

French Republic
In the Name of the French People

APPELLATE COURT OF PARIS

Fourth Chamber -- Section B

JUDGMENT OF 22 APRIL 2005

Docket Number [répertoire général]: 04/14933

Decision deferred to the Court: Judgment of 30 April 2004 - Tribunal de Grande Instance de PARIS -
RG n° 03/8500

APPELLANTS

Mr. Stéphane P

represented by Master Chantal BODIN-CASALIS, solicitor to the Court,
with counsel of Master G r me FRANCK.

Association U.F.C.

L'UNION FEDERALE DES CONSOMMATEURS-QUE CHOISIR

[National Consumers' Union]

founded by statute of July 1st, 1901

represented in person by its president,

whose main office is located at: 11 rue Guenot 75011 PARIS

represented by Master Chantal BODIN-CASALIS, solicitor to the Court,
with counsel of Master G r me FRANCK.

RESPONDENT

Soci t  UNIVERSAL PICTURES VIDEO FRANCE

represented by its President Director General

whose main office is located at: 20 rue Hamelin 75116 PARIS

represented by the SCP BOLLING-DURAND-LALLEMENT, solicitors to the Court,
with counsel of Master Christian SOULIE, P267.

VOLUNTARY INTERVENOR

LE SYNDICAT DE L'EDITION VIDEO, Professional Corporation

whose main office is located at: 24 rue Marboeuf 75008 Paris

represented by the SCP BOLLING-DURAND-LALLEMENT, solicitors to the Court,
with counsel of Master Christian SOULIE, P267.

ALAIN SARDE FILMS, S.A.
in the person of its legal representatives,
whose main office is located at: 17 rue Dumont d'Urville 75116 PARIS

represented by Master HUYGHE, solicitor,
with counsel of Master J.C. ZYLBERSTEIN.

STUDIO CANAL, S.A.
in the person of its legal representatives,
Espace Lumière
having main offices located at: 5/13 Blvd de la Republique,
92100 BOULOGNE BILLANCOURT,

represented by Master HUYGHE, solicitor,
with counsel of Master J.C. ZYLBERSTEIN.

INTERVENOR

LE SYNDICAT DE L'EDITION VIDEO, Professional Corporation
whose main office is located at: 24 rue Marboeuf 75008 Paris

represented by the SCP of solicitors BOLLING DURAND LALLEMENT,
assisted by Master Christian G. SOULIE [P267], of the Paris Bar

COMPOSITION OF THE COURT :

The matter was debated in public on 24 February 2005, before
a panel of deliberating judges composed of:
Madame PEZARD, President,
Madame REGNIEZ, Counselor,
Monsieur MARCUS, Counselor

REGISTRAR during the debate : E. KLOCK

JUDGMENT :

- overruled
- announced from the bench by Madame PEZARD, president.
- signed by Madame PEZARD, president;
and by L. MALTERRE-PAYARD, attending clerk

The court is referred an appeal brought by Mr. P and by the organization U.F.C. QUE CHOISIR (hereinafter UFC) from adverse judgment rendered by the Tribunal de Grande Instance de Paris, on 30 April 2004, in litigation against ALAIN SARDE FILMS SA, (hereinafter Alain Sarde), UNIVERSAL PICTURES VIDEO FRANCE SA (hereinafter Universal), STUDIO CANAL IMAGE SA, STUDIO CANAL SA, and the SYNDICAT DE L'EDITION VIDEO, which has voluntarily intervened.

It will be recalled that :

- 1) Mr. P purchased a DVD reproducing the film "MULHOLLAND DRIVE," produced by ALAIN SARDE and STUDIO CANAL, distributed by UNIVERSAL, and was not able to copy the DVD, due to placement on the digital media of a technical protective system which had not been clearly mentioned on the cover jacket of the DVD,
- 2) he then notified UPC, who had similar complaints referred from other consumers, concerning technical protective measures taken by producers to prevent the making of copies for private usage of videos sold on digital media,
- 3) believing this conflicted with provisions of Article L.122-5 of the Intellectual Property Code which would set forth the principle, for purchasers of recorded works, the "right to make a private copy" and furthermore conflicted with provisions of Article L.111-1 of the Consumer Code which places an obligation on vendors to inform consumers about essential characteristics of goods or services, the U.F.C. and Mr. P brought a summons to ALAIN SARDE, UNIVERSAL, and STUDIO CANAL IMAGE, on 28 May 2003 and 30 May 2003; and then on 30 July 2003 brought a summons for compulsory intervention to STUDIO CANAL.

The defendants have essentially, apart from issues of inadmissibility, argued that there was neither any specific violation of the exception for private copy nor any infraction to the provisions of the Consumer Code.

By the judgment undertaken, the tribunal :

- 1) rejected the petition for annulment of the summons,
- 2) rejected the petition for withdrawal of Document No. 4 communicated by UFC
- 3) declared Mr. P and UFC admissible in their action
- 4) dismissed the cause of action brought against STUDIO CANAL IMAGE
- 5) struck down the entirety of claims brought by Mr. P and UFC
- 6) dismissed all other claims, narrow or broad
- 7) assessed liability jointly against Mr. P and UPC to pay fines, under the requirements of Article 700 the NCPC [New Code of Civil Procedure], in the amounts of:
 - * 2500 euros to ALAIN SARDE FILMS;
 - * 3500 euros to UNIVERSAL PICTURES VIDEO FRANCE;
 - * 1000 euros to STUDIO CANAL IMAGE;
 - * 1000 euros to STUDIO CANAL;
- 8) assessed liability jointly against Mr. P and UFC to pay expenses.

