Jaké podmínky musí splňovat autorské dílo, aby mohlo být zařazeno do veřejně přístupného repozitáře?

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PUBLISHING GREY LITERATURE IN ON-LINE REPOSITORY: COPYRIGHT LAW PERSPECTIVE

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Abstract
The aim of the paper is to provide easy-to-follow guidelines to determine if a document can be published in an on-line repository. It is suggested that the process of evaluation can be formalized to such a degree that the process would be carried out by a non-lawyer. There is a group of rather trivial properties that should decide to which regime the work should be assigned. The presentation outlines the basic principles of the evaluative process which is represented by a tree-like structured set of simple questions. Thus, the presentation generally assesses which properties should a work have in order to be eligible for being made available by a means of an online repository.

Keywords
Copyright, on-line repository, grey literature.

In recent years the phenomenon of publicly available on-line repositories has gradually grown into one of the most important means of making reliable information accessible to general public.[1] The impact of the phenomenon can be also clearly recognized in the area of grey literature.[2] While some repositories maintain a very strict policy as regards documents eligible for publishing within their framework – e.g. an original literary work that has not been published anywhere else – some of them aim to offer a wider database by accepting a whole variety of documents. If latter is the case an administrator of such a repository has to sooner or later encounter numerous obstacles caused by the copyright law regulation. Often it is not very complicated to determine if the inclusion of a particular document into the on-line repository constitutes a copyright infringement. However, there are situations in which it is virtually impossible to do so in absence of a professional assistance. Furthermore, it is problematic to imagine that a person with no legal background can be aware of all the aspects that have to be taken into account when deciding if it is possible to publish the document in the on-line repository and what are the options if it is not.

[1] E.g. Social Science Research Network (accessible at ssrn.com) has been established in 1994, arXiv.org repository (accessible at arxiv.org) has been established in 1991 or Public Library of Science (accessible at plos.org) has been established in 2001.

[2] E.g. National Repository of Grey Literature (accessible at nrgl.techlib.cz/index.php/Main_Page) has been established in 2008.

This paper describes an easy-to-use framework that can be employed by a layperson to determine if: (a) it is possible to publish a document in an on-line repository, (b) it is not possible to publish a document in an on-line repository or (c) it is advised to seek a professional help with respect to the particular case. The framework also contains instructions regarding the possible means of changing a status of the document from (a) to (b). However, it has to be highlighted that the paper deals exclusively with the copyright issues of the act of publishing a document in the publicly available on-line repository and does not take into account other areas of law that may also be relevant – e.g. trade secrets, national security, etc. This means that any document successfully passing the established framework as eligible to be included into the on-line repository is free of any copyright issues but no guarantee can be given that other obstacles arising from different areas of law may not still exist. It has to be also emphasized, that this article focuses solely on the legal issues arising from the Czech copyright laws and its conclusions may not be applicable in other countries.

First of all it is necessary to establish the notion of a document that has already been used on couple of occasions within the preceding text and distinguish it from the notion of a work. In reality it is not easy to provide a generally recognized definition of the document, especially within the environment created by modern communication and information technology. However, as regards the purpose of this paper it is sufficient to define a document as any data – even those that are meaningless – stored in a digital format as a separate file. It is not important whether the form of a document is a text, audio or video and whether the format of a file is txt, pdf, odt, doc, mp3, wav, jpg, png, gif, avi or any other.

From the perspective of copyright law any such document can be published in publicly available on-line repository unless it is a literary work or any other work of art or scientific work protected by copyright law. The notion is explicitly defined in Art. 2 of the Czech Copyright Act[3] as "a unique outcome of the creative activity of the author (...) expressed in any objectively perceivable manner including electronic form, permanent or temporary, irrespective of its scope, purpose or significance." Furthermore the law provides a non-exhaustive list of work types containing a literary work, a musical work, a dramatic work, a musical-dramatic work, a choreographic work, a pantomimic work, a photographic work, a work produced by a process similar to photography, an audiovisual work, a work of fine arts, a work of architecture, a work of applied arts, a cartographic work, a computer program and a database. If a document clearly falls outside of the copyright protection scope – i.e. does not meet the before-mentioned criteria – naturally, there are no obstacles with respect to copyright law as regards its publishing in a publicly available on-line repository. On the other hand, if a document clearly falls within the scope of copyright protection it is not possible to decide on the matter and one has to enter the next stage of the process. Shall any doubts as regards the nature of a document remain – preventing one from determining whether it falls within the scope of copyright protection – there is no other option but to either restrain from the publishing (and enter the next stage of the process) or to seek a professional advice.

