Chapter 12
License Contracts, Free Software and Creative Commons in the Hungarian Law

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Abstract The Hungarian Copyright Act (HCA) includes a separate chapter on the terms of license ("use") contracts. The provisions of the HCA serve as *lex specialis* against the background of general and special rules of contract law codified by the Hungarian Civil Code (HCC). From a historical point of view, the birth of software as a new type of protected work encouraged the reform of copyright contract rules. Nevertheless, the HCA does not contain specific rules on FOSS and CC licenses. It has certain rules on non-written (oral) contracts, introduced especially for these types of licenses entering into Hungarian legal practice. Both pieces of legislation mentioned above apply in relation to FOSS and CC licenses.

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General Information on FOSS and Alternative Licensing

Rules Applicable to License Contracts in General

The Hungarian Copyright Act (HCA) [1] includes a separate chapter on the terms of license ("*use*") contracts.[2] These provisions serve as lex specialis compared to the general and special rules of contract law codified by the Hungarian Civil Code (hereinafter referred to as the 'Old HCC').[3]

Special Provisions on FOSS or Other Alternative Licenses

Neither Hungarian civil law, nor the copyright law contains any special provisions on FOSS or other alternative license. However, the HCA contains some special contract rules related to software licenses.

Reported Case Law on FOSS or Other Alternative Licenses

A search of the official website of the Hungarian judiciary through which one may access all higher court decisions did not return any results for FOSS or Creative Commons licenses. Nevertheless the Council of Copyright Experts has given some opinions on contracts related to open source software.[4]

[1] Act LXXVI of 1999.

[2] See: Art. 42–55 of the HCA. Interpretation of the Act see in P Gyertyánfy (ed.), *Nagykommentár a Szerzői jogi törvényhez* (Budapest, Complex Kiadó, 2014); Á Dudás, *A szoftver Szerzői jogi védelme I–II.* (Iparjogvédelmi és Szerzői Jogi szemle 2005/2–3.); G Faludi, *Az új Ptk. hatása a szerzői jogi és iparjogvédelmi jogátruházási szerződésekre.* [A Pogácsás, *Quarendo et Creando – Ünnepi kötet Tattay Levente 70. születésnapjára* (Szent István Társulat, Buadpest, 2014.)]; E Telek, *A szoftver felhasználási szerződések elmélete és gyakorlata, avagy a végfelhasználók és szoftvergyártók háborúja* (Inkommunikáció és Jog, 2008/27.); E Telek, *Lex Informatica, led Licentia. Alternatív szerzői jog?* (Infokommunikáció és Jog, 2011/5.)

[3] Act IV of 1959. The Hungarian Parliament adopted a new Civil Code in 2013 (Act V of 2013) that has come into force on 15 March, 2014. (Hereinafter referred to as: New HCC.)

[4] The Council's functions are regulated by 156/1999 (XI.3) *Korm.rendelet a Szerzői Jogi Szakértő Testület szervezeté ről és működéséről*. The Council's main task is to offer legal opinions on copyright related questions raised by courts, other authorities or private parties [Art. 1(1)]. The Council has the power to provide expert opinions on matters related to any copyright, neighboring right or sui generis database dispute, further in respect of any uses of economic rights [Art. 1(2)-(3)]. The chair of the Council designates the panel that gives the expert opinion. The Council panel generally consists of three experts. The chair is often a distinguished copyright lawyer, the Rapporteur a copyright lawyer with special expertise on the legal issue raised before the council, and the third panelist is either another copyright lawyer or, where necessary, a person with professional experience relating to the legal issue (i.e. an architect in the case of a copyright-related issues pertaining

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Jurisdiction-Specific Standard Licenses for FOSS or Other Content

There are no jurisdiction-specific licenses available in Hungary.

