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**THE NEED AND POSSIBLE LEGISLATIVE FRAMEWORK
FOR A PARODY EXCEPTION
IN THE HUNGARIAN COPYRIGHT SYSTEM**

Abstract of Doctoral Thesis

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*„You are going to create a foundation for literary property.
This is what is right, and you are going to embody it in law.”*

Victor Hugo¹

¹ Brian FITZGERALD – John GILCHRIST (ed.): *Copyright Perspectives, Past, Present and Prospect*. Springer, 2015. p. 3. Victor Hugo’s speech on 17 June 1878, at the founding Congress of ALAI was translated into English by Benedict Atkinson.

I. SUBJECT AND RESEARCH OBJECTIVE OF THE THESIS

The expression of humour and sarcasm in the form of parody is probably as old as human creativity, although the roots of the particular literary genre can only be traced back to Homer.² Of course, the implementation and context of parodies has changed a lot since then, but its relevance in copyright law has become increasingly prominent.

The question perceived by the dissertation and primarily to be answered can therefore be defined as follows: what is the approach of Hungarian Copyright Law to this widely known, significant and centuries-old use, and partly in response to this, why did Act LXXVI of 1999 on Copyright Law (hereinafter referred to as: HCA) not recognize parody as free use?

In addition, the thesis examines whether there would be a need in Hungarian Copyright Law for an explicit parody exception, and if the answer to this question can be answered in the affirmative, what criteria should be taken into account, and in the light of all this, what specific wording is most ideal to achieve the legislative objective.

In order to fully respond to the questions above, a number of topics should be taken into account. Firstly, the thesis examines the relationship between the instruments of the international copyright framework – in particular the Berne Convention³ and TRIPs Agreement⁴ – and parody. In order to identify trends in the development of the international copyright system and their impact on the provisions arising from international law, the thesis briefly summarizes the results of international copyright legislation, their indications, emergence and evolution. The three-step test, which provides a general framework for free uses, will then be analysed in detail, as well as certain incarnations and interpretations of the test.

The next part of the thesis examines parody in the light of the European Union's legal framework. In this context, particular attention will be paid to the authorizations provided in Article 5(3)(k) of the InfoSoc Directive⁵ and Article 17(7) of the (C)DSM Directive⁶ and to

² Simon DENTITH: *Parody – The New Critical Idiom*. Routledge, London, 2010. p. 10.

³ Berne Convention for the Protection of Literary and Artistic Works, 1886/1979.

⁴ The Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁵ 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.

the decision of the Court of Justice of the European Union (hereinafter referred to as ECJ) in the Deckmyn case, along with the effects of this decision.

The exhaustive examination of foreign examples and regulations is one of the main goals of the dissertation. This will include an overview of most European and major Anglo-Saxon countries' approaches to parody, including an examination of the United States' fair use exception and the outstanding developments in US case law. Of course, a thorough examination of the Hungarian Copyright Law's approach is also essential in order to answer the preliminary questions of the dissertation. Thus, the HCA's regulations, the papers of authors particularly relevant on the subject, and the Council of Copyright Experts' (hereinafter mentioned as: CCE) opinions should be analysed as well.

Although rarely covered by international or Hungarian papers or monographies, it is necessary to examine one of the most sensitive points in the copyright assessment of parodies: its compatibility with moral rights, in view of the international copyright framework, EU law and Hungary's domestic approach.

Thus, the most important purpose of the dissertation was to take a position on the necessity of introducing a parody exception and also to propose a possible framework and wording for the free use itself.

⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

II. METHODOLOGY

The research, in order to establish the findings of the thesis, examines the *instruments of the international copyright framework*, their *commentaries* and *protocols*, and where relevant, the *decision* of the World Trade Organization's (WTO) *Dispute Settlement Body*.

The *founding treaties* of the European Union, its *secondary legal sources* and the *case law of the ECJ* – and the effects of *Deckmyn* decision – are particularly relevant in case of the parody exception, so their analysis and identifying their effects on member states' regulations and practice is essential.

The methods of comparative law are not applied in the thesis, but for the sake of completeness it examines the *regulatory solutions of many European and Anglo-Saxon countries* and, where relevant, *the case law of the covered countries*. In this context, special attention is paid to the United States' fair use test and its interpretation through the relevant case law.

The primary basis of the research is the widest possible processing of the relevant Hungarian and international *papers (studies and monographies)*. Primary, this covers the examination of works in the field of jurisprudence, sometimes supplemented by examining works of literary studies that analyse parody as a genre.

