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French Court of Cassation Defines Notion of “fixation” of the performance

Catherine Stary (Zschunke) · Wednesday, February 27th, 2019

Introduction



In a [decision from 12 September 2018](#), the French Court of Cassation (hereafter: “the Court”) defines the notion of fixation of the performance of a performer in order to determine the date of such fixation for several works. This decision is particularly interesting as it deals with an issue that has mostly been disregarded so far in French case law. In addition, the definition of this notion has various consequences for French intellectual property law, in particular related rights to copyright.

The decision and its consequences in more detail

This decision was issued in a dispute between the beneficiaries of the famous French comedian Coluche and the production company with which the comedian had concluded contracts (before his death) for the recording, distribution and publication of his sketches. In this context, the Court was asked to decide on the question of whether the fixation date of a performance was the actual date of recording of the artist’s performance or the date of production of the master recording.

To answer this question, the Court had to define the notion of the fixation of the performance as mentioned in article L. 212-3 of the French Intellectual Property Code,

which states that the fixation of the performance shall be subject to the written authorisation of the performer.

The notion of fixation of the performance is referred to in the French Intellectual Property Code in several places, but never properly defined. Both article L. 212-3 and article L. 212-4 of the aforementioned Code seem to distinguish the notion of fixation from the notion of reproduction. However, such a distinction is not as clear in other articles. Some European Law texts also contribute to the confusion between the fixation right and the reproduction right. In this respect, while Directive 2001/29/CE states in article 2 that performers shall have the exclusive right to authorise or prohibit the reproduction of the fixation of their performances (Art. 2 b), it does not provide for an autonomous fixation right for performers.

In this regard, the Court of Appeal (whose decision was referred to the Court) considered the fixation of a performance as the act of communication of the performance to the public, in other words its commercial exploitation. The Court adopted, therefore, an economic approach to the notion of fixation by stating that the fixation is *“the act of exploitation which marks the end of the production operations, as a process of technical and artistic formatting involving operations on different recordings, and that, consequently, the fixation date for each sketch in dispute is the date of its master.”* The Court of Appeal thus took a clear stance on the notion of fixation of the performance despite the lack of clarity in the texts and took into account in its appreciation the commercial purpose of the fixation rather than the act of fixation itself.

Such a definition however leads to confusion between the notions of fixation of the performance and its reproduction, both of which are referred to in article L. 212-3 of the French Intellectual Property Code as being subject to the artist’s authorisation.

The French superior court thus found that the Court of Appeal had violated the aforementioned article and specified a definition of the fixation of the performance in its decision as follows: *“the fixing of the performance is constituted by the first incorporation of the artist’s performance into a medium.”*

This definition clearly distinguishes between the fixation of the performance, its reproduction and its communication to the public, thus being consistent with article L. 212-3 of the French Intellectual Property Code.

It is also in line with other international legal texts such as the Rome convention for the protection of performers, producers of phonograms and broadcasting organisations from 12 October 1961 which provides for an autonomous fixation right independent from the reproduction right or any other exploitation of the fixed performance in its article 7.1 (b): *“The protection provided for performers by this Convention shall include the possibility of preventing: (b) the fixation, without their consent, of their unfixed performance.”*

At European level, it is Directive 2006/115/CE in particular which provides for a right for performers to authorise or not the fixing of their performance (article 7.1: *“Member States shall provide for performers the exclusive right to authorise or*

prohibit the fixation of their performances”).

The importance of the present judgment lies not only in confirming the existence of a fixation right, distinct from the reproduction right, but also in providing a definition of the concept of “fixation”. The definition given by the Court of Cassation (“*the fixing of the performance is constituted by the first incorporation of the artist’s performance into a medium*”) corresponds to the definition of the notion of fixation of the artist’s performance provided in the WIPO Performances and Phonograms Treaty (WPPT) dated 20 December 1996, which states in its Article 2 (c) that “fixation” means “*the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.*”

Concluding Thoughts

This decision affirms the autonomy of the fixation right of the performance of the artist from his reproduction right. The fixation of the performance refers to the act by which the performance is fixed to a medium. In the case at issue, it must therefore be concluded that the sketches were fixed on the date of the performer’s physical performance. In this regard, the subsequent technical work on the records in order to allow their exploitation is not relevant and must be considered as a reproduction.

This definition has many consequences for the rights of performers under French law, including the scope of the authorisation given by the performer regarding the fixation of their performance which therefore does not imply the authorisation of the reproduction of this fixation.

Furthermore, this definition will be useful for the interpretation of other articles of the French Intellectual Property Code, such as article L. 211-4 which sets out the duration of the performer’s patrimonial rights. Since there are very few decisions on the notion of fixation of the artist’s performance, it will be interesting to observe the use of this definition in subsequent case law.

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