

NATIONAL REPORT OF HUNGARY

under Article 18 of Directive 2004/48/EC on the enforcement of intellectual property rights

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1. Implementation of the Directive

The European Parliament and the Council adopted *Directive 2004/48/EC on the enforcement of intellectual property rights* on 29 April 2004 (hereinafter referred to as “the Directive”), which harmonises the laws of Member States in relation to legal recourses, procedures and remedies of a civil or administrative nature, applicable in the case of copyright and industrial property right¹ infringements.

The deadline for transposing the Directive into national law was 29 April 2006. Hungary fulfilled its duty of implementation by adopting *Act CLXV of 2005 amending certain laws relating to the enforcement of industrial property rights and copyright*, which affected four national acts: Act LIII of 1994 on Judicial Execution (“Judicial Execution Act”), Act XXXIII of 1995 on the Protection of Inventions by Patents (“Patent Act”), Act XI of 1997 on the Protection of Trade Marks and Geographical Indications (“Trade Mark Act”) and Act LXXVI of 1999 on Copyright (“Copyright Act”).

The majority of the new provisions introduced were only *adjusting measures that had been already known* and applied in Hungarian industrial property and copyright law to the Community requirements (e.g. by amending the preconditions and procedural rules of preliminary evidence, provisional and precautionary measures; see details below). Extending the scope of the right of information, however, was one of the *major novelties* that appeared in the legal instruments in question. The *optional provisions* of sampling [Article 6(1) of the Directive], and alternative measures (Article 12 of the Directive) have not been transposed into Hungarian law.

The *most important new elements* in the relevant acts can be summarised as follows:

- extension of the inventory of measures that the court may order, at the request of the applicant, in the case of an infringement of intellectual property rights:
 - recall and removal from the channels of commerce, destruction;
 - injunctions against intermediaries;

¹ The Commission in its Statement 2005/295/EC considers that at least the following intellectual property rights are covered by the scope of the Directive: copyright, rights related to copyright, *sui generis* right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned.

- interlocutory injunctions to cease and desist in the case of imminent infringements;
- broader right of information (in content and in the persons obliged to provide data);
- publication of judicial decisions.
- measures enhancing the efficiency of enforcement:
 - provisional measures (request may be filed prior to the filing of an action);
 - precautionary measures (and possible court orders for the defendant to provide the necessary financial information);
 - security from the alleged infringer (to be requested or ordered instead of an injunction);
 - special rules on preliminary evidence.
- special procedural rules for the application of the new measures:
 - designated court (Budapest Metropolitan Court) and special (pre-litigation) procedure for ordering provisional measures or preliminary evidence (and for the review of these measures);
 - revocation if no proceedings are initiated within a given deadline;
 - *inaudita altera parte* decisions and review thereof.
- special rules concerning copyright:
 - acknowledging collective rights management bodies as entitled to apply for the application of all measures, procedures and remedies against infringers of economic rights represented by them;
 - a three-level regulation of the presumption of authorship or ownership.

According to Article 18(1) of the Directive, Member States are bound to prepare a *national report* on the implementation thereof, with detailed information on the application of the newly introduced rules in national law. These national reports will form the basis of a Commission report on the various effects of the Directive, with a possible eventual initiative to amend it.

The *table of correspondence* on the Hungarian implementation of the Directive was prepared and sent in due time to the European Commission. In addition, an updated version of the table was forwarded in early 2009.

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2. Methodology

In order to gather reliable and comparable information from the Member States and to make the structure of the exercise clear, the Commission prepared two sets of questions: one to be answered by the public authorities of Member States involved in IP enforcement and one to be answered by stakeholders. Thus, the national authorities responsible for preparing the national report under Article 18 of the Directive were to collect the relevant replies and make a summary by highlighting the experiences on the application of the new or altered enforcement measures, underpinned, where appropriate, by quantitative data. By comparing the answers given by public authorities and the users of the system, not only the differences in perspective will become clear but also the measures that can be deemed truly efficient.

The Hungarian Patent Office (HPO) and the Ministry of Justice and Law Enforcement (MJLE) have prepared the present national report in close cooperation. According to the

working method applied, the Commission's questionnaires had only been the bases of the questionnaires that were regularly sent out to the relevant authorities and stakeholders every year (in 2007, 2008 and 2009) for public consultation. The *additional questions* asked served on the one hand, the purpose of clarifying the Commission's questions by asking for more precise details in the context of national law, and had, on the other hand the objective to get a broader overview on the situation of IP enforcement in Hungary, with an outlook on the activities of special expert bodies (Board of Experts on Copyright and Board of Experts on Industrial Property) and criminal law enforcement.

A preliminary assessment of the replies received until last year was carried out in the framework of the semi-annual IP conference of the Hungarian Association for the Protection of Industrial Property and Copyright in November 2008.

However, given the short period of time laid down in the Directive for assessment (only 3 years from the implementation deadline), the relatively low number of intellectual property-related court cases in Hungary and the length of such proceedings, the results of the public consultation are not as abundant and informative as they might have been some years later. Few lawsuits have been filed and have been adjudicated so far under the new rules, and one cannot speak of a steady and well-established jurisprudence concerning the amended provisions.

