TRANSLATION: DECISION BY THE JURISDICTIONAL AFFAIRS SUB-DIRECTION OF THE NATIONAL COPYRIGHT DIRECTION: CARLOS ALBERTO MASSÓ VASCO V. CARACOL TELEVISIÓN S. A.

TRANSLATION BY SANTIAGO DIONISIO*

DECISION TRANSCRIPT N. 36

REFERENCE: I-2018-37921

Verbal procedure iniciated by Mr. Carlos Alberto Massó Vasco against the company Caracol Televisión S. A., identified with the NIT 860.025.674-2

Decision delivered by: Carlos Andrés Corredor Blanco

Bogotá D. C., 30th of January 2020

The Jurisdictional Affairs Sub-Direction of the National Copyright Direction, presents the following decision transcript:

BACKGROUND

I. COMPLAINT

On 2nd of May 2018, a copyright infringement complaint was received by The Jurisdictional Affairs Sub-Direction of the Special Administrative Unit, National Copyright Direction, filed by Mr. Jesús María Méndez Bermúdez in representation of Mr. Carlos Alberto Massó Vasco, against the company Caracol Televisión S. A., based upon the facts underneath summarized:

* Estudiante de quinto año de Derecho de la Universidad Externado de Colombia, promoción 2020. Contacto: santiago.dionisio@est.uexternado.edu.co. Bogotá DC. (Colombia).
Para citar el artículo: Translation: Decision by the Jurisdictional Affairs Sub-Direction of the National Copyright Direction: Carlos Alberto Massó Vasco v. Caracol Televisión S. A. *Revista La Propiedad Inmaterial* n.º 29, Universidad Externado de Colombia, enero-junio, 2020, pp. 241-262. DOI: https://doi.org/10.18601/16571959.n29.09.

1.1. Mr. Carlos Alberto Massó Vasco is a professional plastic artist specialized in equine portraits and, in exercise of his craft, he has been rewarded with several acknowledgements and held exhibitions at multiple art galleries.

1.2. The plaintiff created the following artistic works in 2000 *Tres caballos en la playa* (*Three horses at the beach*), with registry certificate 5-429-44; in 2004 *Composición para expresiones en movimiento* (*Composition for moving expressions*), with registry certificate 5-429-42; and in 2006 *Cabeza de caballo III* (Head of a Horse III), with registry certificate 5-429-42.

1.3. In 2013 the limited company Caracol Televisión S. A. made and broadcasted the audiovisual work *La Selección,* in which, without prior and express consent, the mentioned artistic works were reproduced, made available, broadcasted, and distributed.

1.4. The audiovisual production was sold in Argentina, Aruba, Bahamas, Anguilla, Antigua, Barbados, Barbuda, Bermuda, Bolivia, Chile, Costa Rica, Dominican, Ecuador, El Salvador, Granada, Guadalupe, Guatemala, Haiti, Honduras, Cayman Islands, Turks and Caicos Islands, British Virgin Islands, United States Virgin Islands, Caribbean Islands, Mexico, Nevis, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Dominican Republic, Trinidad and Tobago, the United States of America, Uruguay, Venezuela, San Martin and Sant Kitts.

1.5. To the date of filing of the complaint, the audiovisual production is available to the public on the online platforms of Caracol Play and Netflix.

1.6. The audiovisual work *La Selección* has been commercialized in digital optical disc storage formats (DVD and Blu-ray).

1.7. The demeanors fulfilled by the defendant infringed, among others, the economic rights to copy, public performance, making available, and distribution, and the moral rights of atribution and to keep a work unpublished, all of which reside in Carlos Alberto Massó Vasco.

1.8. Due to the recounted facts, Mr. Carlos Alberto Massó Vasco contacted the legal representants of the defendant, intending to conciliate on the differences emerged from the harmful event.

1.9. The actions carried out by Caracol Televisión S. A., have caused grave damages, of both pecuniary and non-pecuniary nature to the plaintiff, which must be compensated integrally according to the applicable principles in the subject.

In accordance with the enlisted facts, the following reliefs were outlined:

1. To declare that Caracol, without prior and express authorization of Master Massó, copied, made available, broadcasted, and distributed the works titled: *Tres caballos en la playa; Cabeza de caballo III*, and *Composición para expresiones en movimiento* in its audiovisual production titled *La Selección*.

2. To declare that Caracol did not recognize the paternity of Master Massó over the artistic works titled *Tres caballos en la playa; Cabeza de caballo III,* and *Composición para expresiones en movimiento* in its audiovisual production titled *La Selección*.

3. To declare that the demeanors executed by Caracol, constitute an infringement to the moral and economic copyrights of Master Massó, as author and copyright owner of the artistic works: *Tres caballos en la playa; Cabeza de caballo III*, and *Composición para expresiones en movimiento*.

4. To order Caracol, to refrain from utilizing the works of the Master Massó in any known or to-be-known media.

5. To order Caracol, to integrally compensate the pecuniary and non-pecuniary damages caused by the unauthorized use of his works, in this manner:

5.1. Pecuniary damage.

Under pecuniary damage, the sum of four hundred ninety-two million, five hundred eighty-four thousand, two hundred Colombian pesos ($492'584.200.oo)

5.2. Non-pecuniary damage.

5.2.1. In consequence of the infringement to constitutionally protected assets and moral damage, the sum equivalent to 60 Minimum Legal Monthly Wages.

5.2.2. As a non-pecuniary form of reparation, to order the company Caracol Television S. A., to publish the resolutive part of the decision that resolves the litigation against them, along with a public apology, during the same television space in which the harmful act occurred, "Prime Time".

6. To order Caracol to defray the expenses of the legal procedure.

II. RESPONSE FROM THE DEFENDANT

To summarize, the representative of the defendant party stated the following regarding the facts:

That it is not aware that Mr. Carlos Alberto Massó Vasco is a plastic artist specialized in equine portraits, nor that in exercising his profession he has received multiple acknowledgements and held exhibitions in multiple art galleries; it is not aware either that the plaintiff created this works *Tres caballos en la playa*; *Cabeza de caballo III*, and *Composición para expresiones en movimiento*.

That it is true that in 2013 the company Caracol S. A. made and broadcasted the audiovisual work *La Selección*.

