

FRENCH REPUBLIC

Ministry of Culture
and Communication

GOVERNMENT BILL

promoting the dissemination and protection of creative works on the internet

EXPLANATORY MEMORANDUM

This bill seeks to halt the drain of cultural works on the internet and create a legal framework which is indispensable for a legal offer of music, films, audio-visual works and programmes and even literary works on the new communication networks. For this purpose, it creates a mainly educational measure which aims in practice to replace the criminal prosecution to which internet users infringing authors' rights currently expose themselves.

Currently, over one in two of the French population have access to a high-speed internet connection. More than simply a cultural phenomenon, it is a real turning point, which, for the dissemination of culture, constitutes an extraordinary opportunity, unprecedented since the invention of the printing press. Henceforward, it is thus possible with digital networks to create for the benefit of the consumer a real tool for distributing dematerialised goods, especially in the cultural field. However, this will only be possible if intellectual property rights are respected.

But at the same time, never have the conditions for creating these works been so much under threat. In 2006, a billion pirated musical and audio-visual works were illegally downloaded in France. This phenomenon has a deeply destabilising effect on the creative artistic economy which relies on production and promotion investment which is indispensable for the very existence of cultural diversity. Thus, the recorded music market has fallen by 50% in volume and in value during the last five years which is reflected by a serious impact both on employment in the production companies and on artistic creation and renewal, with the cancellation of many performers' contracts and a fall of 40% in the number of new performers "signed up" each year. Cinema and television are beginning to feel the first effects of this change in habits and books will probably quickly follow this trend.

Over and above the consequences this has on the traditional physical media, the culture of pirated works is, today, the main obstacle to the development of legal downloads in our country. Digital dematerialised sales of music, films and audio-visual programmes – which must take over from sales on physical media (CDs or DVDs) – remain much lower than in other developed countries with comparable consumer habits: scarcely greater than 7% of our music market whereas this rate is over 20% in the United States.

Pirating, apart from the harm it does to the artist and the company which supports him/her, particularly when this concerns small independent production companies, dissuades investment in distribution by skewing the conditions of competition.

However, the wealth of legal downloads on offer has greatly increased in the last few years. Several million musical records for example, are now available. The cost too for the consumer has fallen considerably, thanks especially to flat fee packages offered by the internet service providers.

It is thus the persistence of wide-scale illegal copying which now remains the main obstacle to the rapid expansion of legal downloads of films, television programmes or music on line and fair payment to artists and the cultural industries.

However, penalties against illegal downloading exist, on the basis of the criminal offence of infringement of copyright: a maximum fine of €300,000 and up to three years imprisonment. They appear inappropriate however, as does the legal procedure in the event of ordinary pirating. This is committed on a very wide scale by several million internet users, often unaware of the blameworthy nature of their actions. The interested parties thus hesitate to use the legal process open to them which, because of this, is used only very occasionally.

The fact remains that an internet user accused of illegal copying can today find himself in the criminal court. Processes of this kind would tend to multiply if the artists and companies which support them were to observe that the public authorities had given up implementing an alternative solution, both better adjusted to the challenge and more efficient – because feasible on a large scale.

As well as these criminal penalties, the law makes the subscriber responsible for monitoring his internet access. Indeed, article L. 335-12 of the intellectual property codes states that the subscriber must ensure that this access is not subject to a use which does not take into consideration literary or artistic copyright. However, although this provision is included in a chapter of the intellectual property code devoted to “criminal provisions”, no penalty currently accompanies non-respect of this responsibility.

This situation needs resolving, both dangerous for internet users and dramatic for the French cultural industries. On the one hand, this is even in the interest of internet users whose actions over time risk causing the sources of creativity and cultural diversity to dry up. On the other hand, this concerns the re-establishment of the balance, today in fact broken, between two basic rights: the artists' ownership rights and the right to the respect of the private life of internet users.

The method chosen for drafting this bill has drawn lessons from the past. It relies on the idea that the solutions implemented must be subject to a very wide consensus reached beforehand between all those who are involved in culture and in the internet. A mission was thus entrusted on 5th September 2007, to Denis Olivennes, president-managing director of 'FNAC' aimed at encouraging an agreement being reached between professionals of music, cinema and audiovisual industries and the internet service providers.

This method relies on an encouraging context in the sense that the interests of all the participants should tend to converge. Indeed, the internet service providers now wish to offer legally, through their most recent pricing packages, cultural works, and are therefore keen to dissuade illegal downloading. They wish to set themselves up as distributors and become honest players in the economy of this type of business. For their part, consumers wish to have quicker access to films and audiovisual works on digital networks – although the French media chronology sets a time period of seven and a half months after their release in cinemas – and they also wish to be able to play the digital music they buy legally on all types of equipment which some technical protection measures included in the works prevent. For their part, the artists and cultural industries have understood that they must improve the diversity, flexibility of use and price of their offer on digital networks.

The mission led to a large number of hearings which enabled the points of view of representatives of music, film, audiovisual, internet users and content deliverers to be taken into consideration. These hearings were followed by a round of negotiations, intentionally very fast, as the situation is urgent. The result of this process was a historic agreement, signed at the Elysée palace on 23rd November 2007 by forty-two companies or representative organisations (now numbering forty-six), which benefits artists as well as internet users and should make illegal copying a pointless risk.

This agreement is historic as it is the first time that the film, music and audiovisual sectors have agreed on the solutions for fighting against piracy and for improving the legal offer, and also the first time that a consensus has been created with the internet service providers. It demonstrates how complementary the activities of artistic creation and distribution are for maintaining cultural diversity. It is intended to be widened eventually to include sites where films and music are shared and exchanged and even to publishing.