As regards of Hungarian law, in addition to the *applicable legislation*, their *reasoning* and *commentaries* – and the relevant *papers* – the *CCE's opinions* are also analysed, completed by the examination of *impact studies* and *experts opinions*.

III. BRIEF SUMMARY OF THE THESIS AND THE RESEARCH

This chapter, following the structure of the thesis, aims to briefly present the findings and results of each chapter of the dissertation.

1. International Background of the Parody Exception, the Three-step Test

1.1. The international copyright framework is a complex legal source system, originally based on national law, but increasingly independent, and which now defines the general copyright framework of individual countries.⁷ The adoption of the Berne Convention is considered a cornerstone, but the results of the World Trade Organization's legislation are also significant.⁸

1.2. The three-step test, which was amended in the wake of the Bern Convention's revision in 1967, originally served as a common minimum of the colourful national free uses of reproduction, and only the TRIPs Agreement transformed it to the general framework of free uses.⁹

1.3. Partially based on this, the interpretation of the three-step test is unclear: it is sometimes disputed whether the test covers all free uses, whether it allows for enactment of new exceptions or whether the commercial nature of the use can be considered as infringing behaviour,¹⁰ but these have not caused significant problems in practice. In addition, the three-step test has a number of alternative interpretations. Thus, it is proposed to interpret it as the US's fair use test,¹¹ to read it as an open-ended exception¹² and to see it as a way to increase flexibility of the free use system.¹³

⁷ Shira PERLMUTTER: Future Directions in International Copyright. *Cardozo Arts & Entertainment Law Journal*, Vol. 16, 1998. p. 309, 370.

⁸ Graeme B. DINWOODIE: The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking? *Case Western Reserve Law Review*, Vol. 57, No. 4, 2007. p. 751.

⁹ GYENGE Anikó: A szerzői jog h-moll miséje: A három lépcsős teszt. *Jogi tanulmányok*, ELTE-ÁJK, Budapest, 2005/10. p. 158.

¹⁰ Guido WESTKAMP: The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making. *Copyright Society of the U.S.A. Journal*, Vol. 56, 2008. p. 9.

¹¹ Daniel J. GERVAIS: Towards a New Core International Copyright Norm: The Reverse Three-Step Test. *Marquette Intellectual Property Law Review*, Vol. 9, 2005. p. 28.

¹² Jonathan GRIFFITHS: Unsticking the Centre-Piece – The Liberation of European Copyright Law? *Journal of Intellectual Property Information Technology and e-Commerce Law*, Vol. 87, 2010. p. 92.

¹³ Ezieddin ELMAHJUB – Nicolas SUZOR: Fair Use and Fairness in Copyright: A Distributive Justice Perspective on Users' Rights. *Monash University Law Review*, Vol. 43, No. 1, 2017. p. 288.

1.4. With regard to the three-step test of the HCA, the legislator has chosen a unique path, both in its structure and in interpretation, because the earlier (international and foreign) approaches of the test have regulated and interpreted the three steps uniformly, while the Hungarian solution differs in the interpretation of the steps, and adds additional elements. There are advantages and disadvantages to this unique solution.

1.5. As an advantage, reducing the number of steps and integrating elements that help interpretability of the test makes the test more focused and flexible, thereby courts a wider margin to fill the content of each free use. At the same time, however, it may be questioned whether the differing interpretation of the steps – in particular, that the Hungarian solution directs the first step to the legislator, and the remaining step to users and courts at the same time – is in line with the international interpretation of the three-step test, since the interpretation of the earlier versions of the does not necessarily justify this differing approach.

1.6. In summary, neither the approach of the international copyright system nor the three-stage test constitute an obstacle to the introduction of a parody exception, and this particular free use can be integrated into this framework without any problems.

2. Parody from the View of EU Law

2.1. The European Community put copyright harmonization on the agenda relatively late¹⁴ compared to the other hemisphere of intellectual property rights (industrial property), but the legislation efforts were able to produce significant results after the turn of the millennium. Currently, EU law contains two directives that aimed to reform the EU copyright framework on a comprehensive¹⁵ and systemic basis:¹⁶ the InfoSoc Directive – transposed in Hungary before joining the EU –¹⁷ and the (C)DSM Directive, to be transposed by 7 June 2020. Both directives contain provisions relevant to parody.