Points out that it is not true that Caracol Televisión S. A., without prior and express authorization from the plaintiff, copied, made available, broadcasted and distributed the mentioned the works *Tres caballos en la playa*; *Cabeza de caballo III*, and *Composición para expresiones en movimiento*.

That it is true the audiovisual production was sold in Argentina, Aruba, Bahamas, Anguilla, Antigua, Barbados, Barbuda, Bermuda, Bolivia, Chile, Costa Rica, Dominican, Ecuador, El Salvador, Granada, Guadalupe, Guatemala, Haiti, Honduras, Cayman Islands, Turks and Caicos Islands, British Virgin Islands, United States Virgin Islands, Caribbean Islands, Mexico, Nevis, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Dominican Republic, Trinidad and Tobago, the United States of America, Uruguay, Venezuela, San Martin and Sant Kitts. Along with that, it is true that the audiovisual work *La Selección* was commercialized in digital optical disc storage formats (DVD and Blu-ray), and to the filing date of the complaint it was available to the public to the online platforms Caracol Play and Netflix.

That it is not true the demeanors carried out by the defendant infringed, among others, the economic rights to copy, publicly communicate, make available and distribution, and the moral rights of paternity and to keep a work unpublished, all of which would reside in Carlos Alberto Massó Vasco.

It is not true either that Mr. Massó intended to resolve the differences risen, since he simply wanted a sum of money for an alleged copyright infringement and violation of the moral right.

Finally, notes that it is not true that the actions performed by the defendant have caused damages to the plaintiff worthy of compensation.

According to the preceding, the representant of the defendant formulated as exceptions: **(i)** that Mr. Massó is not entitled to claim the outlined rights, (ii) the existence an authorization for the use of the works granted by Asdepaso, owner of the artistic works, (iii) that in this case the principle *minimis lex non regit* or *minimis non curat lex* must be applied, (iv) the lack of existence of the alleged infringement to the economic rights to broadcast, copy, and distribute, and (v) that the exception from the paragraph *h*, article 22 of the Andean Decision 351 of 1993 must be applied.

DISCUSSION

The article 3 of our Community regulation establishes as a three-dimensional work or work of fine art the "artistic creation intended to appeal to the aesthetic sense

of the person perceiving it, such as a painting, drawing, engraving or lithography". Regarding the painting area, the WIPO Glossary defines it as an artistic work created in lines and colors over a surface, through the use of colorant materials; on the other hand, defines the drawing as an artistic work in which all sorts of objects or imaginative elements are represented by means of lines.

In the case in question, this Office observes the plaintiff claims protection over a charcoal drawing named *Cabeza de caballo III*, and two oil paintings known as *Tres caballos en la playa*, and *Composición para expresiones en movimiento*.

Let us remember now that in the settlement of the dispute carried out in the initial hearing, the parties of the current controversy agreed on recognizing as a fact that the plaintiff, back in 2000, created the work *Tres caballos en la playa*, with registry certificate 5-429-44; in 2004 *Composición para expresiones en movimiento*, with registry certificate 5-429-42; and in 2006 *Cabeza de caballo III*, with registry certificate 5-429-42.

Having identified the works to protect, the next step is to establish if the plaintiff is entitled to claim the cited rights in this process.

First, we shall mention that within the authorial discipline, one can identify two types of owners, original and derivative. The former refers to the author who, according to article 3 of the Andean Decision 351, is "the natural person who achieves the intellectual creation". In turn, the derivative owner is the person who acquires the prerogative of exercising the rights over a work, being then, rightful claimant of the author. It is worth mentioning that the role of derivative owner can only be put into practice as for the economic rights, since the moral ones belong to the author alone.

In this sense, having into account that the moral right is, by its nature, inalienable, unwaiverable, imprescriptible, set up to be perpetual, and belong exclusively to the authors, Mr. Massó is entitled to employ the legal actions he considers suitable to defend these rights if an alleged infringement is in order.

Furthermore, we observe the economic rights, which consist in the exclusive capabilities that allow to control the work to the point where they are considered a special form of property which grants the owner the exclusive power to authorize or prohibit any sort of use, exploitation, or profiting known – or to-be-known – of the work. Thus, it is compulsory to determine who possesses the economic rights in this case.

At this point, it must be specified that one thing is the material form of the work, in the present case the canvas, and a very different one the work itself; the former is a movable object the author uses to exteriorize its creation and from which he exercises the right to property, also known as *corpus mecanicum*, whereas the work constitutes an immaterial or intangible good, known as *corpus mysticum*, which involves an artistic creation from the author, and erects itself as the core of protection of the Copyright law.

Likewise, apart from the legal transaction through which the property over the material form of a work is acquired, it is crucial to clarify that this does not necessarily implies that one is the owner of all the copyrights over the work under discussion as immateriality (sic), as article 6 of the Andean decision 351 establishes.

Indeed, the property over the material form, even for unique pieces, does not imply the copyright ownership. One and other are different and independent rights; just like one who owns a book or a CD containing a literary or artistic work, which allows the personal enjoyment of the works contained, lacks the right to dispose them.

Regarding this aspect, it is mandatory to mention that some works have received special treatment, since the law contains rules allowing the transfer of the economic rights of authors. Such is the case of article 185 of Law 23 of 1983, which reads "unless stipulated otherwise, the selling of a work of pictorial, sculptural or figurative art in general, does not give the acquirer the right to copy, which remains in the author or its successors".

The previous rule aims to solve eventual conflicts among the owner of the property right over the movable good incorporating a work in an unique material form, with the rights the author holds over the immaterial work, establishing that after the transfer of the material form of this particular type of works, the only right kept is the right to copy, considering the others are transferred due to sale of the material form. In this manner, the article seeks for the enjoyment of the movable good by its owner, not to be irrationally affected by the application of the Copyright law by the author, without completely emptying the prerogatives of economic nature the latter has.

This balance is prudent, since the owner of the material form as a movable good surely expects to freely exhibit the pictorial work, which is an act of communication to the public; selling it again or loaning it in exchange for money, both within the right to distribute and – lacking regulation – would require the authorization of the author. It is also wise the owner of the work is not able to authorize acts of reproduction or infringe moral rights, as these overflow the common usage an owner of a material form makes within the frame of its ownership and allows the creator to maintain the connection with the work and profit from its immateriality.

