26/02/2025 | FRANCE | N°12500131

France, Court of Cassation, Civil Chamber 1, February 26, 2025, 12500131

LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, a rendu l'arrêt suivant :

CIV. 1

MY1

COUR DE CASSATION

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Audience publique du 26 février 2025

Rejet

Mme CHAMPALAUNE, président

Pourvoi n° E 23-15.966

R É P U B L I Q U E F R A N Ç A I S E

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AU NOM DU PEUPLE FRANÇAIS
_____r>

ARRÊT DE LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, DU 26 FÉVRIER 2025

La société DStorage, société par actions simplifiée unipersonnelle, dont le siège est [Adresse 2], a formé le pourvoi n° E 23-15.966 contre l'arrêt rend...

Voir plus

THE COURT OF CASSATION, FIRST CIVIL CHAMBER, has rendered the following judgment:

CIV. 1

MY1

COURT OF CASSATION

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Public hearing of February 26, 2025

Rejection

Mrs. CHAMPALAUNE, president

Judgment No. 131 FD

Appeal No. E 23-15.966

IN THE NAME OF THE FRENCH PEOPLE

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JUDGMENT OF THE COURT OF CASSATION, FIRST CIVIL CHAMBER, OF FEBRUARY 26, 2025

DStorage, a single-member simplified joint-stock company, with registered office at [Address 2], has filed appeal no. E 23-15.966 against the judgment rendered on April 12, 2023 by the Paris Court of Appeal (division 5, chamber 1), in the dispute between it:

1°/ to the company Nintendo Co Ltd, whose head office is at [Address 1] (Japan), a company incorporated under Japanese law,

2°/ to the company The Pokemon Company, whose head office is at [Address 5] (Japan), a company incorporated under Japanese law,

3°/ to the company Creatures Inc, whose head office is at [Address 4] (Japan), a company incorporated under Japanese law,

4°/ to the company Game Freak Inc, whose head office is at [Address 3] (Japan), a company incorporated under Japanese law,

defendants in cassation.

The applicant invokes four grounds for cassation in support of its appeal.

The file was forwarded to the Attorney General.

On the report of Mr Chevalier, advisor, the observations of SARL Matuchansky, Poupot, Valdelièvre and Rameix, lawyer for DStorage, of SCP Spinosi, lawyer for Nintendo Co Ltd, The Pokemon Company, Creatures Inc and Game Freak Inc, and the opinion of Mr Aparisi, attorney general, after debates at the public hearing of 7 January 2025, where Ms Champalaune, president, Mr Chevalier, reporting advisor, Ms Duval-Arnould, senior advisor, and Ms Ben Belkacem, chamber clerk, were present,

the first civil chamber of the Court of Cassation, composed of the aforementioned president and advisers, after having deliberated in accordance with the law, has rendered the present judgment.

Facts and procedure

1. According to the contested judgment (Paris, 12 April 2023), Nintendo Co., Ltd (Nintendo) manufactures and markets in many countries, including France, game consoles and video games, such as the “Pokémon” video games, the copyright for which it claims to be joint owner with The Pokemon Company, Creatures Inc. and Game Freak Inc. It is also the owner of several European Union or international word or figurative trademarks.

the user then being able to communicate the download link from a public platform and without access restrictions.

3. By registered letter with acknowledgement of receipt dated 22 January 2018, Nintendo, The Pokemon Company, Creatures Inc. and GameFreak Inc. (the Nintendo ea companies) notified DStorage of the existence of links allowing the downloading of unauthorised copies of their games "Super Mario Maker for Nintendo 3DS", "Pokémon Sun" and "Pokémon Moon" and requested their removal.

4. By registered letter with acknowledgement of receipt dated 30 January 2018, they reiterated their request and also requested the removal of the links leading to the unauthorised copies of the games "The Legend of Zelda: Breath of the Wild", "Super Mario Odyssey", "Mario Kart 8 Deluxe", "Splatoon 2", "Pokémon Ultra Sun" and "Pokémon Ultra Moon".

5. On May 24, 2018, after noting that the disputed links were still available on the 1fichier.com site, they sued DStorage for liability and compensation and removed the links under penalty of a penalty.

Review of means

On the fourth ground

6. Pursuant to Article 1014, paragraph 2, of the Code of Civil Procedure, there is no need to rule by a specially reasoned decision on this argument which is clearly not of a nature to lead to cassation.

