

# ACCESS TO NETWORK SERVICES AND PROTECTION OF CONSTITUTIONAL RIGHTS: RECOGNIZING THE ESSENTIAL ROLE OF INTERNET ACCESS FOR THE FREEDOM OF EXPRESSION

*Nicola Lucchi\**

## ABSTRACT

In January 2010, after a troubled process, the French law for “creation and Internet,” commonly known as “HADOPI 2,” was finally adopted in an amended form. The enacted text was the result of corrective action undertaken by the *Conseil constitutionnel* [Constitutional Council] (France’s highest constitutional authority), through Decision No. 2009-580DC of the 10th of June 2009. In coming to its conclusion the *Conseil constitutionnel* examined the mechanism of sanctions introduced by the regulatory measure, assessing compliance with such fundamental rights and freedoms as the presumption of innocence, the separation of powers, the right of defense, the right to fair trial, respect for the right to be heard and the necessary compromise between copyright and freedom of expression and communication.

## TABLE OF CONTENTS

I. INTRODUCTION .....	646
II. REGULATION AND CONTROL OF COMMUNICATION .....	649

---

\* Assistant Professor and Research Associate, Department of Juridical Sciences, University of Ferrara, Italy. E-mail: lcn@unife.it. This article was prepared during a four-month tenure as stipendiat at the Max Planck Institute for Intellectual Property, Competition & Tax Law in Munich, Germany (from Jan. to May 2010). I would like to thank the Max Planck Society for providing financial and intellectual support for this research. In particular I wish to thank professor Josef Drexl and professor Eva Marina Bastian. I am indebted to Mario Savino for inspiring this work and to Roberto Bin, Filippo Benelli, Cesare Mainardis, Marina Mantovani, Sylvie Nérison, Paolo Veronesi and Anthony Norris for their extremely helpful comments on an earlier draft of this paper. I also wish to thank Mike Izrailev of the CJICL for the substantial editing and revision of my writing. All the remaining mistakes are mine.

A.	The Controversial HADOPI Anti-Piracy Legislation and the Graduate Response .....	650
III.	THE SCRUTINY OF THE CONSEIL CONSTITUTIONNEL AND THE EUROPEAN DEBATE.....	652
A.	Fair Trial, Administrative Sanctions and Freedom of Communication .....	657
B.	The Presumption of Innocence and the Defendant's Fundamental Rights.....	664
C.	Freedom of Communication and Access to Public Online Services.....	668
D.	Defining the Balance Between Freedom of Expression and Property Rights.....	671
IV.	AFTER THE CONSTITUTIONAL SCRUTINY: HADOPI 2 .....	672
V.	CONCLUSION .....	675

## I. INTRODUCTION

In today's society, digital technologies are increasingly used in the communication and dissemination of information. Of the wide range of available tools, the Internet is undoubtedly the most widely recognized and utilized digital technological tool used to propagate information. The use of technological tools raises the question of what rules professionals must follow in the communication and dissemination of information. The aim of these rules is to set the boundaries of legality within which the dissemination of ideas and opinions may be established and conducted.<sup>1</sup>

In almost all democratic systems, use of both new and old forms of information media have not only posed problems of a boundary definition, but have often resulted in attempts to contain and control information flow.<sup>2</sup> The key point is that computer-mediated communication is beyond the control of the nation-state, "ushering in a new era of extra-territorial communication."<sup>3</sup> The problem of information control has thus become amplified by the phenomenon of new media.<sup>4</sup> In order to contain information and

---

<sup>1</sup> See generally CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* (1999) (describing the rules of the new information economy).

<sup>2</sup> See MANUEL CASTELLS, *THE POWER OF IDENTITY* 320 (2d ed., 2010) (observing that control of information has always been the foundation of state power); see also Carl J. Couch, *Mass Communications and State Structures*, 27 *SOC. SCI. J.* 111 (1990).

<sup>3</sup> See CASTELLS, *supra* note 2, at 319.

<sup>4</sup> See DOMINIQUE FORAY, *THE ECONOMICS OF KNOWLEDGE* 5 (2004) (recognizing

maintain control over access, some countries have made legislative attempts to regulate and monitor digital content.<sup>5</sup> As it has been observed by some scholars, virtually every industrialized country and many developing countries have passed laws that “expand[] the capacities of state intelligence and law enforcement agencies to monitor internet communications.”<sup>6</sup> The experience of democratic countries with provisions designed to monitor and control the flow of information on the Internet, reveals that the restriction of the freedom of the media may not withstand constitutional scrutiny.<sup>7</sup> In fact, analogous regulations were often criticized for their inability to reconcile technological progress, protection of economic interests, as well as other conflicting interests.<sup>8</sup> Any discussion on this matter inevitably leads to two

---

that the economic problem of information is essentially its protection and disclosure—a problem of public goods). Here the term “new media” refers to the broad concept of digital communications media. For a discussion about this definition, see LEV MANOVICH, *THE LANGUAGE OF NEW MEDIA* 19 (2001).

<sup>5</sup> For example, specific state legislation has been adopted in the United States, the United Kingdom, Canada and Australia. The number of regulations designed to monitor and control the flow of information on the internet certainly increased since September 11, 2001. See Ronald J. Deibert, *Black Code Redux: Censorship, Surveillance, and the Militarization of Cyberspace*, in *DIGITAL MEDIA AND DEMOCRACY: TACTICS IN HARD TIMES* 137, 144-51 (Megan Boler ed., 2008) (as argued by the author, such “pressures to regulate the internet reflect the natural maturation process that previous media, such as print, radio, and television, all experienced as they evolved out of unrestrained and experimental to tightly controlled and regulated environments.”). For a detailed discussion of the opportunities and challenges of the networked information environment, see YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS & FREEDOM* 32, 266 (2006); see also JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?* 65 (2006) (describing the success of governments in securing digital *content distribution*).

<sup>6</sup> See Deibert, *supra* note 5, at 138 (arguing that “when combined with the mounting pressures to regulate intellectual property on the internet coming from the commercial sector, the forces impinging on and shaping the very foundations of global civic networks are formidable and grow daily.”).

<sup>7</sup> See *e.g.*, the controversy over the constitutionality of the U.S. Communication Decency Act of 1996 in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (invalidating certain provisions of a proposed law designed to regulate indecent and obscene speech on the Internet); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (holding that the enforcement of the Child Online Protection Act should be enjoined because the law likely violated the First Amendment); and the French case: “Loi Fillon,” Conseil constitutionnel [CC] [Constitutional Council] decision no. 96-378DC, Jul. 23, 1996, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, Jul. 27, 1996, p. 11400 (Fr.) (censoring most of the dispositions of the Fillon amendment concerning regulation of the Internet and the linked power given to the Conseil Supérieur de l’Audiovisuel [Audiovisual Regulatory Authority]).

<sup>8</sup> See Deibert, *supra* note 5, at 152. (asserting that “these measures fundamentally alter the environment within which Internet communications take place.”); see also CASS R. SUNSTEIN, *REPUBLIC.COM* 134 (2001) (stating that the real question here is what kind

classic questions: (1) what restrictions and safeguards should be imposed on the fundamental freedom of expression in a democratic society; and (2) under which conditions and guarantees are these restrictions and safeguards feasible?

A significant example of the balancing of the two aforementioned questions is provided by a recent decision of the French Constitutional Council.<sup>9</sup> By reviewing the constitutionality of laws under Article 61, paragraph 2 of the French Constitution,<sup>10</sup> the Court declared partially unconstitutional a law aimed at preventing the illegal copying and redistribution over the Internet of digital content protected by copyright.<sup>11</sup> This article analyses the most controversial points of the decision and the impact it may have on the future of the global information society.<sup>12</sup>

Part II begins with a brief introduction that describes the

of regulation, not whether to have regulation).

<sup>9</sup> The Conseil constitutionnel [Constitutional Council] is the French body in charge of reviewing the conformity of statutes with the Constitution. See INTRODUCTION TO FRENCH LAW 30 (George A. Berman & Etienne Picard eds., 2008); FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL [CONSTITUTIONAL LAW] 834 (31st ed. 2009).

<sup>10</sup> See 1958 CONST. art. 61, § 2 (Fr.). According to this provision, “Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.” See, e.g., INTRODUCTION TO FRENCH LAW, *supra* note 9, at 30-31; HAMON & TROPER, *supra* note 9, at 834.

<sup>11</sup> See Conseil constitutionnel [CC] [Constitutional Court], decision No. 2009-580DC, June 22, 2009, relative à la loi favorisant la diffusion et la protection de la création sur internet, June 13, 2009, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] p. 9675, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (in French) and [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglaconstitutionnel/root/bank\\_mm/anglais/2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglaconstitutionnel/root/bank_mm/anglais/2009_580dc.pdf) (in English) [hereinafter Decision 2009-580]. The law reviewed by the French Constitutional Council is the so called “HADOPI 1”: Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 135 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666 [hereinafter HADOPI 1].

<sup>12</sup> The term “information society” was “coined at the turn of the century to describe a society in which information and communication technologies have become an integral part of daily life.” U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., SCIENCE IN THE INFO. SOC’Y 10 (2003), <http://portal.unesco.org/ci/en/files/12852/10704633955science.pdf/science.pdf>. According to the European Commission, the term “information society” relates to:

[T]he society currently being put into place, where low-cost information and data storage and transmission technologies are in general use. This generalization of information and data use is being accompanied by organizational, commercial, social and legal innovations that will profoundly change life both in the world of work and in society generally.

See *Commission Final Policy Report of the High Level Group of Experts*, at 16, COM (April 1997), [http://www.epractice.eu/files/media/media\\_688.pdf](http://www.epractice.eu/files/media/media_688.pdf).

heated debate and vigorous controversy surrounding the adoption of the French online copyright infringement law (HADOPI 1),<sup>13</sup> focusing on the relationship between the role of judiciary and administrative authorities. Part II then proceeds to discuss the controversial graduate response mechanism adopted by the HADOPI anti-piracy legislation. Part III considers the legal issues surrounding the restriction of fundamental freedoms in cyberspace. In particular, it highlights the court's reasoning about the fundamental role of access to information and the consequent necessity of a judicial decision before any form of Internet access can be deprived. Part IV provides an overview of the final enacted version of the HADOPI law after censorship by the Constitutional Council.

## II. REGULATION AND CONTROL OF COMMUNICATION

The multimedia revolution is affecting not only habits of thought and expression, but also economics, science, and law; thereby involving in a global debate issues concerning fundamental freedoms and access to knowledge.<sup>14</sup> The rules governing the world of information and communication have never been—as they are in the current period—the subject of such profound changes. This has inevitably caused tension in the delicate balance that underpins fundamental rights and basic democratic principles.

