SOME NEW ELEMENTS OF CONSEQUENCES OF COPYRIGHT INFRINGEMENT UNDER THE NEW HUNGARIAN COPYRIGHT ACT

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1. INTERNATIONAL BACKGROUND OF THE SANCTIONS SYSTEM

Obviously, the international rapprochement of the sanctions of copyright infringements is unavoidable. The more opportunities become available for the transgression of frontiers of works and performances - in a material or immaterial form - the more warranted is the claim that the rights owner should enjoy a similar-level legal protection in case of the infringement of their rights. One of the most progressive consequences of the trade-related international regulation of the Trade Related Aspects of IP Rights (TRIPS) consists in the harmonization of the sanctions systems of the infringements.

1.1 The Berne Union Convention (BUC)

Although, as a rule, the role of TRIPS is stressed in the international unification of the sanctions of infringement, one shouldn't forget that the BUC, as incorporated into TRIPS too, contains certain sanctions

a) concerning the facilitation of the assertion of the rights of the rights owners (Art. 15, par. (1)), as well as

b) on the seizure of the work - and its copies - created as a result of such infringement (Art. 16). In order to prove the ownership of the copyright, the first provision a/ merely provides for the usual indication of the name (the protection is not conditioned on any kind of registration), while the second b/ provision leaves room for the national laws to enact any detailed rules on the seizure. In any case, the BUC's catalogue of minimum rights also includes provisions easing the enforcement of rights, yet the compliance with the BUC's provisions does not, by far, provide an efficient protection.

1.2. TRIPS : Agreement on Trade-related Aspects of Intellectual Property Rights

TRIPS devotes a separate chapter to the enforcement of intellectual property rights (TRIPS Part III).

It owes its wide acceptance and law-unification power to the fact - among others - that, apart from the national treatment (BUC Art. 5. par. 1. TRIPS Art. 3. par. 1.) it also provides for securing the most favored nation treatment (TRIPS Art. 4).

The Agreement builds up a whole system of law enforcement and sanctions (civil-law, penal law, customs law), besides imposing obligations on the member states to introduce national laws that mirror the TRIPS rules.

It provides for an efficient procedure, as well as sanctions preventing as well as deterring from further infringement in favor of the aggrieved party (TRIPS Art. 41).

From among the material consequences the following must be put into the limelight:

- a provisional measure - exceptionally even without hearing the other party - is possible (TRIPS Art. 50, par.. 1/a), par.-s 2 to 8),

- provision of information in connection with the the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution (TRIPS Art. 47),

- claim for damages and recovery of unjust enrichment (TRIPS Art. 45),

  - - border measures regarding infringing goods (TRIPS Art. 51-60, and

  - - criminal law sanctions including deterrent imprisonment, and fines (TRIPS Art. 61).

  As regards the procedure: if the aggrieved party claims evidence which is in the possession of the other party, the burden of proof may be reversed. And, where the adversary is in delay with the evidence, or refuses to produce such, it is possible to pass the decision on the strength of the available data. (TRIPS Art. 43.)

  On the other hand:

  - the sanctions shall be applied in a fair and equitable procedure (TRIPS Art. 41. par.. 2),

    - - the opposing parties have the right to be informed in due time in writing about the claims raised against each,

    - - they shall be given the opportunity to give the reasons for their position and for the submission of proper evidence (TRIPS Art. 42),

    - - in case of a provisional measure and border measures, they may claim a deposit covering their eventual damages (TRIPS Art. 50, par. 3., Art. 53.),

    - - if an injunction has been passed ex parte, such party shall be entitled to

      - - - legal remedy including the claim of being heard (TRIPS Art. 50. par.. 4), further

      - - - damages against the claimant in case of abuse of the right (TRIPS Art. 48.).

Even the former Copyright Act had been in harmony with the TRIPS provisions. Act XI of 1997 on the protection of trade marks and geographical indications had introduced the amendments which were in force as of July 1, 1997, which have been also included in the

new Copyright Act (hereinafter: C.A.) in the chapter on infringement of rights (please see in the attachment).

1.3. WCT and WPPT

Ratified by Parliament Decision No. 56/1998 (Sep. 29.), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) both include provisions that are mirrored in the C.A. WCT Art. 14 as well as WPPT Art. 23 provide general requirements as to the efficacy of the sanctions system. The identical contents of WCT Art. 11-12 and WPPT Art. 18 and 19 are incorporated into our national law (in Art. 95 C.A.) regarding protection against circumvention of technological measures. Further Art. 96 includes the protection of rights management information. Lastly, the respective criminal-law sanctions are included in our Criminal Code, Art. 329/B and Art. 329/C, as effective from March 1, 2000.

1.4. Community law sources

The European (Association) Agreement (Act I of 1994), in its Art. 65 provides for a similar level of protection of intellectual property rights as that afforded by the Community. This fact necessitated taking into consideration the European sources of law, when establishing the (national) provisions of authors' rights. The said article explicitly provides for the harmonization of the rules on enforcement of copyright. As regards the customs law sanctions one had to keep in mind Regulation No. 3295/94 EC of the Council. The now quoted Regulation prohibits the free distribution, exports and re-exports of the goods infringing copyright and neighboring rights and also provides for applicable border measures in respect of such goods. (The Regulation has been amended by Regulation No. 241/1999/EC, and broadens the scope of application, affecting industrial property subject-matters). The former Copyright Act by complying with the TRIPS provisions, and additionally the adoption of the Government regulation No. 128/1997 (July 24) on the border measures had satisfied the European requirements too.