The method and the provisions of the Elysée agreements have been closely watched abroad. Several countries in Europe (such as Great Britain) or from other continents (such as Canada or Japan) have already started negotiations of a similar nature, overseen by the public authorities which will step in when needed. The European Commission in its communication on creative content on line of 3rd January 2008 invited the digital network access and service providers, copyright holders and consumers to work together closely to fight against on line piracy and guarantee a wide ranging legal offer. It submitted for public consultation, open until the autumn to the economic players and Member states, a question regarding the appropriateness of imitating the French example.

The Elysée agreements are made up of two parts which cannot be separated.

On the one hand, the legal offer will be more easily accessible, more varied and more flexible. The record production companies have agreed to withdraw the technical protection measures from the French production of their catalogues. This means that a legally purchased piece of music can be played more easily on all types of equipment. Moreover, the time period for access to films by “video on demand” (VOD) services will be brought down to the same level as that for DVDs, i.e. six months after the film’s release to cinemas, as soon as the mechanism for prevention and fighting against piracy takes effect. Then discussions will take place resulting, within a year, in an overall revision of the exploitation sequence of the various media.

On the other hand, there is a completely different approach to the fight against mass piracy: it means making the consumer understand that henceforward internet, at the same time as its use for communication and exchange, is an efficient and modern tool for commercial distribution. It will therefore be mainly preventive and the possible penalty for disregarding literary and artistic property rights will no longer necessarily be set by a judge.

The situation at the moment means that when the companies who defend the interests of the copyright holders observe computer piracy, the only option open to them consists of taking court action based on the offence of infringement of copyright. This solution is not suited to mass piracy and the agreements provide for the setting up by the public authorities of an independent administrative authority responsible for guarding against and punishing piracy.

This authority will be the Authority for the regulation of technical measures, created at the Senate’s initiative in 2006 and with authority currently for ensuring the interoperability of technical protective measures and that using these measures does not interfere with the benefit of the exception for private copying. It will be renamed the High Authority for the dissemination of works and the protection of rights on the internet, to better reflect the new scope of its authority.

In its role of protecting works, cases of copyright infringement will be brought before it by legally accredited staff of professional associations combating piracy and companies for collecting and distributing royalties. It will begin by sending warning messages to those involved in piracy – called recommendations – by email then by registered letter with acknowledgement of receipt so that there is no doubt that the interested party is fully aware of the action of which he is accused. A preventive phase will therefore precede possible penalties, something the law has not allowed until now.

However, the preventive aspect is indispensable. Very recent research, carried out on internet users in Great Britain – a country which plans to set up a measure similar to that in France – and published in March 2008 in the magazine *Entertainment Media Research*, shows that 70% of internet users would stop downloading on receiving an initial warning message and 90% on receiving a second one. These estimates are consistent with the rates observed in the United States on digital networks where a solution of a similar order has already been set up following agreements made between copyright holders and internet service providers. A recent review has shown that 70% of internet users stop downloading as soon as they receive their first warning message and 85 to 90% on receiving their second one and 97% on receiving their third warning which may be in the form of – and it is the access provider who can choose – a registered letter or a telephone call. An IPSOS survey carried out in France in May 2008 shows that a measure of the same type could have a comparable preventive effect on French internet users with 90% of them stating that they would stop downloading illegally after receiving two warning messages.

The High Authority will then fix, under the control of a judge, an appropriate penalty in accordance with the type of action which requires stopping: a temporary suspension of the internet subscription accompanied by a ban on re-subscribing during the same period. In order to guarantee that the suspensive measures decided on are respected, the internet service providers will have to check when agreeing to any new contract, that the contracting party is not part of a list of people, managed by the High Authority, whose subscription has been suspended. The High Authority will be able to fine internet service providers not carrying out this check or not implementing the suspensive measures.

The High Authority will also be able, depending on the use –notably professional – made by the communication service, to resort to an alternative penalty by way of an injunction made against the subscriber to take measures of a kind to guard against renewing his failure to respect the law and to make him aware of this, if necessary, by periodic penalty payments. This measure may be subject to a publication at the subscriber's expense. Such a penalty is more especially aimed at companies and businesses in general, for which suspension of access to the internet could have disproportional consequences.

No part of this measure is based on the offence of copyright infringement, but on a monitoring obligation, already the responsibility of the internet subscriber by the current article L. 335-12 of the intellectual property code which will be reworked and henceforward accompanied by a penalty. The internet service subscriber will therefore be under the obligation to take care to ensure that access is not subject to use for a purpose which can damage literary and artistic property rights. A renewed failure to respect this monitoring obligation in the year following the receipt of a recommendation will result in the suspension of access for a period of three-months to one year, accompanied by a ban on subscribing for the same period to another contract with any another operator. The High Authority will however be able to offer the subscriber, by way of settlement, and accepted of his own accord a suspension of a shorter time period, of between one and three months. This aspect of compromise, which creates a dialogue between the High Authority and the subscriber, will highlight further the educational side of the mechanism. The requirement of the repeated nature of the failure to respect the monitoring obligation again highlights the progressive aspect of the mechanism: an initial failure could, in any circumstances, only give rise to a recommendation.

The access subscriber will be able to absolve himself from his responsibility by securing his computer using efficient systems which will be offered to him by his access provider. For this purpose, the High Authority will draw up a list of security systems considered as efficient to guard against a failure to respect the monitoring obligation. The access subscriber will also be able to cite force majeure as well as fraudulent access of a third party to his access to the communication service – except if this fraud were carried out by a person placed under his authority or his supervision.

To guarantee the proportionality of the damage done to the private life of internet users with regard to the dual objective of the safeguard of copyright and cultural creativity, the use of data relating to subscribers who have failed to respect the obligation provided for by article L. 336-3 is surrounded by many precautionary measures.