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In their pleadings filed 27 January 2005, appellants M.P. and UFC petitioned the court to :

- 1) reject the inadmissibility invoked by STUDIO CANAL,
- 2) confirm the 30 April 2004 judgment of the Tribunal de Grand Instance de Paris in that it rejected a petition for annulment of the summons introduced by STUDIO CANAL IMAGE, rejecting a petition for withdrawal of Document No. 4, and declared Mr. P. and UFC admissible for their action,
- 3) vacate said judgment which had struck down the entirety of claims brought by Mr. P. and UFC, and rule on the voluntary intervention of SYNDICAT NATIONAL DE L'EDITION VIDEO,
- 4) state that the DVD "MULHOLLAND DRIVE" produced by ALAIN SARDE and STUDIO CANAL is fitted with technical protective measures depriving Mr. P. from making an ordinary private copy on any kind of media,
- 5) state that about this restriction of usage, which constitutes an essential characteristic of the product, there is no mention made,
- 6) assess liability jointly against ALAIN SARDE, STUDIO CANAL, and UNIVERSAL to pay fines to Mr. P., as compensation for damages incurred, the amount of 150 euros,
- 7) forbid ALAIN SARDE and STUDIO CANAL from using technical protective measures incompatible with the right of private copy, following a period of eight days from service of the decision, under compulsory penalty of 10,000 euros per each day after expiration of the said period,
- 8) order the publication of a judicial decree in three journals, at the choice of UFC, at a cost of no less than 10,000 euros for each insertion, the text of the judicial decree to be the following :
*"At the request of UFC QUE CHOISIR, the appellate court of Paris has decreed that the companies ALAIN SARDE FILMS and STUDIO CANAL have, by placement of technical protective measures, curtailed the rights of consumers by preventing them from making a private copy of a DVD distributed under the title "MULHOLLAND DRIVE." The court furthermore has decreed that the company UNIVERSAL PICTURES VIDEO FRANCE failed its informational obligation, by not indicating the existence of this usage restriction to prospective buyers.
The court has ruled that such schemes are unlawful.
At the request of UFC QUE CHOISIR, the court reaffirms the right of private copy, for which the consumers remit a royalty, authorizing them to make a copy of the work, to be strictly reserved for their personal use.
The present decree is published to inform consumers of their rights." ;*
- 9) declare judgment that the publication of this passage will be accomplished at the cost of the companies ALAIN SARDE, STUDIO CANAL, and UNIVERSAL, by application of Article L.421-9 of the Consumer Code,
- 10) assess liability jointly against the companies ALAIN SARDE, STUDIO CANAL and UNIVERSAL for payment of a fine to UFC, as compensation for the harm caused to the collective interest of consumers, in the amount of 30,000 euros,
- 11) assess liability jointly against the companies ALAIN SARDE, STUDIO CANAL and UNIVERSAL for payment of fines to Mr. P., in the amount of 150 euros, and to UFC, in the amount of 3,000 euros, on the basis of Article 700 of the NCPC and for expenses.

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In pleadings filed 16 February 2005, respondent ALAIN SARDE petitioned the court to :

1) confirm the judgment under appeal in all its findings, after having decreed :

* that neither the provisions of Articles L.122-5 and L.211-3 of the Intellectual Property Code nor the text of the 22 May 2001 European directive recognize the existence of any “right of private copy” for which the implementation could be justified,

* that this notion of private copy is, to the contrary, conceived and organized as an exception to the exclusive rights of authors, interpretive artists and producers of phonograms and videograms;

* that by their necessarily strict interpretation, national and European rules of law regarding “the exception for private copy” never impose upon rightholders to offer the user, for each medium for exploitation of a work, another opportunity to copy it but encourage -- entirely to the contrary -- these same rightholders have recourse to technical measures in order to ensure protection of their most sought-after media against “casual pirating.”

2) decree again and as may be needed that installation of a copy protection system on a DVD does not constitute a “restriction of usage” in the sense of Article L.113-3 of the Consumer Code,

3) assess liability jointly against UFC and Mr. P for payment of a fine to ALAIN SARDE, in the amount of 15,000 euros under application of Article 700 of the NCPC,

4) as a subsidiary matter, “with consideration to Article 234 of the Treaty, pose the two following interlocutory questions to the Court of Justice of the European Communities (CJEC) :

1st) may the private copying of audiovisual works on DVD and VHS cassettes be allowed under the title of exceptions and limitations stated in paragraph 2 of Article 5 of the directive, notwithstanding the requirements of paragraph 5 of the same Article?

2nd) must not Article 6.4 of the European Directive of 21 May 2001 which authorizes member States to take appropriate measures to ensure that beneficiaries of the envisioned exception or limitation of Article 5 paragraph 2, subparagraph (b) may enjoy this benefit “unless reproduction for private use has already been made possible by rightholders to the extent necessary”, lead to denying beneficiaries of the said exception or limitation the right to forbid rightholders -- a fortiori by the judicial function -- from putting technical measures into place upon a given medium when it is established that the reproduction of the same work for private usage was already made possible, for other media, by these rightholders?”

and to postpone decision until the CJCE has answered these two questions,

5) assess liability jointly against Mr. P and UFC QUE CHOISIR, to pay all expenses.

In their last pleading of 10 February 2005, respondents UNIVERSAL and SYNDICAT DE L'EDITION VIDEO requested the court to :

1) vacate the judgment of the Tribunal de Grande Instance de Paris from the date of 30 April 2004 in that it :

* declared Mr. P and UFC admissible in their action,

* dismissed the petition for withdrawal of Document 4 by UFC,

2) confirm said judgment by the Tribunal de Grande Instance de Paris from the date of 30 April 2004 in that it declared SYNDICAT DE L'EDITION VIDEO admissible in its voluntary accessory intervention in support of UNIVERSAL and STUDIO CANAL,

3) confirm said judgment in that it struck down Mr. P and UFC and the entirety of their claims, goals and conclusions,

And as corollary,

4) declare judgment, the court ruling hypothetically to the contrary, that the business corporation STUDIO CANAL must act to guarantee UNIVERSAL from any liability found against it,

5) assess liability jointly against Mr. P and UFC to pay reparation to UNIVERSAL, in the amount of 20,000 euros for one-time costs under Article 700 of the NCPC and for expenses.

