

# EMPLOYER AS COPYRIGHT OWNER FROM A EUROPEAN PERSPECTIVE

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*ABSTRACT. Authors can create works in various legal relations such as licensing agreements, publishing agreements, or within the scope of employment. Due to the free movement of labour in Europe or to globalization they can do it parallel in different countries also. This paper deals with the diverse legislations on works created within the scope of employment in Europe.*

*Chapter one of the paper presents the economic importance of copyright industries and the legal questions which are raised by the works made in the course of employment. Chapter two analyzes the European copyright framework in the light of the Luksan case. Chapter three presents the different solutions as a historical country report of Hungary outlining their strengths and weaknesses. Finally the paper presents the effects of diverse legislation on transaction costs.*

## 1. INTRODUCTION

Creation is a relatively simple process: just draw a line and you could become a painter or just sing whatever you feel and you could become a composer or a lyricist. From a legal point of view, creation and the resulting work may appear in dozens of different variations depending on aspects of authorship, legal relationships between the author and third parties, economic and moral rights, and licensing schemes. And all of these aspects are multiplied in an international environment.

The act of intellectual creation may take many forms, one of which is the case when the creation of works falls within the duties of an employee. Hundreds of universities, research institutes, publishers, record companies, film studios, architectural firms, software companies, radio stations and television channels employ professionals<sup>1</sup> who do not only perform intellectual work, but also create original and therefore copyrighted products.

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<sup>1</sup> See Copyright-intensive industries INTELLECTUAL PROPERTY RIGHTS INTENSIVE INDUSTRIES: CONTRIBUTION TO ECONOMIC PERFORMANCE AND EMPLOYMENT IN THE EUROPEAN UNION: INDUSTRY-LEVEL ANALYSIS REPORT, SEPTEMBER 2013 54 (2013), [http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf).

For the present it is hard to measure<sup>2</sup> how many works are created in employment, what the total worth of copyright owned by employers is, or how it is possible to separate the wage and the royalty part of a salary. The International Standard Classification of Occupations<sup>3</sup> could help to identify and define the jobs concerned, e.g. university and higher education teachers (2310), software developers (2512), authors and related writers, handicraft workers (731) or fortune-tellers (5161) who are all participants of cultural employment.<sup>4</sup> Some indicators show the direct and indirect contribution of copyright-intensive industries to the total employment or GDP. According to the EPO-OHIM report, the total number of employees in these sectors amounts to 9.3 million, which is 4.3 percent of the total employment rate, and they have a 4.2 percent share in the total EU GDP.<sup>5</sup> According to the WIPO analysis based on data from 42 national studies, which were finalized in December 2013, the contribution of copyright industries to national employment is slightly higher (average 5.32 percent) than the GDP share (average 5.18 percent)<sup>6</sup>. Mexico and the Philippines have by far the highest shares of their labour force in the copyright industries (11 percent), which is 8.35 percent in the USA.<sup>7</sup> The Hungarian Report – which is based on the WIPO methodology – states that the copyright-intensive industries provided 7.38 percent of the total employment (almost 270 thousand persons) in 2011.<sup>8</sup>

Given the length of the copyright protection, the worth of the yearly created works cumulates, because some of them are used by the employers continuously. The exploitation of works can even influence the GDP, if the creator is not already employed.

From a legal perspective the question arises: why is it important to know, what the legal relation is between the employee and the employer, who owns the copyright, or which rights may be assigned to the employer? In this case, the very long term of protection also plays a significant role. In general the employee gets his salary and leaves his employer in peace forever. But in case of copyright for instance a work which was created at the end of the 19<sup>th</sup> century can still be copyright protected the term of protection affects nowadays the adaptation (filming, translation) or digitisation of a work.<sup>9</sup>

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<sup>2</sup> DAVID THORSBY, *THE ECONOMICS OF CULTURAL POLICY* 217 (2010).

<sup>3</sup> 1 INTERNATIONAL STANDARD CLASSIFICATION OF OCCUPATIONS: ISCO-08 STRUCTURE, GROUP DEFINITIONS AND CORRESPONDENCE TABLES (2012), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_172572.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_172572.pdf).

<sup>4</sup> Francoise Benhamou, *Artists' labour markets*, in *A HANDBOOK OF CULTURAL ECONOMICS*, 53 (Ruth Towse ed., 2011).

<sup>5</sup> EPO-OHIM REPORT, *supra* note 1.

<sup>6</sup> WIPO STUDIES ON THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT INDUSTRIES 2-3 (2014), [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf).

<sup>7</sup> *Id.* at 27.

<sup>8</sup> DOROTTYA SIMON, *A SZERZŐI JOGI ÁGAZATOK GAZDASÁGI SÚLYA MAGYARORSZÁGON 4.* [THE ECONOMIC CONTRIBUTION OF COPYRIGHT-BASED INDUSTRIES IN HUNGARY 4.] (2014).

<sup>9</sup> See Dénes Legeza, *„Segítsük az árvákat” - útmutató az árva művek egyes felhasználásaihoz* [“Please Help the Orphans” – Guidelines to Certain Uses of Orphan Works], 7(117) *IPARJOGVÉDELMI ÉS SZERZŐI JOGI SZEMLE* 23-58 (2012).

The employer could not (and still cannot) calculate with the change of law (monistic-dualistic approaches), with the immense growth of the variety of rights (e.g. moral rights, radio broadcasting, and internet), or with the new rightholders (read: who was not an author when the agreement was concluded). And—due to the free movement of labour in Europe—from an employer’s perspective, who has many creative employees from several European countries, it may be also uncertain what rights are vested in him from the employee by operation of law, or of the contract.

From an economic perspective uncertain legal situation can cause damages and imperfect contracts, diverse or changing regulation can increase transaction costs. The harmonisation of regulations regarding works made in an employment relationship influence the value of production in Europe.

This paper deals with the diverse legislations in respect of works created within the scope of employment. Consequently, neither the ‘work made for hire’ doctrine of the United States nor the problems of commissioned works (as non-standard forms of employment) will be analysed here. Due to space limitations this study does not include copyright related questions with regard to the legal relationship between a university and its students, nor issues of research contracts, applicable law, the term or termination of a licensing contract, remuneration in general, collective management of rights, orphan works, neighbouring rights or labour law.

## 2. EUROPEAN COPYRIGHT FRAMEWORK

However the relation between copyright and employment is not harmonised in general, their connection has appeared in some European directives. The Infosoc Directive emphasises that the harmonisation of the legal framework “*will safeguard employment and encourage new job creation.*”<sup>10</sup> The Enforcement Directive says that the protection of intellectual property is important for developing employment and improving competitiveness.<sup>11</sup> Nowadays the European Union is still engaged to improve copyright protection. According to the Digital Single Market Strategy contract and copyright law has become a kind of barrier in a digital environment,<sup>12</sup> which should be broken down for a better cross-border online activity and for a ‘more European’ copyright framework<sup>13</sup> on the one hand, and the Reda report

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<sup>10</sup> (4) INFOSOC DIRECTIVE, 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, OJ L 167, 22.6.2001, 10-19.

<sup>11</sup> (1) DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004 ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS, OJ L157, 30.4.2004, 16.

<sup>12</sup> 2 DSM Strategy 2015, A DIGITAL SINGLE MARKET STRATEGY FOR EUROPE, BRUSSELS, 6.5.2015 COM(2015) 192 FINAL.

<sup>13</sup> 2.4 *Id.*

thought that introducing a right to termination of transfers and licenses is necessary on the other.<sup>14</sup>

The hypothesis is that—from the employer’s perspective—in an ideal legal environment each exploitation right of a work is assigned from the employer to the employee by operation of law. This includes the unknown type of exploitation, the unforeseen uses of the work and the related moral rights also. In consideration of this, the employer pays wage regularly. That situation would be the most efficient and economical if it could be the initial owner of the copyright. If this is not possible, it should be allowed to the employer to acquire rights by a single employment contract.

Our focus is on works made in employment relation between a European employer and employees from several other European countries. In the first part, the different copyright systems then the scope of assignment of rights will be discussed from the point of view of the Berne Convention and European directives. The scope of assignment of rights covers the continental authorship concept and the nature of the rights concerned. At the end of this chapter—as a case study—the Luksan case will be analysed.

## 2.1. Copyright and author’s right systems

In spite of the fact that the copying of manuscripts was usual in the antiquity, the first real copyright act was codified in the 18<sup>th</sup> century. Copyright legislations developed in parallel in different countries, which resulted in different approaches. Continental legislation put the author in the centre (*szerzői jog, urheberrecht, droit d’auteur*), while in common law countries the focus was put on the act of copying (*copyright*).

