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Copyright in motor vehicle spare parts from competition law perspective

I. Significance of copyright in the motor vehicle industry

Income of motor vehicle manufacturers has basically two sources. On the one part, it stems from the sale of new motor vehicles on the primary market and, on the other part, it stems from the sales of spare parts on the secondary market.¹ Importance of income generated on the secondary market has been increasing for the past decade as the fierce competition on the primary market compelled the manufacturers to reduce prices of new motor vehicles and therefore loss of profit can be offset only by the increased income from the spare part market where the competition is less intensive. This course was confirmed by the annual reports of the European Commission up to 2011 on the average car prices in Europe that used to show clearly how new car prices were continuously decreasing and, by contrast, how spare part prices were increasing.² As prices increase on the secondary market, so does the number of undertakings willing to enter the market of spare parts with their own products to compete with manufacturers of original spare parts. Hence manufacturers of original spare parts, in order to keep spare part prices high, try to squeeze independent spare part manufacturers out of the market by all lawful means.³ In doing so, they use their intellectual property rights also to keep competitors off the market and to compel repair shops to use their original products for replacement instead of cheaper replicas, reproductions and look-alike spare parts produced and distributed by these independent manufacturers.⁴ This course of conduct basically relates to all component parts, but mostly to body parts⁵ because sale of body parts forms the majority of spare part market. The reason for

¹ For a recent market analysis of European motor vehicle industry see *The European Automotive Aftermarket Landscape* (The Boston Consulting Group) <http://www.bcg.com/documents/file111373.pdf> (10 May 2014)

² European Commission, in its last report on car prices (IP/11/921), confirmed that new car prices at average kept on decreasing. Although it claimed also that 2010 was the first year when service fees for repair and maintenance did not increase, the spare part prices have still increased throughout a decade. See Eurostat HICP, CORCOP CP071, CP0721, CP0723; 2005-2013.

³ The motor vehicle manufacturers in Germany made a commitment in 2003 not to use industrial design protection to prevent the marketing of non-OEM visible parts. Cf. Opinion no. 12-A-21 of 8 October 2012 of the Competition Authority of France, pp. 195-200

⁴ If component parts were not protected properly on secondary markets, average prices for those parts concerned would likely fall. In this case, however, new motor vehicle prices would likely increase. Cf. Opinion no. 12-A-21 of 8 October 2012 of the Competition Authority of France, p. 6. See also Levin, Marianna: *Spare Parts and their Protection From a European Perspective*. In Monte Carlo Open Forum Papers, 1999. p. 4.

⁵ The term 'body parts' is used here in the meaning of bodyworks of a car including all visible components firmly connected thereto.

this is that replacement of damaged body parts causes less loss of quality and value than their repair would cause, even if the replacement itself is usually more expensive than the repair.

Manufacturers generally protect both their original parts and spare parts by registered design protection. This protection is not complete, however, because in many European countries⁶ the owner of a registered design shall not prohibit anyone from using the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance.⁷ This provision is actually based on Article 14 of Directive 98/71/EC that specifically aims at intensification of competition on the spare part markets.⁸ In addition, Regulation 6/2002/EC does not allow exclusivity for the exploitation of a community design in a component part of a complex product when that is used for the purpose of the repair of that complex product so as to restore its original appearance.⁹ Although these provisions breaking through the exclusive right to exploitation allow free use only in a narrow range, the manufacturers seek to protect their products as much as possible. There came, thus, copyright protection to supplement registered design protection. With regard to intellectual property rights, copyright is reasonable means of protection, even though protecting functional articles by copyright is far not typical.

Since copyright, similarly to registered design protection, generally provides exclusive right to exploitation, exercising this right may constitute a monopoly in terms of the copyright owner may reserve all rights of exploitation. It means, in practice, that it is nearly impossible to enter the spare part market of a specific make of car without the license of the owner of intellectual property rights.¹⁰ Thus, by decreasing intensity of competition, the copyright holder enjoying monopoly can keep prices high. Although it is, in effect, contrary to the increase of consumer welfare by its very nature, which is one of the major goals of competition law in Europe.¹¹ But nevertheless, if the copyright holder did not have exclusive right for the exploitation of the copyright work, it would take away the essence of copyright. By recognizing this dilemma, Advocate General Jacobs pointed out in his opinion in Oscar Bronner case¹² that exclusive intellectual property rights granted by the law for a limited period provides an incentive for research and development. In certain cases, however, that exclusivity may admittedly lead to permanent exclusion of competition. Particular care is required, therefore, in assessing conflicting interests in relation to refusal to license intellectual property rights. A couple of years later, Court of Justice of the European Union (CJEU) in confirming the opinion of Advocate General Tizzano in IMS Health case, ruled that “*in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers.*”¹³ It must be noted, in addition, that in Maxicar case the CJEU made a distinction between subsistence of an exclusive right and its exercise. It declared moreover, that “*the mere fact of securing the benefit of an exclusive right granted by law, the effect of which is to enable the manufacture and sale*

⁶ Cf. COM (2004) 582 (final) p. 4

⁷ Act XLVIII of 2001 on the Legal Protection of Designs, Sec 17 par (2)

⁸ COM (2004) 582. (final) pp. 3. and 10. In 2004, the Commission submitted its proposal for the harmonization of specific free use of designs on the secondary market, but in 2014 it withdrew the proposal.

⁹ Reg 6/2002/EC Art 110. The fact that this provision on free use was set out as a transitional provision clearly shows how complicated it was to come to an agreement on this.

¹⁰ Theoretically it is not impossible to enter the market with spare parts that are different from the original parts provided that they are technically interchangeable. However, repairers other than tuning shops hardly can introduce new designs into the market.

¹¹ Motta, Massimo: *Competition Policy. Theory and Practice*. Cambridge University Press, 2004. pp. 19-22.

¹² Case C-7/97 Oscar Bronner GmbH & Co v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others [1979] ECR I-07791, Opinion of AG Jacobs par 62. See also 2009/C 45/02. 75.

¹³ Case C-418/01 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004] ECR I-05039, Opinion of AG Tizzano, par 48.

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of protected products by unauthorized third parties to be prevented, cannot be regarded as an abusive method of eliminating competition.”¹⁴ However, the CJEU claimed also that “exercise of the exclusive right may be prohibited by Article 86 if it gives rise to certain abusive conduct on the part of an undertaking occupying a dominant position.”

As visible, exclusivity in exploitation of intellectual property rights such as copyright is literally capable to distort the competition, and so to harm consumer welfare. But on the other hand, elimination of that exclusivity would harm the interest of authors and would discourage undertakings from investing in development. Interests, thus, constitute a triangle, where exclusivity on the benefit of the author, consumer welfare in relation to economical supply of replacement spare parts and competition law protecting the market are conflicting apparently.¹⁵

II. Landmark cases in the United Kingdom (Ford Motor Co Ltd and BL v Armstrong)

Although copyright in motor vehicle body parts has never resulted in noteworthy litigation in Hungary so far, it happened two times in the United Kingdom in the 1980's that gave rise to broad discussions on this topic.¹⁶ The first case goes back to 1985 when the Monopolies and Mergers Commission (MMC) was called upon by the Director General of Fair Trading to investigate a course of conduct of Ford Motor Company Limited.¹⁷ According to the facts established, Ford did not grant license to any undertakings (other than to those supplying body parts to Ford) to manufacture or sell any replacement body part in the United Kingdom where Ford claimed to be entitled to prohibit such manufacture or sale by virtue of the copyright in the drawings or the design protection in designs of replacement panels. In addition, Ford brought suits against those independents having used, without license, his copyrighted or design protected works.

Ford stated that he owned copyright or registered design protection subsisting in component body parts in question, which means he had the exclusive right, ensured by the law, for exploitation. It follows that whereas the owner of these property rights was not obliged to grant license to any undertaking, and had the right to determine the appropriate royalty, his conduct was not infringing the law. MMC, however, ruled Ford's arguments to be unfounded, and declared that his course of conduct was infringing the Competition Act by foreclosing potential competitors. But nevertheless, MMC faced that both economic competition and exclusivity of copyright and design protection were protected by laws and the decision should be respecting the balance between underlying interests.

