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Koščík, Michal
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LEGAL FRAMEWORK FOR DIGITALISATION AND STORAGE OF DIGITAL WORKS BY PUBLIC ARCHIVES

Michal Koščík

michalkoscik@gmail.com

Masaryk University, Brno

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Abstract

The article observes the legal framework of Czechia for making digital copies and their further use by cultural heritage institutions. The article generally describes the laws regulating copyright exemptions and then describes the functioning of individual exemptions harmonised by InfoSoc directive within the Czech legal system. Finally, the article describes the exemptions not directly presumed by InfoSoc directive that are formulated as a duties of public institutions towards public but involve copyrighted works.

Keywords

InfoSoc, copyright, digitalisation

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Introduction

The aim of this article is to provide a national report on the state of copyright exceptions for the digitisation of works and the use of digital copies by public repositories such as libraries, cultural heritage institutions and educational institutions.

The legal regulation of copyright and related rights is concentrated into the Czech Copyright Act¹ ("CA"). The CA covers most of the substantive rules on copyright, related rights and database rights, including statutory exceptions and rules on the collective management of copyright rights. Basically, all the EU *acquis* on copyright and related rights has been implemented into the wording of the CA².

The concept of the CA as a single act that would cover all substantive rules related to copyright has, however, eroded over time. The rules on license agreements are currently part of the Czech Civil Code³ and certain statutory copyright exceptions are implemented in other Acts⁴. The statutory exceptions outside the CA are usually formulated as the duty of an institution to make, preserve or enable a copy of a certain work, rather than rights that the institution can exercise at will. Typical examples of such statutory exceptions are the duty of a university to make all theses and dissertations available to the public⁵, or the duty of the owner of a cultural archival relic to provide a backup "security" copy of the item⁶.

Apart from the CA, the relevant provisions for digitising and preserving digital documents can be found in the abovementioned Act on Archiving and Records Management⁷, the Library Act and the Free Access to Information Act⁸. The legal deposit obligations are regulated by the Act on Non-periodical Publications⁹ and the Act on Periodical (Print) Publications¹⁰. These laws contain provisions that could be perceived as statutory exceptions or obligatory licenses and will be addressed below.

Making a digital copy part of the collection

The purpose of a library, archive or museum is to collect items, preserve them and make them available for the public¹¹. Acquisition is traditionally performed through the purchase of a tangible object that is itemised and put into storage. Items in storage are subsequently indexed/catalogued and collectively form the institution's collection. The acquisition

¹ Act No 121/2000 on Copyright and Rights Related to Copyright and on the Amendment of Certain Acts.

² For example, the CA contains provisions harmonised by legislation on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), the Software Directive, the Database Directive and the Orphan Works Directive.

³ Act No 89/2012, the Civil Code, Sections 2358 to 2389.

⁴ See below.

⁵ See Section 47b of Act No 111/1998, the Higher Education Act.

⁶ Act No 499/2004, on archiving and records management.

⁷ Act No 499/2004, on archiving and records management.

⁸ Act No 106/1999, the Free Access to Information Act.

⁹ Act No 37/1995, on non-periodical publications.

¹⁰ Act No 46/2000, on periodical publications.

¹¹ For example, Section 2 of Act No 122/2000, on the protection of museum character collections and on the amendment of certain other Acts, defines a museum as an institution that acquires, collects, preserves and indexes natural objects or human works and makes them available on equal terms to everybody. A gallery is defined as a special form of museum focused on the visual arts. The Library Act defines a library as an institution that provides a library service to everybody (Section 2), which also includes making the library collection available (Section 4).

of a tangible object is typically performed through donation, purchase or a legal obligation to hand over certain items such as a public deposit obligation.

Acquiring digital content into a collection usually relies on a different set of legal instruments. Instead of purchase or donation, the acquisition is usually performed through a license agreement or by taking advantage of a statutory exception. The use of licenses for public archive purposes has already been broadly covered elsewhere¹². Below, we focus mainly on the statutory exceptions.

Statutory exception for preservation purposes

A physical (analogue) medium such as paper deteriorates over time or can be damaged. It is often therefore important to make backup copies to preserve the work or document it contains. Making a backup copy is explicitly permitted by a statutory exception contained in Czech law¹³. The statutory exception contained in Section 37(1)(a) of the Czech Copyright Act enables every library, archive, museum or educational institution to create a copy of any work to preserve that work for its internal archival or conservational purposes.

