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Questions to National Rapporteurs

The national rapporteurs are kindly invited to answer the following questions.

1. Does your jurisdiction’s copyright law provide for a so-called “triple test” provision, namely a provision which reiterates the requirement of international treaties that exceptions and limitations to copyright shall only apply in certain special cases which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the author? If yes, please provide [an English version of] the text of this provision. If no, how does your law understand and comply with that requirement? In particular, is that requirement taken into account by the courts in individual cases and to what extent? Is there any case law which can serve as guidance? Can you refer to concrete examples used by your national scholars to illustrate that requirement and its concrete consequences? In particular, can you comment on precedents, if any, where the court found that (i) the application of the exception conflicts with the normal exploitation of the work (ii) unreasonably prejudices the legitimate interests of the author?

The Czech Act No. 121/2000 Coll., on Copyright and Rights related to Copyright (Copyright Act) explicitly provides for the so-called “triple test” in Art.29 and in general, the triple test is recognized as the interpretation rule, i.e. the guidelines for the interpretation of Copyright Act provisions dealing with various types of Copyright restrictions, i.e. especially regarding the interpretation of Art.30 et foll. The wording of Art.29 of the Copyright Act introduces Section 4 called Exceptions and limitations of Copyright and it is as follows:

Section 4 Exceptions and limitations of copyright

Subsection 1 General provision

Article 29

(1) Exceptions and limitations of Copyright can be applied only in special cases provided for by this Act and only if such a use of copyrighted work does neither conflict with a regular use of the work nor disproportionately affect the legitimate interests of the author.

This triple requirement is seriously taken into account by courts in individual cases and is heavily mentioned by national scholars. Indeed, scholars underline that this is a universal interpretation rule for all free uses and law licenses (Chaloupková & Holý, 2012).

The Czech Supreme Court decided in 30 Cdo 3474/2010 on 30 November 2011 that making accessible CDs owned by some members of an association without juridical personality to other members of this association cannot be qualified as an allowable free use (restriction on copyright) according to the Art.30 of the Czech Copyright Act, because this activity has rather features of a rental. By purchasing a CD, no license was obtained to permit using the copyrighted work (music recording) by others. An opposite interpretation would lead to an unjustified breach of the legitimate interests of authors. In other words, the Czech Supreme Court in this case confirmed the triple test interpretation rule, interpreted Art.30 of the Czech Copyright Act accordingly and because its 3rd step-requirement (unreasonable prejudices to the legitimate interests of the author) rejected recognizing the copyright restriction in this case. This judgment is fully in compliance with the judgment of the Czech Supreme Court in 30 Cdo 329/2008 from 12 November 2009 and the deliberation of the Czech Constitutional Court II. ÚS 423/10 from 1 April 2010 and even refers to them. Further, it needs to be pointed out that the Czech Supreme Court in 30 Cdo 3474/2010 repeated the Explanatory note to the Art.29 of the Czech Copyright Act, according to which “Art.29 regulates a general principle, which is included in the Bern Convention and TRIPS Agreement, regarding restrictions on the exclusive copyright.”

2. Does your jurisdiction’s copyright law provide for a list of exceptions? If yes, is it a closed list, namely a list designed in such a way that any use which falls outside the list is not permitted - unless it is authorized by the copyright owner?

Art.29 of the Czech Copyright Act explicitly and expressly states that restrictions can be applied exclusively to special cases mentioned by the Czech Copyright Act, i.e. Art.30-Art.39 of the Czech Copyright Act. This legislative wording is fully respected and well confirmed by scholarly writings as well as case law. There has not been any real successful attempt to indirectly expand this exhaustive list.

For example, the Czech Supreme Court in 30 Cdo 3056/2012 from 31 January 2013 confirmed that this legislative provision needs to be interpreted in a restrictive manner, again referred to the triple test as to the general principle and pointed out the Bern Convention and TRIPS Agreement. In the given case, the Czech Supreme Court stated that the restriction on copyright granted to health care providers does not extend to a spa, namely to the Bertiny Spa Třeboň. Identically, the Czech Supreme Court in 30 Cdo 3093/2012 from 28 March 2013 reconfirmed that the list is exhaustive and cases included cannot be interpreted broadly, i.e. even the Lázně Aurora Spa Třeboň could not rely on the health care restriction on copyright in general. If a spa wants to use it, it has to distinguish patients really obtaining necessary rehabilitation health from other (wellness) patients and only the first group allows for relying on the restriction on copyright. Thus, the second group can enjoy copyrighted works via listening to the radio or watching TV, only based on a paid license.

