INA’s exploitation of performances approved by CJEU and Court of Cassation

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The *Institut national de l’audiovisuel* (National Audiovisual Institute – INA) was created to protect and promote the archives of French public radio and television companies. Its role was later broadened when, in 1992, it became the legal deposit library for radio and television, and then for media websites in 2006.

In a ruling of 22 January 2020, the Cour de cassation (Court of Cassation) brought an end to a major dispute concerning the INA’s exploitation of performers’ performances.

In the case at hand, the holders of the rights of a musician who had died in 1985 discovered in 2009 that the INA was marketing, in its online shop and without their authorisation, video recordings and phonograms produced and then broadcast by national broadcasting companies reproducing the musician’s performances between 1959 and 1978. In order to obtain compensation for the alleged infringement of the performer’s rights which they hold, they then brought an action against the INA on the basis of Article L. 212-3 of the Intellectual Property Code, which states that “The fixation of his performance, its reproduction and communication to the public, as well as any separate use of the sound and image of the performance when it has been fixed for both sound and image, shall be subject to the written authorisation of the performer.”

The amended Article 49 of Law No. 86-1067 of 30 September 1986, which gives the INA the right to exploit the audiovisual archives of national broadcasting companies, establishes a derogation under which the conditions for the exploitation of performers’ performances and the remuneration for that exploitation are governed by agreements concluded between the performers themselves or the employee organisations representing performers and the INA. Those agreements must specify in particular the scale of remuneration and the arrangements for payment of that remuneration.

In a judgment of 10 March 2017, the court of appeal before which the case was brought back dismissed the rightsholders’ claims. The court considered that Article 49 establishes, for the sole benefit of the INA, a simple presumption of the performer’s prior consent, which could be challenged, and thus did not call into question the performer’s exclusive right. The agreements with the trade union

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organisations referred to in that article did not confer on them the right to 'authorise and prohibit', which was vested in the performer, but had the sole purpose of fixing the performer's remuneration. The appellants and Spedidam (a collecting society for performers' rights), which had intervened voluntarily, brought an appeal against the judgment. The Court of Cassation decided to stay the proceedings and refer to the Court of Justice of the European Union (CJEU) the question of the compatibility of the legal rules set out in Article 49 of the aforementioned 1986 law with Articles 2, 3 and 5 of Directive 2001/29 on copyright in the information society.

In a judgment of 14 November 2019 (Case C-484/18), the CJEU ruled that the provisions of the Directive must be interpreted as not precluding national legislation which established, as regards the exploitation of audiovisual archives by a body set up for that purpose, a rebuttable presumption that the performer had authorised the fixation and exploitation of his performances, where that performer was involved in the recording of an audiovisual work so that it may be broadcast.

In this case, and in view of the CJEU's response, the Court of Cassation, in a decision of 22 January 2020, pointed out that the INA had a specific mission, enshrined in successive laws, to conserve and promote the national audiovisual heritage, that it preserved the audiovisual archives of national broadcasting companies and assisted with their exploitation, and that it was the sole owner of the said archives and held the exclusive right to exploit them. It added that the disputed video recordings and phonograms were covered by the derogation in favour of the INA. Therefore, the performer in this case had been involved in the making of these works knowing that they would be broadcast by national broadcasting companies and had given his performance for the purposes of such use.

The Court of Cassation therefore decided that the appeal court had correctly stated that, by exempting the INA from proving that the performer had given written authorisation, Article 49, as amended, of the Law of 30 September 1986 did not remove the requirement to obtain consent, but established a simple, rebuttable presumption that authorisation had been given, and did not call into question the exclusive right for performers to authorise or prohibit the reproduction, communication or making available to the public of fixations of their performances.

Civ. 1re, 22 janvier 2020, n° 17-18.177, SPEDIDAM et a. c/ INA

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/47_22_44292.html

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1st civil chamber of the Court of Cassation, 22 January 2020, judgment no. 17-18.177, Spedidam at al. v INA

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