

Brussels, 8 June 2020

Subject: Opinion on the consultation proposal on the transposition of the Directive on Copyright and Related Rights in the Digital Single Market into Hungarian law, published by the Ministry of Justice and HIPO on May 7 2020

Dear Sir or Madam,

COMMUNIA is an international association incorporated under Belgian law whose mission is to foster, strengthen and enrich the Public Domain, including user rights created by limitations and exceptions to copyright. We have been actively involved in copyright reform advocacy, and followed closely the legislative process that led to the adoption of the Directive 2019/790.

This opinion is restricted to the implementation of the exceptions that allow uses for the purposes of caricature, parody or pastiche (Section §34/A).

Option B correctly implements Directive 2019/790

The consultation proposal published by the Ministry of Justice and HIPO on May 7 2020 includes the option to introduce:

- an exception allowing “anyone to use any work for the purposes of (...) parody by evoking the original work and by expressing humour or mockery” (Option A), or
- an exception allowing “anyone to use any work for the purposes of (...) creating a parody, caricature or pastiche” (Option B).

In our opinion, by recommending to omit the implementation of the caricature and pastiche exceptions, Option A fails to transpose correctly Directive 2019/790. On the contrary, Option B, by proposing to implement an exception allowing uses for parody, caricature and pastiche purposes, correctly implements the Directive.

Indeed, Article 17(7) second para. of Directive 2019/790 makes it mandatory for Member States to have in place exceptions that allow uses for the purpose not only of parody, but also caricature and pastiche.

Article 17(7) second para. provides that Member States “shall ensure” that, when a user uploads on the OCSSPs’ services user generated content containing third party content, the

user is “able to rely” on those “existing” copyright exceptions in “each Member State”. Recital 70 further clarifies that those copyright exceptions should “be made mandatory in order to ensure that users receive uniform protection across the Union”.

“Existing” refers to those copyright exceptions already contained in EU law, since both the quotation exception and the exceptions for purposes of caricature, parody or pastiche were already foreseen in Articles 5(3)(d) and (k) of the Information Society Directive; the only difference is that those exceptions were then optional (and thus were not implemented in all Member States) and are now mandatory for all Member States. In other words, Member States that have not yet implemented those exceptions, have to do so now.

The EU lawmaker gives a reinforced protection to these copyright exceptions due to their fundamental rights basis. Recital 70 clarifies that to allow users to rely on these exceptions “is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (“the Charter”), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property”.

This is aligned with the case law of the Court of Justice of the European Union (“CJEU”), according to which Member States have no discretion as to whether to implement or not the “optional” exceptions contained in the Information Society Directive that are aimed to observe fundamental freedoms enshrined in the EU Charter of Fundamental Rights. In the recent *Funke Medien*, *Spiegel Online* and *Pelham* decisions, dated as of 29 July 2019, the CJEU states that certain exceptions “may, or even *must*, be transposed by the Member States”, since those balancing mechanisms “must nevertheless find concrete expression in the national measures transposing that directive and in their application by national authorities” (See *Funke Medien*, para. 58; *Pelham*, para. 60; and *Spiegel Online*, para. 43.)

Option B ensures the effectiveness of the harmonisation of exceptions at EU level

Option B recommends to follow closely the language of the exception contained in article 5(3)(k) of the Information Society Directive, and to leave the interpretation of the concepts of parody, caricature and pastiche to the courts.

Implementing exceptions using language similar to that contained in the EU “prototypes” is the most effective way to ensure that Member States “arrive at a coherent application of these exceptions and limitations” and that there are no “direct negative effects on the functioning of the internal market of copyright and related rights”, which are the objectives of the EU lawmakers (see Recitals 31 and 32 of the Information Society Directive).

The fact that, in the past, Member States employed different wording or added further conditions to the application of the exceptions, narrowing down the scope of protection of those provisions, endangered the effectiveness of the harmonisation of copyright and related rights laid out by the Information Society Directive. That is why Article 17(2) second para. of Directive 2019/790 leaves no option to Member States but to implement the quotation exception and the exceptions for purposes of caricature, parody or pastiche foreseen in Articles 5(3)(d) and (k) of the Information Society Directive.

Option B takes full advantage of the policy space that is available to Member States

In addition to ensuring that the aforementioned exceptions and limitations are applied consistently, Option B also takes full advantage of the flexible wording of the parody, caricature and pastiche exceptions. Making use of the entire breathing space that is provided by the EU laws permits national courts to easily adjust to new and temporary circumstances and is, therefore, the only way to ensure that the national laws fully respect, at all times, the fundamental rights enshrined in the Charter.

Teresa Nobre

Vice-President
COMMUNIA International Association