Thus referrals by the copyright holders will be dealt with by a copyright protection commission under the direction of senior judges, by civil servants whose approval will be preceded by administrative enquiries. Furthermore, consultation by the internet service providers of the list of suspended subscribers will be done in the form of a simple query about the presence of the contracting party's name. Moreover, although the law authorises the High Authority to implement automated processing for the requirements of managing its procedures and the list of suspended subscribers, the government will send to the National commission for data processing and freedoms, alongside the provisional decree in the State Council which will set out the procedures for applying the law on this point, a file of prerequisite formalities in accordance with article 30 of law no. 78-17 of 6th January 1978 relating to data processing, files and freedoms. Finally, the various decrees in the State Council about the procedural aspects will back up the guarantees which are included in the law.

The High Authority will also take on the role of a monitoring body, both in the field of illegal use of works but also regarding the respect, by the copyright holders of music, film and audiovisual media, of their commitments in the field of the legal offer which makes up one of the two parts of the Elysée agreements.

Lastly, the bill, in the spirit of the Elysée agreements, changes for greater efficiency and for the proper hearing of both parties within the procedure, the exercise by the legal authority of the competence, currently entrusted to the president of the high court by point 4 of article L. 332-1 of the intellectual property code, to take against technical intermediaries any measure necessary to stop or prevent the renewal of an infringement of copyright or to a similar right caused by the content of an on line communication service for the public.

The 1st article contains the provisions for coordination and carries out a redistribution of the articles of the intellectual property code which lists the current competences of the Authority for the regulation of technical measures.

Article 2 constitutes the central part of the bill. In chapter 1 of title III of book III of the first part of the intellectual property code, section 3, given over to the "High Authority for the dissemination of works and protection of rights on internet", the new name given to the Authority for the regulation of technical measures.

This section, which creates or rewrites articles L. 331-12 to 331-36 of the intellectual property code is divided into four sub-sections respectively allocated to competences, the composition and organisation of the High Authority (sub-section 1), its mission for the protection of works on the new networks (sub-section 2), its mission for monitoring the legal offer and the illegal use of these works (sub-section 3), finally, to its current mission of regulating and monitoring the field of technical protective measures and the identification of these same works and objects (sub-section 4).

Article L. 331-12 institutes the High Authority for the dissemination of works and the protection of rights on internet and confers on it the role of an independent administrative authority.

Article L. 331-13 lists the three missions of the High Authority: the protection of works on the new networks of communication, the monitoring of their illegal use and the development of the legal offer and regulation in the fields of technical protection measures and identification.

Article L. 331-14 henceforward distinguishes, within the High Authority, the board of the rights protection commission. Except by expression provision, the missions entrusted to the High Authority are exercised by the board. It is within the context of this general distribution of competences that the rights protection commission will be responsible for taking preventive measures and penalties for piracy, provided for in sub-section 2.

Article L. 331-15 details the composition of the board of the High Authority, which henceforward includes nine members, since to the five current members (a senior civil servant reporting to the Council of State and appointed by the vice-president of the Council of State, an advisor from the Appeal court appointed by the first president of the Appeal court, a judge of the Accounting Court appointed by the first president of the Accounting court, a member appointed by the president of the Academy of technologies, a member of the Superior council of literary and artistic property appointed by its president) four qualified persons are added, appointed by joint proposal of the ministers responsible for electronic communications, consumption and culture.

On the other hand, the board no longer provides for the presence with a consultative role of the president of the commission instituted by article L. 311-5 of the intellectual property code, the so-called “commission for private copying”. This change, aimed at strengthening the guarantees of objective impartiality presented by the board when it rules on the subject of the guarantee of the benefit of the exception for private copying, does not put any obstacle to it hearing, as required, the opinion of the president of the “private copying commission” to enlighten it on its choices.

In order to strengthen the independence and the impartiality of the High Authority, its president is appointed from among the three members of the board who are judges or have judicial roles.

Furthermore, the mandate of its members for a duration of three years is neither revocable nor renewable except if the length of service has not exceeded two years. In order to guarantee the permanence of the institution, its members are partly renewed every three years.

Article L. 331-16 entrusts the rights protection commission with the competence for implementing the mechanism of piracy prevention and penalties. Moreover, the composition of this commission is surrounded with all the necessary guarantees for ensuring the impartiality of its decisions and the respect for the private life of the internet users when the procedures are implemented. In fact it sets out that it will be exclusively made up of judges or civil servants with judicial roles, appointed by decree and whose mandates will be neither renewable nor revocable. It also states that being both a member of the board and a member of the rights protection commission are incompatible roles.

Article L. 331-17 restates, for the members of the board as for those of the rights protection commission, the essential part of the incompatibilities currently laid down in article L. 331-19. They are aimed at guaranteeing the independence of the High Authority with regard to music, film, works or audio-visual programmes production companies, or offering downloading services or sharing of works and objects protected by copyright or by related rights.

Article L. 331-18 reuses in part the provisions of the current article L. 331-20 relating to the services, rapporteurs, the budget and the monitoring of the expenses of the High Authority.

Article L. 331-19 provides for the decisions of the High Authority to be made by majority voting and that within the board – but not the rights protection commission – the president will have the casting vote in the event of a split vote.

Article L. 331-20 provides that referrals addressed to the rights protection commission will be exclusively received and dealt with by civil servants, especially duly authorised for this purpose. It provides a framework for and details the prerogatives of these civil servants regarding access to the documents required for carrying out the procedures.

Article L. 331-21 subjects these civil servants to professional secrecy, under pain of criminal penalties, provides that they may be subject to an administrative enquiry prior to their approval and subjects this enquiry to the respect of the ethical rules set out in a decree of the Council of State.

Sub-section 2, which includes articles L. 331-22 to L. 331-35, lists the competencies attributed to the High Authority within the framework of its mission of protecting creation on electronic communication networks.

