Osiřelá díla a díla na trhu nedostupná po novele autorského zákona

Myška, Matěj
2017

10th Conference on Grey Literature and Repositories: proceedings [online]. Prague: National Library of Technology, 2017 [cit. 2017-10-15]. Available from: **http://nrgl.techlib.cz/conference/conference-proceedings/**. ISSN 2336-5021.

ORPHAN AND OUT-OF-COMMERCE WORKS AFTER THE AMENDMENT OF THE CZECH COPYRIGHT ACT

Matěj Myška

matej.myska@law.muni.cz

Masaryk University, School of Law, Institue of Law and Technology, Czech Republic

Abstract

This paper focuses on the changes introduced by the major amendment of the Czech Copyright Act in 2017 in the area of orphan and out-of-commerce works licensing. It offers a brief description and basic black letter law analysis of the new legal regulation, discusses the newly introduced regulatory regimes in the context of the judgment of the Court of Justice of the European Union *Soulier and Doke* and offers some tips on practical functioning thereof.

Keywords

Orphan Works; Out-of-Commerce Works; Memory and Educational Institutions; Copyright; Extended Collective Licensing.

The publication of this paper is supported by the Czech Scientific Foundation – project no. GA17-22474S “Adapting Exceptions and Limitations to Copyright, Neighbouring Rights and Sui Generis Database Rights to Digital Network Environment”.

Introduction

The main legislative aim[1] of the last major amendment[2] of the Czech Copyright Act[3] was to implement the Collective Rights Management Directive (32014L0026). However, as the initiator of the amendment, the Czech Ministry of Culture added further important points to the agenda. Apart from other interesting issues, such as the implementation of the exception for parody (Sec. 38g of the CA), the Amendment also broadened the possibilities of orphan works licensing (further referred to as "OW") and introduced a legal framework for licensing of out-of-commerce works (further referred to as "OCW"). The aim of this short paper is to present and critically analyse the new legislation. Next, it aims to discuss and evaluate it within the context of the recent Court of Justice of the European Union (further referred to as the "CJEU") judgment in the case *Soulier and Doke*.[4] Finally, the paper aims to formulate some practical operational principles that should ensure the legal certainty of the subjects involved. As regards the scope of the paper, it must be noted that it focuses mainly on the newly adopted regulation introduced by the Amendment.[5]

Orphan works

The Orphan Works Directive (32012L0028) was implemented in Czech law already in 2014.[6] The system for the use of OW[7] that was established at the time could be described as minimal – only memory and educational institutions[8] and public service broadcasters could make use of the statutory exception, for specific uses and only for non-profit purposes based on the statutory exception (Sec. 37a of the CA) and for achieving aims related to their public-interest missions. As such, the use was gratuitous and payment of remuneration was due only when the OW status was ended by the author and should be paid retrospectively. Pursuant to Sec. 37a of the CA, the amount of the remuneration was to be determined *"based on the purpose for which and circumstances in which the work is used, as well as the extent of the damage incurred on the author by such use".* Other subjects or other types of use or use for

[1] See the Explanatory Memorandum to the Act No. 102/2017 Coll., Amending Act No. 121/2000 Coll., on copyright, on rights related to copyright and on the amendment of certain acts (Copyright Act), as amended – in the Parliamentary press no. 724/00, p. 46 (further referred to as "ER").

[2] The Act No. 102/2017 Coll., Amending Act No. 121/2000 Coll., on copyright, on rights related to copyright and on the amendment of certain acts (Copyright Act), as amended (further referred to as the "Amendment").

[3] Act No. 121/2000 Coll., on copyright, on rights related to copyright and on the amendment of certain acts (Copyright Act), as amended (further referred to as the "CA").

[4] C-301/15, EU:C:2016:878.

[5] The functioning of the previous regulation in detail as well as the basic underlying concepts of the issue of orphan works has already been thoroughly described and analysed by others (See e.g. (Bertoni, Guerrieri, Montagnani 2017, pp. 41–51; Mackovičová 2016; Prchal 2013).

[6] Act No. 228/2014 Coll., amending Act No. 121/2000 Coll., on copyright, on rights related to copyright and on the amendment of certain acts (Copyright Act), as amended, and Act No. 151/1997 Coll., on Property Valuation and on the amendment of certain acts (Act on Property Valuation), as amended.

