

**Whether or not the incidental appearance of pictorial works (paintings) —previously sold to a third party— in scenes of an audiovisual work qualifies as public communication of such works.**

By Preliminary Ruling 135-IP-2020 of January 23, 2024, published in the Official Gazette of the Cartagena Agreement no. 5406 of the 26th of the same month, the Court of Justice of the Andean Community has developed the following interpretative legal criteria in matters of copyright:

**“...Whether or not the incidental appearance of pictorial works — previously sold to a third party— in scenes of an audiovisual work qualifies as public communication of such works**

...In accordance with the provisions of literal b) of article 13 of Decision 351 [Andean copyright law], the author or, where applicable, his successors, have the exclusive right to carry out, authorize or prohibit the public communication of the work by any means that serves to spread words, signs, sounds or images.

...For its part, literal g) of article 15 of Decision 351 establishes that public communication is understood as any act by which a plurality of people, whether or not gathered in the same place, can have access to the work without prior distribution of copies to each of them, and especially the public exhibition of works of art (*e.g.*, pictorial works) or their reproductions.

...The person who purchases a painting (pictorial work) acquires, among other property rights (*e.g.*, selling or pledging the painting), the right to exhibit the painting privately. So, for example, if a person buys a painting for a hundred or a million dollars, he can display it in his living room, in his office, in the board of directors of the company in which he is a shareholder, director or manager, etc. If the author of the work wished to restrict the right of exhibition, he would have had to include a clause to that effect in the sales contract. This would obviously influence the price of the painting. In effect, if in the contract for the sale of the painting it is agreed that the pictorial work can only be exhibited in a certain place, the purchaser will have incentives to pay a lower price given the condition that he will have to fulfill contractually.

...The sale of a painting does not affect the moral rights of the author of the pictorial work, but it does affect the patrimonial rights. If nothing is otherwise agreed, nothing prevents the buyer from storing the pictorial work in a basement so that no one sees it.

...While authorization from the author is required for the public exhibition of a work of art, such authorization is not required if it is an incidental public communication of the work of art, which may be a painting.

...If a lawyer acquires a pictorial work and displays it in his office, it will be seen by all his clients. This does not give the author any (patrimonial) rights unless something different had been agreed upon when acquiring the work. The lawyer could be interviewed by a news reporter or filmed for a documentary about legal services. In both cases, if the corresponding video focuses on the lawyer and his legal services, but the painting appears incidentally in the recording, this does not mean a public communication of the work.

...In the case of an audiovisual work in which an artistic work appears incidentally, as is the case of a painting, it must be differentiated whether the intention is to show the work or if the intention is to show the environment. If the intention is to show the work, there is public communication of it (in the terms of literal g of article 15 of Decision 351). If the intention is to show the surroundings (the setting), there is no public communication of the work of art.

...In the case of the lawyer who is interviewed in his office, whether for a news program or a documentary, if the interview focuses on the jurist and the legal cases he has won or lost, whatever is shown in the interview forms part of the surroundings of the lawyer's office, in which would possibly not only appear paintings, but also books, desks, furniture, lamps, etc. These objects may be works of art, but their appearance is simply incidental, so this does not generate any economic right for the author of the artistic works in question. Otherwise, we would reach the absurdity of every public or private person who is going to be interviewed having to hide all the paintings or other artistic works that are in his or her room or office.

...If the audiovisual work is a film, a novel or a television series, the same analysis will have to be carried out, but more carefully. It is one thing that, intentionally, it is decided that a particular painting is part of the setting and plays a role in the plot in question, in which case we can speak of public communication (or exhibition); and a different one, in which the pictorial work appears incidentally, simply as part of the environment (or setting).

...These are elements that can be taken into consideration, to appreciate the incidental nature of the appearance of the pictorial work, such as the duration of its appearance, its mere appearance on the stage, the lack of knowledge of the author of the work, etc.

...In fact, if the characters of the audiovisual work are seen in the scene and suddenly a pictorial work appears in the background, almost imperceptible, for a few seconds, we are faced with an incidental appearance that does not qualify as a communication or public exhibition of the work.

...It is different the case in which the characters talk about the pictorial work, its author, its value, how it was acquired, etc., and the camera lens focuses on the painting, so that the viewer takes awareness of it. In this case, the painting plays a role in the audiovisual work, so we are faced with a public communication (or public exhibition) of the painting.

...In conclusion, if the intention is to show the pictorial work and for the viewer to become aware of it, then a public communication of it is being carried out. On the other hand, the incidental, fleeting, minimal appearance of the painting, so that it is irrelevant within the audiovisual work, in which it simply appears as part of the environment, does not qualify as a public exhibition of the pictorial work.

...In the respective purchase and sale agreement, the author of an artistic work and the buyer can clearly agree on the types of exhibitions that the purchaser may make of the work, which may include its appearance in all types of audiovisual works, which will obviously influence in the price to be paid. A right that the author of a work of art can cede, in exchange for the respective remuneration, is the public exhibition of said work.”

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