In almost all democratic societies, new media, besides incurring definitional problems, has led to attempts to restrict and control online information.<sup>15</sup> This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other interests.

In recent years, there have been several attempts by states to regulate the content on the Internet. One of the most famous, and certainly one of the most debated, was the United States Communication Decency Act of 1996 (the Act).<sup>16</sup> It was the first important effort by the United States Congress to control

---

<sup>13</sup> See HADOPI 1, *supra* note 11.

<sup>14</sup> See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804 (2008).

<sup>15</sup> See SUNSTEIN, *supra* note 8, at 138.

<sup>16</sup> The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered parts of section forty-seven of the United States Code). For a complete overview of the case, see MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 323 (rev. ed. 2003).

pornographic content on the Internet. In the landmark 1997 case of *Reno v. ACLU*,<sup>17</sup> the U.S. Supreme Court held that the Act violated the freedom of speech provisions of the First Amendment.<sup>18</sup> The case generated a lot of international press coverage, as well as heated legal debate over freedom of expression on the Internet and in developing technologies. Currently, the French online copyright infringement law (HADOPI 1)<sup>19</sup> poses similar challenges and risks that can be dealt with in similar ways.

#### *A. The Controversial HADOPI Anti-Piracy Legislation and the Graduate Response*

With the HADOPI anti-piracy legislation,<sup>20</sup> France became the first country to experiment with a warning system to protect copyrighted works on the Internet. Pursuant to this law, Internet usage is monitored to detect illegal content sharing and suspected infringers are tracked back to their Internet service providers (ISPs). One of the key provisions of the law is the creation of an independent administrative authority, the “Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet” (HADOPI Authority) [High Authority for the Diffusion of Works and the Protection of Copyright on the Internet].<sup>21</sup> This

---

<sup>17</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). The Communications Decency Act of 1996 was designed to regulate indecent and obscene speech on the Internet and to prevent the transmission of similar information to any person under the age of eighteen. The Supreme Court held that the Communications Decency Act placed “an unacceptably heavy burden on protected speech.” *Id.* at 882. Furthermore the Court remarked that the statute, in protecting children from harmful content, “suppresses a large amount of speech that adults have a constitutional right to receive and to address to one other.” *Id.* at 874.

<sup>18</sup> The essence of the Court’s holding was that the restriction of indecent adult speech on the Internet to safeguard minors was a violation of the First Amendment freedom of speech right of adults to receive and view such content. *Id.* at 885. Justice Stevens summed up the decision by stating:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that the governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

*Id.* at 885.

<sup>19</sup> See HADOPI 1, *supra* note 11.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* art 5. This new Authority replaces the “Autorité de régulation des mesures techniques” (ARMT) introduced by the so called “Dadvisi Law,” Loi 2006-961 du 1 août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information, 178

independent administrative body is tasked with monitoring the web and discovering perpetrators of illegal downloads.<sup>22</sup> The legislation provides for gradual intervention (the so called three strikes procedure); three email warnings are sent before a formal judicial complaint is filed.<sup>23</sup> The email warnings are sent directly by the Internet Service Providers at the request of the HADOPI Authority. An example of a first warning message reads as follows: “Warning, your internet connection has been used to commit legally-noted acts that may constitute a breach of the law.”<sup>24</sup> A similar communication is essentially devoted to draw attention to the fact that the user’s account has been used to download content illegally. If illegal activity is observed in the six-month period following the first notification, the HADOPI Authority can send a second warning communication (by registered mail).<sup>25</sup> Should alleged copyright infringement continue thereafter, the suspected infringer is reported to a judge who has the power to impose a range of penalties, such as Internet disconnection.<sup>26</sup> According to the pre-amended version of the law (HADOPI 1), this sanctioning power was directly granted to the HADOPI Administrative Authority.<sup>27</sup> After the adoption of the constitutional amendment, the HADOPI Administrative Authority no longer has the power to order sanctions.<sup>28</sup> Judicial control is now exercised through a simplified procedure (the so

---

JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], August 3, 2006, p. 11529. For more on the Dadvsi Law, see Jane Winn & Nicolas Jondet, *A New Deal for End Users? Lessons From a French Innovation*, in *The Regulation of Interoperability*, 51 WM. & MARY L. REV. 547 (2009).

<sup>22</sup> See Code de la Propriété Intellectuelle [C. PROP. INTELL.] [French Intellectual Property Code] art. L. 331-13, al. 1, 2° [hereinafter C. Prop. Intellectuelle], available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414> (follow hyperlink).

<sup>23</sup> See *id.* art. L. 331-25, al. 1.

<sup>24</sup> See HADOPI (2010), <http://hadopi.fr/actualites/agenda/la-commission-de-protection-des-droits-diffuse-publiquement-un-modele-de-la-recommandation.html> (where the model warning letter can be downloaded).

<sup>25</sup> *Id.* art. L. 331-25, al. 2.

<sup>26</sup> *Id.* art. L. 335-7.

<sup>27</sup> See HADOPI 1, *supra* note 11. Under Article 5, the administrative authority had direct power to decide and to enforce penalties against internet users. *Id.*

<sup>28</sup> See Loi 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet arts. 6 and 7, 251 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 29, 2009, p. 18290 [hereinafter HADOPI 2]. On the point, see Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the “Graduated Response” a Good Reply?*, 1 WORLD INTELL. PROP. ORG. J. 75, 80 (2009) (highlighting that, “[t]he new bill creates an expedited procedure before a judge empowered to impose criminal penalties or suspend an infringer’s account for up to one year” can exercise his authority).

called “ordonnance pénale” [criminal order]), as provided by Article 495 of the French Code of Criminal Procedure.<sup>29</sup>

Despite many criticisms, doubts of unconstitutionality, and an unprecedented mass mobilization against the law, the French government has chosen to go forward. Starting in October 2010, the HADOPI Authority commenced its work, sending the first warning emails to suspected file-sharers.<sup>30</sup>

### III. THE SCRUTINY OF THE CONSEIL CONSTITUTIONNEL AND THE EUROPEAN DEBATE

On the first of January 2010, after a two-year-long and troubled process, the new French law “Création et Internet”<sup>31</sup> took effect. It is commonly known by its acronym “HADOPI 2,” which stands for “Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet.” This is also the name of the authority expressly set up by this law and appointed to monitor Internet users behavior in violation of copyright.

As compared to the original text, (HADOPI 1), the new statute is the result of corrective action taken by the *Conseil constitutionnel* (in decision no. 2009-580DC).<sup>32</sup> This decision has in fact weakened some key principles of the original legislation, among which is the application of mass measures against the illegal transmission of digital content protected by copyright.<sup>33</sup> For this

---

<sup>29</sup> CODE DE PROCEDURE PENALE [C. PR. PEN.] [Code of Criminal Procedure] art. 495-1 (Fr.), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3995> (in English). The article reads as follows:

The public prosecutor who chooses the simplified procedure sends the case file and any submissions to the presiding judge of the court. The presiding judge rules by means of a criminal order (*ordonnance pénale*) made without a hearing. This may result in a discharge or the imposition of a fine as well as, where appropriate, of one or more of the applicable additional penalties. Such penalties may be pronounced instead of a principal penalty. If he considers that a hearing is necessary or that a prison sentence should be imposed, the judge sends the case file back to the public prosecutor.

*Id.* See EMMANUEL DERIEUX & AGNÈS GRANCHET, LUTTE CONTRE LE TÉLÉCHARGEMENT ILLÉGALE 185-86 (2010).

<sup>30</sup> See *L'Hadopi a envoyé ses premiers courriels d'avertissement* [Hadopi sent its first warning e-mails], LE MONDE, Apr. 10, 2010, [http://www.lemonde.fr/technologies/article/2010/10/04/l-hadopi-a-envoye-ses-premiers-courriels-d-avertissement\\_1420203\\_651865.html](http://www.lemonde.fr/technologies/article/2010/10/04/l-hadopi-a-envoye-ses-premiers-courriels-d-avertissement_1420203_651865.html).

<sup>31</sup> See HADOPI 2, *supra* note 28.

<sup>32</sup> See Decision 2009-580, *supra* note 11.

<sup>33</sup> Among earlier commentators, see Florence Chaltiel, *La loi Hadopi devant le Conseil constitutionnel*, 125 LES PETITES AFFICHES 7 (2009) (Fr.); Lionel Costes, *La loi “Création et Internet” partiellement censurée par le Conseil constitutionnel*, 50 REV. LAMY DR. L'IMMATÉRIEL 3 (2009) (Fr.); Jean-Philippe Feldman, *Le Conseil constitutionnel, la loi*

reason, some commentators have argued that the statute is deprived of its original intent to the point of making its practical enforcement very difficult.<sup>34</sup>

The revised text, which entered into force, is the result of scrutiny by the *Conseil constitutionnel*, which in its June 10, 2009 decision criticized all sanctioning powers granted to the HADOPI Authority.<sup>35</sup> As recognized by the French legislative process, and according to Article 61(2) of the French constitution,<sup>36</sup> the *Conseil constitutionnel* can exercise a priori and abstract control over the constitutionality of laws before their entry into force.<sup>37</sup> On the basis of this principle, members of the National Assembly referred

