LICENCE AGREEMENT IN THE LEGAL SYSTEMS OF THE CZECH REPUBLIC AND ENGLAND AND WALES

Diploma Thesis

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Diploma thesis is up-to-date to: October 2016
„I hereby proclaim that the submitted diploma thesis is devised exclusively by my own skill and labour and all its sources are properly referenced. Furthermore, this thesis has not been subjected to obtaining of any other or similar degree.”

In Prague on: Signature:
Acknowledgements

I wish to express my sincere gratitude towards my supervisor, JUDr. Petra Žikovská. This thesis would have never been written should not she approve its topic and provide me with always helpful advice and encouragement.

I also want to pay my deepest respect to Willis who held the door.
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## Abbreviations

### Czech

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tbody>
<tr>
<td>Civil Code</td>
<td>Act No. 89/2012 Col., Civil Code</td>
</tr>
<tr>
<td>Copyright Act</td>
<td>Act No. 121/2000 Col., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts</td>
</tr>
<tr>
<td>Trademarks Act</td>
<td>Act No. 441/2003 Col., on Trademarks</td>
</tr>
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### English

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tbody>
<tr>
<td>Britain</td>
<td>England and Wales</td>
</tr>
<tr>
<td>LDMA</td>
<td>Literary, dramatic, musical and artistic (works)</td>
</tr>
<tr>
<td>UK</td>
<td>The United Kingdom of Great Britain and Northern Ireland</td>
</tr>
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</table>
**European and International**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>Berne Convention</td>
<td>Berne Convention for the Protection of Literary and Artistic Works, first enacted in 1886</td>
</tr>
<tr>
<td>BSA</td>
<td>Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury, C-393/09</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>EPC</td>
<td>European Patent Convention, first enacted in 1973</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>Infopaq</td>
<td>Infopaq International A/S v Danske Dagblades Forening, C-5/08</td>
</tr>
<tr>
<td>TRIPS</td>
<td>The Agreement on Trade-Related Aspects of Intellectual Property Rights, first enacted 1994</td>
</tr>
<tr>
<td>UPC</td>
<td>Unified Patent Court</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>The World Trade Organization</td>
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Introduction

The objective of this diploma thesis is to bring a satisfactory analysis of law regarding licence contracts under two fundamentally different legal systems. Family of Continental legal systems will be represented by the law of the Czech Republic while historical country of Britain shall provide us with the most typical example of a Common Law country. I believe that closer scrutiny of abovementioned jurisdictions offers a unique opportunity to understand not only how the law stands and changes in time - I equally aim to offer a deeper illustration of rationales driving the contemporary state of affairs.

In addition to observation and subsequent description of various licensing features, I desire to unveil how colourful it is when two families of law collide and coexist with each other. The current law in the Czech Republic and Britain was born and developed under different policies and sources of influence. We were able to ignore the aching gap more or less successfully for hundreds of years, relying on territorial effect of law. Nevertheless, the situation had been changing over years and it shifted significantly when economic interests became more and more pressing in the post-colonial age. When the time was ripe to open the borders of individual countries and bring the world closer together, legislators had to step out of their shells of tradition and settle for an inevitably problematic compromise. In order to tackle the outcome of this vital need of cooperation, I will address how respective legal systems were influenced and which steps had to be made at both European and international level concerning intellectual property law. Simultaneously, I will (with a very limited enthusiasm, as I am willing to admit beforehand) reflect on consequences that are probably about to arise from the UK's decision to leave the community of the EU member states. My tentativeness regarding this side of my work arises from an uncertainty that lies over the whole so called Brexit decision – which, when combined with a complex phenomenon of European regulation on intellectual property law, seems to ask me questions that are virtually impossible to answer at this time.
Intellectual property law is one of the most globalised legal areas due to its highly dynamic nature. Intellectual property rights are prone to spread virally, reaching millions of subjects in a split of a second. We can use evolution of copyright at the British Isles as an illustrative example, while copyright is a notoriously frequent subject to licensing. Its origin is historically linked to written literary works\(^1\). The imminent need of copyright protection can be followed back to the middle of the 15\(^{th}\) century when Johannes Gutenberg invented printing press technology. Prior to the introduction of this magnificent machine, the society was not urged in any way to protect the intangible property of ideas in a comprehensive manner, legally or otherwise. It demanded a significant amount of time and labour to reproduce any literary work, therefore plagiarism did not represent a phenomenon of serious concern. As soon as massive production of literary works took place, economic interests were threatened and copyright protection emerged. Furthermore, the invention of internet "changed the gear\(^2\)" of our world, therefore virtually every asset protected by the intellectual property law is threatened on a daily basis by the internet. Newly emerging ways of infringement embody another feature discussed later in this diploma thesis.

Law is a comprehensive sociological phenomenon and it goes without saying that legislators all around the world choose different tools to regulate their respective legal systems. Reasons, justifications and utility of individual legislative methods differ significantly, as well as independent commentators' (dis)approvals regarding them. Legislative instruments, their rationales and arising criticism are another methods I intend to apply in this work.

Finally, I choose licence agreements as a subject matter of this diploma thesis because of the inherent contractual freedom it offers and two vital consequences arising from it. Firstly, Continental Law countries base their legal theory on dichotomy of private and public law, with its foundation in reception of Roman legal culture\(^3\). Licence contracts are traditionally held to belong in the area of private with all arising

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3 Explanatory notes to the Civil Code, page 1.
consequences\textsuperscript{4}. Notwithstanding this dichotomy, licence agreements are typically understood in the perspective of contractual freedom by both Continental and Common Law countries. Building on this, licensing is a predominantly liberal act and any intervention by the government\textsuperscript{5} must be well justified on the basis of cost-value analysis. It will be examined more closely how many restrictions do Czech and British law vest in provisions regulating licence agreements and whether or not are these broadly accepted as just and necessary. Secondly, contractual freedom entitles private entities to exercise their freedom of will and include endless portfolio of contractual provisions in their contracts. It is a question of observation to conclude that legal practice is always more vivid and colourful than legislators' attempts to foresee undesirable outcomes and regulate in pursuit of avoiding those. Contractual parties are usually rational in their contractual negotiations, i.e. seeking the most profitable and safe bargains – which is what drives them to agree on various interesting and well-designed contractual provisions. I find it necessary to address the most frequent and influential of these provisions briefly as well as those covered by the legislation. It should be said in advance that contractual types concurring to licence agreements often fit the need of flexibility more successfully, which is why I intend to address some of these alternative contracts as well later in this thesis.

\textsuperscript{4} TRIPS agreement recognizes that intellectual property rights are private rights in its preamble.

\textsuperscript{5} Or any other entity endowed with public power entitling it to regulate, e. g. international organizations such as WIPO.
1. Licence

Licence agreements have a very simple core function – to provide licensee with a licence granted by the licensor. However, the term "licence" is everything but simple to define. I will shortly address how various areas of law provide us with different meanings of licence and which particular kind of licence is subject matter to this diploma thesis.

1.1. Definition and Classification of Licence

There is a rather ancient origin behind the term licence as we know it in contemporary law. Etymologically speaking, we can track the term "licence" back to the age of the Roman Empire. There is an undisputable resemblance with Latin words licere (allow, permit) and licentia (permission, freedom of will). It indeed is a common feature among all forms of licence we distinguish at law to give a permission by one entity to another. I believe that the best way to classify and describe different understandings of licence is via dichotomy of private and public law adopted by the Continental Law jurisdictions.

Public licence is well known to every regulator all around the globe, regardless of colourful terminology adopted by individual governing entities. Common Law countries broadly recognize advantages of licensing in Consumer Law and related policy. Its core premise is based on prior examination by an authority responsible for market surveillance. Should an application meet all conditions necessary, the applicant is granted the licence – a permission to carry out activities specified in the licence. Advocates of prior approval argue that prior examination of goods or services enables the society to minimise damages inflicted upon recipients of potentially dangerous goods or services.

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7 Licensing is, in this case, synonymous with "prior approval".
Practically speaking, there is the UK Licensing Act 2003 that regulates goods and activities possessing an aggravated level of risk, such as alcohol, regulated entertainment and late night refreshment. The law of the Czech Republic is not unfamiliar with the doctrine of licensing either. Similarly, Czech legislator acknowledges that some markets represent threats too serious to be left without regulation. A reasonable answer is contained in the Act to Regulate Trades in the form of concessions\textsuperscript{9}. The Act to Regulate Trades intentionally distinguishes between two forms of trade and regulates more strictly those that bear grave potential risks. Analogically, there are professions that are conditioned to prior approval, such as medical practitioners or lawyers. The Czech Bar Association is a self-governing body that supervises providing of legal services by attorneys in the Czech Republic and only those who are members of the Bar are allowed to offer legal services as attorneys. Abovementioned are only few examples of what we can call licences in public law. All of them follow a similar scheme of an authorising condition granted by a governing body prior to the commencement of the regulated activity.

I stated above that I am particularly fond of licences because of the contractual freedom they offer. The abovementioned statement forces me now to briefly address licences that lack any contractual freedom. I can flag up illustrative examples in Czech law of copyright, such as free use, statutory licences\textsuperscript{10} or orphan work\textsuperscript{11}. To balance this thesis properly, I mention compulsory patent licences in the UK Patents Act 1977\textsuperscript{12} in response - all the same, their origin can be tracked to international legislation\textsuperscript{13}. I wish to conclude now that it is not the objective of this work to elaborate further on these particular types of licences. My main goal is to illustrate how the Czech and British law grasp on the idea of contractual freedom regarding private licences and licences presented in this paragraph are fundamentally inappropriate in this matter, therefore will be hereinafter omitted in this work.

\textsuperscript{12}See Sections 46 and following of the Patents Act 1977.
\textsuperscript{13}E. g. TRIPS contains provisions in relation to compulsory patent licences.
After all, abovementioned types of licences are undoubtedly, at least speaking in quantity, outnumbered by freely disposable private law licences. It is broadly accepted by the authorities of EU member countries (the UK amongst them, for the time being) that licence is a permission of the licensor allowing the licensee to exercise intellectual property rights that are held by the licensor – simply speaking, licence grants the permission to do something that would be an infringement of the rights without the licence. Industrial Property Offices of both the Czech Republic and UK are no exceptions to this definition and explicitly use it in their guidelines.14

1.2. Intellectual Property

Omitting public licences that I addressed earlier, it can be summarized that by the virtue of licence licensors offer dynamic, modern and vivid rights of intellectual property. It is licence contract that is the key legal instrument of this work. Notwithstanding fatal importance of licence agreements regarding this thesis, I first have to address the main differences in intellectual property rights between the law of the Czech Republic and Britain.15 After all, intellectual property is all about protection of intangible property and licence, as said above, is a defence to otherwise infringing conduct. Building on that premise, licence is devoid of utility if there is no protection. That being said, I intend to dedicate the following part of my work to pinpointing of the most crucial distinctions between the Czech and British law regarding intellectual property rights. All I can say in advance is that there are fundamental differences between the two legal systems I put under scrutiny. Acceptable scenarios of compromise and humble predictions of mine will be provided to the respective queries accordingly.

15 Generally speaking, most of these differences are directly applicable to the Common/Continental Law dichotomy.
1.2.1. Intellectual Property Rationales

Before I engage in defining intellectual property as a part of modern legal vocabulary, I find it appropriate to unveil its rationales first. Area of intellectual property is highly politicized and it would be naïve to think that it is universally accepted as free of controversy in modern law. Those advocating broad protection of intangible intellectual assets tend to argue that intellectual property law is necessary in order to secure time, money and energy invested in their creation and capitalization. Other intellectual streams point at activities abusing intellectual property law and consequently violating economy, such as cyber squatters acquiring potentially lucrative domain names or patent trolls who put honest ways of research and development in jeopardy\(^\text{16}\). Building on imperfections of intellectual property law, many experts are convinced that protection of intellectual property as we know it in contemporary law is a serious obstacle to development and puts unjustified restrictions on intangible things that should be, by their elementary nature, free for everybody to use. Moreover, there are commentators who do not hesitate to describe intellectual property as a cancer of globalised law\(^\text{17}\).

The fields of war over utility and efficiency of intellectual property law are usually split into two mutually related categories. Firstly, there is a call upon ethical and moral character of intellectual property rights. Intangible character does not degrade value or social importance of intellectual property rights in any way. Taking into account state of technology in the 21\(^{\text{st}}\) century, it is striking me as an easy job to print a book – I can do it with my printer in a minute. When I am done with the printing task, I have exclusive property rights over the tangible book. Contrary to the material form of the book in question, it demands a vast amount of resources to write the respective book, i.e. to create an intangible literary work protected by copyright. That being said, there are serious arguments suggesting that protection of intellectual property rights is justifiable on ethical and moral grounds. Similarly, trade mark protection is justified

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\(^\text{16}\) BENTLY, L., SHERMAN, B., see reference 2, page 4.  
insofar as it prevents third parties from becoming unjustly enriched by someone else's good reputation or, in different words, "reaping where they have not sown"\textsuperscript{18}.

Secondly, commentators focus on the grounds of instrumental justifications. This argument discusses how intellectual property rights encourage desirable activities\textsuperscript{19}. Patents might provide incentives to spend resources on research and development as well as enhancing current state of art by being published. Similarly, trademarks are frequently seen as a great tool of consumer protection, bearing a badge of origin and consequent quality of the goods or services. There is a huge amount of polarized literature on this topic and it is not likely that commentators ever make piece on a compromise satisfying both camps. I personally hope they will not – lively discussion is, in my opinion, crucial for dynamic areas of law.

Putting aside economic and philosophical views of intellectual property, we have to acknowledge that international law of human rights, as it stands, requires us to protect intellectual property - Universal Declaration of Human Rights\textsuperscript{20} and Charter of Fundamental Rights of the European Union\textsuperscript{21} being only the most important ones\textsuperscript{22}. The question therefore stands not if the legislators should recognize intellectual property at all, but what balance between protection of intellectual property rights and opposing interests should be established. I will focus on this fragile balance throughout this thesis on the platform of individual intellectual property rights.

\textbf{1.2.2. Definition and Classification of Intellectual Property}

Intellectual property is, much like licence, hard to define. Both Czech and British commentators agree that intellectual property law creates exclusive rights in a wide and diverse range of intangible things\textsuperscript{23}. Nevertheless, there is no exhaustive list provided by neither the Czech nor British legal science (which, as I explain later, is

\begin{itemize}
\item \textsuperscript{18} BENTLY, L., SHERMAN, B., see reference 2, page 5.
\item \textsuperscript{20} Article 27 (2) of the Universal Declaration of Human Rights.
\item \textsuperscript{21} Article 17 (2) of the Charter of Fundamental Rights of the European Union.
\end{itemize}
arguably for the best). British commentators argue that there are six main undisputable rights within intellectual property law:

- Copyright;
- rights in performances;
- patent;
- trade mark;
- registered designs and
design rights.