Due to the cross-border trade of books countries concluded bilateral agreements on copyright from the early 19<sup>th</sup> century. Later, the first international copyright agreement, the Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886. Even the title of the Berne Convention—which mentions the protection of the *works* and not of the *authors*—shows, that it is hard to harmonise the different approaches.

### 2.1.1. Copyright system

In a copyright system not only natural persons but also legal persons (other than “flesh-and-blood authors”<sup>15</sup>) are entitled to authorship. The best known example is

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<sup>14</sup> 25 REDA REPORT, REPORT ON THE IMPLEMENTATION 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 (2014/2256(INI)), 24.6.2015, A8-0209/2015 10 “(...) considering a reasonable period for the use of rights transferred by authors to third parties, after which those rights would lapse, as contractual exchanges may be marked by an imbalance of power; stresses in this connection the importance of contractual freedom.”

<sup>15</sup> PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 21 (3 ed. 2012).

'the works made for hire' doctrine in the United States, where "*the employer or other person for whom the work was prepared is considered the author.*"<sup>16</sup> In contrast, the United Kingdom Copyright, Designs and Patents Act 1988 makes a distinction between the author (the person who creates the work and some legal entities such as producers) and the first ownership of copyright.<sup>17</sup> In sum, the concept of authorship in a copyright system is much wider than in continental jurisdictions.

The ownership of rights is transferable,<sup>18</sup> which covers mainly economic rights in the United States. While the economic rights are fully transferable,<sup>19</sup> moral rights are not transferable but they may be subject to a waiver or consent by the rightholder<sup>20</sup> in the United Kingdom.

### 2.1.2. Author's right systems

The French *dualistic approach* can be characterized by the separation of economic rights and moral rights. The former serves the financial acknowledgement, the latter the recognition of authorship. Copyright laws originally stipulated the exploitation of works (such as reproduction and dissemination), but the perpetual and inalienable (or unwaivable) moral rights were crystallized in France only at the beginning of the 20<sup>th</sup> century. As a main rule, the creator of the work is the author and he/she may exercise the economic rights by the transfer thereof.<sup>21</sup>

The other main European traditional civil law approach, called the *monistic approach*, is followed in Germany, Austria and Hungary. The main difference of this approach is the unity of the copyright, which means, that the source of the copyright is the creator-author, who disposes of his/her economic and moral rights. The moral rights are also inalienable, and the economic rights cannot be transferred either with some exceptions. The exploitation of the work is granted by a licensing agreement. As György Boytha presented in his study, the moral and economic rights are closely connected and complement each other: "*in the case of the first publication of a writing, where the rights of divulgation and reproduction are necessarily exercised by one and the same act of authorization. The right to authorize adaptation also inevitably involves both economic and moral aspects. The right of withdrawal of the work, again, is inseparably linked with economic consequences to the author, and so on.*"<sup>22</sup> If a country's legislation contains both of these groups of rights, the exploitation of the work could lead to difficulties when they are exercised by different persons. In certain circumstances the legislator tears through the veil of the author's moral rights, and provides the licensee (user) with the right to perform the necessary changes of the work.<sup>23</sup>

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<sup>16</sup> U.S. COPYRIGHT ACT, §201(b).

<sup>17</sup> Article 9(1) COPYRIGHT, DESIGNS AND PATENTS ACT 1988.

<sup>18</sup> 17 U.S.C., *supra* note 16 §201(d).

<sup>19</sup> Article 90 (1) CDPA 1988, *supra* note 17 "Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property."

<sup>20</sup> Article 87 *Id.*

<sup>21</sup> GOLDSTEIN AND HUGENHOLTZ, *supra* note 15 at 265.

<sup>22</sup> György Boytha, *Whose right is Copyright?*, GRUR, 383 (1983).

<sup>23</sup> Article 50 SZERZŐI JOGRÓL SZÓLÓ 1999. ÉVI LXXVI. TÖRVÉNY [HUNGARIAN COPYRIGHT ACT OF 1999], [http://www.sztnh.gov.hu/en/English/jogforras/hungarian\\_copyright\\_act.pdf](http://www.sztnh.gov.hu/en/English/jogforras/hungarian_copyright_act.pdf); Article 39(2) GESETZ

## 2.2. Scope of assignment

After the differences between copyright and author's right regimes have been presented, some aspects of the assignment, namely authorship, and the transferability of rights will be analysed. The authorship is central to the works made within the scope of employment 'quandary'<sup>24</sup> because if the law permits the employer to become the author or the initial owner of the copyright, further transfer is unnecessary. If the employer may be a derivative (non-initial) rightholder only, the rights must be transferred. The transferability of rights shows which rights are non-transferable, and which rights or right to equitable or appropriate remuneration and fair compensation remain with the author. These remaining rights and the new forms of exploitation could cause difficulties in the future exploitation of a work.

### 2.2.1. Creator as author doctrine

Although the term 'author' is not defined by the Berne Convention as none of its provisions defines that only a natural person or both natural and legal persons can be an author, some scholars find that the term of protection (life plus 50 years<sup>25</sup> – except anonymous works or works written under a pseudonym), the phrase 'death'<sup>26</sup> and the moral rights are the evidence proving that the Berne Convention protects mainly natural persons. Article 7<sup>bis</sup> which provides the calculation of the term of protection in joint authorship says: "[the term of protection] shall be calculated from *the death of the last surviving author*" [emphasis added].

As a matter of fact, Article 14<sup>bis</sup> of the Berne Convention<sup>27</sup> has a special provision for cinematographic works. In the first place it provides copyright protections to the

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ÜBER URHEBERRECHT UND VERWANDTE SCHUTZRECHTE 16. SEPTEMBER 1965 [GERMAN COPYRIGHT ACT OF 1965].

<sup>24</sup> Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, 34 (1993).

<sup>25</sup> Article 7 BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS TEXT 1971).

<sup>26</sup> Article 6bis, 7, 7bis *Id.*

<sup>27</sup> (1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The *owner of copyright* in a cinematographic work *shall enjoy the same rights as the author* of an original work, including the rights referred to in the preceding Article.

(2) (a) *Ownership of copyright* in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, *include among the owners of copyright in a cinematographic work authors* who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(...)

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to

owner of the copyright in a cinematographic work, who can be defined by a national legislator, and differentiates the owner of the copyright from the other authors, who have brought contributions to the making of the work. Section (3) makes it clear that these contributors can be natural persons such as the author of the screenplay or the principal director. From this point of view, the Berne Convention entitles legislators to widen the concept of the author regarding cinematic works, and does not preclude the legal persons as authors.

Apart from the Berne Convention, the European Union regulated the concept of author and of ownership in some directives, which can serve as a stronghold. The relating provisions will be analysed below.

The Software Directive<sup>28</sup> makes a distinction with regard to the circumstances of software creation. In a 'general relationship' which can be a non-employment relationship, a natural person (or a group of natural persons) and—if where the legislation of the Member State permits—a legal person can be the author or the rightholder of software.<sup>29</sup> By contrast, in an employment relationship where the software is created by an employee, unless the parties agreed otherwise, the employer exclusively shall be *entitled to exercise all economic rights* in the program.<sup>30</sup> It necessarily follows that in an employment relationship as *lex specialis*, the legislation of the Member State cannot permit that a legal person (employers usually are legal persons) be the initial rightholder of a computer program. Hence the copyright is not vested in the employer by operation of law as the employer obtains only a grant.

The original Software Directive was adopted in 1991, and the Database Directive of 1996 has the same provisions,<sup>31</sup> except for the employment rules. The original European legislator probably changed his intent for harmonising the employment relationship in copyright. Article 2(3) of the Software Directive can be found in recital 29 of the Database Directive.<sup>32</sup> The European Communities stepped back, and left the question of databases created by employees to the discretion of the Member States.

Taking the opportunity given by the Berne Convention, the European Union as national legislator defined the copyright owner of the cinematographic work in several directives: “[f]or the purposes of [the given] Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors.

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such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

<sup>28</sup> DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 APRIL 2009 ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS (CODIFIED VERSION), OJ L 111, 5.5.2009, 16-22.

<sup>29</sup> Article 2(1) *Id.*

<sup>30</sup> Article 2(3) *Id.*

<sup>31</sup> DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MARCH 1996 ON THE LEGAL PROTECTION OF DATABASES, OJ L 077, 27/03/1996, 20-28.

<sup>32</sup> (29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract.

