

## Debates and Proposals on Copyright in Hungarian Lawyers' Society in 1906

This paper focuses on the history of the evolution and regulation of Hungarian copyright law in the first decades of the 20<sup>th</sup> century. It pays special attention to the debate of Hungarian Lawyers' Society (Magyar Jogászegylet) held in 1906, which affected the fundamentals of the regulation of copyright law, and Elemér Balás P.'s reform proposals. The history of Hungarian copyright law is characterised both by successful and unsuccessful attempts at codification, although aborted bills failed due to changes in historical circumstances rather than the standard of proposals. The Bill submitted by Bertalan Szemere to the National Assembly in 1844 was not enacted for lack of royal sanctioning. Following the age of imperial patents and decrees, after the Compromise (1867) the Society of Hungarian Writers and Artists put forth—again an unsuccessful—motion for regulation. The last attempt at modernising copyright law in the first decades of the 20<sup>th</sup> century can be linked with the name of Elemér Balás P.; his Bill drafted in 1934 was published in 1947, however, due to political changes this Bill could not become an act.

### 1. The 1906 debate of the Hungarian Lawyers' Society on the copyright act

The first Hungarian copyright law,<sup>2</sup> Act XVI of 1884, was made following László Arany's initiative, upon István Apáthy's motion.<sup>3</sup> Later re-codification of Hungarian copyright law was required by the need to create internal legal conditions of the accession to the Berne Union Convention. Act LIV of 1921 harmonised our copyright law with the current text of the Convention, and adjusted our regulation to the results of technological development.<sup>4</sup> In those decades between 1844 and 1921 a debate was held in Hungarian Lawyers' Society (Magyar Jogászegylet), which affected the fundamentals of the regulation of copyright law.

#### 1.1. Miksa Márton's proposals

Miksa Márton, a member of stage authors' association, in the part of his speech on the merits called the attention to the faults of the copyright act. He did not dwell on the sections of the act one by one, instead he pointed out the general faults of the copyright act he had been convinced of in practice.

In his view, since the 1884 copyright act entered into force several factors whose conditions the copyright act regulated had changed to a great extent, with special regard to the conditions of the stage and writers of the age. In his speech Miksa Márton did not intend to give a political opinion or go into arguments, he called the attention of the persons present to the following: "*... Hungarian writers are not just priests offering things on the altar of culture: Hungarian writers by their pen, orators by their word, painters by their brush are soldiers,*

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<sup>2</sup> On further aspects of Hungarian copyright law see Nótári Tamás: *A magyar szerzői jog fejlődése* [Development of Hungarian Copyright Law]. Lectum, Szeged, 2010.

<sup>3</sup> On this Act see also Knorr Alajos: *A szerzői jog magyarázata* [Explanation of copyright law]. Nagel, Budapest, 1890; Kenedi Géza: *A magyar szerzői jog* [Hungarian copyright law]. Athenaeum, Budapest, 1908.

<sup>4</sup> On this Act see also Szalai Emil: *A Berni Unio-Egyezmény magyarázata* [Explanation to the Berne Union Convention]. Athenaeum, Budapest, 1922; Idem: *A magyar szerzői jog magyarázata* [Explanation of Hungarian copyright law]. Athenaeum, Budapest, 1922.

*whose words, writing are their weapon: weapon that unites, that disseminates the Hungarian nation that conquers the country for the Hungarian element and ensures continued existence of Hungarians.*"<sup>5</sup> He called the attention to the point that the literary scene did play an important role in the life of the nation, fulfilled an outstanding task in maintaining the Hungarian mind and anyone who respected literature could be pleased to see that our literature was able, in spite of all external pressure, impact, to retain *"its own racial Hungarian nature, special Hungarian colour"*.<sup>6</sup> He set requirements that the copyright act was to meet and he wanted to attain through the reform first and foremost. One of his requirements was that the act should protect property rights more radically than other legislation.

He points out that the commercial code regulates only the business character of publisher's transactions, and takes into consideration the content of only legal transactions that the author enters into with his publisher, and pays no regard to the content of the author's rights. He mentions as an example that German legislation lists item by item the author's rights that he may exercise against the publisher: they include the right of translation and adaptation (the latter can play a significant role for musical works), after that he gives a detailed analysis of the copyright act.

He mentions that the copyright act is not radical enough: section 1 of the act contains the general provisions, which is the main item of the act—it stipulates provisions regarding reproduction, publication and marketing of writer's, author's works, however, in his view this provision does not contain all essential elements. In Miksa Márton's opinion even section one provides provisions within a rather narrow scope, and later on he dwells on them in details. Next he criticises section 6: as if here the rule of law wanted to make up for the deficiencies of section one, i.e., the problem that it defined the term of copyright not in accordance with requirements; it lists the cases of infringement of copyright. As if the definition of who is that violates copyright appeared as a counterbalance from which we might deduce what copyright actually is. By that, however, the act raises another problem: in court proceedings both section 1 and section 6 shall be taken into account, and the judge is bound by both. As it lists usurpation in seven points, which can be considered itemised, a case might arise where none of the opportunities can be used because it is not included in the listed items, however, copyright has been nevertheless violated, and the court cannot declare the case of usurpation regarding copyright, thus, the act does not achieve its goal, does not sufficiently protect the author and his right. The lecturer argues as follows: *"When the act, whose prime requisite is precision, clarity, leaves such gaps with respect to its very first, primary definitions, then it is clear that this will result in uncertainty, instability in judicature..."*.<sup>7</sup> The thoughts described above formulate the opportunity that the judge handles the above-mentioned sections extensively for the sake of easier applicability, in this case, however, faith in administration of justice can be easily shaken. Miksa Márton refers to the provisions of both the Austrian and German copyright act. In his opinion, the German act regulates this field of law quite precisely, and believes that the Germans have a perfectly worked out copyright law in spite of the conservative elements in it. The Austrian act can serve as an example too; its advantage is that in terms of territory it is closer to us, so it can be easier identified with our own provisions. On the contrary, he makes critical remarks concerning the French law and does not refer to it, arguing that in France the relevant law is outdated, and at the turn of the

