

Cour de Cassation 5 February 2008 Appeal No.07-81387

THE CRIMINAL CHAMBER OF THE COUR DE CASSATION handed down the following judgment:

Concerning the appeals relating to Marcio X, Roberts Y and Olivier Z against the judgment of the Court of Appeal of Paris (13th Chamber) of 17 January 2007, which found them guilty of breach of copyright for disseminating original creative works contrary to the rights of the authors, for which the first and second appellants were fined 8,000 euros and the third 3,000 euros, made orders for publication and made findings concerning the interests of the civil parties.

The COURT hearing oral submissions on 8 January 2008 where the following people were present: M. Cotte, President, M. Blondet, Research Adviser, MM. Farge, Palisse, Le Corroller, Mrs Radenne, Court Lawyer, MM. Chaumont, Delbano, Trainee Lawyers.

Advocate General: M. Davenas;

Court Bailiff: Mrs Lambert;

ON THE REPORT OF COUNCILLOR BLONDET, the submissions of the law firm WAQUET, FARGE and HAZAN, the law firm ROGER and SEVAUX, barristers, AND THE SUBMISSIONS OF THE ADVOCATE GENERAL MR DAVENAS, the lawyers for the parties having the right of reply;
hearing the appeals together by reason of the similar subject matter;

having seen the evidence of the appellants and the defendants;

on the question of admissibility of documents produced for Gaulme, Kenzo and Christian Lacroix:

The Court noted that because their claim had been dismissed, these three companies were not able to participate in the appeal brought by the accused.

On the sole ground for setting aside the appeal, based on a violation of Article 10 of the European Convention on Human Rights, L.112-1, L.112-2, L.122-5, 9, L.335-2 and L.335.3 of the Intellectual Property Code, Article 112-1 subparagraph 3 of the Penal Code, and Articles 591 and 593 of the Criminal Procedure Code;

"The court noted the judgment under appeal held Olivier Z, Marcio X and Roberts YA were guilty of breach of copyright concerning authorial rights, sentence them, in the action brought by the State, to pay a fine and, in a civil action, to indemnify the other parties to the civil action and order them to publish a judiciary communique (Ed.:pay for the placement of an advertisement setting out the court's verdict).

Because the fashion creations and fashion shows were, in the terms of Articles L.112-1 and L.112-2 of the Intellectual Property Code original creations which benefited from the protection of Chapter 1 of the said Code and the fashion houses were the holders of authorial rights for these creations because they contained an original character, which was not contested in these proceedings when they were heard in Paris from 6 to 10 March 2003. For

