

**ADVERTISING SPOTS OR MERE AUDIOVISUAL RECORDINGS  
WITHIN THE FIELD OF TELEVISION?  
A STUDY OF THE CONSEQUENCES OF THE CJEU RULING  
OF 18 NOVEMBER 2020.**

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*In honor of Professor Pierre Sirinelli, on the occasion of his retirement.*

Summary: I. The CJEU judgment of November 18, 2020 (case C-147/19), ruling on the Atresmedia case. II. Introduction. III. Advertising in the field of television. 1) The role of unfair competition in the field of advertising. IV. Objective novelty and creative height in the jurisprudence of the Spanish Supreme Court and its impact on the consequences of the CJEU ruling in the Atresmedia case. V. Conclusions

## I. THE CJEU JUDGMENT OF NOVEMBER 18, 2020 (CASE C-147/19), RULING ON THE *ATRESMEDIA* CASE

The judgment of the CJEU on November 18, 2020 (C-147/19), which ruled in the case *AGEDI/AIE v. Atresmedia Corporación de medios de comunicación*, emphasized the importance of determining the extent to which television commercials can be considered as audiovisual works eligible for copyright protection<sup>1</sup>. This ruling establishes that Article 8.2 of Directives 92/100/EEC and 2006/115/EC (codified version), considered in the light of Article 2 b) of the WIPO Performances and Phonograms Treaty (WPPT) of 1996, must be interpreted as meaning that the equitable remuneration referred to in this regulation is not payable by users who make a communication to the public of a recording containing a fixation of an audiovisual work, which incorporates a commercial phonogram, or its reproduction. Thus, the communication to the public of the audiovisual work does not entail, for the purposes of the collection of the above-mentioned remuneration, the communication to the public of the phonogram – recitals 47, 51 and 52 of the CJEU judgment. In Spanish law, this right is recognized in Article 108.4, for performers, and in Article 116.2, for phonogram producers, of the consolidated text of the Spanish Law on Intellectual Property (*hereinafter* LPI). Finally, in its decision of February 9, 2021 (RJ 2021/589), the Spanish Supreme Court (First Chamber) applies the interpretation resulting from the CJEU judgment, stating in its third recital that «[w]hile these directives establish a minimum regulation, as

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1. In Spain, AGEDI is the collective management society for producers of phonograms, and AIE is the collective management society for musical performers.

“Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public” (recital 16 of Directive 2006/115/EC), the transposition carried out in Articles 108.4 and 116.2 of the IPL did not increase the protection of the holders of related rights, since it only transposed the provisions of Article 8.2 of Directives 92/100/EEC and 2006/115/EC into the national law provisions, without making any relevant additions. Therefore, in order to resolve the dispute, it is appropriate to follow the interpretation of the provisions, derived from the Directives, given by the Court of Justice of the European Union (*hereinafter*, CJEU) in its judgment of November 18, 2020, in Case C-147/19, by which the Court answered the question referred by that court for a preliminary ruling in the context of the present dispute, since national law does not add anything relevant to the provisions of those Directives.»

Following the CJEU ruling, this judgment of the Spanish Supreme Court of February 9, 2021 addresses the issue of advertisements, that AGEDI and AIE intend to introduce in their opposition to the appeal, and more significantly, as part of their response to the hearing granted to them in connection with the CJEU ruling. In its fifth recital, the Supreme Court considers that this is a new issue that has not arisen before, and therefore it does not enter into its assessment. To this end, the Supreme Court states that the issue must be addressed during the execution of the judgment, when the actual use of the phonograms by Antena 3 is to be determined in accordance with the criteria established by the Commercial Court.

This issue is therefore of considerable importance. As such, in the field of television advertising, it is essential to determine whether one is dealing with an audiovisual work. It is appropriate to recall that the plaintiffs had requested, and obtained on appeal, the sum of 17,093,260 euros, for the period from June 1, 2003 to December 31, 2009.

Before addressing this important issue, let us briefly recall the history of these proceedings and the basis on which the CJEU reached this conclusion. The request for the collection of the aforementioned remuneration by the collecting societies AGEDI and AIE was brought before Court No. 4 of Madrid on June 10, 2013, which rejected it on the basis of the following argument: *«the sonorous discourse of the musical phonogram is associated with the visual discourse of a creative sequence of images giving rise to an aesthetic, ambient, temporal or rhythmic coincidence between sound and image, so that, integrated into a larger expressive whole represented by the harmonic and singular synthesis of image and sound, what is produced, from the point of view of the work fixed in the phonogram, is a transformation of the latter that gives rise to a derivative work.»* Consequently, the court admitted that the phonogram, as such, disappears in a way, by its incorporation into the audiovisual work. The plaintiffs appealed this judgment. On January 25, 2016, the Provincial Court of Madrid (28th section) admitted the appeal, ruling that *«the qualities of the sounds fixed in the phonogram are objectively the same before and after the synchronization. This means that the sound fixation that remains in the audiovisual work after the synchronization of the phonogram cannot be considered as a mere replica of the sounds fixed in the synchronized phonogram, but as a reproduction of the phonogram itself. The reproduction, the communication of which to the public,*

*like that of the phonogram itself, gives rise to the right to equitable remuneration provided for in Articles 108-4 and 116-2 of the Law on Intellectual Property.»*

Atresmedia appealed to the Supreme Court (1st Chamber), which referred a question to the CJEU for a preliminary ruling. It is interesting to note that the Supreme Court, in the order raising this issue, asks whether the issue is: *«deciding whether, once a phonogram published for commercial purposes, on which a performance of a musical work has been recorded, has been “reproduced” or “synchronized” in an audiovisual recording on which an audiovisual work is fixed, the right of performers and producers of phonograms to receive the single equitable remuneration provided for in Article 8. 2 of the above-mentioned Directives is exhausted [...] it is necessary to clarify the interpretation to be given to the notion of «phonogram» and «reproduction of a phonogram published for commercial purposes» contained in Article 8.2 of Directives 92/100/EEC and 2006/115/EC [...]».* *«Depending on the interpretation given to these concepts, it will result that the communication to the public of an audiovisual recording containing a fixation of an audiovisual work, in which a phonogram published for commercial purposes has been synchronized or reproduced, constitutes a communication to the public of the phonogram or a reproduction of the phonogram, with the consequence that the user who makes this communication to the public has the obligation to pay the sole equitable remuneration to the performers of the musical work recorded on the phonogram and to the producers of these phonograms ; or, on the contrary, that once the phonogram has been synchronized or reproduced in the audiovisual recording containing the fixation of the audiovisual work, the communication to the public of this recording of the audiovisual work no longer constitutes a communication of the phonogram or its reproduction and that only equitable and exclusive remuneration rights are generated for the owners of*

*intellectual property rights in the audiovisual recording and the audiovisual work, since the remuneration of the related rights in the phonogram was made when the reproduction or synchronization of the phonogram in the audiovisual work was authorized.»*

On the basis of this reasoning, the following two questions were referred for a preliminary ruling :

*«1. Does the concept of the «reproduction of a phonogram published for commercial purposes» referred to in Article 8 (2) of Directives 92/100 and 2006/115 include the reproduction of a phonogram published for commercial purposes in an audiovisual recording containing the fixation of an audiovisual work?*

*2. In the event that the answer to the previous question is in the affirmative, is a television broadcasting organisation which, for any type of communication to the public, uses an audiovisual recording containing the fixation of a cinematographic or audiovisual work in which a phonogram published for commercial purposes has been reproduced, under an obligation to pay the single equitable remuneration provided for in Article 8 (2) of the aforementioned directives?»*

First of all, the CJEU, as on many occasions, begins by affirming that the «phonogram» is an autonomous concept of European Union law, insofar as there is no definition of phonograms in the directives and no express reference to the national legislation of the Member States is made (recital 33). The gaps left by the European legislator have allowed the CJEU to progressively

complete, through its case law, the European regulation of intellectual property rights<sup>2</sup>. This is another example of the role played by the CJEU, which not only interprets European law, but also participates in its creation.

