

Deliberation 2021-147 of December 9, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation: Opinion

Legal status: In force Date of publication on Légifrance: Friday December 31, 2021 NOR: CNIX2138936V Deliberation n° 2021-147 of December 9, 2021 providing an opinion on a draft decree amending decree no. 2010-236 of March 5, 2010 relating to the automated processing of personal data authorized by article L. 331-29 of the intellectual property code called "System of management of measures for the protection works on the Internet" (request for opinion no. 21019536) The National Commission for Computing and Liberties,

Seizure by the Ministry of Culture of a request for an opinion concerning a draft decree amending decree no. 2010-236 of March 5, 2010 relating to the automated processing of personal data authorized by article L. 331-29 of the intellectual property code called System of management of measures for the protection of works on the Internet;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter GDPR);

Having regard to the Intellectual Property Code, in particular its article L. 331-29;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms;

Having regard to Law No. 2021-1382 of October 25, 2021 relating to the regulation and protection of access to cultural works in the digital age;

Having regard to Decree No. 2010-236 of March 5, 2010 relating to the automated processing of personal data authorized by Article L. 331-29 of the Intellectual Property Code, referred to as the System for managing measures for the protection of works on the Internet ;After hearing the report of Ms. Aminata NIAKATÉ, commissioner, and the observations of Mr. Benjamin TOUZANNE, government commissioner,Being reminded of the following contextual elements:Law n° 2009-669 of June 12, 2009 promoting the dissemination and protection of creation on the Internet led to the creation of the High Authority for the dissemination of works and the protection of rights on the Internet (HADOPI).

It is the rights protection commission, within the HADOPI, which implements the so-called graduated response procedure: it is responsible for sending the Internet subscribers concerned a recommendation when it receives information likely to constitute a breach of the obligation imposed on any subscriber to ensure the lawful use of his Internet access. In the event of a recurrence within six months, a new recommendation is sent.

To this end, HADOPI is authorized, under the terms of Article L. 331-29 of the Intellectual Property Code, to create an automated processing of personal data relating to the persons subject to the procedure of the graduated response.

Decree No. 2010-236 of March 5, 2010 thus sets the terms of application of this automated processing called the System for managing measures for the protection of works on the Internet and provides for its implementation by the rights protection commission.

The Commission notes that several associations have asked the Council of State to repeal this decree. By decision n° 433539 of July 5, 2021, the Council of State considered that the applicants are not justified in maintaining that the decree is deprived of a legal basis. It has, however, suspended ruling until the Court of Justice of the European Union has ruled on the point of knowing, in particular, whether the European directive of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector requires HADOPI to obtain, before any request for personal data from Internet access providers, the authorization of a court or an independent administrative entity.

Law n° 2021-1382 of October 25, 2021 relating to the regulation and protection of access to cultural works in the digital era created the Regulatory Authority for Audiovisual and Digital Communication (ARCOM), a merger of the Higher Audiovisual Council (CSA) and HADOPI.

The disappearance of HADOPI and the creation of ARCOM as of January 1, 2022 has consequences in particular for the implementation of the graduated response procedure. It is in this context that the Ministry of Culture has asked the Commission for an opinion on a draft decree amending decree no. 2010-236 of March 5, 2010. Issues the following opinion on:

L general economy of the draft decree: On taking into account a new method of referral to ARCOM: Article 1 of the law of October 25, 2021 provides for a new method of referral to ARCOM on the basis of a bailiff's report drawn up at the request of a beneficiary.

Consequently, Article 9 of the draft decree provides that personal data and information from bailiff's reports may henceforth be recorded (in addition to data from regularly constituted professional defense bodies, collective management bodies, from the National Center for Cinema and the Moving Image as well as those from the public prosecutor). of March 5, 2010: In view of the six-month extension of the time limit for referral to ARCOM by the public prosecutor, article 4 of the draft decree provides for extending the time limits for erasing data that pass of :

- fourteen to twenty months, after the date of the sending of a recommendation provided for in the first paragraph of Article L.

