

## Decision n° 2006-540 DC dated July 27<sup>th</sup> 2006

On July 7<sup>th</sup> 2006, the Constitutional Council received a referral, pursuant to indent 2, Article 61 of the Constitution, for review of the constitutionality of the Act pertaining to copyright and related rights in the information society, from Mr. Jean-Marc AYRAULT et al .....  
Deputies

### THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58 1057 of November 7<sup>th</sup> 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Treaties instituting the European Communities, in particular Article 234 thereof;

Having regard to Directive 2001/29/CE of the European Parliament and Council dated May 22<sup>nd</sup> 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;

Having regard to the Intellectual Property Code;

Having regard to Act n° 86-1067 of September 30<sup>th</sup> 1986 as amended pertaining to the freedom of communication;

Having regard to the observations of the Government registered on July 19<sup>th</sup> 2006;

Having regarding to the observations by way of rejoinder registered on July 21<sup>st</sup> 2006;

Having heard the Rapporteur;

1. The abovenamed parties have referred for review by the Constitutional Council the statute pertaining to copyright and related rights in the information society; they challenge the regularity of the parliamentary proceedings leading to the passing of this statute, and argue that Sections 1, 2, 3, 14, 16, 21, 22, 23, 24 and 44 thereof are unconstitutional :

- WITH RESPECT TO THE PARLIAMENTARY PROCEEDINGS LEADING TO THE PASSING OF THE STATUTE

2. The Members making the referral criticise the Government for having withdrawn Clause 1 from the Bill during its reading by the National Assembly, after the passing of various amendments, for the purpose of replacing it by an alternative provision via a fresh amendment containing a further clause; they consider that this manner of proceeding " substantially adversely affects the exercising of the right of Members of Parliament to amend draft legislation", they add that subsequent reintroduction of Clause 1 " without any constitutional or

regulatory grounds" , far from having removed this irregularity, "made it worse"; they also denounce a wrongful amendment of the text while under discussion by the Joint Committee; they argue that the parliamentary proceedings involved were thus vitiated in that the clarity and sincerity thereof had been adversely affected;

3. Firstly, any parliamentary assembly, when called upon to debate a Public Bill or Private Member's Bill, is always free not to vote in favour of a clause when the latter is put to the vote, including when this clause has already been the object of an amendment; however the withdrawal by the Government of a clause which had already been amended in order to replace this clause by a further clause is likely to adversely affect the effective exercising of the right of amendment guaranteed to all members of Parliament by the first indent of Article 44 of the Constitution, whereby " Members of Parliament and the Government shall have the right of amendment";

4. The withdrawal by the Government of clause 1 of the Bill, which was announced to the National Assembly during the sitting on March 6<sup>th</sup> 2006, was irregular;

5. This clause was however subsequently redrafted as amended prior to its withdrawal; this redrafting took place before the Members of Parliament passed any other provision of the text under debate; during the second sitting on March 9<sup>th</sup> 2006 the National Assembly successively voted on the remaining amendments of clause 1 of the Bill then once this clause had been voted upon and defeated, on the additional clause proposed by the Government; the previous irregularity had no effect on the sequence of voting; the manner of proceeding involved did not therefore vitiate the parliamentary proceedings;

6. Secondly, the additions or amendments made to the Bill by the Joint Committee which met on June 22<sup>nd</sup> 2006 were directly connected with the provisions remaining to be debated upon; hence the rule laid down by indent 2 of Article 45 of the Constitution whereby the Joint Committee is " required to propose a text on the provisions still under discussion";

7. It results from the foregoing that the complaints based on the irregularity of parliamentary proceedings should be dismissed

- WITH RESPECT TO THE NORMS APPLICABLE TO THE REVIEW OF THE CONTENTS OF A STATUTE

8. The Members making the referral argue that the disputed provisions adversely affect the intelligibility of the statute, infringe the principle of the legality of offences and punishments, the right of redress, the rights of the defence, the right to a fair trial, the principle of equality and the right to property; they also argue failure to comply with the terms of the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove;

- With respect to the objectives that the law be intelligible and accessible:

