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CHANGES IN THE AREA OF EXTENDED COLLECTIVE MANAGEMENT IN RELATION TO MEMORY AND EDUCATIONAL INSTITUTIONS IN THE LIGHT OF THE CZECH AMENDED COPYRIGHT ACT

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Abstract

The paper deals with changes brought by the amendment of the Czech Copyright Act (Act No. 102/2017 Coll.)¹ within the relation of the extended collective management to the memory and educational institutions. Especially will be focused on a preservation exception and an exception for teaching purposes. The paper presents the current legislation, compares it to the previous one, analyses its impacts and effects especially on the area of memory institutions and educational institutions.

Keywords

Collective Management; Extended Collective Management; Memory and Educational Institutions; Copyright; Preservation Exception; Teaching Purposes Exception

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Introduction

The latest major amendment to the Czech Copyright Act² was motivated primarily by the need to transpose the new EU Directive 2014/26/EU, on Collective Management of Copyright and Related rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market³, but it does not concern only these areas. The changes also affected memory and educational institutions (libraries, museums, schools, etc.)⁴, especially their digitization efforts and the possibility to copy copyrighted works for the purpose of education.⁵

According to the explanatory report on the Amended CA, the purpose of the changes in the legislation is to facilitate the licensing of uses such as accessing digitized content on the Internet and accessing content digitized by another library in the Czech Republic at its terminals for memory and educational institutions.⁶ The solution might be an extended collective management for such licensing. Thus, based on a collective agreement, libraries could share digitized content among themselves and schools and make copies of works available to the public more widely than ever before.

¹ Consolidated version of Act No. 121/2000, on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), effective from 20 April 2017, (further referred as "the Amended CA"). Available from: https://www.mkcr.cz/doc/cms_library/autorsky-zakon-uplne-zneni-zakona-c-121-2000-sb-k-1-7-2017-7586.docx

² Ibid.

³ Further referred as "the Directive". Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026>.

⁴ Further referred as "memory" and/or "educational" institutions.

⁵ DŮVODOVÁ ZPRÁVA: Návrh novely autorského zákona (zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů, ve znění pozdějších předpisů). Praha: Ministerstvo kultury. p. 22-23.

⁶ Ibid.

The second part of this paper introduced issues in the collective management of rights, with the emphasis in particular on the *extended* collective management of rights. In the following parts, it focuses on specific novelties in the field of extended collective management which relate to the subject institutions of this paper.

Extended collective management of rights

Collective management of rights serves as a means of protecting the legitimate rights and claims of the authors. For them, it is (usually) more useful and economical to associate and manage these matters collectively.⁷ Its purpose is to apply and protect copyright law and copyright-related rights and to make the copyrighted works available to the public.

In the Czech legal environment and in many jurisdictions of EU member states, three categories of collective management can be distinguished. Namely:

- Compulsory collective management,⁸ which includes the rights that cannot be effectively managed by the authors (or by the rightholders) themselves. These rights include (regardless of whether or not the rightholders are represented by the collective management organisation⁹): the right to remuneration for the specific use of the protected work,¹⁰ the right to remuneration for the rental of the original or reproduction of the protected work,¹¹ and the right to use the protected work by cable transmission¹² and the right to an additional remuneration for granting of an exclusive license to use a recorded performance of a performer.¹³ As regards the nature of these rights, they cannot be managed individually. The only obstacle to receiving a remuneration from this category of collective management is the need to register with the relevant CMO.¹⁴ Otherwise, the remuneration will not be received.
- Extended collective management,¹⁵ created as a fiction of legal representation,¹⁶ which is based on the right of the rightholder to reserve rights that fall into this category for himself. A passive author, who is not represented by CMO, will be represented anyway in these cases.¹⁷ A collective or cumulative agreement¹⁸ can be concluded and entitle the potential users to use protected works. This license may be granted for rights such as performing artistic performances from a commercial sound record,¹⁹ broadcasting

⁷ HARTMANOVÁ, Dagmar. *Kolektivní správa autorských práv a práv souvisejících s právem autorským: historicko-teoretická studie: výklad platné právní úpravy včetně porovnání s právní úpravou vybraných evropských zemí, soutěžně právní aspekty kolektivní správy*. Praha: Linde, 2000. ISBN 978-807-2012-183. pp. 19-32.

