Kluwer Copyright Blog

Slovakia adopts a new Copyright Act: It's a Mixed Bag – Part I

Martin Husovec (London School of Economics) · Monday, February 29th, 2016

By Martin Husovec, Tilburg University and Matej Gera, CIPPM, Bournemouth University

Some will associate the year of 2016 with the year of the Fire Monkey or the monkey selfie. Not Slovak copyright scholars, whose government decided to engage in its own monkey business – an entirely new Copyright Act (Act No. 185/2015). Being the third already in Slovakia's 23-year long history, the expectations of the community were rather high. In this two-part blog we will summarise the most important substantive changes that will be of interest to international readers.

1. **Subject matter**

The new Copyright Act ("NCA") redefines the subject matter of copyright by inserting the word "unique" in the general definition of the protected work (Section 3(1) NCA). Only photographs (Section 3(1)(5)), computer programs (Section 87(1) NCA) and databases (Section 131) continue to require the "author's own intellectual creation" as a threshold. Although this change in the wording is only codifying existing case-law of the Supreme Court and closely follows the historical path of the EU's harmonisation, it is not necessarily in line with the latest, CJEU-led developments (*Infopaq* et seq.). The existence of a real conflict, however, depends on two things. First, how serious the CJEU is about the common originality threshold, and secondly, how far Slovak judges are willing to stretch the concept of "uniqueness" in the future.

2. **Exceptions and limitations**

The NCA substantially broadens exceptions and limitations. There is a lot to celebrate there. First of all, the legislator widens the exception for citation. Unlike its predecessor, which was based on the German model, there is no longer a requirement to incorporate the cited text in one's own work of art. Any published work or part thereof can now be used for the purposes of "review and criticism of this work" (Section 37 NCA). The only requirement is that a user does so "in compliance with the customs and provided that the extent can be justified by the purpose of citation". This novel form of citation exception thus arguably allows more generous treatment of the activity of researchers and journalists, such as data-mining, but also that of search engines. Moreover, the NCA also introduces a new exception for "caricature, parody and pastiche" (Section 38 NCA), which is, however, allowed only provided that the result does not "cause confusion with the original work". There are also some other important improvements with respect to exceptions for libraries, archives, schools and museums (Section 48 NCA), freedom of panorama (Section 41 NCA) and the research and teaching exemption (Section 44 NCA). Unfortunately, due to the less-than-optimal drafting technique (enumerating specific exclusive rights that are to be limited while

simultaneously allowing the existence of non-enumerated exclusive rights), certain exceptions might require some tricky interpretation by the courts in the future (Sections 44, 46, 47, 52 NCA).

The Slovak copyright law continues to take advantage of the possibility under EU law to provide exceptions for reprography (Section 43 NCA) and private copying (Section 42 NCA). The reprographic exemption still limits the reach of the exemption by disallowing copying of "an entire literary work or its substantial part", a musical work recorded in the written form and a graphical representation of an architectonic work (Section 43(2) NCA). The statute now explicitly incorporates the conclusions of the *ACI Adam* case and stresses that the reprography and private copying exceptions are applicable only if the source of the copy is lawful (Section 35(3) NCA). Since the EU framework requires that right-holders are fairly compensated for such uses (Art. 5.1(a) and (b) InfoSoc Directive 2001/29/EC), the NCA introduces its own system of compensation. The old Copyright Act already required importers, manufacturers and providers of reprographic services to pay levies for private copying or reprography. With the introduction of the new act, the system was amended, which triggered a wave of protest from the IT industry, claiming that the new, more broadly applicable levies will increase the prices of some electronics.

The system of payments is now more detailed and the rates are set in the separate annex to the NCA. The levies are again calculated as a percentage of a price of a unit. The table below contains an overview of the various levels of levies for private copying exception:

Private copying levies (Section 42 of the New Copyright Act)	
Data carriers (DVD, CD, Blu-ray, minidisk, magnetic tape, USB flash drive, memory card, hard disk drives – not attached to an electronic device)	6% of the import price of a carrier
Electronic devices capable of making copies on data carriers, including *inter alia* audio-video recorder, set-top box, gaming consoles, Smart TV, mp3 / mp4 recorder or other device with such capability	3% of the import price of a device
Mobile phones capable of making copies	0,7% of the import price of a device
Tablets capable of making copies	0,6% of the import price of a device
Computers capable of making copies	0,85% of the import price of a device
Camcorders capable of making copies	1% of the import price of a device
Cameras capable of making copies	0,35% of the import price of a device

The detailed categorisation and distinction between devices such as tablets, smart phones, personal computers or gaming consoles could be difficult to translate into practice. Although the differences in rates among phones, tablets and computers are less significant, the lines between these categories of devices are becoming increasingly blurry. The rise in popularity of tablets with desktop operating systems and "phablets" will make such delineation – without any clarification from the legislator – something to chew on for the courts and in practice for the years to come.