¹⁴ TATTAY Levente: A szellemi tulajdonjogok fejlődéstörténete az Európai Unióban (1958-2010). In: JAKAB Éva (ed.): *Geistiges Eigentum und Urheberrecht aus der historischen Perspektive*. Pólay Elemér Alapítvány, Szeged, 2013. p. 135. Available at: <http://juris.oldportal.u-szeged.hu/download.php?docID=30113>.

¹⁵ Jakub HALEK – Martin HRACHOVINA: Directive on Copyright in the Digital Single Market: A Challenge for the Future. *Common Law Review*, Iss. 16, 2020. p. 44.

¹⁶ GRAD-GYENGE Anikó: A szerződési jog harmonizációja rendelettel: új utak a szerzői jogi harmonizációban. In: GRAD-GYENGE Anikó – KABAI Eszter – MENYHÁRD Attila (ed.): *Liber Amicorum – Studia G. Faludi Dedicata: Ünnepi tanulmányok Faludi Gábor 65. születésnapja tiszteletére*. ELTE Eötvös Kiadó, Budapest, 2018. p. 130.

¹⁷ TATTAY Levente: A szellemi alkotások teljes körű újraszabályozása Magyarországon. *Iustum Aequum Salutare*, 2009/2. p. 161. Available at: <http://ias.jak.ppke.hu/hir/ias/20092sz/11.pdf>.

2.2. The optional parody exception of the InfoSoc Directive¹⁸ provides a free use covering the right of reproduction and communication to the public, if the use is carried out for the purposes of caricature, parody or pastiche. EU law does not give the national legislator much grip on the specific content of the exception.

2.3. However, Article 17(7) of the (C)DSM Directive states that the new direct liability regime¹⁹ should not result in the prevention of uses protected by exceptions or limitation. In this context, Member States are obliged to ensure that users are able to make use of exceptions covering quotations, criticism, review and caricature, parody or pastiche.²⁰ Thus, the (C)DSM Directive made certain exceptions – already known in the InfoSoc Directive – mandatory,²¹ even if not fully, only in terms of communication to the public. With this, the (C)DSM Directive took away the possibility from of the Hungarian legislator of considering the need to include an explicit parody exception, but left open the question whether the transposition should cover the exception in its entirety, or only in terms of communication to the public.

2.4. The ECJ's Deckmyn decision is of paramount importance in terms of parody. In its judgment, the ECJ stated that the definition of parody is not clarified in the InfoSoc Directive and that the directive does not refer to the law of the Member States, and “*must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union*”.²² Therefore, in the reading of the ECJ a parody use is not infringing copyright if 1. It does not conflict with national law, i.e. there is a parody exception in that Member State (it must be highlighted, that in national law, the parody exception must be in line with the

¹⁸ InfoSoc Directive Art 5 „(3) Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(k) use for the purpose of caricature, parody or pastiche;”.

¹⁹ Laura ROZENFELDOVA – Pavol SOKOL: Liability Regime of Online Platforms New Approaches and Perspectives. *EU and Comparative Law Issues and Challenges Series*, Vol. 3, 2019. p. 870–873.

²⁰ Gerald SPINDLER: The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 10, No. 3, 2019. p. 369.

²¹ Joho Pedro QUINTAIS – Giancarlo FROSIO – Stef VAN GOMPEL – P. Bernt HUGENHOLTZ – Martin HUSOVEC – Bernd Justin JUTTE – Martin SENFTLEBEN: Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 10, No. 3, 2019. p. 278.

²² MEZEI Péter: Vicces kedvében van az Európai Unió Bírósága. *Szerzői jog a XXI. században*, blog post, 10 September, 2014. Available at: <https://goo.gl/EuEpxE>.

conditions laid down in the Deckmyn decision),²³ 2. Meets the conditions of parody as an autonomous concept of EU law (evokes an existing work, expresses humor or mockery), 3. Establishes an appropriate balance of interests between stakeholders and is not discriminatory.

2.5. By emphasize the importance of (prohibition of) discrimination, the ECJ highlighted the need to take account of the conflict of fundamental rights in the assessment of parody, which may also affect the nature and applicability of the exception itself.