Ford's primary argument was based on inapplicability of Competition Act whose scope extended to any course of conduct restricting, distorting or preventing competition. He claimed that exercise of a copyright or a design right should not be construed as a "course of conduct" within the meaning of the Competition Act, since that exercise of property rights was based on the laws. MMC refused this argument on the ground of analogy of laws. According to the then effective Patents Act, if the MMC had found that an anti-competitive practice in relation to patented products was operating against the public interest, the Comptroller-General of Patents, Designs and Trademarks could have declared that licenses under the patent were to be available as of right. The Competition Act defined, in addition, the circumstances in which a course of

¹⁴ Case 53/87 Maxicar and others v Régie nationale des usines Renault [1988] ECR I-06039 paras 15-16.

¹⁵ Cf. Levin: *supra*, pp. 3-4.

¹⁶ On the basis of design protection of car body parts, quite a few legal actions were taken by manufacturers especially in France and Germany. See Opinion no. 12-A-21 of 8 October 2012 of the Competition Authority of France, pp. 198-199.

¹⁷ A report on the policy and practice of the Ford Motor Company Limited of not granting licenses to manufacture or sell in the United Kingdom certain replacement body parts for Ford vehicles. (Cmnd. 9437)

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conduct could have been regarded as anti-competitive, and one of them was that the patentee refused to grant license on reasonable terms. MMC was led to the conclusion that this interpretation should be applied, through analogy, also to copyright and registered design, even though Competition Act stipulated this rule only to patents.¹⁸ Since Ford refused to grant license to potential competitors in relation to copyright and registered design, it was duly deemed to be a "course of conduct" within the meaning of Competition Act.

The secondary argument of Ford was based on that even if refusal to grant license were capable of constituting such a course of conduct within the meaning of the Competition Act, it did neither restrict, nor distort, nor prevent competition in fact, since licensing on what he would have regarded as fair terms would not have resulted in increased competition. Ford contended that a reasonable rate of royalty for license would have been 60% of Ford's prices.¹⁹ The remaining 40% apparently would not have provided significant room to contest his prices, and hence there would not have been effective competition. It follows, according to Ford, that there was no competition having been restricted, distorted or prevented. MMC did not accept this argument, firstly because that alleged value of royalty was considered to be extremely high, and secondly, because in lack of Ford's practice, competition would have become at least legally possible. According to MMC, it was unfounded to assert that there would not have been effective competition until the obstacle was removed. Consequently, Ford's practice having prevented even the opportunity for competition resulted in an anti-competitive conduct.

Ford's tertiary argument was based on rejection of that his conduct was against the public interest. The reasoning was two-fold. Firstly, Ford contended that a compulsory license would have resulted in unfair competition as the licensees would have been entitled to use his copyright or registered design without bearing the expenses of underlying research and development. Secondly, compulsory licensing would have been bound to diminish the flow of innovation and to discourage research and development. MMC refused both arguments on the grounds of that competition would have had beneficial effects on prices and innovation, so licensing would have served the public interest through competition. Innovation could have been sustained by an adequate reward throughout industry, thus licensing on royalty was not considered to be the only way of balancing conflicting interests.²⁰

Thus, MMC concluded that Ford's practice was anti-competitive and was against public interest. But nevertheless, no satisfactory remedy was there provided by the law for resolving the conflict between exclusive right of the owner of the copyright or registered design and the public interest. Therefore, MMC made a proposal towards the legislation, whereby it recommended to reduce the period of protection of copyright and design protection in relation to body panels or alternatively, to remove copyright from purely functional designs.

The other case was assessed by the House of Lords who rendered its judgment in 1986 upon appeal in relation to copyright in motor vehicle spare parts.²¹ As for the facts established by the Lords, Armstrong Patents Co (appellants) manufactured replacement exhaust pipes for

¹⁸ MMC's deduction was based on the fact that Competition Act did not provide this special rule for copyright or registered design was a simple consequence of that neither copyright, nor registered design had counterpart to the Comptroller-General or the register of patents. However, there was no reason in fact why this lacuna would have been construed as that refusal to grant license under copyright or registered design was not able to restrict, distort or prevent competition.

¹⁹ Ford claimed that to give it fair compensation for that loss of contribution to competitive profit and overhead costs of the total business which would result from loss of turnover to licensees, a reasonable rate of royalty would be 60% of its prices.

²⁰ Ford had two more minor arguments stating that compulsory licensing would have enabled putting low quality body parts into circulation, and would have been detrimental to Ford's investments and employment. MMC did not accept these arguments either as there was no convincing evidence supporting these assertions.

²¹ *British Leyland Motor Corporation Limited and others v Armstrong Patents Company Limited and others*, A.C. 577, (1986) 1 All E.R. 850

Marina cars that were manufactured by British Leyland Motor Corp (respondents). Since exhaust pipes of the appellants were copies in shape and in dimensions of the original exhaust pipes, the respondents required Armstrong to pay royalty for the use of their copyright. The appellants declined to pay royalty, and therefore the respondents obtained an injunction that was to prevent Armstrong from manufacturing replacement exhaust pipes in order to inhibit infringing their copyright. The appeal of Armstrong and others gave rise to examination of copyright subsisting in motor vehicle parts and its impacts on competition. Copyright in component parts, as Lord Templeman pointed out, was literally capable of creating a monopoly enjoyable by all manufacturers of mass produced machinery in respect of repairs. Since the market for replacement parts only for Marina cars only exceeded £ 800 million a year, this case would have wide implications not only on the competition on the market, but also on the extensions of copyright.

The defence of the appellants was two-fold. Their primary defence was essentially based on that copyright did not extend to the direct reproduction of a functional article such as an exhaust pipe that they had admittedly copied, since the original pipe was not protected. The appellants asserted, therefore, their exhaust pipes were indirect copies of the engineering drawing under copyright protection, and direct copies of the original exhaust pipe that was neither protected by copyright, nor by patent law, nor by registered design. Although copyright admittedly subsisted in the engineering drawing of the original exhaust pipe, they had not copied it as they had not even seen that drawing. Consequently, appellants asserted that copyright did not apply to prevent the indirect copying of drawings of functional articles, so they had not infringed the copyright of the respondents. Hence, their replacement exhaust pipes were not infringing copyright of British Leyland.

This defence was dismissed by the majority of the Lords – except for Lord Griffiths – on the ground of the law interpreted in light of preceding case law. According to the then effective Copyright Act, copyright was infringed by any person who, not being the owner of the copyright, and without the license of the owner, reproduced the work in any material form. Although the word “reproduction” included, as per the law, also a version produced by converting the work into a three dimensional form, Copyright Act set out a relief for such conversions. Accordingly, “*The making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work.*”²² The first question was whether the word “reproduction” included indirect copying or not. And then, if the answer was in the affirmative, did the relief apply to the present situation? The Lords, on the ground of settled case law²³, concluded that the word “reproduction” covered also the indirect copying even if the copier had not seen the engineering drawings under copyright protection but had used an original product for the reproduction by reverse engineering.²⁴ Lord Templeman pointed out that if the original exhaust pipe had not had an underlying engineering drawing but only a prototype, the appellants' exhaust pipes would not have been even indirect copies. Since there was actually an underlying engineering drawing and the respondents made clear the copyright therein, the appellants could not rely on not being aware of this fact. Consequently, the exhaust pipes of the appellants were reproductions of the engineering drawing in terms of the Copyright Act. The applicability of the relief depended on the interpretation of the clause referring to 'not experts'. As to this legal term, Lord Templeman pointed out that, in light of settled case law, 'not experts'

²² Copyright Act 1956, Sec 9 par (8).

²³ The reasoning in this respect was mostly based on the decision rendered in L.B. (Plastics) Ltd v Swish Products Ltd case. R.P.C. 551 (1979) F.S.R. 145. H.L.

²⁴ As per Lord Griffiths, the term 'reproduction' did not imply indirect copying. The opposite conclusion was based on misunderstanding of the Copyright Act, he claimed.

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was to be construed as laymen (“a man of reasonable and average intelligence”²⁵). Since the exhaust pipes of the appellants were quite obviously reproductions of original products of the respondents, the relief set out by the Copyright Act did not apply to the present case. The primary argument of the appellants was, hence, rejected.

The secondary defence of the appellants was based on that respondents should not rely on their copyright to prevent a repair of a car supplied by British Leyland and requiring a replacement of the exhaust pipe. Otherwise, on the one hand, respondents would deprive purchasers of the right to repair and, on the other hand, it would lead to the recognition of monopoly in effect. As for the purchasers' right to repair a car including to have its component parts replaced, the respondents' opinion was that owners of Marina cars would not face any inconvenience in obtaining a replacement exhaust pipe as required either from British Leyland or from its licensees since these spare parts were available in the market. In respect of the alleged monopoly, the respondents denied that they were claiming a monopoly in the reproduction of their exhaust pipe. They asserted, by contrast, that anyone was free to copy their original component parts upon payment of royalty.