In its pleadings of 5 January 2005, respondent STUDIO CANAL petitioned the court to :

- 1) declare the claim of UFC, seeking payment from STUDIO CANAL in the amount of 30,000 euros for interest damages, new and consequently inadmissible,
- 2) declare judgment that neither the provisions of Articles L.122-5 and L.211-3 of the Intellectual Property Code nor the text of the European Directive of 22 May 2001 recognize the existence of any “right of private copy” for which the implementation could be justified,
- 3) declare judgment that this notion of private copy is, to the contrary, conceived and organized as an exception to the exclusive rights of authors, interpretive artists and producers of phonograms and videograms,
- 4) declare judgment that by their necessarily strict interpretation, national and European rules of law regarding “the exception for private copy” never impose upon rightholders to offer the user, for each medium for exploitation of a work, another opportunity to copy it but encourage -- entirely to the contrary -- these same rightholders have recourse to technical measures in order to ensure protection of their most sought-after media against “casual pirating,”
- 5) declare judgment that the European Directive of 22 May 2001 exclusively authorizes States -- and not users or judges -- to take appropriate measures for beneficiaries of the exceptions to profit from them accordingly,
- 6) declare judgment that the installation of a copy protection system on a DVD does not constitute a “restriction of usage” in the sense of Article L.113-3 of the Consumer Code,
- 7) confirm the judgment undertaken in all its provisions,
- 8) assess liability jointly against UFC and Mr. P for payment of a fine to STUDIO CANAL in the amount of 10,000 euros, under application of Article 700 of the NCPC,
- 9) as a subsidiary matter, “with consideration to Article 234 of the Treaty, pose the two following interlocutory questions to the Court of Justice of the European Communities (CJEC) :

1st) may the private copying of audiovisual works on DVD and VHS cassettes be allowed under the title of exceptions and limitations stated in paragraph 2 of Article 5 of the directive, notwithstanding the requirements of paragraph 5 of the same Article?

2nd) must not Article 6.4 of the European Directive of 21 May 2001 which authorizes member States to take appropriate measures to ensure that beneficiaries of the envisioned exception or limitation of Article 5 paragraph 2, subparagraph (b) may enjoy this benefit “unless reproduction for private use has already been made possible by rightholders to the extent necessary”, lead to denying beneficiaries of the said exception or limitation the right to forbid rightholders -- a fortiori by the judicial function -- from putting technical measures into place upon a given medium when it is established that the reproduction of the same work for private usage was already made possible, for other media, by these rightholders?”

and to postpone decision until the CJCE has answered these two questions,

- 10) assess liability jointly against Mr. P and UFC to pay all expenses.

In pleadings of 15 February 2005, the appellants sought dismissal, by application of Articles 15 and 16 of the New Code of Civil Procedure, of the pleadings filed 10 February 2005 by UNIVERSAL and SYNDICAT DE L'EDITION VIDEO, along with Document 56 communicated that day.

In pleadings of 17 February 2005, UNIVERSAL and SYNDICAT DE L'EDITION VIDEO, have opposed this request and, as corollary, requested the court to postpone the calendar in this matter in order to permit establishment of a fully balanced debate.

In pleadings of 17 February 2005, the appellants similarly requested dismissal of motions filed 16 February 2005 by ALAIN SARDE.

Cloture in the proceedings was pronounced on 17 February 2005.

In pleadings of 18 February 2005, ALAIN SARDE opposed the request for dismissal and, to the extent needed, requested revocation of the cloture order of 17 February 2005, and deferral of its pronouncement to 24 February 2005, the date of the hearing.

CONSIDERING THIS, THE COURT :

Whereas it will be noted at the outset that the appeal was not lodged against STUDIO CANAL IMAGE, cleared from these proceedings, and that no claim has been asserted regarding dismissal of the annulment of the summons; that as may be needed, judgment will be confirmed on these points ;

On the procedure

Whereas no ruling is made on appellants' demands for dismissal of pleadings filed on 10 February and 16 February 2005; since these demands do not contain any new modes of reasoning nor new assertions and only repeat the pleadings of 25 January 2005, filed by the appellants ;

That henceforth no ruling will be made upon the demand to dismiss Document 56, communicated on 10 February 2005, since by reason of the 17 February 2005 report ordering cloture initially planned for 10 February 2005, appellants had sufficient time to examine this document and to present their views ;

That there was no harm incurred to rights of defendant nor detraction from principles of balanced argument; that the pleadings of 10 February and 16 February 2005, and Document 56 are admissible ;

On the demurral of non-admissibility

Whereas, according to UNIVERSAL and SYNDICAT DE L'EDITION VIDEO, Mr. P did not establish what would be his legitimate interest in the matter; that they state that in fact, the grounds invoked by Mr. P to justify copying of the DVD to a video cassette, so as to watch the film at the home of his parents who did not have a DVD player, are not of an acceptable nature to show his legitimate interest to prevail over the exception for private copy which is only valid for private usage and not for familial usage ;

Whereas it is furthermore asserted by UNIVERSAL and SYNDICAT DE L'EDITION VIDEO that Mr. P is not admissible since he bases his action:

*upon the fact that there exists a legal restriction owing to the presence on the DVD of a technical protection which does not permit him to exercise "his right of private copy" and owing to a royalty collected on all blank media and that the impossibility of making a copy effectively strips any cause for remuneration received by the producers,

*and upon the defect of information as to restrictions for utilization of the DVD due to the selling producer not having taken measures to inform the consumer regarding the essential characteristics of the goods or services,

however :

