

Kluwer Copyright Blog

Pictures from the (Copyright) Front

Francisco Javier Cabrera Blázquez (European Audiovisual Observatory) · Tuesday, November 15th, 2011



On 6 September 2011, General Advocate Verica Trstenjak released her Opinion on case C-277/10 (the original German version of the Opinion is available [here](#), other language versions [here](#)). The case deals a.o. with the controversial *cessio legis* provision of the Austrian [Urheberrechtsgesetz](#) (Copyright Act - UrhG). According to this provision included in Art. 38(1) UrhG, the exploitation rights to commercially produced cinematographic works belong to the producer of the film with the exception of the restriction of § 39(4) UrhG (translation and adaptation of the work). With regard to the author's statutory remuneration rights, only 50% belong to him/her while the other 50% belong to the film producer, as long as these rights are waivable and the author has not agreed otherwise with the producer of the film.

The applicant in the main proceedings is screenwriter and principal director of the documentary film entitled "Fotos von der Front" ("Pictures from the front"), dealing with German war photography during the Second World War. The defendant is the producer of the film.

On 13 March 2008, the parties signed a contract providing that the applicant was the main screenwriter and director of the film, and that the defendant produced and exploited the film. The applicant granted the defendant all author and/or neighboring rights to this film. However, this granting of rights excluded the right of making available to the public on digital networks, as well as the right to broadcast through "Closed Circuit TV" and "Pay TV". The contract did not provide explicitly any rule regarding rights to remuneration, but prior to the conclusion of the contract, the applicant had transferred his rights to remuneration (especially the "blank tape remuneration" or *Leerkassettenvergütung* - 42b UrhG) to a collecting society.

The film had its première on 14 May 2009. It was broadcast on BRalpha on 7 September 2009 and is also available on DVD. The defendant also granted the VoD rights to Movieeurope.com. The defendant also made the trailer available on the Internet via YouTube and has also granted Pay TV rights to scandinavia.tv.

The applicant brought an action against the defendant before the *Handelsgericht Wien* (Market Court of Vienna). The applicant considered that the granting of rights made by the defendant constitutes a breach of contract and an infringement of his exploitation rights. He requested the court to confirm that he owned the right of making available as well as the Pay TV rights.

However, the defendant considered that, being the producer of the film, he held all the exclusive exploitation rights to it. According to the aforementioned *cessio legis* provision, the exclusive exploitation rights would belong to the defendant. Therefore the clauses provided in the contract would be void.

In this regard, the referring court observed that, according to the *cessio legis* provision, the exploitation rights belong to the film producer. The Austrian Supreme Court does not consider the *cessio legis* as a rebuttable presumption of transfer of rights, but as an original and direct transfer of rights to the producer of the film. On the basis of this interpretation, agreements contrary to this rule would be null and the *cessio legis* would not be revocable. The referring court doubted that this interpretation of the *cessio legis* provision is compatible with EU law.

With regard to statutory remuneration rights, the applicant asked the court to confirm that he was entitled to half of the compensation provided for by the Copyright Act, including the “blank tape remuneration”. However, the defendant contended that, as a producer, all rights to compensation under the Copyright Act belonged to him.

The referring court observed that, according to the second sentence of Art. 38(1) UrhG, 50% of the rights to remuneration belong to the producer and 50% to the author of the film, provided that the producer of the film had not agreed otherwise with the author. The court did not put into question the sharing of remuneration rights. However, the court doubted that this provision was compatible with EU law because it allows an agreement between the parties derogating from the remuneration rights of the author of the film.

For all these reasons, on 3 June 2010 the *Handelsgericht Wien* referred the case for a preliminary ruling to the CJEU (the questions referred are available [here](#)).

In her Opinion, General Advocate Verica Trstenjak proposed that the CJEU reply as follows:

1) The provisions of Art. 1(5) and Art. 2 of the SatCab Directive, combined with the provisions of Article 2(1) of the Term of Protection Directive, and Articles 2 and 3 of the InfoSoc Directive must be interpreted as meaning that the principal director is the author of the film within the meaning of these provisions and, therefore, he or she owns the rights of reproduction, satellite broadcasting and other communication to the public through the making available to the public.

2) However, under Article 14a, paragraphs 2, b) to d), and 3 of the Berne Convention, Member States have the option to include a provision transferring exclusively the exploitation rights to the film producer, provided that:

- the producer and the director of the film have signed a contract whereby the latter undertakes to bring his or her contributions to the making of the film;

- EU Member States ensure that the author of the film gets fair compensation within the meaning of Art. 17(1) of the Charter of Fundamental Rights of the European Union;
- national legislation allows for the conclusion of agreements reserving the exclusive exploitation rights or the exercise thereto to the principal director.

3) If Member States foresee a private copying exception concerning the reproduction right of the author of the film, they need to provide for fair compensation.

4) Articles 5(2)(b) and 2(a) of the InfoSoc Directive must be interpreted as precluding a national provision granting the author of the film only half of the amount due as fair compensation for the private copying of his or her work. However, a provision according to which a separate right to fair compensation is provided for the film producer is compatible with EU law.

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