Nevertheless, however sparse the experience gathered within this period is, there are some important conclusions to draw, based upon the answers received. Below (after a short introduction of the input material) follows the part of the report which – based on the Commission's questionnaire, presented along the Articles of the Directive – compiles and summarises the data collected, making the insights of public authorities comparable with the experience of stakeholders. The stakeholder evaluation is indicated at every Article (in bold) where the Commission's methodology asked for a "grade", according to the legend presented by the Commission document. The report is concluded with a general assessment of the exercise and supplemented by the table of correspondence.

3. Composition of contributors

From the *public sector*, the Prosecution Service, the Headquarters of the National Police, the National Judicial Council and the county courts have furnished the HPO and the MJLE with substantial contributions each year. The Legal Sciences Institute of the Hungarian Scientific Academy shared its views as well in 2009. As it is the Budapest Metropolitan Court that has exclusive competence to adjudicate industrial property infringements, the replies received from that court bear special significance.

A wide range of *stakeholders* filled out the questionnaire, giving valuable feedback and contribution to the assessment required by the Directive. Besides right management societies, representatives of the Hungarian pharmaceutical sector, copyright organisations, the content providers association, broadcasting organisations, a law firm and patent attorneys also sent in their replies. It can be noted that the majority of the stakeholders participating in the exercise were representing the copyright branch of intellectual property.

It should also be borne in mind that feedback was mainly gathered from stakeholders that usually take the applicant side in court proceedings, thus the contributions have to be

considered with reserve and taking into account that alleged infringers would probably take the opposite position.

The *general public* was consulted through a survey carried out in the framework of the activities of the National Board Against Counterfeiting, a consultative and advisory body of the Government established in 2008. Feedback was received with views on counterfeiting and mass IP infringements, but the enforcement side of those data is naturally very limited.

4. Summary of the answers received

<i>General</i>

In general, the remark about the questionnaire being somewhat premature was present in almost all substantial contributions: few effects of the amendments can be detected in such a short period, the low quantity of available data is not sufficient to draw far-reaching conclusions, and no stable jurisprudence could develop within these three years.

According to the National Judicial Council, the amendments have not brought any significant increase in the number of lawsuits. Even though the awareness of the new rules among patent attorneys and specialised law firms is satisfactory, few right holders are well-informed about the novelties in the substantive and procedural rules. Smaller right management organisations still tend to prefer out-of-court settlements.

The *copyright lawsuits* filed per year vary from 10 to 30 per county (350-400 cases per year in the whole country). The amendments have not brought significant increases in case numbers. The Supreme Court's statistics of copyright cases that reached the third instance (extraordinary) review stage: 6 in 2004, 4 in 2005, 7 in 2006, 10 in 2007 and 5 in 2008.

Hungarian courts hear approximately 15-20 *patent infringement cases* a year, out of which more than 50% go to appeal (invalidation proceedings are to be initiated at the HPO). This number has not raised since the transposition of the Directive (on the contrary: while 19 new patent infringement cases were filed in 2006, the 2008 data only show 7 newly initiated lawsuits after 2007 with 12 new cases).

Between May 2008 and April 2009, 85 *trade mark infringement cases* were initiated before the court. Compared to the previous years' data, this means a 4-5% decrease in the number of cases.

The impact of the amendments on innovation and on the development of information society is not detectable so far. There are voices articulating that the relatively uniform enforcement rules introduced relating to the different types of intellectual property protection (e.g. provisions tailored for copyright infringements being applied in patent law cases) can even have an adverse effect on innovation.

Article 4 – Persons entitled to apply for the measures, procedures and remedies

The amendment of the Copyright Act clarified the legal position of the collective rights management bodies in infringement proceedings. As the earlier provisions of the Act were interpreted by the courts, rights management organisations had only been entitled to claim a remuneration which should have been paid by the user in the case of asking for a licence. This had been an unreasonably narrow interpretation of the position of collective rights management bodies, and it made the effective enforcement of rights managed collectively practically impossible.

According to the amended text of the Copyright Act, rights management organisations have the legal standing of a right holder of authors' rights or neighbouring rights when enforcing copyright claims that fall under the scope of collective management of rights before courts. The new rules make it clear that it is not required to involve any other right holder in the procedure as a party for such a body in order to be entitled to enforce the infringed rights. This amendment was unanimously welcomed by stakeholders.

Hungarian law has not implemented Article 4(d) of the Directive, although some interested groups would have supported its implementation in the field of copyright.

Article 5 – Presumption of authorship or ownership

According to data received from courts and stakeholders, authorship is hardly ever questioned in copyright cases. There was no example of rebutting the presumption between 2005 and 2009.

Nevertheless a complex “cascade” system of presumption of authorship was introduced into Hungarian copyright law by the amendment of the Copyright Act (with presumptions of a certain ranking). Besides the presumption based on the Directive, a similar presumption arises from the voluntary register of authorship managed by the Hungarian Patent Office, and a further one from the collective rights management bodies' databases (the latter containing works, subject-matter protected by neighbouring rights and rightholders subject to collective rights management). The register of the Hungarian Patent Office was established in 2005, and approximately 800 works have been registered since then.

