


Paris Appeals Court Rules DVD Anti-Copy Measures Illegal

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 Anti copying devices; Consumer protection; DVDs; France; Private copying

In France consumers have a "right" to make a copy of a copyrighted work for private usage. The word "right" is in quotation marks on purpose, because the existence and extent of this "right" is fiercely debated. Article L 122-5 of the French Intellectual Property Code provides that

"Once a work has been made available publicly, the author may not prohibit:

...

2° copies or reproductions strictly reserved for the private use of the copier and not destined for a collective usage, with the exception of copies of works of art destined to be used for purposes identical to those for which the original work was created; and copies of software other than the backup copy created under the conditions set forth in paragraph II or article L 122-6-14, as well as copies or reproductions of electronic databases."

The French consumer's union UFC Que Choisir claims that this Article of the French Intellectual Property Code creates an inviolable right for consumers to make a private copy of any digital work, and that this right takes precedence over an author's right to insert anti-copy protection measures in his or her digital work. Defenders of French copyright have argued that such a reading of the French Code is incompatible with Directive 2001/29 on Copyright and Related Rights in the Information Society, and would mean that no author could ever put copy-protection technology in his or her digital work. The debate surrounding the alleged "right" of private copy has been responsible in part for France's delay in implementing Directive 2001/29. (The other reason is that the French parliamentary calendar is backed up with other measures with a higher political priority.) France is now over two years late in enacting national law that would bring France's Intellectual Property Code into compliance with the Directive. The French Government proposed a draft law to implement the Directive, but ducked the politically sensitive issue of private copies, by decreeing that issues regarding the coexistence of copy-protection technology and the consumers' ability to make a private copy would be resolved by an independent commission.

The Paris Court of Appeals has helped crystallise the debate by issuing a decision on April 22, 2005 making the use of copy-protection technology all but illegal in France. When the decision

was issued, many viewed the decision as a blow to copyright holders. But the Paris court's decision could turn out to be a blessing in disguise, because it will force the French legislature to deal head-on with the issue by modifying the French Code provision on private copies.

The Paris court decision posed the question of whether the copy-protected DVD of *Mulholland Drive* offered for sale in France violated a consumer's right to make a private copy under Art.L 122-5 of the French Intellectual Property Code. This issue had already been dealt with in other lower courts, particularly in the context of CDs. The courts had held that copyright holders could include anti-copy protections on CDs, as long as the CD cover clearly warned consumers that the CDs contained such measures. The courts had heretofore focused on the need to fully disclose to consumers the presence of anti-copy measures, but no court had found such anti-copy measures illegal *per se*. This state of affairs led the French Government to believe that the two rights (the author's right to insert anti-copy measures and the consumer's ability to make a private copy) could peacefully coexist, and that a change in the Code's "private copy" language was not necessary. The Paris Court of Appeals changed all that, taking a more literal reading of Art.L 122-5 of the French Code. According to the Paris court, the statute's language states that an author "cannot prohibit" private copies, and that this clear statutory language means that authors cannot insert anti-copy technology that would render impossible the making of private copies. According to the court, the statute makes no distinction between analogue and digital media. The only exceptions in the statute relate to certain works of art, computer programs and electronic databases. The court looked at the compatibility of Art.L 122-5 of the Code with provisions of Directive 2001/29, which permit Member States to include in their national laws a private copy exception to copyright, provided that the exception satisfies a three-step test. The court held that in the context of the *Mulholland Drive* case, the French private copy exception is compatible with the Directive because France had put into place a system of equitable remuneration for authors based on the sale of blank recording media and because, according to the court, the French legislature could reasonably conclude that copies of this kind would not interfere with the normal exploitation of the work.

