Kluwer Copyright Blog

Tank Man hits the Constitutional Court

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Regular readers of this blog will be familiar with an earlier decision by the Slovak Supreme Court about unauthorised use of a famous Tank Man picture in the Slovak media. The case has now hit the Slovak Constitutional Court, thus providing it with the first ever opportunity to discuss the interface of copyright and freedom of expression. And it is very interesting reading.

Some background first. In 1968, when Soviets invaded Czechoslovakia following the Prague Spring, the Tank Man picture was splashed across the front page of major newspapers globally. It was taken by a young photographer, Ladislav Bielik, and showed a bare-chested man in front of the occupiers' tank who was ready to be shot for his freedom (see above). Decades later, the Slovak courts had to decide whether a local tabloid newspaper – Nový ?as – could use the "Tank Man" picture repeatedly in 2003 and 2005 without permission and attribution when reporting on '68 events.

Heirs of Mr. Bielik's estate sued jointly for an infringement of their father's economic and moral rights to the picture, claiming 4000 EUR as a non-material satisfaction and asserting their right to information. The newspaper Nový ?as, the defendant, disputed that the "Tank Man" even has copyright protection, arguing that the photography constitutes "daily news", which is excluded from copyright protection. Secondly, the defendant argued that even if the photo is protected as a work of art, newspapers shall be free to use it based on the exception for news reporting (Section 35, Article 5(3)(c) of the InfoSoc Directive).

The newspaper has lost in all the instances, including the Supreme Court. The courts basically rejected all the arguments of the defendant. The photo does, in their opinion, constitute a protected work of art because it "provides a testimony" and its uniqueness comes from "capturing the immediate reaction of E.G. [person standing in front of the tank]" and showing his "expression of anger, despair and helplessness". The courts further rejected the applicability of the subject matter exclusion for daily news and of the news reporting exemption, arguing that photos, unlike news *per se* or public speeches, were not intended as a subject matter covered by this exemption. In the course of denouncing the behaviour of the defendant, the second instance court found not only that a wrong attribution constituted an infringement upon moral rights, but that the quality changes

made to the photograph and setting in which they appeared – a tabloid newspaper – also did .

The newspaper did not give up and decided to file a complaint with the Constitutional Court, arguing that these court decisions infringed upon its freedom of expression. Not very surprisingly, the newspaper lost again. This time, however, leaving behind interesting case-law on the interface of copyright and freedom of expression (II. ÚS 647/2014-22). The Constitutional Court, similarly to other courts, accepted that "since the author acquires the possibility of prohibiting third parties from sharing his work, his rights must be viewed as a general form of restriction on freedom of expression" (§ 30).

It then went on to examine whether the interference was "prescribed by the law", closely following copyright norm and its application in order to find out whether a) time-relevant norm was applied; b) the photograph falls under the subject matter; c) none of the exclusions, such as one for daily news, applies; d) the defendant acted within the scope of rights; and e) none of the exceptions and limitations, especially the exception for informing on current events, applies.

The Court explained the two-fold rationale of this step-by-step approach as follows: "If the ordinary court were to rely on a plausible interpretation in the step of legality, but the proportionality test would subsequently unveil the conflict of the result of such interpretation with the Constitution, the Constitutional Court could impose an interpretation of the copyright law that is more compliant with the Constitution. The detailed analysis of an interference on the level of legality therefore also serves the aim of identifying the possible points of leakage of the fundamental rights into the ordinary law of copyright, which could then accommodate the constitutionally conformational interpretation" (§ 27).

Having come to the conclusion that the interpretation of the Courts was plausible, the Court then turned to the proportionality exercise, i.e. whether an interference: a) pursues a legitimate aim, b) is necessary and c) proportionate in the strict sense.