9. Parliament must exercise to the full the powers vested in it by the Constitution and in particular by Article 34; the full exercise of this power, together with the constitutional objective that the law be intelligible and accessible which derives from Articles 4, 5, 6 and 16 of the Declaration of the Rights of Man and the Citizen of 1789, place it under a duty to enact provisions which are sufficiently precise and unequivocal; protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to Courts of law or Administrative authorities to lay down rules which the Constitution provides should be the sole preserve of statute law;

- With respect to the principal of legality of offences and punishments:

10. Article 8 of the Declaration of the Rights of Man and the Citizen 1789 provides "The law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except under a law laid down and promulgated before the commission of the offence and applied in accordance with the law"; Article 34 of the Constitution provides " Statutes shall determine the rules pertaining to ...the determination of serious crimes and other indictable offences together with the penalties applicable thereto.." ; these provisions show that Parliament is required itself to determine the scope of the application of criminal law and to define crimes and indictable offences in sufficiently clear and precise terms; this requirement exists not only to ensure the absence of arbitrary decisions when inflicting penalties but also to avoid unnecessary harshness when seeking out offenders;

- With respect to the right of redress, the rights of the defence and the right to a fair trial

11. Under Article 16 of the Declaration of 1789 : " Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution"; this provision guarantees the right of persons concerned to effective redress, the right to a fair trial, together with the rights of the defence when a penalty designed act as a punishment is involved;"

- With respect to the principle of equality:

12. Article 6 of the Declaration of 1789 provides : " The law .. shall be the same for all, whether it protects or punishes..";

13. The principle of equality does not preclude Parliament from treating different situations in different ways, nor from derogating from the principle of equality in the general interest provided that in each case the resulting

difference of treatment is directly related to the purpose of the statute providing for such different treatment;

- With respect to the right to property :

14. The right to property appears in the list of the Rights of Man enshrined in Article 2 of the Declaration of 1789; Article 17 of the latter states that " Since the right to property is inviolable and sacred, no one shall be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and on condition that fair and prior compensation is given";

15. The purposes and conditions for exercising the right to property have since 1789 undergone changes in the form of an extension of the scope thereof to new fields; among the latter are to be found intellectual property rights and related rights in the information society.

- With respect to the obligations specific to a transposing statute

16. Title 1 of the statute referred for review is designed to transpose the abovementioned Directive of May 22<sup>nd</sup> 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;

17. Indent 1 of Article 88-1 of the Constitution provides : " The Republic shall participate in the European Communities and the European Union constituted by States which have freely chosen, under the Treaties that established them, to exercise some of their powers in common"; the transposition of a Community Directive into domestic law thus complies with a constitutional requirement;

18. The Constitutional Council, to which referral has been made in the conditions provided for by Article 61 of the Constitution for review of a statute designed to transpose a Community Directive into domestic law, is under a duty to comply with this requirement; the review it carries out to this end is however subject to a twofold limitation;

19. Firstly, the transposition of a Directive cannot run counter to an rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto;

20. Secondly, insofar as it is required to give a ruling before the promulgation of the statute in the time allotted by Article 61 of the Constitution, the Constitutional Council cannot request a preliminary ruling from the European Court of Justice under Article 234 of the Treaties setting up the European Communities; consequently it can only find a statutory provision unconstitutional under Article 88-1 of the Constitution if this provision is obviously incompatible with the Directive which it is intended to transpose; in all events it is incumbent upon national Courts of law, if need be, to refer a matter to the Court of Justice of the European Communities for a preliminary ruling;

21. Article 2 of the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove provides that " Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part :

- a) for authors, of their works;
- b) for performers, of fixations of their performances;
- c) for phonogram producers, of their phonograms;
- d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- e) for broadcasting organisations, of fixation of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite;

22. Article 3 (1) of the Directive, pertaining to the right of communication to the public of works of authors provides that " Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them";

23 Article 3(2) pertaining to the making available to the public of other subject-matter belonging to holders of related rights :

"Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them:

- a) for performers, of fixations of their performances;
- b) for phonogram producers, of their phonograms;
- c) for the producers of the first fixations of films, in respect of the original and copies of their films;
- d) for broadcasting organisations, of fixation of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite;

24. Article 5 of the Directive sets out a restricted list of exceptions which can be made to these exclusive rights, while subjecting such restrictions to the condition that they do not "conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder";

