

Anomalous Brazilian state appeals court decision finds lack of reciprocity, denies protection to US software companies

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A 2-1 decision issued in May 2010 by a panel of the Appellate Court of the State of Minas Gerais (Appeal No. 1.0224.08.199736-3) refused to acknowledge Microsoft Corporation's and Autodesk Inc.'s rights in and to computer programs. According to the majority, Microsoft and Autodesk had failed to show that US copyright law grants Brazilian nationals and their work the same treatment afforded foreign nationals by the Brazilian Software Law.

Both Plaintiffs and Defendants had appealed the trial court's decision, which had found that Defendants had violated Plaintiffs' copyrights in the programs. The Plaintiffs had appealed alleging that the trial court had not awarded sufficient damages, while the Defendants had appealed alleging, among other things, lack of reciprocity under US copyright laws.

In order to afford foreigners domiciled abroad the same rights granted to Brazilians, the Brazilian Software Law specifically requires reciprocity, *i.e.*, that the foreign country give Brazilians domiciled in Brazil the same rights provided by Brazilian law. Judge Fabio Maia Viani, writing for the majority, found that Microsoft and Autodesk had failed to show the existence of such reciprocity under US law.

To establish reciprocity, Microsoft and Autodesk had filed a declaration from the US Copyright Office Attorney General stating that US copyright law affords Brazilian nationals and their work the same protection it affords authors in the US. Judge Viani found that the declaration was insufficient to prove reciprocity, however, given the Defendants' allegations that the Berne Convention had been superseded by a more recent treaty, the WIPO International Treaty on Copyright Law, to which the US was a party, but Brazil not. According to Judge Viani, the very core of the controversy was the existence of corresponding rights, which had to be determined through detailed analysis and comparison of US and Brazilian law, and Microsoft and Autodesk had not provided evidence sufficient for the comparison and analysis to be performed.

According to dissenting Judge Guilherme Luciano Baeta Nunes, however, the trial court had analyzed the reciprocity issue correctly. Judge Nunes pointed out that while Plaintiffs came forward with some credible evidence of the existence of reciprocity under US law, the Defendants had simply alleged, without any proof, a lack of reciprocity. In Judge Nunes words, "the United States of America, the country with the biggest production of software in the world, would not refuse to sign reciprocal law, as the companies located in the US would be the ones most harmed." Judge Nunes further observed that "the Brazilian legal system affords effective protection to copyrights, including computer programs, regardless of who the author is, national or foreigner, barring illegal copy or so-called piracy."

According to news reports, Microsoft and Autodesk have appealed this decision to the Superior Tribunal of Justice, the highest court in Brazil for non-constitutional issues.

Although the Appellate Court of the State of Minas Gerais is not bound by the decisions of higher courts, its decision is inconsistent with a prior decision of the Superior Tribunal of Justice, which has held that there is no need for foreign authors to show reciprocity of legislation from their countries of origin, as Brazil is a signatory of the Berne Convention, which specifically classifies computer programs as literary works enjoying protection internationally.

In fact, this decision is even inconsistent with prior decisions of different panels of the same Appellate Court. In 2000, a different panel of the Court, faced with the same arguments from Defendants concerning reciprocity in a case filed by Autodesk Inc., held unanimously that the sworn declaration from the US Copyright Office Attorney General was sufficient to show reciprocity. In 2008, a 2-1 majority also held the declaration from the US Copyright Office's Attorney General was sufficient to show reciprocity.

This decision appears to be an isolated holding which is inconsistent with the overall majority interpretation of the issue. Nonetheless, in the Brazilian legal system, the decision can be relied on by other courts.