

Question Q216A

National Group: Hungary

Title: **Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors**

Contributors: Dr. Gábor FALUDI and Dr. Gusztáv BACHER

Representative within Working Committee: Dr. Gábor FALUDI

Date: 10 March 2010

Questions

The purpose of Q216A is to explore exceptions to copyright protection resulting not from issues of eligibility/qualification for protection but from various exceptions, permitted uses or defences. As stated above, this purpose is of itself extremely broad ranging. As such, the work will be limited to a small number of the potential exceptions, permitted uses or defences.

Questions about specific exceptions or permitted uses existing in your country/region

1. *What exceptions or permitted uses apply in relation to the activities of an ISP or other intermediaries? Are there any limitations on those exceptions/uses, for example when the ISP is put on notice of unlawful content? Which types of service provider may benefit from such exceptions: would they, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?*

The exceptions and permitted uses are provided for in the Copyright Act (Act LXXVI of 1999 on Copyright, as amended), while limitation of liabilities of intermediary service providers as well as the rules on notice and take down (“**NTD**”) are provided for in the E-Commerce Act (Act CVIII of 2001, as amended).

Article 35(6) of the Copyright Act provides an exception regarding temporary reproductions that also covers some acts of intermediary ISPs. A temporary act of reproduction that is transient or incidental, and is an integral and essential part of a technological process with no independent economic significance, shall be free if its sole purpose is to enable a transmission in a network between third parties by an intermediary, or a use of the work authorized by the author or permitted as free use pursuant to the provisions of this Act.

As a result, transmission-driven reproduction (reproduction, if required for the transmission and some reproductions that are required to the caching (in fact: mirror-caching)) of the content by intermediary ISPs are regarded as free uses. Please note that search engines do

not reproduce works but merely provide assistance to reproductions made by the recipients of such services using the reproduction/link functions of the browser software.

If the acts carried out by an ISP exceed the limits of free use under Article 35(6) of the Copyright Act, the ISP is in principle fully liable for any IP infringement committed via its service. This liability is however limited for the benefit of intermediary service providers under the E-Commerce Act in accordance with the EU EC Directive (Directive 2000/31). The Hungarian solution reflects all rules of the EC Directive.

Intermediary service providers enjoy safe harbour as explained in the following.

'Intermediary service provider' means any provider of information society services that is engaged in

- the transmission of information supplied by the recipient of the service through a telecommunications network, or who provides access to a telecommunications network (**mere conduit** and network access);
- the transmission of information supplied by the recipient of the service in a telecommunications network, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request (**caching**);
- the storage of the information supplied by the recipient of the service (**hosting**);
- providing tools to the recipient of the service for the location of information (**location tool services** = search engines).

Under the basic provision ISPs shall be held liable for infringing content. Service providers shall be liable for any unlawful information they have made available.

Safe harbour cases are as follows:

Mere conduit (transmission)

The intermediary service providers that provide access (transmission) shall not be held liable for the information transmitted, on condition that the provider did not:

- a) initiate the transmission;
- b) select the receiver of the transmission; and
- c) select or modify the information contained in the transmission.

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted insofar as this takes place for the sole purpose of carrying out the transmission, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

The intermediary service providers that provide caching shall not be held liable for damages resulting from the automatic, intermediate and transient storage of the information transmitted on condition that:

- a) the provider did not modify the information;
- b) access to the stored information was provided in compliance with conditions on access to the information;
- c) the provider complies with rules on updating the information, specified in a manner widely recognized and used by industry;
- d) the intermediate storage did not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and
- e) the provider acted expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or any other authority has ordered such removal or disablement.

Hosting

Hosting intermediary service providers shall not be held liable for the information stored at the request of a recipient of the service, on condition that:

- a) the provider does not have actual knowledge of illegal activity in connection with the information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- b) the provider, upon obtaining knowledge or awareness of illegality under paragraph a) acts expeditiously to remove or to disable access to the information.

