

Third Time Unlucky - the Polish Constitutional Tribunal Axes the Triple Licence Fee

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For quite a long time nothing special has been happening in Polish copyright law. Some court decisions here and there (in all fairness unlikely to be called ground-breaking) and some new legislative initiatives (that will be worthy of presenting if eventually passed). However, yesterday (June 23, 2015) the Polish Constitutional Tribunal issued a decision on the art. 79.1 (3 a) of the Polish Copyright Act, declaring the provision unconstitutional. Several facets of the case deserve wider attention and may be relevant in the context of the general discussion on the enforcement of copyright and the desired level of sanctions available in copyright law.

Polish law is very friendly towards copyright owners. It is true that the courts are not always the swiftest in delivering justice, but the severity of substantive copyright law almost compensates for this. Liability for copyright infringements is objective and fault may only affect the amount of damages the rightholder is entitled to pursue. Art. 79 of the Copyright Act, among a few other remedies, allows plaintiffs to demand damages (this in itself is of course nothing special) offering as an alternative to the traditional civil law concept of damages requiring evidence of actual losses or lost profits the payment of a reasonable licence fee (more specifically a remuneration that would be reasonable in the circumstances of the case). Again nothing special, one may say, but the law has a twist: if the infringement is innocent (i.e. without fault) the defendant should pay double licence fee, and if there was fault (in any form so even slight negligence suffices), triple licence fee should be paid. These rules have been in force since 1994, i.e. the year the current Copyright Act was enacted.

The most common argument in favour of privileging copyright owners this way focuses on the ease of infringing copyright and the need for copyright law to deter from infringements. If illegal users were only under obligation to pay the applicable licence fee, the argument goes, they would have no incentive to act legally. After all, it is probable they may not be caught, and even if they are, they would only have to pay what would have had to be paid anyway. The critics on the other hand have pointed out that the copyright solution is absolutely unique in the Polish legal system, departing from the generally accepted tenets of civil law. Double and triple licence fees, they reasoned, are in fact punitive damages in (loose) disguise. Interestingly, multiple licence fees cannot be claimed for infringements of other exclusive rights, e.g. patents or trademarks.

The unease about multiple licence fees previously shared mostly by some legal scholars has gradually taken hold with the judiciary. The most prominent example is the Supreme Court's decision of May 15, 2015 to refer a preliminary question to the CJEU. The Supreme Court wants to ask the European Court whether art. 79 of the Copyright Act is consistent with the Enforcement Directive (2004/48/EC). The question will be of course phrased differently (if it is not withdrawn because of what has just happened), but that is the general idea. This surely could, if the CJEU has a good day (these, unfortunately, seem to be rare in copyright cases), provide some insight as to whether European law sets some maximum standards with regard to sanctions for IP rights infringements and it should be mentioned that to my knowledge Poland is not the only member state with a 'multiplied remuneration'.

Before the CJEU has had the chance to satisfy the Polish Supreme Court's curiosity the problem of art. 79 has found a different solution. In Poland individuals (including companies) may lodge a constitutional complaint if they are of the opinion that a final court decision issued in their case has been based on an unconstitutional provision of law. In one of the disputes between the Polish Filmmakers Association (a collecting society) and UPC Poland (cable operator) the court ordered UPC to pay damages calculated according to the triple licence fee model described above. UPC challenged the constitutionality of the used legal ground and the Constitutional Tribunal in principle agreed. The detailed reasoning of the Tribunal has not been made available yet, but based on oral arguments the Tribunal considered the triple licence fee disproportionate. The judges seem to believe that the assumptions usually cited to defend the special calculation of damages in copyright law are outdated. The Tribunal finds that authors and rightholders are no longer "weaker parties" in copyright disputes and that the preventive role of multiplied licence fees is not indispensable in the light of comprehensive criminal sanctions for copyright infringements. Rightholders also have many other legal instruments at their disposal, such as information claims, so that difficulties in pursuing infringements have been substantially reduced. Probably written grounds of the decision will elaborate on how in the Tribunal's view the correct balance of interests should be attained and how far the legislator is allowed to go, but even the already revealed reasons give some food for thought.

One peculiar consequence of the Tribunal's ruling is that art. 79.1 (3 a) of the Copyright Act remains in force as regards the double fee for innocent infringements (in my opinion much more questionable than triple fee for intentional or negligent infringements), because this part of the provision was not covered by the complaint. Nevertheless, it would be hard to imagine any court ordering innocent infringers to pay double licence fees whereas those at fault would have to pay less.

The controversial multiple licence fee is therefore as good as dead. If one wanted to play with words, one could say that the third wheel of the Polish Copyright Act has been given as three-strikes-out approach already with the first blow, but the matter is actually serious. Despite many reservations about the regime of multiple licence fees, the Tribunal's arguments are not fully convincing. For example, if modestly effective remedies (like information claims) or excessive criminal sanctions (not benefiting rightholders directly and paid for by the state) are responsible for the demise of multiple licence fees, the trade-off may not seem to be such a good deal.