*Member States may provide for others to be considered as its co-authors.*"<sup>33</sup> This union-level harmonisation of an authorship will be shown by the Luksan case.

### 2.2.2. *The rights concerned*

In this part of the study the economic and moral rights will be analysed as far as necessary to our research goal.

Neither moral nor economic rights have an exhaustive list. The Berne Convention determines two types of inalienable *moral rights*<sup>34</sup> as a minimum standard: the right of paternity and the right of integrity. Furthermore, some countries ensure the right of divulgation (i.e. first publication) and the right of withdrawal, but others—in addition—provide the right of modification, the right to access to the single copy or a rare copy of the work in order to exercise any of the other rights.<sup>35</sup> It is problematic whether these additional moral rights are inalienable too. This can lead further multiplication of moral rights, and prevent the regular exploitation of works. Despite inalienability, according to the legislation of some countries and to the opinion of some scholars it is possible that the author not to exercise, or limit the moral rights with his/her implied or expressed consent.<sup>36</sup>

Number of *economic rights* is growing with the technological development. Initially reproduction, distribution, public performance, exhibition and translation used to be the common forms of exploitation, later adaptation and new forms of communication to the public (e.g. broadcasting, cable retransmission, making available to the public) were determined by national legislature and international treaties. Though the main rule of the Berne Convention is that economic rights are transferable—even *after the transfer* of the author's *economic rights*—the Convention itself and European directives limit this transfer.

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<sup>33</sup> Article 1(5) COUNCIL DIRECTIVE 93/83/EEC OF 27 SEPTEMBER 1993 ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION, OJ L 248, 06/10/1993, 15-21; Article 2(2) DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 ON RENTAL RIGHT AND LENDING RIGHT AND ON CERTAIN RIGHTS RELATED TO COPYRIGHT IN THE FIELD OF INTELLECTUAL PROPERTY (CODIFIED VERSION), OJ L 376, 27.12.2006, 28-35; Article 2(1) 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), OJ L 372, 27.12.2006, 12-18.

<sup>34</sup> Article 6bis BERNE CONVENTION, *supra* note 25 (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>35</sup> Article 14(7) REAL DECRETO LEGISLATIVO 1/1996, DE 12 DE ABRIL, POR EL QUE SE APRUEBA EL TEXTO REFUNDIDO DE LA LEY DE PROPIEDAD INTELECTUAL, REGULARIZANDO, ACLARANDO Y ARMONIZANDO LAS DISPOSICIONES LEGALES VIGENTES SOBRE LA MATERIA [SPANISH COPYRIGHT ACT AS AMENDED 4.11.2014]; Article 67(6) HCA 1999, *supra* note 23 "The user of the work shall tolerate the presentation of the work and the taking of photographs and video records thereof by persons authorised thereto if this is without prejudice to his equitable interests."

<sup>36</sup> Article 30(5) HCA 1999, *supra* note 23; Article 3(5) WITTEM PROJECT, EUROPEAN COPYRIGHT CODE OF 2010.

Resale right (*droit de suite*) is the only exception mentioned by Article 14<sup>ter</sup> the Berne Convention<sup>37</sup> which was incorporated therein it during the Brussels Conference of 1948. The European Union legislature harmonised this unassignable and inalienable right to an economic interest in 2001.<sup>38</sup> Authors cannot waive, even in advance, this type of remuneration. Concerning other rights rental and lending rights are transferable, but the authors have unwaivable right to equitable remuneration.<sup>39</sup> Cable retransmission right can be assigned but rightholders have also an unwaivable right to appropriate remuneration.<sup>40</sup> The exercise of cable retransmission right is regulated via collective management organisation.<sup>41</sup> In other cases the given work and the type of right determine whether the use is authorised by individually or collectively.

The present situation does not make easier the analysis of the previous or still existing contractual relations. Could the author assign his/her rights for unknown type of exploitation or authorise the unforeseen uses of the work, when a given right or its transferability was not harmonised in the EU, or even that right did not exist at all in a certain period and legislation (e.g. internet in the 1950s)?

Close to this question further problems may arise such as who exercises the right to opt out from a non-mandatory collective licensing, who has the merchandising right or does full assignment include the grant for trademark registration?<sup>42</sup>

For the time being moral rights remain outside the scope of European legislature,<sup>43</sup> neither provisions of the directives nor case law of the European Union gives support in the supposed (or factual) conflicts between economic and moral rights.<sup>44</sup> A lack of moral rights' harmonisation can be observed in the Deckmyn case,<sup>45</sup> where the affect

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<sup>37</sup> Article 14<sup>ter</sup> BERNE CONVENTION, *supra* note 25 (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed. (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

<sup>38</sup> Article 1(1) DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 SEPTEMBER 2001 ON THE RESELL RIGHT FOR THE BENEFIT OF THE AUTHOR OF AN ORIGINAL WORK OF ART, OJ L 272, 13/10/2001 32-36.

<sup>39</sup> Article 5 RENTAL DIRECTIVE, *supra* note 33.

<sup>40</sup> (25) SATELLITE DIRECTIVE, *supra* note 33.

<sup>41</sup> Article 9 *Id.*

<sup>42</sup> According to Article 53(2) c) copyright [of third party] could cause invalidity on relative ground. COUNCIL REGULATION (EC) NO 207/2009 OF 26 FEBRUARY 2009 ON THE COMMUNITY TRADE MARK (CODIFIED VERSION), OJ 2009 L 78, 1.

<sup>43</sup> INFOSOC DIRECTIVE, *supra* note 10 (19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

<sup>44</sup> 10.21-10.23 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (2006).

<sup>45</sup> JOHAN DECKMYN, VRIJHEIDSFONDS VZW V HELENA VANDERSTEEN AND OTHERS, CASE C-201/13, EUROPEAN COURT OF JUSTICE (ECJ), 3 SEPTEMBER 2014, ECLI:EU:C:2014:2132.

of a parody to the original author was examined and in the ITP v Commission case in which the Court of First Instance said that the copyright essential function is to protect the moral rights in the work and ensure a reward for the creative effort.<sup>46</sup>

In sum a colourful bouquet of rights must be considered by an employer.

### 2.2.3. *Luksan case*<sup>47</sup>

In this case the European Court of Justice interpreted the legal relations and the scope of the transferable rights between Mr Luksan, the scriptwriter and principal director of a documentary film, and Mr van der Let, the producer of the audiovisual production. The Austrian Copyright Act provides a 'statutory assignment' to the producer of the film, which means that all exclusive exploitation rights are vested in him. In addition, the statutory rights to remuneration provided for by the Austrian Copyright Act, in particular the 'remuneration for reproductions made on recording material', share the fate of the exploitation rights. Consequently, because of the contract granting the producer all the exploitation rights in the film, all the statutory rights to remuneration are also vested in him. Mr van der Let claimed to be entitled to receive not only one half of the statutory rights to remuneration in his capacity as producer, but also the other half which is vested in principle in the film's author, since this statutory provision of the Austrian Copyright Act is dispositive. Mr Luksan as the author of the film requested the national court to declare that half of the statutory rights to remuneration be vested in him.

The court said that the relevant provisions of European directives must be interpreted as meaning that exploitation rights of a cinematographic work are vested by operation of law, directly and originally, in the principal director.<sup>48</sup> The court explained that the exploitation rights cannot be transferred exclusively to the producer by operation of national law. Secondly, the national legislation can regulate the presumption of transfer, but it has to allow the principal director the option of agreeing otherwise.<sup>49</sup> Finally the Court ruled that the principal director, in his capacity as author must be entitled, by operation of law, directly and originally, to the right to the fair compensation from private copying and the Member States cannot lay down a presumption of transfer of this right in favour of the producer of a cinematographic work.<sup>50</sup>

Many scholars wrote about the significance of this case. Burrell and Hudson analysed this case from the view of abandonment of copyright, and they said that "*the CJEU would conclude that such a doctrine is incompatible with European law*",<sup>51</sup> according to

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<sup>46</sup> INDEPENDENT TELEVISION PUBLICATIONS LTD (ITP) v COMMISSION OF THE EUROPEAN COMMUNITIES, CASE T-76/89, COURT OF FIRST INSTANCE, 10 JULY 1991, ECLI:EU:T:1991:41 56.

<sup>47</sup> MARTIN LUKSAN v PETRUS VAN DER LET, CASE C-277/10, EUROPEAN COURT OF JUSTICE (ECJ), 9 FEBRUARY 2012 [LUKSAN CASE].