*Articles 6 and 7 – Evidence and measures for preserving evidence**1. Collection of evidence***Stakeholder evaluation: 1**

Most stakeholders feel that the collection of necessary evidence has not been improved. Some even mentioned that Community and national rules on data protection and privacy are counterproductive when it comes to IP enforcement: “wilful infringers” are eager to invoke those rules to avoid the obligation of providing evidence under their control and courts tend to be overly cautious when they are called to turn down those arguments.

The new provisions that allow the courts to order collection of preliminary evidence even before the lawsuit is initiated, together with the court's ability to order on the request of the applicant the presentation of evidence or data from the opposing party, are not considered sufficient by stakeholders, as evidence under the control of third parties (e.g. pharmaceutical substances manufactured abroad) cannot be procured this way. Therefore, these provisions may be suitable to preserve available evidence, but are not apt to open access to new resources.

One comment indicates that infringements on the Internet are more and more often proven by asking public notaries to certify the presence of the contentious content at a given date.

The comments received also contained some complaints about the Appeal Court's tendency to require too extensive evidence (usually embodied in documents with qualified formalities) from applicants who are often not in possession of all necessary data.

2. Sampling

General rules on appreciation of evidence are provided for in Articles 3(5) and 206 of Act III of 1952 on the Code of Civil Procedure ("CCP"): the court is free to use any means of evidence that are suitable to establish the factual circumstances of the case and evaluates them according to his or her conviction. The IP acts, apart from some rebuttable presumptions, do not contain special provisions on the appreciation of evidence and the second sentence of Article 6(1) on sampling was not explicitly transposed into Hungarian law with Act CLXV of 2005.

The data received, however, indicates that in practice, courts do apply the rule that a reasonable sample of a substantial number of copies of a work or any other protected object is to be considered by the competent judicial authorities to constitute reasonable evidence (as long as the contrary is not proven), relying on the general provisions mentioned above. This practice is not even linked to the transposition of the Directive: it had been applied before 2006, too.

Based on the above, the courts are usually willing to accept the infringing nature of all copies/products when one illegal piece is presented, provided that the defendant is not proving the contrary. In some cases, however, the court did not deem the same evidence sufficient to demonstrate continuous marketing as well; but repeated sampling (also during the proceedings) may help when this problem arises.

3. Communication of banking, financial and commercial documents

According to the National Judicial Council, the obligation to communicate banking, commercial or financial documents in this context has not been imposed so far.

Stakeholder evaluation: 3-4

Stakeholders warmly welcome the new rules that allow courts to order communication of certain financial data from the defendant as means that facilitate procuring relevant evidence. It may also be very useful when the amount of due royalties and eventual additional profits gained by the infringer (and to be paid to the applicant) has to be established: these data can corroborate information provided under national rules in compliance with Article 8 of the

Directive. Further infringers in the commercial chain might as well be more easily identified looking into the documents in question.

Some respondents highlight, however, that it has not been ordered yet (thus no experience is available), and have articulated doubts about the practical execution of such an order. Other stakeholders warned that this tool should only be used if the appropriate balance between the parties' interest is safeguarded, and the test should not be the same with respect to every form of intellectual property protection: in patent cases, where strategic litigation is not rare, additional caution is necessary before ordering such measures. Different types of cases may necessitate different types of documents to be communicated. One contributor from the audiovisual sector even believes that it is superfluous to order the communication of these data.

4. Protection of witnesses' identity

The transposition of the Directive did not result in amendments to the relevant provisions of the CCP and there was no change in the practice of courts, either. This kind of measure is seldom applied in intellectual property cases.

Article 8 – Right of information

1. General evaluation

According to courts, information on distribution had been ordered before the implementation of the Directive as well, and printing undertakings, reproducing facilities, manufacturers, members of the distribution network had all been sources of this kind of information. As for the content of information to be provided, the amendments only conveyed clarifications, but there has been no substantial change so far in the practice of courts. The court orders the defendant to provide information in approximately 80% of infringement cases.

Stakeholder evaluation: 3

While some stakeholders are sceptical about the real added value of the new provisions, most of them deem the amendments useful and *believe that enforcement becomes more effective* by listing the specific data which can be asked from the defendant. Not only the organisations and networks of infringers become much more easily identifiable, but also gathering relevant evidence. With the quantitative information gained (number of copies, prices, etc.), the *amount of unfair profits (unpaid royalties) and damages can be calculated* on a more realistic basis and can be claimed less hypothetically than before. Information provided in out-of-court negotiations are usually less reliable than those gathered upon the order of the court.

Some expressed their misgivings that protection of confidential information is sometimes overridden by the courts' orders to provide sensitive business data. *The principal criticism about the functioning of the right of information is that courts are reluctant to order it as a provisional measure.* Most often, they order it in the final judgment or in a partial or intermediary decision, but the data acquired at that time (or, in many cases, after a long execution procedure) can only be used in new proceedings or with significant delays. Thus the originally useful provision loses its real advantages in practice and does not contribute to the immediate protection of the right holder.

