

THE POST CONFERENCE PUBLICATION

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FUTURE OF COPYRIGHT IN EUROPE

INTERNATIONAL COPYCAMP CONFERENCE 2016 THE POST-CONFERENCE PUBLICATION

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Introduction

It is 2016 and it's already the fifth time that we've met in Warsaw at CopyCamp. As usual, we invited authors, artists, members of the European Parliament, pirates, collecting societies, librarians, lawyers, scientists, teachers and many others who are interested in the impact of copyright and the information society. For CopyCamp 2016, we managed to gather the largest number of international guests to date, representing diverse points of view from many different parts of the world. By far the most speakers came from the Visegrad Group (V4) countries, and we'd like to make their perspectives even more visible by releasing this post-conference publication.

And theirs are interesting perspectives, in particular due to the region's specific history, which unavoidably affects the letter of copyright law and the practice of its application. You can read about historical developments in Hungarian copyright law in the article by Péter Munkácsi. Another interesting read, which adds to experiences from the recent regional political transformations, is the article by Dániel G. Szabó, exploring the intersection between copyright and freedom of information.

A glance at other topics selected by our Visegrad speakers shows that collective management of copyrights and related rights is a hot issue in the region. The Czech Republic is finalizing its implementation of the respective EU directive and you can read about details in the article by Michal Dubovan. Then we encourage you to continue to a short review of the new Hungarian act on collective management, by Péter Lábody. Indeed, we are curious to learn whether and how the implementation of the CMO Directive transforms collecting societies in the region, which have their own peculiarities and face specific challenges, especially in the rapidly changing digital environment and the development of multinational licensing hubs.

Another hot topic in the region is Open Access and Open Science. The Hungarian Academy of Sciences was one of the first V4 scientific institutions

to adopt open mandate – we recommend reading more about this in the article by Anikó Grad-Gyenge. Currently, the region is blossoming with scientific repositories, with many gratis and even libre open-access publications. A Czech summary on the usage of CC licenses in these repositories was delivered by Petra Pejšová. Her summary is neatly accompanied by the article by Jan Vobořil, who wrote about the use of CC licenses in the Czech Republic in general, but showing that much of this use takes place in the area of scientific publishing.

But the V4 countries are not confined to their own internal problems. They are also generous contributors to international and pan-European discussions. Matej Gera's article on exceptions and limitations to copyright is a prominent example of such contribution to currently developing European copyright reform, which is likely to shape the future of European copyright law over upcoming decades.

Enjoy your reading,

Krzysztof Siewicz

Modern Poland Foundation

Collective Management Directive: Implementation in the Czech Republic

Although the deadline for implementation of the Collective Management Directive^[1] (CMD) expired in April 2016, the implementation process in the Czech Republic is still not finished. The relevant amendment is currently being discussed in the lower chamber of the Czech Parliament, and it is unlikely that the bill will pass before the end of 2016. This article therefore draws from the government proposal tabled in August 2015.

Implementation of CMD into the Czech Copyright Act required overwriting the entire title IV on collective management of rights, which as a result grew from nine articles to sixty. Other approaches such as a new copyright act or a separate act on collective management were considered in the impact assessment yet were dismissed. Apart from implementing CMD, the ministry of culture also decided to tackle the issue of tariff setting and to expand the extended collective-licensing scheme to include orphan and out-of-commerce works.

One of the challenges faced during the legislative procedure was reconciling CMD and the proposed collective-management regulation with the new Czech Civil Code (No. 89/2012 Coll.). This new Civil Code represents a major development in the area of private law in the Czech Republic since its entry into law in 2014. Collective-management organizations (CMOs) in the Czech Republic already had to change their legal form from societies to associations. The amendment to the Copyright Act now suggests that collective management of rights should be viewed as administration of property of others instead of representation.

^[1] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, 72–98.

Preservation of legal monopoly^[2] is another important feature of the proposed legislation. This fairly controversial provision has been a part of the Copyright Act since 2000 and was confirmed as compliant with EU law by the CJEU^[3]. Any Czech entity wanting to execute collective management of rights still needs to obtain authorization from the ministry of culture. This of course does not apply to CMOs from other member states of the EU.

When it comes to independent-management entities as defined in Article 3 (b) of CMD, there are already at least two subjects acting in such capacity in the Czech Republic. Independent-management entities should notify the ministry for record-keeping purposes before initiating their activity. Unlike collective management of rights, no authorization is needed. It is the prevailing opinion that an independent-management entity may administer rights not covered by collective-management authorization (that is, mandatory and extended collective management).

As has been mentioned above, one of the goals of the government proposal from its conception has been to try to improve the procedure (or lack thereof) for setting tariffs. For quite some time, users of protected subject matter in the Czech Republic have been criticizing CMOs for unilaterally setting their tariff rates and, by doing so, abusing their monopoly.

It has been the position of the ministry that the relationship between CMOs and users should be governed by private law, with the monopoly aspect supervised by the Office for the Protection of Competition. It has been pointed out that the ministry is not equipped to serve as a market regulator. On the other hand, lengthy lawsuits concerning the amount of remuneration and recurring complaints prompted the effort to come up with an improved framework for negotiations between users' associations and CMOs.

