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Question B

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"To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?"

1. Does your jurisdiction's copyright law provide for a so-called "triple test" provision, namely a provision which reiterates the requirement of international treaties that exceptions and limitations to copyright shall only apply in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author? If yes, please provide [an English version of] the text of this provision. If no, how does your law understand and comply with that requirement? In particular, is that requirement taken into account by the courts in individual cases and to what extent? Is there any case law which can serve as guidance? Can you refer to concrete examples used by your national scholars to illustrate that requirement and its concrete consequences? In particular, can you comment on precedents, if any, where the court found that (i) the application of the exception conflicts with the normal exploitation of the work (ii) unreasonably prejudices the legitimate interests of the author?

In its Preamble, the Hungarian Act LXXVI of 1999 on Copyright (hereinafter referred to: 'the Act') not only acknowledges the need for and importance of a modern, technology-friendly copyright regime, but also stresses the relevance of striking fair balance between the prevailing interests of right-holders and those of the users. As one of the main tools for achieving this aim, the legislator chose to transpose the test into Subsection 2 of Section 33 by omitting the first step and adding two further conditions. Accordingly, the Hungarian 'Four-step-test' shall be read as follows. *"The use under the provisions relating to free use is permitted and not subject to remuneration only so far as it does not conflict with the proper use of the work and does not unreasonably prejudice the legitimate interests of the author, and it is in compliance with the requirements of fairness and is not designed for a purpose incompatible with the intention of free use. "* With regards to the general standards of legal interpretation, all legal instruments should be interpreted in conformity with European harmonizing measures and the courts may turn to the relevant international treaties when interpreting the above section.

To this day, however, judgments handed down in relation to copyright infringement cases concerning free uses, fail to explicitly assess, analyze or indicate the test's merits or applicability. Rather, they generally observe the specific requirements to be met for a certain type of free use through the glass of Section 33 (2) as cited above. The courts in Hungary afford scrutiny on a case-by-base bases to the special provisions of each and every instance of free use subject to the test.

2. Does your jurisdiction's copyright law provide for a list of exceptions? If yes, is it a closed list, namely a list designed in such a way that any use which falls outside the list is not permitted - unless it is authorized by the copyright owner?

The Hungarian Copyright Act provides for an exhaustive list of exceptions. The closed nature of the list is being confirmed by Section 33 (3) which strictly prohibits legal interpretation of an inclusive nature. Absent of any catch-all exception incorporated in the Act, uses, which fail to satisfy both the special criteria pertaining to

specific cases of free use and the general standards in Section 33, constitute infringement of the right-holders exclusive rights.

3. If your jurisdiction's copyright law provides for a list of exceptions, what are the fundamental rights or the objectives supporting the permitted uses which justify the exceptions? In particular, do the exceptions pursue the following fundamental rights or objectives: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama? Are there fundamental rights or objectives which are overlooked or unduly minimized in the current list of exceptions?

The current framework of Hungarian copyright exceptions takes all but one of the above list of fundamental rights interests into consideration. Many uses fall under several above listed categories of fundamental rights, therefore we list below the most important free uses under each fundamental right.

Education and research

The objective to support education and research is achieved by enabling as free use the following uses of copyrighted works:

- borrowing from a number of works already published provided that the resulting work is not to be marketed (Section 34 (2));
- non-commercial reproduction and publication of textbooks and course books which either in part or in full consist or comprise of borrowed works (Section 34 (3));
- adaptations of works created for illustrative purposes by educational institutions (Section 34 (4));
- non-profit reproduction of works essential to attaining such aims by educational establishments, museums, archives, picture and sound recordings held in public collections (Section 35 (4));
- partial reproductions of literary works published as books, newspapers and periodicals in an amount commensurate to the number of students attending classes or sitting exams (Section 35 (5));
- public performance, recitation or presentation of works serving educational purposes (Section 38 (1) b);
- integrating pictures of fine art, architectural, applied art works as well as pictures of industrial designs and photographic works into scientific and educational lectures (Section 68 (2));
- extracting most of the content of protected databases (Section 84/C (2)).

Access to culture and knowledge

Gaining access to culture and knowledge in general is achieved by the following free use exceptions: a natural person acting without the intent to directly or indirectly profit from others' intellectual efforts shall be free to

- produce (partial) copies on the basis of educational, research, archival and intra-organizational purposes as laid down in Section 35 (4), only if classified as one of the following repositories under specific other legislation: public libraries, educational establishments, museums, archives, picture and sound recordings held in public collections;
- make available works to the public in a restricted manner in concordance with Section 35 (5);
- engage in lending copies of works except for software and databases safeguarded by technological protection measures if classified as a national library pursuant to Section 39.

Freedom of expression and the right to receive and impart information

From all the exceptions of the Act, several may be subsumed under these two fundamental rights and freedoms. Quotation, as being one the first recognized limits to copyright, enables the members of the public to lead informed discussions, to contrast their respective contentions, to bring forth novel theories by indicating the source and the author's name provided that the underlying creation is of a creative, original nature and the length

of the part borrowed does not exceed the reasonable limits of proportionality (Section 34 (1)). With a view to fostering public discourse, articles and broadcast works concerning current daily events, political and economic occurrences may be referenced, displayed or otherwise communicated to the public unless precluded by the right-holder in advance (Section 36 (2)). Similarly, sections of public lectures, other similar works and political speeches may also be used for information services under certain specific purpose- and proportionality-related requirements (Section 36(1)).