25. Article 6 of the Directive puts Member States under a duty to provide for " adequate legal protection against the circumvention of any effective technological

measures, which the person concerned carries out in the knowledge or with reasonable grounds to know that he or she is pursuing that objective"; indent 2 of this same Article provides that " Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which :

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures

26. With respect to the exception concerning the right of reproduction for private use, indent 4 of Article 6 of the Directive allows a member State to take appropriate measures to ensure that persons may avail themselves of these exceptions : "unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned .....without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions";

27. Indent 4 of Article 6 of the Directive adds " The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.";

28. The foregoing provisions thus show, firstly, that the abovementioned Directive of May 22<sup>nd</sup> 2001 does not run counter to any rule or principle inherent to the constitutional identity of France, and contains unconditional and precise provisions, in particular as regards indent 5 of Article 5;

29 Secondly, the provisions of the Directive, clarified by the explanatory provisions thereof, show that in order to foster creativity and ensure the harmonisation of exchanges of goods and cultural services throughout the European Union, Member States must protect holders of copyright and related rights;

30. The French statute transposing these provisions would therefore run counter to the constitutional requirement laid down in Article 88-1 of the Constitution if it were to adversely affect the prerogatives which the Directive recognises as being those of holders of copyright and related rights in matters of reproduction and communication to the public of their works and services; that

in such a case it would obviously fail to comply with the general objective which the Directive is designed to pursue and the unconditional provisions thereof;

31. The measures adopted by Parliament to cover firstly copyright and related rights and secondly the objective of "interoperability" cannot adversely affect the prerogatives of holders of copyright and related rights without failing to comply with the constitutional requirement of transposition; the same also applies to the measures laid down in the statute and designed to ensure the fair balance of rights and interests between the holders of copyright and related rights, on the one hand and the effective benefit of the exceptions concerning reproduction for private use on the other hand;

- WITH RESPECT TO SECTIONS 1, 2 AND 3

32. Sections 1, 2 and 3 of the statute referred for review modify Articles L 122-5, L 211-3 and L 342-3 of the Intellectual Property Code which list the exceptions to copyright, related rights and the rights of producers of data bases; the penultimate indent of Article L 122-5 and the final indents of Articles L 211-3 and L 342-3 specify that these exceptions must meet the requirement known as the "three stage test", namely, in addition to appearing in such a list, they must not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder;

33. The parties making the referral argue that Parliament has failed to respect the principle of the legality of punishments by requiring persons seeking to benefit from exceptions to these rights to prove, on pain of prosecution for infringement of copyright, that the incriminated use meets the "three stage test" requirement; they feel that this requirement is not precise and that it is impossible for a private individual to prove that these three conditions have been fulfilled;

34. Article 5 of the abovementioned Directive of May 22<sup>nd</sup> 2001, allows Member States to provide for certain specifically listed exceptions and limitations to the right of reproduction and communication to the public of works and other protected subject-matters ; in each of these specific cases indent 5 of this Article puts Member States under a duty to ensure that the benefit of such exceptions and limitations does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightholder;

35. The challenged provisions merely draw the necessary consequences from these unconditional and precise provisions upon which it is not the task of the Constitutional Council to make a ruling; hence the argument relied upon by the parties making the referral cannot usefully be raised before the Council;

36. Furthermore the principle of the "three stage test" has a general scope; it applies to all the limitations and exceptions affecting the exclusive rights of copyright and related rights as set out in the statute referred for review;

37. In particular, with respect to exceptions to exclusive rights of reproduction, the provisions of the section entitled "Technological measures for protection and information" inserted in the Intellectual Property Code by the statute referred for review, should be read as not prohibiting authors or holders of related rights from having recourse to technological protection measures limiting the benefit of the exception to a sole copy, or even precluding the making of copies in specific cases where such a solution is required by the need to ensure the normal exploitation of the work or to prevent an unjustified prejudice to the legitimate interests of the rightholder; any other interpretation would be obviously incompatible with respect for the principle of the "three stage test", upon which indent 5 of Article 5 of the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove makes the benefit of any exception to the exclusive rights of copyright and other related rights depend;

