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Copyright, to be or not to be

COUNTRY REPORT: The Czech Republic

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Questionnaire

I. The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

The Czech copyright law is based on the natural law theory² of protection of literary, artistic and scientific works. However, compared with natural law justifications based on the „Lockean labour theory“,³ the Czech approach is primarily based on moral rights of the author. The nature of author's rights⁴ is derived from the personal aspects of human creativity. Unlike in the common law, the economic rights of the author represent just a specific expression of author's personal interests. Both categories of author's rights (i.e. moral rights and economic rights) serve a different purpose: moral rights reflect author's personal relationship with his work; economic rights satisfy author's interests in the economic exploitation of copyrighted work.

The Czech copyright legislation was inspired by the French dualistic concept,⁵ which is characterized by the full distinction of moral and economic rights. According to the legal doctrine the pure copyright dualism means “sovereignty of moral rights and sovereignty of economic rights with the possibility of full transferability of economic rights inter vivos and a different duration of moral and economic rights after the author's death”.⁶

¹ The execution of the Part II was enabled thanks to the institutional support of the long-term development of the scientific organization of the University of Finance and Administration.

² *Telec/Tůma, 2007, p. 139. Telec, 2002, p. 69 ff.*

³ *Drahos, 1996, p. 41 ff.*

⁴ *Sterling, 2008, p. 55.*

⁵ *Telec/Tůma, 2007, p. 141.*

⁶ *Ibid.*

Nevertheless, the Czech concept constitutes a very specific form of the dualistic approach. In some areas the German monistic system is reflected, other provisions of the Czech Copyright Act⁷ are inspired by the French dualism (as regards specific manifestations of these approaches, especially in the issue of transferability of the author's rights, see analysis provided under the question No. 3). Although this solution may be considered as an eclectic one, the Czech copyright law is regarded to be an excellent legislative product among the European Union countries.⁸

The natural law justifications of the copyright are expressed neither in any provisions of the Czech Copyright Act nor in any other piece of the Czech legislation. However, doctrinal justifications⁹ were accepted in the case-law of the Czech Supreme Court. In the dispute between the Czech scriptwriter Zdeněk Svěrák and the Bauhaus Company¹⁰ the Supreme Court ruled that: "The copyright is derived from the nature of relations arising from the creation of the copyrighted works... The author has a similar, but not identical, legal status as the owner of tangible assets; although due to the inherent nature of the copyrighted work the author is not an owner of the ideal object".

From the constitutional law perspective the Czech copyright law is primarily based on Art. 11 and Art. 34 of the Charter of Fundamental Rights and Freedoms.¹¹ Nevertheless, these provisions do not represent the express reasoning of the copyright protection in the meaning of the referred question.

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

The Czech copyright doctrine distinguishes between two categories: "rights neighbouring to the copyright" and "rights related to the copyright"¹². Neighbouring rights include only the rights of performers to their artistic performances (Art. 67 ff. of the Czech Copyright Act). These rights are inherently linked to the personality of the performing artist. The artistic performance is result of a special talent, feelings and intellect of its creator, and bears the distinctive character resulting from performer's personality¹³.

On the other hand, rights related to the copyright¹⁴ do not have the same nature as the copyright and therefore are called as the "related rights", which expresses their different character.

⁷ Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts, as amended.

⁸ Dietz, 2002, pp. 215-232.

⁹ See ref. No. 1.

¹⁰ The decision of the Czech Supreme Court, Case No. 30 Cdo 739/2007 [30.4.2007].

¹¹ Constitutional Act No. 2/1993 Coll., as amended. Art. 34 of the Charter of Fundamental Rights and Freedoms provides that the rights to results of creative intellectual activity are protected by the law. Art. 11 states, that everyone has the right to own a property, which according to the case-law of the Constitutional Court (case No. III.ÚS 2912/12, case No. II.ÚS 2186/14) includes the ownership of tangible and intangible assets.

¹² Telec/Tůma, 2007, p. 640.

¹³ Ibid. p. 641.

