

Assignment of rights to exercise economic rights to works created under employment: A blessing in disguise?

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It's been almost two years since the Slovak legislator introduced an improved legal framework by adoption of a completely new Slovak Copyright Act. The main aim of the legislation was to introduce modern and flexible legal rules ensuring, on the one hand, that authors have more effective means to control the use of their works (e.g. new rules on rights management) and, on the other hand, that the overall copyright framework is more closely aligned with the requirements of the Internet economy (e.g. exceptions and limitations). Commentators have described their feelings about the new framework as mixed at the very least. In our opinion, not all is doomed and the new Copyright Act has managed to correct at least some of the flaws of the previous framework.

In particular, in the area of works created in the course of an employment relationship, the Slovak Copyright Act has reintroduced an interesting contractual tool enabling employers to transfer economic rights to works created under employment, by way of assignment of the right to exercise economic rights. This is interesting for several reasons. First, the Slovak copyright law is characterised by a dualist system of moral and economic rights, both of which are inalienable (non-transferable) and remain with the author throughout his lifetime. Second, the Slovak Republic has consistently followed the civil law tradition of author's rights

and the natural right strain by emphasising the importance of the author and by viewing works as extensions of the author's personality.

Admittedly, as in many civil law countries, in the area of works created under employment Slovakia too has developed an exception to the general rule pursuant to which the author is the first holder of any author's rights (owner of copyright). In this regard, at the core of the framework has always been a rule stipulating that the employer has the exclusive right to exercise any and all economic rights to works made under employment. European legislators should also be familiar with this exception as it mirrors the regime of the Software Directive under which where a computer program is created by an employee in the execution of her duties or following the instructions given by her employer, the employer shall be exclusively entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

In addition to the exception from the rule that moral and economic rights are always vested with the author, the previous legal framework contained a rule stipulating that the employer may only assign the right to exercise economic rights to others with the consent of the author-employee. Due to the way the rule was drafted (consent requirement), the employers could not reap the benefits of this tool to the fullest extent. For employers, the requirement to obtain consent caused problems on several fronts. For example, if the employer failed to include a clause in the employment agreement under which the employee grants consent to the right to assign the right to exercise economic rights, and at the time of the assignment the employee no longer worked with the employer or unreasonably withheld consent, the employer was blocked from exercising his right to assign. To address these situations, the Slovak legislator has reintroduced the rule by drafting the right without the requirement to obtain prior consent of the author-employee.

In our view, the ability to assign the right to exercise economic rights in a work to another person in countries that normally do not afford assignment or transfer of copyright is a useful contractual tool, not only for employers but also for businesses and individuals (as potential assignees) to which these employers provide services. For example, where assignment is possible, the parties do not have to spend valuable time and incur additional costs by negotiating an extensive licence agreement which in the end still implies reliance of the licensee on the licensor. Since by exercising the right to assign the employer completely forgoes the right to exercise economic rights to a work thus created and loses the ability to

license the work further, it assures the potential assignee that she will remain undisturbed in further licensing the right to use the work to others. In the end, it is the assignee who invested in the creation of a work by procuring services from the employer.

Another advantage of the new legal rules is that the new Copyright Act contains a legal presumption that where the employer exercises economic rights of the author-employee to a work created for the employer, the author is deemed to have consented to the exercise of some of her moral rights. These moral rights include, for example, the right of divulgation, the right of indication on the work of the name or business name of the employer and the right to completion, alteration or other interference with the work. In the absence of these rights, the author could theoretically object to the fact that the employer breached her moral rights by altering the work. Such objection would have a direct impact on the effectiveness of the right to exercise economic rights. With regard to moral rights, the new legal regime is not clear on whether the assignment of the right to exercise economic rights also covers the assignment of the above moral rights.

Understandably, the ability to exercise economic rights to works is in great demand, especially in creative and technology industries. This is all the more true in countries which do not provide a legal basis for a transfer of rights to works. In our view, the assignment of rights grants businesses which finance the development of works (such as software) a much stronger form of control over further exploitation of the final product, at least as compared to the position under a mere licence negotiated with the employer (as software developer). Despite the fact that the rule under which any author would be able to transfer his rights to others did not survive the legislative process leading to the final wording of the new Copyright Act, we welcome the compromise reached by the stakeholders, at least on the ability to assign the right to exercise economic rights for works created under employment. It remains to be seen whether the renewed rule opens the Pandora's Box of employee remuneration.