

# The New Orphan Works Regulation of Hungary

Péter Mezei

Published online: 2 December 2014

© Max Planck Institute for Innovation and Competition, Munich 2014

**Abstract** The Hungarian Parliament accepted a regulation to settle the orphan works dilemma in 2008. Under this system the Hungarian Intellectual Property Office grants a license to applicants to use orphan works under limited circumstances. Since the entry into force of the amendment of the Hungarian Copyright Law in 2009 the system had modest success. Due to the acceptance of the Orphan Works Directive in 2012, however, it became necessary to amend the Hungarian Copyright Act to introduce the new limitation granted by the directive for beneficiary institutions. The future Hungarian regime will therefore include both systems: the licensing model (for the benefit of every user), and the limitation model (for the benefit of specific institutions). This paper introduces the main points of the former (old) regime, and also includes comments and criticism of the experiences of the past five years. Further the paper summarizes the key elements of the implementation of the directive and highlights its prospective positive effects and the drawbacks of the legislation (both the statute and the government decree) as well.

**Keywords** Hungary · Copyright · Orphan works · 2012/28/EU Directive on Orphan Works · Licensing · Limitation

---

P. Mezei (✉)

Dr. jur., Ph.D.; Associate Professor of Law

Institute of Comparative Law, University of Szeged, Szeged, Hungary

e-mail: mezei@juris.u-szeged.hu

## 1 The “Old” Orphan Works Regime<sup>1</sup>

### 1.1 The Licensing Model

The Hungarian Parliament adopted a statutory system to offer a solution for the orphan works dilemma in December 2008.<sup>2</sup> Under this model the Hungarian Intellectual Property Office (HIPO) may grant a non-exclusive, non-transferable license to an applicant who has completed a diligent search to locate the rightholder of a protected subject matter to use the relevant subject matter for a maximum of five years solely within the territory of Hungary. The user cannot grant a sublicense, cannot adapt the work/performance, and cannot use it in any way contrary to the moral rights of the rightholder. The search by the user may be deemed as reasonable, if all necessary steps are taken that are appropriate in the given circumstances and in respect of the given subject matter.<sup>3</sup> Reasonable steps may include: searches in the voluntary register of works kept at the HIPO; searches in the database of collective rights management associations, and/or any other publicly accessible databases; request of disclosure of information by organizations that regularly publish the type of the relevant work; and finally, publishing advertisements in nationwide journals/newspapers.<sup>4</sup> The user shall document every step of her search, since that is an element of her formal application.<sup>5</sup>

In case the applicant aims to acquire financial gain through the use of the orphan work, she shall pay a specific remuneration determined by the HIPO. The remuneration shall resemble the manner and degree of the use. This remuneration shall be deposited at the HIPO. If the licensee is not aiming to gain or to increase revenue either directly or indirectly, she does not have to deposit the remuneration in advance.<sup>6</sup> In any case, if the reappearing rightholder contests the remuneration determined by the HIPO, she may initiate a civil court proceeding to settle the dispute.<sup>7</sup>

<sup>1</sup> On the “old” orphan works regime *see* in Hungarian: Gyenge (2009), Gondol (2009), Hepp (2010), Veréb (2010), Petkó (2011), Legeza (2012), Grad-Gyenge (2012). In English *see* Ficsor (2009) and Mezei (2012).

<sup>2</sup> Act CXII of 2008 amending Act LXXVI of 1999 on Copyright Law (hereinafter HCA). The new regulation – included into Arts. 57/A-D – came into force on 1 February 2009. It might be worth noting that the legal predecessor of the largest Hungarian collective rights management association (*Artisjus*), called “Szerzői Jogvédő Hivatal” (“Copyright Office”), had the right in the 1950s to license any further use of published copyrighted works where the descendants of the author were unknown despite carrying out a diligent search. *See* Palágyi (1959). Sadly no statistics are available on the operation of this scheme.

<sup>3</sup> HCA Art. 57/A para. 1.

<sup>4</sup> Decree 100/2009. (V.8.) of the Government on the detailed rules related to the licensing of certain use of orphan works, Art. 3 para. 1., points (a)–(c). (Hereinafter Government Decree 2009.) The Hungarian Parliament authorized the Government to create the above decree by HCA Art. 57/B para. 4. The decree might be accessible in English language via <http://www.wipo.int/edocs/lexdocs/laws/en/hu/hu073en.pdf>. *See further* Ficsor, *supra* note 1, at 14–15.

