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SUI GENERIS DATABASE RIGHT AND OFFICIAL WORK EXCEPTION

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Abstract

Sec. 94 of Copyright Act was amended by “Open Data Act” in the way that official work exception applies mutatis mutandis, to the maker of the database. The new regulation makes it easier to work with public sector databases, including grey publicly funded literature repositories. However, it presents interpretation difficulties. This paper points to them and suggests solutions. The first part analyses the official work exception and its legal construction. The second part briefly deals with sui generis database rights and their exceptions. The third part connects first two topics. It analyses the possibility of application of the official work exception to sui generis database rights and deals with the transitional provision, which contains the amending “Open Data Act”.

Keywords

Sui generis database rights, official work, grey literature

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Introduction

Institutions interested in the collection, cataloguing and publication of grey literature must properly address intellectual property rights which may relate to the content. Apart from copyright, they must not forget the sui generis database right. If the grey literature database is protected by such right, it must also be licensed during the publication process. Otherwise, any future ambitions to reuse grey literature works in the database might be thwarted even though they are not directly protected by copyright.

This article considers as grey literature documents within the meaning of the Prague definition of grey literature.[1] In the Czech Republic, a vast number of such documents are excluded from copyright protection thanks to the official work exception. Section 2 of this article briefly addresses this exception and its application to grey literature.

Once collected, grey literature works are placed in repositories and made accessible to the public. These repositories are databases within the meaning of European database directive No 96/9/EC.[2] Even though we usually do not think of database content directly as grey literature[3], intellectual property rights which relate to such databases are important because they play a supporting, instrumental role for the database content. Part 3 of this paper presents basic sui generis database right protection concepts in connection with grey literature repository practice.

The so-called "Open Data Act" (No 298/2016 Sb.[4]) introduced a new rule stating that the official work exception applies mutatis mutandis to the maker of the database. This change is important for institutions operating repositories created during the exercise of legal duties. In these cases, such institutions would not need to concern themselves with any licensing of database rights. Therefore, the change ensures easy the accessibility and reusability of provided content. Unfortunately, however the amendment also introduced a transitional provision which makes its interpretation more complicated. The presented article addresses this concern in Section 4 and seeks to provide an interpretation aid for practical use.

Official work

The official work exception is stipulated in Section 3(a) of the Copyright Act[5], and states that official works are excluded from copyright protection.[6] Its purpose is to ensure the free

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[1] See Joachim Schöpfel, 'Towards a Prague Definition of Grey Literature', in *Grey Tech Approaches to High Tech Issues.* (Presented at the Twelfth International Conference on Grey Literature: Transparency in Grey Literature, Prague, 2011), pp. 11–26. This definition was chosen because of its recency, clarity and exhaustiveness.

[2] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[3] Schöpfel argues that grey literature is acquired and put into collections. That indicates that the content of a database (of a collection) can be grey literature, but the database of such works itself will most likely not be. See ibidem p. 17. Nevertheless, if present, database rights must be addressed during the publication of grey literature.

[4] This Act is primarily harmonisation legislation enacted in connection with European Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market. The regulation of open data is present only as a relatively independent part of the Act, and it amended Act No 106/1999 on the freedom of information and Act No 121/2000, the Copyright Act.

[5] See Act No 121/2000 Sb., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts.

[6] The full text of the mentioned section states: "*Copyright protection shall not apply to an official work, such as a legal regulation, decision, public charter, publicly accessible register and collection of its documents, and also any official draft of an official work and other preparatory official documentation including the official translation of such work, Chamber of Deputies and Senate*

availability of public and publicly important documents. It is a quite traditional legal institute in Czechia. The exclusion of certain publicly important documents from copyright protection was already present in the Czechoslovak Copyright Act from 1926.[7] The application of this exception is generally broad for two reasons. Firstly, the list of excluded documents it mentions is not exhaustive. Secondly, the definition is open thanks to the statement that it covers "also any other work where there is a public interest in its exclusion from copyright protection".[8] The exception covers most of the documents created during the fulfilment of public administration duties (e.g. Acts, court decisions, opinions, recommendations etc.). However, in situations when a work is created by a third party (e.g. an attorney who writes a legal analysis), this exception generally does not apply.

A vast amount of Czech grey literature - covering all governmental documents, opinions and analyses - falls within this exception and can therefore be freely distributed and used for any purpose. On the other hand, this exception does not apply to other grey literature documents such as master and doctoral theses, and these are thus covered by copyright. Furthermore, the official work exception is applicable to copyrightable databases[9] if the abovementioned condition of public interest is met. A database can be protected by copyright when "by reason of the selection or arrangement of the content, it constitutes the author's own intellectual creation".[10] The copyright applying to such a database does not protect its content,[11] but only the structure and arrangement of that content. Good examples of copyrightable databases that fall within the application of the official work exception are the Register of Persons and the Business Register.

Sui generis database right

The sui generis database right protects the investment required for the creation of the database.[12] The maker of the database is a person or a body which "is involved both in the initial organization of the database and its financing."[13] In the case of grey literature repositories, the maker of the database is the institution which creates and operates the repository. The right is established when there is a qualitatively or quantitatively substantial investment in obtaining, verifying or presenting the content.[14] For example, if the grey literature

publications, a memorial chronicle of a municipality (municipal chronicles), a state symbol and symbol of a municipality, and any other such works where there is public interest in their exclusion from copyright protection."

[7] See Section 6 of Act No 218/1926. Sb. Telec dates this exception back to 1895. See Ivo Telec and Pavel Tůma, *Autorský zákon - Komentář* (Prague: C. H. Beck, 2007), p. 73.

