

ALAI BRUSSELS 2014
Moral rights in the 21st century
The changing role of the moral rights in an era of information overload

RESPONSE BY THE HUNGARIAN ALAI GROUP TO THE QUESTIONNAIRE

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1. Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.

Until 1970 the Hungarian copyright law *per se* did not contain any provisions concerning moral rights. The first Bill in the history of the national copyright submitted by Bertalan SZEMERE to the National Assembly in 1844 was not enacted for lack of royal sanction. The Austrian Imperial Court preferred general decrees valid for the whole empire to purely Hungarian laws, since such decrees strengthened the internal integration processes of the Empire. At that time, such a general decree on copyright was already being prepared. It was promulgated in 1846. The first copyright law, Act XVI of 1884, was made following László ARANY's initiative, upon István APÁTHY's motion. These instruments allowed the transfer of copyright as a whole to others, with or without limitations. The transfer of right was meant to cover the economic rights of authors.

Later, the re-codification of Hungarian copyright legislation required by the need to create internal legal conditions of the accession to the Berne Convention for the Protection of Literary and Artistic Works (The Berne Convention). Act LIV of 1921 harmonised the copyright law with the 1908 Berlin text of the Convention, and did not address the rights of personality or the moral rights of the authors explicitly, however Article 3 of the Act provided a limited right to the author in the case of transfer of copyright to carry out alterations until the reproduction of the work was completed.

The 1928 Rome text of the Berne Convention, and thus Article 6bis on moral rights and Article 7 on duration of these rights were introduced into domestic law by Act XXIV of 1931. The Royal Hungarian Curia (*Magyar Királyi Kúria* - the supreme jurisdiction in Hungary between 1861 and 1949) interpreted the then current version of the Berne Convention and Article 3 of Act LIV of 1921 with an inclination towards the dualism theory.² However, despite several decisions of the Royal Curia concerning the protection of moral rights of the authors (the disclosure of the works: P. I. 8104/1926, P. I. 1582/1928, P. I. 5009/1937, P. I. 5466/1941; withdrawal of the authorization to disclose the work: P. I. 2483/ 1930; the indication of the author's name or pseudonym: P. I. 1132/1937, P. I. 2193/1934, P. I. 2867/1937, P. I. 5459/1937, P. I. 3448/1930; the protection of the integrity of the works: P.I. 3896/1929,P.I. 4065/1929, P.I. 4478/1929)³, according to the scholarly literature the

¹ The author would like to thank Gergely BÉKÉS, Gábor FALUDI, Mihály FICSOR, Zoltán KISS, Pál TOMORI for their much appreciated assistance in the preparation of the replies, in particular to questions 9-10.

² Decision P.I.348/1932, Dezső ALFÖLDY: A magyar szerzői jog, különös tekintettel a M. Kir. Kúria gyakorlatára az 1921: LIV, Az 1922: XIII., az 1931:XXIV. T-cikkek és a velük összefüggő törvények és rendeletek szövegével [Hungarian copyright law, with regards in particular the jurisdiction of the Royal Hungarian Curia, with the text of Acts of LIV of 1921, XIII of 1922, XXIV of 1931 and the related acts and orders], Grill, Budapest, 1936, p.35.

³ Ibid., pp.36-39; p. 84.

protection of moral rights did not become the central element of copyright law approach either in theory or in practice.⁴

In the era of socialism (1948-1989), the third copyright law, Act III of 1969 and of the Implementing Decree No. 9/1969 (XII.29.) MM. (entered into force in 1970), was produced under a constellation of relatively favourable economic policies in Hungary and was strongly based on the international legal evolution of the domain concerned. As 'an instrument for the management of cultural processes'⁵ the copyright law was defined by the integral unity of moral and economic rights.⁶ Chapter II of the Act enacted moral rights for the first time in the legislative history of the land based on the monistic approach. Article 10 of the 1969 Act illustrates that approach by having laid down that any unauthorized use/exploitation of economic rights also violated the author's moral rights.

The 1994 Amendment of the Copyright Act (by Act VII of 1994) was an important step forward concerning moral rights. In order to meet Hungary's international obligations in this field the national law recognised moral rights for performers.

As the explanatory memorandum of the copyright law in force, Act LXXVI of 1999 on Copyright (CA) referred, the monistic and dualistic approaches on alienation of the rights (in particular the transfer of economic rights) had been a subject of a heated debate during the period of drafting and preparing the CA. Certain views of jurisprudence and the authors' representatives would have preserved the integral unity of moral and economic rights. On the other hand, some other copyright experts, most users and certain neighbouring rights organisation representatives were in favour of the introduction of the transfer of economic rights, based on the dualistic approach. Following careful analyses of the developments of the transitional economy, the Hungarian legal traditions, the content of the international conventions, in particular Article 6bis of the Berne Convention, as well as the copyright *acquis communautaire* [Article 2 (3) of the 'Software' Directive⁷; Article 2 (4) and Article 4 of the 'Rental' Directive⁸], a compromise solution was established. Since 1 September 1999 when the CA came into force, Article 9 (1) lays down that the *entirety* (emphasis added P.M.) of authors' rights – moral rights and economic rights – shall accrue to the author from the time of the creation of the work. Pursuant to Article 9 (3) of CA subject to the exceptions in Paragraphs (4) to (6), economic rights may not be assigned or may not devolve to another person, and may not be waived. In order to promote the culture, creativity and innovation, Hungary, likewise other countries of Central and Eastern Europe, provides rigorous legislative protection for moral rights.⁹

For further details please see the reply to question 2.

