internet based on the fact that it would not have complied with its obligations to survey and secure its internet access, as required by the new article L.336-3 of the French Intellectual Property Code.

But the Constitutional Council simply just censored this enactment of the law under grounds that definitely remind us the well-known amendment 138 supported before the European Commission within the framework of the Telecom Package discussions.

Accordingly, the Constitutional Council decided that in the present status of the communication system, freedom of expression – one of our most precious rights – also implies freedom to have an internet connection.

Wise men therefore considered that "*whatever the guaranties secured around a verdict, lawmakers could in no way confer to an administrative authority such powers to protect the rights of copyright holders*".

Freedom to an internet connection thereby consecrated as a right deprived the HADOPI law of its repressive powers making the sanction enforceable only by a judge. Its scope of action in fighting against illegal downloading is thus limited to a preventive action, sending email warnings to the connection holder.

Prevailing presumption of innocence in French law

The Constitutional Council did not just establish such a principal, but it also further struck down the « Creation on Internet » Law.

As a matter of fact, the Council considered that the presumption of liability thereby arising from the law – as it envisaged that no sanctions could be taken against the connection owner and noticeably if he had secured his connection using certain means among those suggested by HADOPI – reverses the charge of the proof and is contrary to the principal of the presumption of innocence under the terms of article 9 of the 1789 Declaration of Rights of Man and of the Citizen.

The Council also partially struck down the procedure in such a way that to obtain the interruption of a user's connection it will be necessary to bring proof that the user violated its obligation to survey and screen its connection. It's not sure that this will be satisfactory for internet users. Indeed, since with the original text the interruption of a connection could be avoided by following several perfectly clear steps. In any case, taking into account the decision of the Constitutional Council, the procedure to interrupt the connection of an internet user is not enforceable as it is now.

What about the other controversies?

The Constitutional Council however did not answer a number of other questions submitted to its attention on various aspects of the Creation on Internet Law. In particular, the Constitutional Council rejected the argument according to which the law obviously brings about a disproportionate imbalance between the protection of copyright holders and the right of privacy, even though it indirectly mentioned the quality of the personal data IP address, which is perfectly in line with the June 3, 2009 informative report of the French Senate.

Besides, the Constitutional Council was requested to acknowledge the unconstitutionality of the procedure by which copyright holders could resort to a judicial court to have it rule that "*any steps taken to prevent or stop any infringement of copyrights and affiliated rights by any person likely to contribute to such infringing*" on grounds that the procedure would deprive the users from their right to information.

The Council did not support the request. It considered that, if need be the competent jurisdiction resorted to would decide measures strictly needed to protect the said rights and respect the right to information.

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The Minister for Culture immediately acknowledged the decision of the Constitutional Council and announced his intention to quickly complete the « Creation on Internet » Law by conferring to the judges the ultimate "gradual response" sanction: the interruption of connection holder's internet access.

The « Creation on Internet » Law: Beyond the aspects of illegal downloading

Even though it was partially censored, the « Creation on Internet » Law was adopted on May 13, 2009 and thus deserves to be looked into. Of course the law installs the well known High Authority for the Diffusion of Art Works and the Protection of rights on Internet (HADOPI), which will have authority to send warnings by email to connection holders. It replaces the ARMT (Regulation of Technical Measures Authority). But the scope of the new law is not limited to this procedure only. Quite the opposite, it contains a number of other clauses briefly exposed hereunder:

Interoperability of Digital Rights Management

While stopping the Digital Rights Management protection in music downloading offers had been announced even before the parliamentary discussions on the bill were open, nowadays some « legal » music downloading offers are still DRM protected and may sometimes cause interoperability difficulties.

The "Creation on Internet" Law could change this since it provides that platforms on which downloading music files must be paid for (outside subscription fees) shall have to pass an agreement with producers within 3 (three) months from June 14, 2009, the date of enforceability of the law, to sell non DRM protected files which prevent interoperability (article 10 quarter).

