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Myška, Matěj
2018

Dostupný z <http://www.nusl.cz/ntk/nusl-387438>

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Datum stažení: 03.05.2024

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PROVIDING PUBLIC ACCESS TO THESES AND COPYRIGHT LAW

Supported by Czech Scientific Foundation – project GA17-22474S Adapting Exceptions and Limitations to Copyright, Neighbouring Rights and Sui Generis Database Rights to Digital Network Environment

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Content

- Basics
- ETDs & law
- Case T. H. v MU
- Conclusions

Basics

- ETD (electronic theses or dissertation) = unique outcome of the creative activity of the author
 - § 2 CA (scientific work) + school work (§ 35 CA)
- Author's rights
 - Personality rights – § 11 CA – právo rozhodnout o zveřejnění díla
 - Economic rights – § 12 CA – právo na sdělování díla veřejnosti
- Might be used:
 - With consent
(Contractual licence)
 - Based upon exception/limitation
(Non-contractual licence)

Providing public access to ETDs

- Balancing of interests

- Public
- Author

- Historical development

- Since 1. 1. 2001 – CA – school work (§ 35 CA), internal needs of the university
- Since 22. 5. 2006 – CA – on-site lending – statutory licence
- HIEA amendments
- Since 1. 1. 2006 – 552/2005 Sb. – introduction of the providing public access mechanism
- Since 1. 7. 2010 – 159/2010 Sb. – info about ETD defence
- Since 1. 9. 2016 – 137/2016 Sb. – transparency and open data – limited

Providing public access to ETDs

- Current regulation
- § 37/1/d CA (not of interest) – defended/lending/on-site/research & private study/not excluded
- § 47 HIEA
 - + § 75 (4) HIEA: The habilitation thesis will be made public pursuant to Section 47b, if it was not made public by other means.

Source of the English translation of HIEA: http://www.msmt.cz/uploads/odbor_30/TF/Legislativa_a_metodicke_pokyny/Novela_2016/Zakon_o_vysokych_skolach_AJ.pdf

§ 47b HIEA [providing access to ETDs]

- (1) Higher education institutions are obliged to make public, **at no profit to themselves**, the Bachelor's, Master's, Doctoral, and advanced Master's (“rigorózní”) theses that have been defended at their institutions, including the readers' reports and the document on the course of the defence and the results of the defence. The institution will do this by making available a database of these theses. **The means of providing access to these theses is stipulated in the internal regulations of the higher education institution.** The higher education institution will not make a Doctoral thesis public, if the Doctoral thesis was already made public by other means.
- **!!! § 47 para. 4 HIEA:** The thesis must contain original as well as published results or results accepted for publication.

Source of the English translation of HIEA: http://www.msmt.cz/uploads/odbor_30/TF/Legislativa_a_metodicke_pokyny/Novela_2016/Zakon_o_vysokych_skolach_AJ.pdf

§ 47b HIEA [on-site access]

- **(2)** Bachelor's Master's, Doctoral, and advanced Master's (“rigorózní”) theses that have been submitted by candidates for defence must also be made available to the public at least five days before the defence at a place designated for this purpose in the internal regulations of the higher education institution, and where this is not the case, in the department or other place at the higher education institution where the defence of the thesis will be taking place. Any individual is entitled, at his/her own expense, to make extracts, copies or photocopies of theses thus made available.

Source of the English translation of HIEA: http://www.msmt.cz/uploads/odbor_30/TF/Legislativa_a_metodicke_pokyny/Novela_2016/Zakon_o_vysokych_skolach_AJ.pdf

§ 47b HIEA [irrefutable presumption]

- **(3)** By handing in a thesis, its author automatically gives assent to its being made public pursuant to the provisions of the Act, irrespective of the result of the defence.