2. Information requested from intermediaries

The Budapest Metropolitan Court – in copyright cases – ordered the providing of data on the quantity of infringing goods from persons in possession of products on a commercial scale in 5 cases in 2007-2008. Reproducing facilities (and subsequently the indicated distributors) have also been sought by the same court to provide information (and relevant documents) 5 times during the last 4 years in the capital. The data to be provided were quantities of supplied goods, and wholesale or retail prices.

According to the data received, almost no stakeholders have used this tool yet directly (only one example was cited, but that case is still pending), but almost all contributors indicated that they are planning to do so in future litigation (concerning copyright issues: primarily in the case of on-line infringements). It is the task of the courts' practice to elaborate the new provisions' relationship to trade secrets. The intermediaries who have previously refused to name the real infringer (GSM operators, domain hosts, ticketing agents, etc.) are expected not to be in the position to remain silent anymore.

It was argued that this provision may especially be useful in trade mark and copyright infringement cases. In the case of on-line infringements, clarification is needed in Community law about the relationship between on-line privacy and the intellectual property rights of copyright or related rights holders. Until intermediary Internet service providers can be ordered to provide information about the infringers, no "equality of arms" will be present in proceedings.

Articles 9 and 11 – Provisional and precautionary measures

1. Provisional measures

a) Concerning *copyright cases*: in Budapest, within one year, the request is filed before the commencement of the judicial proceedings in approximately 4 cases, while in 10 cases it is incorporated in the petition (14 requests per year). Almost no such requests have been filed outside the capital in the last years. The requests are usually not substantiated enough to order the provisional measure. The courts require at least one infringing copy and evidence (e.g. invoice) that it can be acquired on the market.

b) Requests for provisional measures are more typical in *industrial property* cases, in particular trade mark infringement actions (within one year's time, there are approximately 30 trademark-related requests, and the majority of them are appealed: in front of the Court of Appeal, 21 out of the 28 review petitions concerning decisions upon provisional measures in 2008 was linked to trade mark infringement cases; the remaining 7 were related to patent or design infringement actions).

In 2008, the Budapest Metropolitan Court ruled that trade mark applications and provisional patent rights (protection after publication but before grant) cannot serve as a basis for provisional measures, nor can a patent which is revoked on first instance by the Hungarian Patent Office. In these cases, the court deemed that the underlying rights are so unstable that their existence cannot be considered as "made likely" (cf. "reasonably available evidence").

The Patent Act expressly states that before ordering provisional measures, the interests of the public and third parties should also be taken into account (this provision may become very important in pharmaceutical cases).

Stakeholder evaluation: 1-2

a) Stakeholders in the *copyright* field feel (and resent) that courts do not apply provisional measures in copyright cases, even when the applicants are ready to deposit adequate security. There was only one example when the court ordered such a measure, but it was annulled upon appeal, and was inflicted by the exceptionally long case history, not by the need for the right holder's immediate protection.

Another sore point for stakeholders is the long delays the courts are working with. The 15-day deadline to adjudicate the requests for provisional measures is hardly ever respected, and only in simpler cases is the decision made within 1-2 months.

It should also be noted that requests for provisional measures *before* initiating a lawsuit are new and somewhat alien to Hungarian procedural law. One of the biggest right management societies mentioned that even though the new rules are not functioning as smoothly as they should yet (and they are still rather exceptional), they have a positive impact on the practice of provisional measures *during* the trial.

b) As for *industrial property cases*, applicants seek provisional measures in about 75% of the trade mark-related actions. Such requests are more and more typical in patent cases, too, but a security (reaching 1–3 billion HUF) is usually required to be deposited by the applicant. The appeal rate of decisions on provisional measures is 25-30%, out of which only 20% is overturned. The defendant is almost always heard before ordering the measure, but in trade mark cases it is usually a written procedure; only in patent cases does the court generally hold oral hearings. Due to the highly technical nature of patent cases, decision on provisional measures can even take as long as 6 months.

Ordering the defendant to provide information is rarely present in provisional measures, but when it happens, it can be very useful. The execution of provisional measures, on the other hand, is slow and often ineffective.

2. „Reasonably available evidence”

With respect to “reasonably available evidence”, Hungarian law (the CCP) requires the applicant „to make the facts substantiating the request for provisional measures likely”. This means less than proof, but more than a mere statement: the imminent damage, the need to maintain the *status quo* or to grant special protection to the applicant have to be made “credible” to the court (so that it can “satisfy itself with a sufficient degree of certainty”).

The Trade Mark Act and the Patent Act set up a refutable presumption in favour of right holders and licensees who can initiate actions on their own right: if they can demonstrate the existence of protection and their entitlement, the “reasonably available evidence” is deemed to be provided. This presumption, however, can only be relied on within a certain deadline (60 days from becoming aware of the infringements, and no longer than 6 months after the beginning of the infringing activity). Rebutting the presumption is also possible, and no evidence is necessary: the same degree of certainty (making the opposite “likely”) is enough

to prevent the court from ordering the measure. The revocation of the European patent in another designated country or the revocation of the patent at first instance shall be taken into account during these deliberations.

In practice, the court usually requires the applicant to submit an excerpt from the trade mark/patent register, a copy of the decision of the customs authority, or the infringing product itself (at least as a sample or a photo thereof) before ordering the measures in question.

