Kluwer Copyright Blog

Newspaper articles not creative enough. An issue for the CJEU?

Martin Husovec (London School of Economics) · Tuesday, January 24th, 2012

On the first week of January, media and blogs extensively reported about a Slovak ruling of the Regional Court in Bratislava, which denied copyright protection on newspaper articles. In fact, the court assessed only three articles submitted as evidence, and of course, did not deny copyright protection in general. On the other hand, it quite strictly applied the classical Slovak, and formerly Czecho-Slovak, doctrine of originality. ECOPRESS v. STORIN is therefore a case about different originality standards and their testing.

The story. Publisher of the Economic Daily (Hospodárske Noviny), ECOPRESS, a.s., sued one of the biggest monitoring agencies, STORIN, for copyright infringement, claiming that defendant´s activities in course of monitoring amounted to unlawful reproduction of its articles. The second instance decision of Regional Court in Bratislava (October, 2011) is very brief on the copyright law issues. Actually, it only generally confirms the legal analysis of District Court Bratislava III. pronounced in the first instance decision (April, 2010), without providing any further substantial law assessments. The courts of both instances rejected existence of any copyright protection in submitted articles (see them: 1,2,3) and thus dismissed the action. Although, the decision is already legally binding, the plaintiff asked the Supreme Court for an appellate review, and also submitted petition to the Constitutional Court.

Both courts applied the classical Slovak copyright threshold of originality, by which a work has to be a 'unique outcome of a creative mind' of the author in order to be eligible for copyright protection. Although the courts recognized some creative effort in the submitted articles, they deemed them to be not creative enough to be original under this doctrine. The first instance court expressly quoted renowned copyright scholar Š. Luby and his work from 1962, as well as decision of Czech Supreme Court from 2007. One may question whether doctrinal criterion of 'unrepeatable individual result of creativity' wasn´t applied too strictly, but from the methodological point of view, the ruling, in this regard, is not that surprising. From the point of Union law however, it may raise several questions.

Firstly, I note that Slovak Copyright law defines the work merely as ' .. literary and other artistic work and scientific work that is the result of creative intellectual activity

of the author .. ' The requirement of 'uniqueness' is therefore only doctrine, which is in place since times of Czecho-Slovakia. Today, looking at judicial activism of the Court of Justice EU, it is however questionable, whether this national test for originality, is still compatible with notion of 'originality' as employed by the CJEU for works under Article 2(a) of Directive 2001/29. The Slovak judge of District Court Bratislava III, Ján Stanček, predominantly concentrated on assessment of "additional value" supplied by own text of said journalists, disregarding any creative effort in the choice and the combination of the included information or sources. After analyzing the submitted texts, he noted that articles are not the 'results of creativity of unrepeatable and unique nature, which would reflect author's personality' and thus fall outside copyright protection.

Infopaq I. C-5/08, BSA C-393/09 and Football Association Premier League C-403/08 expanded Union law concept of originality 6 to other works than photographs, databases and computer programs, which have their own directives. Newspapers articles are therefore undoubtedly 'works' under Article 2(a) of Directive 2001/29, for which the originality criterion shall be applied as a benchmark. As this concept is understood as autonomous concept of the Union law, the national doctrine, regardless of its long history, shall not apply. To me, 'unrepeatable individual result of creativity' seems to be stricter than mixture of BSA 393/09 (works in general) and Painer C-145/10 (photographs) arguments suggested by Advocate General in Football Dataco C-604/10 (databases) by saying: "In that regard, the Court has also stated that a work is an intellectual creation if it reflects the personality of its author, which is the case if the author was able to make free and creative choices in the production of the work. The Court has further specified that, in general, the necessary originality will be absent if the features of a work are predetermined by its technical function." In my opinion, it is likely that the CJEU would see enough free and creative choices in the production of works used in ECOPRESS v. STORIN, if it will be asked to issue an opinion. Maybe SAS Institute C-406/10 with its copyrightability of manual of a computer program under Art. 2(a) of Directive 2001/29 will highlight this problem soon.

As the case will be probably scrutinized on merits by the Supreme Court, the European Information Society Institute, a Slovak NGO, is filing for amicus curiae, pointing the Supreme Court to the CILFIT doctrine and explaining recent judicial harmonization by CJEU. Even if Supreme Court refers ECOPRESS v. STORIN case back to the lower instance, there is still another issue to be solved: what room does art. 4(3)(c) Directive 2001/29 provides to member states and to what extend is the national law after Infopaq, BSA and Football Association Premier League allowed to exclude some works from protection at all (because the decision also confusingly mentions copyright exclusion of 'daily news'). Plus, some questions from Infopaq II. C-302/10 might be also very relevant.

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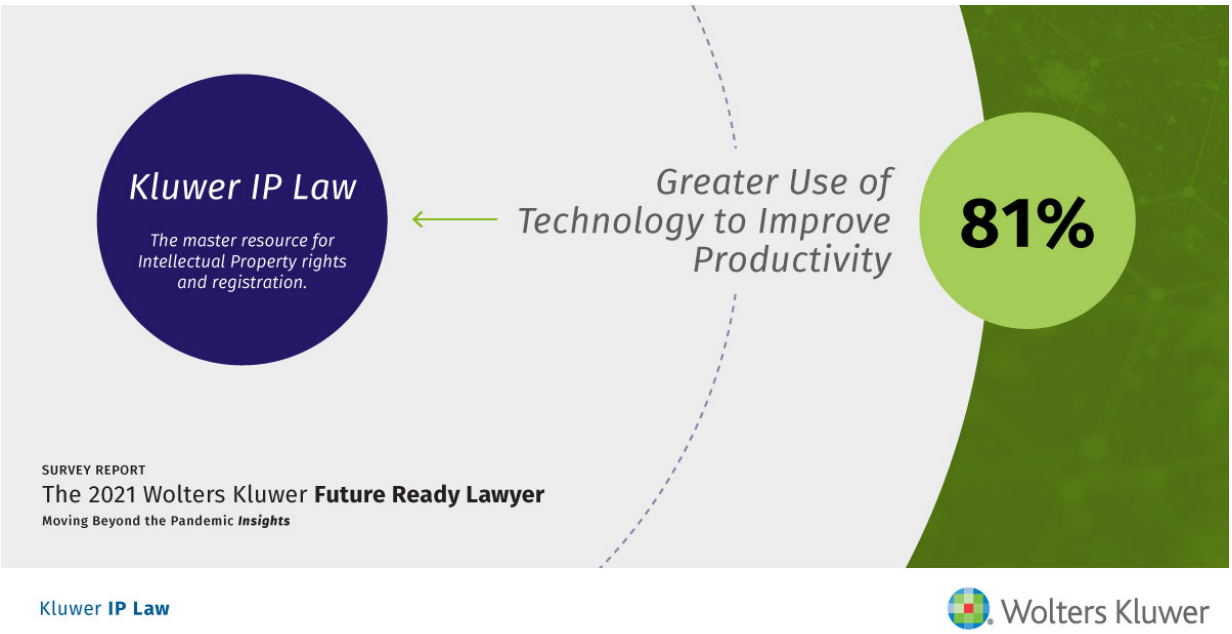

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