In defining this concept, the CJEU takes the WIPO Performances and Phonograms Treaty (WPPT) of 1996 as its starting point, as well as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, although the latter, unlike the WPPT, does not form part of the EU legal order, as the EU has not adhered to the Convention. However, the CJEU considers that it produces indirect effects (recital 36). On this basis, and in accordance with the provisions of Article 3 (b) of that Convention, a phonogram means «*any exclusively aural fixation of sounds of a performance or of other sounds*». Images would therefore be excluded. Article 2 (b) of the WPPT defines a phonogram as «*the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work*». Following the WIPO Guide to Copyright and Related Rights administered by WIPO, Article 2 (b) of the WPPT updated Article 3 (b) of the Rome Convention by incorporating, on the one hand, «*representations of sound*» and by replacing, on the other hand, the expression «*exclusively aural*» by «*other than in the form of a fixation incorporated in a cinematographic or other audiovisual work*». According to Recital 40 of its ruling, the consequence of the wording contained in the WPPT would be that «*in a case where an audiovisual fixation does not qualify as a work, a fixation of the sounds of a*

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2. See M. Walter, «Du développement du droit d'auteur européen durant la dernière décennie et du rôle de la Cour de Justice de l'Union Européenne», *Mélanges en l'honneur du professeur André Lucas*, Lexis Nexis, 2014, p. 792 *sq.*

*performance or of other sounds, or of a representation of sounds, incorporated in such an audiovisual fixation, is to be regarded as a “phonogram”.* Therefore, *«a fixation of sounds incorporated in a cinematographic or other audiovisual work»* cannot be considered a phonogram (Recital 41). Finally, according to Recital 44, this conclusion would not be altered by the joint statement that *«the definition of phonogram provided in Article 2 (b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.»* This statement would have the effect of confirming, regarding the phonogram itself, that *«loses its status as a “phonogram” in so far as it forms part of such a work, without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue.»* (Recital 44).

Obviously, the economic consequences of this ruling for phonogram producers and performers are very important. And this, although the CJEU went on to state that the incorporation of phonograms is done with the authorization of the right holders in exchange for a proper remuneration, which would achieve the objectives of Directive 92/100, codified in Directive 2006/2015, to ensure legal protection that ensures the continuity of the work of the creator and performers and amortizes the investments of phonogram producers (recitals 25, 54 and 55 of the judgment). But nothing could be further from the truth, insofar as, as far as producers are concerned, they lose an important right to simple remuneration from broadcasters, a situation that is even worse for performers, who do not participate in the negotiations for the synchronization of the phonogram in the audiovisual work<sup>3</sup>. Finally, another

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3. In this respect, and in general, for a critical interpretation of this CJEU ruling, see A. Lucas, «Chroniques. Copyright and related rights», *Propriétés Intellectuelles*, n° 78, p. 58.



negative consequence for these holders of related rights is the introduction of a variable outside their sphere of management, such as the question of the existence or not of a work, in order for them to be granted or not the right to remuneration for the public communication of their phonograms. Thus, this article, and the entire argument that will be proposed in support of it, is intended to emphasize that, with respect to television commercials incorporating phonograms, it is the broadcasters, and not the producers and performers, who must prove that the commercial is an audiovisual work.

## II. INTRODUCTION

Audiovisual works, regulated in Title VII of the Spanish IPL (Articles 86 et seq.), as well as photographic works, regulated in Article 10(h) of the IPL, within Book I on copyright, have presented difficulties when it comes to admitting their protection through copyright. In both cases, the use of a mechanical means of capture or filming is indispensable, without which the work would not exist. In the case of audiovisual works, a technical device is necessary to make them accessible to the public. In both cases, reality is captured and reflected through the camera, which makes it possible to understand that in its early days the cinematograph was understood as a means of reproducing and projecting images of real life, far from any intellectual creation<sup>4</sup>. Its inclusion in the Berne Convention, among the list of works

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4. See V. F. Gotzen, «From cinematographic work to audiovisual work. The evolution of a notion in the history of the international texts concerning authors' rights», *Les œuvres audiovisuelles et la propriété littéraire et artistique, Congrès du premier siècle du cinéma*, ALAI/UNESCO, Paris, 1996, p. 34.

eligible for the protection set forth in Article 2, took place during the Brussels revision of the treaty in 1948.

The first mention of cinematography in the treaty, however, appeared as early as the revision of the Berne Convention in 1908<sup>5</sup>. The cinematograph, as is well known, was invented by the brothers Auguste and Louis Lumière in 1895. Thus, it is logical to assume that it is only at the beginning of the 20th century that the first judicial decisions in the field of cinematography appeared<sup>6</sup>. It was the French administration that proposed the introduction of cinematography in the Convention. It was also pointed out on this occasion that «the manufacturers of cinematographic motion pictures and the photographers are united by the nature of their industry»<sup>7</sup>. However, as early as the Berlin Conference, and following the enlightening intervention of Professor Renoult, it was concluded that the cinematograph could be not only an instrument of reproduction, but also of creation of new works<sup>8</sup>. This led to the drafting of the second paragraph of Article 14, which states that «cinematographic productions shall be protected as literary or artistic works when the author has given the work a personal and original character by means of the staging devices or the combinations of the scenes represented.»<sup>9</sup>

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5. See S. Ricketson, *The Berne Convention for the protection of literary and artistic Works*, 1886-1986, Londres, 1987, p. 95.

6. The first judicial decision cited in this respect is the decision pronounced by the Court of Appeal of Pau on November 18, 1904, in which the purely mechanical character of film shooting is rejected, excluding it from any possible copyright worthy creativity. See C. Bernault, *La propriété littéraire et artistique appliquée à l'audiovisuel*, LGDJ, 2003, p. 24, note 7.

7. *Berlin Act of the Conference held from October 14 to November 14*, 1908, Bern, 1910, p. 190.

8. *Berlin Act*, *op. cit.*, p. 265.

9. See, in this respect, F. Gotzen, *op. cit.* p. 21.

Later on, in the context of the Rome revision of 1928, the modification introduced in Article 14 dealt precisely with the question of originality, as shown by the wording of Article 14 (2): «Cinematographic productions shall be protected as literary or artistic works when the author has given the work an original nature. If this characteristic is lacking, the cinematographic production enjoys the protection of photographic works.»<sup>10</sup> It was only in the Brussels revision of 1948 that cinematographic works were included in the list of works in Article 2.1, placing them on the same level as the other literary, artistic and scientific works covered by the Convention.