Source of the English translation of HIEA: http://www.msmt.cz/uploads/odbor_30/TF/Legislativa_a_metodicke_pokyny/Novela_2016/Zakon_o_vysokych_skolach_AJ.pdf

§ 47b HIEA

- (4) A higher education institution can delay the publication of Bachelor's, Master's, Doctoral, and advanced Master's ("rigorózní") theses or their parts for the duration of the barrier to publishing³¹), but only for three years. Information about the delay together with the reasons must be published in the same place as the Bachelor's, Master's, Doctoral, and advanced Master's ("rigorózní") theses. After the defence of the Bachelor's, Master's, Doctoral, or advanced Master's ("rigorózní") thesis which is to be published with delay in compliance with the first Sentence, the higher education institution will send one copy to the Ministry to be stored, without undue delay.
- **BUT – specific laws (but not CA) priority – personal data protection**

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Criticism

- Unconstitutional?
- EU non-conform?
 - Limitation of copyright not based on 2001/29/EC
- The problem of 3 years

T. H. v MU – facts

- T. H. – author of dissertation thesis
- MU - public university
- 11. 2. 2011 / 27. 1. 2012 – thesis (even a second version) not defended, both version online in IS
- 1. 6. 2011 – 1. version – published in form of a book

T. H. v MU – Regional Court

- Judgment of the Regional Court in Brno of 29. 4.2014, file no. 23 C 61/2013-117
- Civil suit to cease and desist – dismissed
- Argument:
 - Existing means how to prevent publication (internal regulation of MU)

Kauza T. H. v MU – Higher Court (1st)

- Judgment of the Higher Court in Olomouc of 26. 2. 2015, file no. 7 Co 5/2014-142
- Overrule of the regional court
- Cease and desist – stop providing public access
- Arguments:
 - School work
 - No internal use
 - (however § 47b HIEA omitted)

Kauza T. H. v MU – NS

- Judgment of the Supreme Court of 29. 10. 2015,
file no. 30 Cdo 2864/2015-172
- Arguments:
 - Balancing of interests
 - The nature of exception – relation CA – HIEA
 - No three-step test analysis (§ 29 CA)

T. H. v MU – SC

- *“Section 47b of the Higher Education Act constructs a quasi-license limitation of copyright, the purpose of which is to publish (§ 4 par. 1 of AutZ) a Bachelor’s, Master’s, Doctoral, and advanced Master’s (“rigorózní”) theses , which exceeds the use of a school work for the internal needs of a school within the meaning of Section 35 (3) CA. However, in this case, the legal limitation of copyright is subject to a restrictive interpretation, which must be in accordance with the three-step test expressly stated in Section 29 (1) of the CA.”*

Kauza T. H. v MU – VS (2nd)

- Judgment of the Higher Court in Olomouc of 9. 2. 2016
file no. 7 Co 5/2014-186
- Confirmed the RC judgment as materially correct
- Arguments:
 - Complies with the three-step test (§ 22 CC)

T. H. v MU – HC

- Three-step test
- 1. certain special cases provided for by law
- 2. no conflict with a normal exploitation of the work
- 3. legitimate interests of the rightholder not unreasonably prejudiced

T. H. v MU – HC (2nd)

- *The HEI has in accordance with the provisions of Section 47b of the Higher Education Act, which was incorporated into this Act by an amendment to the Act. No. 552/2005 Coll., the **right to provide public access on a non-profit basis** to the final thesis, which was defended, including the opinions of the opponents and the record of the course and the result of the defense. If the student intends to finish the studies properly, he / she must submit the theses, **the act of submission includes the implicit consent of the author to providing such public access**. If the student did not take any steps before the start of the dispute to prevent the HEI from publication, even though he had the possibility to do so, then this inaction indicates that providing public access to his dissertation could not unreasonably prejudice his legitimate interests.*

T. H. v MU – Constitutional Court

- Order of the Constitutional Court of 15. 2. 2017,
file no. II.ÚS 1317/16
- Complaint rejected
- Arguments:
 - Procedural fails

Conclusions – T. H. v MU

- Before the amendment 137/2016 Sb.
- Three-step test assessment needed
 - „The means of providing access to these theses is stipulated in the internal regulations of the higher education institution.“

Conclusions

- New case law missing
- Delicate balancing
- Proper internal procedures need
- Obligation to publish

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