Privacy and private use

Private use as such within the meaning of the Act is protected by exceptions pertaining to

- private copying (Section 35),
- performance, recitation or presentation of works for purposes of private use and occasional private events (Section 38 (1) f),
- certain acts carried out in relation to software legally acquired according to the license agreement's provisions (Section 59) and
- the exempted reproduction and translation of source codes necessary for establishing interoperability between different computer programs (Section 60).

Needs of people with disabilities

Section 41 (1) of the Act aims to safeguard the privileged interests of the handicapped and disabled by establishing that in order to exclusively satisfy their particular needs, to the extent required, non-commercial uses of all kinds of works may be permitted.

Preservation of cultural heritage

Forming an essential part of numerous European and international initiatives, this aim shall also extend to creative intellectual works, regardless of their originators' nationality. Thus, the Act offers legal field specific tools for preserving works available to future generations. Perhaps the most important exception serving such objective is covered by the reproduction, lending and making available works to the visitors of public libraries and like institutions and the performance of works serving educational purposes (Section 35). Further, if the performance is of non-commercial nature, works may be communicated to the audience of celebrations held on national holidays. Similarly, ephemeral recordings made by radio or television organizations of works previously licensed for broadcasting purposes need not be deleted within the statutory deadline if they are capable of demonstrating exceptional documentary value (Section 35 (7)).

Public security

The overriding interest of the efficient, unobstructed operation of courts, administrative and other authorities including the Parliament often require copyright works to be used in a variety of ways which would otherwise infringe upon right-holders' exclusive right to prohibit or authorize the exploitation of their works. To alleviate this tension, Section 41 (2) and (3) set forth two exceptions exempting uses of works during the course of such proceedings in a manner consistent with and proportionate to the objectives pursued.

Freedom of panorama

Lastly, the Act indeed provides for a panorama exception in Section 68 in conformity with European standards.

4. If your jurisdiction's copyright law provides for a list of exceptions, are the conditions mentioned in the provisions - in order for the use concerned to be permitted – [unduly] strict and compelling, or rather is there room for flexibility? Can you mention examples to illustrate solutions in this respect? Does the law make a distinction between (i) uses for commercial purposes and uses for non-commercial purposes (ii) uses by individuals and uses by others (e.g. companies, organizations)?

Flowing from the exhaustive list of exceptions and the Hungarian version of the three-step-test, as well as from the express provision of the Act that the provisions relating to free use shall be interpreted narrowly the provisions related to permitted uses allow for very little to no room to exercise judicial discretion. Thereby, courts lack the statutory leeway necessary to flexibly interpret and adapt the existing rules to the unique circumstances of each case. This rigidity, in part, may be attributed to the 'extensive exclusive rights - narrow exceptions' constellation in addition to the prohibition aiming to curtail the extensive interpretation of the test.

The free uses are typically uses for non-commercial purposes and therefore undertaken by private individuals. Based on the concept of the narrow interpretation of the free use exceptions and the exclusive nature of the copyright uses which even indirectly serve commercial purposes shall not be considered free use. As an example, in BH2005.144., it was ruled that setting up and operating tv and radio devices in communal areas of a holiday resort, which was open to the defendant's employees only, and the failure to pay the required levies constituted the infringement of the right-holders' right to communicate works to the public. All of the defendant's defenses that had aimed to support the lack of commercial nature as the service had been provided during a private event, were rejected by the Court. Instead, it was affirmed that the factual possibility of guests frequenting the resort and stressing that no private performance of a work (under free use) may serve the pursuit of gainful activities or increasing the establishment's possible turnover.

However in the recent ruling of the Budapest Court of Appeal (No. BDT. 2016.3424.) the court held that even the for-profit re-utilization of an insubstantial part of a database legally obtained, falling under the scope of free use, without the consent of the right-holder (plaintiff), shall be permitted. This decision was based on the fact that the Act expressly provides for this possibility in Section 84/B by stating that "*no consent of the maker of the database shall be required for the repeated or regular extraction or re-utilization of an insubstantial part of the content of the database by a person lawfully using the database made public.*"

5. If your jurisdiction's copyright law provides for a list of exceptions, are the exceptions listed mandatory or optional? Does your law make a distinction in this respect? If yes, does the distinction depend on the nature of the exception? If the exceptions are mandatory, does that mean that they cannot be ruled out by contract, even if the contract organizes an online (interactive) access to the works? Does your law make a distinction between off-line and on-line uses in this respect? Do you have any other comment concerning the mandatory or the optional character of the exceptions?

As the provisions of the Act are typically mandatory, with the exception of the provisions on the use agreements, the exceptions have to be regarded mandatory as well. However, there are some instances, were the Act itself allows that the right holder may exclude or limit the free use. For example in the case of articles published on current economic or political topics, which may be reproduced and communicated to the public in the press freely, but inly if the author has not expressly prohibited such a use [Section 36 (2)].

6. If your jurisdiction's copyright law provides for a list of exceptions, do these exceptions relate to the "reproduction right" only or to the "right of communication to the public" only, or to both? Does the law make a distinction depending on the exception concerned? If yes, what are the negative consequences in practice for the user of the work, i.e. to what extent is he prevented from making use of the work in a way that is sufficiently effective for the purpose contemplated by the legislature? Can you give some illustrations?