On the first and second grounds, taken together

Statement of means

7. By its first ground of appeal, DStorage complains that the judgment held that Nintendo, The Pokemon Company, Creatures and Game Freak validly notified it on 22 and 30 January 2018 of the presence on its website https://1fichier.com of manifestly illegal content infringing Nintendo's rights over certain European Union and international trademarks and the copyright in the aforementioned video games Super Mario Maker for Nintendo 3DS, Pokémon Sun, Pokémon Moon, and that by not acting promptly to remove this data or make access to it impossible, it incurred civil liability as a content host, and consequently ordered it to remove from its website https://1fichier.com or block access to the content listed in the relevant tables and to content constituting copies of these video games within 72 hours from the date of service of the decision, subject to a penalty payment of EUR 1,000 per day, the penalty payment running for six months and to order it to compensate the commercial damage suffered by Nintendo, then:

"1°/ that natural or legal persons who provide, even free of charge, for the purpose of making available to the public through online public communication services, the storage of signals, writings, images, sounds or messages of any nature provided by recipients of these services cannot be held civilly liable for the activities or information

promptly to remove these data or make access to them impossible; that knowledge of such facts or circumstances is only presumed to have been acquired by these persons when the notification given to them is accompanied by a copy of the correspondence addressed to the author or publisher of the disputed information or activities requesting their interruption, withdrawal or modification, or by proof that the author or publisher could not be contacted; that in order to consider that the Nintendo companies could not be criticised for not having attached a copy of such correspondence addressed to the author or publisher of the disputed information or for not having justified the fact that they could not have been contacted, the Court of Appeal stated that "the circumstance that in order to explain the path followed by the Internet user to access the content hosted on the 1fichier.com site operated by the DStorage company, the Nintendo companies [had] been able to identify the origin of a disputed file as coming from a romspure.com site referring to an email address [was] of little importance" since the DStorage company did not dispute that the identity of the "authors" was not revealed on its website; that by refusing to investigate, as it was invited to do, whether the website romspure.com had the status of publisher, and as such could be contacted, regardless of the fact that the author of the publication containing the link to the website 1fichier.com was not identified, the Court of Appeal deprived its decision of a legal basis with regard to Article 6, I, 5, of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy, in its wording applicable to the case in point, resulting from Law No. 2016-444 of 13 April 2016;

2°/ that, more fundamentally, by thus taking into consideration the possibility or not of contacting the users of the 1fichier.com site, when it was up to it to take into account the possibility of contacting the authors or publishers of the disputed information or activities, at the origin of the publication of the links on publicly accessible websites distinct from the 1fichier.com site, authors or publishers who were not necessarily the users of the 1fichier.com site, the latter service moreover not allowing the public any direct access ¿ without the download link ¿ to the data stored on behalf of the users, the Court of Appeal, which created a confusion between these users and the authors or publishers of the disputed content, violated Article 6, I, 5, of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy, in its wording applicable to the case, resulting from Law No. 2016-444 of April 13, 2016;

3°/ that by stating that DStorage did not dispute having indicated
in its first instance submissions that the identity of the authors was not
revealed on its website, while noting that DStorage had then argued that it “is a service that stores content and not a video sharing platform” and that “it is therefore pointless to reveal the identity of its users”, the Court of Appeal, which contradicted itself, disregarded the requirements of Article 455 of the Code of Civil Procedure.”

8. By its second ground, DStorage makes the same complaint to the judgment, whereas:

"1°/ that natural or legal persons who provide, even free of charge, for the purpose of making available to the public through online public communication services, the storage of signals, writings, images, sounds or messages of any nature provided by recipients of these services cannot be held civilly liable for the activities or information

promptly to remove these data or make access to them impossible; that knowledge of such facts or circumstances is only presumed to have been acquired by these persons when the notification given to them describes the disputed facts, locates them precisely and indicates the reasons why the content must be removed, including the mention of the legal provisions and justifications of the facts; that in the case of alleged trademark infringement, the unlawfulness can only be manifest if the notifier explains that the required conditions in this matter have been met, namely use in the course of trade of a sign identical or similar to the registered trademark, without the consent of the owner thereof, for products or services identical or similar to those for which the trademark was registered and infringing or likely to infringing the essential function of the trademark, which is to guarantee to consumers the origin of the products or services, due to a risk of confusion in the mind of the public; that in order to hold that the infringing nature of the Nintendo companies' trademarks in the download links was obvious, the Court of Appeal merely noted that the latter included, in their names, the reproduction of the trademarks as well as mentions such as "spoofed" or "game free download" and that the legal grounds relating to trademark infringement were mentioned and refused to examine whether the use of the trademarks was carried out in the course of trade, on the grounds that the action of the Nintendo companies was not based on the infringement of the trademarks but on the specific liability of the hosts; that by ruling in this way, when the assessment of the host's liability depended on the manifest nature of the illegality complained of and, therefore, on the demonstration in the notification of use of the signs alleged to be trademark infringement in the course of business, the Court of Appeal violated Article 6, I, 2 and 5 of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy,in its wording applicable to the species, resulting from law n° 2016-444 of April 13, 2016;