Article L. 331-22 states that the rights protection commission cannot act on its own, but only by referral to it by legally accredited staff who are appointed, either by a professional association for combating piracy or by companies collecting and distributing royalties, or by the national cinematographic centre or by holders of exclusive rights on protected works. It can also act on the basis of information sent to it by the State prosecutor.

The commission cannot be referred to for facts going back more than six months and article L. 331-23 states that all the measures it takes will be limited to what is necessary for putting a stop to the failure to respect the obligation set out in article L. 336-3.

Articles L. 331-24 to L. 331-28 list the range of measures the commission has available to it for guarding against and stopping this failure.

When it is referred to with facts likely to constitute a failure to respect the law, the rights protection commission can first send to the subscriber, through his internet service provider, a recommendation by email, reminding him of the obligation set out in article L. 336-3 and warning him of the penalties he is exposing himself to in the event of a recurrence of the failure to respect the law. It can then, in the event of a recurrence, within six months of the facts likely to constitute a failure to respect the law, accompany this by sending a new recommendation by letter with acknowledgement of receipt. In order to guarantee the educational efficiency of the mechanism, the rights protection commission will make use of this ability in a systematic way, except for special circumstances.

The recommendations, which can be seen as simple reminders of the law, are not by themselves complaints. They cannot therefore be subject to legal recourse and their basis can only be challenged through an appeal directed against the ruling of a penalty.

The commission may, in the event of a recurrence of the failure to respect the law, in the year following the receipt of a recommendation, order the suspension of access to the service for a period of three months to one year accompanied by a ban on subscribing for the same period to another contract with any another operator. However, it may, instead of this penalty, offer the subscriber a settlement, which gives rise to the suspension of access to the service for a shorter time period, from one to three months. In the event of a refusal by the subscriber to the offer of a settlement or the non-execution of this, the commission may decide a suspension for a duration of three months to one year.

This suspension applies strictly and is limited to the access of public on line communication services. It does not concern – for example in the event of composite commercial offers including other types of services – telephone services or television. The suspension does not affect the payment of the price of the subscription to the provider of the service, since the latter must not bear the consequences of an action which is the subscriber's responsibility – who remains of course free to terminate his subscription, according to the cancellation procedures provided for in his contract.

The High Authority will also be able, depending on the use –notably professional – made by the communication service, to resort to an alternative penalty by way of an injunction made against the subscriber to take measures of a kind to guard against renewing his failure to respect the law and to make him aware of this, if necessary, by periodic penalty payments. This measure may be subject to a publication at the subscriber's expense. Such a penalty is more especially aimed at companies and businesses in general, for which suspension of access to the internet could have disproportional

consequences.

Penalties decided unilaterally by the commission may be subject to an appeal for their cancellation or revision before the legal judge. A decree fixes the jurisdictions competent to hear these appeals and a decree by the Council of State fixes the conditions in which these penalties can be subject to a deferment of their execution.

Article L. 331-29 provides that the internet service provider to which the rights protection commission notifies the settlement referred to in article L. 331-26 or the suspension referred to in article L. 331-25, must implement them within fifteen days, failure to do so leaving him open to a maximum financial penalty of €5,000 per observed failing, open to action for annulment or revision before the legal judge. A decree fixes the jurisdictions competent to hear these appeals and a decree by the Council of State fixes the conditions in which these penalties can be subject to a deferment of their execution.

Article L. 331-30 provides for the High Authority to draw up a list of security systems considered as efficient to guard against failing to respect the obligation referred to in article L. 336-3, about which the internet service providers inform their subscribers in application of the last paragraph introduced into point 1 of I of article 6 of law no. 2004-575 of 21st June 2004 for confidence in the digital economy by article 8 of this bill.

The purpose of article L. 331-31 is to ensure the effectiveness of the suspension measures ordered by the rights protection commission or accepted by subscribers within the context of proposed settlements by it. To this effect, it provides that the High Authority should draw up a national directory of persons for whom access to an on line public communication service has been suspended and makes the internet service providers responsible for checking when finalising any new contract whether the name of the contracting party is included in this directory.

In order to guarantee the protection of the private life of internet users, this consultation will be undertaken in the form of a simple query about the presence of the contracting party's name.

A service provider which does not comply with this obligation will be subject to a financial penalty of a maximum of €5,000 per observed failure, open to action for annulment or revision before the legal judge. A decree fixes the jurisdictions competent to hear these appeals and a decree by the Council of State fixes the conditions in which these penalties can be subject to a deferment of their execution.

Article L. 331-32 provides that in new contracts made with their subscribers, the internet service providers mention clearly and visibly the provisions of the intellectual property code which relate to the mechanism of recommendation and penalty.

Article L. 331-33 provides that the rights protection commission can preserve the technical data made available to it for the time required for it to exercise its powers entrusted to it and, at the latest, until the time when the penalty it has possibly decided on has completely expired.

Article L. 331-34 authorises the creation of automated processing of data of a personal nature the final purpose of which is the implementation by the rights protection commission of the mechanism of recommendation and of penalty as well as the national directory of persons for whom internet access has been suspended. A decree by the Council of State, taken after an opinion given by the National commission for data processing and freedoms, will fix the ways in which this article will be applied.

Article L. 331-35 provides that a decree by the Council of State should fix the rules applicable to the procedure and the investigation of the cases before the High Authority's board and the rights protection commission. As far as the competences currently exercised by the Authority for the regulation of technical measures are concerned, these are set out in decree no. 2007-510 of 4th April 2007 relating to the Authority for the regulation of technical measures instituted by article L.331-17 of

the intellectual property code which will therefore be completed to take account of the new competences of the board and of those attributed to the rights protection commission.

Article L. 331-36 provides for the publication by the High Authority of indicators in the field of the monitoring of the illegal use of protected works and objects and the development of the legal offer. This provision guarantees that the improvement in the legal offer, which was the subject of important commitments from the cultural industries who are parties to the agreements – in terms of timescales for making available to the general public, films, works and audiovisual programmes and the interoperability of music files – will be subject to close and impartial monitoring.