<sup>48</sup> Ruling (1) *Id.*

<sup>49</sup> Ruling (2) *Id.*

<sup>50</sup> Rulings (3)-(4) *Id.*

<sup>51</sup> Robert Burrell & Emily Hudson, *Property concepts in European copyright law: the case of abandonment*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW, 228 (Helena R. Howe & Jonathan Griffiths eds., 2013).

Stamatoudi and Torremans this case is part of the CJEU harmonisation agenda.<sup>52</sup> Quaedvlieg thought that within the neutral frame of Article 14<sup>bis</sup> of the Berne Convention (as cited above), the European Union follows an author-friendly policy,<sup>53</sup> and he stated that in the absence of European harmonisation on authorship and ownership we are witnesses of the metamorphoses of the creator doctrine. He took the view, that this new approach changes the author's position from the philosophical foundation to economic considerations of fostering innovation.<sup>54</sup>

It seems that in this case regarding the author's concept, the CJEU went to the wall. According to the Satellite, the Rental and the Term of protection Directives, the principal director must be considered as the author or one of the authors of the cinematographic or audiovisual work. With these provisions the European Union legislature exercised the competence of the European Union in the field of intellectual property, which means that the Member States are no longer competent to adopt interfering provisions. Although Article 14<sup>bis</sup> of the Berne Convention granted the countries of the (Berne) Union the right determined the ownership of the cinematographic work, the Member States no longer have this right.<sup>55</sup> The argument of the CJEU was founded on the concept of property, which is protected as a fundamental right by the Charter of Fundamental Rights of the European Union.<sup>56</sup> Therefore the principal director must be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property of a cinematographic work.<sup>57</sup> If the Member States exercises their power and determine the owner of the cinematographic work detriment to the principal director, they injure the competence of the European Union and the inalienable property right of the principal director. As the Court severely said: "[i]n those circumstances, the fact that national legislation denies him the exploitation rights at issue would be tantamount to *depriving him of his lawfully acquired intellectual property right.*"<sup>58</sup>

It follows from the foregoing that Member States cannot deny such an authorship which is determined by the European Union legislature, nevertheless, the option of laying down a presumption of transfer of rights to exploit the work it is allowed provided that such a presumption is not an irrebuttable one.<sup>59</sup>

Though only the principal director, the film producer and certain rights (satellite broadcasting right, reproduction right and any other right of communication to the

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<sup>52</sup> EU COPYRIGHT LAW A COMMENTARY, 1113 (Irina Stamatoudi & Paul Torremans eds., 2014).

<sup>53</sup> Antoon Quadvlieg, *Authorship and Ownership: Authors, Entrepreneurs and Rights*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW. CHALLENGES AND PERSPECTIVES (Tatiana-Eleni Synodinou ed., 2012).

<sup>54</sup> *Id.* at 230–231.

<sup>55</sup> Luksan case, *supra* note 47 at 64.

<sup>56</sup> *Id.* at 66, 68. Article 17 Right to property 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.

<sup>57</sup> *Id.* at 69.

<sup>58</sup> *Id.* at 70. emphasis added.

<sup>59</sup> *Id.* at 87.

public through the making available to the public) were affected in the main proceedings, in our point of view the judgement of the CJEU can be interpreted in a wider context.

### 3. DIFFERENT SOLUTIONS IN HUNGARY A HISTORICAL COUNTRY REPORT

The most European countries have different provisions for the works made by an employee in the course of employment. The Netherlands has a work made for hire regime where the employee is taken to be the creator,<sup>60</sup> in the United Kingdom the employer is the first owner<sup>61</sup> of any copyright in the work. In contrary—besides the inalienable moral rights—the French dualistic author’s right approach permits the transfer of economic rights,<sup>62</sup> the German monistic approach<sup>63</sup> makes the granting of economic rights—which are need for business<sup>64</sup> purposes—possible only. The common is in each regulation that the parties can agree otherwise.

In this chapter instead of international comparative analysis, different solutions will be presented in a historical country report.<sup>65</sup> The copyright legislation had an idiosyncratic development in Hungary. The first draft bills and the Copyright Acts followed the dualistic approach (if we can speak of dualism at all in the absence of moral rights in the 19<sup>th</sup> century) until 1970, and then the monistic approach. Although the current Hungarian Copyright Act represents the latter, the provisions of the works made by an employee are strongly dualistic, namely the employer becomes the legal successor of the employee’s economic rights, and the limitation of the moral rights (to stay anonymous) are granted by the Act.

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<sup>60</sup> Article 7 WET VAN 23 SEPTEMBER 1912, HOUDENDE NIEUWE REGELING VAN HET AUTEURSRECHT [DUTCH COPYRIGHT ACT “Where labour which is carried out in the service of another consists in the making of certain literary, scientific or artistic works, the person in whose service the works were created is taken to be the maker, unless the parties have agreed otherwise.” (Translation M.M.M. van Eechoud); see Jacqueline Seignette, *Authorship, Copyright Ownership and Works made on Commission and under Employment*, in *A CENTURY OF DUTCH COPYRIGHT LAW* 115–140 (P. Bernt Hugenholtz, Antoon Quadvlieg, & Dirk Visser eds., 2012), [http://hocker.nl/uploads/files/publication\\_documents/2543/A\\_Century\\_of\\_Dutch\\_Copyright\\_Law.pdf](http://hocker.nl/uploads/files/publication_documents/2543/A_Century_of_Dutch_Copyright_Law.pdf).

<sup>61</sup> Article 11 CDPA 1988, *supra* note 17 “(1) The author of a work is the first owner of any copyright in it, subject to the following provisions. (2) Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”

<sup>62</sup> Article L111-3 LOI NO 92-597 DU 1ER JUILLET 1992 RELATIVE AU CODE DE LA PROPRIÉTÉ INTELLECTUELLE [CPI 1992]; see André Lucas, Henri-Jacques Lucas & Agnès Lucas-Schloetter, *L’auteur salarié ou fonctionnaire*, in *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 173–190 (2012).

<sup>63</sup> Articles 29, 31, 39 URHG 1965, *supra* note 23.

<sup>64</sup> Julian Klagge & Christian Czychowski, *How does Europe deal with the question of how to transfer rights from the author to the exploiter? The European perspective on the work made for hire doctrine*, *LES NOUVELLES* 178–183, 181 (2014).

<sup>65</sup> This chapter is based on Dénes Legeza, *Egy paragrafus margójára - adalékok a munkaviszonyban létrehozott művek szabályozásához [Comment on a paragraph: Additional Information on the Hungarian Regulation of Works Created within the Scope of Employment]*, 9 *IPARJOGVÉDELMI ÉS SZERZŐI JOGI SZEMLE* 107–124 (2014).

The subject matter of this kind of research is of great importance nowadays. If we want to digitalize a journal and make it available on the internet, to colorize an old black and white film, to demolish a building or make it wheelchair accessible, we have to know who owns the copyright. The existing legislation is applicable to the object and the term of copyright protection and infringement as well in Hungary. But the applicable law for licence agreements is that which was in force when the agreement in question was signed. The orphan works regime or the collective management organisations may authorise certain uses of works, but for instance the problem of publishing or adaptation of a literary work – in the absence of rightholder – is not solved in many countries.<sup>66</sup>

### 3.1. The period of publishing law

Until 1875 neither publishing nor copyright law was regulated in Hungary. Since 1844, at least five copyright acts had been drafted, yet none of them were adopted. Only one regulation of the Provisional Rules of Legislation<sup>67</sup> protected intellectual creations as a whole: “*creations of intellect are to be taken as property, which is protected by law*”. The Commercial Code<sup>68</sup> regulated publishing as a commercial transaction. The assignment of copyright ownership existed, although there were no works made in the course of employment per se.

#### 3.1.1. The scope of copyright and publishing law

Following a dualistic approach, Hungarian Copyright Act of 1884<sup>69</sup> (HCA 1884) and the superseding Copyright Act of 1921<sup>70</sup> (HCA 1921) made the entire assignment of copyright as property right possible. Within the meaning of the act, copyright can be wholly or partly assigned by contract or passed by inheritance. As a result, if the parties stipulated this in a contract, then the author’s rights were partially or fully passed according to the contractual consensus. The first two Hungarian copyright acts did not contain any further provisions applicable to works made in the course of employment. However, some cases related to this issue can be found in the academic references and jurisprudence.

Géza Kenedi writes about employed journalists who were bound to their publishers in terms of employment on the one hand, and a copyright relationship on the other,<sup>71</sup> hence general private law regulations applied to the former, while provisions of the Commercial Code affected the latter. According to Kenedi, an employed journalist’s

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<sup>66</sup> see Péter Mezei, *The New Orphan Works Regulation of Hungary*, 45 INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW 940–952 (2014).