Even articles 6 and 7 of Draft Directive on "the harmonization of certain aspects of authors'rights and neighboring rights in the information society are reflected in Art. 95 and 96. of the C.A. The said provisions correspond to the rules of the WIPO Treaties mentioned above under 1.2.2. Moreover they specify the latter inasmuch as they list all the types of economic rights in copyrights and neighboring rights known in the European laws where the enforcement of the protection is a must. (Among others such "additional" economic rights are: those stemming from the sui generis protection of the data bases and the neighboring rights of the broadcasting organizations in respect of on line communication to the public.) What cannot be called direct sources of law (in the language used in the Official Motivation of the C.A. they are indicated as "soft laws"), are the Recommendations of the Committee of Ministers of the Council of Europe. These relate partly to copyright piracy, partly to the protection of encrypted radio and television programs. However, the C.A.'s chapter dealing with the sanctions of the infringement and the penal provisions have kept in mind these recommendations too.

1.5. *Bilateral Agreement between the Government of the Hungarian Republic and the United States of America on Intellectual Property*

The Agreement quoted above had quasi projected in advance the requirements of TRIPS in the relation of the Contracting Parties. Concluded in 1993 and promulgated in the Official Gazette under No. 1993/173, the Agreement's substantive (and not the enforcement) rules had been introduced into our old copyright law already by Act VII of 1994. As to the requirements of enforcement, these are partly treated in a general way in Art. 1, and in particular in Art. VII of the Bilateral Agreement. In merits it fully tallies with the introductory part of the enforcement provisions of TRIPS, which are part of our national law.

2. THE SYSTEM OF SANCTIONS OF COPYRIGHT INFRINGEMENT IN THE VARIOUS BRANCHES OF LAW

The specification of the sanctions of copyright infringements has never been a simple task. Difficulties arise because of the parallel infringement of the rights attaching to the person (moral rights), the pertinent grave pecuniary harms, grievous acts involving the State's punitive power - which acts may also occur simultaneously. For instance, the Copyright Act of 1921 linked the civil-law and penal sanctions. In the given case the civil judge applied criminal and private-law sanctions. The option was in the hands of the aggrieved claimant, combined with the claim directed to the criminal-law punishment.

The former Copyright Act separated the private-law sanctions from the penal ones, making them independently enforceable. (The latter are included in the Criminal Code only since 1993.) Said separation has been maintained by the new C.A. The C.A. features the uniform civil law sanctions of the infringement of moral and economic rights. The Criminal Code establishes two types of penal law provisions in case of the infringement of authors' (and neighboring) rights (Crim.Code Art. 329, 329/A.) The former provision relates to all types of intellectual creations. Other two provisions regulate the corresponding penal sanctions of the newly introduced "infringements" as regulated in the Copyright Act (C.A. Art. 95, Criminal Code Art. 329/B; further C.A. Art. 96, Crim. Code 329/C.) Said sanctions are supplemented with customs law consequences which provide for border measures in case of the said infringements (Government Regulation No. 128/1997. VII.24.).

In writing - regarding the purpose of the paper - I focused on the following brand new elements of the sanctions system:

- protection of technological measures,

- rights management information.

At the same time I was compelled to neglect such highly interesting topics, like e.g. provisional measures, damages for moral damage, claim to information in respect of circulation of infringing goods, and enforcement of claims of copyright societies in respect of fair and equitable remuneration, relation between the claim to licensing fee and to recover unjust enrichment etc.

3. The protection of technological measures

3.1. The effective technological measure

In the wake of the international treaties listed above our copyright law incorporated the protection against the circumvention of technological measures. In the absence of practical experience, its interpretation may rely on the WCT Art. 11, the WPPT Art. 18 and the preparatory materials, reflecting the legislative history of the treaties. A further, indirect assistance may be obtained from the recommendation elaborated within the Council of Europe on the protection of encrypted broadcasts (Cf. Recommendations No. R /91/ 14 and R /95/ l, adopted by the Committee of Ministers of the Council of Europe.), furthermore by the Draft-Directive on copyright and related rights in the information society prepared in the European Community, - dealing also with this subject.

3.1.1. What is a technological measure?

In the wake of the technological development more and more possibilities have opened for those entitled to prevent infringements. Their essential feature is that the respective rights owner employs a solution by which it is possible to prevent the access to the work, the performance, the sound recording or the radio / TV program respectively the use thereof. (Hereinafter I'll mention "works", but I understand thereunder all subject-matters, protected by authors' right or neighboring rights. The provisions on the copyright infringement are regulated in a separate chapter in the C.A, they refer to works only, but a rule in the Chapter on the neighboring rights provides for the application of the whole infringement chapter to infringements in respect of the subject-matters protected by neighboring rights as well.) Such solutions are called, collectively, technological measures by the C.A. (Art. 95. par. 2.). Such solution may consist of a product, a process, a computer program, a means or a method, provided its normal use has the purpose of hinder the use of the work, or the access thereto.