3. If your jurisdiction's copyright law provides for a list of exceptions, what are the fundamental rights or the objectives supporting the permitted uses which justify the exceptions? In particular, do the exceptions pursue the following fundamental rights or objectives: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama? Are there fundamental rights or objectives which are overlooked or unduly minimized in the current list of exceptions?

The Czech Copyright Act proceeds hierarchically. Firstly, by Art.2, certain outcomes are not copyrighted works, i.e. they can never ever obtain a copyright regime and protection. These outcomes include the subject of the work, daily news, any fact by itself, an idea, proceeding, principle, method, discovery, scientific theory, a mathematical or similar formula, statistical graph or similar subject as such.

Secondly, by Art.3, it completely excludes from the protection two types of copyrighted works and justifies this as "exceptions from copyright protection in public interest". These two types of copyrighted works without copyright protection and thus free for use are official works, such as legal regulation documents, decisions, Parliamentary publications, etc., and creations of traditional folk cultures. Naturally, these works satisfy the criteria to be considered a copyrighted work and their authors are still alive, nevertheless by the operation of the law, they are, due to the public interest, free.

Secondly, exceptions and limitations of copyright (restrictions of copyright) are covered by the Section 4 of the Czech Copyright Act and need to be interpreted according to Art.29, i.e. a restrictive application of the triple test. There follows an exhaustive list which does not look too systematic and uses various forms (free use, law license, limitation, exception, etc.) with basically the same result – the free use of copyrighted work without any need to obtain a consent or license from the authors of the copyright beneficiary. The exhaustive list from Art.30-Art.39 includes:

- Art.30 deemed not use under the Copyright Act and thus free – personal use without direct or indirect economic profit;
- Art.30a no breach of copyright – making copies on paper for personal or internal use;
- Art.30b no breach of copyright – use of work for repairing a device of a customer;
- Art.31 no breach of copyright – quotations/citations;
- Art.32 no breach of copyright – propagation of exhibition or sale of art works;
- Art.33 no breach of copyright – use of works located in public places ("panorama exception");
- Art.34 no breach of copyright – official and reporting license – use of works for public security, for court or administrative proceedings, in periodical press, public speeches, etc.
- Art.35 no breach of copyright – use of works for civic or religious ceremonies or of school works;
- Art.36 no breach of copyright – limitation of copyright to a collection;
- Art.37 no breach of copyright – library license – libraries and schools making copies and making them available to third parties (in certain situations fees to authors need to be paid);
- Art.37a no breach of copyright – copying and making available "orphaned" works;
- Art.38 no breach of copyright – license for handicapped people;
- Art.38a no breach of copyright – license for temporary copies;
- Art.38b no breach of copyright – license for photos;
- Art.38c no breach if insignificant auxiliary use of works;

- Art.38d no breach of copyright – license to use works of fine art or architectonic works;
- Art.38e no breach of copyright – license for social establishments, i.e. social care and health providers which are established not for profit;
- Art.38f no breach of copyright – allowing antenna reception for TV or radio broadcasting for units in a building;
- Art.38g no breach of copyright – if use of a work for caricature or parody purposes.
- Art.39 no breach – exhibiting original or copy of beaux art, photographic or other work.

An overview of this rather disorganized list demonstrates that several fundamental rights and objectives, as well as public order interests and concerns, are reflected. The education and research is at least partially covered by Art.31, Art.35 and Art.37, the access to culture and knowledge is at least partially covered by Art.3, Art.32, Art.33 Art.35, Art. 37, Art.37a, Art.38a, Art.38d and Art.39, the freedom of expression and right to receive and disseminate information is at least partially covered by Art.1, Art.3, Art.34 and Art.37, the privacy and private use is covered by Art.30, the needs of people with a disability are covered by Art.38, the preservation of cultural heritage is reflected especially by Art.3, the public security is at least partially covered by Art.34 and the freedom of panorama is included in Art.33.

