

H. Summary

The Users' Rights in the Information Society

Dissertation thesis “The Users’ Rights in the Information Society” focuses on the copyright exceptions and limitations (hereinafter referred to as copyright limitations) as an area which, in addition to the licensed use, affects users of copyrighted works in the most direct way. The term “users” is understood in the concept of this work, in accordance with foreign and Czech scientific literature, in a broad sense, covering also consumers of copyrighted works or users of digital content on the Internet. In the context of copyright limitations users are allowed to use copyrighted works on a non-contractual basis, without the consent of the author, either for free or in the form of a paid statutory license. Copyright limitations include a wide range of uses reaching from the quotations through the use for a private purpose to the so-called news reporting and governmental statutory limitations. The concept of users’ rights (despite - as seen from a certain angle - its actual existence) has not been so far defined in the legal literature in a consistent manner. However it attracts an exceptional academic attention for its conceptual and strategic importance. The concept of users’ rights represents - rather than a framework of real subjective rights - a platform for various efforts to regain the desired balance in copyright law after a period that focused on the expansion of the copyright law carried out partially at the expense of the user’s status in the system of copyright law.

The dissertation thesis is divided into five main parts. The first introductory section focuses on the general overview of the topic and the most important trends of the current copyright law. This section shares the concern of many scholars regarding the status of users in the system of copyright law, in particular in relation to the fragmentation of the legal provisions governing the copyright limitations and the weakening of their role in general. This disruption of the balance can be explained by the realized expansion of the copyright law. The

expansion can be divided into theoretical categories of primary and secondary expansion and their respective individual trends. This fact, together with the lack of flexibility in applying the copyright limitations due to stricter interpretation of the three-step test and the closed list of copyright limitations in the Information Society Directive, subsequently threatens even the legitimacy of the copyright law as such. The devaluation of the status of copyright limitations, in addition to unprecedented massive copyright infringements on the Internet, is considered to be the greatest threat to the current copyright law, and underlines the importance of the topic of this work. The final part of the introductory section contains an overview of scientific literature which has been up to the present dedicated to the topic of users' rights seen from different angles.

The second part of this work focuses on more general aspects and on the explanation of some contexts, which are interconnected with the dissertation topic. These topics include the main changes of the copyright law at the beginning of the new Millennium such as the impact of the Community law in this area, the profound influence of the international law-making process, the development of information technologies and greater involvement of the public into the debate on the copyright law. It reflects on the slow establishment of explicit reference in the legal norms to the principle of balance of interests in the copyright law. The achievement of the balance of interests in copyright law in practice is presented in detail on the internal and external limits of copyright law. The internal limits of the copyright law arising from the subject of protection, fulfilling of formalities known in the Anglo-Saxon copyright system, limited duration of copyright protection and limited scope of exclusive rights are shown together with examples. The external limits of the copyright law are presented in relation to other legal fields, especially the protection of human rights and fundamental freedoms, competition and consumer laws. These three legal fields are and increasingly will be representing the important border lines in the application of copyright law. For this reason, there is a special subchapter dedicated to the analysis of human rights and fundamental freedoms in relation to copyright rights and in general to other intellectual property rights in the international treaties, Community law and national constitutional systems of particular countries. It

states on the one hand ambiguous human-rights embodiment of intellectual property rights in the various legal norms and on the other hand human-rights status of number of copyright limitations. Together, these can bring in the future interpretation collisions. A classification of users to the basic categories of institutional users and end-users, including their individual subcategories has been carried out. Non-homogeneous understanding of users in copyright law is declared on the ambiguous conceptions of lawful use, lawful user and lawful acquirer as overlapping concepts of particular directives of the Community law. Current involvement of the public in the debate on the future of copyright law is presented by a detailed review of NGO activities in the last decade, especially at European level, giving insight into the history of the movement for users' rights. One of the subchapters is devoted to the evolution, the concept and development of the information society as a framework of the current development of copyright law. As a symbol of the significant change in the behavior of most Internet users there is mentioned the transition to the so-called Web 2.0 and from that resulting growth of influence of the so-called user-generated content. These trends and their dynamism put big pressure on the legal regulation and directly affect the applicability of many traditional copyright limitations in a changing digital environment. Another subchapter deals with the theoretical definition framework of copyright limitations, the used terminology and with the internal division of copyright limitations. Differences in the concept of copyright limitations between the continental and Anglo-Saxon copyright systems as well as the limitations of moral rights are also mentioned. In the final part of this section there is a general historical review of the evolution of copyright limitations starting from the emergence of modern copyright law in England, the establishment of copyright limitations in the early copyright laws of England, USA, France, Germany and Austria-Hungarian Empire, to the reference to the provisions covering this area in the first bilateral and multilateral international agreements and Community laws. Emphasis in this subchapter is given to the overview of copyright limitations in the historical context of the provisions in force at the Czech territory from the imperial patent in 1846 to the previous Copyright Act No. 35/1965 Coll. The general section concludes with a subchapter focused on economic aspects of

copyright limitations, with a reference to the recent studies on the positive impact of this area on the economies of the EU and the USA.

