Question Q216B

National Group: [Hungarian Group]

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

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Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions about specific exceptions or permitted uses existing in their national laws:

1. *What exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC)? Are there any limitations on those exceptions/uses, for example when the service provider is put on notice of unlawful content uploaded by internet users? Would they also apply to UGC sites which likely attract infringement? Which types of service provider may benefit from such exceptions: What content does your jurisdiction define as UGC? Would exceptions for UGC, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?*

UGC has no definition. In theory and practice one has to make distinction between UGC and UCC (user created content). UGC is a broader term. UGC includes UCC and foreign content or the adaptation thereof if generated by the user. If the UGC does not exceed UCC and the UCC is the own intellectual creation of the user then - as it is obvious - no copyright infringement occurs with the reproduction and making available of the UCC.

There are no special exceptions or permitted uses to be applied to service providers in relation to UGC. Ordinary safe harbour rules apply. The connection between Notice and Takedown (NTD) and safe harbour are identical regarding the intermediary online services provided in relation to all contents protected by copyright and trademark rights.

(Please see below the copy of our response given to Q 126 1.).

Intermediary service providers enjoy safe harbour.

'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).

In principle 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 accessed[1] - shall be entitled to notify the hosting, caching, search engine providing intermediary service provider in a private deed with full probative force or in an 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 holders' name, residence address or registered office, phone number and email address.

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.

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.

[1] To be understood as domain name

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 Subsection (1) of Section 4 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 adopted 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 rules in case of IP infringements, they may be exempted from all liabilities.

2. *What exceptions or permitted uses apply in relation to temporary acts of infringement? Do transient/temporary copies of electronic works, held for example in a cache or in a computer's working memory (RAM) amount to infringing copies?*

§ 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 § 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. Please see the safe harbour rules under 1) above.

3. *Is there a private copying exception? If so, what is its scope? Should copyright levies apply for private use? If so what uses should be subject to the levy?*

In sum:

In Hungary private copying of natural persons is free use. This free use (and some other free uses as well are compensated with a remuneration in accordance with Article 5.2.b), preambles 35 and 38 of the the Infosoc Directive.

As to the compensation:

The private reproduction (so called blank media) remuneration[2] serves to compensate some free reproductions[3]. The blank media remuneration shall compensate the harm caused by

[2] The Copyrigt Act provides also for reprography remuneration, but § 126/B deal with digital uses.
[3] § 35 (8) of the Copyright Act

private copying[4], LAMS (=Libraries, Archives, Museums, Schools) free internal reproductions[5], and broadcasters' ephemer free reproduction[6].

Authors, performers, phonogram producers and film producers are entitled to the blank media remuneration with regards to the broadcast, and other forms of communication to the public of their works and other protected content. [7]

The remuneration shall be determined and collected by the musical and literary collective management society (hereafter: CMS) in agreement with the other interested CMS.[8] The amount of remuneration shall be determined consistent with the TPM (=technological protection measure) employed for the protection of copyright and related rights of the works, performances, audiovisual creations or phonograms affected.

Manufacturers of blank video and audio media are obliged to pay the blank media remuneration to the musical and literary CMS within eight days of marketing or the date admission for storage for the purpose of distribution, whichever occurs earlier. In the event of foreign manufacturing, the person obliged to pay the customs duty or - if there is no customs payment obligation - the person importing the media together with the person placing it into commercial circulation for the first time is obliged to pay the blank media remuneration. within eight days following the completion of customs formalities or the date when placed into commercial circulation or upon payment of customs if there is a customs payment obligation. Payment of remuneration shall fall within the joint and several liability of all domestic distributors of the blank media in question.

Media used for export and professional uses (for equipment (e. g. studio equipment, dictaphones) that is not normally used for making private copies of the protected content as described above are exempted from the blank media remuneration. (The applicable Tariff Chart of the CMS responsible for the collection observes duly the Padawan decision[9] of the European Court of Justice and grants an exemption for not rewritable media that are exclusively used for professional purposes). There is a recent Hungarian court practice that took into consideration the Padawan case.[10]

The CMS responsible for the collection shall distribute the remuneration to the other interested CMS according to a quota provided for in the Copyright Act[11]. All CMS are obliged

[4] § 35 (1) of the Copyright Act,
[5] § 35 (4), 5) of the Copyright Act,
[6] § 35 (7) of the Copyright Act
[7] § 20 (1) of the Copyright Act
[8] Four CMS: those of performers, sound recording producers, film authors and producers, visual artists
[9] C-467/08 (http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docppoag=docppoag&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=Padawan&resmax=100)
[10] The Artisjus vs. Samsung case, where the Metropolitan Appellate Court held that Samsung shall be held liable to pay the private coy remuneration regarding the integrated memories of mobile phones and memory cards applicable in mobile phones (published under 2011/32 in. Itélőtáblai Határozatok.
[11] § 20 (4) (5) and (6) of the Copyright Act

to distribute the remuneration among their members and other represented right holders in accordance with their approved Distribution Schemes.