The House of Lords eventually accepted the secondary defence of Armstrong and claimed that the copyright owner in a drawing of an exhaust pipe was not entitled to invoke its copyright in order to defeat the right of the purchaser to repair his car. However, the reasoning of this decision was far not unanimous due to the fact that the Lords recognized the grave dilemma in balancing between exclusivity stemming out from the very essence of copyright law and the public interest in completeness of property and competition. Indeed, all of these arguments were used by the Lords.

According to Lord Bridge of Harwich the owner of a car must be entitled to have the car repaired in the most efficient way to keep it in running order. The right to replace a damaged component part was inherent in the ownership of the car itself, and therefore exclusivity stemming out from copyright did not preclude replacement of car parts.

Lord Scarman and Lord Templeman took a different view. They asserted that a grantor having given a thing with one hand was not to take away the means of enjoying it with the other. Hence, whereas motor vehicles are durable consumer products that need to be repaired from time to time in order its proper operation, the seller would derogate owners' respective rights if he was entitled to prohibit replacement of car parts by virtue of copyright. This principle of “non derogation from grant” was evolving over a century in the case law mainly in relation to real properties. It appeared first time in a decision²⁶ that said “a grantor having given a thing with one hand is not to take away the means of enjoying it with the other”. The Lords analogically concluded that the seller of a car should not retain the copyright in relation to repair since it would render the car unfit for the purpose for which the car was held. As a corollary, Lord Templeman claimed that, every owner of a car has the right to repair it or to have it repaired. Respondents, therefore, were not entitled to assert the copyright in their drawing of an exhaust pipe in order to defeat the right of the purchasers to repair their car or to have it repaired; otherwise the right to repair would have been useless.

In contrast to the majority, Lord Griffiths held that copyright protection precluded others from reproducing the copyright work, unless it was licensed; and therefore the copyright holder should always have the right to prohibit the reproduction of its copyright work. Although exercise of this right might lead to development of monopolies, firstly it formed, in his view, an essential part of copyright protection and, secondly, it was not the House of Lords to resolve the contradiction between copyright law and competition law. Instead, he proposed an amendment to the Copyright Act concerning a statutory license for cases where the exercise of exclusive right

²⁵ *Merchant Adventurers v M Grew & Co Ltd* [1971] 2 All ER 657

²⁶ *Birmingham, Dudley and District Banking Co. v. Ross* (1888) 38 Ch. D. 295.

would be so abusive that would restrict the competition on the market. Hence, he did not accept the secondary defence of the appellants. Having said that, he accepted the primary defence of Armstrong instead, namely that reproduction of the original exhaust pipe shall not constitute infringement of copyright in engineering drawing.

Lord Edmund-Davies shared to some extent the opinion of Lord Griffith. But nevertheless, he accepted the merit of the decision and shared also the majority's opinion in the reasoning. The House of Lords, therefore, ruled that the manufacturer should not obstruct, by virtue of its copyright protection, the reproduction of its copyright work. It was not the competition considerations that led the House of Lords to this conclusion but a contractual principle derived from the case law. Nevertheless, the House resolved this case as a quasi consumer protection case.

Eventually, the Parliament perceived Lord Griffith's thoughts and acted, to some extent, as the MMC proposed a year before in terms of adoption of a new law. As a consequence, the new Copyright, Designs and Patent Act of 1988 does not provide copyright in industrial designs anymore, but provides a similar design protection instead.²⁷ This protection differs from registered design protection by not requiring registration, and from copyright by the shorter period of protection. As a special limitation, this design protection may not subsist in features of shape or configuration of an article which enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function, or are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part.²⁸ This limitation aims at not enabling the owner of the property right to foreclose competitors or to preclude competitors from copying any feature of the work ensuring fitting of component parts.²⁹

The copyright law in the United Kingdom, hence, resolved the conflict of interests between copyright law and competition law by removing the protection from purely functional designs, and by limiting the period of protection of other designs. Consequently, arguments of both "implied license" and "non derogation from grant" became obsolete in relation to motor vehicle component parts. This resulted in that a limited protection may still subsist in car component parts, but competitors cannot be foreclosed by exclusivity of intellectual property rights.

III. Copyright in car body parts in Hungary

The courts in Hungary have not yet had to make a judgment on conflicting interests behind competition law, copyright law and consumer protection in relation to car components. Copyright in body parts does not have any case law either as yet. In respect of Hungarian copyright law, however, subsistence of copyright in car components appears to be definitely possible. Thus, exclusivity stemming out from copyright³⁰ is at least theoretically capable of restricting competition on the spare part market.

Although the body parts are primarily protected by registered design protection, that does not provide perfect protection due to its limits as mentioned above. The unraveling texture of exclusivity, thus, may be sewn up by the copyright protection being applied by manufacturers. The question may arise then as to whether copyright protection may subsist in a work beside the registered design protection? The Hague Agreement allows works of applied arts to qualify for

²⁷ See Part III of Copyright, Designs and Patents Act of 1988.

²⁸ See Sec 213 par 3 of Copyright, Designs and Patents Act of 1988. There is a similar provision in Sec 6 par (2) of the Hungarian Act XLVIII of 2001 on the Legal Protection of Designs.

²⁹ Motor car parts. A report on the wholesale supply of motor car parts within the United Kingdom (Cmnd. 1818)

³⁰ Gyenge Anikó: *A kivételek és korlátozások céljai a szerzői monopóljogban*. In Verseny és Szabályozás, 2011. p. 76.

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both industrial design protection and copyright protection at the same time.³¹ In addition, the Berne Convention addresses the right to the discretion of the member states, to determine the scope of copyright protection in industrial designs and works of applied arts.³² Within the European Union, Article 17 of Directive 98/71/EC on the legal protection of designs claims that „*A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.*” Thus, EU forbids prohibition of cumulation of protections³³, but addresses the right to determine the scope of copyright protection to the discretion of the Member States.³⁴ In Hungary, Section 64 of the Act XLVIII of 2001 on the Legal Protection of Industrial Designs specifically allows the subsistence of copyright protection beside the design protection. This two-fold protection, thus, shall apply to products being eligible for both protections. In other words, a product may be protected by copyright provided that criteria set out by the law are met, irrespectively if it is also under registered design protection or not. The question then is whether car body parts meet the criteria of copyright protection.

According to Section 1, paragraph 2 of the Copyright Act (Act), „*Copyright subsists in all literary, scientific and artistic works regardless if it is defined by this Act or not.*”³⁵ It must be, therefore, examined firstly whether motor vehicle body parts are literary, scientific or artistic works.³⁶ These are the main types of works that copyright law is intended to protect. The Act itself contains a non exhaustive list of numerous genres of such works, which means a work not being listed therein may still be eligible for copyright protection, provided that qualifies for literary, scientific or artistic work and meets additional criteria. Although criteria of qualifying for copyright work are the same for each genre of works regardless of the type, the applicability of supplementary rules depends on the work type, and therefore it can have significance. Nevertheless, it is also possible that a work qualifies for two or more genres at the same time.³⁷

Provided that a part qualifies for a defined genre, that is definitely in scope of Section 1 of the Act. If it does not qualify for either of those named genres, then it must be determined first whether it is considered to be a literary, scientific or artistic work. In other words, if a car body part turns out to have solely industrial character, then copyright does not apply, because it applies only if the part has a character of one of the named types. Some of the different genres listed by that Act, like „public speeches” are apparently inapplicable to car components by their very nature. There are also some genres whose inapplicability is not apparent at the first sight. For example, the genre of „engineering structures and their designs” set out by subparagraph 1) appears to be applicable to car parts, but this type applies, in fact, to erections other than buildings, according to the jurisprudence.³⁸ Motor vehicle body parts, hence, are not considered as such according to the settled case law despite they obviously have mechanical character.³⁹

³¹ Hague Agreement Concerning the International Deposit of Industrial Designs as amended by Geneva Act of July 1999, Art. 2.

³² Art 2, par 7 of the Berne Convention for the Protection of Literary and Artistic Works as amended on September 29, 1979.

