

Decision No. 2009-590 DC of October 22nd 2009

Act pertaining to the Protection under Criminal law of Literary and Artistic Property on the Internet

A referral was made to the Constitutional Council on September 28th 2009, pursuant to Article 61, paragraph 2 of the Constitution, by Messrs Jean-Marc AYRAULT et al. Members of the National Assembly, with respect to the Act pertaining to the Protection under Criminal law of Literary and Artistic Property on the Internet

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Criminal Code;

Having regard to the Code of Criminal Procedure, and decision n° 2002-461 DC of August 29th 2002;

Having regard to the Intellectual Property Code;

Having regard to Act n° 2009-669 of June 12th 2009 Furthering the Diffusion and Protection of Creation on the Internet and decision n° 2009-580 DC of June 10th 2009;

Having regard to the observations of the Government registered on October 14th 2009;

Having regard to the observations by way of rejoinder registered on October 19th 2009;

Having heard the Rapporteur

1. The parties making the referral for review by the Constitutional Council of the Act pertaining to the Protection under Criminal law of Literary and Artistic Property on the Internet contend that sections 1,6, 7,8 and 11 of said statute are unconstitutional.

2. The statute referred for view is designed to complete the Act of June 12th 2009 referred to above by drawing the conclusions from the decision of the

Council dated June 10th 2009 referred to above. It sets out in particular the conditions in which certain offences provided for by the Intellectual Property Code may be ascertained, prosecuted and tried in the event of said offences being committed by a public online communication service. It introduces a supplementary penalty of suspension of access to such a service both for the commission of offences provided for under Articles L.335-2, L 335-3 and L 335-4 of the Intellectual Property Code, when committed by using such a service and for the new offences to be created by Decree. Lastly it provides for the conditions in which said supplementary penalty is to be imposed and enforced.

WITH RESPECT TO SECTION 1:

3. Section 1 of the statute referred for review inserts into the Intellectual Property Code Article L 331-21-1 worded as follows : "The members of the Committee for the Protection of Copyright, together with its agents duly authorised and sworn before the judicial authority referred to in Article L 331-21, may ascertain the commission of acts likely to constitute offences provided for herein when they are punishable by the supplementary penalty of suspension of access to a public online communication service as referred to in Articles L 335-7 and L 335-7-1

" They may also take note of observations made by the persons concerned. The letter of summons shall state the existence of this right.

" When the persons concerned ask to be heard, they shall summon them and give them a hearing. Every person to be heard is entitled to be assisted by an Attorney of his choosing.

" A copy of the formal record of the hearing shall be handed to the person concerned".

4. According to the parties making the referral, the words "ascertain the acts likely to constitute offences" fail to comply with the requirement that the law be accessible and intelligible. They therefore petition the Constitutional Council firstly to specify that the adjective "likely" must require the authorities in charge of applying the law to carry out in all events further investigations so that the mere ascertainments of the HADOPI do not make it possible to convict suspected subscribers and secondly to require that all proceedings shall include a hearing of the person involved when the file leading to prosecution is in the course of preparation.

5. Firstly, insofar as the challenged provisions are neither obscure nor ambiguous, the argument based on failure to comply with the constitutional objective of accessibility and intelligibility of the law is unsupported by the facts.

6. Secondly, pursuant to paragraph 2 of Article 61 of the Constitution, the Constitutional Council has jurisdiction to rule on the conformity with the Constitution of a statute referred to it for review. It is only incumbent upon the Council to construe statutory provisions which are referred to it when such a

construction is a prerequisite to its decision as to the constitutionality of said provisions. In the case in hand the relevant judicial authorities will decide on a case by case basis, as they are required to do, whether further investigations or enquiries are required or if the evidence obtained by the civil servants and agents vested with police powers is sufficient to prove the guilt of the person accused and, as the case may be, make it possible to determine the applicable penalty. It is therefore not necessary for the Constitutional Council to accede to the request for construction of the provisions.

7. Section 1 of the Act is therefore not unconstitutional.

WITH RESPECT TO ARTICLE 6 :

8. I of section 6 amends Article 398-1 of the Code of Criminal Procedure by adding to the list of offences tried by the Tribunal Correctionnel sitting with a single judge "the offences provided for in Articles L 335-2, L 335-3 and L 335-4 of the Intellectual Property Code when said offences are committed by use of a public online communication service". II of section 6 inserts into the Code of Criminal Procedure Article 495-6-1 worded as follows : " The offences provided for in Articles L 335-2, L 335-3 and L 335-4 of the Intellectual Property Code, when committed by the use of a public online communication service, may also be dealt with under the summary procedure of a criminal order provided for herein. In such cases the injured party may ask the President to rule in the order dealing with the prosecution as to the claim for damages bought by the civil claimant. The order is thus notified to the civil claimant and may be opposed in the manner provided for by Article 495-3".