* Mr. P did not use any right of private copy and might only prevail by the exception of Articles L.122-5 and L.211-3 of the Intellectual Property Code, which has to be strictly interpreted,

* he asserts without proving it that he paid a fee for remuneration for private copying and that the debtors for this remuneration are according to the law (Article L.311-4 of the Intellectual Property Code) “the manufacturer, the importer or the person who performs purchases from within the European Union” of recording media, and that this remuneration is not passed on mathematically and automatically in the price paid by the consumer,

* the information about the impossibility of copying had been properly given since there was an indication on the DVD, “CP” meaning “copy prohibited,” and thus, no proof is brought for his legitimate interest to act ;

Whereas, this being said, the line of argument relies in reality upon discussion regarding the impact of Articles L.122-5 and L.211.3 of the Intellectual Property Code as well as the duty to inform stated in Article L.111-1 of the Consumer Code, and is thus linked to an assessment of the validity of the action; it is thus with pertinent grounds that the court adopts the reasoning of the first judges in upholding that Mr. P who purchased a DVD of the film “MULHOLLAND DRIVE” was admissible to plead a violation of the provisions of Article L.111-1 of the aforementioned code and to seek clarification of the scope of the provisions of Articles L.122-5 and L.211-3 of the Intellectual Property Code; that judgment on this point will be confirmed ;

Whereas UNIVERSAL and SYNDICAT DE L'EDITION VIDEO also asserted inadmissibility of the UFC petitions ;

That as the basis of their claims, they state that :

1) UFC does not have any interest in the matter based upon Article L.421-1 of the Consumer Code and thus there exists no punishable offense, and thus the association cannot exercise “rights recognized for civil party intervenors” and furthermore, it has not established the existence of any damages borne by the collective interest of the consumer;

2) nor would it be any more admissible to bring an action on the basis of Article L.321-7 of the Consumer Code, from the moment when it is not intervening in the proceedings, but acting in principal title ;

Whereas, this said, UFC does not claim to bring action upon the basis of Article L.421-1 of the Consumer Code, which opens the possibility of becoming civil party intervenor within the framework of a criminal action, but upon the basis of the provisions of Article L.421-7 of the Consumer Code ; that according to this article, “the recognized associations of consumers may institute proceeding in civil courts and, in particular, request application of measures provided for in Article L.421-2” ;

That it is not contested that UFC is a recognized association; furthermore, it acted not by itself before the civil court of jurisdiction, but on the side of Mr. P , an individual consumer for whom the action is, in principal title, admissible; that the statute which uses the term “intervention” does not specify the forms by which this intervention must be effected; that it is notably not retained in the particular provisions of the new Code of civil procedure; that it is with pertinent grounds that the court adopts the reasoning of the tribunal in upholding that the term “intervention” must be understood in its common sense and that in specific, the action of UFC was admissible, since this association intervened in the proceedings on the side of Mr. P ; that it was not necessary that the principal action be introduced by Mr. P alone, an intervention being able to proceed as a conjoint

action; that the judgment will be confirmed and UFC declared admissible on the basis of Article L.421-7 of the Consumer Code; that no further ruling will be made on the claim of subsidiary inadmissibility as based upon grounds that the association may have acted in the name and in the interest of “consumers from all continents,” this general formula thus encompassing the French consumer for which this association was authorized and has an interest to act, to defend the common interests of the latter ;

On the admissibility of the demand for indemnification brought against STUDIO CANAL

Whereas, according to this company, the demand for indemnification brought against it for the first time during the appeal must therefore be declared inadmissible under Article 564 of the new Code of civil procedure ;

That the appellants reply that it is from a material error that their last pleading did not in the first instance invoke any indemnification demand against this company, all the demands (including demands for indemnification) having been directed in the first place against STUDIO CANAL IMAGE then after intervention of STUDIO CANAL against this latter, and that it is by a typographic error that the indemnification demand had been wrongly asserted against STUDIO CANAL IMAGE ;

Whereas if apparently the original pleadings for indemnification contain a typographical error, it remains that the courts can modify the subject matter of a claim only such as contained within contents of the pleadings; the court cannot reaffirm demands for damages and interests that were not brought against STUDIO CANAL; that it is then the question of a new claim, which is not admissible ;

On the admissibility of the voluntary intervention of SYNDICAT DE L'EDITION VIDEO

Whereas although the appellants demand, in their last pleading, to vacate judgment in that it declared admissible the voluntary intervention of SYNDICAT DE L'EDITION VIDEO, they do not develop any basis to support this demand; that it will consequently be rejected ;

On the demand to withdraw Document 4 (journal minutes from the meeting of the BRUN-BUISSON Commission)

Whereas UNIVERSAL and SYNDICAT DE L'EDITION VIDEO withdrew their original argument requesting exclusion of this document with reference to the provisions of Article 13 of the internal regulations of the commission stated in Article L.311-5 of the Intellectual Property Code which sets forth that “the members of the commission and experts are held to the obligation of discretion by reason of the evidence, documents and information of which they have had knowledge” and by the fact that meetings of the commission are not public ;

However, whereas the first judges have with reason dismissed this demand, holding the duty of discretion does not necessarily imply that all journal minutes of the commission meetings could not justifiably be produced ; that it will be added that this duty of discretion bears not upon the journal minutes of the commission meetings, but upon the contents of debate or documents of which the members of the commission would have had knowledge ; that on this ground, the judgment will be confirmed ;

On the violation of Articles L.122-5 and L.211-3 of the Code of Intellectual Property by a protective device on a DVD preventing all copying for private purposes

