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NEWSLETTER EMPRESARIAL

Junio 2011 – June 2011

Includes an International IP Law Section in English

I.- JURISPRUDENCIA

1. PROPIEDAD INTELECTUAL. Portal de internet. Descarga de contenidos.
2. PROPIEDAD INTELECTUAL. Restauración de mural. Daños y perjuicios.

II.-

International IP Law Section in English

1. US Fashion Law Update. By Michelle Marsh and Natasha Grant. Kenyon & Kenyon LLP.

I.- JURISPRUDENCIA

I. 1. PROPIEDAD INTELECTUAL. Portal de internet. Descarga de contenidos.

Abstract. In re “www....net on prosecutions” the Criminal and Correctional Chamber of Appeals confirmed the prosecution of several website owners who, through their website allowed to download articles protected by the intellectual property law infringing it. The Chamber ruled that reproduction could be defined as the way in which a material multiplication (through any form or by any means) of corporal objects identical or similar could be carried on. Having said this, the Tribunal considered that the

defendants allowed, through their website, the publicity of several works that were finally reproduced without the owners’ consent. Despite the fact that this was possible through reference to another website, the truth was that it was the first website which made it possible through its service. The owners admitted that during the hearings, as well as in their briefs, and besides it emerged from the cause, they were the site’s administrators and because of that they were found responsible. The Tribunal noted that defendants were at least necessary participants of the illicit and that they were also clearly aware of that and because of that reason the agreement exhibited by them in order to exonerate from any kind of responsibility was not taken into consideration by the Court. Spanish version: En “www....net s/ procesamiento” la Cámara Criminal y Correccional confirmó

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el procesamiento de los dueños de un sitio de internet que permite la descarga de contenidos en infracción a la ley de propiedad intelectual. Para así decir, la Cámara sostuvo que la reproducción ha sido definida como *el modo de llevar a cabo la multiplicación material en cualquier forma o por cualquier medio de objetos corporales idénticos o similares* (“Molina, Ernesto”). Consideró así que los imputados a través de su sitio permitían que se publiciten obras que finalmente eran reproducidas **sin consentimiento de sus titulares**. Si bien ello ocurría a través de la remisión a otro espacio de Internet, lo cierto es que justamente tal posibilidad la brindaba su servicio. Han reconocido tanto en la audiencia como en sus escritos y además surge de la causa, que son los administradores de la página, debiendo responder en tal sentido. Adviértase que si bien los autores del hecho fi-

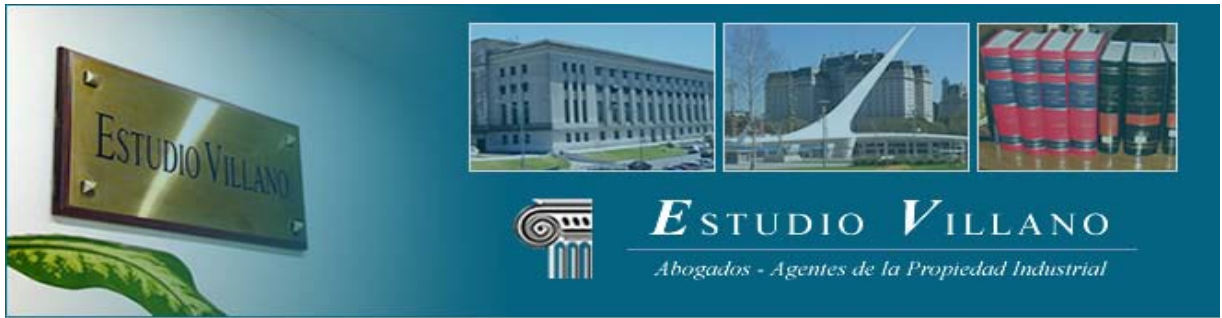
nalmente serían aquéllos que subieron la obra al website y los que “la bajan”, lo cierto es que el encuentro de ambos obedece a la utilización de la página en trato, siendo sus responsables al menos **partícipes necesarios de la maniobra** y además **claros conocedores de su ilicitud**, por lo que el convenio que exhiben para pretender exonerarse de responsabilidad no podrá ser tenido en cuenta. Fuente: www.eldial.com.ar