⁸ Sec. 97d of the Amended CA.

⁹ Further referred as "CMO" or "CMOs".

¹⁰ Sec. 97d Art. (1) a) of the Amended CA.

¹¹ Ibid. Sec. 97d Art. (1) b).

¹² Ibid. Sec. 97d Art. (1) c).

¹³ Ibid. Sec. 97d Art. (1) c).

¹⁴ Ibid. Sec. 99c Art. 1.

¹⁵ Ibid. Sec. 97d.

¹⁶ ŠALOMOUN, Michal. *Kolektivní správa – formace a deformace autorské vůle*. Beck-online: Právní rozhledy [online]. 2004, č. 6 [cit. 2017-09-12]. Available from: <https://www.beck-online.cz/bo/document-view.seamtype=html&documentId=nrptembqgrpxa4s7qzpxq5dsl4zdaoa&groupIndex=6&rowIndex=0&conversationId=18992>

¹⁷ Ibid.

¹⁸ Collective agreements have an extensive effect, because they also affect rightholders who are not contractually represented - this is the fictitious representation mentioned above.

¹⁹ Sec. 97e Art. (4) a) of the Amended CA.

a certain type of work²⁰ or lending the original or a reproduction of a work.²¹ An active rightholder who is not represented by CMO can exclude the extended collective management using a unilateral act towards the CMO and towards the user.²² Therefore, her works could be excluded from this regime, and the management of these rights will be reserved for her.²³

- Voluntary collective management, where the CMO represents the author to the extent agreed upon with the author in the contract.

The most complicated regime is extended collective management, which is still developing (even faster than the other two).²⁴ Its purpose is to facilitate the exercise of rights whose management might be facilitated even more in the system of collective management, but in the event that rightholders want to manage their right individually, they can exclude this regime. The rights focused on in this paper are therefore included in this regime. It is necessary to emphasize that the author can exclude this type of collective management, and it is then necessary to negotiate directly with the author (or the rightholder), not the CMO.

Archival and preservation exception

According to the previous legal regulation, memory and educational institutions could (i) digitalize content for archival and preservation purposes and (ii) allow access (also) to the digitized content of the works in the institution's premises through dedicated technical equipment and only for purposes of study or research.²⁵ This previous legislation contained only relatively limited legal licenses enabling memory and educational institutions to exploit the potential of digital technologies. They could not access digitized content on the Internet or access content on the terminals digitized by another library in the Czech Republic.

The only possible way was to use one of the exceptions and limitations of the copyright, a so-called library license.²⁶ Within this library license, memory and educational institutions could allow the public to access both copies and original works. However, it was never possible to use such materials for direct or indirect profit.²⁷ As regards collective management, no remuneration was paid to the authors in these cases because of the nature of on-site lending.²⁸

In cases where there is an interest in using the work beyond the copyright exceptions and limitations (especially beyond the described library licence), memory and educational institutions must conclude a standard licence agreement with the rightholder.²⁹ Despite the

²⁰ Ibid. Sec. 97e Art. (4) c), d).

²¹ Ibid. Sec. 97e Art. (4) e).

²² Ibid. Sec. 97e Art. (2).

²³ This unilateral act cannot be performed (in Czech law) in the case of radio and television broadcasting. MYŠKA, Matěj.

Vybrané právní problémy licencí Creative Commons a kolektivní správy práv. In: *COFOLA 2014: The Conference Proceedings*. Brno: Masaryk university, 2014. ISBN 978-80-210-7211-4. p. 6.

²⁴ Some EU member states have just launched this regime in recent years (Slovakia).

²⁵ Sec. 37 Art. 1 of the previous Copyright Act (effective until 19. 4. 2017).

²⁶ Ibid.

²⁷ Ibid.

²⁸ As in the case of "standard" book lending in libraries. Sec. 37 Art. (2) of the Previous Copyright Act.