Search engine

Intermediary service providers maintaining a search engine shall not be held liable for damages resulting from allowing access to information via the search engine on the condition that:

- a) the provider does not have actual knowledge of illegal activity in connection with the information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- b) the provider, upon obtaining knowledge or awareness of illegality under paragraph a) acts expeditiously to remove or to disable access to the information.

Exception from liability limitation

An intermediary service provider shall not be relieved from liability when the recipient of the service is acting under the authority or the control of the provider.

Safe harbour limits

The limitation of liability of the intermediary service provider shall not affect the enforcement of the claim of the injured person stemming from the infringement before a court, including the requirement for the intermediary service provider (in addition to the infringer) to terminate or prevent an infringement. (Limitation of liability does not preclude an injunction!)

Connection between limitation of liability and NTD

The intermediary service providers that provide caching, hosting or search engine shall not be liable for any infringement or for the ensuing damages to third persons resulting from an information society service that consists of the transmission or storage of information provided by others with unlawful content, or the provision of access to such information, provided that the intermediary service provider carries out the measures specified under NTD rules (please see below).

No liability towards recipients of services in the event of take down or interruption of service

Intermediary service providers shall not be liable for any infringement resulting from the removal or disabling of access to information, provided that they have acted in accordance with the limitation of liability and NTD rules.

No monitoring obligation

Intermediary service providers shall not be required to monitor the contents of the information they transmit, store, or provide access to, nor shall they be required to actively seek facts or circumstances indicating illegal activity.

NTD in the E-Commerce Act

Any right holder whose rights relating to any works, performances, phonograms, broadcast program, audiovisual works or database under copyright and neighbouring rights protection, furthermore, whose exclusive rights conferred by trademark protection under the Act on the Protection of Trademarks and Geographical Indications are infringed upon by any information to which a service provider has given access - not including the standardized title of the information accessed¹ - shall be entitled to notify the hosting, caching, search engine providing intermediary service provider in a private deed with full probative force or in a publicly certified instrument for removing the information in question.

The notification shall contain:

- a) the subject-matter of the infringement and the facts supporting the infringement;
- b) the particulars necessary for the identification of the illegal information;
- c) the right holder's name, residence, address or registered office, phone number and email address.

(3) Where applicable, the right holder's authorization fixed in a private deed with full probative force or in a publicly certified instrument and issued to his representative for attending the "notice and take down" procedures shall also be attached with the notification.

Within twelve hours following receipt of the notification the service provider shall take the necessary measures for removing the information indicated in the notification, or for disabling access thereto, and shall concurrently inform in writing the recipient of the service who has provided the information that infringes upon the right holder's right (hereinafter referred to as "recipient of the service affected") within three working days, and shall indicate the right holder and the right holder's notice on the basis of which the information was taken down.

¹ To be understood as domain name.

The service provider shall refuse to comply with a notice requesting the removal of information or the disabling of access to it, if he has already taken the measures acting upon the notification of the same right holder or of its authorized representative, except where the removal of the information or the disabling of access to it was ordered by a court or other authority.

The recipient of the service affected can lodge an objection against the removal of the information contested in a private deed with full probative force or in a publicly certified instrument at the service provider within eight days of receipt of the notice. The objection shall contain:

a) the particulars for the identification of the information removed or to which access has been disabled, including the network address where it was previously hosted, and the particulars for the identification of the recipient of the service affected, as provided for in the E-Commerce Act for all content providers (Paragraphs a)-e) and g) of Article (4)(1) of E-Commerce Act);

b) a statement, including justification, declaring that the information provided by the recipient of the service did not infringe upon the rights of the right holder indicated in the notice.

Upon receipt of the objection the service provider shall proceed without delay to restore access to the information in question, and shall simultaneously send a copy of the objection to the right holder, except where the removal of the information or the disabling of access to it was ordered by a court or other authority.