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<sup>5</sup> Szladits Károly (ed): A szerzői jogról szóló törvény reformja. A Magyar Jogászegyletben 1906. évi márczius havában tartott vita. Márton Miksa, Kenedi Géza, Szalai Emil, Marton Sándor és Fényes Samu felszólalásaival [Reform of the Copyright Act. Debate at the Hungarian Lawyers' Society in March 1906. Speeches of Miksa Márton, Géza Kenedi, Emil Szalai, Sándor Marton and Samu Fényes]. Magyar Jogászegylet, Budapest, 1906. 5.

<sup>6</sup> Szladits: op. cit. p. 5.

<sup>7</sup> Szladits: op. cit. p. 8.

century they apply mostly the results of administration of justice and not itemised provisions. The Austrian act gives the definition of the infringement of copyright briefly and concisely: *"adaptation of the author's work without the author's licence shall be considered infringement of copyright"*.<sup>8</sup> So, the deficiency of domestic act is that if somebody can freely dispose over his own work, then why should he not dispose over its adaptation, use too? In judicial practice this raises further problems because for lack of legal regulation only files accumulate in cases concerning this issue. It occurs quite often that a drama has been made from a short story, narrative, so it is a typical case where adaptation is implemented. In this case the law in force at the time does not contain any provision that provides protection for the authors against adaptation. As the next example the speaker raises the issue of writer's letters that were published formerly in a collected edition, which was quite a popular genre; the act, however, does not even mention them, so does not regulate this subject area, while the German act resolutely provides for this too.

The next serious problem comes from lack of regulation of extracts, in other words, what may be borrowed from the work and what not. Section 9 of the act states that *"quoting certain loci or minor parts of a work already published shall not be considered infringement of copyright"*, then in continuation *"inclusion of published minor papers in a restricted volume justified by the goal in a greater work that is independent in its content can be considered a scientific work"*.<sup>9</sup> In this part the act discusses what right the author is deprived of, here we expect to see a correct, precise definition, however, we find an obscure, unclear statutory definition only. Presumably, what gives reason for regular abuses of copyright is that the act does not provide proper legal security, moral and ethical value, so anybody can act freely with works in this field due to gaps in the law because there is no applicable retaliation against it or proper penalty. It follows from the above that authors do not trust the copyright act, contrary to criminal rules of law since the provisions set forth in them are clearer and more easily understandable and therefore can be enforced, so they guarantee legal security much better.

Márton asserts that in terms of its structure the copyright act cannot be considered good either because it is incomprehensible; also, it occurs that it mixes questions or settles them in parts where they cannot be classified into taxonomically. The speaker calls the attention to the second sentence of section 1 of the act, which is quite contrary to section 7 of the Austrian copyright act; it is clear evidence of this poorly built structure (*"regarding works which cannot be separated into several parts intellectually, only jointly are the authors entitled to right of disposal"*)<sup>10</sup> Meaning that concerning substantive issues we can speak about divisibility, which can be as well proportionate, yet, the right of disposal is indivisible.

In what follows, the speaker disputes provisions regarding translation, which again would need amendments. Translation constitutes the most fundamental element of copyright, so it deserves to be dealt with in more details, just as Miksa Márton did. As it has become clear earlier, if the author disposes over publication, marketing of the work, distribution and related deadlines and forms, then the author should dispose over translation too since this is one of the forms of distribution. Consequently, it is a significant issue who translates the work into another language, which is one the author's prime interests too. It is possible to raise the general problem against the act that the author can dispose over translation only in the event that the author has reserved his right to it. The provision of the act in section 7, which cannot be considered exact again, is as follows: *"...translation of the original work without the author's consent can be considered infringement of copyright if the author has reserved the right of translation on the title page of the original work, on condition that translation has been commenced during one year and completed during three years from publication of the*

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<sup>8</sup> Szladits: op. cit. p. 8.

<sup>9</sup> Szladits: op. cit. p. 10.

<sup>10</sup> Szladits: op. cit. p. 11.

*original work*". The above quotation from the act can be perhaps taken as one of the best examples of obscure and incomprehensible formulation. More specifically, it does not reveal regarding whom it stipulates deadlines and what the date of commencement and date of termination of such deadline is. Miksa Márton raised another problem concerning section 7: "*for theatre plays translation shall be fully completed during six months from publication of the original work*". His question to this is "*who is to complete it and from when six months is calculated from?*"<sup>11</sup> Although he himself gives answer to the second part of his question based on his own experience: it is calculated from the date of the first performance, the answer comes soon from the audience: it is the entitled translator who must complete it.