this reason, these fashion houses had a right to authorise, or not authorise, the reproduction or dissemination of these creations. In the present case, the defendants are accused of having disseminated (in the case of Marcio X and Roberts YA) or permitted to be disseminated (for Olivier Z), on the internet site of the Viewfinder "firstview.com" photographs which were reproductions of images or models for which there was no authorisation from the right holders. As to the evidence of breach of the statute, it was established that the photographs were taken at the fashion show, mainly by Marcio X, the director of Zeppelin Company, but also by Roberts YA and Olivier Z. They were sent to Zeppelin Society where they were put onto a CD-ROM, then copied and transmitted directly to the computer of the Viewfinder company situated at New York where they were made available for the public on the internet site firstview.com, several hours after the fashion parade. The evidence of the dissemination consisted of the providing of these photographs to Zeppelin Company with the intention of being transmitted to the public shown by the conduct of Marcio X, who in his capacity as director of the company responsible for disseminating the photographs to on online personally gave instructions to this effect, concerning Roberts YA, that he sent his photos to Zeppelin Company in full knowledge of the destination even though certain photographs could not be put immediately online for technical reasons, and concerning Olivier Z, that he could not pretend to have sent his photographs without realising that they could be disseminated. This dissemination was made without the authorisation of the right holders concerned. This authorisation had nothing to do with the accreditation which the defendants had been given to attend the fashion show for taking photographs, because this had only been given to them for the purpose of the media organisations who had made the request. It was pointless for the defendants to submit that they were not bound by the terms of engagement for members of the press on the basis that they had never been told about it and had not signed any exclusivity agreement concerning their photographs. Consequently, they knew they were invited in the capacity of persons having press accreditation. Marcio X had unsuccessfully sought an accreditation for Viewfinder Company, and there was no basis to support his claim that he was unaware of the system in place under the aegis of the Federation of Couture. Even noting that they had not been invited to this fashion parade personally, by reason of their reputation, there was no evidence before the Court that they had, jointly or severally, received some form of permission from the fashion houses to disseminate their creations to the public. Marcio X and Roberts YA, directors of Viewfinder Company, were aware of the decisions handed down in 2001 by the Paris Criminal Court which had put them personally on notice as to the circumstances in which the dissemination of photographs taken in relation to other fashion shows had been treated as breach of copyright. The argument that the procedure for inviting the press was poorly set up or disregarded by reason of multiple accreditations for the same photograph and the absence of an efficient procedure for obtaining the signatures of parties to an agreement as to exclusivity were without merit concerning the personal responsibility of the accused. Finally, Marcio X, Roberts YA and Olivier Z, who had been professional photographers for a long time, were neither ignorant of the rules of fashion houses by which they regulated their authorial rights, since they were familiar with the procedure for the use of photographs of high fashion over which they had no rights to deal other than as authorised by the holders of authorial rights, nor were they entitled to send these photographs to any destination other than that authorised by the holders of the authorial rights. Consequently, the elements of the offence of breach of copyright were established. The mens rea of the offence was established against Marcio X, Roberts YA and Olivier Z, who could not point to any authorisation for dissemination and who had not provided proof of their good faith. On the contrary, the two first named defendants knew that they had not obtained the accreditation sought for Viewfinder. Olivier Z, well knowing of the existence of firstview.com had not made any enquiry to avoid the photographs being put online. Good faith does not result from

the American line of authority concerning the terms in which litigious acts are not contrary to the law of the State of New York, although the constituent elements of the offence have been committed on French soil, and they knew the illegal character of their conduct in France by reason of the judgments handed down in 2001 which were referred to above (appeal, pages 17-18).

1. In order to be established, the offence of breach of copyright requires that the work have an original character, without which no authorial right can exist. Olivier Z, Marcio X and Roberts Y are accused of having breached the copyright of prêt-a-porter which took place between 6 and 10 March 2003. They reproduced photographs of the prêt-a-porter fashion. In a purely theoretical and general way, fashion creations and fashion shows are original works over which fashion houses are holders of the authorial rights in consequence of the fact that they are original and that originality had not been contested in these proceedings, contrary to the assertion by the defendants concerning the elements of the offence (pages 12-13 of the submissions on appeal of Marcio X and Roberts Y). The Court of Appeal, which had considered the crime and all of its elements, all of which were proved, in order to make its finding of guilty, had not provided a proper legal basis for its decision;

2. According to the new article L.122-5,9° of the Intellectual Property Code , the first article I of the law n° 2006-961 of 1 August 2006 (JO of 3 August 2006) is applicable to the facts in this case in that it creates an exception to the rights of authorship. An author cannot forbid reproduction or use, partial or whole, of a graphic, plastic or architectural work by print media, audiovisual or internet means, in a way directly related to these works, without clearly indicating the name of the author. In not investigating whether this provision denies authorship rights, and consequential penal liability in the case of the defendants, and whether it was applicable to internet publication when the photographs had been made available on an internet site devoted to fashion and haute couture, the court of appeal had erred.

3. Although internet dissemination was restricted in time and number to professional photographs of works where the creators permitted this to ensure media coverage of the event, it was the case here that all the photographers charged in these proceedings had been invited with other press representatives and authorised to take photographs. The defendants had not signed any contract agreeing not to divulge the photographs immediately after the fashion shows, which was to ensure there was an audience for these events. The dissemination of the prohibited reproductions had been limited to putting them on line for an internet fashion site firstview.com in order to cover this fashion event. In failing to ascertain whether this had occurred because the fashion houses who had organised the parades had not intended to permit the dissemination of the photographs the subject of the litigation to ensure publicity for their shows and their names, and whether the dissemination of images on the website in question was not legal in the absence of formal authorisation, the court of appeal had erred.