Article 3 of the bill creates, within section 3 of chapter I, title III of book III of the intellectual property code dedicated to the High Authority, a sub-section 4 which brings together the provisions which relate to the missions currently attributed to the Authority for the regulation of technical measures in the field of technical protection measures and the identification of protected works and objects.

Article 4 of the bill removes the current article L. 335-12 of the intellectual property code which puts the burden on a subscriber to the internet the obligation of ensuring that his access is not subject to a use which infringes literary and artistic copyright by coordinating this with the creation of a new article L. 336-3 which details the content of this obligation, provides it with a penalty and lists the clauses which dispense responsibility.

Article 5 of the bill changes, for greater efficiency and a strengthening of a hearing of both parties in the procedure, the exercise by the judicial authority of the competence currently entrusted to the president of the high court by point 4 of article L. 332-1 of the intellectual property code, to take, against any technical intermediaries, any measure required to stop or guard against the recurrence of an infringement of copyright or related right caused by the content of an on line public communication service.

In virtue of article L. 332-1 of the intellectual property code: “The president of the high court may (...), in the same form [injunctive relief], order: (...) 4. “The suspension, by any means, of the content of an on line public communication service infringing the copyright of the author, including ordering an end to the storage of this content, or if necessary, by ending the right of access. The time period in which the discharge or limitation of the effects of this measure may be requested by the applicant is fixed by the regulations”. This provision was introduced by law no. 2004-575 of 21st June 2004 for confidence in the digital economy, with the purpose of transposing into French law directive 2001/29/EC of the European Parliament and the Council of 22nd May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

The purpose of this action is however quite different from that of seizing counterfeit goods, which is both real and valid, to which the other provisions of article L. 332-1 are dedicated. The provisions of point 4 appear therefore to need improving in several respects.

Firstly, the nature of procedure which does not properly hear both parties quickly appeared inappropriate to the subject in question. A large part of the legal opinion moreover, very early on, considered that the use of interim rulings should be available.

Secondly, the insertion of this procedure within article L. 332-1 results in the obligation for the applicant to bring the case before the jurisdiction hearing the case in accordance with the conditions provided for by article L. 332-3: “A failure by the applicant to have the case heard by the competent jurisdiction within a time period set out by the regulations, may result in a discharge of this seizure being ordered at the request of the distrainee or garnishee by the president of the court, making a preliminary ruling”. Thus implementing the provisions of the directive through an action which uses the procedure of a seizure of counterfeit goods leads to pointless complications with regard to the real purpose of this action. The transposition in several other countries has moreover taken the form of an

interim action or an action with a hearing of both parties within a short time period. The most recent and most explicit example is that of the Belgian legislation.

Article 5 of the bill therefore replaces the current point 4 of article L. 332-1 of the intellectual property code with a solution of this kind. The procedure in the form of interim measures is appropriate insofar as it allows a hearing of both parties while ensuring the indispensable speed needed for dealing with the dissemination of protected works and objects on the internet. The removal of a subsequent procedure to the hearing is compensated from the point of view of guaranteeing the right to a fair trial by the fact that the mechanism henceforward hears both parties.

Article L. 336-2 which it is proposed will be introduced into the intellectual property code will replace the current article with the same number. Its provisions which originate in law no. 2006-961 of 1st August 2006 relative to copyright and related rights in the information society, provide for internet service providers periodically sending out messages of a general nature to make internet users aware of the consequences illegal copying has on artistic creation. The article however has not been applied due to the lack of an application decree, the signature of which was deferred when the Government began much more ambitious steps to send out personalised educational messages within the context of the implementation of the Elysée agreements.

Article 6 of the bill creates in the intellectual property code an article, L. 336-3, which sets out firstly, the basis of the mechanism of recommendation and penalty implemented by the rights protection commission. This is not the crime of counterfeiting – punishable before a criminal judge – but the obligation, for which the holder of an access to an on line communication service for the public has by the current article L. 335-12, to ensure that this access is not subject to a use which fails to respect literary or artistic copyright.

The second paragraph of article L. 336-3 accompanies this obligation with a penalty by providing for the fact for the subscriber to fail to respect this may give rise to a penalty under the conditions defined in article L. 331-25.

The following paragraphs provide dispensatory clauses. They set out that the responsibility of the access holder cannot be maintained when the access holder has implemented security systems defined in application of article L. 331-30. They also remove the subscriber's responsibility when a third-party has fraudulently gained access to the service, unless this person has been placed under the authority of the supervision of the subscriber. Finally, they provide for the case of force majeure.

Article 7 of the bill simply restates the mission of regulation and monitoring currently entrusted to the High Authority in the field of technical measures for protection and identification implemented by the creators of databases.

Article 8 modifies point 1 of I of article 6 of law no. 2004-575 of 21st June 2004 for confidence in the digital economy. Its purpose is to set out that the internet service providers should inform their subscribers of the existence of technical systems allowing them to guard against the fraudulent use of the internet access – technical systems of which the implementation will enable the title holder to use the dispensatory clause set out in article L. 336-3 of the intellectual property code. However, it does not impose on the internet service providers the obligation to propose such measures, unlike what is set out in the same article of the law of 21st June 2004 regarding the technical systems enabling the restriction of access to particular services or to select them (so-called “parental control”).

Article 9 modifies II of article L. 34-1 of the postal and electronic communications code in order to enable the High Authority to have the information required for carrying out its missions. This

provision at the moment sets out that the operators of electronic communication and notably internet service providers can, for the needs of research and to track criminal offences and for a maximum period of one year, suspend operations which may remove or make anonymous certain categories of technical data relating to the traffic. In its decision of 23rd May 2007, *SACEM and others*, the Council of State indicated that article 34-1 notably did not enable the sending of educational messages to the internet users which were not connected with proceedings for criminal offences.