In this case, on page 194 of book 2, there is a communication sent out by Asdepaso where they state the material expressions that contain the works *Tres caballos en la playa*, *Composición para expresiones en movimiento*, and *Cabeza de caballo III* (which we can also classify as pictorial) are found in their facilities, they are the owners, and the works were acquired in exchange for their exhibition.

The previous statement goes along with the declaration given by the plaintiff who said that he donated the referred material forms to Asdepaso and that "it is customary in the artistic area when there is a right to make an exhibition, to donate or leave a work in return, either chosen by the artist or by the person who provided the facility".

Taking that into account, as a consequence of the property transference of the material forms containing the works under discussion, this decision maker concludes that Mr. Carlos Alberto Massó holds no more than the moral rights and the economic right to copy over them, therefore, he can only claim protection in order to defend these.

Regarding the *infringement of rights*, having stated the above, let us remember that during the settlement of the dispute the parties agreed it is not true that the actions of Caracol had violated the moral right to keep a work unpublished over the works at issue, as a consequence, and if we note the petitions of the plaintiff, it remains only the analysis of a possible infringement to the moral right of paternity and the economic right to copy.

Let us begin with the right of attribution. As established in article 6bis of the Berne Convention and paragraph *b*, article 11 of the Andean Decision 351 of 1993, it is the prerogative of the author to claim the authorship of the work at any moment. In turn, article 30 of Law 23 of 1982, paragraph *a* adds to the quoted articles the following "[…] and, specially, so that its name or pseudonym is indicated whenever any of the acts mentioned in article 12 of this Law is performed".

Ricardo Antequera Parilli says on his book about Copyrights that the right of attribution presents two aspects, the first one in a positive sense, is the attribute of the author to demand having his name associated with any use of the work, and the second one in the opposite sense, is the prerogative of the author to demand not having his identity linked to the availability of the work to the public.

The previously said develops itself in rules such as article 10 of Law 23 of 1982, which establishes that author of a work, unless proven otherwise, is the person whose name, pseudonym or initials or any other conventional brand or sign remarkably known as equivalents of the name itself, appear printed on said work or its copies, or is announced on the declamation, performance, representation, interpretation or any form of public diffusion of the said work.

Therefore, despite the law not specifying a way in which the creator of a work should be mentioned, in the Guide on treaties about copyrights and related rights managed by the WIPO, when analyzing article 6bis of the Berne Convention regarding the right of attribution, points out that in spite of the author having the right to be identified and determining how, this must be done in a viable way and in a reasonable sense, under the circumstances.

In this case, within the evidence there is a document provided by the plaintiff titled "authentic copies of appearance, cover and back cover of books that praise the work of the Master". In it, one can observe multiple artistic works of the plaintiff that have his signature on the bottom; this is consequent with the confessed by the plaintiff, who during cross-interrogatory, answered to the question posed by the representant of the defendant "say if it is true or not, that your way of claiming the attribution of a work consists of a signature on the bottom of the said paintings", to which he answered, "yes, they are signed".

The previous argument is reinforced by the testimony given by the judicial assistant Juan Carlos González García, visible on the pages 74 to 105 of book 1, who said in the hearing of article 373 of the GPC, that after directly observing the works of this dispute and comparing them with the ones visible on the audiovisual work *La Selección,* it was possible for him to denote that in both cases the signature was placed on the same area, which allowed him to deduce that it was indeed the signature of the plaintiff.

As a result of the examination of said evidence, it is possible to conclude that the common way the plaintiff chose to indicate his authorship over his creations is using a signature, which he places on the bottom of the works, sometimes on the right side and other times on the left side.

Now, observing the scenes in which the three paintings are appreciated, it is possible to appreciate in the bottom right part of these a signature, and taking into account that the plaintiff confessed in his statement that the works were not altered because he saw them in the audiovisual work *La Selección* as he painted them, this Office concludes with absolute certainty that it is the signature of Mr. Massó.

In summary, it is clear that Caracol Televisión S. A. made mention of the author in the works under discussion in the way that Mr. Carlos Alberto Massó chose to, which, moreover, is common to all his paintings; furthermore, in the opinion of this Court, the action from the defendant is reasonable taking into account the circumstances of the use, therefore, the exception called "Non-existence of the violation of the moral right of paternity" is bound to prosper.

In regard to the economic right, it is possible to say that we are facing an infringement when a third party exercises the exclusive right granted to the owner (original or derivative), over a work, without the corresponding, previous, and express authorization or, in its absence, without being legitimized by any of the limitations and exceptions existent in the legal system.

Regarding the right to copy, we must remember that it is defined in article 12 of Law 23 of 1982, which was modified by article 3 of Law 1915 of 2018, as the prerogative the owner has to authorize, prohibit or make "a copy of the work under any way or form, permanent or temporary, by means of any procedure including the temporary storage in electronic form".

In addition to the above, article 14 of the Andean Decision 351 of 1993 brings a definition of what should be understood as an act of copy, mentioning that it is "[…] the fixation of the work in a medium that allows its communication or the obtaining of copies of all or part of it, by any means or procedure".

In the present case, this Office finds on pages 181 to 191 of book 2, eleven CDs containing the audiovisual work *La Selección*, one can observe in chapters 41, 42, 44, 45 and 47 the works *Cabeza de caballo III* and *Tres caballos en la playa*, and in chapters 47, 63 and 65 the work *Composición para expresiones en movimiento*; with such a level of detail that the representatives of the defendant rightly mention that the signature of the master Massó is identifiable.

Now, regarding the closing arguments of the defense attorney, in which she states that it is not possible to make copies or communicate the paintings from the audiovisual work, we cannot fail to mention that it was from the latter that the same attorneys of the defendant obtained the photograms of the pictorial works that were submitted in the response, and that these were distributed in different ways along with the audiovisual, as can be seen from the certification of Caracol visible on the page 162 of Book 5.

Thus, it is concluded that the acts of the defendant consisted in fixing the works in an audiovisual work; that they can be clearly seen inside the audiovisual work in several scenes; that they were disseminated in different ways along with it, and that copies can be obtained from them, which clearly is framed in the concept of copy stipulated in our Andean legislation in its article 14.

With regard to the need to request authorization from the copyright owner, taking into account that the use of the works is incidental, it is necessary to recognize that in fact, a sector of the doctrine, specifically Rob H. Aft and Charles-Edouard Renault, in their book "From the Script to the Screen", state that this type of use does not require such authorization. However, from reviewing the national regulations and the Andean Decision 351, as well as the treaties signed by Colombia, it is concluded that none of them consecrate this type of use as a limitation or exception that exempts from the obligation to request the corresponding authorization.