^[2] According to Article 98 paragraph 6, authorization to execute collective management of rights can only be granted where no other person has acquired authorisation for the same item of protection and, in the case of works, no other person has acquired authorisation for the exercise of rights in respect of the same type of work".

^[3] See case C 351/12 OSA, ECLI:EU:C:2014:110.

The government proposal contains a basic time frame for negotiating certain tariff rates with sanctions for noncompliance imposed by the ministry. Also discussed was the possibility of tariffs being issued by the ministry as either a decree or a binding measure of general nature^[4] as a last resort. In the end, the proposal includes an open-ended procedure involving special copyright mediators. Civil litigation still remains as the ultimate solution for tariff disputes. After the biggest Czech CMO raised most of its tariff rates for 2017, citing market distortion and low rates compared to other countries, debate in the Parliament focused mainly on introducing stricter supervision of these matters carried out either by the ministry of culture or the Office for the Protection of Competition. One of the main criteria stated in the proposed MP amendments, which indicates whether or not the increase should be subject to approval, is the rate of inflation. Czech implementation of CMD should hopefully be completed in 2017. Ongoing discussions in the Parliament and thereafter in the Senate could bring further changes in the bill. At this time, the fundamental question seems to be whether CMO tariffs should be subject to approval and if so which body should be responsible and what criteria should apply.

[4] Specific act from German jurisprudence called die Allgemeinverfügung.

Michal Dubovan

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"Grey Area" between
Exclusivity and Exceptions:
Scope of Exclusive Rights
in the Context of National
and European Union Lawmaking

Exclusive right is sometimes seen, in the heat of policy debates, as a black-or-white, all-or-nothing thing: either the author has 100% say in authorization or the preventive nature of right must give way to an exception. But such a perception would be false. There are a number of instruments making that view of exclusive rights with exceptions as the sole legislative options incorrect.

Rather than thinking about exclusive rights as "on/off" switch, a better way to think of them is as having a number of "settings." The power over authorization can be granted in way that does not grant full power over exploitation of the exclusive right, yet at the same time the rightholder is not fully deprived of that control. Such mechanisms might rely on rebuttable presumption of authorization, or might confer certain rights to a collective management organization or other institution on the condition that the rightholder does not object to such treatment. These mechanisms go by various names, such as "extended collective licensing" and "presumption of representation." They find their use in settings where exclusive rights do not work satisfactorily yet at the same time complete deprivation of the rightholder's control is deemed unnecessary.

While the exact contours of these instruments are not defined by EU law or even by copyright academics, the main point remains: the degree of control over use is lessened in comparison to full exclusive right but is not eliminated, as it would be in the case of exception.

I term the legislative space where these instruments are introduced a "grey area." While exclusive rights and exceptions themselves are harmonized by EU law^[1], the above-mentioned legislative mechanisms available in between are not clearly delineated with regards to harmonization. This legislative space is currently divided between EU and Member States (MS) and it constitutes an important functional element in the interface between national and EU copyright laws. In some cases, licensing mechanisms residing in the "grey area" are permitted explicitly by EU law^[2]. In many other cases, important national policies among MS function in the "grey area," independent from EU framework^[3]. Thus "grey area" resembles a relatively peaceful coexistence of both the national and EU measures.

What is now at stake is the danger that this peaceful cohabitation will be disturbed. A pending case before the Court of the Justice of the European Union (CJEU) could mean an end to the presence of MS lawmaking in the "grey area." Under the proposal of the advocate general (AG)^[4], such derogations in the area of exclusive rights would compromise EU legislation, therefore no derogation from the exclusive right in national copyright law should be allowed – regardless of how reasonable, safe or useful.

If the AG's view is adopted, the "grey area" would be filled exclusively by the EU, and various national derogations from exclusive rights situated in the "grey area" would become unlawful literally overnight. Because the lawmaking space would now be filled by the EU, the MS would be ousted from the "grey area" and there would be a "vacuum" in existing policies. The crucial problem with usurpation of the entire space by the EU is the fact that the EU is not prepared to step into these policies in place of the MS. If MS

^[1] Here pointing mainly to Art. 2, 3, 4 and 5 of the InfoSoc Directive 2001/29/EC (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML).

^[2] Such as public lending right, where derogation is allowed in Art. 6 of Lending and Rental Directive 2006/115/EC (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0028:0035:EN:PDF).

^[3] A good example can be a measure implemented by Denmark. In general, see Thomas Riis and Jens Schovsbo, "Extended Collective Licenses and the Nordic Experience: It's a Hybrid but Is It a Volvo or a Lemon?" in Columbia Journal of Law & the Arts 33, no. 4 (2010): 471–553.

^[4] Opinion of Advocate General Wathelet in Case C301/15 (Soulier & Doke), delivered on 7 July 2016. Available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=181445&pageIndex=0&doclang=EN.

are prevented from introducing or keeping specific legislative measures in copyright area, but at the same time the EU won't replace these instruments by its own legislation, a host of important policies will be jeopardized, such as preservation and dissemination of cultural heritage, licensing of material for educational purposes and licensing mechanisms in the area of broadcasting.

