

The reproduction of copyright works for the benefit of blind and deaf-mute

Contents

Introduction

I. General scope of the exception

II. Beneficiaries and works subject to the exception

III. Rightholders' obligations

IV. Competent bodies' obligations

Conclusion

Introduction

Although the issue of exceptions and limitations in the EU seemed to have been settled after the enactment of the Information Society Directive (2001/29), this was not entirely so for a variety of reasons. The harmonization achieved was only a partial harmonization and it was the result of the compromise that led to an acceptable solution. First, the issue of exceptions was never truly harmonized since EU Member States could pick and chose from the list found in the Directive. Second, even if all Member States had all chosen the same exceptions (which was highly unlikely anyway), they could still differentiate in the manner implementing them: a) they could choose whether or not to make full use of the scope of each exception as this exception was enshrined in the Directive, b) they could filter or not the scope of each exception through the three-step test (there is, of course, a strong argument that the exceptions found in the EU Directive have already been filtered before their inclusion in it), and c) they could choose whether to make their exceptions obligatory or voluntary. The exception concerning impaired people (found in article 5(3)(b) of the Directive) is a characteristic example in this respect. EU Member States could choose whether or not to adopt this exception, to what extend to adopt it and whether or not to render it obligatory (if it was considered not to be obligatory in the first place).

I. General scope of the exception

The copyright exception for blind and deaf-mute was introduced into the Greek Copyright Act (as article 28A of Law 2121/1993)¹ for the first time in 2002 by article 81 of Law 3057/2002, which implemented into Greek copyright law the EU Directive 2001/29.² Until then, no such exception had existed in Greek law although there had been instances where publishers were asked, out of their own good will and not in compliance with some legal provision, to provide works to people with disabilities for free. This practice continued sporadically, especially in Universities, even after the introduction of the relevant provision in Greek law and in any case before the introduction of the Ministerial Decision implementing this provision (2007).

According to article 28A (of the Greek Copyright Act)³ *“The reproduction of the work is allowed for the benefit of blind and deaf-mute, for uses of a non-commercial nature, directly related to the disability and to the extent required by the specific disability. The conditions of application of this provision as well as the application of this provision to other categories of persons with disabilities may be determined by resolution of the Minister of Culture”*.

Article 28A sets out the general framework of the exception incorporating the three criteria found in article 5 paragraph 3 b of Directive 2001/29.⁴ In other words, the exception applies only to uses for the benefit of people with a disability. These uses should be a) of a non-commercial nature, b) directly related to the disability and c) to the extent required by the specific disability. Yet, the exception could not yet operate without the issuing of the resolution provided in the law. This resolution was enacted almost four years later (in 2007) in the form of a Ministerial Decision.

¹ Law 2121/1993 on Copyright, Related Rights and Cultural Matters (Official Gazette A 25 1993) <http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html>.

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ of the European Community L 167/10, 22.6.2001.

³ Entitled “Reproduction for the Benefit of Blind and Deaf-Mute” of Chapter IV on Limitations on the Economic Right of the Greek Copyright Law 2121/1993.

⁴ Article 5(3): “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: [...] (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”.

The exception in Greek copyright law for people with disabilities is rather limited compared to the one found in the EU Directive. The Greek provision makes express reference to blind and deaf-mute but it also allows the application of the provision to other categories of persons with disabilities. However, it only works as an exception to the reproduction right and not to the distribution right, the right of communication to the public or the right of making available to the public. This legislative solution was found under the circumstances appropriate since it was feared that any other solution would be too wide and would impinge on the rights of authors and rightholders. It was also perhaps taken into account that authors and publishers may come to agreements out of their own free will or consent to uses of their works by disabled people without the need of a statutory exception.

Article 28A provides for the general framework of the exception. However, in order for the exception to become operative and in compliance with Recital 43⁵ of the EU Directive, which provides that Member States adopt all necessary measures to facilitate access to works by persons suffering from a disability, in 2007 a Ministerial Decision by the then Minister of Culture was enacted.⁶

The Ministerial Decision defines the exact scope of the exception, sets out its conditions of application and most importantly makes the exception obligatory. In other words, the exception cannot be contracted out in agreements between the publisher and the author.