2.6. The conditions laid down in the Deckmyn decision has been taken into practice by two national courts which had decades of practice and independent conditionality for their national parody exception. In Germany, in their judgment in the *Fett getrimmt* case,²⁴ and in France in *Bauret v. Koons*,²⁵ courts ruled that the conditionality laid down by the ECJ should be incorporated. In addition, in Canada, the Federal Court reached a corresponding conclusion in *United Airlines v. Jeremy Cooperstock*.²⁶

2.7. In summary, the law of the European Union gives a limited-mandatory and an extensive-optional mandate to regulate parody exceptions, in both cases the wording of the exception seeks to find the minimum common wording of Member States' provisions. The findings of the Deckmyn decision also had a strong influence on the courts of Germany and France. Thus, the current EU framework is suitable to serve as a starting point for a domestic regulation of a parody exception.

3. Parody in National Legal Systems

3.1. In terms of copyright's recognition of parody, different countries have chosen different approaches. Some countries *a)* have an explicit exception for parody, such as France or Lithuania, *b)* do not have an explicit parody exception at legislative level, but in their court

²³ In addition to the exceptions set out in the InfoSoc Directive, Member States are not be able to introduce exceptions or limitations. See Bernd Justin JÜTTE: The EU's Trouble with Mashups – From Disabling to Enabling a Digital Art Form. *Journal of Intellectual Property, Information Technology & E-Commerce Law*, Vol. 5, Iss. 3, 2014. p. 180.

²⁴ BGH, I ZR 9/15, 2016. Available at: <https://goo.gl/grl4wI>.

²⁵ Decision of first instance: Bauret v. Koons. Tribunal de Grande Instance de Paris, No. 15-01086. March 9, 2017. Second Degree Decision: Bauret v. Koons. Cour d'Appel de Paris, No. 17/09695. 17, December, 2019. Available at: <https://drive.google.com/file/d/1Qqb2NXAJaZLzoSd7vbScX050dQntyB95/view>.

²⁶ *United Airlines v. Jeremy Cooperstock* (2017 FC 616). Available at: <https://ccla.org/cclanewsites/wp-content/uploads/2018/07/UA-v-Cooperstock-CCLA-Memo-of-Fact-Law-FINAL-July-3-2018.pdf>.

law they are expressly accept to parodies, such as the Scandinavian countries; *c*) have an exception of a general nature, which does not, or does not explicitly refer to parody, but does acknowledge parodies in practice, such as Germany, *d*) recognize parodies under another exception, such as Italy, and *e*) do not recognize parodies – such as Hungary.

3.2. Approximately 84.8% of the European countries – which have been examined in the thesis – provides some kind limitation for parodies and 57.5% have an explicit parody exception. In the 28 member states of the EU,²⁷ 85.7% of countries have some kind of limitation for parodies and 57.1% of the countries have an explicit parody exception. Ukraine alone does not have parody exceptions from the countries neighbouring Hungary, while five of the seven neighbouring countries have an explicit parody exception.

3.3. In an international context, it can be concluded that a large number of European states and the vast majority of Anglo-Saxon countries recognize parody in at least some clearly identifiable form, but explicit parody exceptions are also very common. A significant number of countries have codified explicit parody exceptions compared to the 2013 situation,²⁸ so foreign trends clearly lean in the direction of recognition of an explicit parody exception. This may have been one aspect taken into account by the EU legislator when – in the spirit of Deckmyn decision²⁹ – the optional authorization of the InfoSoc Directive was made partially binding in the (C)DSM Directive, thereby avoiding the fragmentation of EU copyright law³⁰ and tackling the issue of reciprocity between Member States.³¹

3.4. It can also be concluded that more than half (53 %) of countries with an explicit parody exception cover both caricature and pastiche as well, and there are only two countries that deal only with parody. In addition, under the conditions of the exception, we most often find – in eight cases – the lawful publication of the original work, which should not be included in

²⁷ Although the UK is no longer a part of the EU, it will be displayed here because of the previous connections.

²⁸ Jean-Paul TRIAILLE (ed.): *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*. De Wolf & Partners, 2013. p. 476-481. Available at: <https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b>.

²⁹ Deckmyn paragraph [15] „It is clear from that case-law that the concept of ‘parody’, which appears in a provision of a directive that does not contain any reference to national laws, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union [...]”

³⁰ (C)DSM Directive recital (70) „[...] Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. [...]”