Contract Law

Contracts or Unilateral Instruments (e.g. Waiver)

Under the general principles of the law of obligations, "*a contract constitutes an obligation to perform services and an entitlement to demand such services*".[5] When read together with the second sentence of Art. 199(1) of the Old HCC ("unless otherwise provided by law, the provisions on contracts shall be duly applied to unilateral statements")[6] it can be stated that FOSS licences are to be construed as contracts. The new HCC does not modify this approach.

FOSS and Alternative Licenses as Contracts

Offer and Acceptance

Under the Old HCC "*contracts are concluded upon the mutual and communicated expression of the parties' intent*".[7] This means that according to the Hungarian Civil Law, the dissemination of a program under a FOSS license shall be deemed as a contractual offer (rather than an invitation to treat), and the download and use of the program by the user, and the acceptance of the terms and conditions of the license, shall be deemed as an acceptance of the offer. Accordingly, the user (person "B" in the above example) is not obliged to contact the rightholder (person "A"), if he/she "*communicates*" his/her intention to enter the contract by clicking on the "*agree*" icon.[8]

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to plans and buildings). For cases that raise particularly difficult or significant legal issues, the panel might include five panelists. For less difficult issues, it is possible to designate only one Rapporteur [Art. 6(1)-(1a)]. The Council is not allowed to review and decide on facts, instead it must rely upon the documents submitted and questions raised to it by the authorities or parties. It might request, however, the submission of further information where necessary [Art. 8(1)].

[5] Old HCC, Art. 198(1). New HCC Art. 6:58.

[6] The new HCC gives general rules on legal statements which shall be applied to contracts and unilateral statements.

[7] Old HCC, Art. 205(1). New HCC Art. 6:63.

[8] On the offer or invitation to treat distinction see in the Hungarian literature: T Kadner Graziano and J Bóka, *Összehasonlító szerződési jog* (Budapest, Complex Kiadó, 2010) 97–143. Compare to

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Consideration Requirement

The Old HCC stresses that "*unless the contract or the applicable circumstances explicitly indicate otherwise, consideration is due for services set forth in the contract*".[9] According to this, in respect of free FOSS, the payment is not a prerequisite to the foundation of a valid contract.[10]

Formal Requirements

The Old HCC provides the general set of rules on formalities for contracts. According to these provisions:

> Art. 216 (1) A contract may be concluded either verbally or in writing, unless otherwise provided by legal regulation. The intent to conclude a contract can also be expressed by conduct that implies such intent.
> (2) Failure to make a statement, if it is not implicit conduct, shall be deemed as acceptance only if legal regulation has so prescribed or the parties have so agreed.
>
> Art. 217 (1) A legal regulation may prescribe definite forms for contracts. A contract concluded in violation of formal requirements shall be null and void, unless otherwise provided by legal regulation.
> (2) A form stipulated by the parties shall be a condition to the validity of a contract, if the parties have expressly agreed. In such cases, the contract shall become valid by acceptance of performance or partial performance, even if no formal requirement had been stipulated.
>
> Art. 218 (1) If a written form is prescribed by legal regulation or an agreement, at least the essential content of the contract must be put in writing.
> (2) If a written form is prescribed by legal regulation and the contracting party is illiterate or is unable to write, a public document or a private document with full probative force shall be required for the validity of the contract.
> (3) If the validity of a contract is tied to a definite form determined by legal regulation or the agreement of the parties, termination or dissolution of the contract concluded in such form shall also be valid only in the specified form. Termination or dissolution of the contract by disregarding the specified form shall also be valid, if the actual state of affairs conforming thereto has been established through the mutually agreed intent of the parties.[11]

The general rules on license contracts are found in the HCA. The basic formal requirement is codified in Art. 45(1). According to this provision, "*unless otherwise provided by this Act, use contracts shall be put in writing*." The decision in BH1994.129, which was handed over before the introduction of the current HCA (however, the same provision was found in the previous HCA and therefore the rationale of the decision is still valid) confirmed that in cases where the HCA

Art. 216(2) of the Old HCC as well (see further below).

[9] Old HCC, Art. 201(1). New HCC Art. 6:61.