This brief introduction on the recognition of audiovisual works at the international level, and its parallelism with photographic works, serves to show that, both in the audiovisual and photographic media, in cases where there is no originality the copyright set out in Book I of the IPL – Article 10 – does not offer any possible protection, this protection being derived from the related or neighboring rights – Book II IPL. Indeed, according to Article 120 of the IPL, «audiovisual recordings are understood to be fixations of a shot or sequence of images with or without sound, whether or not they are creations that may be qualified as audiovisual works within the meaning of Article 86 of this Law». Thus, the producer of an audiovisual recording, as defined by the law, *i.e.* «the natural or legal person who has the initiative and assumes responsibility for this audiovisual recording», benefits from related rights, without it being necessary that this recording contains any intellectual creation. In this way, cinematography can enjoy greater protection from the point of view of intellectual property law if it is a work, because in this case,

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10. See this formulation and its commentary in S. Ricketson, *op. cit.*, p. 553-554.

the author's right will correspond to its authors, according to the provisions of Article 87 of the IPL. In addition, due to the fact of the audiovisual recording, the producer of the recording will have his own rights, the related rights, acknowledged in Article 120 of the IPL. On the other hand, if the fixations of a shot or a sequence of images, with or without sound, are not original, then only the producer of the recording will have the rights granted in Book II of the IPL. Likewise, if a photograph is not original, its author will only benefit from the protection provided by Book II. To this end, Article 128 of the IPL provides that «Anyone who makes a photograph or other reproduction obtained by a process analogous to the first, when neither the first nor the second is a work protected in Book I, shall enjoy the exclusive right to authorize its reproduction, distribution and public communication, under the same conditions granted by this Law to authors of photographic works. This right shall have a duration of 25 years from the first of January of the year following the date on which the photograph or reproduction was made.» The protection established by Article 128 of the IPL, when referring to another reproduction obtained by a process similar to photography, includes still images (*i.e.*, each of the images that follow one another in a cinematographic motion picture – according to the definition of the Spanish Royal Academy –)<sup>11</sup>. This parallelism, which is still based on the use of mechanical means and the possible capture of reality, or of something different (creative), also conditions the way in which originality is determined. Therefore, as the CJEU has acknowledged in the case of photographic works<sup>12</sup>, originality can also be found in an audiovisual work at the moment preceding the shooting, in the arrangement of the filmed

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11. See R. Bercovitz, «Comentario al art. 128 LPI», in R. Bercovitz (ed.), *Comentarios a la LPI*, 4<sup>e</sup> éd., Tecnos, 2017, p. 1766.

12. CJEU judgment of 1 December 2011 in the *Painer case* (case C 145/100).

objects; at the moment of shooting, *i.e.* in the audiovisual field, during the actual making of the film – positioning of the camera, framing, lighting, etc.<sup>13</sup> Thus, when someone captures images that take place in real life, without the manifestation of «free and creative choices» in the words of the CJEU, we will not be dealing with an audiovisual work<sup>14</sup>. For this reason, traditionally, long before the CJEU defined the concept of originality and also applied it to photographs, doctrine and judicial precedents raised the problems posed in this area by documentaries, broadcasts of news events, sporting events, news programs, interviews, televised competitions, among others, in the audiovisual field<sup>15</sup>. Thus, in these cases, it is difficult to determine when the filming is sufficiently original to be protected by copyright, and when it is not, *i.e.* when the technical work of the filmmaker or the educational interest of the filming predominates<sup>16</sup>.

Within audiovisual works, televisual works constitute a type of work that can be defined as audiovisual works essentially intended to be communicated to the public by means of broadcasting, so that they can be shown by the use of a television receiver. Therefore, television, which has become the mass and entertainment medium par excellence, is more oriented towards the

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13. See A. González, «La noción de obra audiovisual en el derecho de autor», *Revista Pe.i*, nº 7, January-April 2001, p. 49-50.

14. On photography, see recital 94 of the judgment of 1 December 2011, Case C 145/100, ruling in the *Painer case*.

15. In this context, it must be taken into account that the rules of the contest themselves are not eligible for copyright protection, as they belong to the world of ideas, excluded from protection under Article 2 of the 1996 WIPO Copyright Treaty, to which the EU is a party, as well as Article 9.2 of the TRIPs Agreements, as copyright protection covers expressions, but not ideas, procedures, methods or operations. See also recital 39 of the CJEU – Grand Chamber – judgment of 18 November 2018 (C 310/17), ruling in the *Levola case*.

16. *Cf.* A. Gonzalez, «La noción de obra audiovisual», *op. cit.*, p. 52-53.

production of contents that capture the attention or interest of the viewer than towards original creation as such. The power of the image on a television set has more effect than it can have on paper, for example, when it comes to informing or entertaining. Even more than on a cinema screen, because of the immediacy of the receiver<sup>17</sup>. Thus, in the television medium, a lot of content is produced that lack originality, a great part of them being of informative nature, news or current affairs. It is therefore more difficult to draw the border between an audiovisual work and a simple audiovisual recording<sup>18</sup>.

If, besides, the producer of the audiovisual recording, which does not contain a work, enjoys the protection provided for in Articles 120 et seq. of the IPL, it is necessary to define this boundary even more clearly, because only when a certain level of creativity is achieved in the filming does it merit the extended protection that the law grants to the owners of copyrights, in terms of the duration and content of the rights. On this point, it is worth recalling the judgment of the Spanish Supreme Court (First Chamber) dated June 25, 2013 (RJ 2013/498), regarding the quality of work of an audiovisual recording. In this case, it concerned the broadcasting and recording of a soccer match. The sixth recital states that: «The decisions of the lower courts have rightly excluded that the recording of these sports events constitute works that are covered by intellectual property, since they are not original literary, artistic or scientific creations expressed by any means or medium, tangible or intangible, and in particular

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17. On the role of television as the main mass medium, see T. Bretones, *Los medios de comunicación de masas. Desarrollo y tipos*, Universit  de Barcelone, <http://diposit.ub.edu/dspace/bitstream/2445/5924/1/Los%20medios%20de%20comunicaci%C3%B3n%20de%20masas.%20Desarrollo%20y%20Tipos.%20Bretones.pdf>

18. See A. Gonz lez, «La noci n de obra audiovisual», *op. cit.*, p. 58.

they are not “creations expressed by means of a series of associated images, with or without incorporated sound”, as defined in Article 86.1 of the consolidated text of the Law on Intellectual Property. Essentially, a live broadcast or recording of a soccer game does not have the minimum originality and creative stature necessary to be considered a “work” protected by copyright. Therefore, no rights in any work, past, present or future, protected by intellectual property could have been transferred to GSM by means of such a contract.» On the one hand, one can therefore note that the object of the recording, in this case a soccer match, is not a work protected by copyright, a point to which we will return. But on the other hand, even if the subject of the recording is not a work, the recording can be a work if it constitutes an original creation (Article 10.1 IPL). The decision rejects the idea that the recording of a soccer match for real-time broadcasting constitutes a work eligible for copyright protection as an audiovisual work. At least, under normal circumstances. This is true even if the recording managers have to decide where to place the cameras, how to capture the sound, and how to alternate the viewing of the game through these cameras throughout the game, with different approaches at different times. All of these activities require a professional qualification of the image and sound, resulting in a more or less satisfactory result of the recording, offering a better knowledge by the spectators of the unfolding of the match. However, it is clear that this objective is incompatible with the requirement of originality necessary to attribute the qualification of work to any creation, in this case to any audiovisual recording: «It must not be forgotten that if a photograph of any reality, of whatever nature, can be a work, there is no reason to deny that, even if it is extraordinary,

a recording of any reality can also be a work, including the recording of a soccer match.»<sup>19</sup> Thus, once again, the parallelism with photography is obvious and, as the Supreme Court reminds us in this judgment – an issue it has already raised as we will have the opportunity to discuss in relation to the question of the classification of a photograph as a mere photograph or as a photographic work – it is decisive to reach a creative height in order to obtain the best protection that intellectual property law grants to original creations compared to other intellectual products that do not deserve such classification.

