Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

A. existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

   i. Offering of hyperlinks to works
   ii. Offering of deep links to works
   iii. Framing/embedding of works
   iv. Streaming of works
   v. Download of works
   vi. Upload of works
   vii. Supply of a platform for 'user-generated content'
   viii. Other novel forms of use on the internet.

The Hungarian Copyright Act (Act LXXVI of 1999 on Copyright[1]; "CA") applies a three-component formula to define restricted acts (i.e. uses that can be carried out only with the consent of the author):

a) a broad, practically all-encompassing definition of "use" [Art. 16(1)]:

"By virtue of 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. Unless otherwise stipulated in this Act, authorisation may be obtained for the use of the work by a licence agreement".

b) a non-exhaustive, *exempli gratia* inventory of acts expressly qualified as constituting "use" within the meaning of the definition referred to above [Art. 17]:

"As uses of the work shall be regarded in particular:
- reproduction (Article 18 and 19),
- distribution (Article 23)
- public performance (Articles 24 and 25)
- communication to the public by broadcasting or in any other manner (Articles 26 and 27),

[1] Unless expressly indicated otherwise, all citations from and references to the CA are made using the consolidated text of the CA as of October 28, 2014.

- retransmission of the broadcast work to the public with the involvement of another organisation than the original one (Article 28),
- adaptation (Article 29), and
- exhibition (Article 69)."

c) an exhaustive list of exceptions and limitations, the application of which is always subject to the so-called three-step-test [Art 33 (1)-(2)]:

"Uses falling within the scope of free use shall not be subject to the payment of any remuneration and to any authorisation of the author. Only works made public may be used freely pursuant to the provisions of this Act.
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."

Hungarian case law consistently interprets the above provisions so that they cover all uses regardless of whether or not they are named and specified in the CA. Also, the definition covers each *subsequent or parallel* use of the work (e.g. musical show [public performance] recorded for television [fixation] and broadcast in the programme [communication to the public], and received and shown on TV-screens in pubs [public performance]) regardless of the length or the individual elements of the chain of uses.

However broadly defined, the interpretation of what constitutes "use" must of course be interpreted in accordance with the (in respect of the right of communication to the public, quite controversial) practice of European Court of Justice. Taking into account, in particular, two recent cases[2] one may, as regards the type of uses specifically mentioned in the questionnaire, deduce the following:

i. Offering of hyperlinks to works – subject to certain conditions, does not constitute a restricted act[3]
ii. Offering of deep links to works – subject to certain conditions, does not constitute a restricted act[4]
iii. Framing/embedding of works – subject to certain conditions, does not constitute a restricted act[5]

[2] Cases C-466/12 ("Svensson") and C-348/13 ("BestWater")
[3] Notwithstanding certain strong reservations regarding the theory of "new public" (see the Opinion adopted by the ALAI Executive Committee, at its 17 September 2014 session, on the "new public" theory, published at http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf and Dr Mihály J Ficsor «Svensson: Honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous "new public" theory»; published at http://www.copyrightseesaw.net/archive/?sw_10_item=68. both last accessed on April 6, 2015)
[4] See notes in footnote 3
[5] See notes in footnote 3

iv. Streaming of works – constitutes communication to the public ("The author shall also have the exclusive right to communicate his work to the public in a manner other than broadcasting […]. This right shall in particular cover the case when the work is made available to the public by cable or any other means or in any other manner in a way that the members of the public can choose the place and time of access individually" – Art. 26(8)).

v. Download of works – constitutes reproduction ("as reproduction of the work shall be regarded in particular […] the storage of the work in a digital form on electronic devices" – Art. 18(2)).

vi. Upload of works – constitutes reproduction (see section v. above) and also communication (making available) to the public (see section iv. above) if the content stored at the target location of the upload is available to members of the public.