In the Czech Republic, there has not been any strong discussion or exchange of fundamental opinions about the extent of the list of restrictions (limitation, exceptions, licenses), about the restrictive interpretation of special cases and about the application of the triple test. Hence, it seems that according the general Czech opinion, the fundamental rights or objectives appear not be prima facie overlooked or unduly minimized by the current list and its interpretation.

4. If your jurisdiction’s copyright law provides for a list of exceptions, are the conditions mentioned in the provisions - in order for the use concerned to be permitted – [unduly] strict and compelling, or rather is there room for flexibility? Can you mention examples to illustrate solutions in this respect? Does the law make a distinction between (i) uses for commercial purposes and uses for non-commercial purposes (ii) uses by individuals and uses by others (e.g. companies, organizations)?

As mentioned above, the Czech Copyright Act provides for a list and does not allow any extensive interpretation. Hence, the first requirement from the triple test, the special cases clause, is strictly observed by the Czech national law. It is worthwhile to point out that these special cases must be set by the Copyright Act (no other legislation can set them up!), see Art. 29 of the Copyright Act.

The above mentioned cases about South Bohemian spas, 30 Cdo 3056/2012 and 30 Cdo 3093/2012, rejected from the benefit of the special case for health care providers (because only some clients are true patients seeking medical and rehabilitation treatment and other clients are rather wellness seekers) demonstrate the rigidity of the Czech understanding, interpretation and application of the first requirement of the triple test.

The distinction between uses for commercial purposes and uses for non-commercial purposes and uses by individuals and uses by others (e.g. companies, organizations) is done on the general as well as special basis. Generally, Art.29 indicates the triple test. Specially, Art.30 provides for free use in the case of the personal needs of a natural person provided this does not have directly or indirectly a commercial purpose. Further, specifically, Art.30a states that there is not a breach of copyright if a copy on paper is done by a natural person for his personal use or by a legal entity or natural person doing business, provided it is for their internal use.

5. If your jurisdiction’s copyright law provides for a list of exceptions, are the exceptions listed mandatory or optional? Does your law make a distinction in this respect? If yes, does the distinction depend on the nature of the exception? If the exceptions are mandatory, does that mean that they cannot be ruled out by contract, even if the contract organizes an online (interactive) access to the works? Does your law make a distinction between off-line and on-line uses in this respect? Do you have any other comment concerning the mandatory or the optional character of the exceptions?

Restrictions, i.e. exceptions, limitations and licenses, are set in an explicit and rigid manner and their interpretation is restrictive.

6. If your jurisdiction’s copyright law provides for a list of exceptions, do these exceptions relate to the “reproduction right” only or to the “right of communication to the public” only, or to both? Does the law make a distinction depending on the exception concerned? If yes, what are the negative consequences in practice for the user of the work, i.e. to what extent is he prevented from making use of the work in a way

that is sufficiently effective for the purpose contemplated by the legislature? Can you give some illustrations?

As stated above, the Czech Copyright Act provides a list which includes both special cases dealing with reproduction, see Art.30, Art.30a, Art.33, Art.34, Art.37, Art.37a, Art.38, Art.38a, Art.38b, and Art.38e, as well as communication to public, see Art.31, Art.32, Art.33, Art.34, Art.35, Art.37, Art.37a, Art.38d, Art.38f, and Art.39.

7. If your jurisdiction's law provides for a list of exceptions, do these exceptions also affect the moral rights of the author? Is the impact on moral rights explicit or implicit? Is it legitimate and proportionate? Is there a mechanism which guarantees a minimum level for the preservation of the moral rights of the copyright owner? Conversely, is there any risk that the copyright owner could unduly invoke his moral rights to block the exception? Please give some examples.

Yes, the list provided by the Czech Copyright Act has an impact on the moral (personal) rights of authors. Indeed, in the majority of provisions dealing with special cases belonging to the list, there is a direct requirement that the author of the work has to be indicated as long as this is feasible or customary, see e.g. Art.31 quotations/citations, Art.32 propagation of exhibition or sale of art works, etc. As a matter of fact, Art. 31 is basically the only unique universal exception allowing to communicate a work, protected by copyright, of someone' else to the public without his or her consent (Jansa et al, 2016). This exception covers as well the "upload on the Internet" and has three levels – (i) citing extracts from published works in an justifiable extent, (ii) citing extracts from works for review or criticism purposes, and (iii) citing entire works for illustration or education purposes.