²⁹ *DŮVODOVÁ ZPRÁVA: Návrh novely autorského zákona (zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů, ve znění pozdějších předpisů, „AZ“)*. Praha: Ministerstvo kultury. p. 22.

growing digitization efforts (National Digital Library project)³⁰, these institutions have had a relatively very limited legal scope for disseminating digitized works to the public.

The role of the libraries has been recognized as a very important in the Czech Republic³¹ and in the EU itself, but the law has to find the right balance between encouraging creativity and allowing access to the works.³² The regulation on the preservation of cultural heritage is also addressed in the forthcoming Directive on Copyright in the Digital Single Market.³³ This Directive states that cultural heritage institutions³⁴ shall be permitted to make copies of any works but solely for the purpose of their preservation.³⁵ However, the Directive on Copyright in the Digital Single Market does not present any wider exception for the communication of digitized works to the public in libraries (with the exception of out-of-commerce works).³⁶

Based on this analysis, it has been proposed that the licensing of the above-mentioned uses be facilitated, or that memory and educational institutions be ensure that extended collective management for such licensing can be allowed for. New ways of communicating the work to the public (but only in libraries)³⁷ are covered in the Amended CA through Sec. 97e Article 4.³⁸ On demand, the library may make the published work and a copy of it available in an intangible form, which in this case means in particular through a computer network. Computer programs and sheet music (as in other copyright restrictions on reproductions), as well as sound or audio image recordings (i.e. music recordings or films), are excluded from this regime.

In practice, this means that libraries will be able to share all the digitized works among themselves, make these works available to the public on site in the libraries (Sec. 97e Art. (4) f) of the Amended CA), and allow access to the all digitized content they have in their possession via the Internet network (Sec. 97e Art. (4) h) of the Amended CA). In both cases, libraries have to conclude a collective agreement with the CMO. The key subject should be the National Library, which already concluded a collective agreement for electronic document delivery with the CMO Dilia.³⁹ This agreement applies only to the on-site communication of digitized works to the public (Sec. 97e Art. (4) f) of the Amended CA). As regards Sec. 97e Art. (4) h) of the Amended CA, which states that anyone can access the work at a time and place of their own choosing, in particular on a computer or similar network, no such contracts have yet been concluded. Libraries are also given a number of additional duties (registration of

³⁰ <http://www.ndk.cz/>

³¹ The Czech Republic is the country with the densest network of public libraries in the EU. Their number is close to the number of municipalities.

³² Cf. CLAGGETT, Karyn Temple a Chris WESTON. Preserving the Viability of Specific Exceptions for Libraries and Archives in the Digital Age. A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY, 67-80. Also available from: http://moritzlaw.osu.edu/students/groups/is/files/2017/08/Claggett_Weston.pdf

³³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN> (further referred to as the "Directive on Copyright in the Digital Single Market").

³⁴ E.g. libraries, museums or galleries, or as referred in this article "memory institutions".

³⁵ Article 5 of the Directive on Copyright in the Digital Single Market.

³⁶ Ibid. Article 7.

³⁷ Libraries according to Sec. 2 a) of Act No. 257/2001 Coll., on libraries and the conditions for the operation of public library and information services (Library Act).

³⁸ Sec. 97e Art. 4, in particular letter h), i), j) of the Amended CA.

³⁹ BARTÁK, Jan. Elektronické dodávání dokumentů. DILIA: Divadelní, literární, audiovizuální agentura, z. s. [online]. Praha, 2017. Available from: <http://www.dilia.cz/index.php/component/k2/item/8418-elektronicke-dodavani-dokumentu-edd>.

authors who have excluded extended collective management; or sent CMO Dilia information on the use of works communicated through the electronic communication.⁴⁰

Exception for teaching purposes

Under previous copyright law, there was no possibility for schools, universities and other educational institutions to legally allow a printed copy to be made. The only way was (respecting the conditions of the Three-step test)⁴¹ to use the standard copyright exception for the internal needs of the educational institution (Sec. 30a Art. (1) of the Amended CA), which did not involve the distribution of copies of these works. Therefore, making copies of educational materials (typically parts of poorly accessible⁴² textbooks or books) and providing them to students was considered as a breach of law. The following provision were, therefore added to the list of authorizations to exercise the rights covered by extended collective management