> Summary extract of the expert opinion of the Council of Copyright Experts (ref.: SzJSzT 36/07/01)[6] on the making available of an e-book published on the author's website.
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> The County Court **a**pplied to the Council of Copyright Experts for guidance in a case, where the plaintiff sued the defendant for the unauthorized making available to the public of the copyright-protected "e-book" of plaintiff a 21-page long article in digital format), where the said work was originally disclosed on plaintiff's website, who also allowed for the making available to the public of the work by the Hungarian Digital Library.
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> The panel stressed that the CA uniformly regulates the protection of and limitations and exceptions to the use of works in both analogue and digital format. There are only a small amount of provisions of the CA that refers to works in digital format and uses via digital means, but all of them contribute to the "interpretation of copyrights and related rights with respect to digital, interactive environment and the adaptation of these rules to such environment". That is true for the private copying exception as well; that is, Art. 35(1) of the CA equally applies for the reproduction of both analogue (paper books) and digital works (e-books). The fact, however, that a work was reproduced in accordance with Art. 35(1) of the CA does not exclude the applicability of Art. 26(8) on making available to the public, if such use was carried out after the reproduction of the relevant work.
>
> Indeed, if the plaintiff has disclosed a notice on his website that he is not approving any making available to the public for for-profit purposes, any use by the defendant on a website that is (directly or indirectly) generating profit runs against such notice and is consequently illegal. The panel also noted that "the publication of the article – due to the fact that interested users might be directed by the internet search engines to defendant's website – increases the chances of visits of the website, and consequently the chances that the visitors might make use of the business services of the website". The panel further stressed that the CA does not include any limitation or exception with regards to the exclusive right of making available to the public. Consequently, any such use is subject to authorization. Any reference to the limitations and exceptions related to education

[6] http://www.sztnh.gov.hu/testuletek/szjszt/SZJSZT_szakvelemenyek/2007/2007PDF/szjszt_szakv_2007_036.pdf (available in Hungarian language version only; last accessed on 6 April 2015)

is flawed, since under the CA educational L&Es are bound to education in schools.

vii. Supply of a platform for 'user-generated content' – this qualifies as a hosting service and special rules of liability apply (see also the collective answer to questions 3 a) and b))

viii. Other novel forms of use on the internet – there is no development to be reported here that would be specific only to Hungary.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (e.g., users uploading protected content on platforms like YouTube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

Hungary is one of the few countries of the world where the exclusive right of authors and performers to make works / fixed performances available to the public (in a way that the members of the public can choose the place and time of access individually) are exercised by way of extended collective administration. This model is a great facilitator of solving situations like the one described in the question. However, even though the "making available" segment of the uploading can be cleared this way, it is to be noted that the "reproduction" element thereof still remains a problem, for this is a restricted act beyond the scope of licensing of the CMO entrusted with the management of the making available right.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:
   - for content providers
   - for host providers
   - for access providers
   - for others?

   b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

[Collective answer to A. 3. a) and b)]

Hungary applies in this respect the relevant provisions of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("E-Commerce Directive"), as transposed into national law by Act CVIII of 2001

on certain issues of electronic commerce services and information society services ("E-Commerce Act").

- Content providers are users. Their liability is not restricted by statutory law and includes liability for damages, providing information on the direct infringer and on the scope of infringement.

- Hosting providers and access providers are intermediary service providers. Their liability is restricted to terminate or, if so ordered by court, to prevent an act of infringement (Art. 7-12 of the "E-Commerce Act").

> Summary extract of the expert opinion of the Council of Copyright Experts (ref.: SzJSzT 07/08/01)[7] on liability under copyright law, criminal law and e-commerce law for offering peer-to-peer (P2P) file-sharing services to end-users. The opinion stressed that the service is simultaneously based upon reproduction and making available to the public of works and objects of related rights. Consequently, authorization might be required from the authors and holders of related rights (either directly or via collective rights management associations). Without any such authorization, such uses shall be deemed as illegal.
>
> Notwithstanding the above, direct liability of service providers under the CA cannot stand, since reproduction and making available to the public is generally carried out by the end-users. On the other hand – in accordance with the relevant international norms (TRIPS Agreement and Directive 2004/48/EC) – several (objective and subjective) law enforcement measures are available against P2P file-sharing service providers. Such measures include the request to cease of and prohibition to continue infringements [Art. 94(3) of the CA]; and the disclosure of data related to the services offered on a commercial scale [Art. 94(4) of the CA]. Seizure of equipment (computers, servers) that were used to offer the services might be also ordered, if the service provider knew, or under the given circumstances the service provider should have known, about the infringements [Art. 94(8) of the CA].
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> The experts also stressed that the P2P file-sharing service providers might deserve safe harbour protection as search engines under the E-Commerce Act. Consequently, they might escape civil law liability at all, as long as they are not aware of the infringements of the end-users, or they remove the illegal content in accordance with Art. 11 of the E-Commerce Act if they become aware of those infringements.
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> If the service provider wilfully contributed to the copyright infringements of the end-users it would face criminal liability under the then effective Art. 329/A of the Hungarian Criminal Code.