The formulation of the exception is very broad and does not limit its scope only to certain works as long as the copy does not serve direct or indirect commercial purposes. This exception can also be applied by analogy to records and documents protected by so-called related rights or rights related to copyright, such as broadcasting records or rights of performing artists. Curiously enough, the exception for making a copy for archiving and preserving purposes is not applicable to data contained in databases protected by the sui generis right and for computer programs¹⁴. The archive or library, however, may make a permanent copy of a computer program under statutory license for backup as determined in Section 66(3) of the CA, which is in fact broader in terms of possible uses than the "archiving exception".

The important question not explicitly answered by the Czech Copyright Act is whether a library or archive can create a copy of a document that was previously not in the collection of the institution. In other words, whether a library can use the exception in Section 37 of the CA to make a certain work part of its collection. For example, can a library make a copy of a literary work that has been uploaded in a pirate repository? Can a public repository make a copy of a publicly available website solely based on the archiving exception?

Historically, the exception to making a copy for archiving purposes was written to enable institutions to create backup copies of items contained in their collections. The explanatory report to the first wording of the CA states that this exception was introduced so that the backup copies can be used in the place of other copies that were "lost, damaged or destroyed".

¹² See: DAVIS, Trisha L. License agreements in lieu of copyright: Are we signing away our rights?. *Library Acquisitions: Practice & Theory* [online]. 1997, 21(1), 19-28 [Accessed 19 October 2018]. DOI: 10.1016/S0364-6408(96)00085-3. ISSN 03646408. Available from: <http://linkinghub.elsevier.com/retrieve/pii/S0364640896000853>; ŠAVELKA, Jaromír and Michal KOŠČÍK. Jaké podmínky musí splňovat autorské dílo, aby mohlo být vloženo do veřejně přístupného repozitáře? In: *Seminar to access of grey literature 2010: 3rd year of the seminar* [online]. Praha: Národní technická knihovna, 2010. ISSN 1803-6015. Available from: <https://nysl.techlib.cz/cs/konference/sbornik-2010>; KOSCIK, Michal; ŠAVELKA, Jaromir. Dangers of Over-Enthusiasm in Licensing under Creative Commons. *Masaryk UJL & Tech.*, 2013, 7: 201.; MYŠKA, Matěj. Vybrané právní aspekty otevřeného přístupu k vědeckým publikacím. *Právní rozhledy*, 2014, 22.18: 611-619.

¹³ Making a copy of any work in the collection of a library or archive is explicitly permitted by Section 37 of the Czech Copyright Act.

¹⁴ Due to the explicit exception contained in Section 66(7) of the CA.

However, the wording of the exception for archiving purposes does not explicitly state that the exception can only be enjoyed by the legitimate holder or user (like in the exceptions under Sections 36 or 66 of the Czech Copyright Act). The grammatical formulation of the exception is rather broad. The wording has to be interpreted in line with the general CA clause, in particular in accordance with the provisions on a "three step test" in Section 29. The archiving exception can also be enjoyed by a user without ownership rights to the medium from which the copy is made as long as this does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. The legislation regulates and restricts how a particular copy may be utilized further, and therefore the mere act of creating a copy for archiving or preservation purposes does not have the potential to interfere with the commercial interests of the rightsholder and is also easily foreseeable by any author who publishes his/her work. It is also important to note that the license to make a copy for preservation purposes is granted even for works where the author has not decided to make such works public¹⁵. It is clear that Czech legislation attributes significant importance to the preservation of cultural heritage, even in cases where the author or rightsholder does not consent to preservation of the work. It can therefore be concluded that a library or archive can make a preservation copy of a cultural heritage item even if the source has questionable rights regarding making the work available to the archive or library in the first place. It is relatively easy for any library or archive to digitise any of its books or items regardless of the nature of the work or the existence of copyright protection for the work.

Making a digital copy accessible for users

Making a digital copy of a work to protect it from destruction or loss is only the first part of a library's or archive's work. It is understandable that an archive needs to share its documents with the public. Making a digital copy available to users is considered a use of a copyrighted work and either a license or statutory exception is needed. The CA provides for three major copyright exceptions for libraries, public archives, schools and other educational institutions to make the content of their collections accessible to the general public.