If the recipient of the service affected acknowledges the infringement or fails to lodge an objection within the mandatory time limit, or lodges an objection but fails to contain the mandatory particulars, the service provider shall keep access to the illegal information disabled or shall keep it removed.

If the right holder moves to enforce his claim relating to an infringement to which the notice pertains by lodging a claim - within ten working days from the day of receipt of this notice - demanding that the infringement of rights be terminated and that the infringer be enjoined to cease any further infringement of rights, or makes a request for a payment warrant, or files criminal charges, the service provider shall take removal measures within twelve hours following receipt of the court's decision for ordering provisional measures, to maintain the removal of the information referred to in the notice or the disabling of access to it. The service provider shall send a copy of the court decision to the recipient of the service affected within one working day after the measures are taken.

The right holder shall inform the service provider of all final and conclusive resolutions rendered by the court, including the approval or rejection of any request for provisional measures. The service provider shall comply with the provisions contained in the final and conclusive resolutions without undue delay.

The right holder and the service provider affected may enter into a contract with respect to the application of the NTD procedure. In the contract the parties may not derogate from the provisions of law, however, they may agree on matters which are not regulated by law. The parties may install a contract clause to consider effective written communication the authentic copies of private documents they sent to or received from third parties, as well as any communication transmitted by way of electronic means if the addressee has acknowledged receipt also by way of electronic means, in which case the parties are required to acknowledge the receipt of electronic consignments from one another.

The service provider shall not be responsible for the success of the removal of information or the disabling of access to it if acting in good faith and in accordance with the NTD provisions.

Summary:

As it can be seen from the relevant provisions, the liability of intermediary service providers – on conditions as cited above - is limited to injunction, however if the service providers comply with the NTD in case of IP infringements, they may be exempted from all liabilities.

UGC hosting

We are not aware of any case law regarding the liability for copyright infringement committed on/via UGC sites. The Group's opinion is as follows: UGC sites include systematically ordered content that can be searched using various search tools. Therefore the content always qualifies as a database subject to sui generis protection (in EU IP law). Based on this and on the fact that the system of the content is offered and maintained by the ISP, the hosting of UGC always exceeds the limits of a pure hosting service that may enjoy liability limitation. In other words the ISP shall be regarded as the editor of the UGC, therefore it shall bear full liability for IP infringement. It is weightless from this aspect that ISPs enter into hosting service (subscription) agreements with recipients of UGC services and such agreements exclude all liability. Justice also requires this interpretation regardless. ISPs generate huge commercial revenues from UGC sites while using IP protected content.

To summarise: if the hosting service provider hosts UGC and makes such content available by creating a systematically ordered database that orders the content and includes supplementary information (related/similar content/top-rated content/most-viewed content etc.), and offers a forum for systematically ordered opinions/comments, this behaviour exceeds safe harbour limits.

2. *Do service or access providers have any obligation (in co-operation with intellectual property right owners or otherwise) to identify, notify or take remedial steps (including termination of access) in relation to their customers who infringe? Is the position different depending on whether the customer has only infringed once or has carried out repeated infringing activities? Do any such obligations affect the scope of the exceptions or permitted uses that apply to those service or access providers?*

No. The upper statutory limit of the obligations of intermediary service providers is to comply with the NTD. However, the agreements concluded with subscribers may include provisions under which the customers shall refrain from infringement.

3. *What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?*

The Copyright Act builds on the mandatory and optional exemptions in Article 5 of the Infosoc Directive. A system of broad free private and institutional (LAMS²) reproductions exists in the Hungarian Copyright Act.

Introduction

² Libraries, archives, museums, schools.

Free uses (exemptions) affecting works shall also apply to all subject-matter of neighbouring right protection (performances, sound recordings, RTV broadcasts, audiovisual works).