- In addition, intermediary service providers are permitted, as a form of free use, to carry out certain acts of temporary reproduction if the following conditions, specified in Art. 35(6) of the CA, are met:

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[7] http://www.sztnh.gov.hu/testuletek/szjszt/SZJSZT_szakvelemenyek/2008/2008PDF/szjszt_szakv_2008_007.pdf (available in Hungarian language version only; last accessed on 6 April 2015)

- the reproduction is auxiliary or interim, and is an integral and essential part of a technological process with no independent economic significance
- its sole purpose is to enable
  - the transmission in a network between third parties by an intermediary service provider, or
  - the use of the work authorised by the author or permitted pursuant to the provisions of the CA.

4. In these cases of infringement, who has standing to sue?

- the author – yes

- the exclusive licensee and the non-exclusive licensee – subject to certain conditions, yes

  "If the author's economic right is infringed, the person acquiring an exclusive licence pursuant to [a licence agreement regulated in] Art. 43(1) may invite the author to take the necessary measures to cease the infringement. If the author fails to take measures within thirty days from the invitation, the acquirer of right is entitled to take action against the infringement on his own behalf.
  In the case of a non-exclusive licence, the acquirer of right is entitled to take action under the [previous paragraph] only if it is expressly stipulated in the licence agreement." [Art. 98(1)-(2)]

- the employer of the author – yes to the extent it is to be regarded as the legal successor of the author

  "Unless otherwise agreed, the delivery of the work to the employer shall imply the transfer of the economic rights upon the employer as the legal successor to the author, provided that the creation of the work is the author's duty under an employment contract." [Art. 30(1)]

- the CMO that manages the exclusive right? – yes

  "(…) within its competence of the collective management of rights, a collecting society shall (…) take action if copyright or related rights are infringed." [Art. 85]
  "Collecting societies shall be regarded to be the holders of copyright or related rights when economic rights of collective rights management are exercised and enforced by them before the court. Involvement of any other rightholder in a lawsuit is not necessary in order to enforce the collecting society's claim before the court." [Art 88(1)]

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

   - as a general rule for all kinds of contracts;
   - as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);
   - in the case of oppressive contracts;
   - in other cases;

   and if so, under what conditions?

- General civil law principles

  - It is to be noted, first of all, that the Civil Code [Act V of 2013 on the Civil Code[8]; "CC"] serves as general regulatory framework to all matters not regulated by the CA [Art. 3].

  - Proportionality of services rendered and consideration received in return for them is a general civil law principle for all contracts, including licence agreements. If the difference between service and consideration is grossly unfair, the grieving party may contest the contract in court [CC Art. 6:98].

  - Also, the so-called usurious contracts (we assume this is what question B. 1. above refers to as "oppressive contracts"), by way of which one party, abusing the other party's situation, seeks to gain grossly unfair benefits to the detriment of that other party, shall be null and void [CC Art. 6:97].

- Application of the general principle of proportionality to licence agreements

  - The principle of proportionality appears in two distinct CA provisions concerning the remuneration of authors.

    - Unless otherwise agreed the remuneration of rightowners shall be in *proportion* to the revenue (returns without deduction of expenses) earned in connection with the use of the work or subject matter (as opposed to a lump sum) [Art. 16(4)].

    - Applying general provisions of civil law to licence agreements, "the court may amend the licence agreement also if such an agreement infringes the author's substantial lawful interest in having a *proportional*

[8] All citations from and reference to the Civil Code are made using the text of the Civil Code as of April 6, 2015. Citations from the Civil Code are always prefixed with the abbreviation "CC".

share in the income resulting from the use because the difference in value between the services provided by the parties becomes strikingly great as a result of the considerable increase in the demand for the use of the work following the conclusion of the agreement" [Art. 48 – this is the so-called best-seller clause].