According to stakeholders, courts are still reluctant to order provisional measures unless the infringement is actually proven (i.e. the “sufficient degree of certainty” is deemed to be too high).

3. Precautionary measures

Experience is scarce relating to precautionary measures: the Budapest Metropolitan Court only issued such orders in 3 cases during 2007-2008.

One of the biggest right management societies indicated that precautionary measures have the additional precondition that the applicant “makes it likely” that recovery of damages or unfair profits is endangered, but this also includes the furnishing of indicative evidence of the existence and the amount of damages. Damages in excess of unpaid royalties are extremely hard to “make credible”. It is still unanswered whether the applicant has to “prove” the culpability of the defendant too, or it is presumed.

4. Recurring penalty payment

The Judicial Execution Act contains the possibility to order recurring penalty payment if the defendant fails to comply with the court’s orders. This possibility is generally deemed useful, but it has almost never been ordered so far.

Stakeholder evaluation: 2

In the case of on-line infringements, compliance can hardly be ensured: removing the illegal content from an URL qualifies as compliance with the court order, but continuation at another address makes a new action necessary. Recurring penalty payment is not a solution in these cases.

Article 10 – Corrective measures

Seizure and destruction is requested in 80% of the cases. Revocation from the channels of commerce was initiated on 2 or 3 occasions.

A possible difficulty in cases where the court orders recall from the channels of commerce is that the applicant is not in the position to verify whether the recall has been actually carried out. To that end, the applicant asked the court to order the defendant to provide relevant information, but the request was not granted.

As for „appropriate measures” other than mentioned in Article 10 of the Directive: the court may order a party to surrender a registered domain name. Removal of the unlawful elements

(typically trade marks) from the products may as well be ordered if it excludes any further abuse; and the court may also opt for an auction of infringing goods or “passing them over to an appointed person” (with all relevant interests taken into account).

No defendant has invoked „particular reasons” why the measures in question should not be carried out at their expense.

<i>Article 13 and 14 – Damages and legal costs</i>
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Stakeholder evaluation: 1 (or 5)

1. Calculating damages

Where infringement of an intellectual property right is established by the court, *the applicant may claim damages according to the relevant provisions of Act IV of 1959 on the Civil Code* (“Civil Code”). The basic principle of awarding damages is “full compensation”, i.e. actual losses, lost profits, costs entailed by the damage and any other compensation necessary to counterbalance the pecuniary and moral damages suffered by the applicant are to be paid by the defendant – provided, of course, that all the conditions necessary to establish liability are met.

It has to be highlighted that *the general scheme of Hungarian law for awarding damages, which had applied before the transposition of the Directive, remained unchanged* with the entry into force of the Enforcement Act. Articles 339, 355(1), 355(4) and 359(1) of the Civil Code are deemed to be in full compliance with Article 13 of the Directive.

The *recovery of unfair profits* on the infringer’s side is an *objective sanction*, i.e. apart from the establishment of the infringement and the existence of such profits, no additional facts (culpability of the infringer) need to be shown.

The amount awarded by courts as damages is usually a cumulation of damages suffered and lost profits (mainly unpaid royalties/licence fees). Compensation for non-pecuniary (moral) damages is only acknowledged and awarded if the damage caused by the infringement of the moral rights of the author or related rights holder is duly substantiated. In industrial property cases, the inventor/author of the design may request such damages under certain circumstances, but no such action has been filed since the transposition of the Directive.

Even though the Civil Code allows it, there has been no judgment ordering the payment of a lump sum since 2005.

To calculate the amount of damages to be awarded, the use of external experts is common practice.

Applicants usually request the recovery of unfair profits and damages alternatively. When determining the amount of unfair profits, the court calculated it in some cases by subtracting the justified costs from the overall income of the defendant in relation to the infringement. Mostly, however, the court still takes as a basis the amount of unpaid (theoretical) licence fees that would have been due in a contractual relationship. It has to be borne in mind, however, that this amount can only be awarded once, either as recovery of unfair profits or as part of the

damages awarded. The court usually invites the applicant to make a statement about which basis he chooses when claiming the unpaid royalties/licence fees.

2. The level of damages awarded

The amount of damages should be, as a general rule, proven by the applicant. Courts indicated that there is a moderate but noticeable yearly increase in awarded damages, though the claims for damages are often somewhat exaggerated. No significant change can be observed in the level of awarded damages since the transposition of the Directive.

While noting that only a few proceedings that have been initiated after the transposition of the Directive have been concluded yet, major stakeholders expressed misgivings about the courts' practice in Hungary concerning damages.

The most important stakeholder complaints include the "overly cautious" court practice when determining the level of damages awarded and the "irrational extent" to which the courts require evidence before awarding damages. Stakeholders (on the right holder side) believe that these two factors result in insufficient compensation for their damages suffered.

Another one of the concerns listed is that when the claims for damages are raised in criminal proceedings and that court redirects the adjudication of those claims to a civil court (this happens in about 80 % of the cases), the judgment of the latter court is often based on the allegedly incomplete and not well-founded expert opinion delivered in the criminal case.

According to general stakeholder views, important economic factors such as the valuation of IP rights, IP-specific market phenomena and business methods should be more adequately explored by courts when deciding on damages in IP cases.