2°/ that natural or legal persons who provide, even free of charge, for the purpose of making available to the public through online public communication services, the storage of signals, writings, images, sounds or messages of any nature provided by recipients of these services cannot be held civilly liable for the activities or information stored at the request of a recipient of these services if they were not actually aware of facts and circumstances that revealed the manifestly illicit nature of the activities or information stored or if, from the moment they became aware of them, they acted promptly to remove these data or make access to them impossible; that knowledge of such facts or circumstances is only presumed to have been acquired by these persons when the notification given to them describes the disputed facts, locates them precisely and indicates the reasons for which the content must be removed, including the mention of the
legal provisions and justifications of the facts; that in the case of alleged copyright infringement, the illegality can only be manifest if the notifier explains that the required conditions in this matter have been met, namely a representation or reproduction - therefore a communication to the public - of a protected work without the authorisation of the holder of the rights to that work; that in order to hold that the infringing nature of the video games of the disputed content stored on the 1fichier.com service at the request of users was manifest, the Court of Appeal considered that the two notifications specifically designated and identified the infringing video games and that the Nintendo companies could not be required to

the illegality complained of and, therefore, on the demonstration in the notification that the conditions for copyright infringement were met, the Court of Appeal once again violated Article 6, I, 2 and 5, of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy, in its wording applicable to the case in point, resulting from Law No. 2016-444 of 13 April 2016;

3°/ that the Court of Appeal considered that the Nintendo companies could not be required to demonstrate, at the notification stage, the ownership of their rights, the originality of the games concerned or the materiality of acts of infringement since neither the ownership of the rights nor the originality of the games nor the reproduction of the video games by the disputed content had been formally contested by the DStorage company in the responses it had provided by email to the Nintendo companies, which consequently did not call for additional information on these points; that by ruling in this way, when the notification must be sufficient in itself and enable the host to assess the manifestly illicit nature of the activities or information stored on behalf of its users, the Court of Appeal violated Article 6, I, 2 and 5, of Law No. 2004-575 of June 21, 2004 on confidence in the digital economy, in its wording applicable to the case in point, resulting from Law No. 2016-444 of April 13, 2016;

4°/ that it is the responsibility of the person claiming copyright protection to identify the characteristics of the work for which he is seeking protection, the originality of the work not being presumed, so that it is the responsibility of the person who brings to the attention of a hoster facts and circumstances likely to reveal the manifestly illicit nature of the activities or information stored by the hoster on behalf of users to identify the characteristics of the work which would be infringed by this stored content; that by holding on the contrary that the Nintendo companies could rely on a presumption of originality of the video games, the Court of Appeal violated Articles L. 111-1 and L. 112-2 of the Intellectual Property Code and 6, I, 2 and 5 of Law No. 2004-575 of June 21, 2004 on confidence in the digital economy, in its wording applicable to the case in point, resulting from Law No. 2016-444 of April 13, 2016;

5°/ that the notoriety of a work is irrelevant in assessing its originality; that in considering that it was not up to the Nintendo companies to demonstrate the originality of the video games that had allegedly been infringed by content stored on the 1fichier.com service, the Court of Appeal noted that the video games in question were very well-known, having sold several million copies worldwide; that in ruling in this way, the Court of Appeal further violated Articles L. 111-1 and L. 112-2 of the Intellectual Property Code and 6, I, 2 and 5, of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy, in its wording applicable to the case in question, resulting from Law No. 2016-444 of 13 April 2016.

Court's response

9. Law No. 2004-575 of 21 June 2004 on confidence in the digital economy (LCEN), as amended by Law No. 2016-444 of 13 April 2016, provides that natural or legal persons who provide, even free of charge, for the purpose of making available to the public through online public communication services, the storage of signals, writings, images, sounds or messages of any kind provided by recipients of these services, may be held

10. Under its Article 6-I.5, knowledge of the disputed facts is presumed to have been acquired by the persons designated in 2 when they are notified of the following elements:
- the date of notification;
- if the notifier is a natural person: his/her surname, first names, profession, address, nationality, date and place of birth; if the applicant is a legal person: its form, name, registered office and the body that legally represents it;
- the name and address of the recipient or, if it is a legal person, its name and registered office;
- the description of the disputed facts and their precise location;
- the reasons why the content must be removed, including the mention of the legal provisions and the justifications of the facts;
- the copy of the correspondence addressed to the author or publisher of the disputed information or activities requesting their interruption, withdrawal or modification, or the justification that the author or publisher could not be contacted.

11. These provisions transpose into French law Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce").

12. It follows from these provisions that the concepts of "author" or "publisher" of the disputed information or activities mentioned in Article 6-I.5, cited above, must be understood as designating the persons who have stored the illegal data and, therefore, as recipients of the online public communication or storage services.

