[FR] Court of Cassation Pronounces on Private Copying versus Technical Protective Devices

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One week before the examination of the bill to transpose into French law the Directive no. 2001/29/EC of 22 May 2001 on copyright and neighbouring rights in the information society was to resume, the Court of Cassation joined the forum by delivering a notable decision on the use of technical protective devices in relation to private copying. A case involving “Mulholland Drive” had been brought before the Court (see IRIS 2004-7: 9 and IRIS 2005-6: 13), in which an individual, backed by a consumer association, complained that he was unable to make a video copy of the DVD of the film he had bought because technical anti-copying measures had been applied to the digital medium but had not been clearly indicated on the cover. The individual and the association claimed that such technical protective measures infringed the user's right to make a private copy recognised by Articles L. 122-5 and L. 211-3 of the Intellectual Property Code. The Court of Appeal in Paris, having noted that private copying was merely an exception available to users and not a right recognised in absolute terms, upheld their claim last April, judging that the exception could not be limited if French law had no corresponding provision, and that in the absence of blameable misuse, proof of which had not been furnished, the making of one copy for private use was not such an infringement of the normal exploitation of the work in DVD form. The Court of Cassation overturned this judgment, on the basis of Articles L. 122-5 and L. 211-3, interpreted in the light of the provisions of Directive No. 2001/29/EC of 22 May 2001 and Article 9.2 of the Bern Convention. The Court began by recalling firstly that these texts uphold the "three-step test", according to which the reproduction of works protected by copyright may be authorised, in certain special cases, on condition that it does not infringe the normal exploitation of the work and does not cause unjustified prejudice to the author's legitimate rights. It then stated that the exception for private copying (which was not a right to make a private copy) could not stand in the way of the application to media on which a protected right was reproduced of technical protective devices intended to prevent copying where this would have the effect of causing prejudice to the normal exploitation of the work, which should be appreciated by taking into account the economic effect such a copy could have in the context of the digital environment. In the present case the Court of Cassation, unlike the court of appeal, held that, in view of “the economic importance the exploitation of a work in DVD form represents in amortising the cost of cinematographic production, the exception for private copying should cease to exist as it causes prejudice to the

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normal exploitation of the work”. The consequences of the decision were not slow in appearing - on 14 March, when the bill was examined in Parliament, Amendment 30, which would have made the making of a copy of a DVD legal, was withdrawn, whereas technical protective devices were legalised. It should now be for a panel of mediators to determine the number of private copies that may be made of any work. In conclusion, as "Maître Eolas" posted in his famous blog (http://maitre.eolas.free.fr/), "the Court of Cassation has begun to apply the law even before its adoption!" on 21 March by the Assembly, before being examined by the Senate.

Cour de cassation (1re ch. civ.), 28 février 2006, Studio Canal, Universal Pictures video France et SEV c/ S. Perquin et Ufc que Choisir

http://www.legifrance.gouv.fr/

Court of Cassation (1st chamber, civil section), 28 February 2006, Studio Canal, Universal Pictures Video France and SEV v. S. Perquin and UFC Que Choisir

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