"Making a printed copy of a work beyond the scope laid down in Sections 29 and 30a (1) and the distribution of such a reproduction by a school, educational institution or higher education institution for the sole purpose of education and not for the gain of a direct or indirect economic or business advantage."⁴³

It is important to note that the fundamental restrictive conditions for such use are contained in the text. This provision is intended solely for printed copies (it, therefore, cannot be a digital copy), while the condition of use solely for educational purposes must be respected, as must the condition of non-commercial use. Here, we arrive at a difficult situation with regard to the interpretation of the terms *economic* and *business*. The law does not interpret these terms (similar to the term "commercial"), and we can find a solution in the case law of neither national nor European courts.

We could assume that the legislature intended to express to the fullest extent possible what can be considered as income, i.e. profitable activity. The Czech Copyright Act Commentary states that the important aspect for distinguishing commercial or non-commercial use is the purpose for which the work is used.⁴⁴ In a case where the user of the work intends to gain some profit by using the work, the commercial intension exists – such use will be always commercial. If these copies are used for educational purposes, does that automatically mean that they are not used for gaining any direct or indirect economic or business advantage? If the education is provided for a fee, will the distribution of copies be considered an act carried for the purpose (direct or indirect) of gaining profit?

⁴⁰ Ibid.

⁴¹ "The exceptions and limitations of copyright may be exercised only in the specific cases provided for in this Act and only if such use of the work is not inconsistent with the normal use of the work and does not unduly prejudice the legitimate interests of the author." Sec. 29 Art. 1. of the Amended CA.

⁴² In particular, so-called out-of-commerce works are newly managed, both in the Amended CA (Sec. 97f, Sec. 97e Art. (4) i) of the Amended CA) and in the Directive on copyright on the Digital Single Market (Title III Chapter I), but they will not be further discussed in this article because of the lack of space.

⁴³ Sec. 97e Art. (4) k) of the Amended CA.

⁴⁴ TELEEC, Ivo and Pavel TŮMA. *Autorský zákon: komentář*. 1. vyd. Praha: C.H. Beck, 2007, xviii, 971 s. ISBN 978-80-7179-608-4. pp. 201-206, section 3.

Regarding the other requirements, it should be emphasized that there is no (compared to the previous part about exceptions for libraries) possibility of accessibility via a computer network or the Internet. Therefore, digital systems with educational materials (educational resources) or courses such as MOOC (massive open online courses) are not affected by this novelty.

Educational institutions can thus copy material that they themselves have legally available for their students (but it cannot be, for example, reproduced on paper by a legal person for internal use - Sec. 30a Art. (1) b). It has to be emphasized that to make this possible, this is again subject to the conclusion of a collective agreement with the CMO.

Conclusion

We can now find more cases of extended collective management in the Amended CA. We are talking about situations in which the CMO grants a collective licence agreement to use protected work in a determined manner not only within the represented rightholders for whom CMOs perform collective management on the basis of an agreement, but also copyrighted works of unrepresented rightholders.

Those exceptions for archival and educational purposes are undoubtedly a good step in the direction towards the 'user-friendly' use of works under copyright law. Memory and educational institutions will have to conclude contracts with the CMOs to pay the authors their remunerations. However, it is not yet clear whether these fees will be payed by users, these institutions, or by the state as in the case of "standard" lending in libraries. Unfortunately, some other (more theoretical) questions are not resolved for now, whether we are talking about the complex issue of defining the term "non-commercial" or the definition or effectiveness of this collective management with regard to the redistribution of remunerations (what amounts will the authors actually receive, won't the remunerations exceed the administrative costs?).

The purpose of this article was to briefly outline novelties in the field of collective management in relation to memory and educational institutions. Currently, it is not yet possible to say how these new uses under extended collective management will work and be used. Some issues that need be addressed in this area, as well as in the rest of the amended Copyright Act in relation to collective management, still remain.

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