⁴ Tamás NÓTÁRI: Remarks on Early Copyright Regulations, in: Éva JAKAB (hrsg.), *Geistiges Eigentum und Urheberrecht aus der historischen Perspektive*, Szeged: Pólay Elemér Alapítvány, Szegedi Tudományegyetem, Állam- és Jogtudományi Kar (Lectiones Iuridicae; 10.), 2014, p.100.

⁵ Appropriate remark by Stephen M. STEWART, *International Copyright and Neighbouring Rights*, 1.17. (Second Edition), Butterworth, 1989.

⁶ More details see, Krisztina PENYIGEY – Péter MUNKÁCSI: The Economic Contribution of Copyright-Based Industries in Hungary, The 2005 Report In: *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries, Creative Industries Series No.1*. WIPO Publication No. 624 (e).

⁷ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

⁸ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

⁹ Latter in the scholarly literature Mira T. SUNDARA RAJAN, *Moral Rights: Principles, Practice and New Technology*, Oxford University Press, 2010, p.11. For further reading see Adolf DIETZ, Trends in the Development of Copyright Law in the Countries of Central and Eastern Europe, 162 RIDA (1994); Silke VON LEWINSKI, Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis, Fordham Intellectual Property, Media and Entertainment Law Journal, Volume 8, Issue 1, 1997, pp. 38.

2. What do the moral rights consist of in your country:

- **right of disclosure (divulgation)**
- **right to claim authorship (paternity right)**
- **right to respect and integrity**
- **right to repent or to withdraw**
- **other elements: ...?**

The Chapter II of CA *mutatis mutandis* adapted the provisions of the 1969 copyright law and it regulates the following moral rights of the authors: disclosure of work (Article 10)¹⁰, withdrawal the authorization to disclose the work (Article 11)¹¹, indication of the author's name [Paternity right (Article 12)]¹², protection of the integrity of the work (Article 13). It should be noted that Article 13 of CA was amended by Act of XVI of 2013 in order to align it with the official version of Article 6bis of the Berne Convention (1948 Brussels text).¹³

Some elements of the moral rights appear in Part Three ('Right Related to Copyright'), Chapter XI ('The protection of neighbouring rights') of CA. In accordance with Article 5 of WIPO Performances

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- ¹⁰ Article 10 of CA: (1) *The author shall decide whether his work may be made public.*
 - (2) *Before making the work public, any information on its substantial content may be provided for the public only subject to the author's consent.*
 - (3) *Unless otherwise stipulated, the conclusion of a licence agreement shall imply the author's consent to the user providing information on the content of the work for the public in a manner complying with the purpose of the use.*
 - (4) *As regards a work becoming known after the author's death, it shall be presumed that the author intended his work to be made public, unless a statement to the contrary has been made by the author or his legal successor, or the contrary is proved otherwise.*

¹¹ Article 11 of CA: *Referring to serious grounds, the author may withdraw, in writing, his authorisation to make his work public or may prohibit the continued use of his work already made public; however, he is obliged to compensate any damage having occurred till the time of such statement. This shall not prejudice the employer's right to exploit the work and shall not prevent, in the case of the assignment of the economic rights, the person acquiring the rights from uses based on the economic rights.*

¹² Article 12 of CA: (1) *The author shall have the right to be indicated on his work or in the communication relating to his work – subject to the scope and nature of the communication – as the author. Reference shall be made to the author in the event of including a part of his work in another work, and quoting or reviewing his work. The author may exercise the right to have his name indicated subject to the nature of the use and in a manner complying therewith.*

(2) *The name of the author of a work shall be indicated on the adaptation, arrangement or translation which is based on the author's work.*

(3) *The author shall be entitled to make his work public without the indication of his name or under a pseudonym. The author may require that his work having been made public with the indication of his name shall, in the case of a subsequent legitimate use, be further used without the indication of his name.*

(4) *The author may request that his author's capacity shall not be called into question.*

¹³ Article 13 of CA: *Moral rights of the author are infringed by the distortion, mutilation or any other alteration of or other derogatory action in relation to his work which prejudices the honour or reputation of the author.* As far as the 1948 Brussels text of the Berne Convention is concerned during the Brussels Conference of the Berne Convention in 1948 in order to broaden the right of integrity, the Hungarian delegation suggested the addition of the work's destruction among the prohibited acts. It argued that destruction should logically be included, since it prejudiced the author's moral interests and would complete the notion of mutilation. While the Hungarian suggestion was not incorporated in the text of the Convention, it nevertheless gave rise to a recommendation enjoining domestic legislatures to provide such protection. Elizabeth ADENEY, *The Moral Rights of Authors and Performers* (Oxford: Oxford University Press, 2006), 7.22-7.23.

and Phonograms Treaty (WPPT), Article 75 provides two kind of moral rights for performers: the right of having their name indicated in paragraph (1), and the protection of the integrity of the performance in paragraph (2).

Article 75 (1) of CA: *In the case of the uses referred to in Article 73(1), the performer shall have the moral right to have his name indicated, depending on the nature of the use and in a manner consistent therewith. In the case of an ensemble of performers, this right shall apply to the indication of the names of the ensemble, the leader of the ensemble, and the chief performers.*

The referred article [Article 73 (1) of CA], enumerates the following uses: (i) fixation of the performer's unfixed performance; (ii) the broadcasting or the communication in another manner to the public of the performer's unfixed performance; (iii) the reproduction of the performer's fixed performance; (iv) the distribution of the performer's fixed performance; (v) making the performer's performance available to the public by cable or any other device or in any other manner in a way that the members of the public can choose the place and time of access individually.