In Hungarian copyright law the free use exceptions are not defined along the lines of certain economic rights. Certain uses by certain persons in certain cases are allowed. The provisions on the exceptions do not make any distinction according to reproduction right or right of communication to the public. If these uses may be exercised in either way then it is allowed - however in certain cases (for example private copy exemption) obviously only one right, the right of reproduction, can be exercised. Practically the majority of exceptions exclusively or additionally are related to the right of reproduction, while only a few of them have been rendered to, for instance, the performance or communication rights.

Quotation

Pursuant to Section 34 (1), virtually almost all types of works - with the exception of works of fine art, photographs, industrial designs, software and databases - may be freely quoted (i.e. *reproduced*) with additional restraints regarding proportionality, the purpose of the use, and the mandatory indication of source.

Borrowing

In accordance with Section 34 (2)(3), parts of a longer work or the entirety of a shorter one - literary, audiovisual, visual works and phonograms included - may be subject of *reproduction, distribution, making available to the public or public performance* without authorization, provided that the resulting work is not utilized commercially and the basic requirements indicated at Quotation are met. However, borrowing may only serve educational or scientific purposes.

Adaptation by schools

Adaptation of copyright works regulated in Section 34 (4) serving educational and instructional purposes affect right-holders' prerogative to exclusively adapt and reproduce their respective creations.

Private copying by a natural person pursuing private purposes

Private copying is obviously a exemption to the author's exclusive *right of reproduction.* Section 35 (1) sets out clear boundaries when emphasizing that reproduction of architectural works, technical structures, software, databases, sheet music and the rendering of 'bootleg' recordings of live performances are being excluded from the said exception's scope. Further the Act implicitly prohibits producing analogue or digital (photo)copies of complete books, periodical and dailies serving even private purposes. Therefrom the permissibility of other works' analogue or digital reproduction may be easily deduced.

Permitted acts carried out by knowledge repositories as beneficiaries of specific copyright exceptions

Premised upon the above 'general' criteria pertaining to *private reproduction*, Section 35 (4) - (5) and Section 40 of the Act establishes the licit reproduction of hardcopy and digital works, their subsequent intra-organizational lending and making available to the public [Section 38 (5)] in a similarly restricted manner by such repositories. It shall be noted that software may also be subject to lending.

Temporary and incidental digital reproduction of software and databases, the permitted free uses of legally acquired copies and those methods of utilization that do not require authorization

Reproduction of software codes have become indispensable elements of running, operating and interacting with computer programs in addition to serving as a basis for every kind of online content-delivery method known to this day. On a combined reading, Section 35 (5), 59 and 60 delineate the room within which lawful users may use, reproduce, re-utilize, exploit, study, create backup copies and reverse-engineer the software and database at hand.

Free use of public lectures, political speeches, similar works and reports of current events

In accordance with the provisions set out in Section 36 (1) - (2) and Section 37, public lectures, political speeches, other alike works, articles and reports on current events concerning news that are of high interest to either the public in general or its particular segment thereof, may be freely used to the extent justified by the given purpose. *Consequently, these uses span all modalities of utilization included but not limited to reproduction, broadcast, making available to the public.* With the exception set out in Section 36 (1), publishing them as a collective work is invariably subject to authorization by the right-holder. As to the inherent difference between the articles' permitted utilization (Section 36 (2)) and those of regarding reports on current events (Section 37), the level of originality characterizing those works shall be deemed pivotal.

Displaying works as scenery, stage property and costumes

As to the exceptions regulated in Section 36 (3) - (4) of the Act, works of visual arts capable to serve such purposes may be displayed or otherwise embedded into audiovisual media services (e.g. tv broadcasting, online-broadcasting, etc.) subject to designating the author's name in case of the former two instances. These criteria need not be met with regards to costumes, although.

Reproduction of visual works for advertising purposes

Referring to public exhibitions and auctions within the ambit of droit de suit, Section 36 (5) governs the lawful and indirectly for-profit *reproduction works of fine art and distribution thereof* with a view to publicize the mentioned events. As an additional remark, the introduction of this exception seems to discriminate against statutory free uses of a non-commercial nature (entailing payment of reprography fees and blank carrier levies) and against the broader category of compulsory licenses granted by collective rights management on behalf of the right-holders.

Public performance of works

In abstract, every provision of Section 38 concerning *public performance of work*s under free use shall encompass all protectable creations except for software and theatrical works.

7. If your jurisdiction's law provides for a list of exceptions, do these exceptions also affect the moral rights of the author? Is the impact on moral rights explicit or implicit? Is it legitimate and proportionate? Is there a mechanism which guarantees a minimum level for the preservation of the moral rights of the copyright owner? Conversely, is there any risk that the copyright owner could unduly invoke his moral rights to block the exception? Please give some examples.

The moral rights of the authors are not assignable and may not be waived by the author under Hungarian copyright law. Consequently, moral rights may not be disregarded when the use of the work is based on a free use exception. From the three moral rights, that is right of making the work public, the right to be named as author and the right of integrity only the last two shall be considered when it comes to free use exceptions. No work, prior to first publication, may be subject of lawful utilization. This means for example that in cases concerning the lawfulness of private copies made from leaked phonograms via file-sharing applications and protocols, authors (or related right holders) may assert their right of publication successfully.

Section 11 grants the right for authors to validly withdraw their prior permission for publication of their works and that of enabling them to prohibit any further on justified grounds. While theoretically after such withdrawal the work should not be subject to free use exceptions either, the enforceability of this in practice is highly questionable.

