

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



How to deal with orphan works in the digital world?

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

How to deal with orphan works in the digital world?

An introduction to the new Hungarian legislation on orphan works

NOTE

This document was requested by the European Parliament's Committee on Legal Affairs

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LIST OF ABBREVIATIONS

ACE Association des Cinémathèques Européennes

ARROW Accessible Registries of Rights Information on Orphan Works
[towards the European Digital Library (EDL)]

CMO collective management organisation

HPO Hungarian Patent Office

NAAF National Audiovisual Archives Foundation

RCC Rights Clearance Centre

EXECUTIVE SUMMARY

Background

Orphan works are works that are still in copyright but whose owners cannot be identified or located. Digital preservation and accessibility are often hindered by rights clearance difficulties in relation to orphan works. Despite some European initiatives, national mechanisms for tackling these problems are scarce and not harmonised.

At present, it appears that Hungary is the only Member State of the European Union providing for a two-fold solution to the problem of orphan works. What makes Hungarian legislation unique in this respect is that, in addition to extended collective licences, it has recently introduced a model of centrally-granted non-exclusive licences covering all uses of orphan works falling outside the scope of collective rights management.

Aim

This paper is intended to give a brief overview of the relevant Hungarian legislation and the first steps taken to implement it. Describing, in a factual but somewhat critical manner, the current Hungarian legal framework for tackling orphan works may contribute to eventually finding solutions to the problem of orphan works at European level as well.

The basic aim of the present note is to describe the Hungarian scheme for licensing certain uses of orphan works. In addition, it also gives some insights into the legislative history and the institutional framework of that scheme. An outline of some other provisions which may be of relevance to orphan works is also included. Furthermore, this note renders an account of the implementing measures introduced and the experience gained thus far. It concludes with a first assessment of the new Hungarian legislation on licensing certain uses of orphan works.

1. ORPHAN WORKS IN HUNGARIAN COPYRIGHT LAW – LEGISLATIVE HISTORY

KEY FINDINGS

- The issue of orphan works has first been addressed in the **mid-term strategy of the Hungarian Patent Office**.
- **Provisions on** licensing certain uses of **orphan works formed part of a comprehensive amendment to the Copyright Act**. It was adopted in December 2008 and **entered into force on 1 February 2009**.
- **The legal framework** for licensing certain uses of orphan works **has been completed by** the adoption of **Decree 100/2009. (V. 8.) Korm. laying down implementing rules**. It entered into force on **16 May 2009**.

1.1. The beginnings: the mid-term strategy of the Hungarian Patent Office

The **mid-term strategy of the Hungarian Patent Office** (HPO), which has been approved by the minister supervising the HPO, covers the period between 2007 and 2010. It was in that mid-term strategy that **the issue of orphan works has been addressed first in a government document**. It contains the following passage on orphan works:

“Our strategic objective is to make the HPO’s copyright-related official tasks and services publicly known and recognised, and to strengthen the HPO’s role in the field of copyright. The main directions are the following:

[...]

- establishment of a system for authorising the use of orphan works (in the course of 2008, after the legal framework has been established).”¹

1.2. Adoption of Act CXII of 2008 amending the Copyright Act

Later on, the idea put forward in the HPO’s mid-term strategy was taken on board when the Ministry of Justice and Law Enforcement began to draft a **comprehensive amendment to** Act LXXVI of 1999 on Copyright (hereinafter referred to as the “**Copyright Act**”). That amendment was intended **to cover a wide range of issues** including public lending and collective management.

The **first draft**, which was drawn up jointly by the Ministry of Justice and Law Enforcement, the Ministry of Education and Culture, and the HPO, was submitted to public and inter-ministerial consultation **in March 2008**. However, some of the provisions relating to collective management and public lending proved more controversial than expected. Lengthy negotiations ensued considerably delaying the submission of the legislative proposal to the Government.

¹ Hungarian Patent Office (2007), p. 43.

The draft, which had been revised several times, was eventually discussed at the meeting of state secretaries on 11 September, and, later on, in late September by the Government itself. **Deliberations in the Parliament** on the Bill submitted by the Government started in mid-October, and quite a few **motions** for amending the Bill were tabled by the MPs. Some of them **proposed the deletion of the provisions on licensing the use of orphan works**. However, **these motions were eventually voted down**. The Bill was passed in the Parliament on 15 December 2008. As a result, **Act CXII of 2008 amending the Copyright Act was adopted. It entered into force on 1 February 2009.**

1.3. Government Decree 100/2009. (V. 8.) Korm. laying down detailed rules on licensing certain uses of orphan works

The Government was mandated by the amended Copyright Act **to adopt implementing rules** concerning the licensing of certain uses of orphan works. The Government should have adopted the necessary Decree by 1 February 2009, i.e. by the date of entry into force of Act CXII of 2008 amending the Copyright Act. However, adoption of that Decree was somewhat delayed by debates between the various government authorities on some implementation details.