[7] The term "orphan work" includes pursuant to the Sec. 37a of the CA not only works published in the form of books, journals, newspapers, magazines or other writings, but also cinematographic or audiovisual works. Due to the referral provisions (Sec. 74, 78 and 82 of the CA), the exception for orphan works shall apply, by analogy, to the performer and his performances (Sec. 74 CA), to the phonogram producer and his phonogram (Sec. 78 of the CA) and to the producer of the audiovisual fixation and to his fixation (Sec. 80 of the CA).

[8] The term "memory and educational institution" is used as a general term for library, archive, museum, gallery, school, university and other non-profit school-related and educational establishment as used in Sec. 37 of the CA.

commercial purposes were not exempted, and therefore, the license to use OW could be granted only within the system of mandatory or extended collective licensing (hereinafter referred to as "ECL").

The main purpose for updating the OW regulation was to allow their broader use – namely by means and subjects other than those already stipulated under the exception or in the regimes of the mandatory or already-existing extended collective licensing. The Czech legislator made use of and relied on recital 24 and Art. 1 para. 5 of the Orphan Works Directive and introduced the possibility for anyone to use the OW (i.e. not only memory and educational institutions) for any purpose, and in particular, for any type of use. The Hungarian, Canadian and U.K. regulations are mentioned as an inspiration.[9]

Therefore, the user (or potential licensee) does not have to rely only on the institute of mandatory and/or extended collective licensing of rights and can acquire a license also for uses that are not covered by these institutes. The respective CMO that is entitled to collectively manage rights to certain types of works shall therefore newly serve as a one-stop-shop[10] for any licensee who is interested in using OW of that type (Sec. 103 of the CA). However, the user must first perform a diligent search[11] before negotiating the license with the CMO, who acts as the legal representative of the author and must pay a license fee for the use. The scope of the license is however limited by law to the territory of Czech Republic and can be granted only for the duration of five years (Sec. 103 para. 3 of the CA).[12] The respective license fee is kept by the CMO for three years and must be paid to the right holder if the status of OW is ended. If this does not happen, the CMO is obligated under the Sec. 103 para. 5 of the CA to transfer the fees to the State Fund for Culture, or the State Cinematography Fund, in the case of orphaned audiovisual works and works used in audiovisual works. However, the end of the OW status does not affect the validity of the license granted by the CMO (Sec. 103 para. 6 of the CA).

Lastly, the Amendment introduced a change regarding the end of the status of OW.[13] Newly, Sec. 27a of the CA entitles the author to end the status of OW directly by informing the user thereof. This provision aims at the situation when the memory and educational institution relies on the statutory exception regulated under Sec. 37a of the CA (i.e. the standard and "old" regulation of OW). After receiving such a notice from the author, which could be submitted also in electronic form,[14] the user is obligated to inform the respective CMO. Furthermore, the author may end the status of OW at any time by notifying the respective CMO, even if the OW is not currently being used pursuant Sec. 37a of the CA. In practice, this last option means that the author could at any time ask the CMO to remove the Work from the Registry of OW[15] that these CMOs are obligated to keep. In order to fulfil the transparency principle, the CMOs are required to keep the Registry updated and available online on their webpages (Sec. 99f para. 1 let. l) of the CA).

[9] ER, p. 132.
[10] The CMO acts in his own name on the account of the rightholder, i.e. as mandatary.
[11] Sec. 27b of the CA referring to Annex 2 of the CA, which contains the source that must be searched.
[12] However, the user may conclude the license agreement repeatedly.
[13] ER, p. 96.
[14] Sec. 562 para. 1 of the Civil Code (Act 89/2012 Coll., Civil Code, as amended).
[15] Every CMO operates the Registry for the type of works to which it is entitled to exercise the collective management and which are known to the CMO from its own activity (Sec. 27a para. 4 and Sec. 97c para. 2 let. b) of the CA).

In other, specifically unregulated issued, the standard rules (i.e. the Head IV of the CA) relating to CMOs should apply mutatis mutandis in the case of OW licensing in the new ECL regime (pursuant to Sec. 103 para. 7). However, this does not include the handling of incomes from the use of OW under the "standard" (i.e. other ECL uses or uses under mandatory collective licensing), as the regulation in Sec. 103 para. 4 of the CA is to be regarded as *lex specialis* to the Sec. 99c of the CA. In practice, this means that the CMOs have to carefully separate the fees on the basis of the legal ground on which the OW have been used.[16]

Out-of-commerce works

The complex regulation of the use of OCW is a novelty previously unknown to Czech copyright law. However, such regulation is not revolutionary, as similar licensing systems are already functioning in the Scandinavian countries, the UK and Germany.[17] Ironically, the ER[18] also mentions the French regulation that was later evaluated as non-compliant with the Information Society Directive (32001L0029) as one of the up-and-running systems of OCW ECL.[19]

Before the Amendment, the simple fact that the work is not available in traditional distribution channels was not reflected in any way, and such works had to be treated as any other work. Consequently, such works could be used only on the basis of a copyright exception or limitation (Sec. 30–39 of the CA), or the user could rely on the institute of mandatory[20] or extended collective licensing.[21] The memory and educational institutions relied especially on the "library" exception (Sec. 37 of the CA) that allowed limited copying, lending and making works available "on-site". Such a stringent regulation did not allow the full use of digitalized work that is not normally available on the market.

