Digitisation, preservation and making available the cultural heritage
IPR legislation, Hungary

by dr. Péter Benjamin TÓTH, lawyer

28 February, 2005

The report below is made for the MINERVA project as a state-of-the-art presentation of the Hungarian intellectual property[1] legislation regarding the digitisation, preservation and making available of the cultural heritage.

1.) International conventions

Hungary is a contracting party to the following conventions:

Berne Convention for the Protection of Literary and Artistic Works
1922 (Act No. XII of 1922); Paris text: 1975 (Law-decree No. 4. of 1975)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
1995 (Government resolution No. 4 of 1994)

Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
1975 (Law-decree No. 18 of 1975)

GATT Marrakesh Agreement (**TRIPs** – Trade Related Aspects of Intellectual Property Rights)
1998 (Act No. IX. of 1998)

WIPO Copyright Treaty
2002 (ratification: Resolution of the Parliament No. 57 of 1998)

WIPO Performances and Phonograms Treaty
2002 (ratification: Resolution of the Parliament No. 57 of 1998)

[1] It is widely accepted, that the term „intellectual property" – although a traditional concept – is misleading. This branch of law has at least as many differences to traditional property law, as many similarities. It worths mentioning, that due to this disparity Hungarian civil law legislation still does not speak about „intellectual property rights". In the current recodification these rights will be placed between law of persons and property law, as *sui generis* rights in the new Civil Code.

2.) Compatibility with the *acquis communautaire*

2.1 In general

In the 90's the Hungarian legislation was amended several times due to the changing European law. In 1999 a new copyright act was accepted [Act No. LXXVI of 1999] which incorporated a regulation in line with the WIPO Treaties and with the European Directives in force. In 2001 (with effect from 1st January, 2002) the sui generis database protection was introduced. In 2003 (with effect from 1st May 2004) the *Infosoc* Directive was implemented. The legislation will accept new legislation this year to implement the „Droit de suite" and the Enforcement directives.

There are two major debated topics regarding the relation of Hungarian and European copyright law:

- whether the copyright act is really in harmonisation with the directives where it is alleged to be so; (some cases relating to our topic will be addressed below, in point 4.)
- whether the proposed changes that are presented by some lobby groups (or by the legislator) in this EU-induced constant legislating period are really resulting from the *acquis* (or is the reference to European norms just a good excuse to force a favourable regulation through).

2.2 Implementation of the Infosoc Directive

2.2.1 Rights

Regarding this part of the directive, the Hungarian Copyright Act needed only small adjustments:

- „in whole or in part" – although the judicial practice recognised it earlier, the copyright act did not contain any provision that also „parts" of the works can only be used with a licence from the rightholder. According to the new legislation: *„By virtue of the copyright protection, the author shall have the exclusive right to use his **entire** work **or an identifiable part thereof** in any tangible or intangible form and to authorise each and every such use."*;
- introducing „making available right" to the broadcasting organisations;
- exhaustion – the already existing national exhaustion was extended to the European Economic Area.

Importance from the viewpoint of preserving and making available cultural heritage:

The Hungarian legislation is fully in line with the acquis communautaire regarding the reproduction and making available rights of authors, performers, broadcasting organisations, phonogram and film producers. (Digitisation – reproduction; online communication – making available.)

2.2.2 Exceptions

As in every member state, in Hungary these provisions caused lots of debates as well. Moreover, even after the amendments, several questions arise.

a) Temporary reproductions [Infosoc Dir. Art. 5.1]

This exception of the Infosoc. Directive was transferred with identical wording. Unfortunately this provision of the directive was not systematically rethought in relation to the liability

limitations of the E-commerce Directive. This leads to uncertainties across the EU, and in Hungary as well.

Importance from the viewpoint of preserving and making available cultural heritage:
This provision is of minor importance. Intermediaries of services communicating the cultural heritage to the public will be exempted from copyright liability according to this norm.

b) Reprographic reproductions [Infosoc Dir. Art. 5.2 a)]
In Hungary the reprographical remunerations are levies paid by the photocopying machine manufacturer/importer and by the copy-shop-operators, as a compensation for the losses caused by the private copying exception.
Under the implementation obligation the Hungarian legislator had to accept the short-sighted policy of the EU regarding sheet music. However the private reproduction thereof cannot be traced – no levy compensates the rightholders for the losses since 1st May, 2004, because it is an illegal act. The right of the author / publisher to license private reproductions of sheet music is unenforceable.

