[FR] Fortuitous Inclusion of a Work Upheld as an Exception to Copyright Protection

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The documentary entitled “To Be and To Have” (Etre et Avoir), first shown in 2002 and devoted to a single-class rural school, has not only made a name for itself in French cinema history - it has also contributed to making legal progress! After the courtroom saga between the main character in the film, the teacher Mr Lopez, who denounced “infringement of copyright by the non-authorised exploitation of his rights as an author and performer, as well as infringement of his exclusive rights in respect of his image, his name and his voice”, has taken the matter as far as the court of cassation in order to obtain compensation from the director, co-producer and distributors of the film (see IRIS 2004-10/11), and the court has been called on to pronounce in another dispute, nearly ten years after the film was first shown!

A draughtsman, who was the illustrator of a reading method entitled “Gafi le fantôme”, and the Société des Auteurs et Arts Visuels et de l'Image Fixe (society of authors, visual arts and fixed image - SAIF), of which he is a member, had the film’s production company summoned on a charge of infringement of copyright. They claim that, on a number of occasions in the course of the film and without being authorised to do so, it had reproduced and represented these illustrations. The judges on the merits of the case had rejected the applications on the grounds that the illustrations were merely “accessories” to the main subject of the film and that there was no infringement of copyright in respect of the works. In support of their appeal before the court of cassation, the applicants claimed that in doing so the court of appeal had made an exception to the applicant’s rights that was in no way provided for but indeed was actually excluded by Article L. 122-5 of the intellectual property code (CPI), as worded as a result of the Act of 1 August 2006 transposing the Directive of 22 May 2001 into national law.

The court of cassation recalled that, as the court of appeal had noted, the disputed illustrations, as shown in the documentary at issue and in the bonus material on the DVD, were merely swept by the camera and seen only in passing. More frequently, they were in the background, as only the characters of the schoolchildren and their teacher were kept in the foreground. They were not at any time presented in terms of their use by the teacher, and formed part of the decor, of which they were a habitual element, appearing for short periods of time but never being represented in their own right. The court of cassation found that

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the court of appeal has deduced correctly that such a presentation of the disputed work was “accessory to the subject being treated”, which was the documentary representation of the lives of and relations between the teacher and the children of a single-class rural school. It should therefore be seen as the “fortuitous inclusion of a work”. However, the court felt that such an inclusion constituted a limitation on the author’s monopoly within the meaning of Directive (EC) 2001/ 29 of 22 May 2001, as intended by the legislator for transposition into positive law, in accordance with the preparatory work for the Act of 1 August 2006.

This judgment is therefore of note in that it creates an exception to copyright protection that was not included in the Intellectual Property Code.

Cour de cassation (1re ch. civ.), 12 mai 2011 - M. Schikler, dit Merel, et SAIF c. Maia Films

Court of cassation (1st civil chamber), 12 May 2011 - Mr Schikler, known as Merel, and SAIF v. Maia Films

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