Whereas the tribunal rejected this demand, holding in substance that, in order to appreciate the impact of the exception for private copy written into these statutes, it was proper to consult provisions of the Berne Convention and the terms subordinated to the implementation of this authority following Article 9-2, provisions which are found enunciated in the agreement on Aspects of the Rights of Intellectual Property regarding Commerce (ADPIC) [Aspects des Droits de Propriété Intellectuelle qui touchent au Commerce] and in the treaty of the OMPI [Organisation Mondiale de la Propriété Intellectuelle] on the rights of authors, adopted in 1996, adding that “the dates at which the internal provisions had been adopted (1957 and 1985) rule out that the legislator had been able to take into consideration the recent increase of media-types upon which a work could be reproduced, and technical protective processes likely to present obstacles to their reproduction, so that an absence of precision in these statutes concerning modes of reproduction cannot be drawn into the argument” ;

That the tribunal also estimated that, although the directive of 22 May 2001 had not yet been transposed into French law, it acknowledged that it would interpret the internal provisions by its light and that this directive, similar to international instruments which have preceded it, subject the benefit of the exception to cumulative conditions envisioned by the Berne Convention, that is to say, the necessity to envision special cases which do not conflict with normal exploitation of the work and do not cause unreasonable prejudice to the legitimate interests of the author ;

That analyzing these cumulative conditions (designated under the phrase “three-step test”), the tribunal held that the commercial exploitation of a film in DVD format constituted a normal mode of exploitation of the work and judged that “the copy of a work of cinema edited for digital media thus could only conflict with normal exploitation of the work” and that this conflict will necessarily be severe -- in the sense of the criteria set forth by the Berne Convention – for it will affect a mode of exploitation essential to the said work, indispensable for amortization of the costs of production ;

Whereas the appellants make objection to the first judges for having :

- 1) estimated that the legislator did not take into account the recent increase in media-types, omitting thereby consultation with the law of 17 July 2001 concerning equitable expected remuneration, in particular for private copying, which limits only the tax basis of remuneration for certain media-types and did not rule this out as concerns digital media,
- 2) interpreted the law with regard to the Berne Convention and the ADPIC which was imposed upon States during introduction of the authorized exception, (analysis that the legislator necessarily conducted before modifying the law), and not by the internal judiciary,
- 3) upheld that a private copy of a DVD seriously conflicts with normal exploitation of the work ;

That they maintain in effect that :

- 1) the right of private copy was expressly sanctioned by Articles L.122-5 § 2 and L.211-3 of the Intellectual Property Code in which it is mentioned that when the work has been disclosed, “the author cannot interdict [. . .] copies of reproductions strictly reserved for private use of the copier and not intended for collective use”,
- 2) the legislator did not make any distinction depending on the media-types upon which, or from which, the private copy could be exercised while the technology of digital media was known and conducted at least to some extent by the legislator in the assessment of royalties, including for digital recording media, whereas he would have been able to rule out private copy from the start and/or upon works copied to digital media,

3) the BRUN BUISSON commission (constituted under Article L.311-5 of the Intellectual Property Code), rather than giving priority to technical protective measures which would make it impossible to copy works onto digital media, instead implemented royalties on these digital media-types, and set a rate proportional to their technical characteristics,

4) such is also the position of the Conseil d'État who in a ruling of 25 November 2002 notably rejected the idea that the right of the author must be secured by technical protective measures to prevent copying ;

That they add that :

1) directive 2001/29/CE of 22 May 2001 no longer limits potential media-types for the private copy (article 5.2, b), this appearing as well in the legislative bill for transposition of this directive which emphasizes the “necessity of finding a permanent way to encourage a greater diffusion of culture, while preserving the rights of creators” and that in a state having substantive law, copies made to digital media are not ruled out from the domain of private copy,

2) article 6 § 4 of the directive provides that the protective measures must not present an obstacle to the right of private copy and that “the member States must speak to the case presented in order to permit the exercise of the right of reproduction for private use against protective measures put into place by rightholders, including the producers of phonograms and videograms, acting to preserve the necessary balance between the interests of rightholders and those of users, an equilibrium which is also exhibited in various international instruments (such as the treaty of the OMPI, Article 27 of the DUDH [Déclaration Universelle des Droits de l'Homme; Universal Declaration of Human Rights] and Article 15 of the International Covenant on Economic, Social and Cultural Rights [Pacte international relatif aux droits économiques, sociaux et culturels]) and which is ensured by an equitable royalty collected on blank media ;

Whereas, on the application of the “three-step test”, the appellants state :

1) that it is a calling to be implemented by each legislator when deciding to introduce, into national law, an exception for private copy, the occurrence of which indeed was carried out notably at the time of the adoption of the law of 3 July 1985,

2) that this is not modified by the directive of 22 May 2001,

3) that, in any case, the tribunal made a poor assessment of the conflict with normal exploitation of a work, only taking into account respect for the authors' rights and not those of the user, which in this state no longer exists, while a limitation on the number of copies would have been able both to ensure protection for rightholders and to reserve possibilities for users to exercise their right of private copy ;

That they furthermore criticize the first judges for not having researched whether there existed an unreasonable prejudice, in this case in particular, remarking that if it is true that DVD sales may permit a certain balance of production, it is not possible “to claim one preemptory mode that alone might be able to accomplish this balance through sale of the DVD, and to therefore authorize, in contempt of the substantive law, the placement of mechanisms to interdict private copy, be they analogue or digital” ; that in this case, moreover, the copy which could not be made was relative to a copy on analogue media and not a copy on digital media ; that the documents put into the debate by the respondents do not suffice to establish that there had been a wrongful injury resulting from the private copy to VHS media, this all the more so as, in particular, a royalty is collected by the authors for private copy, which is also in compliance with provisions of the directive in Article 5.2(b) and whereas [considérant] 35 and 38 ;

Whereas in order to respond to an argument asserted by the respondents, the appellants contend that the possibility of obtaining a copy from sources other than DVD could not be usefully offered, to the extent that :

- * television broadcast of a work is unpredictable
- * access to works broadcast on television might require payment and consequently not be available to all consumers ;

Whereas respondents insist, to the contrary, in substance that :