³³ See Case 168/09 Flos SpA v Semeraro Casa e Famiglia SpA, and Case 219/09 Vitra Patente AG v High Tech Srl, and Case 198/10 Assina SpA v Alivar Srl and Galliani Host Arredamenti Srl.

³⁴ Hepp Nóra: *A formatervezésiminta-oltalom szerzői jogi megközelítése*. In Iparjogvédelmi és Szerzői Jogi Szemle, 2011/5. p. 50.

³⁵ Act LXXVI of 1999 on Copyright

³⁶ Opinion of the Council of Copyright Experts, Nr. SZJSZT 23/2010.

³⁷ Opinion of the Council of Copyright Experts, Nr. SZJSZT 34/02.

³⁸ Gyertyánfy Péter (ed.): *A szerzői jogi törvény magyarázata*. Complex, 2006. pp. 354-355.

³⁹ Opinion of the Council of Copyright Experts, Nr. SZJSZT 28/2002.

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Original parts and spare parts, in fact, are designed on the desk first and manufactured afterwards. This may give rise to the question as to which one may be the copyright work, the design or the physical product. From the perspective of copyright protection, however, there is no difference between a design and a manufactured product, since Hungarian copyright law protects the „*identifiably expressed original thought*”, regardless of the form of expression.⁴⁰ That original thought may be manifested in various forms, from a song to a house in accordance with the list of genres. So literally both a design and a manufactured car part may qualify for copyright protection. Nevertheless, the indirect object of the Hungarian copyright law is the expression of an original and unique thought, not the pure idea in itself.⁴¹ „*The protection of expression is certainly aligned with specificities of content and genre of the work*”⁴², and therefore the originality and uniqueness are measured in different ways by genres. Accordingly, designs of car components may qualify for designs as copyright works set forth in subparagraph h) or second part of subparagraph m), while manufactured car component parts may theoretically qualify for copyright works⁴³ referenced in subparagraph m) or o).⁴⁴ Although each work genre has the same basic criteria for qualifying for copyright work, additional rules of protection are aligned with genres of copyright work, and therefore the identification of the genre is essential even if it may be difficult especially regarding art like works.⁴⁵

Works of applied arts mean works of art with usage functions according to the jurisprudence.⁴⁶ According to the case law, hobby clothes⁴⁷ juried by the Lectorate of Graphic Arts and Industrial Arts and lamps under industrial design protection⁴⁸ qualified for applied art works, even though they were functional products principally. Furthermore, a handrail for stairs qualified for an applied art work since „*an industrial art work is qualified for artistic nature by the mere quality of construction of an artist*”⁴⁹. Although differentiation between applied art work and fine art work is sometimes difficult in practice, this latter is obviously inapplicable to motor vehicle body parts. The difference between applied art works and industrial designs is generally based on that latter works are manufactured in industrial producing technology, while the earlier is manufactured by craftsmen work⁵⁰. Since motor vehicles and their parts also are typically manufactured in industrial mass production, the type of applied art work is hardly applicable thereto. Basically car tuning shops may produce such unique spare parts as for example a special gearshift head that may qualify for an applied art work.

An applied art work is basically an artistic work with some usage function, whereas an industrial design, by contrast, has usage as its primary function. As per the jurisprudence, industrial design is „*a design or model of the physical appearance of a product shaped up in accordance with aesthetic and technological considerations, whereby the product is manufactured in industrial producing technology and distributed as an article (not as a piece of artistic work)*.”⁵¹ This definition has three main elements. The third element as „distributed as an article” undoubtedly applies to all motor vehicle parts as they are not sold as masterpieces. The second element i.e. industrial producing technology of

⁴⁰ Opinion of the Council of Copyright Experts, Nr. SZJSZT 15/2011.

⁴¹ Gyertyánfy: supra, p. 28.

⁴² Opinion of the Council of Copyright Experts, Nr. SZJSZT 05/2007 and Nr. SZJSZT 18/2007.

⁴³ Cf. Opinion of the Council of Copyright Experts, Nr. SZJSZT 24/2009.

⁴⁴ Sec 1 par (2) subpar h) of the Act defines “works created by drawing, painting, sculpturing, engraving, lithography or in any other similar manner as well as designs thereof.” Subpar m) defines “applied art works and designs thereof.” Subpar o) defines “industrial design works.”

⁴⁵ Gyertyánfy: supra, p. 29.

⁴⁶ Ibid. p. 356.

⁴⁷ Opinion of the Council of Copyright Experts, Nr. SZJSZT 32/2002.

⁴⁸ Opinion of the Council of Copyright Experts, Nr. SZJSZT 05/2007.

⁴⁹ Opinion of the Council of Copyright Experts, Nr. SZJSZT 10/92 cited by Gyertyánfy: supra, p. 31.

⁵⁰ Gyertyánfy: supra, p. 356.

⁵¹ Ibid, p. 370.

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manufacturing apparently applies to the vast majority of body parts. Only those component parts can be exceptions that are handcraft works made for individual consumer preferences. For example car seat drape and wood inlay can be regarded as such in luxury vehicles. Also in car tuning shops, unique spare parts may be manufactured but not in mass production due to their low series. The first part of the definition refers to the physical appearance shaped up in consideration of aesthetic and technological considerations. This criterion remarkably restricts the set of body parts to be considered, because designs of non visible parts are quite obviously produced regardless of aesthetic aspects. So in particular a floor panel, a propeller shaft, a cylinder head or other hidden parts is not aesthetically designed at all. Some few other parts like a radiator, a knocker, a mirror box or a searchlight cover are obviously designed in consideration of aesthetic aspects. In case of a few other car body parts, such as the roof or a seat, aesthetic design is unsure. These latter ones are typically not aesthetically but predominantly function oriented parts. That being said, some aesthetic feature may still appear therein. Although the copyright protection is not dependent on any aesthetic quality according to Section 1, paragraph 3 of the Act, a work created in aesthetical considerations is obviously artistic and so falls within the scope of Section 1, paragraph 2. According to the first part of the definition, the work has to be created in both aesthetic and technological considerations at the same time. Nonetheless, technological aspect „describes the aesthetic design of appearance”⁵², not the structure inside as per the case law. Aesthetic and technological aspects therefore must be in strong connection since the criterion of technological aspects refers back to aesthetic considerations.

Component parts neither qualifying for applied art work, nor for industrial design, are not excluded from copyright protection, provided that they are considered as literary, scientific or artistic work.⁵³ Qualification for literary work is almost impossible in fact. Although theoretically a motor vehicle body part can be described in a so detailed manner that a literary work represents the part, in practice it would be really rare.⁵⁴ Type of scientific works appears to be applicable to a few mechanical components since the creation of a spoiler can be regarded as scientific achievement in aerodynamics. But nevertheless, out of those three generic types, the type of artistic work is applicable the most to motor vehicle parts concerned.

It is also an important question as to whether copyright may subsist in individual car parts or rather in the entire motor vehicle? It is beyond doubt that the design of a motor vehicle highly considers aesthetic aspects as cars are not only functional objects nowadays but serve other purposes as well. On the other hand, however, body parts have their own specific design, and furthermore, they are distributed singly as original spare parts. In my opinion, copyright may subsist not only in spare parts but in the entire car also provided that, as a whole, it meets the criteria. In addition, copyright may subsist in the whole vehicle even if its parts are not copyright works because a car in itself may qualify for collection of works also.⁵⁵ From this aspect it must be taken into account that not only the parts but also the entire car are designed under a single conception that may be original and unique.

Copyright may subsist in works meeting the criteria set forth in Section 1, paragraph 2 of the Act provided that they additionally meet the double criteria set out in paragraph 3 and are not excluded by paragraphs 4-7. Criteria defined in paragraph 3 stipulate that a work shall be original and unique, but none of any aesthetical quality requirement applies. The Supreme Court claimed in a case that „copyright protection subsists in all works on whose form the original features stemming out from

⁵² Opinion of the Council of Copyright Experts, Nr. SZJSZT 29/2010.

⁵³ Opinion of the Council of Copyright Experts, Nr. SZJSZT 09/12.

⁵⁴ Theoretically it is not impossible that such iconic car parts as the specific red light bar on the hood of the Pontiac Firebird TransAm called K.I.T.T. in the TV series Knight Rider, or the exhaust headers of the DeLorean DMC-12 operated as time machine in the Back to the future! trilogy may qualify for literary copyright works by the mere creation of the script.