- WITH RESPECT TO SECTIONS 13 AND 14

38. Section 13 of the statute referred for review inserts an Article L 331-5 in the Intellectual Property Code; the fourth indent of the latter provides that "having due regard to copyright" .." technological measures must not result in preventing the effective implementation of interoperability" and that "providers of technological measures shall give access to information essential for interoperability in the conditions set forth in Articles L 331-6 and L 331-7";

39. Article 14 inserts in the Intellectual Property Code two Articles L 331-6 and L 331-7; these new Articles are designed to reconcile "interoperability" of materials and software on the one hand and recourse to technological measures designed to prevent or limit use of a work not authorised by the copyright holder or holder or a related right on the other hand; in particular indent 1 of the new Article L 331-7 provides that "any software editor, any manufacturer of technological systems and any service operator may, in the event of refusal of access to information essential for interoperability, request the Authority regulating technological protection measures to guarantee the interoperability of existing systems and services, while respecting the rights of the parties, and to obtain from the holder of the rights to the technological measure the information essential for such operability";

- With respect to respect for intellectual property rights :

40. The reference made to Section 13 to the respect for "copyright" should be read, in view of the context, as including respect for copyright related rights; with this qualification Section 13 is not obviously incompatible with the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove;

41. Section 14 states that the Authority regulating technological protection measures is vested with the task of guaranteeing the "interoperability" of existing systems and services " while respecting the rights of the parties"; this



provision should be read as applying both to copyright holders or holders of related rights having recourse to protective measures and to holders of rights in the technological protective measures themselves ; in the event of the latter refusing to communicate information essential for "interoperability" such communication will require payment of compensation; were this not the case, the provisions of Article 17 of the Declaration of 1789 whereby " Since the right the Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior compensation has been paid" would not be respected;

- With respect to the referral to the Authority regulating technological protection measures :

42. The parties making the referral argue that by restricting the possibility of referring a matter to the Authority regulating technological protection measures to software editors, technological systems manufacturers and service operators, Parliament has failed to respect the principle of equality and deprived holders of intellectual property rights and consumers of the right to effective redress;

43. Firstly, referring a matter to the Authority regulating technological protection measures is intended to obtain communication of technologically complex data which may be covered by provisions of industrial confidentiality; Parliament intended to restrict such referral to those people likely to make good use of the data thus obtained in order to facilitate the making of compatible systems; the resulting difference in treatment, which is directly connected with the ends to be achieved, is thus not unconstitutional;

44. Secondly, the challenged provisions do not adversely affect the right to redress of consumers or associations representing them or intellectual property rightholders; they may bring any actions needed to defend their rights before the courts of law with jurisdiction over such matters;

45. The foregoing thus shows that, with the qualifications set forth in reasons 40 and 41, Articles 13 and 14 are not unconstitutional;

- WITH RESPECT TO SECTION 16

46. Section 16 of the statute referred for review inserts into the Intellectual Property Code nine articles numbered L 331-8 to L331-6;

47. The first indent of Article L 331-8 provides that the benefit of exceptions for private use and the other exceptions provided for, in particular for teaching and research activities, libraries and disabled persons, is guaranteed by the provisions of the nine Articles referred to above; indent two thereof provides that the Authority regulating technological protection measures "shall ensure that the implementation of technological protection measures shall not deprive beneficiaries "of these exceptions"; the last indent thereof moreover provides to

this end that " subject to Articles L 331-9 to L 331-16, the Authority shall determine the manner for benefiting from the abovementioned exceptions and shall in particular fix the minimum number of copies authorised in the framework of the exception for reproduction for private use";

48. The first indent of Article L 331-9 provides : " Rightholders who have recourse to the technological protection measures... may require that a limit be placed on the number of copies. They shall however take all useful measures to ensure that the implementation of protection measures shall not deprive beneficiaries of the exceptions provided for in Article L 331-6 of their right to avail themselves of said exceptions; indent two goes on to add that " The provisions hereof may, to the extent that technology so permits, make the effective benefit of such exceptions dependent upon lawful access to a work or phonogram, video recording or programme and ensure that such exceptions do not unreasonably prejudice the legitimate interests of the rightholder in the work or other protected subject-matter";