His next argument concerns sections 46 and 48, to be more precise, he considers these injurious. Section 46 of the act provides for infringement of copyright regarding musical works: "*any adaptation published without the author's consent that cannot be considered own composition*". Again, he confronts this section with section 32 of the Austrian act, which defines the cases where adaptation of a musical work implements violation of rights, and where it allows the adapter the following: "*certain variations, fantasies may be, others may not be made from certain musical works*".<sup>12</sup> After the above-mentioned section, he touches on section 48, deemed more injurious by him. Use of a published author's work as the text of a musical work cannot be considered infringement of copyright, and it follows from the above that poets' works can be freely used. Commenting upon this part of the act Márton expounds that this is contrary to the author's most fundamental right since only the author shall dispose over the poem or text. This opportunity of use is contrary to equity because the composer uses the work and obtains income therefrom, while the author of the original work gets no consideration for it although the composer would not have any income without him. Márton raises the following example in this respect: "*... 'A falu rossza' ['Scoundrel of the Village'] was written as a folk play and composer Jenő Hubay made an opera of it. Mrs Ede Tót sued Jenő Hubay for unauthorised use and infringement of copyright. The curia [the Supreme Court] passed judgment in accordance with section 48 that texts that owing to their nature have significance only with respect to music composition such as texts of operas, oratorios shall be taken out of the term of usurpation.*"<sup>13</sup>

According to Márton the act does not consider protection of dramatic works important enough, which is clear from section 50 too, which states that outside stage overtures, parts of music between the acts and other parts can be performed without the copyright owner's consent, however, authors lose their source of income due to this section. The Austrian act stipulates contrary provisions because consideration shall be paid for using the author's music. Miksa Márton finds section 51 injurious too, which states that musical works published in reproduced form and offered for sale can be performed without the copyright owner's consent provided that the author has not reserved the right of performance on the title page or at the beginning of the work. This inflicts the author more than the section on translation because public performance of a stage work is the author's most fundamental right. He refers to the fact that German regulation is also liberal but in certain cases only: in charity parties where admission is free and contributors perform free of charge; Hungarian regulation, however, makes copyright a prey without any restrictions, and binds enforcement of copyright to a formality whereas the author cannot be demanded to reserve assertion of a formal right separately.

According to section 52, if there are several authors of the work, paragraphs two and three of section 1 shall be applied with respect to public performance with the deviation that performance of musical works with words, including musical plays, need the composer's

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<sup>11</sup> Szladits: op. cit. p. 13.

<sup>12</sup> Szladits: op. cit. p. 14.

<sup>13</sup> Szladits: op. cit. p. 14.

consent only in general. The speaker claims it is hard to understand why the composer's work is judged differently than the librettist's work, and why greater right of disposal is given to him.

Section 58 of the copyright act applies to performance of theatre plays; it states that in case of violation of rights *"the total income from unauthorised performance without deduction of the costs incurred shall be paid as indemnity"*. This is contrary to the generally accepted practice of the period because the injured could get a certain part only. If this section of the act stood indeed, then each author would watch when rules are infringed, would look for conflict so that the total income received could be delivered to him as indemnity. Probably some kind of error is hiding here, he says, since in Hungary the basis of compensation can be only the part of the total income which serves to determine the author's royalty.

The copyright act does not provide for several issues, however, development makes it unavoidable to make rules with regard to mechanical reproduction, publication and marketing: lawmakers cannot forget that development brings along more modern, more state-of-the-art technologies that raise problems in law. There is no correct statutory definition for the above-mentioned mechanical reproduction, publication and marketing; the German act, on the contrary, foreseeing technological development, exhaustively describes what the phrase *mechanical reproduction* covers. It is a particular question whether the phonograph is a machine or not, and if copyright can be infringed by reproducing the author's work through a phonograph. According to German regulation, infringement of right cannot be committed through a phonograph, the French act, however, regulates these issues stricter because phonograph is deemed a means suitable for that.

From among the rules to be reformed arising in connection with limitation he highlights section 36 which states that penalty of infringement of copyright and claim for compensation and unlawful enrichment will lapse in three years, and the three years will start on the day when distribution of unlawfully reproduced copies commences or publication of the work takes place. Márton considers this inequitable, the three years little and determination of the commencement of limitation unreasonable. If, for example, the author goes abroad for a longer period, during this time somebody might publish his work and if the author returns home and learns of what has happened only four years later, then he cannot take action against the infringer as the term of assertion of rights has already expired because distribution started more than three years before. It would be a more equitable solution if the term of limitation was calculated not from commencement of distribution but from the date of learning of the facts since this rule protects the author's interests, therefore, it should be adjusted to his information, knowledge of the facts.

Furthermore, he contests the procedural law part of the act, again based on his experience: he does not deem it equitable that the term of passing judgment in copyright related claims is longer than one year. In Márton's practice it had never occurred that the court passed judgment within one year in copyright claims: *"...I do not speak about compensation for damage, which could be left with the competent court according to the extent of the amount, however, the fact of infringement of copyright should be reserved for court of justice and minutes proceedings against the flagrant offender, which as we know takes painfully such a long time"*.<sup>14</sup>

Also, he points out how big uncertainty is concerning copyright in our country and refers to relations maintained with foreign countries. He finds it injurious that the country "dropped out of" the Berne Convention, and that we do not maintain good relations with several foreign states, which has produced a "really robbing practice". He emphasises that the Authors' Association makes every effort to act within its sphere of authority and, for example, in

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<sup>14</sup> Szladits: op. cit. p. 18.

consultation with the US consul in Budapest it tries to create reciprocity between the two countries.

## 1.2. Géza Kenedi's proposals

In Géza Kenedi's view it is a generally unfortunate feature of Hungarian lawmaking that all of our acts were enacted when they were already considered outdated in the country where they came from (often, other branches of law in Hungary lag behind too). He considers our copyright act reception of the 1870 German copyright act, however, it was considered outdated in Germany by 1884. *"I have wanted to grasp this old statute to criticise it and search for great motifs of the act and it always slips out of my hands. I can always find, as the honourable speaker detailed it quite well, fragmentary measures, which are bad, have no sense in parts or when they have sense they should rather not have that sense"*<sup>15</sup>, Géza Kenedi begins his speech on the merits. He shares the opinion of the previous speaker regarding reform, so the question is not if reform is needed, since it is obviously clear from the present situation, but in which direction it should go. Géza Kenedi's opinion is different in several points from Miksa Márton's views, who took the floor before him. *"Actully, advanced education has not produced many new instruments with respect to expressing thoughts and—as music is also concerned here—emotions since the date of this act."* Apart from the telephone and phonograph, it was motion picture that has appeared as a new instrument, so the regulation of only these instruments should be integrated in the act, which the Germans have partly done as their act was made in 1901.