In accordance with Section 12 of the Act, the right to be named as author entitles the author to affix his real or pseudonym name onto his work to the extent made possible by the size and nature thereof. If choosing so, all others intending to re-work, adopt, quote or present it shall be obliged to designate his name except for a small number of free uses. This right is expressly referred to in the provisions on free use where it is relevant. Thus the Act expressly provides for the necessity that the source and the author is named if (i) some quotes from the work; (ii) the work is used for educational purposes; (iii) parts of publicly presented lectures and other similar works as well as political speeches are freely used; (iv) the works are used freely for the purpose of providing information on current events. And in one occasion the Act expressly allows that the name of the author shall not be mentioned, namely when fine art, photographic, architectural, applied art or industrial design creations are freely used as scenery in audiovisual media services.

Free use may occur only without the alteration of the work. Therefore, any modification, alteration or out-of-context use of the work would not only prejudice the self-expression embedded in the work but would also harm

the author's right of integrity (Section 13). That, undeniably, could occur under various free use exceptions such as quotation, public performance and reproduction of illegally acquired copies.

8. Under your jurisdiction's copyright law, to what extent is there a risk that technological protection measures could prevent from enjoying the benefit of the exceptions to copyright? Is there an obligation upon the copyright owner to make available to the beneficiary of an exception the means of benefiting from that exception? Is there a distinction between the exceptions, depending on their nature? How can the individual user of a work (or a group of individual users) obtain the full and effective benefit of the exceptions?

The setting up, operation and consistent development of technical protection measures are quintessential in blocking attempts to unlawfully access and reproduce authors' and related right holders' content. Such measures span various of methods from access control TPMs (e.g. password control-, payment-, time access control systems, encryption) to copy control measures (e.g. zone codes of DVDs and DVD players, file and program locks). However public interest must be safeguarded as well. The question therefore is . how does copyright law allow for lawful free uses to be carried out when there is TPM put in place?

In short, Section 95/A of the Act aims to resolve the above predicament by granting an enforceable right to the beneficiaries of certain specific free use exceptions as against the right-holder, with a view to allowing an exception from the TPM in question. This right shall be enforceable only if

- the exempted uses fall under the scope of those enlisted in Section 95/A (private reproduction by way of reprography carried out by a natural person [Section 35 (1)], borrowing from copyright works for educational and research purposes not including the reproduction and distribution of the resulting work [Section 34 (2)], reproduction of works for non-profit purposes undertaken by knowledge repositories [Section 35 (4)], ephemeral reproduction of works made by radio or television organizations [Section 35 (7)], free use for serving the needs of the handicapped and the disabled [Section 41 (1)], uses of works in court or other proceedings [Section 41 (2)]);
- the beneficiary has 'legal access' to the copy of the work. This provision shall be translated to mean that the copy must have been made lawfully available to him (or to the public in general) in a manner other than on-demand communication. As a subjective criteria, it does not necessitate the lawfulness of the source be verified, rather, it simply requires to show diligence and prudence normally expected in assessing the legal nature of the copies;
- the beneficiary has informed the right-holder of his demand;
- they commence discussions pursuant to which e.g. a copy of the work not protected by TPM will be provided to the beneficiary; or
- failing to come to terms, the proceeding of the Arbitration Board operating within the framework of the Council of Copyright Experts has been requested by either party or on their behalf which resulted in the conclusion of a settlement agreement from within 8 days of the commencement of the procedure (Section 105-105/A);
- the proceedings of the aforementioned body have not been successful whereby the beneficiary may bring an action before the Metropolitan Court to enforce his right.

According to available data, however, no such procedure has taken place yet.

9. Does your jurisdiction's copyright law provide for a "catch all" exception, i.e. an exception which is worded in such a way that it can apply in various cases which differ significantly from each other (e.g. "fair use")? If yes, what is the wording of that exception and what are potential illustrations of its flexibility? What are the conditions for a successful application of this exception? What is the guidance for

the application of this exception? To what extent are the effects of this exception sufficiently predictable? To what extent is this exception compliant with the triple test?

Confirmed briefly above, the Act does not provide for a catch-all exception.

10. In your jurisdiction's legal system, when you make abstraction of the exceptions mentioned in the copyright law, to what extent can other fundamental rights than copyright (e.g. freedom of expression, right to private life, right to education) prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner ? Can you mention different situations where other fundamental rights can prevail and result into a permitted use of the work? Is the solution different if the use concerned is already addressed in the copyright law itself, and said use does not comply with the conditions required for the application of the exception? Is there case law which can serve as guidance?

Under the effective laws of Hungary prior to January 1 2012, it was not possible to extend the applicability or scope of free use exceptions by reliance on fundamental rights / objectives other than regulated in the Act. From the said date onwards, signifying the effective date of the new constitution titled *"Fundamental Laws of Hungary"*, a new obligation has been imposed upon courts by Article 28 declaring that they shall *"...in principle interpret the laws in light of their purpose and in accordance with the Fundamental Law."* In principle, this provision could open the door to the possibility of giving effect to other fundamental rights and interests as incorporated by the constitution in cases concerning copyright law. In practice, however, the provision set out in Section 33 (3), that is that the provisions relating to free use shall not be interpreted inclusively, would likely to bar any such extensive interpretation of the test and of the free use exceptions.

11. If your jurisdiction's copyright law provides for a list of exceptions, does it also provide for a compensation in favor of the copyright owner? Does the law make a distinction between the exceptions in this regard? How is the compensation calculated? Is there a mechanism to ensure that the compensation remains within certain limits, i.e. it does not result into an "overcompensation" to the detriment of some categories of users?