The third section of this work is of key importance and is also the most extensive part of the dissertation. This section contains a thorough analysis of the relevant provisions of international and Community law regulating copyright limitations for the purpose of their later comparative application to the corresponding provisions of the current Czech Copyright Act No. 121/2000 Coll. All provisions of the international treaties and Community law are analyzed according to particular normative requirements and their effects. Particular attention is paid to the practical application. Their overview is based on the available scientific literature and the case law (judgments of the European Court of Justice are used extensively). There is emphasis on European Union directives, which were direct and relevant sources for provisions of the Czech Copyright Act. The provisions of the Czech Copyright Act themselves are analyzed in terms of the success of the transposition of European and international norms, where a part of the provisions represents an incorrect implementation. The dissertation thesis proposes that these concrete parts should be changed *de lege ferenda*. Certain provisions of the Czech Copyright Act, which were not taken from the Community law, are analyzed with the same emphasis on individual normative requirements. The third part of the thesis is introduced by a subchapter dealing with the three-step test as the present primary interpretative tool for the scope of the particular copyright limitations. A three-step test is not only dealt with in regard to individual international treaties and to its occurrence in the Community law, but also it is drawn attention to problems related to its own text after the last implementation in the Czech Copyright Act. This chapter critically debates its non-homogenous use across various norms. The meaning of individual steps is presented in detail, in particular in connection with the interpretation adopted by the WTO panel decision. Decision WT/DS160/R itself is also elaborated on a factual basis. There are also mentioned alternative approaches to the three-step test associated i.a. with the efforts of the academic community for its balanced interpretation. Within the copyright limitations in the international treaties, the greatest attention is paid to provisions in the Berne Convention forming the basis

for other international agreements. This part critically approaches the fragmented set-up of this area that emerged rather spontaneously as a counterweight to the newly approved exclusive rights in the various revisions of the Berne Convention. Given the comparative focus of this work on European and Czech legislation, the copyright limitations for developing countries under the Annex to the Revised Berne Convention are discussed in less detail. The chapter also discusses the provisions governing copyright limitations in the individual treaties such as the Universal Copyright Convention, the TRIPS Agreement, and the WCT as well as the limitations to neighboring rights in the Rome Convention, Geneva and Brussels Convention and the WPPT. Copyright limitations in the Community law are contained in four directives (Directive on the legal protection of computer programs, Directive on rental right and lending right, Directive on legal protection of databases, Directive on the Information Society). The work also analyses gaps arising from this fragmented regulation. The interpretation problems arising from these legal gaps can negatively occur especially in case of complex multimedia digital content and multi-functional products that are so typical for the current market. The key Directive on the Information Society is critically perceived for its non-conceptual scope. On the one hand it establishes an enumerative list of copyright limitations and unilateral flexibility built on the three-step test, which brings subsequently a rigid interpretation of national provisions. However it leaves on the other hand most of its provisions as voluntary for transposition and it grants freedom to the Member States as far as copyright limitations for analogue use are concerned. Together with the ambiguously regulated overridability of art. 5 by the contracts and with the relation of copyright limitations to the technical protection measures, this proves the imperfect harmonization.

The fourth section is devoted to the further development of copyright limitations in the future. The introductory part of this section focuses on particular activities at the international level in the area of proposals of binding multilateral agreements as well as the case of development through soft law mechanisms. The latter is considered by many as a possible option for further progress to avoid the blocked international law-making process, as has happened in recent years. Examples of a possible development in analogy to the Tunisian model law for