Inspired by the Memorandum of Understanding "Key Principles on the Digitisation and Making Available of Out-of-Commerce Works" (further referred to as the "Memorandum") and the Commission Recommendation of 2006,[22] the Amendment subjected the copying of OCW and its communication to the public to the regime of extended collective licensing (Sec. 97e para. 4 let. i) of the CA). Consequently, an OCW could be reproduced and made available to the respective individual also via a computer network[23] by a library[24] upon the payment of the license fee for the maximum term of five years.[25]

[16] The CMOs also have the obligation to keep the incomes obtained from "standard" ECL and mandatory collective licensing separate (Sec. 99c para. 3 of the CA).
[17] These countries are explicitly mentioned by the Czech legislator as a source of inspiration on p. 120 of the ER. For a detailed overview of the respective national regimes, see the respective references cited in footnotes 13–24 in (Gera 2017, p. 262).
[18] ER, p. 120.
[19] The proposal of the CA was sent to the Members of the Parliament on 17. 2. 2016. The *Soulier and Doke* case was decided on 16. 11. 2016.
[20] Sec. 95 of the CA before the Amendment.
[21] Sec. 101 para. 9 of the CA before the Amendment.
[22] European Commission, Commission Recommendation of 24 August 2006, on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC) (OJ L 236/28, 31 August 2006).
[23] The making available must therefore be controlled to the extent to which the library is able to ascertain the number of views. The licensing fee should also take into account the amount of views of the OCW (Richter 2017).
[24] As defined in the Library Act (Act No. 257/2001 Coll., on Libraries and of Conditions for the Operation of Public Library and Information Services (Library Act), as amended). According to Sec. 2, a "library" is a *"facility in which all public library and information services are provided for everyone on a non-discriminatory basis and which is registered in the register of libraries".*
[25] The duration of the license might be prolonged repeatedly.

Contrary to the Memorandum,[26] the CA does not contain an exact and explicit definition of OCW. Its constituting elements must therefore be deduced from the required conditions that must be fulfilled so that the work is eligible for inclusion into the List of OCW (further referred to as the "List"). Firstly, the OCW might be only works expressed in words ("verbal" works). It, therefore, seems that the precise classification as regards the category of the work, i.e. whether the work is literal, scientific or a work of art (Sec. 2 of the CA), is not important. Only the expressive means used are important. Consequently, OCW might include also scientific works or dramatic works, but not sole photographic works, audiovisual works, computer programs or sculptural works, for example. However, works embedded or incorporated in the "verbal" works that are an integral part of it might also be included on the List and consequently used in accordance with the law. Next, the work must be (logically) "out-of-commerce", i.e. not obtainable through general business channels. According to Sec. 97f para 3. let. a) of the CA, this condition is fulfilled when the work in the same or a similar format is not obtainable with reasonable efforts and under normal conditions and upon payment in the normal business network within 6 months from the date of receipt of the proposal for inclusion in the List. Furthermore, under Sec. 97f para. 3 let. b) of the CA, the OCW must also not be subject to licensing conditions or terms and conditions of sale excluding inclusion in the List. As a result, periodicals available from licensed databases as well as e-books with prohibitive terms and conditions are not considered as OCW.

The work is listed only based on proposal from the right holder, the library or the respective CMO that is to be made publicly available on the web pages of the National Library (Sec. 97f para. 2 of the CA). In accordance with the second principle of the Memorandum,[27] the right holder (i.e. not only the author but also, for example, her heir or the publisher if he is entitled to do so) may opt out from the regime of OCW and withdraw her work from the List during this timeframe. However, the realization of such a right by the right holder does not affect the validity of the license granted to the library by the respective CMO (Sec. 97f para. 5 of the CA). Periodicals have a specific regime (Sec. 97f para. 4 of the CA), as they might be included in the List by the National Library provided that they had been published ten and more years ago and they are not subject to the terms and conditions excluding such inclusion.