Are there any persuasive legal arguments for the EU to take the entire "grey area"? In my opinion, there are not. One of the arguments for why the EU is entitled to entire "grey area" has been that this conclusion stems from previous case law, mainly cases SCF^[5] and OSA^[6], where the court has assured that exclusive rights are "preventive right in nature" as opposed to mere remuneration right. While it is true that under normal conditions exclusive rights are characterized by their preventive function, this does not imply that the preventive nature cannot be overridden by a licensing mechanism relying on presumption of authorization. The CJEU's decisions in SCF and OSA concern exploitation of works under "normal" conditions, meaning there was no policy which would point to a need to partially override the preventive nature. However, this conclusion should not be extended to 100% of cases. Indeed, nothing in the wording of the CJEU's decisions seems to imply that introduction of exclusive rights into EU law framework would mean that national legislations relying on overriding the full exclusivity of right in cases of specific policies should be forbidden.

Another argument opposing the usurpation of the "grey area" by the EU can be based on various references scattered across the entire EU copyright framework, which clearly suggest that EU legislation is without prejudice regarding the introduction of specific licensing mechanisms on the national level.^[7]

^[5] In particular para. 75, judgment of 15 March 2012 in SCF (C135/10)

^[6] In particular para. 36, judgement of 27 February 2014 in OSA (C351/12)

^[7] See recital 18 of the InfoSoc Directive 2001/29/EC (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML); recital 12 of Collective Management of Rights Directive 2014/26/EU (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN); recital 4 of Orphan Works Directive 2012/28/EC (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&from=EN).

The final message therefore is: let's mind the "grey area." Though the policy discussions are mainly preoccupied by questions of infringements and exceptions, let's not lose track of what is going on in the background. Usurpation of the "grey area" by the EU would be neither welcome nor sound from the point of view of legitimacy and reason.

Matej Gera

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Open Access in Hungary: an Academic Point of View

The need to gain access to the latest scientific results certainly must be mentioned when discussing what can be downloaded from the Internet. However, I don't share the view that unlimited access necessarily leads to knowledge, understanding and interpretation. Furthermore, no efficient knowledge industry can be based on this. On the contrary, in my opinion it cannot be considered a rational aim that all results should be available for anyone without any limitation, yet they should be accessible to those who are able to or want to understand, interpret or acquire that information. This means the scientific community, in our case.

There has always been an intention to create a certain balance in the regulation of intellectual-property rights. The frequently quoted preamble of the Hungarian Copyright Code expressly provides that. The preamble of the WIPO Copyright Treaty shows the same approach.

Creative Commons (CC) is a model that is on one hand a traditional means of civil law (a system of general conditions of agreement), while on the other hand it is a revolutionary initiative highlighting the voluntary free sharing of knowledge. By and large, it works without causing any major legal troubles and it can be applied in professional fields where authors do not intend to live on the royalties. Thus CC has always considered its goal the publication of as many scientific works as possible by using a CC license. In many cases, it simply grants a legal framework to free accessibility, strictly retaining the right to claim authorship, which is the crucial aspect of publication in the scientific world.

Copyright laws have always been enforced in a special way in science, as most authors carrying out scientific activities do not live on royalties (except for some scientists who write best-sellers). Although almost all scientific

authors receive some kind of royalties, their activities are mainly financed by the scientific institution, university or other organization employing them. However, in this field the intermediary (the publishing company) tends to be a strong participant in the ecosphere, largely based upon the fact that they are not going to finance the results. Therefore the basic function of copyright law, the finance of production, does not appear as a primary goal here.

Those countries that keep their educational and scientific expenditures at a high level in their budgets produce the greatest results for several reasons. First, they also attract experts from abroad; second, they grant the necessary financial and other background for experts to do their best; and third, they ensure access to the latest scientific achievements. As a result of this, making scientific results competitive is a key element in the competitiveness of the EU, and accessibility is a condition of this. It is no coincidence that open access and its penetration was a flagship project under the Dutch presidency of the EU.

The importance of open access was recognized in Hungary very early. This is shown by the fact that the Budapest Initiative, considered a fundamental document of the open-access movement, was born in Hungary.

To some extent, this also explains that one of the centers of the Hungarian scientific world, the Hungarian Academy of Sciences, recognized very early that it is necessary to help the cause of making the intellectual products of its scientific institutes accessible through some open access.

In the 27/2012 (IX.24.) decree, the president of the Hungarian Academy of Sciences provided for the manner of making scientific works available through open access. It not only offers golden and green open-access models to scientists, but provides for other ways too, which can finally grant open access to these works. If the publication is not open access at the publishing company, the work should be stored in a repository by the institute and the scientist.

Nevertheless, although reform of higher education was carried out in Hungary in 2011, it is not at all about open access, so a given position on open access depends on intellectual-property rules at various institutes of higher

education. Only a few such rules can be found to date, but it is quite interesting that they should be found at institutes where education and research is in the natural sciences (for example, the University of Szeged has such regulations).