9. The parties making the referral contend that introducing a specific procedure applicable to infringement of copyright committed by the use of a public online communication service and making it possible to have this offence tried by a single judge or under the summary procedure of a criminal order fails to comply with the principle of equality before the law. They argue that this "regression of procedural guarantees" is incompatible as regards both the complex nature of litigation concerning infringement of copyright and the severity of penalties liable to be imposed. Furthermore the possibility given to injured parties to ask the judge to rule by way of a criminal order on a claim for damages brought by the civil claimant deprives the accused of any opportunity to contest these claims. This being the case, the provisions fail to comply with the right to a fair trial, the rights of the defence and the presumption of innocence.

10. Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that the law "shall be the same for all, whether it protects or punishes". If Parliament is at liberty to provide for different rules of procedure depending on the facts of a case, the situations and persons involved, this is on condition that such differences do not arise from unjustified distinctions and that

all persons enjoy the same guarantees, in particular as regards respect for the rights of the defence, which imply in particular that proceedings be just and fair.

11. Firstly, as regards the particularities of the offence of infringement of copyright committed by the use of a public online communication service, Parliament was at liberty to provide for specific rules governing prosecution for said offences. When providing that these offences be tried by the Tribunal correctionnel sitting with a single judge or prosecuted under a summary procedure, Parliament intended to take into account the extent of infringement of copyright committed via these communication services. The rules of procedure introduced by the challenged provisions do not create any difference between persons committing such acts.

12. Secondly, as the Constitutional Council held in paragraphs 78 to 82 of its decision of August 29th 2002 referred to above, the summary procedure provided for by Articles 495 to 495-6 of the Code of Criminal Procedure does not fail to comply with the principle of equality before the law. Neither does extending the scope of the application of this procedure to offences of infringement of copyright committed by use of public online communication services and the possibility for ordering suspension of access to said services by a criminal order.

13. Thirdly, no constitutional rule or principle precludes a judge from ruling by a criminal order on a claim for damages made by an injured party once he feels that he has at his disposal sufficient evidence to enable him to make his ruling.

14. However Article 34 of the Constitution reserves for statute law the laying down of the rules of criminal procedure. Paragraph 2 of Article 495-6-1 of the Code of Criminal Procedure provides that under the summary procedure, the injured party may make a claim for damages and, as the case may be, oppose the criminal order. This provision does not however determine the manner in which such a claim may be brought. It does not specify the effects of any opposition by the injured party and does not guarantee the right of the accused to limit his opposition to the sole civil provisions of the criminal order or to the sole criminal provisions thereof. Parliament has thus failed to fully exercise the powers vested in it. Paragraph 2 of Article 495-6-1 of the Code of Criminal Procedure must thus be held to be unconstitutional.

15. In view of the foregoing, the remainder of section 6 is not unconstitutional.

WITH RESPECT TO SECTION 7:

16. Section 7 of the statute referred for review re-inserts into the Code of Intellectual Property Article L 335-7 worded as follows : "When the offence has been committed by use of a public online communication service, persons guilty of the offences provided for in Articles L 335-2, L 335-3 and L 335-4 may also be liable to imposition of a supplementary penalty of suspension of access to a public

online communication service for a maximum period of one year, together with a prohibition on taking out any other contract of a similar nature with another online access provider for the same period.

"When such a service is purchased as part of a commercial package including other types of service such as telephone or television connections, the decision to suspend online access shall not affect subscriptions to these other services.

" Suspension of access shall not, per se, affect the payment of the subscription fee to the service provider. Article L 121-84 of the Consumer Code shall not apply during the suspension period.

" The costs of any termination of subscription during the suspension period shall be borne by the subscriber.

" When the decision is executory, the High Authority for the Diffusion of Works and Protection of Copyright on the Internet shall be informed of the supplementary penalty provided for herein and shall in turn notify the provider of access to public online communication services of the same in order for the latter to proceed to suspend access of the subscriber involved no later than 15 days of said notice.

" Failure by any provider of access to public online communication services to implement the notified order to suspend access shall carry a maximum fine of 5000 €.

" 3° of Article 777 of the Code of Criminal Procedure shall not apply to the supplementary penalty provided for herein".

17. The parties making the referral contend that the penalty of suspension of access to the Internet for a period of one year is disproportionate and in particular should not be imposed in the framework of the summary procedure. They argue that the duty to pay the subscription fee constitutes a patently disproportionate penalty and also contend that the technical impossibility, albeit temporary, of enforcing the provisions of paragraph 2 of Article L 335-7 of the Intellectual Property Code throughout French territory confers upon certain citizens a type of immunity which fails to comply with the principle of equality and is an obstacle to the immediate application of the law. Lastly they argue that by vesting an administrative authority with the power to enforce penalties of suspension of access to the Internet, paragraph 5 disregards the principle of separation of powers.

18. Firstly, Article 8 of the Declaration provides : " The law shall prescribe only those punishments which are strictly and evidently necessary". Article 34 of the Constitution provides ; "Statute law shall determine the rules concerning ... the definition of crimes and other offences together with the penalties they carry".

19. Article 61 of the Constitution does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that vested in

Parliament. It merely confers upon it jurisdiction to rule on the conformity with the Constitution of statutes referred for review.

