Kluwer Copyright Blog

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

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This a continuation of our recent blogpost: "Slovakia adopts a new Copyright Act: It's a Mixed Bag – Part I". In the first part, we discussed the amended threshold for the protection of subject matter, exceptions and limitations and explained changes that have been made to the collective management of rights. The second part will be devoted to a detailed account of the new system of Extended Collective Licensing and its peculiarities. The post will conclude with an overall evaluation of the new Copyright Act (NCA).

1. Collective management of rights – Extended Collective Licensing

The biggest change by far under the NCA concerns extended collective licensing (*see* also Matej Gera, Extended collective licensing under the new Slovak Copyright Act, Journal of Intellectual Property Law & Practice 2016 11: 170-171). The Extended Collective Licensing (ECL) mechanism is gaining in popularity throughout Europe. More and more countries are introducing ECL into their copyright laws, addressing situations where it would be too cumbersome or even impossible to obtain authorisation directly from the particular right-holder. The term "extended" refers to the fact that the licensing mechanism applies to copyright holders who have not explicitly agreed to such use of their work or other protected subject-matter as well. Therefore, the authorisation is being provided by a designated authority – in most cases Collective Management Organisations (CMO). Under such a scheme, right-holders ordinarily have the option to opt out and to manage their rights themselves.

Before the introduction of the NCA, the Copyright Act did not contain an explicit reference to ECL. The disputes surrounding the correct application of the only provision appearing to provide a legal basis for ECL (Section 84 OCA, translation available here) were never settled and according to opinions of leading Slovak scholars (see Zuzana Adamová, Martin Husovec, 'Chapter 1. Copyright' (2014), pp. 34–90, in Vanhees, Blanpain & Colucci (Eds) IEL Intellectual Property (Kluwer Law International BV, The Netherlands)), it extended collective licensing to non-members only in the case of mere remuneration rights which were not subject to mandatory collective licensing (including two remuneration rights – the right of a performer, phonogram producer and audiovisual producer to equitable remuneration for a communication to the public, and the right of an audiovisual producer to remuneration for retransmission).

As of January 2016, with the new act coming into force, Sections 79 and 80 NCA now authorise CMOs to grant so-called "collective licences" to use works and other protected subject-matter

under the ECL scheme. A collective licence gives a user rights to use both works of authors and right-holders who are contractually represented by CMOs and those who are being represented by the extension of law. The licence can be granted for a maximum of one year, with automatic renewal every year (provided that the conditions for operation of the scheme are fulfilled and neither of the parties wishes to terminate the licence).

If a specific CMO wants to operate under the ECL provision, two conditions must be fulfilled: (a) it must represent the highest number of right-holders in a given sector from among all the CMOs active in Slovakia; and (b) this information must be recorded in the registry of the Ministry of Culture (so far, two CMOs – SOZA, managing rights in musical works and LITA, managing rights pertaining to literary works – are authorised to issue licences based on Section 79, according to the website of the Ministry). Details of the process – i.e. whether the recording of the information in the registry is automatic or the CMO has to actively ask to be designated as such – are not known.

Copyright holders who do not wish to be subjected to the ECL can opt out of the scheme at any time. Interestingly, right-holders are free to decide whether they wish to opt out with respect to their whole repertoire or only some of their works (or other protected subject-matter). In order to effectively opt out, the copyright owner must inform the CMO about his intention in written form. It is not clear from the statute what exactly is meant by "written form". In particular, it is unclear whether a simple e-mail could be used as a means to opt-out, or whether a more formal means of communication with the CMO is required.

The main stumbling block of the whole scheme is the range of possible uses under the ECL. While most of the enumerated uses are well-defined and moderate (Section 80a NCA – communication to the public or public performance of works via technical means in the premises of a business; Section 80c NCA – performance of literary works; Section 80d NCA – satellite broadcasting; Section 80e NCA – lending and rental; and Section 80g NCA – retransmission), Section 80f NCA is more troublesome. Section 80f NCA allows a CMO to simply grant a licence to make available copies of a work, which is particularly alarming, due to its unrestricted nature. Section 80f merely states that a "*collective management organisation can authorise the making available of copies of the work through an extended collective licence*" (the right to make available here corresponds to Art. 3(2) of the InfoSoc Directive 2001/29/EC). The words of the statute do not restrain possible uses under Section 80f and thus provide for authorisation to offer extended collective licences, unrestricted by purpose. The provision does not seem to be backed by any particular policy reasons, although the previous drafts of the act and the explanatory memorandum to the act indicate that Section 80f was meant to serve as a basis for digitisation in certain cases (the explanatory memorandum gives an example of digitising book covers in order to be used as thumbnails). Nevertheless, no such limitation is apparent from the text of section 80f and the explanatory memorandum has only limited impact on the interpretation of the law. This means that CMOs have a free hand in licensing uses under the rubric of making available.

