

Teleshopping ads found to infringe copyright

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Introduction

On 25 July 2018 Barcelona Commercial Court Number 2 declared that teleshopping ads broadcast by European Home Shopping, SL (the defendant) had infringed the copyright in three similar ads created by Telebrands Corp, International Edge, Inc and Best Option Products SL (the plaintiffs).

This was an unusual case, as the success of the claim relied on proving:

- the statutory required level of originality for a creation to be copyrightable; and
- the plagiarism of the pre-existing works in a particularly active sector in which all the ads had in common was that they explained the virtues and functionality of the advertised products to show how they can solve daily (mostly domestic) issues that the audience might have.

Facts

Telebrands was the creator and copyright holder of the teleshopping ads, whereas International Edge was the international distributor of Telebrands' products and the ads. Both were North American companies. Best Option was a Spanish company, which – by means of a licence with International Edge – exploited Telebrands' ads and products in Spain. To do so, Best Option had to translate the ads from English into Spanish.

While Best Option was broadcasting a Telebrands ad for auto-adjustable goggles, it noticed that European Home Shopping had started to broadcast a similar ad for the same kind of product on the same TV channels during the same time slots and on its website.

The plaintiffs filed a preliminary injunction petition prior to filing a suit against the controversial ad based on copyright infringement (and subsidiary unfair competition acts of confusion). The petition was granted, ordering the defendant to:

- provisionally cease the exploitation of the controversial ad and any others which copied the essential characteristics of the plaintiffs' ad; and
- notify the preliminary injunction decision to the TV channels on which the controversial ad was being broadcast.

The defendant did not appeal this decision.

The plaintiffs subsequently became aware that European Home Shopping had plagiarised two other ads for non-stick frying pans and spinning brooms and filed an *ex parte* preliminary injunction petition, which was granted with the same measures as before. The defendant appealed this preliminary injunction decision (the Court of Appeal's decision is pending).

On the merits, the plaintiffs' petition sought an order for the defendant to:

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- cease its infringing activity;
- compensate the damages caused; and
- publish the judgment.

Based on the reports of a fine art expert with an in-depth knowledge of TV ad creation, the plaintiffs claimed that the three original ads had the statutory required level of originality to be protected by copyright and that the defendant had copied them.

European Home Shopping's defence focused on challenging the requisite of the originality of the plaintiffs' works, stating that ideas cannot be protected and that the ideas that defined Telebrands' ads were present in many other teleshopping ads. As such, the defendant sought the suit's dismissal.

Decision

Barcelona Commercial Court Number 2 substantially granted the plaintiffs' claims.

After an analysis of the concept and requisites of originality, the court implicitly acknowledged that the plaintiffs' ads had possessed the statutory required level of originality to be protected by copyright.

As regards the plagiarism, the court ruled that the defendant had infringed the plaintiffs' rights to exclusively exploit their works – in particular, by way of reproduction and transformation (Articles 17, 18 and 21 of the Copyright Act). The court considered that the defendant had not just copied the ideas behind the plaintiffs' ads, but also the way in which they were expressed. It considered that while the defendant had not copied the ads in their entirety, there were coincidences which occurred at the same point of time in each ad and the coincidences lasted the same duration of time, as proven by the expert reports filed by the plaintiff. In addition, the ads were:

- almost identical in terms of dialogue and message; and
- similar in terms of structure, sequences, scenarios, illuminations, colour ranges and camera movements.

Further, the court stated that the defendant had not denied using ads which were similar to those of the plaintiffs.

In light of the above, the court declared that the ads had infringed the plaintiffs' copyright and ordered European Home Shopping to:

- cease, by any means, its exploitation of the controversial ads and any others that copied the essential characteristics of the plaintiffs' ads for adjustable goggles, non-stick frying pans and spinning brooms;
- compensate the plaintiffs for the damages caused; and
- publish the substantive part of the judgment on its website for seven days and broadcast it on a TV channel for two days.

The judgment is not yet definitive and can be appealed by both parties.

For further information on this topic please contact [Guillem Villaescusa](mailto:g.villaescusa@ga-ip.com) at Grau & Angulo by telephone (+34 93 202 34 56) or email (g.villaescusa@ga-ip.com). The Grau & Angulo website can be accessed at www.ga-ip.com.

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