In addition, there are provisions dealing with special cases which directly affect the moral (personal) rights of the author in a restrictive manner. Namely, Art.38c deals with an insignificant auxiliary use of work and states that there is not any breach of copyright, if someone randomly uses a work in relation to the planned main use of another work. Further, Art.39d provides for a license to use works of fine art or architectural works and allows changes in a completed building which is an expression of a copyrighted work in the necessary extent and while maintaining the value of the copyrighted work. In such a case, the author of the primary copyrighted work is only informed about it, his consent is not needed.

8. Under your jurisdiction's copyright law, to what extent is there a risk that technological protection measures could prevent from enjoying the benefit of the exceptions to copyright? Is there an obligation upon the copyright owner to make available to the beneficiary of an exception the means of benefiting from that exception? Is there a distinction between the exceptions, depending on their nature? How can the individual user of a work (or a group of individual users) obtain the full and effective benefit of the exceptions?

No special regulations are provided in order to address the (alleged) risk that technological protection measures could reduce or impair the enjoyment of restrictions, limitations, licenses or exceptions to copyright. There is not any strong call for it. However, the Czech Republic closely follows the EU discussion about the 2nd copyright package and in general about the modernization of the EU copyright rules.

9. Does your jurisdiction's copyright law provide for a "catch all" exception, i.e. an exception which is worded in such a way that it can apply in various cases which differ significantly from each other (e.g. "fair use")? If yes, what is the wording of that exception and what are potential illustrations of its flexibility? What are the conditions for a successful application of this exception? What is the guidance for the application of this exception? To what extent are the effects of this exception sufficiently predictable? To what extent is this exception compliant with the triple test?

In addition to Art.29 of the Czech Copyright Act, which provides a general interpretation triple test rule, Art.30 of the Czech Copyright Act deals specifically with "free use". According to Art.30, using or reproducing a copyrighted work for the personal needs of a natural person with a purpose, which is neither directly nor directly to generate commercial profit, is not considered to be use under Copyright Act and thus it is freely available. This "free use" does not apply to computer programs and electronic databases. Similarly, pursuant to Art.30a, it is not a breach of copyright if a natural person, for his personal needs or a legal entity or natural person conducting business, makes a reproduction of work on a paper.

Interestingly, according to the commentaries to the Czech Copyright Act, Art.30 should be interpreted broadly, i.e. the free use for the personal needs of a natural person extends to each and any form of “copying”, i.e. not only to make a reproduction (Chaloupková & Holý, 2012). This broad interpretation, i.e. extension of the “fair use” for each and any form of “copying” for personal or internal needs is justified by the teleological approach, i.e. by the true intent of the legislature.

A discussion has developed around the term “personal needs”, namely how far it goes vis-à-vis beneficiaries of such a free use (needs of the individual or his family members or even of other more or less close persons?) and what is the quantitative extent (how many copies can be done?).

The Czech Supreme Court decided in 5 Tdo 234/2009 on 25 March 2009, regarding an individual having in his home 236 pieces of copies of CDs and DVDs, that this amount per se does not exclude the possibility of the “free use” restriction, i.e. that having 236 copies can still qualify for the free use regime. The Czech Supreme Court in this case reversed the judgments of the lower courts which wrongly interpreted the Czech Copyright Act, namely Art.30 as allowing only one single copy for personal needs. These lower courts followed strictly the literal interpretation approach and implied from the wording “making a record or a copy” that the grammatical singular that only one copy is allowed. However, according to the Czech Supreme Court, the legislature’s language uses the singular without excluding the meaning of the plural and it is necessary to proceed always with a consideration of circumstances and embrace the purposive, or even the teleological, approach. Further, the Supreme Court referred to the triple test (three step test) as implied by the decision of the WTO in proceedings EC v. USA Act Nr. WTO WT/DS160/R(2000). The 1st requirement is rather formal (specific cases) while the 2nd and 3rd requirements (no conflicts with normal exploration and no unreasonable prejudice) are rather material.