In what follows he refers to some examples in his speech. The first ones include the case of the Telephone Herald: he recalls how difficult it was to place it among dogmatic concepts, in spite of the fact that its copyright law and press law aspects were unquestionable. (Through the Telephone Herald a poem of one of the Hungarian poets was disseminated throughout the city. An action was brought in the case; in the claim they asserted that this took place through mechanical reproduction; the objection made in the first instance was that this was not mechanical only acoustic reproduction. Therefore, they lost the lawsuit in the first instance; in the second instance, however, they made use of the fact that the court strictly insisted on conceptual definitions, and they based their argument on that. Finally the court declared usurpation without being excessively bound by concepts.) A similar problem was raised at that time by theft of electricity in terms of criminal law regulation, i.e., whether electricity is material or not; it was not decided, yet it was certain that taking it qualifies as theft. German regulation dwelled on it separately; it declared that electricity can be stolen although it is not material.

Kenedi asserts that outstanding progress in thoughts and jurisprudence is the main reason for reform, and that several concepts have in the meantime been determined more precisely, and that the number of unlawful acts has widened. Concerning copyright, in stead of *theft*—which actually cannot be called theft since the point under review is a right of other nature rather than property in the traditional sense—one should speak about misappropriation, infringement of the intellectual property of another person. After expounding these thoughts he calls the audience's attention to the point that if they want to make reforms, they should not forget about the fact that people usually find loopholes, so it is worth taking great care to explore and eliminate them. According to his somewhat idealistic opinion alien to the reactive nature of law, it would be an essential aspect if judges were motivated to find frauds before rather than after they occur.

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<sup>15</sup> Szladits: op. cit. p. 22.

*“Protection of author’s rights should be governed, directed every time by two leading thoughts in terms of public interest and individual aspect.”*<sup>16</sup> The core of one of the thoughts is that freedom, movement of ideas, thoughts should take place in the whole society as extensively as possible without any restrictions. Kenedi’s long-term hope is that free spreading should be absolutely unlimited but this can be realised only in the event that the state shows greater care for the products of culture, the arts; the other thought is that protection of the author—and protection of its own rights, which means copyright protection—serves public interest too.

Kenedi raises the question *“whether it is just that under the umbrella of protection of the creative work of human intellect inferior, valueless works and destructive products of the mind are given such protection too?”*<sup>17</sup> By that he means to tell the audience that albeit great poets would benefit from this reform, should protection be given to those who write “pulp works” with vocabulary and subjects incomparable to true literary works. He notes that he shares Márton’s opinion with respect to usurpation, he also thinks that formulation is not precise, not perfect: it is worth comparing it to the 1901 German act because we can be surprised to experience that in those days the tendency of these laws embraced far more developed, far greater interests, which justifies it all the more to make a new act instead of the Hungarian copyright act. In his view the difficulty comes from the fact that it should be determined in practice who the actual owner of the literary work is; this can easily cause problems: is it the author or the agency to whom he has transferred it, or the person to whom the agency has transferred it. One should not forget that copyright means exclusivity; and Kenedi brings an example: a famous writer sold his work with his name written on it to a publisher, who exercised its acquired right; then another publisher took action referring to an earlier contract claiming that the author sold it to them earlier, six years before to be precise. Also, a case occurred where two, three or more publishers took action claiming that the work was sold to them earlier. Kenedi did not refer to names but he added that writers often forget which work they have sold already and so plenty of actions are brought. During them *“it happens that the suitor comes across a person who has not committed usurpation but stood on legal grounds and yet according to the law, since he had not made arrangements in advance, he is punished and obliged to pay compensation, at least to reimburse the interest although he is innocent”*.<sup>18</sup>

Copyright protection lasts for fifty years from the death of the author, and this raises further questions. German regulation is as follows: regarding these institutions more attention was paid to public interest: a period of thirty years from the death of the author was set, with one stipulation, however, which meant protection of excellent, appreciated works; more specifically if the work was published during these thirty years, then protection lasted for another ten years. This stipulation applies to scientific, mathematical works because it often occurs that their real value is revealed only later with the progress of technology and then copyrights are reserved for another ten years. This means protection of intellectual work of the highest level. Regulation similar to that would stand its ground in our country too, so fifty years would be reduced, which would be in the interest of national culture.

In the Hungarian act restriction of the right to translate a literary work and the author’s translation right is unacceptable. It would be senseless and useless to maintain the rule that new translations cannot be made for fifty years from the death of the author, therefore *“the author should have right to his own work, if he has published it in a certain language, for fifty years from his death and if he has this work published in translation himself or by others, this should be limited to five years, furthermore, this should be on condition that he can start the*

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<sup>16</sup> Szladits: op. cit. p. 25.

<sup>17</sup> Szladits: op. cit. p. 25.

<sup>18</sup> Szladits: op. cit. p. 26.

*translation during the first year and should complete it during the three years*".<sup>19</sup> This is legal injury to the author too, which was solved in a form easier to handle in legislative practice abroad. We borrowed this outdated regulation from the earlier 1870 imperial statute; at the time of making the German act there was a view prevailing in Germany that the impact of literary works and the German intellect should not be restricted when the idea of the empire awakens, and thereby they wanted to attain that the idea and culture of the German empire *"should entrench itself in other countries"*. In Hungary this goal was achieved indeed since we borrowed the act from them, which cannot be considered a fortunate step, because we borrowed all of its faults instead of legislation having analysed this rule more thoroughly and having taken amendatory measures to make a more efficient act.