³¹ Guy PESSACH: Toward a New Jurisprudence of Copyright Exemptions. *IDEA – The Intellectual Property Law Review*, Vol. 55, No. 2, 2015. p. 302.

case of the Hungarian transposition, given that the HCA already contains it as a general prerequisite for free use.³²

3.5. The requirement that the parodied works cannot be confused or potentially confused with the original work is also often used as conditions – typically in the countries surrounding Hungary and in Spain. At the same time, Western European countries (France, Belgium, Luxembourg and the Netherlands) often have the condition of respecting the rules of the genre, fair practice of genres, conformity with social practices or fair practice, which is likely to stem from the French exception. The originality of the derivative work also appears in several countries (Luxembourg, Estonia, Poland, Croatia), although less frequently and there is not necessarily a territorial link to be found here.

3.6. Among the Anglo-Saxon countries, the United States clearly has the most colourful practice in terms of parody and copyright law. The thesis carries out an in-depth analysis of twenty legal cases, of which the importance of the *Campbell v. Acuff-Rose Music*,³³ *Bourne Co. v. Twentieth Century Fox Film Corp.*³⁴ and *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*³⁵ decisions should be highlighted. With regard to parody, the fair use exception provided by US copyright law was available relatively early to users and authors of derivative works, the courts' interpretation and case law adapted flexibly to the needs and social expectations of a given era, even if the findings of the most recent, extremely permissible decisions may be questionable. These judgments clearly show that the United States' approach to parody has constantly evolved to be more and more flexible over the decades, resulting in (one of) the widest exception globally available. At the same time, the regulation had a clear incentive for parodies and provided a fertile breeding ground to encourage the creation of derivative works.

3.7. The current Hungarian legal standpoint states that freedom of expression (a constitutional right acknowledged in Art IX of the Hungarian Fundamental Law) is an external limitation of copyright law, and parody (as a form of expression), based on the hierarchy of norms, without

³² HCA Art 33(1).

³³ *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994.). Available at: <https://goo.gl/2fPCRG>.

³⁴ *Bourne Co. v. Twentieth Century Fox Film Corp.* 602 F. Supp.2d 499 (2009). Available at: <https://goo.gl/BPU9p0>.

³⁵ *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*. 868 F. Supp. 2d 962 (C.D. Cal. 2012). Available at: <https://casetext.com/case/northland-family-planning-clinic-inc-v-ctr-for-bioethical-reform>.

being expressly recognized in the HCA, serves as an internal limitation to copyright law.³⁶ Thus, an explicit exception in HCA is unnecessary.

3.8. But the interpretation of freedom of expression³⁷ – which is considered as a basis and source of copyright law itself –³⁸ as an external limitation of copyright law, does not necessarily imply that non-explicitly regulated exceptions could (or should) be recognized in the HCA. This reasoning seems to be contrary to Art 33(3) of HCA, which prohibits extensive interpretation of exceptions³⁹ and with the fact that the HCA regulates exceptions through an exhaustive list, as confirmed by the commentary of the HCA itself.⁴⁰ It follows that Hungarian copyright law only acknowledges explicitly regulated exceptions.

3.9. When examining the Hungarian standpoint on parody, it can be seen that the current approach backed by the CEE's opinions⁴¹ – stating that there are no relevant parody cases in Hungary and parody is adequately recognized as a not explicitly regulated exception – does not consider it necessary to add an explicit parody exception to the HCA. In our view, a number of factors – in particular the decision of the Regional Court of Appeal of Budapest in 2019 –⁴² point to the fact that the current Hungarian standpoint has not been able to adequately respond to the dogmatic questions and the challenges in practice. In our view, this standpoint would need to be reviewed, even in the absence of the obligation laid down in Art17(7) of the (C)DSM Directive.

3.10. The US case law is an excellent example of the need for a clear, flexible and well-defined environment for users and authors to support and achieve the goals and purpose of copyright, including serving as an incentive to creativity.⁴³ Therefore, the fact that parody arises in a small number in the Hungarian case law points not to the lack of reasons for

³⁶ FALUDI Gábor: A szerzői jog és az iparjogvédelem belső korlátjai. *Jogtudományi Közlöny*, 2006/7–8. p. 280–292.

³⁷ See also FALUDI Gábor: *A szerzői jog alapjogi szemlélete az Európai Unióban*. In: Faludi Gábor (ed.): *Liber amicorum: studia P. Gyertyánfy dedicata: ünnepi dolgozatok Gyertyánfy Péter tiszteletére*. ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2008. p. 185–209.

³⁸ Kim TREIGER-BAR-AM: Kant on Copyright: Rights of Transformative Authorship. *Cardozo Arts & Entertainment*, Vol. 25, No. 3, 2008. p. 1066.

