
IF YOU'RE AN INFLUENCER, BE PREPARED TO INFLUENCE:

SOCIAL MEDIA STAR LOSES CLAIMS BASED ON ONLINE "CHARACTER"

By: Barry Irwin and Adam Reis | September 27, 2019

When faced with determining the scope of protection in a social media influencer's "character," the United States District Court for the Southern District of New York concluded that omitting the key features of the influencer's "character" can preclude claims of copyright infringement, even though the accused character appeared to draw heavily from the influencer.

Milan-based influencer Gianluca Vacchi sued E-Trade Financial Corp. ("E-Trade") claiming commercials E-Trade ran featured a character that was a rip-off of a character Vacchi had created and cultivated for his social media presence. Vacchi has over 13 million followers and regularly posts videos. Five of these videos—for which Vacchi registered the copyrights—formed the basis of Vacchi's claims. Vacchi claimed he created a character for his social media presence—"an extravagant millionaire dancing with beautiful ladies in exotic locations." This "character," played by Vacchi, using Vacchi's name, and having traits based on Vacchi's personality—such as a neatly trimmed salt-and-pepper beard, square-shaped glasses, and numerous torso tattoos—appeared in all five of the relevant videos.

E-Trade created and aired two commercials. Each of E-Trade's commercials featured an older man with a salt-and-pepper beard, square-shaped glasses, and a tattooed torso. Like Vacchi's "character," this older man is depicted dancing with younger women on a boat. A quick comparison of the two men makes the similarities readily apparent. Vacchi asserted copyright infringement—for both the videos he registered and the "character" contained in those videos—and false endorsement. E-Trade moved to dismiss, and its motion was granted. As for the claims based on the videos, the Court found the similarities "amount[] to little more than their joint reliance on a *scène à faire* to create an ambiance" and the differences outweighed any similarities.

Turning to Vacchi's next claims, the Court found that Vacchi failed to establish infringement of his "character." Assuming that the man in Vacchi's videos was sufficiently delineated to warrant copyright protection as a character, the Court nonetheless found that the character in the E-Trade commercials was not substantially similar to Vacchi's. The Court noted that E-Trade's character lacked the key features of Vacchi's "character," including physical fitness, similar tattoos, a rolled-up pant leg, a small knot in his beard, and an ankle bracelet and wrist cuffs, which the Court considered to be the most notable attributes. In the Second Circuit, failure to establish substantial similarity in a parallel copyright claim dooms likelihood of confusion claims, and the Court dismissed Vacchi's false endorsement claims.

It seems likely that E-Trade drew upon Vacchi's online presence in creating the commercials, but at what point is that taking too much? It isn't unreasonable that Vacchi should be afforded some protection of the image he has carefully cultivated. E-Trade's use of Vacchi's image directly would almost certainly have infringed some of Vacchi's rights. Since E-Trade created a new, somewhat similar character, Vacchi was left in the unenviable position of relying on copyright claims. For example, the Court assumed that Vacchi's character was protectable, which is a heavy burden to carry at later stages not to be taken lightly. And Vacchi would have certainly faced a fair use defense. Vacchi raised some novel arguments, however, and while this case didn't work out for him, it may pave the way for claims by influencers in the future.