Decision n° 2009-580 of June 10th 2009

Act furthering the diffusion and protection of creation on the Internet

A referral was made to the Constitutional Council on May 19th 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 furthering the diffusion and protection of creation 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 Intellectual Property Code;

Having regard to the Post Office and Electronic Communications Code;

Having regard to Act n° 78-17 of January 1978 as amended on Data Processing, Data Files and Individual Liberties and to decision n° 2004-499 DC of July 29th 2004;

Having regard to the observations of the Government registered in May 29th 2009;

Having heard the Rapporteur

- 1. The parties making the referral for review by the Constitutional Council of the Act furthering the diffusion and protection of creation on the Internet contest the manner in which said statute was debated by Parliament and contend that sections 5,10 and 11 of said statute are unconstitutional.
 - WITH RESPECT TO THE MANNER IN WHICH THE STATUTE WAS DEBATED BY PARLIAMENT
- 2. The parties making the referral argue that the Government failed to supply Parliament with objective elements of information needed to ensure clarity and accuracy of debate. They therefore claim that the statute was passed in an improper manner.
- 3. The Houses of Parliament had at their disposal, as is attested by the reports of the Committees called upon to examine or give their opinion on the Bill and by the minutes of debate, sufficient elements of information on the provisions of the Bill under debate. The argument raised is thus not supported by the facts.

- WITH RESPECT TO SECTIONS 5 AND 11

- 4. Firstly section 5 of the statute referred for review inserts into Chapter 1 of Title III of Book III of the first part of the Intellectual Property Code a section comprising Articles L 331-12 to L 331-45 devoted to the "High Authority for the diffusion of works and protection of copyright on the Internet". This new independent administrative authority is composed of a college and a committee for the protection of copyright. The college is responsible in particular for furthering the lawful offer of works and property covered by copyright or related rights. The task of the Committee for the protection of copyright is to trigger the new warning mechanisms and administrative penalties incurred by internet users who have failed to monitor access to the internet.
- 5. Secondly, section 11 inserts into Chapter IV of the same Title Articles L 336-3 and L 336-4. It defines the duty to monitor access to the internet and determines the cases in which internet subscribers whose access has been used in a manner such as to infringe copyright will escape the imposition of penalties.
 - As regards the duty to monitor access to the internet:
- 6. The first paragraph of Article L336-3 of the Intellectual Property Code provides "A person who has subscribed to internet access to online public communication services is under a duty to ensure that said access is not used for reproducing, showing, making available or communicating to the public works or property protected by copyright or a related right without the authorization of the copyright holders provided for in Books I and II when such authorization is required".
- 7. Contrary to what is claimed by the parties making the referral, the definition of this duty is distinct from that of the offence of infringing copyright. It is defined in sufficiently clear and precise terms. When imposing this duty Parliament neither failed to exercise fully the powers vested in it by Article 34 of the Constitution nor failed to comply with the constitutional objective of intelligibility and accessibility of the law.
- As regards the penalties incurred for failure to comply with the duty to monitor access
 - 8. Firstly, paragraphs 2 to 6 of the same Article L 336-3 provide
 - " No penalty shall be imposed on an internet access holder in the following cases:
 - 1. If the access holder has installed one of the security devices referred to in the second paragraph of Article L 331-32;

- 2. If the infringement of the rights referred to in the first paragraph hereof has been committed by a person who has fraudulently accessed public online communication services
- 3. In the event of force majeure.

Failure by the access holder to comply with the duty set out in paragraph one hereof shall not result in the incurring of criminal liability by said access holder".