4. *Under what conditions do the hyperlinking or location tool services provided by search engines infringe copyright? Are there any exceptions or permitted uses relevant to this activity?*

Hyperlinking as such does not constitute a subject-matter of special legal regulation, and does not even emerges in the published Hungarian court practice. As a consequence the existing (traditional) Hungarian copyright rules shall apply when deciding whether hyperlinking constitutes use in the sense of the copyright law.

The Working Group is of the view based on jurisprudence and foreign court practice that the surface and deep hyperlinking per se do not amount to a copyright (IP right) infringement, since not the person that creates the link, but the user while using his internet browser conducts the act of reproduction of the protected content that is referred to by the hyperlink. Hyperlinking shall not be deemed as communication to the public, because the link does not contain copyrighted content itself, the link shows only the way to the content. It is true that the link ensures a broader audience but it cannot be considered as use in the meaning of the copyright act.

Looking at the other side of the coin the hyperlink as such can not be regarded as a free use under copyright, since

a) it is not listed among the free uses of the Copyright Act,

b) it can not be regarded as a citation/quotation since the preconditions of this case of the free use are missing. There is usually no citing (basic) work, the moral rights of the author of the content referred to in the hyperlink are not served and the extent of the protected work “cited” /referred to exceeds the permitted extent of an ordinary citation.

And it shall also be considered that only a use in terms of copyright can be qualified as free use. If there is no use in terms of copyright, the hyperlinking cannot be deemed as a free use

Thus the question whether the creation of a hyperlink constitutes reproduction and/or communication to the public of the protected content can be answered with a positive no in case of an ordinary surface or deep link.

The answer is however a positive yes, if the hyperlink is an embedded one or the link is created with framing. In such a case

a) the visitor of the website that applies the embedded link does not even know that he/she has been redirected to another website by the hyperlink, and

b) the foreign content is indirectly reproduced on the website of the person that applied the embedded link, and

c) the communication to the public shall fall within the responsibility of the person that applied the embedded link.

Those cases, where the right holder takes steps attributable to him under the given circumstances to exclude hyperlinking, should be treated differently. Such steps can

comprise of appropriate copyright notices or of technical measures that can prevent (embedded) hyperlinking (the manual creation of a hyperlink can not be prevented).

In case of existing and effective protective measures applied by the right owner of the content all hyperlinks can be regarded as unlawful.

As to the safe harbour enjoyed by search engines, please see our answer to Q1.

5. Are there any other exceptions or permitted uses which you consider particularly relevant to the digital environment (not previously studied in Q216 A)?

No.

II. Proposals for harmonization

The Groups are invited to put forward proposals for the adoption of harmonised rules. More specifically, the Groups are invited to answer the following questions without regard to their national laws:

6. *In your opinion, are the exceptions to copyright protection for (i) user-generated content, (ii) transient/temporary copies, (iii) private copying (taking into account any copyright levies) and (iv) hyperlinking 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 sectors?*

Yes, except for hyperlinking.

If we allow for the approach that a traditional hyperlink might be qualified as use in terms of copyright (that might be applied in some legal systems), a provision on the free use of traditional (surface or deep) hyperlinking save for the cases where the right holder excludes in a copyright note or TPM the hyperlinking,, would assist to hold the balance. However, if we start out from the qualification that the deep and surface link do not constitute any type of use in terms of copyright, it is not necessary (and even possible) to create a new free use provision. In this case the traditional copyright rules are sufficient to handle the questions concerning the links.

7. *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?*

Such exceptions and permitted uses mirror the international and European framework. If the presumed equilibrium that was created by the 1996 WIPO Internet treaties will be revised with due regards to the emergence of the web 2.0 services (filesharing, videosharing sites etc.), a refinement of the solution can be implemented. The phenomenon, that copyright is not enforceable shall be recognised by the international lawmakers. No national (restricted) solution can be found to the problem.

8. *What, if any, additional exceptions would you wish to see relevant to these areas?*

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9. 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?

Due to the diverging traditional approaches of the exceptions and limitations (free use vs. fair use or fair dealing) that is in turn a logical consequence of the genesis of the various copyright regimes we can not imagine at present any further harmonisation/ unification of the rule on exceptions and limitations. (Such an attempt proved to be unsuccessful at the 1967-71 review of the Berne Convention.)

Summary

There are no special exceptions or permitted uses to be applied to service providers in relation to UGC. Ordinary safe harbour rules apply.

IP (copyright and trademark) right holders may seek NTD under the E-Commerce Act. In the event of complying with the NTD the intermediary service providers shall also be exempted from the injunctive relief.

§ 35 (6) of the Copyright Act provides an exception regarding temporary reproductions in line with the Infosoc Directive (2001/29/EC Directive) that also covers some acts of intermediary ISPs.

Private copying of natural persons is free use. This free use (and some other free uses as well are compensated with a remuneration in accordance with Article 5.2.b), preambles 35 and 38 of the the Infosoc Directive.

Hyperlinking as such does not constitute a subject-matter of special legal regulation. The existing (traditional) Hungarian copyright rules shall apply when deciding whether hyperlinking constitutes use in the sense of the copyright law.

The surface and deep hyperlinking per se do not amount to a copyright (IP right) infringement.

The use in terms of copyright however takes place, if the hyperlink is an embedded one or the link is created with framing.