[10] On the issue of consideration see in the Hungarian literature: Kadner Graziano and Bóka: *ibid* at 145–204.

[11] New HCC Art. 6:7 and 6:70.

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requires the conclusion of the contract in writing, failure to satisfy this element leads to an invalid contract. Consequently, Art. 45(1) of the HCA is an "*ad validitatem*" provision of the statute.

The courts have confirmed that where parties do not put their oral agreement for the production of a motion picture into writing, the agreement shall be void due to a breach of formal requirements.[12] On the other hand, it has been held that the lack of written agreement may not impede a liability claim for the payment of license fees.[13] Should the parties start to perform under a contract that later turns out to be invalid due to a lack of formalities, courts may declare the contract valid until the day on which the court decision is handed over and the parties may still opt to conclude a valid contract for the future.[14]

FOSS is usually made available over the internet. The HCA stipulates that in cases where a work has been made available via the internet, "*the use contract shall be deemed to have been made in writing if the author has granted additional use rights for the works in question in a contract negotiated and executed by way of electronic means.*"[15] This means that the use contract is valid notwithstanding the absence of a paper version of the agreement. It is also possible that FOSS is made available on physical data carriers. In this case, the HCA provides that in the case that "*copies of the software [...] are procured in the course of commercial distribution, it is not obligatory to put in writing a contract relating to the use of the software.*"

To conclude, under the basic requirements of the HCC and HCA, the use contract for FOSS shall be put into writing, except in respect of the commercial distribution of physical copies. Where FOSS is made available via the internet, a "*clickwrap license*" is formally valid in accordance with HCA Art. 45(3). Where the author did not grant additional use rights in respect of works made available via the internet, the contract shall be deemed formally invalid. In the latter case, however, if parties start performance, the license might still be declared valid by courts. Further, in the case of any dispute, courts can freely interpret the content of the contract, and may base their decision upon the facts before them.

Alternative Licenses as Standard Terms and Conditions

FOSS licenses clearly meet the definition of standard terms and conditions set out under the Old HCC. Under Art. 205/A(1) "*any term that has been drafted in advance by one of the parties in the context of a pre-formulated standard contract, that the other party has therefore not been able to influence the substance of the terms, and*

[12] *Decision no. 4.P.20.188/2010/7* of the County Court of Győr-Moson-Sopron.

[13] *Decision no. Pf.V.20.167/2011/4* of the Court of Appeals of Győr.

[14] See especially *BH1994. 22, BH1994.24, BH1994.129* or *BH1994.249*. The previous HCA served the legal basis for these decisions; however, the relevant provision was codified into the current HCA without any significant change.

[15] HCA Art. 45(3).

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that has not been individually negotiated, shall be construed as a standard contract condition".[16] The Old HCC includes several provisions related to the use of standard terms and licenses.

Art. 205/B (1) Contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance.
(2) The other party shall be explicitly informed of any standard contract conditions that differ substantially from the usual contract conditions, the regulations pertaining to contracts, or any stipulations previously applied by the same parties. Such conditions shall only become part of the contract if, upon receiving special notification, the other party has explicitly accepted them.

Art. 205/C
If a standard contract condition and another condition of the contract differ from one another, the latter shall be integrated into the contract.

Art. 207 (1) In the event of a dispute, the parties shall, in light of the presumed intent of the person issuing the statement and the circumstances of the case, construe statements in accordance with the general accepted meaning of the words.
(2) If the meaning of a standard contract condition or the contents of a consumer contract cannot be clearly established by the application of the provisions set out in Subsection (1), the interpretation that is more favorable to the consumer or to the party entering into a contract with the person imposing such contractual term or condition shall prevail.[17]

FOSS Licenses Drafted in English Only

The Old HCC does not preclude parties from concluding the contract in English. Drafting in Hungarian is not a prerequisite for contracts to be valid under Hungarian Civil Law.

