Kluwer Copyright Blog

What is a “work”? Apparently only fine art, Portuguese Appeals Court rules

Ana Ramalho (Maastricht University) · Monday, September 19th, 2011

On 30 June 2011, the Lisbon Court of Appeals has issued its decision in case 323/07.8TVLSB.L1-2 (unfortunately there is no English translation of this). The facts of the case are as follows: a company wanted to hire an artist to create a sculpture, and for that purpose it received a few proposals from different artists. The appellant was one of the artists who sent in a proposal, which was comprised of several elements, including sketches and a maquette. The company did not hire the appellant in the end, so he asked for the preparatory material back. However, the maquette wasn’t returned. It had disappeared, probably because it had been destroyed. The artist sued for damages, alleging inter alia that the maquette was a work protected by copyright and that both his economic and moral rights had been infringed.

The Lisbon Court of Appeals came to confirm the lower court’s verdict. In an odd decision to say the least, the court declared that a maquette is only a means to achieve the finalized sculpture, and therefore it does not have the same character as the latter. According to the court, the maquette is not a work of art and should not be protected as such. Hence, damages resulting from its disappearance or destruction should be computed considering that the maquette is a good like any other. This entails, for example, assessing moral damages under the rules of the Civil Code and not the Copyright Code. According to Article 496 paragraph 1 of the Civil Code, only grave damages are eligible for compensation. In this case, the artist’s damages did not qualify for compensation.

The concept of protected work has been considered as non-harmonized terrain, although now it is defensible that the ECJ carried out a harmonization of the definition in its (in)famous Infopaq decision. This is because paragraph 37 of the said decision states that “copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation.”

On the other hand, Article 1 paragraph 1 of the Portuguese Copyright Code establishes that any externalized intellectual creation in the literary, scientific and artistic domain is protected by copyright. Article 2 paragraph 1 further clarifies that a work shall be protected independently of its genre, form of expression, merits, means of communication and objective.

Be it under Portuguese law or under the concept of work as defined by the ECJ, the decision of the Lisbon Court of Appeals remains inscrutable. The maquette is certainly the author’s own intellectual creation. It’s an externalized intellectual creation. It’s original. But all this was not considered. Instead, the court carried out a true merits-based analysis and decided that this

intellectual creation was not worthy of copyright protection. Why? Not because it is not original or the author's own intellectual creation; just because it is a means to a more noble form of art (the finalized sculpture), and therefore it is not an independent work, protected by copyright. So this begs the question: what if the artist never finalizes the sculpture? Is the work doomed to be stuck in the purgatory of copyright vacuum? Somewhere between the world of non-externalized ideas and the reality of protected works? Place your bets.

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