3.1.2. The efficacy

The purpose of the technological measure will not be fulfilled, unless it is suitable to achieve that the work should be perceived or used only with the authorization of the owner of the right. That is implied by the term of efficacy (Art. 95, par. 2, second phrase). Before perceiving or using the work, certain acts must be performed which are authorized by the owner of the right. Such acts generally consist of the transformation of the work's information content but may be other processes (like feeding in certain data, passwords etc.) capable of decrypting the "code". Not every transformation of the information carrying the work falls within the term of effective technological measure. For instance, the traditional (conventional) broadcasting, or even a live performance where sound-amplification is used, involve the modification of the information carrying the work. For the sake of the better utilization of the electronic media and for the sake of increasing the speed of data-transfer frequently the data compression is resorted to, as a result of which certain "elements" of the work may even get lost - for instance bits carrying sounds (Such is, e.g. the compression using the MP-3 format which enables the quicker transfer of the sound-carrying information.) In such cases one cannot speak of "effective technological measures" in the sense of the C.A. An effective technological measure - encoding or encryption-

may be spoken of only when its purpose is the limitation of the access (perceiving) or the use (see WCT 11; WPPT Art. 18. quoting the wording "restrict act"). The use of an effective technological measure may have the consequence that it impairs not only the use in terms of copyright law, but also the "free" perceiving, the enjoyment of the work. For instance when the rights owner restricts the access to the software, then it limits the use thereof, because running the software and "perceiving" it on the display qualifies as a use (being a form of reproduction (C.A. Art. 17/a, and 18.) When an effective technological measure is used in respect of a musical work, that will restrict not only the uses relevant in copyright, but the possibility to listen to the work as well. If the same is accompanied by a visual effect (e.g. a video clip), that will restrict its visual sensing too. All these, by themselves do not fall within the scope of use under the copyright law. Citing an example from the realm of neighboring rights: the encryption of the radio and TV programs (when the members of the public cannot receive such program except with the "decoder" obtained from or with the consent of the owner of the right) qualifies as an effective technological measure (Art. 26., par.-s. 3 and 4.)

3.2. Circumvention of the effective technological measure

The essential point of the term "circumvention" is whether the scope of the provision ensuring protection against circumvention does or does not cover the member's of public own perceiving of the work and own use. If we start out from the language of Art. 95, par. 1.: it says :"every act that…" and apply the grammatical interpretation thereto, the provision covers such acts which (subject to the hereinafter-mentioned technological conditions) will illegitimately enable, or facilitate the circumvention of the effective technological measures. Consequently, "circumvention" in the stricter grammatical sense means that the user of / the person perceiving the work completes the actions eliminating the restrictions of the access not with the permission of the owner of right. However the provision in question sanctions the act of enabling the circumvention and not the circumvention itself, in its stricter sense.

That involves two questions. The first is: what is the consequence when a person wishing to perceive/use the work enables / facilitates the circumvention for his own purpose? The second question is: what will be the consequence of the circumvention consisting of the unauthorized access to the work?

No clear answer to the first question is found in the law. In the grammatical sense "circumvention" covers the possibility to circumvent either for someone else, or for one's own purpose. Thus, we could say that the scope of the provision also covers the illegal decoding act performed for the person's own purpose. That view is seemingly supported by the fact that the preamble of the provision speaks of "every act …", and lists the acts performed for the sake of other only by way of examples like: "manufacture" of goods, distribution of the latter, and services offered." One might say - with a far-expanded interpretation - that the production of goods among the cited examples may ensue also for own purpose; but this allegation must be dismissed. The term "manufacture" (as it is used in Art.6., par. 2 of the Draft Directive of the EU) means a regular activity of factory-scale, purposing the production of a factory product under the generally accepted meaning of the words ("see: Magyar Értelmezo Szótár"). Consequently, when an object, thing is completed for one's own purpose, that would fall short of the quoted term. Where the acts listed in the exemplificative enumeration refer to acts only performed for the sake of other

persons, it should be examined whether the term "every act that…" includes acts performed for one's own purpose. At this point we have to refer to the text of the WCT and WPPT, those being the international background furnishing the basis of the national law. Both treaties oblige the Member States to ensure an effective protection against the circumvention of technological measures. The said treaties mean the measures that the rights owner take in the course of their ordinary exercise of their rights granted to them by the corresponding treaties (in case of authors: the Berne Union Convention, TRIPS and WCT, in case of performing artists and phonogram producers: the Rome Convention, TRIPS and WPPT). The measure may only restrict uses not licensed by the rights owner, or not allowed by the law itself (free or fair uses). As it is, the quoted treaties may only provide for rights relevant to copyright. Consequently, the circumvention as defined in the said treaties, if performed for one's own purpose shall be prohibited only if it results in a use (utilization) in copyright terms unauthorized by the rights owner or by law. As regards the Hungarian law: an act enabling / facilitating the unauthorized access to the work, provided such act is performed for one's own purpose, shall not fall under Art. 95, par. 1, unless the unauthorized access exceeds the simple perception of the work, which is irrelevant under the copyright law. **When, namely, the access, the perception in itself does not qualify as "use", the "illicit" act assisting, facilitating the former cannot be a sui generis infringement sanctioned in the copyright law**.