Special Rules of Interpretation for License Contracts

The general rules of interpretation in civil law sound the following:

Art. 207(1) In the event of a dispute, the parties shall, in light of the presumed intent of the person issuing the statement and the circumstances of the case, construe statements in accordance with the general accepted meaning of the words.
(2) If the meaning of a standard contract condition or the contents of a consumer contract cannot be clearly established by the application of the provisions set out in Subsection (1), the interpretation that is more favourable to the consumer or to the party entering into a contract with the person imposing such contractual term or condition shall prevail.

[16] *See also* New HCC Art. 6:77.

[17] New HCC Art. 6:81.

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(3) The interpretative provision referred to in Subsection (2) shall not apply with respect to any contractual terms or standard contractual conditions contested in proceedings opened according to Section 209/B or Subsection (5) or (6) of Section 301/A.
(4) Should a person waive his rights in part or in full, such a statement cannot be broadly construed.
(5) The parties' secret reservations or concealed motives shall be immaterial with regard to the validity of the contract.
(6) A false contract shall be null and void, and if such contract is intended to disguise another contract, the contract is to be judged on the basis of the disguised contract.[18]

The basic approach to interpretation in civil law is the grammatical one. Under this approach, the general meaning that the other (receiving) party might perceive from the issued statement shall be given to the word in question.

Art. 207 is discussed by courts in details. The following decisions may have some relevance in respect of copyright law.

According to the decision in BH2009.207, when interpreting a contract, courts must pay attention to the antecedents of contracting and the behavior of the parties following the conclusion of the agreement, in addition to the precise written document or oral statements. The above statement is not precisely applicable in copyright cases, where written documents might be only accepted as contracts, except where the HCA explicitly allows an exception to it. Notwithstanding the above, a teleological interpretation shall have importance when deciding on the meaning of phrases used or when determining the possible scope of the use contract.

This is clearly evidenced by the decision in BH2006.114. In this case, a publisher with Hungarian-American nationality and an American author signed a contract to transfer the author's right to publish in respect of any works that were already published or that were available as manuscripts. The agreement stipulated that the publisher had a right to distribute the works in Hungarian and in Hungary as well. The author later granted a right to publish her individual works to other publishers in Hungary. The original publisher sought protection in Hungary in respect of those works she had published in Hungary, claiming that the later contracts were invalid, since the original contract transferred copyrights to her exclusively. The Supreme Court stressed that "*it has to be decided through the interpretation of the contract, whether the plaintiff [the original publisher] has received an exclusive right to use. The disclosure of the will of the parties at the time of the conclusion of the contract, the evaluation of statements made by the parties after the conclusion of the contract, ultimately the balancing of the whole documentation [needs to be discussed]*". The former HCA did not prohibit the grant of an exclusive license; however, it required the parties to explicitly stipulate the exclusivity of the contract. The parties did not meet this requirement in the actual case. The court therefore decided that the "*transfer of rights*" (that would inevitably lead to exclusivity on behalf of the successor) was to be deemed only as a "*non exclusive use contract*".

BH2005.102 confirms that contracts shall be evaluated in light of their content and the rights and duties that the parties stipulate, rather than the exact name that

[18] On the substantively similar provisions of the New HCC see: Art. 6:86–87.

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they give to their agreement. The issue in this case concerned the change of an employment contract into a service contract. Similarly in a case concerning copyright, even though the defendants "*assigned*" their economic rights to the plaintiff, they could not effectively transfer these rights under law.[19] Furthermore, it was held in a different case that where parties had contracted to transfer their claims for the unpaid license fees and damages, the agreement was not to be considered a use contract.[20] Finally, a contract for the production and installation of a computer program, along with education for its use, was deemed to be a software use contract, rather than a supply contract, since the special rules on software were found in the HCA, rather than the HCC.[21]

In addition to the above general rules of civil law, the HCA specifically stipulates that "*if the contents of a use contract cannot be clearly interpreted, the interpretation that is most favorable for the author must be accepted.*"[22] This provision means that the party other than the author needs to express her intent as precisely as possible. Any ambiguous terminology in the contract will be resolved in favor of the author's point of view in case of any dispute. This basic principle seems to be in conflict with the rule on the interpretation of standard terms and conditions found in the Old HCC which holds that, in the case of any dispute, the interpretation given should favour the party who did not participate in the formulation of the terms and conditions (i.e. the user).