### III. ADVERTISING ON TELEVISION

Initially, an advertising work is an intellectual creation that is characterized – and differentiated from others - by the fact that it incorporates information about a product or service, becoming the main message of its creation. Its essential function is to present a product or a service in order to encourage demand. It is therefore inherent to the economic activity of companies. According to the etymology of the term, it aims at «making public» the information of a company concerning its goods or services offered on the market<sup>20</sup>. They are expressly mentioned in Article 90.6, in Title VI of Book I of the IPL, which regulates the legal regime for cinematographic and other audiovisual works, stating that «the rights (of remuneration) referred to in paragraphs 3 and 4 of this Article shall be inalienable and non-transferable,

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19. Cf. R. Bercovitz, «Comentario a la STS de 25 de junio de 2013», *Cuadernos Civitas de Jurisprudencia Civil*, n° 95, 2014, oline version: BIB 2014/1606.

20. See on this topic, N. Pérez de Castro, «Las obras publicitarias en el ámbito de la propiedad intelectual. Su específica referencia en el artículo 90», *Revista Pe.i*, n° 2, 1999, p. 66; A. González, *La propiedad intelectual sobre la obra audiovisual*, Comares, 2001, p. 202-203.



by inter vivos transactions, and shall not apply to authors of audiovisual works of an advertising nature.» The reason why audiovisual advertising works are excluded from the remuneration provided for authors in the case of projection or exhibition in accessible public places, with or without admission, and in the case of transmission to the public by any means, with or without a wire (paragraphs 3 and 4 mentioned above, which include, among others, the case that interests us here, television), is that these advertising works are not economically exploited as such. They are not revenues derived from their exploitation as such, since the revenues generated by the exploitation of audiovisual advertising works are indirect, resulting from the increase in contracts for the good or service being advertised<sup>21</sup>.

Obviously, these particularities, *i.e.*, these features, are also what justify the above-mentioned exception. The extension of these exceptions to other issues related to the legal regime of audiovisual works under Article 86 and following of the IPL (among others, their ownership) has also been discussed. This does not prevent them, in any case, from being exceptionally works that can be protected by copyright, insofar as they demonstrate originality, like any other intellectual creation, in accordance with the provisions of Article 10 of the Law on Intellectual Property<sup>22</sup>.

These features also affect its originality. In this respect, it is relevant to point out that in the French case law, where the criterion of subjective

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21. Cf. N. Pérez de Castro, «Comentarios a los arts. 91 y 93 de la Ley de Propiedad Intelectual», *Comentarios a la LPI, op. cit.*, p. 1326. Same idea as in N. Pérez de Castro, «Las obras publicitarias en el ámbito de la propiedad intelectual», *op. cit.*, p. 73.

22. Regarding this problem, see A. González, *La propiedad intelectual sobre la obra audiovisual, op. cit.*, p. 205 et s.

appreciation of originality predominates, *i.e.*, conceived as the expression of the author's personality, without the need to reach any creative height (in the judicial level, at least, this criterion is not expressed in the same way as it is in the Spanish case law), it is precisely in the field of advertising that the criterion has traditionally been objectified<sup>23</sup>. This objectification has been done to avoid protecting anything by copyright, by raising the creativity requirement in order to exclude from copyright protection what is merely banal, or what any professional in the advertising sector would be able to do. Thus, according to the French doctrine, each case must be examined individually in order to assess whether or not the barrier of what should be eligible for protection is crossed. This requires a case-by-case approach, without being able to give a general answer beforehand for all cases. Therefore, it can be said that in the field of advertising, there will always be an (additional) uncertainty as to whether or not a work exists<sup>24</sup>.

Indeed, without prejudice to the fact that on certain occasions advertising activity involves creative activity within the meaning of Article 10 of the IPL, there are many cases where the result is not original. Thus, Article 21 of the Spanish General Advertising Law (34/1988) of November 11, 1988 – renumbered by Law 29/2009 of December 30, 2009, formerly Article 23 – establishes that «advertising creations may benefit from industrial or intellectual property rights when they meet the requirements of the following provisions». Therefore, in order for an advertising creation to be protected by copyright,

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23. See A. Lucas and S. Chatry, *Jurisclasseur Propriété littéraire et artistique - Fasc. 1159 : Œuvres protégées, Œuvres publicitaires* (last revision March 1, 2020), n° 6, p. 15. On the traditional criterion maintained in French doctrine and case law, as opposed to the objective criterion, see, for example, H. Desbois, *Le droit d'auteur en France*, Dalloz, 1978, p. 41.

24. Cf. C. Bigot, *Droit de la création publicitaire: LGDJ, coll. Droit des affaires*, 1997, p. 11.

it must meet the requirements of the Copyright Law. An advertising designer is not bound to create a work eligible for copyright protection unless this is expressly provided for in the contract. Thus, according to Article 20 of the General Advertising Law - formerly Article 22 -, «the contract of advertising creation is that by which, in return for compensation, a natural or legal person undertakes on behalf of an advertiser or an agency to conceive and prepare a project for an advertising campaign, a part of it, or any other advertising element.» In this context, it has been stated that «if advertising is considered an art, it cannot be forgotten that it is a self-interested art in the service of social, political, economic ends [...] and that the creativity of its professionals is subject to the tyranny of marketers, psychologists, sociologists, statisticians and lawyers – among other specialists - who largely restrain it [...]. In general, their work can in no way be considered properly creative.»<sup>25</sup>

The advertising activity applies certain techniques to capture the attention of the recipient, spreading simple and clear messages, whose content and tone, in theory, should not call for reflection, but seduce the recipient, generating the need to acquire the product: here is what you need, look at the result of the use of this product, enjoy the before or after... Even the simple image of a famous person, with the product in hand, arouses the desire of the consumer to have it in his possession<sup>26</sup>. The act of advertising obviously implies an effort on the part of the person who proposes it, and it is possible that behind the simplest advertisement there are strategic studies, market

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25. See E. J. Lázaro, «Comentario a los arts. 22 y 23 de la Ley General de Publicidad», in E. J. Lázaro (ed.) *Comentarios a la Ley General de Publicidad*, Civitas Thomson Reuters, 2009, p. 394.

26. See F. J. Alonso, «Comentario a los arts. 1 y 2 de la Ley General de Publicidad», *op. cit.*, p. 28.

studies or psychological studies, since it is a question of studying the behavior of the potential buyer. However, copyright does not protect the effort, nor the professional expertise, nor the simple work, but the formal expression of ideas in an original way<sup>27</sup>. In the judgment delivered by the CJEU on March 1, 2012 – Case C-604/10 – in the *Football Dataco* case, in relation to the question put to the Court as to whether the English league soccer matches fixture lists could be protected by copyright, deserving to be considered as an intellectual creation, the Court replied that «the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author [...] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data» – recital 42 –.