Natural persons

A copy of the work may be made by a natural person for private purposes if it is not intended for profit or increasing income even indirectly. This provision shall not apply to architectural works, engineering structures, software and databases operated by a computer device, or to the audio/visual recording of a public performance of a work. It shall not be allowed to reproduce sheet music by means of reprography.

Courtesy³ free use for publishers

A complete book as well as the whole of a periodical or daily may be copied even for private purpose only by handwriting or typing.

Exception from free reproduction of private persons

It shall not be considered as free use to have a work copied by someone else by means of a computer and/or on an electronic data carrier, even for private purposes.

LAMS free reproduction

Publicly accessible libraries, educational establishments, museums and archives as well as audio and audiovisual archives qualifying as public collections shall be allowed to make a copy of a work if it is not intended for profit or increasing income even indirectly and if

- a) the copy is required for scientific research or archiving,
- b) the copy is made for public library supply or for the purpose of a use provided for in Article 38(5)⁴,
- c) the copy is made of a minor part of a work made public or of an article published in a newspaper or periodical for internal purposes of the entity, or
- d) the copying is allowed by a separate law under certain conditions, in exceptional cases.⁵

Reproduction for school education purposes

Specific parts of a work published as a book as well as newspaper and periodical articles may be reproduced for the purposes of school education in a number corresponding to the number of pupils in a class, or for purposes of exams in public and higher education in a number necessary for the said purpose.

Ephemeral free reproduction and long term free storage of broadcast programs

Ephemeral recording of a work lawfully used by a radio or television organization for the broadcast of its own program if made by its own facilities shall be free. Unless otherwise provided by the contract authorizing the broadcasting of the work, the recording shall be destroyed or erased within **three months** counted from its making. Those recordings as

³ It is called "courtesy" in this report since this provision is a *lex imperfecta*.

⁴ Making available right for visitors of LAMS institutions.

⁵ Here is hinted at (referred to) the Act on National Audivisual Archives, and the beneficiary of this provision is this Archive.

specified in separate legislation may, however, be preserved for an **indefinite term** on the grounds of their **exceptional documentary character** in audiovisual and audio archives qualifying as public collections.

Compensation for free reproductions by blank media remuneration

The free uses mentioned above shall be without prejudice to the application of the provisions on blank media remuneration. In other words, right holders shall be compensated for the exceptions that derogate from the exclusive rights.

4. *Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?*

Please see our response to question 3.

5. *Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?*

A subchapter of the Copyright Act (please see the whole subchapter below) governs the compulsory licensing of the use of orphan works. An Implementation Regulation (Decree 100/2009. (V. 8.) Korm. of the Government) provides for the important details among others the terms of diligent search.

EU legal basis

The Hungarian legal solution is based on Recommendation 2006/585/EC 6 (a) and (c) of 24 August 2006 of the European Council on the digitalization and on-line availability of cultural materials and cultural preserve.

The term “orphan work”

A work is orphan if its author or the domicile of the author is unknown.

Compulsory license

The Hungarian Patent Office has the power to grant compulsory licenses in consideration of a fair license fee adapted to the mode and scope of the planned use to exploit orphan works if the user has taken all measures that can be generally expected under the given circumstances to search the right holder, and the search failed. The license is not an act under private law; it qualifies as an administrative decision. The procedure is subject to the provisions of the Act on the general rules of the administrative procedures with some deviations arising out of the nature of the matter.

The license is not exclusive, non-transferable, it is not possible to sub-license it, it does not authorize the user to transform the work, and is effective for a term of 5 years in the territory of Hungary only.

Condition of compulsory license- the diligent search

Terms of a diligent search are provided for in said Government Decree.

A diligent search comprises of:

- (a) searching the database edited upon the voluntary register of works of the Hungarian Patent Office, and in respect of the requested manner of use, searching the databases of the concerned collective management organizations registered in Hungary, searching databases

available on the Internet, searching databases suitable to find the residence of the authors and searching databases of collections concerning the type of work, available for the public;

(b) requesting information from the organizations performing the usual publication concerning the type of work, from persons performing a different use of the work, from other authors of the work who are known and can be found, as well as from the authorities performing official functions in connection with the type of work;

(c) advertising in national daily newspapers.