Based on all the considerations mentioned above, it may not be necessary to draw any conclusion, yet if it is necessary, I think that it can be stated that it is a basic necessity to grant Central-Eastern European countries access to scientific sources, and if sources necessary based upon traditional models cannot be provided, open access can be a good and effective means, although it cannot be considered the "ultimate solution."

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The Implementation of Directive 2014/26/EU on Collective Management into Hungarian Law

Directive 2014/26/EU on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market was adopted in February 2014 after long-lasting and tiresome rounds of negotiations at the EU level. The effort has resulted in a huge legal norm that put a heavy load on colleagues busy in implementing EU legislation into national copyright laws in Member States (MS). It includes 45 articles (far more than those previously adopted in the field of copyright) and covers not only strictly copyright-related aspects but also endless lists of organizational duties, transparency obligations and provisions that one might expect to find instead in legal texts related to banking or corporate law. The deadline of 10 April 2016 was set for the transposition of the norm. The purpose of this brief article is to succinctly outline the biggest challenge faced by the Hungarian administration, related to this implementation process.

First, a few characteristics of the Hungarian collective-management system that had been in effect before the implementation of the new directive. For decades, Hungarian copyright law has enabled (and also required) collective-management organizations (CMOs) to provide so-called extended licenses to users. In the Hungarian model, if only one CMO is registered to manage the same economic rights of a rightholders' group, and this CMO grants a user a licence to use, or enforces claims for remuneration against the user, the user shall also be entitled to use works and subject matter of related rights of the same genre of all rightholders represented by the CMO. The remuneration charged for such licenses shall be paid under the same conditions set out in tariffs approved by the Ministry of Justice on an annual basis. Just to highlight the main causes of our headaches during the implementation: neither the registration of CMOs (basically a license to operate) nor the extended nature of licensing and the approval of tariffs form part of the system envisaged by the directive. (To be more precise: extended licensing might

be upheld in national systems but there are basically no provisions on how they might be accommodated with those articles of the directive that may seem to be contrary to these characteristics.)

Three consultations were held in relation to the implementation process. The first was held at the end of 2014 and suggested that the implementation shall not be carried out by supplementing the Hungarian Copyright Act (adopted in 1999) but by a new act dealing solely with collective management of rights. The second round of consultations (July 2015 to August 2016) made it clear that the aforementioned characteristics are supported by the vast majority of stakeholders due to their positive effect on legal certainty in the field of copyright licensing, and thus should be upheld as intact as possible. The third phase of consultations (March 2016) were carried out based on a conceptual paper that tried to accommodate all the issues raised by the directive (including the role of independent–management entities or the special regime of the licensing of non-commercial uses by rightholders, which had been neither known nor applied in Hungary before the birth of the directive).

But let's turn now to the outcome of the process which was manifested in a draft proposal. This proposal, in our view, provided a solution that on one hand respected the requirements set out by the directive and on the other hand also included those main pillars of our system that had enabled proper functioning of collective management in Hungary to date. For the purposes of the first aim, in our understanding we had no choice but to generally eliminate the registration requirement that CMOs had to comply with in order to start providing collective management (services) in Hungary. On the other hand, however, in order to maintain the extended effect of licenses, some safeguards needed to be upheld. Such a possibility for a CMO – at least in our understanding – should require adequate representation by the given rightholders, as well as certain technical means (such as databases for the proper distribution) and special expertise that should be checked and approved before such an organization may start to operate and provide licenses with an extended effect.

In order to accommodate this twofold requirement, the Hungarian administration decided to introduce a two-level system into Hungarian law. We created a general

(a normal?) category of CMOs that may initiate their operations without a license in Hungary. They are only required to notify the Hungarian IP office (HIPO), the authority responsible for the supervision of collective management, and upon this notification HIPO registers their data into the public registery of CMOs. General CMOs are not required to have their tariffs approved by the administration; they only publish them according to rules set out by the directive. The other type of CMO introduced by the implementing act is the so-called Representative CMO (RCMO). As one might guess, this CMO shall be representative, which means that it must represent a significant number of Hungarian and foreign rightholders and shall require a license issued by HIPO as a prerequisite to providing extended licenses according to tariffs approved by the Ministry of Justice on an annual basis.

By this approach, hopefully, we have found a solution that has not changed our collective-management system dramatically, but is also in compliance with the relevant requirements set out by EU law.

The above approach became law in June 2016 by an act on collective management, accompanied by a Government Decree in July and a Ministerial Decree in September. Currently, the entire Hungarian CMO community is working to adapt to all the new provisions, which of course do not include only the changes mentioned above but far more. (Unfortunately, I could not cover all the aspects in such a short space.) One might think, accordingly, that it is time to rest for those who had worked on the implementation. That is far from true, however: we shall now also adapt ourselves to applying all the provisions that we have done. Which, I am afraid, will not be an easy task.



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Historical Developments of the Copyright Law in Hungary: Historical Developments in the 1970s

"Pearl Haired Girl came
Was it true, or was I dreaming?"