Importance from the viewpoint of preserving and making available cultural heritage:
This provision is of minor importance. It is dealing with copies of private persons, not of institutions. Full books or journals cannot be copied with photocopying devices.

c) Private copying [Infosoc Dir. Art. 5.2 b)]
The legislation regarding the private copying levies (paid for blank media by the manufacturer / importer) was amended in two ways:

- „At the determination of the remuneration, it shall be taken into account whether effective technological measures for the protection of copyright and related rights are applied on the works, performances, films and sound recordings concerned."
- Due to the internal market, the provisions relating to the pay of custom duties was amended. Originally, the person obliged to pay custom duties was to pay levies; in the new legislation in case of „internal market imports" the „importer" and all domestic distributors are jointly liable. (However, due to the lack of other amendments, this levy is very hard to enforce.)

Importance from the viewpoint of preserving and making available cultural heritage:
This provision is of minor importance. It is dealing with copies of private persons, not of institutions. It shall not be considered as free use to have a work copied by someone else in case of digital copying, even if it is done for private purposes.

d) Reproduction in LAMS institutions [Infosoc. Dir. Art. 5.2 c)]
Earlier every institution enjoyed a wide free copying exception for internal purposes; the new regulation narrowed this to schools, libraries, museums and archives.

„(4) Publicly accessible libraries, educational establishments [Article 33(4)] museums and archives as well as audio and audiovisual archives shall be allowed to make a copy of a work for internal institutional purposes – outside the scope of entrepreneurial activity – to the extent and in the way justified by such a purpose if it is not intended for earning or increasing income even in an indirect way and if the copy is

a) required for scientific research,
b) made for archiving from an own copy of such an institution for scientific purpose or for public library supply,
c) made of a minor part of a work made public or of an article published in a newspaper or periodical, or
d) the copying is allowed by a separate law under certain conditions, in exceptional cases."

Importance from the viewpoint of preserving and making available cultural heritage:

This Article makes the preservation by favoured institutions (libraries, archives, museums and schools) possible. The practical applicability of this provision is touched by case No. 29/2004-SzJSzT, see point 4.

e) Ephemeral recordings of broadcasting organisations [Infosoc. Dir. Art. 5.2 d)]
New exception in the Hungarian copyright act:
„(7) Ephemeral recording of a work lawfully used by a radio or television organization for the broadcast of its own program if made by its own facilities shall be free. Unless otherwise provided by the contract authorizing the broadcasting of the work, such a recording shall be destroyed or erased within three months counted from its making. Those of such recordings which are specified in separate legislation may, however, be for an indefinite term preserved on the ground of their exceptional documentary character in audiovisual and audio archives qualifying as public collections."

Importance from the viewpoint of preserving and making available cultural heritage:
The government plans to launch NAVA, the National Audiovisual Archive *[www.nava.hu]*. By now, an act is accepted about this new official archive. Act No. CXXXVII. of 2004 will be in force from 1st January 2006. According to this act: *„the programme items fixed by NAVA with an archiving intention shall be deemed as ones of 'exceptional documentary character'"* This provision is clearly against the directives; a recording must *first* be 'exceptional' and *then* can be preserved by the official archive. It cannot be the other way round: the archive's decision on the fixation makes the programme 'exceptional'?

f) Uses for the benefit of people with a disability [Infosoc. Dir. Art. 5.3 b)]
The earlier exception was slightly amended in line with the Infosoc. Directive. According to the new text:
„Any non-commercial use of a work shall be free if the sole purpose of the use is to meet demands of disabled persons that are directly related to the disability and it does not exceed the extent justified by the purpose, shall be free."

