

Licensing the Use of Grey Literature under the Czech Law

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Legally reflecting grey literature

The concept of grey² literature obviously does not have legal nature. It emerged as factual consequence to growing production of various kinds of literary works whose primary aims and applications somehow differed from 'white'³ literature. However, when Gokhale⁴ tried to precisely define and categorize grey literature, it turned out that this general category breaks down to dozens of subtypes and subcategories. Moreover, it seems that the term "Grey Literature" might even have different meanings for different areas of knowledge⁵.

As the broadness and complicated structure of grey literature makes it difficult even for a librarian to precisely define what does the term in fact mean, it is then even more difficult for a lawyer to add its precise legal understanding. Therefore, we need first to clarify at least basic legally established criteria for the distinction between grey and other 'coloured' literature in order to be able to define its legal regimes and subsequent rights and duties.

As pointed out above, grey literature is to be generally understood as having slightly different basic nature. When trying to find out some general point of distinction, we can start with very general and not entirely precise but relatively simply conclusion that the basic aim of grey literature differs by the fact that its primary aim is not to be publicly issued and disseminated. While the reason for the creation of (general) literature is to broadly disseminate the ideas of its creators, the reasons for the creation of grey literature is mostly:

1. Fulfilling the conditions of various study programmes (namely at universities)
2. Reporting activities of academic institutions incl. the progress or outcomes of research projects
3. Confronting ideas within limited groups of specialists (namely at conferences or in the process of drafting various publications)
4. Defining technical standards

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² The concept is also regularly referred to as 'gray' literature – see for example Auger, Ch., P. Information sources in grey literature, 2nd edition, London: Bowker-Saur: New York, 1989.

³ We decided to use the term 'white' literature to indicate the conventional forms of literature. Another possible term, 'published' literature does not seem entirely suitable for this purpose (in fact, most of forms of grey literature are regularly published, so the use of the term 'published' would be a bit binding when discussing its legal regulatory framework).

⁴ See Gokhale, Pratibha. Grey Literature Varieties - Definitional Problems, in Third International Conference on Grey Literature : Perspectives on the Design and Transfer of Scientific and Technical Information, 13-14 November 1997 (Conference Proceedings), Amsterdam : GreyNet, 1998, pp. 259-273.

⁵ This can be a consequence of the fact that different disciplines work with different scientific procedures, publication usages and, probably most importantly, with different business models.

5. Fulfilling legal obligations (namely in bookkeeping and official reporting)

Grey and white literatures differ also in their availability. As the main aim of grey literature is other than to be (truly) published⁶, its general public availability is relatively low. Then, there are lots of publications falling within the category of grey literature that are on one hand highly scientifically valuable, useful or inspiring, but on the other hand difficult to be spotted and obtained. Consequently, we see significant development of various activities aiming broader availability of grey literature including its classification, systematic storage and public dissemination⁷.

Neither in the Czech Republic, nor in the rest of the world has the presence and significance of grey literature been directly acknowledged by black-letter law. Thus, there is no special legal definition or concept that would precisely reflect the existence of literary works of the above indicated different teleology. However, it does not mean that it would be impossible to legally handle grey literature, i.e. to speak about rights arising of the process of its creation, storage and use.

Grey literature in the Czech Law

In the following paragraphs, we will briefly focus on the forms in which Czech law applies namely on legal issues of gray literature that we see as crucially important, i.e. on its legal licensing. It should be noted in advance that the concept of copyright in the Czech Republic is no different from other European states, as Czechoslovakia and then Czech Republic were members of basic harmonizing international conventions such as:

- Convention establishing the World Intellectual Property Organization (WIPO/OMPI) - a member since 1970
- Berne Convention for the Protection of Literary and Artistic Works - a member since 1921.
- The Agreement on Trade-Related Aspects of Intellectual Property Rights - a member since 1995.
- WIPO Copyright Treaty - a member since 2002.

In the process of the accession of the Czech Republic to the EU, the copyright provisions of the Czech law were harmonized also with EC directives such as:

- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

⁶ It is also typical that grey literature is being created or produced but not truly published, so that one of its typical features is the lack of the presence of a publisher in the production chain.

⁷ One of such activities is for example The Virtual Data Centre designed by Harvard University and University of Michigan – see Altman, M., Andreev, L., Diggory, M., King, G., Kiskis, D. L., Kolster, E., Krot, M., Verba, S. A Digital Library for the Dissemination and Replication of Quantitative Social Science Research: The Virtual Data Center. *Social Science Computer Review*, Vol. 19, No. 4, pp. 458-470.

- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
- Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Similarly as in the case of other European countries, the concept of Czech copyright law is based on a distinction of moral and material rights of an author⁸. The moral rights include namely:

- authorship right - a right to be indicated as an author
- integrity right – a right for the preservation of the integrity of the work (incl. exclusive right to permit modifications)
- publication right – a right to decide upon first publication of the work⁹

The moral rights belong exclusively to the author and, importantly for legal regulation of grey literature, they represent the only copyrights that might be executed by a third person even upon one-sided permission of the author. On the contrary, the material rights represented by the most important rights to use the literary works, can be executed by anyone else than the author only upon an agreement. Taking the point of view of the creation, processing and dissemination of grey literature, we shall focus namely on material rights, i.e. on the rights of usage of the respective literary works.

In the case of white literature, the author concludes a contract with a publisher upon which the respective literary work is processed and exclusively disseminated by the publisher. As noted above, one of the differences between white and grey literature is in the fact that grey literature is not created primarily in order to be published. Moreover, in most cases of grey literature, the role of the publisher is entirely missing. Consequently to our above basic classification of general purposes of grey literature, we can distinguish the following legal regimes:

⁸ This distinction originates in the Berne Convention for the Protection of Literary and Artistic Works.

⁹ As mentioned above, grey literature is often indicated also as 'unpublished' literature. If we take this term from the legal point of view, we have to state that in fact it cannot apply on most of documents of grey literature, as they have been made available to the public for example by publicly defending a thesis or by displaying a research report on the internet. Thus, vast majority of grey publications are published in the legal sense.

1. Fulfilling the conditions of various study programmes – works created by students in the course of their studies.
2. Reporting activities of academic institutions incl. the progress or outcomes of research projects – works created by researchers directly for their research institutions or projects.
3. Confronting ideas within limited groups of specialists – works created by independent individuals and published as manuscripts or articles in conference proceedings.
4. Defining technical standards – works created by employees of state, unions, guilds or similar organizations.
5. Fulfilling legal obligations – works created by employees of business units or state organizations.

From the point of view of the Czech copyright law, the above types of grey literature can be subsumed under the following categories:

- A. Falling outside of the scope of copyright law – those of sub 4. and sub 5. that are either not of creative nature (accounting books, filled forms etc.) or that have a form of official publications (texts of laws, decrees, judgments, etc.)
- B. Student works – namely sub 1.
- C. Employment works – namely sub 2. and those of sub 4. and sub 5. that do fall within the scope of copyright.
- D. Contracted works – namely those of sub 2. in the case when a report is not produced by employees of the respective institution but upon a contract by 3rd person (for example by project management agency)
- E. Individual works – namely sub 3.

As the category sub A. falls outside of the scope of copyright protection, it has no generally definable legal regime¹⁰.

The category sub E. represents from the legal point of view normal (unspecific) creation that is being handled by the copyright law as any other literary work. In most of these cases, the authors make their works publicly available under some of implied licenses¹¹, namely under the implied license for the use for personal purposes¹². It is also quite common that authors of such works extend the reach of implied licenses by making their

¹⁰ Any protection of this type of documents is based on their content. Thus, these documents might be particularly protected as know-how, trade secrets, personal data etc.

¹¹ The concept of implied licenses is analogous to Anglo-American doctrine of fair use – see for example Fischman, A. O. Implied License - An Emerging New Standard in Copyright Law. Santa Clara Computer and High Technology Law Journal, Vol. 25, No. 2, p. 275.

¹² This form of use includes also the use for the purposes of individual research – see for example Litman, J. Lawful Personal Use. Texas Law Review, Vol. 85, p. 1871.

works available under some of so-called free or open licenses such as Creative Commons or Open Access¹³.

The rest of categories include works with specific legal regimes that shall be briefly described in particular.

Student works in grey literature

As noted above, this category includes namely works that are created by students in the course of their studies. It includes various dissertations, seminary works and other types of works that are used namely in order to prove the fulfillment of duties prescribed for the respective types of study programmes.

These works are authored by students. However, the respective schools also hold some rights that reflect the fact that the creation of the works was sponsored by them in a form of consultations by staff members, access to library resources etc. The Czech law defines the rights arising of the creation of student works in Article 60 of the Copyright Act¹⁴ that read as follows (informal translation):

(1) A school or school or educational establishment shall have the right to conclude, under habitual terms, a licence agreement on the utilization of a school work (Article 35 paragraph (3)). Where the author of such work has refused to grant his permission without stating a serious reason, such entities may claim compensation for the absence of manifestation of will in court. The provision of Article 35 paragraph (3) shall remain unaffected.

(2) Unless agreed otherwise, the author of a school work may use his work or grant the licence to another party if this is not in contravention of the legitimate interests of the school or school or educational establishment.