Up to then, there was no express provision in the law, case law or literature as to whether limitations in Greek law are obligatory or not with the exception of those expressly provided as such in the European Union Directives and implemented as such into Greek

⁵ Recital 43: “It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats”.

⁶ YPPO/DIOIK/98546 Reproduction of Copyrighted Work for the Benefit of the Blind and the Deaf-Mute and Extension of the Arrangement to other Categories of People with Disabilities (Official Gazette: B 2065/24.10.2007). For an English version of the Ministerial Decision see <http://web.opi.gr/opifiles/tyfloi/ya_98546_en.pdf>.

law. Views on this issue were divided not only in Greece but also abroad.⁷ The Ministerial Decision put an end to the discussion with regard to the particular exception in conformity with the public interests served by it.

II. Beneficiaries and works subject to the exception

The Ministerial Decision is neither limited nor too extensive when compared to the EU Directive. Beneficiaries are blind people, but also people with defective or impaired vision that cannot be improved with the use of corrective lenses to a degree satisfactory for reading. It also covers deaf-mute, but also, in general, people who, because of a disability, are unable to read a printed text in a conventional way or perceive the content of a work via their physical senses.

Dyslexic people or people with other disabilities are not covered.

Not all copyright works are covered by the exception. The exception only applies to literary works in as much as they cannot be perceived in their existing form by the beneficiaries. It does not apply to the source code of computer programs since at the time of its drafting no justifying reason was found as to why a person with disability needs to have access to the source code of a computer program and how this could facilitate his/her needs.

Beneficiaries cannot reproduce or adapt the works into appropriate formats themselves; only competent bodies can do it for them. According to the law, competent bodies are any non-profit organization, association, union or other pertinent organisation whose main mission is to provide specialised services related to the education and training of the beneficiaries. Thus, any kind of school for the beneficiaries provided for in the Ministerial Decision qualifies, as well as associations for the Blind such as The Lighthouse for the Blind of Greece, a non-profit association subsidised and overseen by

⁷ See I. Stamatoudi, “Can copyright limitations be limited by contract?” in ATRIP Congress (Association of Teachers and Researchers in Intellectual Property), Munich, 19 July 2008.

the Ministry of Health and Prevention.⁸ Tertiary education establishments, such as Universities, Polytechnics, Institutes of Technology and so on, are also included.

In case of doubt whether a body is entitled to reproduce works for the beneficiaries, the Hellenic Copyright Organisation (HCO), which is the Greek Copyright Office supervised by the Ministry of Culture and Tourism, makes the final decision; HCO maintains a list of all competent bodies in this respect.

Works can be reproduced in any form responding to the needs of the beneficiaries and always to the extent required by their disability. Some of these forms are provided for in the Ministerial Decision, such as Braille, Moon, Daisy or talking books. Forms have also been left open in order for the provision to be flexible to evolution be it technological or other.

III. Rightholders' obligations

It is publishers that have to provide the work. Publishers need to provide the work within thirty (30) days from the date of the competent body's request. In the event that there is a cost for the copy provided beneficiaries need to cover this cost, which, in any case, cannot exceed the reproduction cost of the copy. So, the issue of cost cannot be used as a pretext by the publisher to avoid providing the work or create an obstacle to the beneficiary to gain access to the work.

Publishers are obliged to deliver the work in electronic form on condition that the work is kept in electronic form. This means that if a publisher does not have a work in electronic form, s/he may provide it in some other form; it is up to the beneficiaries to change the format at their own expense respecting the rights of the authors and rightholders including authors' moral rights.

The Ministerial Decision provides for an indicative list of electronic forms as well as an indicative list of means of delivery from the publisher to the competent body.⁹

⁸ It was founded in 1946. It aims to support blind individuals, reduce the impact from the loss of sight and raise public and State awareness on the problems that they face.

Publishers need to deliver all textbooks of primary and secondary education as well as mandatory textbooks of tertiary education. They also need to deliver any other work, up to 10% of their annual publishing output excluding from such percentage any textbooks of primary, secondary or tertiary education.