<sup>5</sup> Government Decree 2009 Art. 2 para. 2.

<sup>6</sup> HCA Art. 57/A para. 2. *See further* Ficsor, *supra* note 1, at 16–17.

<sup>7</sup> HCA Art. 57/A para. 6.

In any case, the user shall pay an administrative service fee to the HIPO. The amount of this fee is regulated by the Government Decree 2009. The standard amount of the fee is HUF 102,500 (approximately € 335); however, if an applicant submits her application on the pre-printed form of the HIPO or electronically, the fee will be reduced to HUF 92,500 (approximately € 300). In case the user pursues a not-for-profit purpose, a preferential administrative service fee of HUF 40,000 (approximately € 130) shall be applied. Furthermore, if the application for a not-for-profit use is submitted on the pre-printed form of the HIPO or electronically, the preferential fee will be further reduced to HUF 30,000 (less than € 100).<sup>8</sup> The administrative service fee shall be separately paid in respect of each application,<sup>9</sup> and the fee shall not be reduced and no exemption applies. Further the fee is not rechargeable.<sup>10</sup>

In case the rightholder or her residence becomes known after the license is granted, the rightholder may request the payment of the deposited money by the HIPO. In respect of not-for-profit uses the remuneration shall be directly paid to the copyright holder by the user. The rightholder may request the payment of the remuneration within five years after the expiry or withdrawal of the license.<sup>11</sup> At the same time the rightholder or the user may request the termination of the license granted by the HIPO.<sup>12</sup> Notwithstanding the above, the user shall be allowed to continue the previously licensed use until the end of the term of the license, but not longer than one year after the rightholder's residence became known.<sup>13</sup> After the termination of the original license, the user and the rightholder have the freedom to sign a use contract according to the general rules of the HCA.<sup>14</sup>

In case the rightholder or her residence remains unknown for five years after the expiry of the term of the license, the HIPO shall transfer the deposited remuneration to the competent collective rights management association. The latter shall manage this amount and shall conduct a reasonable search to locate the copyright holder. In case the association successfully identifies the rightholder, the organization is obliged to transfer the money to her. In case there is no association responsible for the type of subject matter affected by the license, the money shall be transferred to the National Cultural Fund, who in turn shall use this amount of money for the purpose of disseminating cultural heritage.<sup>15</sup>

The above-mentioned licensing regime shall not cover those rights that are managed by collective rights management associations.<sup>16</sup> These include:

<sup>8</sup> On these amounts *see* Government Decree 2009 Art. 4 paras. (2)–(4).

<sup>9</sup> An application might include several requests, in case all of these relate to the identical use of works of the same subject matter of the same author. *See* Government Decree 2009, Art. 2 para. 5. In this case the applicant shall pay a one-time administrative service fee, irrespectively of the number of works covered by the application.

<sup>10</sup> Government Decree 2009 Art. 4 para. (6).

<sup>11</sup> HCA Art. 57/A para. 5 sentence 1. This means that the rightholder has maximum 10 years to reappear and request the payment of the remuneration.

<sup>12</sup> This procedure costs HUF 10,500 (approximately € 35). *See* Government Decree 2009 Art. 4 para. (5).

<sup>13</sup> HCA Art. 57/A para. 3.

<sup>14</sup> HCA Arts. 42–57.

<sup>15</sup> HCA Art. 57/A para. 5 sentences 2 and 4.

<sup>16</sup> HCA Art. 57/A para. 7.

- Compulsory “mechanical” license;<sup>17</sup>
- The collection of remuneration connected to private copying (reprography and copying on any other medium);<sup>18</sup>
- Public rental of cinematographic works and works embodied in sound recording, where the author transferred or licensed this right to the producer of the audiovisual content or sound recording;<sup>19</sup>
- Public lending of cinematographic works and works embodied in sound recording;<sup>20</sup>
- Public lending of literary works and sheet music by public libraries;<sup>21</sup>
- Public performance of literary works, except of scenes or sections of literary works and dramatic works intended for stage, scientific works, and works of great extent (for example novels);<sup>22</sup>
- Transmission, broadcasting by wire or wireless means, further recordings that make repeated broadcasting possible;<sup>23</sup>
- Making available to the public of sound recordings;<sup>24</sup>
- Reproduction and any other further use of audiovisual works by the producer of the work;<sup>25</sup>
- *Droit de suite*.<sup>26</sup>

The fact that the above rights are not covered by the orphan works regime is based upon the general rules on collective rights management. Hungarian associations have the ability and legitimacy to represent those rightholders (and their repertoire as well) who are not members of the association (that is commonly called as “extended collective licensing”).<sup>27</sup> This means that even if a specific rightholder is unknown or cannot be located, the use of her repertoire might be allowed by the respective collective rights management association.