The next subject area he discussed in his speech was the issue of setting to music. Kenedi was also indignant at the procedure used inland against the author. The act was also improper because according to its rules it did not qualify as usurpation when an author's work was used for making a musical work, and the text was made together with musical accompaniment. The above-mentioned example of 'The Scoundrel of the Village' arises again. The inheritors of the writer of the work, Ede Tóth sued the writer of the libretto of the opera, who misappropriated the work; the case was referred to a national experts committee, which found that the all of the figures, names, characters and events that occur in the opera are equal to those in the work made by Ede Tóth, so the opera was a complete replica of Tóth's work, it was used without any material changes. The experts committee submitted its findings to the court, stating that *"this is usurpation proper and the court declared that—awful explanation of letters which Hungary's judicature cannot get rid of concerning many issues—it was not usurpation because the law allowed it."*<sup>20</sup> This example clearly shows that the reform of copyright law allows of no delay. The German regulation made in 1901 was more advanced because according to it certain parts of poems or minor poems can be used for setting them to music.

Then, he speaks about circumstances that unambiguously supports the need for reform. This is the issue of translation in a country where culture develops fast by integrating products of art, ideas, while works of national literature must be extraordinarily protected. In this country, in Hungary it is of key significance what rules on translation of works are like because the problem of possible injuries is decided in accordance with them, also, it is questionable what international contracts should be by which we regulate the right of translation in line with our needs. Hungary "exports" a very low number of literary works abroad; yet, compared to that plenty of works come into the country. Our literary balance shows a huge deficit since literary works, mostly from Germany, are flowing into the country in large quantities. In this respect he raises the question how we should pay for incoming imports and if we do pay tax to a foreign culture what we should pay for: *"For multitudes of inferior, weaker, valueless works, or is it able to arrange its laws in such fashion that if it protects translation of foreign works, then it should provide for translation so that genuinely precious works in the foreign culture that can enrich the nation's life and culture should be given priority."*<sup>21</sup> Undoubtedly, international contracts should be concluded on the basis of this principle.

The next point of his speech was the issue of the Berne Convention. At the time of making the Hungarian copyright act, at the end of the 1800's, the foundations of the Berne Convention had been laid already, in spite of that an invalid act was made in Hungary. By 1906, most of the European states had ratified the convention, except for Austria-Hungary. The core of the Berne Convention is that it provides the author's right of translation in his own state; abroad, it allows ten years for starting translation, if translation has been started, it provides the same

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<sup>19</sup> Szladits: op. cit. p. 27.

<sup>20</sup> Szladits: op. cit. p. 30.

<sup>21</sup> Szladits: op. cit. p. 31.

rights that he enjoys at home; this means much greater security for literary works. By this regulatory method valuable Hungarian literary works could obtain foreign markets, so it would be important to integrate the rules of the Convention in the reform—this view was shared by traders and publishers. At the relevant time it was not in the interest of our country not to ratify the international agreement, it was aborted by the Czechs and the Polish to hinder breakthrough of German culture in Austria. At the end of his speech Géza Kenedi notes that it is very difficult for our lawmaking machinery to adapt the act, although it would be of utmost importance to adapt to the needs of the nation: *"Beings that cannot adapt will scrape by or waste away: this is a law of nature."*

### 1. 3. Emil Szalai's proposals

In Emil Szalai's opinion—following previous speakers—Hungarian copyright act needs profound reform, although he does not find the present copyright situation so hopeless, yet, he would not highlight Act XVI of 1884 as a masterpiece of lawmaking. It cannot be considered a work of high standard either in terms of its wording, concept or structure; however, in the hands of a proper judge this rule of law can be used but only if the judge has a feeling for literary and artistic life. Applicability of an incomplete, inaccurate act can be helped by judicial practice and legal custom, if it does not get stuck on possibly less properly worked out statutory provisions, the judge can make up for deficiencies in dispensation of justice. He refers to the legal practice of France as an example for efficient application of old rules of law where copyright law is in a situation similar to that in Hungary.

In his opinion the Hungarian act could have been made better if the interests of the persons to be protected had been taken into consideration. In defense of the court it can be raised that copyright related cases are very rarely referred to them, so very rarely have they been in a situation where they had to adopt a decision with regard to copyright. Furthermore, it can be stated that artists, writers and publishers endured their cases alleged to be legal injuries without taking any action, they did not use protection provided by law, they endured that their works were taken unlawfully from them, were abused. Accordingly, such claims have not appeared in judicial practice, so far only a few have occurred in the capital city, lots of provincial courts have not dealt with any copyright related lawsuits at all. Possibly the situation would have been different if only the courts of Budapest, Kolozsvár and Marosvásárhely had been vested with power in copyright issues, and the professional standard of judging the cases would have been higher. If lawsuit had been conducted before the above-mentioned courts only, then practice would have matured much better and cases would have been handled more professionally since similar cases would have concentrated here, which would have made judges' work easier.

Szalai would not put emphasis on authors' legal protection in the reform—in his view this is set forth in the present act, and it is a question of interpretation only—instead, he would integrate institutions of social character. In his view, authors' attention should be called to the point that they should seek legal protection and request legal remedy of injuries in court, by which authors would recognise that they can obtain pecuniary advantages on the grounds of the present act too, and the growing number of illegal works in literary life could be eliminated; the most obvious form of that is setting up associations, professional societies, and bringing artists together in them.