---

*“Hadopi” et la présomption d’innocence*, 28 SEM. JUR. ÉD. GÉN. 25 (2009) (Fr.); Allan Gautron, *La “réponse graduée” (à nouveau) épinglée par le Conseil constitutionnel. Ou la délicate adéquation des moyens aux fins*, 51 REV. LAMY DR. L’IMMATÉRIEL 63 (2009) (Fr.); Franck Macrez & Julien Gossa, *Surveillance et Sécurisation: Ce que l’Hadopi Rate. à Propos de la “Petite loi” “Création et Internet”*, 50 REV. LAMY DR. L’IMMATÉRIEL 79 (2009) (Fr.); Dominique Rousseau, *Hado-pirate la Constitution: le Conseil sanctionne!*, 51 REVUE LAMY DROIT DE L’IMMATÉRIEL 103 (2009) (Fr.); Michel Verpeaux, *La liberté de communication avant tout. La censure de la loi Hadopi 1 par le Conseil constitutionnel*, 39 SEM. JUR. ÉD. GÉN. 45 (2009) (Fr.); Iliana Boubekour, *De la “Loi Hadopi” à la “Loi Hadopi 2.” Analyse de la décision du Conseil Constitutionnel 2009-580 DC et de ses Conséquences*, 51 REV. LAMY DR. L’IMMATÉRIEL 107 (2009) (Fr.). For a detailed discussion of the problematic “iter” of the law and its relevant aspects, see also DERIEUX & GRANCHET, *supra* note 29. For some critical comments in English, see Sandrine Rambaud, *Illegal Internet File Downloads Under Hadopi 1 and 2*, 15 CYBERSPACE L. 10 (2010); Lyombe Eko, *American Exceptionalism, The French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on The Internet*, 10 J. MARSHALL REV. INTELL. PROP. L. 95, 146-47 (2010); Grégory Sroussi, *The Hadopi Law and France’s Controversial Fight Against Piracy*, TECHNOLOGY, MEDIA & TELECOMMUNICATIONS NEWS (Linklaters, London, U.K.) Oct. 2009, at 12; Patrick Van Eecke & Maarten Truyens, *Recent Events in EU Internet Law*, 13 J. INTERNET L. 21, 21-22 (2009); Laurent Szuskin, Sophie Fourques de Ruyter, Jennifer Doucleff, *Beyond Counterfeiting: The Expanding Battle Against Online Piracy*, 21 No. 11 INTELL. PROP. & TECH. L.J. 1, 3-6 (2009); Alain Strowel, *supra* note 28, at 79-84. For a detailed analysis of this case from and Italian perspective, see Bruno Carotti, *L’Accesso alla Rete e la Tutela dei Diritti Fondamentali* [Internet Access and the Protection of Fundamental Rights], 16 GIORNALE DI DIRITTO AMMINISTRATIVO 643 (2010); Paolo Passaglia, *L’accesso ad internet è un diritto (il Conseil constitutionnel francese dichiara l’incostituzionalità di parte della c.d. “legge anti file-sharing”)* [Internet Access is a Fundamental Right (The French Constitutional Council Declares the Unconstitutionality of the so called “Anti-file sharing law”)], 4 IL FORO ITALIANO, IV, c. 473 (2009).

<sup>34</sup> In this sense, see Costes, *supra* note 33, at 3.

<sup>35</sup> The law reviewed by the Constitutional Court is HADOPI 1, *supra* note 11.

<sup>36</sup> See 1958 CONST. art. 61, § 2 (Fr.).

<sup>37</sup> See INTRODUCTION TO FRENCH LAW, *supra* note 9, at 30-31 (highlighting that the judicial review of legislation is the most important power of the Constitutional Council and that the Council is different in some important respects from other constitutional Courts. The most striking difference is that the Constitutional Council only exercises an *a priori* and abstract control, and that access to the Council is limited to a very small number of authorities); see also HAMON & TROPER, *supra* note 9, at 834-35.

the HADOPI law (HADOPI 1) to the *Conseil constitutionnel* for review on the grounds of a potential violation of constitutional rights.<sup>38</sup> When called to evaluate the constitutionality of the normative act, the *Conseil constitutionnel* denied the argument that the protection of intellectual property rights might justify an inappropriate reduction in the full enjoyment of freedom of expression—which finds one of its fullest realizations in the Internet.<sup>39</sup> Moreover, HADOPI 1 noticeably lacked compliance with the set of procedural safeguards that usually come into play when sanctions are imposed: e.g., the right to a fair trial, the right to a defense and the presumption of innocence.<sup>40</sup>

Besides criticizing the sanctioning mechanism contained in the statute, the decision of the *Conseil constitutionnel* highlights a sort of “fundamental right” of access to computer networks.<sup>41</sup> At the same time, it lays the basis for a debate about the need of a balancing analysis by a jurisdictional authority before any sanctions are applied, a debate whose consequences may be felt beyond the borders of France.<sup>42</sup>

The framework set up by the law anticipates further developments in the relationship between the use of networks and fundamental rights, as well as unavoidable adverse effects within other European countries and European Community legislation.<sup>43</sup> The same concerns have arisen with regard to the secret negotiation of the proposed Anti-Counterfeiting Trade Agreement (ACTA),<sup>44</sup> which is also focused on the

---

<sup>38</sup> See Note sous décision n° 2009-580 DC du 10 juin 2009, 27 CAH. CONS. CONST. 101 (2009), [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/pdf/pdf\\_cahiers/cccc27.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/pdf_cahiers/cccc27.pdf) [hereinafter Note sous decision n° 2009-580].

<sup>39</sup> See Decision 2009-580, *supra* note 11.

<sup>40</sup> On the constitutional consecration of these rights, see LOUIS FAVOREU ET AL., *DROIT CONSTITUTIONNEL* 808, 817 (4th ed. 2001).

<sup>41</sup> See Laure Marino, *Le Droit d'Accès à Internet, Nouveau Droit Fondamental*, 30 *RECUEIL DALLOZ* 2045 (2009).

<sup>42</sup> See Peter K. Yu, *The Graduated Response*, 62 *FLA. L. REV.* 1373, 1376-77 (2010) (observing that in addition to France, similar laws and policies have been adopted, considered, or rejected by Australia, Hong Kong, Germany, the Netherlands, New Zealand, South Korea, Sweden, Taiwan, and the United Kingdom).

<sup>43</sup> In the United Kingdom, the Digital Economy Act addresses the problem of online copyright infringement by the introduction of the same graduated response regime. See Peppe Santoro, *Progressive IP Strategies for European Clients*, in *IP CLIENT STRATEGIES IN EUROPE* 161, 168 (Emmanuel Baud et al. eds., 2010). An analogous system is in use or being considered in New Zealand, Taiwan and South Korea. *Id.*

<sup>44</sup> Anti-Counterfeiting Trade Agreement (ACTA), Public Predecisional/Deliberative Draft, (Apr. 2010), [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf). For more information on the negotiation of the proposed ACTA, see *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUNDATION, <http://www EFF.org/issues/acta>

implementation of a “graduated response” regime.<sup>45</sup>

In this context it is interesting to note that at the European political level attempts have been made to introduce proposals for a “graduated response” system in the revision of the European Union (EU) telecom regulation. In December 2009, the European Parliament finally approved the so-called Telecom package. The Telecom package sets out new provisions for a substantial European reform of the regulatory framework for electronic communications, and addresses privacy on the Internet.<sup>46</sup>

The package, which is made up of a regulation (1211/2009/EC)<sup>47</sup> and two directives (2009/136/EC)<sup>48</sup> and (2009/140/EC),<sup>49</sup> is aimed at radically modifying the normative and institutional structure concerning telecommunications.<sup>50</sup> The new European text generated hot debate in the European Parliament

---

(last visited Mar. 21, 2011). See also Annemarie Bridy, *ACTA and the Specter of Graduated Response*, (American Univ., Washington College of Law, PIJIP Research Paper No. 2, 2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=research&sei->; Margot Kaminski, *Recent Development, The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT'L L. 247 (2009) (discussing the proposed measures contained in the ACTA).

<sup>45</sup> The term “graduated response,” refers to:

[A]n alternative mechanism to fight internet piracy (in particular resulting from P2P file sharing) that relies on a form of co-operation with the internet access providers that goes beyond the classical “notice and take down” approach, and implies an educational notification mechanism for alleged online infringers before more stringent measures can be imposed (including, possibly, the suspension or termination of the internet service).

Strowel, *supra* note 28, at 77.

<sup>46</sup> Press Release, EU Commission, Digital Agenda: New Telecoms Rules Benefit Citizens and Businesses Across Europe (May 23, 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/622&format=HTML&aged=0&language=EN>.

<sup>47</sup> Commission Regulation 1211/2009, Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2009 O.J. (L 337) 1.

<sup>48</sup> Directive 2009/136/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector and Regulation (EC) No. 2006/2004 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws, 2009 O.J. (L 337) 11.

<sup>49</sup> Directive 2009/140/EC, of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, and 2002/20/EC on the Authorization of Electronic Communications Networks and Services, 2009 O.J. (L 337) 37.

<sup>50</sup> See *The Telecoms Reform*, EUROPE'S INFO. SOC'Y THEMATIC PORTAL, [http://ec.europa.eu/information\\_society/policy/ecommm/tomorrow/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm) (last visited Jun. 20, 2011).

when, in striking similarity to the French law, it seemed that a provision would be adopted that would remove the right to a fair trial which was as previously provided by Amendment 138/46, which amended art. 8, par. 4, letter g-bis of the 2002/21/EC directive.<sup>51</sup> This Amendment stated that no restrictions could be imposed on the rights and liberties of the users of electronic communication services, unless a preliminary decision regarding the legality of use was issued by a judicial authority.<sup>52</sup>

Arm-wrestling between the Council of the European Union (Council) and the European Parliament produced a text that, according to the aforementioned Amendment, accords internet users a presumption of innocence and the right to privacy; assuring that the imposition of penalties will follow a fair and impartial trial, and providing efficient jurisdictional protection as well as a fair trial before the imposition of any sanctions. In regards to access and the use of services and applications by means of electronic communication networks, the Member States of the European Union will have to comply with the fundamental rights and freedoms of the individual, as these are granted by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the general principles of European Community law.<sup>53</sup> The agreement reached between the Council and the European Parliament on Amendment 138 is set forth in Article 1(3)(a) of Directive 2009/136/EC (the Framework Directive):

Measures taken by Member States regarding end-users' access

---

<sup>51</sup> European Parliament Legislative Resolution of 24 September 2008 on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, Directive 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, and Directive 2002/20/EC on the Authorization of Electronic Communications Networks and Services, (COM 0697) (2007), 2010 OJ (C 8E) 276, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+20080924+ITEMS+DOC+XML+V0//EN&language=EN#BKMD-40> [hereinafter EP Resolution 2008].

<sup>52</sup> The Amendment required that national regulatory authorities protect the interests of EU citizens, in particular:

[A]pplying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened in which case the ruling may be subsequent.

EP Resolution 2008, *supra* note 51, art. 8(h).

<sup>53</sup> See Directive 2009/136/EC, *supra* note 48, art. 1(3); Directive 2009/140/EC, *supra* note 49, art. 1(b).

to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.<sup>54</sup>

It is yet to be seen how Member States will implement these directives into national law.<sup>55</sup>

*A. Fair Trial, Administrative Sanctions and Freedom of Communication*

The French Decision at issue in this article essentially addresses compliance with the principle of a “fair trial” in the context of special measures implemented for certain crimes committed online. The Decision refers to respect for procedural rights that constitute “minimum guarantees” of a fair trial.<sup>56</sup> Here, the concept of a fair trial is framed in a way that corresponds to the procedural safeguards understood to be implicit in the due process clause of the United States Constitution<sup>57</sup> or embodied in the European concept of “*procès équitable*.”<sup>58</sup>

The most discussed point of HADOPI 1 concerned the procedural safeguards granted to Internet users infringing copyright law.<sup>59</sup> On this point the French law seemed to weaken procedural safeguard guarantees in certain urgent cases (providing only a generic “right to a fair proceeding”). The law granted to a

---

<sup>54</sup> See Directive 2009/136/EC, *supra* note 48, art. 1(3).