Decree 100/2009. (V. 8.) Korm. laying down detailed rules on licensing certain uses of orphan works (hereinafter referred to as the "**Government Decree**") finally **entered into force on 16 May 2009** completing the legislative framework in Hungary for licensing certain uses of orphan works.

2. WHY THE HPO? THE HPO'S ROLE IN THE NEW MECHANISM FOR LICENSING CERTAIN USES OF ORPHAN WORKS

KEY FINDINGS

- **The HPO is an intellectual property office** responsible for both industrial property and copyright.
- **It performs a number of copyright-related tasks.**

2.1. The HPO: an IP office

One might wonder what a patent office has to do with copyright, and, in particular, with licensing the use of orphan works. So it may be worth noting that the HPO is not only a patent office. In fact, its competence is not even limited to industrial property, either. **The HPO**, despite its somewhat misleading but historical name, **is an intellectual property office**. It is a so-called "government office" **responsible for** the protection of intellectual property, i.e. for **both industrial property and copyright**.

2.2. Copyright-related tasks of the HPO

Even prior to the establishment of the specific mechanism for licensing certain uses of orphan works, **the HPO performed (and continues to perform) the following tasks in relation to copyright:**

- it keeps a **voluntary register of works**;
- it delivers **opinions on tariffs** proposed by collective management organisations (CMOs) prior to their ministerial approval;
- it administers the **Copyright Experts Council** (which advises courts and enforcement authorities on copyright-related questions and provides alternative, out-of-court dispute resolution);
- it takes part in formulating the **Government's copyright policy** as well as in **international co-operation** and **drafting new legislation**;
- it **disseminates information** and organises **training** and **awareness raising** events on copyright.

Against this background, it has been considered quite **logical that the HPO be entrusted with the administrative tasks relating to the licensing of certain uses of orphan works.**

3. CENTRALLY GRANTED LICENCE TO USE ORPHAN WORKS UNDER HUNGARIAN COPYRIGHT LEGISLATION

KEY FINDINGS

- Hungarian provisions on licensing the use of orphan works apply to **the same category of works that is described in various Commission and other EU documents**. They cover **works whose author is unknown or, if known, cannot be found**.
- **On the basis of the extended licensing system managed by CMOs, users can obtain licences for the use of orphan works as well.**
- As regards **the right of making available to the public, collective management provides**, in many cases, and due to its extended effect, **an appropriate solution to the problem of orphan works and orphan performances**.
- **Hungarian provisions on licensing the use of orphan works are to be applied *mutatis mutandis* to licensing the use of performers' performances. Other related rights are not covered.**
- **A diligent search for the rightholder is required as a precondition for lawfully using an orphan work. Sector-specific criteria are to be applied when examining whether a diligent search has been performed. The fact that a diligent search has been performed needs to be documented.**
- **A licence to use an orphan work may only be granted for a term not exceeding five years. It is only valid in Hungary, non-exclusive and non-transferable.**
- **Remuneration is to be paid for the licence to use an orphan work. It is fixed by the HPO and has to be deposited with it as a condition of commencing the use. The rightholder may claim payment of the remuneration deposited with the HPO within five years after the expiry, or withdrawal, of the licence. Should the rightholder dispute the amount of the remuneration, he may bring the case to court, in accordance with the provisions applicable to copyright lawsuits.**
- **Hungarian legislation provides for a register of orphan works. It is to be kept by the HPO, but only in respect of those orphan works for the use of which it has granted a licence. It is a publicly available administrative register.**
- The new Hungarian legislation offers a **preferential treatment for not-for-profit uses: the amount of remuneration does not have to be deposited and a preferential rate of the administrative fees applies.**

3.1. The scope of the new legislation; the definition of orphan works

There exist a number of different, but somewhat convergent, **definitions of orphan works** and the problems associated with their use.

Recital 10 of **Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC)** (hereinafter referred to as the “**2006 Commission Recommendation**”) refers to orphan works in the following manner:

“copyrighted works whose owners are difficult or even impossible to locate”.

The Commission’s **Green Paper on Copyright in the Knowledge Economy** describes orphan works and the problems related to them as follows:

“Orphan works are works which are still in copyright but whose owners cannot be identified or located. There is a significant demand for the dissemination of works or sound recordings of an educational, historical or cultural value at a relatively low cost to a wide audience online. It is often claimed that such projects are held up due to the lack of a satisfactory solution to the orphan works issue. Protected works can become orphaned if data on the author and/or the relevant rightholder(s) [...] is missing or outdated. [...]

“The lack of data on their ownership can constitute an obstacle to making such works available online to the public and can impede restoration efforts. [...]

“The issue of orphan works is mainly a rights clearance issue i.e. how to ensure that users who make orphan works available are not liable for copyright infringement when the rightholder reappears and asserts his rights over the work. Apart from liability concerns, the cost and time needed to locate or identify the rightholders, especially in the case of works of multiple authorship, can prove to be too great to justify the effort. [...] Copyright clearance of orphan works can constitute an obstacle to the dissemination of valuable content and can be seen as hampering follow-on creativity.”²

In its **Communication** to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions **on Europeana – next steps**, the **Commission** has used the following definition of orphan works:

“works for which it is impossible or very difficult to trace the rightholders”.