## 1.2 Comments on the “Old” Regime

The above Hungarian regulation is a fair and workable solution from a normative perspective. This does not mean, however, that the regime operates perfectly in practice. The combination of the administrative service fee and the remuneration (especially if the latter is to be deposited in advance, irrespectively of the success or

<sup>17</sup> HCA Art. 19.

<sup>18</sup> HCA Arts. 20–21.

<sup>19</sup> HCA Art. 23 para. 6.

<sup>20</sup> HCA Art. 23 para. 3.

<sup>21</sup> HCA Art. 23/A.

<sup>22</sup> HCA Art. 25 paras. 1 and 3.

<sup>23</sup> HCA Art. 26 paras. 6 and 7; Art. 27 paras. 1 and 2.

<sup>24</sup> HCA Art. 26 para. 8.

<sup>25</sup> HCA Art. 66 para. 3.

<sup>26</sup> HCA Art. 70.

<sup>27</sup> On the content of the extended collective licensing in Hungarian law *see* HCA Art. 87 para 1. On the definition of extended collective licensing and on its roots in the Scandinavian copyright system *see* Karnell (1985), Riis and Schovsbo (2010), Strowel (2011).

failure of the project) might hinder the use of the licensing scheme. Indeed, it might be difficult to pay the administrative service fee for each of the affected works by not-for-profit users. As Mr. Ficsor, Vice-President of the HIPO summarized it in his report on the issue:

[a]lthough, under certain circumstances, a single licence can be requested for multiple orphan works, the scheme is not the best suited to deal with mass-scale digitisation projects involving a large number of works. Certain prospective users might find the administrative fees charged for the HIPO's procedures too high or even prohibitive.<sup>28</sup>

Similarly, the fact that the license is limited in time might be contra-productive and deters several prospective users from the application. For example, the reproduction of an orphaned audiovisual content by documentary movie producers and further the distribution (or communication to the public) of the new work might need a permission that lasts longer than five years. It could easily happen that the documentary is not finished within the stretch of the license due to some unforeseen budgetary problems.

Another notable fact is that a vast majority of rights are managed by collective rights management associations in Hungary. Reproduction and different types of communication to the public – that might be the main forms of utilization – are licensed by relevant associations. We have to agree with Mr. Ficsor, who claimed that extended collective licensing is an effective supplement of the orphan works regime.<sup>29</sup> It might be added, however, that due to the difficulties arising from such a complex dual system, users/applicants might be discouraged from the use of orphan works.

The exclusion of the right of adaptation might be a correct decision of the legislator, since adapting any work might affect moral rights (especially the right of integrity) of the rightholders. This effect is, however, only probable and definitely not an inevitable consequence of the use. Although the whole system is designed on granting permission by the HIPO, the latter is not controlling the underlying interests of the users. The applications shall only meet formal requirements to be accepted by the HIPO.<sup>30</sup> If it is only the fear of misuse of moral rights that causes the exclusion of the adaptation right from the model, this anxiety might be eased through the introduction of a substantive control by the HIPO. Such discretion might guarantee that HIPO only grants licenses for adaptation, where the applicant reasonably guarantees that she will respect moral rights. Indeed, should any

<sup>28</sup> Ficsor, *supra* note 1, at 25.

<sup>29</sup> Ficsor, *supra* note 1, at 12.

<sup>30</sup> The application shall include: (1) the information suitable to identify the work and if possible the rightholder(s); (2) the mode, the extent, the planned duration of the use and any other circumstances which are necessary to determine the amount of remuneration; (3) whether the purpose of use is to gain or increase revenue; (4) all the proofs, which certify that the applicant has conducted a reasonable search to identify/locate the rightholder and that the search was unsuccessful; (5) if the work is co-authored and not all of the rightholders are unknown or reside in an unknown place the use contract concluded with the known rightholders; (6) further, the applicant shall pay the necessary administrative service fee. *See* Government Decree 2009, Art. 2 paras. 1–3 and Art. 4.

infringement take place after concluding the use contract, the HIPO shall be entitled to enforce the moral rights of the unknown rightholders in front of the courts.

