Kluwer Copyright Blog

Czech Supreme Court: Embedding is communication to the public

Martin Husovec (London School of Economics) · Tuesday, November 5th, 2013

In February this year, the Czech Supreme Court ruled that a mere posting of an embedded link that links to copyright-protected material, must be regarded as a communication to the public and therewith as a direct copyright infringement. The Court was either unaware of pending cases in Luxembourg, or too impatient to wait for the CJEU. Paradoxically, whatever the response of CJEU in BestWater C-348/13 will be, the Czech court cannot be said to be *wrong* with regard to the direct infringement issue.

A few weeks ago, the Czech Constitutional Court (III. ÚS 1768/13) rejected a constitutional complaint of a young man, who was found guilty of copyright infringement by all court instances, including the Czech Supreme Court. His criminal conduct consisted of operating a website and posting embedded links to pirated movies that were hosted elsewhere. Although the courts gave him a conditional prison sentence of 5 months, he will not have to serve it, as ex-president's Klaus's controversial mass amnesty annulled it. The young man will now most likely face "only" civil litigation from the right holders, who will try to collect the "damages" of two and half million unauthorized downloads, that he is said to have caused with the embedded links.

The Supreme Court (8 Tdo 137/2013) upheld the lower courts decisions, arguing that posting an embedded link amounts to a communication to the public of the linked to works. The Court relied solely on the most influential Czech copyright commentary, written by prof. Telec and dr. T?ma. Following their *opinion*, the Court concluded that embedded linking always equals a direct use of a work. Thus, the Court didn't take the context of EU-law or other, (conflicting) common arguments or practices of other Member States, into consideration. The court did not even think of the social and economic consequences that its decision might have.

This is even more striking if one realizes that the Court *wasn't* forced to even touch this controversial issue. From the facts of the case, it was clear that the young man would already be liable for intentionally aiding and abetting infringement of others, even if he didn't communicate the works to the public himself. He wouldn't be able to escape liability anyway.

But the Czech Supreme Court was ready to do even more, if needed. Similarly to the German Federal Supreme Court (BGH), that, in its earlier referral to CJEU, insinuated that embedding videos may be a yet "unnamed right of exploitation" within the scope of Art. 15(2) Copyright Act,

the Czech court noted that “unauthorized interference with the legally granted rights can be done by a whole set of different kinds of acts, therefore it is not possible to set a definition that would outline them, or to determine clearly how such acts are carried out”. Eventually, due to the classification as communication to the public, the Court refrained from “creating” new exploitation rights outside of the InfoSoc framework.

What remains is the question whether labeling the different uses of a work is becoming obsolete for the digital world. After all, the struggle that the CJEU seems to be having with *its own case-law* about ‘communication to the public right’ may give us certain clues (wait, did you just say that only *sometimes* there have to be a “new public” (§ 38, ITV) and that only *sometimes* the profit making nature matters (§ 88, SCF) – great test!), but all these doctrines on categories like distribution, copying, communication to the public are becoming rather useless, when national courts start to extend the existing catalog of rights, relying on slippery justifications of the individual case at hand.

After all, regardless of whether you side on embedded links with the ALAI or the European Copyright Society, one has to admit that the idea of clearly defined exclusive rights of an (online) author, is closer to a myth than a reality. And the most ironic is that, if the CJEU will take *any* of these two positions or some middle position, things might just get worse anyway, as a CJEU ruling won’t preempt national courts from adopting “unnamed rights” [1] and further fragmenting the landscape of exclusive rights in the EU.

[1] Explicit general clause of exploitation rights exists in § 12(5) of Czech, § 15(1) of German and § 18(2) of Slovak Copyright Act.

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