1) the appellants are not able to prevail with a “right of private copy which does not exist” ; that in fact, there is only one exception to the exclusive right of artists and creators, and it must be interpreted in a strict manner; that neither the law of 11 March 1957 nor that of 3 July 1985, nor that of 17 July 2001, and still less the European directive of 22 May 2001 intend validation of any “right of private copy”, the mechanism for the royalty for private copy introduced by the law of 3 July 1985 having the purpose, as shown by the parliamentary efforts, of being a stop-gap and not an end in itself (Senator JOLIBOIS notably pointed out in his report that “the multiplication of cassette recordings made by individuals is likely to cause unreasonable prejudice to the legitimate interests of the authors [. . .] lacking anything better, the only solution would then seem to consist in the institution of a financial compensation designed to lessen the damage suffered by exclusive right holders due to the impossibility they feel to exercise such rights”),

2) this exception is imposed only because of the technical impossibility of control by the author who, insofar as these means are possible, recovers full exercise of his authorship rights, precisely according to the royalty applied to digital media which was provided in 2001 and which shares the same logic ;

3) they can no longer rely upon the exception of private copy, this exception not covering the three-step test imposed by the applicable international treaties, and notably by the directive of 22 May 2001 which must already have been transposed into the national law and which in its Article 6.4 authorizes (as only one option) that member States desirous to institute an “exception for private copy” take appropriate measures to ensure that the beneficiaries of the exception for private copy are able to profit accordingly, with a two-fold condition :

- * that the exception for private copy defined in the national legislation of the member State be applicable only in certain special cases which do not conflict with normal exploitation of the work or other protected subject matter, or cause unreasonable prejudice to the legitimate interests of rights holders (Article 5.5),

- * that reproduction for private use not already have been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned (Article 6.4 § 2) ;

That they deduce from this that it is “totally inconceivable” to interpret Articles L.122-5 and L.211-3 of the Intellectual Property Code, as originally from laws of 1957 and 1985, as adding to the burden of rightholders an obligation to permit analogue and/or digital copying of their works ; it would be necessary to give priority to technical measures as they have assured European municipal officials (see the report of the Cultural Affairs Committee of the Senate from 28 April 1999) concerning the outline of the directive ;

Whereas they furthermore insist that the directive would not permit either individuals or an association of consumers to litigate the application of measures permitting the exercise of private copy, only the State of France having the option to do so ;

Whereas they also assert that, by application of Article 6.4 § 2 of the directive which states “that a State member may also take such measures (measures appropriate to ensure that beneficiaries of exceptions might be able to derive the benefit) unless the reproduction for private use had been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned ; Mr. P had the possibility of making a private copy from analogue media, offered for sale on 4 September 2002, or from televised broadcast, and that therefore the exception for private copy had been honored ;

Whereas UNIVERSAL and SYNDICAT DE L'EDITION VIDEO furthermore observe that it is not relevant to consult Article 27 of the Universal Declaration of Human Rights of 10 December 1948 and Article 15 of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, designed to implement the aforesaid provisions, that consequently it is about a generic recognition by all participants in cultural life, which implies nothing other than the power to undermine protection of authors' rights, being consistent with the need to search for a balance between explicitly recognized rights and the legitimate interests of users, the one and the other not having the same place in the legal hierarchy ; that they point out that when it is about copying from a DVD this balance is precisely in question insofar as digital clones are perfectly substitutable for commercial copies ;

Whereas it is finally argued, essentially by STUDIO CANAL, that the copies Mr. P was hoping to make do not constitute a copy designed for his personal use or for family viewing, solely authorized, but for his parents, and outside his home ; that this conception of private usage is too extensive, that copier and the user of the copy must be one and the same person ;

Whereas, this said, Article L.122-5 § 2 of the Intellectual Property Code states that “once a work has been disclosed, the author cannot prohibit [. . .] copies or reproductions reserved strictly for the private use of the copier and not intended for collective use” ; that Article L.211-3 § 2 of the Code of Intellectual Property similarly provides that the next rightholder “may not prohibit reproductions that are strictly reserved for private use by the person who has made them and that are not intended for any collective use” ; that if the appellants wrongly conclude that they are to be beneficiaries of the right of private copy, when it is a question of a legal exception to the author's rights, and not a right which would be recognized in an absolute manner for the user (Article 27 of the DUDH and Article 15 of the International Covenant on Economic, Social and Cultural Rights decree only general principals of access to culture), it then abides, contrary to the respondents' assertions, that this legal exception can be limited only with conditions specified in the texts ;

Whereas, on this point, the appellants rightly insist that the exception for private copy is not limited, in the internal legislation, to one reproduction of the work on a specified media, nor from what a private copy may be made ; that the argument retained by the first judges, holding in fact that the legislator could not have taken into consideration the increase in media enabling reproduction of works for private copy and the technical processes capable of standing in the way to their reproduction, is inoperative ; that in effect, at least during 2001, whereas the development of these means was known, the legislator nevertheless did not rule out certain media from the field of private copy ;

That therefore, law n°2001-624 of 17 July 2001, adding to Article L.311-1 of the Intellectual Property Code a first line to Paragraph 2, states that : “The authors and publishers of works fixed on any other medium are also entitled to this remuneration (for private copy) for the reproduction of those works made, in accordance with item 2 of Article L122-5, on a digital recording medium” ; that it is

therefore manifest that the legislator in 2001 had knowledge about the technical progress and did not then intend to limit the exception for private copy by the kinds of media ;

That it will also be pointed out that Article L.311-4 of the Intellectual Property Code, concerning the persons bound to pay the royalty for private copy, is drafted in general terms because it intends “recording media that may be used for reproduction of works for private use “ which does not at all exclude digital media ;