Importance from the viewpoint of preserving and making available cultural heritage:
The importance is evident for people living with a disability; preservation and making available are both excluded from the exclusive right of the copyright holder, as long as the *sole purpose* of such a use is to meet the demands of disabled persons. The regulations outside copyright law (act and ministerial decree on the schoolbook market) make it obligatory to the schoolbook-publishers to deliver an electronic copy of the book to the Hungarian Association of Blind People, in order to enhance the efficiency of this copyright exception.

g) Use of publicly exhibited visual works [Infosoc. Dir. Art. 5.3 b)]
According to the unchanged paragraph of Copyright Act:
„Of a fine art, architectural and applied art creation erected with a permanent character outdoors in a public place a view may be made and used without the authorization of the author and paying remuneration to him."

Importance from the viewpoint of preserving and making available cultural heritage:
This part of the cultural heritage can freely be preserved and communicated on photos.

h) Making available in LAMS institutions [Infosoc. Dir. Art. 5.3 n)]
One of the most debated new regulations of the modified Copyright Act is the wide free communication to the public right of schools, libraries, museums, archives.

„In the absence of a contractual provision to the contrary, works forming part of the collection of publicly accessible libraries, educational establishments [Article 33(4)], museums, archives, as well as audio and audiovisual archives, may be, for the purpose of research or private study, freely displayed to individual members of the public on the screens of dedicated terminals on the premises of such establishments, and, in the interest of this, they may be in a way and on conditions as provided for in separate legislation communicated, including their making available, to such members of the public, provided that this is not for direct or indirect earning or increasing income."

Importance from the viewpoint of preserving and making available cultural heritage:

This Article makes the on-the-spot communication of preserved cultural heritage by favoured institutions (libraries, archives, museums and schools) possible. However, several scholars points out, that this regulation overstretches the possibilities provided by the Infosoc. Directive. This point of view is also expressed in case No. 29/2004-SzJSzT, see point 4.

This provision of the Copyright Act is completed by a Government Decree [No. 117/2004 (IV.28.) Gov.D.] that deals with several conditions of this exception. According to this decree, the library can only use the work freely, if it uses a secure technical solution, under which the modification, reproduction or retransmission of the content is prevented.

2.2.3 Technological Protection Measures (TPM) *[Infosoc. Dir. Art. 6.]*
Hungary has adopted a regulation in line with the Infosoc. Directive, amending slightly the earlier provisions on TPMs.

In case of TPMs in conflict with exceptions:

- Firstly, the beneficiaries of several appointed exceptions and the rightholder are negotiating with each other about the application of the exception.
- If the parties cannot reach an agreement, a mediator body (Mediation Board, established at the Hungarian Patent Office) is the next obligatory step, where the procedure can be started by any of them. The procedure may also be initiated by the representative organizations of the beneficiaries. The objective of the procedure of the Mediation Board is the facilitation of an agreement between the parties.

- If the mediated negotiations also fail, the beneficiary of the exception may turn to the court and may demand in a lawsuit that the court oblige the rightholder to make the free use possible according to the conditions indicated by him.

2.2.4 Rights Management Information *[Infosoc. Dir. Art. 7.]*
The already existing regulation was amended according to the wording of the Infosoc. Directive.

3.) Collective management of copyright – law and practice

In Hungary the first collective management organisation of the musical authors was established in 1907, under the name MARS. In the communist regime, this activity was brought under state control. In 1996 a new regulation was accepted for the „re-privatisation" of collective management organisations, under which new civil law societies were established – partly as new organisations, partly as legal successors of the state authority.

According to the Hungarian legislation the collective management of copyright has the following main characteristics:

- *Legal monopoly*. Only one society may be registered nation-wide for the collective administration of authors' rights and neighbouring rights related to each types of work and product.
- *Extended licensing*. The first „leg" of the collective management are the membership and other mandates from the individual rightholders. The second „leg": reciprocal representation agreements with similar foreign collecting societies. These mean a very wide representation right at the organisation, what is the basis of the approval by the Ministry of Culture. Only a collecting society that represents substantial part of the world repertoire can be registered by the Minister to the record of the collective management societies. If a society is registered, the law extends its representation right also to those, who did not give mandate for administering their rights. The rightholder can opt-out from this circle, however in some cases (where the international treaties make it possible) the collective rights management is obligatory, therefore no opt-out is allowed.