-Omega / Kult

"'Dziewczyna o perlowych włosach"

"Girl with Pearls Hair"

From the legal historian's point of view, it is often said that the economy/ society "shapes" law, or law "influences" the economy/society, or that law and the economy/society are "mutually constitutive," which is in line with this short essay. These interactions and causal relationship should be taken into account in some of the focal issues of Hungarian copyright history from the period under consideration.

The main aim of this essay is showing that copyright-law developments were not uniform across the former Soviet Bloc, with an explanation that these developments did not occur in complete isolation from the West.

Hungary, like most Central and Eastern European countries, has longstanding copyright traditions intertwined with cultural policy. Culture and copyright were used as exhibits in the shop window of the political system. The main element for Hungarian cultural policy indicated the place of culture in the building of socialism by pointing out that an advanced economic and social order could only be established by educated people, thereby raising cultural policy to its proper level. The system of central economic and political control, strongly evident in the period under consideration, left a heavy imprint on the development of copyright laws. The state monopoly on consumers, users, and distributors of artworks, and central foreign-exchange control, were natural, inherent characteristics of the system; this all led to state preferences, bans and censorship when it came to the issue of presenting works to the public.

In this period in Hungary, the establishment created in culture a special "system of the three 'Ts"; this name comes from the Hungarian words for support, toleration, denial (támogatás, tűrés, tiltás). Certain areas (for example, film production and book publishing) were given significant direct, regular state support. As an unexpected result of the denial by the authorities, a huge intellectual and creative capacity blossomed in the region's counter-culture, in particular within samizdat publication and the alternative-music scene, in the sense of a Gesamtkunstwerk with complex links to other art branches, alternative theater, performance art, film, literature.

In Central and Eastern Europe, the Brezhnev years after 1968 saw a reassertion of quasi-Stalinist models of control, while in the West a comparable economic and political chill brought to an end what had seemed a period of rising affluence, expanding horizons and freedoms.

That sense of tasting these freedoms while under the strong control maintained in our common regional playground, surrounded by the iron curtain included hitchhiking from Hungary to explore Kraków and listening to master instrumentalists Zbigniew Namysłowski and Tomasz Stańko at the legendary Polish Jazz Jamboree festivals. We listened on vinyl and cassettes to each other's favorite bands; Silesian jazz-rock fusion group SBB and singer-songwriter Czesław Niemen were extremely popular in this period in Hungary, and Poland's Kazik Staszewski and his band Kult sang the legendary hymn by the Hungarian group Omega (see the lyric above).

This example highlights a distinctive characteristic of socialist copyright law: the proper balance of interests of an author creating literary and artistic works on one hand, and society claiming and enjoying such works on the other.

Act III of 1969 on Copyright with the Implementation Decree 9/1969 (XII.29.) MM, codified in the socialist era, was a result of rising affluence, expanded horizons and freedoms strongly based on the international legal evolution of the concerned domain, and took into account historically the European continental legal system — a tradition that continues today.

These changes in Hungarian copyright law were in concordance with developments of major multilateral conventions such as the Berne Convention and the Universal Copyright Convention, both revised in 1971.

As "an instrument for the management of cultural processes" copyright law was defined by the integral unity of moral and economic rights. Chapter II of Act III enacted moral rights for the first time in the legislative history of our land, based on the monistic approach.

There were also important amendments of copyright law from 1975 then later in the early 1980s, implemented first in line with such new fields of using authors rights as droit de suite, blank-tape levy and software programs.

Conclusion

Hungarian copyright law in the late 1970s and early 1980s was at the vanguard of European and worldwide legal developments, and was not isolated from the Western market-economy countries. The political transformation, similar to all other economic sectors, brought radical changes in the cultural sphere to which the majority of the core copyright industries belong. Nevertheless, legislative enactments after 2000, as in other EU member states from Central and Eastern Europe, shows a "Janus face" development: copyright experts responsible for legislation successfully transformed their substantial copyright system to regional and international standards but could not find appropriate answers to online and digital phenomena. There never has been a tremendous difference between copyright legislation and reality in this so-called post-Napster period.

After the first reading of the second round of European proposals on the modernization of copyright, it seems that the approach of the Commission is a more realistic and balanced one. So a question remains about quoting that Omega / Kult hymn, "was it true, or was I dreaming?" Should we have great expectations for the future of (Central and Eastern) European copyrights?



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Using CC Licenses in Repositories in the Czech Republic

This short article will describe five years of using Creative Commons (CC) licenses in Czech repositories. Statistics will be compared from 2011 and 2016. The source of data is the national repository of grey literature (the repository), which is run by the National Library of Technology (NTK). The building of the repository began in 2008. The repository is focused mainly on research and education with the goal of supporting open access, dissemination and the reuse of grey literature. Because of this, we started from the beginning to think about including Creative Commons licenses in the repository.

The definition of grey literature is "Information produced on all levels of government, academics, business and industry in electronic and print formats not controlled by commercial publishing, i.e., where publishing is not the primary activity of the producing body." [1]

NTK was building the repository between 2008 and 2011, and began run full operations from the end of 2011. At present, we have 152 cooperating organizations in partnership network. These are research institutes, universities, all levels of state administration, nonprofit organizations and organizations from the culture sphere including libraries, galleries and museums, and last but not least personal archives.

