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PROVIDING PUBLIC ACCESS TO THESES AND COPYRIGHT LAW

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Abstract

The paper presents a basic overview of the issue of providing public access to electronic theses and dissertations from copyright's law perspective in the Czech Republic. The first part introduces the purpose of this institute as well as the development of legal regulation. The second part identifies and discusses the emerging problems of the current regulation, especially the ones related to providing online access to theses. The third part presents the relevant existing Czech case law. The last part proposes possible evaluates the applicability of the existing case law to the current regulation and recommends how achieve the desired balance of the two legal obligations (access providing and copyright protection).

Keywords

Copyright law, exceptions and limitations, three-step test, electronic theses and dissertations

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Introduction

Providing public access to theses and dissertations seems an ideal way to achieve the broadest dissemination of the achieved results, ensure transparency in education and control the handling of public funds. The development of the relevant infrastructure is also helping to achieve these aims more effortlessly[1]. What still remains a challenge is the "rights thicket" of protection regimes pertinent to theses.

Firstly, a thesis should, by definition, be an original copyrighted work of the author. The thesis is consequently protected by copyright and the author has the moral right to decide whether or not to make her work public (Section 11 of the Copyright Act ("CA"))[2] and the economic right to use her work (Section 12 CA), including the communication of such work to the public (Section 18 CA). In order not to infringe these rights, the provision of public access must be based on an adequate legal title. This might include either an explicit (contractual) license with the author of the thesis, or a statutory license.

Secondly, based on the content of the thesis, the provision of public access might also potentially infringe rights and interests of third parties such as copyright, trade secrets, privacy and personal data. Even in this case, a proper legal title to provide public access to these protected assets is needed (i.e. consent granted by the respective concerned person or legal permission).

This brief paper mainly focuses on the first of the abovementioned issues[3]. The legislative framework for discussion is primarily Czech legislation[4] with the necessary overlaps into international and European regulatory frameworks. This brief paper does not, however, discuss the history, basic aspects and fundamental notions of the issue at hand, as this has already been done elsewhere. Specifically, no attention is paid to the question of defining grey literature (Schöpfel, 2011), copyright protection for grey literature (Schöpfel and Lipinski, 2011), theses as grey literature (Schöpfel and Rasuli, 2018) or theses as copyrighted works and their treatment as grey literature (Polčák and Šavelka, 2009; Polčák, 2010).

Purpose and regulation

Providing public access to theses is an excellent practical example of the balancing of the various interests and rights of the individual and of the public. On the one hand, the author of the copyrighted work enjoys the copyright protection that is also guaranteed by

[1] For an overview of initiatives in this field see e.g. The Networked Digital Library of Theses and Dissertations (http://www.ndltd.org/about) and (Suleman, Atkins, Gonçalves, France, Fox, Chachra, Crowder, Young 2001a; 2001b). In Czech see (Mach 2015).

[2] Act No 121/2000 Sb., on copyright, on rights related to copyright, and on amending certain other Acts (Copyright Act), as amended ("CA").

[3] The second issue (i.e. the rights and interests of third parties) is a very complex one and cannot be dealt with in the necessary detail within the scope of this brief paper as this would only lead to misleading oversimplification. At national level, the issue of the protection of personal data in research has been dealt with in (Koščík, Polčák, Myška, Harašta 2017, pp. 59–76); and trade secrets protection in (Horáček, Čada, Hajn 2017, pp. 298–306). Both trade secrets and privacy protection are also elucidated and elaborated upon in the respective commentaries to the Czech Civil Code (e.g. Lavický, Dávid, Dobrovolná, Handlar, Havlan, Horecký, Hurdík, Hrdlička, Koukal, Ronovská, Ruban 2014; Melzer, Tégl 2014)

[4] Primarily Act No 111/1998 Sb., on higher education institutions and on amendments and supplements to some other Acts (Higher Education Institutions Act") or "HEIA") and the CA.

the Charter of Fundamental Rights and Freedoms.[5] On the other hand, there is the political right to information. The public interest in the transparency[6] of functioning of higher education institutions is substantiated mainly because the public higher educations are financed from public funds. Telec (2006) also mentions the legitimate public interest in "improving the state of science, technology and art". This interest is demonstrated in the introductory provision of the HEIA (Section 1 HEIA), which refers to higher education institutions as "the leading centres of education, independent knowledge and creative activity" that "play a key role in the scholarly, scientific, cultural, social and economic development of society". Telec (2006) also argues that public access to theses helps in the discovery of malpractice during the elaboration of the theses, such as plagiarism.