Examples: When the organizer of a concert establishes such gates at the entrance that will alert the guards when someone carries an instrument capable of recording the sounds or pictures of the live performance, and a spectator circumvents such measure, that constitutes an circumvention of the technological measure. The reason: it is prohibited in copyright law (C.A. Art. 35 par. (1) to make a "bootleg" recording of a live performance, even for one's own purpose; accordingly the "technological measure" prevented an illicit use. When the owner of the software employs a "code" limiting the access, and someone breaks the code (decoding), even when the software is run for his own purpose, such person will commit the circumvention, because running even for one's own purpose constitutes a use (reproduction).

Supposing that a content provider makes the downloadable service accessible dependent on a "code", and someone breaks the code, such code-breaking will constitute a circumvention of the measure, because downloading is a form of reproduction, therefore it constitutes "use".

An act enabling - or facilitating - the access to a work protected by an effective technological measure is prohibited only if it has no significant economic effect, apart from the circumvention of the said technological measure. That means that the protection against circumvention does not want to interfere with the manufacture and distribution of goods, development of software and offering and provision of services, that may serve another economic purpose beyond the circumvention of the technological measure. This point is closely linked with the aspect of the efficacy of the measure. If a measure can be circumvented simply by the modification of signals by means of a commercially sold "signal modifying" tool, then, on the one hand, we cannot speak of an effective measure, on the other hand the signal modification does not qualify as circumvention. The purpose of the legal protection is to prevent the manufacture of such products, and the offering of such services, or the offering thereof, whose primary purpose is to enable others to circumvent the technological measures intended to limit or prevent access. (This approach

can be derived from item 30. of the Explanatory Memorandum attached to the said Draft-Directive of the European Union.)

3.3. What are the sanctions of the circumvention of the effective technological measures?

To acts violating the protection the consequences of a copyright infringement shall apply (Art. 95. par. 1, preamble). **That means, on the one hand, that such conducts do not qualify as "real" copyright infringements: they are sui generis violations of copyright rules**. That statement supports the view described in the preceding paragraphs. The circumvention - under the system of the Hungarian C.A. - means the assistance to the illicit access, not the illicit access itself. On the other hand, the reference to the sanctions of copyright infringement would mean that a/ in case of non-negligent conduct the claims listed in Art. 94. par. 1 would apply - optionally, b/ in case of negligent acts damages could be claimed according to Art. 94. par. 2. That apparently logical system is disturbed by the fact that a conduct to circumvent under the second sentence of Art. 95. par. 1, qualifies as an infringing act only in case of malice (i.e. male fide conduct), according to the terms of the Hungarian civil law. The "malice" would have to be proven by the claimant! In other words, the claimant having used the effective technological measure would have to show that the defendant enabling or facilitating the circumvention did know, or should have with the reasonable care known, that his act illicitly assisted the circumvention of the measure. Art. 94. par. 6 gives the claimant appreciable help. It is sufficient to substantiate that the assistance to the circumvention of the technological measure occurred; thereafter he can request the Court to order the reversion of the burden of proof .

It is not the task of the present work to compare the conditions of the negligence (Civil Code Art. 4. par. 4) relating to the behavior with the malice (male fide conduct) of the perpetrator relating to the perpetrator's frame of mind (consciousness), whose sanctions are found in Art. 95. par. 1, second sentence. Still, we are of the opinion that when an act is committed with malice, that will fulfil the criteria of negligence too. Consequently, the legal position stemming from the protection against the circumvention of a measure, will enable the claimant to enforce his claim both on the basis of Art. 94.par. 1 (objective basis), and on the strength of Art. 94. par. 2, i.e. negligence. The right of choice from among the sanctions (Art. 94. par. 1.) depending on the circumstances of the case, is due to the claimant.

Finally, we have to deal with the consequences of enabling or facilitating the circumvention for the defendant's own purpose.

We have to start out from the example that Person A/ commits an act infringing Art. 95. par. 1 (facilitates a circumvention) and as a result Person B/ uses a work without authorization. In that case the rights owner has a claim against A/ on the strength of Art. 95. par. 1 (circumvention), and against B/ on the strength of Art. 94 (infringement).

When Person B/ commits the act infringing the circumvention provision (Art. 95. par. 1.) for his own purpose and uses a work illicitly, then he will have committed two different infringements/violations, which are both sanctioned under Art. 94. (The first act, the circumvention is sanctioned indirectly, by the reference of the Act, that to circumvention the sanctions of infringement apply.) Consequently, there are two claims in the lawsuit,

each having its separate legal grounds, however they involve the same legal consequences. These claims will merge in respect of claims regarding the furnishing of data, the claim for the recovery of unjust enrichment, and the claim for damages. (The said claims are listed under Art. 94, par. 1/d, Art. 94, par. 1/a; Art. 94. Art. Par. 2. in the respective order.)