As far as the protection of the integrity of the performance is concerned, the current version of Article 75 (2) of CA, as amended by Act CLIX of 2013, fully harmonises with the text of Article 13 of CA based on the model of Article 6bis of the Berne Convention: *Moral rights of the performer are infringed by the distortion, mutilation or any other alteration of or other derogatory action in relation to his performance which prejudices the honour or reputation of the performer.* Taking into account the relevant legal literature, the 2013 amendment raises some doubts. As FICSOR noted in his commentary to the Article 5 of WPPT, there are more substantive differences in comparison with Article 6bis of the Berne Convention in the case of the 'right of respect'. "First, this right, in Berne Article 6bis, also extends to 'other derogatory action in relation to...the work' and this is not covered in WPPT Article 5. Second, while under Berne Article 6bis an author may object to any action mentioned there not only where it would be prejudicial to his reputation but also where it would be prejudicial to his honour, the latter basis for opposition is missing from the WPPT Article 5. This second difference seems to be the more important one, and its justification is not sufficiently clear. Also it seems to be quite rare that an action prejudicing the reputation of a performer does not have a similar impact on his honour. Nevertheless, during the informal negotiations, reference was made to parodies – being more frequent in respect of performances than in respect of works – and it was emphasized that it would not be appropriate to allow performers to oppose parodies citing possible prejudice to their honour."¹⁴

The CA contains also specific provisions on moral rights and their exercise concerning the inclusion of pictures in the publication of literary works within the publishing agreement (Article 57 of CA), alteration of a cinematographic creation (Article 65 of CA), creations of fine art, photography,

¹⁴ Mihaly FICSOR, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002), PP5.05. Same opinion from ADENEY: „In the text [Article 5 of WPPT added by P.M.] as finally adopted, the possibility of harm through 'other derogatory action', such as use of a performance out of context, is not accommodated. Further, for the right of integrity to be breached, prejudice to reputation must be established. Prejudice to honour does not constitute relevant harm for the purposes of the article. Elizabeth ADENEY, *The Moral Rights of Authors and Performers* (Oxford: Oxford University Press, 2006), 7.71-7.73. Furthermore, at the 2003 ALAI Congress in Budapest, Pál TOMORI summarized the answers of the relevant questionnaire and pointed out that "even if some prejudice has to be proved, the model of Article 6bis of the Berne Convention is more consistently followed by those national laws which include in the protected personal aspects of the performer not only his reputation but his honour, too, as is the case, for example in Italy, the Netherlands or Hungary." Pál TOMORI, Protection, Exercise and Enforcement of Performers' Rights after the 1996 and 2000 WIPO Diplomatic Conferences Summary and Analysis of the Answers to the Questionnaire, in: *Creators' Rights in the Information Society, ALAI Budapest 2003*, p.652.

architecture, applied art, industrial design and designs of engineering structures (Articles 67 and 69 (3), furthermore Article 71 a)-b) of CA).

In addition to the above-mentioned provisions, there are some further, ‘invisible’ or ‘hidden’ moral rights elements in the act. Beyond the forms of exploitation referred to in Article 75 (1) of CA the performer might have a right to have his/her name indicated also in the case of public lending and rental of copies of a phonogram put into circulation (Article 78 of CA), these being specific forms of distribution of the performer’s fixed performance, as laid down in Art 73 (1) d) of CA.¹⁵

Notwithstanding that the indication of the name relating to the producer of the phonogram and the radio or television organisations does not take part on the moral right system in general, Article 79 and 81 of CA provides the right for them.¹⁶

3. Can the moral rights be transferred or waived in your country?

The moral rights in the Hungarian copyright law are inalienable *inter vivos*. In Article 9 (2) of CA stated that the author may not assign his moral rights and such rights may not devolve to another person in any other manner, and may not be waived by the author.

4. Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?

Article 31 of CA regulates the term of protection of the authors’ moral and economic rights jointly. Therefore, the term of protection regarding the authors’ moral and economic rights extends to the author’s lifetime and seventy years following his/her death.

Pursuant to Article 14 of CA after the author’s death, action against the infringement of the moral rights specified in this Act can be taken within the term of protection (Article 31 of CA) by the person entrusted by the author with the administration of his literary, scientific or artistic legacy, and if there is no such person or the one entrusted fails to take actions, it shall be the person having acquired the economic rights by virtue of inheritance.

After the expiration of the term of protection, the affected collecting society or representative organisations of authors may take action, with reference to the violation of the author’s memory, against a conduct which would be taken under the term of protection to infringe the author’s right to have his/her name indicated on his work or in a communication related to his/her work [Article 14 (2) of CA].

In case of the right of disclosure, Article 10 (4) of CA laid down, when the work becoming known after the author’s death, it shall be presumed that the author intended his work to be made public, unless a statement to the contrary has been made by the author or his legal successor, or the contrary is proved otherwise.

¹⁵ TOMORI, XI. Chapter, 75§, p. 450, in Péter GYERTYÁNFY (Szerk.): *Nagykommentár a szerzői jogi törvényhez* [Commentary to the Copyright Act], Wolters Kluwer Budapest 2014.