Nevertheless, in grace of discussion, this Office will analyze if the use of the works *Three Horses on the Beach*, *Composition for Moving Expressions*, and *Cabeza de caballo III* in the audiovisual was incidental.

According to the dictionary of the Royal Spanish Academy, the word incidental is defined when it refers to a thing or fact, as something accessory, of minor importance. Now, by looking at the audiovisual scenes in which the pictorial works are observed, this judge appreciates that the art of the scene, that is, the paintings, the furniture and in general the visible elements, follow an orderly and harmonious disposition that achieves a balance of the image. Moreover, they are related to the history, since the pictorial works in which horses are depicted are observed in the scenes that develop the story of Faustino Asprilla, who, according to the very narrative thread of the audiovisual, when seen, shows in several chapters a deep taste for these animals.

The previous point is confirmed by the expert Juan Carlos González García, who affirmed during the hearing of instruction and judgment that it is the department of art, scenography, and props, the one that selects all the visible elements in a take, decision that in addition is conscious and not product of the chance, because these are decisive in the perception that has the spectator of the scene, and that has its genesis in the work of scouting, that consists of the selection of the appropriate places for the development of different takes; as is mentioned by the legal representative of Caracol Televisión S. A.

Having seen these elements, it is possible to conclude that the use of the works *Three Horses on the Beach*, *Composition for Moving Expressions*, and *Horse Head III*

was neither incidental nor accidental, since all the characteristics of the works can be appreciated and without them they would not have obtained the visual result that was intended to be expressed through the scenes in which they appear. Likewise, it is clear that their inclusion is not a product of chance but of choices made by the scouting managers in pre-production, the general director, the film manager and the art director in the shooting; and finally, their permanence in the product is no different from a choice made by the person who edited the audiovisual work in the post-production phase.

Having overcome the above and taking into account that the defendant company also claims to be covered by an exception contemplated in paragraph *h* of the article 22 of the Andean Decision 351 of 1993, we proceed to study those arguments.

The referred regulation states that it will be lawful to carry out, without the authorization from the author, and without the payment of any remuneration among other acts, the copy of the image of a series of works among which are included those of fine arts, provided that they are permanently located in a place open to the public.

In support of its claim, the defendant refers to the corporate purpose of Asdepaso contained in its certificate of existence and legal representation, according to which the association carries out recreational and sporting activities that generate new markets and alternatives for its members, as well as events, exhibitions, competitions and promotes social, educational, illustrative or recreational activities at its headquarters that promote equestrian activity.

Regarding the above, the first thing that should be pointed out is that the shots in which the works of Mr. Massó are appreciated, is that the creations are located inside a building, which, as the legal representative of the defendant pointed out, was used to recreate the scene of an office from a construction company; thus, at first glance, it is perceived as a closed place delimited by walls.

In addition, the witness Eliana Nieto Amaya stated that she personally attended the facilities of Asdepaso, and upon arriving at the building she observed a reception desk at which she had to announce herself and be authorized. In other words, it was not enough for the witness to register her entry in a document, but a permission was necessary to allow her access, which clearly conflicts with the concept of "open to the public" referred to in the Andean Decision 351.

Nor was it proved that the arrangement of the works in places accessible to members, guests or authorized people, such as a corridor or a hall, were "permanent", since when the witness was asked whether she remembered the location of those that were specifically the subject of discussion, she stated that she did not.

On the arguments raised regarding the corporate purpose of Asdepaso, although the activities indicated in the response actually coincide with those described in the certificate of existence and legal representation, this does not prove that the events and the entrance to its facilities are open, especially if one takes into account

that there it is read that the activities are for the members, that is, some type of affiliation or membership is required to access them.

In the end, the attorney could not prove the hypothesis enshrined in the rule he cites, which is why the exception of merit that seeks to protect the activity of Caracol Televisión S. A. in the limitation of paragraph *h*, article 22 of our Communitarian rule is not called to prosper either.

In relation to the consequential claims of condemnation we must mention that, although the Andean Decision 351 of 1993, in its article 57 provides that: "The competent national authority may likewise order the following: (a) payment, to the owner of the infringed rights, of adequate compensation or indemnification for damages sustained as a result of the infringement [...]"; this concept must be understood in context, by virtue of the principle of indispensable complement, with article 2341 of the Civil Code, related to liability, which states that: "The one who has committed a crime or fault, or has inferred damage to another, is bound to compensate".

In relation to the non-contractual civil liability of artificial persons, it is now accepted without major obstacles in doctrine and jurisprudence that legal entities can be liable in civil matters. In this sense, the Supreme Court of Justice has mentioned, in its decision of October 28, 1965, that it is "a principle of strict law and not only of equity that moral entities, whatever their class, as subjects of law, must assume and respond for the damages they cause to third parties with their acts, just like they gather the advantages that these bring for them, since, as Francisco Ferrara rightly observes, legal activity cannot be divided into its qualities and consequences".

Although the Civil Code does not expressly mention the non-contractual liability of legal entities, jurisprudence by the Supreme Court of Justice, based on the objective rule stating that any damage attributable to the fault of a person must be compensated by him, and on the subjective rule that all those who have suffered a damage must be compensated, enshrined the liability of legal entities by fault.

In the case of direct and therefore, not indirect liability, it is appropriate to apply the legal provision contained in article 2341 of the Civil Code and not the one described in articles 2347 and 2349.

Taking into consideration the above mentioned, it will be analyzed if in the present case the company Caracol Televisión S. A., is obligated or not to repair the damage that could have been caused to the plaintiff by the infringement of his economic right to copy. To this purpose, it will have to be verified if the elements of the subjective liability are set up, as in this case we are in front of a possible scenario of direct liability for the own doing.

It has long been pointed out that *damage* is the injury or impairment of a legitimately protected interest or one of the subjective rights of individuals (Diego García, Manual de Responsabilidad Civil y del Estado, 2009, p. 13).

As for the type of damage, we can say that it is material when we face the destruction or impairment of any of the economic rights of a person, either directly or indirectly, and immaterial or moral, when there is an injury or impairment of internal order to the feelings or honor of people (Arturo Valencia, Álvaro Ortiz, Derecho Civil, tomo III, 2010, p. 229).