Related to the rules of interpretation found in the HCA, there are several other provisions that stress a restrictive interpretation of the terms and conditions of use contracts.

> Art. 43 (1) Use contracts grant exclusive rights only if it is expressly stated.
> (4) In the absence of legal or contractual provisions to the contrary, a license to use a work includes the territory of Hungary and its duration will be based on the customary duration in contracts concluded for the use of works similar to the work forming the object of the contract.
> (5) Should the contract fail to indicate the means of use to which a license pertains or the licensed extent of use, the license will be limited to the means and extent of use that are indispensably necessary for implementing the purpose of the contract.
> Art. 44 (1) A use contract in which an author grants a license for the use of an indefinite number of future works is null and void.
> (2) No license can be validly granted for a means of use that is unknown at the time a contract is concluded.
> Art. 47 (1) A license to use a work includes the adaptation of a work only if it is expressly stipulated.
> (2) A license to reproduce a work permits the user to fix the work in a video or phonogram or to copy it by way of computer or onto electronic data media only if it is expressly stipulated.
> (3) A license to distribute a work shall permit the user to import copies of the work in order to distribute or market them only if it is expressly stipulated.

[19] *Decision no. 21.P.22.998/2006/24* of the County Court of Pest.

[20] *Decision no. 8.Pf.20.034/2009/6* of the Court of Appeals of Budapest.

[21] *Decision no. 3.Pf.20.032/2010/3* of the Court of Appeals of Budapest.

[22] HCA Art. 42(3).

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(4) A license to reproduce a work shall, in case of doubt, include distribution of the reproduced copies of the work. This does not pertain to the importation of copies of the work into the country in order to distribute or market them.

Promulgation of Revised Versions of FOSS and Other Alternative Licenses

The rightholder has the right to unilaterally amend the standard terms and conditions of the FOSS license. However, any modification shall bind the user only if the rightholder informs the user about the changes and the latter accepts them expressly. Compare this with the following provisions set out in the Old HCC:

Art. 205 (2) Where any party claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. This provision shall also apply where there is no agreement between the parties as to whether a contractual term that has been drafted in advance by the party entering into a consumer contract with the consumer had been individually negotiated or not.

Art. 205/B (1) Contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance.
(2) The other party shall be explicitly informed of any standard contract conditions that differ substantially from the usual contract conditions, the regulations pertaining to contracts, or any stipulations previously applied by the same parties. Such conditions shall only become part of the contract if, upon receiving special notification, the other party has explicitly accepted it.

Art. 240 (1) Unless otherwise provided by legal regulation, the parties shall be entitled to amend the content of a contract by mutual consent or change the legal title of their commitment.[23]

Disclaimers of Warranty and Liability

The Old HCC forbids the exclusion of liability in only a few situations. See especially:

Art. 314 (1) Liability for a breach of contract damaging life, physical integrity or health that has been caused willfully, by gross negligence, or by a felony offense cannot be validly excluded.
(2) Unless otherwise prescribed by law, liability for breach of contract shall not be excluded or restricted, unless the disadvantage incurred thereby can be offset by the adequate reduction of the consideration or by some other advantage.[24]

[23] New HCC Art. 6:191.

[24] New HCC Art. 6:152.

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Since free and open source software are usually offered by its creators for free the above provision – that speaks about the reduction of the consideration rather than the exclusion of it – does not have any effect upon FOSS. On the other hand Art. 314 says that the liability might be excluded, if the disadvantage is balanced through the reduction of the original consideration (that is the original contract included some provision on payment).

Automatic Termination of Licenses

Since the contract of parties is valid, the above term of any FOSS license (i.e. automatic termination on violation of terms) shall be deemed enforceable by courts. According to the knowledge of the national reporters, however, no court decision has been published on this issue yet.