¹⁶ Article 79 of CA: *The producer of the phonogram shall have the right to have his name indicated on the copies of the phonogram.*

Article 81 of CA: *In the case of uses referred to in Article 80, radio or television organisations and organisations communicating by cable their own programmes to the public shall have the right to have their names indicated.*

5. Do other types of rights (such as “personality rights”, “civil rights”, “publicity rights”, “portrait rights” or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

Pursuant to Article 3 of CA to matters not regulated by this Act for the transfer, assignment, pledge of copyright and related rights and also in any other moral or economic legal relations in connection with works or other subject matter within the scope of this Act, the provisions of the Civil Code shall apply.

Part Three (Rights Related to Personality) Title XI. (General Provisions and Certain Rights relating to Personality) of Act V of 2013 (2013 Civil Code) provide the background rules to moral rights in copyright. Section 2:42 describes the absolute nature of these rights which must be respected by all.¹⁷ Sections 2:43-2:50 of the Civil Code complete it with further examples.

The ground of these private law provisions is the Fundamental Law of Hungary (25 April 2011), in particular the Article II on human dignity¹⁸ and the Article X (1) on the freedom of scientific research and artistic expression.¹⁹ The Constitutional Court of Hungary recognised in some decisions, i.e. with regard to the right of human dignity (and to general personality right as well) the character of natural right of which no one could be deprived. Such right included, *inter alia*, the right to free personal development, to self-determination, to privacy or the general freedom of action. It was a "mother right", a basic fundamental right which might be relied upon to protect an individual's autonomy when no particular, specified fundamental right was applicable.²⁰ The Fundamental Law maintains and reaffirms such significance of dignity; its function to protect the individuals and equality is upheld therein.²¹

6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?

As it was mentioned in the reply to question 1 the Hungarian copyright law is an entirety of the economic and moral rights, as laid down in Article 9 (1) of CA. The civil law consequences in case of copyright infringement applicable either to economic or moral rights. These consequences divide into objective and subjective sanctions.

Article 94 (1) of CA enumerates the following objective sanctions:

¹⁷ Section 2:42 [Protection of rights relating to personality]

(1) Everyone is entitled to freely practice his personality rights within the framework of the law and within the rights of others, and to not be impeded in exercising such right by others.

(2) Human dignity and the related personality rights must be respected by all. Personality rights are protected under this Act.

(3) Personality rights shall not be considered violated by any conduct if the person affected has given prior consent thereto.

¹⁸ Article II: Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception.

¹⁹ Article X (1): Hungary shall protect the freedom of scientific research and artistic expression, as well as the freedom of learning and - within the framework defined by law - teaching so as to attain the highest level of knowledge possible.

²⁰ For reading the Decision 8 of 1990 of the Hungarian Constitutional Court, see the following link: http://mkab.hu/letoltesek/en_0008_1990.pdf

²¹ Lóránt CSINK, Balázs SCHANDA, András Zs. VARGA (eds.), *The Basic Law of Hungary, A First Commentary*, NIPA, Clarus Press, Dublin, 2012, p.69.

If his rights are infringed, the author may – in accordance with the circumstances of the case – have recourse to the civil law remedies as follows, claiming:

- a) to be established by the court that there has been an infringement;*
- b) that the infringement and acts directly threatening with infringement be ceased and to enjoin the infringer from any further infringement;*
- c) that the infringer make amends for his action by a statement or in some other appropriate manner, and, if necessary, that such amends should be given appropriate publicity by and at the expense of the infringer;*
- d) that the infringer provide information on parties taking part in the production, distribution or performance of goods or services affected by the infringement, as well as on business relationships established for the infringing acts;*
- e) the recovery of the enrichment achieved via the infringement;*
- f) the injurious state of affairs be terminated, the antecedent state of affairs be restored, the seizure of materials and devices used exclusively or primarily for the infringement, as well as the seizure of goods resulted from the infringement or the delivery thereof to a particular person, or the recall or definitive removal thereof from commercial circulation, or the destruction thereof.*

The subjective civil law sanction is the claim for damage and the moral damage system as it stated in Art 94 (2()) of CA.

In the event of copyright infringement, the author may also claim damages under the rules of civil liability. In the event of infringement of moral rights specified in this Act, the author may demand relief for moral damages in accordance with the provisions on general rules of civil law.

Following a landmark decision 34/1992 (VI.1.) AB of the Constitutional Court of Hungary the former Civil Code (1959 Civil Code) was amended in 1993, introducing the possibility of the claim for non-material damages. According to the opinion of the Court in the case of non-material damages the unlawfulness based on rather the infringement of the moral rights than causing damages. Therefore the introduced legal institution was a civil sanction for the violation of the personality.

The copyright jurisprudence in the last period provided a broad non-material damages in case of the infringement of moral rights. The courts recognized the fact of infringement of moral rights, in particular the lack of indication of the author's name considered as common knowledge. The 'one-directed, in favour of the non-material damage' jurisprudence became empty.