In the case of copyrights, the object of protection is the work and the legal protection of these is reflected through a series of exclusive rights. Thus, the infringement of any of these prerogatives materializes the damage, precisely because the owner is deprived of the power to exercise the right that only corresponds to him, thereby affecting his legitimate interests in relation to the works, as it would be in the specific case, to authorize by the author, the fixation of his paintings in an audiovisual work and to receive a payment in return.

In this sense, having infringed the economic right to copy of Mr. Carlos Alberto Massó, it caused him a material damage, because not only he was prevented from exercising his exclusive prerogative to authorize or prohibit the use of the works, but also his legitimate interest to obtain a payment for the license that he usually grants for this type of use of his works was undermined, as it is proved with the contracts signed with Teleset S. A. and Foxtelecolombia S. A.

Now, the typology under which this damage is manifested is a lost profit for those incomes that were supposed to enter his patrimony in the normal course of events and never did, due to the use by Caracol without paying the value that the plaintiff usually charges for granting the prior and express authorization for the use of the works.

With regard to the fault of non-contractual liability, the civil reproach does not lie in having acted badly but in not acting in accordance with the standard of prudence that is required, which can be appreciated by taking into account the way the average man acts, that is, the man who normally acts with a certain amount of prudence and diligence (Cas. Civil. Sent. 30th of September 2016).

As established in the analysis corresponding to the infringement, the company Caracol Televisión S. A. reproduced the artistic works *Tres caballos en la playa*, *Composición para expresiones en movimiento*, and *Cabeza de caballo III* without the respective prior and express authorization of the author Carlos Alberto Massó, by fixing them in the audiovisual work *La Selección*. Thus, it is not only possible to affirm that we are dealing with an act or conduct of the defendant company, which, in addition, in the development of its corporate purpose has to do with the authorial regulations, but also that such conduct has the character of culpable, to the extent that the damage was not foreseen having been able to do so.

In addition, it is clear that, as a result of the exclusive rights recognized to creators in our legal system, anyone wishing to use a work protected by copyrights, if it is not covered by a limitation or exception, has a duty to refrain from using it without the respective prior and express authorization. For this reason, in view of the disregard of this obligation, it can be stated that there is a conscious omission

of the duty to guide the conduct according to the pre-established rules, and as the Supreme Court of Justice has repeated, the non-observance of pre-established rules or norms of conduct is reckless *in re ipsa*, that is, it implies an automatic judgment of guilt when it has a legal correlation with the compensable damage, as is the case here.

Now, between the fact attributable to a natural or a legal person and the damage caused, there must also be a relation of causality. In this sense, after making an assessment of the circumstances and the evidentiary material corresponding to the present case, it is concluded that the facts attributed to the passive end of the dispute are not remote causes but contemporary or close to the damage caused to Mr. Carlos Alberto Massó, since the former chose where to make his recordings, the elements that would be part of the composition of the image and which of all the shots made would go on the air; Therefore, the impairment or injury to the subjective right protected in this case was a direct consequence of the acts of reproduction of the artistic works carried out by Caracol Televisión S. A..

When it comes to the quantification or the amount of the damage or material loss to be assessed, article 206 of the GPC establishes that whoever seeks the recognition of an indemnity, compensation, or the payment of fruits or improvements, must reasonably estimate it under oath in the corresponding complaint or petition, distinguishing each of its concepts. This oath will prove the amount of the compensation as long as the amount is not objected to by the opposing party in the respective transfer, considering only the objection that reasonably specifies the inaccuracy attributed to the estimate.

In the case under analysis, the defendant presented within the respective transfer a reasoned objection to the estimation oath that specified the inaccuracy of the estimation, therefore, this does not prove the amount that is claimed, reason why this Office will value the evidence in the file to quantify the damage, in accordance with the provisions of article 176 of the GPC.

Thus, on page 61 of book 5, an initial expert opinion was drawn up by Fernando Alonso Vélez, the purpose of which is to estimate the economic impact of the use of the three works of art here, using the contrast between the value of comparable transactions on the market for an intangible asset as a method, which the Office considers to be the most appropriate one in this case.

The judicial assistant states that in order to reach to his results he took into account two variables, the first one being the time in which the paintings of Mr. Massó are visible in an audiovisual, and the second one consists of the two agreements signed by the plaintiff, one with Teleset S. A. and the other with Foxtelecolombia S. A.

Let us start by referring to the agreements. It should be noted that these were provided as evidence, visible on pages 128 to 131 and 142 to 147 of book 1, both of which are intended to authorize the copy of different artistic works by Mr. Massó so that they can be fixed in an audiovisual work, a situation that is comparable to that of the present dispute.

Now, although the defendant claims that extraordinary circumstances affected the value in the agreements signed with Teleset S. A. and Foxtelecolombia S. A. and were not taken into account, as it would be to make a claim while the audiovisuals of the former were on the air, and that this had the potential to affect the advertising already contracted, no convincing means are put forward to support such claims.

Now, taking the aforementioned licenses as a starting point, the expert Fernando Alonso Vélez concludes that the plaintiff charges per visible second for a work of its authorship in an audiovisual; this is also supported by the communication issued on 17th of October 2017 by Foxtelecolombia S. A. in which it states the number of seconds during which the licensed work was visible.

It then establishes how much was charged on each license per second. Let us remember that when making this comparison one gets different values, so one determines that the higher amount is the maximum charged and the lower amount is the minimum, and with the mentioned margin an average value is settled.

It should be noted that the average amount obtained is $293,044, so the expert takes this value as the one that the plaintiff company should have paid for each second that the work was visible in the audiovisual work La Selección, multiplies it by the total number of seconds that a painting is seen in the audiovisual work and the result obtained is multiplied by four, indicating that this is the number of rights that Mr. Massó was called upon to authorize.

Regarding this last aspect, this Sub-Direction notes, in concordance with the defense from Caracol, that the plaintiff does not license the use of its works based on the number of rights, but rather on the number of seconds in which its creations are visible in audiovisual works regardless of the uses that the licensee later makes of the work in its entirety; therefore, it is sufficient to multiply the average value by the total number of seconds in which a painting is appreciated in the audiovisual work La Selección.