These two factors together mean, that a user can get full warranty of title: if he obtained a license from the collecting society, no one else has the right to object the use or collect royalties for that use.

The following collective management societies operate in Hungary:

1. *Artisjus* – Society Artisjus Hungarian Bureau for the Protection of Authors' Rights [www.artisjus.hu] – representing composers, lyricists, music publishers and literary authors.
2. *EJI* – Bureau for the Protection of Performing Artists' Rights [www.eji.hu] – representing performing artists.
3. *Hungart* – Collective Rights Management Society of Visual Artists [www.hungart.org] – representing visual artists.
4. *Filmjus* – Society for the Protection of Film Authors' and Producers' Rights [www.filmjus.hu] – representing film authors and film producers.
5. *MAHASZ* – Hungarian Alliance of Record Producers [www.mahasz.hu] – representing phonogram producers, local group of IFPI.

6. *MASZRE* – Hungarian Society of Authors and Publishers of Fictional and Technical Works for Reprographic Rights – a society distributing the reprographic levies collected by HARR for authors and publishers of fictional and scientific works.
7. *HARR* – Hungarian Alliance of Reprographic Rights [www.reprografia.hu] – an association of Hungart and MASZRE for the collection of reprographic royalties. The distribution is carried out by the two member organisations.

4.) Case-law – digitisation and on-line uses

Unfortunately there is no published judicial practice for digitisation and online uses in the field of copyright. As far as I know, there has been no final court decisions in this topic at all.

However, in a few cases the *Board of Experts for Copyright* set up at the Hungarian Patent Office [http://www.hpo.hu/English/hivatalrol/testuletek/szjszt/] gave experts' opinion on topics related to the digital preservation and communication of copyrighted works. It is highly interesting, that while the majority of the Board's opinions are given for court proceedings, in this specific circle it has only been requested to give opinion in out of court procedures.

Case No. 25/2000-SzJSzT *„news agency"*
Main findings:

- the protection provided by copyright automatically extends to the „publication" of works on internet websites, as a *„making available"* right under the WIPO 1996 Treaties and the corresponding Hungarian copyright regulations. For this extension no „copyright notice" is required.

Case No. 38/2003-SzJSzT *„media monitoring"*
Main findings:

- writing down television programmes is not a relevant reproduction of the programmes according to the *neighboring rights* of the broadcasting organisation. (Ie. it does not need the license thereof.)
- in case the text of the programme is protected also by copyright, such a full-text writing down is a relevant reproduction regarding the *authors' rights* provisions. Only in cases of legal exceptions from the exclusive right may this activity be regarded as „free" of license and of royalty.
- however, if only facts or news are written down from such a programme, no license is needed.

Case No. 37/2001-SzJSzT *„musical ringtones"*
Main findings:

- the communication of musical mobile phone ringtones by the provider to the customer is an *„online making available"* under the WIPO 1996 Treaties and the corresponding Hungarian copyright regulations, if the consumer individually chooses the work (in a time and on a place also choosen by him/her) on the Internet and the provider sends the requested work to his/her telephone set.

Case No. 29/2004-SzJSzT *„digitisation and communication of periodicals by a public library"*
The Library of the Parliament turned to the Board. They intend to digitise all articles from periodicals in their field of collection, then „publish" it via the library intranet and later possibly on the internet as well. In this expert opinion the author of this report was proud to be presenter of the case. As the conclusions of this opinion in many field are quite pointing forward, and mostly based on harmonised European norms, I hope that this case can be of interest for anyone in the European library sector.
Main findings:

a) regarding the digital preservation of periodicals

- Not only the rights of the authors of individual articles needs to be investigated, but also *1.)* the rights of the editors (if the periodicals are copyright-protected collections) *2.)* the *sui generis* rights of the maker of the database (if the periodicals are databases produced with substantial investment under Directive 96/9/EC).

