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Eric Zemmour's presidential campaign: A candidacy announcement out of the (legal) frame

This is a presidential campaign video which created a buzz. Eager to show France, its history, its knowledge and its culture, Eric Zemmour illustrated his words with many images, without any authorization from the holders of the rights to the footage used. Could he rely on the copyright exception known as the "short quotation exception" (known as *exception de courte citation* under French law) or freedom of expression to circumvent copyright?

The Paris Judicial Court says no; the rights holders must be compensated and the video removed. However, could not the judges have ruled out any infringement on the ground that the very short footage at issue were merely incidental to the political speech?

The presidential candidate wanted to make something original. The announcement of his candidacy in the form of a video somewhat inspired by the figure of General de Gaulle, a text declaimed in a solemn tone, with France in the spotlight. But not only... His "borrowed" sequences follow one another to the sound of Beethoven's seventh symphony; the newspaper *Le Monde* reportedly counted no less than 114 "borrowed" sequences. Images of public personalities all of kinds, movie excerpts, street scenes, all these illustrations scrolling to the rhythm of the words.

Some of the people quoted or shown on the background screen used to illustrate the candidate's words were not troubled. Others, on the other hand, such as the holders of the rights to the movies "*Un singe en hiver*" (*A Monkey in Winter*), "*Quai des brumes*" (*Port of Shadows*) and "*Jeanne d'Arc*" (*The Messenger: The Story of Joan of Arc*), as well as to the documentary "*Louis Pasteur portrait d'un visionnaire*" (*Louis Pasteur, portrait of a visionary*), decided to take legal action.

Their respective formal notices demanding to put an immediate end to any exploitation of the excerpts from these audiovisual works, sent in November 2021, had indeed remained dead letters. Not intending to let the broadcasting of the video "*je suis candidat à l'élection présidentielle*" (*I'm Running for President*) continue on the Internet, they filed a petition for authorization to summon on a fixed date and at a fixed time. This procedural choice allowed them to plead on January 27, 2022, and a decision was handed down on March 4, 2022^[1]; however, this decision was not a mere summary judgment as the case was adjudicated on the merits.

The infringement action was brought not only against Mr. Eric Zemmour and his association called "*Reconquete !*" (formerly known as "*Les amis d'Eric Zemmour*"), publisher of the website "*zemmour22.fr*", but also against the owner of the website "*lesamisdericzemmour.fr*", due to the broadcasting of the disputed video on the aforementioned websites, on Facebook and on the YouTube and Dailymotion platforms.

The numerous plaintiffs included the movie production companies Gaumont and Europacorp, as well as the co-authors of the above-mentioned movies or their heirs.

They requested the Paris Judicial Court to rule that the unauthorized use of excerpts from these movies constituted copyright infringement. They, therefore, requested their removal from the disputed video, the payment of a 5,000 euro fine per day of non-compliance and the publication of a press release. They also claimed damages for the harm suffered and an indemnification for the unrecoverable legal fees they had to incur to defend their rights.

In terms of copyright infringement, a distinction must be made between the economic rights held by the producers of the relevant audiovisual works (by way of assignment of such rights by the authors) and the moral rights held by the co-authors of these works, which are non-transferable but which pass on to the heirs.

The unauthorized diffusion of images violates copyright in its proprietary element (infringement of the rights of representation and reproduction according to the form of exploitation in question). But it can also violate the moral rights of the authors, in case of failure to respect their right of authorship (failure to mention the name of the author) and infringement of the integrity of the works (diversion of the purpose of the movies which are not supposed to illustrate an electoral campaign).

Regarding copyright infringement, the defendants invoked the short quotation exception and pleaded freedom of expression.

However, the first argument did not work in several respects.

Of course, it was tempting to use such argument as the disputed excerpts were indeed short. However, this

criterion is not sufficient:

“The excerpts used, although sufficiently short since they each last only a few seconds while they are taken from feature-length movies, cannot however be considered as justified by the critical, polemical, educational, scientific or informational nature of the disputed video”.

The Paris Judicial Court indeed noted that they only constitute an illustration, a visual background, to a political speech. The judge referred to the content of this speech to exclude any polemic or information in the sense that the disputed images do not support an argumentation, do not allow *“to deepen an analysis”* and *“do not aim at an exclusive purpose of immediate information in direct relation with the works from which they are taken”*. Clearly, the reproduced works are not the subject-matter of the candidate’s speech, they only illustrate certain words or references, like *“Jeanne d’Arc”* (Joan of Arc) for example. The only information is Mr. Eric Zemmour’s candidacy for the presidential election.

Moreover, the short quotation exception can only apply if the name of the authors is mentioned. This was not the case in the matter at hand, since only a link to the title of the movie and the name of the owner of the YouTube channel from which the excerpts were taken was available on the platform. This reference alone does not meet the applicable legal requirements in this respect.

The Paris Judicial Court also dismissed the argument based on the freedom of expression which, even though enshrined in Article 10 of the European Convention on Human Rights (ECHR), is itself limited by the necessary *“respect for other fundamental rights such as the right to property, from which copyright derives”*.