Consequently, both case law and academia came to the conclusion that “personal needs” means the needs of family members, but not of friends or colleagues from the work, the copy must be made by the person with the needs (such a person cannot ask somebody else to do it for him for her) and that a copy made based on the “exception” of Art.30 (free use) cannot later be used for the internal needs of a legal entity or of a business making natural person (Jansa et al, 2016).

Regarding downloading works from the Internet, the “exception” of Art.30 (free use) applies only to situations when downloading persons download for his or her personal needs and at the same time believe that the downloaded work was not placed on the Internet in breach of copyright (Jansa et al, 2016).

10. In your jurisdiction’s legal system, when you make abstraction of the exceptions mentioned in the copyright law, to what extent can other fundamental rights than copyright (e.g. freedom of expression, right to private life, right to education) prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner? Can you mention different situations where other fundamental rights can prevail and result into a permitted use of the work? Is the solution different if the use concerned is already addressed in the copyright law itself, and said use does not comply with the conditions required for the application of the exception? Is there case law which can serve as guidance?

The Czech law is not inclined to expand or to add other special cases to the list provided by the Art.29 et foll. of the Czech Copyright Act. Nevertheless, there are cases showing that judges can be more flexible. For example, the Czech Supreme Court in 30 Cdo 154/2011 on 14 March 2012 confirmed judgments of lower courts in this case and rejected the claim of the wife of the ex-prime minister, Petra Paroubková. She sued the publisher Ringier Axel Springer because it published, in its journal Reflex, comics Green Raul part 739, in which her sexual caricature was published. The courts balanced constitutional rights and freedoms, namely the right for the protection of privacy and freedom of speech, of belief and of artistic activities. The lower judges as well as the Supreme Court reached the conclusion that, in the given case, the caricature concerned a politically exposed person, was founded upon a real basis and did not breach the proportionality. In general, the caricature, entertaining imitation and pastiche seem to be acceptable under the Czech law, especially if politicians and celebrities are involved and at least partially the truth is observed.

Nevertheless, the 30 Cdo 154/2011 and its aftermath generated a lot of discussion and the explicit and express inclusion of the “pastiche” in the Czech Copyright Act is considered in order to make absolutely clear that this is acceptable and breaches neither copyright nor (if other requirements met) the constitution.

11. If your jurisdiction’s copyright law provides for a list of exceptions, does it also provide for a compensation in favor of the copyright owner? Does the law make a distinction between the exceptions in

this regard? How is the compensation calculated? Is there a mechanism to ensure that the compensation remains within certain limits, i.e. it does not result into an “overcompensation” to the detriment of some categories of users?

The Czech Copyright Act provides neither a systematic remuneration system nor includes in every special case belonging to the list an appropriate model or formula for a compensation calculation. Hence, for some special cases, a clear remuneration calculation model is established, while for others not. The special cases with a pre-set partially clear remuneration model are e.g. Art.30 free use and Art.30a reproduction on paper complemented by Art.25 to which both, Art.30 and Art.30a refer to.

Article 25 Right to remuneration in connection with the reproduction of the work for personal needs or own internal need

(1) For published works, which can be reproduced for

a) personal needs of a natural person or internal needs of a legal entity(§30 and §30a)on a paper..

b) personal needs of a natural person based on an audio, audio-video or other recording ..

the author has right on a compensation ...

(2) The person obliged to pay the compensation to the collective administrator (collecting society) is

a) a producer of device for making reproduction of recordings...

b) a proucer of devices making print reproductions ..

c) a producer of unrecorded carriers for recording,....

e) provider of paid reproduction services for print copies (Art.30a)..

(4) The compensation to be paid based on 2b) depends upon the probable number of device desinged to make print reproduction pursuant to Art.30a ...The probable number of these device is set as 20%. The compensation is calculated based on the average price of the device without addend value tax. ...

(7)The Ministry of Culture sets in its Decree types of devices for making print reproduction and types of unrecorded carriers for recording ... and the fixed compensation ... Further the amount of the compensation is set in Annex 1 to this Act.