- 9. Secondly, under Article L 331-27: "When it has been ascertained that the subscriber has failed to comply with the duty defined in Article L 336-3 in the year following receipt of a recommendation addressed by the Committee for the protection of copyright accompanied by a signed acknowledgment of receipt or any other means likely to prove the date of the sending of said recommendation and its receipt by the subscriber, the Committee may, after a full hearing of all parties, impose one of the following penalties depending on the seriousness of the failure to comply and the use of internet access:
- 1° Suspension of access to the Internet for a period of between two months and one year accompanied by the impossibility for the subscriber to enter into any other contract with any other operator for access to online public communication services
- 2° An injunction to take, within a period determined by the Committee, measures designed to prevent any repetition of the breach of duty ascertained, in particular by installing a security device from among those listed in paragraph 2 of Article L 331-32, and to account for the same to the High Authority on pain, if need be, of payment of a financial penalty.
- 10. Under Article L 331-28, the High Authority's Committee for the protection of copyright may, before initiating penalty proceedings, propose an amicable arrangement whereby the offending subscriber has his/her internet access cut off for a period of between one to three months, or is put under a duty to take the necessary steps to prevent the re-occurrence of said breach of duty. Article L 331-29 authorises this Committee to impose the penalties provided for in Article L 331-27 in the event of failure to comply with the terms of said amicable arrangement. Article L 331-30 specifies the contractual consequences of the suspension of access to the internet, Article L 331-31 provides for the conditions in which internet access suppliers are required to proceed to withdraw access; Article L 331-32 determines the manner for drawing up the list of devices of which the installation exonerates the access holder from all penalties; articles L 331-33 and L 331-34 set up a national register containing the names of persons whose access has been withdrawn. Lastly Article L 331-36 allows the Committee for the protection of copyright to retain the technical data supplied to it until such time as access to the internet has been completely withdrawn.
- 11. The parties contend that by giving an administrative authority, albeit independent, the power to impose penalties in the form of withholding access to

the internet, Parliament firstly infringed the fundamental right of freedom of expression and communication, and secondly, introduced patently disproportionate penalties. They also argue that the conditions for imposing such penalties introduce a presumption of guilt which patently infringes the rights of the defence.

- 12. Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims: "The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law". In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.
- 13. Property is one of the rights of man enshrined in Articles 2 and 17 of the Declaration of 1789. The purposes and conditions of exercising the right to property have since 1789 undergone substantial changes characterized by the extension of the scope of this right to new fields. Among the latter exits the right, for copyright holders and holders of related rights to enjoy their intellectual property rights and protect the same within a framework set out by statute and in compliance with the international undertakings entered into by France. The fight against infringement of copyright through internet piracy is a response to the need to safeguard intellectual property.
- 14. Neither the principle of the separation of powers, nor any other principle or rule of constitutional status, precludes an administrative authority, acting within its powers as a public body, from exercising its power to impose penalties needed to enable it to carry out its tasks once the exercising of this power is accompanied by statutory measures designed to ensure the protection of constitutionally guaranteed rights and freedoms. In particular due respect must be shown for the principle of the legality of offences and punishments and the rights of the defence, principles which apply to all penalties intended to serve as a punishment, even though Parliament has left it to a non-judicial authority to impose such penalties.
- 15. Article 34 of the Constitution provides: "statutes shall determine the rules concerning ... civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties". On this basis Parliament is at liberty to lay down rules intended to reconcile the pursuit of the objective of fighting infringement of copyright on the internet with the right of free communication and freedom to speak, write and publish. Freedom of expression and communication are all the more precious since they are one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms. Any restrictions placed on the exercising of such freedom must necessarily be adapted and proportionate to the purpose it is sought to achieve.

