[FR] Anti-copying Devices vs. the Private Copy

IRIS 2005-6:1/25

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In a much-noted decision adopted on 27 April, the Court of Appeal in Paris deliberated on the legality of using technical means to prevent the copying of protected works (anti-copying device on a digital medium) in view of the private copy exception. The original case had been brought by a private individual, backed by a consumer group, who complained that he had not been able to make a video copy of the DVD of the film *Mulholland Drive* because the digital medium included technical protective devices that were not clearly indicated on the box. In support of their case, the applicants claimed that this constituted an infringement of the private copy exception contained in Articles L. 122-5 and L. 211-3 of the French intellectual property code (*Code de la propriété intellectuelle* - CPI), 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 being sold.

In the initial proceedings, the Regional Court in Paris held that the anti-copying device did not infringe the private copy exception (see IRIS 2004-7: 9).

In its decision, the Court of Appeal upheld firstly that the exception allowing a private copy to be made was intended to apply to digital media, since "no distinction should be applied where none is included in the legislation". The Court of Appeal agreed with the Regional Court that the scope of the exception could only be appreciated in the light of the "three-step test" contained in Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and neighbouring rights in the information society, which has not yet been transposed into national law, and the Bern Convention.

After examining the matter, the Court found that making a private copy of a work on a digital medium did indeed constitute a special case (1st step). Unlike the initial court, it found that the existence of a private copy neither prevented the normal commercial exploitation of the work, which was the source of the income necessary to amortise the cost of production (2nd step), nor caused prejudice to the rightholders (3rd step). Consequently, the Court found that the use of technical means preventing all copying for private purposes constituted wrongful behaviour that caused prejudice to the consumer. The Court also held that the indication "CP" (" *copie prohibée* " - 'no copying') shown on the DVD was not enough to inform the consumer about the essential features of the medium. The judgment in the initial proceedings was therefore overturned and the film's producers and

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distributors ordered to pay the applicant consumer EUR 1 000 in damages. They were also prohibited from using any technical means on the disputed DVD that were incompatible with the private copy exception.

There will probably be clarification of the matter since, more than two years late, the French Parliament is scheduled to examine the bill to transpose the Directive of 22 May 2001 into national law on 6 June.

Cour d'appel de Paris (4e ch. B), 22 avril 2005 - S. Perquin et Association Que Choisir c/ Universal Pictures vidéo France, SA Films Alain Sarde et autres

Court of Appeal in Paris, (4th chamber, B section), 22 April 2005 - S. Perquin and the association Que Choisir v. Universal Pictures Vidéo France S.A., Films Alain Sarde, et al.

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