49. The parties making the referral for review put forward three grounds for complaint as regards Section 16 : firstly that it is unintelligible, particularly as regards the reconciliation between the exception covering copies for private use and the prerogatives of rightholders; secondly that the statute has not sufficiently specified "the criteria for and means of checking and proving that a copy made in the private sphere has not been made through lawful access to the work involved" and that such uncertainty would be a source of legal insecurity for users and incompatible with the principles of respect for privacy and the rights of the defence; thirdly that if rightholders are given the possibility of restricting copies for private use, the statute does not specify the effects of such a decision on the sharing out of the payment for making copies for private use; this would lead to a "unjustified infringement of equality between rightholders, in that those who do not limit the number of copies would bear the consequences of the drop in remuneration resulting from the global use of this possibility" ;

50. Firstly, Parliament has expressly indicated in the final indent of Article 331-8 that if the Authority regulating technological protection measures determines the manner in which exceptions to copyright and related right can be availed of and fixes the minimum number of authorised copies, this can only be done " subject to Articles L 331-9 to L 331-16"; Parliament thus intended, as clearly emerges from Parliamentary debate, to leave it up to rightholders to take the necessary steps to reconcile technological protection measures and the exceptions provided for; consequently the Authority regulating technological protection measures may only fix a minimum number of copies after the lapse of a reasonable period of time during which rightholders may, in accordance with indent 1 of Article L 331-9, take all necessary steps to ensure that technological protection measures do not prevent beneficiaries of these exceptions from availing themselves of the same; Article L 331-9 guarantees rightholders, by these technological protection measures, the possibility of limiting the number of copies they are willing to authorise; subject to these qualifications Parliament

has defined in a sufficiently precise manner the rules governing the reconciliation of technological protection measures and exceptions to copyright and related rights and hence has not failed to comply with Article 34 of the Constitution nor the constitutional requirement that the law be intelligible; neither has it obviously failed to respect the provisions of indent 4 of Article 6 of the abovementioned Directive of May 22<sup>nd</sup> 2001;

51. Secondly, Parliament was at liberty to make the effective benefit of exceptions dependent upon "lawful access" to the work, phonogram, video recording or programme, and upon respect for the legitimate interests of rightholders; contrary to what is argued by the parties making the referral for review, the provisions made to this effect will not compel beneficiaries of these exceptions to decide for themselves whether their access has been lawful or unlawful; when indicating in the second indent of Article L 331-9 that it is " to the extent to which technology so permits" that the benefit of exceptions may be made dependent upon lawful access, Parliament merely authorised the use of devices aimed at and resulting in making unlawful access technologically impossible; hence the arguments based on an infringement of the right to privacy and the rights of the defence are not supported by the facts; the argument based on Parliament's failing to exercise its powers fully is also dismissed;

52. Thirdly, the provisions involved cannot be challenged for not having provided for the effects of resorting to technical protection measures on the apportionment of payment for copies intended for private use; the final indent of Article L 311-4 of the Intellectual Property Code, as drafted pursuant to Section 9 of the statute referred for review, provides that the amount of payment for making copies for private use " shall take into account the degree of utilisation of the technological measures as defined in Article L 331-5 and their effect on the uses coming under the exception covering copies made for private use"; hence the argument based on an infringement of the principle of equality between rightholders is to be dismissed;

53. As is shown by the foregoing, with the qualifications set out in paragraph 50, the challenges to Section 16 of the statute are dismissed;

- WITH RESPECT TO SECTION 21;

54. Section 21 of the statute referred for review inserts in the Intellectual Property Code Article L 335-2-1 worded as follows : " Whosoever shall 1° edit, make available to the public or communicate to the public, knowingly and in any form whatsoever, software obviously designed to make available to the public without authorisation protected works or other subject-matter; 2° Knowingly encourage others to use software as described in 1° hereinabove, including by advertising the same, shall upon conviction be sentenced to a term of three years' imprisonment and a fine of 300 000€. The provisions hereof shall not apply to

software designed for work in collaboration, research or the exchange of files or subject-matter not subject to payment of copyright ";

55. The parties making the referral argue that the terms "knowingly" " obviously designed" and " work in collaboration" are not precise and thus infringe the principle of legality of offences and punishments; they add that by focusing solely on " subject-matter and files not subject to payment of copyright" the clause exonerating from criminal liability introduces a discrimination which infringes on the moral rights of authors who have waived payment, and also on related rights;