⁵⁵ Cf. Opinion of the Council of Copyright Experts, Nr. SZJSZT 30/2000.

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*the intellectual works of the author are recognized, regardless of what aesthetic impression they cause.*⁵⁶ In this sense, the work is „unique if given circumstances allow options for expression, and the author applies one or another out of them”. Furthermore, a work is original if that is not a simple counterfeit of an other work.⁵⁷ Originality and uniqueness may appear in different ways in genres of copyright works, and since the list of genres is not exhaustive, there are innumerable different ways of assessing the originality and uniqueness. Inasmuch as originality and uniqueness must be expressed by the appearance of the work itself⁵⁸, their assessments are not always separated.⁵⁹

Aspects of originality and uniqueness can be elucidated in light of the case law of courts and opinions of the Council of Copyright Experts (CCE).⁶⁰ In a case of 1967, the Supreme Court held that copyright did not subsist in an embossed plate made of red copper because it was „a counterfeit made by minimal intellectual work.”⁶¹ CCE held a checked tablecloth not to be original because the use of that checked pattern in the kitchen was notorious.⁶² In cases of a folkloric canteen⁶³ and parking tickets⁶⁴ the assessment led to the conclusion that these did not qualify for copyright works due to the lack of originality by virtue of lack of the minimal level of distinguishability from other similar goods. In an other case CCE found that wrapper of a product was not original because the setting of graphical elements represented an axiomatic connection amongst what they signified.⁶⁵ At the same time, in examining the originality it considered that notable difference between the size of graphical elements might have different impacts on consumers. Furthermore, CCE held such clothes designs to be original that were created on a basis of well known and published ideas having been recommended to use by fashion designers, due to the fact that the author, in creation, used certain ideas differently in details.⁶⁶

These aspects of originality and uniqueness may be relevant also in case of motor vehicle body parts. On the one hand, it is obvious that copyright may subsist neither in a part, nor in the whole car due to the lack of originality if the new product is a simple copy of an other one. In those cases, therefore, where a manufacturer copies a product of an other upon its license and then distributes that under its own brand,⁶⁷ these later ones are not original so that they do not constitute new copyright works.⁶⁸ Arguments leveraged from the case law such as axiomaticness, notoriousness, axiomatic connection and lack of distinguishability may be relevant also to body parts even under industrial design protection. Some parts such as wind screen can hardly or impossibly be distinguished from similar goods, but other parts can be identified easily. So, for example a radiator shirred along on the side of a car between the wheels,⁶⁹ searchlight boxes

⁵⁶ Court decisions BH.1980.332.

⁵⁷ Opinion of the Council of Copyright Experts, Nr. SZJSZT 5/2007/1, and Gyertyánfy: supra, p. 26.

⁵⁸ Opinion of the Council of Copyright Experts, Nr. SZJSZT 21/2006.

⁵⁹ Opinion of the Council of Copyright Experts, Nr. SZJSZT 19/2005.

⁶⁰ Council of Copyright Experts is a body established by the law. It advises on copyright-related matters upon request of courts, authorities or parties in both juridical and extra-judicial procedures. Although its opinions are not formally binding, they are highly taken into consideration in fact, since this body represents the expertise in copyright.

⁶¹ Decision of the Supreme Court LfB.Pf.III.20.680/1967 as cited by Gyertyánfy: supra, p. 31.

⁶² Opinion of the Council of Copyright Experts, Nr. SZJSZT 11/2002.

⁶³ Opinion of the Council of Copyright Experts, Nr. SZJSZT 21/2008.

⁶⁴ Opinion of the Council of Copyright Experts, Nr. SZJSZT 18/2007.

⁶⁵ Opinion of the Council of Copyright Experts, Nr. SZJSZT 30/2000.

⁶⁶ Opinion of the Council of Copyright Experts, Nr. SZJSZT 7/2005.

⁶⁷ Accordingly, the bodywork of a Lada 1200 as a reproduction of the Fiat 124 of 1967 or the bodywork of a Suzuki Vagon R manufactured as a copy of Opel Agila would not qualify for original copyright work.

⁶⁸ Copyright protection may still subsist in these reproductions, but not as in new copyright works. In this case, copyright would be still owned by the author of the original work.

⁶⁹ It is a typical part of the Ferrari Testarossa as designed by Sergio Pininfarina

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emerging from the hood⁷⁰, four tailpipes set in a circle shape⁷¹, or a domed radiator on the front panel⁷² are so typical forms that are neither notorious, nor confusable to experts or non experts. These parts are obviously easily distinguishable from other similar goods. In case of other parts such as an offset mirror box cover, a hood with symmetrically shattered arch are likely distinguishable only to an expert, but a non expert would probably not recognize their originality. Answering the question as to whether in interpretation of the law, the expert's view or a non expert's view is to be considered for assessing the originality, an opinion of the CCE in relation to clothes designs can be taken into account. In that opinion, CCE took professional journals and opinions of professional designers into account in assessing the originality.⁷³ Hence it appears that notoriousness and axiomaticity in relation to the originality shall be examined from the experts' viewpoint. All these underline, from one part, the principle that qualifying for a copyright work requires subjective novelty⁷⁴, and challenge, from the other part, the method CCE applied in a few advices, namely that originality was examined in light of confusability from consumers' aspect.⁷⁵

The most important aspect of uniqueness is the author's choice between alternative options in relation to creating the work. *“Only a choice in an intellectual latitude can be construed as creating. Evident or trite shaping determined by the task in itself is not enough.”*⁷⁶ Consequently, uniqueness can only be found where the author had some latitude in the creating. *“The latitude of creating forms, therefore, the baseline for examining how wide or narrow space was given to the author by circumstances to create a copyright work and to what extent the author took the chance provided by the latitude of creation to create in an original and unique fashion.”*⁷⁷ Industrial designs primarily have a functionality and hence artistic aspects can be subsisting only where they do not affect the usage of the work. In order to qualify for a copyright work, however, *“the work has to have a unique intellectual nature that is not determined by the function and the content of the work itself.”*⁷⁸

In relation to parking tickets CCE held that since a parking ticket was a product whose functionality determined its essential elements, in setting and designing those elements the author had *“a very narrow latitude of creating as an intellectual activity. The mere fact that there are other products functioning as parking tickets with different look and design does not make the present parking ticket unique and original style. According to the Council, setting the numbers, the perforation technique or use of different colours creating minimal distinguishability are purely such ideas whose protection is excluded by the Act.”*⁷⁹ Also due to the lack of unique and original style, CCE held a soot transporter vehicle not to be copyright work, because *“the shape of the vehicle is a cuboid whose size is determined by the size of the original vehicle and by height allowed by traffic regulations. According to the Council, [...] the engineering design and the construction of the transformed vehicle are predominantly determined by the special function of the vehicle, by statutory engineering and safety (road traffic safety) regulations and by the shape of the original vehicle. This, in effect, precludes the unique and original style of a copyright work. It also can be asserted, furthermore, [...] that the purpose of the designers was not to construct a unique shape, but to create an interior set-up aligned the best with the function. Aforementioned circumstances preclude also the design and the vehicle itself from qualifying for registered design, applied art work or industrial design.”*⁸⁰ Nor the design of console shelves was

⁷⁰ It is a typical part of the Porsche 911 SC as manufactured in 1981.

⁷¹ It is a typical part of the Pagani Zonda C12 F

⁷² It is a typical part of the Bugatti Veyron

⁷³ Opinion of the Council of Copyright Experts, Nr. SZJSZT 7/2005.

⁷⁴ Opinion of the Council of Copyright Experts, Nr. SZJSZT 5/2007/1.

⁷⁵ Opinion of the Council of Copyright Experts, Nr. SZJSZT 30/2000.

⁷⁶ Gyertyánfy Péter: *The judicial practice of copyright law from 2006: the object of protection and the integrity of the work.* In Iparjogvédelmi és Szerzői Jogi Szemle, 2012/4. p. 37.

⁷⁷ Opinion of the Council of Copyright Experts, Nr. SZJSZT 8/2011.

⁷⁸ Opinion of the Council of Copyright Experts, Nr. SZJSZT 28/2002.

⁷⁹ Opinion of the Council of Copyright Experts, Nr. SZJSZT 18/2007.

⁸⁰ Opinion of the Council of Copyright Experts, Nr. SZJSZT 28/2002.