¹⁴ Rights of the phonogram producers; rights of the audio-visual recordings producers; rights of the radio or television broadcasters; rights of the publisher of previously unpublished work; rights of the publisher to a remuneration in connection with the private copying of the published work (Art. 1 b) of the Czech Copyright Act).

We can find the same reasoning for the rights of performers as for the copyright (natural law justifications); the Czech Copyright Act, similarly as in the case of the copyright, stipulates non-transferability of moral and economic rights of performers.

The justification of related rights is based on a different approach which can be characterised as the “protection of the investment”.¹⁵ Immaterial objects of related rights (such as phonograms, audio-visual recordings, television broadcasting etc.) are also considered as intangible assets, but not as results of a creative activity, which are associated with the personality of the author/performing artist. Objects of related rights are results of purely economic activities. Given that, the Czech Copyright Act expressly allows for a full transferability of related rights, which is the legislative reflection of economic investments spent by the producers.

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

Natural law justifications of copyright and performer’s rights, as well as the protection of investments, which lies behind the existence of related rights, have a direct impact on several provisions of the Czech Copyright Act.

The German monistic doctrine which was source of the inspiration for the previous Czechoslovak Copyright Act from 1965¹⁶ was abandoned¹⁷, and the Czech Copyright Act from 2000 is based on the French dualistic concept. However, this approach has not been implemented in its entirety.

According to the Czech Copyright Act, author’s rights consist of exclusive moral and economic rights. The transferability of rights inter vivos is expressly prohibited for both categories of author’s rights (Art. 11 para. 4, Art. 26 para. 1 of the Czech Copyright Act). The economic rights may be transferred just upon the death of the author (mortis causa) in a form of testator’s will or testamentary bequest. The only way how the author may dispose of economic rights during his life is the license transfer, which constitutes the right to use the copyrighted work on behalf of the licensee. The license transfer of the rights is called “constitutive transfer”, because the economic rights of the author are not directly transferred to the transferee and the author is still the owner of the copyright.

If the license is granted as an exclusive one, the provider is not allowed to grant the same license during the duration of the exclusive license to another person and he himself has to refrain from the exploitation of the rights to which the exclusive license was granted.¹⁸

Because the full transfer of economic rights inter vivos is prohibited by the Art. 26 para. 1 of the Czech Copyright Act (as for the performing artist the transferability of economic rights is forbidden by the Art. 74 of the Czech Copyright Act), the Czech copyright approach is called “quasi-dualism”.¹⁹ Regarding related rights,

¹⁵ *Telec/Tůma, 2007, p. 669.*

¹⁶ *Act No. 35/1965 Coll., on Literary, Scientific and Artistic Works (Copyright Act), as amended.*

¹⁷ *Telec, 2001, p. 41.*

¹⁸ *Art. 2360 Law. No. 89/2012 Coll., Civil Code, as amended.*

¹⁹ *Telec, 2001, p. 42.*

the Czech Copyright Act enables their full transferability, which is consistent with the investment-theory justifying their existence.

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

As was mentioned above neither the Czech Copyright Act nor other piece of Czech legislation explicitly justifies the existence of copyright. Natural law justifications of copyright, which were reflected by provisions of the Czech Copyright Act and by the case-law of the Czech Supreme Court, have been strongly influenced by the doctrinal argumentation of prof. Ivo Telec, who regarding the existence of copyright and related rights states: “Continuous natural-law principle of the world is something, on which the essence and significance of fundamental rights and freedoms is based, including those fundamental rights related to creations or intangible assets”.²⁰

II. Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

The Arts and Theatre Institute (Institut umění – Divadelní ústav) has been systematically conducting empirical research on the social and economic impact of the creative industries since 2006 within several projects, such as “The Study of the Situation, Structure, Conditions and Financing of the Arts in the Czech Republic” (2006–2011)²¹ which resulted in the book “Cultural and Creative Industries in the Czech Republic”,²² or “Mapping of the Cultural and Creative Industries in the Czech Republic” (2011–2015)²³ and “Research and Development in the Cultural and Creative Industries”.²⁴ The statistics in the creative industries have been systematically collected since 2008 also by the government within the project “Satellite Account of Culture of the Czech Republic”.²⁵

According to the study “The Economy of Culture in Europe”, cultural and creative industries attribute in average by 2.3 % on the GDP in Europe (2003), according to newer study, this is even 4.5 % of the EU GDP.²⁶ Unlike that, according to the book “Cultural and Creative Industries in the Czech Republic”, the cultural and creative industries attribute to the Czech GDP by 1,76 % (2009).