The exceptions and permitted uses mirror the international and European framework. If the presumed equilibrium that was created by the 1996 WIPO Internet treaties will be revised with due regards to the emergence of the web 2.0 services (filesharing, videosharing sites etc.), a refinement of the solution can be implemented. The phenomenon, that copyright is not enforceable shall be recognised by the international lawmakers.

Zusammenfassung

Im Zusammenhang mit dem von den Nutzern generierten Inhalt (user generated content - UGC) gibt es in Hinsicht auf die Internet-Dienstleister keine speziellen Ausnahmen oder genehmigten Nutzungen. Es sind die allgemeinen Vorschriften anzuwenden.

Die Inhaber geistiger Eigentumsrechte (Urheberrecht und Markenrecht) können aufgrund des Gesetzes über den elektronischen Geschäftsverkehr ein Mitteilungs- und Entfernungsverfahren verfolgen. In dem Fall, wenn der vermittelnde Dienstleister (Intermediär) dem Mitteilungs- und Entfernungsverfahren nachkommt, ist dieser von der Verantwortlichkeit befreit.

Der Abs. (6) des § 35 Urheberrechtsgesetzes formuliert im Einklang mit der Infosoc-Richtlinie (Richtlinie 2001/29/EG) eine Ausnahme im Zusammenhang mit zeitweiligen Vervielfältigungen, die auch die einzelnen Tätigkeiten der vermittelnden Dienstleister abdeckt.

Natürliche Personen können für private Zwecke eine Kopie eines Werkes anfertigen, diese Nutzung ist frei. Diese Art freier Nutzung (und auch andere freie Nutzungen) wird im Einklang mit dem Artikel 5.2.b), Präambeln 35 und 38 der Infosoc-Richtlinie durch einen Honoraranspruch kompensiert.

Hyperlinks sind nicht Gegenstand spezieller Rechtsvorschriften. Bei der Entscheidung, ob die Nutzung von Hyperlinks eine im Sinne des Urheberrechts verstandene Nutzung verwirklicht, sind die existierenden (konventionellen) ungarischen Regeln des Urheberrechts anzuwenden. Surface- und Deep-Links allein realisieren keine Verletzung von Urheberrecht (geistigem Eigentumsrecht).

Eine im Sinne des Urheberrechts verstandene Nutzung erfolgt jedoch dann, wenn der Hyperlink in Form eines eingebetteten Links oder mittels Rahmentechnik verwirklicht wird.

Die Ausnahmen und genehmigten Nutzungen widerspiegeln die internationalen und europäischen Rahmen. Wenn das angenommene Gleichgewicht, welches die WIPO-Verträge von 1996 schufen, unter Berücksichtigung der Erscheinung der Web-Dienstleistungen 2.0 (File-Verteiler-, Video-Verteiler-Seiten) überprüft wird, kann eine Vervollkommnung der Lösung erwartet werden. Das Phänomen, dass das Urheberrecht nicht geltend gemacht werden kann, muss auch von den internationalen Gesetzgebern erkannt werden.

Résumé

Au sujet des CGU il n’y pas d’exceptions spéciales ou d’utilisations autorisées pour les fournisseurs d’internet. Les prescriptions générales sont d’application.

Les détenteurs des droits de propriété intellectuelle (droits d’auteur et de marque) peuvent intenter un procès AD sur la base de la loi sur le commerce électronique. Si le fournisseur intermédiaire satisfait à la procédure AD, il sera déchargé de sa responsabilité.

Le 6e paragraphe de l'article 35 de la loi d'auteur, en conformité avec le principe directeur Infosoc (2001/29/EC), fournit une exception au sujet de la reproduction transitoire qui couvre aussi quelques activités des fournisseurs intermédiaires.

Des personnes physiques peuvent réaliser des copies à but privé, ce qui constitue une utilisation libre. L'utilisation libre de ce type (ainsi que d'autres utilisations libres) seront compensées par une rémunération en conformité avec l'article 5.2.b), préambules 35 et 38, de la Directive Infosoc.

Les hyperlinks ne font pas l'objet d'une législation spéciale. Les règles hongroises existantes (traditionnelles) de droit d'auteur sont d'application pour décider si l'emploi d'hyperlinks constitue une utilisation au sens de la loi d'auteur. Les hyperlinks superficiels et les hyperlinks profonds ne constituent pas en eux-mêmes une violation du droit d'auteur (de PI). Toutefois, une utilisation au sens du droit d'auteur a lieu, si l'hyperlink est un link incorporé ou s'il se réalise par la technique de l'encadrement.

Les exceptions et les utilisation permises reflètent les cadres internationaux et européens. Si l'équilibre présumé, créé par les conventions de l'OMPI sur l'internet, vient à être révisé du fait de l'apparition de services web 2.0 (pages web de partage de fichiers et de partage de vidéos), on pourra s'attendre au perfectionnement de cette solution. Le phénomène de l'impossibilité de faire valoir le droit d'auteur doit être reconnu aussi par les législateurs internationaux.

CGU = contenu généré par l'utilisateur

AD = avis et détachement

PI = propriété intellectuelle