<sup>67</sup> These rules were approved by both chambers of the Parliament but were not formally enacted. The Provisional Rules of Legislation entered into force on 23 July 1861 and their majority were in force until 1 May 1960.

<sup>68</sup> KERESKEDELMI TÖRVÉNYRŐL SZÓLÓ 1875. ÉVI XXXVII. TÖRVÉNYCIKK [HUNGARIAN COMMERCIAL CODE OF 1875].

<sup>69</sup> SZERZŐI JOGRÓL SZÓLÓ 1884. ÉVI XVI. TÖRVÉNY [HUNGARIAN COPYRIGHT ACT OF 1884].

<sup>70</sup> SZERZŐI JOGRÓL SZÓLÓ 1921. ÉVI LIV. TÖRVÉNY [HUNGARIAN COPYRIGHT ACT OF 1921].

<sup>71</sup> GÉZA KENEDI, A MAGYAR SZERZŐI JOG [THE HUNGARIAN COPYRIGHT LAW] 88–89 (1908).

duties were to write and translate articles in return for remuneration. Unless the parties agreed otherwise or the copyright was transferred according to the Commercial Code, the author was discharged of the exclusive publishing contract only after all copies of the newspaper were sold.<sup>72</sup> Beside literary works, this act also applied for technical inventions and art as a commercial transaction. Furthermore, it included reproduction and distribution as well.<sup>73</sup>

The Commercial Code did not determine the form of the valid contract, nor that consideration (royalty) must be specified. Therefore, several regulations of the Code could replace contractual provisions of the parties,<sup>74</sup> for instance in case of doubt, a contract entitled the publisher only to a single publication of the work, and translation and its publication were not implied to the contract. Besides, the publishing contract was exclusive, which means that the author could not use his/her work. Finally, the parties were able to limit the territorial (like translation), temporal and quantitative (number of copies) scope of use contractually.<sup>75</sup>

### 3.1.2. *The scope of assignment*

In the period of the HCA 1884 and the HCA 1921, the authors generally assigned the copyright only partly. Several decisions of the Royal Curia<sup>76</sup> support this: there is no presumption that the author assigned the publishing rights for the full term of protection,<sup>77</sup> and if nevertheless the publishing rights had been assigned, the author still retained the moral rights<sup>78</sup> and the right of adaptation.<sup>79</sup> With regard to new types of use, one decision declared that *“in the case of a copyright assignment or publishing transaction, it generally had to be assumed that the will of the contracting parties had been aimed at the assignment of only those rights which had been known to the parties at the time of contracting and only at the possible exploitation of these rights which had been apparent to the parties at the time of contracting. However, rights, which the parties could not even have thought of at the time of contracting, cannot be deemed assigned – unless it can be inferred from the content of the contract and the existing circumstances that the parties could have stipulated to the contrary.”*<sup>80</sup>

<sup>72</sup> Article 515 HUNGARIAN COMMERCIAL CODE OF 1875, *supra* note 68.

<sup>73</sup> Article 517 *Id.*

<sup>74</sup> ISTVÁN APÁTHY, A MAGYAR KERESKEDELMI TÖRVÉNYKÖNYV TERVEZETE [DRAFT BILL OF THE HUNGARIAN COMMERCIAL CODE] 579 (1873).

<sup>75</sup> FERENC NAGY, A MAGYAR KERESKEDELMI JOG KÉZIKÖNYVE KÜLÖNÖS TEKINTETTEL A BÍRÓI GYAKORLATRA ÉS A KÜLFÖLDI TÖRVÉNYHOZÁSOKRA [HANDBOOK OF THE HUNGARIAN COMMERCIAL LAW ESPECIALLY WITH REGARD TO JUDICIAL PRACTICE AND FOREIGN LEGISLATION] 479–483 (1913).

<sup>76</sup> The Royal Curia was the Supreme Court between 1868-1949 in Hungary.

<sup>77</sup> A Magyar Királyi Kúria [Judgement of the Hungarian Royal Curia] C. 1122/1906. ítélete, *in* A MAGYAR KERESKEDELMI JOG KÉZIKÖNYVE KÜLÖNÖS TEKINTETTEL A BÍRÓI GYAKORLATRA ÉS A KÜLFÖLDI TÖRVÉNYHOZÁSOKRA [HANDBOOK OF THE HUNGARIAN COMMERCIAL LAW ESPECIALLY WITH REGARD TO JUDICIAL PRACTICE AND FOREIGN LEGISLATION] 482 (Ferenc Nagy ed., 1913).

<sup>78</sup> A Magyar Királyi Kúria [Judgement of the Hungarian Royal Curia] P. I. 348/1932. ítélete, 1 *in* A MAGYAR BÍRÓI GYAKORLAT [THE HUNGARIAN JUDICIAL PRACTICE] 522 (Károly Szladits ed., 1935).

<sup>79</sup> A Magyar Királyi Kúria [Judgement of the Hungarian Royal Curia] P. I. 3896/1929. ítélete, 1 *in* A MAGYAR BÍRÓI GYAKORLAT [THE HUNGARIAN JUDICIAL PRACTICE] 528 (Károly Szladits ed., 1935).

<sup>80</sup> A Magyar Királyi Kúria [Judgement of the Hungarian Royal Curia] P. I. 1112/1932. ítélete, 1 *in* A MAGYAR BÍRÓI GYAKORLAT [THE HUNGARIAN JUDICIAL PRACTICE] 522–523 (Károly Szladits ed., 1935).

Later, it is demonstrated that the scope of the assigned moral and economic rights is an important element of the regulation pertaining to works made in the course of employment.

According to judge Dezső Alföldy, who synthesised in his book the judicial practice of the 1930s, the Royal Curia took it upon itself to supplement insufficient legislation with interpretation of the law.<sup>81</sup> In the jurisprudence, the exploitation rights of authors are only assigned in the case of cinematographic works to the film studio by a production agreement. The rights of writers and composers participating in the filmmaking process can only be assigned in a separate contract (e.g. like the agreement for adaptation for screen).

In the case of other works, according to the Royal Curia, the circumstances of the given situation should help decide to what extent the copyright was contractually assigned to the employer.<sup>82</sup> Thus, the scope of assignment was defined by the circumstances of the case and the presumable will of the contracting parties and not by a service or other similar relationship such as that between an author and the editor of an anthology for instance. At newspapers, employed journalists were free to publish their own articles as collected works, since the employer or commissioner did not have exclusive rights.<sup>83</sup>

According to a later commentator, Róbert Palágyi, the agreement of the parties was the norm with regard to work made in the course of employment. *“In principle, the right of exploitation outside the business activities of the employer remained with the author.”*<sup>84</sup> This confirmed the view that the parties could dispose of their rights freely and the employer could only use the work for his / her intended purpose.

### 3.2. Demand for regulation

Based on the above, it can be seen that up to the years following World War II, neither academic references, nor legislation dealt with the necessity to regulate copyright issues arising between the employee and the employer. The demand for regulation of works made in the course of employment emerged in the 1950s. In a society, where the work of laborious people is placed on a pedestal, it is necessary to regulate the legal standing of works made in the course of employment. As a first step, the provisions of the Commercial Code were supplemented with a ministerial decree in 1951,<sup>85</sup> which required publishing contracts to include royalties and made

<sup>81</sup> DEZSŐ ALFÖLDY, A MAGYAR SZERZŐI JOG [THE HUNGARIAN COPYRIGHT LAW] 172 (1936).

<sup>82</sup> A Magyar Királyi Kúria [Judgement of the Hungarian Royal Curia] P. I. 1684/1934. sz. ítélete, XXVIII in GRILL-FÉLE ÚJ DÖNTVÉNYTÁR 1934-35 [NEW CASE BOOK OF GRILLS 1934-35] 251 (Béla Téry ed., 1936).

<sup>83</sup> ALFÖLDY, *supra* note 81 at 23.

<sup>84</sup> Palágyi was the Legal counsel of the Association of Hungarian Lyricists, Composers and Music Publishers collective management organization (nowadays Artisjus) RÓBERT PALÁGYI, A MAGYAR SZERZŐI JOG ZSEBKÖNYVE [POCKETBOOK OF THE HUNGARIAN COPYRIGHT LAW] 105–106 (2 ed. 1959).