The fact pattern in this case was highly unusual. The copier, "Stéphane P.", wanted to make a copy of the *Mulholland Drive* DVD on a VHS cassette so he could watch *Mulholland Drive* at his mother's house. Stéphane P.'s mother did not possess a DVD player. This fact pattern is particularly attractive for proponents of the "private copy" regime, because an analogue VHS copy clearly poses less of a threat to the normal exploitation of the work than would a perfect digital copy. Moreover, Stéphane P. would have had difficulty arguing that he needed a second DVD copy, or a computer copy, for his private usage. A single DVD copy should suffice for an individual's private use: Stéphane P. could take the purchased DVD copy with him, to his mother's or elsewhere, for personal viewing. The court held that Stéphane P. should be able to make a VHS copy, but did not explain why Stéphane P. necessarily must be able to make the copy directly from the DVD player. The defendants argued that Stéphane P. could have filmed

his TV screen using a camcorder, and that he would then have his private VHS copy. The statute nowhere says that the copy must be of good quality.

The Paris Court of Appeals approached the reading of the French statute as if the French legislature had enacted Art.L 122-5 with Directive 2001/29 in mind. The court concluded that the legislature had taken advantage of the flexibility offered by the Directive's provisions on private copying when it adopted Art.L 122-5 of the Code and that the provisions of the French law were therefore valid. In reality, the French legislature enacted Art.L 122-5 long before the Directive came into existence. Nevertheless, the court put the responsibility for the drafting of Art.L 122-5 back on the legislature, interpreting the wording as if it had been adopted with full knowledge of the Directive's provisions. One of the paradoxes of the court's decision is that it states at one point that Art.L 155-2 does not create a "right" to a private copy, only an "exception" to the author's *droit d'auteur*. This is the traditional way of interpreting the French private copy provision, consistent with the Berne Convention. Yet the court also held that the anti-copy measures contained in the *Mulholland Drive* DVD violated Art.L 155-2 by not permitting Stéphane P. to make his VHS copy. That outcome makes Art.L 155-2 sound very much like a "right", and is certainly interpreted that way by consumer advocates. Another possible (and preferable from a copyright standpoint) interpretation of Art.L 155-2 would be that it prevents the author from taking action against someone like Stéphane B. for making a private copy *if he is able to do so* (by filming his TV screen, for example), but that the Article does not require authors to *facilitate* such copying by removing all copy-protection technology.

The right holders have lodged an appeal before the French Supreme Court (Court de Cassation), and the Court de Cassation has put the case on a fast-track. If the Court de Cassation reverses the Court of Appeals, the French Parliament will be able to avoid modifying Art.L 155-2, which the Parliament and Government would surely prefer to do because of the politically controversial nature of the subject. Article L 155-2 pits the powerful consumer's union against the equally powerful defenders of French cinema and culture, creating a political hot potato.

The second part of the court's decision relates to the requirement that consumers be put on notice regarding the anti-copy measures included in the DVD. The French consumer's union argued that the initials "CP" (meaning "Copy Protected" or "Copy Prohibited") were insufficient to satisfy the requirements of Art.L III-1 of the French Consumer Code, which requires that a supplier of goods inform the consumer in advance of the "essential characteristics" of the good. According to the court, the ability to make a private copy is an "essential characteristic" of a DVD, and the initials "CP" are not sufficient to inform the consumer that he cannot make a copy. This holding is similar to previous court decisions in France relating to CDs, which require that the CD cover show clearly that the CD is copy protected.

The Paris court's decision has triggered a flood of new complaints, orchestrated by consumer lawyers who are trying to create a French version of US class actions. DVD owners can sign up to sue online, using the website www.classaction.fr. Although class actions do not exist in France, President Jacques Chirac made

statements earlier in the year suggesting that the law may be changed to permit such actions.

For the time being, the legality of anti-copy measures in France has been put in limbo. Unless the Court of Cassation reverses the Paris Court of Appeals, the French legislature will have to modify Art.L 122-5 of the Code, to provide that the exception for private copying in France is without prejudice to the author's right to include "effective technological measures" to prevent unauthorised copying of any protected work. It is hard to imagine France, the stalwart of *droit d'auteur*, requiring motion picture producers to remove copy protection measures from DVDs.