When technical expertise and skill prevail, as is also the case in sporting or bullfighting events, there is no original creation that can be protected. Thus, in the case of soccer, this was emphasized by the CJEU in its *Football association premier league* judgment of 4 October 2011 (Grand Chamber) – case C403/08 –. The CJEU goes on to state, insofar as it is relevant here, that «sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving

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27. The CJEU's very own case law defining the autonomous notion of originality from the Infopaq ruling has led to a change in UK case law, which had previously been the most liberal in applying copyright protection, requiring only «skill, intent and labour». Regarding this development, see P. Torremans, «El papel de los conceptos autónomos del Tribunal de Justicia como elemento armonizador de la legislación sobre derechos de autor en el Reino Unido», in P. Cámara and I. Garrote (ed.), *La unificación del derecho de propiedad intelectual en la Unión Europea*, Tirant lo Blanch, 2019, p. 641 et s.

no room for creative freedom for the purposes of copyright» (recitals 96, 97 and 98 of the judgment).

With regard to bullfighting shows, the Spanish Supreme Court (First Chamber) recently expressed its opinion on the matter in a decision of February 16, 2021. Although it considered that the main problem for admitting, as the plaintiff claimed, that a bullfighting show was eligible for copyright protection from beginning to end, was the lack of identification of the object to be protected, it stated, in its 6<sup>th</sup> recital, that: «However, two aspects stand out that are not protected as works of intellectual property: the technique and the skill of the bullfighter. Part of the skill projected in each bullfight is the knowledge that he has of the bulls and his ability to understand the bull with which he has to compete in the best possible way, which allows him to adapt to its behavior (provoking an exit, channeling the animal's run, directing it with a movement of the arm or wrist, etc.), as well as to his positioning in relation to the bull. Likewise, the ability developed with the cape, muleta and sword, in order to accomplish a specific task, which always constitute skills.»<sup>28</sup>

### **A. The part played by unfair competition in the field of advertising**

It is not surprising that, in the field of advertising, the defense of those who consider that other competitors in the market have appropriated what they have produced has sometimes been, or should be, directed towards unfair

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28. See P. Cámara, «La protection d'une performance de tauromachie par le droit d'auteur: une étude de la jurisprudence espagnole sur l'objet de la protection du droit d'auteur», *Revue internationale du Droit D'auteur (RIDA)*, n° 270, October 2021, p. 53 et s.

competition and not towards copyright protection<sup>29</sup>. Thus, a well-known case in France involves television advertising that gave rise to a dispute between the cleaning products company *Lever* and *Procter and Gamble*, which was resolved by the decision of the Paris Court of Appeal on April 22, 1969<sup>30</sup>. The plaintiff, *Lever*, claimed that the defendant, *Procter and Gamble*, had copied the advertising theme used in its television commercials, consisting of a comparison of clothes before and after washing with their products. The lawsuit was rightly brought not on the basis of copyright infringement, but for unfair competition (on the basis of Article 1382 of the French Civil Code). When the advertising theme is the highlight of a TV spot, it is obvious that the path of protection is not intellectual property, because it belongs to the domain of ideas, which are not protected by copyright<sup>31</sup>. A television advertisement that merely shows a piece of clothing before and after washing with a product – one can imagine how many advertisements show this «magical» effect of the application of a product by comparing before and after its use – could not be considered as subject to copyright protection. It would then constitute nothing more than a simple audiovisual recording.

In this field, the law of unfair competition is called upon to play an essential role, since in many cases there is the expression of ideas in an unoriginal manner, the essential element for capturing the attention of the recipient of the advertising product being the advertising idea, which copyright does not protect. Thus, as has been pointed out, *the increase in conflicts in the field*

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29. For Spain, relating to the protection of advertising by unfair competition, see E. Galán Corona, «El derecho de autor y la publicidad», *I Congreso Iberoamericano de propiedad intelectual*, t. II, p. 1057 et 1058, Ministerio de Cultura, 1991.

30. *Recueil Dalloz*, 1970, p. 214, note by J. M. Mousseron.

31. Cf. Bigot, *op. cit.*, p. 21-22.

of advertising through unfair competition is inversely proportional to those who resort to copyright in order to face those who substantially copy it<sup>32</sup>. This was also reflected in the case decided by the French Court of Cassation (Commercial Chamber) on November 24, 2015<sup>33</sup>. In this case, the company *Andros*, which manufactures fruit desserts and juices, attacked another company in the sector, *Pepsico France*, and its trademark «Tropicana», for having produced, as it had been doing for years, a television commercial consisting of presenting an orange – freshly picked from the tree, with its green leaves and stem – with the trademark stacked on top of it in the form of a sticker, and then presenting the packaging of the product containing the final fruit juice extracted from this orange. On this point, the Court of Cassation states that «the use of a competitor’s advertising idea, which is both arbitrary and distinctive of the competitor’s products, may constitute an act of unfair competition, if, in accordance with the provisions of Article 1382 of the Civil Code, it creates a risk of confusion in the minds of customers as to the origin of the products, which is prejudicial to the peaceful and fair exercise of trade.»<sup>34</sup> The dispute, as can be seen, does not result from a violation of copyright – more precisely from plagiarism – of an audiovisual work. The images of the orange, the sticker overlaid on the orange with the trademark, and the following image of the packaging containing the product resulting from the intervention of the

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32. Lucas and S. Chatry, *Jurisclasseur Propriété littéraire et artistique - Fasc. 1159 : Œuvres protégées. Œuvres publicitaires, op. cit.*, p. 4.

33. Decision n° 14-16.806, consulted on Legifrance: [https://www.legifrance.gouv.fr/juri/id/JURITEXT000031541889?init=true&isAdvancedResult=true&numAffaire=14.16806&page=1&pageSize=10&query=%7B%28%40ALL%5Bt%22\\*%22%5D%29%29%7D&sortValue=DATE\\_DESC&tab\\_selection=juri&typeRecherche=date](https://www.legifrance.gouv.fr/juri/id/JURITEXT000031541889?init=true&isAdvancedResult=true&numAffaire=14.16806&page=1&pageSize=10&query=%7B%28%40ALL%5Bt%22*%22%5D%29%29%7D&sortValue=DATE_DESC&tab_selection=juri&typeRecherche=date). For a commentary on this decision, see M. Malaurie-Vignal, *Revue Lexis Nexis*, Jurisclasseur, February 2016, p. 24.

34. About the value of advertising ideas, see P. Le Tourneau, «Folles idées sur les idées», *Revue Comm. com. électr.*, 2001, chron. 4, in particular n° 24, p. 11.

advertising company, would not have been considered as original elements eligible for protection of an audiovisual work; thus, these elements, which were central in the television spot, and which denote a creative advertising effort, allowing the recipient to easily identify the product and associate the juices with this brand, are outside the scope of copyright protection. Copyright protection is much broader than that offered by unfair competition, insofar as it encompasses personal aspects – in this case, the moral right of authorship – and exclusive economic aspects of a large temporal extension, such as the exclusive economic rights of authors. For this reason, in Spanish law, in cases of consumer confusion, the provisions of Article 6 of Law 3/1991, of January 10, 1991, on Unfair Competition, are applicable, according to which «Any behavior that creates confusion with the activity, services or establishment of another is considered unfair. The risk of consumers being confused as to the origin of the service is sufficient to justify the unfair nature of a practice.» Therefore, as has been pointed out by the doctrine, it can be said that Article 6 of this law «will be applicable to acts of competition that may cause a risk of confusion through the use of formal creations that identify a certain entrepreneur or differentiate his services, activity or establishment»<sup>35</sup>.