<sup>85</sup> AZ ÍRÓI MŰVEK KIADÁSÁRÓL SZÓLÓ 98/1951. (IV. 21.) MT RENDELET [DECREE ON THE PUBLISHING OF LITERARY WORKS]; A KIADÓI SZERZŐDÉSEK FELTÉTELEIRŐL ÉS A SZERZŐI DÍJAKRÓL SZÓLÓ 1/1970. (III. 20.) MM RENDELET [DECREE ON THE TERMS OF PUBLISHING CONTRACTS AND ROYALTIES].

them valid up to four years (until 1996, then eight years until 1999), limiting the freedom of contract.

### 3.2.1. *The keynote study of János Batta*

The article of János Batta appeared in a law journal *Magyar Jog* in July of 1956.<sup>86</sup> Batta presented the Royal Curia's already cited decision about the inalienable nature of moral rights<sup>87</sup> and two further decisions of the Hungarian Supreme Court<sup>88</sup> about the remuneration of employees.<sup>89</sup>

In the first case, a professor had to submit his lecture notes to his institution in accordance with its bylaws. For these notes, he was not entitled to any additional remuneration such as royalties on top of his wage. Nevertheless, the notes were used by other schools as well, from whom the teacher could have claimed royalties. In the second case, the employed photographer took pictures for advertising purposes. In this case, the employee's task was to take photos of the employer's products, and therefore, it was self-evident that the pictures would be handed over to third parties. The photographer was aware of the purpose of the pictures at the time of the shooting, and consequently, he could not claim further royalties.<sup>90</sup>

In these two decisions, the dividing line between the copyrights of the employee and the employer was very sharply demarcated.

After reviewing the decisions, Batta defined four principles: moral rights are inalienable, the property rights of works made in the course of employment are assigned to the employer, the employer only gains economic rights falling within his/her sphere of interests, finally the employed author can only allow the use of his/her work to third parties with the employer's approval.<sup>91</sup>

### 3.2.2. *The debate of 1962*

The Hungarian Lawyers' Association organised a debate on the 13<sup>th</sup> of February 1962 with the participation of Hungarian civil and labour law specialists.<sup>92</sup>

In the view of Aurél Benárd, it is necessary to regulate the relationship between the author and the employer in socialist law, as more and more people create in

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<sup>86</sup> János Batta, *Munkaviszonyban álló szerzők szerzői joga [Copyright law of the authors in employment relationship]*, *MAGYAR JOG*, 210–212 (1956).

<sup>87</sup> The Supreme Court kept in force the decision of the Royal Curia on moral rights. *AZ LB ELVI TANÁCSÁNAK 1423/1952. (VI.20.) DÖNTÉSE [DECISION OF THE DOCTRINAL COUNCIL OF THE SUPREME COURT]*.

<sup>88</sup> Called Supreme Court of the (People's) Republic of Hungary between 1949-(1989)-2012

<sup>89</sup> BH 1956.875 [Court Decision], in *DÖNTVÉNYTÁR – BÍRÓSÁGI HATÁROZATOK 1953. OKTÓBER -1955. DECEMBER [CASE BOOK]* 210 (Kálmán Gézczy ed., 1956).

<sup>90</sup> Kálmán Gézczy, *BH 1956.959 [Court Decision]*, in *DÖNTVÉNYTÁR – BÍRÓSÁGI HATÁROZATOK 1953. OKTÓBER -1955. DECEMBER [CASE BOOK]* 210 (1956).

<sup>91</sup> Batta, *supra* note 86 at 212.

<sup>92</sup> Istvánné Hágelmayer, *Vitaülés a munkaviszony és a szerzői jog problémaköréből [Debate on the problem of employment relationship and copyright]*, *MAGYAR JOG*, 136–138 (1962).

employment.<sup>93</sup> Legislation of the time had to address the questions of whether copyright was to be assigned exclusively to the employer, if not, how particular rights could be divided, and whether the employee was eligible for further remuneration on top of his/her wages. According to Benárd, the answer to the first and third question is that moral rights had to be ensured for the employee as moral incentive, “*strictly speaking remuneration for works made in the course of employment must not be determined, since that would mean double compensation.*”<sup>94</sup>

He considered it self-evident that the employer’s rights prevailed only within his/her standard business activities, only the author can give permission for the use of the work to third parties, and only he can decide about the assignment of the economic rights. In spite of the fact that in principle the author’s moral rights were not infringed, in everyday life, both the right of divulgation and the right of integrity were infringed according to Benárd. In his opinion, it is not the employee, but the supervisor who decides whether a work is completed or not. In the same manner, the employer had the author, or if he/she was not willing, somebody else, make necessary changes to the work. Notwithstanding the above, the right of paternity enabled the relationship between the work and the author, or on the contrary, he/she could request anonymity in case he/she found the work to be distorted.<sup>95</sup> In his point of view, the law should provide for how a work could be used outside the employer’s sphere of interests similarly to inventions made in the course of employment.<sup>96</sup> He concluded his lecture with the problematic aspects of remuneration on top of regular wages: “*As a matter of fact, why do we pay for further use? Since the author does not do anything!*” In connection with this, he explained that wages compensate the employee for the work done and for the future use of the work. Nevertheless, if the work was used further and in other forms, then the original remuneration was not in balance with the work done. “*The author’s work satisfies societal needs, and therefore, he is given remuneration from society.*”<sup>97</sup>

During the debate, Róbert Palágyi suggested that the scope of the employer’s rights should be limited to 2-4 years, after which the copyright would be reassigned to the author. Many participants agreed with the introductory lecture in that the author was entitled to remuneration if “*the work outgrew the confines of the employment.*”<sup>98</sup>

The participants concurred with Benárd’s closing thoughts “*that a regulatory system should be formed, which encouraged members of society to create, and thus furthered the development of science, art and literature with the most suitable and most effective methods.*”<sup>99</sup>

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<sup>93</sup> Aurél Benárd, *Munkaviszony és szerzői jog [Employment relationship and copyright]*, MAGYAR JOG, 111 (1962).

<sup>94</sup> *Id.* at 112.

<sup>95</sup> *Id.* at 112–113.

<sup>96</sup> *Id.* at 114.

<sup>97</sup> *Id.* at 115.

<sup>98</sup> Hágelmayer, *supra* note 92 at 137.

<sup>99</sup> Benárd, *supra* note 93 at 115.

### 3.3. The codification of the HCA 1969

The third Hungarian Copyright Act III of 1969 (hereinafter HCA 1969) and its ministerial decree<sup>100</sup> regulated the legal standing of works made in the course of employment. Now it is examined how the individual issues, which emerged in the study and during the debate above, were codified.

#### 3.3.1. *Partial limitation of moral rights*

The ministerial justification of the bill boldly declared that the author's moral rights should not be infringed in the course of employment. *"The decrees pertaining to the use of works made in the course of employment shall not affect the moral rights of the author, thus the author shall have the right to claim authorship of the work, the right of paternity, the right for anonymity, or the right for protection against unauthorised use or distortion."*<sup>101</sup> According to the law, the author determined whether the work was completed or not, and he/she consented to the publication of the work by handing it over. After the handover, the employer has the right to dispose of the work: he/she decided about publication and adaptation as well.

#### 3.3.2. *Scope of employment*

It was only possible to apply the special decrees pertaining to employment under strict conditions. These decrees applied to works made in the course of employment only if the creation of the work was an employment duty of the author documented in written form—which could have been workplace regulations or direct written instructions—and if the employer was qualified in his/her business activities for the use of the work. The proof of the above was the employer's duty, since the employee-author was in a doubly exposed position.

#### 3.3.3. *Remuneration on top of wages*

In the judicial practice referenced during the debate, it emerged that double compensation could occur in the use of works made by employees and this should not be a goal to be followed. The HCA 1969 declared that a work made by an employee could be beneficial for the employer as well as society, thus it would be exploitation if the employee was not be eligible for further remuneration. The act allows for supplementary remuneration for the author in the case of use outside the business activities of the employer. To put it simply: if the employer's tasks did not cover contracting the right to use to third parties, the author was eligible for 60-80% of the royalties, or 10-30% in the case of software; if the employer's tasks did cover contracting the right to use to third parties, the author was eligible for a maximum of

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<sup>100</sup> Article 14 SZERZŐI JOGRÓL SZÓLÓ 1969. ÉVI III. TÖRVÉNY [HUNGARIAN COPYRIGHT ACT OF 1969] Article 11-12 Decree of the HCA 1969.

<sup>101</sup> *Indokolás a szerzői jogról szóló törvényjavaslatához [Ministerial justification of the bill on Copyright Law], in AZ 1967. ÉVI MÁRCIUS 19-ÉRE ÖSSZEHÍVOTT ORSZÁGGYŰLÉS IROMÁNYAI (1967.III.19–1971.II.10.) [PARLIAMENTARY DOCUMENTS], 351 (1979).*

60%, or 10% respectively. If the author was authorised and contracted the right to use to a third party, then he/she was eligible for the whole amount of the royalties.