- 16. The powers to impose penalties created by the challenged provisions vest the Committee for the protection of copyright, which is not a court of law, with the power to restrict or deny access to the internet by access holders and those persons whom the latter allow to access the internet. The powers vested in this administrative authority are not limited to a specific category of persons but extend to the entire population. The powers of this Committee may thus lead to restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home. In these conditions, in view of the freedom guaranteed by Article 11 of the Declaration of 1789, Parliament was not at liberty, irrespective of the guarantees accompanying the imposition of penalties, to vest an administrative authority with such powers for the purpose of protecting holders of copyright and related rights;
- 17. Furthermore, under Article 9 of the Declaration of 1789, every man is presumed innocent until proved guilty. Parliament cannot therefore introduce a principle of presumption of guilt in criminal matters. However, as an exceptional measure, such a presumption may be introduced, particularly in the case of minor offences, once such presumptions are not irrebuttable, the rights of the defence are respected and the available facts tend to confirm the likelihood of the commission of the incriminated act.
- 18. In the case in hand, under the provisions referred for review, the commission of an infringement of copyright at the address of the registered subscriber constitutes, according to the terms of the second paragraph of Article L 331-21 "the material ingredients of the breach of duty defined in Article L 336-3". Solely the party to the internet access contract may be the object of the penalties introduced by the provisions referred for review. In order to avoid the imposition of such penalties it is incumbent upon him, under Article L 331-38, to adduce evidence that the infringement of copyright or related rights was due to fraud perpetrated by a third party. Thus by reversing the burden of proof, Article L 331-38, introduces, contrary to the requirements deriving from Article 9 of the Declaration, a presumption of guilt on the part of the internet access holder such as to entail the imposition of penalties restricting or depriving him of his rights.
- 19. As a consequence of the foregoing, and without it being necessary to examine any other arguments raised, section 11 of the statute referred for review, paragraphs 2 to 5 of Article L 336-3 and in section 5, Articles L 331-27 to L 331-31, L. 331-33 and L 331-34 must be held to be unconstitutional. The same holds good for the second paragraph of Article L 331-21, the words "and ascertain the material ingredients of the breach of the duty defined in Article L 336-3", for the final paragraph of Article L 331-26 and the words "to be considered, in its opinion, as validly exonerating the access holder from liability under article L 336-3" found in the first paragraph of Article L 331-32 and the words "of which the installation shall validly exonerate the access holder from liability under Article L 336-3" found in the second paragraph of the same article.

20. The following must also be held to be unconstitutional, insofar as they are unseverable from section 5: the words "and warning him of penalties incurred in the event of any fresh presumed breach of duty" found in the first paragraph of Article L 331-26; the words "together with all possible appeal procedures under articles L 331-26 to L 331-31 and L 331-33" found in Article L 331-35; the words "and until such time as withdrawal of access to the internet provided for by these provisions has been completed" found in the first paragraph of Article L 331-36 and the second paragraph of the article, the words "together with the national register referred to in Article L 331-33, enabling in particular persons in the business of offering access to online public communication services to have at their disposal, via a simple application, information strictly necessary to carry out the checks provided for by this same article", found in Article L 331-37, together with the second paragraph of Article L 331-38. The same also holds good for the words, in section 16, "breach of the duty defined in Article L 336-3 of the Intellectual Property Code" together with I and V of section 19.

- As regards the right to privacy

- 21. The parties making the referral contend that the statute referred for review produces a patently unbalanced reconciliation between the protection of copyright and the right to privacy. The purpose Parliament seeks to achieve would require the implementation of measures for monitoring citizens and the introduction of a "generalized control of electronic communications" incompatible with the constitutional requirements of the right to privacy. The parties making the referral argue that the powers conferred on private agents, empowered to collect the addresses of subscribers suspected of sharing files of protected works, are not accompanied by sufficient guarantees.
- 22. Firstly, Article 2 of the Declaration of 1789 proclaims: "The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are liberty, property, safety and resistance to oppression". The liberty proclaimed by this Article implies the right to privacy.
- 23. Secondly, it is the task of Parliament, under Article 34 of the Constitution, to lay down the rules concerning the fundamental guarantees granted to citizens for the exercising of their civil liberties. It is therefore incumbent upon it to strike a balance between the right to privacy and other constitutional requirements such as the protection of the right to property.
- 24. Under Article L 331-24 of the Intellectual Property Code, the Committee for the protection of copyright acts upon referral by sworn agents approved in the conditions laid down in Article L 331-2 of the same Code. These agents are appointed by duly constituted professional defence organizations, by companies in charge of collecting and apportioning copyright fees, and by the National Cinematographic Centre.

