

Superior Court of Justice decides about parody based on Erasmo and Roberto Carlos' song for campaign purposes

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It is difficult to think of an electoral period without remembering the campaign jingles, especially the "parodies" of famous songs, common and important instruments in the search for votes, either by less popular politicians or by figures known on their podiums.

The month of August, which inaugurated the campaign season until the 2022 elections, has already started with a news broadcasted by the Brazilian Union of Composers – UBC that the PL (Liberal Party) would have a new version for the song "The Gate" (from the popular chorus "I came back, now to stay. Because here, here is my place"), by Erasmo and Roberto Carlos, to campaign for the re-election of Congressman Tiririca by São Paulo.

For those who do not remember, the chorus of this same song was used by this politician in his 2014 campaign and generated a lot of controversy, due to the lack of authorization from its holders. The controversy was initially judged in a lawsuit filed by the recording company which owns the economic rights of the song, before the State Court of São Paulo. The Appellate Court understood, at the time, that the "usage of the excerpt from the song (with original lyrics modified) had no humorous purpose". Thus, it could not be classified as a parody¹, which does not characterize copyright infringement, according to Article 47 of the Brazilian Copyright Law ("LDA"). It then ordered the comedian and politician to pay damages "20 times over the amount that would originally be due" to the plaintiffs", according to Article 109 of the LDA.

In 2019, the discussion came to the Superior Court of Justice (STJ) which reversed the previous decision on the grounds that the absence of comicality would not mischaracterize parody (although the decision considers – as a background - that the candidate is a popular artist who stood out precisely in the humorous environment through making parodies). According to the Superior Court, "the parody is the result of a new interpretation, or an adaptation to a new context, in order to approach the sender and recipient of the communicated message". He pointed out that the electoral purpose would not bring any impact to the conclusion by the unlawfulness. Actually, the violation of copyright would only be characterized if an offensive or discrediting content had been verified to the original work or its author.

Displeased with the judgment, the recording company filed a new appeal (ERESp. 1.810.440/SP) which was analyzed and dismissed on August 24, 2022.

In summary, the recording company sought to change the result of the judgment based on the allegation that the solution given to the case diverged from another STJ decision which dealt with the controversy about the use of the song "Roda, Roda, Roda" (vignette of old tv show "Programa do Chacrinha") in an advertising for Carrefour, a famous Brazilian supermarket

(Resp. 1.131.498/RJ). In such judgment, the STJ understood that the song was changed by Carrefour in order to attract consumers to the market, "there being no way to refer to it as a paraphrase, because the original song was not used as a motto for the development of another thought, or even in parody, that is, in comic imitation, or in antithetical treatment of the theme. It was misrepresented to better serve the commercial interests of the promoted in the advertisement." and, therefore, it would be appropriate to indemnify the composers. In other words, the Court concluded that the campaign did not have sufficient comic creative effort to be qualified as a legal exception.

After the outcome of the case before the STJ, Tiririca published a video containing another adaptation of the song – now to the campaign for reelection this year -, as anticipated by the UBC news. After that, Roberto Carlos filed a new lawsuit before the Court of São Paulo, requesting a preliminary injunction to stop the broadcasting of the video and also claiming damages based on infringement of his personality rights. However, the Judge denied the injunction, based on the understanding that the principle of freedom of expression should prevail, since he could not see, in a preliminary analysis, any damage to the singer's image.

The lawsuit is ongoing, creating another chapter to the controversy, this time initiated by the singer alleging violation of the rights of image and honor, but not by the recording company, which alleged only violation of economic rights by the unauthorized use of the song.

It is worth remembering two other appeals judged by the STJ regarding the application of Article 47 of the LDA. In 2017, the Court decided the dispute between the newspaper Folha de São Paulo and the holder of the website www.falhadesaopaulo.com.br (Resp No. 1.548.849/SP), in which parodies/criticisms of the news from the newspaper Folha de São Paulo were published. On such occasion, the STJ understood that the publications on the website called "Fault" were evidently parodies of a critical and humorous nature, therefore, it is not possible to conclude that Folha de São Paulo had its rights infringed.

In 2018, STJ tried a case which discussed the parody of an excerpt from Vinícius de Moraes' song in an advertising campaign (Resp No. 1.597.678/RJ). The Court once again understood that the exception of Article 47 of the LDA should be applied considering the Appellate Court conclusion on the creativity and clear comic purpose of the advertisers - and also its conclusion that this usage did not cause depreciation of the song or for its author.

The decisions mentioned above reinforce the subjective nature of the legal exception. Indeed, the legislator was only clear in determining that parodies cannot simply reproduce the work and should not discredit it.

The fact is, therefore, that the conclusion about the lawfulness will always depend on the specific case.

NOTE:

¹ Although it has no legal definition, parody can be traditionally defined as a comic or critical rereading of a work.

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