On the other hand, the claims stemming from the two separate legal grounds will necessarily separate when enforcing the following claims: - declaratory judgement, claim for prohibitory injunction, claim for giving amends, claim for the restoration of the state prior to the infringement (Art. 94, par.-s. 1/a, b, c, f). When Person B/ commits - apparently - the act to circumvent the measure, only for his own access, i.e. for the mere perception to the work, which doesn't exhaust the term of copyright-law use, then neither the infringement of copyright, nor the circumvention of the technological measure will ensue. The rights owner may sue for damages under the provisions on contractual liability, provided that there was a contract between the rights owner and Person B/ licensing the former's service, or else: under the rules on tort liability, if there was no agreement whatsoever between Person B/ and the rights owner. (Anyway the rules on the two types of liability are identical in the Hungarian Civil Law.)

3.4. Circumvention of effective technological measures and free use

Both the WCT Art. 11. and WPPT Art. 18. stress that the rights owners use the effective technological measures in order to limit such acts which are unauthorized either by themselves or by the law. It would follow therefrom, that in the realm of free use such technological measures would be inadmissible. The problem emerges sharply in case of the free use applicable under Art. 41, par. 2, which allows free use of works for purposes of judicial and administrative procedure. The C.A. fails to provide for this case. Therefore we have to take the standpoint - also with a view to the general boundaries of free use - that the limitation of access is the exclusive right of the rights owner, including the restriction of free use. This problem should be dealt with, in the not too distant future, and regulated in the wake of the adoption of the EU Directive on Copyright and related rights in the information society reflecting hopefully a European consensus.

The harmonization of free use and the protection against the circumvention of the effective technological measure faces serious difficulties all over the world. There exists still no final solution. The Copyright Act of the USA, too, seems to have delayed an "operative" answer to this question till Oct. 28, 2000, by an interim provision empowering the head of the Library of Congress to deal with the problem. The said official shall determine the existing or future negative influences that will befall the persons availing themselves through the restriction of non-infringing (i.e. free - in U.S. copyright terms: fair) uses. The Congress Library's head shall determine such adverse impacts for the first time until the above date, and every three years thereafter. The said persons exercising fair use rights, shall be exempt from the sanctions of the circumvention of technological measures. (cf. 17 U.S.C. § 1201, /a/ /1/, /B/ and /C). In addition to the former: the uses for government purposes - in the broadest sense, are also exempted from the protection (17 U.S.C. §. 1201 d.). Further exemptions include: the uses in the framework of non-profit library, archives and educational activities; with strong guarantees against abusive practices.

As far as the European Union is concerned: In the course of the preparation of the respective E.U. Directive, a lively discussion was going on about the subject of the relation between the free use and the restriction of access. There is a reference in the issue 7 of

2000 of the World Licensing Law report - please see page 5 - that on June 8, 2000 the Directive was adopted by the member states, but it is still open for the approval by the European Parliament. Rights holders groups are not at all satisfied with the compromise reached, since there are "approximately 20 exemptions" for the benefit of libraries, museums, educational and other non-commercial uses, where member states may take measures against rights holders that use technological measures.

3.5. Legal consequences under criminal law

Art. 329/B of the Criminal Code threatens with punishment only acts to assist the circumvention of the effective technological measure protected by C.A. The commission of the crime must be a/ intentional and b/ completed with the purpose of obtaining profit. The framework of "assisting" acts is seemingly narrower than that of the acts involving civil-law sanctions. The latter framework, namely, covers all acts, thus the provision of services, and the use of certain methods as well. The Criminal Code does not mention explicitly the services, methods, but par. 2 of the cited provision lists economic, organizational knowledge the transfer of which has the purpose of assisting the circumvention of the effective technological measures, as a punishable offense. It is beyond doubt that the provision of services or the transfer of a method may consist of the "transfer" of the respective knowledge; on the other hand it is also certain that the provision of services or passing on a method and assisting the use thereof is much broader than the transfer of the respective knowledge itself. It can be hardly explained, how the circumvention of the technological measure can be assisted by the passing on of an economic or organizational piece of knowledge.

The governmental official explanatory memorandum to Law CXX of 1999 amending the Criminal Code repeats the provision of the C.A., subsequently it features the Criminal Code's provision differing from the former, but it provides no explanation for the difference. It is up to the judicial practice to hone together the term "technological measure" as defined in C.A. Art. 95, par. 2, and the different wording of the Criminal Code.

4. PROTECTION OF RIGHTS MANAGEMENT INFORMATION

4.1. Reasons for a special protection

The international sources of Art. 96 and of the criminal sanction are found in WCT Art. 12 and WPPT 19. Their wording is identical, only the rights owners are different. In the Hungarian legal system all neighboring rights owners, including broadcasters are protected, while WPPT affects performers and phonogram producers only. The rule essentially provides for the extension of the protection of name and authorship title enjoyed by the author and the owners of neighboring rights. The rule has been necessary because the digital techniques transform the images, sounds and the accompanying information into binary data. That makes it easy to remove or to alter the data attached to the work /performance relating to the rights owner as well as to the terms and conditions of the licensing of use.