The study “Research and Development in the Cultural and Creative Industries”²⁷ concluded that research and development in the field of cultural and creative industries is an accelerating sector which outperforms the

²⁰ Telec, 2002, p. 34.

²¹ Studie stavu, struktury, podmínek a financování umění v ČR (2006–2011).

²² Kulturní a kreativní průmysly v České republice. Praha, 2011.

²³ Mapování kulturních a kreativních průmyslů v České republice (2011-2015).

²⁴ Výzkum a vývoj v kulturních a kreativních odvětvích, 2014.

²⁵ Satelitní účet kultury. Results – collected data related to culture – are available online at <http://www.nipos-mk.cz/?cat=424> (accessed Feb 08, 2017).

²⁶ Building a Digital Economy. The Importance of Saving Jobs in the EU’s Creative Industries. Tera Consultants, 2010.

²⁷ Research and Development in the Cultural and Creative Industries.

https://www.tacr.cz/dokums_raw/novinky/VaV_v_kulturn%C3%ADch_a_kreativn%C3%ADch_odv%C4%9Btv%C3%ADch_FINAL.pdf (accessed Feb 08, 2017).

automotive, chemical and engineering industries in terms of growth, total expenses or number of employees, although not in income.

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

Still ongoing research is based on the methodology of the Compendium of Cultural Statistics (Council of Europe) and on the Study on the Economy of Culture in Europe (2006) commissioned by the European Commission.

The Institute also developed a methodology of assessing the multiplier effect of the activities of cultural organizations which was acknowledged and certified by the Czech Ministry of Culture.

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

We are not aware of any related research. However, in certain instances – such as in the case of collective rights management, it can be clearly found how much of the proceeds were used for the administration of rights and how much were disbursed among right holders differentiating authors and performers on the one hand and licensees such as publishers, record labels etc. on the other hand.

III. Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

In the Czech Republic is a rather wide-spread culture of collective management of copyright and related rights with tradition going back to 1919, therefore collective management is definitely not limited to the 'core' areas of musical performing rights and reprography rights. Collective management is currently regulated by Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act). Previously, collective management was regulated by Act No. 237/1995 Coll., on Collective Management of Copyright and Related rights, Copyright and on Amendment to Certain Acts. Collective management in the Czech Republic is defined as a legal representation of a larger number of people and administration of the author's economic rights to a work and related economic rights. Collective management therefore concerns authors, performers, producers of phonograms, producers of audio-visual recordings, those legally entitled to exercise the economic rights to the work (employers) and licensees possessing sub-licensable exclusive unlimited license.²⁸ In the Czech Republic there are six organizations (collective rights managers) authorized by decisions of the Ministry of Culture to provide collective rights management services. These organizations are: DILIA (the rights to works of theater, literature, audiovisual), INTERGRAM (rights of performers and producers of phonograms and audiovisual recordings), OSA (rights to musical works), OOA-S (the rights to works of art, architecture and visual components of audiovisual works), GESTOR (right to pay

²⁸ Šebelová, 2006, p. 146

the resale of an original work of graphic art / “resale law” / “droit de suite”), OAZA (works of sound engineers).²⁹ These organizations have divided the market. Their position on the market for services is granted by a statutory monopoly (Art. 98 para. 6 clause c) of Copyright Act). Each organization performs collective management for a specific range of rights. From the range of rights, which can be licensed by these organizations computer programs are excluded. There is no collective rights manager performing management of rights for computer programs representing computer programmers (authors).