According to this Annex 1 to the Copyright Act, the one (and only) to be paid fixed compensation is generally 3% from the sales price of the reproduction devices, while in the case of broadcasting and TV devices allowing recording it is 1.5% from the sales price of such devices. The compensation for each print reproduction of a work is CZK 0.20 in the case of a black-and-white copy and CZK 0.40 in the case of a colour copy. The probable number of the print reproduction is 70% for libraries, 20% for state offices and archives. The compensation for rental is CZK 0.50.

12. Does your jurisdiction’s law provide for an exception in order to allow temporary acts of reproduction which are necessary to enable a lawful use? What is the wording (in English) of that exception? What are the conditions thereof? Is that exception sufficiently effective to enable the development of [most of] legitimate online activities/ new business models? Can you give some examples where that exception was (un)successfully applied? Is that exception mandatory?

Art. 38a of the Czech Copyright Act is labelled “license for temporary reproductions” and provides that there is not a breach of a copyright if someone makes temporary reproductions, which are ephemeral, auxiliary and without value per se and at the same time are an integral part of a technological process and their purpose is to allow the transmission of a work or the legitimate use of a work.

13. Does your jurisdiction’s copyright law provide for exceptions in order to allow the freedom of expression? If yes, please provide [the English version of] the text of these provisions. What are the conditions for the use to be permitted? Can you give some examples where these exceptions were successfully, respectively not successfully, applied? Is there any compensation required for the benefit of the copyright owner? Are the exceptions concerned mandatory?

Since there is not a specific provision in this respect in the Czech Copyright Act, the provisions from constitutional law apply, especially provisions from the Charter of Fundamental Rights and Freedoms. Regarding the case, please see above 30 Cdo 154/2011 about the caricature of the wife of the ex-prime minster, Petra Paroubková. Despite a long ongoing discussion, the Czech law, namely the Czech Copyright Act, until 2017, did not include any copyright limitation or exception regarding the parody or caricature, i.e. processing another work or distributing a work for parody purposes did not constitute a special case (1st requirement of the Bern triple test) pursuant to the Czech law (Prchal, 2016).

However, the Act No. 102/2017 Coll., amending the Copyright Act finally introduced since April 2017 this new “exception”, i.e. special case regarding the caricature and parody

Article 38g Licence for caricature and parody

There is not a breach of a copyright if someone uses a work for caricature or parody purposes.

14. What are the cases (e.g. political speeches, news of the day, mere items of press information), if any, where your jurisdiction’s copyright law explicitly provides that the content concerned is excluded from the benefit of copyright protection? If there is a list of such cases, is that list a closed list? Is there, in your view, any content missing in that list? Would you recommend to provide for such a list?

Firstly, Art.2(6) of the Czech Copyright Act explicitly excludes from the definition of the copyrighted work daily news, i.e. if news of the day or press information are considered to be daily news, than the copyright regime and protection of the Czech Copyright Act does not extend to them.

Secondly, the list of restrictions deals specifically with use of news and speeches via Art.34 labelled “official and reporting license”.

Art.34 Official reporting license

There is no breach of copyright if someone uses

a) in a legitimate extent a work based on the law for public securities, court or administrative proceedings purposes or for other official purposes or for Parliament proceedings and for making a recording about them;

b) work in the relation to news reporting relating current events, and this in the extent reflecting information purpose;

c) in the reflecting manner the work in periodical press, TV or broadcasting ... to communicate news reporting about current political, economic, religious matters

d) political speech or extracts from public speeches or similar works in the extent reflecting the information purpose...

15. In the context of education, what are the uses which are permitted by your jurisdiction’s copyright law? What are the conditions for the uses to be permitted? Are the provisions sufficiently broad to cover distance learning? Does the law make a distinction depending on whether the user is a profit or a non-profit organization, and pursues a (non-) commercial purpose? Is there a compensation provided for the benefit of the copyright owner? How is the compensation calculated? Are the exceptions concerned mandatory?