³⁹ HCA 33(3).

⁴⁰ KISS Zoltán: *Kommentár a szerzői jogról szóló 1999. évi LXXVI. törvényhez*. Online version.

⁴¹ CCE 16/08. Available at: <https://goo.gl/n6TxhT>.

⁴² Regional Court of Appeal of Budapest (Fővárosi Ítéltábla) decision no. 8.Pf.20.424/2019/5.

⁴³ See also UJHELYI Dávid: A szerzői jog célja és emberképe a szellemi alkotásokat megalapozó elméletek tükrében. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2014/5. p. 34–52. Available at: <https://goo.gl/IPYzaG>.

enacting an explicit parody exception,⁴⁴ but rather to the uncertainty arising from the current approach, and the necessity to implement the parody exception based on the authorization of the InfoSoc and (C)DSM directives.

3.11. In copyright, freedom of expression⁴⁵ has a particularly important role and the conflict with the right to property affects a number of provisions in copyright law. Parody – a historical and well known form of expression – represents an added value that brings the possibility of catalysing an exchange of views. Leaving this form of expression without copyright law’s recognition seems unjustified by the Hungarian legislator.

3.12. In our view, parody is not a special but marginal adaptation, forcedly recognized as a non-explicit exception. Parody is a critical creative genre, having roots in fundamental rights, bearing international recognition and social value. It is a special, and fertile soil for nurturing creativity, and it should be to be fully recognized in the Hungarian copyright system.

4. The Connection Between Moral Rights and Parody

4.1. Two moral rights seem to be particularly relevant in connection with parody, but with different intensity. On the one hand, with regard to the recognition of authorship, the question arises: is it required from the adaptation to indicate the author of the original work and does the interests of the author dictate indicating his name on the parody at all.

4.2. The relevant papers only casually address the issue of recognition of authorship, the right of integrity is usually considered of greater importance. There is a very close relationship between adaptation and the right of integrity,⁴⁶ and this necessarily affects copyright’s approach on parody (as a special form of adaptation).

⁴⁴ Cf. FALUDI Gábor: A paródia a szerzői jogban. In: KÓHIDI Ákos – KESERŰ Barna Arnold (ed.): *Tanulmányok a 65 éves Lenkovich Barnabás tiszteletére*. Eötvös József Könyv- és Lapkiadó, Győr, Budapest, 2015.

⁴⁵ William MCGEVERAN: The Imaginary Trademark Parody Crisis (and Real One). *Washington Law Review*, Vol. 90, 2015. p. 727.

⁴⁶ FALUDI Gábor: Az új Ptk. hatása a szerzői jogi és iparjogvédelmi jogátruházási szerződésekre. In: POGÁCSÁS Anett (ed.): *Quaerendo et creando. Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére*. Szent István Társulat, Budapest, 2014. p. 175. és FALUDI Gábor: Szerzői jog, iparvédelem és a Ptk. koncepciója – II. rész. *Polgári Jogi Kodifikáció*, 5. évfolyam, 3. szám, 2003b. p. 4. Available at: <https://ptk2013.hu/wp-content/uploads/2012/11/2003-3kodi.pdf>.

4.3. Moral rights became part of the international copyright framework when the Berne Convention was amended by the Rome Protocol in 1928, and when the legislation was updated in 1948 by the Brussels Protocol.⁴⁷ It seems widely accepted that Art 6^{bis} of the Berne Convention aimed to achieve common ground⁴⁸ between the contracting parties, while giving the national legislator a very wide margin: as regards the scope and limitation of moral rights and the possibility of waiving the rights,⁴⁹ the actual regulation can be adapted to the national needs of the Member States.⁵⁰ Therefore the landscape of moral rights is very diverse, even at a European level.

4.4. As regards the interpretation of the scope of the limited authorization⁵¹ contained in Article 118 TFEU, the relevant papers typically state that the provision does not or only very narrowly allow⁵² the EU's legislation to affect moral rights.⁵³

4.5. The Opinion of Advocate General prior to Deckmyn decision is in favor of this narrow interpretation when it states – based on recital (19) of the InfoSoc Directive – that “*the decision as to whether or not there has been an infringement of moral rights is left entirely to the assessment of the national court.*”⁵⁴ In line with this, ECJ's Deckmyn decision does not explicitly mention the issue of moral rights, but the reasoning used by the ECJ contains points that may be relevant in this respect.⁵⁵ The Deckmyn decision, although formally avoiding the issue of moral rights, makes statements relevant and with serious consequences in terms of recognition of authorship, designation of name and the right of integrity. This is particularly true with regard to Hungarian copyright law, where it is not possible to look at the findings of

⁴⁷ Robert C. BIRD – Lucille M. PONTE: Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations. *Boston University International Law Journal*, Vol. 24, No. 2, 2006. p. 224.

