

Article

French Copyright Law Reform: French Supreme Court Upholds Legality of DVD Anti-Copy Measures

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Last year¹ the authors wrote about a startling Court of Appeals decision that rendered anti-copy measures for DVDs illegal in France, on the ground that those measures frustrated the French consumer's right to make a private copy. The French Supreme Court reversed the Court of Appeals ruling on February 28, 2006. On March 21, 2006, the National Assembly voted for a proposed law² that would reaffirm France's private copy exception notwithstanding the use of "effective technical measures" to prevent unauthorised copying. The Senate was to review the text in May.

The private copy exception initially was included in French law as a tolerance—the legislator recognised that it would be impractical to try to enforce an author's rights to prevent certain kinds of private copies. A fee was levied on blank storage media to remunerate authors for the collective damage caused by these private copies. However, with time France's private copy exception morphed into a right. The politically sensitive debate on private copies delayed France's transposition of Directive 2001/29 (the "Directive"). Consumer advocate groups³ made the private copy debate their *cause célèbre*, encouraging French consumers to stand up for what the consumer groups say is a Frenchman's fundamental right to make a private copy. The voice of *droit d'auteur* was almost drowned out by the raucous consumer groups. Private copy also hindered enforcement efforts in France against peer-to-peer downloaders, some of whom argued successfully that their downloading was covered by the private copy exception.

The French Supreme Court gave *droit d'auteur* a boost on February 28, 2006 by confirming right holders' ability to insert anti-copy protection on DVDs. In the *Mulholland Drive* case⁴ the

Supreme Court reversed the Paris Court of Appeals, holding that the appellate court should have applied the "three-step" test of the Directive before holding that anti-copy mechanisms were illegal. The French Supreme Court rendered its decision while a major reform of French copyright law was under way before the National Assembly. The purpose of the reform was to transpose the Directive—in particular, to add to the law the Directive's three-step balancing test for private copy (which resembles in some respects the US "fair use" doctrine) and try to find a way for effective technical measures and private copy to coexist. As of April 12, 2006, the reform had not yet been enacted.⁵

This article will examine the French Supreme Court's reasoning in the *Mulholland Drive* case as well as the proposed law's approach to the private copy exception. The article will also assess the application (or not) of the private copy exception under the proposed law for several digital media.

The French Supreme Court authorises DVD anti-copy measures (the "Mulholland Drive" case)

The Supreme Court's recent holding in the *Mulholland Drive* case turned on whether Art.L.122-5 of the French Intellectual Property Code ("IP Code") granted consumers the "right" to make a private copy of any copyrighted work; and if so, whether such a right took priority over the author's ability to insert anti-copy measures

5. The French National Assembly adopted on March 21, 2006 a draft Bill transposing the Directive (whenever the authors refer to the "Bill" or the "new law" in this article, they refer to the text that was adopted on March 21, 2006). The Bill is now before the Senate. Because France is over three years late in transposing the Directive, the draft law was discussed under an emergency procedure, and now only needs to be approved by the Senate and promulgated by the French President to become law (no additional reviews by either assembly). This means that the law is on a fast track and could be adopted before the summer.

1. [2005] Ent.L.R. 230.

2. Available at www.assemblee-nationale.fr.

3. The leading group is UFC Que Choisir.

4. Cass. Civ. Ière, February 28, 2006.

in his or her digital work. The court also considered whether the Directive's "three-step test" should have direct effect on France's existing Intellectual Property Code.

The facts of this case were relatively unusual: the plaintiff, Stéphane P., had purchased the DVD of David Lynch's picture *Mulholland Drive* and realised he could not copy the film on to a VHS cassette and so could not watch the film at his mother's house. He sued the production company and distributor, alleging (1) that Art.L.122-5 of the IP Code entitled him to copy the DVD, and (2) that the defendants had failed to inform him of the existence of anti-copy measures on the DVD in question, in violation of Art.L.111-1 of the Consumer Code. The Paris Court of Appeals held in favour of the consumer, judging that anti-copy measures unduly restricted the private copy exception. The court made a literal reading of the French statute, which says that an author "may not prohibit" a private copy.

The Supreme Court overturned this ruling, asserting that the private copy was not an absolute right for consumers, only an exception to an author's rights—an exception which, as all exceptions under French law, should be strictly construed. Most remarkable in the court's holding is its application of the "three-step test" contained in the Berne Convention (Art.9.2) and in Art.5(5) of the Directive. The three-step test provides that exceptions to *droit d'auteur* are to apply only (1) in special cases (2) which do not impair the normal exploitation of the work or other protected device and (3) which do not cause unjustified harm to the legitimate interests of the right holder. The court focused on the second branch of this test and held that the private copy at issue impaired normal exploitation of the work

"in light of the risks inherent to the new digital environment and in light of the economic significance of DVD exploitation for the amortization of motion picture production costs".