- 25. Under section 9 of the Act of January 6th 1978 referred to above "The processing of personal data pertaining to offences, convictions and security measures may only be carried out by4° The legal entities mentioned in Article L 321-1 and L 331-1 of the Intellectual Property Code, acting in the framework of the rights they are responsible for managing or on behalf of persons whose rights have been infringed as provided for in Books 1, II and III of the same Code and for the purpose of ensuring the defence of said rights". These legal entities are the companies in charge of collecting and apportioning copyright fees and duly constituted professional defence organizations.
- 26. The combined provisions of Article L 34-1 of the Post Office and Electronic Communications Code, as amended by section 14 of the statute referred for review, of the 3rd and 5th paragraphs of Article L 331-21 of the Intellectual Property Code and of Article L 331-24 thereof result in modifying the purposes for which such persons may process data connected with offences. They in fact make it henceforth possible for data thus collected to have a nominative nature also in the framework of proceedings before the Committee for the protection of copyright.
- 27. The fight against infringement of copyright by internet piracy is designed to achieve the objective of safeguarding intellectual property and cultural creation. However the authorization granted to private persons to collect data making it indirectly possible to identify persons having a right of access to online public communication services leads to these same private persons processing data of a personal nature in connection with offences. Such an authorization cannot, without constituting a disproportionate infringement of the right to privacy, have other purposes than to enable copyright holders to institute legal proceedings on the same footing as any natural person or legal entity who has been the victim of an offence.
- 28. Subsequent to the censure resulting from the foregoing paragraphs 19 and 20, the Committee for the protection of copyright cannot impose the penalties provided for by the statute referred for review. Its sole role consists in taking measures preliminary to the institution of legal proceedings. Its intervention is justified by the extent of copyright infringements committed via the internet and the utility, in the interests of good administration of justice, of limiting the number of offences brought before the courts of law. Hence the processing of data of a personal nature by the companies and bodies referred to hereinabove, together with the transmission of such data to the Committee for the protection of copyright in order to allow it to carry out its mission, are preliminaries to referring cases to the courts with jurisdiction over such matters.
- 29. Such processing of data shall be subjected to the requirements provided for by the Act of January 6th 1978 referred to hereinabove. Such data shall be transmitted solely to this administrative authority or to the judicial authorities. It will be incumbent upon the National Committee on Data Processing and Civil Liberties, when requested to authorise such processing of data, to ensure that the

manner in which such processing is carried out, in particular the conditions governing the conservation of such data, is strictly proportional to the purpose it is sought to achieve.

- 30. Furthermore, contrary to what is claimed by the parties making the referral, the sworn agents referred to in Article L 331-24 of the Intellectual Property Code are not vested with the power to monitor or intercept private exchanges or correspondence.
- 31. In consequence of the foregoing, and with the qualification set out in paragraph 29, the processing of personal data does not fail to comply with the constitutional requirements referred to hereinabove.
 - As regards the recourse to Decrees submitted to the Council of State
- 32. The parties making the referral contend that by leaving it to a Decree to specify the conditions in which the High Authority can award a label making it possible "to clearly identify the lawful nature" of offers of online communication services, Article L331-23 of the Intellectual Property Code gives the High Authority the power to determine discretionarily those offers which, in its opinion, are of a lawful nature. The parties making the referral add that Article L 331-32 could not leave it to a Decree to fix the procedure for assessing and labelling the means of monitoring access to internet. They argue that by acting thus Parliament failed to exercise the powers vested in it by Article 34 of the Constitution regarding fundamental guarantees granted to citizens for the exercising of their civil liberties.
- 33. Although Article 34 of the Constitution provides that "statutes shall determine the rules concerning ... the fundamental guarantees granted to citizens for the exercise of their civil liberties" the implementation of the guarantees determined by Parliament is the preserve of the Government. The provisions of Article 21 of the Constitution, which make the Prime Minister responsible for ensuring the implementation of legislation and, subject to the provisions of Article 13, for exercising the power to make regulations, do not preclude Parliament from entrusting a public authority other than the Prime Minister with the task of fixing norms for the implementation of principles laid down by statutes, provided that such empowerment concerns solely measures limited in both scope and content. Such empowerment does not exempt the authority making regulations from compliance with constitutional requirements.
- 34. The awarding of labels attesting to the "lawful nature" of offers of online public communication services is designed solely to facilitate the identification by the public of offers of services respecting intellectual property rights. Under paragraph 2 of article L 331-23, the High Authority, when application is made to it for the award of such a label, shall be required to respond favourably once it has ascertained that the services proposed by such an offer do not infringe copyright or related rights. Leaving it to a Decree to fix the conditions for the

awarding of such a label is solely designed to determine the manner in which applications for the award of such a label are to be received and examined by the High Authority. These provisions do not confer any arbitrary authority on the latter.