In case of a work that can be deemed not to have been first published in Hungary the diligent search measures shall also be taken in the country where the work was first published if it does not come up against disproportionate difficulties.

License fee

The license fee must be deposited with the Hungarian Patent Office in case of for profit uses. Non-profit uses are in fact licensed free of charge if the right holder is unknown or he cannot be located.

If the right holder emerges

In the opposite case the user has to pay the fee after the right holder emerges or can be located. If the right holder becomes known or can be located the license shall be withdrawn, but the bona fide use licensed can be continued until the term of the license expires but not longer than one year.

Transfer of deposited amounts

Deposited amounts shall be transferred after the expiry of five years to the respective CMS, or if the work/use is not subject to collective management, to the National Cultural Fund.

Extension of orphan works to orphan performances

The Implementation Regulation extended the scope of licensing of orphan works to that of orphan performances.

Exclusion of collective management

The whole orphan work/performance licensing does not apply if the license to be granted falls within the scope of collective management.

6. *What, if any, fair dealing/fair use provisions apply? Are there any examples of fair dealing/use provisions having a particular application to Library/search facilities such as Google Book Search?*

There is no general rule of fair dealing in the Hungarian Copyright Act. The exemptions are listed in a Chapter of the Act. Please see the responses above.

7. *How does the law in your country/region understand the requirement of international treaties that exceptions to copyright must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author?*

The Hungarian Copyright Act repeats the rule of the three step test as the introductory provision of the Chapter of Copyright Act on exemptions. Both the legislator and the courts can be deemed as addresses of the test. There is no court practice to corroborate this view but various opinions can be found in the legal literature. The Copyright Expert Council (operating at the Hungarian Patent Office) issued an opinion (17/200) that states that private copy from illegal sources infringes upon the three step test, therefore, it can not be regarded as an act falling under the exemption. The legislator made an attempt to solve the problem of private copies made (in fact usually downloaded) from illegal sources. Under a planned provision the reproduction shall not be regarded free if the beneficiary of the free use knows, or with the care that is generally attributable to him under the given circumstances would be expected to know, that the reproduction takes place from an illicit copy or from a work communicated unlawfully to the public. This amendment was refused by the Parliament. However the second provision that would serve the same objective was not touched upon by the MPs. Under this new enforcement provision, if the right holder wishes to enforce recovery of profit or damages claim with regard to illegal private reproductions, the remuneration paid must be taken into consideration (in fact: set-off against/deducted from the recovery of profit or damages).

8. *Are there any other exceptions or permitted uses which you consider particularly relevant to the hi-tech and digital sectors with regard to ISPs, digitisation and format shifting or orphan works?*

It is worth mentioning Article 38(5) of the Copyright Act, which offers a wide exemption for the benefit of LAMS institutions and their visitors/customers. This is the so called on the spot free access right:

In the absence of a contractual provision to the contrary, works forming part of the collection of LAMS institutions, as well as audio and/or audiovisual archives qualifying as public collections, may be, for the purpose of research or private study, **freely displayed to individual members of the public** on the screens of dedicated terminals on the premises of such establishments, and, in the interest of this, they may be - in a way and on conditions as provided for in separate legislation - communicated, including their making available, to such members of the public, provided that this is not for direct or indirect profit or increasing income.

It is essential that LAMS institutions are allowed to connect their networks. As a result a huge amount of dedicated networks may serve for free, on the spot access to protected subject matter of collections of LAMS institutions.

Your views

(a) *In your opinion, are the exceptions to copyright protection for (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and the fair dealing/fair use provisions that apply to Library/search facility applications in your country/region suitable to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sector?*

Yes, the said provisions express a proper balance. There is one potential future exception that is worth considering: the remote and controlled access to the protected subject matter of collections of the LAMS institutions via dedicated networks combined with a fair compensation right to be exercised by mandatory collective management.