Szalai does not consider it right to implement the reform in a form that underlines authors' (pecuniary) interests only and makes regulation paying regard to it, since it must be admitted that authors have moral, ethical interests too. Only a part of the authors believe that their prime interest is to increase their wealth by their work, lots of them put the emphasis on propagating, disseminating their own thoughts, ideas. Some publishers also intend to achieve

that much rather than increasing pecuniary assets: for there are publishers that have been set up as non-profit organisations, for example, a political party or a social movement whose *raison d'être* is to disseminate the idea of literary works, but here the primary aim is not to increase proceeds but to recruit adherents and followers to their ideas. Several writers think that as acknowledgement of their work they expect an increasingly wide range of people to become familiar with their works rather than pecuniary assets. It is in the interest of society and the state that works should be disseminated as extensively as possible, however, it is also in the interest of them that pecuniary benefits should urge people to think or engage in writing, thinking regularly. As a matter of fact, it is also necessary that anybody who has talent in writing should be provided with financial means, should be able to earn a living from his artistic work. *"Therefore, harmony between culture and author's financial interests should be the guiding line in the reform of copyright law."*<sup>22</sup>

The former thought should determine the direction in the reform of copyright law, particularly in the field with international aspects and translation. He refers to the train of thoughts in Géza Kenedi's speech that domestic literature is not significant in exports, its imports are all the more significant. He thinks it should be deliberated whether it is domestic interests and values or the works of otherwise well paid authors that should have priority. It is needless to make efforts as soon as possible to pay increasingly high customs duties to countries that import books duty free, in the form of author's royalty through regulation of translation rights and international agreements. This is an important aspect regarding the issue of joining the Berne Convention—therefore, Szalai does not support accession to the Berne Convention either.

In the reform special emphasis should be laid on the need to revise the new act so that we should obtain financial benefit from imported works instead of the currently effective regulation under which foreign authors' works flow into the country without payment of any customs duty, by this shift giving a chance to publishers, translators to have foreign literature flowing in huge volumes marketed in Hungarian and thereby to generate profit. Competition on the market will favour dissemination of high standard foreign works too. Contrary to Kenedi's opinion, he thinks that Hungarian edition of popular scientific works should be entered in the market in a much wider scope at a lower price.

He specifically highlights the issue of the right of public performances because he considers its regulation rather obscure. Public performance is a special genre in terms of regulation since it is a less palpable work, not a lasting work in the traditional sense; therefore, original, independent provisions are required in this respect. Szalai asserts that section 50 of the act, which does not protect overtures of plays, is rather injurious. As an example he refers to *János vitéz [John the Hero]* by Pongrác Kacsóh: enterprises set up to present musical performances such as music cafes or music-halls allure the public (against payment of admission fee or using raised prices) by the music of *János vitéz*, however, during the performance guests will hear nothing else than the song *Egy rózsaszál [A Rose]*. In the case of another song, a part of a play, which was sung and played by orchestras throughout the country, only a minimum amount was paid by the publisher to the author when the author sold it to them before the first performance. The Austrian and German law regulates the issue more strictly for the benefit of the author, because it orders to pay fee to the author separately for each performance, while domestic authors get almost nothing for the right to perform the music of plays on the grounds of statutory provisions. Szalai would leave section 51 of the act in force with respect to the music of theatre plays too, and he argues that it is often in the interest of the composer and theatres to make the song known as extensively as possible to allure audience to the performances.

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<sup>22</sup> Szladits: op. cit. p. 38.

He calls the chapter of the act on penalties and compensation absolutely useless; he believes it needs to be reformed immediately. With respect to fundamental principles this part is extremely outdated, and in practice it has been proved that these rules ensure copyright protection to a low extent. Statutory provisions regarding usurpation have been made in a form typical of criminal law regulation, and perhaps, he adds, that is why the chapter has the title penalties. Whereas, the objective would be "pecuniary indemnity", and penalty should serve the author's benefit: it seems to be less realistic that, if the author can see that the amount received from penalty enriches the state treasury and the author himself gets nothing due to his injury, he would bring an action in the case, whereas, if he had pecuniary advantage from the lawsuit, in addition to moral indemnity, then he would take action sooner before court in case of injury. The German regulation considers the author's compensation an issue of prime importance, the title of the relevant chapter is *Rechtsverletzungen*: it puts compensation in the centre, the issue of penalty is secondary, the amount of the fine imposed by the court is payable to the author, and penalty, which is payable to the state treasury, can be imposed additionally.

#### 1.4. Sándor Marton's proposals

Sándor Marton at the beginning of his speech sets his fundamental principles regarding the reform. The first thing he mentions is that the author himself should enjoy the financial benefits of his work, that is, only the author should be able to "exploit" intellectual activity financially. The other direction is protection of the author's moral values. The author's protection from two directions gets in conflict with the interest of the state, more specifically cultural interests, "*the education developing force implied by the products of human mind should be provided for the plenitude, which necessarily involves restriction of the author's claims for protection*".<sup>23</sup> Restriction shows itself in the fact that the form into which the author casts its work comes only from his own inner self, however, each author draws inspiration to make his work from the common treasures of mankind and merely adds his own ideas, thoughts to it. Accordingly, he refers to the Italian act that states that the author works for mankind, and social order provides the author with enjoyment of his work solely within the term of protection. (Marton stresses that Jhering, through the law of persons approach, classified usurpation claim as *iniuriarum actio*, and the only available Roman law reference to it in the copyright law systems of the turn of the century is the one that Ulpianus expounded when he spoke just about *iniuriarum actio*: "*...iniuriam damnum accipiemus ... culpa datum, etiam ab eo, qui nocere noluit*".<sup>24</sup>)

Ample literature supported the German law of property approach that copyright is property right—in this field Proudhon's approach was the most extreme: he compares the author who sells his book to a woman who offers her charms for sale. Marton asserts that Roman law and the authors of the antiquity left nothing to us with regard to copyright from which we could set out in this question; this problem occurred owing to spreading of printing and paper only, mostly from publishers' point of view, since copyright developed from bans on reprints.