56. The terms "obviously designed" and "knowingly" are sufficiently clear and precise for the criminal law provisions which refer to them to respect the constitutional principle of legality of offences and punishments;

57. However, the same does not hold good for the concept of " work in collaboration"; furthermore the final indent of Article 21 of the statute referred, which exonerates from all criminal liability editors of software designed for "work in collaboration" or the exchanging of files or subject-matter not subject to payment of copyright, neither assists in delimiting the scope of the offence as defined in the first three indents of this article, nor gives an exhaustive list of actions which are necessarily excluded; lastly it does not ensure any protection under criminal law of the moral rights of authors who have waived payment, together with holders of related rights; it therefore infringes the principle of the legality of offences and punishments and the principle of equality, and thus is unconstitutional;

- WITH RESPECT TO ARTICLES 22 AND 23:

58. Sections 22 and 23 of the statute referred for review insert in the Intellectual Property Code Articles L 335-3-1 and L 335-4-1 and Articles L 335-3-2 and L 335-4-2; the first two of these Articles specify which acts adversely affecting technological protection measures designed to prevent or limit uses of a work, other than software, of a performance, a phonogram, a video recording or a programme not authorised by a copyright holder or holder of related rights are of a criminal nature; the two other Articles punish alterations of information concerning a system of copyright or related rights and the dissemination of protected subject-matter of which a component has been altered; some of these acts are not punishable if they are committed for purposes of "research"; the eighth and last indent of Articles 22 and 23 provide that these provisions shall not apply to acts done for the purposes of "interoperability";

59. The parties making the referral criticise Parliament for having infringed the principle of legality of offences and punishments by failing to define the concept of "interoperability", despite having made the latter a ground for exoneration of criminal liability;

60. Parliament has made "operability" an element which conditions the scope of criminal law; it should therefore define in clear and precise terms the meaning which it imparts to this concept in this particular context; by failing to do so it has infringed the principle of legality of offences and punishments;

61. The words "of interoperability or" found in indent 8 of Section 22 and the 8<sup>th</sup> and final indent of Section 23 and the words "of interoperability" found in the final indent of Article 22 are thus held to be unconstitutional;

62. Furthermore, in accordance with paragraph 48 of the abovementioned Directive of May 22<sup>nd</sup> 2001 and parliamentary debate, the grounds for exoneration provided for to the benefit of "research" by the new Articles L 335-3-1, L.335-3-2, L 335-4-1 and L 335-4-2 of the Intellectual Property Code should be taken to include scientific research in cryptography on condition that the latter does not prejudice rightholders;

- WITH RESPECT TO ARTICLE 24:

63. Article 24 of the statute referred for review inserts into the Intellectual Property Code Article 335-11 which is intended to remove certain acts from the provisions applicable to the offences of infringement of copyright in the fields of intellectual and artistic property; it provides that henceforth certain acts will cease to be indictable offences or felonies and become summary offences or misdemeanours : firstly "unauthorised reproduction for personal purposes of a work, a performance, a phonogram, a video recording, or a programme protected by copyright or a related right" when the latter have been "made available to the public through a peer to peer software exchange"; secondly " communication to the public for non commercial purposes" of such subject-matter " by way of an on-line service of communication to the public when such communication is an automatic and secondary consequence of their reproduction" through peer to peer software exchange;

64. The parties making the referral argue that this provision infringes the principle of equality before criminal law by introducing an unjustified difference in treatment between persons who reproduce or communicate subject-matter protected by copyright or related rights depending on whether they use peer to peer software or other forms of electronic communication; they also criticise Parliament for having infringed the principle of legality of offences and punishments; lastly they argue that the statute contains no provisions pertaining to the means of evidence needed to prove the commission of these offences and that Parliament has failed to fully exercise the powers vested in it;

65. As regards the prejudice caused to holders of copyright or related rights, natural persons who, for personal purposes, reproduce or communicate to the public protected subject-matter covered by such rights are placed on the same footing irrespective of whether they use peer to peer software or other public on-line communication services; the particularities of peer to peer exchange

networks are not such as to justify the difference in treatment which the challenged provision introduces; hence Section 24 of the statute deferred for review infringes the principle of equality before criminal law; hence, without it being necessary to examine the other arguments raised, this Section must be held to be unconstitutional ;