In case publishers fail to comply with their obligations under the Ministerial Decision, the percentage of the works of their annual publishing production they are supposed to provide doubles.¹⁰

IV. Competent bodies' obligations

When the Ministerial Decision was drafted, fears were expressed that it might work as a vehicle for abusing the rights of authors and of rightholders. There were also fears that works provided to beneficiaries would leak to non-beneficiaries, especially by the use of electronic means including the Internet, and create a new source of piracy. This was so because certain formats of literary works used by disabled people compared to conventional formats had nothing different apart from an enlargement of their fonts. This meant that these works could easily be read or used by anyone irrespective of the existence of any disability.

These fears were dissolved by the introduction of a number of requirements and safeguards. According to these safeguards, competent bodies have to purchase one copy of the work they intend to reproduce, irrespective of the number of copies to be reproduced. They should not use reproduced copies for purposes other than those specified in the Ministerial Decision.¹¹ If competent bodies use third parties to reproduce the works competent bodies incur the principal's liability for any copyright infringements

⁹ E.g. extensible mark-up language, hypertext mark-up language, Microsoft word, American Standard Code for Information Interchange-ASCII, Portable Document Format-PDF. Delivery can take place by post, courier, e-mail, file transfer protocol-ftp or in any other form of electronic delivery (Article 6 paragraph 3 of the Ministerial Decision).

¹⁰ Article 6 paragraph 2 of the Ministerial Decision.

¹¹ Article 7 paragraph 6 of the Ministerial Decision: “[..]Any person making use of such a file for purposes other than those provided for in article 1 hereof shall be liable pursuant to articles 65 et seq. of Law 2121/1993”.

committed by these third parties. In any case, when one infringes, one incurs the sanctions provided for in the Greek Copyright Act.

Competent bodies also have to notify the publisher of the number of copies of the work they reproduced and of the form of such reproduction. They also need to inform HCO and the Association of Book Publishers so that they update their records in respect of the titles of works in electronic form held by each competent body and the particular form in which the works have been reproduced. This allows some control to be exercised over the reproduction and the use of works; it is helpful in terms of the collection of statistical data; and allows the system to be effective in that the same work is not reproduced twice if already available.

In case competent bodies change their purpose or dissolve, they need to destroy all electronic files in their possession and report such destruction both to HCO and to the Association of Book Publishers.

What is also of interest is the fact that it is the competent bodies that examine whether a beneficiary qualifies as such. In other words, it is the competent body which bears the responsibility for the application of the Ministerial Decision within its purpose.

Additional safeguards are also provided for the protection of authors and rightholders.

It is only legally published works that can be reproduced. Works that have not been published do not fall within the statutory exception. The reproduction cannot be for direct or indirect commercial uses and it always has to be directly related to the disability.

The exception does not apply to works that are already on the market in forms specifically designed for the needs of beneficiaries. This means that publishers can decide whether it is to their benefit to exploit a work themselves in this respect by putting it on the market and making it commercially available. However, publishers cannot invoke such intention to avoid providing the work. The law is clear that the work should already

be on the market for publishers to avoid such obligation. What is of interest is whether e-books or works that are available in electronic formats, which can be easily transformed in format or else manipulated by the use of simple software tools available on the operating software found in computers, fall within the category of works that publishers need to provide to beneficiaries. Such a case would be, for example, where the change in format would only consist in the enlarging of fonts and the change of colors or brightness on the screen. Although such a case has not emerged so far in Greece, it would be fair to say that, if a work meets the needs of a beneficiary as it is or in the form it may take by the simple use of his/her computer's operating system, then this beneficiary cannot and should not invoke the exception.

There are additional safeguards: Once the work is reproduced in the appropriate format, the reproduced copy has to mention the name of the author, the publisher and the date of first publication, provided such information is included in the work. This information should also appear on the physical carrier of the copy as well as the wording that the copy has been reproduced pursuant to article 28A of Law 2121/1993 and the Ministerial Decision and that any further reproduction in forms other than those defined in the Ministerial Decision constitute copyright infringement and incur the sanctions provided for in the Greek Copyright Act.

Lastly, the competent body has to respect author's rights while reproducing or using work within the boundaries of the exception. The work cannot be changed or altered (basically in the sense of infringing the right of integrity as this right is set out in the Greek Copyright Act for authors)¹² without the author's and the publisher's authorisation in relation to each one's respective rights. This provision, of course, is not intended for changes relating to layout and pagination, which are dictated by the need to convert the form of the work in order to serve the needs of the beneficiaries.