In the **Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works of the Copyright Subgroup of the High Level Expert Group on Digital Libraries** (hereinafter referred to as the “**Final Report**”) the following explanation of the term “orphan works” can be found:

“In some cases right holders cannot be identified or, if they can be identified, they cannot be located, hence the term ‘orphan’.”³

² European Commission (2008), p. 10.; a similar definition can be found in the recently issued Communication from the Commission on Copyright in the Knowledge Economy: “[o]rphan works are works that are in copyright but whose right holders cannot be identified or located”; European Commission (2009a), p. 5.

³ Final Report, p. 10.

It can be relatively safely stated that **Hungarian provisions** on licensing the use of orphan works apply to the same category of works that has been described above in the various quotations. They **cover works whose authors are unknown or, if known, cannot be found**. This can be inferred from the references Article 57/A of the Copyright Act makes to “the identity or the residence of the author” that can, or cannot, be identified. This also follows from Article 1(1) of the Government Decree, which provides that the provisions of that Decree

“shall be applied to licensing that use of works falling under the scope of the Copyright Act [...] in respect of which the person entitled to grant a licence [...] is unknown or resides in an unknown place.”

In this context, it is to be noted that, under Article 57/A(7) of the Copyright Act, the **new provisions on authorising the use of orphan works cannot be applied to those types of uses in respect of which rights clearance takes place through collective management**. In his explanatory memorandum to the Bill on the basis of which the Copyright Act has been amended to include specific provisions on orphan works, the **Minister of Justice and Law Enforcement** has pointed out that, as a result of Article 57/A(7) of the Copyright Act, and due to the extended collective licensing system existing under Hungarian copyright law, what one is in fact confronted with is **not “orphan works” but rather “orphan rights”**. This follows from the very nature of extended collective licences: there is a legal extension of the repertoire of the CMO to encompass even those right holders (whether they are known or not, and whether they can or cannot be found) that are not members of the organisation (neither did they give it an express authorisation to represent them). Therefore, even if the author of a certain work cannot be identified and/or located, those types of uses of the work that fall within the scope of collective management can still be licensed. Thus, **on the basis of the extended licensing system managed by CMOs, users can obtain licences for the use of orphan works as well**. As a result, a licence is to be applied for at the HPO under Article 57/A of the Copyright Act in respect of only those types of uses that are not licensed by CMOs.

Although the 2006 Commission Recommendation deals with orphan works in the digital context and recommends Member States to “improve conditions for digitisation of, and online accessibility to, cultural material by [...] creating mechanisms to facilitate the use of orphan works”⁴, the relevant **Hungarian legislation is not limited to digitisation**. It extends to the authorisation of all possible uses, be they digital or analogue, of orphan works. As to “online accessibility”, the following deserve mentioning.

In respect of the **right of making available to the public**, and as regards certain categories of works, Article 27(3) of the Copyright Act foresees **collective management**: in the name of composers and lyricists – with the exception of dramatic-musical works, or scenes or overviews thereof – the organisation performing collective management of rights in literary and musical works is mandated to conclude contracts with users on the authorisation of making available to the public of already disclosed musical works with or without words and on the remuneration to be paid for it. (However, authors can **opt out** of collective management and choose to exercise their right individually.) The same applies to the performers’ right of making available to the public [in accordance with Article 74(2)]. Therefore, **as regards the right of making available to the public, collective management** foreseen in the above-mentioned provisions **provides**, in many cases, and due to its extended effect, **an appropriate solution to the problem of orphan works**

⁴ See Paragraph 6(a) of the 2006 Commission Recommendation.

(at least in respect of those types of works and uses that belong to collective management) **and orphan performances.**

Furthermore, **one of the free uses** (exceptions to copyright) is defined by Article 38(5) of the Copyright Act as follows:

“In the absence of a contractual provision to the contrary, works forming part of the collection of publicly accessible libraries, educational establishments [...], museums, and audiovisual or sound archives qualified as public collections may be, for the purpose of research and private study, freely displayed to individual members of the public on the screens of dedicated terminals on the premises of such establishments, and, in the interest of this, they may be communicated, including their making available, to such members of the public, provided this is not for direct or indirect earning or increasing income.”