- Both Art. 16(4) and Art. 48. are applicable to the remuneration of performers as well.

- Right to fair / equitable remuneration

  - In certain cases fair / equitable (hereinafter collectively referred to as "equitable")[9] remuneration shall be due to rightowners. Given that practically all such cases are managed collectively by CMOs, the concept of "equity" is to be applied in the course of CMOs devising their tariffs, as well as in the process of approving such tariffs by competent authorities. It is to be noted that case law[10] interprets tariffs of CMOs as "general terms and conditions" regarding which Civil Code provisions pertaining to general terms shall be applicable, including the opportunity to contest in court terms that are considered "unfair".

  - Described in a substantially simplified manner, the key points of devising and approving the tariffs of CMOs are as follows [see Art. 92/H]:

    - Subject to the requirements of equal treatment and without any unjustified discrimination of users, CMOs are free to determine their tariffs. In the course of doing so, all relevant circumstances of the use concerned shall be taken into account, including agreements, if any, reached in mediation procedure.

    - The tariffs are approved by the minister responsible for justice based on the proposal of the Hungarian Intellectual Property Office ("HIPO"), after that this latter has invited the opinion of major users. However, if a price increase in the tariffs would exceed the customers' price index established by the Hungarian Central Statistical Office for the previous calendar year, or if the tariff would aim to extend the scope of application of the tariff to users hitherto not compelled to pay, the approval requires a government decision.

    - In case of tariffs determining the amount of compensation for private copying, a representative survey on the extent of reproduction for private use shall also be attached. The method of survey shall be

[9] When referring to fair / equitable remuneration, the Hungarian CA uses the term "adequate". We are perfectly aware of the significance of differences in terminology, yet for the purposes of this questionnaire these three terms are considered to be synonymous and are collectively referred to as "equitable".
[10] BH2001. 380 (Inventory of Judicial Decisions, case No 380 of 2001).

determined after consultation with major users and representative organisations of the users. The results of the survey shall be made available to all parties involved the approval procedure.

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

There are certain exceptional cases where the law itself determines the exact amount of remuneration to be paid. Each case hereunder is different as regards the reasons leading to its incorporation into statutory law.

- The collectively managed remuneration of authors for the reproduction of their works by any form of reprography shall not exceed 2% of the manufacturing issue (market entry) price of the device suitable for reprography, or, if the device is manufactured abroad, 2% of the value for customs [Art 21(4)]. In the opinion of the Hungarian ALAI Group this capping of remuneration, introduced in 2005, was the result of an extremely aggressive lobbying campaign by businesses interested in manufacturing devices suitable for reprography.

- Transposing the relevant provisions of the Resale Right Directive[11], Art. 70(4) of the CA determines resale royalty rates in accordance with Art. 4.1. of this Directive.

- The *domaine public payant* is an important tool to promote creativity and protect the social interest of creators. This specific levy has been introduced into our national copyright legislation in 1978. Art. 100(2) sets the rate of the levy at 4% of the sale price net of tax and other public dues.

    - Key regulatory elements of the *domain public payant* [Art. 100]:
        - After the expiry of the term of protection of copyright, the assignment of the ownership of an original work of art by an art dealer shall be subject to the payment of a contribution.
        - The contribution shall be 4 per cent of the sale price net of tax and other public dues.
        - The collecting society entrusted with the management of this levy shall use the collected contribution for the purposes of supporting creative activities and contributing to the social welfare of creative artists.
        - No contribution shall be paid if the ownership of the original work of art is obtained by or from a museum.

- As a matter of cultural policy, the remuneration of authors for the public lending of their works in libraries is covered by government budget. The collecting society entrusted with the management of this remuneration shall set the tariffs for this

[11] 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art

remuneration within the limits of the amount set forth specifically for this purpose in the government budget. [Art. 23/A]

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

Mechanisms the application of which is left to the individual negotiation of authors / performers on the one hand, and users on the other, work inefficiently in practice in most cases. Authors' / performers' inferior bargaining powers and their lack of financial reserves frequently results in assignment of their rights, compelling them to waive all guarantees for a proportional remuneration, and accept buy-out / lump-sum agreements instead, etc.