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considered to be unique by CCE because it was based on “*elements of generally known and used shapes*” as well as “*scales given by the function and usual constructions*.”⁸¹

In relation to motor vehicle body parts, it is obvious that as much as the vehicle itself is function oriented, so are its parts. The vehicle has the transportation as its primary function and its parts are subordinate to that function. In addition, the laws determine the main attributes of the component parts for road traffic safety and environment. From this aspect, design of body parts seems to have a very limited range because its function, the laws and consumer preferences determine the appearance of the parts to significant extent. On the other hand, however, cars are apparently not only transportation devices nowadays and therefore also the current fashion affects their and their parts' design. Moreover, sometimes reputable designers design typifying parts of a car. So the question here is that whether the remaining latitude of individual designing is sufficient for the qualification for uniqueness and originality. From the cases cited above, the answer does not seem to be in the affirmative. Nevertheless, CCE has given several advices stating that the appearance of a product was unique and original despite the narrow range of individual designing.

As per the case law, a work significantly determined by its functionality may still be original if it has typifying unique attributes compared to other similar products on the market. In relation to lamps, CCE declared that they were such works, whose function, applied nature significantly determined their construction. “*Having said that, compared to other lamps on the market, Pasquale lamps in their structure and shape, in their construction (e.g. fashion of fixing glass slabs, construction of spacers, mode of shaping of metal slabs) still have features that substantiate their unique and, compared to shown other lamps, original style, and therefore they are under copyright protection.*”⁸² A handrail was regarded as a copyright work by virtue of similar considerations, because of its “*unique flexions and original work being capable of correcting defects of architectural construction*”.⁸³ CCE highlighted, mostly in relation to architectural designs, that copyright might subsist in them despite the fact that designing was affected by significant constraints. It assessed copyright protection in many designs, although “*physics laws and legal regulations on construction leave obviously narrower latitude of the designing than for the author of graphic arts.*”⁸⁴ CCE declared also that a scenography, a product design and a construction design might be copyright protected despite the fact that one must, during the designing, adapt to environmental facilities.⁸⁵

As visible, the uniqueness shall always be examined in the light of latitude of creating. If this latitude is narrow, then it is more difficult to create a work that any other author, independently from the other work, would create differently; if the latitude is wide, then it is easier. CCE pointed out in relation to parlour game figures that uniqueness of a work is manifested by the “*complexity of decisions and answers postulating the creating of the author*”⁸⁶. Projecting these to motor vehicle body parts, it means that different ranges shall be applied to the appraisal of a roof and a radiator. Designing a roof of a car, hence, leaves so narrow latitude for creating that only an extremely unusual shape would qualify for required uniqueness, while in case of a less constrained shape of a radiator, a less unusual shape may qualify for uniqueness due to the broader range of creating. Although uniqueness and originality of car body parts, therefore, shall be examined on a wide scale, qualifying for copyright work appears to be definitely possible in respect of some certain components.

⁸¹ Decision of the Supreme Court LfB.Pf.III.21.105/1971 as cited by Gyertyánfy Péter (ed.): *A szerzői jogi törvény magyarázata*. Complex, 2006. p. 31.

⁸² Opinion of the Council of Copyright Experts, Nr. SZJSZT 5/2007.

⁸³ Opinion of the Council of Copyright Experts, Nr. SZJSZT 10/1992 as cited Gyertyánfy: *supra*, p. 31.

⁸⁴ Opinion of the Council of Copyright Experts, Nr. SZJSZT 38/2001.

⁸⁵ Opinion of the Council of Copyright Experts, Nr. SZJSZT 23/2010.

⁸⁶ Opinion of the Council of Copyright Experts, Nr. SZJSZT 09/2012.

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Negative conditions of copyright protection are set out by Section 1, paragraphs 4-7. Terms of idea and conception require particular attention out of them in relation to motor vehicle parts.⁸⁷ Since copyright protects the expressed unique and original thought, an idea not reaching the level of work shall be differentiated from a copyright work.⁸⁸ Not expressed thoughts obviously cannot be protected by copyright, but also those expressed thoughts fall out of the scope of copyright protection whose expression do not reach that level of elaboration whereby the creating of the author is recognizable.⁸⁹ A particular advice of CCE in relation to photographs may be echoed here that stated “*in fact, all photographs made by human beings inevitably include elements of originality.*”⁹⁰ This statement can be extrapolated at least theoretically to every work created by human beings. Whereas each and every component part to motor vehicles are duly designed before mass production, in fact, personality of the designer inevitably affects the work, and therefore the body parts always have uniqueness to some extent – even if minimal. But nevertheless, there is a level of unique and original style of expression, not being exactly definable, a product has to achieve in order to qualify for a copyright work. Works not meeting this invisible level of uniqueness and originality as well as not expressed thoughts are regarded as idea or conception. In respect of motor vehicle body parts, it means that despite all of them are designed by human beings, some of those parts will not exceed the level of idea or conception. So, for example, it is doubtful whether a sketched rim that is not designed in a detailed fashion would qualify for copyright work. Body parts meeting the expected level of qualification for copyright work probably enjoy copyright protection.

Inasmuch as a work qualifies for copyright work, the author has an exclusive right for exploitation, including reproduction and licensing reproduction. It means that copyright, in principle, is infringed by a person who without the license of the copyright owner does or authorizes others to do any of the acts restricted by copyright such as reproduction. This exclusive right is cut cross, however, by the free use, as set out by the law,⁹¹ which constitutes an exception to the general rule of exclusive rights of the author and allows specific use of the copyright work as of law without the license of the author. The Act sets out a few forms of free use and defines their conditions too. From the aspect of car body parts, the relevant form of free use is declared by Section 35 paragraph 1 as “*A copy of the work may be made by a natural person for private purposes provided that it is not intended for earning or increasing income even in an indirect way.*” Certainly, reproduction of a motor vehicle body part usually requires expertise and special equipment, so most people are unable to reproduce a part at home. Since this private reproduction may be performed by a third party on the individual's behalf, even for return⁹², the natural person owner of a car is entitled to make a manufacturer reproduce a part regardless of the copyright therein. Theoretically it is not even subject to condition of repairing the damaged car. Considering, however, that reproduction under free use shall not be intended for earning or increasing income, moreover distribution of reproductions requires license of the author, free use typically may serve only the occasional replacement of damaged component part. Car owners, therefore, are entitled to have a damaged body part of their car replaced by reproduction made under free use instead of an original spare part. It means, in fact, that if for example a radiator under copyright protection is damaged by a collision, the owner shall have the right to have a reproduction of that copyright work made for replacing the damaged body part.

⁸⁷ “*Ideas, principles, theories, procedures, operating methods and mathematical operations shall not be the subject matter of copyright protection*”. Section 1 par (6) of the Copyright Act.

⁸⁸ Gyertyánfy: supra, p. 32.

⁸⁹ Opinion of the Council of Copyright Experts, Nr. SZJSZT 03/09.

⁹⁰ Opinion of the Council of Copyright Experts, Nr. SZJSZT 10/07/1.

⁹¹ Gyenge: supra, p. 88.

⁹² Gyertyánfy: supra, p. 204.

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By the rules of free use, Hungarian copyright law, therefore, offers solution to the problem the House of Lords resolved with the principles of “non derogation from grant” and the implied license in the *Armstrong Patents Company Ltd and others v. British Leyland Motor Corporation and others* case.⁹³ However, unlike Hungarian copyright law, the decision of the House of Lords and then the new Copyright Act ensured not only the rights of car owners for replacement parts but also entering the secondary market of motor vehicles. Hungarian copyright law, by contrast, does not enable independent undertakings to enter the spare part market by restriction of copyright. Although a natural person owner of a car has the right to reproduce or to authorize an other person to reproduce a body part within the scope of free use, independent manufacturers are not entitled to manufacture in advance and to distribute such reproductions as spare parts for three reasons. Firstly because the reproduction within free use of copyright must not have economic purposes⁹⁴; secondly, commercial distribution of a reproduction requires license from the copyright owner⁹⁵, as free use does not extend to that; thirdly, the copyright law limits the free use to the extent of fair and proper use of laws.⁹⁶ As a consequence, an independent manufacturer willing to enter the market of spare parts has to gain license for the reproduction of spare parts from holder of copyright. In case the copyright owner, in using the exclusivity provided by the law, refuses to grant license for reproduction, it would lead to the development of monopoly.