- AS TO ARTICLE 44

66. Section 44 of the statute referred for review completes the final indent of II of Section 40 of the Act of September 30<sup>th</sup> 1986 referred to hereinabove by two sentences worded as follows : "However, by derogation to Article L 212-3 and L 212-4 of the Intellectual Property Code, the conditions of the exploitation of the services of performers of the archives mentioned herein and the payment to which this exploitation gives rise are governed by agreements entered into by the performers themselves or by organisations representing the performers and the Institute. These agreements should in particular specify the payment scale and the means whereby these payments are to be made;

67. The parties making the referral consider that no general interest justifies the adverse effect which this provision has on the right to property of performers by giving employee organisations the exclusive power to authorise, prohibit and lay down the conditions in which the services of these performers are to be exploited; they argue that the introduction of an exception in favour of the National Audiovisual Institute would lead to discrimination to the prejudice of other establishments pursuing the same objectives of general interest in keeping and disseminating documentary collections; that Parliament did not use its powers to the full when enacting the challenged provision; lastly that Parliament failed to comply with the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove;

68. Firstly, the very terms of Section 44 of the statute referred for review show that the argument that this Section would give organisations representing performers exclusive power to determine the conditions of payment of monies these performers in connection with the exploitation of the archives of the National Audiovisual Institute is not supported by the facts;

69. Secondly, under Article 34 of the Constitution, the law determines the fundamental principles of the regime governing ownership, rights in rem and civil and commercial obligations;

70. Under Section 49 of the Act of September 30<sup>th</sup> 1986 referred to hereinabove, "The National Audiovisual Institute, a public establishment of the State of an industrial and commercial nature, is responsible for conserving and enhancing the national audiovisual heritage. I – The Institute ensures the conservation of the audiovisual archives of national television programme companies and assists in the exploitation thereof..."

71. In view of the general interest in conserving and enhancing the national audiovisual heritage, Parliament was at liberty to provide for a system of derogation with respect to the exploitation of performers' services to the benefit of the National Audiovisual Institute; because of the tasks vested in it by statute, some of which are of an exclusive nature, this public establishment is in a different position from that of other public bodies also contributing to the conservation of audiovisual works; in particular, Parliament could empower Unions representing performers to enter into agreements with the Institute fixing the conditions in which the archives would be exploited in return for payment of fair compensation; by doing this it infringed neither the principle of equality nor the right of performers to intellectual property, nor Article 34 of the Constitution;

72. Lastly, contrary to the claims made by the parties making the referral, Section 44 which appears in Book IV of the statute referred for review concerning the depositing of duty copies of books is not intended to transpose the Directive of May 22<sup>nd</sup> 2001 referred to hereinabove;

73. In view of the foregoing, the arguments raised against Section 44 are to be dismissed;

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

### **HELD**

Article 1 : The following provisions of the statute on copyright and related rights in the information society are unconstitutional :

- the final indent of Section 21
- the words "of interoperability or" found in the eighth indent of Section 22 together with the words "of interoperability" found in the final indent of the same Section;
- the words "of interoperability" found in the eighth and final indents of Section 23;
- Section 24

Article 2 : The following provisions of the statute on copyright and related rights in the information society are not unconstitutional:

- the penultimate indent of Articles L 122-5 and the last indents of Articles L 211-3 and L 342-3 of the Intellectual Property Code as worded on the basis of Sections 1 and 3 of the said statute;
- the rest of Section 21;
- with the qualification made in paragraph 62, the rest of Sections 22 and 23;

- with the qualifications made in paragraphs 37, 40, 41 and 50, Sections 13, 14 and 16
- Section 44

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

Deliberated by the Constitutional Council sitting on July 27<sup>th</sup> 2006 composed of Messrs and Mesdames Pierre MAZEAUD, President, Jean-Claude COLLIARD, Olivier DUTHEILLET de LAMOTHE, Jacqueline de GUILLENCHMIDT, Pierre JOXE, Jean-Louis PEZANT, Dominique SCHNAPPER, Pierre STEINMETZ and Simone VEIL.