

No Time to Laugh – The Parody Defence is Unavailable under Hungarian Copyright Law
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The Municipal Court of Appeals has confirmed that the parody defence is unavailable under Hungarian copyright law due to the lack of an express statutory recognition.

Legal Context

Ruling 8.Pf.20.424/2019/5 of the Municipal Court of Appeals is of great significance as it is the highest level ruling so far on the parody defence in Hungarian copyright law. Hungary is one of those Member States of the European Union that did not implement Article 5(3)(k) of Directive 2001/29 concerning an exception or limitation for “parody, caricature and pastiche” into their national copyright laws (Act LXXVI of 1999 on Copyright). No court of appeals decision had so far addressed the question whether the parody defence could be nonetheless evoked. The ruling – without mentioning the ‘Copyright Trilogy’ of the Court of Justice of the European Union (CJEU) (*Funke Medien*, C-469/17, EU:C:2019:623; *Pelham*, C-476/17, EU:C:2019:624; *Spiegel Online*, C-516/17, EU:C:2019:625) – also allows us to conclude that no other limitations or exceptions might be relied on than those listed in the Hungarian Copyright Act.

Facts

The plaintiff holds the copyrights and trade mark rights in the Superman character. The defendant is the publisher of a weekly journal (*Heti Világgazdaság*, better known as HVG). HVG uses exaggerated images portraying current political and economic events or the society at large. The 18 September 2016 issue was published with an image imitating Superman’s famous ‘S’ logo (the highly stylized S insignia within a yellow diamond-shaped shield bordered in red on Superman’s blue costume). HVG’s cover image – focussing only on the character’s chest – represented S as a dollar sign (\$) and the character had a big fat belly popping out of his shirt. The title of the image was ‘Strawman – Sham Billionaires and True Wealth’ (‘STRÓMAN – Álmilliárdosok és valódi vagyonok’). This was a reference to the article that discussed the enrichment of businessmen, who were closely connected to the innermost political circles. The plaintiff claimed that the use of the Superman character was an unauthorized adaptation of its protected character.

The court of first instance (Regional Court of Budapest) dismissed the trade mark claim, and the plaintiff did not appeal that part of the ruling. Hence, the case subsequently centred on the copyright claim and HVG’s parody defence.

The Regional Court of Budapest – following the Hungarian Copyright Expert Board’s unpublished expert opinion No 07/19 – declared that the use made by the defendant was an unauthorized adaptation of the Superman character. The secondary expression was based on the plaintiff’s work, imitating Superman’s signature move to unravel his blue costume from his regular clothes. HVG’s cover image differed from the original expression by indicating that a money-oriented chubby person would have \$uperpower. The Regional Court of Budapest

concluded that HVG had adapted the original work. The differences in the graphical representation, the difference of meaning and spirituality of Superman's character were enough to declare the cover image a derivative work, the making of which would, however, require prior authorization from the rightholder. The court also refused the defendant's parody argument on the ground that the Hungarian Copyright Act envisages no expressed parody exception.

Analysis

Following an appeal, the Municipal Court of Appeals upheld the trial court decision by confirming, on the one hand, that the original work's main characteristics remained noticeable, while the secondary work differed from the original one. On the other hand, those differences were not aimed at distinguishing the two works, but sought – instead – to create a contraposition of the two works to reach critical, humorous effects. Based on this, the court concluded that HVG's cover image lacked any individual, independent meaning, and failed to keep the necessary distance from the source material. Finally, the Municipal Court of Appeals noted that the defendant would be unable to escape liability based on parody, as the Hungarian Copyright Act includes no such express exception.

Practical Significance

The strongest criticism of this case might be that courts misinterpreted parody as a concept. On the one hand, both the Regional Court of Budapest and the Municipal Court of Appeals seemed to misunderstand the purpose of the defendant's cover image. The defendant did not dispute the message and spirituality of the Superman character (Superman fights criminals rather than capitalists *per se*), but rather criticized corruption at the highest levels. On the other hand, the Municipal Court of Appeals appeared to interpret the obligation to keep distance from the original work and the requirement of independent, individual meaning in a pure formalistic sense (are the two images visually different?).

This logic is flawed for at least two reasons. First, it would unnecessarily limit (lawful) 'parody' to 'style parody'. This would empty the whole concept of parody as 'style', ie something that has never been protected by copyright. Second, it disregarded the ratio of the CJEU *Deckmyn* ruling (C-201/13, EU:C:2014:2132). There, the CJEU expressly favoured 'parody with' over 'parody of', and allowed broad or open parodies of anything with the help of any copyright-protected expressions (subject to some inherent limitations, as well as the three-step test). HVG's STRÖMAN cover image seems to fully comply with the CJEU approach, according to which "the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery" (*Deckmyn*, at [20]) Based on the very images at issue in *Deckmyn*, we can argue that "noticeably different" shall not be limited to formal differences (that is, the expressions must look or sound differently): it also includes noticeably different meanings. In sum, the final ruling of the Municipal Court of Appeals seems to disregard the *Deckmyn* requirements.

The ruling itself is nevertheless correct in its outcome for the simple reason that – as confirmed by both courts – the Hungarian legislature did not implement the parody (as well as caricature and pastiche) exception of Directive 2001/29 into its own law. Courts are not in a position to introduce new laws either. The statutory hiatus, read together with the rationale of the CJEU's 'Copyright Trilogy' that excludes the application of external limitations and exceptions in copyright law, leads to a really disturbing conclusion. There is no way under the effective

Hungarian copyright norms to lawfully publish a work that evokes an existing work while having a noticeably different meaning from it in order to constitute an expression of humour or mockery. Even more, this outcome might lead to another frustrating tension. The constitutionalization of copyright law might be effectively rejected (as the ‘Copyright Trilogy’ did) in cases where limitations and exceptions are available on the national level. Where, however, limitations and exceptions are not available internally (under the domestic copyright acts), the exercise of, e.g., the freedom of expression and the freedom of press seem to be unduly hindered without the chance to rely on external sources of law.

All these concerns might be the past soon though. Directive 2019/790 on copyright in the Digital Single Market (CDSM-Directive) obliges Member States to mandatorily implement the parody, caricature and pastiche exception with respect to user-generated content that fall under the scope of Art. 17(7) second sentence (b) therein. While the CDSM-Directive only requires the implementation of a ‘user-generated parody exception’, the draft proposal for the implementation of the CDSM-Directive (published by the Ministry of Justice and the Hungarian Intellectual Property Office on May 8, 2020) proposes two alternatives for such implementation, and both of them favour the general introduction of a parody exception. Option A) allows “anyone to use any work for the purposes of (...) parody by evoking the original work and by expressing humour or mockery”. Option B) allows “anyone to use any work for the purposes of (...) creating a parody, caricature or pastiche”. In both cases, the use shall not affect more than a reasonable amount of the original work. Option B) recommends following the language of Directive 2001/29, and recommends leaving the interpretation of the concepts of parody, caricature and pastiche to the courts. Option A), however, focuses solely on parodies. Lacking any special justification for this wording, we believe that Option A) either recommends omitting the implementation of the caricature and pastiche exceptions or deems them to be parts of the concept of parody. Option A), however, expressly recommends including the *Deckmyn* requirements in the corpus of the Copyright Act.

It might take a few months to see which option the Hungarian legislature will follow, but – at the moment – it seems so that Hungary might finally introduce a general parody exception. If that happens, we might need to re-evaluate the *STRÖMAN* ruling. Maybe from 2021, HVG and others could express their critical opinion in a more relaxed copyright environment.