Rights listed above are undoubtedly recognized by the British law and thus are suitable for disposition via licence contracts. However, there are rights that do not fall within any of the groups offered above and still attract protection under British intellectual property law. The law of the UK, in addition to the six fundamental rights, constantly tries to acknowledge or repudiate various rights as intellectual property rights. A particularly heated discussion was held in regard of technical or commercial information endowed with a high level of confidentiality. The Supreme Court tried to bring more clarity in this topic – with rather unsatisfactory results. In Phillips v. Mulcaire, the Supreme Court held that the term intellectual property "lacks potency" to be defined and therefore there is no general consensus whether confidential information can be unconditionally classified as an intellectual property right. It now appears that intellectual property law in the UK must, as a legal concept, determine its meaning by reference to the specific legislative context in individual cases.

Czech commentators, on the other hand, traditionally prefer to classify intellectual property by distinguishing between two or three specific categories. Firstly, there is a group of 1) industrial property rights, accompanied by 2) copyright and 3) rights related to copyright and the rights of a database maker to his database. Concretely speaking, there is a broad portfolio of intellectual property rights recognized by legal literature: rights to literary, artistic and scientific works, the rights of a

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24 TORREMANS, P., see reference 1, pages 3-4.
27 HULMÁK, M., et al., see reference 6, page 599.
performer to his artistic performance, the right of a producer of a phonogram to his phonogram, the right of a producer of an audiovisual fixation to his fixation, the right of a radio or television broadcaster to his broadcast, rights to inventions, scientific discoveries, industrial designs and models, trademarks, brands, business names and firms, protection against unfair competition, other rights related to intellectual activity in industry, science, literature and art, appellation of origin of products and many others, depending on which author you favour\(^{28}\).

I already rendered a presumption that intellectual property is a strongly globalised legal area attracting lots of political attention from all around the globe. It should therefore go without surprise that we register a portfolio of international treaties concerned with intellectual property that try to carry out their own definition of intellectual property. Convention Establishing the WIPO signed at Stockholm on 14th July 1967 offers us its own list of rights protected by intellectual property law in Article 2, paragraph VIII, namely:

- literary, artistic and scientific works;
- performances of performing artists, phonograms, and broadcasts;
- inventions in all fields of human endeavour;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

As we can see, the convention cited above intentionally leaves it possible to include new rights by the virtue of its last sentence. It is not at all rare to leave the list of

intellectual property rights open, as we can see on example of other international treaties.

Concurring definition of intellectual property was attempted by the TRIPS agreement. Following the wording of TRIPS, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II\textsuperscript{29}. By the means of interpretation, that leaves us with copyright and related rights, trade marks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and protection of undisclosed information. Despite not including an open category of intellectual property following wording of the Convention Establishing the WIPO, TRIPS does not restrict its signatories from including additional intellectual property rights they desire to protect.

I mentioned above my fondness of the open-ended doctrine regarding intellectual property rights in pursuit of flexible protection. I deem highly convenient and preferable not to enact a closed-list for intellectual property rights. The motive behind is inextricably linked to the very nature of intellectual property rights explained above, i.e. their vivid and dynamic evolution in everyday life. Preferring closed lists puts undesirable restrictions on newly emerging rights. I illustrated earlier that intellectual property law is facing threats from new technologies of communication, such as the internet. Leaving intellectual property law open to new rights should be understood as a valuable adaptive tool necessary to successfully face the challenges of modern technologies.

Notwithstanding the importance of flexibility regarding definitions of intellectual property rights, it is fair to say that the open-ended approach might give rise to some problematic issues as well. I stated above that this diploma thesis focuses on intellectual property rights that are suitable for being a subject matter of licence agreements. Contractual parties regularly have to face a preliminary question whether the right they wish to dispose with is a genuine intellectual property right qualified for transaction. I can now conclude that the current state of intellectual property definition is flexible enough to cover newly emerging and ever changing intellectual property rights and, at

\textsuperscript{29} Article 1 paragraph 2 of TRIPS.
the same time, inherently brings queries what rights can be disposed with via licence agreements\textsuperscript{30}.

2. **Comparison of Czech and British intellectual property**

The ultimate objective of this thesis is to provide the reader with an illustration of practical legal agenda that might be encountered in dealing with Czech and British licence contracts. Licence contracts central to this work allow the contractual parties to dispose with their intellectual property rights – regardless of how extensive or restrictive we are in determining which rights have intellectual property nature. That is why I do not aspire to render an exhaustive list elaborating on numerous intellectual property rights that modern law recognizes. Instead, I choose to engage in a different technique of research.

I wish to dedicate following pages to two particular intellectual property rights I find most suitable for the purpose of this work, namely copyright and patent. I pick these two areas of law for several crucial reasons. Firstly, they are typical representatives of intellectual property law. Copyright is a rather independent area of intellectual property law, unique in many of its features. Patent law, on the other hand, is an undisputable member of industrial property branch recognized all around the world. Secondly, copyright and patents are notoriously known for being subjected to capitalization via licence agreements. Thirdly, and arguably most conveniently, it is copyright and patent that are based on substantially different principles in the legal systems of the Czech Republic and Britain. That is why deeper understanding of these legal regimes is crucial in international trade. I will flag up the most critical distinctions regarding subsistence, scope of protection, interpretation and subsequent policies. International legal sources and tendencies will be provided as often as possible, reflecting on obligations arising from both European and international law.

2.1. **Copyright law**

I declared earlier that copyright law is a vivid market commodity. Conditions of economic dispositions are therefore of the highest importance to consider for every legislator. Before I turn to licence contracts and other forms of copyright exploitation, I have to address substantive law of copyright in the Czech Republic and Britain. As we
will see later, nature of copyright as understood in two different legal systems is what stands behind law of licensing and undoubtedly emanates into it.

Building on high economic potential of copyright, it is sensible enough that most countries wish to, at least partially, unify copyright law to promote trade at international markets and support legal certainty regarding subject matter of such trades. Czech Republic and UK are signatories to a substantive body of international treaties on copyright, most importantly to Berne Convention, Rome Convention\(^{31}\), TRIPS, WIPO Copyright Treaty\(^{32}\), WIPO Performances and Phonograms Treaty\(^{33}\), Beijing Treaty on Audiovisual Performances\(^{34}\) or Marrakesh Treaty for the Visually Impaired\(^{35}\).

However, international treaties listed above are not the most important international source of law in neither the Czech Republic nor the UK. EU law has a significantly higher impact on contemporary copyright law in all EU member countries, as will be illustrated on the following pages. EU affects copyright law of member states mostly via directives and case law, while the most influential directives are Software Directive\(^{36}\), Related Rights Directive\(^{37}\), Cable and Satellite Directive\(^{38}\), Term Directive\(^{39}\), Database Directive\(^{40}\), E-commerce Directive\(^{41}\), Resale Rights Directive\(^{42}\), Orphan Works Directive\(^{43}\), Collective Rights Management Directive\(^{44}\) and, most importantly, Information Society Directive\(^{45}\) also known as the "Copyright Directive".

We should not forget that the internal market of the EU is based on the free movement

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\(^{31}\) Rome Convention, first enacted in 1961.
\(^{32}\) WIPO Copyright Treaty, first enacted in 1996.
\(^{33}\) WIPO Performances and Phonograms Treaty, first enacted in 1996.
\(^{34}\) Beijing Treaty on Audiovisual Performances, first enacted in 2012.
\(^{35}\) Marrakesh Treaty for the Visually Impaired, first enacted in 2013.
\(^{36}\) Directive 2009/24/EC on the legal protection of computer programmes.
\(^{37}\) Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
\(^{38}\) Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
\(^{39}\) Directive 2006/116/EC on the term of protection of copyright and certain related rights.
\(^{40}\) Directive 96/9/EC on the legal protection of databases.
\(^{41}\) Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
\(^{42}\) Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.
\(^{43}\) Directive 2012/28/EU on certain permitted uses of orphan works.
\(^{44}\) Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
of goods, services, capital and people. Rights recognized by copyright law are no exception and certain level of unification is inevitable in that matter. Until the end of June 2016, it seemed that European copyright was slowly evolving into a unified shape, regardless of obstacles that it has always faced. These impediments that complicate compromise over the European copyright originate predominantly from the very nature of two independent legal families examined in this thesis. Nevertheless, the UK in/out referendum recently made the British will to leave the EU clear and a huge question mark was casted upon the future of European copyright.

2.1.1. Czech Copyright law

Copyright law in the Czech Republic has developed under a strong influence of Continental legal culture. Its origin is trackable via many routes in practice. First of all, copyright in the Czech Republic is codified in the Copyright Act – which is a legislative practice linked to Continental Law for centuries. That is why I will engage predominantly in statutory provisions of the Copyright Act trying to grasp on contemporary state of copyright in the Czech Republic. Nevertheless, I at least have to mention that the Copyright Act explicitly states that it implements relevant EU legislation. Beside European legislation, a substantive influence of international treaties can be identified in the Copyright Act.

The Copyright Act provides copyright protection exclusively to two categories of work. Firstly, it is author's work as defined in section 2. Secondly, the Copyright Act protects rights related (neighbouring) to copyright contained in sections 67-87. The dichotomy of copyright protected works has a long standing history in the Continental Law and Czech Republic is not exceptional in enacting this distinction – in analogy, France acknowledges droit voisins and Germany protects verwandte Schutzrechte.

Coming back to author's works, a backbone of copyright protection, we have to carry out a deeper analysis of section 2 (1), wording: "[t]he subject matter of copyright shall be a literary work or any other work of art or a scientific work, which is a unique

46 Article 1 of the Copyright Act.
47 Which is based on Article 2 of the Berne Convention.
outcome of the creative activity of the author and is expressed in any objectively perceivable manner including electronic form, permanent or temporary, irrespective of its scope, purpose or significance [...]. A work shall be, without limitation, a literary work [...]. Section 2 (1) provides with protection only three categories of work - literary, artistic and scientific – without any legal definition of these. Commentators argue that, in fact, there are only two categories of work, for literary works can always be subsumed under either artistic or scientific works\(^\text{49}\). Nevertheless, authors' works in neither of these categories are affected by their scope, purpose or significance. Even authors' works that in some way violate public law (e.g. administrative, criminal) are protected by Czech law of copyright.\(^\text{50}\)

Elaborating further on categorization of authors' works, section 2 (1) of the Copyright Act contains an open-ended list regarding typology of author's works, naming literary, musical, dramatic, choreographic, pantomimic, photographic and several more types of work. Demonstrative character of this list intentionally leads to a liberal interpretation of law. Copyright Act does not rely on rigid categorizing of works – every literary/artistic/scientific work that meets subsequent necessary conditions of the Copyright Act is granted copyright protection. That is why it is not vital for the authors to fit their work within any of the subcategories of works listed in section 2 (1) of the Copyright Act.

Following the precise wording in section 2 (1), not every literary/artistic/scientific work is qualified for protection – only those that satisfy a condition of being a unique outcome of the creative activity of the author. Author's work necessarily originates from its author's mind and is a reflection of his personality\(^\text{51}\). There is a broad portfolio of influences projected into the work by its author – state of mind, creative abilities, incentives and other unique personal characteristics\(^\text{52}\). A creative author projects the mixture of his personality into the work via process of creative activity, giving rise to a unique author's work bearing features emanated from the author as a human individual. Emphasis on author's unparalleled

\(^{49}\) Explanatory notes to the Copyright Act, section 1.
\(^{50}\) TELEC, I., TŮMA, P., see reference 10, pages 24-27.
\(^{52}\) TELEC, I., TŮMA, P., see reference 10, pages 18-19.
personality arises from the approach of Continental Law towards copyright, which is fundamentally built on human rights\textsuperscript{53}. In conformity with this doctrine, author's work is a mere reflection of its author.

However, the Copyright Act does not provide us with a definition of creative activity, which is why we have to shift our attention to case law and legal literature seeking the true meaning of this term. The Supreme Court has pointed at this absence and declared desirability of defining the creative activity. The Supreme Court itself adopted a rather straightforward and easily approachable definition: creative activity is an activity leading to "creation of an intangible asset with its final form obtained both intentionally and unintentionally, dependant on author's personal attributes essential for the newly created intangible asset"\textsuperscript{54}.

Definition adopted in the Supreme Court's decision and intangible character of copyright lead us to a conclusion that creative activity is always a mental activity carried out by the author – which cannot be understood as to exclude associated mechanical activity. Also, from the very meaning of word creative, mere copying, repeating etc. is not qualified to attract copyright protection.\textsuperscript{55}

Another cumulative condition of section 2 (1) is that the work is expressed in any objectively perceivable manner including electronic form, permanent or temporary, irrespective of its scope, purpose or significance. It means that a mere unexpressed idea is not capable of attracting protection by copyright. A material expression is necessary to occur for copyright purposes, no matter how ephemeral in nature. This is why a scientific speech given by a lecturer or an improvised song sung by a street performer will be protected by copyright in the Czech law without being recorded in a material form. Aforementioned works are expressed in an objectively perceivable manner when their respective authors produced sound, materially affecting surrounding air communicating the content of their respective authors' works. However, their works

\textsuperscript{54} Supreme Court, decision No. 30 Cdo 4924/2007.
\textsuperscript{55} Border cases can be seen in translations, collections of work etc. These categories are protected by copyright despite a certain derivative character.
must be perceivable via senses endowed in human beings\textsuperscript{56} – effectively disqualifying elements beyond the scope of sensual perception.

Coming back to the doctrine of human rights inseparably linked to Czech copyright law, it is argued that a real author's work can never happen to exist in the exact same version anywhere around the world. This premise can be argued in two ways. Firstly, there is a quantitative condition of author's creative activity, invested in the work.\textsuperscript{57} Secondly, there is a statistical uniqueness of the work processing the likelihood of repetition regarding authors' works among multiple authors. Unlike industrial rights, copyright does not follow laws of nature and, as advocated by the Continental legal systems, absolutely unique personalities of individual authors emanate into their respective author's works.

Nevertheless, there is a substantive exception to the uniqueness of authors' works described above. Section 2 (2) of the Copyright Act provides the same level of protection to so called fictitious works consisting of computer programmes, photography and databases. These works are subjected to a lower threshold of originality than standard authors' works. The requirement of uniqueness is omitted and the authors only have to prove that these works are made as their own intellectual creation. The motive behind this lower threshold is relatively simple and purely utilitarian. A photography serves well as an illustration why fictitious works do not necessarily have to show uniqueness. Think about all the visitors at the Tower Bridge in London taking thousands of pictures every day, many of them with the same device model, setting, from the same spot and at the same time (relatively), inevitably giving rise to a very similar, nearly identical photo. Czech legislator decided to address this practical problem by lowering the originality threshold for fictitious works contained in section 2 (2) of the Copyright Act.

I declared above that the Continental Law origin of Czech copyright law is ever present in numerous outcomes and the person of the author is one of them. Section 5 (1) of the Copyright Act allows only natural persons to become authors of authors' works. There is undisputable logic behind this arrangement. Only natural persons are able to

\textsuperscript{56} TEL\textsc{e}C, I., T\textsc{u}MA, P., see reference 10, pages 22-23.