(3) The school or school or educational establishment shall be entitled to claim from the author of the school work, from the income earned by him in connection with the utilization of the work or granting of the licence pursuant to paragraph (2), an appropriate contribution to the reimbursement of the cost incurred by them due to the creation of the work, and that, depending on the circumstances, up to the full amount of this cost; the determination of the amount shall take into account the proceeds from the utilisation of the school work pursuant to paragraph (1) received by the school or school or educational establishment.

¹³ These types of licenses work from the legal point of view as public contractual offers with a reference to some standardized terms – see for example Hietanen, H. A. A License or a Contract, Analyzing the Nature of Creative Commons Licenses. NIR, Nordic Intellectual Property Law Review, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1029366>. Although these licenses are highly popular, there can be seen some legal limitation of their use, namely in countries with compulsory collective administration of some aspects of copyrights including the Czech Republic.

¹⁴ The Act No. 121/2000 Sb., on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act). Unfortunately, there are no formal translations of Czech laws available and there is also no general database of translated Czech black-letter law. The informal translations used in this article are taken from WIPO database at http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=962.

As implied from the above, the schools might use the works of their students freely for internal purposes¹⁵. In the case the schools would like to use these works in any other manner, for example to publish them or to upload them to databases of grey literature operated by 3rd person, there is a need of a conclusion of a license agreement. There is, however important exception for works that fall within the scope of the Higher Education Act¹⁶, i.e. bachelor theses, master theses, rigorous theses and doctoral dissertations. In the case of these theses, the schools have a duty (and obviously the right at the same time) to make them available to the public. This duty that includes operating publicly accessible database arises of Article 47b(1) of the Higher Education Act that reads as follows:

(1) Higher education institutions are obliged to make public, at no profit to themselves, the doctoral, Master's, Bachelor's and advanced Master's ("rigorózní") theses that have been defended at their institutions, including the readers' reports and results of the defence. The institution will do this by making available a database of these theses. The means of providing access to these theses is stipulated in the internal regulations of the higher education institution.

The above article gives higher education institutions, namely universities, a right of creating and operating databases that are used in order to process the above listed types of student works¹⁷. Schools are in this case in the position of a maker of a database what gives them rights not just to make the database publicly available but also to non-commercially dispose with it as defined in Article 90(1-3) of the Copyright Act as follows:

(1) The maker of the database shall have the right to extraction or re-utilisation of the whole content of the database or of its qualitatively or quantitatively substantial part, and the right to grant to another person the authorisation to execute such right.

(2) The extraction pursuant to paragraph (1) means the permanent or temporary transfer of all or substantial part of the content of a database to another medium by any means or in any form.

(3) The re-utilization pursuant to paragraph (1) shall mean any form of making available to the public all or a substantial part of the content of a database by the distribution of copies, by rental, by on-line or other forms of transmission.

¹⁵ One of contemporary most frequent form of use is the inclusion of these works into referential databases for fighting plagiarism.

¹⁶ The Act No. 111/1998 Sb., on Higher Education Institutions and on Amendments and Supplements to Some Other Acts (The Higher Education Act). The informal translation used in this article was taken from the server of Masaryk University at http://www.muni.cz/general/legal_standards/higher_education_act.

¹⁷ The main purpose of this provision is to make higher education more transparent and to allow broader public control over academic procedures. These databases are also used as a source of valuable data for automated anti-plagiarism systems out of which the most complex is being operated by Masaryk University.

It should be noted that schools are entitled only for non-commercial disposal of the above database rights. Thus, in the case when a school decides to cooperate with an operator of grey literature database, the licenses might permit only non-commercial reuse of the content. Moreover, the above implied license for operating databases of school works does not include all types of school works, but only those listed under Article 47b(1) of the Higher Education Act. Thus, the publication or re-use of any other works require having prior license agreement with their authors (i.e. the students).

Employment works in grey literature

As noted above, substantial proportion of grey literature has the form of annual reports, research reports or other documents that are created in order to record the activities of various academic institutions like universities or research institutes. These documents are created as a byproduct in the course of research or other academic activities and are authored mostly by academic and/or administrative staff.

Czech legal regime of employment works is relatively simple. Although there are no exceptions as to the attribution of moral or material rights to the respective authors, both of these groups of rights are exclusively exercised by the employer as laid down in Article 58 of the Copyright Act:

(1) Unless agreed otherwise, the author's economic rights to a work created by the author in fulfilling his duties arising from the employment or civil service contract to the employer or from an employment relationship between a cooperative and its member (henceforth referred to as employee work) shall be exercised exclusively by the employer in his own name and on his own account. The employer may assign the exercise of the right pursuant to this paragraph to a third person only with the author's consent, unless this occurs during the sale of the undertaking or of its part.

(2) In the event of the death or dissolution of the employer who has been authorised to exercise the economic rights to an employee work, and who has no legal successor, the authorisation to the exercise of these rights shall fall to the author.

