[FR] Details of conditions for INA using artists' performances

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With its decision delivered on 14 October 2015, the Court of Cassation has provided details on respect for the neighbouring rights of performing artists when their performances are used by the *Institut National de l'Audiovisuel* (National Audiovisual Institute - INA). The INA has a public-service mission to conserve, use, and make available France's audiovisual heritage. More specifically, under its most recent terms of reference, the INA has undertaken to "improve the editorialisation of its archives by constituting a themed multimedia offer that is as relevant and as accessible as possible, while respecting beneficiaries' rights". The INA therefore concluded, notably between 2005 and 2008, various general and collective agreements with the representatives of the beneficiaries concerned (writers, producers, performers, etc). This agreement has been consolidated by Article 44 of the Code de la Propriété Intellectuelle (Intellectual Property Act - CPI) of 1 August 2006, which reinforces the presumption of the transfer of performers' rights to the INA as resulted, in the audiovisual field, from Article L. 212-4 of the CPI. This Article amended Article 49 II of Act No. 86-1067 of 30 September 1986 on freedom of communication, according to which "the INA exercises the rights to use the audiovisual archives of the national programme companies while respecting the moral and pecuniary rights of the holders of copyright and neighbouring rights and of their beneficiaries; nevertheless, Articles L. 212-3 and L. 212-4 of the CPI notwithstanding, the conditions for using the performances of artists contained in the archives and the remuneration generated by such use are governed by a number of agreements concluded between the performers themselves or the employee organisations representing the performers, and the INA. These agreements ought to lay down the scale of remunerations and the ways in which such remuneration is to be paid".

In the present case, the beneficiaries of the rights in respect of the late jazz drummer Kenny Clarke claimed that the INA was offering a number of videograms and one phonogram reproducing the musician's performances for sale on its Internet site without their authorisation. They therefore had the INA summoned to obtain compensation for the alleged infringement of the performer's rights which they held. They invoked Article L. 212-3 of the CPI, according to which a performer's written authorisation is required for making a recording, reproducing and communicating to the public his/her performance, and any separate use of the sound and image of the performance where this had been made in respect of both sound and image. The court of appeal found in their favour and ordered the

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INA to pay them EUR 5,000 to make good the prejudice suffered as a result of the unauthorised use of the videograms and the phonogram at issue. The judge recalled that the mission to conserve and use audiovisual archives conferred on the INA by the legislator did not exonerate it from respecting performers' rights, and stated that the waiver provided for in Article 44 of the Act of 1 August 2006 should only apply where the performer had authorised the recording and initial use to be made of his/her performance. In such a case, the INA was released from the requirement to request authorisation from the performer or his/her beneficiaries for further use of the performance. In the present case, however, the INA was not able to establish a written contract or any other element establishing the existence of agreement on the part of the musician. The INA appealed to the Court of Cassation against this decision, which substantially reduces its possibility of using the programmes in its archives. In its decision delivered on 14 October 2015, the Court of Cassation found that by subordinating in this way the applicability of the exemption scheme set up in favour of the INA as evidence of the performer's authorisation of the initial use of the performance, the court of appeal had added to the law a condition that it did not contain and had violated the applicable provisions of the law. The dispute was therefore referred to another court of appeal.

Cour de cassation (1re ch. civ.), 14 octobre 2015 - Institut national de l'audiovisuel c/ M. Laurent X. et autres

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1092_14_32757.html

Court of Cassation (1st civil chamber), 14 October 2015 - Institut National de l'Audiovisuel (INA) vs. Mr Laurent X. and others

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