Setting out from the little available legal sources, János Suhajda, in his private law, advises writers, judges "*that everybody should help himself as he can*". Marton refers to the case of Jenő Rákosi as an example: in 1878 the director of the German theatre in Gyapjú street announced performance of the play entitled *Niniche*, however, the right to perform this play was obtained by Jenő Rákosi, director of the Folk Theatre, so they applied to the police for banning the performance of the play, and on the opening night of the play the performance was banned indeed. As a matter of fact, the director of the German theatre lodged an appeal in

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<sup>23</sup> Szladits: op. cit. p. 45.

<sup>24</sup> Ulp. D. 9, 2, 5, 1.

the case, but the police action was approved in the second instance too. In 1878, when copyright acts had been made all over Europe, police intervention in a case of private nature was justified by the general principle of prevention. It was under such circumstances that the draft bill on writers' and artists' property rights was published in the yearbooks of the Kisfaludy Society, which was made by László Arany, who acted on the verge of writer's and lawyer's profession, and which formed the basis of Act XVI of 1884. Marton's opinion is fully identical with the opinion of earlier speakers to the extent that the act on copyright can be radically reformed only in the event that publisher's rights are reformed simultaneously.

Concerning the right of translation Marton believes that section 7 of the act can be maintained to enable works to get to readers extensively. The author's right is sufficiently protected because in the case of his own authorised translation the author enjoys the normal term of limitation of copyright, that is, the principle of *volenti non fit iniuria* prevails. If the author does not exercise this right, it can be presumed that he does not want to prevent his work from becoming public domain. However, he believes that the reservation and notification procedure should be repealed, and he would determine a period of three years uniformly for term of protection reserved for the author with respect to translations.

According to the reasons of the act, the nature of usurpation brings about that copyright injury can be remedied if it has been retaliated within a short time. Marton also believes that retaliation of usurpation carries criminal law elements, and it follows from this that the party injured by usurpation have almost the same rights as the injured party within the scope of acts of criminal law with request for prosecution. Determination of the term of limitation creates harmony with the criminal code: according to section 22 of the copyright act usurpation is implemented upon the first reproduced copy of the work has been (unlawfully) completed, however, limitation begins, according to section 36, from commencement of the distribution, publication of the work. Only usurpation set forth in section 23 of the copyright act, businesslike offering for sale and distribution can be considered usurpation committed against the author's pecuniary interest, however, limitation of the related claim will commence as from the last day of distribution. If the author has not intended to exercise his right during the three years available, then it can be presumed that he has not considered it injurious.

Turning to the issue of adaptation, he puts the question to what extent it is allowed and when adaptation is usurpation. At this point he condemns German regulation because he finds it too strict that it is the author's exclusive right to arrange his narrative work for the stage and vice versa. "*The author's work is the individual shape made perceptible in which he presents his own thoughts.*"<sup>25</sup> It follows from this that pure plagiarism does not qualify as usurpation: processing of the thoughts of other persons might as well produce a new work. Marton asserts that the dividing line between plagiarism and usurpation cannot be absolutely marked, it should be analysed on a case by case basis whether an independent literary or artistic work has been produced through processing the basic thought. According to paragraph 1 of section 9, inclusion of minor parts of specific works and minor papers in volume justified by the purpose in an independent scientific work is allowed—so it is important that the work into which they are imported should be a scientific work of greater importance.

With respect to works of the fine arts he demands thorough revision of the act. Comparison of sections 61 and 62 shows striking analogy: paragraph 2 of section 61 considers remaking infringement of copyright even if the original work is imitated in another genre or another kind of art; according to paragraph 2 of section 62, however, it shall not be considered infringement of copyright when specific replicas are made not for the purpose of marketing. "*This is the anomaly; while simple copying in the same kind of art can be carried out without*

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<sup>25</sup> Szladits: op. cit. p. 51.

*any hindrance permanently, adaptation in another kind of art requiring separate independent work is prohibited even in specific copies.*"<sup>26</sup>

He raises the issue of infringement of copyright in musical works when adapted to gramophone or phonograph. According to the German act this qualifies as reproduction: "*durch Platten, Walzen und ähnliche Bestandteile von Instrumenten ... welche zur mechanischen Wiedergabe von Musikstücken dienen*", which is allowed all over Europe, except for Hungary. According to section 5 of the copyright act, mechanical reproduction of the author's work can be considered infringement of copyright but according paragraph 2 writing down is also mechanical reproduction if it is used instead of mechanical reproduction. In musical works, it is not the musical notations or the score but the musical thought itself that is protected. According to section 45 usurpation—properly applying section 5 and paragraph 2 thereof—can be committed in all the forms in which the musical thought, the author's combination of sounds are recorded in such fashion that the musical thought can be reproduced from it. Notes are merely tools to produce sound; sounds, however, can be remade not only by notes but by plenty of other tools, such as phonographs. With regard to protection of musical works, Marton asserts, it is not enough to make sure that musical notations could not be duplicated through printing, protection should be provided for writer's works for the case when they are made for the blind by relief printing, and protection is required for musical works too when duplication is made not by duplicating notes but by another method.

Section 22 of the German act contains restriction of composers' rights, section 9 of the Hungarian copyright act lists item-by-item the measures that restrict the author's natural right, however, it does not contain any restrictions regarding permitted forms of reproduction and publication. Irrespective of the German regulation, the Hungarian regulation in force at the turn of the century qualified marketing of musical works through gramophone as injurious conduct.