The first of these exceptions is the right to lend a "lawfully" made reproduction of a work that has been damaged or lost, providing that the work no longer has any commercial nature¹⁶. The CA does not restrict such copies to analogue form, and this provision might be applicable to lending digital copies, especially after it was made clear by the Court of Justice that the concept of lending can extend to digital copies¹⁷.

The second exception allows public archives and libraries¹⁸ to display digital copies via dedicated terminals located on their premises, such a work being made available in this way exclusively for the purposes of research or private study by members. The digital copy needs to be a copy of an item that is part of the institution's collection. We described above that it is relatively easy for a public archive or library to make a digital copy of any item and make it a part of its collection. Hence the three-step test has to be applied to determine whether the

¹⁵ See Section 29(2) of the CA.

¹⁶ Section 37(1)(b) of the CA.

¹⁷ C-174/15 - Vereiniging Openbare Bibliotheken ECLI:EU:C:2016:856.

¹⁸ The exception extends to library, archive, museum, gallery, school, university and other non-profit school-related and educational establishments.

actual on-site display does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author¹⁹. As the case law of the CJEU²⁰ shows, printouts from terminals can be considered the use of a work that would need either license or compensation via the collective management. Czech legislation enables the provision of printed copies of such reproductions via an intermediary (upon request), providing that the intermediary pays the remuneration to the collective rights manager. The aspects of collective rights management of digital works will not be discussed further, as this topic has recently been discussed by Straková²¹. Another practical problem faced by the archives is that the use of digital works can be prohibited by contractual arrangements that take precedence over the statutory exception. This puts major parts of contemporary content that are usually distributed digitally outside the scope of this exception. Unlike the exception for "preservation purposes", the exception for displaying digital copies via terminals does not relate to works that have not yet been made available to the public²².

The third exception relates to orphan works. Again, this exception will not be discussed in detail as it has recently been addressed on the same forum by Myška²³.

Statutory limits to exceptions

The limits of the abovementioned exceptions are contained in the general clauses of the CA (Section 29) which, in addition to the three-step test, contain specific protection for unpublished works. The second paragraph of Section 29 CA stipulates that the exceptions can be generally enjoyed only in relation to works that have already been published. This restriction was a significant obstacle to repositories of grey literature because large parts of the works archived as grey literature were never created with the intention of being published²⁴ (such as minutes of meetings and sessions) or were auxiliary records (such as technical drawings). The restriction from Section 29 CA did not serve much purpose as regards protection of rights-holders, since the mere creation of a copy for archiving purposes did not automatically give a repository the right to publish it. This restriction was partially lifted in 2017 when an amendment to the CA²⁵ enabled libraries and museums to collect even unpublished works. The practical impacts of these restrictions remain low because repositories still have to rely on the authors' consent²⁶ if they want to publish unpublished works in their collections.

Another statutory restriction to the digitisation of works was discussed by Telec in his work on the digitisation of films²⁷, where he concluded that the archiving exception does not allow for the remastering of original works and that the original work also has to be archived with its flaws and imperfections.

¹⁹ Section 29(1) of the CA.

²⁰ C-117/13, Technische Universität Darmstadt, ECLI:EU:C:2014:2196.

²¹ See: STRAKOVÁ, Lucie. Changes in the Area of Extended Collective Management in Relation to Memory and Educational Institutions in the Light of the Czech Amended Copyright Act. *An International Journal on Grey Literature, TextRelease*, 2018, ron. 14, Special Winter Issue, p. 61-65. ISSN 1574-1796.

²² See below.

²³ MYŠKA, Matěj. Orphan and Out-Of-Commerce Works After the Amendment of the Czech Copyright Act. *The Grey Journal*, Amsterdam: TextRelease, 2018, ron. 14, Special Winter Issue, p.55-60. ISSN 1574-180X.

²⁴ Instead, they were meant to be used as documents for internal use.

²⁵ Act No 102/2017, amending the CA.

²⁶ Or eventually the death of the author (if known).

²⁷ TELEČ, Ivo. Digitalizace filmů. *Právní rozhledy*, Prague: Nakladatelství C. H. Beck, s. r. o., 2015, vol. 23, 15/16, p. 526-528.