<sup>55</sup> The transposition of the Telecom reform into the national laws of the 27 EU Member States is expected by June 2011. See Directive 2009/136/EC, *supra* note 48, art. 4; Directive 2009/140/EC, *supra* note 49, art. 5.

<sup>56</sup> See Decision 2009-580, *supra* note 11, ¶¶ 16-20.

<sup>57</sup> U.S. CONST. amends. V, XIV. The constitutional guarantee of due process of law excludes all levels of government from arbitrarily or unfairly depriving individuals of their fundamental constitutional rights to life, liberty, and property. On due process, see generally, RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15, 17 (4th ed. 2007); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984). “Fair trial” and “due process,” in addition to being general principles incorporated into national constitutions and international conventions, are now considered global principles applicable under European Community law. For more on the argument of so called “process rights,” see TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (2d ed. 2006).

<sup>58</sup> See European Convention on Human Rights, art. (6)(1), Nov. 4, 1950, 213 U.N.T.S. 221, [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B4575C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B4575C9014916D7A/0/ENG_CONV.pdf).

<sup>59</sup> See Gautron, *supra* note 33, at 66; Boubekeur, *supra* note 33, at 110; Rousseau, *supra* note 33, at 104.

specific administrative body the authority to block Internet access.<sup>60</sup> It provided for the appointment of an administrative authority whose work depended (and continues to depend) on seemingly “clear” violations of law, without the need for evaluation by a judge.<sup>61</sup> On the one hand, the creation of this administrative control authority found its justification in the necessity to safeguard copyright—an area of law directly threatened by the advent of digital technologies. On the other hand, however, the law likely weakened constitutional guarantees designed to preserve constitutional freedoms and liberties, consequently moving the debate from one about the principles of legality to one about the principle of judicial protection from administrative acts.<sup>62</sup>

The *Conseil constitutionnel*'s findings primarily addressed the sanctioning procedures in place for violations of the obligation of surveillance imposed on intermediaries of communication for content transmitted, posted, or stored by their users, using services they provide on the internet. Criticism concerning the excessive vagueness of the sanctioning procedures in Article L. 336-3 of the *Code de la propriété intellectuelle* was rejected.<sup>63</sup> The Article provided an obligation of surveillance separate from the crime of counterfeiting.<sup>64</sup> On this point the *Conseil constitutionnel* observed that such an obligation is different from that of the crime of counterfeiting because it appears defined in sufficiently clear and unambiguous terms.<sup>65</sup> According to the *Conseil constitutionnel*'s reasoning, one of the most contentious aspects of

---

<sup>60</sup> See HADOPI 1, *supra* note 11, art. 6. Under Article 5, the administrative authority had direct power to decide and to enforce penalties against Internet users. *See id.* art. 5.

<sup>61</sup> On this point, it is remarkable to note the similarity between the French regulatory measure and the Italian debate concerning the adoption of special measures against crimes of opinion committed through social networks—a debate which commenced following aggression directed at the Prime Minister. This debate was followed by the much-discussed national transposition of the European Directive on Audiovisual Media Services. The Italian transposing decree, in fact, grants wide powers of control to the Communications Regulatory Authority over some categories of online digital content and in instances of infringement of copyright law. *See* D.Lgs. 15 marzo 2010, n. 44, in G.U. Mar. 29, 2010 (It.), available at <http://www.camera.it/parlam/leggi/deleghe/10044dl.htm>.

<sup>62</sup> *See* Decision 2009-580, *supra* note 11.

<sup>63</sup> *Id.* ¶¶ 6-7.

<sup>64</sup> Before the passage of HADOPI 1, infringement of copyrights was essentially considered a criminal offense in France. *See* ITALIAN COMMUNICATIONS AUTHORITY, IL DIRITTO D'AUTORE SULLE RETI DI COMUNICAZIONE ELETTRONICA (Feb. 12, 2010), <http://www.agcom.it/default.aspx?message=visualizzadocument&DocID=3790>.

<sup>65</sup> Decision 2009-580, *supra* note 11, ¶ 7.

the law concerned the “graded response” mechanism.<sup>66</sup> In order to limit illegal downloading of digital content protected by copyright, the French law (HADOPI 1) provided for a tightening of control measures and the introduction of an innovative enforcement process.<sup>67</sup> In the latter case, a net user could receive, directly from the service provider, two e-mail messages with a specific request to stop any suspicious activities. If the user failed to comply with such requests, the HADOPI Authority could impose a special penalty consisting of the suspension of Internet access for a period of two months to one year.<sup>68</sup>

Thus, HADOPI 1 resulted in the emergence of a new form of internet network surveillance monitored by a semi-police authority, which consequently created troublesome issues related to the protection of privacy and civil liberties in electronic communications. At the same time, HADOPI 1 also resulted in the introduction of a new set of sanctioning rules, devised with the intention of targeting net users suspected of illegal activities (according to the quantity and type of downloaded data). In its decision, the *Conseil constitutionnel* first considered the nature of access to information networks, and then examined the mechanism of sanctions introduced by the act, evaluating the law’s respect for fundamental rights and liberties, such as the presumption of innocence, the separation of powers, the right to defense, the right to a fair trial, the principle of cross-examination, as well as the necessary balance between copyright law and freedom of expression.<sup>69</sup>

In analyzing the decision of the *Conseil constitutionnel* the first critical point to address is the role of the HADOPI Authority in administrative and judicial enforcement.<sup>70</sup> In particular, it is necessary to examine the relationship between the HADOPI Authority and its competence to ensure protection of constitutionally mandated fundamental rights and freedoms. In

---

<sup>66</sup> *Id.* ¶¶ 8-12, 17.

<sup>67</sup> *See* Gautron, *supra* note 33, at 66.

<sup>68</sup> *See* HADOPI 1, *supra* note 11, art. 5(3). The article reads as follows: “La suspension de l’accès au service pour une durée de deux mois à un an assortie de l’impossibilité, pour l’abonné, de souscrire pendant la même période un autre contrat portant sur l’accès à un service de communication au public en ligne auprès de tout opérateur.” [The suspension of access to the service for a period from two months to one year combined with the impossibility, for the subscriber, to sign during the same period another contract concerning the access to a service of on-line communication with any other operator].

<sup>69</sup> *See* Decision 2009-580, *supra* note 11, ¶¶ 6-16.

<sup>70</sup> *Id.* ¶¶ 4, 16.

other words, how can constitutionally protected interests avoid being compromised in situations where the HADOPI Authority exercises its legislatively created powers?<sup>71</sup> Here, the important point to consider is whether the defendant's constitutional rights are fully protected; particularly in certain specific situations where administrative agencies impose sanctions without regard for constitutional principles like equality or procedural fairness.<sup>72</sup> In this context, the protection and defense of constitutional rights was most likely what motivated the *Conseil constitutionnel* to contain the power of the HADOPI Authority in its decision.<sup>73</sup>

As is evident, the main question foresees the problem of a denial of due process rights at the procedural level and on a more strictly administrative level. Can an administrative body assume the role of a judicial body; imposing sanctions, such as the interruption of Internet access on the basis of technically "clear" copyright infringement, but without compliance with any procedural constraint? On this point, it is necessary to note that the French law did not specifically provide the possibility of an appeal against the HADOPI decision (*rectius* the decision of the *Commission de protection des droits*).<sup>74</sup> An appeal would only be possible after the adoption of the sanction: "Le bien-fondé des recommandations adressées sur le fondement du présent article ne peut être contesté qu'à l'appui d'un recours dirigé contre une décision de sanction prononcée en application de l'article L. 331-27."<sup>75</sup> Moreover, on the matter of substantial and procedural guarantees, the law stated that the Internet user—previously notified by e-mail communications—would only be provided with the date and time of the alleged infringement.<sup>76</sup> It is self-evident

---

<sup>71</sup> See MARCO CUNIBERTI, *AUTORITÀ INDIPENDENTI E LIBERTÀ COSTITUZIONALI* [INDEPENDENT AUTHORITIES AND CONSTITUTIONAL FREEDOMS] 70 (2007).

<sup>72</sup> See Rousseau, *supra* note 33, at 104.

<sup>73</sup> See Gautron, *supra* note 33, at 66; Boubekeur, *supra* note 33, at 110; Rousseau, *supra* note 33, at 104; Marino, *supra* note 41, at 2045.

<sup>74</sup> The HADOPI Authority is composed of two bodies: a board (College) and a Commission for the Protection of Rights (Commission de Protection des Droits). The board is the chief administrative body of the HADOPI Authority and consists of nine members. The Commission consists of three magistrates and supervises the "graduated response" mechanism. See HADOPI 1, *supra* note 11, art. 5(1).

<sup>75</sup> *Id.* art. 5(3) ("The well-founded recommendations on the basis of this article can not be disputed that in support of an appeal against a decision to sanction imposed pursuant to Article L. 331-27."). On this point, see Boubekeur, *supra* note 33, at 111.

<sup>76</sup> "Les recommandations adressées sur le fondement du présent article mentionnent la date et l'heure auxquelles les faits susceptibles de constituer un manquement à l'obligation définie à l'article L. 336-3 ont été constatés." [The recommendations on the basis of this article shall include the date and time to which the facts susceptible to constitute a breach

that this procedure does not meet judicial and procedural guarantees of fairness: in particular the guarantee of adversarial equality and complete disclosure on the nature and cause of the charges.<sup>77</sup>

In the French legal system, the mechanism of protection of freedoms often hinges on constitutional limits (i.e. the reservation of statutory powers and the reservation of jurisdiction), as is true in many other countries.<sup>78</sup> This structure implies that administrative actions—in areas not covered by jurisdictional limits—are subject to the constraints of the principle of legality.<sup>79</sup> Therefore, decisions on measures resulting in a severe limitation of fundamental freedoms<sup>80</sup> are traditionally attributed to the judicial authority and removed from administrative authority. In addition, French constitutional jurisprudence has recognized a jurisdictional reservation of the protection of the right of property, of which copyright represents an intangible variant, in the judicial authority.<sup>81</sup>

The wide powers of sanction and control given to the heterogeneous universe of administrative authorities—usually appointed by government, parliament or elective assembly's (thus, not totally independent)<sup>82</sup>—make their positions closer to that of judges.<sup>83</sup> A problem arises when a non-judicial authority is

---

of the obligation defined in article L. 336-3 were noticed]. See HADOPI 1, *supra* note 11, art. 5(3).

<sup>77</sup> See Decision 2009-580, *supra* note 11, ¶ 9.