On 15 March of 2014 the new Civil Code (2013 Civil Code) entered into force and one of the most important novelty was the introduction of a new legal institution, the injury fee/restitution (*sérelemdíj* – there is no exact translation in English on the concept) which replaced the non-material damages. Comparison with the previous system it should be noted that the injury fee/restitution is not a compensation for damages. Pursuant to Section 2:52 of the 2013 Civil Code any person whose rights relating to personality had been violated shall be entitled to injury fee/restitution for any non-material violation suffered. As regards the conditions for the obligation of payment of injury fee/restitution - such as the definition of the person liable for the injury fee/restitution payable and the cases of exemptions - the rules on liability for damages shall apply, with the proviso that apart from the fact of the infringement no other harm has to be verified for entitlement to restitution. The court shall determine the amount of injury fee/restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

As far as the abusive exercise of the moral rights by the author or his/her heirs is concerned the first sentence of Article 11 of CA should be recalled: *Referring to serious grounds, the author may withdraw, in writing, his authorisation to make his work public or may prohibit the continued use of his work already made public; however, he is obliged to compensate any damage having occurred till the time of such statement.* The Hungarian Council of Copyright Experts²² has come to the conclusion in their opinion Nr. 30/03 that the exercise of moral rights may be abusive if it aims to prevent any and all changes to the work regardless of their purpose or nature. In the core of the case submitted to the Board was the audio-visual fixation of a modern staging of Bartok's *The Miraculous Mandarin*, in which the contemporary relevance of the work had been emphasised, amongst others, by replacing the role of the young student with that of a pizza delivery boy or allowing to appear on set certain modern technical devices such as, for example, a video camera. The Board was of the opinion that these changes only enhanced the dramatic power of the original work, without any alteration detrimental to the Bartokian opus. A claim, therefore, by the heirs of Bartok to prohibit any and all changes to the work not expressly appearing among the original staging instructions should be deemed abusive and should be rejected.

7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to "material" property on the "carrier" of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)

A conflict between the exercise of a moral right and of any other proprietary right emerges where the single work is of great value, i.e. architecture, or other work of art which are fixed to architecture and its environment such as fresco, wall ceramic or statue. Two noteworthy examples arise in relation to the possible conflicts between copyright and property law: (i) alteration of architecture, engineering structures; (ii) termination, demolition of architecture, engineering structures.

Alteration is a part of the author's economic rights if the existing building is reconstructed individually and originally (Article 29 of CA). Pursuant to Article 67 (1) of CA the alteration of the design of an architectural creation or engineering structure that is made without the author's consent and influences the appearance or the intended proper use shall be regarded to be an unauthorised alteration of the work. There is no further guidance in CA about the meaning of 'the intended proper use'. The rule on right of integrity (Article 13 of CA) as *lex generalis* and the Article 67 of CA as *lex specialis* must be interpreted together. Following the practice of the Hungarian Council of Copyright Experts, in their opinions Nr. 35/02; 26/04 and 1/06, there is an infringement of author's integrity rights in case of architecture in so far as the appearance is distorted, mutilated significantly as a result of alteration of the work or rather the appearance, the intended proper use

²² The Hungarian Council of Copyright Experts after a long silence has been re-founded in 1970. Its function, the framework rules of its structure and operation are laid down again in CA. The Government Decree No. 156/1999 (XI. 3.) Korm. on the Organization and Functioning of the Council of Copyright Experts contains further detailed regulations. According to CA and the Government Decree the Council proceeds in connection with professional questions that arise in copyright disputes at the request of courts or authorities, or on out of court commission in matters in connection with the exercise of use rights.

The Board of the Council consists of members with proficiency in the fields of copyright or creation and performance. The Board usually proceeds in three member councils, however in more complicated cases five member councils may be set up. It is a characteristic of the Board's expert opinions that they extend to both the specialist and legal issues of the given case. According to the practical experiences the Council primarily plays a role in disputes between parties already involved in court proceedings, however it is not impossible that it is requested to give an expert opinion in out of court procedures or before litigation.

changes in such a manner that prejudices the honour or reputation of the author.²³ Lack of relevant case-law it is just presumable that the removal of the other work of art which are fixed to architecture and its environment could infringe also Article 13 of CA. The copyright law remains silent on the issue of termination or demolition and there is no case-law.

As far as the indication of name is concerned, pursuant to Article 67 (3) and (4) of the CA the author's name shall be indicated on a view if it is intended to present a specific fine art, architectural, applied art or industrial design creation or engineering structure. The author's name shall be also indicated if such creations are used for presentation in scientific educational lectures as well as for school education purposes. In the case of further uses of the design of an architectural or engineering creation in an unaltered form, only the name of the author of the original design shall be indicated.

8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?

Among the countries of Central and Eastern Europe Hungary seems to have produced the constitutional court with the most activity involving rights of communication. Apparently, but only partly, this is because in Hungary, the Constitutional Court of Hungary played a larger role in the interpretation of the former Constitution.²⁴

In their decisions, the judges have articulated a special interpretation of freedom of expression. The Constitutional Court of Hungary may have gone farthest in stating the privileged nature of freedom of expression. The opinion issued in connection with the important Decision 30/1992 (V.26.) AB on racial hate speech, stated for the first time that freedom of expression enjoyed a privileged position among basic constitutional rights, and that it is in certain sense the 'mother' of the so called 'communication-related basic rights'.²⁵ The Fundamental Law recites the wording that appears in the decisions of the Constitutional Court: '*Hungary [...] shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion*'. According to the scholarly literature, continuity in this matter is therefore clear.²⁶

Freedom of expression is not an absolute right. Its limits are determined in a different manner by different jurisdictions, and its distance from absolute freedom is different in those jurisdictions.²⁷ Taking into account the practice of the Constitutional Court of Hungary it seems that the exercise of a copyright moral right and the exercise of the freedom of expression (or other fundamental right) does not occur serious conflict. The Decision 24/1996. (VI. 25.) AB of the Court examined if the judgement of the artistic works before the sale does harm the freedom of expression or the freedom

²³ SZINGER, X. Chapter, 67.§, 2. point, pp. 413-414, in Péter GYERTYÁNYI (Szerk.): *Nagykommentár a szerzői jogi törvényhez* [Commentary to the Copyright Act], Wolters Kluwer Budapest 2014.

