[FR] Soundtrack of an Audiovisual Work Comprises Pre-existing Music

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The question of the scope of legal licence, i.e. cases where the use of a commercial phonogram does not require the authorisation of the producer and the performer, is currently under debate before a number of courts in France. These cases are listed in Article L 214-1 of the French Intellectual Property Code (CPI), which states that «where a phonogram has been published for commercial purposes, the performer and the producer may not object to: 1. its direct communication in a public place, as long as it is not used as part of a show, or 2. its broadcast or the simultaneous distribution in full of such broadcast by cable». In such cases, the user pays a certain sum to a collection society, which then pays half the sum to the producer of the phonogram and half to the performer. Theoretically, other uses of commercial phonograms require the prior authorisation of the producer, under Article L 213-1 of the CPI. However, some broadcasters claim that the definition of a «broadcast» enables them to make free use of phonograms to provide the soundtrack of the audio-visual works they produce. This is the background to the dispute between the broadcaster France 2 and the EMI Records company, which produces phonograms; the television channel had reproduced, without the production company's authorisation, the recording of the song All you need is love on the soundtrack for the credits of a programme it was producing. The Court of Appeal in Paris, to which the case was referred, was clear in its refusal on 26 October of the claims of France 2, thereby upholding the judgment handed down when the case was first heard by the regional court of Paris on 7 September 1998. The court held that the reproduction of a commercial phonogram prior to its broadcasting did not fall within the scope of the legal licence instituted by Article L 214-1 of the CPI. In support of its claims, the broadcasting company referred in particular to Article 12 of the 1961 Rome Convention and Article 8 of the European directive of 19 November 1992 on rental and lending rights. The Court concurred that, according to these texts, the use for broadcasting purposes of a reproduction of a commercial phonogram gives the entitlement to a fair, single sum in remuneration. These texts could not, however, be used to cancel the requirement of prior authorisation from the producer of the phonogram, whose exclusive right in respect of reproduction is recognised by Article 10 of the Rome Convention (according to which the producers of phonograms enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms).

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The Court of Appeal went one step further and categorised the disputed credits as a video. Thus France 2 effected neither a «broadcast» nor a «direct communication in a public place» within the meaning of Article 214 of the CPI, but a communication to the public of the reproduction of the phonogram by means of a video which included this reproduction. For having failed to apply to the producer of the phonogram for authorisation before firstly reproducing this, and secondly broadcasting the disputed credits, France 2 was ordered to pay the producer FRF 150 000 in damages.

Cour d'appel de Paris (1re ch., section A), 26 octobre 1999 S.A. France 2 Société nationale de télévision France 2 c/ Société Emi records LTD UK.

Court of Appeal of Paris (1st chamber, section A), 26 October 1999 S.A. France 2 (national television company) v. the company EMI Records Ltd, UK.

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