Use of the services of collective rights managers is warranted for practical subjects, as a result of a significant number of users of works and performances, both domestically and globally, these beneficiaries could involve considerable costs alone to authorize the use of the works themselves, and choosing the appropriate remuneration. Also it works well for users. It would be very difficult, if not impossible, to contract with an individual authorized person directly and pay them remuneration. Therefore, also in its own interests of authors and other authorized persons began to form already historically similar organizations in the Czech Republic.³⁰ Collective Management in the Czech Republic means for the rightholder the possibility of an economically efficient performance rights on the one hand, and on the other hand it means for them - with some exceptions - losing the possibility to individually select the acquirer’s permission. For the user, then the collective management on the one hand, strengthens the availability of rights and legal certainty for users, on the other hand it leads them to fear abuse of a dominant or monopoly position of collective organizations, particularly as regards to the level of remuneration.³¹

Collective management is divided into three groups: **A) Mandatory B) Extended C) Contractual (voluntary)**

Mandatory collective management is defined in Art. 96 Copyright Act. Collectively managed rights are for all groups of right (unrepresented and contractually represented) especially the right to remuneration for certain specific uses of the subject matter, for the rental of the original or a copy of the subject matter and the cable retransmission right. The reason for its existence is the fact that these rights cannot be managed individually. The only obstacle is the necessity to register with the competent collective rights manager in order to receive remuneration.

Mandatory collective management includes:

A) The right to remuneration for:

1. the use of an artistic performance fixed on a phonogram published for commercial purposes by (radio or television) broadcasting or by rebroadcasting and retransmission of the (radio or television) broadcast,
2. the use of a phonogram published for commercial purposes by (radio or television) broadcasting or by rebroadcasting and by retransmission of the (radio or television) broadcast,
3. the making of a reproduction for personal use on the basis of an audio or audiovisual fixation or any other fixation by the transfer of its content by means of a technical device to a blank carrier of such fixation,

²⁹ Organizations authorized to perform collective management of rights. <https://www.mkcr.cz/organizace-opravnene-k-vykonu-kolektivni-spravy-prav-692.html> (accessed Feb 08, 2017).

³⁰ *Telec*, 1994, p. 196.

³¹ *Kříž et al.*, 2005, p. 243.

4. the making of a reproduction for a natural person's personal use or for a legal person's or sole trader's own internal use by means of a technical device for making printed reproductions on paper or any other carrier material, also through a third party,

5. resale of the original of a work of art,

6. the lending of the original or reproduction of a published work in accordance with Art. 37 para. 2;

B) the right to an equitable remuneration for the rental of the original or a copy of the work, or of a performer's performance fixed in an audio or audiovisual fixation;

C) the right to the use – by cable retransmission – of works, live performances and performances fixed on phonogram or in an audiovisual fixation, with the exception of such performances whose phonogram has been published for commercial purposes [Clause a) Item 1], and also the right to the use – by cable retransmission – of audiovisual fixations and phonograms other than those published for commercial purposes [Clause a) Item 2] with the exception of the cases where the rights to cable retransmission are exercised by the broadcaster for its own broadcasting, irrespective of whether such rights are his own rights or rights exercised on the basis of a license agreement with a rightholder,

D) the right to the additional annual remuneration pursuant to Art. 71 (4).

Extended collective management is based on the fiction of legal representation in cases defined by the Copyright Act, which is based on the possibility of the rightholder to reserve for themselves the management. The passive rightholder who is not contractually represented, will be represented by a collective rights manager even in these cases. A collective contract may be concluded pursuant to Art. 100 para. 1) clause h) item 1 of the Copyright Act which will entitle the user to exercise the right to use objects of protection. This license may grant the rights that can be found in Art. 101 para. 9 of Copyright Act.

