

Question Q 240

National Group: Hungary

Title: Exhaustion

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Questions

I. Current law and practice

The Groups are invited to answer the following questions under their national laws:

Right of distribution

1) Does the copyright law of your country recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT? If so, please cite the provisions which set forth the definition of the right of distribution and recognise such right.

The Hungarian Copyright Act (Act LXXVI of 1999 as amended, hereafter: CA) is in full harmony with WCT and all EU copyright directives where the implementation period expired. Therefore the CA includes provisions in § 23 and 23/A that include all modes of distribution:

transfer of property,
import,
public lending and rental:

Article 23

(1) The author shall have the exclusive right to distribute his work and to authorise others therefor. Making accessible to the public of the original copy or the reproduced copies of the work through putting into circulation or offering for putting into circulation shall be regarded as distribution.

(2) The distribution shall, in particular, imply the assignment of ownership and the rental of the copy of the work as well as the importation of the copy of the work into the country with the purpose of putting it into circulation. The possession of an infringing copy of a work for commercial purposes shall also be regarded as an infringement of the right of distribution if the possessor is aware of, or, with proper circumspection in the given case, should be aware of, the fact that the copy is the result of infringement.

(3) The right of distribution shall also extend to the lending to the public of single copies of the work. The authors of works included in phonograms may exercise this right in compliance with Article 78(2). The authors of cinematographic creations may also exercise this right only through collective management of rights. They may waive their remuneration with an effect following the date of the distribution only and to the extent of the amount due to them.

(4) Within the domain of architecture, applied art, and industrial design, the right of distribution through rental only pertains to plans and designs.

(5...) see below at Q2.

(6) If the right of rental relating to a cinematographic creation or a work included in a phonogram has been assigned by the author to the producer of the film or phonogram, or if the author authorises the producers in another manner to exercise this right, the author shall retain a claim to the producer of the film or phonogram for a fair remuneration regarding the distribution of the work through rental. This right may not be waived by the author; however, he may enforce his claim to remuneration only through a collecting society.

Exhaustion of copyright-protected works

2) *Does the copyright law of your country recognise the exhaustion of copyright-protected works after the first sale of the work with the authorisation of the author? Is it recognised by statutory law or case law?*

It is recognized in the CA:

§ 23 (5) CA:

"If the copy of the work has been put into circulation by the right holder or by another person expressly authorised therefor by the right holder through sale or the assignment of ownership in any other manner within the European Economic Area, the right of distribution, with the exception of the right of rental, lending and importation, shall further on be exhausted with regard to the copy of the work thus put into circulation."

3) *How does your law treat exhaustion of copyright-protected works? Specifically,*

a) *Does exhaustion of rights occur for all kinds of works or is exhaustion limited to certain kinds of works?*

Exhaustion applies to all kinds of works that can be incorporated into tangible property. The law provides for works in general.

In connection with on-line exhaustion (exhaustion in the case of downloaded copies of copyrightable works), we refer to our response to Question 7.

b) *Which right can be exhausted? Is it (a) the right of distribution, and/or (b) the right of reproduction, and/or (c) the right of lending and/or renting of copies?*

The right of transfer of property (assignment of ownership) within the broad term of distribution that covers other distribution acts as well (please see the answer to Q1.)

c) What are the requirements for exhaustion of rights to occur? What activities by right holders are required for exhaustion to apply? Are licensees/buyers required to take any positive steps for exhaustion to be applicable?

There are no specific requirements. The first sale shall occur with the authorization of the right holder and the exhaustion applies to the copies that were subject to the authorization.

d) If the right holder A distributes lawful copies made by A to people including B, B purchases a copy from A and sells it to C, and thereafter A cancels the sales agreement between A and B because of non-payment of the price by B to A, may A assert his/her copyright against C? May C rely on exhaustion of A's rights to the work (or the right of distribution)? In this connection, which party (A or C) will keep the right of ownership in the tangible copy?

We have no specific case law on this subject. However we are of the view that the exhaustion is an imperative rule, one of the most important limitations of copyright. Therefore the cancellation of the first sale agreement (on any legal ground) may not have any legal effect on the occurrence of exhaustion. There is an other issue namely what happens to the ownership of C) if the first sale agreement between A) and B) is cancelled or qualifies as null and void? In ordinary cases A) has a rei vindicationis claim. However the Hungarian Civil Code provides that in the course of trade the bona fide buyer obtains ownership even if the seller had no ownership right. As a consequence if C acquires the copies in the course of trade the copies may not be reclaimed even if the sale agreement between A) and B were null and void, let alone any other causes of termination/cancellation.

e) Are there any statutory exceptions to the exhaustion of rights, e.g. transformation of the work by the licensee/buyer prior to re-selling?

No. there are no such exceptions.

The so called resale right (in the Hungarian system droit de suite) can be regarded as a special limitation to "free" exhaustion, since the remuneration has to be paid by the merchant, auction house, museum (etc.) with regards to the further sales of pieces of visual arts, and the remuneration (as defined in the CA) shall be due to the author via mandatory collective management.

f) May the exhaustion of rights be waived contractually?

