

Use of Copyright Images / Material in Adverts – Fair Use or Infringement?

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Executive Summary

- On 3 June 2019 the Court of Appeal upheld a High Court decision that found that the use of the appellant's copyrighted map in an advert was not an infringement of copyright as it was 'incidental inclusion'.
- The Court of Appeal emphasised that what constitutes 'incidental inclusion' can only be determined on a case by case basis.
- It is prudent for marketing teams to carefully consider all the elements of their advertising campaign and consider if consent would be required from third parties for using their copyrighted work.

Introduction

According to the PWC *Entertainment and Media Outlook 2018-2022 – An African Perspective* report Kenya's entertainment and media industry was valued at USD 1.7 billion (in 2017) and projected to grow to approximately USD 2.1 billion this year.

With such significant spending, there will be a correlated increase in copyright materials produced and its use by creatives in different foras. This therefore raises the issue of what can be freely used or referenced when developing new content? A case in point of this type of scenario occurring happened in 1990 when the popular sitcom 'The Cosby Show' had to drop from its opening credits the image of a mural painted by students of the Creative Arts Workshop for Homeless Students because it did not have the obtain necessary approval from the workshop.

The Kenyan media and in particular the advertising industry through a Court of Appeal decision now have some clarity of what they need to bear in mind when using another's art, music, picture, audio-visual etc. to develop their own content.

Summary of the Case

In 2009, the appellant discovered their copyrighted map was being used in a TV commercial promoting a mobile network provider's coverage. The map was used as a prop to show the towns and areas the mobile network provider was located in by using pins on the map. The appellant sued the mobile network (the first respondent) along with the advertising agency (the second respondent) and the company that put together

the commercial (the third respondent) for using their map without their consent.

At the High Court, partner Peter Gachuhi (representing the third respondent) successfully argued that the use of the map was not the subject matter of the advert and the copyright owner had no right to control its use. It fell within the exception in the Copyright Act of what is referred to as an ‘incidental inclusion’ (in line with the exception under section 26 (1) (c) of the Copyright Act). In the circumstances the advert was not an infringement of the appellants copyright. The High Court agreed with this argument noting only portions of the map was used in the advert to stick a pin to a particular location and then the information transferred to a whiteboard.

The appellant appealed the decision arguing that because the respondent had captured images of the map and stored it on a CD to be shared with various broadcasting stations this amounted to a ‘reproduction’ under the Copyright Act and therefore a breach of its copyright. Furthermore, breach of copyright is a tort of strict liability and therefore the appellant did not need to demonstrate any loss.

The Court of Appeal agreed with the appellant that held that the filming of the map and displaying it in the advert was indeed a reproduction of copyrighted work. However, agreeing with Mr Gachuhi’s submissions, the use was incidental on the basis that the main essence of the advert was the “the Engineer travelling to various locations and relaying information to the gentleman in the office who would tick the relevant locations on a white board.” Without

the map the mobile network’s message of having a wide coverage was still communicated to the public.

The Court of Appeal confirmed that the test to determine if copyright material was incidental is based on determining whether the copyright work “is essential to the object for which” it has been used in. If it is not essential then it is incidental.

Conclusion

The Court of Appeal also stressed that what constitutes ‘incidental inclusion’ can only be determined on a case-by-case basis. It is therefore important for businesses to routinely scrutinise in great detail the content it is producing to determine if copyright material is being used.

For further advice about any of the information contained here please feel free to contact:

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