The relevant documents and legal instruments issued at EU level quite frequently contain fairly general references to “orphan works”. However, these references seem, more often than not, to extend to **other protected “cultural material”**, and, thus, **embrace related rights as well.**

Hungarian provisions on licensing the use of orphan works appear to only go halfway in that regard. Article 1(2) of the Government Decree provides that its provisions **are to be applied *mutatis mutandis* to licensing the use of performers’ performances.** Therefore, **other related rights** (such as the rights of phonogram producers) **are not covered.** The background to this can be found in Article 55 of the Copyright Act making the copyright-related provisions on licensing agreements *mutatis mutandis* applicable to licensing the use of performers’ performances. Both Article 55 and Article 57/A form part of the same chapter of the Copyright Act (Chapter V, entitled: “Licensing Agreements”). The Government Decree only reflects the conclusion that can be drawn from these provisions and their place within the structure of the Copyright Act, namely, that the use of “orphan” performances of performers can also be licensed under the specific scheme set up by Articles 57/A-57/D of the Copyright Act. On the other hand, there was no legal basis to extend, at the level of a Government Decree, that scheme to other related rights (e.g. to those of phonogram producers). Should that extension prove necessary in view of the practical experience to be gained in the implementation of the new legislation, it could only be brought about through an appropriate amendment to the Copyright Act.

Nevertheless, as far as works are concerned, Hungarian copyright law seems to follow the Final Report and its Annex 6, namely the **i2010 Digital Libraries Copyright Subgroup’s Recommended Key Principles for Rights Clearance Centres and Databases for Orphan Works** (hereinafter referred to as “**Key Principles**”) to the extent that it covers “all relevant categories of works protected by copyright”, and is “applicable to all kinds of protected works”⁵.

3.2. “Diligent search” under Hungarian copyright law

There appears to be general consensus that, under any possible scheme for enabling the use of orphan works, **a diligent search should be required of the prospective user as a precondition for lawfully using the orphan work.**

⁵ Final Report, Annex 6, p. 1.

The **Final Report** identifies it as a “general prerequisite” to be fulfilled that

“[d]ue diligence has been performed in trying to identify the right holders and/or locate them”⁶.

In addition, the Final Report also suggests that the notion and conditions of “diligent search” in the context of orphan works should be elaborated. It proposes *inter alia*, **the following parameters**:

- “- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work.
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works
- Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.”⁷

The Key Principles also confirm this approach and stress the need for “sector specific criteria for [...] right holder search”⁸.

It also deserves mentioning that, in the framework of the **European Digital Libraries Initiative**, representatives of right holders and cultural institutions have agreed on a **Memorandum of Understanding on Diligent Search Guidelines for Orphan Works**, in which they have emphasized

“[t]hat the due diligence guidelines [...] should be observed, to the extent applicable, when searching for right holders and that a work can only be considered orphan if the relevant criteria, including the documentation of the process, have been followed without finding the right holders”⁹.

Under Article 77 of the **Canadian Copyright Act**, the Copyright Board grants a licence only if the applicant has made every reasonable effort to find the copyright owner, and, in spite of that, has been unable to locate him.

Hungarian copyright law also requires a diligent search for the right holder¹⁰.

Pursuant to Article 57/A(1) of the Copyright Act, it is a precondition for issuing a licence by the HPO that the applicant has taken **every appropriate measure reasonable in the given circumstances to find the right holder** and that the search has proven unsuccessful. When assessing whether all reasonable efforts have been made to find the right holder, due regard is to be paid to the **type of the work** concerned and the **mode of the envisaged use**. Thus, it seems **Hungarian legislation does allow sector-specific criteria to be applied** when examining whether a diligent search for the right holder has

⁶ Final Report, p. 12.

⁷ Final Report, p. 15.

⁸ Final Report, Annex 6, p. 1.

⁹ High Level Expert Group (2008), p. 2.

¹⁰ In respect of the system of extended collective management (and, in particular, “non-distributable amounts”), there also seems to be a need for appropriate rules to guarantee that works do not too lightly end up in the category of orphan works. This would require, *inter alia*, the extension of diligent search obligations to CMOs. This element also appears in the Communication from the Commission on Copyright in the Knowledge Economy, which foresees, as one of the possible options, an extended collective licensing system but only “on the basis of a due diligent search”; European Commission (2009a), p. 5.

been performed. Furthermore, as regards the requirement of a diligent search, the wording of Article 57/A(1) of the Copyright Act is certainly **flexible enough to accommodate the individual circumstances of each orphan work**.

Article 3(1) of the Government Decree establishes **a non-exhaustive list of measures** that may be taken to perform a diligent search. The examples given in this Article **do not constitute a minimum of search steps, either**. A prospective user can perform a diligent search without taking all the measures listed, and, on the other hand, even taking all the measures on the list may not amount to a truly diligent search. This has to be determined having **due regard to the individual circumstances of each case**.

The following **measures** are mentioned in Article 3(1) of the Government Decree:

- search in the database set up by the HPO on the basis of its voluntary register of works,
- search in the databases of CMOs,
- search in databases available on the Internet,
- search in databases suitable for finding the residence of the rightholder,
- search in the databases of publicly accessible collections of works,
- requesting information from organisations engaged in publishing works on a regular basis, from persons carrying out some other use of the work, from other authors of the work if they are known and can be found, as well as from public authorities performing official functions in relation to the work,
- advertising in national daily newspapers.