Henceforward, this possibility will also be open for the requirement of the procedure undertaken before the High Authority for failure to respect the obligation set out in article L. 336-3.

Article 10 includes provisional measures required for the transformation of the Authority for the regulation of technical measures into the High Authority for the dissemination of works and the protection of rights on internet. It also sets out that a decree made by the Council of State provides the ways in which the obligations to which the internet service providers are subject in application of articles L. 331-29, L. 331-31 and L. 331-32 will come into effect, notably concerning already existing contracts.

Article 11 governs the ways the provisions of the bill are applied overseas.

It provides in I that its provisions are not applicable in French Polynesia in the absence of criminal content and not falling within the remit of any jurisdiction of the State in this territory. They will be applicable however in the islands of Wallis and Futuna and in New-Caledonia as well as, de jure, at Mayotte, at Saint-Barthélemy, at Saint-Martin, at Saint-Pierre-et-Miquelon and in the French Southern Territories and French Antarctic Territories.

II modifies article L. 811-1 of the intellectual property code in order to draw the conclusions of the laws no. 2007-223 and no. 2007-224 of 21st February 2007 which include the statutory and institutional provisions relating to the overseas territories. Indeed, since 1st January 2008, the provisions relating to intellectual property rights apply, de jure, at Mayotte and in the French Southern Territories and French Antarctic Territories (civil law applicable de jure). This concerns a simple adaptation on the basis of established law.

GOVERNMENT BILL

Article 2

In chapter 1 of title III of book III of the Intellectual Property Code, Section 3 shall be added and shall read as follows:

« Section 3

« *High Authority for the distribution of works and the protection of rights on the internet*

« Sub-section 1

« *Competences, composition and organisation*

«*Art. L. 331-12.* – The High Authority for the Distribution of Works and the Protection of Rights on the Internet is an independent administrative authority.

« *Art. L. 331-13.* – The High Authority shall undertake :

« 1 The task of protecting works and objects subject to copyright or to any similar rights as regards the infringements of these rights committed on electronic communication networks used for the provision of online public communication services;

« 2 The task of observing the legal supply and illegal use of these works and objects on electronic communication networks used for the provision of online public communication services ;

« 3 The task of regulating in the area of technical measures for the protection and identification of works and objects protected by copyright or other similar rights.

« *Art. L. 331-14.* – The High Authority shall be composed of a college and a Commission for the Protection of Rights.

« Unless otherwise specified, the tasks delegated to the High Authority shall be exercised by the college.

« In the exercise of its competence, the members of the college and of the Commission for the Protection of Rights shall receive no instruction from any other authority.

«*Art. L. 331-15.* – The college of the High Authority is composed of nine members, including the president, who shall be appointed by decree for a duration of six years:

« 1 A member of the Council of State designated by the vice president of the Council of State;

« 2 A councillor of the Court of Cassation designated by the first president of the Court of Cassation;

« 3 A master councillor of the Revenue Court designated by the first president of the Revenue Court;

« 4 A member designated by the president of the National Academy of Technologies of France, given its competencies in information technologies;

« 5 A member of the Higher Council on Literary and Artistic Property designated by the President of the Higher Council on Literary and Artistic Property;

« 6: Four qualified persons, designated by the joint proposal of ministers for Electronic Communications, Consumption and Culture.

« The president of the college shall be named from among the members mentioned under parts 1, 2 and 3 of this article.

« For members designated under parts 1 to 5 above, substitute members shall be designated under the same conditions.

« To constitute the High Authority, the president shall be appointed for six years. The length of the mandate of the eight other members shall be fixed, by the drawing of lots, at three years for four of the members and six years for the four others.

« The mandate received by members is not revocable. It is not renewable, except where it has not exceeded two years.

« Where a seat is vacated by a member of the college, this seat will pass to his/her replacement for the duration of the mandate remaining.

« *Art. L. 331-16.* – The Commission for the Protection of Rights is charged with undertaking the measures detailed in articles L. 33 1-24 to L. 33 1-29 and article L. 331-31.

« It shall be composed of three members, including the president, appointed for a duration of six years, by decree:

« 1 A member of the Council of State, designated by the vice-president of the Council of State;

« 2 A councillor of the Court of Cassation, designated by the first president of the Court of Cassation;

« 3 A councillor of the Revenue Court designated by the first president of the Revenue Court.

« Substitute members shall be named under the same conditions.

« To constitute the commission, the president shall be appointed for six years. The length of the mandate of the other members shall be fixed, by the drawing of lots, at three years for one member and six years for the other.

« The mandate received by members is not revocable. It is not renewable, except where it has not exceeded two years.

« Where a seat is vacated by a member of the Commission for the Protection of Rights, this seat shall pass to his/her replacement for the duration of the mandate remaining.

« The offices of member of the college and member of the Commission for the Protection of Rights are incompatible.

« *Art. L. 331-17.* – The office of member of the High Authority is incompatible with the office of director or salaried employee or former director or former employee of a company classified under title II of the current book or of any business carrying out activities in the production of phonograms or video-grams or offering download services for works or objects protected by copyrights or other similar rights.

« Members of the High Authority may not directly or indirectly hold any interest in any company undertaking any of the activities mentioned in the first paragraph.

« No member of the High Authority may participate in any deliberation concerning a business or company controlled, in the sense of article L. 223-16 of the commercial code, by a business in which he/she has, in the three years preceding deliberations, held any position or any mandate.

« *Art. L. 331-18.* – The High Authority shall have at its disposal the services placed under the authority of its secretary general.

« The reporters whose responsibility it shall be to prepare cases for judgement shall be appointed by the president.

« During the drafting of the yearly finance bill, the High Authority will propose the credits necessary for it to complete its tasks.