IV. Refusal to grant license from competition law perspective

Even though copyright in car body parts has not yet been assessed in Hungary, in light of foregoing cited case law, it may subsist in some of those products. Exclusive rights stemming out from copyright, thus, may preclude the competition among manufacturers of car parts in the market. Nevertheless, conflicting interests behind copyright law and competition law cannot be easily resolved. Although a couple of copyright related cases were already assessed by the Hungarian Competition Authority (HCA)⁹⁷, breach of competition law by misuse of copyright has never been ascertained so far. Even the monopoly stemming out from copyright was recognized in the *Intercom* case⁹⁸ where the distribution of copies of films was in question, but the infringement was not established, because the HCA was unable to work out and to order a better scheme for distribution that would ease supply of copies concerned and would respect interests of the copyright owners at the same time.

It looks to be unclear, thus, how the HCA would decide in a case where the manufacturer of motor vehicle body parts refused to grant license in relation to copyright. Considering, however, that HCA's discretion in judging an infringement under the national competition law is partially restricted if also the European competition law is applicable, it should be examined first as to whether that is the case. Whereas in circumstances in question the manufacturer would likely enjoy a dominant position on the market, and the copyright protection would likely extend to territories of several Member States of the EU⁹⁹, a refusal would probably be capable of

⁹³ Theoretically, the concept of implied licence underscored by the decision of the House of Lords is recognized also by the Section 50 of the Hungarian Copyright Act. However, Hungarian laws allow only the transformation of the product for the usage, not the reproduction. Cf. Opinion of the Council of Copyright Experts, Nr. SZJSZT 01/2006.

⁹⁴ Gyertyánfy: *supra*, p. 203.

⁹⁵ Cf. Section 40 of the Copyright Act.

⁹⁶ Cf. Section 33 paragraph 3 of the Copyright Act

⁹⁷ See cases in particular Vj-161/1998/22, Vj-50/2000/12 and Vj-40/2002/19.

⁹⁸ See case Vj-55/2002/76.

⁹⁹ Cf. Art 5 of the Berne Convention for the Protection of Literary and Artistic Works as amended on September 29, 1979.

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appreciably affecting patterns of trade between the Member States.¹⁰⁰ It follows that Article 102 of the Treaty on the Functioning of the European Union (TFEU) would likely be applicable on the grounds of the Modernization Regulation.¹⁰¹ If an undertaking in dominant position refuses to supply an input to a potential buyer, it may infringe Article 102 of TFEU which stipulates that “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.” Notwithstanding, refusal to grant license to copyright has very limited practice under the European competition law since there were only few relevant cases brought before the CJEU. Moreover, enforcement priorities of the European Commission (EC) have changed recently in the name of the “more economic approach”¹⁰². But nevertheless, the most helpful guideline to the assessment is still the EC's latest guidance on enforcement priorities regarding abusive exclusionary conducts,¹⁰³ since even though it does not have particular focus on intellectual property rights, it sets out the conditions on which a refusal may be considered to be an infringement.¹⁰⁴ EC's guidance defines six criteria for the assessment of infringement of Article 102 through refusal to supply.¹⁰⁵ Applying these criteria to licensing copyright traces out the framework within which the refusal to grant license might constitute an abuse of dominant position.

Accordingly, the first criterion is that the undertaking refusing to grant license has a dominant position on a defined market. It definitely requires proper market definition case by case, but taking into account that motor vehicle body panels of a certain make of car can hardly be substituted by goods of different design, definition of the relevant downstream market should reflect the market of that specific body part for a specific make of car. Since exercise of exclusivity in copyright provides a legal monopoly in the component parts in respect of which copyright subsists, the copyright holder probably enjoys a dominant position in the upstream market.¹⁰⁶

As per the second criterion, the behavior of the copyright owner is characterized as refusal. Within this context, refusal includes not only the explicit refusal but also delaying tactics in granting license as well as imposing unfair trading conditions.¹⁰⁷ This means, in practice, that the copyright owner's course of conduct may be characterized as refusal not only in case of expressed refusal but also if it requires unreasonably high royalty or if it grants license only upon

¹⁰⁰ Sections 93-96 of Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) Cf. Joined Cases C-241/91, C-242/91 RTE and ITP v Commission [1995] ECR I-00743 paras 70-71.

¹⁰¹ Art 3 par 1 of Reg 1/2003/EC.

¹⁰² Report by the EAGCP: An economic approach to Article 82. (EAGCP) http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf (5 July 2014)

¹⁰³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02)

¹⁰⁴ The Discussion Paper defining EC's initial position (Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses) proposed detailed principles in relation to intellectual property rights, but the adopted Guidance does not distinguish between refusal to grant license and refusal to supply due to the fierce debate on the exclusivity as essential part of intellectual property rights. So, despite the fact that the Guidance makes a reference to refusal to license to intellectual property rights, it does not emphasize its specificities compared to refusal to supply products.

¹⁰⁵ Communication from the Commission (2009/C 45/02), paras 75-90.

¹⁰⁶ Case 53/87 Maxicar and others v Régie nationale des usines Renault [1988] ECR I-06039, Opinion AG Mischo, para 54, and Case 238/87 AB Volvo v Erik Veng (UK) Ltd [1988] ECR I-06211, *Opinion AG Mischo para 14*. See also Case 226/84 *British Leyland v Commission* [1984] paras 9-11 and Case C-52/07 *Kanal5 and others v STIP* [2008] ECR I-09275 par 21

¹⁰⁷ Tóth Tihamér: *Az Európai Unió versenyjoga*. Complex, 2007. p. 269. and Whish, Richard: *Versenyjog*. HVG-Orac, 2010, trs: Hörömpöli-Tóth Levente et al. p. 686. See also DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005) sections 209. and 225.

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considerably undue delay.¹⁰⁸ In other words, unless the copyright owner grants license on fair terms without undue delay, his conduct is likely deemed to be a refusal within the meaning of Article 102 of TFEU.

The third condition, according to the Commission, is that license to copyright is an indispensable input for operators in the downstream market to be able to compete effectively. An input is considered to be indispensable if there is no actual or potential substitute¹⁰⁹ on which the operators in the downstream market could rely on so as to counter the negative effects of the refusal. Since replacement spare parts should be, in principle, quite identical to the original parts, there are no actual substitute goods for the original spare parts. Although replicas and unique body parts could theoretically be brought to the market, these would take only insignificant share, as consumers usually prefer the original design matching to the design of the whole car. Hence, this potential substitution is very limited due to the limited demand-side substitution. The original design, however, is protected by copyright that ensures exclusivity to the owner and prohibits others from, without a license, using the protected design. The term use in this context encompasses all ways of use of a copyright work for which the copyright owner has exclusive right by virtue of the law. Such ways are in particular reproduction, distribution, adaptation and exhibition of the copyright work.¹¹⁰ It follows that when a use is not in scope of exclusivity by virtue of the laws that does not require license from the copyright owner, which means the license is not indispensable for that particular use. So is the case when the copyright work inspires someone to create a new copyright work provided that it is not deemed to be an adaptation of the former one. Nonetheless, forgoing listed ways of use of a copyright work are in scope of exclusivity of the owner by virtue of the laws, and thus, undertakings willing to manufacture and distribute that have to be licensed. Therefore, copyright license to body parts is likely considered to be indispensable for offering conforming goods in the downstream market.

The elimination of effective competition on the market is the fourth criterion defined by the Commission. This principle was established in the Clearstream and the Microsoft cases¹¹¹, but since then the Commission seems to have overstepped this criterion. The CJEU by accepting EC's argument in the AstraZeneca case, actually confirmed that assessing the abuse of dominant position did not require elimination of all effective competition, but it was sufficient to demonstrate that the competition was restricted and entering the market of new products was impeded.¹¹² Most recently, Advocate General Jääskinen proposed to return to the criterion of elimination of all competition as mentioned in the Commercial Solvents case¹¹³, but the CJEU did not answer the question concerned.¹¹⁴ Anyway, it clearly shows how the required threshold of impact on competition has been changing through decades.¹¹⁵ With regard to intellectual property rights, the exercise of exclusivity in copyright is obviously capable of eliminating all

¹⁰⁸ Case T-301/04 Clearstream and others v Commission [2009] ECR II-03155 par 151. According to AG Jääskinen, nevertheless, delay in supply is not sufficient for constituting an abuse of dominant position. See Case C-138/11 Compass-Datenbank v Austrian Republic [2012], Opinion of AG Jääskinen, para 72.