It goes without saying that **these measures are to be taken having regard to the type of the work concerned as well as to the mode of the requested use**.

Moreover, Article 3(2) of the Government Decree also provides that, where it can be assumed that **the work was first published outside Hungary, the diligent search has to be performed in the country of first publication** unless this would come up against disproportionate difficulties. This corresponds with one of the conclusions contained in the **Final Report**, namely that “[d]iligent search for rightholders [...] will normally be carried out in the country of origin of the work when identifiable”¹¹.

The fact that a diligent search has been performed needs **to be documented**. In accordance with Article 2(2) of the Government Decree, **the applicant is required to supply evidence** on that. Clearly, this is the duty of the applicant (i.e. the prospective user) and **the HPO is not supposed to perform any search**. Its only task is to check, on the basis of the evidence supplied by the applicant, whether a diligent search has indeed been performed.

This seems to be in full line with the following recommendations of the **Final Report**:

“The user [...] has the full responsibility for carrying out a diligent search for rightholders to the orphan works. The diligent search must be [...] documented prior to the granting of a license”¹².

3.3. Terms of the licence to use an orphan work

The application to the HPO **for a licence** to use an orphan work **has to indicate the type (mode), extent and planned duration of the intended use** [Article 2(1) of the Government Decree]. However, there are certain limits to this, as Article 57/A(1) of **the**

¹¹ Final Report, p. 25.

¹² Final Report, p. 25.

Copyright Act lays down certain conditions with which all licences to use orphan works have to comply.

They are the following:

- The licence can only be granted for **a term not exceeding five years**.
- It is only **valid in Hungary**.
- It is **not exclusive**.
- It **cannot be transferred**.
- The licensee is not entitled to give others further licences, i.e. **sub-licensing is excluded**.
- The licence **cannot extend to the adaptation** of the work.

Although, in the course of the public consultation preceding the adoption of the new legislation, this issue did come up, the amendment to the Copyright Act has finally **left open the question whether a person who has been granted a licence to use an orphan work can also take action and institute proceedings against an infringement of the copyright in the work**.

The entitlement of this special kind of licensee **would not necessarily be in conflict with Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter referred to as the "Enforcement Directive")**, as Article 4(b) of that Directive provides that

"Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this chapter [*i.e. Chapter II of the Directive*]

[...]

(b) all [...] persons authorised to use those [i.e. intellectual property] rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law."

In this case, the Copyright Act of Hungary is the applicable law. Under its Article 57/A(1), the licence to use an orphan work is not exclusive. Pursuant to Article 98(2) of the Copyright Act, a holder of a non-exclusive licence can only initiate infringement proceedings if the licensing agreement has explicitly entitled him to do so. Therefore, the question arises **whether the HPO can, perhaps at the request of the applicant, include in the licence an express authorization for the licensee to take action and institute proceedings against infringement**.

3.4. Remuneration for the licence

It goes without saying that, as in the case of normal, contractual licensing, **remuneration is to be paid for the licence to use an orphan work**. The **Final Report** also qualifies it as a "commonly accepted core principle" with which different national solutions need to comply that they should "include [a] requirement for general remuneration or remuneration if the rightholder reappears"¹³. This is also inherent in other recommendations of the Final Report, in particular where they refer to "the licence fee" to be paid by the user, or to the paying out of "the collected fees"¹⁴ to the rightholder if he reappears. In addition, the **Canadian regime** as well contains an element of remuneration: if the copyright owner reappears he is entitled to collect royalties within a deadline of five years from the expiry of the licence granted by the Copyright Board.

¹³ Final Report, p. 15.

¹⁴ Final Report, p. 26.

The **new Hungarian legislation** follows the same path.

Whenever the HPO grants a licence to use an orphan work it also **has to fix the remuneration** (fee) which is due in return for the licence. For that purpose, **the application for a licence has to indicate**, among other things, **all circumstances** that can be **relevant in setting the fee** to be paid for the licence, including (but not limited to) the extent, mode and planned duration of the envisaged use [Article 57/A(1) of the Copyright Act and Article 2(2) of the Government Decree].

If the intended use is for profit (i.e. "it serves to generate or increase income in any way or form"), **the remuneration** (fee) which has been fixed in the decision to grant a licence **has to be deposited with the HPO. Use of the orphan work** pursuant to the licence granted by the HPO **can only be commenced after the depositing of that amount**. In other words, depositing that fee is a precondition for lawfully using the orphan work [Article 57/A(1) of the Copyright Act].

Should the rightholder become identified or should he reappear or be found while the licence granted by the HPO is still valid, **the licence has to be withdrawn** at the request of either the rightholder or the user. However, for the remaining period of the licence, but for one year at most, use can still be continued to that extent existing at the time of identifying or finding the author, or of his reappearance. This also applies to serious preparations undertaken by the user until that time.