Although the impact assessment of the draft Government Decree 2009 calculated with approximately 500 applications per annum, these hopes turned out to be unrealistic.<sup>31</sup> In fact, the model earned only modest popularity that is evidenced by the low number of applications and applicants since the entry into force of the regulation in February 2009.<sup>32</sup> HIPO granted 39 licenses to only eight applicants until the end of February 2014. These applications covered 69 separate works/sound recordings. Eighteen applications related to not-for-profit uses, and the remaining 21 applications related to for-profit uses. Except for one case, the licensee of the not-for-profit uses was the John Neumann Digital Library and Multimedia Center Nonprofit Ltd.<sup>33</sup> Sixteen out of the for-profit applications were submitted by the publisher of Official Journal of Hungary (Magyar Közlöny Lap- és Könyvkiadó). All of the licenses were granted for the maximum term, that is, for five years. The amount of remuneration determined by the HIPO for not-for-profit reproductions varied between HUF 1,750–5,500 (approximately € 5.50–18). The remuneration for the permissions for not-for-profit reproduction and distribution varied between HUF 40,000–80,000 (approx. € 130–260). The amount of remuneration in respect of the for-profit reproductions and distributions varied between HUF 10,000–20,000 (approximately € 32–64), with some notorious examples, where the remuneration varied between HUF 150,000–700,000 (€ 490–2,300).<sup>34</sup> Altogether less than two million HUF have been deposited with the HIPO until the end of 2013. There is no information on the reappearance of any rightholder after granting the licenses by the HIPO.

## 2 The Implementation of the 2012/28/EU Directive

### 2.1 The Fate of the “Old” Regime

The Orphan Works Directive was published in the Official Journal on 27 October 2012.<sup>35</sup> The Government took immediate steps to implement the provisions of the directive. Bill No. 11776 was submitted to the Parliament in May 2013. The statute

<sup>31</sup> Ficsor, *supra* note 1, at 21.

<sup>32</sup> One might argue that the number of licenses is similarly low under the Japanese (introduced in 1970) or Canadian (created in 1985) orphan works regime. In Japan only 46 permissions were granted until the end of October 2010. See Bently et al. (2010). The Copyright Board of Canada issued 277 licenses until the end of 2013 (and refused only eight). See Decisions/Licenses Issued to the Following Applicants (<http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html>). Only time will tell, whether the Hungarian statistics (an average of less than eight licenses per annum) shall be deemed as remote, average or outstanding.

<sup>33</sup> It might be noted that the John Neumann Digital Library was originally willing to apply for approximately 370 licenses. See Ficsor, *supra* note 1, at 21.

<sup>34</sup> The list of granted licenses might be available in Hungarian language via [http://www.sztnh.gov.hu/szerzoi jog/arva/ARVA-muvek-nyilvantartas\\_teljes.pdf](http://www.sztnh.gov.hu/szerzoi jog/arva/ARVA-muvek-nyilvantartas_teljes.pdf).

<sup>35</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Official Journal of the European Union, 27.10.2012, L299/5-12 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>).

was accepted during the fall session of 2013 and it was finally published on 17 October 2013.<sup>36</sup>

The new text, for the first time, included a doctrinal introduction. In accordance with the definition envisaged by the Orphan Works Directive,<sup>37</sup> any work or other protected subject matter whose rightholder is not identified or cannot be located despite a diligent search having been carried out appropriately in the given circumstances and in good faith shall be deemed as an orphan work.<sup>38</sup> The users of orphan works – including licensees and beneficiary institutions – shall be obliged to consult with those databases and other sources listed by the recently accepted Government Decree 2014.<sup>39</sup> The statute emphasizes that a diligent search shall be carried out in the country of origin;<sup>40</sup> however, beneficiary institutions shall search for the rightholder only in Hungary.<sup>41</sup> Rightholders are allowed to put an end to the orphan work status at any time.<sup>42</sup> The HCA will henceforth exclude the licensing of those rights from the scope of the regulation that are managed by collective rights management associations.<sup>43</sup>

The Orphan Works Directive introduced a limitation for the advantage of selected beneficiary institutions to reproduce and make available selected subject matter. The “old” orphan works regime is therefore not in contradiction with the content of the Orphan Works Directive; indeed, it clearly supplements its content.<sup>44</sup> Consequently, the amendment of the HCA upheld the “old” licensing scheme. The provisions from Art. 57/A–D were moved to Art. 41/B–E without any substantial modification. The placement of these sections will, however, be criticized (see Sect. 2.3 below).