Here, again, we have to make speculative findings. The CA does not prohibit the waiver. Still we are of the view that the exhaustion is a mandatory, rather an imperative rule that ensures the free movement of goods on the Internal Market, the supremacy of the ownership on lawfully acquired tangible property over the distribution right of the author, and makes possible the trade in used books, sound recording, pieces of still protected visual arts, etc.

4) *What is the rationale/justification under your law for the exhaustion of rights?*

Please see our response to 3.f.

International exhaustion (specific issue 1)

5) *Does your law recognise international exhaustion of copyright? Specifically, if a copyright-protected work stored on a tangible medium (such as CD or DVD) which was lawfully made and distributed outside your jurisdiction is imported into and sold in your jurisdiction, may the holder of the copyright in your jurisdiction assert his/her copyright against such copy?*

No, if the work (the carrier of the work) was first sold with the consent of the right holder in the territory of the EEA. If the first sale as described in the previous sentence occurred outside the EU, the answer is yes..

6. *If your law recognises international exhaustion of rights, what is the rationale/justification under your law for such international exhaustion? On-line exhaustion (specific issue 2)*

Not relevant. The rationale of the regional exhaustion in our system is described above under 3(f.)

7. *Does your law recognise on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works? Under which conditions are which kind of rights in different kinds of copyright-protected works exhausted?*

Yes. We are not aware of such case law, on the other hand, Hungarian law is bound by the preliminary decisions of the EUCJ. Therefore the online exhaustion is acknowledged to that extent as it is acknowledged by the Usedsoft decision (described in the Working Guidelines) As a result the online exhaustion is strictly confined to softwares in cases that are analogous to the Usedsoft case.

8.) *Are rights exhausted in a perpetual or non-perpetual licence? Are "re-sellers" of digital copies allowed to further re-sell such digital copies under the circumstances described in UsedSoft v. Oracle? Can multi-user-licences be split up and sold separately?*

Please see our response to Q 7. In all cases, where the Usedsoft decision allows for the "exhaustion", the Hungarian practice has to follow the decision.

9) *Is a distinction made for each kind of copyright-protected work (computer programs, music files, e-books and videos)?*

Yes, positively. The Software Directive is *lex specialis*, as it was confirmed by the EUCJ in the Nintendo decision (C-355/12, para 23.). As a result no other types/categories of works are subject to the online exhaustion.

10) *If your exhaustion regime for digital works differs from that for analogue works what is the rationale/justification for such difference?*

The difference is made by the Usedsoft decision that qualifies a perpetual license as a sale agreement and provides for the deletion of the original copy in order to avoid unlawful reproduction that may not be subject to the exhaustion.

Exhaustion of copyright-protected works in case of recycling and repair of goods (specific issue 3)

11) In the case of recycling or repair of goods which are copyright-protected works, to what extent may one recycle or repair such goods without infringing (1) the right of reproduction, (2) the right of adaptation, the right of arrangement and/or other alteration rights; or (3) the right to integrity?

The Hungarian CA does not include special provisions for recycling or repair or even destruction of copyrighted works. As a result such acts are subject to the authorization of the right holder. However the court practice holds that the lawful rights of the owner of the tangible property may overrule those of the right holder of copyright if the owner does not abuse his/her ownership right. This court practice can be claimed clear in relation to architectural works and even to visual art works.

II. Policy considerations and proposals for improvements of the current law

*12) How should the law treat exhaustion of rights?
Specifically,*

a) Should exhaustion of rights occur for all kinds of works or should exhaustion be limited to certain kinds of works?

The Hungarian group is not in favour of any broadening of the scope of exhaustion. Therefore we do not have a proposal in this regard.

b) Which right(s) should be exhausted?

The right of transfer of ownership within the distribution right.

c) What should be the requirements for exhaustion of rights to occur?

Please see our responses on the existing legal solution.

d) Should copyright be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price or similar circumstance?

Yes. Please compare with our response to 3 d).

International exhaustion (specific issue 1)

13) Should there be international exhaustion of copyrights?

No. Not at all. The regional exhaustion has its own rationale in the principles of EU law. The international exhaustion goes too far. The right holders' lawful monopoly

would be eroded if he/she could not object to parallel import from markets, where prices are influenced by unknown factors. Even now the markets of 28 countries with various economies, process etc. constitute a territorial unit to give sufficient room for parallel import.

On-line exhaustion (specific issue 2)

14) Should there be on-line exhaustion of downloaded copies? In your view, are downloaded copies fully comparable with copies stored on tangible data media?

No, not at all. On-line exhaustion would simply deprive the copyright holder from the right to utilize their works. The first online sale's price would go extremely high, and piracy could not be sanctioned. One could never be sure whether the copy is an unlawful one or an "exhausted" one.

15) If there should be on-line exhaustion, under which conditions should different kinds of rights be exhausted? Should there be any differences between downloading a work and streaming it? Should rights be exhausted in a perpetual or non-perpetual licence? Should "re-sellers" of digital copies be allowed to further re-sell such digital copies? Should multi-user-licences be split up and sold separately?