However, until 2006, theses could be used by the respective higher education institution only based on the statutory license for the school work (Section 35 CA). Based on this provision, the thesis could be used for the non-commercial "internal needs" of the higher education institution. For any other uses not covered by further statutory exceptions and limitations, the institution needed a contractual license from the author. Pursuant to Section 60 CA, however, the institution had the right to conclude such a license agreement under the usual terms unless the author did not demonstrate valid reasons for not doing so. In 2006[7] the library exception (Section 37 CA) was amended in such a way that a higher education institution may lend Bachelor's, Master's, Doctoral, advanced Master's ("rigorosum") and habilitation theses on its own premises for the purposes of research and private study, provided the author did not exclude such use.[8]

Since 2006[9] the legislative approach to providing public access to theses has fundamentally changed. In brief, the basic modality changed from "permitted use under certain circumstances" to "an obligation to provide public access". Pursuant to Section 47b(1) HEIA higher education institutions are obliged to provide public access to a defended Bachelor's, Master's, Doctoral, and advanced Master's[10] thesis in a publicly accessible database. The text of the provision does not however expressly stipulate the specific means of achieving this goal and leaves it to the higher education institution to decide this in its internal regulations. It is thus upon the higher education institution itself to adequately balance the abovementioned rights. A university might therefore also set up an online repository

[5] Art. 34 of the Constitutional Act No 2/1993 Sb., on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, as amended, declares that: "*The rights to the fruits of one's creative intellectual activity shall be protected by law*".

[6] Transparency and open data are mentioned as the leading reasons for providing public access in the Explanatory Memorandum to the Act that most recently revised the regulation in the Czech Republic (Explanatory Memorandum to Act No 137/2016 Sb. on amending Act No 111/1998 Sb., on higher education institutions and on amendments and supplements to some other Acts (Higher Education Institutions Act) – Parliamentary press 464/0, p. 136–137).

[7] Act No 216/2006 Sb., amending Act 121/2000 Sb. Act, on copyright, on rights related to copyright, and on amending certain other Acts (Copyright Act), as amended, and certain other Acts.

[8] However, with the public obligation introduced in the HEIA discussed below, this provision lost its main purpose and is only applicable to theses defended before 1 January 2006 (Telec, Tůma 2007, p. 391).

[9] Section 47b HEIA was introduced by Act No 552/2005 Sb., on amending Act No 111/1998 Sb., on higher education institutions and on amendments and supplements to some other Acts (Higher Education Institutions Act), as amended, and certain other Acts.

[10] Furthermore, readers' reports must also be provided. The Act amending Act No 563/2004 Sb., on educational workers and on amendments to certain other Acts, as amended, Act No 227/2009 Sb., amending certain laws in connection with the adoption of the Act on Basic Registers, as amended, and Act No 111/1998 Sb., on higher education institutions and on the amendment of certain other Acts (Higher Education Institutions Act), as amended, added the obligation to also provide access to the document describing the course of the defence process.

(electronic database) of theses, as was done e.g. by Charles University[11] and Masaryk University.[12] As regards not-yet-defended theses, the HEIA (Section 47b(2)) foresees the obligation of the institution to make these publicly available at least five days before the defence on-site (i.e. on the premises of the institution) and allows anyone to make copies thereof. The HEIA also contains the presumed consent of the candidate with the provision of public access to the thesis (Section 47b(3) HEIA) effective at the moment the thesis is handed in.

In 2017[13] Section 47b HEIA was significantly amended. Firstly, doctoral theses do not have to be made public if they have been made available to the public in another way (e.g. published as a scientific book). The reason for this exclusion is the actual fulfilment of the purpose of the provision in the case of such publication, i.e. public access to the result. Pursuant to Section 74(5) HEIA habilitation theses are also made public in the same manner if they were not made available to the public in another way (e.g. published as a scientific book). Secondly, the amendment introduced the possibility to delay the provision of public access to a thesis for three years and thus avoid the possible negative consequences of such an action.[14] The reasons for such delay are not mentioned explicitly, but a footnote referencing the illustrative list of Acts regulating potentially infringed rights and interests is provided. Consequently, the protection of copyright (presumably the author's)[15] and the protection of classified information[16] and trade secrets[17] are regarded as credible reasons to delay publication. In order to avoid the misuse of this delay,[18] in such a case one copy of the thesis must immediately be sent to the Ministry of Education, Youth and Sports for archiving, and the reason for the delay must be presented in the same manner in which the thesis would be made available.