The Court identified the legitimate interest in the copyright protection in Article 43 of the Constitution, which provides that "The rights to the results of creative intellectual activity are protected by law". Here is how it explained at length the meaning of the clause (§§ 43-45):

"The Constitution, in its Article 43(1), creates a framework for freedom of scientific research and freedom of art. Unlike foreign legislations, but also the federal Charter, the systematics of the Constitution clearly and progressively formulate a strong bond between protection of intellectual creations on one hand, and freedom of scientific research, freedom of art and right to cultural participation on the other. The Constitution thus binds the state to create certain material conditions for inventors and creations, in order to promote freedom of art and scientific research. It does so by lending them various rights to the results of their intellectual creations in the public interest. It is up to the state to decide how it will materialise this obligation. The copyright law is just one of the possible means. In any case, any provided protection is not the aim in itself, but only a means to achieve the societal goal of progress of science and art [..] If respecting the constitutional minimum of this protection, it is up to the legislator to determine the exact contours of rights to the results of intellectual creations. In the case of moral rights, as well as Article 43, it is important to also keep in mind the possible application of the author's interest in protection of his human dignity, honour, reputation and name according to Article 19(1) of the Constitution. [..] The Constitution, by means of Article 43, does not guarantee a possibility to benefit from any use of such creations [..] Article 43(2) of the Constitution limits the means of protection provided by guaranteeing the right of

public to access of its cultural heritage. The provision is a reflection of Article 27(1) of the Universal declaration on human rights, according to which everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The public interest is thus not only the reason for creation, but also a source of limitation of the protection provided to inventors and creators. The legislative formulation of this principle in the copyright law is time limitation of the rights of the author, their clear scope and also exceptions and limitations."

The Court then recognised that after a grant by legislator, the economic exclusive rights also enjoy protection as a form of property within the contours prescribed by the legislator (§ 45). The decision thus curiously coincides with similar ideas within the recent UN Special Rapporteur Farida Shaheed's report on copyright policy and the right to science and culture, which was, however, published several months after the decision of the Constitutional Court was decided, but not yet made public.

Looking at the Copyright Act, the Court noted that the exclusion for the daily news has its basis in the freedom of expression. "The aim is to exclude, from an exclusive right of a single person, the kind of objects, which by their nature, could unreasonably choke the public discussion", since "the freedom of expression here emanates into the ordinary law of copyright" (§ 35).

The Court also found the values of the freedom of expression behind the copyright limitation for reporting on current news. It held that "The Copyright Act limits, in favour of the freedom of expression, the rights of an author to object to the copyright relevant use of its photographs whenever society needs to inform about current events, provided that some other conditions are met. Since this provision is a point where the freedom of expression emanates into the copyright law, the interpretation used does not have to be in anyway restrictive, but on the contrary, must follow a societal aim, which it is supposed to serve" (§ 39).

After establishing that the interference was justified, the Court also examined whether it was necessary in the democratic society. It opined that an obligation to pay for use of the picture helps the author to secure his living because he does not need to rely on the support from "the powerful", but can freely exploit his creations on the market. In a situation where the right holder was willing to license it and there was no issue of time pressure, the freedom of informing about the events of 1968 will not be jeopardized by the fact that the newspapers need to secure a consent from the respective right holder before they use one of the iconic pictures of the happenings. Given that non-material satisfaction of 4000 EUR is not high and other obligations imposed by the court are not excessive, the interference was deemed proportionate and the complaint rejected as unfounded.

The Court also noted, however, that the interpretation of the second instance court, according to which moral rights could be infringed by mere inclusion in the tabloid newspaper, should be viewed critically. It stressed that: "Post-mortal protection of an author may not prevent any use of a work which the author would not wish to see. He can object only to those kind of uses of his work which have detrimental effect on his work objectively, and not only according to his subjective feeling. The extent of the post-mortal protection, and also means of its realisation have to be interpreted in light of the freedom of expression. Its aim should be to enable the widest possibility of an honest societal discourse". Given that the complainant infringed the rights already by not attributing the author, there was no need for the Court to step in.

The Court concluded by reminding that "In assessing the proportionality, it is important to also

take into account how the copyright law restricted the freedom of expression. An interference is of a different systematic intensity, if it occurs “only” by situational grant of constitutionally non-conforming remedies than in a case of repeated grant of protection over the object, which constitutionally unacceptably limits the freedom of expression in every circumstance. Multi-layered construction of the copyright law suitably allows the balancing of individual cases of constitutional unreasonableness on its several levels”. Thus hinting that if simple situational denial of remedies can help to satisfy the Constitutional guarantees of the freedom of expression, there is no need to put the entire subject matter into the question.

Only time will tell the value of this decision.

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