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## Criminal sentence for possession of infringing FC Barcelona t-shirts

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ABOGADOS

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Intellectual Property, Spain

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On 26 June 2019 the Madrid Court of Appeal confirmed a 29 December 2018 decision of the Madrid Trial Court Number 11, which had sentenced a Spanish resident of Chinese origin to five months' imprisonment for the possession of 9,317 counterfeit items of clothing – including t-shirts which infringed FC Barcelona's IP rights – for commercial purposes. The appeal court also confirmed the trial court's order of a fine, additional penalties, civil liability payments and compensation for legal costs.

### Trial court decision

The Madrid Trial Court Number 11 rejected the defence's argument that the crime lacked a subjective element because the defendant had, due to her psychological and cultural background, believed that she had been acting legally (the error of prohibition theory).

The trial court highlighted the fact that the defendant had been selling textile products to the public for many years and was a professional in the sector in Spain. Further, it held that "present-day Spanish society was well aware of these kinds of conducts, continuously being investigated and mentioned in the mass media".

In addition, the defendant's products were much cheaper than the original products and it had been proven that her employee had acted cautiously when dealing with the infringing products, which suggested an awareness that the actions were illegal.

The trial court also rejected the defence concerning one of the objective elements of the crime – namely, that the accused was not responsible for the adjacent warehouse, as:

- she had given the police permission to search it; and
- the items of clothing from her shop were identical to those seized from the warehouse.

The defendant's employee also declared that the defendant had paid for all of the products.

### Appeal court decision

On appeal, the defence alleged that:

- the sentence handed down by the trial court had been based on an expert report issued by police officers, who were not IP specialists;

- the trademark owners had not seen the garments directly and were therefore unable to determine whether they were counterfeit;
- the defendant was not responsible for the adjacent warehouse; and
- the chain of custody had been broken.

However, the Madrid Court of Appeal confirmed the sentence on the grounds that the police officers who had been surveying the premises in plain clothes when they saw the suspicious unloading of unlabelled goods were specialised in counterfeit matters. Further, the manager of the premises had been unable to show any invoice or delivery note for said goods.

In any case, the appeal court observed that the expert report had not led to the defendant's sentencing. Rather, the counterfeit nature of the products had been confirmed by the trademark owners, who had provided details concerning the original products and their labelling which had led to the determination that the goods in question were counterfeit.

As regards the relationship between the accused and the adjacent warehouse, the appeal court confirmed the trial court's observations in their entirety.

The appeal court affirmed that in order for the interrogation of an individual to be correctly assessed, it must be carried out in accordance with the principle of confrontation and the guarantees of orality and judicial immediacy during the trial hearing, as second-instance courts are unable to assess:

*the forcefulness, hesitations or doubts in the cross-examinations, the spontaneity and the speed of the responses or delays between the questions and the answers, the calmness or nervousness, the gestures or body language accompanying the verbal expression.*

Finally, the appeal court ruled that the fact that the defence had not claimed that the chain of custody had been broken at an earlier stage of the proceedings meant that it was outside "the scope of revision of the second instance court". Rather, it was one of "these new questions which the lower instance court did not have a chance to take a stance on".

In sum, the appeal court stated that all of the evidence had been correctly assessed and that the trial court's reasoning had been logical and flawless.

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