(b) *Are these exceptions and permitted uses appropriate to the technology, understandable and realistic? Do they contribute to a situation where copyright is enforceable in practice?*

One has to face up to and reconcile with the fact that copyright is in transition. As long as the underlying paradigm of copyright protection does not change, the fight between the accelerated development of technology and enforcement/exercise of copyright remains. There is no other way than to proceed step by step in order to preserve an equilibrium that reflects the copyright paradigm.

(c) *What, if any, additional exceptions would you wish to see relevant to these areas?*

Please see our response in a) above.

(d) *Given the international nature of the hi-tech and digital fields, do you consider that an exhaustive list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright? Might you go further and say that there should be a prescribed list? If so, what would you include?*

We cannot imagine a full uniform copyright instrument on exceptions and limitations. We would like to recall the preparation of the review of the Berne Convention between 1967 and 1971 as well as the preparation of the WIPO Internet Treaties (1991-1996). There are fundamentally different approaches to exceptions and limitations (general fair use vs. a taxative list of free uses as well as the combination of the two approaches). The three step test as an umbrella above all solutions is the only possible way for "harmonisation".

Summary

The Hungarian Copyright Act is in full conformity with the Infosoc and E-Commerce Directives and provides for a wide range of exceptions and limitations adapted to the digital era. The E-Commerce Act reflects the safe harbour provided for in the E-Commerce Directive, and in addition introduced the NTD procedure in case of IP infringement. Compliance with the NTD rules results in full exemption of ISP-s. For the future it would be worth considering the introduction of the free remote access to the collections of LAMS institutions combined with a remuneration right to be exercised by mandatory collective management. We can not imagine a uniform system (list of cases) of free uses because of the historical and theoretical differences of copyright approaches.

Résumé

La loi Hongroise sur le droit d'auteur est en pleine conformité avec les directives Infosoc et E-Commerce et prévoit un éventail large des exceptions et des limitations adaptées à l'ère numérique. La loi sur le e-commerce reflète la sphère de sécurité prévue dans la directive e-commerce et même introduit la procédure de NTD en cas de violation de la propriété intellectuelle. Le respect des règles de NTD résulte l'exonération totale des fournisseurs d'accès à Internet. Pour l'avenir, il serait utile d'envisager l'introduction d'un accès à distance gratuit aux collections des institutions LAMS combiné avec un droit à rémunération exercé par une gestionnaire collective obligatoire. Nous ne pouvons pas imaginer un système uniforme (liste des cas) des utilisations gratuites en raison des différences historiques et théoriques des modèles d'auteur.

Zusammenfassung

Das ungarische Urheberrechtsgesetz entspricht vollständig den Infosoc und E-Commerce Richtlinien und enthält eine Fülle von Ausnahmen und Einschränkungen, die dem digitalen Zeitalter angepasst sind. Das E-Commerce Gesetz spiegelt den sicheren Hafen wieder, den die E-Commerce Richtlinie zur Verfügung stellt und führte zusätzlich das NTD-Verfahren im

Fälle der Verletzung von Immaterialgüterrechten ein. Die Einhaltung der NTD Regeln hat die vollumfängliche Befreiung der Internetdienstanbieter zur Folge. In der Zukunft wäre es sinnvoll, den kostenlosen Fernzugriff zu den Sammlungen der LAMS (Büchereien, Archive, Museen, Schulen) Institutionen einzuführen, kombiniert mit einem Recht auf Entgelt, welches durch eine obligatorische Kollektivverwaltung ausgeübt wird. Wegen den historischen und theoretischen Unterschieden in der Herangehensweise zum Urheberrecht können wir uns kein einheitliches System (Liste von Fällen) von kostenlosem Gebrauch vorstellen.