The new Media Chronology

The media chronology as it set now establishing a period of time before using a featuring film on television, or under the form of a video or on internet, is the result of an inter-professional agreement. Though new negotiations were announced in 2008, the media chronology barely changed since the Elysée November 23, 2007 agreement, the scope of which incidentally is quite uncertain.

Because it is so difficult to get the various actors to come to an understanding, article 9 of the « Creation on Internet » Law directly changes the chronology by reducing the period of time before using featuring films in the form of a DVD to 4 months instead of 6. Regarding Video on demand, the law stipulates that an inter-professional agreement will have to define the applicable period of time, but indicates that in the absence of an agreement within 1 month after the law is published, then the start off of Video on demand could occur within 4 months from the featuring date of the film.

In-cinema screen capturing of films: copyright infringement

Illegal downloading most often concerns featuring films starting on the same day they are released. To put off piracy of cinematographic works from the screens in cinemas, the « Creation on Internet » law intends to add a new paragraph to the new article L335-3 of the French Intellectual Property Code. The addendum indicates, as though it were necessary, that capturing a cinematographic work from a screen in a cinema is a copyright infringement.

Publisher on-line : A new status?

Because the publisher on-line must have been wrongly confused with the publisher within the meaning of the terms of the June 21, 2004 law « Confidence in digital economy », it had no specific legal consideration up to now. The "Creation on Internet" Law has therefore established a legal status for on-line publishers, which is from now on: "*any communication service offered on-line to the public published for professional reasons by an individual or a corporate body who controls the publishing of the content thereof, consisting in the production and release to the public of an original content, of general interest, regularly updated, comprising information related to daily events and treated as a news-type information, that is not a promotion tool or an industrial or commercial activity accessory."*

There will soon be a decree stipulating the terms by which the status of on-line publisher will be granted, it being already specified that for political and general information on-line press services to enjoy such status, they will have to employ at least one professional journalist on a regular basis.

Tax benefits are linked to the new status, since indeed the online press is not bound to pay the tax on business activities and may to a certain extent build up reserves that are deductible from the net accounts (and this up to the fiscal year 2010) to allow it to face the expenses listed non exhaustively in article 39 A bis of the French Tax Code.

There is another provision in the « Creation on Internet » Law that publishers are surely going to appreciate. In the event a press offence arises (like slandering for instance) out of the publication of a message from an internet user in a personal contribution dedicated space on the online publishers site, the publishing director will not be held liable for a criminal offence as main author if it is proved that he did not actually know the content of the message before it was put on line or if, as soon as he became aware of the content of said message, he promptly took action to withdraw such message.

An important modification in the copyright scheme of professional journalists

The « Creation on Internet » Law brings about new articles in the French Intellectual Property Code. As such unless otherwise specified in the employment contract between a journalist an his employer, under the terms of the employment contract the journalist agrees to assign exclusivity rights to his employer to exploit his works produced within the scope of a specific newspaper, whether it is published or not. (cf. article L.132-36).

In addition, the law stipulates noticeably that the wording newspaper relates globally to the press agency to which the journalist has brought his contribution and also all the derivative works on the same subject, whatever media aid, or whatever broadcasting method is used, except audiovisual communication services (article L.132-35). Therefore the law authorizes the multi-medium exploitation of news articles, as long as the media is from the same newspaper. Incidentally, the law indicates that the multi-media exploitation will not produce in favour of the journalist any extra earnings, during a period of time to be defined in a business agreement or, in the absence of such, in any collective agreement. But on the other hand, exploiting the article beyond the specified period of time shall have to be paid for in the form of royalties or salary.

The law goes further since it does indeed envisage for instance that business agreements may allow for a larger exploitation of one same article, for instance in an newspaper published by a company owned by the same group.

Regarding professional photojournalists who mainly live on the earnings from their activity and who contribute only occasionally to the preparation of a newspaper, it should be underlined that the automatic assignment of their rights as specified in article L.132-36 of the French Intellectual Property Code applies only in the case of contract for hire.

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