²⁴ Gabor HALMAI, Free Speech in the New Hungarian Practice, International Journal of Sociology, vol. 26 no. 4, Winter 1996-97, p. 67.

²⁵ Ibid., p.68. In another Decision 37/1992 (VI.10.) AB declared government supervision of Hungarian Radio and Hungarian Television unconstitutional, the maternal nature of the right to freedom of expression was repeatedly confirmed.

²⁶ See Article IX para. 2 of the Fundamental Law. Lóránt CSINK, Balázs SCHANDA, András Zs. VARGA (eds.), *The Basic Law of Hungary, A First Commentary*, NIPA, Clarus Press, Dublin, 2012, p. 80.

²⁷ Gabor HALMAI, Free Speech in the New Hungarian Practice, International Journal of Sociology, vol. 26 no. 4, Winter 1996-97, p. 69.

of artistic expression.²⁸ Pursuant to former Constitution, in the Republic of Hungary everyone has the right to freely express his opinion.²⁹ The Constitutional Court referred to an earlier decision established that the freedom of expression is a "mother right", a basic fundamental right for communication.

The Court held that the interpretation of the freedom of artistic expression as basic right includes the freedom of artistic creativity, freedom of all kind of unlimited artist' self-expression, freedom of the making the work public, freedom of presentation and distribution of the work. The Court mad also a reference to the relevant ECHR jurisdiction (Case of Müller and others vs. Switzerland, Judgement 24 May 1988).³⁰

From the moral right perspective it was important that the Constitutional Court expressed the linkage between the copyright and the fundamental rights that it is essential from the point of freedom of artistic expression the exercise of artistic creativity without any influence by the power, and the free expression of the artistic thought, thus the right to divulge the work. Therefore, the petitioned provisions of the Decree limited unconstitutionally the artist' divulgation right and right to freedom of artistic expression.³¹

9. How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?

The general rule of CA is that the author in practice personally exercises his/her moral rights.³² Pursuant to Article 14 of CA after the author's death, action against the infringement of the moral rights specified in this Act can be taken within the term of protection (Article 31 of CA) by the person entrusted by the author with the administration of his/her literary, scientific or artistic legacy, and if there is no such person or the one entrusted fails to take actions, it shall be the person having acquired the economic rights by virtue of inheritance.

After the expiration of the term of protection, the affected collecting society or representative organisations of authors may take action, with reference to the violation of the author's memory,

²⁸ The petitioned provisions of the Council of Ministers Decree 83/1982 (XII. 29.) MT on the Regulation of Certain Questions related to Fine Arts, Applied Arts, Photographic Arts, and Industrial Design Arts provided that economic organisations, budgetary organs, societies and associations only after an official judgement could buy, use or put into circulation these artistic works. Judgement of the artistic works carried out by the Ministry of Culture and Education or other official experts from Fine and Applied Art Department.

²⁹ Article 61 (1) of Act XX of 1949.

³⁰ Para. 27: „The applicants indisputably exercised their right to freedom of expression - the first applicant by painting and then exhibiting the works in question, and the nine others by giving him the opportunity to show them in public at the "Fri-Art 81" exhibition they had mounted.”

³¹ cf. Anikó GYENGE, *Szerzői jogi korlátozások és a szerzői jog emberi jogi háttere* [Limitations on Copyright and the Human Rights Background of Copyright], HVG-ORAC, Budapest, 2010, p.174

³² It should be noted that pursuant to Article 106 (1) of CA wherever the term 'author' is mentioned in this Act, the legal successor of the author and other right holders under copyright shall be understood to be mutatis mutandis included.

against a conduct which would be taken under the term of protection to infringe the author's right to have his/her name indicated on his/her work or in a communication related to his/her work [Article 14 (2) of CA].

In addition, following Article 15 of CA the user may also take action for the protection of the author's specific moral rights if the author has expressly given his/her consent to such action in the licence agreement.

It is well known, that the right of authorship is acknowledged. In some cases book and newspaper/periodical publishers prefer to indicate themselves under the copyright symbol, although the economic rights are – with well-founded exceptions – inalienable. A similar phenomenon appears in the SME sector. The owners of the companies/partnerships are the authors (we speak of family enterprises) and they indicate their enterprise as the holder of the economic rights without a service work relationship or any other transaction between them and their enterprises that would serve as a legal basis for the assignment of the economic right (service works) or a broad licence that would authorize the licensee to enforce claims in the event of copyright infringement.

According to the new scholarly literature there should be a limitation on the exercise of the moral right when the work created under employment or other similar legal relations, however there are no relevant case-law. Pursuant to Article 30 (5) and (6) of CA if the creation of the work is the author's duty under an employment contract, the delivery of the work to the employer shall be considered as an act of consent to make the work public. In the case of the author's statement aimed at withdrawing his/her work (Article 13), the employer is obliged to omit the author's name. The author's name shall likewise be omitted, at the author's request, if, availing himself/herself of his/her employer's rights, the employer makes alterations in the work and the author does not agree therewith. Legal statements made with regard to the work created by way of fulfilment of the author's duty under an employment contract shall be laid down in writing. In these provisions mentioned right of withdrawal and the right of integrity weaken toward a simple right to anonymity.³³