By default, the exclusive economic rights afforded to authors and other related right-holders could not serve their purpose intended if their exploitation would not result in incurring financial benefits from the various uses permitted by law. Thus, as a starting point, Section 16 (4)-(5) provides for statutory entitlement to (appropriate) remuneration with regard to, on the one hand, individual permissions granted in form of license agreements concluded and certain cases classified either as free use or uses which are impractical and/or impossible to authorize individually, on the other. Logically, the latter category is being governed and administered by collective rights management societies.

With regard to free use exceptions, two compulsory copyright levies have to be mentioned: the reprography fee and the blank data carrier levy.

The competent collective rights management society being the Hungarian Alliance of Reprographic Rights in case of the former, it has been tasked with the calculation, recurrent publication, collection and administration of reprographic fee payable by manufacturers of reproduction equipment, importers together with the person putting them into circulation both burdened by joint and several liability, and by commercial operators of such machineries under Section 21 (1) of the Act. Furthermore, the Alliance's publication provides extremely detailed and differentiated lists of fees due. For example, copy/print shops operating in Budapest are obliged to pay a monthly sum of 12.300 HUF per machine capable of producing more than 50 copies per minute. In a commercial establishment whose main area of operation is not professional copying this amount shall be 9.000 HUF if seated in the capital, too.

Blank data carrier levies, by contrast, carry greater significance due to the omnipresence of portable and built-in digital storage units, in addition to the classic carriers such as cds and dvds. The collecting society ARTISJUS, the Hungarian Bureau for the Protection of Authors' Rights, sets out and publishes its yearly tariffs in a similarly differentiating manner pursuant to the obligation conferred thereupon by Section 20 (2). Accordingly, it shall calculate, collect and administer the levy payable by the importer, the person introducing the device incorporating the storage unit or the carrier itself to the market for the first time or by the person required by law to pay the customs duty for importing such media. For instance, after each memory card integrated into cellphones capable of storing and playing audio content one shall pay 798 HUF up to 1 GBytes of storage capacity, or 3724 HUF up to 32 GBytes.

Given the whole structure of now available technical solutions and uses which often deprives the authors of fair compensation we are of the view that the above described systematic and well-regulated apportionment mechanism does not result in overcompensating the right-holders.

12. Does your jurisdiction's law provide for an exception in order to allow temporary acts of reproduction which are necessary to enable a lawful use? What is the wording (in English) of that exception? What are the conditions thereof? Is that exception sufficiently effective to enable the development of [most of] legitimate online activities/ new business models? Can you give some examples where that exception was (un)successfully applied? Is that exception mandatory?

Fulfilling the harmonization requirement laid down by the InfoSoc Directive, the legislator chose to transpose Article 5 (1) in a way sufficiently mirroring its essence by drafting and enacting Section 35 (6) effective from May 1, 2004. As discussed above, this exception also is of mandatory nature and predominantly relied upon in online/digital context.

The said Section reads as follows:

"*A temporary reproduction that is auxiliary or interim – and is an integral and essential part of a technological process with no independent economic significance – shall be free if its sole purpose is to enable*

a) the transmission in a network between third parties by an intermediary service provider,

or

b) the use of the work authorised by the author or permitted pursuant to the provisions of this Act."

Absent of any court decision interpreting or even employing the above provision, we shall refer to the expert opinions of the Council of Copyright Experts where the merits of such temporary reproductions regarded as free use have been discussed on several occasions. In its Expert Opinion No. 31/07/01, the Council was tasked to assess the copyright-related implications of IPTV services, that is, the provision of television 'broadcasting' services based on broadband internet protocols in a digital (encrypted) format. Two main features of such services were identified as being the so-called 'PVR' (personal video recorder), and the method of 'time-shifting'. The Council essentially held that with regard to both features, the service provider's activities fell within the ambit of Section 28 (2) of the Act according to which it was making available works on an on-demand bases to its subscribers (by merely enabling access to the said contents stored on its own servers). However, the reproduction of such works by utilizing its own facilities was deemed to fulfill the requirements of the above exception reasoned by the fact that it was necessary for facilitating subscribers' lawful use. It was, therefore stressed that such interim reproduction of licensed works had not carried any independent economic significance.

13. Does your jurisdiction's copyright law provide for exceptions in order to allow the freedom of expression? If yes, please provide [the English version of] the text of these provisions. What are the

conditions for the use to be permitted? Can you give some examples where these exceptions were successfully, respectively not successfully, applied? Is there any compensation required for the benefit of the copyright owner? Are the exceptions concerned mandatory?

As referred to above, freedom of expression is mainly fostered and protected by quotation [Section 43 (1)], the permitted use of parts of public lectures, alike works and political speeches [Section 36 (1)], making accessible to the public of articles concerning daily events, current politico-economic issues and broadcast work related to such subjects [Section 36 (2)].

Quotation

"Anyone is entitled to quote parts of works - to the extent warranted by the character and purpose of the recipient work - by designating the source and the author specified therein."

This exceptions has not been considered by the Hungarian courts yet. However, quotation of works is being frequently measured against the right-holder's moral rights by reliance on the author's and the work's integrity as for example in case No. BDT2004.1037. revolving around the quotation of certain stills made from the author's movies in the defendant's television programme.

Permitted uses of public lectures, similar works and political speeches

"Sections of public lectures and other similar works as well as political speeches may be used freely for information services to the extent justified for the purpose. In such cases, the source and the name of the author must be indicated unless it proves to be impossible. The author's consent is required for the publication of collections of such works."