developing countries or academic proposals for world copyright code are given. There are deeply analyzed proposals discussed in the WIPO concerning the international provisions on copyright limitations for people with visual impairment or for libraries and archives. Although these proposals contain many stimulating approaches and would in principle be useful for a similar modernization of the rules adopted at the international level, the discussed texts so far include many weaknesses and do not present fully balanced norms. On the other hand, some changes that will probably be introduced by the ACTA agreement or the draft of the international treaty on the protection of audiovisual performances, are not ground-breaking in nature and do not bring the expected new impetus for a more comprehensive and modern regulation of copyright limitations in the 21st century. The following subchapter is focused at the further development of copyright limitations at Community level. It analyses the proposal of a directive on certain permitted uses of orphan works as well as the academic efforts for the European Copyright Code. The planned revision of the Czech Copyright Act, according to current information, should not deeply affect the copyright limitations. Therefore the following subchapter discusses only the changes that are so far known, and that would not in some cases fully conform to certain aspects of the Community law. This section is concluded by short review of the concept of fair use, since the fair use or its components are often cited as possible future alternatives to the current model of closed list of copyright limitations in Europe. The flexibility of the concept of fair use is very interesting at the theoretical level. Most references have focused only on its implementation in the USA, while there is a more modern variant of fair use in the Israeli copyright law. This thesis therefore studies both variants for comparative reasons.

The fifth and final section focuses on more theoretical perspectives of the future direction of copyright limitations in the system of copyright. In this respect, it also encompasses a possible deepening of copyright limitations to the users' rights. Based on the previous sections, particularly with regard to the section on future development of copyright limitations on the international and Community level, the dissertation thesis concludes that the next decade will be marked by the expansion of copyright limitations. Primary expansion of copyright limitations

will be focused on the development of new specific copyright limitations or eventually on the extension of application of the existing ones to additional uses relevant to the digital environment. Secondary expansion of copyright limitations will take place owing to other legal fields, particularly in relation to consumer law. This horizontal expansion will be complemented also by the vertical expansion of copyright limitations at four levels - mandatory treatment of copyright limitations, maintenance of their scope despite the technical protection measures, promotion of legal analogy and extensive interpretation and higher enforceability of copyright limitations. Vertical expansion of copyright limitations and the debate on their enforceability can be combined with the discussions about the users' rights. The actual expansion of copyright limitations may lead (and it is already represented by these particular directions in the scientific literature today) to three different scenarios, - minimalist, maximalist and practical approaches. A minimalist approach divides copyright limitations into two categories where one associated e.g. with the mirroring of human rights and fundamental freedoms gains preferential status, which will have even priority over e.g. contractual arrangements. A maximalist approach is based on the notion of creating a counterpart of the exclusive rights in the form of subjective users' rights. A practical approach, to which this dissertation thesis tends, is based more on the evolutionary development of the relationship between authors and users by creating the needed flexibility in the interpretation of copyright limitations, allowing the use of legal analogy and an extensive way of their interpretation. The following subchapter applies the three proposals *de lege ferenda*. The proposals are presented on the example of the Czech Copyright Act, however they have a general applicability, especially where the adjustment at the Community level would be preferable due to a need of common framework in the Internal Market. The first proposal is to create a more balanced interpretation of the three-step test without changing its actual text by the adoption of the introductory provision on the purpose of the Act guaranteeing the balance of interests of authors and users in copyright law. This kind of preamble was taken over in a modified version from the previous Copyright Act No. 35/1965 Coll. The second proposal is to establish the possibility of analogy and extensive interpretation of the current copyright

limitations subject to prerequisite of compliance with the requirement of bona fide/fair practices and with the three-step test. A third proposal, then set the so-called reverse exclusion users' rights (i.e. preventing others from interfering into these users' rights), but only for the benefit of lawful users and only for other eventual acts necessary to fulfill the purpose of the ordinary use of the work (again provided that the requirements of bona fide/fair practices and the three-step test are fulfilled). This would be a certain limited version of digital exhaustion of rights for consumers, i.e. providing the legal certainty to lawful users, and thus the motivational impetus for the transition to the use of works in a legal way for the users of the digital content. In the following subchapter the pitfalls and conditions of adopting the users' rights as the truly subjective rights are discussed in detail. Furthermore it is stated there that part of the problems arising from a more limited role of copyright limitations is likely to be solved by the technological developments associated with the expansion of cloud computing. In the final part of this section a problem is mentioned concerning the existing scientific literature, which has so far insufficiently dealt with various scenarios of further development where eventual users' obligations would be seen as a kind of compensation for the adoption of users' rights. Without the additional research in this aspect (including the set-up, for example, of higher users' obligations for institutional users than for individual end-users), the alternative of the users' rights will not be relevant. The missing element of the well-defined users' rights and obligations is seen as the remaining core part for finalizing the mosaic of the modern copyright law for the 21st century. Copyright law is currently at a cross-road as it has never been challenged by such a deep crisis of legitimacy from the public. This work encourages proceeding faster with the reflection for the future progress of copyright limitations. This progression remains possible without encountering all of the accrued negative consequences of the expansion of copyright law. In the end Noah too started to build the Arch before it really began to rain.