[8] Some authors argue that a work can become an administrative work only once the consent of the right holder is given, because otherwise it would be a form of expropriation. See ibidem.

[9] In the light of Art. 1 of Directive No 96/9/EC, a database means "*a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*". For an exhaustive explanation see P. Bernt Hugenholtz, 'Directive 96/9/EC', in *Concise European Copyright Law*, ed. by Thomas Dreier and P. Bernt Hugenholtz, Second edition (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2016), pp. 379–420 (pp. 379–401).

[10] See Article 3 Section 1 of Directive No 96/9/EC.

[11] See e.g. Michal Koščík and others, Výzkumná data a výzkumné databáze. Právní rámec zpracování a sdílení vědeckých poznatků (Prague: Wolters Kluwer ČR, 2018), p. 43.

[12] This opinion is confirmed by legal doctrine. See e.g. Hugenholtz, p. 402; Matěj Myška a Jakub Harašta, 'Omezení Autorského Práva a Zvláštních Práv Pořizovatele Databáze v Případě Datové Analýzy', *Časopis pro Právní Vědu a Praxi*, 23.4 (2016), 375–84 (p. 377); Telec a Tůma, p. 732.

[13] Hugenholtz, p. 403.

[14] See Article 7 of Directive 96/9/EC. A detailed explanation of these terms is beyond the scope of this article. For more information see e.g. Hugenholtz, pp. 402–15; and Matěj Myška and Jakub Harašta, 'Less Is More? Protecting Databases in the

repository operator invests in creating a presentation layer which enables direct automatic computer access to the database (application interface, or "API" in short), that might constitute necessary investment.

The maker of the database has an absolute right to prevent anyone else from extracting (copying in any way) and re-using (any further use) the database content. Therefore, it can be said that the sui generis database right indirectly protects the database content. Furthermore, direct access to the database is not necessary for this protection to apply. Extracting data from a mirror copy of a database may constitute an infringement of the sui generis right of the first database.[15] The maker of the database can license and (unlike copyright) also waive his rights.

When a database protected by sui generis right is made public, anyone authorised to access it can extract and re-utilise insubstantial parts of its content. Directive 96/9/EC also provides a few exceptions from database protection, like the use of database content for illustration when teaching or performing scientific research. An insubstantial part of the content from an online repository of qualification theses can be, for example, extracted and reused by anyone.[16] In all other situations, the maker of the database must license the sui generis right to fully provide its content. Otherwise, the full scope of the content[17] cannot be used by third persons.

The sui generis database right and the official work exception

When a database is made by a public sector body in the course of fulfilling its public administration duties, such database should not be protected by the sui generis database right. This is because such database is funded from a public budget, so there is no investment and no risk in it, and thus no need for protection.[18] This idea was acknowledged by the Czech legislator through the Open Data amendment of the Copyright Act. Section 94 of the Copyright Act states that the official work exception applies mutatis mutandis to the database maker. Therefore, in situations when a database is made as a part of a public administration agenda, the sui generis database right legal protection does not apply. Unlike copyright protection, this exception should apply even in a situation when the database itself is created by a third party on behalf of a public sector body through public procurement. The initiative and funding come from the public sector body and thus the public sector body should be the maker of the database. In such cases, the public sector body can provide the whole content of the database for extraction and re-utilisation without any licence.

For example, a university is the operator of a repository of qualification theses. It is the maker of a database made to fulfil its legal duty to make the theses publicly available in accordance with Section 47b of Act No 111/1998 Sb.[19]. Thus, the database of theses should not be

EU after Ryanair', *Masaryk University Journal of Law and Technology*, 10.2 (2016), 170–99. Available from: **https://doi.org/10.5817/MUJLT2016-2-3**

[15] For more on this topic see Hugenholtz, who refers to the European Court of Justice cases British Horseracing Board and Directmedia Publishing. In Hugenholtz, p. 407.

[16] This example deals only with the *sui generis* database right. Copyright to the specific works must also be taken into consideration.

[17] This also covers a search service built upon the database. See Decision of the Court of Justice of the European Union No C-202/12 – Innoweb.

[18] Hugenholtz refers to a Dutch case in which the court used this argument to rule that the city of Amsterdam is not eligible for the sui generis database right. See Hugenholtz, p. 405.

[19] See Act No 111/1998 Sb., on higher education institutions.

protected by sui generis right, and the official work exception should apply. It must be stressed that this does not mean the theses themselves are not protected by copyright.

Act No 298/2016 Sb. which reintroduced the application of the official work exception to sui generis, contains a transitional provision which reads as follows: "This provision does not apply to databases protected by the sui generis right of the database maker obtained before this Act came into force." [20] According to the explanatory memorandum, the reason behind this provision is to limit possible negative outcomes to the existing rights of the makers of databases. There is a practical negative outcome from this provision. If there is a new substantial investment in a database (either changing, obtaining, verifying or presenting the content), the 15-year term of protection recommences. Hence it is very possible that old databases protected before 1 January 2017 will continue to be protected forever as long as substantially important changes are made to them. This results in a situation with a quite low level of legal certainty because it is almost impossible for a layperson to correctly guess in advance whether a database is protected or not.

Conclusion

Operators of grey literature repositories should address the sui generis database right in addition to copyright during the publication process. If such right exists, the operator should provide a licence which would enable the full use of the database content. In cases where the operator is a public sector body and fulfilling an administrative duty, the database made and used for such purpose is not protected by the sui generis database right because of the application of the official work exception. However, it the database was created before 1 January 2017, the protection applies. To enable maximum content use, it is recommended to waive the sui generis database right, for example by using the CC0 licence.

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[20] The Act came into force on 1 January 2017.

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