Due to its uncertain formulation, relatively broad scope and less-than-ideal legislative technique,[19] the introduction of the obligation to provide public access to theses immediately came under the scrutiny of the Ministry of Culture,[20] practitioners and jurisprudence (Telec, 2006; Křesťanová and Holcová 2008; Polčák, 2010). The next part thus discusses the related problems as regards author rights.

[11] See **https://dspace.cuni.cz/?locale-attribute=en**

[12] See **https://is.muni.cz/thesis/?lang=en**

[13] Act No 137/2016 Sb. on amending the Act No 111/1998 Sb., on Higher Education Institutions and on Amendments and Supplements to some other Acts (Higher Education Act).

[14] The previous version of sec. 47(b) HEIA did not entail such mitigating provisions and was prone to, if interpreted rigorously, generate negative consequences such as disclosure of trade secret (Polčák 2010, pp. 74–75).

[15] CA.

[16] Act No 412/2005 Sb., on the Protection of Classified Information and on Security Competence, as amended. Dostál (2018) already convincingly presented that this referral has basically no meaning and practical application in this area, mainly due to the time limitation of the delay with provision of public access to maximum of three years.

[17] Sections 504, 2976, and 2985 of the Act No 89/2012, Civil Code, as amended.

[18] Explanatory memorandum to the Act No 137/2016 Sb. on amending the Act No 111/1998 Sb., on Higher Education Institutions and on Amendments and Supplements to some other Acts (Higher Education Institutions Act) – Parliamentary press 464/0, p. 137.

[19] I.e. that the HEIA does not use the same terms as the CA.

[20] Stanovisko Samostatného oddělení autorského práva Ministerstva kultury k právnímu názoru odboru legislativního a právního Ministerstva školství, mládeže a tělovýchovy k aplikaci § 47b zákona o vysokých školách č. 111/1998 [Opinion of the Independent Department of Copyright of the Ministry of Culture on the Legal Opinion of the Legislative and Legal Department of the Ministry of Education, Youth and Sports on the Application of Section 47b of the Higher Education Institutions Act No 111/1998] Available from: **http://ipk.nkp.cz/legislativa/01_LegPod/autorske-pravo/Stanovisko111_98.htm**

Emerging issues

In order to frame the discussion, it must firstly be noted that providing public access to theses, might, without the proper legal title, infringe the author's rights provided in the CA. Specifically, both the moral right to decide whether to make the work public (Section 11 CA) as well as the economic rights of reproduction (Section 13 CA), lending (Section 16 CA) and communication to the public through making it available (Section 18 para 2 CA) in the case of provision of online access. As already stated in the introduction, disposition with the thesis is, based upon copyright legislation, primarily in the hands of the author. Without a contractual license, a thesis may only be used based upon a statutory exception or limitation of exclusive rights. As a framing reference, it must also be noted that the question of limitation of exclusive right are regulated by the CA, which must however be compliant with the respective international agreements[21] to which the Czech Republic is a party, and EU legislation.[22] Specifically, the right of reproduction and right of communication to the public are harmonized rights, and Member States can only limit them in cases foreseen in Art. 5 InfoD. Moreover, such exceptions and limitations must also pass the so-called "three-step test" set in Art. 5(5) InfoD, i.e. they "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder." This three-step test was also implemented in Section 29 CA and serves as a general limitation on exceptions and limitations, i.e. a material precondition for their application (Telec and Tůma, 2007, p. 340).

Section 47b HEIA contains more exceptions and limitations of author rights. Firstly, in para. 3, it stipulates the legal fiction of consent with making the work public. Consequently, the moral rights of the author are not infringed by providing public access to the thesis. This conclusion is undisputed both by jurisprudence (Telec and Tůma, 2007, p. 382) as well as the Ministry of Culture.[23] The main argument for this conclusion is that the author is informed from the beginning of her studies about this consequence. The second paragraph of Section 47b HEIA limits the right of reproduction. Again, this issue is not disputed in jurisprudence (Telec and Tůma, 2007, p. 382; Křesťanová and Holcová, 2008, pp. 44–45) or by the Ministry of Culture[24] and is to be regarded only as duplicity of the "free use" (i.e. private copying) exception in the CA regulated through Sections 30 and 30a CA.