However, the preliminary nature of the above observations (especially in patent cases) is underlined by the fact that most patent infringement trials take 4-7 years (and if the defendant prevails, he has to initiate new proceedings for the recovery of his losses).

3. Moral damages

Applicants request damages for moral prejudice in approximately 10% of the copyright-related cases, but hardly any of these were fully successful in the last 3 years. Courts tend to deem the claimed amounts too high, while stakeholders resent that in court practice, there is an "invisible upper limit" of 1 million HUF (3500 EUR). Applicants also find it too hard to prove the existence of damages stemming from the harm of the company's goodwill caused by the infringement.

4. Lost profits of the applicant and recovery of unfair profits made by the infringer

Lost profits are usually considered identical to the unpaid royalties/licence fees that would have been due had the parties been in a contractual relationship. This is the part of the damages which is most often awarded without any difficulty. To calculate the amounts, the court usually relies on expert opinions.

The *recovery of unfair profits* on the infringer's side is an *objective sanction*, i.e. apart from the establishment of the infringement and the existence of such profits, no additional facts

(culpability of the infringer, actual damage) need to be shown. This option is welcomed by stakeholders, as it allows the applicants at least to get the unpaid royalties/licence fees even if damages are not awarded in the absence of satisfactory additional evidence required by the Civil Code.

As indicated above, applicants usually request the *recovery of unfair profits and damages alternatively*. In the majority of cases, the court still takes as a basis the amount of unpaid (theoretical) licence fees mentioned above. It has to be borne in mind, however, that this amount can only be awarded once, either as recovery of unfair profits or as part of the damages awarded. The court usually invites the applicant to make a statement about which basis he chooses when claiming the unpaid royalties/licence fees and thus the request is often modified accordingly.

Recovery of additional “unfair profits” (apart from the unpaid royalties/licence fees) has never been ordered yet, mainly because applicants are lacking relevant data of the defendant’s financial data and thus are not in the position to submit evidence showing that such profits exist.

5. “Appropriate aspects” and “elements” not explicitly mentioned in Article 13(1)

As the Enforcement Act did not introduce any amendments in the Civil Code’s provisions relating to damages, the principle of “full compensation” (i.e. actual losses, lost profits, costs entailed by the damage and any other compensation necessary to counterbalance the pecuniary and moral damages suffered by the applicant) and jurisprudence built thereon remained unchanged. Aspects and elements not included in that list are not applied, and Hungarian law does not allow punitive damages.

6. Legal costs

Articles 75-83 of the CCP, which govern this issue, have not been amended in relation to the implementation of the Directive, and no specific rules are in force concerning legal costs in IP-related court cases. No change of legal practice has been introduced in relation to legal costs: as a general rule, justified costs are still borne by the losing party, as before.

The bearing of fees paid to legal representatives (including patent attorneys) is a controversial issue: they are considered to be a part of legal costs, but based on the Ministerial Decree 32/2003. (VIII. 22.) IM they can be diminished by the court if it considers them disproportionate to the work the case necessitated. Even though stakeholders acknowledge that the level of granted representatives’ costs have slightly increased, some still express their frustration that courts are willing to accept the actual value indicated on the invoice only if the value at stake in the case is very high. They argue that IP cases are often very complex and require a lot of legal work from the representatives, which is not honoured by the present practice.

Equity factors have always been taken into account, as the relevant factors are incorporated in the CCP: superfluous litigation, unjustified delays or missed deadlines, litigation in spite of out-of-court settlement and partial winning can all result in the (at least partly) successful party bearing the costs concerned.

<i>Article 15 – Publication of judicial decisions</i>

Stakeholder evaluation: 1 (or 5)*1. General evaluation*

The option laid down in Article 35(11) of the Patent Act, Article 27(11) of the Trade Mark Act and Article 94(10) of the Copyright Act (incorporated by the Enforcement Act) is not the same as the obligation set forth in Part Four of Act XC of 2005 on the freedom of electronic information, which provides for the publication of certain court decisions: on the one hand, these rules concern only judgments of the Supreme Court and the Courts of Appeal, and on the other hand, the personal references of the published decisions are deleted (subject to certain exceptions). It is clear that this publication does not serve the same purpose as the publication requested by the applicant under the rules based on the Directive, which has a sanction character by linking the infringer's name with an illegal act.

Even though the explicit option to request the court to order publication was brought to the IP Acts by the Enforcement Act, such publication was ordered at the request of the applicant before the implementation of the Directive as well. This can be explained by the fact that the relevant legal instruments had provided for the option to claim “adequate reparation by way of a statement or otherwise, assuring (if necessary) appropriate publicity thereto by, or at the expense of, the infringer”, which was usually interpreted the same way as the “publication claims” are in the current practice. There is unresolved uncertainty among stakeholders if the preconditions for the two kinds of claims differ at all, and they cannot see the added value of the new provision.

A major law firm specialised in IP cases raised the point that the option concerned has not brought significant changes into (industrial property) practice, due to the low number of cases and to the fact that the representatives' names are not deleted from the “automatically” published judgments, so interested parties know very well which undertakings are concerned by the decisions.

