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## **ECONOMIC RIGHTS TO RESULTS OF SCIENTIFIC RESEARCH AND MAKING THE RESULTS AVAILABLE TO THE PUBLIC**

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### **Abstract**

The contribution provides a general overview of economic rights that arise in connection to the results of scientific research with particular emphasis given to the possibilities of making the results accessible to the public. The introductory part consists of a brief survey of the economic rights that are applicable to the results of scientific research and deliberates on the issue of who are the persons entitled to those rights given the different situations. Consequently, barriers that may prevent one from making the results available to the public are elaborated on. The main part deals with recommendations on the subject of avoiding these barriers in order to be able to make the results available to the public in absence of third parties' rights violation.

### **Keywords**

Economic rights, copyright, results of scientific research, making available.

### **1. INTRODUCTION**

Scientific research is a diligent endeavour the sole purpose of which is to gather relevant data and to process them in such a way that new knowledge about the world is created. Achievements of scientific research as well as the scientific method itself should be considered crown jewels of human effort to understand the world. Consequently, activities promoting scientific research should be considered as generally desirable. Lawyers would like to think that copyright law and other types of Intellectual Property are instruments that do just that - they promote scientific research. Although, some may disagree the lawyers are absolutely right on that point. If there were no laws on copyright and patents the pay offs the authors and inventors would be able to collect from their hard work would often be seriously jeopardized. If that would be the case the incentives to engage in the pursuit of new knowledge would be very low. A large portion of those that produce scientific results would be driven away to participate in different activities. However, this does not mean that the framework established by the existing Intellectual Property laws should be treated uncritically. Making the results available to the widest audience possible is in line with the aim of promotion of scientific research. As long as the pursuance of this objective does not seriously interfere with the economic and other interests of the authors and inventors it should be encouraged.

The regulatory mechanisms introduced by the individual types of Intellectual Property protection share some common traits - which constitute their core. The idea behind any type of Intellectual Property protection is rather straightforward: if a person contributes to the origination of a carefully specified object then the person shall enjoy certain exclusive erga omnes rights with respect to that object. When dealing with issues related to Intellectual property protection it is always necessary to clarify the situation as regards the following:

1. Does the object meet the criteria to be eligible for a specific type of Intellectual Property protection?
2. Which person or persons should be granted the exclusive rights?
3. What power over the object can be exercised on the basis of these rights?

If one fails to adopt the correct position towards these issues then any subsequent considerations of the situation go in vain. On the other hand, if those issues are cleared one is in a perfect position to solve the problem correctly.

As regards the question ad 1. the Czech Copyright Act provides that '[t]he subject matter of copyright shall be [...] a scientific work, which is a unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner.'<sup>1</sup> Besides, it states inter alia that 'A database which by the way of the selection or arrangement of its content is the author's own intellectual creation [...] is a collection of works.'<sup>2</sup> These two are the most important objects of copyright protection when approaching it from the perspective of the protection of scientific research results. Of course, other types of objects that generally enjoy copyright protection - such as computer programs, maps or drawings - can also result from the true scientific research. But for the sake of clarity of the exposition we narrow the scope to scientific works and databases. Such an approach enables us to ignore certain subtleties surroundings some of the other types of works and to keep the exposition moving straight forward.

The answer to the question ad 2. is also seemingly provided directly by the Copyright Act which provides that 'Author is the natural person who created the work. [...] Author of a collection of works is the natural person who selected and arranged works in a creative way [...]'<sup>3</sup> However, in reality the situation can be complicated on the grounds of a variety of factors. For example if the work has been created by multiple persons or if it has been created for another person or if another person has paid the costs of the creation or if it has been created by means of transformation of already existing work. These considerations play pivotal role throughout this paper.

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<sup>1</sup> Article 2 para 1 of the act no. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended.

<sup>2</sup> Ibidem, article 2 para 2.

<sup>3</sup> Ibidem, article 5 para 1 and 2.

In response to the ad 3. question posed by the list the Czech Copyright Act states that '[c]opyright shall include exclusive moral rights [...] and exclusive economic rights [...]'.<sup>4</sup> Taking into account the purpose of this exposition I leave aside the issue of moral rights. As regards the economic rights I shall elaborate exclusively on the right to use a work, which means 'the right to reproduce a work, to distribute an original or a copy of the work, to rent an original or a copy of the work, to lend an original or a copy of the work, to exhibit an original or a copy of the work and to communicate the work to the public.'<sup>5</sup> Shall anyone desire to use the work in any of those ways he or she needs the rightholder's permission to do so.