The Government Decree 2014 included the updated executive rules on the licensing regime.<sup>45</sup> After 29 October 2014 applications shall only be submitted on the pre-printed form of the HIPO. The administrative service fee will be HUF 92,500 in respect of for-profit uses. The preferential fee for not-for-profit uses will

<sup>36</sup> Act CLIX of 2013, Art. 16. See 2013(172) Magyar Közlöny 73969-73972 (<http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK13172.pdf>) (only in Hungarian). The statute amended several other IP related statutes as well, and similarly amended other articles of the HCA.

<sup>37</sup> Orphan Works Directive, Art. 2 para 1.

<sup>38</sup> HCA Art. 41/A para. 1. See further Ficsor, *supra* note 1, at 12.

<sup>39</sup> Decree 138/2014. (IV. 30.) of the Government on the detailed rules related to the use of orphan works, Art. 2. (Hereinafter Government Decree 2014.) See: 2014(61) Magyar Közlöny 8815-8820 (<http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK14061.pdf>) This list generally corresponds with the content of the Annex of the Orphan Works Directive.

<sup>40</sup> HCA Art. 41/A paras. 3–4.

<sup>41</sup> HCA Art. 41/A para. 5.

<sup>42</sup> HCA Art. 41/A para. 8. Interestingly the Government Decree 2014 – contrary to the previous decree and the original draft of the new decree – does not include any provision on the costs of this procedure. Compare to Government Decree 2009, Art. 4 para. 5 and Government Decree 2014, Art. 7. The draft of the decree might be available via [http://www.kormany.hu/download/c/a6/31000/Tervezet\\_arva\\_mu\\_felhasznalasa.pdf](http://www.kormany.hu/download/c/a6/31000/Tervezet_arva_mu_felhasznalasa.pdf).

<sup>43</sup> HCA Art. 41/A para. 9.

<sup>44</sup> Compare to recitals (4) and (20) of the Orphan Works Directive. On the analysis of the relationship of the directive and the Hungarian national regime see Grad-Gyenge, *supra* note 1, at 34–36.

<sup>45</sup> Government Decree 2014, Arts. 3–8.

be HUF 30,000.<sup>46</sup> Another novelty is that the administrative service fee might be refunded in case the application is refused by the HIPO.<sup>47</sup>

## 2.2 The Use of Orphan Works by Beneficiary Institutions

The main rationale of the Orphan Works Directive was to privilege libraries and other cultural institutions – which are key actors of preservation and dissemination of knowledge and cultural heritage – to provide full access to orphan works.<sup>48</sup> According to this, beneficiary institutions (publicly accessible libraries, educational establishments and museums, as well as public archives, film or audio heritage institutions and public-service broadcasting organizations) are granted limited freedom to digitize and make available to the public protected subject matter.<sup>49</sup> Beneficiary institutions shall comply with the requirements of diligent search. They must also submit information to the HIPO on the search results, the exact use, any changes to the orphan status and contact information.<sup>50</sup> On the other hand, beneficiary institutions might generate income from the use of the orphan works; however, all such income shall be allocated to covering the costs of the use. This means that beneficiary institutions shall not run any for-profit business. The scope of affected subject matter complies with the list set forth by the Orphan Works Directive.<sup>51</sup> Similarly, the Hungarian Parliament codified the mutual recognition clause of the directive.<sup>52</sup>

As mentioned above, the rightholder may put an end to the orphan work status at any time. Unlike the case of uses licensed by HIPO, where the licensee might continue to use the work until the end of the license but for maximum of an extra year after the reappearance of the rightholder, beneficiary institutions may continue to use the work only in accordance with the permission of the rightholder.<sup>53</sup> Should the rightholder reappear and put an end to the orphan status,<sup>54</sup> she has to request payment of the remuneration within six months.<sup>55</sup> Beneficiary institutions shall

<sup>46</sup> Government Decree 2014, Art. 4 para. 2.

<sup>47</sup> Government Decree 2014, Art. 4 para. 3.

<sup>48</sup> Orphan Works Directive, Recitals (1)–(3).

<sup>49</sup> HCA Art. 41/F para. 1.

<sup>50</sup> HCA Art. 41/G para. 1. All this information shall be expeditiously forwarded by the HIPO to the Office for Harmonization in the Internal Market (OHIM). The submission of the above information is the prerequisite of the commencement of the use. *See* HCA Art. 41/G paras. 2–3. The platform for such a submission and forwarding of information will be set up by OHIM. *See* Government Decree 2014, Art. 9 paras. 1–2.