In addition, and in grace of discussion, even if the license is granted on the basis of the number of economic rights authorized, it is worth remembering that Mr. Massó is only entitled to claim the right to copy, as we saw in the section on legitimization, so clearly the final result should not be multiplied by four.

On the other hand, although this decision maker considers both the method used and the formula established by the expert to be correct, except for the factor of multiplication by the number of rights as explained above, a simple review of the chapters in which the works are appreciated reveals that the number of seconds used to clear the equation is incorrect.

Let us talk about this topic, the work *Tres caballos en la playa* is visible for a total time of 89 seconds, as follows: in chapter 41 from minute 37:00 to 37:01 and from 37:05 to 37:13; in chapter 42 from minute 42:17 to 42:28; in chapter 44 from minute 23:28 to 23:35, from 23:42 to 23:48, from 23: 55 to 23:57, from 24:01 to 24:02, from 24:08 to 24:10, from 24:14 to 24:20 and from 24:23 to 24:34; in chapter 45 from minute 08:33 to 08:40, from 08:43 to 08:45, from

08:48 to 08:51, from 08:54 to 08:55, from 08:59 to 09:03 and from 09:07 to 09:10; and in chapter 47 from minute 08:18 to 08:27 and from 08:29 to 08:35.

The work *Cabeza de caballo III* is visible for a total time of 54 seconds, as follows: in chapter 41 from minute 37:00 to 37:13 and from 37:24 to 37:29; in chapter 42 from minute 42:17 to 42: 20 and from 42:22 to 42:28; in chapter 44 from 23:28 to 23:35; in chapter 45 from 08:33 to 08:40, from 08:43 to 08:47 and from 08:50 to 08:53; and in chapter 47 from 08:18 to 08:23 and from 08:31 to 08:32.

The work *Composición para expresiones en movimiento* is visible for a total time of 24 seconds as follows: in chapter 47 from minute 10:11 to 10:13, in chapter 63 from minute 24:36 to 24:39, from 24:42 to 24:44, from 24:46 to 24:51 and from 24:59 to 25:01; and in chapter 65 from minute 27:22 to 27:24, from 27:28 to 27:30, from 27:33 to 27:35, from 27:38 to 27:40 and from 27:42 to 27:44.

Now, we must point out that even though a second expert report is on file, different from the one analyzed previously, which is the source of information for the previous one, and provided with in the complaint, in which a greater number of seconds is indicated, this is due to the fact that the judicial assistant included seconds in which it is not possible to see the works but parts of them that make it impossible to identify them, this is recognized by the expert when he indicates that "Although the entire work is not observed in this scene, it was possible to verify that it is a work by Carlos Alberto Massó Vasco, by observing another scene that was recorded in the same location", that is to say, from seeing the shot it is not possible to identify the painting until another scene developed in the same place is watched.

In this sense, the mathematical operation established by the expert Fernando Alonso Vélez will be carried out again, without the multiplication factor and replacing the number of seconds in which the works are visible with those that correspond to reality, maintaining the average value indicated in the report, as this Office considers it to be fairest for the parties.

From the mathematical operation the following results are obtained: in the case of the work " *Tres caballos en la playa*", multiplying $293,044 by the 89 seconds during which it was visible results in the amount of twenty-six million eighty thousand nine hundred and sixteen pesos ($26,080,916); on the other hand, for the work *Cabeza de caballo III*, multiplying $293,044 for the 54 seconds during which it was visible, the result is the amount of fifteen million eight hundred and twenty four thousand three hundred and seven pesos ($15,824,376); finally, for the work *Composición para expresiones en movimiento* multiplying $293,044 by the 24 seconds during which it was visible, we obtain as a result the amount of seven million thirty three thousand fifty six pesos ($7,033,056).

It must be considered that the first studied expert opinion states that the values are obtained from transaction agreements concluded in 2015, so they must be adjusted by means of indexation. In this sense, Obdulio Velásquez Posada points out in his book "Responsabilidad Civil Extracontractual" that the formula based on

the consumer price index (CPI), which is mostly used by the jurisprudence and the most recommended by the doctrine is, to divide the CPI at the time of liquidation (also called final) by the CPI at the date of the amount to be indexed (also called initial) and this result is multiplied by the value to be updated; Now, about the consumer price index, we must point out that it maintains the purchasing power of money and is an economic indicator, so we must abide to what is enshrined in the article 180 of the GPC, which states that these are of a notorious nature, so they are exempt from requiring evidence.

Thus, this Office proceeds to perform the referred update according to the table called "junction series from 2003 to 2019" issued by the National Administrative Department of Statistics - DANE, which indicates that the initial CPI is 85.21 and the current one is 103.80; Therefore, the value of the work *Tres caballos en la playa* indexed at the date of the ruling is thirty one million seven hundred and seventy thousand nine hundred and eight pesos ($31,770,908), that of the work *Cabeza de caballo III* is nineteen million two hundred and seven thousand seven hundred and thirty pesos ($19,276,730) and that of the work *Composición para expresiones en movimiento* is eight million five hundred and sixty seven thousand four hundred and thirty five pesos ($8,567,435).

It should be mentioned at this point that, with respect to the first analyzed opinion, the defendant submitted an expert opinion in which Mr. Milton Camilo Chico Triana assessed the cost of the paintings taking as a criterion, among others, the prices at which Mr. Massó has marketed the supports that incorporate his works; despite that, the expert does not refer to the value of the license for the reproduction of the works as an immateriality within the audiovisuals, a transaction which in the particular case is not comparable, given the difference between the *corpus mecanicum* and the *corpus mysticum* explained above.

It also points out that the value of the license cannot be greater than the value of the material support of the work; however, in the absence of a contradiction this judge finds that such premise is false, since as it was effectively proven, Mr. Carlos Alberto Massó granted licenses to Teleset S. A. and Foxtelecolombia S. A. for an amount greater than the estimated price of the sale of the material support that incorporates his works. In addition, it is not superfluous to emphasize that the purchase value of each legal transaction was determined by the market in an independent and differential manner.

The defendant also provides a contract signed between the company Sello Naranja S. A.S. and Mrs. María del Pilar Cabrera, by means of which, the latter authorizes the use of a work of her authorship in an audiovisual, however, since this reflects the value in the market of the licensing of works of an author different from the plaintiff, in our opinion it should not be, for this specific case and specifically the reference value to calculate the amount to be compensated, especially if we take into account that there are convincing means in the process that allow us

to determine how much Mr. Massó charges and how he licenses for authorizing the fixation of his creations in audiovisual works.