Copyright Law

Mere Use of a Program Without a License

The installation of software is typically essential to its use (except in cases where software is offered/run via the cloud). Installation involves the making of a reproduction (copy) of the program in the memory of a computer. This means that the single act of installation leads to "*use*" of the program. Any other use shall be deemed legal only if (1) the specific economic right affected by the act of the user is included in the use contract; (2) the specific use – not included in the contract – is "*indispensably necessary for implementing the purpose of the contract*"[25]; (3) the use shall be deemed as free use (related to any copyrighted subject matter[26]; or specifically to software[27]); or (4) the FOSS provider offers access to the software voluntarily without requiring the user to sign any license contract.

Interpretation of Broad and Unspecific License Grants

According to Art. 43(5) of the HCA, "*should the contract fail to indicate the means of use to which a license pertains, or the licensed extent of use, the license will be limited to the means and extent of use that are indispensably necessary for*

[25] Compare to HCA Art. 43(5), see further section "Interpretation of Broad and Unspecific License Grants".

[26] Compare to HCA Art. 33–41.

[27] Compare to HCA Art. 59–60, see further section "Interpretation of Broad and Unspecific License Grants".

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implementing the purpose of the contract." Art. 47(3) of the HCA stresses that "*a license to distribute a work shall permit the user to import copies of the work in order to distribute or market them only if it is expressly stipulated.*" This means that in the absence of a clear reference to the making available to the public right by the use contract, the latter right will not be covered by the distribution right[28]

Under Hungarian copyright law, parties are not required to delineate all possible ways in which the work may be utilized, and consequently ambiguous terminology does not necessarily lead to the invalidation of terms. However, improper formulation inevitably gives rise to the need for interpretation of the contract.

In respect of software, several further special provisions based upon the law of the EU grant users specific rights:

> Art. 59 (1) Unless otherwise agreed, an author's exclusive rights do not cover reproduction, alteration, adaptation, translation, or any other modification of the software – including the correction of mistakes – as well as the reproduction of the results of these acts in so far as the person authorized to acquire the software performs these actions in accord with the intended purpose of the software.
> (2) Use contracts cannot prohibit users from making back-up copies of software if it is necessary for use.
> (3) Persons authorized to use copies of software are entitled, without the author's authorization, to observe, study and test the functioning of the software and make a trial use thereof in the process of loading, displaying, running, transmitting or storing the program in order to determine the ideas and principles underlying the software.

See further Art. 60 on reverse engineering.

Modes of Using a Work Unknown at the Time of the License Grant

Art. 44 (2) of the HCA clearly answers the above issue:

> No license can be validly granted for a means of use that is unknown at the time a contract is concluded. However, a method of use that comes into being after a contract is concluded is not to be considered a means of use that is unknown at the time the contract was concluded if it merely makes it possible to implement previously known means of use more efficiently, under more favorable conditions, or with better quality.

[28] For some similar provisions see further HCA Art. 47(1)-(2), (4):

"(1) A license to use a work includes the adaptation of a work only if it is expressly stipulated.
(2) A license to reproduce a work permits the user to fix the work in a video or phonogram or copy it by way of computer or onto electronic data media only if it is expressly stipulated.
(4) A license to reproduce a work shall, in case of doubt, include distribution of the reproduced copies of the work. This does not pertain to the importation of copies of the work into the country in order to distribute or market them."

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Direct License or Sub-license

Granting a sub-license is possible under Hungarian copyright and civil law, however, no special provisions exist in relation to the situation as described above.