For example, if advertising creations – including television spots – pose problems for copyright protection, it is because of the lack of originality and the centrality of the idea itself, the form of expression of this idea being irrelevant from the point of view of originality<sup>36</sup>. Let's imagine a television spot centered on the main image of a brand, with a slogan superimposed on it, and an image

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35. Cf. M. Curto, «Comentario al art. 6 de la Ley de Competencia Desleal», in A. Bercovitz (ed.), *Comentarios a la Ley de Competencia Desleal*, Aranzadi Thomson Reuters, 2011, p. 153.

36. See A. Lucas and S. Chary, *op. cit.*, p. 5.



related to the product – for example, a runner, the brand *Nike* and the advertising slogan, that is always associated with this brand, on a musical background. Is it an audiovisual work? Couldn't someone else make a similar ad, adding an image of a runner, another brand and its slogan? Would the person doing this be plagiarizing the work? As we saw in the fruit juice case decided by the French Court of Cassation, it is not copyright that should be at stake here, but rather, given that what is essential is the idea of associating the product with a specific brand with a slogan, and the quality of the product, what should be determined is whether or not this could create confusion among the consumer as to the type of product that is being advertised. Moreover, advertising running shoes with an athlete running lacks creative stature, as does advertising a cleaning product by showing the before and after the application of the product (there are countless television commercials that consist precisely of showing the effects of using the marketed product, in order to immediately make people want to buy it). Some television commercials are audiovisual works, but many others are not. And originality is not presumed; on the contrary, reaching the levels required to obtain copyright protection requires proof, which excludes other branches of law from being applicable in this specific case. And this is especially true in a matter like this, where we have seen how the room for maneuver of copyright is more limited than in other types of audiovisual productions.

In Spain, although the case did not involve television advertising, but rather advertisements expressed in writing, the Supreme Court's decision on May 13, 2002 (RJ 2002/6745) has been much commented on and criticized<sup>37</sup>.

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37. See P. Cámara, « Los conceptos autónomos sobre el objeto de protección del derecho de autor », in *La unificación del derecho de propiedad intelectual en la Unión Europea*, op. cit., p. 81.

In this ruling, the Supreme Court recognized as linguistic works protected by copyright job advertisements expressed in words inserted in a newspaper. The newspaper «La Vanguardia» published in a section of advertisements of various job offers, which a weekly newspaper, called SOL, reproduced verbatim in its pages. After examining the question of whether the advertisements were works of art, and the consequent violation by the defendant of the plaintiff's copyright, the Supreme Court (first recital) declared that: «(...) these advertisements, known as “job offers”, are quite simply a creative activity with a lot of originality, which cannot be confined to style clauses or typographical uses. In this respect, it should not be forgotten that a job offer, with the socio-economic burden that it entails, requires an intellectual activity of a certain depth to make the offer attractive, especially with the aim of achieving a success that would be in favor of both the publisher and the future candidate, as well as the medium in which the offer is made, which therefore has the right to be protected for its creative side.» In this case, the Supreme Court, without entering into the question of where originality would be found in these ads, states, without a doubt, that they are all subject to copyright protection: the creative effort would be justified in itself, when it comes to making a job offer, so that any such ad would automatically become subject to protection. As I have already pointed out, contrary to what this Supreme Court ruling says, a job advertisement does not need «intellectual activity of a certain depth to make it attractive», since what is attractive in these advertisements is what is not protected by copyright: data, information such as salary, duration of the contract, activities to be performed, etc.<sup>38</sup>

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38. See P. Cámara, *ibidem*.

This decision was criticized by the doctrine because it implied a surrender of any requirement of originality or creative height<sup>39</sup>. In my opinion, as I have had the opportunity to defend elsewhere, this case is further evidence of the way in which some disputes attempt to be brought under copyright law, in order to obtain the high level of protection that intellectual property law recognizes through the existence of an original creation, when on the contrary, another regulation is applicable<sup>40</sup>. In this case, it is clear that the conduct of the defendant, who copied word for word the advertisements published in «La Vanguardia», should not be legally admissible. However, it is not the Intellectual Property Law that is applicable, but the Law 3/1991 of January 10, 1991 on Unfair Competition, specifically Article 4 – General Clause – which provides in paragraph 1 that «Any conduct objectively contrary to the requirements of good faith shall be considered unfair»<sup>41</sup>. This behavior, which is consistent with objective good faith, has been referred to on several occasions by case law, as in the case of the Supreme Court ruling on October 21, 2005 – RJ 2005/8274 – according to which «competition is not fair when, in addition, it violates the good faith of the competing market, or acts in violation of the elementary principles of respect for others, or obtains results not through its own efforts, but through the appropriation of those thus obtained by others (SS. July 14, 2003 – RJ 2003/4634– and February 3, 2005 – RJ 2005/1458–)». In my opinion, it is material considerations that led the Supreme Court to recognize, in the case of «La Vanguardia», that these are

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39. For this critical view, see R. Bercovitz (ed.), *Manual de propiedad intelectual*, 9<sup>th</sup> ed. 2021, p. 57.

40. See P. Cámara, «Buenas y malas prácticas investigadoras y docentes. El plagio en la Universidad», *Anuario de la Facultad de Derecho de la UAM*, n° 24, 2020, p. 205.

41. See A. Bercovitz, «Comentario al art. 4 de la Ley de Competencia Desleal», A. Bercovitz (ed.), *Comentarios a la Ley de competencia desleal*, Aranzadi Thomson Reuters, 2011, p. 93 et s.

works protected by copyright, materialized by the fact that no other issue was raised by the plaintiff in his *petition*.

Thus, we can conclude that the function of advertising blurs the distinction between idea and form, and makes the assessment of originality arbitrary. The desirability of copyright protection for advertising works is, to some extent, suspended. By seeking to protect a large number of creations in this way, copyright loses its essence. For this reason, it is not a mistake for those principally concerned to seek or directly prefer other legal bases such as trademark law or unfair competition to obtain protection<sup>42</sup>.

#### **IV. THE REQUIREMENTS OF NOVELTY AND CREATIVE HEIGHT IN THE CASE LAW OF THE SPANISH SUPREME COURT AND ITS IMPACT ON THE CONSEQUENCES OF THE CJEU RULING IN THE *ATRESMEDIA* CASE**

The aforementioned decision, dated May 13, 2002, is the last ruling of the Spanish Supreme Court to waive the requirement of a minimum level of creativity. The next decision in this matter entails a change in the previous case law, insofar as objective novelty and a minimum level of creativity are expressly required in order to enjoy copyright protection. This is the decision of the Supreme Court of June 24, 2004 (RJ 2004/4318)<sup>43</sup>. The judgment is of interest to us because it concerns the field of marketing and advertising. The company Meeting Ibérica had registered a game in its name entitled

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42. Cf. A. Lucas and S. Chary, *JCPL, Œuvres publicitaires, op. cit.*, p. 23.

43. See R. Bercovitz, «Comentario a la STS de 24 de junio de 2004», *Cuadernos Civitas de Jurisprudencia Civil*, n° 67, 2005, 1805, p. 397 et s.