4.2. The rights management information

Art. 96, par. 2 gives the reasons of the extension of the right to the name (authorship title). The rights management information identify the author (Art. 12, par.-s. 1,2) who is otherwise protected under the respective moral right; further the performing artist (Art.75); the producer of phonograms (Art.79), and the broadcasting organization (Art. 80) In addition, the said provision covers also any right owner different from the author and his /her heir as indicated in Art. 14. par. 1. In other words: the said provision covers all the persons who may acquire the author's economic rights by way of assignment or devolution. In addition, the provision also protects the collective societies (Art. 92. par. 1), as well as the users. The latter is supported by Art. 96. par. 2,: the phrase that refers to "other holders of rights pertaining to the work". It should be stressed that the licensee's position involves the protection of rights management information, and this legal position is independent from the licensee's exclusive or non-exclusive right, and it is further independent of whether the licensee may plead in his /her own name under Art. 98 on the grounds of infringement of author's rights. That view is further supported by the fact that the data belonging to the management of rights include the information on the conditions in which a license to use the work/performance can be obtained (Art. 96, par. 2, second phrase: "informs about the conditions of license ") Given the fact that a further license may be acquired from the licensee, too (with the consent of the original rights owner within the limits of Art. 46. par. 1 (by way of the further assignment or sub-license), it is logical that the data identifying the licensee, too, qualify as rights management data. The "quality" of the data is indifferent from the aspect of protection. It may be a conventional indication of the name, but it may be a number, code, sign. It deserves mentioning that the rights owners have developed various systems applying allegedly non-removable digital identification data. These are sometimes called "watermarks" that are applied on the works, or copies of works, or the "signals" carrying the works (cf. Artisjus Tariffs for 2000, Chapter IV, item 12 in Official Gazette year 2000, issue 5.) It is, however, the absolute condition of protection of the data that the work/performance should be linked physically with the data. That purpose can be realized either by fixing them on the specimen/copy of the work, or by indicating them in conjunction with the on line or other non-material use of the works / performances. An example to the second case: the data of an Internet homepage identifying the rights owner of the contents of the homepage, on the condition, that the said homepage includes content protected by copyright.

4.3. When does an act infringe the rights stemming from the protection of rights management information?

The acts infringing the rights mentioned in the title above are defined in Art. 96. par. 1. These are divided in two groups. The first group comprising the removal or altering of the data - needs no explanation. The second group includes the use of such works/performances from which another person (a third person/ has removed or changed the rights management information. The acts listed in the law are: the distribution (Art. 23, par. 2), the importation with the purpose of distribution and the communication to the public (Art. 26.) In the system of the Hungarian C.A. it is no need to separately quote the "importation with the purpose of distribution" since the term of distribution includes the importation right. (The only imaginable reason is that the legislators wished to reflect the treaty language.) As it is, the reproduction has been omitted (Art.18) from the above list (in accordance with the international agreements, i.e. WCT Art. 12, par. 1, subpar. /i/; WPPT Art. 19, par. 1, subpar. /ii/). The reason for the omission might be the fact that under

the conditions of the digital technology the alteration of the data involves the reproduction anyway. The term of "reproduction" is very broadly tailored in the C.A.: it includes the temporary, direct or indirect reproduction.(Art. 18, par. 1.)

However, we can find no acceptable explanation to the omission of reproduction in case of the removal of rights management data. If a person reproduces works or other protected material from which another person removed the rights management data, and forwards the reproduced on line or off line "copies" to a third person for distribution (in case of off line copies) or for communication to the public (in case of on line copies), this act should be sanctioned under the protection of rights management information. Nevertheless, a possible explanation may be that the reproduction by itself does not forward or communicate the work deprived of the rights management data.

Any act specified in the provision can be committed with malice (male fide behavior) only (Art. 96, par. 1, second sentence). The malice depends on whether the consciousness of the perpetrator covers -or with reasonable care should cover- the consequence that his/her act enables or facilitates the infringement of copyright - or it induces a third person to commit infringement.. According to the Joint Declaration attached to WCT Art. 12, and WPPT Art. 19, infringement covers the violation of both exclusive rights and remuneration claims

4.4. Civil-law sanctions of the infringement of the protection of rights management information

The infringement mentioned in the title here above is, in itself, not a copyright infringement, yet the consequences of the copyright infringement shall apply to it. (Cf. Art. 94. par. 1.) Inasmuch as the law grants the authorship / rights ownership title (i.e. the right to the name of the author or the rights owner of the neighboring rights), the separate protection of the data of rights management adds almost nothing to existing the civil-law protection, when such data is the name of the rights owner itself. As it is, the author and the rights owners of neighboring rights harmed in their moral rights (cf. Art. 99) can assert their claims under Art. 94. par.-s. 1 and 2, either against the user, or against the person having removed, or altered the data or both. Still the protection is wider, inasmuch as the claimant may assert his claim also concerning the data relating to the obtaining of license - which is otherwise not included in the protection of the authorship title. Any of the claims listed in Art. 94, par. 1. may be suitable to redress the harm /(depending on the circumstances). Even if we suppose the highly improbable case that violation of the rights management data protection is not coupled with the infringement of economic rights, yet the non-pecuniary damages can be asserted under Art. 94. par. 2.