35. As worded subsequent to the censure resulting from paragraphs 19 and 20 hereinabove, Article L 331-32 is designed solely to facilitate the use of security devices intended to ensure the monitoring of access to the internet in accordance with the requirements of Article L 336-3. It is incumbent upon those in charge of making regulations to define the conditions in which this label will be awarded. Hence the provisions of sections 5 and 1 of the statute referred for review, other than those found to be unconstitutional, are not flawed by any failure by Parliament to exercise its powers to the full.

- WITH RESPECT TO SECTION 10:

- 36. Section 10 rewords Article L 336-2 of the Intellectual Property Code. Under this article "In the presence of an infringement of copyright or a related right due to the contents of an online public communication service, the Tribunal de grande instance, ruling if need be in summary proceedings, may order at the request of holders of copyright in protected works or property or of the beneficiaries of said holders, or of companies for the collection and apportionment of copyright fees referred to in Article L 321-1 or professional defence organizations referred to in Article 331-1, the taking of all measures necessary to prevent or put an end to such infringement of copyright or a related right by any person likely to contribute to resolving the problem"
- 37. The parties making the referral argue that the possibility "of blocking, by measures and injunctions, the functioning of telecommunications infrastructures ... might deprive many internet users of the right to receive information and ideas". They also contend that the excessively wide and uncertain nature of this provisions may lead persons potentially concerned by section 10 to preventively restrict access to the internet.
- 38. When enabling copyright holders or holders of related rights, together with persons authorised to represent the same for the defence of their rights, to petition the Tribunal de grande instance to order, after a full hearing of all parties, the taking of measures necessary to prevent or put an end to such infringement of their rights, Parliament has not failed to respect freedom of expression and communication. It will be incumbent upon the court called upon to hear such petitions to order solely those measures strictly necessary to preserve the rights involved. Subject to this qualification, section 10 is not unconstitutional.
- 39. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

<u>Article 1</u> - The following provisions of the Intellectual Property Code as worded pursuant to sections 5 and 11 of the Act furthering the diffusion and protection of creation on the Internet are unconstitutional:

- in the second paragraph of Article L 331-21, the words "and ascertain the material ingredients of the breach of the duty defined in Article L 336-3",
- in the first paragraph of Article L 331-26 the words "and warning him of penalties incurred in the event of any fresh presumed breach of duty"
- the final paragraph of Article L 331-26
- Article L 331-27 to 331-31
- in the first paragraph of Article L 331-32 the words "to be considered, in its opinion, as validly exonerating the access holder from liability under article L 336-3"
- in the second paragraph of the same article the words "of which the installation shall validly exonerate the access holder from liability under Article L 336-3"
- Articles L 331-33 and L 331-34
- In Article L 331-35 the words "together with all possible appeal procedures under articles L 331-26 to L 331-31 and L 331-33"
- in Article L 331-36, the words "and until such time as withdrawal of access to the internet provided for by these provisions has been completed" found in the first and the second paragraph of the article
- in the second paragraph of Article L 331-37 the words "together with the national register referred to in Article L 331-33, enabling in particular persons in the business of offering access to online public communication services to have at their disposal, via a simple application, information strictly necessary to carry out the checks provided for by this same article"
- the second paragraph of Article L 331-38
- paragraphs 2 to 5 of Article L 336-3

The same also holds good for the words, "breach of the duty defined in Article L 336-3 of the Intellectual Property Code and" in section 16 of the same statute, together with I and V of section 19.

Article 2 - In the first paragraph of Article L 331-17 of the same Code, as worded by section 5 of the same statute, the words "in Articles L 331-26 to L 331-31 and in Article L 331-33" are replaced by the words " in Article L 331-26"

Article 3 – With the qualifications set forth in paragraphs 29 and 38 hereinabove, section 10 of the same statute and the remaining parts of sections 5,11,16 and 19 thereof are not unconstitutional.

Article 4 – This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on June 10th 2009 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.