Firstly, Art.35(2) allows to use a work for non commercial purposes during school shows. Secondly, Art.35(3) allows a school or other education establishments to use a work created by a student for a non commercial purpose during lectures or for its own internal needs. Thirdly, Art.37(1) allows, via the so-called library license the school or educational establishment to (i) make a reproduction of a work for non commercial purposes but for archive or conservation needs or to (ii) make accessible to the public a work, the use of which is not covered by sales or license conditions, provided it is done exclusively for research and private study purposes or to (iii) loan originals or copies of bachelor, master, Ph.D., Ph.Dr., and habilitation theses for research or private study purposes. Art.37(2) and Art.37 (5) specifies that in the case of such loans, this person (e.g., educational establishment) has to present annual summary reports to a relevant collective administrator (collecting society) and has to pay to them or directly to authors a compensation set by the Annex 1 to the Copyright Act.

16. In the context of research, what are the uses which are permitted by your jurisdiction’s copyright law? Is there an exception to support big data related activities? Is there an exception concerning “text and data mining”? What are the conditions for said uses to be permitted? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Are the exceptions concerned mandatory?

The Czech law, namely the Czech Copyright Act, does not include any special provision dealing explicitly with research and thus the research per se and as such is not a special case (1st Bern requirement). Nevertheless, the research is (in)directly covered by other limitations and exceptions of the Czech Copyright Act. Namely, researches can possibly rely on Art.30 “free use” and research institutions on Art.37 “library license”. Making copies can in certain situations, at least theoretically, lead to a need to pay a compensation stated by the Annex 1 to the Copyright Act.

The Czech law, namely the Czech Copyright Act, does not have any special provision dealing with big data and even does not mention this term or its equivalents.

17. In your jurisdiction's copyright law, to what extent and under which conditions is the copyright exhausted? To what extent and under which conditions does exhaustion of copyright apply to online situations where the work has been made available by electronic means in a digital format? To what extent can the copyright owner exclude the exhaustion of copyright via the terms and conditions of an agreement?

Pursuant to Art.12, the property (economic) rights of an author includes the right to use work, which means among else to reproduce and distribute the original or copies as well as right to communicate work to the public. A special form of the right to communicate work to the public is the right to make work accessible, including the electronic accessibility, see Information Society Directive (Bartoň, 2016).

The Czech Copyright Act strictly distinguishes between diffusion to public methods, i.e. between the reproduction and distribution (dissemination) of a work in the tangible and communication to the public of a work in the intangible form. The copyright exhaustion is provided only for works in the tangible form, see Art.14.

§ 14 Distribution

(1) The distribution of the original or a copy of a work is understood as making accessible to the public of work in the tangible form or other ownership title transfer to the original or a copy of the work, including their offering for this purpose.

(2) By the first sale or another first transfer of the ownership right to the original or to the copy of the work in the tangible form, which was done by the author or with his or her consent in the territory of any EU member states or a state belonging to the European Economic Area, exhausts the copyright of the author regarding the distribution in the EU and in the EEA. However, the right on the rent (for commercial profit) and on the loan (for non commercial purposes) remains intact.

18. Does your jurisdiction's copyright law provide for a panorama-exception? What are the conditions for that exception? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Is the exception mandatory?

Yes, the Czech Copyright Act includes explicitly as one of the special cases (1st requirement of the Bern triple test) the so called "panorama exception" and the explicit provision is contained by Art.33.

Article 33 Utilization of a work located in a public area

(1) Copyright shall not be infringed by whoever records or expresses by drawing, painting, graphic art, photography or film a work located on a square, in a street, in a park, on a public route or in any other public place; even more, copyright shall not be infringed by whoever further uses such an expressed, captured, or recorded work. If possible, it is necessary to indicate the name of the author, or the name of the person under which name the work is presented to the public, and the name of the work and its location.

(2) The provisions of paragraph (1) shall not apply to making a copy or an imitation of an architectural work or to the reproduction and distribution of the work by means of a three-dimensional reproduction.

19. To what extent and under what conditions does your jurisdiction's copyright law allow to make private copies? Is the private copy exception inapplicable to some critical situations (like the scanning of works by others than private individuals)? Is there a compensation for the benefit of the copyright owner? If yes, what form(s) of compensation (one single form or two forms)? Is there a risk that the compensation system could result into an "overcompensation" to the detriment of some users? Is the exception mandatory?

