[FR] Television Trailers Constitute Advertising outside the Scope of the Legal Licence

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The judgment delivered on 28 September 2000 by the Court of Appeal in Versailles will add further fuel to the debate which has been going on for a number of years on the scope of the legal licence for using commercial phonograms. In the initial proceedings (see IRIS 1998-2: 6), the Regional Court in Nanterre delivered a judgment in this case between the musician Johnny Clegg and his producers, and the company TF1 on 5 November 1997. At the same time, the Court of Appeal in Paris had already delivered a judgment in another case involving the same occurrences and had found the television company France 2 guilty of infringing copyright by using extracts of phonograms to provide background music for its advertising trailers, and the judgment of the Court of Cassation is still pending.

Referring more specifically to the latest decision of the Court of Appeal in Versailles, the facts of the case involved the use by the company TF1 of two of the best-known songs by the musician Johnny Clegg to provide background music for a trailer and the credits for broadcasting rugby matches in the World Cup series. The case was brought by the artist and his producers, and the television company was ordered by the Court in the initial proceedings to pay a large sum in damages for having infringed copyright and for having exceeded the scope of the legal licence.

The question here was whether or not such use could be considered to be covered by the protocol signed by TF1 with the Société des Auteurs, Compositeurs et Editeurs de Musique (Association of Authors, Composers and Music Editors - SACEM) enabling it to use works in the SACEM repertoire in its programmes and whether, concerning neighbouring rights, this fell within the framework of the legal licence provided for in Article L 214-1 of the Intellectual Property Code. On both these points the Regional Court had replied that the trailers constituted advertising material and that the use of phonograms as background music for them therefore required express, specific authorisation. The Court of Appeal upheld the Regional Court's decision, and held that the disputed sequences were indeed trailers produced by TF1 to promote its programmes and that, even if they did not correspond to the characteristic content and form of advertising material, they undeniably constituted advertising since they concerned a specific product and its producer. The Court also stated, in response to an argument put forward

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by TF1, that the fact that the CSA did not consider such trailers as advertising was irrelevant. As the protocol between TF1 and the SACEM prohibited any use of the repertoire for purposes other than those of the requirements of its television broadcasts, the television channel's disputed use of Johnny Clegg's songs therefore constituted infringement of copyright. It infringed both his moral rights by diverting the work from its intended use and the economic rights of the company which held the rights for using the work.

As regards neighbouring rights, the Court continued the same line of reasoning; considering that the legal licence system authorised the broadcasting of a work but in no way its use in advertising material - which was the case here - and that the broadcasting covered by Article L 214-1 of the Intellectual Property Code allowed a work to be presented to the public, the purpose of such presentation being to make the said work known to the public, whereas in the case in question the songs had been used for advertising purposes as a means to an end and not in their own right, the rights of both the artist and the producer had been infringed.

Cour d'appel de Versailles, 28 septembre 2000, Société TF1 C/ M. Johnny Clegg et autres

Court of Appeal of Versailles, 28 September 2000; Société TF1 v. Johnny Clegg et al.

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