On the other hand, the last remaining limiting paragraph of Section 47b HEIA is regarded as highly controversial and problematic. The main reason is its unclear legal nature that has been subject to debate in Czech copyright jurisprudence. Two main opinion streams are identifiable.

The first, represented by Křesťanová and Holcová (2008, p. 45), criticizes its legislative quality and claims that it might be unconstitutional. Namely, this exception is not based on any of the available exceptions and limitations in the InfoD.[25] Even if treated as a sui generis

[21] In particular, the Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended by the Paris Revision of 1971, the World Intellectual Property Organization World Copyright Treaty of 1996.

[22] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoD").

[23] Stanovisko Samostatného oddělení autorského práva Ministerstva kultury k právnímu názoru odboru legislativního a právního Ministerstva školství, mládeže a tělovýchovy k aplikaci § 47b zákona o vysokých školách č. 111/1998 Sb. Available from: **http://ipk.nkp.cz/legislativa/01_LegPod/autorske-pravo/Stanovisko111_98.htm**

[24] Ibid.

[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

copyright exception, the section would not pass the three-step test as it is not specific enough due to it permitting a university to set its own rules regarding the "database of theses" (Křesťanová and Holcová, 2008, p. 45). This opinion was also expressed by the Ministry of Culture, which classified this exception as non-compliant with European legislation[26]. As a result, these authors recommended the conclusion of licensing agreements with the students submitting their theses (Křesťanová and Holcová, 2008, p. 47).[27]

On the other hand, Telec and Tůma regard this paragraph as a specific "quasi-license", i.e. a sui generis limitation of rights with only a specific beneficiary (i.e. the higher education institution) and that is based only on a specific legal relationship between the student and the respective institution. As a result, the higher education institution is not only obliged, but also entitled, to use the thesis for such purposes – namely on the basis of the legal fiction of a legal license.[28] Consequently, such a limitation is not subject to Art. 5 InfoD. However, as with any limitation of exclusive right, it must be interpreted restrictively and in compliance with the three-step test. Polčák (2010, p. 74) opined that the obligation to provide access to theses "using a publicly accessible database gives implicit permission (a license) in and of itself for the university".

Case law

The provision was extensively examined by Czech courts in the dispute between T. H. and Masaryk University. This public university generally provides online access to full texts of submitted theses and readers' records. The question was, however, discussed under specific factual circumstances. Namely, the claimant submitted two versions of his dissertation thesis (2011, 2012) for defence, and at the same time concluded an exclusive (sic!) licensing agreement with a publishing house (2010) that consequently published the first version of the dissertation as a book in 2011. Furthermore, the internal regulations of Masaryk University contained the option not to provide public access to a respective thesis, due inter alia to the protection of legitimate third-party interests, of which the author did not take advantage.

The Regional Court in Brno[29] applied Section 47b HEIA dismissed the cease-and-desist claim and ruled that the Masaryk University had proceeded secundum et intra legem.

The appellate Higher Court[30] overruled this decision and stated that Masaryk University had infringed the appellant's copyright. The reasoning was, however, rather unclear as the appellate court simply stated that the university had not made the theses accessible only to the inner academic community as foreseen by Section 35(3) CA. Thus, it completely omitted and did not apply Section 47b HEIA. Masaryk University filed a recourse to the Supreme Court which dealt with the main question of whether the legal obligations, i.e. to

[26] Stanovisko Samostatného oddělení autorského práva Ministerstva kultury k právnímu názoru odboru legislativního a právního Ministerstva školství, mládeže a tělovýchovy k aplikaci § 47b zákona o vysokých školách č. 111/1998. Available from: **http://ipk.nkp.cz/legislativa/01_LegPod/autorske-pravo/Stanovisko111_98.htm**

[27] The same recommendation was reached by the Expert Committee on Providing Electronic Access to Theses of the Association of Libraries of the Czech Universities (**http://www.evskp.cz/dokumenty.php?tsekce=2&sek=&ukol=1**).

[28] As elucidated aptly by (Křesťanová, Holcová 2008, p. 47). Under this view, the legislator tried to balance the rights and interest of the institution and the author beforehand.

[29] Regional Court in Brno of 29 April 2014, file No 23 C 61/2013-117.

