

World Intellectual Property Day 2021

2nd Article



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1. World Intellectual Property Day 2021

Like every year, the World Intellectual Property Day (WIPO) was celebrated on the 26th of April.

This year the main focus was on Small and Medium Enterprises, but we can say that Intellectual Property (IP) is important for every kind of company that wants to take its ideas to the market.

The motto of this year has been that businesses benefit from IP when taking their ideas to the market. Technology, brands, designs and content need to be protected when businesses run on Know-how.

With regards to this special day we offer you the lecture on some curiosities from the latest news that most people ignore about IP:

Tattoos and IPR infringement:

Regarding this topic, we found a recent case law from California in which a photographer claims against a tattoo artist that tattooed an imitation of a photo that he made in 1989. In the claimant's view, the making of the tattoo infringes his copyright in the photograph. The claim was based on the fact that apart from the photo being registered, the photograph is sufficiently original and therefore falls under the umbrella of copyright protection in the strict sense of the term as a photographic work.

The fact is that the originality of a photograph has been the subject of doctrinal and jurisprudential debate on numerous occasions (in Spain and internationally), without there being uniform criteria to delimit the degree of originality that is required, the solution is dependent on the casuistry and the circumstances of the specific case.

Thus, Casas Vallés points out that *"it would be reasonable to assume that photographs are, in principle, no more than mere photographs, with the burden of proving that there is an original creation falling on those who maintain the contrary -i.e. that they are works of art-"*. And, concerning copyright protection, Rodríguez Tapia states that *"Copyright probably protects both (i) a graphic sum of more or less original data and content in terms of its identity, its selection or its arrangement in a very varied combination of forms, lights and colours, and (ii) the photographer's gaze, which is completed with objects, tricks and techniques added later in his laboratory or computer"*.

Spanish regulation contains a closed list of limits according to which, if the tattooist's conduct did not fall within any of the limits provided for in the Intellectual Property Law, a court could cover this conduct as "legitimate" or with little capacity to endanger the interests of the owners.

However, we will have to wait for the outcome of this case, which will undoubtedly generate controversy over the concept and scope of copyright protection and unauthorized conducts that can be considered of fair use.



Bullfighting:

The background to the case dates back to 2014, in Spain, when a known bullfighter applied for the registration in the Intellectual Property Register a work entitled *"two-ear performance with the request for the tail of bull "Curioso" nº 94, weighing 539 kg, born in February 2010, Garcigrande livestock, San Juan de Badajoz fair, 22nd June 2014"* consisting, according to the bullfighter, of *"a natural left hand changing hands on the back without moving; the bull comes out loose and the bullfighter goes towards him giving a pass over the top with his right hand"*.

This application was rejected, and the bullfighter filed an ordinary lawsuit before, arguing that the *"faena"* (work of a bullfighter) was an original artistic creation in the sense of copyright regulations and that its registration was correct.

Their claims were dismissed pointing out that it cannot be an interpretation without a pre-existing work, and there will be no original work if the bullfighter performs predetermined lances and movements. The second judgement won't agree with the bullfighter either and recalls that it is a physical activity and the possibilities of execution are practically infinite.

For the last instance, the case was taken to the Spanish Supreme Court. The court analyzed two recent cases of the Court of Justice of the European Union: *Cofemel (C-683/17)* and *Levola (C-310/15)*, in which the requirements to make the consideration of work as an object susceptible of protection by IP are determined.

To sum up, it must gather two elements:

- there must be an original object that constitutes an original creation of its author
- the object must be identifiable with sufficient precision and objectivity.

However, the court recognizes the artistic consideration that can be given to a bullfighter's performance (expressed, among others, in the *"body language, the aesthetics and the creation of figures using which the bullfighter projects his feelings to the spectator"*), although it recalls that, in the

application of the criteria, it is necessary to specify that the recognition as a protected work is requested for give rise to the strong protection conferred by copyright. The court concludes that it is not possible to objectively and precisely identify bullfighting as an artistic creation of the bullfighter, which excludes the recognition of the bullfight as a work protected by copyright law.

Finally, the judgement also points out the possibility of the bullfighter's performance to be protected as a choreographic work, but unlike what happens in a choreography, where it is possible to identify in a precise and objective manner the movements and forms of which it is composed, such objective identification is very difficult in a bullfighter's performance, in respect of which it is not possible to claim exclusivity.



Did you find these two cases interesting? How will they be solved in your home country? Let us know in the comments!

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CJEU, 12th September 2019, C-683/17, *Case Cofemel and others*.

CJEU, 13th November 2018, C-310/17, *Case Levola*.