\textsuperscript{57} TEL\textsc{e}C, I., T\textsc{u}MA, P., see reference 10, pages 19-21.
express their "creative soul"\textsuperscript{58} and give rise to intangible content of copyright. Legal entities are, after all, a mere creation of law and their will is exercised via natural persons. That is why they lack unique personality indispensable in the nature of author's work.

Should all abovementioned statutory conditions be met, author's work appears and the author holds copyright in it. Czech literature describes the (subjective) rights vested in copyright as rights constituted in author's favour that are executable in regard of the created work\textsuperscript{59}. The Copyright Act categorizes these rights into two fundamentally different groups – moral and economic rights\textsuperscript{60}. Moral/economic rights dichotomy is essential for copyright disposition in the Czech Republic, as I will address later in more detail.

It goes without surprise that emphasis on protection of moral rights is another Continental law tendency arising from doctrines of human rights and legal naturalism. Moral rights are, following aforementioned doctrines, forbidden to be waived or disposed with\textsuperscript{61} and cease to exist upon author's death\textsuperscript{62} – which is a rather confusing statutory wording, because certain protection of moral rights post mortem is provided by virtue of section 11 (5) of the Copyright Act. Distinguishing moral and economic rights in copyright law might lead us to conclude that Czech copyright law is dualistic – an objection to this presumption will arise in discussion of copyright transfer later in this work.

Copyright Act leaves us with four individual rights incorporated in portfolio of moral rights. Section 11 defines right to publish the author's work, right to claim authorship, the right to decide whether and in what way the authorship is to be indicated when the author's work is made public and the right to inviolability of the author's work.

\textsuperscript{60} Section 10 of the Copyright Act.
\textsuperscript{61} Author is only entitled to authorize interference with his moral rights, see at TELEC, I., TŮMA, P. Licenční smlouva v pojetí nového občanského zákoníku. In: JAKL, L., ed. Nový občanský zákoník a duševní vlastnictví. First edition, Praha, Metropolitan University Prague Press, 2012, ISBN 9788086855875, page 89.
\textsuperscript{62} Section 11 (4) of the Copyright Act.
The means of further interpretation of the Civil Code may allow us to include withdrawal from the agreement due to a change of the author’s conviction\textsuperscript{63} and right to prior correction regarding publishing licence agreements\textsuperscript{64}, whilst both rights are based strongly on moral rights foundation\textsuperscript{65}.

Economic rights in copyright, contrary to moral rights, have a utilitarian function - capitalization on copyright takes place via economic rights. Economic rights appear in many shapes described closely in sections 12-27 of the Copyright Act. Statutory wording of section 12 (5) conveniently leaves it open to interpretation what "use" of copyright protected work means. Considering open-ended definition of "use" and quantity of other economic rights, I can now conclude that Czech copyright law provides the right holder with a flexible and comprehensive protection of his economic interests in intangible property vested in author's work\textsuperscript{66}.

Nature of economic rights is significantly disproportionate compared to its moral rights counterpart. However, despite the moral/economic rights dichotomy, there are certain features they have in common. Analogically, economic rights cannot be waived, are not subject to the execution of a decision\textsuperscript{67} and are not transferable\textsuperscript{68}. Contrary to moral rights, economic rights can be inherited and thus be held by a legal entity as well as by natural persons. Finally, prohibition of transferability does not preclude economic rights from all forms of disposition, as I will illustrate later in this thesis.

\section{2.1.2. British Copyright law}

Copyright law in the UK is regulated mostly via statutory instruments, contrary to traditional legislative techniques in Common Law. The code covering most of copyright law in Britain is CDPA 1988, significantly amended by the EU law. CDPA 1988 is the first code abandoning a formal distinction between author's rights and neighbouring rights. Nevertheless, material categorization is still present in the CDPA 1988.

\textsuperscript{63} Section 2382 of the Civil Code.
\textsuperscript{64} Section 2385 (1) of the Civil Code.
\textsuperscript{65} ŠEBELOVÁ, M., see reference 59, page 47.
\textsuperscript{66} Economic rights are practically identical in Czech and British copyright law.
\textsuperscript{67} Unlike claims arising from them.
\textsuperscript{68} Section 26 of the Copyright Act.
The CDPA 1988 provides a detailed and closed list of subject matter protected by copyright law. In order to be granted copyright protection, a work must fall within one of eight categories: literary works (restrictively interpreted, as we will see), dramatic works, musical works, artistic works, films, sound recordings, broadcasts and published editions\(^69\). Opposed to Continental Law system, creations in all eight categories are called "works", i.e. CDPA 1988 does not formally recognize a special category of neighbouring rights. However, as we will see later, material distinction still separates eight categories of works listed in CDPA 1988.

Some of the eight copyright protected works are defined in CDPA 1988 (literary works\(^70\)) and some are not (dramatic works). All the same, every particular category has been elaborated on by both British and European courts. British copyright law is more restrictive in this matter compared to liberal Czech requirement of literary/artistic/scientific nature in author's work. Subsuming individual works under one (or more) of the protected categories makes judges engage in comprehensive and often controversial legal arguments. The results are, every now and then, balancing on the common sense.

One of the most famous cases illustrating how tricky it is to subsume certain works under one of the eight categories is represented by Creation Records v. News Group\(^71\) case. This dispute was based on a scene arranged by Noel Garragher in preparation of shooting for Oasis' album Be Here Now. Members of the band stood around a pool and various objects were placed in a rather artistic manner. However, despite extensive security precautions, a newspaper photographer took a photo of the scene. The newspaper published the photography, which was significantly similar to a photography used later by the record company, and even offered to sell posters of the scene. The record company brought a claim based on copyright infringement and – controversially - failed. The High Court via Lloyd J held that the scene was not protected under any of the eight (then nine) categories of work, arguing that a) the scene was inherently static and lacked movement, story or action, therefore it could not be a dramatic work b) the scene was not carved, modelled or made in any other way in

\(^{69}\) Section 1 of the CDPA 1988.

\(^{70}\) Section 3 (1) of the CDPA 1988.

which sculpture as an artistic work is made c) the scene was not a work of artistic craftsmanship since it was a mere assemblage of objects d) the scene was not a collage for its ephemeral character and e) the two photographs arose from a common source and therefore lacked copying, regardless of their similarity. Despite the fact that interim relief was granted on breach of confidence\textsuperscript{72}, the scene was found to fall outside copyright protection. I strongly doubt that the same result would be reached applying provisions of Czech Copyright Act.

Perhaps even more questions were raised by Lucasfilm Ltd. v. Ainsworth\textsuperscript{73}. A notoriously known Stormtrooper helmet from the Star Wars franchise was held under scrutiny in this case. Mann J carried out a very thorough argumentation on the nature of sculpture protected as an artistic work, ultimately reaching a conclusion that Stormtrooper helmet is not a sculpture, therefore cannot be granted copyright protection. Mann J argued that the primary purpose of a sculpture is to bear visual appeal intended by the artist. Contrary to that, "[t]he purpose of the [Stormtrooper] helmet was that it was to be worn as an item of costume in a film, to identify a character, but in addition to portray something about that character—its allegiance, force, menace, purpose and, to some extent, probably its anonymity. It was a mixture of costume and prop. But its primary function is utilitarian."\textsuperscript{74} I personally find the consequences of this argumentation disturbing. Stormtrooper helmet is a unique piece of design, satisfying any threshold of originality I can think about. Its market potential is enormous and it is an inherent part of the Star Wars franchise. Denying protection to the helmet is strongly against my inner instinct regarding works given copyright protection. In addition, I am not convinced that the approach taken in Creation Records and Lucasfilm provides us with a desirable level of legal certainty. The judges in those cases engaged in a complex analysis of law, far beyond abilities of authors concerned with copyright protection. Consequently, I have doubts whether this is the right way to promote public faith in copyright.

I declared that the CDPA 1988 materially separates its categories of copyright into two groups. First group consists of LDMA works, also called authorial works,

\textsuperscript{72} Taking into account security arrangements aimed to provide privacy and confidentiality.
\textsuperscript{73} Lucasfilm Ltd. v. Ainsworth [2009] FSR 103.
\textsuperscript{74} Lucasfilm Ltd. v. Ainsworth [2009] FSR 103, par. 121.
opposed to second group of entrepreneurial works. The crucial distinction between authorial and entrepreneurial works is requirement of originality demanded only from authorial works. Unfortunately, CDPA 1988 does not provide us with a definition of originality, which is why we have to pay a great attention to relevant case law.

Before I start a brief historical illustration of originality requirement, I want to warn in advance that there is no broadly accepted agreement regarding originality in British copyright. All that commentators leave without dispute is that "the dividing line between original (and therefore protected) works, and unoriginal (and therefore unprotected) works, remains an uncertain and shifting one." I will try to tackle only the least controversial doctrines and highlight their justifications.

The oldest case relevant for contemporary understanding of originality in British copyright is University of London Press v. University Tutorial Press. Peterson J concluded in this dispute that originality is linked to the authors, therefore works are original if they "originate from the author and are not copied by him from another book or other papers [works]."

Building solely on University of London Press, we might be tempted to conclude that British concept of originality is somewhat similar to Czech requirement of a unique outcome of the creative activity of the author. Interpretation of originality in Ladbroke v. William Hill brings a serious objection against such conclusions. House of Lords addressed originality of treated football pool coupons arranged to allow customers gamble on the results in a certain number of matches. After a complex reasoning, Their Lordships found that disputed pool coupons were original compilations because of the labour, skill and judgment that had gone into devising the betting system that informed the coupons.

Labour, skill and judgment doctrine is a convenient label allowing me to describe the traditional British originality test. I must note that, no matter how

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75 Sound recordings, films, broadcasts, typographical arrangements.
76 Section 1 (1) (a) of the CDPA 1988.
79 Section 2 (1) of the Copyright Act.
influential the doctrine is, it has never been deployed with great precision. The judges rephrase the doctrine in a creative manner. Sometimes a demonstrative character is adopted, wording labour, skill or judgment, other judges favour cumulative reading labour, skill and judgment. More curiously, in Ladbroke v William Hill, both views were adopted\(^8^1\). On other occasions, the words work, capital, effort, industry, time, knowledge, taste, ingenuity experience and investment were employed\(^8^2\). Nevertheless, we can trace a unifying feature in the investment of human resources – opposed to Continental key feature of connection between the author's mental picture that is printed in the author's work.

To complicate this matter more, not all works created by application of labour, skill and judgment are protected by the British copyright. There must be a substantial amount of resources invested by the authors in their works to justify copyright protection. A broad portfolio of cases addressed the question of substantial amount regarding judgment, skill and labour. For example, in Merchandising Corporation v. Harpbond\(^8^3\), a rather simple face paint was held to be a product of insignificant amount of labour unqualified to attract copyright protection. Similarly, an advertising slogan The Lawyer's Diary was denied copyright protection "on the ground that the choice of words involved too slight a degree of skill and labour to justify copyright protection"\(^8^4\). Building on the argumentation adopted in case law demanding a substantial amount of labour, skill and judgment invested in copyright protected works, we can identify a quantitative condition of originality for LDAM works.

The UK courts elaborated further on the traditional originality doctrine discussing that "only certain kinds of skill, labour and judgment confer originality"\(^8^5\). The judges engaged in identifying the wrong type of labour rather than seeking any definition of the right type, denying protection to direct or slavish copy of another work\(^8^6\) – despite quite liberal British approach towards protection of copied and

\(^8^1\) Lord Reid favoured demonstrative and Lord Evershed cumulative character.  
\(^8^2\) BENTLY, L., SHERMAN, B., see reference 2, page 97.  
\(^8^4\) Rose v Information Services [1987] FSR 254.  
infringing works. Lord Oliver in Interlego AG v. Tyco Industries held that mere copying is devoid of copyrightable character, however much skill or labour may be devoted to the process. By disqualifying certain types of labour, skill and judgment, Common Law developed a qualitative condition of originality for LDAM works.

Entrepreneurial works are not subjected to any originality test. Instead, the CDPA 1988 enacts that films, sound recordings or typographical arrangements copied from a previous work of the same kind are never copyright protectable. Broadcast, a bit differently, does not attract copyright in case that another broadcast is infringed by it. Entrepreneurial works are subjected to the lower standard because of their nature, protecting not the "content", but a mere "signal" created not by an individual's effort, but via means of technology. In the content/signal dichotomy, LDAM works are designed to protect the content, e.g. a dramatic work. The signal is a medium carrying the protected LDAM works (or unprotected works as well), such as broadcast which diffuses it.

Copyright in the UK regarding published literary works and some artistic works subjected these works to registration until 1912. Coming back to revolutionary invention of printing press, two crucial tendencies arose. Publishers' economic interests were put in jeopardy and, perhaps more importantly, the state and church alike were significantly alert of undesirable consequences arising from suddenly virally spread knowledge and information. In reaction, special printers to the Crown were appointed, later arose establishment of designated printers and preventive censors. Subsequently, in both Continental Europe and British Isles, guilds protected authors on the recognition of a right to copy in England, droit de copie in France or Verlagsrecht in Germany.

87 Infringing work can still be original and granted copyright, see more at Redwood Music v Chappell [1982] RPC 109.
89 Sections 5A (2), 5B (4) and 8 (2) of the CDPA 1988.
90 Section 6 (6) of the CDPA 1988.
Modern UK copyright follows different interests and relies on different legal tools. The registration regime has been deserted for more than a century. The CDPA 1988 favours recording in material forms instead, a legal doctrine commonly known as fixation. Literary, dramatic and musical works are not protected unless and until they are "recorded in writing or otherwise"\(93\). Writing is defined to include any form of notation or code regardless of the method by which, or medium in or on which, it is recorded\(94\). Following this definition, any digital embodiment should be sufficient.

Note that artistic works are not obliged by the CDPA 1988 to be recorded in a material form. This omission might lead us to presume that a display of coloured lights\(95\) or other non-recorded artistic works should be protected. As we will see later, ideas are not protected by the UK copyright, therefore artistic works must at least be expressed in any objectively perceivable manner – which rings a bell and allows me to say that artistic works in Britain are, in regard of their expression requirement, similar to Czech copyright law.

Entrepreneurial works are not subjected to condition of fixation either. After all, in the case of sound recordings and films is recording implicit in their respective statutory definitions\(96\). Similarly, published editions must be fixated by their very nature. Broadcast, however, does not have to be fixed or embodied in any particular form. Even a broadcasted material which is produced without saving in any material form attracts copyright protection as an entrepreneurial work.