[30] Judgement of the Higher Court in Olomouc of 26 February 2015, file No 7 Co 5/2014-142.

provide public access and to protect the rights of the author, had been properly balanced, especially as regards the form and manner of such provision.

The Supreme Court[31] preferred the position of Telec and Tůma (2007, p. 381) that Section 47b HEIA is a "quasi-license" limitation of the author's rights[32] that must be interpreted restrictively and in compliance with the three-step test (Section 29 CA). The Supreme Court also elucidated the relationship between the CA and HIEA, namely that the CA is lex generalis and HIEA lex specialis. The Supreme Court did not however dwell on the international and/or European aspects of this issue. Interestingly, Section 47b HEIA with its reference to the internal regulation of the higher education institution, was found to be sufficient to pass the first step of the three-step test, i.e. that the limitation of copyright is applicable only in "certain special cases"[33]. The provision of online access did not seem in conflict with the second step of the test, as making theses available is a common part of the graduation process that does not conflict with the normal exploitation of the work[34]. Also, Masaryk University (defendant) had set up an internal procedure regarding how to block access to the thesis that might have been used before it was handed in. However, the author did not take advantage of this opportunity. Consequently, the third step was sufficiently passed, as the legitimate interests of the author were not unreasonably prejudiced.

On the second occasion, the Higher Court,[35] bound by the legal opinion of the Supreme Court, actually applied the three-step test in casu. The first step was satisfied, as the rights of the author were limited on a legal basis (specifically Section 47b HEIA) and the internal regulations of Masaryk University also reflected this legal basis. There was also no problem with the second step as "the submission of the final thesis is a one of the prerequisites for completing the studies"[36]. The internal regulations of Masaryk University had foreseen this manner of publication and also reflected Section 47b(3) HEIA in that submission of the thesis also implies consent to provide public access to it. The Higher Court further inferred - from the fact that the thesis is accessible in the university information system - that its use is for study purposes. Such use can be deemed normal. Even the third step had been complied with in the current case. The legitimate interest could not have been unreasonably prejudiced as he had the opportunity to proceed according to the internal regulations and request that the thesis not be made publicly accessible but had not done so.

After this decision, T. H. filed a constitutional complaint directly against this judgment of the Higher Court as it allegedly infringed his right to the protection of the rights 'to the fruits of one's creative intellectual activity'. The complainant also filed for the declaration of Section 47b HEIA as unconstitutional. However, as he "failed to exhaust all the procedures afforded

[31] Judgement of the Supreme Court of 29 October 2015, file No 30 Cdo 2864/2015.
[32] Limitations of copyright might also be included in Acts other than the CA, which was reflected in the most recent amendment to Section 29 CA (Act No 102/2017, amending Act No 121/2000, on copyright, on rights related to copyright and amending certain other Acts (Copyright Act), as amended).
[33] Notwithstanding the opinion of Křesťanová and Holcová (2008, p. 45) that such a limitation of author's rights is too broad and no certain enough.
[34] Including the in casu situation, where the first version of the thesis was published as a book – the author notably had the possibility to block/delay access to it.
[35] Judgment of the Higher Court in Olomouc of 9 February 2016, file No 7 Co 5/2014-186.
[36] Judgment of the Higher Court in Olomouc of 9 February 2016, file No 7 Co 5/2014-186.

him by law for the protection of his rights"[37] the complaint was rejected as inadmissible[38]. As a result, the Constitutional Court did not carry out the assessment so sought by Czech jurisprudence (see e.g. Křesťanová and Holcová, 2008). Thus it is still possible that this provision might be declared unconstitutional, especially as the Supreme Court only evaluated the previous version of the HEIA that did not contain a maximum delay of three years. Furthermore, the provision might also be challenged as to its conformity with the InfoD in the form of a reference for a preliminary ruling.