The rightholder may claim payment of the remuneration deposited with the HPO within five years after the expiry, or withdrawal, of the licence. This is in full line with one of the principles laid down in the **Final Report**: "[i]f the rightholder [...] reappears the RCC examines the claim and certifies that the claimant is the correct rightholder and pays out, when applicable, the collected fees". **Should the rightholder dispute the amount of the remuneration, he may bring the case to court**, which will settle the dispute **in accordance with the provisions applicable to copyright lawsuits**.

After the expiry of the above-mentioned **five-year period, the HPO transfers the deposited remuneration to the CMO that would normally authorise other uses of the orphan work** concerned. If there are several such CMOs, the amount is divided equally among them. If there is no such CMO, the deposited remuneration is transferred to the **National Cultural Fund** for facilitating the making available of cultural material.

3.5. Procedural aspects

The **main features of the procedure** for granting a licence to use an orphan work [as set out in Articles 57/B-57/D of the Copyright Act] are the following:

- The licence is granted by a **public body**, i.e. the HPO in an **administrative procedure**.
- Unless the Copyright Act provides otherwise, the **general rules of administrative procedures** (as contained in Act CXL of 2004) are to be applied.
- As a general rule, **an application** for a licence **can only relate to the use of a single work**. A licence to use **more than one** work can only be requested in a single application **if it concerns the same mode of use in respect of the same type of works of the same author**.
- In the case of works with **multiple authorship**, the application has to meet the prescribed conditions in respect of each author. If one or some of the rightholders can be identified and located, a copy of the licensing agreement(s) concluded with him/them has to be attached to the application.

- **Applications can be filed electronically**, but this is **only an option for applicants**, they can also submit their applications **on paper**.
- An **administrative fee** is to be paid for each application for a licence. Its amount is HUF 102 500¹⁵. It is, however, HUF 10 000 lower if the application is filed by using a form drawn up by the HPO or electronic means. In the case of an application for the withdrawal of a licence, the administrative fee is HUF 10 500.
- There is **judicial review** of the administrative decisions taken by the HPO in respect of orphan works. These decisions are reviewed by the Metropolitan Court of Budapest (i.e. there is **centralised jurisdiction** for dealing with these cases) in a **somewhat simplified civil procedure**.

3.6. The register of orphan works

A core element of both the **2006 Commission Recommendation** and the **Final Report** is that **data on orphan works should be made available to the public** through databases or lists.

The **2006 Commission Recommendation** advises Member States to “improve conditions for digitisation of, and online accessibility to, cultural material by”, among other things, “promoting the availability of lists of known orphan works”¹⁶.

Furthermore, the **Final Report** contains detailed and well elaborated principles and recommendations on databases of orphan works. It sets out the rationale and the European prospects of developing orphan work databases and registries as follows:

“The development of databases of information on orphan works can facilitate users in their search. The rationale of a database is to provide assistance to users in their search. The interlinking of national databases and registries is needed to achieve a common multilingual access point and a European-wide resource.”¹⁷

The Copyright Subgroup has also developed the **Key Principles** (see above), which are contained in Annex 6 to the Final Report and extend to issues related to the development of orphan work databases. Based on those recommendations, and as a follow-up to the Final Report, a project, called **ARROW**¹⁸, has been launched **with the eventual aim of establishing a European registry of orphan works**.

Hungarian legislation (namely, Article 8 of the Government Decree) also **provides for a register of orphan works**. It is to be **kept by the HPO**, but only **in respect of those orphan works for the use of which it has granted a licence**. It is a **publicly available administrative register** that can be consulted and inspected by anyone. It has to be made electronically (**online**) **accessible**. **The register contains the following information:**

- the application number pertaining to the orphan work concerned,
- data identifying the orphan work concerned,
- information on the extent to which the work can be used under the licence,
- the amount of the remuneration and the date of its depositing,

¹⁵ One euro is approximately HUF 265-270.

¹⁶ See Paragraph 6(c) of the 2006 Commission Recommendation.

¹⁷ Final Report, p. 11.

¹⁸ See at <http://www.arrow-net.eu/>.

- the fact that the licence has been withdrawn and the date when the withdrawal took effect,
- the institution of any procedure, and its object, in relation to the orphan work.

In addition, with the express, written consent of the holder of a licence, the HPO may include in the register, and publish, information on the identity of the licensee as well as his contact details.

Changes to these data have to be entered into the register without delay.

As it can be seen above, the register to be kept by the HPO on orphan works will be necessarily **incomplete**, as **it will only extend to orphan works for the use of which the HPO has granted a licence**. It remains to be seen whether the Hungarian register can, and will, be made interoperable with other registries and databases kept at national or European level. The fact that it is electronically accessible fulfils at least an important technical precondition for that.

3.7. Preferences for not-for-profit uses

The **Final Report** strongly recommends that solutions to the orphan work issue should “offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes”¹⁹.