In the debate of the German copyright act, the *Reichstag* requested the chancellor to enter into negotiations with the states that acceded to the Berne Convention of 9 September 1886 that they should prohibit arranging musical works, without the author's permit, for any musical instrument by which musical works can be reproduced. Thus, they speak about reproduction only in the event that the work is produced in a determined number in such form from which it becomes possible to communicate the author's thoughts to others but it does not need to be made in the same form as the original. Furthermore, it is not necessary that the same audience should be addressed by it, so mechanical reproduction advances perceiving the work by other sense organs. With regard to mechanical reproduction they stated that it is equal to printing in terms of form, purpose and essence, so it can be classified into the same category as printing also in terms of usurpation—albeit, an expert can somewhat enjoy reading musical notations, their readability is not condition of the copyright protection of the musical work, the general public can enjoy them only in the forms of sounds. Section 46 of the copyright act states that: "*Any adaptation of musical works published without the author's consent that cannot be considered own composition shall be considered infringement of copyright. Such as ... arrangement of musical works for one or several musical instruments ... or impression ... of their melodies.*" Marton asserts that it follows from this that the gramophone is an arrangement of musical works for gramophone-musical instruments apparatus.

Marton claims that Kenedi's standpoint—that copyright protection should not be extended to pulp works—is an outdated view. The question occurs to him whether exclusion from protection might produce contrary effect and make them more competitive on the market: if a work has obscene content indeed, then it belongs to the relevant state of facts of the effective criminal code. Their opinions are identical at one point: all printed products should not be

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<sup>26</sup> Kováts Gyula: Az írói és művészi tulajdonjog [Writer's and artistic property right]. Pfeifer, Budapest, 1879, p. 41.

necessarily provided with copyright protection; at that time there were attempts to protect plenty of printed materials by copyright, which owing to judicial dispensation of justice were protected indeed (for example, price lists, programs, playbills). The speaker does not consider it right because in his view these products belong to the sphere of unfair competition and not to the scope of copyright.

The opinions of Marton and Kenedi regarding state agreements are completely identical: the issue of state agreements is an economic issue. He considers the first agreement an erroneous measure: our country entered into this agreement with France in 1866 on copyright, when the term of protection of translations regarding French works was unlimited, while Hungarian works were not provided with any protection. Lacking statistical data, however, relying on his information, he asserts that annually approximately five hundred literary works and ca. forty stage works in foreign language are staged in translation in Hungary. It follows from this that we pay a huge amount abroad for obtaining translation rights, and only a fraction of it is returned to us. He believes it would be worth following the German legislative practice and narrowing authors' rights "in terms of industrial policy".

### 1. 5. Samu Fényes's proposals

In his speech Samu Fényes holds the position that the Hungarian copyright act is in every respect and by all means the worst possible act. In his view, it would be more favourable for the protection of culture and copyright if this regulation did not exist at all.

Similarly to Miksa Márton, he tries to interpret section 7 of the act, and he finds that this section of the act is incomprehensible: *"But we who say that we do not understand it understand more of it than those who say that they understand it because those who say they understand it do not understand it at all"*.<sup>27</sup> He believes it is shocking in the act that the first possible state of facts regarding usurpation is that anybody who translates a work made in a dead language into a living language commits usurpation. He points out that this was borrowed from the earlier German regulation and that this regulation was introduced in Germany because they wanted to ensure translation rights to the *Sprachwissenschaftliche Gesellschaft*, and it had its significance in Germany since this company published texts in eastern dead languages in huge volumes—this is not really needed in Hungary. This means that it is much more worth writing works in dead languages and translating them into Hungarian because then they will enjoy five years protection.

He finds that paragraph 3 of section 7 has been indeed worked out in accordance with domestic interests: translation without permit shall be considered usurpation only in the event that translation has been commenced within one year and has been completed in three years. He underlines the incomplete structure of the act when it states in one sentence that publication shall start within one year, in another sentence it sets forth that translation shall be started, which is not the same. So, if anybody starts translation within one year and publishes it after three years have passed, then it will not qualify as usurpation, however, if he publishes it within three years, the case of usurpation does not hold either. It is an interesting point in the regulation that translations of theatre plays shall be completed within six months from publication of the original. *"As in the introduction the section sets forth the cases of usurpation, obviously it should be interpreted that the statement here means that it shall be completed within six months from publication of the original to implement usurpation. But it has no sense really that it should stipulate quasi as an order how one shall usurp, so only another sense can be attributed to this provision."*<sup>28</sup> An imperative norm due to its nature cannot be qualified as author's protection.

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<sup>27</sup> Szladits: op. cit. p. 70.

<sup>28</sup> Szladits: op. cit. p. 72.

It is the fault of the act that it does not sufficiently protect property rights because after one year it makes translation free and only one collected edition from several literary works can be published under copyright protection. *"Only these two cardinal requirements can be bound to copyright: that it should protect the author's financial interests, his right to his work, i.e., property rights; secondly, that it should protect individuality of his work, i.e., moral powers and as this act does not achieve these goals, it is necessary to make a law that enforces these two postulates."*<sup>29</sup>

In the rest of his speech, he discusses Kenedi's position regarding pulp fiction. Kenedi would provide protection against immoral, low standard works, and Samu Fényes agrees with it to the extent that there is no forum that would determine what qualifies as obscenity. He adds that it is noteworthy that compared to general conditions of world literature the number of pornographic works in Hungary is outstandingly high, the reason for it, he says, is presumably that they can be taken by anybody, the three years that protect the author pass quickly, and after that the work becomes a prey, it is easy to fill the market with it; it costs nothing, it needs no science or linguistic skills, and we get a useless literary work. On the contrary, he believes scientific works in Hungarian are very rare in the market, apart from a few works. Turning the above argument the other way round, copyright should protect trash for long years so that writers of trash should deliver their work for reproduction only for high valuable consideration and this would make the price of trash rise, so it would not be possible to enter the market with cheap publications.

In Samu Fényes's opinion, reform of the copyright act can be implemented solely in the event that writers are protected against translations and collected editions, and for this reason this right of protection should prevail for thirty-forty years from the death of the author with regard to translators of foreign works too.

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<sup>29</sup> Szladits: op. cit. p. 72.