Evaluation and recommendation

The fundamental conclusion of the decision is that making theses available online does not conflict with the rights of the author, and consequently no license agreement with the author is currently needed[39]. However, the decision of the Supreme Court discussed above dealt with the previous version of Section 47b HEIA that did not include the possibility to delay the provision of access for a maximum of three years. If a similar suit were filed again, the courts would have to re-evaluate the compatibility of the provision and also the specific chosen form and manner of providing of public access with the three-step test. In other words, whether the balance between the legal obligation of the higher education institution and the protected rights of the author will still be achieved. As regards the provision itself, the fundamental problem might potentially lie with the second step of the three-step test, i.e. conflict with the normal of a work. However, it could be argued that the normal exploitation of theses is precisely to make them available to the public for public scrutiny. Also, even though public access might only be delayed for three years, this term should be regarded as sufficient to commercially exploit the theses. Furthermore, it could be also argued[40] that the provision stipulates a "one-time" delay that could, however (under the strictest conditions), also be renewed. At the level of internal regulations, the use of technological protection measures could also achieve the desired balance. Providing public access (even online) with the application of technological measures that would only enable mere access (i.e. not the making of reproductions in the form of prints and digital downloads) would surely be regarded as compliance with the second and third steps. However, non-display uses (Borghi and Karapapa, 2011), e.g. for data mining, should still be allowed.

De lege ferenda, the "publication clause" concerning a dissertation thesis (47b(1) HEIA in fine), i.e. no obligation to provide public access if it has already been provided, e.g. through the publication of a scientific book, should be extended to all the concerned theses. This would again make the provision more acceptable in the context of the three-step test.

In order to address all the identified problems, a more systematic reform of access provision would be needed. The Slovakian Central Repository of Theses[41] might serve as good

[37] Section 75 of the Act Constitutional Court Act 182/1993 Sb. (English translation of the Act cited from: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/ZUS_EN_verze_2018.pdf). The correct procedural step would have been the filing of an appeal to the Supreme Court.

[38] Order of the Constitutional Court of 15 February 2017, file No II.ÚS 1317/16.

[39] These findings directly contravene the conclusions of Křesťanová and Holcová (2008, pp. 46–47) and confirm the conclusions of Polčák (2010, p. 74).

[40] I would like to thank my colleague Michal Koščík for this idea.

[41] Central Register of Final and Qualifying Works [Centrálny register záverečných a kvalifikačných prác]. For general information, see its home page at http://cms.crzp.sk/. The register is primarily regulated in Section the sec. 63(7) to (13) of Act No 131/2002 Z. z., on higher education and on amendments to some other Acts ("HEIA-SVK"). The details are set out in the respective Decree (Decree of the Ministry of Education, Science, Research and Sport of the Slovak Republic No 233/111 Z.z.,

inspiration. The system is state-run, and higher education institutions have an obligation to submit theses into this repository, which also provides an originality check (Section 63(7) HEIA-SVK). Public access is only provided on the basis of a contractual license with the author, which they are, however, obliged to conclude (Section 69(9) HEIA-SVK). The provision of access might be delayed for at most three years (Section 69(10) HEIA-SVK). The manner of provision might also include "protected" access limited using technological protection measures blocking the copying and printing of the theses (Section 69(10) HEIA-SVK). In order to properly balance the rights, published theses are not subject to the access obligation, as in the Czech Republic.

Conclusion

The Czech legislation concerning the providing of public access to theses is prima facie not suitable to provide clear answers and potentially not compliant with the InfoD. The approach to this regulation was also dichotomic. Part of the national jurisprudence as well as the expert bodies recommended that higher education institutions conclude license agreements with their students. On the other hand, another part of the doctrine suggested that this is completely legal, as the obligation to do so also implies the necessary authorisation. Finally, the Supreme Court sanctioned that a solution based on this legislation consisting of making theses available online without restriction was compliant provided there was also the opportunity to prevent the provision of public access to the theses. The last HEIA amendment introduced yet another level of legal uncertainty, as the provision of access might be delayed but only for three years. Currently there is no case law reassessing the compliance of this specific condition.

Higher education institutions are therefore in an unenviable situation. They must create a system to provide public access to theses that would carefully balance all the involved interests and at the same time fulfil legal obligations. Following the decision of the Supreme Court, these details should be adequately stipulated in the internal regulations of the higher education institution. The second step, i.e. the conflict with the normal exploitation of the work, seems to be just as crucial, however still passable even if the delay is limited to at most three years, if the blocking mechanisms are set up.

A more radical approach would be the complete overhaul of the system and introduction of a complex state-backed system for providing public access to theses such as the one in the Slovak Republic.

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implementing some provisions of Act 131/2008 Z. z., on higher education and on the amendment and supplementation of some other Act). This decree contains, inter alia, a licensing agreement template. The legal analysis of its functioning is provided in (Adamová, Hazucha 2018, pp. 721–723).

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