As a mater of fact, the legal consequences of the infringement and the violation of the protection of rights management information merge here (The deliberations on the on the dual legal grounds of the plea in case of circumvention of effective technological measures are guiding here too.) The basis of the claim (grounds of the plea) against the person having removed / altered the data are the following: if the removal / alteration has ensued without reproduction then the protection of rights management information is the legal ground; if it has ensued with unauthorized reproduction, copyright infringement has been committed. The user of such a work will be liable if such use is unauthorized or the use impairs the remuneration rights under the provision on copyright infringement. If the use is otherwise authorized but a work provided with a removed or altered data is being used,

then the user will only be liable under the provision on the protection of rights management information, provided any act listed in the respective Art. 96, par. 1 has been committed.

The essence is: Art. 96 fills the gap in the case when no infringement under Art. 94 is committed but the harm to the rights management data occurs.

The real winner of Art. 96 is the licensee who has a right to enforce copyright claims only within the limits of the licensing agreement in case of the infringement of moral rights of the author, and within the limits of the Act (Art. 98) in case of the infringement to the economic rights. Nevertheless, when the licensee has been granted the right to sub-license or assign his license to a third person, and the data relating to that fact is removed / altered, the licensee may automatically assert his claims according to Art. 96 against the third person infringing the protection of rights management data.

4.5. Criminal-law sanctions

Art. 329/C of the Criminal Code does not tally reflect the international treaty language, yet its contents coincide with the latter. It (par. 1 of Art. 329/C.) refers back to the term of rights management information as defined in the C.A. and also stresses (repeats?) that the criminal-law protection is subject to the condition that the data should be linked to the work/performance. The criminal provision merely punishes the removal or alteration of the rights management data The title of the offense is commonly termed "falsification"), but it does not mention the utilization of the "falsified" work / performance, or its communication to the public. Nevertheless, the sanctioning of such conducts is integral part of the treaty commitments - which is obvious from the civil law sanctions (C.A. Art. 96, par. 1).

The apparent lack can be explained of in two ways. The first is that Art. 329/A (the criminal sanction of copyright infringement) covers also those unauthorized uses, where the user knows or should with reasonable care know, that the removal / alteration of the rights management information had in fact been committed. The other - more simple - explanation is that the said treaties do not impose the duty of sanctioning every illicit acts under criminal law. The treaties merely provide, that "adequate and effective legal remedies" should be ensured. That commitment may be fulfilled by the civil law sanctions chosen by the Hungarian legislator.

The other apparent difference from the WCT and WPPT is that the removal / alteration of the data is not punishable under criminal law, unless committed "with the purpose of material gain." The intentional acts without the purpose of profit fall under Art. 96 C.A. imposing civil-law sanctions. As it is, one of the preconditions of civil law sanctions consists in the male fide behavior, where the respondent is or should with reasonable care be aware that he may contribute to an infringement. The WIPO treaties stop at the point where the sanctions are applicable only when the perpetrator should be aware under the given conditions and with due care - that his conduct may assist an infringement. In other words, the Hungarian lawmakers opted for this admitted solution when they transplanted the international treaties into the national law. The option was that the male fide (and concomitantly intentional) conducts involve merely civil-law sanctions, while intentional acts committed with the purpose of gain, involve criminal-law sanctions.

The criminal provision sanctions the falsification of data regarding both authors' works and performances of neighboring rights owners in the same provision. For the sake of completeness it should be mentioned that the criminal sanction protects also the data regarding licensees (Art. 329/C of the Criminal Code speaks of rights management data indicated in conjunction with the utilization of the work, respectively of performances protected by neighboring rights).

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ATTACHMENT

EXCERPTS FROM RELEVANT INTERNATIONAL AND HUNGARIAN LEGAL SOURCES

I. Excerpts from the WIPO treaties

WCT

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 12

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. [See the agreed statement concerning Article 12]

Agreed statement concerning Article 12

It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

WPPT

Article 18

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Article 19

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

  (i) to remove or alter any electronic rights management information without authority;

  (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public. [See the agreed statement concerning Article 19]

Agreed statement concerning Article 19

The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 19 (on Obligations concerning Rights Management Information) of the WIPO Performances and Phonograms Treaty.

<u>II. Copyright Act of Hungary (Act LXXVI of 1999)</u>

Chapter XIII

CONSEQUENCES OF COPYRIGHT INFRINGEMENT

Consequences under Civil Law

Section 94

(1) In the event his rights are infringed, an author may assert various claims under civil law, depending on the circumstances of the case.

a) The author may request a court finding that there has been an infringement of rights.

b) The author may request that the infringement of rights be terminated and that the offender be enjoined to cease any further infringement of rights.

c) The author may request that the offender make amends for his action - by declaration or in some other appropriate manner - and, if necessary, that such amends should be given due publicity by and at the cost of the offender.

d) The author may request the offender to provide information concerning the persons involved in producing and distributing the objects and/or providing the services affected by the infringement of rights as well as information concerning the business contacts that had been used in the infringement of his rights.

e) The author may request the recovery of enrichment acquired through the infringement of rights.

f) The author may request that the infringement be terminated, the state of affairs prior to the infringement be restored by or at the cost of the offender, and the device or material that has been exclusively or primarily used for the infringement of rights be destroyed or deprived of its capacity for being used in the infringement of rights.