These rights are as follows:

a) for performing artistic performances from a phonogram published for commercial purposes, or for performing those phonograms as such;

b) for the non-theatrical performance of musical works with or without text from a phonogram published for commercial purposes;

c) for the radio or television broadcasting of a certain type of works;

d) for performing radio or television broadcasting of a certain type of works, artistic performances, phonograms and audiovisual fixations;

e) for the lending of the original or reproduction of a work, except computer program, or for the lending of a work or a performer's performance fixed as an audio or audiovisual fixation, and for the lending of such fixations;

f) for making available the works by a library, also including the making of a reproduction of a published work, to individual members of the public upon request in accordance with Art. 18 para. (2) for the purposes of research and private study; this shall not apply to computer programs, phonograms, audiovisual fixations,

published musical notation of a musical work or musical - dramatic work, and also to the works not subject to license agreements, and to cases where the rightholder forbade it;

g) for live non-theatrical performance of a work, if the performance of the work does not look towards achieving direct or indirect economic or commercial benefit;

Contractual (voluntary) collective management means that the collective rights manager represents the author in the contractually agreed scope.

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

Czech law does not contain legislative provisions aiming at facilitating the management of copyright and related rights. Czech law contains provisions on collective management, as mentioned in the previous answer. However, collective rights managers including other organizations such as public libraries use information systems and specialized computer programs, including online access to the database of represented rightholders and a database of users which facilitate the management of copyright and related rights.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

In national law there has been implemented the model of statutory licensing for limitations and exceptions that complements the model of mandatory and extended collective management of copyright and related rights. Regarding mandatory and extended collective management we refer to the previous answers. As regards the closed catalog of statutory licenses, they are systematically dealt with in Part 4 of Title I of the Copyright Act. Exceptions and limitations regarding the computer program are dealt with in Part 7 of the Copyright Act. The national catalog of statutory licenses is a well-defined catalog of exceptions and limitations that individually allow the use of works in specific, relatively narrow cases (standardized use).³²

Statutory licenses are linked with the application of a three-step test in Art. 29 of the Copyright Act. Current wording of the Three-step test at the time of the adoption of the Copyright Act was not the same as it is today, which was taken up later by implementing the Information Directive in relation to the requirement for the application of exceptions and limitations. It happened under the Act No. 216/2006 Coll. of 25 04th 2006, which incorporates the Information Directive as well as a number of other directives in connection with the Czech Republic's accession to the EU.

Entirely new exceptions were also included. As examples the exception for reproduction on paper or a similar surface (Art. 30a), the exemption for the use of works in connection with the introduction of the device to the customer (Art. 30b), licenses for temporary reproductions (Art. 38a) license for photographic portrait (Art. 38b), nonessential secondary use of the work (Art. 38c), license for works of applied art and architectural works (Art. 38d) license for social facilities (Art. 38 e) the operation of a common home antenna (Art. 38 f).

Along with this, there was also a change in content and refinement of existing exemptions, including changes in their designation. This applies to personal use (Art. 30), quotation (Art.31), promoting art exhibitions (Art.

³² Prchal, 2016, p. 182

32), use of the work in a public space (Art. 33), and intelligence official license (Art. 34), use of work within the civil or religious ceremonies or in official events organized by public authorities, in the context of school performances and use of school work (Art. 35), library license (Art. 37), a license for the disabled person (Art. 38), the use of original or copy works of art, photographs or works expressed by a process similar to photograph by exposure (Art. 39).

Exceptions to the use of computer programs have also been affected by the above-mentioned amendment, which brought in Art. 66 of the Copyright Act changing existing and adding new exceptions, in connection with the implementation of the Directive on the legal protection of computer programs.

In the case of other exceptions the subsequent change is historically linked up to the time of the implementation of the Directive on orphan works,³³ which meant incorporating an entirely new exemption for certain uses of orphan works (Art. 37a) and a minor refinement modification to the existing library license (Art. 37).

The Implementation of the Information Directive and the Directive on the legal protection of computer programs fundamentally affected the overall structure and composition of the current catalogue of limitations and exceptions. We can therefore talk about a catalog of exceptions and limitations, which is in compliance with the existing Euro-Union legislation.³⁴

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³³ Directive 2012/28/EU of the European parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, CELEX 32012L0028.

³⁴ Prchal, 2016, p. 183.

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