¹² Article 4 (1)(c) of Law 2121/1993: "The moral rights shall confer upon the author notably the following rights: [...]
c) to prohibit any distortion, mutilation or other modification of his work and any offence to the author due to the circumstances of the presentation of the work in public [...]"

In order to avoid delays in cases of non compliance with the Ministerial Decision, a speedy court procedure has been provided for, that is the procedure for injunctions found in the Greek Civil Procedure Code.¹³

Conclusion

The Ministerial Decision has been in force since the end of 2007.¹⁴

It tried to strike a balance between the actual needs of the impaired people and the legitimate rights of authors and publishers concerning the protection and exploitation of their copyrights. This was done within the limits set by the original provision found in the Greek Copyright Act, which, at the time of its drafting (namely when Greek law implemented the EU Directive), did not make full use of the potential provided by the relevant EU Directive.

Although at the outset of its drafting reservations were expressed as to whether it would work in practice and views were expressed in favour of maintaining the situation on a voluntary basis as the case was until before the enactment of the Ministerial Decision, the Decision has proven itself effective and served to the full the functions that it was originally set to serve without upsetting the market. It also clarified the legal nature of the exception by making it obligatory and stressing the important public policy reasons behind it. This was another issue, which was left open in the original copyright provision.

Today there are approximately 27.000 blind people in Greece. Just over a thousand of them are young people aged up to 18 years old. People with defective or impaired vision at a disability rate of 67% or more are approximately 80.000. However, only a small number of them, which makes use of this Ministerial Decision, study in tertiary education. Panteion University (a Greek University specialized on political sciences) alone has served approximately 50-100 people within the scope of the Ministerial Decision. 15 people have been served by the University of Macedonia in Thessaloniki

¹³ Articles 682seq. of the Greek Civil Procedure Code.

¹⁴ Numbers are updated until June 2011.

and 30 people by The Lighthouse for the Blind of Greece (an Association for the Blind in Greece). These are only some rough estimates produced so far which originate from institutions that have put in place the means and personnel to serve these people. In an informal inquiry, the institutions making use of the Ministerial Decision informed HCO that the help provided to people with disabilities -although the number in need of educational facilities is small- is immense; the Ministerial Decision has considerably facilitated the library and education services offered to them.

Unfortunately, we have no precise numbers for deaf-mute or people with similar disabilities affecting their reading of a work. We, however, estimate that these numbers are similar to the ones for blind.

At this stage, I should point out that it is up to the disabled person to ask from the University or Institution to provide the book or other work needed and not for the University or Institution to take the initiative by itself. So, works are requested only when there is real need for them, whilst duplicates are avoided: each institution knows exactly the works it requested and reproduced and keeps records in this respect. In this sense, the system is also cost effective.

Many Greek publishers have welcomed the Ministerial Decision; they thought that it did not place a considerable burden on them and it was indeed a social measure, which did not impinge on copyright's protective core. So far, there were no instances where publishers denied providing a book or expressed dissent. Fears for leaks of the reproduced works on the market and even more on the international market are rather limited since the number of impaired people in Greece is rather low and the Greek language is a barrier in itself for leaks of works abroad.

In a world where copyright becomes more and more stringent, in order to be able to recuperate the damage caused to the rights of authors and rightholders by piracy as well as serve the needs of competitive economies, exceptions can play -now more than ever- a considerably important balancing role between the rights of authors/rightholders and

those of society. This becomes even more relevant in our days given the discussions at the World Intellectual Property Organization (WIPO) regarding the adoption of an international instrument concerning the rights of the visually impaired persons. At the time of writing this, lobbying is still in progress and it is still not clear whether the flow in WIPO will be towards a draft Treaty or a Recommendation although it is very likely that the first option (that of a Treaty) will prevail.¹⁵

In any event, what is important is that each State puts in place a system it considers appropriate under the circumstances to serve in a balanced and controlled manner the needs of visually impaired people as well as of people with related disabilities. And that should be irrespective of any international obligation or recommendation.

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¹⁵ <<http://www.wipo.int/portal/index.html.en>>.