<sup>51</sup> Literary, cinematographic and audiovisual works, phonograms, further cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations, finally any other subject matter incorporated or embedded into any of the above. *See* HCA Art. 41/F para. 2, points (a)–(d) and para. 4.

<sup>52</sup> HCA Art. 41/H para. 1.

<sup>53</sup> HCA Art. 41/I para. 1; Government Decree 2014, Art. 10 para. 2.

<sup>54</sup> Rightholders might put an end to the orphan status on the platform designed for that purpose by the OHIM, or through noticing the beneficiary institution in writing. *See* Government Decree 2014, Art. 10 para. 1.

<sup>55</sup> Government Decree 2014, Art. 11 para. 1.



transfer the remuneration to the rightholder within 60 days after receiving the request of payment.<sup>56</sup>

The remuneration is fixed by Government Decree 2014. The exact amount depends upon the scope and length of use, the subject matter and the length of the work.<sup>57</sup> The calculation may be introduced by the following chart:

Subject matter	Basic amount of remuneration	Scope of use	Length of use
Fictional and scientific literature	HUF 3,000/ printed sheet <sup>a</sup>	The remuneration shall be halved if the user only reproduced or made the subject matter available to the public	First year: basic remuneration
Poetry	HUF 100/line		Any further years: 50 % of the basic remuneration
Compilations	HUF 600/printed sheet		
Cinematographic and audiovisual works	HUF 100/min		
Phonograms	HUF 100/min		
Cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations	HUF 100/min		
Any other subject matter incorporated or embedded into any of the above	HUF 200 each		

<sup>a</sup> One printed sheet equals to 40,000 characters (including spaces)

Let's take a hypothetical example, where a book of ten printed sheets in length is digitized and made available to the public by a library, and the rightholder reappears six and a half years after the commencement of the use. In this case the library shall pay ten times HUF 3,000 for the first year and further six times HUF 1,500 for each of the ten printed sheets, that is, altogether HUF 120,000. In case the rightholder contests the remuneration determined by the Government Decree 2014 she may bring her case to court.<sup>58</sup>

<sup>56</sup> HCA Art. 41/I para. 2; Government Decree 2014, Art. 11 para. 2.

<sup>57</sup> Government Decree 2014, Annex I. It might be important to note that the draft of the decree envisaged partially different amounts of remuneration. For fictional and scientific literature HUF 5,000/printed sheet, for poems HUF 10/line, for compilations HUF 1,000/printed sheet was planned. The draft did not mention, however, the remuneration for any other subject matter incorporated or embedded into any of the benefited subject matter.

<sup>58</sup> Government Decree 2014, Art. 11 para 1.

### 2.3 Comments and Criticism of the New Regulation

1. The new regulation may be criticized from a dogmatic perspective first. The fact that the “old” regime was moved from Chapter 5 of the HCA on use contracts to Chapter 4 on free uses and other limitations of exclusive rights might be deemed as a failure. In light of its content as introduced above this scheme shall be deemed as a use contract model rather than an exception or limitation. This is evidenced by the license granted through an administrative procedure of the HIPO, the limited scope of the permission, the right of the user to use the orphaned work in accordance with the license, the remuneration determined by the HIPO, and the fact that the reappearing rightholder has the right to terminate the contract signed by the HIPO and the user.<sup>59</sup> Exceptions may be carried out without any permission of and any payment due to the rightholder. Further, under limitations of exclusive rights the privileged users are allowed to use the work without any permission in exchange of remuneration.<sup>60</sup> Further, free uses are not rights of the users in Hungary, but exceptions to the exclusive rights of the rightholders.<sup>61</sup> Finally, rightholders are not allowed to restrict the scope of the limitations and exceptions, since the latter are prescribed and guaranteed by the statute. One might argue that the advantage of the new structure is that all relevant aspects of the orphan works regulation (doctrinal introduction, licensing model, free use by beneficiary institutions) are located at the same place. This argument is not convincing if we support doctrinal clarity and exactitude. To sum up: the location of the licensing model within the chapter on free uses is flawed.

2. Both the licensing model and the limitation in favor of beneficiary institutions have three major parts: reasonable/diligent search, use by the licensee or the beneficiary institution, and finally the reappearance of the rightholder. The Hungarian rules on diligent search are well founded; the list included in Government Decree 2014 is reasonable and corresponds to the Annex of the Orphan Works Directive. There are, however, no public calculations on the average cost of a diligent search process. This would be quite important for both applicants of HIPO licenses and beneficiary institutions for the perspective of planning and budgeting.