13. Firstly, since the Court of Appeal held that the two notifications specified that the persons who had posted the disputed content online were not identified on the website " https://1fichier.com " and that it was not contested by DStorage that the identity of the authors was not revealed on its website, it correctly deduced, without being required to follow the parties in the detail of their arguments and without tainting its decision with contradiction, that the notifications met the formal conditions prescribed by Article 6-1-5 of the LCEN.

14. Secondly, since the Court of Appeal held that the two notifications and the annexed tables indicated precisely that the trademarks of Nintendo, designated by their registration number, were reproduced in links allowing the downloading of files containing video games, without the authorisation of their owner and that the infringing nature of some of these links, containing the reproduction of the trademarks as well as mentions such as "spoofed" or "game free download", was obvious, it correctly deduced that Nintendo, The Pokemon Company, Creatures and Game Freak, which had not based their action on trademark infringement but on the liability specific to content hosts and which did not have to demonstrate, at the notification stage, the ownership of the rights, the originality of the games and the reproduction of the video games not having been contested, had described in the notifications the facts enabling DStorage to know the manifestly unlawful nature of the content they were using. requested the withdrawal of the copyright and trademark rights invoked.

European Union law, there is no need to refer questions to the Court of Justice of the European Union for a preliminary ruling.

On the third ground

Statement of the means

17. DStorage complains that the judgment ordered it to remove from its website " https://1fichier.com " or to block access to content constituting copies of the video games Super Mario Maker for Nintendo 3DS, Pokémon Sun, Pokémon Moon, The Legend of Zelda: Breath of the Wild, Super Mario Odyssey, Mario Kart 8, Splatoon 2, Pokémon Ultra Sun and Pokémon Ultra Moon, within 72 hours from the date of service of the decision, subject to a penalty payment of EUR 1,000 per day, the penalty payment running for six months, whereas "natural or legal persons who provide, even free of charge, for making available to the public through online public communication services, the storage of signals, writings, images, sounds or messages of any kind provided by recipients of these services are not subject to a general obligation to monitor the information they store, nor to a general obligation to seek out facts or circumstances revealing illicit activities, without prejudice to any targeted and temporary surveillance activity requested by the judicial authority; that by ordering DStorage to remove from its website https://1fichier.com or to block access to content constituting copies of the video games Super Mario Maker for Nintendo 3DS, Pokémon Sun, Pokémon Moon, The Legend of Zelda: Breath of the Wild, Super Mario Odyssey, Mario Kart 8, Splatoon 2, Pokémon Ultra Sun and Pokémon Ultra Moon, the Court of Appeal, which did not limit itself to a targeted and temporary surveillance measure and imposed on DStorage a general obligation to monitor the information stored and search for facts or circumstances revealing illicit activities, violated Article 6, I, 7, of the Law on Confidence in the Digital Economy, in its wording applicable to the case in question, resulting from Law No. 2016-444 of April 13, 2016.

Court's response

18. If, according to Article 6-I.7 of the LCEN in its wording resulting from Law No. 2016-444 of April 13, 2016, legal entities, which ensure the online storage of signals, writings, images, sounds or messages of any nature provided by recipients of these services, are not subject to a general obligation to monitor the information that they transmit or store, nor to a general obligation to search for facts or circumstances revealing illicit activities, they may be subject to targeted and temporary surveillance activity by the judicial authority.

19. The Court of Appeal was right to hold that the measure ordered, consisting of the removal of the DStorage company's website " https://1fichier.com " or the blocking of access to content constituting copies of the aforementioned video games, subject to a penalty payment limited to six months, only imposed on this company a targeted surveillance activity on very specific and temporary content.

20. The argument is therefore unfounded.

FOR THESE REASONS, the Court:

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the application filed by DStorage and orders it to pay Nintendo Co. Ltd, The Pokemon Company, Creatures Inc. and Game Freak Inc. the total sum of 5,000 euros;

Thus done and judged by the Court of Cassation, First Civil Chamber, and pronounced by the President at its public hearing of February twenty-six, two thousand and twenty-five.

Synthesis

Country: France
Jurisdiction: Court of Cassation
Formation: Civil Chamber 1
Judgment number: 12500131
Date of decision: 02/26/2025
Direction of judgment: Rejection

References:

Decision challenged: Paris Court of Appeal, April 12, 2023

Publications

Proposed citation: Cass. Civ. 1st, 26 Feb. 2025, appeal no. 12500131

Composition of the Court

President : Mrs. Champalaune (president)
Lawyer(s) : SARL Matuchansky, Poupot, Valdelièvre et Rameix, SCP Spinosi

Origin of the decision

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