British law generally demands authorial works to be fixated, setting a higher standard compared to its Continental Law counterparts. Some argue that fixation requirement is a residuum of registration in the UK copyright law. Other commentators believe that fixation is a tool enhancing legal certainty by giving clear borders to the copyright protected subject matter while simultaneously simplifying procedural part of arising disputes\(97\). All the same, the fixation doctrine led British lawyers to concentrate on the expression, not on the idea standing behind it. Czech Copyright Act excludes

\(93\) Section 3 (2) of the CDPA 1988.
\(94\) Section 178 of the CDPA 1988.
\(95\) BENTLY, L., SHERMAN, B., see reference 2, page 92.
\(96\) Sections 5A (1), 5B (1) of the CDPA 1988.
\(97\) Material forms are substantively better suited to serve as evidence material.
ideas from copyright protection\textsuperscript{98} and so did the UK case law for decades. However, Czech law distinguishes between bare and advanced ideas. Bare ideas are disqualified from copyright protection. Only other areas of law, such as protection from unfair competition, might be concerned with them. Advanced ideas, such as a plot of a novel or abstract, might be considered to be a unique outcome of the creative activity of the author and thus fall within the scope of copyright protection as author's work\textsuperscript{99}. Continental Law countries satisfy the need to protect ideas of higher detail and quality by doctrine of intellectual creation, but old British labour, skill and judgment approach combined with fixation is not capable to do so. However, British courts have emerged with a very innovative and creative interpretation of idea/expression dichotomy.

First, we have to understand that direct protection of ideas is not an option for the British law. We saw how restrictive British law is with the closed list of eight copyright protected categories in the CDPA 1988 or in following qualitative and quantitative standards in originality. These doctrines are established in order to balance rights of the copyright holder and opposing interests, such as enhancement of creativity and avoidance of monopolizing intellectual property subject matter. Providing mere ideas with copyright protection would significantly undermine this fragile balance in favour of undesirably broad protection. Along with these well justified rationales, European and international law forbid protection of mere ideas – namely WIPO Copyright Treaty 1996\textsuperscript{100}, TRIPS\textsuperscript{101} or Software Directive\textsuperscript{102}. Courts balanced well on obligations arising from these treaties and leading authority of Designers Guild Ltd v Russell Williams\textsuperscript{103} in parallel offers a satisfying protection to advanced ideas.

House of Lords faced a rather simple dispute in Designers Guild Ltd v Russell Williams. Two very similar fabric designs were presented in a case of alleged infringement. The defendant did not deny copying, but rather argued that a mere idea was copied, not leading to copying of a substantial part as necessary for infringement to

\textsuperscript{98} Section 2 (6) of the Copyright Act.

\textsuperscript{99} TELEC, I., TŮMA, P., see reference 10, pages 66-67.

\textsuperscript{100} Article 2 of the WIPO Copyright Treaty 1996.

\textsuperscript{101} Article 9 (2) of the TRIPS.

\textsuperscript{102} Article 1 (2) of the Directive 2009/24/EC on the legal protection of computer programmes.

\textsuperscript{103} Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416.
occur by virtue of the CDPA 1988\textsuperscript{104}. House of Lords first repeated a phrase "\textit{that copyright subsists not in ideas but in the form in which the ideas are expressed}", notoriously known to case law and literature. Notwithstanding this general rule, an exception was authoritatively recognized. Arguing that plot of a novel or original scheme of a play might be materially copied without technically copying them word by word, some ideas can enjoy protection by their very nature. Although a single sentence or visual part might not be identical, there still can be found a substantial part of the work in question, therefore a copyright infringement can occur on that basis. Designers Guild Ltd v Russell Williams thus deviates from traditional British emphasis on material form and adopts a doctrine protecting advanced ideas, well known to Continental Law jurisdictions.

We saw above that Continental law strongly favours protection of moral rights. British law, on the other hand, always emphasized economic rights and paid little or no attention to protection of moral rights. Notwithstanding the origin of British law, moral rights are protected by the CDPA 1988\textsuperscript{105}. Commentators frequently flag up that CDPA 1988 is the first code recognizing moral rights, but some protection of moral rights has always been present in the UK copyright through case law using torts of defamation\textsuperscript{106} or passing off\textsuperscript{107}.

British law strikes us as a bit anxious about entrepreneurial rights being threatened by a broad scope of moral rights. After all, it is only human individuals that can create authorial works and enjoy moral rights in them\textsuperscript{108}, but it is entrepreneurial works that lead to profit and overly extensive moral rights are a serious impediment for entrepreneurs trying to exploit copyright protected works and make profit\textsuperscript{109}. In addition, moral rights are frequently criticized to enhance an illusion of the author as an isolated creative genius who in creating a work imparts his personality upon the resulting work. This image fails to acknowledge the collaborative and intertextual

\textsuperscript{104} Article 16 (3) of the CDPA 1988.
\textsuperscript{106} Humphreys v. Thomson [1908] Ma CC 148.
\textsuperscript{107} Samuelson v. Producers Distributing [1932] 1 Ch 201.
\textsuperscript{108} Contemporary British copyright law does not allow legal entities to create authorial works.
\textsuperscript{109} TORREMANS, P., see reference 1, pages 254-255.
nature of the creative process\textsuperscript{110}. Alien nature of moral rights is also held against them, allegedly upsetting the copyright system in Common Law countries\textsuperscript{111}. Finally, moral rights might be perceived as violating the idea of free market. Recognition of moral rights is an obstacle making copyright a problematic asset for markets.

British scepticism emanates through provisions on moral rights in CDPA 1988. UK was forced to recognize moral rights by the Berne Convention\textsuperscript{112} and does so in CDPA 1988 – not going an inch further than required. Four moral rights are recognized by the CDPA 1988:

- The right to be identified as the author or director of a work, the "\textit{paternity right}"\textsuperscript{113}.
- The right of the author or a director of a work to object to derogatory treatment of that work, the "\textit{integrity right}"\textsuperscript{114}.
- The right for everyone not to have a work falsely attributed to him\textsuperscript{115}.
- The commissioner's right of privacy in respect of a photograph or film made for private and domestic purposes\textsuperscript{116}.

List of moral rights protected in the UK is shorter than the one provided by Czech Copyright Act and the Civil Code. Nevertheless, it suffices to satisfy all UK's obligations in this matter. Moral rights cannot be waived and are not assignable. Contrary to Czech legislation, CDPA 1988 states that they are transmissible upon author's death\textsuperscript{117}.

\section*{2.1.3. European Copyright law}

We saw above how fundamental differences can be found when having a closer look at the Continental and Common Law copyright. Disagreements over them are, in

\textsuperscript{110}JAZSI, P. On the Author Effect: Contemporary Copyright and Collective Creativity. Cardozo AELJ, volume 10, 1992, pages 29-56.
\textsuperscript{111}STAMATOUDI, I. A. Moral rights of authors in England: the missing emphasis on the role of creators. Intellectual Property Quarterly, volume 4, pages 499.
\textsuperscript{112}Article 6bis of the Berne Convention.
\textsuperscript{113}Sections 77-79 of the CDPA 1988.
\textsuperscript{114}Sections 80-83 of the CDPA 1988.
\textsuperscript{115}Section 84 of the CDPA 1988.
\textsuperscript{116}Section 85 of the CDPA 1988.
\textsuperscript{117}Sections 94-95 of the CDPA 1988.
practice, a serious hurdle to free trade within the EU. Commentators broadly agree that copyright might be subjected to harmonisation in the EU. We saw that EU directives significantly affect domestic legal systems, Information Society Directive being the most prominent one. However, EU law might go further, enactment of EU Copyright Code being in the realm of possibilities\textsuperscript{118}. I do not intend to predict future regarding EU copyright, especially due to the probable lack of UK participation in this process. It is unknown which EU regulations are about to be abolished as a consequence of the UK leaving the EU. Instead, I will focus on controversial steps towards further harmonization that have been already taken by the CJEU\textsuperscript{119}.

I explored above how eight categories of copyrightable works in the CDPA 1988 give rise to more restrictive results than the Continental Law counterpart requirement of literary/artistic/scientific works. Despite the fact that no directive or any other European legislation have never forbidden the UK from following their restrictive categorizing doctrine, the closed character of eight categories in the CDPA 1988 seems to be seriously challenged by the EU law. The directives do not tell us what a work is and intentionally leave this query open. The CJEU, on the other hand, took this matter under its own consideration and interpreted the EU directives in a unifying manner. Contemporary state of affairs in the perspective of CJEU ruling was discussed in SAS Institute Inc. v. World Programming Ltd\textsuperscript{120}. CJEU answers on preliminary questions asked by a British court lead us to conclude that works protected by directives should be defined as limited only by a liberal approach distinguishing between literary and artistic works, following Article 2 (1) of the Berne Convention. Interpretation of the CDPA 1988 providing copyright protection only to 8 categories of work in section 1 (1) should be therefore revised\textsuperscript{121} - after all, UK is still obliged to follow EU legislation until the withdrawal is effective, which is an unprecedented process lasting years.

\textsuperscript{118} As proposed by the Wittem International Network Project on a European Copyright Code, available at: http://www.copyrightcode.eu/.
\textsuperscript{120} SAS Institute Inc. v. World Programming Ltd C-5/08.
\textsuperscript{121} VAN EECHOUD, M. Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work. Journal of Intellectual Property, Information Technology and E-Commerce Law, volume 3 (1), 2012, par. 82.
An even greater step towards copyright harmonisation in the EU might have been taken via the Infopaq decision. A Danish court filled preliminary ruling, giving the CJEU opportunity to discuss the core requirements of copyright subsistence, i.e. when a work becomes copyright protected work. After reviewing the Berne Convention and Software, Database and Term directives, the CJEU concluded that there is only one generalized standard of copyrightable work – the author's own intellectual creation, inconsistent with the old British concept of labour, skill and judgment.

Needless to say, Infopaq brought numerous concerns upon British copyright law. First of all, there were tendencies to limit Infopaq only to matters of infringement it was concerned with in the first place. Subsistence of copyright would stay untouched by this way of interpretation. This suggestion collapsed under following CJEU rulings. First, the CJEU indicated in the BSA case that a graphic user interface would be protected under the Information Society Directive as "the author's own intellectual creation". In reverse, football matches were not granted copyright protection due to lack of relevant originality, because "football matches, which are subject to rules of the game, leave no room for creative freedom for the purposes of copyright". There thus seems little doubt that as far as "authorial works" are concerned, it is necessary to apply the European standard of originality. Harmonization of originality surprisingly went through case law, despite European Commission's promise to leave copyright subsistence outside the scope of harmonization.

Czech law remains untouched by Infopaq and subsequent case law, but British law is forced to reconsider its core principles. Opening eight categories of work

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122 Infopaq International A/S v Danske Dagblades Forening, C-5/08.
123 Infopaq International A/S v Danske Dagblades Forening, C-5/08, par. 37.
126 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury, C-393/09.
127 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd, joined cases C-403/08 and C-429/08, par 98.
protected by the CDPA 1988 is a huge discontinuity regarding stable case law elaborating on individual protected categories. As far as the required threshold of originality is concerned, shifting originality to intellectual creation represents a higher originality threshold than English labour, skill and judgment test. In fact, traditional British originality well resembles lower Czech threshold for fictitious works as examined earlier. It seems that UK must, at least for the time being, refrain from protecting human resources invested in work and adopt more pro-natural right attitude in order to meet contemporary EU law interpretation delivered by the CJEU.

Harmonising categories of protected works and the originality requirement are the most influential changes presented by the EU law, targeting the very subsistence of copyright. Notwithstanding their importance, I do not wish to omit different harmonising features, such as an unwaivable right to equitable remuneration for the authors of works that are the subject to rental and lending\textsuperscript{130}, recognition of computer programmes as literary works\textsuperscript{131} or comprehensive special rules regulating works made by employees in the course of employment\textsuperscript{132}. Contemporary copyright in the EU is, according to certain Advocate Generals, "compromise, which, despite the declared objective of harmonisation, sufficiently takes into account the differing legal traditions and views in the Member States of the European Union"\textsuperscript{133} I will render my respectful disagreement with this opinion in the conclusive part of this thesis.

2.2. Patent law

Traditional classification of intellectual property rights recognizes two pillar groups. I already discussed copyright law and now choose patent law as a suitable representative of industrial property rights. The aim of this work is to guide the reader through difficulties that might be faced in licensing via licence contracts. As we will see on the example of patent, industrial property rights under the two examined jurisdictions are not significantly different in the matter of subsistence – mostly because of

\textsuperscript{130} Article 5 of the Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

\textsuperscript{131} Article 1(1) of the Directive 2009/24/EC on the legal protection of computer programmes.

\textsuperscript{132} Section 58 of the Copyright Act and Section 11 (2) of the CDPA 1988.

\textsuperscript{133} Opinion of Advocate General Trstenjak, Sociedad General de Autores y Editores (SGAE) v Padawan S. L., C-467/08, par. 43.
harmonisation carried out by international and European law\textsuperscript{134}. Generally speaking, disparities in industrial property rights are not as substantive as in copyright.

All the same, right holders want to be sure how courts\textsuperscript{135} in individual countries interpret the content of their respective intellectual property rights. Patents are designed to provide their holders with an exclusive legal monopoly over the patented subject-matter for a limited period of time. Patent holders enforce their exclusivity rights in the patent via infringement claims. Inconveniently, approach towards interpretation of patent content in infringement proceedings is an area of patent law crucially affected by polarized traditional standards in Czech and British patent law.

\subsection*{2.2.1. Czech Patent law}

Czech patent law has its code in the Patent Act, defining "the scope of protection conferred upon patent or patent application determined by wording of patent claims. Description and drawings contained shall be used equally."\textsuperscript{136} The extent of patent protection provided by the Patent Act was significantly amended by the Act No. 116/2000 Col., pursuing harmonisation with the EPC favouring broader engagement of descriptions and drawings\textsuperscript{137}. Until the abovementioned amendment was introduced, descriptions and drawings were considered only in the case of doubt.

Using the drawings and descriptions in patent interpretation was therefore not new to Czech patent law - EPC only extended their scope of use. Continental law had favoured purposive interpretation relying on drawings and descriptions even before EPC was introduced. In Germany and elsewhere, the patent claims were considered to be a mere "broad guideline" specified precisely by subsequent drawings and descriptions\textsuperscript{138}. Taking into account a strong influence of German jurisprudence in

\begin{footnotes}
\item[134] Paris Convention for the Protection of Industrial Property, first enacted in 1883; Patent Cooperation Treaty, first enacted in 1970; TRIPS; EPC; Patent Law Treaty, first enacted in 2000 etc.
\item[135] Or other entities endowed with authority to interpret content of individual patents, such as arbitrators or intellectual property offices.
\item[136] Section 12 (1) of the Patent Act.
\item[137] Explanatory notes to the Act No. 116/2000 Col., section 12.
\item[138] TORREMANS, P., see reference 1, page 163.
\end{footnotes}
Czech legal history\textsuperscript{139}, we can conclude that strictly literal approach focusing solely on precise wording of patent claims has never been adopted in the Czech Republic.