4. There was an implied authorisation to reproduce these works, limited to information for the public, arising from the invitation of a professional photographer to a fashion show in the course of which creations were shown to the press which they were authorised to reproduce. The judgment below noted the defendants were professional photographers invited to the fashion houses to participate in the presentation to the press of their fashion parades and collections and they were authorised to take photographs for the purpose of information. Therefore there was an implied authorisation to disseminate, for information purposes, reproductions of the creations shown in this way. In requiring express authority to disseminate to prevent attack on the rights of the fashion houses, when such authorisation

resulted from circumstances in which the defendants had been invited to the fashion parades, the court of appeal had erred.

5. Copyright infringement is an offence requiring guilty intention. For the offence to be proved, the existence of guilty intent is essential. The appeal judgment found Olivier Z, who had given these photographs to Zeppelin Company which had then transmitted them to Viewfinder Company, had not exercised any care to prevent these photographs being put on the net by this company, the existence of which he was well aware. In finding Olivier Z had committed an imprudent act amounting to the criminal offence of breach of copyright, the court of appeal had erred. The judgment appealed from and the pleadings noted that on 11 March 2003 the French Federation of Fashion and various other societies involved in haute couture, prêt-à-porter and fashion creation commenced proceedings *ex parte* for breach of copyright for disseminating creative works in breach of the authors' rights. The organisation for preventing industrial and artistic copyright infringement commenced two proceedings on 7 and 10 March 2003 against the Agency for the protection of programmes. The American company Viewfinder Inc, set up by Marcio X and Roberts YA disseminated on the internet site "Firstview.com" the parades of prêt-à-porter taking place in Paris on 6 and 10 March 2003. On 11 March 2003 officers of the judicial police questioned Marcio X, Roberts YA and Olivier Z, an independent photographer holding; as they did, press accreditation from the French Federation of Fashion, concerning the Chanel fashion show. A search carried out at the offices of Zeppelin Company, of which Marcio X was the manager and Olivier Z a photograph seller, enabled the police to seize a CD-ROM containing photographs taken on 6 and 10 March of the fashion show and to prove the transfer of photographs of the Lanvin fashion parade to the Viewfinder company.

When the inquiry was commenced Marcio X, Roberts YA and Olivier Z were brought before the criminal courts on a charge of breach of copyright in that they disseminated original works without the permission of the author. The Criminal Court acquitted them and dismissed the claims of the French Federation of Fashion, prêt-à-porter and couturiers and fashion designers and 12 fashion houses, who were the civil parties. The Minister and the civil parties had appealed these decisions.

However, in setting aside the judgment, declaring the accused guilty and ordering them to indemnify ten of the thirteen civil parties, the judgment appealed from first held that fashion creations and fashion shows were creative works over which fashion houses held property rights protected by the Intellectual Property Code. The court held that in photographing several fashion parades and disseminating pictures on line outside French territory, without the permission of the holders of authorial rights for the creations reproduced in this way, Olivier Z, Marcio X and Roberts YA had committed the offence of breach of copyright of original works in violation of the rights of the authors. The judges had commented that Marcio X had unsuccessfully sought accreditation for Viewfinder Company, Roberts YA must have known of this refusal of accreditation and Olivier Z, who made no inquiry to prevent the putting on line of his photographs, had not shown evidence of good faith.

By reason of these findings; proceeding from the Court's understanding of the facts and circumstances of the case, although there was evidence to the contrary; the court of appeal had sufficient grounds for its decision.

It followed that the appeal ground that there was an exception in article L.122-5, 9° of the Code of Intellectual Property concerning fashion creations, protected by L.122-2 of the said Code, could not be accepted;

The judgment appealed from was therefore without error;

APPEAL DISMISSED.

THE COURT DETERMINES at 150 euros the sums which Marcio X, Roberts Y A and Olivier Z must each pay to each of the civil parties, namely the companies Céline, Chanel, Christian Dior Couture, Jean-Paul Gaultier, Givenchy, Hermès International, Hermès Sellier, Loewe, Louis Vuitton, Malletier and to the French Federation of Fashion for ready to wear, fashion creations, in accordance with Article 618-1 of the Penal Procedure Code.