

in the background not to be protected by copyright. As discussed above, although Judge Birss conceded it was a difficult case to decide, he did not reach this conclusion. One academic, Prof Jeremy Phillips, has suggested that the case could represent a worrying development for photographers: ‘the photographer who recreates the effect of another’s photograph of a public scene or monument is now a copyright infringer, and that there may now be a notion of copyright in an idea, a lay-out or a scheme for such a photograph’. That is, that the decision now blurs what is known as the idea/expression dichotomy in copyright law.

At the time of writing, there was no indication of whether or not NET would appeal the decision to the Court of Appeal. It also worth noting that the decision of Judge Birss is not binding on the High Court (the Patents County Court being restricted to financial claims of less than £500,000 in intellectual property cases).

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ASA’s harsh verdict on Mercedes Benz ‘promotion from hell’

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Topic: Promotion marketing

Who: Mercedes Benz (United Kingdom) Ltd (Mercedes Benz) and the Advertising Standards Authority (ASA)

Where: United Kingdom

When: January 2012

Law stated as at: 1 February 2012

What happened

The Advertising Standards Authority investigated a complaint by one of the ten finalists (the ‘Complainant’) in a ‘Win a New Vito’ competition organized by Mercedes Benz (the ‘Competition’).

Contestants were invited to submit their own video, written submission or photograph with a caption that demonstrated why they deserved to win a new Mercedes Benz Vito. After the entry closing date, a judging panel would draw up a shortlist of ten entries. These would go online for a month’s public voting to decide the Vito winner.

The Complainant questioned whether the competition had been administered fairly, because the rules had been allegedly altered while the competition was in progress.

Here is the bizarre backstory that had unfolded before this complaint was made:

June 2011

Mercedes Benz launches the Competition on its website. The Competition terms and conditions (the ‘Rules’) include a provision as follows:

‘The promoter reserves its right to alter, amend or foreclose the promotion at any time and without further notice’.

1 September 2011

The 1 month public voting period starts.

5 September 2011

The Complainant emails Mercedes Benz saying she believes two finalists (2 Finalists) are acting improperly. She says they are illegitimately massaging votes for their entries by posting them on third-party ‘forum’ websites that utilize public voting systems and apparently allow contestants to purchase votes (although it is not clear from the ASA report whether this vote-buying aspect was drawn to Mercedes Benz’s attention at this time).

6–18 September 2011

Having received no reply from Mercedes Benz clarifying that the 2 Finalists’ activities broke the Rules, the Complainant posts on vote exchange websites that allow competition entrants to swap votes with participants in other competitions.

19 September 2011

After this and subsequent chasing emails from the Complainant initially disappear into a spam folder, Mercedes Benz finds the messages, responds to the Complainant and investigates.

19–20 September 2011

Mercedes Benz replies to the Complainant saying it does not feel this practice breaks the Rules. The Complainant challenges this and on re-checking, Mercedes Benz establishes that the 2 Finalists had indeed been offering to pay for votes for their entries.

21 September 2011

As it considers that this practice is not in the spirit of the Competition, Mercedes Benz suspends the online voting, disqualifies the 2 Finalists and adds to the Rules the following:

‘The Promoter reserves the right to disqualify any finalists ... if it has reason to believe that anyone voting for such finalist’s submission has

been paid or incentivised in any way for placing their vote, either by the finalist or any third party’.

22 September 2011

Mercedes Benz reactivates the voting process and tells all finalists this is what they are doing.

23 September 2011

Mercedes Benz discovers the Complainant’s use of vote exchange sites and disqualifies her as well pursuant to the new Rule introduced 48h previously.

The ASA verdict

One can see the force in Mercedes Benz’s subsequent submissions to the ASA that in all these extraordinary circumstances, it believed it had taken appropriate remedial action to ensure that all finalists were treated fairly.

The ASA, however, was not assuaged.

Perhaps surprisingly, the regulator felt that Mercedes Benz had ‘created uncertainty’ about the Rules by (1) the lack of detail in the original version of the Rules about unacceptable practices and (2) the promoter’s delay in replying to the Complainant to clarify its views on the 2 Finalists’ conduct.

In the circumstances, the ASA felt that the Complainant had justifiable grounds for complaint after being disqualified for practices that were not expressly prohibited in the original Rules and which the ASA says in the report were at one point ‘expressly condoned’.

Therefore, the Competition had not been conducted efficiently, the ASA held. This had caused the Complainant ‘unnecessary disappointment’, it adjudged and therefore Mercedes Benz had breached the CAP Code as follows:

- 8.1 Promoters are responsible for all aspects and all stages of their promotions (Author’s comment: How can this be breached exactly and surely in this case Mercedes Benz accepted responsibility for the running of the promotion?)
- 8.2 Promoters must conduct their promotions equitably, promptly and efficiently and be seen to deal fairly and honourably with participants and potential participants. Promoters must not cause unnecessary disappointment.
- 8.14 Promoters must ensure that their promotions are conducted under proper supervision and make adequate resources available to administer them. Promoters, agencies and intermediaries should not give consumers justifiable grounds for complaint.

Mercedes Benz was asked to ensure that it had suitable terms and conditions and internal systems in place so that future competitions were administered effectively.

Why this matters

At first sight, one might be forgiven for taking the view that the conduct of all the disqualified finalists was equally egregious and that the ASA seems to have counter-intuitively taken the view that in this case two wrongs do indeed make a right.

The fact remains, however, that however challenging the circumstances and reasonable-seeming a promoter's response to them, changing the rules of a promotion part way through is always going to be a risky course.

So the perhaps unattractive, but inevitable, lesson from this case is that promoters contemplating 'user-generated content' prize promotions, particularly with voting in the mechanic, must take care with the terms and conditions. The drafting should with minimal legalese give maximum scope for immediate, fair and decisive action should abuse come to light.

In addition, general reservations of the right to alter promotion rules or suspend the promotion are going to be of limited use when disaster strikes and steps should be taken to make sure that whatever communication channel is provided for entrants to report any concerns or queries, this will be continuously monitored and will not suffer from the 'spam folder' issues that arose in this case.

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