[FR] Does the special scheme granted to the INA for using audiovisual archives comply with Directive 2001/29 on copyright?

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The holders of the rights to the works of a deceased jazz drummer claimed that the Institut National de l'Audiovisuel (the National Audiovisual Institute - the INA) was marketing a number of video clips and a disc on its website that reproduced some of the musician's performances without their authorisation. They had the INA summoned to appear in court to obtain compensation for the infringement of the rights that they hold, invoking Article L. 212-3 of the Code de la Propriété Intellectuelle (the Intellectual Property Code - CPI). Since the adoption of legislation on 1 August 2006 amending Article 49 of the Act of 30 September 1986, the INA has indeed enjoyed the benefit of a simplified authorisation scheme that allows it to waive Articles L. 212-3 and L. 212-4 of the CPI, which lay down the conditions for its use of the work of performers contained in its audiovisual archives and the corresponding remuneration and scales of payment for such use; such payments are governed by agreements between the performers and the INA. The question at issue was whether this special scheme freed the INA from the obligation to obtain authorisation from the jazz drummer's rightsholders.

SPEDIDAM (a society managing performers' rights) applied to be joined to the case, calling on the court to order the INA to pay it damages in compensation for the collective prejudice suffered by the performing profession. Upon appeal, the Court of Cassation dismissed the claims, and the musician's rightsholders appealed again to the Court of Cassation.

The Court of Cassation began by reiterating the terms of Article L. 212-3 of the CPI, and went on to note that Directive 2001/29(EC) on the harmonisation of certain aspects of copyright and related rights in the information society, in particular its Articles 2(b) and 3.2(a), provided that performers had the right to authorise or prohibit the reproduction and the making available of their performances, but that Article 5 allowed member States to provide for exceptions to this principle of prior authorisation. However, the Court of Cassation noted that the special waiver granted the INA did not fall within the scope of any of the exceptions and limitations that the member States were allowed to provide for under Article 5.

In support of their appeal, the claimants invoked a CJEU judgment delivered on 16 November 2016 in the case of Soulier and Doke regarding the digital use of books that were out of print and not available in any other form, which stated that while the protection provided for by Articles 2 and 3.1 of Directive 2001/29 EC did not prevent national regulations pursuing an objective in the cultural interest of consumers and society in general, pursuit of that objective could not be used to justify allowing an exception not provided for by the EU legislature in the Directive.

The Court of Cassation found that this solution could not be applied in the case at issue, and noted the question of whether Articles 2(b), 3.2(a) and 5 of the Directive should be interpreted as opposing the waiver scheme enjoyed by the INA in application of Article 49 II of the Act of 30 September. It added that this question was a determining factor in dealing with the case that had been submitted to it, and that it raised a serious difficulty. The Court of Cassation therefore decided to refer the matter to the CJEU. To be continued …

Cour de cassation (1re ch. civ.), 11 juillet 2018 - Spedidam et a. c/ INA

Court of Cassation (1st chamber (civil)), 11 July 2018 - SPEDIDAM and others v. INA