Once the work is created (is expressed in any objectively perceivable manner for the first time<sup>6</sup>) the initial 'game stage' as regards the distribution of the exclusive rights among the rightholders is set. The configuration can be changed by means of a license or a transfer of the power to exercise those rights (not transfer of those rights themselves).<sup>7</sup> In the sections that follow I am going to explore this stage from the perspective of different persons attempting to change the stage in such a way the work shall become available to the public. My aim is to identify the common obstacles that have to be taken into account when performing this task. In section 2 the author's perspective is explained. Section 3 centers around the perspective of the institution facilitating the research. Section 4 presents a perspective of the funding provider or grantor. Publisher's perspective is considered in section 5. Finally, a perspective of a consumer or an "end-user" is explained. It is important to mention that it may often be the case that multiple roles that have been mentioned are occupied by a single person.

## **2. AUTHOR'S PERSPECTIVE**

The author is the very person that has created the results of scientific research. From the point of the author it is usually desirable to make the work available to the widest possible audience. Thus, a publication under the terms of a selected public license seems to be the best option for which he or she should opt. This, however, may often not be the case as it may be much more important for the author to publish in a prestigious journal which is highly respected by the author's peers. Usually the author will rather aim for a relevant audience rather than the widest possible audience. The customs established within the community play an important role as regards the author's choice by which means he or she makes the work available to the public. Sometimes the remuneration may be the key factor.

When considering the individual possibilities the author may be completely free or constrained by any of the persons involved in the process. The most common situations are the following:

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<sup>4</sup> Ibidem, article 10.

<sup>5</sup> Ibidem, article 12 para 4.

<sup>6</sup> Ibidem, article 2 para 1.

<sup>7</sup> Cf. Ibidem, article 26 para 1 which provides that Economic rights may not be waived by the author; such rights are not transferable and are not subject to the execution of a decision; this provision shall not apply to claims arising from such economic rights.

- the author is the sole creator of the work and no other person possess any exclusive economic right to the work
- the work has been created as a joint effort of several authors
- the work has been created under the auspices of the research institution which is the employer of the author or authors
- the work has been published with a publishing house under the terms of an exclusive license

If the author is the sole creator of the work he or she has a complete dominion over the work. If he or she decides to make the work available ta a public, e.g. under the terms of a selected public license, there are no constraints (at least in terms of Copyright law) that would prevent him or her from doing so.<sup>8</sup> If the work has been created as a joint effort of several authors it can be made available only if they all agree to do so.<sup>9</sup> If one of them would make the work available under the terms of a public license in absence of the others' consents he or she would infringe their rights to the work. If the work has been created under the auspices of the research institution which is the employer of the author it would be the institution who is entitled to make the work public.<sup>10</sup> The only exception would be if the author and the institution expressly agree to contrary. If the work has been published under the terms of an exclusive license the author cannot make it available to a public in absence of a licensee's consent.<sup>11</sup>

### **3. PERSPECTIVE OF THE INSTITUTION FACILITATING THE RESEARCH**

The institution facilitating the research is an organization that concentrates (at least partially) on the generation of scientific results. Various institutions fall within this category, e.g. research centres, think tanks, universities, labs, expert panels, etc. The defining feature is that they provide necessary conditions and resources for the authors to produce the results of scientific research. The institution can have a whole variety of interests to the work. Sometimes, although it would theoretically be entitled to claim the right to execute certain economic rights it might leave the author free to dispose with the work as he or she wishes. On other occassions, however, it may be of key importance that the work is published or made available in a specified way.

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<sup>8</sup> Ibidem, article 5.

<sup>9</sup> Ibidem, article 8.

<sup>10</sup> Ibidem, article 58.

<sup>11</sup> Ibidem, article 47 para 2.

The institution is always constrained by the author's rights to the work. It is also not rare if rights of a funding provider or grantor come into play. The most common situations are the following:

- the work is created by the employee or employees of the institution in a process of fulfillment of their working duties
- the work is created by the employee or employees of the institution within the framework of externally funded project
- the work is created by the joint team of employees, students and contractual partners of the institution within the framework of externally funded project

If the work is created by the employees of the institution in a process of fulfillment of their working duties the institution is, by default, entitled to make the work available to the public.<sup>12</sup> If, however, the agreement to the contrary between the institution and the authors exists then the institution has to ask for their consent. If the work is created by the employee or employees of the institution within the framework of externally funded project the situation may differ significantly. Depending on the legal framework within which the project is carried out the institution or the funding provider may be the person entitled to make the work available to the public.<sup>13</sup> In certain cases their mutual consent may be required. If the work is created by the joint team of employees, students and contractual partners of the institution within the framework of externally funded project the situation gets even more complicated. The institution would have to carefully consider the entitlements of all those involved before it can make the work available to the public.<sup>14</sup>

#### **4. FUNDING PROVIDER'S/GRANTOR'S PERSPECTIVE**

A person who enters into a legal relationship in which he/she/it stipulates to cover the costs (fully or partially) of the scientific research results production qualifies to be considered a funding provider or a grantor. Usually such person is a public body, but it can also be a private company or an individual. Such a person can have a whole variety of interests on the basis of which it is involved in funding of scientific research. The interests may be of commercial nature, or may promote a selected public interest or contribute to a reputation of the respective person.