Although authors do have broad moral rights, the exercise thereof depends always on their bargaining position. The same applies to the exercise of the right of integrity in relation to derivative works. The Hungarian Council of Copyright Experts stated in their opinion Nr. 2/01 that the relationship between the architect plans build upon each another and their beneficiaries should be laid down in the intersection Article 13 of CA (right of integrity), Article 18 of CA (right of reproduction), Article 29 of CA (right of adaptation) Article 50 of CA (right of user to make nonessential alteration within the licence agreement) and Article 67 of CA (right of integrity *lex specialis*).³⁴ The alteration and the plans for reconstruction and renovation of the establishment are related in the recent opinion (Nr. 19/12) of the Council. Those elements (activities) of the renovation realise alteration that result in an achievement with individual and original nature which is different from the original work. According to the additional opinion of Nr. 19/12-2 of the Council the alteration results a derivative joint work which is different from the works of joint authorship (Article

³³ Péter GYERTYÁNYI, A szerzői jog bírói gyakorlata 2006-tól: a jogok keletkezése, forgalmuk; a személyhez fűződő jogok [Copyright Jurisprudence since 2006: Origin of Rights and their Trade, Moral Rights], Iparjogvédelmi és Szerzői Jogi Szemle, 8.(118.) évfolyam 3.szám 2013 június, pp.70, 3.2.

³⁴ Cf reply to question No 7.

5 of CA). The author and the person who makes alteration shall be entitled separately and individually from each other to grant licence on the altered work.³⁵

Hungary is not aware of model contracts. When some societies functioning in an artistic sector prepared model contracts, the Hungarian Competition Authority imposed sanctions since the model contract included prices as well.³⁶ Architects have model contracts, but they do not carry any weight on the market towards stronger partners, e.g. in public procurement tenders the architect is bound by the request for bids.³⁷

10. Do collective management organisations play a role in the exercise of the moral rights in your country?

Apart from the exceptional case of Article 14 (2) of CA, collective management organizations do not play a role in the exercise of the moral rights in Hungary, it is strictly separated. These organisations are registered (authorized) to exercise some economic rights only. They are forbidden to exercise rights not included in the register. As a result all tariffs and licensing agreements include a caveat: the licensee shall observe the moral rights of authors. The licence granted by the CMO does not cover any licence/consent other than those included in the licensing agreement. The Supreme Court passed a decision that includes *expressis verbis* that the licence granted by the CMO does not exempt the licensee from the legal consequences of the infringement of moral rights.³⁸

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- “*artistic quotation*”
- *user generated content*
- *folklore*
- *orphan works*
- *cloud computing*
- *alternative (free) licensing schemes (in particular open source licences or creative commons)*
- *international aspects (determination of jurisdiction and applicable law)*

In our legislation and case law, there are no specific provisions and case law findings, respectively, on these issues. It is to be noted that the Hungarian ALAI Group (the Hungarian Copyright Forum Association) in March 2014 prepared and sent detailed responses to the European Commission’s Questionnaire of “Public Consultation on the review of the EU copyright rules” and it included comments on the issue of user-generated content (UGC). The ALAI Group differentiated between two possible cases and, with respect to them, it stressed, *inter alia*, as follows:

First, if lawful derivative works are involved, since it has been authorized by the authors on the basis of their exclusive right provided in Article 12 of the Berne Convention or by the law, for example as for a parody, its status is exactly the same as the status of any work protected under the international treaties. Since this is the case, if there is any question concerning due

³⁵ Gábor FALUDI, Az építészeti művek a Szerzői jogi Szakértő testület gyakorlatában [Creations of Architecture in the Practice of the Hungarian Council of Copyright Experts] Manuscript of an forthcoming article, citation under the kind permission of the author.

³⁶ Graphic designers, No. Vj-98/2004; partly modified by Budapest – Capital Regional Court of Appeal (*Fővárosi Itélezőtábla*) 2. Kf. 27. 435/2007/12. from 2 April 2008.

³⁷ Opinion of the Hungarian Council of Copyright Experts No. 04/10.

³⁸ Decision of Supreme Court LB-H-PJ-2008-203.

remuneration of authors for online uses of their works, the question is necessarily the same from the viewpoint of the authors of all categories of works irrespective of whether they are pre-existing works or derivative works.

Second, if – in contrast – someone makes a derivative work without authorization by the authors or by the law, due to the... legal principle of *nemo auditur suam turpitudinem allegans*, the very question of how the infringer have any well-founded claim may hardly be justified. If the work is used either in its pre-existing form or in a form adapted or otherwise altered by such infringers, the remuneration is due to the author of the original work. (It may be an issue to discuss how the principle of “theft is prohibited even from a thief” might be applied in such a case, and how the maker of an infringing derivative version might oppose the use thereof. However, it does not change the legal situation that, if such non-authorized altered versions of pre-existing works are used, the authors of those works are in the position to exercise their rights, including the right to receive remuneration.)

In fact, in many cases, in addition to special licensing systems and tariffs for “small users” (the existence of which has been recognized as a result of the “Licensing Europe” consultations), it may be a solution for the authors of pre-existing works not to pay attention necessarily to the question of whether unauthorized non-commercial “UGC” versions truly amount to derivative works or not, but just to exercise and enforce their rights in respect of such versions too on the basis of their rights in the pre-existing works.