Revocation or Rescission Rights in Copyright Legislation

The general rules on revocation of use contracts[29] does not have any meaningful relevance in respect of FOSS, because for example the revocation rules only apply to "*licenses of exclusive use*",[30] or since FOSS use contracts rarely involve debates on moral rights.[31] Art. 52–53. provide for specific rules on revocation of use contracts that might be applicable for FOSS as well. According to these:

> Section 52
> (1) If a use contract for works to be created in the future is concluded in such a manner that the future works are designated only by genre or type, either party may abrogate the contract with a six months' notice after the lapse of five years and every five years thereafter.
> (2) Authors may not waive the right of abrogation described in Subsection (1) in advance.
> Section 53
> (1) An author may abrogate a use contract for good cause if he revokes the license to communicate his work to the public or if he forbids the further use of a work that has already been communicated to the public.
> (2) Exercising the right of abrogation is contingent upon the author providing collateral security to compensate for any damage that might have occurred prior to the time at which the statement was made.
> (3) If, following abrogation of a use contract on the grounds stipulated in Subsection (1), an author again wishes to authorize communication of his work to the public or continued use of the work, the previous user shall have the right of preemption.
> (4) The rules governing the right of first refusal regarding purchases shall apply to the right of preemption.

Further, parties to the contract may deviate from the general set of rules envisaged by the HCA.[32] This necessarily means that FOSS providers can include almost any terms and conditions into the contract that do not explicitly contradict the HCA or the HCC.

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[29] HCA Art. 51(1)-(5); Art. 53(1)-(4).

[30] Art. 51(1) HCA.

[31] Compare to Art. 53(4) HCA on the revocation of the author's permission to the communication to the public of the work covered by the licence.

[32] HCA Art. 42(2).

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Author's Statutory Right for Equitable Remuneration

Art. 16 (4)-(5) of the HCA stipulates that "*(4) Unless otherwise stipulated in this Act, authors are entitled to remuneration in return for granting permission to use their works. Remuneration must be in proportion to the income in connection with the use, barring any agreement to the contrary. Entitled persons must make explicit statements in order to waive remuneration. If the law requires a specific form for the validity of use contracts, the statement concerning the waiver of remuneration is also valid only in the specific form. (5) In the cases as specified by this Act, remuneration shall be due to the author for the use of his work even if he has no exclusive right to authorize the use. The law may exclude the right to waive such remuneration, and should such provision fail to obtain, the author may only waive the remuneration by an express representation to that end (equitable remuneration).*"

Related to the Art. 16 (4), Art. 42 (1) of the HCA stresses that "*authors grant licenses for the use of their works on the basis of use contracts, and the users are obliged to pay remuneration in return (royalty)*".

In relation to the Art. 16 (5) it can be said that in most cases the HCA prevents the waiving of such remuneration; such waivers are invalid. In general, the rightholders cannot waive, for example, the private copy remuneration, the resale right royalty etc. However most of these equitable remuneration rules are not applicable to software.

All this means that FOSS providers are entitled to receive royalties from the users of their software, however, they have the right and freedom to opt for the free sharing of their software. In case the waiver of the royalty is explicitly stated by the FOSS provider, this latter statement will not contradict the basic principle of due remuneration envisaged by Art. 16 and 42.

Participation in the Distribution of Revenues by Collecting Societies

There is no clear answer to this topic, mainly because software related issues are not affected by collective rights management (CRM) in Hungary. Theoretically, if there were any CRM in respect of any exclusive right of software producers, double exercise of the same right would not be possible. If the CRM organization had the right to manage (collect and distribute) private copying remuneration, then FOSS providers would not have the right to do the same on their own. Notwithstanding the above, any exclusive right (like adaptation) that would not be included in the CRM could be exercised by the FOSS providers individually.

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Right to Modify and Moral Rights

The fact that the alternative licenses were developed in common law countries is clearly mirrored by their limited treatment of moral rights related to the software. Moral rights included in the Berne Convention and granted by the domestic copyright statutes generally forbid users to usurp works of authorship, including software and FOSS as well.