Whereas, consequently, that the national legislator, when treating private copy, did not make the distinction as to media from which or upon which the private copy could be made (Article L.311.4 of the Intellectual Property Code), or expressly aim at digital media (Article L.311-1 of the Intellectual Property Code); that there is no room for distinction where the law does not distinguish ;

Whereas the internal law is not in contradiction with directive 2001/29/CE of 22 May 2001 relative to harmonization of certain aspects of author's rights and rights of similar type in the information society, which in its Whereas {Considérant} No. 31, emphasizes the need to maintain a fair balance of rights and interests between different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter, and which according to Article 5-2 (b) leaves to the attention of the member States to allow for an exception to the right of reproduction “in respect of reproductions on any media made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation” ; that therefore, the exception for private copy is always a possibility in internal law ;

Whereas because of the multiplication of technical means permitting reproduction of a work for private purposes and the need to compensate authors, the French legislator and the European directive have envisioned the principle of a particular payment, applying especially to blank media that are found in commerce, paid indirectly by the consumer who purchases blank media for purposes of reproduction, since the cost of fair compensation is included in the sales price and that this compensation is designed to restore the balance between the author's right and the exception, with the condition of an authorized usage for copying ;

Whereas the appellants rightly insist that, insofar as the legislator had admitted this exception in 1957, he had considered at the outset whether it would fulfill the conditions set by the international treaties, of which the Berne Convention in its Article 9.2 and the national judge have nothing to say, as to whether these conditions were fulfilled ; that nevertheless, the internal law presently considers that the directive of 22 Mai 2001 which would have had to be transposed no later than 22 December 2002 and which specifies in Article 5.2(b) that the member States have the option of allowing in their national law a singular exception to the right of reproduction belonging to rightholders, with the condition that the said exception fulfills the criteria stated in point 5 of the same Article, that is to say that “exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”, commonly known as the “three-step test” ;

That Article 6.4 § 2 similarly invites the member States to take appropriate measures to ensure the efficacy of these singular exceptions of reproduction by rightholders and Article 5.5 has a purpose for application only where the measure or the optional exception stated in Article 5.2(b) is taken over by national law ;

Whereas, consequently when there exists in the national law that is in effect a singular exception to reproduction by holders of author's rights for private copy, the internal law must be analyzed in comparison with Articles 5.2(b) and 5.5 of the directive ; that in effect no ambiguity exists in the text which would necessitate, as litigated in an ancillary proceeding, posing an interlocutory question to the Court of Justice of the European Communities ;

That it was agreed upon to consider whether, in particular, the exception for private copy presently written without a limitation on media-type in the internal law is congruent with the instructions of Article 5.5 of the directive ;

Whereas the decision of the first judges is not criticized in that it had held that the first condition requiring a special case was honored ;

Whereas, concerning the condition of not conflicting with normal exploitation of the work or other protected subject matter, the tribunal could not have known whether it would be sustained when it judged that “the copy of a work of cinema edited for digital media thus could only conflict with normal exploitation of the work; and this conflict will necessarily be severe for it will affect a mode of exploitation essential to the said work, indispensable for amortization of the costs of production”

That, in effect, if it is not disputable that the exploitation of a work in the form of a DVD constitutes a normal exploitation of the work, as it is elsewhere for exploitation of a video cassette, and is a necessary source of revenue for the amortization of the costs of production, yet it is not explained just what in the existence of a private copy, which in principle and in the absence of reprehensible corruption does not frustrate normal commercial exploitation, characterizes the unlawful scope; all the more so taking into account this demand for profitability by setting a royalty contingent upon the quality of a digital reproduction, the author or his rightholder not having to suffer then a lack of earnings, the impossibility of making a copy not necessarily implying that the consumer might make a new purchase of the same product ;

Whereas it is no more demonstrated that the exception for private copy would have been in particular, originally, an unreasonable prejudice to the legitimate interests of rightholders ; that in effect, on the one hand Mr. P did not abuse the exception for private copy, the plan for the copying being carried out by himself, to be used, certainly outside his home, but in a limited family circle, and on the other hand, in purchasing this DVD, Mr. P at least in part paid the royalty intended to the authors as *quid pro quo* for the possible reproduction ;

That therefore, the exception for private copy such as stated in the internal legislation, analyzed in regards to Article 5.5 of the directive, being congruent with the conditions enacted by the text, it is necessary to say that Mr. P and UFC may prevail, at least so far as concerns the DVD in question ;

Whereas it is furthermore asserted that the exception for private copy could not be admissible to apply in specific, in view of Article 6.4 § 2 and the directive which provides that “a member State may also take such measures (that is to say, those envisioned in Article 6.4 § 1) in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5 § (2) (b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5 § (2) (b) and Article 5 § 5, without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions” ;

That UNIVERSAL and LE SYNDICAT DE L'EDITION VIDEO point out in effect that Mr. P was able to process copies, whether from television series for which the film had been distributed, or commercial video cassettes, and that he could no longer avail himself of a private copy from a DVD ;

However, whereas aforementioned Article 6.4 § 2 does not have compulsory nature since it only allows the member State the option of taking measures under certain conditions ; that its meaning does not compel national jurisdictions, consequently that the internal law does not imply the same disposition ; that the well-founded reasoning of the application of this article will consequently be bracketed ; that it is not fitting for the judge to substitute for the legislator in order to determine the applicable protective measures, and the technical state of the art, for private copy made from one digital media to another digital media ;

Whereas consequently, that in the applicable state of internal law, which does not envision any limit to the exception for private copy since it could only be effectively made for private usage and must honor the conditions of Article 5.5 of the directive, Mr. P who, in specific, purchased a DVD in a regular commercial manner and who then was not able to process a copy on a video cassette intended for private usage suffered de facto damage for fan behavior from companies which had by technical means totally “locked” the DVD in question ;