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<sup>12</sup> Ibidem, article 58.

<sup>13</sup> Article 16 of the act no. 130/2002 Coll., on the promotion of research, development and innovations from public funds, as amended.

<sup>14</sup> Article 58 - 61 of the act no. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended.

Funding provider or grantor usually does not claim the exclusive control over the work. It is much more common that such a person is granted only those entitlements that are necessary to accomplish the aim of the funded project. The most common situations are the following:

- the funding provider or grantor is a public body attempting to promote a selected public interest
- the funding provider or grantor is a commercial company attempting to gain an exclusive knowledge providing a competitive advantage within a market

If the funding provider or grantor is a public body attempting to promote a selected public interest it can request, by means of a contract under the terms of which the funding is provided, that the work is made available to the public - either for free or under the fair and equal conditions.<sup>15</sup> If the funding provider or grantor is a commercial company the possibilities of making it publicly available would be governed by the contract under the terms of which the funding has been provided.

## **5. PUBLISHER'S PERSPECTIVE**

Publisher is a person which facilitates the publication and subsequent distribution of the work. Publisher plays an all-important role as regards making the work available to the public. Publisher would usually be interested in acquisition of exclusive high-quality content that would consequently be distributed within a carefully selected business model. Although, making the content available only after the end-user pays a default fee seems the most sensible way how to dispose with the work, a different strategy may often be adopted. As the publisher necessarily needs to attract as many end-users as possible it may often pay off to make at least some works freely available.

The publisher will usually attempt to claim an exclusive license over the work but in certain situations non-exclusive license may suffice to promote the desired outcomes. The most common situations are the following:

- the rightholder license the work exclusively to the publisher
- the rightholder license the work exclusively to the publisher but claims certain rights to dispose with the work
- the rightholder license the work to the publisher under the terms of a non-exclusive license

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<sup>15</sup> Article 16 of the act no. 130/2002 Coll., on the promotion of research, development and innovations from public funds, as amended.

If the rightholder license the work exclusively to the publisher then the publisher is the one who is entitled to decide on making it available.<sup>16</sup> If the rightholder license the work exclusively to the publisher but claims certain rights to dispose with the work the most often consent of both of them would be necessary in order to make the work available to the public. If the rightholder license the work to the publisher under the terms of a non-exclusive license either the rightholder or both, the rightholder and the publisher, would be entitled to make the work available to the public.<sup>17</sup>

## **6. "END-USER'S" PERSPECTIVE**

The end-users are actually the audience to which the results of scientific research should be made public. Anyone but the very author, institution facilitating the research, funding provider or grantor and publisher, is considered an end-user in this paper.

The end-users often have little impact as regards the availability of the work. However, in certain cases - if the work is available under a terms of a free public license - they may play a key role in its distribution. The most common situations are the following:

- the end-users are asked to pay for the content and they are entitled to use it within their personal sphere
- the work is made available under the terms of a selected public license

If the end-users are asked to pay for the content and they are entitled to use it within their personal sphere they cannot contribute to making the work available. If, however, the work is made available under the terms of a selected public license then the users are allowed to take an active part in making the work available provided they abide to the framework set up by the license.<sup>18</sup>

## **7. CONCLUSIONS**

We have shown that a large variety of different situations may rise in connection to making the results of scientific research available to the public. As interest of a number of different persons may be involved it is always necessary to assess carefully what is the actual legal status of the work and legitimate claims of all those who are involved, i.e. the authors, the institutions facilitating the research, the funding providers or grantors and the publishers. If the initial situation is assessed correctly the person who attempts to make the work available to the public is in a reasonably good position to ask for the necessary consents and succeed in the attempt while not infringing the rights of others.

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<sup>16</sup> Article 47 para 2 of the act no. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended.

<sup>17</sup> Ibidem, article 47 para 3.

<sup>18</sup> Ibidem, article 46 para 5.

*Seminar on Providing Access to Grey Literature 2012: The 5th year of the seminar focused on storage and providing access to the grey literature, 23th October 2012 [online]. Praha: National Technical Library, 2012. Available at WWW: <http://nusl.techlib.cz/Sborniky>. ISSN 1803-6015.*

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