The HCA has recently been modified by the Hungarian Parliament, and now regulates the right of integrity as follows:

> the moral rights of an author are violated by every kind of distortion and mutilation or any other alteration or any other misuse of her work that is injurious to the honor or reputation of the author.[33]

Act XVI of 2013 introduced the "*any other misuse of the work*" expression into the HCA by replacing the former term "*impairment*". There was no external pressure from the EU or any other organization, nor any domestic reason to justify this amendment. The new terminology is rather broad. Whilst the former expression expressly referred to some illegal or unethical activity, the neutral word "*misuse*" grants an almost unlimited power to the copyright holder to enforce her subjective intent. On the other hand, the latter terminology might be closer to the original text of the Berne Convention that – in the official English translation – mentions "*any derogatory action*" in the respective Article. This part of the Act has come into force on the 1st of November 2013.

In light of the above, any misuse of FOSS (including the unpermitted amendment of the software), and especially uses that are derogatory to the goodwill of the rightholder, may be actionable before the courts, even if the contract allows the right to modify the content of the program.

Remedies in Case of Termination of the Licensee's Rights

Licensors of FOSS shall be able to use all the remedies granted to any rightholders by the HCA in case of any infringement (non-compliance with the agreed terms and conditions is a typical infringement of copyright).[34] The HCA includes a right for

[33] HCA Art. 13.

[34] See especially HCA Art. 94(1):

"In the event that his rights are infringed the author may – in accordance with the circumstances of the case – lodge the following civil law claims:

(a) he may demand a court ruling establishing that there has been an infringement of rights;
(b) he may demand that the infringement of rights be terminated and that the infringer be enjoined to cease any further infringement of rights;
(c) he may demand that the infringer make amends for his action – by declaration or in some other appropriate manner – and, if necessary, that such amends should be given due publicity by and at the expense of the infringer;

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the author to apply for damages under the general terms of liability found in the HCC. Under the Old HCC, the well-known provision of Art. 339 (1) stipulates that "*a person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation.*" The above provision shall mean that compensation for damages is only due, if the user violates the law (breach of contract included) and causes damages. Under Art. 355(4) of the HCA "*compensation must be made for any depreciation in value of the property of the aggrieved person and any pecuniary advantage lost due to the damage as well as the indemnity or costs necessary for the attenuation or elimination of the material and non-material losses sustained by the aggrieved person.*" Although none of these provisions seem to be applicable in respect of any free/gratuitous license, the rightholder might nonetheless provide evidence to satisfy the requirements.

Other Aspects

Legal Disputes Based on Patent Claims and FOSS

The national reporters are not aware of any special patent dispute related to FOSS.

Trademark Conflicts Concerning FOSS

The national reporters are not aware of any special trademark dispute related to FOSS.

Copyleft Provisions and Competition Law

There are no public decisions related to this topic.

(d) he may demand that the infringer provide information on parties taking part in the manufacture of and trade in goods or performance of services affected by the infringement of rights, as well as on business relationships established for the use of the infringer;
(e) he may demand restitution of the economic gains achieved through infringement of rights;
(f) he may demand that the infringement be terminated, the antecedent state of affairs be restored, and the seizure of those assets and materials used exclusively or primarily in the infringement of rights, as well as of the goods infringing on the rights, or demand that they are delivered to a particular person, recalled and definitively withdrawn from commercial circulation, or destroyed."

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Public Procurement

There are no specific public procurement provisions relating to FOSS.[35] It might be important to emphasize that the public procurement system only applies to software that is purchased by public organizations subject to consideration. That is to say that "*free of charge FOSS*" will not be covered by this area of law.

There are specific public law regulations related to the in-house acquisition of computer programs. In-house acquisition is, however, not subject to public procurement procedure under Art. 9(1)k) of the Act on Public Procurement (Act CVIII of 2011).

Other Issues

No further issues need to be discussed.

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E Telek, *Lex Informatica, lex Licentia. Alternatív szerzői jog?* (Infokommunikáció és Jog, 2011/5.)

[35] You can find the English translation of the most important laws regulating public procurement in Hungary under the following link: http://kozbeszerzes.hu/nyelvi-verziok/hungarian-act-on-public-procurement/.

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