¹⁰⁹ Joined Cases T-374/94, T-375/94, T-384/94, T-388/94 European Night Services and others v Commission [1998] ECR II-03141 par 147.

¹¹⁰ Copyright Act, Sec 17

¹¹¹ Case T-301/04 Clearstream and others v Commission [2009] ECR II-03155 par 148 and Case T-201/04 Microsoft v Commission [2007] ECR II-03601 par 563

¹¹² Case C-457/10 AstraZeneca and others v Commission [2012] par 153.

¹¹³ Joined Cases 6/73, 7/73 Commercial Solvents and others v Commission [1974] ECR I-00223 par 25. See also Case C-7/97 Oscar Bronner v Mediasprint and others [1998] ECR I-07791 par 41 and Case C-418/2001 IMS Health v NDC Health [2004] par 52.

¹¹⁴ Case C-138/11 Compass-Datenbank v Austrian Republic [2012], Opinion of AG Jääskinen, par 72.

¹¹⁵ Not only the restriction on an actual market infringes competition law, but also the restriction on a potential market, since competition law protects also the potential or even a hypothetical market. Case C-418/2001 IMS Health v NDC Health [2004] par 44 and Case C-138/11 Compass-Datenbank v Austrian Republic [2012], Opinion of AG Jääskinen, par 64.

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competition.¹¹⁶ Although the existence and the exercise of copyright should be differentiated¹¹⁷, only the exercise of this right can affect the competition.¹¹⁸ When the copyright owner, in exercising its exclusivity, refused to grant license to anyone in relation to motor vehicle body parts, it would definitely eliminate all competition on the market of that particular body part. Even though replicas and unique body panels could theoretically be brought to the market, these would take very little share. Notwithstanding, when the copyright owner granted license to a few undertakings and refused that to all others, it would quite obviously not eliminate all competition, but would be capable of impeding effective competition. Therefore, meeting this fourth criterion depends on the required threshold of harm on competition and also on that whether the copyright owner refuses licensing to all undertakings or grants license to a few ones.

The fifth criterion, according to the Commission, is the consumer harm as a consequence of the refusal. The Commission considers that consumer harm may arise in particular where foreclosed competitors are prevented by the refusal from bringing improved or innovative products or services to the downstream market, or where the refusal impedes price competition. The price competition can be obstructed by the sheer monopoly stemming out from the exclusivity of copyright, unless there are other undertakings having been granted the license. Prevention from bringing improved or innovative goods or services to the market postulates that the requestor would not only duplicate the product or provide the service which is already offered in the market, but intends to provide new or improved goods or services.¹¹⁹ In relation to motor vehicle spare parts, neither repairing, nor distributing is considered to be new services as these are already offered in the market. As for the new product, it must be noted that if, on the one hand, the new part is original and unique, then the license to copyright is not indispensable and if, on the other hand, the new product is a simple look-alike one relative to the original one, then it is not a real new product from legal perspective. Consequently, an independent undertaking willing to enter the spare part market in order to distribute or to manufacture motor vehicle body parts has to demonstrate that there is a consumer demand for a service other than repair and distribution or for an adaptation of the copyrighted work; otherwise the refusal cannot be regarded as an abuse of dominant position.

The sixth criterion is a negative condition in terms of there is no efficiency advances balancing negative consequences of the refusal. This criterion is crucial in relation to intellectual property rights, since the exclusivity in exercise is the reward for the innovation in terms of ensuring a temporary monopoly as a return for the expenses of development. Elimination of that exclusivity may discourage undertakings from investing in improvement which would have wide implications on consumer welfare through innovation. So the basic dilemma about balancing between economic freedom of the copyright owner and undistorted competition recurs in this sixth criterion. In recognizing this, the CJEU confirmed exclusivity in exploitation as an essential part of intellectual property rights, and declared that the refusal to grant license in itself did not constitute an infringement, unless exceptional circumstances exist.¹²⁰ However, it falls on the copyright owner to demonstrate any negative impact which an obligation to grant license would likely to have on its own level of innovation.

As visible, there may be cases where the refusal is lawful and also a few cases where the refusal infringes the European competition law, depending on all circumstances. So for example, when the requestor intends to simply reproduce and distribute the copyrighted body part, the

¹¹⁶ Joined Cases C-241/91, C-242/91 RTE and ITP v Commission [1995] ECR I-00743 paras 56-57.

¹¹⁷ Case 53/87 Maxicar and others v Régie nationale des usines Renault [1988] ECR I-06039 paras 15-16.

¹¹⁸ Case T-70/89 BBC and other v Commission [1991] ECR II-00535 par 58.

¹¹⁹ C-418/2001 IMS Health v NDC Health [2004] par 49 and T-201/04 Microsoft v Commission [2007] ECR II-03601 par 658.

¹²⁰ Case 53/87 Maxicar and others v Régie nationale des usines Renault [1988] ECR I-06039 paras 15 and Joined Cases C-241/91, C-242/91 RTE and ITP v Commission [1995] ECR I-00743 paras 50.

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refusal of the copyright owner would unlikely be considered to breach Article 102. On the other hand, however, if the requestor intends to offer an adaptation of the copyright work in the market and there is an identifiable consumer demand, the refusal would likely be an infringement provided that the owner cannot demonstrate that licensing would reduce its innovation. European competition law, hence, offers a solution to undertakings willing to enter the spare part market with innovative products or services and, at the same time, respects essentially the copyright owners' interest. Nevertheless, the HCA is allowed to apply Hungarian competition law even if the conduct is not infringing Article 102 of TFEU. So substantial questions still await for a precedent case, in particular as to in what circumstances a refusal to grant license to copyright would infringe the Hungarian competition law.¹²¹

V. Concluding remarks

Economic significance of spare part market within the motor vehicle industry has been growing in Europe for the last decade.¹²² Intensifying competition urges the manufacturers of car body parts to protect their products from competition in order to defend their market positions. One of the ways of protection is copyright which generally provides exclusivity to the owner for exploitation. Since this exclusivity, besides ensuring return of investment in development, creates a monopoly, it is capable of distorting economic competition. Justifiable interests of the copyright holder, the independent undertakings willing to enter the spare part market and the consumers can hardly be balanced as all of them have their underlying rights in conflict.¹²³ Two milestone cases in the United Kingdom resulted in legislative actions in terms of adoption of a new copyright Act, which as a new legal framework provided limited protection to car component parts and, by doing so, enabled independent undertakings to enter the spare part market. This served also the consumers' interests and led to an apparently sustainable equilibrium of conflicting interests.

In Hungary, neither the copyright in car parts, nor the infringement of competition law by misuse of copyright has been asserted as yet. Nevertheless, in light of settled case law, copyright may subsist in a few motor vehicle body parts. It follows that since Hungarian copyright law provides almost an absolute exclusivity – with few exceptions – to the owner, it is capable of constituting a monopoly in the market. HCA has not yet declared infringement of competition law by refusal to grant license to copyright but had already faced the dilemma of conflicting interests. Considering that distortion of competition by refusal to grant license would likely have appreciable affect on patterns of trade between Member States, Article 102 of TFEU would probably be applicable. Having gone through the landmark decisions of the CJEU and the guidance of the EC it appears that refusal to grant license only in exceptional circumstances constitutes an infringement of Article 102. Since the HCA is entitled to apply also national competition law and to impose fine on that ground, a refusal to grant license may still involve sanction even if it does not infringe Article 102. Taking into account that the spare part market in Europe has been growing and the competition will presumably be intensified,¹²⁴ the first

¹²¹ According to Sec 21 par b of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, “It shall be prohibited to abuse a dominant position, in particular to refuse, without justification, to create or maintain business relations appropriate for the type of transaction.”

¹²² Cf. Sulyok Márton Péter: *Műszaki információk a gépjármű-ágazat uniós versenyjogában: a szabályozás története*. In *Jogelméleti Szemle*, 2014/2, p. 254.

¹²³ Noteworthy, the Competition Authority of France, after balancing competing interests, recommended that a repair clause be introduced into French law in order to allow more competition on the aftermarket. See Opinion no. 12-A-21 of 8 October 2012 of the Competition Authority of France, pp. 6-7.

¹²⁴ *The European Automotive Aftermarket Landscape* (The Boston Consulting Group) pp 13-15. <http://www.bcg.com/documents/file111373.pdf> (10 May 2014)

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landmark decision concerned may come in the near future. That prospective decision will hopefully clarify the borderline between interests in copyright and free competition.