⁴⁸ Peter JONES: Copyright Law and Moral Rights. *Waikato Law Review*, Vol. 5, 1997. p. 86–87.

⁴⁹ Roberta Rosenthal Kwall: Copyright and the Moral Right: Is an American Marriage Possible. *Vanderbilt Law Review*, Vol. 38, Iss. 1, 1985. p. 14.

⁵⁰ Molly Torsen: Authorial Rights and Artistic Works: An Analysis of the International Calibration. *eLaw Journal*, Vol. 15, No. 2, 2008. p. 238.

⁵¹ See also Eleonora Rosati: *Originality in EU Copyright: Full Harmonization through Case Law*. Edward Elgar, 2013. p. 231–236.

⁵² Marina Perraki: Moral Rights: Could There Be a European Harmonisation - A Comparative Study of the Common Law and Civil Law Approach. *Revue hellénique de droit international*, Vol. 53, 2000. p. 344.

⁵³ Albert Fang: Let Digital Technology Lay the Moral Right of Integrity to Rest. *Connecticut Journal of Intellectual Property Law*, Vol. 26, 2011. p. 475.

⁵⁴ See advocate general Villalón 's opinion, paragraph 28.

⁵⁵ Eugene C. Lim: On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience. *SCRIPTed: A Journal of Law, Technology and Society*, Vol. 15, No. 1, 2018. p. 88.

the ECJ in the context of previous exceptions, the ECJ's findings must be considered by the codification of the parody exception.

4.6. Moral rights were born in a continental cradle,⁵⁶ and their birthplace was France.⁵⁷ In our view from French practice, particularly in the *Peanuts*,⁵⁸ *Tarzoon*⁵⁹ and *Dieudonné* cases,⁶⁰ it can be concluded that moral rights do not take precedence over the parodies complying with the conditions of the exception, but at the same time externalities may override the exception (especially if the use goes beyond the allowed framework of freedom of expression).

4.7. The United States' regulation deals only marginally with moral rights by declaring the primacy of the fair use test. Case law does not comment on the issues arising from possible conflicts of parodies and moral rights recognition of authorship or the right of integrity).⁶¹

4.8. Although moral rights raise serious questions about parody at an international level, Hungarian copyright law's approach puts the legislator in a particularly difficult position when considering the enactment of the parody exception to the HCA.

4.9. Free uses, although undoubtedly affecting several aspects of moral rights, are essentially intended to restrict the property aspects of copyright, such as right to reproduction. Therefore, the enactment of a parody exception would not mean that the exception would also affect moral rights.⁶² In accordance with *Deckmyn* decision, there seems to be no interest on the author's side to be designated on the derivative work, although this would indirectly limit Art 12 of the HCA.

4.10. As regards the right of integrity, Hungarian copyright law's approach varied from time to time: The Copyright Act of 1969 had a very strict approach,⁶³ the HCA initially reduced the

⁵⁶ Mariko A. FOSTER: Parody's Precarious Place: The Need to Legally Recognize Parody as Japan's Cultural Property. *Seton Hall Journal of Sports and Entertainment Law*, Vol. 23, No. 2, 2013. p. 243.

⁵⁷ Roberta Rosenthal Kwall: *The soul of creativity: forging a moral rights law for the United States*. Stanford University Press, 2010. p. 39.

⁵⁸ Les Peanuts. Trib. de. Gr. Inst. de Paris, 19 January, 1977. *Revue Internationale de Droit D'auteur*, Vol. 92, 1977. p. 167. Available at: <https://www.la-rida.com/fr/article-rida/2990?lang=fr>.

⁵⁹ Tarzoon. Trib. de. Gr. Inst. de Paris, 3 January, 1978.

⁶⁰ Dieudonné. La tribunal de grande instance de Paris, 15 January, 2015. Available at: https://www.huffingtonpost.fr/caroline-mecary/condamnation-dieudonne-barbara_b_6513612.html.