Others highlight that the Directive (and national law implementing it) only provides for this possibility to applicants, which create an unjustified imbalance in the position of parties. Defendants should also be entitled to request the publication of judgments in their favour.

The possible functions of publications mentioned by stakeholders are as follows:

- orientation when infringements are committed on a grand scale and the factual background is very similar in each case (typical cases, e.g. file sharing);
- orientation when there is uncertainty about the interpretation of certain rules (e.g. the scope of limitations and exceptions);
- deterrent effect (provided that the defendant is known enough);
- revealing big scale, organised infringement activities;
- weakening the market position of the infringer (by losing consumer trust and business partners, especially in trade mark cases);
- information when a given user (e.g. a broadcasting organisation) is in contact with a wide circle of right holders;

- information when a certain use requires no licence but adequate remuneration, hence the right holders' control possibilities are limited.

2. *Methods of publication*

Usually it was the rules on „rectification in press” that were applied *mutatis mutandis*. In the absence of fulfilling the publication duty, the relevant provisions of the Judicial Execution Act can be applied.

Applicants still rather tend to ask for publication of the *operative part of the judgment* within the request for “appropriate (non-pecuniary) reparation”, not as an independent request. The publication usually takes place on the Internet or in daily or weekly newspapers (the national or local nature of the newspaper depends on the gravity of the case). The court usually only orders the publication of the part of the judgment where the infringement is established, and determines the time frame, size, colour, quantity and length of the publication.

Some stakeholders urge to create a website expressly dedicated to this kind of publication, others deem it more effective to get permission from the court to publish a certain part of the decision on their own webpage. Publication in printed media is only justified if the infringer is notorious.

Article 17 – Codes of conduct

1. *Existing codes of conduct*

Article 15/A of *Act CVIII of 2001 on certain matters pertaining to electronic commercial services and information society* (E-commerce Act) encourages elaboration of codes of conduct and making these codes available in all relevant languages of the European Economic Area. Furthermore, the same Article provides for dissemination of information about the application of such codes for interested parties (in cooperation with the minister in charge of informatics).

Contributors mentioned the following codes of conduct:

- *Code of Content Providing* (Regulation of operations, ethics, and procedures with respect to content providing, issued by the Hungarian Association of Content Providers, date of the latest supervision: 25 June 2007; http://mte.hu/dokumentumok/mte_kodex_eng.doc).
- *Domain Registration Rules and Procedures* established by the Scientific Association of Hungarian Internet Service Providers Council (explicitly based on Article 15/A of the E-commerce Act).

2. *Evaluation of codes of conduct*

Stakeholder evaluation: 3

Self-regulation and self-restriction can most often be more efficient than external rules imposed on the actors concerned. When the main players realise how much added expediency and flexibility can be gained by subjecting themselves to their own rules than by having an

overly detailed regulatory framework or by having no rules at all (especially in a rapidly developing technical environment with brand new legal challenges), codes of conduct can prove to be very efficient. Such codes can also facilitate dispute settlement and help avoiding litigation while creating a healthy balance between the different interests.

It should be noted, however, that codes of conduct in the IP field are still not widely used in Hungary, as relevant traditions are missing and the organic development of self-regulation is not a rapid process. Another tendency is that codes of conduct often repeat existing legislative provisions without adding more self-imposed obligations thereto; and heavy financial interests may render the stipulations and sanctions “symbolic”.

3. Government tools to stimulate the creation of codes of conduct

Some believe that the government should encourage and promote the elaboration and application of codes of conduct, even delegating some powers (e.g. alternative dispute settlement) to the bodies designated by those codes. By including media-related topics in basic education and teaching conscious Internet use, seeds of future self-regulation can be sown.

Others warned that overly detailed and stringent legislation can be an obstacle in front of codes of conduct and underlined that adequate links between such codes and the State-managed enforcement authorities should be provided for. A good example for this is the question of enforcing the decisions of alternative dispute settlement bodies (i.e. on what legal grounds may courts adjudicate in such questions).

There were voices that would oppose governmental intervention concerning codes of conduct: these instruments should be stemming from the stakeholders’ own initiative and founded on mutual trust.

Broadcasting organisations indicated that not only collective management societies should be consulted in such matters but also users and right holders outside the scope of collective right management.

„Commercial scale”

According to courts, even one single product is suitable to render the act be deemed on a commercial scale (if the infringement has the potential to affect a wider circle of persons). In one case, the Pécs Court of Appeal ruled that in the case of unlicensed use of a work under copyright, there is a presumption that such illegal use was carried out for business or other profit-gaining purposes.

Stakeholders assume that intermediaries who contributed in the production or marketing of infringing products or provided services in relation to the infringement will be considered to do so aiming at income/advantage, therefore they act on a “commercial scale”. The only category where “commercial scale” can be excluded without any doubt is the end consumer (acting in good faith).

Still, it is the European Court of Justice that has to clarify the exact content of this concept in an eventual preliminary ruling.

<i>Overall assessment and future</i>

Stakeholder evaluation: 2-3

Firstly, it has to be emphasized that the transposition of the Directive has not transformed the whole structure of IPR enforcement in Hungary. All measures laid down in the Directive had been already known and used before in some version, only modalities have been changed and some conditions of application have been altered – however important they may prove to be in practice.