(3) Where the employer does not at all utilize the economic rights to an employee work, or utilizes them inadequately, the author shall have the right to ask the employer to grant him the licence under habitual conditions, unless there is a serious reason on the part of the employer to refuse it.

(4) The author's personal rights to an employee work shall remain unaffected. Where the employer exercises the economic rights to an employee work it shall be deemed, however, that the author has given his consent to the work being made public, altered, adapted including translation, joined with another work, included into a collective work and, unless agreed otherwise, also being introduced in public under the employer's name.

(5) Unless agreed otherwise, it shall be deemed that the author has given the employer his consent to complete his unfinished employee work in the case where it has not been finished in spite of a challenge by the employer to complete the employee work within an

extended period, or when the employee's obligation to complete such work has expired due to his death or due to the impossibility to meet this obligation.

(6) Unless agreed otherwise, the author of the employee work is entitled to an appropriate supplementary remuneration from the employer if the wages paid to the author by the employer are in evident disproportion to the profit from the utilisation of rights to the employee work and to the importance of such work for the achievement of this profit; this provision shall not apply to works referred to in paragraph (7), be they employee works or considered as such, unless agreed otherwise

(7) Computer programs and databases, and cartographic works which are not collective works shall be deemed employee works also where they have been created to order; the person who ordered them shall in such case be considered the employer. The provisions of Article 61 shall not apply to such works.

(8) The provisions of paragraphs (1) to (6) shall remain unaffected by the termination of the legal relationship pursuant to paragraph (1) or, respectively, paragraph (7).

The above implied license gives the employer almost total control over moral and personality rights to the copyrighted works of its employees. It means that the employer might indicate itself as the author and copyright holder of the respective document, it might freely use or license it and it might also freely update or modify it even after the termination of the labour contract. The employer is in this case also fully entitled to dispose with copyrights what enables it to contract with publishers or to make the documents available for any form of re-use including any form of transfer to a database of grey literature or making it available by some of free licenses. Compared to implied legal position of schools in previously explained case of student works, employers dispose with copyrights not just to the whole database, but also to every single document. Moreover, the copyrights to employment works might be exploited by the employer also commercially.

Contracted works in grey literature

The only significant formal difference between employment works and contracted works is to be seen in the nature of the relation between authors and users of their works. While employment works are created upon labour or similar contracts, contracted works are produced upon business agreements. This basic difference is reflected by implied license in Article 61(1,2) of the Copyright Act that reads as follows:

(1) A work created on the basis of a contract for work (a work created to order) may be used by the person who ordered it only for the purpose defined by the contract. Unless stipulated otherwise by this Act, the customer shall be authorised to use the work in extension of such purpose only on the basis of a licence agreement.

(2) Unless agreed otherwise, the author may use the work made to order himself and to grant a licence also to another party if this does not contravene the legitimate interests of the customer.

As it can be seen, the above implied license includes very limited set of rights. However, if the object of above mentioned contract is a document of grey literature, we can formulate an opinion that its re-use naturally falls within the scope of the purpose of the contract as laid down in Article 61(1), first sentence. In any case, it is highly advisable in cases of contracted production of grey literature to pay enough attention to precise defining of licenses and eventual exclusivities, as the law leaves the field of licensing of such works almost entirely opened for mutual stipulations.

Concluding remarks

As grey literature shares almost in full the legal regime with other copyrighted literary works, any processing including the most common ways of its dissemination through academic databases has to be properly licensed. Unlike in the case of a dissemination of white literature where licensing and publishing is relatively simple and straightforward, licensing and sublicensing of grey literature is in most cases multi-level and relatively complicated. Moreover, legal handling of grey literature in most cases relies not on contracted but rather on implied licenses.

All the above mentioned factors cause the legal regime of regular ways of creation and dissemination of grey literature to be less certain and more risky than in the case of regular publications. In that context, it is quite problematic to simply rely on an assumption that these risks will be constantly mitigated by the fact that there are still missing particular legal interests and consequent claims.

This brief note aimed on giving basic overview of specific legal regimes of implied licensing of most common works in grey literature under the Czech Law. As the Czech law, similarly to other European jurisdictions, does not reflect the existence of grey literature as specific concept of literary work, we see here significant risk in the development of international systems for the creation, processing and dissemination of grey literature without careful implementing local legal standards.

Thus, national specific features namely of implied licensing still represent major legal constraint to the development of cross-border databases of grey literature. As more particular harmonization of this aspect of copyright is not very likely to take place in foreseeable time, it is and will remain a must for designers of various systems processing grey literature to back them not just by proper (universal) concept, system and technology, but also by country-specific analysis and implementation of applicable legal regimes.