« The president shall present the accounts for the High Authority to the Revenue Court.

« *Art. L. 331-19.* – The decisions taken by the college and by the Commission for the Protection of Rights will be taken on the basis of a simple majority. Within the college, the president shall exercise a casting vote in cases there is no majority.

« *Art. L. 331-20.* – In order for the Commission for the Protection of Rights to exercise its competence, the High Authority shall have at its disposal public agents, specially authorised by the president of the High Authority under the conditions set by a decree from the Council of State.

« These agents shall receive submissions of cases to the Commission for the Protection of Rights under the conditions stipulated under article L.331-22. They shall proceed to examine the facts and establish the reality of the breach of obligations defined under article L. 336-3

« They may, for procedural necessity, obtain all documents, of any format, including data kept and processed by operators of electronic communications under article L. 34-1 of the Post Office and Telecommunications Code and the service providers mentioned in 1 and 2 of article 6 of law number 2004-575 passed on the 21st June 2004 on trust in the digital economy.

« They may also obtain copies of the documents mentioned in the preceding paragraph.

« They may obtain from electronic communications operators the identity, postal address, electronic address and telephone numbers of the holder of the subscription used for the reproduction, representation, publication or public communication of any protected works or objects without the consent of the bearers of the rights stipulated in books I and II when such consent is required.

« *Art. L. 331-21.* – The public agents mentioned in article L. 331-20 are required to maintain professional secrecy as regards facts, acts or information that they may be made aware of during the course of their duties, under the conditions stipulated in articles 226-13 and 413-10 of the penal code.

« Under the conditions stipulated by article 17-1 of law number 95-73 of the 21st January 1995 on the direction and planning of matters of security, the decision to authorise these agents shall be preceded by administrative enquiries to verify that their behaviour and not incompatible with the exercise of their roles and tasks.

« Agents must additionally fulfil the conditions of morality and observe the code of practice defined by the decrees of the Council of State.

« *Sub-section 2*

« *The task of protecting works and objects subject to
« copyright or other similar rights*

«Art. L. 331-22. – The Commission for the Protection of Rights will act upon the submissions of sworn agents designated by:

- « - regularly constituted professional interest organisations;
- « - Beneficiaries legitimately holding exclusive copyrights, as defined under the terms of book II, belonging to a producer of phonograms or video-grams;
- « - companies created for the collection and distribution of rights;
- « - the national centre for cinematography.

« The Commission for the Protection of Rights may also act on the basis of information transmitted to it by the state prosecutor.

« It may not accept submissions of facts more than six months old.

«Art. L. 331-23. – The measures taken by the Commission for the Protection of Rights are limited to that which is necessary to terminate a breach of obligations as defined under article L. 336-3.

«Art. L. 331-24. – When it is made aware of facts that may constitute a breach of the obligations defined under article L. 336-3, the Commission for the Protection for Rights may send to the subscriber, under its own seal and at its own expense, by electronic means or through the person offering access to the public online communication services who has concluded a contract with the subscriber, a recommendation reminding the user of the prescriptions of article L. 336-3, enjoining the user to respect this obligation and warning the user of the sanctions incurred in case of the breach reoccurring.

« In case of the reoccurrence, within six months from the recommendation stipulated in the paragraph above being sent, of facts constituting a breach of the obligations defined in article L. 336-3, the Commission may additionally send a new recommendation, by electronic means, by means of a registered letter or by any other means appropriate to establish the proof of the date of this recommendation being sent and that of its reception by the subscriber.

« The legitimacy of recommendations sent under the provisions of the current article may only be contested by the use of an appeal against a decision to hand down a sentence taken under the terms of article L. 331-25.

«Art. L. 331-25. – When it is established that the subscriber has disregarded the obligations defined under article L. 336-3 within one calendar year subsequent to the reception of the recommendation sent by the Commission under the conditions defined under article L. 331-24, the Commission may, after adversarial proceedings, pronounce, in accordance with the seriousness of the breach and of the use of access, one of the following sentences:

« 1 The suspension of access to the service for the duration of three months and a ban of the same duration on the subscriber subscribing to another contract pertaining to access to a public online communication service with any operator;

« 2 An injunction to take measures to prevent the renewal of the established breach and to give account to the High Authority, where necessary upon penalty.

« The commission may decide that the sentence mentioned in part 2 should be inserted into the publications, newspapers or formats it designates, the fees for which shall be payable by the person(s) punished.

« The sentences handed down in application of the current article may be subject to appeal by the parties concerned to legal jurisdictions for them to be annulled or overturned.

« A decree of the Council of State shall set the conditions under which these sentences may be suspended.

« A decree shall determine the competent jurisdiction to have jurisdiction over such appeals.

«*Art. L. 331-26.* – Before undertaking sentencing procedures under the conditions stipulated under article L. 331-25, the Commission for the Protection of Rights may propose to the liable subscriber a settlement. This may take one of the following forms:

« 1 A suspension of access to the service for a period of between one and three months and a ban from subscribing during the same period to any other contract involving access to a public online communication service with any operator;

« 2 An obligation to undertake measures to avoid a renewal of the breach.

«*Art. L. 331-27.* – Where the subscriber does not honour the terms of such an accepted settlement, the Commission may hand down one of the sentences stipulated under article L. 331-25.

«*Art. L. 331-28.* – The suspension of access mentioned in articles L. 331-25 and L. 331-26 shall not itself affect the payment of fees by the subscriber to their service provider.

« Fees resulting from any termination of any subscription in place during the period of suspension shall be payable by the subscriber.

« Suspension is only applicable to access to public online communication services. When this access service is bought as part of a composite commercial offer including other types of services, such as telephony or television, the decision to suspend the service does not apply to these other services.