Mechanisms, however, by way of which authors / performers can, to a certain extent, balance the inequalities of individual bargaining such as in particular, collective management of rights, often prove to be working efficiently in practice. (This is of course not to say that collective management should replace individual negotiations in all cases but as far as mechanisms to guarantee fair remuneration of rightowners are concerned, collective management, at least in terms of attaining equitable remuneration proved to be far more efficient than individual bargaining.)

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

Hereunder, we provide a (necessarily simplified) overview of existing statutory remuneration rights, including those exclusive rights that are *de facto* exercised as remuneration rights:

1. Statutory remuneration rights compulsorily covering all rightowners concerned:
   - 1.1. mechanical rights of non-dramatic musical works [Art. 19(1)] - authors
   - 1.2. compensation for private copying [Art. 20 and 73(3)] – authors, performers, producers
   - 1.3. reproduction of works by reprography [Art. 21.] - authors
   - 1.4. rental and lending of works and phonograms [Art. 23(3), 23/A and 78(2)] – authors and phonogram producers
   - 1.5. residual remuneration right, after the transfer of the exclusive right, for rental of works and performances incorporated in films and phonograms [Art. 23(6) and 73(3)] – authors and performers
   - 1.6. broadcasting of non-dramatic literary and musical works [Art 27(1)]

1.7. remuneration for non-interactive communication to the public of phonograms [Art. 77] – performers and phonogram producers
1.8. simultaneous and unaltered retransmission of programmes broadcast or transmitted by wire ("cable TV") [Art. 28, 73(3) and 77(3)] – authors, performers, producers
1.9. *droit de suite* (Art. 70) - authors
1.10. *domain public payant* (Art. 100) - authors

2. Statutory remuneration rights with extended scope of application, covering all rightowners, except those who opted out from collective management and chose to exercise their rights individually:
   2.1. public performance of non-dramatic musical works and shorter literary works [Art. 25(3)] - authors
   2.2. satellite broadcasting of non-dramatic literary and musical works carried out simultaneously with their terrestrial broadcasting [Art. 26(7) and 27(2)-(3)] - authors
   2.3. interactive communication to the public [Art. 27(3) and 74(2)] – authors and performers
   2.4. repeat broadcast of non-dramatic musical works or of performances fixed for purposes of broadcasting

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

There are no explicit provisions on compulsory licenses, but the regulations regarding the exception of private copying and those pertaining to the compensation for private copying are or may be construed, collectively, as a legal/compulsory licence granted in favour of persons making copies for private purposes. The same logic may be applied to the interpretation of the public lending remuneration right, for it also works, in practice, as a compulsory licence in favour of libraries (see also the last paragraph of the response to question B. 2.)

3.

i. For which statutory remuneration rights does your law provide for obligatory collective management?

Please refer to responses to question C. 1. Statutory remuneration rights compulsorily covering all rightowners concerned may not be exercised individually.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

Please refer to responses to question C. 1.

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a

manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

With the exception of certain specific cases hereunder mentioned, remuneration has to be paid by the user of the work or other subject matter.

- Compensation for private copying shall be paid by the manufacturer of blank video and audio carriers. In the case the carriers are manufactured abroad it shall be paid by the person obliged to pay customs duties, or - in the absence of obligation to pay customs duties - by the person who imports the carriers and by the first domestic distributor thereof, under joint and several liability [Art. 20(2)].

- The remuneration of authors for the reproduction of their works by any form of reprography shall be paid by the manufacturer of the device suitable for reprography. If the device is manufactured abroad it shall be paid by the person obliged to pay customs duties, or - in the absence of obligation to pay customs duties - by the person who imports the device and by its first domestic distributor under joint and several liability [Art. 21(1)]

- The remuneration of authors for the public lending of their works in libraries is covered by government budget. The collecting society entrusted with the management of this remuneration shall set the tariffs for this remuneration within the limits of the amount set forth specifically for this purpose in the government budget. [Art 23/A]

- The remuneration for the simultaneous and unaltered retransmission of the programmes of the Hungarian public media service radio and television organisation shall be paid from the Media Support and Asset Management Fund (an integral part of the government budget) [Art 28(6)].