- The digitital preserving / digitising activity (by scanner or any other means) is to be considered as „reproduction" in copyright. (In the field of the *sui generis* database protection the used term is „extraction".)

- *Is the periodical a collection protected by copyright?* Usually yes, due to the compiling practice of the publishers, except in cases, where the compilation does not offer an individual creative scope for action for the editor.

- *Is the periodical a database protected by the sui generis right?*
Sub-questions:

i) „...arranged in a systematic or methodical way and individually accessible by electronic or other means."

1) *„Arrangement in a systematic or methodical way"* on one hand, and *„individual accessibility"* on the other may seem to be seperate characteristics of databases. However, as the European Court of Justice (ECJ) pointed to in case No. C-444/02 [Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE (OPAP)], these two conditions are to be interpreted together as follows: Those electronic or other means, that make the individual accessibility possible, are representing the system or method by which the making of the database was realised.
2) „Indvidual acessibility" means that the independent component materials of the database can be separated without their value being not in the least affected.
3) In the wording of the database directive, the individual accessibility „by electronic or other means" cannot be interpreted as individual accessibility „by electronic or other way". There always has to be some kind of means or instrument, „tool" (eg. table of contents, thesaurus, index, register), that makes the individual accessibility possible.
4) In case of printed databases the „individual accessibility" can only be verified if the component materials lead to the searched material with their order value (eg. alphanumeric arrangement), so that the requested information can be tracked down without a contentual selection of the collection.

⇒ As a general conclusion: the periodicals – due to the publishers' compiling practice – are generally arranged in a systematic or methodical way. The individual accessibility,

however, can only be verified if an instrument (index, table of contents) reflecting this system or method makes the independent cognition of the required element possible.

ii) „...qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents..."

1) Following the 2004 November decisions of the ECJ, when investigating the „substantial investment" at the *sui generis* database-protection, only those investments can be taken into account, that are needed to the making of the database as such. These investments do not include those for creating of the content.
2) „substantial investment in the obtaining of the contents" in case of periodicals
   - If the articles or studies are created on the order of the publisher, the investment applied for this creation cannot be taken into consideration, only the resources used to seek out already existing independent materials.
   - If the authors turn to the publisher with finished works that are not yet made public, the royalty paid to the author cannot be regarded as an investment in the obtaining of contents for the database. This amount shall be considered as a resource used to the creation of the content.
3) „substantial investment in the verification of the contents" in case of periodicals
   - The investment in the „verification of the contents" means the resources used by the publisher to check the accuracy and factual correctness of the articles or studies.

⇒ As a general conclusion: the publishers of periodicals usually do not carry out substantial investment to the database nature of one issue of the periodical.

iii) succeeding issues of periodicals

1) Two or more succeeding, but discretely published issues of a periodical do not form a „collection", as the elements are separated.
2) However, the publisher has the possibility to form a new (cumulative) database from the collection of its already existing articles or studies with substantial investment. For example, if it makes the articles of the collection accessible through a newly created register of subjects or builds an electronic database. In this case the resources used either to the verification or to the presentation of the contents can be taken into account.

⇒ As a general conclusion: although the publishers of periodicals usually do not usually carry out substantial investment to the database nature of one issue of the periodical, if the library wishes to use a cumulative database as a source of its digital preservation, where the investment to the database nature was substantial, the sui generis database right of the maker has to be respected.

⇒ The very essence of the sui generis database protection is – however the database is maybe not the only source to get to know its content elements – to defend the commercial value of the substantial investment needed to the compilation, verification and publication of the systematized set of data.

- Is a licence required for the digital preservation?

1) Scanning the periodicals contained in the collection of the Library of the Parliament is „free use" under the copyright act [Art. 35§(4), see 2.2.4 d) above]. However, where the source is a database protected under the sui generis right, no such exception exists, as the European database directive does not give any such possibility to the legislators.
2) If the rightholder defends the copy of the work with a technological protection measure (TPM), the Library of the Parliament (as a publicly accessible library) shall be deemed as a „beneficiary of the exception" regarding Art. 35§ (4) of the Copyright Act. This

exception is one of the appointed ones, which means that the library (as beneficiary of the exception) may demand that the rightholder make the free use possible for him, provided that he has got access to the work lawfully. (see 2.2.3 above)
However, if the library obtains the TPM-protected work lawfully from the internet, then it does not have this right against the TPM.