⁶¹ Alvin DEUTSCH: The Piracy of Parody. *Entertainment and Sports Lawyer*, Vol. 12, No. 3, 1994. p. 18.

⁶² FALUDI *op.cit.* (2015) 117.

⁶³ Act III of 1969 on Copyright Law.

integrity right's protection to the level of the Berne Convention, but a modification in 2013 once again applied a stricter regulation.⁶⁴

4.11. Parody has a necessary effect on the right of integrity:⁶⁵ in the process of making a parody, the original work is changed, which in some cases involves mutilation or distortion of the work. The criticism in the parody is often sharp, sometimes even obscene, directed to both the work and its author; it may be considered “*an attack on the author's personality.*”⁶⁶

4.12. In order to settle the relationship between parody and the right of integrity, the legislator has a number of instruments (not necessarily excluding each other): on the one hand, it is possible to return the HCA's original interpretation of Art 13, an independent standard may be set in for limiting the integrity right in respect of the parodies, and the question may be left to the discretion of the courts.

5. Instead of Conclusion: Regulatory Options for a Hungarian Parody Exception

5.1. Due to the parody's close relation to the adaptation right,⁶⁷ the parody exception should be placed in the HCA as Art 34/A, the provisions of the three-step test set out in Art 33(2) of the HCA will be evidently applicable.⁶⁸

5.2. Both the InfoSoc Directive and the (C)DSM Directive provide for exceptions to three genres: parody, caricature and pastiche. However, in our view, all three genres are redundant in both dogmatic and technical terms. In the explanatory memorandum of the amending law, it can be indicated that the parody covers caricature and pastiche⁶⁹ as well, in line with the ECJ's approach.

⁶⁴ Act XVI of 2013, which amended HCA.

⁶⁵ Sheldon N. LIGHT: Parody, Burlesque, and the Economic Rationale for Copyright. *Connecticut Law Review*, Vol. 11, No. 4, 1979. p. 617.

⁶⁶ Moana WEIR: Making Sense of Copyright Law Relating to Parody – A Moral Rights Perspective. *Monash University Law Review*, Vol 18, No 2, 1992. p. 196.

⁶⁷ The InfoSoc Directive provides a limitation on reproduction and communication to the public, the (C)DSM Directive on the new aspect of communication to the public under Article 17; the right to adaptation is not harmonized by EU law.

⁶⁸ See also P. Bernt HUGENHOLTZ (szerk.): *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*. Kluwer Law International, 2009. p. 113.

⁶⁹ If, pursuant to Art 1(6) of the HCA it is considered to be a use subject to authorization at all.

5.3. The (C)DSM Directive's authorization for a parody exception also makes it necessary to provide an exception for quotation, criticism, review. In Art 34/A, apart from parody, it is necessary to provide an exception for these uses as well.

5.4. In principle, a Member State may decide to introduce the parody exception only in respect of the new aspect of communication to the public introduced by the (C)DSM Directive, while retaining the copyright holder's exclusive rights for all other uses. However, in our view, this approach is not suitable for achieving the objectives pursued by amending an explicit parody exception, particularly with a view to achieving a balance with freedom of expression.⁷⁰

5.5. Neither the InfoSoc Directive nor the (C)DSM Directive name specific conditions for the parody exception. This legislative solution is due to the fact that the list of optional exceptions in the InfoSoc Directive served as a compromise, covering all the exceptions of Member States at the time when the Directive was created, formulating the provisions as a common minimum. The ECJ's Deckmyn decision examined a number of criteria and excluded the applicability of a significant part of them. In the view of the ECJ, the parody exception can only be linked to two conditions: evoking the original work and to expressing humour or mockery. This has been adopted by two EU Member States and one Canadian court.

5.6. The double conditionality of the ECJ cannot be ignored in the codification of the parody exception, and it is necessary to explicitly incorporate these conditions. This is also justified, because the introduction of a parody exception into Hungarian law will be a new limitation on the exclusive rights of right holders, so the conditions of the exception can be considered as an important guarantee element as well.

5.7. As regards to moral rights, it seems necessary to restore the HCA's original integrity regime, and in addition to that, a special provision should be added to Art 13 of the HCA which states that the author may only invoke the right of integrity if the parody exceeds the necessary and proportionate level of expression, if the use fulfils the exception's criteria.

⁷⁰ See also Christophe GEIGER – Elena IZYUMENKO: Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression. *International Review of Intellectual Property and Competition Law*, Vol. 45, 2014. p. 326–339.

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