The Supreme Court had to decide whether one of the dictionary editors of the Research Institute for Linguistics<sup>102</sup> or one of the members of the design team of a construction company<sup>103</sup> was entitled to royalties on top of his/her wages. The Court dismissed the claim in both cases, since the Institute published the volume in the dictionary case, and the construction company dealt with construction besides design. The employers used the works within their usual business activities in both cases.

### 3.3.4. *Relation between civil law and labour law*

It is also important to regulate the relationship between copyright law and labour law. Article 3 of the HCA 1969 solved this issue by stating that the Labour Code was decisive in questions pertaining to labour law in the absence of special copyright regulations. Thus the coordinative civil law relationship was decisive in copyright law as opposed to the superior-subordinate labour law relationship.

### 3.3.5. *The allocation of rights*

The legislature divided the author's economic rights between the employer and the employee. The employer gained the right to use only partially, since the work could only be used within his/her usual business activities. However, it was possible to interpret usual business activities in a way that the employer was qualified to use the work in another work made in the scope of his/her business activities. The employee is authorised to allow the use of the work outside the employer's usual business activities, although the act bound this to the employer's consent, which the employer could only deny on reasonable grounds.

The scope of this particular law was limited by further decrees defining the length of time according to work type after which the copyright was completely reassigned to the author. Moreover, the decrees defined the length of licensing contracts (e.g.: publishing contract) as well in a mandatory or dispositive way.

Mandatory regulations can help decide if the economic rights of authors formerly employed at state-owned companies, institutes or public institutions can still not be assigned to their former employers, i.e. use of works handed over before the 1<sup>st</sup> of September 1999 can only be requested from the author. On the other hand, employers had surely not gained rights to use in cases that were not regulated by the copyright laws of the time.

Hungarian regulations do not mention the relationship between works made in the course of employment and time of protection. The main message of this being that the *post mortem auctoris* principle was asserted (i.e. time of protection lasted 50 years

<sup>102</sup> BH 1968/10. No. 5833. [Court Decision], 4 in POLGÁRI JOGI DÖNTVÉNYTÁR - BÍRÓSÁGI HATÁROZATOK 1968-1970. [CIVIL LAW CASE BOOK] 24-25 (Béla Bardócz ed., 1972).

<sup>103</sup> BH 1974/11. No 432 [Court Decision], 6 in POLGÁRI JOGI DÖNTVÉNYTÁR - BÍRÓSÁGI HATÁROZATOK 1973-1975. [CIVIL LAW CASE BOOK] 31-33 (Károly Benedek ed., 1977).

after the death of the author, later it was increased to 70 years) despite the scope of copyright assignment.<sup>104</sup>

### 3.4. The provisions of HCA 1999

The prevailing copyright law expanded the special provisions analysed thus far to include other works made in similar legal relations,<sup>105</sup> and further strengthened the rights of the employer. In lack of any other agreement, the employer as the legal successor of the author receives the economic rights if the creation of the work is an employment duty of the author.<sup>106</sup> *“In case of works made in the course of employment, the employer gains not only the right to use, but becomes the owner of all economic rights, unlike in the previous copyright regulations.”*<sup>107</sup>

It is the employer’s duty to reach an agreement with the employee in writing concerning work tasks and remuneration, since the Labour Code<sup>108</sup> declares that the employment contract has to be in written form. The written form is not only important to exactly clarify the economic and moral rights, but also because of the power difference between the two parties in the course of employment.<sup>109</sup> The written agreement makes it possible for the parties to agree so that certain economic rights remain with the employed author contrary to the main regulation.

The new rights of the employer have to be interpreted restrictively, since if the employer gives permission to third parties for use or assigns economic rights connected to the work, the author is entitled to equitable remuneration.<sup>110</sup> Nevertheless, it is allowed to depart from this remuneration if it turns out from the collective agreement, internal regulation or company profile that the completed works are from the beginning meant to be passed on to a third party for further use.

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<sup>104</sup> It was not a work made for hire type of protection term like used in the United States.

<sup>105</sup> Article 30(7) HCA 1999, *supra* note 23 “The provisions relating to a work created as duty under an employment contract shall be applied *mutatis mutandis* if the work has been created by a person employed as a public or civil servant, a person belonging to the professional staff of the armed forces and police forces and being in active service, or a co-operative member employed under legal relations similar to those of employment relations.”

<sup>106</sup> Article 30(1) *Id.* “Unless otherwise agreed, the delivery of the work to the employer shall imply the transfer of the economic rights upon the employer as the legal successor to the author, provided that the creation of the work is the author’s duty under an employment contract.”

<sup>107</sup> SZJSZT-18/2004 HÍRSZOLGÁLAT EGYES ANYAGAINAK SZERZŐI, ILLETVE KAPCSOLÓDÓ JOGI VÉDELME ÉS A VONATKOZÓ SZERZŐDÉSEK [EXPERT OPINION OF THE HUNGARIAN COPYRIGHT EXPERT BOARD ON COPYRIGHT AND RELATED RIGHTS PROTECTION OF CERTAIN MATERIALS OF NEWS SERVICE AND CONTRACTS CONCERNED],

[http://www.sztnh.gov.hu/sites/default/files/SZJSZT\\_szakvelemenyek\\_pdf/szjszt\\_szakv\\_2004\\_018.pdf](http://www.sztnh.gov.hu/sites/default/files/SZJSZT_szakvelemenyek_pdf/szjszt_szakv_2004_018.pdf).

<sup>108</sup> Article 44, 23(1), 45(1) A MUNKA TÖRVÉNYKÖNYVÉRŐL SZÓLÓ 2012. ÉVI I. TÖRVÉNY [HUNGARIAN LABOUR CODE].

<sup>109</sup> Article 30(6) HCA 1999, *supra* note 23 “Legal statements made with regard to the work created by way of fulfilment of the author’s duty under an employment contract shall be laid down in writing.”

<sup>110</sup> Article 30(3) *Id.* “The author shall be entitled to fair remuneration if the employer authorises another person to use the work or assigns the economic rights relating to the work to another person.”

In such a case the salary already contains the appropriate remuneration.<sup>111</sup> In case of a dispute between the parties, the employer may demand the work to be handed over not on the basis of copyright, but of labour law.<sup>112</sup> According to judicial practice, the employer is authorised to change this work without the author's consent, thus the work can be modified by a colleague or it can be used in other works.<sup>113</sup> In case the author does not agree with the modifications or does not consent to the changes to the work, then he/she can only request anonymity, otherwise the author's right of paternity remains intact.

An important element of the regulation is that the author is still entitled to remuneration resulting from economic rights enforced by collective management organisations, such as private copy levy, reprographic levy, right of cable retransmission, public lending right and resale right.

This report tried to illustrate that several regulation can coexist and each of them is good in its own way. The first was based on the freedom of contract, but in the absence of a contract only judicial practice can show the contracting patterns. The second protected the author's interests; hence the copyright was temporarily divided between the employer and the employee. The present legislation has regard to the employer's investment and the employer is the owner of the most of economic rights.

In spite of the fact that the changes of the copyright regulation can be shown, it is increasingly difficult to find the rightholder because of the nationalisation of private publishing houses and film companies after 1948, the state companies in the period of socialism, then the privatisation or the liquidation thereof after the change regime in 1989.

#### 4. THE TRANSACTION COSTS OF WORKS MADE IN THE COURSE OF EMPLOYMENT

The economic effect of the diverse regulations can be considerable. As briefly discussed by Landes,<sup>114</sup> the Coase theorem can be applied to copyright in general

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<sup>111</sup> SZJSZT-09/2001 BANKJEGY-, ILLETVE PÉNZÉRME-KÉP SZERZŐI JOGI VÉDELME, FELHASZNÁLÁSA; A SZERZŐI JOGOK JOGOSULTJA [EXPERT OPINION OF THE HUNGARIAN COPYRIGHT EXPERT BOARD ON COPYRIGHT PROTECTION AND EXPLOITATION OF THE DESIGN OF BANKNOTE OR COIN; THE COPYRIGHT HOLDER],

[http://www.sztnh.gov.hu/sites/default/files/SZJSZT\\_szakvelemenyek\\_pdf/szjszt\\_szakv\\_2001\\_009.pdf](http://www.sztnh.gov.hu/sites/default/files/SZJSZT_szakvelemenyek_pdf/szjszt_szakv_2001_009.pdf); SZJSZT-14/2002 KÖNYVTÁRAK ÁLLOMÁNYGYARAPÍTÁSI TANÁCSADÓJÁNAK JOGI VÉDELME;

INTERNETES FELHASZNÁLÁSI JOGÁNAK GYAKORLÁSA [EXPERT OPINION OF THE HUNGARIAN COPYRIGHT EXPERT BOARD ON PROTECTION OF THE 'ADVISOR FOR LIBRARY ACQUISITION' AND EXERCISE OF THE MAKING AVAILABLE RIGHT],

[http://www.sztnh.gov.hu/sites/default/files/SZJSZT\\_szakvelemenyek\\_pdf/szjszt\\_szakv\\_2002\\_014.pdf](http://www.sztnh.gov.hu/sites/default/files/SZJSZT_szakvelemenyek_pdf/szjszt_szakv_2002_014.pdf).

