INTELLECTUAL PROPERTY - POLAND

The Witcher author uses 'bestseller clause' to request additional remuneration

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Introduction

At the beginning of October 2018, Andrzej Sapkowski, a well-known Polish writer and author of *The Witcher* fantasy saga, requested additional remuneration of at least Z60 million (approximately $16 million) from CD Projekt, a video game publisher. In 2007 CD Projekt had developed and released the first video game of a series entitled *The Witcher*. The game used characters and was inspired by stories that Sapkowski had created and its release was agreed by the parties.

When he signed the agreement, Sapkowski thought that the game would not be a success and demanded a flat fee rather than the proposed profits-based remuneration remuneration. Following the game's worldwide success, Sapkowski claimed under Article 44 of the Copyright Act that the remuneration granted to him was too low relative to the benefits derived from the exploitation of his work.

So-called 'bestseller clause'

According to Article 44 of the Copyright Act:

> *In the case of a gross disparity between the author's remuneration and the benefits of the acquirer of the author's economic rights or the licensee, the author may request their remuneration to be adequately increased by a court.*

This is a mandatory provision of law, which means that its applicability cannot be excluded or restricted by the parties' will.

The so-called 'bestseller clause' introduces a mechanism to safeguard authors' rights and ensure the equivalence of benefits assigned to the parties in agreements relating to copyrightable works. In order to apply the clause, it must be demonstrated that:

- the parties concluded a copyright assignment or license agreement;
- there is a disparity between the author's remuneration and the benefits of the party that exploits the work; and
- this disparity is glaring.

If conditions are met, the courts have the power to increase an author's remuneration accordingly.

According to jurisprudence, the notion of 'disparity' means an imbalance or disproportionality regardless of its size, and 'gross' in the context of Article 44 should be understood as undisputed disproportion – a difference that definitely goes beyond the acceptable contractual risk.

The bestseller clause is rarely applied in practice. There is no established interpretation in case law and few court judgments have been issued on this basis. For instance, in a recent Warsaw Court of Appeal judgment, the court stated that the mere market success of a work is insufficient to establish a gross disparity. Rather, there must be exceptional circumstances in which reasonable and fair evaluators consider that:

- an author's remuneration was manifestly too low; and
- if the parties had been aware of the disparity when they agreed the contract they would not have concluded it under the agreed conditions.

In addition, the decision found that the concept of gross disparity should not be judged solely by comparing the amounts of money obtained, but by considering all of the circumstances affecting the success of a work.(1)

Relevant facts

The agreements concluded between Sapkowski and CD Projekt have not been disclosed, so it is impossible to accurately assess the validity of Sapkowski's request. However, general conclusions can be drawn with regard to the publicly available facts – namely, when assessing the allegations made on the basis of Article 44 of the Copyright Act, it is necessary to consider several additional factors that affected the parties' cooperation as well as the measurable effect that the success of *The Witcher* video game has had on both parties.

Before *The Witcher* game was created by CD Projekt, another games studio had tried to create a similar computer game, but the project was unsuccessful. When negotiations with CD Projekt started, Sapkowski had the choice of a different method of remuneration based on the number of games sold and chose a lump sum, as he did not believe that the project would be successful. Therefore, the risk of creating the game and its release and potential failure, therefore, were the sole responsibility of CD Projekt.

The game's initial success in Poland could have been linked to Sapkowski's popularity. However, with regard to its global success, it was undoubtedly linked to the quality and playability of the game that CD Projekt's IT specialists, scriptwriters and designers had created, as well as the company's economic and promotional efforts.

The fact that the game's popularity has increased Sapkowski's recognition worldwide and affected the sale of his books also cannot be disregarded. Also, he decided to change the English title of his books from *The Hexer* to *The Witcher* following the undeniable success of CD Projekt's game worldwide. Therefore, Sapkowski indirectly profitted due to the popularity of *The Witcher* game.

Although the first edition of the game was based on the book's plot, the subsequent versions, which were commercially more successful, were based on stories developed by CD Projekt.

Practical consequences of judgment

The dispute, if examined by court, will provide an opportunity to test a provision that has yet to have a broad practical application. A court judgment might clarify a number of interpretative doubts relating to authors' rights to demand an increase of remuneration for the use of copyrightable works. If Sapkowski is successful, the judgment may encourage other authors to raise similar claims.

Doubts should be raised as to the application of the bestseller clause and additional remuneration granted to authors where the burden of promotion, expenditure and financial risk relating to the exploitation of a work rests solely with one party (CD Projekt in the present case).

Regardless of the dispute's outcome, it looks set to have a significant effect on the publishing, IT and household design industries.

For further information on this topic please contact Szymon Gogulski or Jacek Zwara at Soltysinski Kawecki & Szlezak by telephone (+48 22 608 7000) or email (szymon.gogulski@skslegal.pl or jacek.zwara@skslegal.pl). The Soltysinski Kawecki & Szlezak website can be accessed at

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Endnotes

(1) See Warsaw Court of Appeal judgment of 8 July 2016, I ACa 1432/15.
