LIABILITY OF INTERNET SERVICE PROVIDERS FOR COPYRIGHT INFRINGEMENTS UNDER THE NEW HUNGARIAN COPYRIGHT ACT

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1. The Copyright Act

The new Copyright Act (Act No LXXVI of 1999), hereinafter referred to as: CA) took effect on September 1, 1999. It was enacted in the wake of international commitments undertaken in the Berne and Rome Conventions, TRIPS (these commitments were already met in the previous Copyright Act) the 1996 WIPO Copyright Treaty (hereinafter referred to as: WCT) and the Performance and Phonogram Treaty (hereinafter referred to as: WPPT). The copyright directives and final drafts thereof of the EU also served as a basis for harmonization of the copyright provisions. The previous Copyright Act (Act III of 1969) had been continuously amended to meet certain new international requirements, the new CA goes farther by incorporating some provisions of WCT and WPPT, the five adopted EU copyright directives, and the one draft Directive, relating to the reproduction and communication to the public of copyrighted contents in the digital era. As a result, the CA reflects all international commitments except for the sui generis protection of the databases, in this area Hungary requested a two year postponement for purposes of observing the developments in the judicial practice of EU member states.

2. The International Commitments in Respect of the Use of Content Transmitted Over the Internet which is Protected by Copyright

WCT and WPPT define and interpret the type of use taking place within and via the internet as a series of temporary and permanent, direct or indirect reproductions and communications to the public (in respect of performances and phonograms: making available to the public).

2.1. *Reproduction Right*

The agreed statement attached to the relevant articles of WPPT (there was no need to create a new notion of reproduction in WCT, it was sufficient to interprete the term used by the Berne Convention) provides a clear explanation: "The reproduction rights (...) fully apply in the digital environment. (...) It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."

2.2. *Communication / Making Available to the Public*

The term “communication to the public” of works required an interpretation that would allow both perceptible and downloadable " transmissions" of works be included. The WCT provides that the traditional definition of communication to the public of copyrighted works includes the

making available to the public of such works in a manner that members of the public may access the works from a place and at a time individually chosen by them. The WPPT creates a similar exclusive right for performers and phonogram producers.

2.3. *Limitations and Exceptions*

At the time of the adoption of the WCT and WPPT in 1996, it was agreed, that limitations and exceptions to the existing and the newly created exclusive rights should be applied to the digital environment. On the one hand the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the WCT or the Berne Convention.

In addition, both the WCT and WPPT grant the contracting parties the freedom in their national legislation to provide new limitations of exceptions and to extend the existing ones in certain special cases where there is no conflict with a normal exploitation of the subject-matter of the protection and the legitimate interests of the rights owner are not unreasonably prejudiced.

3. Implementation of the WCT and WPPT in the CA

3.1. *Reproduction Right*

Article 18 of the CA is in full compliance with the broad notion of reproduction used in the pertinent international treaties. Examples supplement the statutory definition, which expressly mentions that a reproduction of the work shall include in particular (...) the storage of the work in a digital form on electronic devices, and the production in a tangible form of the work transmitted by the computer network.

3.2. *Communication / Making Available to the Public in the CA*

The WCT is reflected in CA Article 26 (8), under which authors enjoy the exclusive right to communicate their works to the public so that the members of the public can individually choose the place and time in which the work is made available. This is to mean that this exclusive right is to cover both perceptible and downloadable communications. An identical new exclusive right is granted to the performers under CA Article 73 (1) e), and to phonogram producers under CA Article 76 (1) c).

3.3. *Limitations and Exceptions Under the CA in the Digital Era*

The traditional, existing types of free uses (the term used in the CA for the limitations and exceptions) apply without any restriction to digital exploitations. The CA introduces a new category of free use with regards to temporary reproduction: if the temporary reproduction of a work is done with the exclusive purpose to permit the lawful use of the work authorized by the author or permitted by the statute, it falls within the scope of free use on the condition that the temporary reproduction is an integral part of the technological process designed to achieve such use and does not have any economic significance of its own. The members of the codification committee kept in mind the then available (1999 February) language of the draft EU directive on the applicability of copyright and related rights in the Information Society.

3.4. *Consequence*

At present it is clear, that all content providers are in principle liable for the content which they fix on their computer/server or which they cause to be fixed by an intermediary on the intermediary's server computer. Since at present there is no special statute regulating /limiting the liability of ISPs, the general rules of the CA apply. If the activity of the ISP exceeds in any way the temporary storage of the content, taking place as a part of a lawful use -- whether because such use was authorized by the rights owner, or by statute (free use) -- and such activity is an indispensable part of the technological process required for the lawful use, and has no independent economic significance whatsoever, then the ISP is liable without regard to the extent of its activity (hosting, or caching) or to its negligence. This so called "objective", non-negligent liability does not extend to damages in the financial sense, that is, damages are limited to the recovery of enrichment. (Other obvious remedies, such as injunctive relief are available. If the ISP acts negligently, the liability extends to damages as well. It goes without saying, that the mere access providers are not liable for the infringing content, since their activity does not qualify as a use in terms of copyright.

The future depends on the domestic and the European legislative results. The draft of a Uniform Telecommunication Act is in preparation. This legislation may regulate the activity and limit the liability of ISPs in line with other domestic laws of the European Union (e.g. Germany) or with the draft EU Directive on electronic commerce. If the new telecommunication law disregards the activity and liability of ISPs, and the EU Directive on Electronic Commerce as well as the Directive on Copyright and Related Rights in the Information Society will be adopted, Hungary's commitment to the EU under the Association Agreement will surely lead to the amendment of the Copyright Act with regard to free uses, and /or will result in legislation addressing the horizontal limitation of the liability of ISPs.

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