There are two ways to cooperate. The first way is for institutions that have institutional repositories. In this case, data is uploaded automatically from institutional repositories to the repository. In this way, we do not have any influence on these organizations. We offer presentations including the use of CC licenses, but we are invited to give such presentations very rarely.

[1] Luxembourg, 1997 - expanded in New York, 2004, at http://www.greynet.org/index.html.

The second way is for organizations that do not have any repository, and we create a collection for them directly in the repository. They can describe and upload documents directly into the repository through the repository's online Web interface. In this case, employees of every organization receive our training, including how to use CC licenses.

Each work is protected by Czech copyright law in the repository, but this does not exclude the use of CC licenses, which is voluntary.

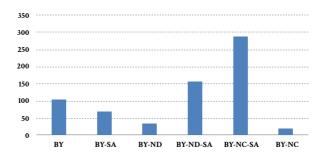
At the start of project, we also began with activities in raising awareness about CC licenses. A presentation related to copyright and CC licenses is an annual conference theme. The first conference presentation about CC licenses was given in 2008. Every year, we arrange one or two workshops at NTK focused only on CC licenses. Information about using CC licenses is included as a part of the training course "How to Publish Work in the Repository."

Comparing statistics from 2016 and 2011

	2016	%	2011	%
Records with digital documents	3,403		283	
Records with CC licenses	665	20%	103	36%
Records without CC licenses	2,738	80%	180	64%

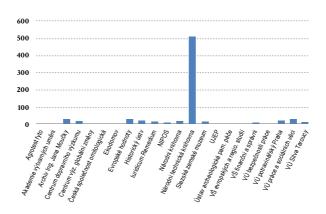
On average, only 112 new documents with CC licenses per year are uploaded to the repository. The number of records with digital documents rises, but the percentage of the number of documents with CC licenses decreases.

The frequency depending on the type of license



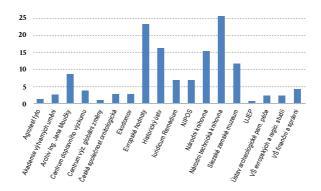
The most restricted types, BY-NC-ND and BY-NC-SA, are most used in the repository. The main reason is that researchers do not want to allow changes in their works.

Use CC by data producers including NTK



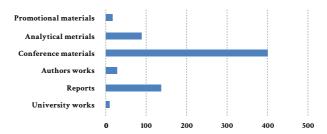
In this graph, one sees that only 22 organizations out of 152 are using CC licenses. The biggest column belongs to NTK. The reason is that NTK wants lead by example, with a director's regulation that employee works must be uploaded into the repository that has been mandatory since 2012.

Use CC by data producers excluding NTK



This is the same as the previous graph but without NTK and organizations that upload only one work with CC licenses. There are 17 organizations: six research institutes, four universities, four nonprofit organizations, one library, one museum and one personal archive.

The frequency by document type



The last graph shows document types used together with CC licenses. Of the total of 665, most common are over 400 documents of conference materials, which are primarily papers including presentations as well as posters, programs, proceedings and research data. Second most common are various kinds of reports including grant, research, annual, travel and press release. In third place are analytical documents, which are analyses, methodologies and studies. Next are promotional materials, authored works and one dissertation.

In conclusion, there are several common reasons for little use of CC licenses in repositories in the Czech Republic. There is still little awareness about CC licenses in the Czech Republic. In the academic sphere, there persists a permanent lack of trust in CC licenses. Regarding the position of the institutions themselves, there is a lack of internal organizational guidelines defining how to publish research works and on usage of CC licenses. To date, research-project terms do not include an obligation to publish project works under CC licenses.

Petra Pejšová, National Library of Technology, Prague

manager of the National repository of Grey Literature in the Czech Republic. Head of the Digital National Technical Library.



photo: Wojciech

Copyright as an Exemption in Freedom of Information Law

Copyright may collide with freedom of information (FOI) in cases where the copyright holder is a third party, not the agency from which the public records are requested. This happened, for example, in the Weisberg case in the US (http://openjurist.org/763/f2d/1436/weisberg-v-us-department-of-justice-weisberg), where a citizen requested FBI records on the investigation of the murder of Martin Luther King. Among these records, the FBI had collected photographs from Time Inc., the parent company of *Life* magazine, and these photos were protected under copyright of this company. In the case, the court ruled that the photos are public records and thus subject to FOI laws, and ordered Time Inc. to join the case. The issue was resolved by agreement of the parties and the photos were released – but not all parties are open to negotiation and courts must decide each collision between copyright and FOI. In the following article, I will outline two different approaches to the problem: first, the very recently developed Hungarian approach, then the more settled and balanced attitude in the United Kingdom.