<sup>78</sup> For example, in the Italian legal system Article 13 of the Constitution stipulates a legal and jurisdictional reservation: nobody can be arrested, imprisoned or deprived of their personal freedom if this deprivation is not imposed by the law and if there is not a regular trial and a judicial authority's oversight. In particular it provides that restrictions of personal freedom can be applied by the police, but they have to inform the judicial authority within forty-eight hours; if the judicial authority does not validate the measures within the following forty-eight hours, they become ineffective. See COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION] Dec. 22, 1947, art. 13 (It). For an English translation, see *Constitution of the Italian Republic*, SENATO DELLA REPUBBLICA, [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

<sup>79</sup> See CUNIBERTI, *supra* note 71, at 61.

<sup>80</sup> For example, freedom of expression, freedom of religion, freedom of thought, freedom of belief, freedom of peaceful assembly, and freedom of association.

<sup>81</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 89-256DC, July 25, 1989, J.O. 9501.

<sup>82</sup> On the alleged impartiality or neutrality of the independent authorities see CUNIBERTI, *supra* note 71, at 404; see also F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 534 (2000).

<sup>83</sup> Traditionally, independent administrative authorities have been delegated functions that are partly administrative, partly legislative, and partly judicial. See EDWIN BLYTHE

granted the power to inflict a sanction which directly affects a constitutionally guaranteed right or freedom. The issue is further complicated when the Constitution stipulates that the limitation of a certain right is necessary to ensure safeguards and procedures laid down by judicial order. For this reason, the *Conseil constitutionnel* held that the HADOPI Authority could not be delegated the role of protecting intellectual property rights due to its nature as an administrative body.<sup>84</sup>

It is also necessary to consider the separation of powers principle as a basis for the judicial protection of fundamental rights.<sup>85</sup> According to the principle of separation of powers, each branch of government (legislative, executive and judiciary) can exercise its specific powers within a clearly defined and limited framework “in order to avoid the abuse of power.”<sup>86</sup> For this reason, legislation that does not provide for judicial review must be carefully considered and evaluated.<sup>87</sup> Arguably, judicial protection of fundamental rights is one of the best indicators of the existence of the rule of law.<sup>88</sup> In this respect, it is important to note that judicial protection of fundamental rights is explicitly

---

STASON & FRANK EDWARD COOPER, *THE LAW OF ADMINISTRATIVE TRIBUNALS: A COLLECTION OF JUDICIAL DECISIONS, STATUTES, ADMINISTRATIVE RULES AND ORDERS AND OTHER MATERIALS* 17 (3d. ed. 1957) (the authors point out that “[o]ne of the great difficulties of properly classifying a particular function of an administrative agency is that frequently—and, indeed; typically—a single function has three aspects. It is partly legislative, partly judicial and partly administrative.”); see also Sabino Cassese, *Poteri indipendenti, Stati, relazioni ultrastatali*, 121 FORO IT. V, 8 (1996).

<sup>84</sup> See Note sous décision n° 2009-580 DC, *supra* note 38, at 105.

<sup>85</sup> See T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 31 (2003); Marino, *supra* note 41, at 2045-46.

<sup>86</sup> See MONTESQUIEU, *DE L'ESPRIT DES LOIS* [SPIRIT OF THE LAWS] 162-64 (Gonzague Truc ed., Paris: Garnier 1949) (1748); see generally Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 3 (Pietro Costa & Danilo Zolo eds., 2007) (discussing the principle of the differentiation of power as divided and distributed across different political institutions and branches).

<sup>87</sup> On judicial review and the enhancement of the protection of individual rights, see Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

<sup>88</sup> For a series of critical studies on the rule of law, see *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* (Pietro Costa & Danilo Zolo eds., 2007). In particular, see Pietro Costa, *The Rule of Law: A Historical Introduction*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 73, 73-76 (Pietro Costa & Danilo Zolo eds., 2007) (drawing on an historical analysis of the rule of law); Luigi Ferrajoli, *The Past and the Future of the Rule of Law*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 323, 355 (Pietro Costa & Danilo Zolo eds., 2007) (providing a definition of the rule of law). On the rule of law in a comparative perspective, see Rainer Grote, *Rule of Law, Rechtsstaat and Etat de Droit*, in *CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS* 269 (Christian Starck ed., 1999).

provided for in Articles 7 and 8 of the 1948 Universal Declaration of Human Rights<sup>89</sup> and Article 13 of the 1950 European Convention on Human Rights.<sup>90</sup>

In order to arrive at its conclusion, the *Conseil constitutionnel* conducted a proportionality review seeking to determine whether the sanctions of the HADOPI law seriously undermine the freedom of expression or other fundamental rights.<sup>91</sup> In this regard, the *Conseil constitutionnel* concluded that the powers vested in the HADOPI Authority were too broad, because they “are not limited to a specific category of persons but extend to the entire population.”<sup>92</sup> The *Conseil constitutionnel* explained that for this reason “the powers of this Committee [HADOPI Authority] 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.”<sup>93</sup> Furthermore, the restriction or denial of access to the Internet was recognized as a sanction that applied not only to the Internet access subscriber, but also to “those persons whom the latter allow[ed] to access the internet.”<sup>94</sup> As a result, in light of the freedom guaranteed by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (1789 Declaration), Parliament was not at liberty—“irrespective of the guarantees accompanying the imposition of penalties”—to allow the Committee for the Protection of Copyright (an administrative body) to decide who should have access to the Internet.<sup>95</sup>

In principle, delegation of judicial power to authorities other than courts is not *per se* unconstitutional.<sup>96</sup> However, in this case the issue was the scope and kind of sanction that could be imposed by an independent administrative agency. This constitutional

---

<sup>89</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213 U.N.T.S. 222. On this point, see Tecla Mazzarese, Towards a Positivist Reading of Neo-constitutionalism, *JURA GENTIUM*, n.10 2008 at 233, 238, available at <http://www.juragentium.unifi.it/en/surveys/rights/mazzares.htm#10>.

<sup>91</sup> See Marino, *supra* note 41, at 2046.

<sup>92</sup> Decision 2009-580, *supra* note 11, ¶ 16.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* The relevant part of the paragraph reads as follows: “[i]n 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.” *Id.*

<sup>96</sup> See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 56-58 (4th ed., 2004); CUNIBERTI, *supra* note 71, at 403; HAMON & TROPER, *supra* note 9, at 145; GEORGES DUPUIS ET AL., *DROIT ADMINISTRATIF* 209 (11th ed. 2009).

problem arose as a result of the creation of an independent ad hoc administrative authority—the HADOPI Authority—which was not obligated to follow legally prescribed procedures and was not required to guarantee adequate defense rights in relation to the nature of the fundamental freedom affected by the imposed sanction.<sup>97</sup>

*B. The Presumption of Innocence and the Defendant's Fundamental Rights*

A second relevant aspect of the French Decision concerns the presumption of innocence principle and the implicit retreat from protection of this right in HADOPI 1. As a matter of fact, the law under scrutiny by the *Conseil constitutionnel* implicitly created a strict liability regime for any Internet access subscriber from whose Internet address (IP address) an act of piracy could be detected, unless the subscriber could prove that the copyright infringement was done by a third party. Following the *Conseil constitutionnel's* rationale, it is evident how this structure, by operating in effect as a reversal of the burden of proof, introduced—in clear contrast with Article 9 of the 1789 Declaration—“a principle of presumption of guilt in criminal matters” against the Internet access subscriber.<sup>98</sup> Furthermore, such a presumption may lead to the application of “sanctions privatives ou restrictives de droit [privative or restrictive sanctions of right]”<sup>99</sup> against the subscriber without any evidence of his personal responsibility.<sup>100</sup> Indeed, the process of identifying the culprit of illegal activity solely by means of the acquired IP address cannot be considered a technically error-free procedure.<sup>101</sup> In particular, using this technique to match the IP address with the registered user of that address may result in error because it does not account for negative external factors that may negatively affect the “exact match.” Even though it is abstractly possible to ascertain the IP address that identifies the computer from which the unlawful act was committed, in

---

<sup>97</sup> See Rousseau, *supra* note 33, at 104.

<sup>98</sup> Decision 2009-580, *supra* note 11, ¶ 17.

<sup>99</sup> *Id.* ¶ 18.

<sup>100</sup> See Feldman, *supra* note 33, at 27.

<sup>101</sup> See Ian Kerr & Alex Cameron, *NYMITY, P2P, & ISPs: Lessons from BMG Canada Inc. v. John Doe*, in *PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION* 269, 272 (Katherine Strandburg & Daniela Stan Raicu, eds., 2006) (arguing that an IP address is an imperfect mechanism for verifying the identity of internet users); IAN J. LLOYD, *INFORMATION TECHNOLOGY LAW* 460-61 (5th ed. 2008) (offering a description of how the IP address system works).

reality there are multiple circumstances that may prevent a positive identification of the responsible party.<sup>102</sup> For example, several people may use the same computer, or the same IP address may be made anonymous or illicitly acquired and used by multiple users.<sup>103</sup> Also a non-expert user can set up a computer to utilize an IP address different from that actually belonging to the device.<sup>104</sup> On this issue, it is worth noting that the *Conseil constitutionnel* considered IP addresses to be data of a personal nature which requires appropriate procedural safeguards to prevent unlawful disclosure and/or misuse.<sup>105</sup> In fact, the communication of the names and addresses of certain Internet users that involves the availability of personal data (i.e, information relating to identified or identifiable natural persons) was considered information that deserves protection.<sup>106</sup>

Generally speaking, it is highly questionable whether or not IP addresses can be identified or are identifiable as personal data and therefore subject to EU data protection rules.<sup>107</sup> There is much doctrinal debate over this issue.<sup>108</sup> Elements of this on-going

---

<sup>102</sup> *Id.* See also Macrez & Gossa, *supra* note 33, at 85.

<sup>103</sup> Consider, for example, the case of illegal use of unprotected WiFi networks by individuals other than the legitimate subscriber. On these technological issues, see Macrez & Gossa, *supra* note 33, at 85-88.

<sup>104</sup> See Kurt Wimmer, *International Liability for Internet Content: Publish Locally, Defend Globally*, in WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION 239, 244 n.10 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003).

<sup>105</sup> Decision 2009-580, *supra* note 11, ¶ 27. On this point see the comments of Charles Simon, *Les adresses IP sont des données personnelles selon le Conseil constitutionnel*, 51 REV. LAMY DR. L'IMMATÉRIEL, 114 (2009); Gautron, *supra* note 33, at 69; Boubekeur, *supra* note 33, at 111. For a discussion of the notion of personal data, see CHRISTOPHER KUNER, EUROPEAN DATA PROTECTION LAW: CORPORATE COMPLIANCE AND REGULATION 74-76 (2d ed., 2007).