20. Although the necessity of punishments for offences is the preserve of the power of appraisal of Parliament, it is incumbent upon the Constitutional Council to ensure that there is no patent disproportion between the offence committed and the punishment incurred.

21. The introduction of a supplementary penalty designed to punish offences of infringement of copyright committed by the use of a public online communication service and consisting in suspending access to such a service for a maximum period of one year, together with a prohibition on entering into another contract for the same services with any other provider does not fail to comply with the principle of the necessity of punishments.

22. Secondly, paragraph 3 of Article L 335-7 of the Intellectual Property Code specifies the consequences of the penalty of suspension of access to the Internet as regards the contractual relationship between the access provider and the subscriber. The obligation imposed on the latter to pay the subscription fee, in the absence of any termination of the contract, constitutes neither a penalty nor a measure of a punitive nature. This provision, which is based on the fact that the breach of contract is attributable to the subscriber, does not disregard any constitutional requirement.

23. Thirdly, the provisions referred for review are applicable throughout the territory of the Republic, except for French Polynesia, an overseas Territorial Community governed by Article 74 of the Constitution. Although, for reasons connected with the features of network communications in certain areas, the impossibility of enforcing the provisions of paragraph 2 of Article L 335-7 of the Code of Intellectual Property may temporarily preclude the actual implementation of the supplementary penalty of suspension of access to the Internet, such a circumstance, which it is up to the judge to take into consideration when imposing the penalty, is not per se such as to constitute any failure to comply with the principle of equality before the law.

24. Fourthly, no constitutional rule or principal precludes an administrative authority from participating in the enforcement of the penalty of suspension of access to the Internet.

25. In view of the foregoing, section 7 is not unconstitutional.

WITH RESPECT TO SECTION 8:

26. Section 8 inserts into the Intellectual Property Code Article L 335-7-1 worded as follows : " For offences in class 5 provided for by this Code, when regulations so provide, the supplementary penalty defined in Article L 335-7 may

be imposed in the same manner, in the event of gross negligence, on the holder of a right of access to a public online communication service to whom the Committee for the Protection of Copyright, pursuant to Article L 331-25, has previously sent by registered letter delivered in person and duly signed for or by any other method ensuring proof of the date of receipt thereof, a recommendation asking said holder of access to implement security tools for its Internet access.

"Gross negligence shall be assessed on the basis of acts committed no later than one year from receipt by the holder of the recommendation referred to in the foregoing paragraph.

" In such cases, the maximum period of suspension shall be of one month.

" Failure by any person who has been the object of the supplementary penalty provided for herein to comply with the prohibition on entering into another contract for access to a public online communication service during the period of suspension shall render said person liable to a maximum fine of 3 750€".

27. The parties making the referral argue that these provisions create a new charge of gross negligence punishable by suspension of access to the Internet. The lack of precision in the definition thereof fails to comply with the principle of the legality of offences and punishments and would introduce a presumption of guilt contrary to the principle of the presumption of innocence and that such a penalty is of a patently disproportionate nature.

28. Firstly, section 8 of the statute referred for review does not introduce a new offence but creates a new class of supplementary penalty applicable to certain class five offences. If, under the challenged provisions, these offences shall only carry the supplementary penalty of a one month maximum suspension of Internet access in cases of gross negligence, it is up to the body vested with the power to make regulations, when exercising the powers vested in it by Article 37 of the Constitution, and under the supervision of the courts with relevant jurisdiction, to define the ingredients of said offence. Furthermore the proportionate nature of a penalty is to be appraised taking into account all the ingredients of the offence which it is sought to punish. The arguments that the new charge fails to comply with Article 8 and 9 of the Declaration of 1789 must therefore be dismissed.

29. Secondly, it is incumbent upon the courts with relevant jurisdiction to appraise factual situations likely to constitute the "gross negligence" mentioned in Article L 335-7-1 of the Intellectual Property Code. This concept, which is not of an equivocal nature, is sufficiently precise to guarantee against any arbitrariness.

30. Section 8 is therefore not unconstitutional.

WITH RESPECT TO SECTION 11:

31. Section 11 amends Article 434-41 of the Criminal Code and punishes by a sentence of two years' imprisonment and a fine of 30 000€ " failure by the convicted offender to comply with the obligations or prohibitions arising from penalties ... prohibiting the entering into any new contract for the access to public online communication services imposed as a supplementary penalty for a criminal offence by Article L 335-7 of the Intellectual Property Code". Contrary to the contentions of the parties making the referral, this provision does not introduce a patently disproportionate penalty. Section 11 is therefore not unconstitutional.

32. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - Paragraph 2 of Article 495-6-1 of the Code of Criminal Procedure, as worded pursuant to section 6 of the Act pertaining to the Protection under Criminal law of Literary and Artistic Property on the Internet, is unconstitutional.

Article 2 - Sections 1, 7, 8 and 11 of the same statute, together with the remainder of section 6, are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on October 22nd 2009 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE and Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.