Parodies, deepfakes and election year

In November 2019, the Superior Court of Justice upheld Special Appeal 1.810.440/RJ filed by former Federal Deputy Tiririca and his political party in a process that discussed the use of parodies in electoral propaganda. The discussion started in 2014 when EMI Songs do Brasil filed an action for damages against a video broadcasted as an electoral propaganda, in which the candidate appeared imitating the singer Roberto Carlos and singing a parody of the song "*O Portão*".[1] One of the most popular passages said, "I voted, and I will vote again. Tiririca, Brasília is his place."

Condemned by the São Paulo Court of Justice, the abstract of that decision stated, "Situation in the file that does not constitute parody (comic take off), but an alteration of a interval/chorus of nationally known song to meet the candidate's interests in an electoral propaganda." However, the former deputy and his party reverted the unfavorable decision before the Third Panel of the Superior Court of Justice (reporting Minister Marco Aurélio Bellizze).

 In our legal system, a work will be defined as a parody when it has elements from the existing original work, as well as new elements derived from the creativity of the new author. The concept has doctrinal and jurisprudential support: "*... the parodist can use the base of the previous work; although, they must exercise their creative ability to give it a unique meaning...*"[2]

Parodies, which are currently ruled by Article 47 of the Brazilian Copyright Law,[3] presuppose an existing copyright work, yet **do not require prior authorization** from the owner of the original work. As the article advocates, parodies will be legal when "t*hey are not true reproductions of the original work nor imply discredit.*" As mentioned, they are **autonomous works** that modify the previous work. In the words of Ascensão, "*... the parody cannot be limited to the mere use of the*

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[1] Available on YouTube through the link: https://www.youtube.com/watch?v=NSVc9Ce_sMg
[2] Santa Catarina Court of Justice - Civil Appeal n. 0000412-86.2016.8.24.0175, rapporteur Judge André Luiz Dacol, Sixth Chamber of Civil Law. Published in DJE on 2018.04.02
[3] Law 9.610 / 1998.

previous theme. It must be valued for its own degree of creativity to judge what is called "unethical treatment of the topic."[4]

The legal assessment of any copyright infringement caused by a parody is, undoubtedly, made case by case. However, it should be emphasized that **to be lawful the parody requires nothing *more* than the provisions of the Copyright Law.**

As the decision in question correctly states, "The purpose of parody, whether commercial,[5]electoral, educational, purely artistic, or for any other means, is indifferent to the characterization of its lawfulness and freedom." Therefore, the parody does not necessarily have to be created for humor, criticism, or satire. Given that, "jurisdictional activity is not intended for artistic criticism,"[6] arguments in this sense should not be sufficient to mischaracterize a parody or its legality. In the words of Minister Bellize, "... *it is imperative that the reproduction is not confused with the original work, and at the same time, it must not alter it to the extent that it makes it impossible to identify the reference work by the public or imply discredit to it.*".

In the vote analyzed here, Minister Marco Aurélio Bellizze advances in this discussion and recognizes that **parodies for electoral purposes are not contrary to the Brazil Copyright Law, as long as they are respecting article 47**. In the vote, three elements are listed that confirm the legality of the ex-deputy's propaganda, which are as follows: (i) there is no offensive content to other candidates, (ii) there is no offensive content to the music owner, and (iii) the new work does not bring discredit to the original work.

This decision is important, if we consider that 2020 will be a year marked by elections in Brazil. The electoral period is conducive to the creation of parodies, either by the candidates or by the citizens themselves. Likewise, the decision is also important to reinforce elements that support the legality of parodies within the country, especially when new technologies (such as deepfakes) allow the creation of new forms of parodies.

In general terms, deepfakes are videos, in which there is overlapping and merging of different images and sounds. Such works are possible to be developed with the help of certain softwares

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[4] ASCENSÃO, José de Oliveira. Direito autoral. 2. ed., ref. e ampl. Rio de Janeiro: Renovar, 1997, p. 65.

[5] This point, which was also controversial in previous decisions, had already been reiterated by the Santa Catarina Court of Justice: "... the creation of parodies and paraphrases, in the legislator's words," is free", and with no hindrances to its economic exploitation." Santa Catarina Court of Justice - Civil Appeal n. 0000447-46.2016.8.24.0175, rapporteur Judge Saul Steil, Third Chamber of Civil Law. Judged on 2018.02.06

[6] As Minister Nancy Andrighi has already explained, "*The parallel question posed by the applicants, regarding the 'level' of humor practiced by the periodical, referred to as 'crude', is not a topic to be debated by the Judiciary, since it is not up to this organ to extend itself in critical analyzes on the talent of the humorists involved. Jurisdictional provision should be limited to saying whether or not there has been an offense to the moral rights of the persons involved in the publication. Therefore, it is not up to the Superior Court of Justice to say whether the humor is 'intelligent' or 'popular'. Such a classification, in itself, is abhorrent as it discriminates humorous activity not based on itself, but according to the audience that consumes it, leading to the belief that all cultural products intended for the less educated part of the population are necessarily pejorative , vulgar, or vile, if analyzed by people of 'higher' intellectual training. For that reason alone, they would already give rise to moral compensation when they involved one of these people, a category in which the applicants expressly include themselves in the initial application of the present case (page 05).*" Superior Court of Justice - Special Appeal n. 736.015/RJ, rapporteur Minister Nancy Andrighi, Third Panel. Published in the DJE on 2005.01.07

and using videos and sounds as a "base". Thus, it is possible to create a new video by modifying elements of the first and merging others into it.[7].

The most common deepfakes nowadays use images of faces, voices, speeches from a celebrity, public person, or politician.[8] Occasionally, such videos can violate rights relating to the personality of the person portrayed, as ruled by the Brazilian Civil Code. As the decision also highlights, in electoral cases, there is extensive jurisprudence on regular electoral propaganda and its limits, in order to avoid situations of defamation, slander, and damage. Notwithstanding, in addition to faces and elements of personality, deepfakes also utilize excerpts from television programs, video clips, soap operas, songs, concerts, or works protected by the Copyright Law.[9]

Accordingly, the precedent of the Superior Court of Justice provides grounds for the defense that deepfake videos with electoral purposes may contain parody from other works, if all legal requirements are respected and lawful. In other words, it may be understood from the recent decision that copyright holders who question such videos will not be successful before the Judiciary, as long as the criteria of article 47 has been respected.

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[7] Thanks to the high quality that such videos have achieved, deepfakes can confuse those who watch them, and thus are a dangerous tool for circulating false content and misinformation. For no other reason, there are already statements from social networks that intend to ban such videos from their platforms. Among them, Twitter announced, "it will start to label photos or videos that have been 'altered or manufactured in a significant and misleading way,' including deepfakes." According to the material accessible through the following link https://www.internetlab.org.br/pt/itens-semanario/twitter-plataforma-anuncia-medidas-para-combater-deepfakes/.

[8] BuzzFeed and the actor and comedian Jordan Peele teamed up to make the "public announcement" in which former President Barack Obama would appear speaking problematic phrases like, "President Trump is a total and complete deep shit." This deepfake has had great international repercussion and is accessible through the following link: https://www.youtube.com/watch?time_continue=1&v=cQ54GDm1eL0&feature=emb_logo.

[9] Among the most popular are the videos created by Bruno Sartori and published on his Instagram account @brunosarttori.