On the defect of information

Whereas the appellants bring grievance against the first judges for having held, while having emphasized the consumers' need for accurate information on the impossibility of making a lawful private copy, that the impossibility of processing a private copy of the DVD did not constitute an essential characteristic of such product ; that they in effect observe that Articles L.122-5 and L.122-3 of the Intellectual Property Code authorize the making of a private copy of a work whatever may be the media and that there is nothing unlawful to consider, when one acquires DVD media that it could be reproduced for private usage ;

Whereas by the terms of Article L.111-1 of the Consumer Code, all professional merchants of goods or providers of services must, before concluding the sales contract, put the consumer in a position to know the essential characteristics of the goods or services ;

That this duty of information notably compels the seller to state the restrictions on utilization or characteristics of the goods or services provided ;

Whereas in particular, the respondents support that by the mention of “CP” placed upon the DVD, the informational obligation has been well fulfilled ; that in effect, according to them, these initials signify “copy prohibited” and are understood as such by the consumer ;

However, whereas with this sole indication, appearing moreover in a type font of small dimension, the consumer could not be sufficiently informed about the essential characteristics of the DVD media that he bought, and upon which was printed the film title “MULHOLLAND DRIVE” ; that “CP” is likely to invite other accepted meanings, all the more so as the consumer knows that the copies for private purposes are authorized ; that the impossibility of making a copy for private purposes was not clearly indicated, the seller did not inform the consumer in an exact manner ; that to the contrary, as the tribunal said, the option of private copy is an essential characteristic of the media in question ;

that a consumer duly informed would have been deterred from purchasing the DVD ; that the judgment will be overruled in that it rejected this claim ;

Whereas ALAIN SARDE and STUDIO CANAL, who produced the film in question and claim that the assignees are responsible for these deficiencies insofar as they are retained under the heading of breach of the exception for private copy, having authorized a locking mechanism for the DVD to prevent all reproduction, thus a defect of information ; that UNIVERSAL as professional distributors are equally responsible for having distributed DVDs not containing sufficient information about one of the essential characteristics of the product ;

On remedial measures

Whereas it will be held as to the measures for interdiction litigated in terms of the system hereinbefore enunciated ;

Whereas the damage suffered by Mr. P occurs entirely at the same time from the marked up price of the blank cassette purchased, in consequence of the amount of royalty owed for private copy, and from the loss of joy that he suffered because he was not able to process a private copy; that with allowance made for the product ingredients, the court estimates that the sum of 100 euros will exactly compensate for this ;

Whereas UNIVERSAL and ALAIN SARDE FILMS will be found liable to pay these amounts, it being recalled that claims for indemnity made by appellants against STUDIO CANAL have been declared inadmissible ;

Whereas the publication measure litigated under the format of the distribution of a judicial communiqué would not appear to be especially appropriate ;

Whereas UNIVERSAL claims to be guaranteed against liability pronounced against it, by STUDIO CANAL, because by the terms of their contract (article 4), it is stipulated that “in a general manner, the editor guarantees to the distributor the provision of finished products ready for disposition to the public. The editor guarantees the distributor against all recourse to third parties who might claim the possession or exercise of rights pertaining to the videogram of the present subject matter and will assume costs by all authority which might be pledged to this matter as well as potential pecuniary liabilities which could be pronounced as the result of such action” ;

That it is agreed upon as regards this contractual clause to uphold the guarantee claim made by UNIVERSAL ;

Whereas the equity decree to allocate to the title of Article 700 of the new Code of civil procedure the amounts of 150 euros to Mr. P and 500 euros to UFC at the sole cost of the respondents ; that the judgment will be overruled and that appellants held liable to pay indemnity on this basis with consideration of the parties present in the appeal ;

FOR THESE REASONS :

Declares admissible the pleadings of UNIVERSAL PICTURES VIDEO FRANCE of 10 February 2005 and ALAIN SARDE FILMS of 16 February 2005 as well as Document No. 56, communicated by UNIVERSAL on 10 February 2005 ;

Declares inadmissible the claim for damages and interests made by the appellants against STUDIO CANAL ;

Affirms judgment in that it had dismissed the petition for nullification of the summons and withdrawal of Document No. 4 of UFC, and declared admissible the present action by Mr. P and by UFC as well as the voluntary intervention of SYNDICAT DE L'EDITION VIDEO, and assessed liability under the title of Article 700 of the new Code of civil procedure pronounced to the benefit of STUDIO CANAL IMAGE ;

Vacates the remainder, giving the ruling again and adding,

Assesses liability jointly against ALAIN SARDE FILMS and UNIVERSAL PICTURES VIDEO FRANCE to pay Mr. P as compensation for damages suffered, the sum of 100 euros ;

Prohibits ALAIN SARDE FILMS and STUDIO CANAL from using technical protection means incompatible with the exception for private copy on the DVD "MULHOLLAND DRIVE" , and within the period of one month from service of the decision, under constraint of 100 euros per day each day past said period ;

Assesses liability jointly against ALAIN SARDE and UNIVERSAL PICTURES VIDEO FRANCE to pay to the association UFC-QUE CHOISIR the sum of 1000 euros as compensation for damages caused to the collective interest of consumers,

Assesses liability jointly against ALAIN SARDE FILMS, UNIVERSAL PICTURES VIDEO FRANCE and STUDIO CANAL to pay, under title of Article 700 of the new Code of civil procedure, the sum of 150 euros to Mr. PERQUIN, and the sum of 1500 euros to the association UFC-QUE CHOISIR

States that STUDIO CANAL must be guarantor to UNIVERSAL PICTURES for the liabilities assessed upon the latter, to include costs under Article 700 of the new Code of civil procedure and expenses ;

Dismisses all other claims ;

Assigns all costs to the respondents ;

Authorizes Master BODIN-CASALIS, solicitor, to recover the expenses of appeal in accordance with the provisions of Article 699 of the new Code of civil procedure.

s/s

REGISTRAR

PRESIDENT