331-25 of the Intellectual Property Code in the event that no action has been taken within this period, the presentation to the same subscriber of a new recommendation provided for in the second paragraph of the same article;

- twenty-one to twenty-seven months, after the date of presentation of the letter delivered against signature or of any other appropriate means to establish proof of the date of presentation of the recommendation provided for in the second paragraph of Article L. 331 -25 of the Intellectual Property Code if the Rights Protection Commission has not transmitted to the territorially competent public prosecutor's office a procedure pursuant to Article R. 331-43 of the Intellectual Property Code. Article 4 of the draft decree also provides for extending the period for erasing data by one year after the transmission of the files by ARCOM to the public prosecutor, due to the processing time of the procedures by the judicial authority. clarifications provided by the Ministry, the Commission considers that the data collected are kept for a period that does not exceed the period necessary taking into account the purposes for which they are collected and processed, in accordance with Article e 5-1-e of the GDPR. On the addition of the source port among the data that can be recorded Article 9 of the draft decree aims to add the source port among the data that can be recorded by ARCOM in the processing System of management of measures for the protection of works on the Internet .

The Commission had already received a request for an opinion on a draft decree aimed at adding the source port among the data that can be recorded by HADOPI in the processing of the graduated response procedure. In the context of its deliberation no. 2020-132 of December 17, 2020, it considered that this was a technical adaptation allowing the operation of the graduated response procedure. On the removal of the possibility of recording the personal data and information relating to the subscriber collected from the service providers mentioned in 1 and 2 of I of article 6 of the law of June 21, 2004 on confidence in the digital economy (LCEN): The draft decree eliminates the possibility of recording subscriber data collected from the service providers mentioned by the LCEN.

The Commission notes that this amendment results from Decision No. 2020-841 QPC of May 20, 2020 of the Constitutional Council, which notably found the third paragraph of Article L. 331-21 of the Intellectual Property Code to be unconstitutional. made it possible to obtain all documents, whatever the medium, including the data stored and processed by [...] the service providers mentioned in 1 and 2 of I of Article 6 of Law No. 2004-575 of June 21, 2004 for confidence in the digital economy.

The conditions for implementing processing: Article 1 of Decree No. 2010-236 of March 5, 2010 is amended to provide that the ARCOM member designated application of IV of article 4 of law n° 86-1067 of September 30, 1986 relating to the freedom of

communication implements the System of management of the measures for the protection of works on Internet instead of the commission of protection of the rights of HADOPI.

This modification results from law n° 2021-1382 of October 25, 2021 which provides that ARCOM appoints, outside their presence, one of the two active members of the Council of State and the Court of Cassation, who exercises, during the first half of his mandate, the graduated response mission. The other member, who replaces him in the exercise of this mission, succeeds him to exercise this mission during the second part of his mandate.

The Commission notes that under the terms of Article L. 331-23 of the Intellectual Property Code, in its wording resulting from Law No. 2021-1382 of October 25, 2021, ARCOM is authorized to create the processing. It also emphasizes that the legislator has entrusted ARCOM with the mission of protecting works and objects to which copyright and/or related rights are attached.

Pursuant to Article L. 331-12 of the Intellectual Property Code in its version in force from January 1, 2022, it is in particular ARCOM's responsibility to take any measure likely to remedy copyright infringements. and neighboring rights.

In view of these elements, it appears that ARCOM alone determines the purposes and means of the processing necessary to ensure the graduated response mechanism, governed by the law of October 25, 2021 and the decree of March 5, 2010.

The Commission recalls that the conditions for implementing a processing operation are not to be confused with the determination of its purposes and its means. Thus, the fact that the System for managing measures for the protection of works on the Internet is implemented by a member of ARCOM, and that the right of access is exercised with him, does not modify the quality of manager processing of ARCOM within the meaning of Article 4 of the GDPR. The President,

M. L. Denis