The court's ruling clarifies application of the three-step test to DVDs, which will help guide future decisions of the "Mediation Committee" that the French legislature wants to create to deal with private copy disputes. The court construed Art.L.122-5 of the French IP Code "in light of the [D]irective." The court was able to interpret French law "in light of" the Directive, and to apply the Directive's three-step test directly, pursuant to the theory of "compliant interpretation" (*théorie de l'interprétation conforme*). This legal theory requires Member State courts to interpret provisions of national law in a way that would make them consistent with the clear and unambiguous provisions of a Directive.

New French Bill authorises both private copy and anti-copy measures, creates special committee to resolve disputes

The new French law transposes many of the provisions of the Directive relating to the private copy exception.

Collège des médiateurs

One of the proposed law's innovations is the creation of a Mediation Committee (*collège des médiateurs*), responsible for "regulating effective technical measures so as to guarantee the benefit of

the private copy exception".⁶ The Mediation Committee will be in charge of balancing the French consumer's right to make a private copy with the content owner's right to implement effective technical measures. The Committee will have the power to arbitrate disputes between right holders and consumer groups. The Committee's decisions will be subject to appeal before the Paris Court of Appeals.

Right holders generally obliged to ensure effectiveness of private copy

The draft law leaves intact the old language regarding the private copy exception, stating that an author "may not prohibit" a private copy, but adds that the exception may not impair the normal exploitation of the work or create unjustified damage to the legitimate interests of the author. The proposed law creates two new sections of the IP Code, the first (Art.L.331-5) to protect effective technical measures and the second (Art.L.331-6) to require entities deploying effective technical measures to permit the "effective benefit" of the private copy exception. Article L.331-6 would require right holders to take all necessary measures within a reasonable time to ensure that consumers are able *in fact* to make a private copy of a copyrighted work notwithstanding the presence of technical measures. Where technical measures are implemented, the right to private copy is subject to two limitations: (1) consumers must be legally entitled to access such a work (which can be a phonogram, videogram or programme), and (2) the exception must not impair normal exploitation of the work or of another protected device and no unjustified damage must be caused to the legitimate interests of the author(s).

The language in the *Mulholland Drive* case would suggest that in the case of a DVD, a private copy would likely impair the normal exploitation of the work. But the situation for CDs is less clear. In a case decided on January 10, 2006, the Paris Court of First Instance found a music distributor liable for using anti-copy measures which made it impossible for the purchaser of a Phil Collins CD to read the CD on his computer.⁷ The court based its ruling in part on Art.L111-1 of the Consumer Code, which requires a prior notice to the consumer informing him or her of the essential characteristics of the product. Importantly, the court also held that the anti-copy protection was not justified under the Directive's three-step test, because (according to the court) the music distributor had not shown that the private copy of the Phil Collins CD would impair the normal exploitation of the work. This raises the question of who has the burden of proving that a private copy would impair the normal exploitation of the work and what level of proof is required. These issues will no doubt be decided by the Mediation Committee as they arbitrate cases between consumer groups and right holders.

Television: distributors must ensure effectiveness of private copy

The proposed law states that anti-copy measures applied to television programmes must not have the effect of depriving the

6. Proposed law, Art.9.

7. Paris TGI, 5th Ch., January 10, 2006 (*Christophe R and UFC Que Choisir v Warner Music France and Fnac*.)

public of the benefit of the private copy exception. As a result, TV programme distributors must allow private copies, which may mean that providers of television programmes will have to integrate private copy functions into set-top boxes and DRM tools. The French media authority (Conseil Supérieur de l'Audiovisuel) will be responsible for ensuring compliance with this provision.

VOD: Right holders not obliged to ensure effectiveness of private copy

Pursuant to Art.6(4) of the Directive, and Art.8 of the proposed law, Member States and right holders respectively are not obliged to make private copies possible for content distributed on-demand. In other words, there is no tolerance at all for private copies made from VOD, and the three-step test would not apply. This is the only area where the proposed French law sets a bright-line rule for private copy.

Authors and performers must approve effective technical measures

The proposed law requires that when an author or performer grants copyright or neighbouring rights to a producer, the contract must contain language expressly (1) recognising the producer's right to deploy effective technical measures and rights management information; (2) describing the reason for use of such measures for each kind of exploitation of the work; and (3) informing the author or performer how he or she can gain access to the

"essential characteristics" of those technical measures and rights information. Fortunately only contracts entered into after the effective date of the new law will be affected by this provision.

Conclusion

The proposed law imports the Directive's three-step test into French law, setting an almost impossible standard for right holders, who must ensure that technical measures guarantee the effective benefit of the private copy exception. This contrasts with the German approach which has created a bright-line rule excluding private copies entirely where effective technical measures have been implemented. The difference in the French and German approaches illustrates how a given copyright subject, supposedly harmonised under a European directive, can receive completely different treatments in different Member States. Once enacted, the new French law will perpetuate uncertainty regarding the compatibility of technical measures with the French consumer's right to a private copy. Right holders may have the burden of proving before the Mediation Committee why private copies are not possible under the relevant technical measures used, and why such copies would impair the normal exploitation of the work. The French Supreme Court has suggested that DVDs may be afforded higher protection against private copies, but the situation for CDs is still very much open.