I. 2. PROPIEDAD INTELECTUAL. **Restauración de mural.** **Daños y perjuicios.**

Abstract. Room M of the Civil Chamber of Appeals sustained the plaintiff's claim who sought monetary compensation for damages caused by defendants whom, by the restoration of a wall impaired by the time went

by, altered it and indicated a different authorship. In re “Seigerman v. Greco” the Civil Chamber of Appeals ruled that **the isologo or logotype is a graphic identifier used to sign an entity's communications** (company, product, service or institution, etc.). *Isologos are usually conformed by the union of a graphic symbol and a textual stimulation represented by typographical signs. However, the pictoric work made by Seigerman, exceeded the concept of the simple logo and had the proper characteristics of the artistic activity. It was so confirmed by the prestigious report issued by the artist Alfredo Jorge Genovese who pointed as original features the ones formed by the acanthus leaves and the straight bands in the external sectors of the work which emerge from the main forms of the facade. In addition, he said that the numerous sketches made by the*

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actor were **preparatory works' evidence of the creation process**, so it could be said that *conception has mediated, composition and expression embodied afterwards in the work. It was recalled that a mural painting does not allow improvisations being sketches, chromatic values and the features over strong paper essential previous tasks to be resolved by the author. The Court concluded ruling that the behaviour the defendants should have observed towards the wall deterioration should be one in which the author was entrusted with the repair instead of hiring other artists who superposed their modifications to the original work, erasing it's author's name and inserting their own. In this case the author claimed for the utilization by the defendants of the activity's design to illustrate cd's, web pages and posters, reproductions that involve a clear for-profit*

aim, and that for those same reasons deserved legal protection of the author's reproduction right. Spanish version. La Sala M de la Cámara Civil hizo lugar a la demanda por daños y perjuicios entablada contra los artistas que para restaurar un mural deteriorado por el tiempo lo alteraron e indicaron otra autoría. En "*Seigerman c Greco s Daños y Perjuicios*" la Cámara Civil sostuvo que **el isologo o isologotipo es un identificador gráfico que sirve para firmar las comunicaciones** de una entidad (empresa, producto, servicio o institución, etc.), que se conforma por la unión de un símbolo gráfico y un estímulo textual representado con signos tipográficos. Sin embargo, la obra pictórica realizada por Seigerman, **excede el concepto de simple logo y reúne las características propias del filete artístico**. Así lo confirma en su informe el prestigioso artista Alfredo Jorge Genovese, quien

señala como rasgos de originalidad el formado por las hojas de acanto y las bandas rectas en los sectores más externos de la obra que surgen de las formas mismas de la fachada. Agregó que **los numerosos bocetos** reservados en autos y realizados por el actor **como trabajos preparatorios dan cuenta de un proceso de creación**, vale decir que ha mediado concepción, composición y expresión luego plasmados en la obra. Cabe recordar que la pintura mural no permite improvisaciones, siendo indispensables los bocetos donde deben estar resueltos la distribución de las masas, los valores cromáticos y la entonación sobre papel fuerte como tarea previa a la pintura. Concluyó el Tribunal que la conducta que debieron observar los demandados ante el deterioro de la pared y la necesidad de recuperar el frente del Centro Cultural, compatible con el derecho moral de autor subsistente en cabeza del

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artista no obstante el pago del precio por los comitentes, era que encomendaran al autor su reparación en lugar de **contratar a otras artistas que superpusieron modificaciones a la obra original**, eliminando el nombre de su autor y consignando el propio. En el caso el actor no reclama por la difusión fotografías de la fachada y, por consiguiente del mural realizado, sino por **la utilización por los accionados del diseño del fileteado efectuado para ilustrar CD, páginas de Internet y afiches, reproducciones que involucran un evidente fin de lucro** y que por tal razón encuadran en el ámbito del derecho de reproducción reservado al autor.
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II.-

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1. US Fashion Law Update. By Michelle Marsh and Natasha Grant. Kenyon & Kenyon LLP .