«Juego promocional de publicaciones», which consisted of numbering copies of newspapers and magazines it wished to promote, and then drawing lots so that the holder of the copy with the lucky number would receive a prize (money, travel, etc.). Later, an editor of a publication drew a cash prize, also based on the reward of whoever had the winning copy of the magazine. Meeting Ibérica claims that there has been an infringement of its copyright insofar as the lottery game is protected by copyright, since it is an original creation. Regarding this issue, the second recital states that: «[a]ccording to a well-established doctrine, the primary presupposition for a human creation to be considered a work is that it must be original, the requirement of which, in its objective perspective, consists in having created something new, which did not exist before; that is to say, the creation that brings and constitutes an objective novelty in relation to any other pre-existing creation: a new creation is original as opposed to any other pre-existing creation, and it is this objective novelty that determines its recognition as a work and the intellectual property protection attributed to its creator. In any case, it is required that this originality has a minimal importance, which does not appear in the case in point, which, in this case, is a new example of the “lottery game” designed by means of the numbering of each of the publications and a draw to determine the winner of the prize or prizes, without the idea of its purpose of promoting newspapers or magazines being of a sufficient level to give it the characteristics of singularity, individuality and distinction, because it is often used in society and in the market as an incentive for the public or consumers. Thus, gifts are drawn by different means: tickets, especially for cultural or sports events, bar codes or coupons included in the packaging of consumer products, tickets for purchases in establishments, etc. We are not in the field of the so-called

minor works, which are becoming more and more numerous, and which the German doctrine calls “small coins” or “small change” (“*kleine Münze*”), and which can nevertheless reach an important economic level on the market, because here the originality is not significant enough to grant protection to their author by intellectual property.»

Thus, as the Supreme Court rightly concludes, the use of a lottery or a draw is a commercial idea or technique, aimed at attracting potential customers, without any creative height. The Supreme Court, following the well-established doctrine, opts for the criterion of objective novelty of originality, which seems to us quite plausible. It is also plausible to require a minimum level of originality or creative height<sup>44</sup>. To do so, he uses the criterion maintained in German law : individuality, uniqueness. According to section 2.2 of the German Copyright Act of 1965, a work is protected if it constitutes a personal intellectual creation – *persönliche geistige Schöpfung* –, where personal means individual<sup>45</sup>. It should therefore be noted that it is one thing to require an objective criterion of originality understood as novelty, and another that, in addition, this originality has a minimal relevance. Objective novelty may or may not be accompanied by a threshold of creative height, in order to separate it from the trivial or futile, which does not deserve protection. This is what the German doctrine calls *Gestaltungshöle*<sup>46</sup>. And the Supreme Court, in this

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44. See in particular R. Bercovitz, «Comentario al art. 10 LPI», *Comentarios a la LPI, op. cit.*, p. 163 et s.

45. Cf. S. von Lewinski, «La qualification d'œuvres de l'esprit à l'épreuve de la jurisprudence européenne : une notion harmonisée?», *L'oeuvre de l'esprit en questions, Un exercice de qualification*, Mare et Martin, p. 212.

46. On the different criteria of originality in the EU, see P. Cámara, «La originalidad de la obra como criterio general de protección del derecho de autor en el derecho comunitario : la sentencia del TJUE de 16 de julio de 2009 que resuelve el asunto Infopaq», *Revista doctrinal Aranzadi Civil-Mercantil*, n° 8, 2012, BIB 2012/3335.

decision, rightly recalls these two requirements. Indeed, the benefit of such a broad protection as that offered by copyright, with economic rights that generally last for the author's entire life and 70 years after his death (Articles 26 *et seq* of the IPL), as well as the attribution of inalienable and irrevocable moral rights – some of which are protected in perpetuity – (Articles 14, 15 and 41 of the IPL), can only be obtained when a minimum level of creation is achieved. The proof is, as we have already underlined, that next to the regime provided by Book I of the IPL for original creations, we find protection for other performances (Book II), with economic rights of a more limited scope and duration, and with the absence, except in the case of performers, of protection of the moral right (Article 113 IPL).

Although the CJEU, since the ruling of July 16, 2009 in the *Infopaq* case (case c-5/08), defines the notion of originality as «the author's own intellectual creation», German doctrine has continued to defend that the CJEU only establishes minimum conditions for the protection of works corresponding to any category. This does not exclude the possibility that more important conditions may be required in other categories than those expressly indicated by the European legislator in the directives concerning computer programs, databases and the term of protection – concerning photographs<sup>47</sup>. And the Spanish case law has invariably continued to require objective novelty and creative height. The expression «the author's own intellectual creation » is sufficiently ambiguous for the judges of the Member States to be able to fit their approach into such a broad definition, maintaining the jurisprudential

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<sup>47</sup>. Cf. J. von Ungern-Sternberg, «Die Rechtsprechung des Bundesgerichtshofs zum Urheberrecht und zu den verwandten Schutzrechten in den Jahren 2008 und 2009», *GRUR*, 2010, p. 273.

trend that they have defended until now<sup>48</sup>. It is here that the requirement of creative height, which our Supreme Court has continued to demand, as we shall see below, in its subsequent judgments, still has its place. And this, although, as I have had the opportunity to criticize in other works, without prejudging the fact that the Spanish Supreme Court should have expressed this adequacy to the ambiguous European Community concept in order to avoid problems in adapting it to European law<sup>49</sup>.

In the area of advertising, this minimum level of originality usually implies that the work exceeds a certain level of complexity. This has been highlighted in the case of slogans, although, as previously mentioned, the protection of their distinctiveness in the target market is ensured by unfair competition or, if appropriate, also by trademark law – Articles 4 and 5 of Law 17/2001, on trademarks –<sup>50</sup>.

As far as the field of advertising is concerned, the judgment handed down by the Spanish Supreme Court on February 2, 2017 (RJ 2017/454) is also interesting, as it deals with the originality of a catalog of construction and DIY products. In its second recital, the Supreme Court states that in this case we could be faced with a work – Articles 10. 1 and 12 IPL –, as an original database due to the selection or arrangement of the contents, since taking into account the two catalogs – structure, format, typography, visual coding, etc. – the existence of an element of protection «could have something to do with the arrangement of the contents, but in this case the originality is

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48. Cf. S. von Lewinski, «La qualification d'œuvres de l'esprit...», *op. cit.*, p. 222-223.

49. See P. Cámara, «La protection d'une performance...», *op. cit.*, p. 89-90.

50. See, in this respect, R. Bercovitz, «Comentario al art. 10 LPI », *op. cit.*, p. 165.



very weak, not to say non-existent, compared to that required by the Law». The Supreme Court thus confirms the criterion of creative height, and in particular in a case of advertising creation such as a brochure in the present case, it even recognizes that there could be some originality in the selection or arrangement of the products, but this would be very weak, preventing access to the required threshold of copyright protection<sup>51</sup>. On the other hand, it is worth noting that the applicant has also invoked as a ground for cassation the violation of Article 5 – now Article 4 - of Law 3/1991, of January 10, on unfair competition, as well as the abusive application of Article 11 of the same text. In this context, the Supreme Court, in its third recital, considered that there was no reason to admit the plea based on unfair competition, concluding that in this case no other circumstances were alleged, let alone accredited, that would determine the unfairness in obtaining a possible benefit from the imitation, as happened in the case at issue in Judgment 393/2013, of June 19.