Given the breadth of the provision, it could turn out to be a real issue for right-holders (not to mention its potential incompatibility with international law – see below). It is feasible that works could be licensed to be used on the Internet, based on Section 80f, without the knowledge of the right-holder. Such a critical weakening of the exclusive nature of the making available right begs numerous questions going beyond this blog post.

In addition, the above-mentioned problem further complicates the position of some special categories of work. Under the new act, out-of-commerce works can be licensed on the basis of

ECL. The act specifically mentions reproduction, making available and distribution of copies of out-of-commerce works (Section 80c). “Out-of-commerce” works are defined as commercially unavailable literary works (not applicable to second-hand purchases) which are listed in the registry of out-of-commerce works, maintained by the Slovak National Library (Section 12(1) NCA). In order for work to gain the status of out-of-commerce work, it must first be ascertained by the Slovak National Library whether the conditions for including the work in the registry are fulfilled (Section 12(4) NCA). It is, then, however, not clear how these special provisions on out-of-commerce works and the laxer “making available” ECL mechanism will interact. In theory, it would be possible to circumvent the obligations under the out-of-commerce provisions and ask “directly” for a licence under the pretence of section 80f, thus making the whole out-of-commerce system largely obsolete.

More importantly, this could also touch upon the special regime of orphan works, which are now harmonised under the Orphan Works Directive 2012/28/EU. On the one hand, the NCA contains an exception allowing the use of orphaned works (after a diligent search) by cultural institutions for certain non-commercial purposes, in line with the directive. On the other hand, the same provision as for out-of-commerce works applies. It seems that Section 80f makes it possible to license orphan works regardless of the other statutory obligations normally required under the orphan works exception and indeed would allow the commercial exploitation of orphaned works by anyone.

In light of the abovementioned alarming concerns regarding ECL of the “making available” right, a constitutional complaint claiming that the ECL mechanism in its present form is incompatible with some of the international copyright treaties – namely the Berne Convention, TRIPS and the WIPO Copyright Treaty – has been drawn up (see here). The main unease lies in the potential discordance with the three-step test (see *inter alia* Art. 13 TRIPS, Art. 10(1) WIPO Copyright Treaty). Because imposing an ECL on right-holders can be considered to be a limitation of their rights, such a measure must comply with the provisions of the three-step test. Particularly worrying in this context is the unrestricted nature of limitation. It raises a question as to whether such a provision, not backed by a specific public policy, can even be introduced into today’s copyright law. Likewise, the level of remuneration is a considerable factor. Although the outsiders are to be treated on equal terms with the other members of the CMO, they are not entitled to individual remuneration (i.e. if a right-holder disagrees with the remuneration provided, there is no mechanism to settle the amount of remuneration with the CMO individually). If the level of remuneration which the right-holder would be able to obtain by individual licensing differs significantly from the remuneration due based on the collective licence, this could indicate an unreasonable prejudice to the copyright owner.

Apart from the changes discussed above and in the first part of our blog post, the NCA brings numerous minor changes to licensing arrangements and enforcement of rights which we unfortunately could not address here.

2. Overall conclusions

The NCA brings with it major changes in some areas of Slovak copyright law, especially more detailed and extended exceptions and limitations, and completely revamped collective management of rights. What it lacks is a coherent vision of how a modern copyright law, living under the restraints of TRIPS and EU legislation, should really look. It is a mash-up of positive and negative changes, which were not always assessed in full. But to be frank, it is not purely the legislator’s

fault. Copyright has become such a complex area of regulation that small countries struggle to properly think through all of its aspects. The regulation is then anything but coherent in its approach. This, however, makes the decision of the legislator – to undertake a rushed local effort – even more grotesque. The result of a Slovak "reform" is a highly technical text which has twice as many Sections and a 55% increase in word count compared to its predecessor. Considering the fact that none of the novelties instituted by the NCA could not have been introduced by way of a simple amendment, it is a considerable waste of resources.

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