Not relevant.

16) Should a distinction be made for each type of copyright-protected work (e.g. computer programs, music, books and films)?

Yes. Even now the software exhaustion under Usedsoft is not of a general nature. All the preconditions of the facts of the case have to be met. E.g. a non-perpetual license or a "rental" from the cloud can avoid the exhaustion. The software exhaustion is justified if a person (entity) wishes to sell his/her/its computer (laptop, notebook, tablet, mobile phone, etc.) with the programs downloaded lawfully on that computer. Also under the circumstances of the Usefsoft the exhaustion can be lawful, however we are convinced that the deletion of the original copy can not be controlled in all cases.

Exhaustion of copyright-protected works in case of recycling or repair of goods (specific issue 3)

Not relevant.

17) To what extent should one be able to recycle or repair goods which are copyrightable works without infringing (1) the right of reproduction, (2) the right of adaptation, arrangement and other alteration rights; and (3) the right to integrity?

Not relevant.

III. Proposals for harmonisation

18) *Should exhaustion of rights as set forth in Question 12 above generally be harmonised? Please provide your reasons.*

No. Please see our response to Q 13.

19) *Should international exhaustion of rights be harmonised or not? Please provide your reasons.*

No. Please see our response to Q 13.

20) *Should on-line exhaustion of rights be harmonised? Please provide your reasons.*

No.

21) *Should exhaustion of rights in case of recycling and repair of goods be harmonised? Please provide your reasons.*

No.

With regard to Questions 18 through 21, if you note that harmonisation is desirable, we will assume that harmonisation should be as your proposals for improvements of the current law as described in your answers to Questions 12 through 17. If that is not the case, please explain.

SUMMARY

The Hungarian Copyright Act is in full harmony with WCT and all EU copyright directives where the implementation period expired. Exhaustion applies for works in general: to all kinds of works that can be incorporated into tangible property. The online exhaustion is acknowledged to that extent as it is acknowledged by the Usedsoft decision of EUCJ.

The Hungarian group is not in favour of international exhaustion of copyrights. The regional exhaustion has its own rationale in the principles of EU law. The international exhaustion goes too far. The rightholders' lawful monopoly would be eroded if he/she could not object to parallel import from markets where prices are influenced by unknown factors.

The Hungarian group notes that the on-line exhaustion would simply deprive the copyright holder from the right to utilize their works. The first online sale's price would go extremely high, and piracy could not be sanctioned. One could never be sure whether the copy is an unlawful one or an "exhausted" one.

ZUSAMMENFASSUNG

Das ungarische Urhebergesetz wurde mit dem WCT und allen EU Urheberrichtlinien harmonisiert, sofern die Harmonisierungsfrist abgelaufen ist. Rechtsserschöpfung gilt für Werke im Allgemeinen: für alle Werksorten, die in Sachvermögen inkorporiert

werden können. Online Erschöpfung ist sofern angenommen, als sie im Usedsoft Urteil des EuGHs angenommen wird.

Die ungarische Gruppe ist nicht für die internationale Urheberrechtsererschöpfung. Die Begründung der regionalen Erschöpfung liegt an den Prinzipien von EU-Recht. Die internationale Urheberrechtsererschöpfung geht zu weit. Das legitime Monopolrecht der Rechtsinhaber wäre erodiert, könnte der Inhaber gegen den Parallelimport von Märkten mit durch unbekannte Umstände beeinflussten Preisen keinen Einspruch erheben.

Die ungarische Gruppe ist der Ansicht, die online Erschöpfung würde einfach der Urheberrechtseinhaber das Nutzungsrecht absprechen. Der erste online Verkaufspreis wäre zu hoch, Piraterie könnte nicht sanktioniert werden. Man könnte nie wissen, ob ein Exemplar unrechtmäßig bzw. „erschöpft“ ist.

RÉSUMÉ

La loi hongroise sur le droit d'auteur est en pleine harmonie avec le WCT et toutes les directives du droit d'auteur de l'Union Européenne où la période de mise en œuvre a expirée. Épuisement en droit d'auteur s'applique en général pour les travaux: pour tous les types de travaux qui peuvent être incorporés dans des biens corporels. L'épuisement en ligne est reconnu dans la mesure qu'il est reconnu par la décision Usedsoft de CJUE .

Le groupe hongrois n'est pas en faveur de l'épuisement international du droit d'auteur. L'épuisement régional dispose de son propre justification dans les principes du droit communautaire. L'épuisement international va trop loin. Le monopole légitime des titulaires des droits serait affaiblie si il / elle ne pourrait pas s'opposer à l'importation parallèle des marchés où les prix sont influencés par des facteurs inconnus.

Le groupe hongrois note que l'épuisement en ligne tout simplement priverait le titulaire du droit d'auteur du droit d'utiliser ses œuvres. Le prix de la première vente en ligne serait très élevé, et la piraterie ne pourrait pas être sanctionnée. On ne pourrait jamais être sûr si la copie est illégale ou «épuisée» .