<sup>112</sup> SZJSZT-09/2001, *supra* note 111.

<sup>113</sup> BH 1997.19 [COURT DECISION].

<sup>114</sup> William M. Landes, *Copyright*, in A HANDBOOK OF CULTURAL ECONOMICS, 106 (Ruth Towse ed., 2011).

and to works made within the scope of employment just as to any other property right. If transaction costs are sufficiently low, it does not matter for the efficient outcome who holds copyright originally. The party valuing copyright the most is going to acquire it after some bargaining. (Note that transaction costs can be saved if this party holds the right from the beginning.) Initial allocation of copyright becomes more important if transaction costs are higher, such as in the case of works with many contributors. The lawmaker should try to assign authorship to the party for which it is most valuable, i.e. where the rights would wind up in a bargaining process with zero or low costs.

The legal relationship between the parties, the types of works and the types of uses (e.g. rights) determine the authorship and the scope of assignment of rights. Hence the employer has to know what sort of creator he/she employs and what types of work will be created. The scope of assignment of rights depends on whether the employee is a programmer, a database administrator or a principal director. If the scope of the assigned rights is not clear, it can increase the transaction costs.

The inalienable moral rights and the unauthorised (in advance) unknown type of exploitation or unforeseen uses influence the search costs on the one hand and the bargaining costs on the other. For instance if a given work is in demand, the successors may request higher royalty for the previously unknown right of making available or e-lending. As Tows says "[an] overly strong copyright protection of one generation of authors and publishers imposes higher costs on the next due to search and information costs."<sup>115</sup>

This dubious position of the assignee affects the enforcement costs also. This can be illustrated with the *Turner v Huston* case<sup>116</sup> regarding moral rights. The movie *Asphalt Jungle* was shot in black and white by John Huston in 1950, which died in 1987. The initial owner of the copyright was the MGM studio, who acquired the film's rights as a work made for hire in the United States. By virtue of a merger with MGM, the Turner Entertainment Co. as a rightholder colorized the movie for broadcast in France in 1988. The heirs of Mr. Huston and others opposed the broadcast because they deemed it a violation of the author's moral right, due to the fact that the director had opposed colorization of his works during his life.<sup>117</sup> As the Court of Appeal emphasized, Mr. Huston expressed his esthetical conception himself clearly about his other famous film, *The Maltese Falcon*, when stated, "I wanted to shoot it in black and white like a sculptor chooses to work in clay, to pour his work in bronze, to sculpt in marble".<sup>118</sup>

Although the Court accepted that the defendant acquired all the rights of the cinematographic work in the United States, the moral rights were attached to the person of the creators of the movie hence they could not be transferred by the original contract. Therefore the creators were entitled to claim recognition and

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<sup>115</sup> Ruth Towse, *Creative industries*, in A HANDBOOK OF CULTURAL ECONOMICS 125–131, 130 (2 ed. 2011).

<sup>116</sup> *Turner Entertainment Co. v. Huston*, CA Versailles, civ. ch., December 19, 1994. in English Entertainment Law Reporter 3.1995.

<sup>117</sup> I.4. *Id.*

<sup>118</sup> III.9. *Id.*

protection in France.<sup>119</sup> This self-evident situation inflicted enforcement costs of at least 400,000 FRF<sup>120</sup> to the initial owner of the copyright 44 years after the conveyance and 200,000 FRF to the broadcasting company.

From a European perspective, where in general we cannot speak about a real work made for hire doctrine (except in the Netherlands) the transaction costs could be high. Suppose the employer and employee are involved in creating a copyrighted work, the employer values the copyright more than the employee does, and the law regards the employee as the author because he/she created the work.

The employer intends to pay only once for the same work, and get as many rights as he can to economize his/her costs.<sup>121</sup> If the initial employment contract does not have any copyright provisions, the parties make another contract which will include a term according to which the employee transfers the copyright to the employer. Referring to the above, the employer bears the financial risks, but cannot be the author or initial owner of the work. What is more, there exist moral rights which are inalienable. The parties can settle the exercise (or non-exercise) of moral rights only contractually—if they can—in a given legislation. This contract should include the question of claiming authorship versus anonymity, and the contingent conflicts between the right of integrity and translation/adaptation. If the employee cannot assign the unknown type of exploitation (new rights as broadcasting or making available to the public in the past) or unforeseen uses of the work to the employer, and in certain situations equitable remuneration (e.g. cable retransmission, rental) or fair compensation (like private copy levies) remains at the employee (like in Luksan case), these increase the transaction costs further.

According to Hardy, if the employer is the initial owner of the entire copyright, the unforeseen uses cannot be bargained over. This causes that the work made for hire situation is efficient, but the status quo is unequal and the employer can reap the windfall profit.<sup>122</sup> In a European context this uncertain gain strengthens the author as creator doctrine, thereby the employee-author or his/her heirs can bargain over the contractual relationship with the employer.

According to Coase “[i]t is always possible to modify by transactions on the market the initial legal delimitation of rights.”<sup>123</sup> Although the allocation of copyrights is not impossible by contract, this increases the costs. The harmonisation of regulations regarding works made in an employment relationship may augment the value of production in Europe.

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<sup>119</sup> III.6. *Id.*

<sup>120</sup> Ruling 6 *Id.* Present value: 120,000 \$.

<sup>121</sup> Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 JOURNAL OF LAW AND ECONOMICS, 245 (1979).

<sup>122</sup> I. Trotter Hardy, *An economic understanding of copyright law's work-made-for-hire doctrine*, WILLIAM & MARY LAW SCHOOL FACULTY PUBLICATIONS, 190-192 (1988).

<sup>123</sup> Roland H. Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS 1-44, 15 (1960).

## 5. CONCLUSION

The number of employment is convincing in the copyright industries. It is necessary to study what the share of employed creators is and whether the parties, the employer and the employee, have realized that the result of the work is to be regarded as creation. This creation is not just an object but different rights belong to it for a very long period.

The legal situation and the main regulatory approaches were identified in the first three chapters. As we saw the most Member States have author's right system in Europe. Either dualistic or monistic approaches are decisive in a given country, the legislation proceeds from the creator as author doctrine. While the European Union legislature regarding some functional types of work (e.g. software, database, and collective works) allowed that legal persons become the author or the initial owner of the copyright, in the case of cinematographic works the European Union differed from the possibility which was granted by an international convention. The CJEU took a stand on the authorship of natural persons – or at least in the case of the principal director – on the grounds of property as a fundamental right.

The direction of the European Union legislature regarding the authorship and work made in employment relationship is given. The CJEU continues the harmonisation of the European copyright law by interpretation, and we hope that the European Union will restart its legislative process after some pause. According to the reasoning of the Court in the *Luksan* case, member states may lay down a rebuttable presumption of transfer of exploitation rights in favour of a third party such as a producer, or an employer. So despite the fact that early employee-made-software provisions were not followed by others – namely this regulation was left to the discretion of the Member States as a recommendation – this presumption of transfer of economic rights can serve as the pattern of a harmonisation.

Notwithstanding significant part of the creators are self-employed persons, the contracting parties have to pay attention to the chain of title. If there is a lack of assignment in the chain between the author-employee and the employer or the self-employed subcontractor and the general contractor, not the whole copyright will be transferred, and they have to allocate the rights afterwards with modification of a contract or with a new contract which causes further costs.

The diverse legislation throughout the European Union is chaotic from the employer's perspective who wants to hire authors from different European countries. The employer acquires different rights from different employees who make the same type of creative work. This can cause – in a long term – different transaction costs on the top of wages. We hope that the European Union legislature will take into consideration the aspects analyzed in this study.