The **new Hungarian legislation** on orphan works does follow this approach and **offers a preferential treatment for not-for-profit uses**. The preferences given to such uses are the following:

- In the case of a not-for-profit use (i.e. where the intended use “does not even indirectly serve the purpose of generating or increasing income”), the HPO only fixes the amount of **remuneration** to be paid for the use it has licensed but that amount **need not be deposited** with it, and therefore, commencing the use of the orphan work is not conditional upon the depositing of the remuneration fixed in the HPO’s decision to grant the licence. If the rightholder reappears, he can claim payment of that remuneration directly from the user [Articles 57/A(2) and 57/A(5)].
- A **preferential rate of the administrative fees** applies to applications relating to not-for-profit uses (HUF 40 000 and HUF 30 000, respectively) [Articles 4(3) and 4(4) of the Government Decree].

It is to be noted that **these preferences are not linked to the type of the institution** applying for a licence **but only depend on whether or not the intended use is for-profit**. Accordingly, it is to be indicated in the application for a licence what purpose the planned use would serve [Article 2(1) of the Government Decree].

¹⁹ Final Report, p. 15.

4. IMPLEMENTATION AND INITIAL EXPERIENCE

KEY FINDINGS

- The scheme for **licensing the use of orphan works became operational only on 16 May 2009**.
- Since then, **no significant experience** has been gained.
- In spite of numerous enquiries, thus far the HPO has only received **two applications** and it has **not issued a single licence**.

4.1. Implementation of the new legislation on orphan works

The **administrative scheme for licensing the use of orphan works became operational on 16 May 2009** with the entry into force of the Government Decree. By that time, the HPO had already completed all the **preparations necessary for implementing the new legislation**. It had, *inter alia*, established the application form and all other forms that could be used in the procedures relating to orphan works, and it had made arrangements for enabling electronic filing. Furthermore, the HPO also launched a campaign for raising public awareness of the new legislation on orphan works. In addition to making all relevant information available on its website, it contacted a number of institutions with a potential interest in using orphan works on a relatively large scale. Representatives of the HPO also participated in a number of seminars and other events with a view to drawing the attention of interested circles to the possibilities offered by the new legislation on orphan works. Last but not least, the HPO also managed to reach a common understanding with CMOs on how co-operation could be further developed with respect to orphan works.

4.2. Initial experience

Obviously, **no significant experience** has been gained since the new mechanism for licensing certain uses of orphan works became operational in Hungary.

Although it is **difficult to estimate the number of orphan works**, there are some indications that, in Europe, cultural institutions do consider this a serious problem. For instance, the **British Library** estimates that "over 40 percent of all in-copyright works are Orphan Works". According to a survey carried out by the **Association des Cinémathèques Européennes (ACE)**, approximately 50 000 of the surveyed works were regarded as orphan. They are mostly non-fiction and pre-date 1945/50. The ACE has also reported that around 2 500 requests for using orphan material are received each year.

Under the **Canadian regime**, a relatively low number of applications (less than 300, resulting in 216 licences) have been filed since that regime started to function in 1989²⁰.

²⁰ Vetulani (2008), p. 8 and p. 10.

In Hungary, the impact assessment attached to the draft Government Decree was based on **the assumption that**, after the full scale roll-out of the new licensing scheme, **the HPO would have to deal with** approximately **500 procedures per annum** and most of them would relate to applications for a licence to use an orphan work.

Nevertheless, since the entry into force of the Government Decree, **the HPO has only received two applications and it has not issued a single licence. The number of enquiries** the HPO has received about the new licensing scheme **is considerably higher**. However, those numerous enquires, for one reason or the other, have not so far led to a correspondingly high number of applications. This can partly be due to the general economic downturn, which seems to affect publicly funded institutions to a very large extent, as well as to the novelty of the system. The fact that the procedure, due to the administrative fees, is relatively costly can also partly explain that the demand for licences has remained lower than originally expected. The time factor should not be left out of consideration, either. Only a few months have passed since the new scheme became operational and a due diligence search may arguably take quite a long time.

There are, however, some promising signs. The other day, the **National Audiovisual Archives Foundation (NAAF)** and the **John Neumann Digital Library** approached the HPO to indicate its **potential interest in obtaining licences for at least 370 orphan works**. These are basically musical works (with or without words) fixed in relatively old phonograms (in respect of which the term of protection of performers' and phonogram producers' rights has already expired but the works are still "in-copyright"). The NAAF intends to digitise these phonograms and to make the works fixed therein publicly available. It has, however, indicated that payment of the administrative fees would impose serious, perhaps even unmanageable, constraints on its financial resources. The HPO and the NAAF are currently looking for a workable and flexible solution to this specific problem.

5. OTHER RELEVANT PROVISIONS IN HUNGARIAN COPYRIGHT LAW

KEY FINDINGS

- In addition to those relating to the licensing of certain uses of orphan works, there are **provisions** in Hungarian copyright law which might prove **instrumental in coping with orphan works as well as in preventing future “orphans”**.
- They concern, in particular, the following: the **extended collective licensing system; communication or making available by dedicated terminals of certain public institutions; anonymous and pseudonymous works; the voluntary register of works.**

5.1. Overview

In addition to those relating to the licensing of certain uses of orphan works, there are **provisions in Hungarian copyright law** which might prove **instrumental in coping with orphan works as well as in preventing future “orphans”**.

