

## **AUDI OUCH**

By: Jim Astrachan

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The Eighth Circuit Court of Appeals recently affirmed a very large judgment against the car maker Audi and its ad agency because of their theft, and use in an ad, of eight words written by someone else. The total verdict was \$965,000; a fair amount of change in anyone's book for limited use of eight words. That's \$120,000 per word. Well, I guess it's not the number of words, but how they are strung together, that creates value.

In 1994, Brian Andreas, an Iowan artist, drew a picture of angels and paired them with these words: "Most people don't know that there are angels whose only job is to make sure you don't get too comfortable and fall asleep and miss your life." For whatever reason, the work was widely published and sold throughout the country.

Enter Audi and its agency, McKinney & Silver, looking for neat ways to highlight the fun awaiting future owners of TT coupes. For TV ads McKinney & Silver filmed the TT coupe in a garden surrounded by angelic looking, neoclassical statues. The ad's voiceover said, "I think I just had a wake up call, and it was disguised as a car, and it was screaming at me not to get too comfortable and fall asleep and miss my life". The ad ran on TV for about six months until

Audi was accused of copyright infringement, at which time the ad was yanked, ostensibly because it had become stale, but in reality to mitigate damages.

The \$965,000 award was comprised of several elements: \$115,000 actual damages, \$280,000 of the agency's profits, who with Audi was jointly and severally liable for the infringement, and \$570,000 of Audi's profits attributable to the infringement. The author attempted to broaden recovery of Audi's profits beyond those earned from sales, but the court said no. If the Plaintiff had shown evidence, however, that persons drawn to showrooms by the TT ad actually purchased other cars, those profits should also have been available, but the Plaintiff didn't try this approach.

Audi appealed the verdict on several grounds. First, it contended that an award of its profits of \$570,000 was too speculative because the author failed to establish a causal connection between the infringement and the profits from sale of the TT coupe. The jury had awarded 10 percent of Audi's after tax profits on TT coupe sales during the time the ad ran. A defense that damages are speculative is often raised in cases where an ad is alleged to infringe on copyright.

Generally, a finding of infringement creates a rebuttable presumption that the infringer's profits are entirely attributable to the infringement, and the burden then shifts to the infringer to demonstrate what portions of the infringement are not traceable to the infringement. For example, did Audi run other ads including non-infringing print during this period: did automotive magazines publish glowing reports of the car? But any doubt is to be resolved in the Plaintiff's

favor, and if the defendant fails to meet its burden, gross revenues will stand for the infringer's profits and be recoverable.

There is a difference, however, between a defendant's sale of the infringing article, say a book, and the defendant's use of an infringing article to sell another product as occurred here. The defendant's indirect profits are more difficult, but certainly not impossible, to quantify. But the defendant's burden to establish that sales were not attributable to the ad remains the same.

Andreas met his burden to establish that the ad resulted in sales of TT coupes. The infringing ad was not merely floating in a vacuum. The appellate court found, "the infringement was the centerpiece of a commercial that essentially showed nothing but the TT coupe." Audi touted the ad to its dealers as an important part of its U.S. launch of this car. The ads were highly rated. In other words, they were great ads and they brought tire kickers to the showrooms and these folks bought TTs. True, the evidence that linked the ads to actual sales was circumstantial, but it was more than enough to allow a judge to conclude that the ad, and the infringed work, generated sales and profits.

The plaintiff, the court concluded, was not required to put on the stand a TT buyer who would testify that she bought the car because of the ad. That's just not the point. The court also recognized that there were many other elements that contributed to sales, such as design and price. Once the plaintiff established a nexus between the ad and sales, his burden was to establish gross sales. Andreas did both.

In awarding 10 percent of Audi's \$5,700,000 profits from the sale of 5,146 cars, the jury concluded that 10 percent of the profit was attributable to the ads; the balance was attributable to other factors.

The court sent a strong message to advertisers and their agencies when it wrote:

We recognize that it is difficult to establish the portion of profits attributable to an infringement in cases when the infringed material is used in an advertisement for another product, but Congress put the burden of establishing "elements of profit attributable to factors other than the copyright work" on the defendant. Further, Congress did not distinguish between direct and indirect profit cases....

I agree. There are indeed rules of the road for an industry claiming to have none.

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