Kluwer Copyright Blog

Copyright Exceptions and Consumer Rights

Tomasz Targosz (Institute of Intellectual Property Law, Jagiellonian University Kraków) · Saturday, January 14th, 2012

One may sometimes get the impression that competition law and consumer protection law can shed new light on any other regulation of a legal system, no matter how well established. An interesting example of this trend has been provided by a recent decision of the Polish Court for the Protection of Competition and Consumers in a case concerning unfair contract terms applied by a library (judgment of December 9, 2011, XVII Amc 113/11).

It seems interesting to report it here because it combines several copyright related issues and may be generally relevant for contractual restrictions concerning copyright exceptions. Before going into the details, it is, however, necessary to set an outline of the Polish approach towards unfair contract terms.

Apart form usual civil law sanctions (i.e. that an unfair term will not be binding for consumers), Polish law goes further and introduces a special procedure which allows practically anyone applying to the Court for the Protection of Competition and Consumers (a specialised court hearing mostly competition law cases, for example appeals against antitrust decisions of the Office for the Protection of Competition and Consumers) to have a clause/term declared unfair (abusive). When such a decision becomes final, the contested unfair clause is entered into the public register of unfair terms. Using clauses declared unfair by the court is regarded as infringing upon collective consumer interests and apart from that fact that such clauses will not be binding, it may entail severe financial sanctions imposed by the President of the Office for Protection of Competition and Consumers.

It is in my opinion obvious that such a system may (and does) produce distorted results, especially because a contract clause may not always be correctly assessed on its own, but should be seen in the context of the whole contract. As it is not a copyright law problem, I will leave it aside. What, however, concerns copyright is that apparently clauses restricting copyright exceptions and limitations (or to put it more precisely, clauses making it difficult for consumers to enjoy these exceptions and limitations) may be declared unfair and thus in fact illegal.

In the case at hand the defendant (library) provided a copy point where it was possible to photocopy books. The terms and conditions of the copy point stipulated that users could only copy no more that one publishing sheet (usually app. 20-25 pages). Polish copyright law recognises the private copy exception and according to the prevailing view it is not limited as to the volume or

number of pages (in other words, even the copying of a whole book is not necessarily outside the scope of the exception). The private use exception does not require that one has to make the copy oneself – when one requests the person operating the copying machine to make a copy, it is still within the ambit of private use. The court has therefore found that a contract term denying users the possibility of making copies of larger parts of books unduly restricted their rights. Since the restriction was not mandated by copyright law, it was consequently not justified. This could have been the end, but the court hastened to add that it did not mean to say whole books could be copied without any restrictions.

How did it come to this conclusion? The answer is: by applying the three-step-test. In Poland the three-step-test has been repeated in art. 35 of the Copyright Act. It is therefore a 'normal' copyright law provision applicable among individuals and not just a guideline addressed at the legislator. In the court practice art. 35 CA is however rarely used and with good reason because the above presented example shows that this test, when applied not at the stage of creating copyright exceptions and limitations, but at the stage of applying statutory provisions on exceptions and limitation, successfully does away with most advantages a system of clear and exhaustive exceptions might have, while at the same time preserving all its faults. What we get is law which is not flexible and cannot accommodate new and often urgently needed cases of fair use, but which does not offer any legal certainty, either. Even if we think we are within the copyright exception as worded in the statute, we may not be sure because this exception is always filtered through a set of three vague and imprecise conditions that may limit it or even entirely exclude it in certain circumstances.

In the reported case the court must have found 20-25 pages too restrictive, but to copy a complete book would have gone too far. What is the right number, then? Half, one-third, some other method? Does it depend on whether the copied book is available to buy or out of print? Dozens of court cases would be needed to explain all these doubts and questions. This in my humble opinion proves that in a system of specified exceptions and limitations the three-step-test should only be applied when drafting them. There is no place for it in a copyright statute.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Saturday, January 14th, 2012 at 1:52 pm and is filed under Case Law, Landmark Cases, Limitations, Poland
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.