<sup>106</sup> Decision 2009-580, *supra* note 11, ¶ 27.

<sup>107</sup> Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L 281) 31. This general data protection Directive has been further enhanced by other legal provisions, such as the e-Privacy Directive for the communications sector. See Directive 2002/58, of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 37. On the qualification of an IP address as personal data, see also the Italian Peppermint case and the decision of the ITALIAN DATA PROTECTION AUTHORITY, GARANTE PER LA PROTEZIONE DEI DATI PERSONALI (Feb. 28, 2008), available at <http://www.garanteprivacy.it/garante/doc.jsp?ID=1495246>.

<sup>108</sup> See e.g., Patrick Lundevall-Unger & Tommy Tranvik, *IP addresses – Just a Number?*, 19 INT'L J.L. & INFO. TECH. 53 (2011); Christopher Kuner, *Data Protection and Rights Protection on the Internet: The Promusicae Judgement of the European Court of Justice*, 30 EUR. INTELL. PROP. REV. 199 (2008). Fanny Coudert & Evi Werkers, *In the aftermath of the Promusicae case: how to strike the balance?*, 18 INT'L J.L. & INFO. TECH.

controversy can be found in the latest French jurisprudence. A recent decision, dated February 1, 2010,<sup>109</sup> of the Court of Appeal of Paris confirms the principle laid down by the Supreme Court of Cassation in a previous case:<sup>110</sup> specifically, that an IP address can be used to identify and locate the source of an offense, but it cannot be used to identify the offender. In other words, and IP address can be used to identify the computer, but not necessarily an individual user. In this respect it could be considered “une donnée indirectement nominative relative à la personne [indirectly nominative information related to the person].”<sup>111</sup> Nevertheless, according to the French National Commission for Information and Liberties (*Commission nationale de l'informatique et des libertés* (CNIL)),<sup>112</sup> IP addresses do represent personal data, as they make it indirectly possible to identify an individual by reference to an identification number.<sup>113</sup>

In looking at the question from a European point of view, it should be that, in a recent press release, the European Commission observed that the “protection of personal data is a fundamental right.”<sup>114</sup> The European Commission also stated that “the right to the protection of personal data is explicitly recognised in Article 8 of the EU’s Charter of Fundamental Rights and in the Lisbon Treaty.”<sup>115</sup> The Lisbon Treaty provides the legal basis for rules on data protection for all activities within the scope of EU

50, 59 (2010).

<sup>109</sup> Cour d’appel [CA] [regional court of appeal], Paris, 12e ch., Feb. 1, 2010 (Fr.), available at [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2852](http://www.legalis.net/jurisprudence-decision.php3?id_article=2852).

<sup>110</sup> Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 13, 2009, Bull. crim., No. 1, at 34 (Fr.).

<sup>111</sup> See Cour d’appel [CA] [regional court of appeal] Paris, 13e ch., sec. A, May 15, 2007 (Fr.), available at [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=1955](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=1955). The same conclusion on this point was reached in Cour d’appel [CA] [regional court of appeal], Paris, 13e ch., sec. B, Apr. 27, 2007, available at [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=1954](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=1954) (“L’adresse IP ne permet pas d’identifier le ou les personnes qui ont utilisé cet ordinateur puisque seule l’autorité légitime pour poursuivre l’enquête (police ou gendarmerie) peut obtenir du fournisseur d’accès l’identité de l’utilisateur.” [The IP address does not allow identification of one or several persons who used the computer because only legitimate authorities (police or gendarmerie) authorized to pursue the investigation can obtain from the access providers the identity of the user].)

<sup>112</sup> CNIL is the French administrative authority devoted to ensuring the protection of privacy and personal data.

<sup>113</sup> See CNIL, 2007 ANNUAL ACTIVITY REPORT (2007), <http://www.cnil.fr/fileadmin/documents/en/CNIL-AnnualReport-2008.pdf>.

<sup>114</sup> Press Release, EU Commission, European Commission Sets Out Strategy to Strengthen EU Data Protection Rules (Nov. 11, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1462>.

<sup>115</sup> *Id.*

law under Article 16.<sup>116</sup> Article 16 serves as the basis for the discussion of whether the protection of personal data is a fundamental right which guarantees the protection of personal data and hence of private life. This is the reason why “a careful and case-by-case assessment in order to strike the balance between the right to privacy and the right to public access,” is likely necessary to ensure the legality of data processing.<sup>117</sup>

Another point to consider is that the use of personal data as evidence of a copyright infringement *per se*, without a trial, is injurious to the concept of a fair trial in general, and in particular the right to present a defense. With regards to this point, the *Conseil constitutionnel* noted that authorization to collect data that indirectly allows for the identification of individuals who access public communication networks is in reality a form of online processing of personal data.<sup>118</sup> Apart from representing a disproportionate interference with respect to privacy, such an authorization has the effect of providing copyright holders with the means necessary to safeguard their legal rights.<sup>119</sup> In this respect, the jurisprudence of the European Court of Justice has offered consistent and useful clarification on the processing of personal data and the protection of privacy in the framework of electronic communications. In a recent case which addressed the tension between digital copyright protection and the right to privacy of Internet users, the Court determined that an IP address has the quality of fundamental data essential to perform a connection service, and is therefore protected according to Article 6 of Directive 2002/58/EC.<sup>120</sup> Despite the position of the European

---

<sup>116</sup> *Id.*

<sup>117</sup> See DATA PROTECTION WORKING PARTY, OPINION 7/2003 ON THE RE-USE OF PUBLIC SECTOR INFORMATION AND THE PROTECTION OF PERSONAL DATA 5 (Dec. 12, 2003), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp83\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp83_en.pdf).

<sup>118</sup> Decision 2009-580, *supra* note 11, ¶ 27.

<sup>119</sup> *Id.* ¶ 28.

<sup>120</sup> See Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 E.C.R. I-00271. For a recent analysis of the case, see Coudert & Werkers, *supra* note 108; Kuner, *supra* note 108. The case is well summarized in GABRIËL MOENS & JOHN TRONE, *COMMERCIAL LAW OF THE EUROPEAN UNION* (2010). The authors summary is provided below:

An association of music producers and publishers sought a judicial order that an Internet service provider disclose the identities of users of a file sharing programme. The association sought this information so that it would be able to use these Internet users for copyright infringement. In that occasion, the Court pointed out that Directive 2002/58 required Internet service providers to ensure the confidentiality of Internet users. But confidentiality could be limited to the protection of the rights and freedom of others, which included

Court of Justice, the *Conseil constitutionnel* rejected the arguments of the plaintiffs, reasoning that the processing of personal data would ultimately be subject to regular judicial procedures as a result of modifications previously made to the sanctioning powers of the HADOPI Authority. Thus, even though the collection and the processing of such data might be seen as an intrusion into the users' private life, the *Conseil constitutionnel* held that this processing conformed to the Constitution because it resulted in the safeguarding of legal rights and interests.<sup>121</sup> Finally, with regard to individual privacy and agency monitoring activities on file-sharing networks, the *Conseil constitutionnel* found that "the processing of personal data does not fail to comply with the constitutional requirements."<sup>122</sup>

The *Conseil constitutionnel's* decision demonstrates a discord between its ultimate conclusion and its consideration of the sanctioning measures—characterized by a mechanism with questionable procedural guarantees—entrusted to an instrument of the French Government. In other words, the *Conseil constitutionnel* wanted to prevent the the HADOPI Authority, an independent administrative agency established by law, from becoming an instrument that carried out unfair activities contrary to the fundamental rights and freedoms of French citizens. The ultimate solution to this question appears to a reconciliation of different values and interests with specific procedural rules capable of allowing for an exhaustive process of decision-making.

### *C. Freedom of Communication and Access to Public Online Services*

Another troublesome issue the *Conseil constitutionnel* had to address concerned the right of access to online networks.<sup>123</sup> The

---

protection of the right to property and the right to judicial protection. Directive 2002/58 thus permitted Member States to limit confidentiality in order to safeguard property rights through civil proceedings. However, the Directive does not obligate Member States to disclosure of personal data in those circumstances.

*Id.* at 320.

<sup>121</sup> Decision 2009-580, *supra* note 11, ¶¶ 29-31. At this point, the technical implementation of the law is somewhat questionable. In fact, it does not seem congruent with the Privacy Directive as well as the so-called "Framework Directive" 2002/21/EC.

<sup>122</sup> Decision 2009-580, *supra* note 11, ¶ 31.

<sup>123</sup> On the debate about internet access as a possible constitutional or fundamental right, see generally U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, delivered to the Comm'n on Hum. Rts., U.N. Doc.

*Conseil constitutionnel* based its discussion of this issue on Article 11 of the 1789 Declaration. According to Article 11 “[t]he free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”<sup>124</sup> The judges of the *Conseil constitutionnel* concluded that this right also includes the freedom to access online networks, given the diffusion of such services and their growing importance to the participation in democratic life and consequently to freedom of expression.<sup>125</sup>

The law at issue, which contemplates forcibly disconnecting an individual from the internet without any type of judicial oversight, might be in conflict with Article 11 of the 1789 Declaration. Although the *Conseil constitutionnel* concluded that Internet access cannot be considered a fundamental right in itself, the freedom of communication—which enjoys a particular status as a protected right—certainly deserves strengthened protection with respect to internet access. In fact, this type of communication—as opposed to other forms of access to information—necessarily relates to each individual.<sup>126</sup> The *Conseil constitutionnel*, in applying its jurisprudence on the assessment of proportionality, has established that the freedom of communication, as applied to the right of access to network services, assumes a peculiar importance.<sup>127</sup> Consequently, the restrictions imposed by the sanctioning power must be limited. On

---

E/CN.4/2000/63 (Jan. 18, 2000), [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf). See David Banisar, *The Right to Information in the Age of Information*, in HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY 85-86 (Rikke Frank Jorgenson ed., 2006); Pasquale Costanzo, *Voce Internet (diritto pubblico)*, in Dig. IV (Disc. Pubbl.), vol. XVIII, Torino, 2000, p. 353.

<sup>124</sup> Declaration des Droits de l’Homme and du Citoyen de 1789 [Declaration of the Rights of Man and the Citizen] art. 11 (1789), available at <http://www.conseil-constitutionnel.fr/textes/d1789.htm>.

<sup>125</sup> See Decision 2009-580, *supra* note 11, ¶ 12. The relevant paragraph in the court’s opinion reads as follows: “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.” On this matter, see also Michel Verpeaux, *La liberté de communication avant tout. La censure de la loi Hadopi 1 par le Conseil constitutionnel* [The freedom of communication above all. The censorship of the law Hadopi 1 by the Constitutional Council], 39 LA SEMAINE JURIDIQUE GENERALE 46, 50 (2009).