Czech courts and the Industrial Property Office are even more generous to patent holders when interpreting the scope of patent protection. Doctrine of equivalents is adopted in this matter, which is quite favourable towards patent holders\textsuperscript{140}. Equivalents provide the patent holders with additional protection in disputes where full identity of all fundamental features is not established. Despite dissimilarity of the key features, the allegedly infringing conduct might still work identically in respect of the function and obtained results. Some authors even argue that every solution deviating solely on the grounds of technical equivalent to a feature or connotation fall within the scope of protection, even if the respective equivalent does not fall within the literal scope of the patent file\textsuperscript{141}.

Czech legal science does not follow one generally accepted view regarding equivalents in patent law and future development in this area will be undoubtedly interesting. Contrary to equivalents, literature finds an agreement over importance of interpretation regarding patent claims. Industrial Property Office systematically expresses its emphasis on patent claims\textsuperscript{142} which demand more attention paid to their designing every year. Great many patents are awarded every year, effectively narrowing gaps between their individual subject matter. Particularly markets with fierce competitive environment tend to give rise to an increasing number of disputes that bring questions concerned with the scope of patent protection\textsuperscript{143}.

\textsuperscript{139} Arguably the most authoritative doctrinal opinion on interpretation of patent claims in Czech 20\textsuperscript{th} century literature is provided by VITÁČEK, F. Definice předmětu patentu a výklad rozsahu patentu. Praha: Úřad pro patenty a vynálezy, Praha, 1963, číselný znak 59-045-62, 67 pages, listing German writing authors exclusively in its references. See more at JAKL, L. ed. Acta MUP, Právní ochrana duševního vlastnictví. Metropolitní univerzita Praha, o.p.s., Praha, 2011, ISSN 1804-6932, page 20.

\textsuperscript{140} ŠTROS, D. K otázkám patentové ochrany léčiv. Právní rozhledy, volume 11, 2002, starting page 542.


\textsuperscript{142} See Industrial Property Office Methodology, part B – inventions and supplementary protection certificates, chapter 2.2.3.1., up-to-date version available at https://www.upv.cz/cs/prumyslova-prava/vynalezy-patenty/metodicke-pokyny-vynalezy.html.

\textsuperscript{143} HORAČEK, R., ČADA, K., HAJN, P., see reference 141, page 141.
2.2.2. British patent law

Contrary to broad purposive interpretation of patent claims developed in Continental Law, British courts traditionally favoured a rather cynical and half-hearted way of strict literal interpretation. I listed above several pieces of EU and international legislation that harmonise patent law across different jurisdictions and none of these adopts a strictly literal approach of interpretation regarding patent claims. Building on that, it is obvious that UK courts had to go through a more significant change than their Continental Law counterparts.

The best illustration of traditional British interpretation of patent claims is probably given in Van Der Lely NV v Bamfords Ltd. This dispute had its merit on a patent claim wording that one of the rows of wheels on which the patented hay rake was driven could be removed for different aspects of the haymaker's art. The relevant patent claim referred to removal of hindmost wheels, whilst the alleged infringer removed the front wheels instead. Needless to say, removal of wheels was not where the inventive step rested – the wheels central to dispute only served when the hay rake was transported to and from a field, where it was employed for its actual purpose. House of Lords relied on its "pith and marrow" doctrine, looking for the actual inventive step embedded in the invention. Surprisingly, Lord Jenkins - speaking for the majority of the Law Lords – found out that the patentee deliberately claimed only the removal of hindmost wheels, thus effectively leaving other technical solutions open for public. Only Lord Reid dissented in this judgment, convinced that identification of one particular pair of wheels was not within the "pith and marrow" of the invention. Ultimately, literal interpretation of claims at its best took primacy in this case.

Only few years passed by and House of Lords had its chance to reconsider still valid authority in Van Der Lely NV v Bamfords Ltd. decision. Rodi & Wienenberger AG v. Henri Showell Ltd. presented a dispute over connections between bands in expandable watch straps. The patente used a U-shaped connection, the opposing party used C-shaped bows instead. It is easy to spot that defining bows as C-shaped and U-shaped is different in writing, but identical in reality and in the matter of its technical

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144 Van der Lely v Bamfords [1963] RPC 61.
core. This time, Lord Reid was joined in dissent by Lord Pierce, who concluded that the matters in which the essential integer differs can never be perceived as essential. Once again, majority of Lordships took an opposing view, arguing that an ordinary reader would think the patentee was intentionally describing U-shaped bows only. If there was any space left for purposive approach by Van Der Lely NV v Bamfords Ltd., the latter decision in Rodi & Wienenberger AG v. Henri Showell Ltd. shattered this option completely.

We can now say that UK courts in the 1960's stubbornly insisted on literal interpretation of patent claims, not going a single inch beyond the precise patent claims wording. It seemed back then that the literal approach was deeply rooted and irreversible in the UK law. It even might have been true in those days, but enactment of EPC in 1973 turned UK patent law upside down, leading to enactment of a brand new code, still effective Patents Act 1977. Critical article 69 of the EPC, demanding use of descriptions and drawings as well as patent claims, even led to introduction of its own protocol prescribing how the content of respective patents should (not) be interpreted.\(^{146}\)

The problematic issue with the protocol is that it does not tell the reader which approach is the right one and what test should be taken to follow it accordingly. In contrary, the protocol forbids us to take neither literal nor purposive approach strictly – a "position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties"\(^{147}\) must be reached instead. All we know is that a strictly literal approach followed in the UK and German "broad guideline" doctrine, leading to an overly extensive purposive interpretation, are both wrong. Once again, it was up to case law to strike the right balance and reconsider its traditional ground.

The Lordships in House of Lords seized their opportunity to deliver an authoritative decision compliant with the modern European doctrine in Catnic v Hill & Smith\(^{148}\). This case was brought to House of Lords upon an infringement claim based on plaintiff's patent concerning a type of steel lintel with specification that the rear side of the lintel is vertical. Defendants produced a similar lintel, but the rear side was at an

\(^{146}\) Protocol on the interpretation of article 69 EPC.

\(^{147}\) Article 1 of the Protocol on the interpretation of article 69 EPC.

angle 6° from vertical (reducing its power by 0.6 per cent). Contrary to argumentation adopted in 1960's rulings discussed above, infringement was found. Lord Diplock, who delivered the opinion of Lordships' majority, rejected "the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge". Instead, the courts shall consider whether a skilled person would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked. Applying this test, the rear side being vertical was held not to be an essential requirement, therefore an infringement occurred. Logic of Catnic v Hill & Smith opened patent claims to purposive interpretation and granted patent holders with significantly more favourable scope of protection than their predecessors.

Catnic v Hill & Smith remains good law until this day, but it did not go through time and courts' application without controversy. In Improver v Remington\textsuperscript{149} decision, Hoffmann J expressly applied the Catnic v Hill & Smith test and creatively elaborated on it. A European patent held by the plaintiff for a depilatory device ("Epilady") for plucking hair used a helical spring bent to the form of an arch which rotated in a high speed. The defendant introduced a concurring device ("Smooth and Silky"), which substituted the helical spring with a tube of synthetic rubber. The defendant's device was less effective, but also significantly less painful in its operation.

Hoffmann J put the EPC and Protocol on the interpretation of article 69 EPC under a closer examination, which allowed him to design three Improver questions, also known as Protocol questions. These questions introduce a three step test (which is in compliance with contemporary European standards) wording:

\begin{enumerate}
\item Does the variant have a material effect upon the way the invention works? If yes, the variant is outside the claim. If no—
\item Would this (i.e. that the variant had no material effect) have been obvious at the date of publication of the patent to a reader skilled in the art. If no, the variant is outside the claim. If yes—
\end{enumerate}

\textsuperscript{149} Improver v Remington [1990] FSR 181.
(3) **Would the reader skilled in the art nevertheless have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention. If yes, the variant is outside the claim.**

Hoffmann J went through all three steps and ultimately concluded that the patent claim cannot be interpreted as to involve a rubber rod, therefore no infringement occurred. I can flag up that this approach takes too much emphasis on literal wording and does not provide patent proprietors with fair protection as demanded by the EPC. Instead, I find it more troubling that the European patent in Epilady was litigated in several other EU countries and in some of them met with success, e.g. in Germany\textsuperscript{150}. Courts in these jurisdictions did not find it appropriate to ask the third question at all, effectively broadening the scope of protection compared to the decision reached in Improver v Remington.

Needless to say, courts and commentators in the UK realized that the situation is unsustainable. Two standards for interpretation of patent claims put EU patent market in jeopardy, subsequently inflicting a negative impact on European economy. Continental Law deals with the third of Protocol questions designed by Hoffmann J via doctrine of equivalents, providing patents with protection beyond the precise wording. There is not an agreement if the UK and Common Law in general accept and follow the equivalent doctrine\textsuperscript{151}. Nevertheless, article 2 of the Protocol on the interpretation of article 69 EPC requires the UK to recognize protection of equivalents in some way and the House of Lords has fulfilled this obligation.

The most up-to-date authority on interpretation of patent claims was delivered by the House of Lords in Kirin-Amgen v Hoechst Marrion Roussel\textsuperscript{152}. In this decision Lordships did not refuse Protocol questions, but labelled them as a mere guide to assess what a skilled person would understand\textsuperscript{153}. Kirin-Amgen v Hoechst Marrion Roussel provided us with a brand new test, significantly more comprehensive than the Protocol.


\textsuperscript{152} Kirin-Amgen v Hoechst Marrion Roussel [2005] RPC 169.

\textsuperscript{153} Kirin-Amgen v Hoechst Marrion Roussel [2005] RPC 169, paragraphs 63 and following.
questions. Court of Appeal transformed the series of steps into an abbreviated and relatively easily approachable form, namely judgment in Mayne Pharma Pty Ltd, Mayne Pharma plc v Pharmacia Italia SPA\textsuperscript{154} reads in paragraph 5:

(a) The first, overarching principle is that contained in Art 69 itself.
(b) Art 69 says that the extent of protection is determined by the terms of the claims. It goes on to say that the description and drawings shall be used to interpret the claims. In short the claims are to be construed in context.
(c) It follows that the claims are to be construed purposively — the inventor's purpose being ascertained from the description and drawings.
(d) It further follows that the claims must not be construed as if they stood alone — the drawings and description only being used to resolve any ambiguity. Purpose is vital to the construction of claims.
(e) Nonetheless purpose is not the be-all and end-all. One is still at the end of the day concerned with the meaning of the language used. Hence the other extreme of the Protocol — a mere guideline — is also ruled out by Art 69 itself. It is the terms of the claims which delineate the patentee's territory.
(f) It follows that if the patentee has included what is obviously a deliberate limitation in his claims, it must have a meaning. One cannot disregard obviously intentional elements.
(g) It also follows that where a patentee has used a word or phrase which, acontextually, might have a particular meaning (narrow or wide) it does not necessarily have that meaning in context.
(h) It further follows that there is no general “doctrine of equivalents”.
(i) On the other hand purposive construction can lead to the conclusion that a technically trivial or minor difference between an element of a claim and the corresponding element of the alleged infringement nonetheless falls within the meaning of the element when read purposively. This is not because there is a doctrine of equivalents: it is because that is the fair way to read the claim in context.

\textsuperscript{154} Mayne Pharma Pty Ltd, Mayne Pharma plc v Pharmacia Italia SPA [2005] EWCA Civ 137.
As we can see, the steps described above refuse purely literal or purposive approach, give partial recognition to doctrine of equivalents and acknowledge importance of context provided by drawings and description. Compared to Czech law, which only had to broaden the context requirements, British patent law was forced to undertake a more significant transformation. We saw in copyright how crucial role played decisions rendered by the CJEU and the same might go for UPC in near future. UPC is an interesting project that provides the EU patent law with an opportunity to push harmonisation further and avoid future discrepancies similar to the Epilady litigations. In fact, establishing UPC is an inevitable step following the idea of Enhanced European Patent system\textsuperscript{155}, which has the potential to overcome gaps between individual member countries and thus enhance the contemporary state of internal market. Commentators have found this proposal desirable for a longer period of time\textsuperscript{156} and current development in the matter of UPC\textsuperscript{157} might ultimately satisfy their calls. Once again, UK withdrawing from the EU is a destabilizing element in this initiative and UK involvement in the harmonised European patent scheme is now quite blurry.


\textsuperscript{156} See HORÁČEK, R., ČADA, K. HAJSN, P. see reference 141, page 144.

\textsuperscript{157} See more at https://www.unified-patent-court.org/news.
3. Licence contract

I deem it now appropriate to summarize the previous findings of this thesis. We saw in the second chapter that licence is a permission in favour of one entity (licensee) to use intellectual property rights held by another entity (licensor). This permission comes in different forms and shapes, while licence granted by the virtue of licence contract is the critical type to this diploma thesis. Licensors conclude licence contracts to capitalize on their intangible property rights by leasing these to other entities in exchange for monetary or other benefits. Licensees pursue licence contracts in order to legally enable themselves to engage in activities that would otherwise lead to an infringement. The Common Law and Continental Law jurisdictions share their view regarding this core purpose of licence contracts. However, both legal systems examined in this thesis have added new creative provisions in regard of licence contracts, giving rise to very sophisticated licence contracts that significantly differ to suit the individual contractual parties' needs as much as possible.

Licence contract is only one of several legal tools available to the intellectual property rights holders who wish to dispose with their intellectual property rights. Some intellectual property rights can be sold or gifted, some can be subjected to innominate contracts, pledged, used as contribution in kind etc. I will have a quick look at some of the other forms of disposition concerning intellectual property rights in chapter 4, but I wish to make a note that it is licence contracts that are most commonly employed by the right owners to dispose with their respective intellectual property rights. The primacy of licence contracts in this matter is acknowledged by the Czech and UK commentators equally.

Nevertheless, misunderstandings to legal effects of licence contracts frequently occur. By the virtue of licence contracts, the licensor merely constitutes a new right to exploitation in favour of the licensee, i.e. the intellectual property right that is subject

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158 Free use, statutory licences, mandatory licences etc. See more in chapter 1.1.
mater to the respective licence contract is not transferred\textsuperscript{161}. Contractual parties and legal literature often adopt a term “sale of a licence”. Using combination of these legal terms might be misleading as to transfer of proprietary title, but its meaning is different entirely. Sale of a licence simply stands for licences that are granted for consideration\textsuperscript{162}.

I declared and illustrated earlier how vague are attempts to satisfactorily define which rights are intellectual property rights. This uncertainty is inconvenient indeed, for it is only intellectual property rights that can be subjected to licence contracts\textsuperscript{163}. Comparing Czech and UK law of copyright and patents above, I witnessed that these rights differ in their content, historical development, classification and in case of copyright in their very subsistence. I concluded the abovementioned parts of this work with a prediction (and my personal desire) that these discrepancies would be overcome soon by the European and international law. But for the time being, we must keep these differences in mind when discussing agenda of licence contracts in member countries of the EU, so far including the UK.

