

TELECOMMUNICATIONS, MEDIA & ENTERTAINMENT UPDATE

French Constitutional Court Invalidates Part of “Three Strikes” Law

On June 10, 2009 the French Constitutional Court held that:

- **the proposed government agency (HADOPI) that will be in charge of protecting copyrighted content online cannot cut off Internet access. Only a French court can do so.**
- **the law cannot reverse the burden of proving illegal infringement: the HADOPI agency must affirmatively prove infringement instead of relying on rebuttable presumptions.**
- **the French data protection agency (CNIL) will have to approve in advance the procedures used by collective rights organizations when they collect IP addresses of alleged infringers and transmit them to the HADOPI agency and to the courts for enforcement action.**
- **the rest of the provisions of the law are okay.**

Balancing of interests:

The decision confirms that copyright holders have a constitutional right to have content protected against piracy. It is part of the constitutional right to own property. That right has to be balanced against other rights such as the right to access information, and the right to privacy. None of those rights is "absolute;" trade-offs can and should be made between those rights. The decision reinforces the balancing test already set forth by the European Court of Justice in the Promusicae case, and is good news for right holders. Some Internet and privacy advocates have argued that privacy rights and the right to access information on the Internet are somehow absolute rights that cannot be balanced against copyright. That is not true.

The decision also confirms that it is possible to cut off Internet access if absolutely necessary to prevent piracy, but the measure must be proportional, i.e. other less intrusive measures would not be sufficient. Also, cutting off Internet access is sufficiently serious that it should be decided by a court in the French judicial system, not an internal administrative court within the HADOPI agency.

The result is that other European countries watching the French HADOPI experience will probably prefer to opt for fines against Internet infringers instead of cutting off Internet access. If a country wishes to sanction infringers by cutting off Internet access, it will be possible to do so, but the ruling will have to come from a court. There is no inherent problem with using the court system, except that special courts and procedures will have to be set up to deal with the volume of cases. In Germany, for example, right holders use the court system to pursue copyright infringers, bringing more than 20,000 cases a year. The system seems to work because online copyright infringement in Germany is less widespread than in France.

All in all, the French decision is not bad for right holders. For one thing, the court validated the new obligation on French Internet subscribers to ensure that their Internet access is not used for illegal file sharing. However, the media buzz surrounding the decision will reinforce politicians and Internet advocates who take the position that citizens have an unfettered right to access content of their choice on the Internet, even if protected by copyright. That position is not supported by the language of the Constitutional Court decision, but the decision is being spun to say that.

What's next?

The government said that it will quickly promulgate the law after deleting the invalid provisions. The government will then propose to parliament in urgent proceedings a supplemental law to provide that French courts (and not the HADOPI agency) will order suspensions of the Internet subscription. The government says that the new agency will be up-and-running, and notices sent to Internet users, before the end of the year as planned. Some members of parliament suggest that the law should be revised to authorize the HADOPI agency to impose fines against Internet infringers instead of cutting off Internet access. This would be consistent with the Constitutional Court's decision and would avoid congestion of the courts.

For a full review of the HADOPI law before its modifications by the Constitutional Court please see our previous [Update](#).

About the TME Update

Hogan & Hartson publishes the Telecommunications, Media and Entertainment Update to track regulatory and legal changes. To have this publication sent to additional colleagues, or for further information on France's digital plan, please contact the authors.

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