

WHO OWNS THE COPYRIGHT IN PHOTOGRAPHS – THE PERSON TAKING THE PHOTOGRAPH OR THE PERSON IN THE PHOTOGRAPH?

By Geetha Kandiah, KASS International Sdn. Bhd., Malaysia

In a matter involving a photograph, a beauty queen, and rice packaging, our High Court in East Malaysia recently threw out a copyright infringement case on the basis that the party that initiated the suit had no *locus standi* (legal standing) to bring the suit to Court. The decision for this case was released on 25 February 2011 and revealed a number of interesting elements.

Let us visit the facts of this case. The Plaintiff, Sherinna Nur Elena Bt Abdullah was a beauty queen from 1992 up to 1994. She had won several beauty pageant titles in the state of Sabah, including the “Unduk Ngadau” beauty pageant which was organized during the Harvest Festival in 1992.

In November 2008, the Plaintiff discovered that a photograph that was taken of her during the Unduk Ngadau beauty pageant had been used on the packaging of products by Kent Well Edar Sdn Bhd (the Defendant), namely packages of rice, without her consent and without any compensation paid to her. The packages were displayed and sold in various retail shops, grocery stores, supermarkets and hypermarkets in the city of Kota Kinabalu, Sabah. The Defendant had also advertised the rice, with the packaging, on a large billboard in the city of Kota Kinabalu.

The Plaintiff’s grounds for bringing the action against the Defendant on their use of her image without her consent were multi-pronged. She claimed that the following rights were violated or infringed: (i) her rights to privacy (ii) her rights to the copyright as she is the rightful owner of the copyright of her own photograph and image and (iii) her rights to her personal and religious values and principles as she has since converted into a Muslim, no longer takes part in beauty pageants and now wears a headscarf as her daily religious practice. Based on the above grounds, the Plaintiff was demanding damages amounting to RM 1 million!

The Defendant, on their rebuttal, claimed that the Plaintiff has no *locus standi* to bring this case as the Plaintiff is NOT the copyright owner of the photograph that was used in the packaging of the Defendant’s products. It was argued that the copyright in the photograph was owned by the organisers of the Unduk Ngadau beauty pageant or the photographer who took them.

The Court considered the Defendant’s argument against the local statutes and found the Defendant’s arguments valid. It is trite law that ownership of copyright lies with the author of the artistic, literary or musical work. The Copyright Act 1987 in Malaysia has provisions to define the term “author” in relation to “photographs” and it states that “*the person by whom the arrangements for taking the photographs were undertaken*” is the author. Therefore, in this case, the author of the copyright is the photographer *and not the individual in the photograph*. As the Plaintiff was not the author and owner of the copyright, the Plaintiff had no right to bring the infringement action to Court.

In regard to the rights of privacy that the Plaintiff claimed, the Court found that there was no invasion of privacy on the Defendant’s part as the Defendant did not intrude onto private property and take the photographs without her consent. The photographs were taken many years ago in a beauty pageant at which the Plaintiff participated willingly. The beauty pageant was not a private affair on private property. In fact, evidence that was adduced by the Plaintiff herself showed the Court that the photographs taken at the pageant were published in the local newspapers and in a book published by the Sabah Tourism Board. As such, the photographs are in the public domain and the use of the same does not amount to invasion of privacy.

This case is certainly an eye opener for many politicians, celebrities, models and socialites in Malaysia who are constantly in the eye of the public. As Malaysia does not have any law on “image rights” and as photographs taken of the individual in a public place is owned by the photographer, Malaysians are unable to claim any ownership rights to the photograph and its various reproductions. For that reason, where there is an event (wedding, birthday party, beauty pageant, etc), individuals who are participating in such events should ensure that the copyright in the photographs taken is *limited* to use on products, merchandise and publications which are related to the event only. If further use is requested by the organiser of the event or the photographer, then the terms of the use can be negotiated (or in other words, you can demand for some monetary remuneration for the additional use). Be wise when exploiting your rights.

Geetha K. is the Director of Trademark and Industrial Designs Division of KASS International. She has extensive experience in handling all aspects of trademarks and designs in various industries, including pharmaceutical, food & beverage, property development, automotive and apparel industries, and manages local, regional and international portfolios. She has written articles for various IP and business publications and her comments on case law in Malaysia and Singapore have also been quoted locally and in publications abroad. If you have any queries or need more information, please visit www.kass.com.my or drop an e-mail to jpr@kass.com.my.