Here, too, courts have not been tasked with assessing public lectures' or political speeches' utilization for the purposes of copyright law.

Making use of articles on daily events and other current events of public interests

"Articles on daily events and on current economic or political issues and works broadcast on these subjects may be freely quoted in the press and communicated to the public - including making them accessible to the general public [Subsection (8) of Section 26] - provided that the author has not expressly prohibited such use. In such cases, the source and the name of the author must be indicated."

As regards utilization of such works by the media, their practices have not entailed any actions brought before courts by right-holders so far.

14. What are the cases (e.g. political speeches, news of the day, mere items of press information), if any, where your jurisdiction's copyright law explicitly provides that the content concerned is excluded from the benefit of copyright protection? If there is a list of such cases, is that list a closed list? Is there, in your view, any content missing in that list? Would you recommend to provide for such a list?

Inclusive of what was mentioned above, Section 36 (1) - (2) shall not only be regarded as a closed list but shall be complemented by Section 1 (5) - (6). Accordingly, *"[c]opyright protection does not extend to facts and daily news items underlying announcements released in the printed press"* and does not allow for *"[i]deas, principles, theories, procedures, operating methods, and mathematical operations"* to be protected by exclusive rights. Also, in line with Section 1 (4), documents produced by specific public bodies, authorities and those of the government fall outside the scope of copyright protection. Lastly, Section 1 (7) precludes expressions of folklore from being covered by copyright as well.

Considering foreign practices and the above provisions stemming from requirements set out in international treaties, they are to be regarded sufficiently effective in safeguarding the balance of interests of different stakeholders.

15. In the context of education, what are the uses which are permitted by your jurisdiction's copyright law? What are the conditions for the uses to be permitted? Are the provisions sufficiently broad to cover distance learning? Does the law make a distinction depending on whether the user is a profit or a non-profit organization, and pursues a (non-) commercial purpose? Is there a compensation provided for the benefit of the copyright owner? How is the compensation calculated? Are the exceptions concerned mandatory?

Several exceptions pertaining to educational and research-related purposes have been put in place by the Hungarian legislator. In addition of affording scrutiny to their exact requirements, their adaptability to the effective distance learning programmes will be outlined here.

As a preliminary remark it is noteworthy that educational activities in general, distance learning options in particular, may be liable to conflict with the following exclusive rights: reproduction (e.g. photocopying or scanning analogue documents or multiplying digital ones), communication to the public (e.g. linking or uploading those books, or other articles, photos up to the programme's respective online platform) and making available to the public on an on-demand basis (i.e. uploading movies in part or in full to such platforms) and public performance (e.g. performing songs in class - See more on the traditional public performance exception in Section 38 (1) b of the Act).

Pursuant to the clear-cut provisions of Section 34 (2), quoted verbatim, " *Part of a literary, musical work or film made public, or such entire works of a smaller extent as well as pictures of works of fine art, architectural, applied art and industrial design creations as well as photographic works, may be borrowed for the purposes of illustration for school education and scientific research, with the indication of the source and the author named therein, to the extent justified by the purpose and on the condition that the borrowing work is not used for commercial purposes. Borrowing shall mean the use of a work in another work to an extent that goes beyond quotation.*" From the foregoing it is clear that in exchange for honoring authors' right to be designated as such, extensive parts of larger works and the entirety of smaller ones may be borrowed, in line with education's definition expounded by the said question. As to scientific research, uses which entail development of competing works intended for actual for-profit exploitation and those stemming from the execution of R&D agreements concluded by an economic operator, cannot be subsumed under this exception.

With respect to making use of the resulting derivative work, Section 34 (3) sets forth that "*The non-commercial reproduction and distribution of the borrowing work mentioned in Paragraph (2) shall not be subject to the author's authorisation where the borrowing work is, pursuant to the relevant legislation, qualified as a textbook or a reference book and the school education purpose is indicated on its front page.*" However, in line with the provisions of Section 34 (4), all other methods of commercial utilization are subject to permission granted by the right-holder.

Most crucially, exceptions rendered to the right of reproduction are to be scrutinized in more detail. First of all, within the meaning of Section 18 (2), for exclusively non-profit purposes even entire copies of works may be reproduced in an analogue and a digital way by (amongst others) educational establishments, except for architectural works, technical structures, software, databases, live performances and sheet music if one of the requirements laid down in Section 35 (4) are met. Namely, such reproduction may only be undertaken if "*a) if the copy is necessary for academic or scientific research; b) if the copy is made for the purposes […] specified in Subsection (5) of Section 38; c) if the copy is made from a smaller part of a work that has already been published or a newspaper or periodical article for internal purposes; or d) if it is allowed under specific other legislation in justified cases subject to specific conditions.*" Further, Section 35 (5) exempts partial reproduction of books, newspapers and periodicals "*...for educational purposes with a number of copies that corresponds to*

the number of students in the class or for high school, college, or university examinations". This is complemented by Section 68 (2) regulating the panorama exception and by Section 84/C (2) concerning the reproduction of a given database's content, whereby *"[a] copy of even a substantial part of the content of the database may be made – in a manner and to the extent consistent with the purpose involved – for purposes of school education and scientific research, provided that reference to the source is made and the use is not intended for earning or increasing income even in an indirect way."*

In reading these provisions related to exempted cases of reproduction in conjunction with those of Article 38 (5), that is the legal reproduction of hardcopy and digital works, their subsequent intra-organizational lending and making available to the public by repositories such as publicly accessible libraries, educational establishments, museums, archives, it is clear that, regarding distance learning, reproduced digital copies of works (or a link pointing to like content) may only be lawfully communicated (as mentioned e.g. in a form of uploading e-books or links), or made available to the restricted public (e.g. providing full movies) through computers ('computer terminals' as referred to by the Act) for students and staff-members, if those devices are operated on the premises of educational institutions. Put it differently, the Act in its present form precludes the possibility of providing copyright material for students at remote locations under the free use regime. Also, even if these acts were to be theoretically covered by these exceptions, the very organizational decision to charge tuition fees would render the whole regime inapplicable for not supporting commercial purposes.