The Questionnaire did not deal with the issue of moral rights concerning UGC and, thus, our response did not cover it either. However, Hungarian legal literature has dealt with the issue expressing the view that a general exception for UGC (going beyond the UGC categories – such as in particular parody – covered by exceptions under the current *acquis*) might have unexpected negative impact on the protection of moral rights. See, for example, Mihály Ficsor: “Why Hong Kong’s Copyright (Amendment) Bill 2014 Is Right to Reject a General Exception for UGC” at www.copyrightseesaw.net. The article lists seven reasons for which a general UGC exception is not justified; and one of them is the potential danger such a general exception may create for moral rights.

12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work’s authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights “shift” in a digital environment:

- **From a divulgation right to a right to the protection of privacy (private life)?**
- **From a right to claim authorship (paternity) to a right to attribution?**
- **From an integrity right to a right to respect the authenticity of the work?**
- **Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?**

The nature of the first three questions differs from the nature of the last one. To the first three questions, our answer is that, although certain changes have taken place in the way moral rights are applied in the digital environment, in our country, there are no indications in legislation, case law and/or scholarly literature that the moral rights would suppose to “shift” in the digital environment in the manner it is suggested in the first three questions above. In our view, there is a basic difference between two things: first, moral rights as provided in the international treaties and national laws, on one hand, and, on the other hand, the way moral rights are exercised by certain authors. The three moral rights mentioned above differ in that the right of divulgation is not covered by the Berne Convention while the right to claim authorship and the right of integrity are.

As regards the right of divulgation, we cannot see how it might be transformed into the protection of private life. The protection of private life might be one of the theoretical reasons (but an overly general and abstract one) for the recognition of the right of divulgation. However, this kind of unnecessary re-theoretisation could (and should) hardly change the legal nature of this right; it is the right of the author to decide whether or not it divulges his work. Neither may it change the decisive personality-right-based justification the right of divulgation relevant for all moral rights; namely the strong internal relationship between the author’ personality and his work.

In the case of the second and third rights mentioned in the questions, the legal situation is different since, while there is no obligation under the international copyright treaties to protect the right of divulgation, Article 6bis obliges the countries party to the Berne Union to protect the right to claim authorship and to object to the actions listed there that may undermine the integrity of works. The right of attribution has always been an element of the right to claim authorship; the latter, however, is broader than the former. Therefore, it would be in conflict with the Convention to simply reduce the right to claim authorship to one of its elements and not to protect it in other aspects. Also, although the protection of the right of integrity may be a guarantee of authenticity, this in no way may allow reducing the obligation under Article 6bis to provide protection against any of the acts listed there that are suitable to endanger the integrity of works (otherwise, as one of the consequences, to undermine their authenticity). The exercise of these rights is another matter. Authors, under certain national laws, may waive these rights and/or may agree to limit their application to mere attribution and authenticity aspects. This, however, has nothing to do with the rights themselves as provided in the Berne Convention the same way as “open licenses” to waive economic rights (by those who, since they have other sources of income, can afford do not caring for the application of those rights) do not change at all the existence of and the obligation to protect those rights.

The digital online environment, in addition to the way of the practical application of moral rights by certain authors, may also influence national laws (both legislation and case law). However, in view of the international obligations, this must not mean disrespecting moral rights as provided in Berne 6bis, but rather only reducing the level of protection (in particular as regards the right of integrity) to what is prescribed in the Convention as a minimum obligation (and not going above that level – in certain cases, even to the right to oppose any alterations). It is a question whether or not ALAI’s objectives and basic principles would justify not only reluctantly accepting this as a reality but also encouraging and applauding it. While this may be a question, it may hardly be a question for ALAI whether or not it might be ready to accept the reduction of the protection of the two basic rights (and not only their exercise by those who, for some specific reasons, do not care for them) below what is prescribed by Article 6bis of the Berne Convention as also required by Article 27(2) of the Universal Declaration of Human Rights.

Of the phenomena mentioned in question 11 of the Questionnaire above, the trend of reduction of moral rights mainly emerge in connection with the Creative Commons and other “open” licenses and with user-generated content (UGC).

As regards CC licenses, a discussion paper was prepared in October 2006 by the Hungarian Association for the Protection of Industrial Property and Copyright (MIE) to which also the representatives of the Hungarian CC community responded. Both materials were general and rather a policy material than a substantive, in-depth analysis; the issues of moral rights remained outside of the discussion. However, we are, of course, aware of the conditions of Version 4.0 CC licenses which require the waiver of the right of integrity “as much as possible” in order to allow free application of the licensed rights (including the right of adaptation). “As much as possible” certainly means, *inter alia*, as much as possible under Article 6bis of the Berne Convention and under the national laws that provide for broader and more generous right of integrity. ALAI may recognize this as a logical element of CC licenses applied, in general, by certain specific (in a way, atypical) categories of authors who do not care for the protection of some – all any – of their rights. This, however, may hardly do anything with the level of protection of moral rights under the Convention and national laws. Concerning UGC, we refer to our reply above to question 11. As we stressed there, the introduction of general UGC exceptions may have unintended negative consequences, *inter alia*, also from the viewpoint of the protection of moral rights.

The topic of the fourth question above is different; namely possible moral-rights-type rights for related-rights beneficiaries.

To this question, as regards performers’ moral rights (real moral rights, not only just moral-rights-type rights) some of our responses above have offered responses. What should still be added is that, by virtue of Article 79 of the Hungarian Copyright Law, producers of phonograms have a kind of right of attribution; the right to indicate their names on the copies of their phonograms. Broadcasting organizations also have such a right. Article 81 of the Law provides that they have the right to indicate their names in connection with any acts covered by their economic rights under Article 80.

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