(2) In the event of copyright infringement, damages shall be due in accordance with civil law liability. There is also a ground for damages if the author's moral rights have been infringed.

(3) In lawsuits filed on grounds of copyright infringement, provisional measures shall be considered necessary in order to protect the petitioner's particularly substantial rights if the petitioner substantiates that the work is protected by copyright and that he or she is the author, the author's heir at law or a user of the work or collective copyright management society that is entitled to take action against the infringement on its own behalf.

(4) The provisions of Subsection (3) cannot be applied if six months have passed from the beginning of the infringement of copyright or sixty days have passed from the date on which the infringement and the identity of the infringer became known to the petitioner.

(5) The Court shall pass a decision in the matter of provisional measures out of order within no more than fifteen days from the submission of the petition for such measures.

(6) If in a lawsuit filed on the grounds of copyright infringement one of the parties has presented reasonably available evidence to substantiate his factual statements, the Court may, at this party's request, order the other party to present any documents or other material evidence in his possession as well as to endure an on site inspection.

(7) In lawsuits filed on the grounds of copyright infringement, the Court may order preliminary evidence subject to providing a security.

Protection Against the Circumvention of Technological Measures

Section 95

(1) The consequences of copyright infringement apply to all acts - including the production and distribution of devices and the provision of services - that enable or facilitate unlawful circumvention of effective technological measures designed to provide copyright protection and have no particular aim or no major economic significance other than the mere circumvention of technological measures. This provision shall be applicable only if the person performing the acts referred to knows or, with the care expected to obtain in the given situation, has reasonable grounds to know that the acts unlawfully enable or facilitate the circumvention of an effective technological measure designed to provide copyright protection.

(2) For the purposes of Subsection (1), technological measures are all devices, products, components, procedures and methods that are designed to prevent or hinder the infringement of copyright. A technological measure shall be considered effective if, as a result of its use, the work becomes accessible to the user through the performance of such actions - with the authorization of the author - as requires the use of the procedure or the provision of the code necessary therefor.

Protection of Rights Management Data

Section 96

(1) The consequences of copyright infringement shall be applied to the unauthorized removal or alteration of rights management data as well as to the unauthorized distribution, importation for distribution, broadcast, or communication to the public in a different manner of works from which the rights management data have been removed or on which such data have been altered without authority, supposing that the person performing any of the acts referred to knows or, with the care expected to obtain in the given situation, has reasonable grounds to know that the acts unlawfully enable or facilitate the infringement of copyright or induce others to commit such infringement.

(2) Rights management data are all particulars provided by the owners of rights that identify the work, the author of the work, the owner of any right in the work, or inform about the terms and conditions of the use of the work, including any numbers or codes that represent such information, when such data are attached to a copy of the work or are made perceptible in connection with the communication of the work to the public.

Consequences of Copyright Infringement under Customs Law

Section 97

In the case of the infringement of copyright, the author may, with reference to the provisions of a special statute, require the customs authorities to take measures to prevent the dutiable goods affected by the infringement of rights from being put into domestic circulation.

III. Criminal Code of Hungary

Circumvention of Technological Measures for the Protection of Copyright and Neighboring Rights

Section 329/B.

(1) A person who

a) manufactures or fabricates,

b) furnishes, distributes or markets any instrument, product, equipment and/or accessory for the circumvention of the technological measures defined in the Act on Copyright instituted for the protection of copyright and neighboring rights commits a misdemeanor offense and shall be punishable by imprisonment of up to two years, labor in the public interest, or a fine.

(2) A person who conveys economic, technical and/or organizational information to another person for the purpose of and as necessary for the circumvention of technological measures instituted for the protection of copyright and neighboring rights shall be punishable as set forth in Subsection (1) above.

(3) The punishment shall be imprisonment of up to three years for a felony, if the circumvention of technological measures instituted for the protection of copyright and neighboring rights is committed as business.

(4) A person implicated in the offense described in Par.graph a) of Subsection (1) above shall not be punishable if voluntarily confessing to the authorities his involvement in the manufacture or production of any instrument, product, equipment and/or accessory intended for the circumvention of the technological measures instituted for the protection of copyright and neighboring rights prior to the authorities gaining knowledge of such, and if surrenders such manufactured and fabricated objects to the authorities, and if provides information concerning any other individuals participating in manufacture or production.

Falsifying Rights Management Information

Section 329/C.

A person who, for pecuniary gain, unlawfully removes or falsifies any rights management data or information - defined as such in the Act on Copyright - and published in connection with the use of a work or performance of another person that is protected by copyright or neighboring rights, commits a misdemeanor offense and shall be punishable by imprisonment of up to two years, labor in the public interest, or a fine.

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