Yet, one cannot draw from this finding that copyright is above freedom of expression, as the judgment commented herein is in line with the finding of the *Court de Cassation* (French Supreme Court)^[2] according to which *“a balance of interests must be struck between the various fundamental rights and freedoms, and hence, in this case, between copyright and freedom of expression”*.

In order to reach this perilous balance, which is subject to free and subjective interpretation, the judge relied on the necessity of the litigious “borrowed” sequences to illustrate the candidate’s political speech, and this approach to the interchangeability of images undoubtedly condemns the latter. Indeed, *“other excerpts or royalty-free images could have been used just as effectively to illustrate his speech”* and *“the removal of the disputed excerpts would not lead to any change in Eric Zemmour’s speech”*.

More concretely, a royalty-free or authorized image of Joan of Arc could have been reproduced in the video instead of the excerpt from the eponym movie, especially since it was indeed the historical figure who was quoted by the candidate and not the character of the movie or the movie itself.

Consequently, there was no disproportionate infringement of freedom of expression and the defendants acted in a thoughtlessness way sanctioned by the judge, insofar as the decision did not find any justification for the choice made with regard to the excerpts used.

It is however surprising that the so-called incidental theory was not raised. Indeed, given the brevity of the reproduced excerpts and the total number of images used in the video – which the Paris Judicial Court admitted were mere illustrations – it could have been argued that the disputed excerpts were, therefore, only incidental to the main subject, recognized by the judges as being the announcement of Mr. Eric Zemmour’s candidacy for the presidential election.

In this respect, it is useful to recall the terms of the landmark decision issued by the *Cour de Cassation* in respect of this theory in a case concerning the development of the *Place des Terreaux* (a famous central square in the city of Lyon) ^[3]:

“But whereas it has noted that, as shown in the views in question, the work of Messrs. X... and Y... was part of the architectural ensemble of the Place des Terreaux, of which it constituted a simple element, the Court of Appeals rightfully inferred that such a presentation of the work in question was incidental to the relevant subject-matter, i.e., the representation of the square, so that it did not achieve the communication of this work to the public.”

In audiovisual matters, the *Cour de Cassation* ^[4], excluded any infringement of a reading method used in classroom in the documentary *“Etre et avoir”* (*To be and to Have*).

In that specific case, it considered that it was a fortuitous inclusion, as it was a matter of brief sequences, although on 22 shots and in full screen; the work in question not being reproduced for itself.

In the case at hand, if the incidental theory argument had been raised, the judge would have had to assess whether the third-party work had been included for itself. This is *a priori doubtful* at least for Joan of Arc and Pasteur who were simply cited as illustrious figures.

As for moral rights, the mere fact that the names of the authors are not mentioned is sufficient to characterize the violation of the authors’ right of authorship.

Regarding the infringement of the integrity of the works, the Paris Judicial Court recalled that the exploitation of infringed works in the form of excerpts was not as such sufficient to constitute an infringement of moral rights. Indeed, it is necessary to demonstrate how the disputed use has distorted the original works.

In the case at hand, this distortion was characterized by the diversion of the infringed works from their primary purpose *“which is to entertain or inform”* to use them for political purposes.

Consequently, the Paris Judicial Court found that the plaintiffs were justified in claiming compensation for their respective damage, which can be valued according to different methods, the judge taking into account the following elements separately:

- the adverse economic consequences of the reported infringement (in particular loss of profits and losses

- suffered),
- the moral damage,
 - the profits earned by the infringer.

Alternatively, the judge may award damages in the form of a lump sum payment higher than the royalties that would have been due (in addition to the moral damage).

In the case at hand, this last method has been chosen by the judge who ordered the defendants, jointly and severally, to pay a total of 50,000 euros in compensation for the damage suffered, plus 20,000 euros under Article 700 of the French Code of Civil Procedure (attorneys' fees).

The Court also ordered that the broadcast of the disputed video be blocked as long as the excerpts from the infringed works have not been removed, subject to a periodic penalty payment in case of non-compliance. To date, the video is no longer available on the platforms (at least in France).

As for the request for the publication of a press release, the Paris Judicial Court did not consider that this measure was necessary given the media coverage of the case. The question may then arise as to whether the plaintiffs should be themselves allowed to communicate about the decision rendered, as long as they assume the associated costs. Indeed, while the defendants cannot be forced to publish anything on their websites and social networks, could the successors in title of the authors of the infringed works publish a press release without taking any legal risk? The open court principle should allow this but courts are nevertheless careful to prevent any abuse of rights in this respect.

The press has reported that an appeal has been lodged against this decision which is, in any case, provisional enforceable. Further developments might, therefore, follow...

[1] Paris Judicial Court, 3rd Chamber, 2nd Section, March 4, 2022, Docket No. 22/00034

[2] 1st Civil chamber of *the Cour de Cassation*, May 15, 2015, 13-27.391: The decision of the Court of Appeals was quashed on the basis of Article 10(2,) of the ECHR for not having "*explained in a concrete manner how the search for a fair balance between the rights at stake commanded the sentence it pronounced*"

[3] 1st Civil chamber of *the Cour de Cassation*, March 15, 2005, appeal No. 03-14.820

[4] 1st Civil chamber of *the Cour de Cassation*, May 12, 2011, appeal No. 08-20.651



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