

Compensation for copyright infringement in the form of double remuneration is in accordance with the Constitution says the Polish Constitutional Tribunal

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Earlier this month, the Constitutional Tribunal of the Republic of Poland issued a long-awaited judgment on the assessment of constitutionality of Article 79(1)(3)(b) of the Copyright and Related Rights Act (judgment of 5 November 2019, reference no. P 14/19). This provision entitles the entity whose copyright has been infringed to demand from the infringer a payment equal to double the amount of the remuneration that would have been due as of the time of claiming it, in exchange for the rightholder's consent for the use of the work, without having to show the actual extent of the damage suffered. The Constitutional Tribunal did not find this provision to be contrary to the relevant provisions of the Polish Constitution^[1], despite the fact that in its previous judgment of 23 June 2015 (reference no. SK 32/14) it had found that a provision authorizing a claim of triple the amount of the relevant remuneration from a person who had culpably infringed copyright was not in accordance with the same provisions in the Polish Constitution.

Therefore, in the view of the Polish Constitutional Tribunal, compensation amounting to triple the amount of the relevant remuneration is unconstitutional, yet double compensation is not. Although the exact justification for the recent judgment is not yet known and will be discussed on this blog as soon as it is available, it seems from the oral grounds of the judgment that the Constitutional Tribunal justifies its current position by the need to protect the interests of entities whose rights have been violated and who might have difficulty in detecting infringements and proving the specific amount of damage suffered. It is interesting that in the 2015 judgment the Constitutional Tribunal made it clear that the perception of authors as the weaker party compared to infringers is currently not valid. This is because they are often represented in infringement cases by collective management organizations, i.e. entities that have sufficient resources and knowledge to enforce their rights.

Is it the end of the discussion?

The judgment ends a long and heated doctrinal discussion, but it certainly opens the door to polemics as to the legitimacy of such a decision, particularly in light of the civil law principles of claiming compensation. The recent judgment of the Constitutional Tribunal may be surprising in light of the cited judgment on the unconstitutionality of triple compensation, but it is in line with the earlier judgment of the Court of Justice of 25 January 2017 in case C-367/15 "Olawska Telewizja Kablowa" Association. In that case, the Court of Justice answered questions referred by the Polish Supreme Court for a preliminary ruling on the compatibility of the Polish provision providing the possibility to claim double compensation without the need to prove damage (Article 79(1)(3)(b) of the Copyright and Related Rights Act) with Article 13 of the Enforcement Directive (2004/48/EC). The Court of Justice did not find it contrary to EU law for a Member State to introduce an alternative way to seek compensation based on the necessity of demonstrating a causal link between the infringement and the damage suffered, in a form of lump sum compensation, not necessarily related to the damage. This judgment was also criticized in Polish scholarship on two main grounds. First, because it did not perceive remuneration as compensation for damage, but rather allowed courts to impose a form of penalty on the infringer. Second, because it failed to take into account the historical interpretation of Article 13 of the Enforcement Directive, where during the legislative procedure the idea of including the double compensation in Article 13 was rejected.

Good news only for right holders

The outcome of the judgment of the Constitutional Tribunal is certainly good news for right holders and their representatives. In the event of infringement of their rights, they can prove before the court the damages suffered. If that is not possible, or the damage actually suffered would be lower than the amount of double remuneration, they can alternatively claim compensation on a lump sum basis. Therefore, contrary to the general principles of civil law, the aforementioned provision gives the entitled person the possibility of seeking compensation for infringement that is greater than the real value of the damage. The choice of method of pursuing claims is left to the right holder.

[1] See Article 64(1) and (2) in conjunction with Article 31(3) in conjunction with Article 2 of the Constitution of the Republic of Poland