Soulier and Doke case and the Czech regulation

The new Czech regulation set up a relatively sophisticated ECL system for OW and OCW. However, during the legislative process, the CJEU issued its decision in the seminal case *Soulier and Doke*. To put it very simply, this judgment imposed quite strict conditions on the prior implicit consent of the author to use of a work, including use under an extended collective license.[28] The CJEU explicitly stated that *"every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes."*[29] Furthermore, it concluded that a mere lack of opposition on the part of the authors cannot be interpreted as an implicit consent to use the work under extended collective licensing.[30] Therefore, an implicit consent might be possible, but only if the author has effective knowledge

[26] According to the Memorandum (p. 2), a work is out of commerce *"when the whole work in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of whether tangible copies of the work* exist *in libraries and among the public (including through second hand bookshops or antiquarian bookshops)."*

[27] Para. 5 of Principle No. 2 of the Memorandum.

[28] Para. 37–38 *Soulier and Doke* (C-301/15, EU:C:2016:878).

[29] Para. 38 *Soulier and Doke* (C-301/15, EU:C:2016:878).

[30] Para. 43 *Soulier and Doke* (C-301/15, EU:C:2016:878).

of the future potential uses of the work and has means to stop it, *"without having to depend […] on the concurrent will of persons".*[31] The crucial conclusions of the CJEU could be found in para. 45 of the decision, where it acknowledged the worthiness of pursuing the *"cultural interest of consumers and of society as a whole"*.[32] In the same paragraph, the CJEU stated that the public interest in making the OCW available to the broad public cannot be justified if the derogation from the author's rights is not provided for by the EU legislature (i.e. the appropriate exception as in the case of OW).[33] Sganga (2017, p. 330) rightly argues that the *"requirement to inform individually each and every author about the existence and functioning of the scheme"* directly opposes the "catch-all" nature of ECL and essentially renders it futile. The contemporary jurisprudence further expresses valid doubts about the proper meaning and implications of the *Soulier and Doke* case. Suthersanen, for example, claims that the ECL licensing mechanism may not be possible (2017, p. 382). Borghi, Erickson and Favale (2016, p. 147) are more cautious and express doubts about the full impact of this decision on ECL systems throughout Europe. Sganga (2017, p. 330) criticizes the CJEU for creating *"further uncertainties"* and opening *"the gate for a potential flow of complaints against national collective management schemes"*. The main reason being the unclear conceptualization of the term "derogation". Namely, in the *Vereniging Openbare Bibliothekencase*,[34] the derogation from public lending right was treated as an "exception" (Gera 2017, n. 40) and therefore basically compliant.

In the light of the above-mentioned, the Czech regulation of both OW and OCW ECL must be evaluated. In general, the OW ECL has a higher chance of passing the test, as it shares its basic features (and therefore protective elements) with the exception-based system of OW (Sec. 27a and 27b of the CA). In order to be able to make use of the ECL, the potential licensee must perform the diligent search before requesting a license from the CMO. On the other hand, this ECL is not based on an EU-legislature exception. The OCW licensing system is problematic especially in the case of periodicals, where the simplified procedure does not involve the prior provision of information about the proposal to list the work. For both of the ECL systems, the protection of *iura questia*, i.e. that the granted license is still valid even after the OW/OCW status has been ended, might be in conflict with the conclusions of the CJEU presented above.

Even though the Czech legislator characterized the system of OCW licensing as a *"carefully balanced compromise for balancing the interests"*[35] of right holders and the public, the CJEU would probably not be of the same opinion. The main reason is that the system lacks the *"guarantees ensuring that authors are actually informed as to the envisaged use of their works and the means at their disposal to prohibit it"*,[36] especially in the case of OCW ECL for periodicals.

[31] Para. 49 *Soulier and Doke* (C-301/15, EU:C:2016:878).
[32] During the consultations preceding the legislative process, the National Library mentioned the enabling of *"broad public access to cultural heritage in digital form to support education and science and personal development"* as the main purpose for the introduction of the OCW licensing (ER, p. 78). This reasoning was consequently also adopted by the legislator (ER, p. 120).
[33] Para. 45 *Soulier and Doke* (C-301/15, EU:C:2016:878).
[34] Para. 50–51*, Vereniging Openbare Bibliotheken* (C-174/15, EU:C:2016:856).
[35] ER, p. 120.
[36] Para. 40 *Soulier and Doke* (C-301/15, EU:C:2016:878).