[3] Law no. 121/2000 Coll., Copyright Act as amended.

If a document can be considered a work protected by copyright the next natural step is to determine whether it falls within the so-called public interest exception pursuant to Art. 3 of the Czech Copyright Act. The exception is based on a very simple premise – specifically, that it is not desirable to restrict access to certain types of works by means of copyright protection. Thus, there are no limitation arising out of the general copyright law protection as regards official works (such as legal regulation, decision, public charter, publicly accessible register, any official draft of an official work and other preparatory official documentation, etc.) and creations of traditional folk culture. It is important to take into account the sui generis database protection[4] in case of the former and the explicit prohibition of using a work in a way that shall detract from its value in case of the latter.[5] If a work cannot be considered subject to the exception it is not possible to decide on its eligibility to be published in an on-line repository and one has to enter the next stage of the evaluation. Shall any doubts remain there is no other option but to either restrain from the publishing (and enter the next stage of the process) or to seek a professional advice.

If a document clearly falls within the scope of copyright protection and at the same time cannot be considered a subject to the public interest exception it is worth shifting the attention from the work itself to the nature of its use within the publicly available on-line repository. It is possible the intended use may suffice the conditions to be covered by one of the so-called compulsory licenses.[6] With respect to the on-line repositories the "quotations",[7] "use of a work located in public place",[8] "official and reporting"[9] compulsory licenses are of particular relevance. Thus, it is not a copyright infringement if one uses in his own work to a justified extent excerpts from works of other authors which were made public, or if one takes a photo of a work permanently located on a public place and use the photo provided the author of a work is properly attributed etc.

If the intended use of a work clearly falls within the scope of the compulsory licenses it is possible to publish a work in the publicly available on-line repository. Otherwise, it is necessary to proceed to proceed to the next stage of the evaluation. Shall any doubts remain there is no other option but to seek a professional advice.

The final stage before a necessity to actively opt for a conclusion of a license contract – i.e. ask a right-holder for a permission to use the work – is to check whether there is an implicit

[4] Art. 88 – 94 of law no. 121/2000 Coll., Copyright Act as amended.

[5] Art. 3 para 2 of law no. 121/2000 Coll., Copyright Act as amended.

[6] Art. 30a – 39 of law no. 121/2000 Coll., Copyright Act as amended.

[7] Art. 31of law no. 121/2000 Coll., Copyright Act as amended.

[8] Art. 33 of law no. 121/2000 Coll., Copyright Act as amended.

[9] Art. 34 of law no. 121/2000 Coll., Copyright Act as amended.

offer (usually called a public license) to use the work.[10] Quite often it may be the case that a work is available under the terms and conditions of one of the many existing pre-tailored public licenses – such as Creative Commons, GNU GPL, etc. - or custom made public license. Although it may bring about a number of legal issues to publish such a work in publicly available on-line repository it is a viable possibility for a well informed administrator of the repository since the situation requires sometimes rather complicated evaluation of the public license and the use that takes place by including the work within the repository. If a public license exist and its scope clearly allows a use of the work within an on-line repository there is no need to obtain any further permissions from the right-holder. If this is not the case it is necessary to proceed to the next stage of the evaluation. Shall any doubts remain there is no other option but to seek a professional advice.

Czech law understands license as a contract[11] and not as a unilateral permission to use a work. This means that both parties of this contract have their rights and obligations. It is also necessary to bear in mind that the contract is an agreement between two or more parties who want to create certain legal obligations. Usually, the contract does not have to be concluded in writing.[12] or be contained in one single document. It can be concluded by any available means of communication, like email, fax or telephone. Nevertheless the written form of contract with signatures of both parties on one document is still highly recommended. When creating a license, we suggest to use the following five-step pattern.

The first step is to identify work precisely and correctly. We have discussed above that not all documents are works protected by the copyright legislation. For the purpose of license contract it is necessary to identify, whether the document is an independent work, or just a part of bigger, more complex work.