3. The new limitation granted to beneficiary institutions affects two economic rights of rightholders: reproduction and making available to the public.

Reproduction for purposes of research, education, archiving and making available to the public via dedicated terminals of the institutions is already allowed by the HCA as long as the use does not aim at generating or increasing income.<sup>62</sup> The new privilege of reproduction by beneficiary institutions may serve the purpose

<sup>59</sup> Grad-Gyenge used the “state (limited compulsory) licensing” expression for the “old” orphan works regime. [In Hungarian “állami (korlátos kényszer-) engedélyezés”.] See Grad-Gyenge, *supra* note 1, at 32.

<sup>60</sup> On the distinction between exceptions and limitations see von Lewinski (2008).

<sup>61</sup> Mezői, *supra* note 1, at 479.

<sup>62</sup> HCA Art. 35 para. 4. This paragraph was inserted in accordance with Art. 5(2)(c) of the Information Society Directive.

of format-shifting, indexing, categorizing, preservation or restoration, and further unlimited making available to the public. Indexing and categorizing shall not be deemed as “use” of a work since these do not lead to the reproduction of copyright protected information, but only metadata. This means indexing and categorizing shall not be illegal even without any permission to reproduce the original work. Further, nothing prevents libraries and other cultural institutions from format-shifting, indexing, categorizing, preservation or restoration of works under Art. 35 para. 4 of the HCA, as long as any of these activities were carried out without for-profit interests and were for the purpose of research or education (which are general features of the operation of libraries). It seems therefore that the regulation of the new reproduction privilege of beneficiary institutions is broader only because of the insertion of unlimited making available to the public as the accepted purpose of the use. The issue of generating income under the new model – which is definitely a significant element of the system – shall not have any relevance in respect of the reproduction right, since payment by users to beneficiary institutions is practically due when users access materials via the internet. This generally means that reproduction on its own does not have any economic significance. If, however, this argument is correct an interesting failure seems to appear in the Government Decree 2014. As introduced above, the appendix of the decree says that in case the user only reproduces *or* makes the orphan works available to the public, the remuneration due to the rightholder shall be halved. This means that where a beneficiary institution archives an orphan work – without making it available to the public – in accordance with HCA Art. 35 para. 4, it remains within the scope of this exception. Under the Government Decree 2014 the institution should, however, pay a specific amount of remuneration to the reappearing rightholder. Necessarily, in such a contradictory situation the HCA should prevail; otherwise, an unconstitutional situation would emerge. This regulative problem might be easily resolved through the amendment of the decree.

4. As indicated above, as soon as the rightholder reappears she is entitled to request payment from the beneficiary institution, and she is entitled to conclude a new use contract with the institution. Consequently, institutions must cease any earlier use. Neither the HCA nor the Government Decree 2014 answers the question, whether beneficiary institutions are only prohibited from making available to the public works that are no longer orphaned, or whether they might have to erase the digitized (reproduced/archived) copy of the work from their servers as well, or if they are prohibited from digitizing any further work of the specific rightholder? The two latter options are definitely irrational. As long as the copy made by an institution falls within the above-mentioned exception envisaged by HCA Art. 35 para. 4, the rightholder cannot request the erasure of the digital file. Likewise, if the original rightholder’s identity or location becomes known, any future use of her other works shall comply with the “normal” rules on limitations and exceptions, but – stressed again – cannot be opposed by the rightholders.

5. Although we do not expect major changes in the practice of the licensing scheme, the entry into force of the new limitation on 29 October 2014 is extremely valuable for several institutions that have benefited from this model. This might be introduced through three different digitization projects.

The Library of the Hungarian Parliament recently completed a project in which it digitized around two million pages of legislative documents (bills, statutes and minutes of sessions) from the last one and a half centuries, from books, journals and periodicals. The project had a budget of HUF 200 million (less than €700,000).<sup>63</sup> The Szeged University library (SZTE Klebelsberg Library) succeeded in digitizing all scientific journals, periodicals, annals, university related publications, and student newspapers ever published by or at the Szeged University for only about HUF 15 million (around €50,000). This digital repository provides access to all major theses written by the students of the University as well.<sup>64</sup> Finally, HUF 250 million (approx. €800,000–900,000) was granted to the National Széchényi Library to digitize almost four million unique items kept in its collection and to provide access to these materials online. The “ELDORADO” project is planned to be launched in November 2014.<sup>65</sup> Although none of these projects intended primarily the digitization and making available to the public of solely orphan works, a significant amount of these archived works may be deemed as orphaned. Without the implementation of the new system, the beneficiary institutions would be able to offer access to these contents solely via dedicated terminals installed within their premises. Further, as soon as the amendment enters into force, these institutions will be allowed to generate income to cover their expenses related to the digitization and the making available of works to the public.