Uncertainty regarding scope of intellectual property rights is not problematic for scholars in the first place. Entities engaging in commercial activities are those who bear the greatest risk of misinterpreting their rights as intellectual property rights or otherwise. As we saw above, know-how, business secret or business model are rights that fall somewhere on the very border of intellectual property rights. To complicate the matters even more, these rights are seldom used individually – they commonly come in a bundle of rights that constitutes the valuable scheme. These imminent features make these rights a subject matter complicated for licence contracts, which is why franchise agreements attract increasing popularity in these days. I will put franchise agreements under examination after the licence contracts because of a different scope of contractual freedom and subsequent use in practice they offer. Practicality of licence contracts is an


ever-present query to ask, which is why I will address it repeatedly in the optic of restrictions adopted in the Czech Republic and Britain.

Last presumption crucial for licence contracts that I made earlier is complexity of protection granted to intellectual property rights. We saw that protection against unfair competition covering intellectual property rights is recognised by international treaties, such as Convention Establishing the WIPO. In addition to right of fair competition, licence contracts are only one of many contractual types recognised by Czech and British law, thus they are governed by general law of contract.

3.1. Rationales of licence contracts

In every licence contract, there is at least one licensor and one licensee. Licensors wish to “licence-out” their intellectual property right, while licensees desire to “license-in” the offered right. I mentioned earlier that both parties do so in pursuit of profit and it is now that I wish to flag up the most essential advantages of licence contracts. First of all, licence contracts allow the contractual parties to share a risk. Licenced intellectual property rights are valuable commodities that generate significant incomes, but their holders might not be qualified to use them effectively in this matter – due to lack of resources, know-how, confidence etc. Similarly, licensees might not want/be able to engage in research and development activities necessary to create valuable intellectual property rights. Licencing therefore allows different entities to maximize their profit and minimize their risks.

Additionally, licencing is a powerful tool in market competition. Intellectual property rights of the licensor can penetrate new markets when licenced to a capable licensee. In return, the licensee obtains a market advantage over his competitors. Western world economy is fundamentally based on an idea of perfect market with uncompromising competition, making every advantage over competitors potentially fatal. Intellectual property rights, due to their dynamic nature and durable intangible character, represent a highly valued asset in market based rivalry.

The collaboration described in the previous paragraph is only one of its many forms we can identify in licencing. The very nature of licencing is sharing intellectual property rights among several entities. In this spirit, legislators should concentrate the regulations on enhancement of competitive environment and (arguably) setting minimum standards of protection on weaker parties. It will be discussed later whether Czech and British law fulfil this presumption and, if not, what amendments might be proposed to settle affairs more conveniently.

### 3.2. Licence contract in Czech law

Statutory provisions in the Czech Republic on licence contracts can be found in the Civil Code, specifically in Book 4, Title II, Chapter 2, Division 5, sections 2358-2389. *Lex specialis* provisions on licence contracts are contained in acts regulating individual intellectual property rights\(^\text{165}\). Location of licence in the Civil Code does not go without its justifications and confirms abovementioned assumptions. Licence contracts belong in relative property rights, arise from juridical acts and relinquish an (intangible) thing to use by another.

The Civil Code unified fragmented state of affairs concerning licences prior to its enactment, when licence contracts were concluded under the Commercial Code, Copyright Act and as innominate contracts\(^\text{166}\). Provisions of the Civil Code follow previous legislation substantively and do not introduce significant amendments in this matter\(^\text{167}\), which means that literature and case law developed before the Civil Code enactment are not devoid of authority. Nevertheless, all provisions in the Civil Code must be interpreted in compliance with new principles enacted by its general provisions.

Despite unification of licence agreement in Czech law, the Civil Code respects specifics of rights protected by the copyright\(^\text{168}\), publishing licence agreements\(^\text{169}\) and

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\(^\text{166}\) HULMÁK, M., et al., see reference 6, pages 599-600.

\(^\text{167}\) Explanatory notes to the Civil Code, sections 2358-2389.

\(^\text{168}\) Subdivision 2, i.e. sections 2371-2383 of the Civil Code.

\(^\text{169}\) Subdivision 3, i.e. sections 2384-2386 of the Civil Code.
rights related to copyright and rights of an author of a database\textsuperscript{170}. These provisions are \textit{lex specialis} to general provisions and thus have primacy in application.

\subsection*{3.2.1. General provisions}

The Civil Code defines licence agreement as follows: "\textit{By a licence agreement, a licensor grants to a licensee an authorisation to exercise intellectual property rights (a licence) within the stipulated limited or unlimited extent, and a licensee undertakes to pay remuneration to the licensor, unless otherwise stipulated.}"\textsuperscript{171} Subject matter of the licence in the Civil Code is therefore in compliance with abovementioned definition given by literature, i.e. licence is a defence to otherwise infringing conduct.

Contractual parties are obliged to identify intellectual property right that is licenced. As we saw, there are disagreements over the scope of intellectual property rights. Should parties try to licence a right that is not an intellectual property right, the contract is still valid as an innominate contract to protect the actual will of contractual parties as much as possible\textsuperscript{172}. Licenced right is also subjected to closer identification regarding its extent. Parties are free to negotiate extent of licence as they find most suitable. Should parties not stipulate on the extent of licenced rights, the extent is deemed to be unlimited – special provisions of section 2376 apply to rights protected by the Copyright Act\textsuperscript{173}.

Not only that we are not sure which rights can be licenced, we also cannot be certain if certain rights can be qualified as "\textit{things}" under the Czech Law. Contemporary Civil Code deviated from its predecessor, which was based on narrow materialistic concept of things\textsuperscript{174}, and adopted a broader idealistic definition of things. Speaking exactly, a thing in a legal sense is everything that is different from a person and serves the needs of people\textsuperscript{175}. The abovementioned definition provided by the Civil Code

\textsuperscript{170} Subdivision 4, i.e. sections 2387-2389 of the Civil Code.
\textsuperscript{171} Section 2358 (1) of the Civil Code.
\textsuperscript{172} PELIKÁNOVÁ, I. Některé otázky smluvního práva ve světle NOZ. Sborník Karlovarské právnické dny, volume 21, 2013, starting page 471, paragraph 7.
\textsuperscript{173} HOLCOVÁ I., KŘESTANOVÁ V. in ŠVESTKA, J., DVOŘÁK, J., FIALA, J., et al., see reference 23, section 2358, par. 7.
\textsuperscript{175} Section 489 of the Civil Code.
involves intangible things and, as a consequence, brings difficulties to decide whether intellectual property rights are included (and if, to what extent). We examined that Continental Law of copyright is based on inextricable bond between author and his work. Furthermore, all works that are creations cannot be successfully separated from a person – moral rights are most fundamental in creations and thus have primacy over economic rights. Nevertheless, these rights might be controversial when labelled as things, but they still can be owned. Following the Civil Code, property is constituted of the totality of what belongs to a person - which does not involve rights to things exclusively. Overall, it seems correct not to include creations in "things" as understood by the Civil Code and rather recognize these as an independent group of rights.

Basic provision in section 2358 (1) recognizes that licences are generally provided for consideration. The Civil Code strengthened freedom of contractual will by allowing contractual parties to stipulate their licence agreements as gratuitous. Prior to enactment of the Civil Code, only copyright licences were permitted to be granted without remuneration. Notwithstanding newly broad scope of gratuitous licence agreements, cautious should be recommended. Wrongly drafted licence contracts might be even held void due to its provisions on consideration – or absence of such. Subsection 2366 (1) a) states that if the amount of the remuneration or the manner of its determination has not been stipulated, the agreement is nevertheless valid if the negotiations of the parties show their will to conclude an onerous agreement even without determining the amount of the remuneration. Should be showed so, the licensee shall pay the remuneration in an amount that is usual at the time of the conclusion under similar terms for such a right. This provision fulfils a legal principle that juridical acts are to be preferably considered valid rather than invalid. Inconveniently, examining the true will of contractual parties leads to unpleasant disputes and gives rise to

176 Creations are typically found in copyright, but patents and designs are also created by creative effort. See more at TELEC, I. Duševní vlastnictví a jeho vliv na věc v právním slova smyslu. Právní rozhledy, volume 12, 2011, starting page 444.
177 Section 495 of the Civil Code.
179 POSPIŠIL, M. Licenční smlouva k předmětům průmyslového vlastnictví podle občanského zákoníku. Rekodifikace & praxe, volume 6, 2014, pages 14-17. Nevertheless, gratuitous licences to industrial property rights were stipulated via innominate contracts, in accordance with section 269 (2) of the Commercial Code.
180 Section 574 of the Civil Code.
additional costs, stipulating consideration precisely is therefore highly preferable\textsuperscript{181}. Consideration can take many forms, most typically monetary, in goods, yields, by cross-licence or combination of these\textsuperscript{182}. Where the amount of the remuneration has been stipulated based on the yields from the use of the licence, the remuneration is determined according to subsections 2366 (2, 3)\textsuperscript{183}. Should parties wish to stipulate that the licence is provided gratuitously, they must do so explicitly. Absence of consideration in licence contracts might seem contradictory to the economic nature of licencing, but everyday practice gives us numerous examples supporting the legitimacy of gratuitous licences. Most typically, granting licences without consideration is a regular practice within business groups\textsuperscript{184}, enabling individual entities to share intellectual property rights in pursuit of raising profits not as an individual entity, but as a complex legal group.

The Civil Code follows doctrine of juridical acts informality\textsuperscript{185}. Nevertheless, licence agreements must be in writing should an exclusive licence be granted (see more later on exclusive licences) or where the licence is to be registered in the appropriate public register. Furthermore, written form is compulsory in permission granted by virtue of subsection 2360 (2) or 2364 and some acts demand written form as \textit{lex specialis} in several cases\textsuperscript{186}. Should requirement of written form not be satisfied, the contract is absolutely void\textsuperscript{187}. Registration of licences in public registers is a typical feature for industrial property rights\textsuperscript{188}. By publishing licences in public registers, they become effective against third persons\textsuperscript{189} and licensees are entitled to exercise their respective

\textsuperscript{182} HULMÁK, M., et al.: see reference 6, pages 613-614.
\textsuperscript{183} Special provisions apply to Copyright licence, see section 2374 of the Civil Code.
\textsuperscript{184} Such as concerns, see sections 71-91 of the Act No. 90/2012 Col., on Commercial Companies and Cooperatives (Business Corporations Act).
\textsuperscript{185} Section 559 of the Civil Code.
\textsuperscript{186} HOLCOVÁ I., KŘESTANOVÁ V. in ŠVESTKA, J., DVOŘÁK, J., FIALA, J., et al., see reference 23, section 2358, par. 9.
\textsuperscript{187} TELEC, I., see reference 161, page 131.
\textsuperscript{188} Not all industrial property rights can be enrolled in public registers, see more at KOŠÍK, P. Licenční smlouvy v oblasti duševního vlastnictví (současný stav podle nového občanského zákoníku). Electronic source, epravo.cz.
\textsuperscript{189} Section 2358 (3) of the Civil Code.
rights against alleged infringers. Simultaneously, public is informed on who is entitled to exercise individual rights and legal certainty is thus enhanced. European law constantly aims to provide licensees with the same rights as licensors regarding protection of their intellectual property rights against infringers. Civil Code adopts this policy by promoting cooperation between licensors and licensees in defence against violation of their intellectual property rights. Section 2369 demands licensees to inform licensors on any potential or actual infringement without undue delay after ascertaining this fact. In return, licensors are obliged to provide cooperation to ensure the legal protection of the licence. Despite quite clear EU tendency to grant licensors and licensees equal legal tools to protect their intellectual property rights, Czech Act on enforcement of industrial property rights favours right holders over licensees and Czech courts recognize licensees' procedural rights only as derivative in the area of industrial property. Quite different attitude is enacted in section 41 of the Copyright Act, enhancing legal position of persons with exclusive authorisation by the author or enjoying use of economic rights on a statutory basis. It can be concluded now that we can expect further development in the licensees' rights against infringers, perhaps even a turbulent one.

Upon entering into licence contracts, parties are obliged to follow certain statutory obligations. Firstly, the licensor must enable the licensee to use the licenced intellectual property right properly by providing all documents and information necessary for the exercise of the licence. The licensor meets this duty without undue delay after the agreement is entered into. After the licence is terminated, licensee must return the documents and keep the information in secret until it becomes publicly known. In addition, licensee must keep documents and information he received in confidentiality, except for employees and persons participating in the business of the

192 Section (2) of the Act No. 221/2006 Col., on enforcement of industrial property rights.
193 High Court in Prague, Decision No. 3 Cmo 318/2010.
195 Section 2367 of the Civil Code.
196 Section 2368 (2) of the Civil Code.
licensee, provided that such persons were obliged by the licensee to maintain confidentiality197.

Subsection 2359 (1) of the Civil Code contains a seemingly odd regulation that licensee is not required to use the licence198, unless the maintaining of the right depends on the exercise thereof. Incentives behind licensee's behaviour are usually utilitarian, presuming that the licensee obtains the licence because of the desire to carry out otherwise infringing actions. However, some licensees might obtain exclusive licences only for the sake of the right not being used, e.g. to inhibit a competitive product that is controlled by the licence. The legislator acknowledges that certain intellectual property rights might be required by law to be used in order to avoid revocation or cancellation – such as trademarks, which can be cancelled by the Intellectual Property Office if not used for a statutory period of time199. Similarly, subsection 2359 (2) reflects that industrial property right might be prolonged – some of them indefinitely, such as trademarks200, other for limited statutory periods, such as industrial designs201. Wording of this subsection puts the licensor under obligation to maintain the licence right as long as the licence remains effective.

Licence contracts are, just like all other contracts, governed by general provisions of the Civil Code on obligations, including their extinction in sections 1908-2009. Lex specialis virtue of section 2370 nevertheless enacts regulation modifying termination regarding licence agreements. Should a licence contract be concluded for an indefinite period, a notice of termination becomes effective one year after the end of the calendar month in which the notice of termination reached the other party. Section 2370 has primacy over general regulation in section 1999, which operates in significantly shorter periods of time. Prolonging of termination period for licences can be justified by

197 Unless the agreement or the nature of the underlying documents and communications indicate that the licensor has no interest in concealing them, see section 2368 (1) of the Civil Code.
198 Licences to Copyright protected assets are governed by a contrary scheme according to section 2372 (2) of the Civil Code and inactivity of the licensee might even entitle the licensor to withdraw from the licence agreement, see sections 2378-2381 of the Civil Code.
200 Section 29 of the Trademarks Act.
201 Section 11 of the Act No. 207/2000 Col., on protection of industrial designs.
nature of intellectual property rights\textsuperscript{202}, especially the fact that they tend to be effective for a very long period of time, even theoretically for perpetuity, such as trademarks that are free to prolongation.

### 3.2.2. Types of licence

The Civil Code and contractual practice have developed various distinctive types of licences. Firstly, we classify licences as limited and unlimited as to their extent. Extent of licence is not one of essential elements of a licence contract and the Civil Code addresses it closer only in regard of copyright licences\textsuperscript{203}. However, cautious regarding licence extent shall be recommended when drafting licence contracts. Diligent negotiation as to extent prevents undesirable disputes and promotes clarity.