The inclusion of camcorders and cameras in the list of devices seems unnecessary at best. The CJEU has stressed on many occasions that the level of remuneration must be linked to the harm caused to the right-holders as a result of the introduction of the private copying exception (see e.g. *Padawan*, para 40 – 42). This approach was nuanced in the latest case-law of the CJEU, where the court acknowledged that even if the device is capable of certain functions, if these functions are rarely used by users, such a situation might not give rise to an obligation to pay fair compensation (*Copydan Båndkopi*, para. 28). Cameras appear to fit squarely within the group described by the CJEU in *Copydan Båndkopi*. Although digital cameras and camcorders have, in many cases, internal memory and are technically capable of making copies of works, it is clear that the overwhelming majority of users are not using these devices for such purposes. In the ordinary course of using the cameras, only user-created photographs and videos are stored in the memory of

the device. Users virtually never keep works of other right-holders on the device memory (e.g. they don't use it to listen to music or watch movies). Accordingly, no harm is caused to any right-holder other than the owner of the camera himself. It would have been advisable to exempt such devices from the obligation to pay remuneration under the *de minimis* rule.

3. **Collective management of rights – Establishment of Collective Management Organisations, "One-stop-shop" mechanism and control**

The rubric relating to collecting societies represents less enjoyable reading. In many cases, well-intended changes, such as extended collective licensing, turn into problematic provisions.

First of all and the worst of all, the existing Slovak collecting societies have managed to cement their own positions in the system. How else would you explain the fact that any new collecting society wishing to apply for an approval by the Ministry of Culture has to prove that it has reciprocal agreements with either (a) 10 foreign collecting societies, (b) 1000 foreign right holders or (c) 10 000 represented works. Surprisingly, however, there is *no* (in words: zero) requirement to represent a minimum number of domestic right owners (Section 148(3)). The European Information Society Institute (EISi), a think-tank, already issued an opinion and prepared a draft submission to the Constitutional Court (not yet filed) arguing that this requirement disproportionally limits authors' access to collective management of their own rights as well as generally limits competition between collecting societies.

Probably on the basis of the proposal of the same think-tank, the NCA now also includes a further novel mechanism – a so-called "one-stop-shop provision" (Section 174 NCA et seq.). This provision not only institutionalises the agreements between collecting societies concerning common collection of royalties from users, but also extends the binding effect of such existing agreements to non-participating collecting societies, provided that the existing agreements cover 2/3 of organisations (yes, you are reading right, the representativeness does not matter). This provision, as it was adopted by the legislator, offers numerous possibilities for future problems among collecting societies, so it remains to be seen how it will be applied in practice. It is unfortunate that the Ministry of Culture did not implement EISi's proposed mechanism, which would guarantee that collecting rights are always granted to the cheapest collecting society, although the legislator should be applauded for requiring that the cost-sharing cannot make the right holder worse off compared to the cost of his own collecting society (Section 174(2)(b) NCA).

Less applaudable, however, is the continued lack of proper control mechanisms even after the introduction of the NCA. Although the Ministry of Culture is granted some additional powers, they can usually only apply *ultima ratio* in situations where no collecting societies would go anyway (e.g. if the cost exceeds 100 % of the collected royalties in two consecutive years (yes, really!) – Section 153(2)(c) NCA). Another negative development is an attempt to water down the legal obligation of collecting societies to contract with users. According to the NCA, the collecting societies can refuse to grant rights "based on objective criteria, especially when the representation would violate the granted approval of the Ministry of Culture or concern non-existent exclusive rights to objects". Clearly, both of the aforementioned cases are instances when the collecting societies could not grant any rights even today. Despite this, the evil can be in the enumeration clause "especially". In practice, there is at least one pending case where a leading collecting society refused to conclude a collective licence agreement with a body representing users (the case is pending before a court and the European Commission).

In the second part of our blog (available here), we discuss further changes to collective licensing under the NCA.

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

This entry was posted on Monday, February 29th, 2016 at 10:14 am and is filed under Collective management, Exceptions, Infringement, Legislative process, Limitations, Remedies, Remuneration (equitable), Slovakia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.