Yes, as stated above, the Czech Copyright Act deals with it explicitly, namely via Art.30 "free use" for personal needs (excluding use of computer programs and databases!) and Art.30a "making copies on the paper or similar medium."

Art.30 Free use

(1) The use of the work pursuant to this Act shall not mean its use for the personal need of a natural person, if the purpose is not to reach directly or indirectly economic or commercial profit, unless this Act provides otherwise.

(2) Further, the Copyright shall not be infringed by someone who, for his or her personal use, makes a record, copy or imitation of a work.

(3) Unless this Act states otherwise, the use under this Act is the use of a computer program or electronic database even for personal needs of a natural person or own internal needs of a legal entity or business conduction natural person, including making copies of such work even for such needs.

Art.30a Making copies on paper or similar medium

(1) The Copyright shall not be infringed if

a) a natural person for his or her personal need,

b) a legal entity or business making natural person for its own internal need,

c) someone based on an order from a natural person for his or her personal need,

d) someone based on an order from a legal entity or business making natural person makes a print copy of work on a paper or on a similar medium by photographic techniques or another method with a similar effect, except note transcript.

The remuneration to both of them, Art.30 and Art.30a, is set by Art.25.

Article 25 The right to remuneration in connection with the reproduction of the work for personal need or own internal need

(1) In the case of works made public which can be reproduced

a) for the personal need of a natural person or own internal need of a legal entity or business making natural person (Art.30 and Art.30a)

the author has a right on the remuneration in relation to such a reproduction of his or her work.

(2) Person having the duty to pay this remuneration to the collective administrator is

a) producer of copying recoding devices

b) producer, importer or receiver of copying print devices ..

..

e) provider of copying services ..

... The remuneration is set by the Annex 1 of the Copyright Act...

Annex 1 of the Copyright

3. One time payment for On first sale of the devices for making record copies is 3% of its sale price For broadcasting and TV receivers allowing to make audio, video or audio-video recording is ...1.5% of the sale price of such receivers ...

6. Remuneration for making one print copy of a work is

a) black and white - CZK 0.20 per page

b) colour - CZK 0.40 per page

20. When you make an overall assessment of your jurisdiction's copyright law, what are the risky factors which could possibly result into an imbalance between the rights of the copyright owner and the rights of (/ the fair use made by) the users of works? In particular, where do the risks come from: the absence of certain exceptions so that specific fair uses could be prevented? The wording of certain conditions for the application of specific exceptions which is unduly demanding to the detriment of some categories of users? The effect of "overcompensation" which unduly favors the copyright owner? The negative impact of some exceptions on the normal exploitation of the work or the legitimate interests of the copyright owner so that the copyright owner is unduly disfavored? What solutions do you recommend to tackle potential issues in this respect?

So far, there are not any clear and prevailing opinion streams about general dramatic imbalance or about dramatic imbalance vis-à-vis particular issues or aspects. Copyright cases linked to the "fair use" are rather sporadic and the case law is not fully developed in this respect. Basically the only heavily objected deficiency (objections voiced by academia as well as general public), the lack of the parody exception, was cured by the legislature a few months ago.

The overcompensation is a hot topic in the Czech Republic, but exclusively regarding rather aggressive practices of the collective administrators (collecting societies), i.e. entities compulsory (by the law) administrating copyright of authors. There are six, and especially one of them, OSA – civic association protecting copyright for musical works, has the reputation to go after end-users and challenge their use of exceptions and limitations, i.e. the application of the fair use/Bern triple test is under a close scrutiny of these collective administrators (collecting societies) and when there is (allegedly) a sign of an (allegedly) too broad application, they do not hesitate to step in and sue, i.e. to start court proceedings.

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5 Tdo 234/2009 from 25 March 2009
30 Cdo 329/2008 from 12 November 2009
30 Cdo 3474/2010 from 30 November 2011
30 Cdo 154/2011 from 14 March 2012
30 Cdo 3056/2012 from 31 January 2013
30 Cdo 3093/2012 from 28 March 2013

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Please send your National Reports to the International Rapporteur, the Secretariat of the League, the General Rapporteur and his Deputy and the Chairman of Question B no later than 30 May 2017.