In a case from 2015, the court ruled (http://budapestbeacon.com/public-policy/kuria-orders-government-to-release-szazadveg-studies/29619) that 77,000 pages of studies had to be released. Those studies, focusing on various policy issues and opinion polls, were written by Századvég, a think tank favored by the government. The key issue in the case was whether the studies fell under the FOI law or were exempt from publication. The government had two main arguments: the studies were preparatory works and were copyrighted and thus exempt from disclosure. The court ruled that the government failed to substantiate both of its claims, therefore the studies must be released. The Copyright Act was quickly amended by a provision allowing an exception from FOI if the requested public record is protected by copyright: under this exemption, the documents need not be copied or scanned and sent to the

requestor (this is the general rule), but providing access to them is sufficient. According to the amended act (although there is no practice yet), a journalist wishing to scrutinize government studies must personally go to government facilities and read the studies there. The amendment entered into force less than a month after the delivery of the judgment.

The amendment did not affect the rights of the copyright holder, it only made technical adjustments, that is, it regulated access to the documents. The same rights are to be respected after the amendment, except that the government believes that by not sending a copy to the requestor, violation of the rights of an author will be made less likely. Now, as much as before the amendment, copyrighted studies can be cited and reviewed by a journalist. The government supported the amendment for the protection of moral rights of an author, but this argument seems problematic. The unity of the work or its authorship remains protected the same way, regardless of the type of access to documents. Even if the government's claim is true, that closed access to documents might better protect moral rights, it is questionable why government subcontractors should be more protected, for example, against plagiarism, than writers, scholars or artists. On the contrary, there is huge public interest in public scrutiny of subcontracted studies: in the Századvég case, journalists found that a great part of those studies was useless, yet had cost a total of 13 million euro (http:// hungarianspectrum.org/2016/04/12/the-szazadveg-saga-largely-useless-studiescommissioned-by-the-orban-government/).

Then there are practical problems. The amendment did not alter the legal status of copyrighted studies: those works remain public under FOI, with the amendment only changing the way the public may access them. Since such studies remain public, will journalists or citizens be allowed to photograph the documents upon reading them in government buildings? If not, why not, given that the documents are public records under FOI law? If yes, why was the amendment necessary, besides making access to public records more difficult for journalists and active citizens?

The approach in the UK shows that copyright may be well protected without the technical burdens (requiring a physical visit to government facilities).

According to the summary of the Information Commissioner's Office (ICO) (https://ico.org.uk/media/for-organisations/documents/1150/intellectual_property_rights_and_disclosures_under_the_foia.pdf), UK law allows the release of copyrighted material under FOI but upholds the copyright. The ICO recommends that public agencies "advise the applicant that the information remains copyright protected." A journalist, for example, is then prohibited from publishing the entire study. Copyright, however, is no barrier against the public scrutinizing the records: criticism, review and news reporting are exemptions from copyright, and it would thus be allowed for a journalist to write a news piece on the reasonableness of the spending of public funds in light of the quality of studies.

The Hungarian solution looks like a way to avert the scrutiny by journalists of subcontracted studies, rather than a sincere way to protect moral rights of a copyright holder. As the copyright expert opinion in the Századvég case concluded (http://www.sztnh.gov.hu/sites/default/files/SZJSZT_szakvelemenyek_pdf/szjszt_szakv_2014_12.pdf), the law does not prevent a journalist from citing and reviewing studies even if the material is copyrighted. In light of this, the amendment merely makes the examination of subcontracted government studies more cumbersome, but does not add any real additional layer of protection for the copyright holder.

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hoto: Woja

Creative Commons in the Czech Republic: Seven Years in Use

I would like to focus on the Czech context of Creative Commons (CC) public licensing that provides an interesting alternative for solving the issue of copyright in the age of digital technology, contributing to the dissemination of information while respecting intellectual property.

The Czech translation of the CC licenses was introduced seven years ago. From the very begining, the Czech NGO Iuridicum Remedium (IuRe) cooperated with the National Library and the Association of Independent Artists. Currently, the Institute of Law and Technology of the Masaryk University in Brno as the Legal Lead and the National Technical Library and IuRe as Public Lead form the Creative Commons affiliate team of the Czech Republic. This means there is no specific Creative Commons organization in the Czech Republic with own legal subjectivity. These three subjects work in cooperation.

In the seven years of their use, Creative Commons licenses have continued expanding into many areas, such as culture, education, public administration or NGO sector. I would like highlight the situation in the fields of public administration and local government, as well as science and education.

Public administration and local government

The use of Creative Commons licenses by public administration and local government and the free use of the copyrighted works produced by these copyright holders is a logical requirement, since these works are funded by public money. Some of these works, such as legal regulations, decisions, publicly accessible registers and so on, are not under copyright protection. Yet there are also works produced by these entities that are not considered official works. These range from texts on Web pages, promotional audio or video materials and open data under database protection, to diverse works

produced by other subjects for the public sector and paid for by public funds. This is a context for Creative Commons licensing.