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?
v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

For a concise description of the procedure applicable to the approval of tariffs, including its supervision by authorities, please refer to the response to question B. 1.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?
vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

The CA provides for certain financial security measures to be applied by the court (e.g. a deposit at court to secure pending future obligations can be requested).

There are no efficient measures against bankruptcy. Some CMOs agree on advance payments with users in return for a discount, to minimise the adverse effects of an eventual liquidation.

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

Yes, the Copyright Act provides for the proportions that apply unless the CMOs concerned agree otherwise.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

- Compensation for private copying [Art. 20(4)-(5)]:
  - Audio carriers
    - 45% - composers and writers
    - 30% - performers
    - 25% - producers of phonograms
  - Video carriers
    - 13% - film producers
    - 22% - cinematographic creators
    - 4% - creators of fine arts, designs and authors of photographic works
    - 16% - script writers
    - 20% - composers and lyricists
    - 25% - performers

- Compensation for private copying by reprography [Art. 21(6)]:
  - 40% - publishers
  - 60% - other rightowners, of which
    - 25% - authors of technical and scientific works
    - 25% - authors of other literary works
    - 10% - authors of works of fine arts and photographic works

- Remuneration for simultaneous and unaltered retransmission of programmes broadcast or transmitted by wire ("cable TV") [Art. 28(4)]:
  - 13% - film producers

- 19% - cinematographic creators
- 3% - of works of fine arts, designs and authors of photographic works
- 14% - scriptwriters
- 16,5% - composers and lyricists
- 26% - performers
- 9% - producers of phonograms.

- Remuneration for non-interactive communication to the public of phonograms [Art. 77]:
  - 50% - performers
  - 50% - producers of phonograms

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

   - N/A

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

   - N/A

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

Distribution rules – similarly to all relevant internal statutes – are subject to government supervision exercised by HIPO. The aim of the supervision is to monitor continuous compliance with the provisions of the CA pertaining to the distribution of royalties.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet? Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

- Free or subscription based on demand streaming services, e.g. YouTube, iTunes, Spotify, Deezer, Google Play;
- Subscription based VOD services, e.g. HBO GO, TV GO, FUSO TV, Mozimania;
- Free online archives of national public service and commercial radio- and television broadcasting organizations, such as Teletéka.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found.

Here, the situation of authors and performers is substantially different:

For authors, these business models have not yet raised any legal problems that would have required litigation; however, the conclusion of license agreements was often a lengthy procedure. Licensing with due regard to excluded repertoire and to tariffs that are already bargained by major players is a challenge that have to be dealt with by CMOs that operate in the environment of extended collective management and of the system of government approval of tariffs.

For performers, the appearance of these new content providers / business models brought hardly anything else than "blood, sweat and tears". Most service providers seem to completely disregard the fact that, for the making available right of performers, under the Hungarian CA, the same extended collective management model exists as for authors, and they fail to obtain a licence to use the repertoire represented by the performers' CMO. Currently, litigation appears to be the only solution to this stalemate situation, dragging on now for quite a long time.

3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Each business model has its own payment model (i.e. free services, different monthly subscriptions, pay per click, “free services” offered to certain premium subscribers etc.). We do not have reliable information on how popular these models are.

4. Within these business models, how do authors and performers get paid?

Here again, the situation of authors and performers is substantially different:

Authors get paid upon separate license agreements based on the current tariffs of CMOs as adapted to the actual business models. The royalty is usually calculated as a percentage that is expressed by the repertoire represented by the CMO as compared to the entire repertoire used by the commercial user, and amounts to a certain percentage of the revenues (ad revenues, net revenues etc.) generated by the service, with a minimum royalty fee. Once the royalty is received, it is distributed to the authors in accordance with the published distribution rules. Distribution is based on the usage data provided by the commercial user.

Due to the situation described in the answer provided to question E. 2., performers currently do not receive remuneration for the use of their collectively managed repertoire. Even when paid individually on a contractual basis, their overall share is usually meagre. The results of a study made by ADAMI, one of the two French performer CMOs, has shown that in France, of the 9.99€ being the typical monthly

subscription fee of popular streaming services such as, for example, Deezer and Spotify, only 0.46€ goes to performers (all the performers of all the phonograms listened to over a month), while the producers and the platforms share 6.54€ amongst themselves for the same period.

Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March 2015