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BUDAPEST

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Tárgy: RAAP ítélet

Tisztelt Főosztályvezető Urak,

Köszönjük, hogy a MIE véleményét kérték az Európai Unió Tanácsának szerzői jogi munkacsoportja 2021. március 1 napjára a RAAP ítélet hatásait megtárgyalandó ülésére készített munkaanyagban feltett kérdésekkel kapcsolatban. A MIE álláspontját az EJI-vel egyeztetve a következő válaszokat adjuk (a könnyebb kezelhetőség érdekében angol nyelven):

Question 1: *What are the practical and legal impacts, if any, of the RAAP judgment in your Member State? For example, do collecting societies in your country collect the equitable remuneration on behalf of and share it with phonogram producers and performers from third countries? Have their practices changed after the RAAP decision, for example as a result of requests for payments coming from third countries? Are you considering legislative changes on this matter at national level?*

Answer (please see the hardcore of the answer in bold):

1. The RAAP decision is based on reservations that can be made by contracting states to the Rome Convention and the WPPT (paragraphs 8, 9, 10, 16, 16, 17, 19.). The central issue is, that if a reservation is made the treaty obligations do not apply in the field where the reservation was made. Then it opens room for the application of material reciprocity. The ECJ holds that the application of the reciprocity is reserved for the EU authorities, i.e. it is subject to the legislative act of the EU. „*Article 15(3) of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty and Article 8(2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15(3) of the WIPO Performances and Phonograms Treaty that have the effect of limiting on their territories the right to a single equitable remuneration (...) do not lead in the European Union to limitations (...) in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. (...)*

2. Hungary adhered to the Rome Convention and to the WPPT without any reservations. Please see:

https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=17
(the line Hungary without any a reference to reservations),

and

https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=20
(the line Hungary without any a reference to reservations).

3. Hungary's Copyright Act does not include any provisions on conventions and material reciprocity with regards to the holders of the neighbouring rights (disregarding here the database makers and film producers of films that do not qualify as cinematographic creations).

This is a consequence of Hungary's adherence to the conventions without any reservations as mentioned in Section 2.

As a result, the RAAP decision may not have any legal impact on Hungary's copyright system as far as the neighbouring rightholders' rights are concerned. In this sense all foreign performing artists, sound recorder producers, radio and TV broadcasters enjoy the rights which are afforded to domestic rightholders. We do not see the necessity and the possibility of any legislative change save for the eventual amendment of Section 2 of the Copyright Act that refers to the direct application of reciprocity for authors, which is now reserved in the RRAP decision for the European legislator.

4. The RAAP decision might have (but in our view does not have) a legal impact on the private copy remuneration (PCR) as follows.[1] The PCR is based (remotely) on Art 9 (2) and in particular on Art 19 of the Berne Convention (there are countries outside the EEA that have introduced PCR, and had to find a legal ground for its introduction). In Europe, the PCR is based on Art. 5(2) b) of the Infosoc Directive. The Hungarian Copyright Act includes a provision on works, the country of origin or the domicile of the rightholder of which is a country other than Hungary. The provision reads as follows: Section 2 of the Copyright Act: „The protection defined by this Act shall extend to works first made public abroad only if the author

[1] A similar analysis can be made with regards to the reprographic remuneration as well.

is a Hungarian national or if the author is entitled to protection on the basis of an international treaty or **reciprocity**". (The scope of this provision does not cover the neighbouring rights and rightholders.) The question may arise therefor, whether the PCR is due to foreign authors other than the legal subjects domiciled in the EEA?

5. The reservation system of the neighbouring right conventions (that reservations can be made with regards to certain economic rights of certain rightholders) does not exist in the Berne Convention (Art 28 (2) allows for the exclusion of the application of the entire operative part, and annexes to the Berne Convention allow for certain limitation of the application of the Berne Convention, but Art 9 (2) and Art 19 is not listed here).

6. One can therefore argue that the RAAP decision applies in cases only where the relevant international convention allows for reservations with regards to specific economic rights (remuneration rights in the specified case) that are also provided for in the EU copyright law. The PCR is not such a right, since the right of contracting states of the Berne Convention to make reservations with regards to PCR is missing.

7. If the PCR is a right introduced under 9 (2) and in particular Art 19 of the Berne Convention (disregarding here Art 5 (2) b) of the Infosoc Directive), the issue is, whether the right to the PCR is subject to national treatment under the Berne Convention and the TRIPs Agreement or not. This is a complicated – and as far as we know – a disputed issue.

8. Under Art 19 of Berne Convention the provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Berne Union.

9. Under Art 5 (1) of the Berne Convention authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals.

10. **It follows from Art 5 (1) and Art 19 that the nationals (authors) of contracting states of the Berne Convention might make a claim to benefit from the PCR, and the application of the PCR is therefore not subject to pure reciprocity.**

11. Under Art 1 (1) of the TRIPS Agreement the member states may provide for a more extensive protection than it is required under the TRIPS Agreement.

12. Under Art 1 (3) of the TRIPS Agreement national treatment applies: „Members shall accord the treatment provided for in this Agreement to the nationals of other Members." It could be interpreted in a way that it applies to rights only that are provided for in the TRIPS Agreement, but Art 3 (1) provides that *"1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the (...) Berne Convention (...)".*

13. Moreover, Art 2 (2) of the TRIPS Agreement reinforces the obligations under the Berne Convention, and in addition Art 4. provides for the most-favoured-nation treatment with exceptions, that do not cover either Art 9(2) or Art 19 of the Berne Convention. It would require the application of the PCR system to all nationals of the contracting states of the Berne

Convention (and of those contracting states of the TRIPS- Agreement who are not direct member states of the Berne Convention).

14. The EU legislation may overrule this treaty framework, or the EU authorities may apply the authentic interpretation of the ECJ. E.g. under the existing practice of the ECJ the private copy remuneration is a sui generis legal institution, a specific right to a compensation for the damage caused by the free private copying. It is neither an exclusive right, nor a fair and equitable remuneration in terms of copyright. Starting out from this interpretation, which is given in the court practice, the EU authorities may provide for an interpretation, under which the application of the national treatment can be rebutted.

Question 2: *Do you consider that legislation should be introduced at EU level to achieve material reciprocity as regards the application of the single equitable remuneration to third country nationals? If so, what should this legislation address and how in your opinion?"*

1. As far as Hungary is concerned, we do not see the necessity of any legislation, since the single equitable remuneration is due to foreign rightholders. The only local amendment, that might be necessary in light of the RAAP decision, is that of Section 2 of the Copyright Act, that might get on the agenda: „The protection defined by this Act shall extend to works first made public abroad only if the author is a Hungarian national or if the author is entitled to protection on the basis of an international treaty or reciprocity". **The application of (material) reciprocity is subject to the act of the European Union.**

2. At EU level, careful consideration would be advisable before adopting any legislation. We believe that the best solution would be to restore (reinstate) the capacity of Member States to decide individually whether or not to make use of a reservation allowed by an international treaty, at least in cases

- where the treaty in question does not explicitly form part of the Union's legal order (as in the case of the 1961 Rome Convention), or where,

- the member State became a contracting party before her adherence to the European Union, or where

- as a consequence of the shared responsibility between Member States and the EU in terms of accession to a treaty, Member States have also become full Contracting Parties of that particular treaty (as in the case of the 1996 WPPT).

Bármilyen további kérdésük esetén készséggel állunk rendelkezésre.

Üdvözlettel,

Dr. Szecskay András
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