In this sense, given that it was determined with complete certainty that the plaintiff establishes the value of the licenses for the use of his works based on the seconds in which these are visible in an audiovisual, and that it is clear that the forms of exploitation of the cinematographic work as well as the profits obtained from it are not factors that determine the amount of the authorizations of Mr. Massó, neither the reports that indicate the income received with the audiovisual work La Selección by Caracol, nor the certification of the rating that the series obtained, will be used for the described calculation.

In conclusion, it will be established as compensation, the value that Mr. Carlos Alberto Massó would have charged, had he authorized the infringing uses, that is fifty-nine million six hundred and fifty-three pesos ($59,615,073), which must be paid to the plaintiff within ten (10) days following the execution of this judgment.

In the same vein, it can be seen that between the proven value, and the originally estimated sum, which was four hundred and ninety two million five hundred and eighty four thousand two hundred pesos ($492,584,200), there is a difference of four hundred and thirty two million nine hundred and sixty nine thousand one hundred and twenty seven pesos ($432,969,127); consequently, by exceeding the estimated amount by more than fifty percent (50%) of which was found to be proven, the person who took the oath of appreciation shall be sentenced to pay to the Superior Council of the Judiciary, Executive Directorate of Judicial Administration, or whoever takes its place, the equivalent of ten percent (10%) of the difference, that is, a sum equal to forty three million two hundred and ninety six thousand nine hundred and twelve pesos ($43,296,912).

With regard to the *impleader*, let us remember that this figure corresponds to a procedural institution that is based on the existence of a legal or contractual right, which binds the call to the law suit, with the purpose of demanding that it assumes the contingencies of the sentence. Thus, procedural economy is satisfied since it avoids the need for a new litigation, since the normal purpose of the procedural relation with an impleader is the decision that produces *res judicata* with respect to the plaintiff, the defendant and those called.

In this case, Caracol Televisión brings as third parties the National Association of Breeders of Colombian Paso Horses and Equine Development –Asdepaso– and the insurance companies Mapfre Seguros Generales de Colombia and Chubb Seguros Colombia S. A., alleging to have a contractual bond that allows it to claim from their impleaded the payment of the compensation of the damages that the invoker will have to pay as a result of the sentence.

Let us remember at this point that, during the settlement of the litigation carried out in the initial hearing, the parties excluded the impleader Zurich Colombia Seguros S. A. from the present litigation.

Now, taking into account that the contract signed with the National Association of Breeders of Colombian Paso Horses and Equine Development is different from those signed with the insurance companies, these will be analyzed separately.

The defendant states that due to the contract known as "authorization for the use of location" signed between him and Asdepaso on the 25th of June 2013, the latter agreed to keep Caracol Televisión S. A. free from third party claims; thus, upon reviewing the document referred to, it is possible to read that they agree as follows: "Before any authority and third party, I will be the only responsible for the integrity, conservation, accidents, repairs, third party claims, fines, and administrative, judicial and any other type of sanctions related to the property, as well as the maintenance and good condition of the *location* during the days in which Caracol uses it, unless such damages have been caused by exclusive fault of Caracol".

In this sense, being clear that the reason of the complaint filed by Mr. Carlos Alberto Massó is not the location and that his claims were not presented during the days in which Caracol used it for the recordings of the audiovisual La Selección, but rather after that, it is concluded that the factual elements do not comply with the required contractual conditions so that Asdepaso gets bound to assume the negative consequences that the active end of the dispute may suffer with the present ruling.

In addition, the defendant states both in its response to the complaint and in its impleader petition that Asdepaso authorized, among other things, the copy of the works under discussion to Caracol Televisión S. A., and bases its statements on the aforementioned contract, which, as already mentioned, is for the use of a location and not to authorize the copy of the pictorial works under discussion in the present proceeding.

Punctually, although in the document it is possible to read that "The resulting audiovisual fixations will be of exclusive property of Caracol and will be able to be destined by Caracol in exclusive form for everybody for their […] reproduction […] and general exploitation related to *the work*", it is important to emphasize that in this clause, in criterion of this judge, the contractors reference to the copy of the audiovisual work La Selección, not to the copy of any other material protected by copyrights that could have been used in the framework of the recording in the mentioned location, so this judge would be wrong in understanding the contract of the 25th of June 2013 as a license for the copy of the paintings *Tres caballos en la playa*; *Cabeza de caballo III*, and *Composición para expresiones en movimiento*.

In addition, given that the transfer of the economic right to copy must be expressly agreed upon, and that this Office does not find any evidence proving that Asdepaso performed this transfer, nor does it find any evidence in the file to prove that Asdepaso claimed ownership of the right in question, it was not possible for Caracol to assume that it was the one called upon to authorize such use, which is why the request for the impleader and the second and eighth exceptions of merit are bound to fail.

On this point, reference should be made to the fact that although Asdepaso's lack of response and its non-attendance at the hearing of the article 372 of the GPC makes it possible to presume that the facts on which the request for the impleader is based are true; after the evidentiary analysis set out in this ruling, convincing means were found that prove against the presumption referred to and infirm the confessions derived from the action of the impleader, which, although negligent with regard to the process, cannot result in a decision contrary to law and evidence in this case.

The insurance modality "claims made" finds its legal support in article 4 of Law 389 of 1997, which enshrines the possibility that, by an express agreement between the contracting parties, the coverage of an insurance contract is temporarily limited, or even extended to events prior to its validity, provided that in both cases the claim is made within the period of validity of the agreement.

Based on the above mentioned rule, not only damage-based insurance, but also that based on the claim was allowed, characterized by the fact that the protection is only activated if, during the validity of the insurance, the claim is made. This does not mean that such requirement is a condition for the configuration of the loss, but rather that, by agreement of the parties, the insurer will only pay those whose claim is made within the framework of the insurance policy, provided that the situation originating the covered liability has been set up.

Hence, independently of the elements required for the configuration of the loss, it established an additional formality, in order for the insurer to be bound to its payment, which is the settlement of the claim within the agreed time period. This is stated in the jurisprudence of the Supreme Court of Justice on this matter, in its ruling SC10300-2017, of 18th of July 2017, in which it states that "claims made" clauses constitute a temporary limitation on coverage, because it is not enough that the events generating civil liability occur, but it is also necessary that the claim by the injured party materializes during the validity of the policy or in the additional and specific period stipulated, so that if it is not presented in a timely manner, the referred debit is excluded at the expense of the insurer, despite the occurrence of the harmful event".