Practical implementation

In the light of the above-mentioned, it seems almost impossible to reconcile an ECL system not founded on an EU legislature-based derogation such as the Czech one with the *Soulier and Doke* decision. On the other hand, as was already noted, the question of whether the needed derogation from the author's rights must be understood only as a specific and explicit exception from the exclusive rights still remains (Sganga 2017, p. 330). However, the ultimate goal of a compliant ECL system should be the actual and individual informing of the respective author whose work is to be subjected to the ECL regime, or as the CJEU put it, to set up a mechanism that ensures that *"authors are actually and individually informed"*.[37]

As of November 2017, the issue of OW ECL does not seem to be reflected sufficiently by the CMOs – the respective CMOs offer only scant information,[38] even though the standard transparency rules should apply to the CMOs mutatis mutandis pursuant to Sec. 103 para. 7 of the CA (i.e. the Head IV CA), especially as regards to the rate of license fees. Furthermore, the actual realization of a diligent search and proving that it has been carried out could be regarded as an issue lacking detailed guidelines and the best practices. It must be noted that these problems only seem to mirror the problematic issues of exception-based uses of OW.[39] However, the best practices should include a rigid framework that would enable adequate handing over of verifiable results to the CMOs. The practical problem in the case of diligent search is that the result desirable for the potential licensee is actually a negative one. Proving a negative fact is not generally practical. Ideally, all of the needed sources to be searched (Annex 2 of the CA) shall be able to produce an electronically signed log of results that should be presented to the CMO. Furthermore, the CMOs shall (Sec. 98f of the CA) offer their tariff fees – which is not the case for OW. The verifiable methodology for setting the licensing fee should be presented publicly as well.

As regards the OCW ECL, the actual details of its practical functioning still remain unknown in November 2017. However, the List shall be set up and operated by the National Library[40], and the scheduled date for the commencement of its operation is set for 2018 (Richter 2017). At least, in accordance with Sec. 98f of the CA, the CMO DILIA (CMO for literary works) made public the proposal of tariff fees for the use of OCW.[41] However, the licensing agreement with the CMO DILIA and the National Library (which acts as the representative of the libraries) is yet to be concluded (Richter, 2017). In this case, the OWC ECL system should be implemented in a more stringent way. As an example, the proposal to list the work should be made public not only via the website of the National Library, but also in a more "traditional" offline media in order to target authors in the broadest possible way and thus fulfil the requirement of "actually and individually" informing the author. The same should be done for periodicals as well.

[37] Para. 43 *Soulier and Doke* (C-301/15, EU:C:2016:878) a contrario.

[38] Such info consists mainly of providing the index of OW (i.e. orphaned subject-matter). This information is provided by OSA – Ochranný svaz autorský pro práva k dílům hudebním, z.s., (CMO representing authors of music and lyrics); INTERGRAM – nezávislá společnost výkonných umělců a výrobců zvukových a zvukově obrazových záznamů (CMO representing performers and producers of phonograms and audiovisual fixations).

[39] These problems were addressed in Bertoni, Guerrieri, Montagnani 2017, pp. 41–51.

[40] The initial investments costs are estimated at two and a half million CZK. The same amount is estimated as operating costs per year (ER, p. 80–81).

[41] Available from: **http://www.dilia.cz/index.php/component/k2/item/download/567_cf881a146082cef0a6b64920cedde1b4**.

Conclusion

The main aim of the Amendment is to alleviate legal uncertainty by simplifying the licensing of technologically determined new uses of the majority of the works included in library funds of the memory and educational institutions. The newly introduced national regulation of OW and OWC ECL systems is ahead of the current developments in the European regulatory framework (i.e. the proposed Digital Single Market Directive). It allows for the licensing of OW to subjects other than memory and educational institutions for commercial purposes and introduces a specific ECL regime for OWC. The regulation lays down a perfect theoretical blueprint of a system that should offer the needed legal certainty as well as flexibility to all the subjects involved. However, this intended objective is significantly challenged by the recent decision of the CJEU in the *Soulier and Douke* case. The Czech system does not seem to fulfill the requirements set therein, and prima facie, it is not compatible with EU law (both the non-exception ECL of OW, as well as the ECL of OCW). As a proposed *de facto* solution, the practical implementation should strive to achieve the actual and individual informing of the author. Paradoxically, the contested ECL is also proposed as a solution for the treatment of OCW the Digital Single Market Directive.[42] In order to achieve full compliance with the *Soulier and Douke,* the solution might lie in introducing a specific exception of the rights of reproduction and communication to the public for the OCW.[43] Therefore, a further amendment of the Czech CA might be necessary.

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[43] As suggested, for example, by Keller (2016).

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