<sup>126</sup> *Id.*

<sup>127</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008-562DC, Feb. 21, 2008, ¶ 22 (Fr.), [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/Bank\\_mm/anglais/a2008562dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/Bank_mm/anglais/a2008562dc.pdf).

this issue the *Conseil constitutionnel* stated that, “violations of freedom of access to the Internet can be analyzed, under the Constitution, as invasions of the liberty guaranteed by the Article 11 of the Declaration of 1789.”<sup>128</sup> Access to such an important tool of communication has become, for millions of citizens, an integral part of their exercise of many other constitutionally protected rights and freedoms.<sup>129</sup> Therefore, inhibiting access to such a source of information would constitute a disproportionate sanction, in the sense that it would also have a strong and direct impact on the exercise of those constitutional rights and freedoms.<sup>130</sup> The Internet, as opposed to other forms of media, allows for the exercise of the freedom of communication not only in a passive way, but also in an active way, because the user can be both a producer and consumer of information.<sup>131</sup>

On the same point, the European Parliament has recently stated that the right to Internet access also constitutes a guarantee of the right to access education. Specifically, on March, 26 2009, the European Parliament declared that granting all citizens internet access is equivalent to ensuring access to education, reasoning that such access should therefore not be denied or used as a sanction by governments or private companies.<sup>132</sup>

---

<sup>128</sup> Note sous décision n° 2009-580, *supra* note 38 (“La portée de la décision, sur ce point, consiste à affirmer que, ‘en l’état,’ les atteintes à la liberté d’accéder à internet s’analysent, au regard de la Constitution, comme des atteintes à la liberté garantie par l’article 11 de la Déclaration de 1789.” [The impact of the decision, on this point, consists in asserting that, violations of freedom of access to the internet can be analyzed, under the Constitution, as violations of freedom guaranteed by Article 11 of the 1789 Declaration].).

<sup>129</sup> See BENKLER, *supra* note 5, at 15 (observing how internet democratizes culture).

<sup>130</sup> See Marino, *supra* note 41, at 2045 (remembering that this right is a “liberté de premier rang”).

<sup>131</sup> See HENRY H. PERRITT, JR., *LAW AND THE INFORMATION SUPERHIGHWAY* § 2.01[B], at 43 (2d ed. 2001); ANDREW MURRAY, *INFORMATION TECHNOLOGY LAW* 104 (2010).

<sup>132</sup> European Parliament Recommendation of 26 March 2009 to the Council on Strengthening Security and Fundamental Freedoms on the Internet, ¶ Q (Mar. 26, 2009), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-20090194+0+DOC+XML+V0//EN> (“whereas e-illiteracy will be the new illiteracy of the 21st Century; whereas ensuring that all citizens have access to the Internet is therefore equivalent to ensuring that all citizens have access to schooling, and whereas such access should not be punitively denied by governments or private companies; whereas such access should not be abused in pursuit of illegal activities; whereas it is important to deal with emerging issues such as network neutrality, interoperability, global reachability of all Internet nodes, and the use of open formats and standards.”).

*D. Defining the Balance Between Freedom of Expression and Property Rights*

In its discussion of the limitations on (personal) freedom, the *Conseil constitutionnel* highlighted the conflict, (at the core of the case before it), between two basic fundamental rights: (1) the freedom of expression, of which the internet is undoubtedly a key element; and (2) property rights, of which copyright represents an intangible aspect.<sup>133</sup> The *Conseil constitutionnel* noted that a legislature faced with such a conflict can wield discretionary power in resolving this problem: “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.”<sup>134</sup> This power, however, is not absolute. On the contrary, it must be exercised together with statutory measures:

[D]esigned 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.<sup>135</sup>

Therefore, the *Conseil constitutionnel's* decision reaffirms that 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.”<sup>136</sup> As a consequence, any restrictions “placed on the exercising of such freedom must necessarily be adapted and proportionate to the purpose it is sought to achieve.”<sup>137</sup> In other words, the issue is not directly related to the use of administrative sanctions, but rather about reconciling freedom of expression with

---

<sup>133</sup> In this respect, it should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright (see Case C-479/04, *Laserdisken ApS v. Kulturministeriet*, 2006 E.C.R. I-8089, ¶ 65), and the fundamental right to effective judicial protection constitute general principles of European Community law (see Joined Cases 154 & 155/04, *Alliance for Natural Health and Others*, 2005 E.C.R. I-6451, ¶ 126, and Case C-432/05, *Unibet*, 2007 E.C.R. I-2271, ¶ 37).

<sup>134</sup> Decision 2009-580, *supra* note 11, ¶ 14.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ¶ 15.

<sup>137</sup> *Id.*

property rights.<sup>138</sup> Accordingly, the legislature must take into account that freedom of expression and communication are preconditions for democracy, and any limitations placed on these freedoms must therefore be essential, effective and proportionate to the pursued aim.<sup>139</sup>

The sanctioning power imposed by the provisions questioned in HADOPI 1 authorize an administrative authority, as opposed to a tribunal, to limit or prevent the Internet access of specific subscribers.<sup>140</sup> Moreover, the effect of the power granted to the administrative authority (the HADOPI Authority) is not limited to a particular category of people, but extends to the whole population. It can thus lead to a limitation of the right of self-expression and the ability to communicate freely, (particularly an individual's ability to do so from his or her home). In such conditions, given the nature of the freedom granted by Article 11 of the 1789 Declaration, the legislature should not entrust such powers to an administrative authority with the primary aim of protecting the rights of copyright holders, despite the existence of guarantees governing the application of sanctions.<sup>141</sup>

#### IV. AFTER THE CONSTITUTIONAL SCRUTINY: HADOPI 2

As a result of, and in response to, the *Conseil constitutionnel's* decision, the French Government enacted a new statute, (HADOPI 2), which delegates the sanctioning power to a judicial authority.<sup>142</sup> The new text, which was approved by the *Conseil constitutionnel* in September 2009<sup>143</sup> and which took effect on January 1, 2010, transforms digital piracy from an administrative

---

<sup>138</sup> See Conseil constitutionnel [CC] [Constitutional Court] decision No. 84-181DC, Oct. 11, 1984, Rec. 84. In that case, the *Conseil constitutionnel* decided on a law intended to limit the concentration and to ensure financial transparency and pluralism of media companies. *Id.*

<sup>139</sup> See Boubekour, *supra* note 33, at 109.

<sup>140</sup> Decision 2009-580, *supra* note 11, ¶¶ 14, 16.

<sup>141</sup> See *id.* ¶ 16; see also Van Eecke & Truyens, *supra* note 33, at 22; Szuskin, Fourques de Ruyter and Doucleff, *supra* note 33, at 6; Rambaud, *supra* note 33, at 10-11.

<sup>142</sup> For a critical perspective, see Rousseau, *supra* note 33, at 105 (observing that the Parliament, by switching the sanctioning power from an administrative authority to a judge, formally meets the requirements of decision of the Conseil constitutionnel, but in reality betrays the real message).

<sup>143</sup> See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-59DC, Oct. 22, 2009, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en2009\\_590dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2009_590dc.pdf). For a comment on the decision, see Emmanuel Derieux, *Validation par le Conseil constitutionnel de l'essentiel des dispositions de la loi "Hadopi 2"* [Validation by the Constitutional Council of the key provisions of the law "Hadopi 2"], 54 REV. LAMY DR. L'IMMATÉRIEL 6 (2009).

offense to a criminal one.<sup>144</sup> The new law, (HADOPI 2), establishes a system of control divided into the following three phases: users suspected of illegally downloading digital contents protected by copyright are first warned via e-mail;<sup>145</sup> they are then warned a second time via registered letter;<sup>146</sup> and upon receipt of a third warning they are invited to appear before a judge, who may decide whether to inflict a financial penalty or force them to disconnect from the internet.<sup>147</sup> In any case, it is not necessarily the offender who receives the warnings and faces the possibility of sanction, but the owner of the Internet access account. The HADOPI Authority, whose members have only recently been appointed,<sup>148</sup> is delegated the role of overseeing and inspecting the adequateness of the whole procedure. The HADOPI Authority acts as an impartial third party, nevertheless providing a service to copyright holders (the so-called *titulaires de droits de propriété intellectuelle*) and to Internet service providers (ISPs), by pinpointing the illegal activity and creating a file related to the matter.<sup>149</sup> According to the Decree n. 2010-872 of July 26, 2010 relating to proceedings before the committee for protection of rights of the High Authority for the dissemination of works and the protection of rights on the Internet, ISPs are obliged to answer questions of the Haute Autorité to identify the names, addresses and e-mails of alleged infringers.<sup>150</sup> They are also obliged to provide infringer's contact information to the HADOPI Commission within eight days from the relevant request.<sup>151</sup> They can be fined €1,500 for each IP address if they refuse to respect

---

<sup>144</sup> See HADOPI 2, *supra* note 28, art. 2.

<sup>145</sup> *Id.* art. 5.

<sup>146</sup> *Id.* art. 8.

<sup>147</sup> *Id.* art. 9.

<sup>148</sup> See Décret of December 23, 2009, Portant nomination des membres du collège et de la commission de protection des droits de la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet [Decree appointing the members of the College and the Committee of Protection of the Rights of the High Authority for the dissemination of works and the protection of the rights on the Internet], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 26, 2009, p. 22372.

<sup>149</sup> See Jean-Sébastien Mariez, HADOPI... 3 small suspension points... 2 (unpublished manuscript), <http://www.juriscom.net/documents/pla20110315.pdf> (arguing that HADOPI operates as a mere letterbox).

<sup>150</sup> See art.1, al. 6, décret 2010-872, October 13, 2010, relatif à la procédure devant la commission de protection des droits de la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet [concerning the proceedings before the committee for protection of rights of the High Authority for the dissemination of works and the protection of rights on the Internet], 171 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] July 27, 2010, 13874.