Finally, it is worth mentioning the Supreme Court's decision on April 5, 2011 (RJ 2011\3146) on the protection of certain photographs as works, and their distinction from mere photographs, in order to continue the parallelism between photographic and audiovisual works that we have established since the beginning of this article. The appellate judgment highlighted a requirement of originality and creative stature in order to obtain copyright protection. In the fifth recital, the Supreme Court: «considers that the interpretation reached by the contested judgment is correct, so that the lack of originality or lack of creativity deprives the photograph of the status of a photographic work

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51. About this decision, see R. Bercovitz, «La originalidad de un catálogo», *Aranzadi Civil*, BIB2017/1146.

(Article 10.1.h IPL), and therefore of copyright, and reduces it to the status of a mere photograph with the limited intellectual property protection of Article 128 IPL. The above criterion is in line with the notion of “original creation” in Article 10. 1 of the IPL, which can be understood as “creative originality”, whose interpretation, reinforced by the reference in the tenth additional provision of the Law on the Legal Protection of Industrial Designs, Law 20/2003, of July 7, “to the degree of creativity and originality necessary” to be protected as an artistic work, is the common position of the doctrine, and, moreover, is particularly relevant in photographic matters to distinguish artistic creations – photographic works – from mere photographs [...]. Uniqueness does not lie in the photographic object, nor even in mere technical correctness, but in the photograph itself, in its creative dimension.»

A few months after this decision was handed down, on December 4, 2011, the CJEU ruled in the Painer case – case C-145/10 -. The question was whether a school portrait of a girl painted by Ms. Painer could be considered as original. The CJEU discusses the originality requirement as follows: «As regards, first, the question whether realistic photographs, particularly portrait photographs, enjoy copyright protection under Article 6 of Directive 93/98, it is important to point out that the Court has already decided, in Case C5/08 *Infopaq International* [2009] ECR I6569, paragraph 35, that copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author’s own intellectual creation. As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author’s own if it reflects the author’s personality. That is the case if the author was able to express his creative abilities in the production of

the work by making free and creative choices [...]» (Recitals 87, 88, 89 of the judgment). The Court goes on to detail how, in a photograph, its author can make «free and creative» choices: «In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can stamp the work created with his “personal touch”» – recitals 91 and 92. She therefore concludes that: «In view of the foregoing, a portrait photograph can, under Article 6 of Directive 93/98, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph» – recital 94.

First, the Court identifies freedom of choice as an essential element of originality<sup>52</sup>. In this case, the emphasis is placed more strongly - because of its repetition - than in previous times on this freedom: where a result is predetermined, there is no originality<sup>53</sup>. But in my opinion, one should keep in mind another element that the CJEU also points out : creativity. The CJEU talks about «free and creative» choices. And this is where I think it is not enough

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52. See V. L. Benabou, «L'originalité: un Janus juridique. Regards sur la naissance d'une notion autonome de droit de l'Union» in *Mélanges en l'honneur du professeur A. Lucas*, Lexis Nexis, 2014, p. 32.

53. Within the French doctrine B. Edelman already stressed that freedom seemed to be the essence of creation, understood as a free production of the human person – see «Liberté et création dans la propriété littéraire et artistique. Esquisse d'une théorie du sujet», *Dalloz*, 1970, chron, XLI, p. 197.

to make a decision for the result to be automatically original. The «personal touch» does not mean, in my opinion, returning to a subjective criterion of originality understood as an expression of the author's personality. It is what allows defining originality in objective terms, beyond a banal choice or decision without creative relevance<sup>54</sup>. Directive 93/98 harmonizing the term of protection of copyright and certain related rights – now codified in Directive 2006/116, states that «[...] a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account [...]» – point 17, now 16 in the 2006 version –. This has raised doubts in the doctrine as to the traditional subjective criterion of the author's personality. And, in this hypothesis, if the criterion of « the author's own intellectual creation » should be interpreted objectively in the case of computer programs and databases, and subjectively when the work is photographic, to finally conclude that it is not<sup>55</sup>.

In my opinion, it appears that there is no change in the concept of «the author's own intellectual creation» in photographic works compared to what was established in the Infopaq case and that, therefore, the expression of the author's personality used by the Court of Justice cannot be taken literally<sup>56</sup>. Indeed, this is a formal reference, which would limit this personal touch to

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54. On this point, as V. L. Benabou says, «to choose is not all to shape this freedom of creation: to choose the clay or the model is not to sculpt», *ibidem*.

55. See J. C. Kabel, *Intellectual Property and Information Law. Essays in honour of Herman Cohen Jejeoram*, Kluwer Law International, 1998, p. 201-209.

56. Cf. A. Lucas, *Droit d'auteur et numérique*, Litec, 1998, p. 44.

the free and creative choices of the author<sup>57</sup>. It cannot therefore be said that the CJEU imposes a subjective notion of originality on the Member States. This would have an obvious impact on our own case law.

Ultimately, in this ruling, what the CJEU does, a reasoning that I believe is correct, is to determine in a photographic work where originality could be found; in other words, at what moments the author can express himself in an original way. Thus, in accordance with the creative process of photography, it describes that this can happen at a stage prior to its production, during the actual capture of the image, or later during its development. The work is the result of the expression of a physical person and therefore necessarily contains personal elements of its creator. It is to this personal sphere that the protection of the author's moral right is addressed. However, one cannot deduce from this that the requirement of protection is a reflection of the personality, because this personality cannot be detected in all works nowadays, nor is this requirement sufficient.

## V. CONCLUSIONS

On the basis of the study of Spanish and foreign doctrine, as well as the case law of the Spanish Supreme Court and the Court of Justice of the European Union, it cannot be concluded that every advertising creation broadcast on television constitutes in itself a work that can be protected by copyright. Therefore, it is up to the party interested in claiming copyright

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57. Cf. A. Lucas in A. Lucas, A. Lucas-Schloetter, C. Bernault, *Traité de la propriété littéraire et artistique*, 5<sup>th</sup> ed., Lexis Nexis, 2017, p. 143.

protection to prove, in each case, that the creation is original, with objective novelty and creative height that distinguishes it from the usual way of presenting an advertising message.

In this creative sector, it is the advertising idea or theme that plays the most important role, and in this respect its natural protection is through the prohibition of acts of confusion dictated by the Unfair Competition Act. Only when it is proven that this creation is original and thus transcends the category of a work, in accordance with Article 21 of the General Advertising Law, does it enjoy copyright protection. To this end, in order to substantiate this originality and the quality of a work that derives from it, it is appropriate to refer to the French experience, whose case law in this area has objectified the criterion of originality, as opposed to the traditional subjective conception of this requirement in that country.

Thus, an advertisement broadcast by a television channel is, in theory, a mere audiovisual recording protected as such by Book II of the Intellectual Property (Neighboring or Related Rights) Act and by Article 6 of the Unfair Competition Act against imitations or confusing copies, or Article 4 of the aforementioned Act, as the case may be, if it exploits the reputation of others. Only when it is shown that its audiovisual content has the originality, in terms of objective novelty and creative height, required by established doctrine and Spanish case law, can an audiovisual work be considered protected as such, in accordance with the provisions of Book I of the Intellectual Property Law governing copyright.