The work itself can exist in several language versions or could be updated in time. Therefore it is necessary to identify the work by its title, name of the author, date of creation and if the work has been already published, also by the reference to the first time it has been published and reference to its eventual updates.

It is possible to conclude one license agreement that deals with several works of the same author or works that are in possession of one rightholder. This can be especially useful when dealing with the grey literature. It is possible to make a license agreement for the whole group of works (for example all the catalogues and circulars of the company between years xxxx to yyyy).

When negotiating a license, be aware that the author of the work is not necessarily the person, who is entitled to conclude a license agreement. The second step in licensing process is to

[10] Art. 46 para 5 of law no. 121/2000 Coll., Copyright Act as amended.

[11] Art. 46 of law no. 121/2000 Coll., Copyright Act as amended

[12] The most notable exception is so called exclusive licese

make sure, that the person we are negotiating with has the right to grant a license. The practical experience shows that even author themselves are often not aware of the third parties' rights to their work. If the work is created by more authors, the license agreement has to be concluded with all of them. If one or of the authors is deceased, the permission has to be obtained from his heirs. If the author created work under as an employee, the license usually has to be concluded with his employer even in cases where the author has already left the job position[13]. If the author created the work on a contract, the copyright right might be exercised by the party that ordered the creation of the work[14]. When negotiating a license, it is also important to ask, whether the author granted any license to third party (usually publisher) and whether such license is still valid. If the license agreement is still valid it is necessary to examine the provisions of the license agreement to determine, whether the author is entitled to grant a license at all.

After we identified the work and made sure that we are negotiating with person who is entitled to conclude the license agreement we have to ask ourselves, for what purpose do we need the license. To create a good license agreement, we have to ask ourselves these four basic questions: For what purpose do I want to use the work? For how long do I want to use the work? On which territory do I want to use the work? Do I need an exclusive license?

The copyright is so called negative right. This means that every use that is not covered by exemption has to be authorized by the copyright holder. Therefore, every license agreement has to define how exactly the work will be used. For example : "the rightholder gives licensee the right to make the Work available on the internet via his website www.website.com" or, "the rightholder gives licensee the right to publish his work in the autumn issue of the XY magazine".

Every license is limited in time. Licenses to use the work forever or for indefinite period of time simply do not exist. Therefore it is necessary to define, for how long is the licensee willing to utilize the work. The longest possible duration of the license contract is the "duration of the copyright rights to the work" which is 70 years after the death of its author. If the contract does not contain the provision that stipulates for how long is the license valid, it is presumed that the license is granted for no longer than one year[15].

The copyright is a strictly territorial concept. Hence the licensee has to define in which areas he wants to possible to utilize the work. If he fails to do so, he will be able to use the work only within the borders of the Czech Republic. If the licensee wants to make the work available via the repository he should stipulate that the "licensee has the right to make the Work available through a digital repository which will be accessible form countries ……." or

[13] Art. 58 of law no. 121/2000 Coll., Copyright Act as amended

[14] Art. 68 of law no. 121/2000 Coll., Copyright Act as amended

[15] Art. 50 para 3 of law no. 121/2000 Coll., Copyright Act as amended

licensee has the right to make the Work available through a digital repository which will be accessible worldwide ."

It is not very probable that the owner of the digital repository will want to have an exclusive license to use the work. In case he wishes so, it has to be remembered that exclusive license agreements must always be in writing.

The license can be granted for a remuneration or for free. However, even if the license is granted for free, the height of remuneration should be stipulated in a contract[16], or should be obvious from the interaction of both parties where the contract is not concluded in writing.

In the ideal situation, the license agreement will have the form of a document drafted by professional with exact terms and conditions and signatures of all involved parties. In less ideal situations, it is possible to conclude a valid license agreement through email. For example, the operator of repository writes the email worded "Dear Mr. X, our gallery is very impressed by your photography with the title "Black" you have published on the website www.website.com. We would be pleased if you gave us consent to make this photography a permanent part of our digital repository, which is available at the website www.repository.com for all registered users". If the author replies positively, the license is concluded. However, it is quite difficult to prove the content of such license agreement. Therefore such "informal" forms of licensing could be recommended only in cases where it is really difficult to conclude a formal written agreement.

[16] Art. 49 of law no. 121/2000 Coll., Copyright Act as amended. If the license is granted for free, it should be expressly stated that the license is provided without any remuneration.