<sup>151</sup> *Id.*

this identification process.<sup>152</sup> Finally, ISPs are also required to submit electronically to each subscriber the HADOPI recommendations (i.e. the warning messages) within twenty-four hours after its submission by the Commission for the Protection of Rights.<sup>153</sup> A Judge is entrusted with the power to issue judgment after taking into account the balance between the rights of authors and those of the users.<sup>154</sup> In particular, the new bill (HADOPI 2) adds “online copyright infringement” (carried out through a public online communication service) to the list of crimes of Article 398-1 of the French Code of Criminal Procedure (*Code de Procédure Pénale*).<sup>155</sup> As a consequence, a suspect can also be charged with these crimes in a tribunal constituted by a single judge.<sup>156</sup>

Thus, contrary to the first version of the law, the HADOPI Authority cannot disconnect an Internet subscriber without an antecedent sentence from a judge. The new text also states that in order to inflict the penalty of suspension of Internet access (which is meant to be a supplemental sanction)<sup>157</sup> and to determine its duration, the judge must consider the circumstances underlying the act; the seriousness of the offense; as well as the personal characteristics of the offender, particularly his or her professional and social background and socio-economic situation.<sup>158</sup> In addition, the duration of the penalty inflicted must be designed to safeguard intellectual property rights while at the same time balancing an individual’s right to free expression and access to information (especially if these rights are related to an individuals’ access to information from his/her home).<sup>159</sup>

---

<sup>152</sup> *Id.* art. 1, al. 8 (“Est puni de l’amende prévue pour les contraventions de cinquième classe le fait de contrevenir aux dispositions de l’article R. 331-37 [Violations of the provisions of article R. 331.37 are punished by a fifth class fine.]”).

<sup>153</sup> *See* art. 1, décret 2010-1202, October 12, 2010, modifiant l’article R. 331-37 du code de la propriété intellectuelle [amending article R. 331-37 of the intellectual property code] 238 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] October 13, 2010, 18389 (“... les opérateurs sont tenus d’adresser par voie électronique à l’abonné chacune des recommandations mentionnées respectivement au premier et au deuxième alinéa de l’article L. 331-25, dans un délai de vingt-quatre heures suivant sa transmission par la commission de protection des droits [... operators are required to submit electronically to the subscriber each of the recommendations mentioned respectively in the first and second paragraph of Article L. 331-25, within twenty-four hours after the transmission by the Commission for Protection of Rights.]”).

<sup>154</sup> *See* HADOPI 2, *supra* note 28, art. 9

<sup>155</sup> *Id.* art. 7. For a discussion of this point, see Mariez, *supra* note 149, at 10 (examining three possible penalty scenarios).

<sup>156</sup> On the point see DERIEUX & GRANCHET, *supra* note 29, at 185.

<sup>157</sup> *Id.* art. 7. *See* DERIEUX & GRANCHET, *supra* note 29, at 169, 185

<sup>158</sup> *See* HADOPI 2, *supra* note 28, art. 9.

<sup>159</sup> *Id.*

At this point a critical question arises: is HADOPI really working as it was intended to? According to several sources, the current volume of warning e-mails sent to users is around 2000 per day.<sup>160</sup> This is much lower than the actual number of daily illegal downloads. However, the HADOPI Authority plans to increase the number of e-mails, and has set a target of 10,000 e-mails per day. Even if it is too early to correctly assess the full impact of the French law, it is nevertheless already possible to identify tendencies and trends. For example, a recent study by the International Federation of the Phonographic Industry (IFPI) stated that third-party studies indicate that, “since the passing of the law, 53 per cent of those who had illegally downloaded stopped or cut back on their activity.”<sup>161</sup> Of course, these numbers may have been impacted by initial campaigns organized to publicize the law. In other words, this data is likely not predictive of a permanent change in users behavior. With this caveat in mind, it must be acknowledged that the fight against digital piracy is becoming more effective, but the approach used to curb the problem remains extremely controversial and “crude.” The real effectiveness of the law will be tested and measured over time.

## V. CONCLUSION

This article addressed the complexity of balancing copyright interests and fundamental constitutional rights in the sphere of increasingly pervasive information technologies. It is no coincidence that in democratic countries, tension over new media and its potential principally revolves around the demarcation of a boundary between information control and the free flow of information. As emphasized above, communication technologies are not only an instrument for free expression, but also a way to access culture and enhance education.<sup>162</sup> With this understanding in mind, it is easy to realize that the consequences of the *Conseil constitutionnel's* opinion are of enormous importance not only on a national, but also on a transnational level. For the first time, the

---

<sup>160</sup> See *L'Hadopi veut envoyer jusqu'à 2000 mails par jour d'ici la fin de l'année*, LE MONDE, Oct. 26, 2010, [http://www.lemonde.fr/technologies/article/2010/10/26/la-hadopi-veut-envoyer-jusqu-a-2-000-mails-par-jour-d-ici-la-fin-de-l-annee\\_1431496\\_651865.html](http://www.lemonde.fr/technologies/article/2010/10/26/la-hadopi-veut-envoyer-jusqu-a-2-000-mails-par-jour-d-ici-la-fin-de-l-annee_1431496_651865.html); *La Hadopi n'envverrait que 2.000 emails par jour aux contrevenants*, LA TRIBUNE, <http://www.latribune.fr/technos-medias/internet/20101215trib000583188/la-hadopi-n-envverrait-que-2.000-emails-par-jour-auxcontrevenants.html> (last visited June 14, 2011).

<sup>161</sup> INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 18 (2011), <http://www.ifpi.org/content/library/DMR2011.pdf>.

<sup>162</sup> See Strowel, *supra* note 28, at 82.

constitutional principle of freedom of expression has been formally expanded to include Internet access as part of freedom of speech.<sup>163</sup> The rationale for this expansion is based on the idea that the right of each individual to access Internet network services is an essential ingredient in the freedom of communication and expression. In particular, the inability to access to Internet networks negatively affects other rights. While the *Conseil constitutionnel's* opinion recognizes the freedom to connect to the Internet, it does not imply that Internet access is a fundamental right. In other words, it is the constitutional guarantee of freedom of expression that includes a constitutional guarantee of Internet access. A prerequisite for the realization of the effective exercise of freedom of expression and access to information is uninhibited access to Internet network infrastructure. As a consequence, limitations on the right of Internet access can only be imposed under strict conditions (as is true of limitations imposed on other forms of expression and communication).<sup>164</sup>

The overall design of the HADOPI regulatory scheme and the consequent analysis carried out by the *Conseil constitutionnel* add significantly to the complex and lively international debate on the regulation of online information. Moreover, the *Conseil constitutionnel's* decision offers a paradigmatic example of the difficult balance between freedom of expression, constitutionally guaranteed rights, and the safeguarding of copyright in the digital context. In particular, this case brings to light the fundamental disorder introduced by new technologies and new media in the copyright context. The pervasiveness of digital platforms begs the

---

<sup>163</sup> In addition to France, Estonia and Finland have recognized that access to the Internet is a human right of their citizens. See Doris Estelle Long, *Three strikes and you are off the Internet*, CHICAGO DAILY LAW BULLETIN (Oct. 29, 2010), <http://www.jmls.edu/news/Long%20CDLB%2010%2010%2029.pdf>. For the Finnish approach, see Decree no. 732/2009 of the Ministry of Transport and Communications on the Minimum Rate of a Functional Internet Access as a Universal Service, Oct. 14, 2009, <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.pdf>. In Estonia, according to Section 33 of the Public Information Act, “[e]very person shall be afforded the opportunity to have free access to public information through the Internet in public libraries, pursuant to the procedure provided for in the Public Libraries Act (RT I 1998, 103, 1696; 2000, 92, 597).” See Public Information Act of Estonia, Nov. 15, 2000, as amended 2003, available at <http://www.legaltext.ee/text/en/X40095K4.htm>. More recently, the Constitutional Court of Costa Rica also declared Internet access to be a fundamental right. See *Andres Oviedo Guzman v. Ministerio de Ambiente, Energia y Telecomunicaciones*, Sentencia No. 2010-012790, July 30, 2010, Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [Constitutional Chamber of the Supreme Court] (Costa Rica), available at <http://bit.ly/9MyR81>.

<sup>164</sup> See Strowel, *supra* note 28, at 82.

question of whether an elaboration of new rights and constitutional liberties is required, or whether existing legal instruments can be adjusted to meet the demands of a new reality.<sup>165</sup> In this sense, the effect of HADOPI 1—originally envisioned as a new form of online information control designed to protect specific economic interests—seems to have been the unexpected consecration, in the era of “access,” of a “freedom of communication” which also comprises the right to the transmission medium.<sup>166</sup>

A final consideration is the possibility of implementing new control measures designed to prevent online copyright infringement at the international level. Can a “graduated response” or “three strikes” mechanism be effectively enforced? This is not simply a question about the possible legal implications of any such provision. Many commentators have observed that the current version of the French law (HADOPI 2) would be difficult to enforce not only because technology always offers a way to circumvent legal restrictions, but also because the law requires strong cooperation from Internet Service Providers who have traditionally served only as neutral intermediaries.<sup>167</sup>

Furthermore, since there are still so many open questions with regard to how the new regulatory framework will operate under HADOPI 2, a future third version of the statute seems possible.<sup>168</sup> The importance of the decision therefore rests on its potential future impact outside the borders of France. Accordingly, the

---

<sup>165</sup> See Marco Cuniberti, *La libertà della comunicazione nello scenario della convergenza*, in NUOVE TECNOLOGIE E LIBERTÀ DELLA COMUNICAZIONE 6 (Marco Cuniberti ed., 2008).

<sup>166</sup> *Id.* See Eur. Consult. Ass., Recommendation CM/Rec (2007) 16 of the Comm. of Ministers to Member States on Measures to Promote the Pub. Service Value of the Internet, 1010th Mtg. of Ministers' Deputies (2007), available at <https://wcd.coe.int/ViewDoc.jsp?id=1207291&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC7>; Eur. Consult. Ass., Declaration of the Comm. of Ministers on Network Neutrality, 1094th Mtg. of Ministers' Deputies (2010), available at <https://wcd.coe.int/ViewDoc.jsp?id=1678287&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

<sup>167</sup> See Anthony Bem, *La procédure d'Hadopi a été faite à la va-vite sans penser aux conséquences* [The Hadopi procedure was enacted rapidly without thinking of the consequences], LE MONDE, Oct. 8, 2010, [http://www.lemonde.fr/technologies/article/2010/10/08/la-procedure-d-hadopi-a-ete-faite-a-la-va-vite-sans-penser-aux-consequences\\_1422715\\_651865.html](http://www.lemonde.fr/technologies/article/2010/10/08/la-procedure-d-hadopi-a-ete-faite-a-la-va-vite-sans-penser-aux-consequences_1422715_651865.html). On the non-neutral role intermediaries can play in the prevention of copyright infringement, see generally Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375 (2009).

<sup>168</sup> See Lionel Costes, *Vers une “loi Hadopi 3”?* [Towards a Hadopi 3?], 54 REV. LAMY DR. L'IMMATÉRIEL 3 (2009).

*Conseil constitutionnel's* decision injects important considerations into the policy debate about information control versus the free flow of information.