As indicated before, some stakeholders mentioned that the relatively uniform enforcement rules introduced relating to the different types of intellectual property protection (e.g. provisions tailored for copyright infringements being applied in patent law cases) can even have an adverse effect on innovation.

Others emphasized that the message of the Directive is definitely a positive one, but few practical changes have been brought about by the amendments. Of course, a relatively slow adaptation of courts practice can also cushion the impact of implementation: it takes time until a new kind of jurisprudence develops along the new provisions. Emerging tendencies and new patterns hardly get visible in three years after transposition. Courts have been using only one or two of the new tools, thus the overall effects of the complex revision of IPR enforcement rules are not palpable yet.

Still, the communication of the new rules and the entailed amendments in national law are in themselves already contributing to raising the awareness about the importance of intellectual property rights (which serves as a reason for the special treatment of these rights).

A stronger position of the right holders in civil enforcement may have the favourable effect of “channelling back” cases from criminal courts to the civil law route, and the voices that demand further criminalisation of IP infringements might be pacified with effective and dissuasive civil measures, where some of those can even be requested (and applied) before the initiation of (often lengthy) court proceedings.

One possible effect of the Directive on information society is that the new measures clarified that intermediaries (e.g. ISPs) also have a certain responsibility (which entails certain obligations) and they cannot rely on some kind of “absolute immunity” when IP rights are infringed. The collision between certain privacy rights and the “right of information” necessary for the (civil) enforcement of IP rights still needs to be resolved in the jurisprudence.

Some also argued that instead of further strengthening the enforcement framework, alternative models should be considered as well in order to “lead out” huge groups of natural persons from illegal (copyright infringing) activities (at this point, examples such as monthly subscriptions for unlimited downloads and IPTV services were cited).

The new measures that are deemed the most useful by stakeholders are *the extended right of information*, the possibility of *securing preliminary evidence and requesting provisional measures before filing the lawsuit* and the *recall from commercial channels*. However, the

means to make expeditious decisions on provisional measures are still missing in the court system.

The most significant complaint of stakeholders concerns the long delays in courts proceedings, which are only partly due to the general problem of huge workload. The fact that even the most simple cases take at least one year to finish is also caused by the courts' willingness to extend missed deadlines (or set new deadlines) for defendant statements, and each new hearing means several extra months in the proceedings. Courts are also reluctant to impose fines on defendants who cause unjustified delays. This entails that the fundamental expectation to make the period when the right holder has to suffer the consequences of infringement the shortest possible is currently not met. It is acknowledged, however, that these problems have their roots not in the special IP enforcement rules but in the general functioning of civil court proceedings. One adverse effect caused by this may be the right holders' growing willingness to initiate criminal proceedings merely because they feel that the civil route is insufficient for their protection.

2. Proposals

Concerning the new enforcement measures, stakeholders submitted a couple of proposals for amendments to consider. Most of them concern only the Hungarian rules which are in conformity with the Directive but might be improved (especially on judicial execution, i.e. ensuring compliance with court rulings).

According to some, the rules on provisional measures should not be uniform and different provisions (e.g. longer deadlines) should be adopted for patent cases where the technical questions make the cases much more complex. Others would like to see an explicit reference in national law that allows applicants to request that the court orders intermediaries to provide data, too (as a provisional measure), even if the infringer is not known yet.

The proposal that concerns the wording of the Directive as well is the consideration relating to publication of decisions (mentioned above): defendants should also be entitled to request the publication of judgments in their favour (at least when the applicant requested publication in the lawsuit).

5. Assessment

Based on the contributions presented above, a couple of conclusions may be drawn. These can be briefly summarised as follows:

a) Evaluation of the effects of the Directive on national enforcement practices is somewhat premature. Some patterns can already be seen, but the closed cases initiated since the transposition of the Directive are not so numerous that far-fetching conclusions could be drawn.

b) The Directive and the amendments of national law have sent out a positive message for IP right holders and introduced measures that strengthen their position, but some fine-tuning may be needed to differentiate between the forms of IP protection entailing court cases with very different characteristics. The decrease in case numbers do not show that the new measures have torn down a "dam" that had barred right holders from litigation before, but court proceedings in Hungary have never been inaccessible (no prohibitive costs and possible self-

representation for natural persons) and the number of cases is not unusually low compared to the registered rights and the size of the market.

c) The criticism about the efficiency of enforcement measures do not principally concern the Directive and the new measures brought about by the Enforcement Act, but rather the inherent – and horizontal – deficiencies of civil court proceedings (delays, low level of damages, execution issues, etc). The principles behind the new rules enjoy general support.

d) The two most welcome types of measures are provisional measures and measures relating to the right to information. However, there are concerns about the level of “certainty” required to order provisional measures and about the speed of decisions on requests, and the right to information concerning intermediaries (in order to identify the infringer) is still to be explored.

e) In the light of the above, there seems to be no need to amend the Directive at this point. One idea that may yet be worth considering is making it possible that when the defendant prevails, the court (upon his request) orders the publication of its decision (at least when the applicant requested publication in the lawsuit).