Expert Contributor

The Quantificatión of Damages in Copyright Cases Related to Music.

By Armando Arenas
OLIVARES Partner
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In Mexico, the repair of material and/or moral damage, as well as compensation for damages for violation of the rights enshrined in the Federal Copyright Law, are contemplated in article 216 bis, which establishes that in no case it will it be less than 40% of the retail price of the original product or the original provision of any type of service that implies a violation of one or more of the rights protected by law. Adding that in those cases in which its determination is not possible, the judge, with assistance of, will set the amount of the repair of the damage or the compensation for damages.

The number of lawsuits in the civil sphere claiming compensation for damages for copyright infringement has increased considerably in recent years, and some of these cases have reached the Supreme Court of Justice, which recently resolved a couple of very interesting cases related to the undue exploitation of musical works.

The first case is related to a company that manages a nightclub and was sued by a Collective Management Society for Authors and Composers (a legally constituted organization dedicated to managing the exploitation rights of owners of works protected by copyright), who claimed from the nightclub the payment of royalties for the reproduction of musical works in its establishment.

On the other side, the company claimed the unconstitutionality of article 216 bis, considering that it violates the principles of legal certainty and proportionality, due to the fact that from its wording it is not possible to establish which income should be applied to the percentage of compensation, since, although musical works were reproduced in its establishment, food and beverage services are also offered, which they maintained could not be considered as part of the quantification of damages. Adding that the payment of inputs, administration expenses, and payment of taxes would not be considered either and that in any case, the compensation would only proceed from a profit.

The Supreme Court of Justice considered that said precept is constitutional, since said article provides for two systems for calculating damage reparation, consisting of the payment of at least 40% of the sale price of the original product or services and when this calculation cannot be made, the opinion of experts must be consulted, in such a way that the compensation is not intended to punish, but rather to compensate the damage caused.

Likewise, it considered that the party that suffered the loss of profit from his work could not suffer the losses or payment of liabilities generated by the operation of the establishment, since to estimate otherwise would be contrary to the compensatory purpose of the questioned article, in such a way that resolved that, in the case of services, the compensation must be quantified with respect to the total income related to the infringement of copyright, including the sale of beverages and food, because they converge in the violation of copyright, since the reproduction of musical works is carried out in order to obtain an additional attraction to the activity of the establishment.

This resolution led to the support of the isolated thesis No. 1a VIII/2022 (11th) by the First Chamber of the Supreme Court of Justice, which, although it is not mandatory jurisprudence for the courts, does constitute a guiding criterion for courts and civil courts.

The second case involved the use of a modified version of a musical work by the famous singer-songwriter Ricardo Arjona, without his consent, in the advertisement of an automotive company to advertise one of its vehicles.

In previous stages, it was ordered to calculate the amount of compensation from the 40% of the total income obtained from the sale of the vehicle during the time that the advertising campaign was on the air, in terms of article 216 Bis of the Federal Copyright Law.

In this regard, the Supreme Court of Justice decided that the price of the vehicles should not be considered for the quantification of damages, because the relationship with the author is not clearly observed, as happens with the sale of records or video recordings of works owned by the owner of the work. Therefore, it resolved that when it is not possible to determine the sale price to the public of the original product or service, as is the case under study, the judge with the support of experts and based on the evidence offered by the parties must set the amount of the compensation.

With which he stressed that arguing that the total income obtained by the company is the basis for compensation, would imply moving away from the compensatory intention of the Federal Copyright Law, resulting in excessive criteria.

Although both decisions reveal the interest of the Supreme Court of Justice in establishing the criteria for the application of said precept, in my opinion, the second criterion is clearer, since on the one

hand it recognizes that the object of copyright protection cannot be the vehicles per se, since these are not assets protected by copyright, but the musical work that was used in the commercial and in this scenario, the appropriate thing to establish fair compensation in terms of the provision itself is to go to the aid of experts, whose quantification could well be established taking into consideration an expert in the matter to determine what would be the cost of a license to use a musical work in a commercial advertisement for vehicles.

In summary, it seems to me that the interest of the Supreme Court of Justice in establishing criteria in the matter is welcome and whose direction is to compensate the holder of the infringed rights.

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