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& ASSOCIADOS
SOCIEDADE DE ADVOGADOS

BRIEFING

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PORTUGUESE SUPREME COURT SPEAKS OUT ON THE USE OF SPEAKERS

INTELLECTUAL PROPERTY

Does the attachment of loudspeakers to a television set or a radio - in order to amplify the sound received through those devices in a commercial establishment - constitute a new and autonomous use of a copyright protected work that requires a new specific authorization? It was found that Portuguese case law in respect of this particular issue of law was contradictory and, therefore, the Portuguese Supreme Court was called upon to provide the correct interpretation of the law.

The court's decision on this matter was made known in the official bulletin of the Portuguese Republic published on December 16th, 2013. The ruling has met stiff criticism from the *Sociedade Portuguesa de Autores*, the largest collective rights management entity operating in Portugal. It has vowed to oppose the decision in other forums, namely at the Court of Justice of the European Union, on the basis that the Portuguese Supreme Court's interpretation is contrary to European Union law, international treaties and other European case law.

The facts of the case can be summed up as follows. In 2007, the 2nd instance court of Guimarães concluded that the proprietor of a commercial establishment committed the crime of copyright infringement (copyright usurpation) when he connected four speakers to a television set used in said establishment. At the time, the Guimarães court stated that the proprietor's actions constituted a new broadcasting of signs, sounds and images. Since he had not obtained the necessary authorisation from the collective rights management entity, the court found the owner of the establishment guilty of the crimes foreseen in paragraph 1 of articles 195 and 197 of the Portuguese Copyright Code ("PCC").

More recently, in 2013, the same court was asked to rule on very similar facts. This time, the television in use in a commercial establishment was connected to a cassette and CD reader, an amplifier, an equaliser, a radio and three speakers. The establishment also had no authorisation from the *Sociedade Portuguesa de Autores*. Despite the legislation being the same as in the previous case, the 2nd instance

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court of Guimarães came to a diametrically opposite decision, stating that the mere reception of a broadcast, in a public place, did not require a specific authorisation from the owner(s) of the intellectual property rights nor did it entitle him (them) to an additional remuneration pursuant to article 155 of the PCC. Furthermore, no crime had been committed.

Faced with these contradictory rulings, the Public Prosecutor initiated a proceeding for the Portuguese Supreme Court to clarify the situation and issue a ruling to establish the correct interpretation of the law.[1] After having confirmed the contradictory interpretations, the Supreme Court accepted the case.

Central to the Portuguese Supreme Court's analysis was the interpretation of article 149 of the PCC, which integrates into national law article 11-bis of the Berne Convention. Paragraph 1 of the latter reads as follows: "**Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.**"

The reasoning produced by Portugal's highest court is interesting because it focuses on the meaning of the expressions "broadcasting" and "communication to the public". In the Supreme Court's view, they are two very different and separate things. A right holder that authorises the broadcasting of his work cannot then demand that a separate authorisation is necessary to receive said broadcast, even if it is in a public place. A new separate authorisation (and remuneration) would only be necessary if the receiver of the broadcast takes certain actions capable of altering the nature of that reception (i.e. providing an additional step that goes beyond merely receiving the broadcast). As an example of such an additional step, the court points to the theoretical case of a commercial establishment making a particular broadcast (e.g., of a sports event) the central event or attraction of the day. In other words, for there to be a communication to the public, the commercial establishment must transform the mere reception of the broadcast into a sort of show for its customers. This type of action, in the Supreme Court's view, would constitute a new use of the work that would merit a separate authorisation and an additional remuneration.

The connection of speakers to a television set in order to amplify the sound, on the other hand, does not in itself alter the nature of the reception of a broadcast and therefore does not fall within the scope of articles 149 and 155 of the PCC.

[1] Under Portuguese procedural law, a ruling of the Supreme Court establishing the correct interpretation does not bind other judicial courts but it does obligate them to provide an explanation if they divert from the established interpretation.

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The Supreme Court's ruling has been greeted with enthusiasm by those that make the sounds and images of a television broadcast available in their commercial establishments for the enjoyment of their customers. The reason for this is that the judicial decision puts into question their need to obtain a blanket licence from a collective rights management entity.

On the other side of the barricade, the Sociedade Portuguesa de Autores has admitted complicated financial troubles ahead for both it and its members (authors of literary, scientific and artistic works) and has made it clear that it will not accept this decision without a fight. Further judicial developments related to this issue are therefore certain and MLGTS will continue to accompany them closely with great interest.

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