With the above in mind and descending on the subject, it is noted on pages 30 to 42 of Book 4, policy number 12/17164, that the insured shall pay in excess of the deductible the damages and/or costs borne by the insured arising from a claim filed for the first time against the insured, during the contractual period, due to an erroneous act.

Now, this judge finds in the particular conditions of the referred policy that its period of validity is from the 1st of December 2014 to the 30th of November 2015; also, clause 27 defines "erroneous act" as any real or supposed act, error, omission, false statement, misleading declaration or negligent breach of the insured in the rendering of its professional services when it arises, among other things, from violation of copyright.

Thus, the first thing to note here is that during the settlement of the dispute the parties agreed it is true that the shareholding company Caracol Televisión S. A., in the development of its corporate purpose, in 2013 made, completed, and broadcast the audiovisual work *La Selección*, therefore, this Sub-Direction will have that year as the year of the occurrence of the harmful event.

Also, the parties agreed to have as a settled fact that Mr. Carlos Alberto Massó contacted the legal representatives of Caracol Televisión S. A., and in accordance with the data message visible on page 127 of book 2, it is possible to determine that the claim was about an infringement of his rights as an author and was filed to the defendant on the 13th of April 2015.

Now, regarding the conditions for notifying the insurer of the first claim, it is stated in the sixth clause, that it is the obligation of the insured to notify the insurer of the filing of any judicial or extrajudicial claim to the insured, or of any circumstance that may result in damage and/or costs to be borne by the insured, within ten calendar days from the date on which they became aware or should have become aware of them. Thus, being the first claim on the 13th of April 2015, Caracol Televisión S. A. should have informed the insurers within ten calendar days, however, the communication in the file on page 24 of Book 4, dates from 30th of August 2018, that is, more than three years later.

In addition, the insurance contract states in its fifth clause that the insurer will be exclusively responsible for paying the damages and/or costs in excess of the deductible, which according to the particular conditions of the policy is US$50,000, that is, one hundred sixty-nine million three hundred and fifty thousand pesos ($169,350,000), as of today, an amount that is higher than the amount established in this ruling.

In short, since the sentenced amount is lower than the agreed deductible and since it is a policy that operates according to a claims made system, and the insurers were not notified in accordance with the agreement, the referred debit in charge of Mapfre Seguros Generales de Colombia and Chubb Seguros Colombia S. A. is excluded, in spite of the fact that the damage occurred, and therefore they are not called upon to assume the contingencies of this sentence.

Finally, bearing in mind that the present declarative process ended with a judgment in favor of the plaintiff and that the factual situations that gave rise to its decree persist, this office will proceed to maintain the precautionary measure decreed, since it guarantees the right that the plaintiff has to prevent the unauthorized copy of his works.

OF THE EXPENSES OF THE PROCESS

The first paragraph of article 365 of the GPC, states that the losing party in the process will be sentenced to pay the expenses of the process. Therefore, this Office will order the company Caracol Televisión S. A. on this amount.

With regard to the legal representation costs, in accordance with article 5 of Agreement No. PSAA16-10554, issued by the Superior Council of the Judiciary, and considering criteria such as the amount and nature of the process, as well as the quality and duration of the management carried out by the attorney of the plaintiff, the amount of these will be fixed at 5% of what was granted, that is, two million nine hundred and eighty thousand seven hundred and fifty three pesos ($2,980.753).

Based on the exposed, the Technical Assistant Director of Jurisdictional Affairs of the National Copyright Direction, Carlos Andrés Corredor Blanco, administering justice on behalf of the Republic of Colombia and by authority of the Law.

CONCLUSION

First: To DECLARE that the company Caracol Televisión S. A., identified with the NIT: 860025674-2, copied in the audiovisual production *La Selección* the artistic works *Tres caballos en la playa*, *Composición para expresiones en movimiento*, and *Cabeza de caballo III*, without the required prior and express authorization by the author, Mr. Carlos Alberto Massó, in accordance with the considerations set out in the arguments of this decision.

Second: To DENY the exceptions of merit proposed by the defendant, with regard to the absence of entitlement of the plaintiff to the economic right to copy; as well as that relating to the application of the exception contemplated in paragraph *h* of article 22 of our Community legislation; also that related to the existence of an authorization given by Asdepaso, and that known as the application of the *de minimis lex non regit* principle.

Third: To ORDER the company Caracol Televisión S. A. to abstain from copying and disseminating the works referred to in the audiovisual La Selección, which implies keeping through time the precautionary measures adopted by the defendant as a consequence of the decreed in the present process.

Fourth: To ACCEPT the exceptions of merit proposed by the defendant with regard to the absence of entitlement of the plaintiff to the economic rights to broadcast and distribution; to the absence of infringement of the moral right of attribution and to keep a work unpublished, and therefore TO REJECT the second relief proposed in the application in accordance with the grounds of this Decision.

Fifth: To SENTENCE the company Caracol Televisión S. A., already identified, to pay Mr. Carlos Alberto Massó, within ten (10) days following the enforceability of this judgment, the sum of fifty-nine million six hundred and fifteen thousand seventy three pesos ($59,615.073).

Sixth: To SENTENCE Mr. Carlos Alberto Massó, identified with identification card number 85,452,334, to pay to the Superior Council of the Judiciary, Executive Directorate of Judicial Administration, or whoever is acting in his place, an amount equivalent to ten percent (10%) of the difference between the estimated

amount and the proven amount. That is, an amount equal to forty three million two hundred and ninety six thousand nine hundred and twelve pesos ($43,296,912).

Seventh: To DENY all the reliefs presented against the impleaders of Caracol Televisión S. A., in accordance with the considerations set out in the arguments of this ruling.

Eighth: To SENTENCE Caracol S. A. to pay the expenses of the law suit.

Ninth: To SET the legal representation costs in two million nine hundred and eighty thousand seven hundred and fifty three pesos ($2,980,753).

Appeal. In accordance with article 322 of the GPC, both parties present an appeal against this decision, which will be resolved by the Superior Court of the Judicial District of Bogotá.