Exceptions for digitisation outside the CA

As mentioned in the introduction, most statutory exceptions outside the CA are not construed as exceptions but rather as duties to provide some kind of public service. Of these exceptions, we can list the obligation of tertiary educational establishments to make all theses and dissertations available to the public, including reviews²⁸, the obligation to make digital conversions in the Act on Archiving²⁹ and the obligation of every public institution to provide information under the Freedom of Information Act ("FIA").

The general principle of the FIA is that any public entity must, on request, provide basically any information it has generated or has in its possession. Therefore, the archives of public entities can be a valuable source of content for museums and libraries. On the other hand, the content generated by libraries and museums can also fall under the scope of the FIA. One of the limits to this obligation is a third party intellectual property right to the requested document or information³⁰. Certain intuitions, such as universities and orchestras, are also excepted from providing copyrighted works they created, however libraries and museums do not fall into this privileged category.

Interestingly, the FIA gives the public entity who provides the information or document an explicit license to digitise the requested document and even to display such document online³¹. This, however, cannot be abused to circumvent or broaden the limits to copyright exceptions imposed by the general clause contained in Section 29 CA if the document is protected by third persons' rights.

The obligation of a public depository that is imposed on every publisher of periodic or non-periodic publications is a specific form of statutory exception. Publications delivered to selected libraries through the public deposit obligation can be digitised for preservation purposes. The benefits of handing over legal deposits purely in electronic form have already been described by Polcak³². However, the concept of electronic legal deposit remains unknown to Czech legislation, even if the question of whether purely digital publications meet the definition of non-periodic publications remains open³³, but largely academical, because libraries and archives are entitled to make digital copies for preservation purposes based on the abovementioned exception.

Copyright rights to digitised copies

Czech legislation does not recognize any specific intellectual property rights to the digitisation of analogue copies. Putting a document into a scanner does not make it a unique product of the author's creative activity, which is a necessary criterion for copyright protection. It is, however, possible that collecting, selecting, scanning and presenting large volumes of digitised documents would constitute a sui generis database right for a repository operator. It is also possible that certain results of elaborate digitisation and three-dimensional modelling would

²⁸ Act No 111/1998, on tertiary education, Section 47b.

²⁹ See Act No 499/2004, on archiving and records management, Section 13(5); Section 15 and Section 69a.

³⁰ See Section 11(2) of Act No 106/1999, the Freedom of Information Act.

³¹ See Section 4a FIA

³² POLČÁK, Radim. Práva k datům spravovaným veřejnými knihovnami ve světle změn informačního zákona. Knihovna, Prague: National Library of the CR, 2016, vol. 27, n. 1, p. 61-73. ISSN 1801-3252. Cf. MATUŠÍK, Zdeněk. K některým autorskoprávním otázkám činnosti knihoven v současnosti. Knihovna plus.

³³ Act No 37/1995, on non-periodical publications, explicitly excludes computer programs and audio-visual works.

acquire copyright protection. Polcak warns that "the possibility of copyright protection for digital images might then provide for the emergence of subsequent copyright protection of old cultural heritage that itself is not protected by copyright"³⁴. Czech legislation solves this problem by explicitly stating that libraries, museums and galleries are obliged to provide their own intellectual property upon request under the FIA³⁵.

Conclusion

The aim of this article was to describe the current state of copyright exception for the digitisation and making digital copies available via cultural heritage and educational institutions in Czechia. Czechia has implemented virtually all the applicable exceptions contained in the InfoSoc directive, however did not go much further beyond the basic exceptions. The regulation on the statutory deposit of electronic digital copies or the creation of web-based archives is still unsatisfactory to non-existent. The current state of copyright exceptions limits cultural heritage institutions to using these exceptions for contemporary content subject to licensing terms and conditions. We have, however, identified that many statutory licenses are in fact disguised as obligations to perform a public service, especially in the field of archiving and tertiary education.

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³⁴ POLČÁK, Radim. Digitisation, Cultural Institutions and Intellectual Property. *Masaryk University Journal of Law and Technology*, Brno: Masaryk University, 2015, vol. 9, n. 2, p. 121-141. ISSN 1802-5943. DOI:10.5817/MUJLT2015-2-7.

³⁵ See Section 11(5)(d) of the Freedom of information Act.

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