In addition, the only remuneration due to right-holders, in this case, are reprography fees and blank carrier levies.

16. In the context of research, what are the uses which are permitted by your jurisdiction's copyright law? Is there an exception to support big data related activities? Is there an exception concerning "text and data mining"? What are the conditions for said uses to be permitted? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Are the exceptions concerned mandatory?

Fundamentally, free use exceptions implemented to support educational activities shall also be applicable to those concerned with research. Here, the precondition of non-profit utilization of works has to be accentuated.

Where text mining and big data analytics stand for mass-scale processing of data by virtue of automated algorithms programmed to identify and gather relevant information found, more often than not, in copyrighted materials, there the following questions are prone to arise.

Firstly, how shall the scanning and saving of copyright materials' content be classified? Secondly, how would one categorize the subsequent setting up of databases based on such data? Thirdly, how shall generating summaries by cross-referencing a multitude of works and the ensuing e.g. the printing thereof be regarded?

In Infopaq (C-5/08) the ECJ assessed questions similar to the above. There the Court basically clarified that data capture processes, involving the above described logic, and the subsequent displaying of 5 words before and after the keyword looked up as short summaries of articles constituted temporary (auxiliary) reproduction. However, producing physical copies of these summaries frustrated the boundaries of the said exception because of not being essential to executing technical processes.

Having regard to the above, the legal consideration of novel data mining techniques shall be as follows.

Bearing in mind that the effective application of free uses exceptions require the said uses to be of non-commercial nature, mass-scale scanning of works may either be regarded reproducing the mentioned works, thus converting their content into digital format, or merely deemed necessary for running computer programs. Under the former scenario, Section 35 (4), that is the right of public collections to make a copy of a work, may be applicable only if these actions are being carried out by educational establishments, museums, archives or other alike organizations not pursuing primary economic aims. Once the said purpose and/or the person

undertaking such reproduction changes, these actions will not benefit from the protection afforded by Section 35 (4), therefore, authorization granted by the right-holder would have to be furnished.

Regulated by Section 35 (6), the temporary reproduction exception would neither be applicable to public collections pursuing commercial data/text mining activities nor to individuals or entities other than public collections engaged in non-profit (e.g. research oriented) writing of text mining algorithms. This is also supported by the underlying rationale of writing and employing data / text mining algorithms. Namely, reproducing, compiling and (re-)structuring data for and within the frame of such algorithms, more often then not, serve commercial purposes, e.g. they may be utilized in social media platforms or could support advertising mechanisms as well. Hence, without authorization granted by the right-holder or the Hungarian Intellectual Property Office with regard to orphan works, such reproduction cannot occur lawfully.

As to setting up databases using the data collected, Section 61 (1) and 84/A not only draw distinction between protection afforded under copyright - as a collective work (Section 7) - and under the sui generis regime, but imply that permission has to be granted by right-holders. Furthermore, given the fact that big data analytics not only draw from various sources but may be potentially used for creating works (summaries or any other novel work) subject to copyright, these would also entail the applicability of the right of adaptation. Accordingly, Section 29 of the Act sets forth that *"[a]uthors have the exclusive right to adapt their works and to authorize other persons to do so. Adaptation constitutes… any kind of alteration of a work as a result of which a work that is different from the original is created. [t]he author shall have the exclusive right to adapt his work or to authorise another person therefor. […A]ny other alteration of the work as a result of which another work is derived from the original one shall be regarded to mean adaptation."*

From the standpoint of balance of interests, the rise of such technological processes have the potential to call the present status quo into question. Utilization of works in a mass scale could outweigh that of individual ones in importance in the near future. Thus, with regard to the interest of furthering scientific advancement, it would be wise to re-consider the scope and applicability of free use exceptions to accommodate the needs of e.g. technology based on big data analytics.

17. In your jurisdiction's copyright law, to what extent and under which conditions is the copyright exhausted? To what extent and under which conditions does exhaustion of copyright apply to online situations where the work has been made available by electronic means in a digital format? To what extent can the copyright owner exclude the exhaustion of copyright via the terms and conditions of an agreement?

The concept of exhaustion of rights shall be equated to that of the distribution right over the copy or copies of works put into commerce upon the right-holder's consent or on his behalf. Section 23 (1) regulates the right of distribution as follows: "*The author shall have the exclusive right to distribute his work and to authorise others therefor. Making accessible to the public of the original copy or the reproduced copies of the work through putting into circulation or offering for putting into circulation shall be regarded as distribution.*" Here, the term "copies of works" shall refer to tangible objects only, in accordance with the provisions of Article 6 of WCT, Article 8 of WPPT, the Agreed Statements rendered thereto and Section 5:14 (1) of the Civil Code.