## References

- Bently L, Suthersanen U, Torremans P (2010) Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace. Edgar Elgar Publishing, Cheltenham, p 474
- Dancs Sz (2013) A digitális felvilágosodás felé – Az ARROW program és az OSZK – digitalizálás, szerzői jog, innovatív megoldások. Könyvtári Figyelő 59(3):465–484
- Ficsor M (2009) How to deal with orphan works in the digital world? An introduction to the new Hungarian legislation on orphan works (Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Legal Affairs; <http://www.europarl.europa.eu/document/activities/cont/200911/20091113ATT64497/20091113ATT64497EN.pdf>)
- Gondol D (2009) Honnan jövünk, kik vagyunk, hová megyünk – gondolatok a szerzői jogi törvény módosításáról. Infokommunikáció és Jog 3:72–75
- Grad-Gyenge A (2012) Magyar árvák valahol Európában. Iparjogvédelmi és Szerzői Jogi Szemle 6:28–50
- Gyenge A (2009) Elárult jog nevelőszülőt keres. Magyar Jog 3:160–172

<sup>63</sup> The Digitized Repository of Legislature project (“Digitalizált Törvényhozási Tudástár”) is funded by the “Electronic Administration Operative Program” (No. EKOP-2.1.5-09-2009-0001). The program was co-funded by the European Union and the European Regional Development Fund. The Digitized Repository of Legislature is available at <http://dt.ogyk.hu/hu/>.

<sup>64</sup> On the CONTENTA project see <http://ww2.bibl.u-szeged.hu/images/stories/files/repozitoriumaink.pdf> (only in Hungarian). The website is available at <http://contenta.bibl.u-szeged.hu/>. The project was funded by the “Social Renewal Operative Program” (No. TÁMOP-4.2.1/B-09/1/KONV-2010-0005). This program is supported by the European Commission and is co-funded by the European Social Fund.

<sup>65</sup> On the ELDORADO (“Elektronikus Dokumentumküldés Országos Rendszere, Adatbázisa, és Dokumentumtárának Megvalósítása az Országos Széchényi Könyvtárban”) project see Dancs (2013). The project was funded by the “Social Renewal Operative Program” (No. TAMOP 3.2.4-B-11/1).

- Hepp N (2010) Szabad út a rejtett műalkotások feltárására, avagy az árva művek szabályozása a szerzői jogban. In: Penyigey K, Kiss M (eds) Fehér Könyv a Szellemi Tulajdon Védelméről (2008–2009). Magyar Szabadalmi Hivatal, Budapest, pp 225–243
- Karnell G (1985) Extended collective license clauses and agreements in Nordic copyright law. *Columbia VLA J Law Art* 10:74–81
- Legeza D (2012) Segítsük az árvákat – útmutató az árva művek egyes felhasználásaihoz. *Iparjogvédelmi és Szerzői Jogi Szemle* 5:23–58
- Mezei P (2012) Hungary. In: Hilty, Nérisson (eds) *Balancing copyright – a survey of national approaches*, Max Planck Institute Studies on Intellectual Property and Competition Law, vol 18. Springer, München, pp 491–492
- Palágyi R (1959) A magyar szerzői jog zsebkönyve, 2nd edn. Közgazdasági és Jogi Könyvkiadó, Budapest, p 102
- Petkó M (2011) Az árva művek szabályozásáról. *Magyar Jog* 3:175–179
- Riis T, Schovsbo J (2010) Extended collective licenses and the Nordic experience: it’s a hybrid but is it a Volvo or a lemon? *Columbia VLA J Law Art* 33:471–498
- Strowel A (2011) The European “extended collective licensing” model. *Columbia VLA J Law Art* 34:665–669
- Veréb V (2010) Digitális könyvtárak Európában – szerzői jogi szemmel. *Iparjogvédelmi és Szerzői Jogi Szemle* 6:57–61
- von Lewinski S (2008) *International copyright law and policy*. Oxford University Press, New York, vol 5, p 150