The Firm has the HONOUR to reproduce the complete text of the following article, with the authors' permission. In the United States today, members of the fashion industry have access to number of tools to protect their intellectual property rights. Fashion designers can use trademark and trade dress rights in any names, symbols, logos and distinctive designs used on their apparel and accessory designs that are indicators of

source. They own the copyright to their original surface patterns and prints. And in some circumstances, even obtain design patent protection. However, a designer typically is not entitled to copyright protection of an entire article of apparel or an accessory or the silhouette of one. Some interest groups believe that limitations on the scope of what is protectable in fashion design prevent fashion designers and manufacturers from effectively enforcing their rights against counterfeiters. On August 5, 2010, US Senator Chuck Schumer introduced the Innovative Design Protection and Piracy Prevention Act (IDPPPA).¹ This proposed legislation would create a three year term of copyright protection for an entire garment, accessory, or unique element of a larger design. The scope of such protection would include

¹ S. 3728, 111th Cong. (2010).

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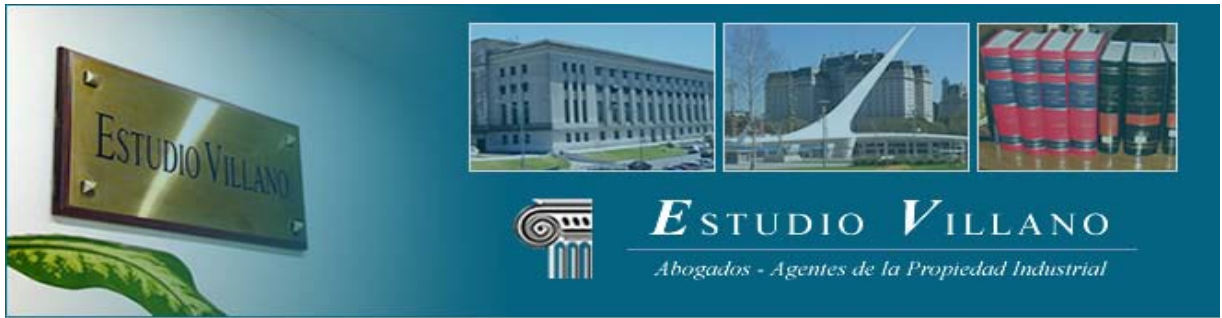
the currently uncopyrightable basic silhouette and overall appearance of a work. This proposed legislation represents the most recent development in a series of bills that sought to enlarge the scope of U.S. intellectual property protection to include fashion designs. The IDPPPA does address some of the criticisms of its predecessors. The ways in which it departs from earlier bills include that it would not require registration as a prerequisite to protection; it would recognize a broader scope of designs as falling into the public domain in order to limit the range of protectable designs; it would impose a greater evidentiary burden on a plaintiff seeking to enforce its rights; and it would provide for approximately one fifth the maximum damages previously proposed. Nevertheless, many stakeholders in the fashion industry maintain that a number of fundamental prob-

lems persist with the proposed law. For example, the California Fashion Association (CFA), which represents thousands of garment designers and manufacturers in Los Angeles, is among the bill's critics. As the CFA has explained to the Los Angeles media,² it believes that the IDPPPA stands to benefit only the biggest name designers, to the detriment not only of pirates and counterfeiters, but also of small and independent designers and manufacturers who lack the resources necessary to effect fair resolution of legal disputes. The increased evidentiary requirements may not only limit the scope of protection available for fashion designs, but also effect a system in which protection is only available to those designers

² Ryan Vaillancourt, *A Fashion Fight Over Knockoffs: Players Battle a Proposed Anti-Piracy Bill*, Los Angeles Downtown News, May 16, 2011.

who can afford to enforce their rights. Without meaningful limits on the legitimacy of the defendants against which such rights may be enforced, critics believe that the economic requirements of the IDPPPA may bar the entry of small designers without significant resources and other newcomers to the fashion industry. As the costs of litigation are generally passed on to consumers, the IDPPPA may even limit access to creative works of fashion design to only those members of the public with the resources necessary to purchase from luxury fashion designers. The risks enumerated by the bill's critics are only magnified for international members of the fashion industry. For foreign fashion designers and manufacturers looking to enter the US, the prospect of being haled into court in the United States involves an even greater financial risk, which may threaten to disrupt and

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restrain the manufacturing, financing, and importation of apparel and accessories in the international fashion industry.

© Michelle Marsh and Natasha Grant. *Estudio Villano hereby deeply acknowledges Michelle and Natasha for their valuable contribution.*

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Página 6 de 6