[FR] Anti-copying Device on DVDs Challenged by Consumers

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The Regional Court in Paris has, for the first time to our knowledge, spoken out on the balancing of the right to making a private copy and the right to use technical means of protecting works. In the present case, a consumer, backed by a national consumer group (Union Fédérale des Consommateurs UFC), complained that he had not been able to make a copy of the DVD of the film "Mulholland Drive" because the digital medium included technical protective devices which were not mentioned at all on the box. In support of their case, the applicants claimed that this constituted an infringement of the right to make a private copy contained in Articles L. 1225 and L. 211-3 of the Intellectual Property Code, and of Article L. 111-1 of the Consumer Code, which obliged the vendor to inform the consumer of the essential features of the goods or service in question.

The Court held that, in order to respond to their application and to appreciate the scope of Articles L. 122-5 and L. 211-3 of the Intellectual Property Code concerning private copying, reference should be made to the provisions of the Berne Convention. The Act of 3 July 1985 that introduced lump-sum remuneration in respect of private copying levied, save in exceptional cases, on all blank recording media (Article L. 311-4 of the Intellectual Property Code) had been adopted in compliance with this Convention. According to Article 9-2 of the Convention, the possibility of allowing the reproduction of works was subject to three cumulative conditions they must constitute special cases and the permitted reproduction must not infringe the normal exploitation of the work or prejudice without justification the author's legitimate interests.

In their defence, the companies producing and distributing the disputed DVD invoked the protection afforded by the Directive of 22 May 2001 on copyright and neighbouring rights. Although this Directive has not yet been transposed into national law, the Court said it should be used to shed light on the interpretation of the national provisions. In this respect, "the Directive does not have the effect of acknowledging, much less introducing, a general entitlement to private copying". Therefore, "since it allows exception subject to the same cumulative conditions as the Berne Convention, it does not affect the solution to the present dispute".

Applying these principles to the present case, the judges stated that the commercial exploitation of a film in the form of a DVD, since it constituted an exploitation mode for many audiovisual works, was included in the normal

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exploitation of such works. Thus copying a film produced on a digital medium could not but prejudice the normal exploitation of the work. The infringement was necessarily serious, within the meaning of the criteria used for the Berne Convention, as it affected an essential mode of exploiting the said work that was vital for amortising the cost of its production. The Court therefore held that the protective device attached to the disputed DVD did not infringe the applicants' right to private copying. Lastly, the alleged infringement of Article L. 111-1 of the Consumer Code was also rejected, as the Court held that the possibility of reproducing a DVD, particularly as it did not have the benefit of exception for the purpose of private copying, did not constitute an essential characteristic of the product.

Tribunal de grande instance de Paris (3 chambre, 2 section), 30 avril 2004, UFC Que choisir et autres c/ Universal Picture Vidéo France et autres

Regional Court of Paris (3 chamber, 2 section), 30 April 2004, UFC, Que choisir et al. v. Universal Picture Vidéo France et al

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