CC licenses are often used for licensing of Web pages or Web content. A frequent problem is that is not clear exactly which works are licensed. In public administration and local government, CC licenses are more often used for data sets with open data. Open-data databases are most frequently licensed by liberal variants of Creative Commons 4.0 licenses. For example, the City of Prague has its own repository of open data with 162 of data sets by the Prague Institute of Planning and Development, Prague City Hall and City districts, but also by the transport service or by Zoo Prague^[1]. Another example of use is a CC license for part of the Web. Opočno, a small town with a population of over 3,000 in the northeast of the country licenses its own photo gallery with hundreds of pictures of the city and various events.^[2]

Reacting to the systematic use of CC licenses by local governments, we prepared a manual with instructions on how to use CC with examples of good praxis of municipalities from the Czech Republic^[3], as well as other countries. To promote CC licenses, we cooperate with the Union of Towns and Municipalities of the Czech Republic, which represents approximately 2,500 municipalities.

Science and education

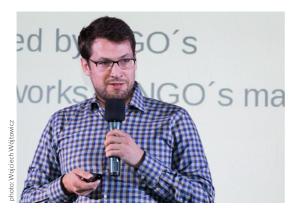
The use of CC licenses in the sector of science and education is connected with concepts of open access and open education. Let's consider open access. We have ten institutions which have signed the Berlin Declaration on Open Access since 2008. Currently, there are 87 open-access journals published in the Czech Republic by most universities as well as the Czech Academy of Sciences^[4]. These journals are mostly published under the CC-BY license.

- [1] http://opendata.praha.eu/.
- [2] http://fotogalerie.opocno.cz/.
- $\label{linear_control_control} \begin{tabular}{ll} [3] $https://www.scribd.com/document/332663961/Licence-Creative-Commons-pro-m%C4\%9Bsta-a-obce-Praktick%C3\%BD-manual\#from_embed. \end{tabular}$
- [4] http://1url.cz/FtEtR

Many institutions have an internal directive for sharing of the full text of publication in their own repositories, but we still lack a systematic solution for open access at the level of state government. In November 2016, the National Strategy for Access to Scientific Information for the years 2017 to 2020 was submitted for comments, which should become a conceptual document for open access. The use of CC licenses for publication of research results and research input data, according to this strategy, should present the starting point for research projects paid for from public funds. Unfortunately, the strategy includes a number of vague rules and possible exemptions so far, which could weaken the principles of open access in the future.

As for open education, the methodological portal RVP.cz allows sharing of materials under CC licences between teachers since 2005^[5]. The majority of materials there is available under CC. Support of open educational materials under CC is part of the Czech Strategy for Digital Education until the Year 2020^[6]. Very important for spreading of CC licensing is the mandatory publication of grant outputs under CC licenses. This is part of the strategy according to which the ministry of education should include this requirement into the conditions for recipients of financial support from EU structural funds through the end of this year.

- [5] http://rvp.cz/
- [6] http://www.vzdelavani2020.cz/images_obsah/dokumenty/strategie/digistrategie.pdf



Jan Vobořil

executive director at luridicum Remedium (luRe). Independent barrister and member of the Czech Bar Association.



CopyCamp 2016 took place from Thursday the 27th to Friday the 28th of October 2016 in Warsaw, Poland. The conference's focus lay in debating topics connected with the overall theme of the future of copyright.

We had the pleasure of hosting guests representing the countries of the European Union, including the specific countries of the Visegrad Group, as well as representatives of Belarus, Colombia, Canada and the United States. Around 250 people who attended the conference, as well as our viewers streaming online via Google Hangouts, heard from a total of 69 speakers. In addition, dozens of people took part in the five workshops that accompanied the conference.

With the upcoming EU copyright rules reform, we listened with particular interest to Ms. Therese Comodini Cachia, Member of the European Parliament and the rapporteur for the proposed Directive on Copyright in the Single Digital Market.

Also among our special guests were Dr. Olga Goriunova, Senior Lecturer in Digital Culture from the University of London; Dr. Rufus Pollock, an economist and founder of Open Knowledge; Michal Dubovan, a senior adviser at the Ministry of Culture of the Czech Republic responsible for copyright legislation and supervision of collective management organizations; Konrad Gliściński, author of the book *All Rights Reserved: The History of Disputes over Copyright,1469 – 1928*, which had its release during the conference; Jonas Holm, legal advisor working with LIBER (Association of European Research Libraries); Mikołaj Iwański, economist (Academy of Art in Szczecin); and Agustin Reyna (senior lawyer for the consumer organization BEUC).

All conference materials are available at: http://copycamp.pl.

All of the presentations from this year's event will be made available on our YouTube channel:

https://www.youtube.com/user/NowoczesnaPolska.

The CopyCamp Conference is part of the Future of the Copyright project conducted by the Modern Poland Foundation, financed by the International Visegrad Fund, ZIPSEE Digital Poland and Google.

Supporting partners are: Collegium Civitas, Digital Europe, Platforma Otwartej Nauki, Stowarzyszenie Wolnego Słowa, Stowarzyszenie Pisarzy Polskich, and the Interdisciplinary Centre for Mathematical and Computational Modelling at the University of Warsaw.

The event is organized under the auspices of the Ministry of Digital Affairs.

Our media partners include Dziennik Internetów, Nowy Obywatel, ResPublica Nova, Ad Monkey, ngo.pl and notes na 6 tygodni.

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THE DIGITAL VERSION OF THE PUBLICATION MAY BE FOUND AT:

http://prawokultury.pl/publikacje/