They concern, in particular, the following:

- the extended collective licensing system;
- implementation of Article 5(3)(n) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred to as the “INFOSOC Directive”);
- anonymous and pseudonymous works;
- the voluntary register of works.

5.2. The extended collective licensing system

A system of **extended collective licensing** applies in Hungary. How this system can provide a solution to the problem of orphan works is explained in more detail in Chapter 3.1.

5.3. Communication or making available by dedicated terminals of certain public institutions

Article 5(3)(n) of the **INFOSOC Directive** provides that one of the cases in which Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 of the Directive is

“use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) [*i.e. publicly accessible libraries, educational establishments or museums, or archives*] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.”

Article 38(5) of **the Copyright Act implements this optional provision of the INFOSOC Directive**. The text of that Article is reproduced in Chapter 3.1. of this Note. The implementing rules to that Article of the Copyright Act are contained in Government Decree 117/2004. (IV. 28.) Korm.

5.4. Anonymous or pseudonymous works

Article 1(3) of **Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights** (codified version) provides that

“[i]n the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in [*the general rules contained in*] paragraph 1”.

This provision of the Directive has been **transposed by Article 31(3) of the Copyright Act**, which reads as follows:

“If the identity of the author is unknown, the term of protection shall be seventy years and shall be counted from the first day of the year following the first disclosure of the work. However, should the author become known during this period of time, the term of protection shall be counted as in paragraph (2) [*i.e. in accordance with the general rules*].”

5.5. The voluntary register of works

In connection with the implementation of Article 5 of the Enforcement Directive, Article 94/B(2) of **the Copyright Act has introduced a rebuttable presumption that the person under whose name the HPO enters the work in the voluntary register of works has to be regarded as the author of that work**. That register was set up in April 2006 in accordance with Decree 18/2006. (IV. 12.) IM of the Minister of Justice on the detailed rules of the voluntary register of works kept at the HPO. Since then **more than 650 works have been registered**.

6. THE NEW HUNGARIAN LEGISLATION ON LICENSING CERTAIN USES OF ORPHAN WORKS – A FIRST ASSESSMENT

KEY FINDINGS

- The various **solutions provided for in Hungarian copyright law** to the problems of orphan works **are mutually complementary**. They together offer an overall solution.
- The new scheme for licensing certain uses of orphan works has both **advantages and drawbacks**.

6.1. Complementary solutions

Under Hungarian copyright law, **the licensing scheme** operated by the HPO **is only one**, although quite significant, **element of a more comprehensive framework** for tackling the problems connected with the use of orphan works. There are **ways of preventing works from becoming orphan** and thus minimising the quantity of future orphan works. Furthermore, the **extended collective licensing system provides a workable solution** in a great number of cases. These **solutions are mutually complementary** under Hungarian copyright law and they together offer a rather satisfactory overall solution to the problem of orphan works.

6.2. Advantages and disadvantages

The new scheme for licensing the use of orphan works under the new Hungarian legislation offers a number of **advantages**:

- It guarantees **respect for copyright** and performers' rights.
- Its scope of application is wide enough, **covering all categories of works and uses** (unless the use is licensed by CMOs).
- It ensures **legal certainty** for prospective users, in particular for cultural institutions, by avoiding liability issues arising at a later stage. Legal certainty is strengthened due to the **verification by an independent public body that a diligent search has indeed been performed**. In addition, the fixing (and, in some cases, the **depositing**) of the amount of **remuneration contributes to predictability** on the users' side and constitutes a certain guarantee for the reappearing rightholder as well.
- **Decisions** on licensing the use of orphan works can be tailor-made, i.e. **adjusted to the individual circumstances** of each case.
- A **publicly available online register** can be developed on the basis of applications relating to orphan works.

There are, however, some **drawbacks** which the new system has to cope with:

- Although, 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 HPO's procedures **too high** or even prohibitive.
- In spite of the efforts it has made to collect them, the HPO might **lack the data necessary for establishing the amount of the remuneration** in a well-founded manner, which might later on lead to legal disputes (and thus to legal uncertainty) over that remuneration.
- The **register** of orphan works kept by the HPO **will remain** necessarily **incomplete**.
- It is not entirely clear **to what extent the Hungarian scheme would fit in with a Europe-wide solution** to the issue of orphan works, and, in particular, **whether**, and under what conditions, **it would ensure mutual recognition** of different arrangements (in particular, different criteria for diligent searches) in various EU Member States²¹.

²¹ In this respect, it is to be noted that the Communication from the Commission on Copyright in the Knowledge Economy states that "an initiative on orphan works should provide for an EU-wide solution to create legal certainty, facilitate the knowledge flow necessary for innovation, and prevent obstacles to intra-Community trade in orphan works"; European Commission (2009a), p. 6.

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