3) The Hungarian copyright act states, that the source of the free preservation shall only be an own copy of the library. However, works obtained from a lawful internet source (eg. free „webjournals", portals) can also make the basis of a lawful preservation, because the copy that is made on the server of the library is made with the consent of rightholder, and therefore can be regarded as an „own copy".

b) regarding the „intranet" communication

Type of use:

- As long as the accessibility of this service is only in the building of Parliament, it cannot be regarded as „making available", because that type of use requires that members of the public access the works on a place individually chosen by them. The display on the dedicated terminal is a *„public performance"*.
- If the readers can choose from several geographical locations (eg. the „intranet" of the institution covers several local branches as well) then we can talk about *„making available"* right under the WIPO 1996 Treaties and the corresponding Hungarian copyright regulations.

Investigation of the elements of the exception provided by the Copyright Act [Art. 38§(5) and Government Decree No. 117/2004, see 2.2.2 h) above]:

- *„works forming part of the collection of publicly accessible libraries, educational establishments, museums, archives"*

Those works, that were freely digitised/archived by the Library of the Parliament, are lawfully contained in their collections, therefore they can form the basis of such a favoured on-the-spot service.

- *„on the premises of such establishments"*

According to the solution of the Hungarian legislator – this becomes clear only from the Government Decree – the collections of the favoured institutions [libraries, archives, museums, schools] can be interlinked. This would mean, that in any of these institutions all works contained in other favoured institutions' collections could be accessed. In the acting council's opinion, this extended interpretation is in logical conflict with the regulation of the Infosoc. Directive and causes self-contradiction within the rule. The cause of this controversy is, that

α) both norms strictly prescribe that the free making available of works can only include *„works and other subject-matter (...) which are contained in their collections"*. If then all these collections could be interlinked, this regulation would become meaningless, therefore the solution used by the Hungarian legislator is excluded;

β) in case of some types of works (eg. scientific works), where the selling copies to libraries, and schools represent a relevant part of the market, this solution contradicts with the three-step-test [Infosoc. Dir. Art. 5.5], because it conflicts with a normal exploitation of these works;

χ) according to the ECJ (Case No. 106/77 „Simmenthal"), if a legal dispute affecting community law is to be decided by a national court, it shall disregard *ex officio* those regulations of the national law, that are in conflict with the community law. It has to proceed according to this obligation without waiting for the annulation according to the constitutional law.

- *„in the absence of a contractual provision to the contrary" vs. „not subject to license or purchasing terms"*
The Infosoc. Directive states, that the free communication of works in Art. 5.2 n) can only be done to works that are „not subject to license or purchasing terms". According to the Board, the Hungarian interpretation, under which the free communication takes place only „in the absence of a contractual provision to the contrary", may not be regarded as the best understanding of the original regulation. Moreover, according to the Hungarian regulation in force there are interpretational difficulties, because this means, that the author and the publisher (in the licensing agreement between them) can „unilaterally" exclude this exception.

c) regarding internet communication

The „publication" of works on internet websites is regarded as „making available" under the WIPO 1996 Treaties and the corresponding Hungarian copyright regulations. It needs a license from the rightholders of works and also from those of the *sui generis* databases.

d) regarding deep links

The Library of the Parliament also considers the possibility of not providing the works from its own server in an own service, but using deep links to works already made available on the internet. Regarding these deep links the Board gave the following advices:

1) The person providing a hyperlink to a content already made available independently, does neither reproduce nor makes available the referred work.

2) This legal opinion could change if
- the hyperlink becomes active „automatically", without the active contribution of the visitor (eg. so-called embedded links);
- the destination of the hyperlink is hidden, and so the content technically coming from a different provider seems to come from the hyperlink-provider;
- the referred content is only accessible through the hyperlink, cannot be found from another source, and this content is provided by the hyperlink-provider as an own content.

(end of report.)