In sum, over tangible copies incorporating authors' works the right of distribution is to be exhausted provided that such copies have been lawfully put into EU-wide circulation upon the right-holders' consent or on their behalf. Regardless of ruling in favor of exhaustion of digital copies in the UsedSoft case (No. C-128/11), neither ECJ's legislative influence nor the enabling provision of Article 1. 2 of the Software Directive have prompted regulatory (or judicial) response in Hungary to amend the existing framework. In addition to the rather confining and strict legislative background, distribution of electronic copies of works exclusively online shall, pursuant to the present status quo, be regarded as either making available to the public or communication to the public not subject to exhaustion. As a general rule, Hungarian courts have to observe and follow ECJ's interpretation of

laws. Therefore, the findings of UsedSoft shall be applied by the courts. However, so far no judgment handed down in cases concerning copyright infringement have made reference to this particular case.

Lastly, pursuant to the Act, the applicability of the distribution right's exhaustion cannot be validly ruled out by law with respect to wholesale, retail, lending, rental and importation of works.

18. Does your jurisdiction's copyright law provide for a panorama-exception? What are the conditions for that exception? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Is the exception mandatory?

The Act devotes two Subsections under Section 68 to address the panorama exception. Accordingly,

"(1) Of a fine art, architectural and applied art creation set up with a permanent character outdoors in a public place, a view may be made and used without the author's consent and paying remuneration to him.

(2) For purposes of scientific educational lectures as well as of school education [Article 33(4)], the picture of a fine art, architectural, applied art and industrial design creation, furthermore photographic works may be used without the author's consent and paying remuneration to him."

As to Section 68 (1), it covers non-profit methods of utilization of certain specific permanently erected works leaving for instance, billboard or other travelling exhibitions unobserved. Nevertheless, it provides for leeway flexible enough to include posting and uploading of user (profile) pictures that display perceivable part of copyright protected outdoor works without having to remunerate the right-holder(s). Here, too, the author's name shall be designated in order to benefit from the protection afforded by this exception.

With regard to Section 68 (2), photos already taken and reproduced may only be lawfully used without compensation paid, if the purpose of such use corresponds to those of research and education. In reality, this provision merely extends to classroom uses or development of strictly non-profit development of scientific publications.

19. To what extent and under what conditions does your jurisdiction's copyright law allow to make private copies? Is the private copy exception inapplicable to some critical situations (like the scanning of works by others than private individuals)? Is there a compensation for the benefit of the copyright owner? If yes, what form(s) of compensation (one single form or two forms)? Is there a risk that the compensation system could result into an "overcompensation" to the detriment of some users? Is the exception mandatory?

Strictly speaking, Section 35 (1) - (3) shall apply to acts of reproductions carried out by natural persons pursuing private purposes. All other exceptions concerning different entities and/or auxiliary reproductions shall be left unobserved here.

To specifically define the reproduction right's scope, the provisions of Section 18 (1) shall be taken into consideration. The right shall entitle the author to undertake by himself or to authorize *"[T]he (direct or indirect) recording of a work on any medium in any manner, whether final or temporary, and [T]he preparation of one or more copies of the recording"*. In the following subsection all possible modalities have been enlisted including prints, magnetic recordings, recording live performances, recording broadcast works, storing digital contents and digitization of material works.

Against this backdrop, any natural person may rely on Section 35 when reproducing the whole or parts of works in a mechanical or digital manner if it *"does not serve to generate or increase income in any way or form."* However, the Hungarian private copying exception does not encompass reproduction of architectural works,

technical structures, software, (substantial parts of) computer-operated databases, recordings of public performances, sheet music, complete books', periodicals' and dailies' mechanic or digital duplications. Also, having another person make copies of all possible subject-matters by means of any digital or electrical technique is considered to fall outside the scope of this exception.

As far as appropriate remuneration is concerned, right-holders shall receive reprography fees and blank data carrier levies on an annual basis, as discussed above in more detail.

20. When you make an overall assessment of your jurisdiction's copyright law, what are the risky factors which could possibly result into an imbalance between the rights of the copyright owner and the rights of (/ the fair use made by) the users of works? In particular, where do the risks come from: the absence of certain exceptions so that specific fair uses could be prevented? The wording of certain conditions for the application of specific exceptions which is unduly demanding to the detriment of some categories of users? The effect of "overcompensation" which unduly favors the copyright owner? The negative impact of some exceptions on the normal exploitation of the work or the legitimate interests of the copyright owner so that the copyright owner is unduly disfavored? What solutions do you recommend to tackle potential issues in this respect? .

Taking into account the rate with which digital technologies supplant and supersede analogue ones, it has to be acknowledged: the present make-up and scope of statutory exceptions has been, in certain cases rendered obsolete. Therefore, a comprehensive overhaul concerning both the general framework of the free use regime would be needed so as to accommodate the needs of versatile user groups, such as developers of state-of-art technology and end-users.

This contention is based on predicaments concerning, among others, the practicality of allowing an entire book to be copied only by hand in an era in which digitization has deeply pervaded our lives; the legality of the so-called sampling techniques used mostly in the music industry that parallel the free use exception of borrowing; or the apparent statutory safeguards provided for the effective economic exploitation and monopolization of communication rights without introducing exceptions thereto. All of these issues may be attributed, in part, to the rigidity of the three-step-test and the minimum protection approach undertaken by EU legislative instruments and to the apparent lack of enacted free use exceptions in the Act.

As to solutions, consensus shall be reached between the various stakeholders. In doing so, reconsidering the introduction and application of the US' three-step-test on European level might be instrumental.