Licences can be limited by time, territory, quantity or types of use. Time extent can be determined in various ways – indefinitely\textsuperscript{204}, to a specific date, by duration of economic rights, to an event (certain, such as death, or uncertain, e.g. until a new song is released), until a defined purpose is reached etc. Limiting licences by quantity might seem odd due to intangible character of intellectual property rights, but contractual practice finds it often highly useful. Especially material forms of use, such as copying and distribution of protected works, are fit to be limited by quantification. Similarly, performances can be quantified by exact numbers\textsuperscript{205}.

Territorial extent is highly problematic due to viral character of the internet, spreading intangible intellectual property rights faster and further than ever. Nevertheless, licences can be limited territorially positively (e.g. to area of Prague only) or negatively (e.g. except for the area of Prague). Once again, special provisions apply to Copyright licences\textsuperscript{206} with a presumptive rule limited to the Czech Republic. Fixing rights to a certain territory often collides with exclusivity of licences. It is then up to the licensee to protect his exclusivity against other competitors, as \textsuperscript{0} successfully did in

\begin{itemize}
\item \textsuperscript{202} HULMÁK, M., et al., see reference 6, page 598.
\item \textsuperscript{203} Section 2376 of the Civil Code.
\item \textsuperscript{204} Copyright licences granted for indefinite period are highly controversial, see at TŮMA, P.: Smluvní licence v autorském právu. Praha, C. H. Beck, Beckova edice právní instituty, 2007, ISBN 9788071795735, page 57.
\item \textsuperscript{205} HULMÁK, M., et al., see reference 6, pages 637-638.
\item \textsuperscript{206} Section 2376 of the Civil Code.
\end{itemize}
regard of their exclusive Champions League broadcasting rights in the Czech Republic\textsuperscript{207}.

Limiting licences by use is arguably the most notoriously known way of licence determination. Use of licence can be modified via ways and extent of use. Individual intellectual property rights have a different scope of use reflecting their colourful nature. Specifying permitted kinds of use in licence contracts helps the contractual parties to avoid any misunderstandings and maximize their profit from the licence agreements. Nevertheless, the Civil Code acknowledges unique nature of Copyright and addresses its extent of use more closely.

In case of Copyright licences, only use which is known at the time of the conclusion of the agreement is allowed; a stipulation to the contrary is disregarded\textsuperscript{208}. Similarly, Copyright Act recognizes rights that can only be disposed with collectively\textsuperscript{209} - these therefore fall outside the scope of licence contracts concluded between standard contractual parties. In addition to abovementioned statutory limitations, a so called negative statutory limitation of licence extent\textsuperscript{210} is enacted in section 2375 of the Civil Code. This presumptive provision contains certain activities that must be refrained from by the licensor.

I already mentioned above that licences can be classified with regard to their exclusivity. Exclusive licences prohibit the licensor from granting the same licence to a third person for the period of the exclusive licence and, unless expressly stipulated otherwise, the licensor himself shall refrain from exercising the right to which he has granted an exclusive licence. Should the licensor grant the licence to a third person without the licensee's written consent during the term of the licensee's exclusive licence, the licence will not be created. If a non-exclusive licence was granted before the granting of an exclusive licence, the non-exclusive licence remains valid\textsuperscript{211}. Contrary, should a non-exclusive licence be stipulated, the licensor is entitled to exercise the right to which he granted the non-exclusive licence, as well as to grant a licence to a third person.

\textsuperscript{208} Section 2372 (1) of the Civil Code.
\textsuperscript{209} Section 96 of the Copyright Act.
\textsuperscript{210} TŮMA, P., see reference 204, page 57.
\textsuperscript{211} Section 2360 of the Civil Code.
person\textsuperscript{212}. Exclusivity of licence must be stipulated, otherwise the licence is conclusively presumed to be non-exclusive, i.e. it cannot be proven otherwise\textsuperscript{213}. Contrary conclusive presumption applies to publishing licences.\textsuperscript{214}

The Civil Code only recognizes between exclusive and non-exclusive licences, but provisions regarding exclusivity are directory (non-mandatory) in their essence\textsuperscript{215}. That is why contractual practice is free to negotiate so called semi-exclusive licences\textsuperscript{216}. These licences combine some features of exclusivity, such as limited number of licences that the licensor can authorise, exclusivity regarding only some territory or period of time etc. So called sole licences mean that the licensor can use licenced right as well as licensee, but is not allowed to grant more licences\textsuperscript{217}.

Contractual parties can stipulate that the licensee is allowed to grant partly or fully content of licence to a third person, i.e. to constitute a sub-licence. By doing so, the licensee allows another person to use his authorisation in full or limited extent. The Civil Code does not prescribe any form regarding licensor's approval of sub-licencing, it can be even granted ex-post. Furthermore, it is not forbidden that sub-licensee could be allowed to grant another subsequent authorisation, giving rise to a sub-licencing chain\textsuperscript{218}.

Assignation of licences is governed by a special provision\textsuperscript{219} having primacy over general provisions of the Civil Code governing assignations\textsuperscript{220}. Following this provision, a licensee may only assign the licence to a third person, in whole or in part, with the consent of the licensor – as examined above, the consent must be in writing. The Civil Code does not prohibit the consent from being obtained ex post. Should the licensee assign the licence, he is obliged to notify the licensor without undue delay on the assignment and the identity of the assignee.

\textsuperscript{212} Section 2361 of the Civil Code.
\textsuperscript{214} Section 2384 (2) of the Civil Code.
\textsuperscript{216} TELEC, I., TŮMA, P., see reference 10, page 499.
\textsuperscript{217} HULMÁK, M., et al., see reference 6, page 609.
\textsuperscript{218} HOLCOVÁ, I., KŘESTANOVÁ, V. in ŠVESTKA, J., DVOŘÁK, J., FIALA, J., et al., see reference 23, section 2363, par. 4.
\textsuperscript{219} Section 2364 of the Civil Code.
\textsuperscript{220} Sections 1879 and following of the Civil Code.
3.3. Licence contract in British law

Turning my attention now to licence agreements under the British law, I have to emphasize that most differences will not arise from different doctrinal approach towards licences as an independent contractual type, but from general law of contract. Contract law in the UK, unlike copyright or patent law examined earlier, is based on traditional Common Law legal sources – case law and custom. We can summarize that statutory instruments are introduced only to soften pragmatic British contract law, enhancing protection of weaker parties, such as employees or consumers\textsuperscript{221}. Bigger part of these statutory instruments has been introduced in order to fulfil obligations arising from the European law. Further harmonisation of contract law by the EU seems now unlikely due to failure of a Common European Sales Law initiative drafted by the European Commission\textsuperscript{222}. Even more importantly, the UK representatives will have to negotiate terms of withdrawal from the EU and nobody knows the regulatory outcomes of this wild process. Apologies for my personal cynical comment, but this uncertainty is only one feature which the Leave supporters should have thought through more diligently before casting their votes.

3.3.1. General British Law of Contract

Abovementioned pragmatism in British contract law is well illustrated in summary of contract law given by Lord Toulson, who concluded that "parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them"\textsuperscript{223}. This utilitarian laissez-faire philosophy is softened by equitable rules such as consideration, illegality, frustration, duress or misrepresentation. So far, the British law of contract reminds us of the contract law adopted by Czech Civil Code, which undoubtedly strengthened contractual freedom in Czech civil law. Notwithstanding equitable rules listed above, other standards crucial to Continental Law cannot be found in British contract law, such as good faith. Good faith in performance


\textsuperscript{223} Prime Sight Ltd v Lavarello [2013] UKPC 22.
of the contract is no general duty in British contract law, despite some tentative steps towards implying such a duty in any ordinary commercial contract\textsuperscript{224}.

I addressed earlier how the Civil Code broadened applicability of gratuitous licences. Common Law contracts, on the other hand, traditionally insist on consideration and offer a very limited protection to gratuitous contracts. A licensee from a gratuitous licence contracts can only be compensated to the extent to which the licensee has been prejudiced as a result of his reliance on the premise\textsuperscript{225}. Ultimately, the licensee cannot rely on the licence in enforcing his use of the intellectual property right negotiated by the licence contract. Nevertheless, consideration does not have to be adequate, it only has to be sufficient. Even a house worth GBP 160.000 can be sold for GBP 1 as long as other legal requirements are met\textsuperscript{226}. Summarizing British doctrine of consideration, it is always preferable for the licensee to provide sufficient consideration – after all, it is the only way how to make sure that the licensee is entitled to all available remedies.

3.3.2. Specifics of licence agreements

Moving from general British contract law, it should go without surprise that UK does not codify licences in any unifying manner. There are no \textit{lex specialis} provisions on withdrawals from licence contracts, additional obligations on parties etc. Licence contracts are simply governed by general contract law with only few provisions enacted in individual acts regulating intellectual property.

One of these provisions can be found in section 90 of the CDPA 1988, dealing with assignment and licencing of copyright. Subsection 4 constitutes that a licence granted by a copyright owner is binding on every successor in title to his interest in the copyright, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser. This provision tackles absence of good faith in UK contract law and provides licence purchasers with additional protection against unknown obligations enforceable

\textsuperscript{224} Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 QB.
\textsuperscript{225} PEEL, E., TREITEL, G. H., see reference 221, pages 132-134.
\textsuperscript{226} McKENDRICK, E., see reference 222, pages 68-69.
against their rights. Similarly, defence preventing infringement is construed with this right\textsuperscript{227}.

Exclusivity of licences regarding individual rights in copyright is defined throughout the CDPA 1988\textsuperscript{228} with its subsequent rights and remedies. Very much like Czech exclusive licences, CDPA 1988 requires exclusive licences to be in writing. Trade Marks Act 1994 goes even further and demands all licences to be in writing in order to be effective\textsuperscript{229}. To complicate affairs even more, Patents Act 1977 does not prescribe written form for any kind of licences. Disunity of formal requirements is arguably the best argument to carry out all licence contracts in writing, thus avoiding nullity and interpretational disputes\textsuperscript{230}.

Non-exclusive licences are generally subjected to substantively lower thresholds. There is no requirement for non-exclusive licences to be in writing and courts are more liberal in finding these licences implied in various contracts\textsuperscript{231}. There even has been a very careful attempt by the High Court to tolerate gratuitous non-exclusive licences\textsuperscript{232}, which is very controversial regarding Common Law emphasis on sufficient consideration. Nevertheless, the decision in Godfrey v Lees and Others is not a sufficient authority to allow further recognition of gratuitous non-exclusive licences by the UK law.

Another feature similar to Czech and British licence contracts is recognition of sub-licences. Patents Act 1977 and Trade Marks Act 1994 expressly allow contractual parties to stipulate on sub-licensing\textsuperscript{233}, while CDPA 1988 omits sub-licences at all, leaving them up to freedom of will.

I discussed earlier that depending on which intellectual property right is subjected to a licence agreement, licensees have different legal tools available seeking protection against infringers. UK law generally provides exclusive licensees with the

\textsuperscript{227} Section 90 (4), second sentence of the CPDA 1988.
\textsuperscript{228} Sections 92, 191D and 225 of the CPDA 1988.
\textsuperscript{229} Section 28 (2) of the Trade Marks Act 1994.
\textsuperscript{230} Written form is also officially recommended by UK Intellectual Property Office, see at Licensing IP - IP Health Check 1, Intellectual Property Office, Newport, 2013, DPS/C450/07-13, page 6.
\textsuperscript{231} BENTLY, L., SHERMAN, B., see reference 2, pages 296-297.
\textsuperscript{233} Section 31 (5) of the Civil Code and section 28 (4) of the Trade Marks Act 1994.
same remedies as licensors\textsuperscript{234}. By granting an exclusive licence, the licensee is awarded a statutory procedural status that is equivalent to that of the proprietor\textsuperscript{235}. Non-exclusive licensees enjoy only some remedies under Trade Marks Act 1994 and CDPA 1988\textsuperscript{236}. These provisions are based on European directive on the enforcement of intellectual property rights, which is why we cannot spot many substantive differences between two examined jurisdictions. Nevertheless, one dissimilar characteristic can be spotted comparing Czech and British enforcement rights of the licensee. We saw that Czech law favours right holders over licensees in both copyright and industrial property right based proceedings. UK law, contrary to Czech law, equals exclusive licensees to rights holders as far as remedies are concerned. The equivalent status of these two entities occasionally even gives rise to confusion whether exclusive licences are not in fact identical with assignment in the British law\textsuperscript{237}. Nevertheless, an exclusive licence is still a derivative right, inferior to proprietary rights of the right holder with several legal consequences arising\textsuperscript{238}.

Analogically to Czech practice of licence agreements, British licence contracts limit the scope of licence by extent and exclusivity. The licence scope is determined similarly to Czech law, i.e. by time, territory, and specification of authorised exploitation by quantity, identification of permitted forms of use etc. Exclusivity is traditionally understood as status of the licence and there are three general types: the licence being granted exclusive (the licensor may not use the IP and only the licensee can use it); sole (the licensor and the licensee may use the IP, but no other licences can be given) and non-exclusive (the licensor may use the IP and may license others to use it as well).\textsuperscript{239} I declared earlier that only some acts define what exclusive licences mean, while no general definition is provided by the British law. It is therefore highly recommendable to define precisely what level of exclusivity is stipulated by the licence contract.

\textsuperscript{236} Section 30 of the Trade Marks Act 1994 and section 191 L of the CDPA 1988.
\textsuperscript{238} See more at BENTLY, L., SHERMAN, B., see reference 2, page 296-297.
\textsuperscript{239} Skeleton Licence. Intellectual Property Office. 2014, DPS/C550/07-14, par. 7.
4. Other forms of disposition with intellectual property rights

Earlier in this thesis, we saw that Czech law is rather confusing in terms of understanding creations as things. Regardless of this controversy, intellectual property rights are subjected to countless forms of disposition substantively different from licencing. We must not forget that licence contracts merely constitute right to use in favour of another party, but the right stays with the right holder. However, transfer of certain intellectual property rights is not only possible, but often preferable over mere licencing.

Intellectual property rights in general (several exceptions apply, some of them will be discussed later), similarly to other rights, can be subjected to sale, pledge, a contract to work\textsuperscript{240}, security, inheritance, insolvency and many other legal regimes. It is not my aim to discuss these legal areas in detail, but I think it is necessary to have a closer a look at two areas of law most discussed with regard to licence contracts – franchise and transfer of copyright.

4.1. Franchise agreement

Franchise agreements are often perceived as a concurring contractual type to licence agreements. It is fair to say that licence contracts are older in terms of origin, but franchise contracts attract increasing attention every year. Closer examination of their nature might unveil characteristics that stand behind the abovementioned boom of franchising.

