

Portuguese Update

Processo n. 3501/05.0TBOER.L1.S1, Acórdão do Supremo Tribunal de Justiça, 29th April, 2010

This was a 2010 decision in which the Supreme Court held that a copyright protected work had not been infringed by a second work because of the individuality of the second, allegedly infringing work, *regardless* of the many similarities between the two works.

The plaintiff held copyright in a TV program format and alleged that the defendant had copied it without authorization. The Appeals Court decided for the defendant – a decision that was upheld by the Portuguese Supreme Court.

The Supreme Court found that where each work has its own individuality, similarities between the two works do not lead to an inference of copyright infringement. The criterion of individuality/creativity prevails over objective similarity. The most important factor to determine infringement is whether something has been added to the third party creation that has been used.

It was significant that the two TV programs were of the same genre, but had different aims. The defendant's aim was to select Miss Portugal 2004, whereas the plaintiff's aim was to select a future TV presenter. The plaintiff's program hoped to ridicule the applicants and showed their lack of culture, whereas the defendant's program did not intend to degrade the applicants, but "to instruct them, as was normally associated to the Miss Portugal beauty contest".

The court concluded that the defendant had not tried to appropriate the creativity of the plaintiff's program and that, therefore, there was no copyright infringement and it was not necessary to assess the similarities and dissimilarities between the two TV programs.

One may argue that this was not exactly the result the ECJ hoped for with the Infopaq decision, of July 16th 2009, when it urged for the application of the notion of "intellectual creation" to all works, as well as to the concept of infringement.