«*Art. L. 331-29.* – When the sentence mentioned under article L. 331-25 or in article L. 331-27 or the settlement mentioned in article L. 331-26 includes a suspension of access by the subscriber, the Commission for the Protection of Rights shall notify the person who offers access to public online communication services having concluded a contract with the subscriber of this suspension and shall enjoin this person to put this suspension in place within fifteen days.

« If this person does not conform to the provisions of the injunction sent to them, the Commission for the Protection of Rights may, after adversarial proceedings, levy a financial penalty on the service provider of a maximum of 5,000€ per breach recorded.

« The sentences handed down in application of the current article may be subject to an appeal for them to be annulled or overturned to the legal jurisdictions by the parties concerned.

« A decree by the Council of State shall fix the conditions under which these sentences may be suspended.

« A decree shall determine the jurisdictions competent to hear such appeals.

« *Art. L. 331-30.* – The High Authority shall establish the list of security means accepted as effective in preventing the breaches of obligation mentioned in article L. 336-3.

« *Art. L. 331-31.* – The High Authority shall establish a national register of persons whose access to public online communication services is currently suspended, under the provisions of articles L. 331-25 to L. 331-27.

« The person who provides access to public online communication services shall verify, upon concluding any new contract for the provision of such service, whether the name of the other party is found on this register.

« If this person does not adhere to this obligation to consult the register, or if they conclude a contract with the party notwithstanding their appearance on the register, the Commission for the Protection of Rights may, after adversarial procedures, hand down to them a financial penalty of up to 5,000€ for each proven breach.

« Sentences handed down in application of the current article may be subject to appeal for them to be annulled or overturned to the legal jurisdictions by the parties concerned.

« A decree by the Council of State shall determine the conditions under which sentences may be suspended.

A decree shall determine the jurisdictions competent to hear these processes.

« *Art. L. 331-32.* – Persons offering access to public online communication services shall ensure that a note of the provisions of article L. 336-3 and such measures that may be taken by the Commission for the Protection of Rights in application of articles L. 331-24 and L. 331-31 appears on contracts concluded with their subscribers.

Art. L. 331-33. – The Commission for the Protection of Rights shall conserve all technical data at their disposal for the duration necessary for the exercise of the competences entrusted to them under the present sub-section and, at a later date, until such a moment as the suspension of subscription stipulated under these provisions has been entirely executed.

«*Art. L. 331-34.* – The High Authority is hereby authorised to create automated processing for personal data relating to persons subject to the procedures detailed in the current sub-section.

« This processing has as its aim the implementation, by the Commission for the Protection of Rights, of measures stipulated in the current sub-section and of all related procedures, as well as the national register of persons who access to a public online communication service has been suspended, notably making such information available to persons who provide access to public online communication systems as is necessary to carry out the verification stipulated under article L. 331-31.

« A decree by the Council of State, issued after advice from the National Commission of Computing and Freedoms, shall set the manner in which the current article shall be applied. It will stipulate:

« - the categories of data recorded and their duration for which they can be retained;

« - those authorised to receive communication of such data, notably persons who offer access to public online communication services;

« - the conditions under which persons concerned may exercise their right to access this data.

«*Art. L. 331-35.* – A decree by the Council of State shall set the rules applicable to the proceeding and preparation of cases before the college and Commission for the Protection of Rights of the High Authority.

« *Sub-section 3*

« *The task of observing the legal supply and illicit use of works and objects
protected by copyright or by other similar rights on the internet*

« *Art. L. 331-36.* – Within the remit of its task to observe the legal supply and the illicit use of works and objects protected by copyright or by other similar rights on public online communication networks, the High Authority shall publish indicators, the list of which shall be set by decree. »

Article 5

In chapter VI of book III of the Intellectual property Code, Article L. 336-2 is replaced with the following:

« *Art. L. 336-2.* – In case of a breach of copyright or other similar right occasioned by the contents of a public online communication service, the Tribunal de Grande Instance (High court), handing down as necessary summary judgements, may order, upon the request of the copyright holder of the works or objects protected, their legal representatives, companies involved in the collection and distribution of rights stipulated in article L. 321-1 or professional interest organisations as stipulated under article L. 331-1, any and all measures regarding the suspension or filtering of contents held to be in breach of copyright or other similar right, as well as all restrictions of access to these contents, against all persons being able to contribute to the remedying of this situation or able to contribute towards the avoidance of this breach being renewed. »

Article 6

Chapter VI of title III of book III of the Intellectual Property Code is hereby completed by article L. 336-3 as follows:

«*Art. L. 336-3.* – The holder of access to public online communication services is obliged to ensure that this access is not used for the reproduction, representation, publication or public communication of works or objects protected by copyright or other similar rights without the authorisation of the holders of such rights as stipulated in books I and II when such authorisation is required.

« The fact of the person holding access to public online communication services having failed to adhere to the obligation defined in the first paragraph may give rise to a sentence, under the conditions set out in article L. 331-25.

« The access holder may not be held liable in the following cases:

« 1 If the access holder has put in place the means of securing their access defined in application of article L. 331-30;

« 2 If the breach stipulated in the first paragraph is committed by a person who has fraudulently used the access to the public online communication service, unless this person was placed under the authority or surveillance of the access holder;

« 3 In cases of force majeure. »

CHAPTER II PROVISIONS MODIFYING LAW NUMBER 2004-575 DATED THE 21ST JUNE 2004 FOR TRUST IN THE DIGITAL ECONOMY

Article 8

Part 1 of article 6 of the law number 2004-575 dated 21st June 2004 for trust in the digital economy is completed by the following paragraph:

« Persons offering access to public online communication services shall also inform their subscribers of the existence of technical means allowing them to prevent the use of their access for the reproduction, representation, publication or public communication of works or objects protected without prior authorisation from the bearers of such rights as stipulated in books I and II of the Intellectual Property Code. »