Franchising is a phenomenon of a truly global scale. Most franchises are negotiated across borders of numerous states, which has led to need of harmonisation at central level. There are organizations in both the Czech Republic and UK associating businesses involved in franchising\textsuperscript{241}. These organizations are member subjects of European Franchise Federation, a self-regulated body promoting franchise in 21 European countries. I mention the cross-border nature of franchise not only to underline its global character, but to offer a satisfactory definition of franchise. Few European

\begin{footnotesize}
\begin{itemize}
  \item Special provisions in sections 2631-2635 of the Civil Code apply in Czech law.
  \item Czech Franchising Association and British Franchise Association.
\end{itemize}
\end{footnotesize}
countries define franchise contracts in their law, but European Code of Ethics for Franchising\textsuperscript{242} enacted by the European Franchise Federation provides us with a broadly accepted definition of franchising.

The Code of Ethics is not an official legal source, but in absence of universally accepted authority on franchising it might as well serve as a commercial custom or at least a badge of quality\textsuperscript{243}. The Code of Ethics defines franchising as "\textit{a system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings}". The aforementioned cooperation between two mutually independent entities is based on a franchise agreement. In the virtue of this contract, the franchisor grants franchise to the franchisee. The franchisee, in return, promises to pay remuneration and conduct a business accordingly to the franchisor's concept. The concept is determined by rights contained in the franchise: most importantly trade mark, know-how, business and technical methods, procedural system, commercial and technical assistance etc.\textsuperscript{244}

Franchise, as described above, is a specific type of a combined licence. By the franchise agreement, a whole package of rights is disposed with, regardless of their differences in nature. The most crucial right that must be always present is a trade mark. Trade mark in franchising serves as an indicator of the franchised brand. By granting franchise, the franchisor and franchisee mutually oblige themselves to recreate a previously known business model. The final outcome is a new independent business that is identical with its predecessor in terms of the business concept. The advantage of franchisee agreements is their ability to transfer a whole business concept at once. As we experienced earlier with licence contracts, only intellectual property rights can be subjected to them. Other rights protected by competition law are not qualified to represent subject matter of a licence contract. Variety of rights disposed with via

\begin{footnotes}
\item[242] European Code of Ethics for Franchising, first enacted in 1972.
\end{footnotes}
franchise agreements represents a significant deflection from licence contracts and, as a consequence, might be viewed as an advantage of franchise contracts.

Broad spectre of application regarding franchise contracts is not the only feature I find highly favourable. We examined earlier that licence contracts are governed by several directory rules (mostly in Czech law) that can be stipulated otherwise by the contractual parties. Nevertheless, these provisions might be omitted in individual contracts and statutory provisions apply, possibly twisting original intention of the contractual parties. Franchise agreements, on the other hand, do not attract special attention by neither Czech nor UK law. I personally favour minimum intervention by the government in the contract law, which is why I find franchise contracts more appealing than their licence counterparts in this matter.

4.2. Transfer of copyright

I declared and demonstrated earlier that a great economic potential is vested in intellectual property rights. This potential is mostly capitalized on via licence contracts, but licences only constitute a mere right to use. Property is understood all around the world as the ultimate legal dominium over assets, which is why many parties seek not only to be authorised to use certain intellectual property rights, but rather to exercise superior proprietary rights over them.

Copyright appears to be the most controversial area of intellectual property law in this matter. As I discussed earlier, both the Czech Republic and the UK distinguish between moral and economic rights. The recognition of moral rights has its roots in the Continental Law and economic rights are most developed under the Common Law. Notwithstanding these dissimilar traditions, Berne Convention obliges its signatories to acknowledge moral rights that last even after a transfer of economic rights. The Copyright Act and CDPA 1988 enact significantly different scope of moral rights, but both codes acknowledge them and, as discussed earlier, forbid them to be waived or transferred. The two codes on copyright disagree on post mortem protection of moral rights, while the Copyright Act terminates moral rights upon the author's death and simultaneously offers certain protective tools available after the author's death.

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245 Article 6bis (1) of the Berne Convention.
CDPA 1988, contrary to the Copyright Act, transfers moral rights upon the author's death. Regardless of these significant statutory differences, both codes are in compliance with provisions of Berne Convention on post mortem protection of moral rights.246

Building on previous findings, transfer of copyright is theoretically available only in the matter of economic rights. The Czech Republic and UK are both dualistic countries247, following doctrine of moral/economic rights dichotomy. Nevertheless, I promised earlier to deliver an objection to this presumption when discussing economic rights under the Copyright Act and it is appropriate to address this issue now in more detail.

Typical dualistic systems of copyright forbid moral rights from any form of disposition248, but leave economic rights transferable. The Copyright Act, however, prescribes that economic rights cannot be transferred249 inter vivos – which is a typical feature of monistic copyrights systems, originating and still effective in Germany250. This is why we can label the British copyright as dualistic, but Czech copyright should be rather perceived as quasi-dualistic due to some level of similarity with monistic copyright systems251.

Despite prohibition of copyright transferability, Czech legal science frequently recognizes transfer of copyright. We have to be cautious in this matter and strictly separate constitutive and real (translativní) transfers of copyright. A real transfer is what lawyers generally understand as a transfer – one party loses its rights and another party derivatively receives these rights. Constitutive transfer, dissimilarly, does not lead to a

246 Article 6bis (2) of the Berne Convention.
247 Common law copyright is traditionally understood as an independent group, but contemporary state in the UK is dualistic in its nature.
248 Author is only entitled to authorise interference with his moral rights, see at TELEC, I., TŮMA, P. Licenční smlouva v pojetí nového občanského zákoníku. In: JAKL, L., ed., see reference 61, page 89.
249 Section 26 (1) of the Copyright Act.
cessation of transferor's rights. By the virtue of a constitutive transfer, a mere right to use is constituted in favour of the transferee\textsuperscript{252} – just like we examined in licences.

Following the findings in the previous paragraph, we should accept transfers in Czech copyright demurely. Constitutive transfer is a legal oxymoron – transfer of rights is typically experienced in sales, but constitutive transfer rather reminds us of lease. I personally find the very concept of constitutive transfer confusing and inherently erroneous. Transfers are used throughout our law as a tool to obtain superior legal title identical with the transferor's original one. Constitutive transfer provides the transferee with a substantively less valuable right to use, which is why broad public might be confused by it and consequently grow suspicious of copyright dispositions.

British law is significantly less restrictive in assigning economic rights in copyright. Economic rights in the UK copyright can be transferred as a whole or partially, by reference to "times, territories and classes of conduct"\textsuperscript{253}. The only additional requirement is that any assignment must be in writing and signed by or on behalf of the assignor in order to be effective\textsuperscript{254}. British courts have even been so liberal that sufficient writing can be provided by an invoice or receipt\textsuperscript{255}. Oral assignments are ineffective at law, but general equitable rules will usually apply in cases where a valuable consideration is provided, therefore offering enforcement rights to both parties of an oral transfer\textsuperscript{256}.

\textsuperscript{252} TŮMA, P., see reference 204, page 11.
\textsuperscript{253} Kervan Trading v. Aktas [1987] IPR 583.
\textsuperscript{254} Section 90 (3) of the CDPA 1988.
\textsuperscript{255} Savoury v. World of Golf [1914] 2 Ch 566.
\textsuperscript{256} BENTLY, L., SHERMAN, B., see reference 2, page 294.
5. Conclusions

Descriptive character of the previous chapters allows me now to provide the reader with several outcomes summarizing my personal assessment of licence contracts under the Czech and British law. An important point to keep in mind is that the following paragraphs shall be strictly understood as my opinions regarding the subject matter of this thesis. These conclusive findings can be challenged by numerous contradictory arguments with their very own justifications. Building on this, acceptance amongst legal authorities seriously differs and is not of the primary concern to my comments and suggestions.

Firstly, both examined jurisdictions favour an open-ended definition of intellectual property rights. I expressed my approval of this doctrinal approach earlier, supporting it as the ideal way how to quickly react on newly emerging rights subsumable under intellectual property. In addition, I find complex protection of intangible assets equally convenient, e.g. by fair competition and consumer law. Mere resemblance of intellectual property rights does not automatically trigger protection by intellectual property law, which is why more suitable legal areas should cover know-how, business methods etc. In this general matter, I find both scrutinized legal systems well designed and effective.

Significantly more controversy arose when I turned my attention towards copyright. I promised to deliver my contradictory assessment regarding Advocate Generals Trstenjak's statement labelling European copyright as a compromise taking sufficiently into account different traditions and views in EU Member States257. EU countries belong predominantly in the Continental Law family and I am strongly convinced that pragmatic Common Law copyright is not given sufficient recognition by the European law.

As I illustrated in chapter 2.1.3., European Commission's promise not to harmonise copyright was broken by the recent CJEU rulings in BSA, Infopaq and

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257 Opinion of Advocate General Trstenjak, Sociedad General de Autores y Editores (SGAE) v Padawan S. L., C-467/08, par. 43.
Argumentation in which the CJEU engaged when deciding these cases has an extensive character over European Directives on copyright, effectively harmonising infringement and subsistence of copyright in the EU. The consequences are problematic in two levels. Firstly, it is highly controversial for the CJEU to push copyright harmonisation further despite European Commission’s previous approach not to intervene in domestic jurisdictions of the Member States. Secondly, CJEU harmonised in the virtue of Continental Law disrespecting Common Law traditions – which is, in my view, a waste of unique opportunity to merge the two legal systems in pursuit of a better copyright system.

I generally make peace with the abolishment of eight categories of protected works in the CDPA 1988 and favouring the extensive Continental Law requirement of literary/artistic/scientific works instead. I presented the Lucasfilm decision to illustrate that restrictive categorization of works under the CDPA 1988 occasionally leads to outcomes contrary to common sense. Complicated subsuming under one of the eight categories led to refusal of protection to works that are broadly perceived as worthy of copyright protection. I believe that the beauty of copyright lies in the fact that the most typical copyright protected works are easily identifiable by our instincts, as something that the author’s mind created and deserves protection on this basis – the Stormtrooper helmet being an undisputable example. In this respect, I find CJEU’s argumentation justifiable and effectively positive towards protection of copyright in the EU, regardless of the UK’s withdrawal from it.

Nevertheless, I strongly disagree with the adoption of intellectual creation as the one correct originality requirement. Continental originality, reaffirmed by the CJEU, is based on a threshold of author’s own intellectual creation, allowing the author to express his creativity in an original manner solely through the choice, sequence and combination of creative elements. A strong emphasis on the unique author’s personality is easy to spot in this originality requirement. In contrary, Common Law does not focus on originality arising from the author, but on resources invested in the

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258 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd, joined cases C-403/08 and C-429/08.
260 Infopaq International A/S v Danske Dagblades Forening, C-5/08, par. 45.
work. I am generally critical to legal naturalism built on human rights and copyright is no exception.

Personal intellectual creation and subsequent uniqueness is often blurry and does not suffice in practice. That is why the Copyright Act recognizes fictitious works and provides these with protection equal to traditional author's works, despite their lower originality level. Common Law solves this problem by demanding labour, skill and judgment, aimed to protect investments, not romantic concept of reflected personality. The traditional British doctrine leads to a lower threshold suitable for a broader portfolio of copyright protected works, but simultaneously is ready to tackle too extensive protection by virtue of qualitative and quantitative conditions examined in chapter 2.1.2. Following aforementioned, the Common law originality strikes me as easier to assess, unburdened by vague romantic construction and more flexible in reacting to the changing needs of copyright protection.

Beside the originality requirement, there is one key feature to subsistence of copyright that so far avoids the EU attention. Common Law fixation and Continental Law requirement of expression in an objectively perceivable manner are highly inconsistent in writing, but rather similar in their reality of application. UK law provides the author with protection even in cases when the work is fixated by someone else, which effectively prohibits capitalizing on ideas of other entities. In addition, artistic works in the CDPA 1988 are not subjected to fixation requirement, which offers protection to ephemeral works such as projection of light. Building on absence of discrepancy in practice, I find it unnecessary to concern ourselves further with this dissimilarity.

Another feature of high controversy can be identified in extent of moral rights in copyright. CDPA 1988 acknowledges fundamental moral rights enacted in Berne Convention and refuses to extent their protection an inch further. I personally find this approach favourable. Moral rights seem necessary in the scope adopted by Berne Convention – after all, author's works truly carry a badge of their author's personality and it seems highly unjust not to protect their non-commercial character. Nevertheless, I believe that the legislator should limit the regulation to protection of those most fundamental moral rights and leave the rest for the authors. Moral rights are put in
jeopardy especially after any disposition with copyright, because it is when the author's control over exploitation of his work is limited. However, authors are not helpless and can enhance protection of their moral rights in contracts – if they desire to do so. I do not feel that four moral rights in the CDPA 1988 are insufficient in any way. Therefore it strikes me as a good policy to leave the rest open for individual stipulation.

Building on few previous paragraphs, I find it unsatisfactory how the CJEU pushes European copyright law towards Continental model. It is only more disappointing when I think of how well worked combination of Continental and Common Law doctrines in the case of patent claims interpretation. EPC and Protocol on Article 69 strike the ideal balance between protection of patents and certainty of third parties – all that achieved by combining German “broad guideline” and British emphasis on actual wording of patent claims. The Epilady example demonstrates that there is still space for improvement, but I believe that activity of the UPC will overcome the present controversies preferably sooner than later. Unfortunately, I am afraid that after the UK leaves the EU, the Common Law voice will lose its main speaker and inevitably diminishes in the European law. Ireland (and perhaps Scotland in near future) does not possess negotiating power anywhere near to comparison to that held by the UK. As a consequence, pragmatic and utilitarian Common Law influence might cease to exist in the EU legislation.

It is now an impossible task to predict what shape will the relationship between the UK and EU take after the UK effectively withdraws from it. The current PM Theresa May has been heard that the Article 50 of the Treaty on European Union will be triggered in March 2017 and the UK thus should leave the EU by summer 2019261. Even the most passionate Leave advocates do not wish to revoke all the existing bonds towards the EU (and its massive internal market, of course). But what deal do they hope to strike with the EU?

The procedure of Article 50 is an incredibly difficult one262, lasting for at least two, but perhaps even more years. This transitional period will be filled with fierce talks over the future cooperation between the UK and EU whilst going through a vast body of

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262 See practically at openeurope.org.uk/today/blog/the-mechanics-of-leaving-the-eu-explaining-article-50/.
EU legislation that is now applicable in the UK. The only thing that is crystal clear is that the UK is not going to face an opponent willing to take many steps back. The EU representatives are most likely ready to make an example out of the UK, to show all the hesitative EU countries that withdrawing from the EU brings serious consequences. In the same time, UK is expected to push towards more independent control of its borders while preserving their citizens' privilege to work and travel freely within the EU. As if this clash of opposing interests was not enough, I can almost see the negotiating rooms boiling when I picture the UK's most influential man in these talks, current Foreign Secretary Boris Johnson. The only thing I am sure about is that we are about to experience some truly unique, life-changing events – with their outcomes unknown in both substance and time, including the future of the European copyright and UK's participation in it.

Examination of licence contracts proved that the Civil Code brought Czech and British law closer together by enhancement of contractual freedom and abolition of disunity regarding licence agreements. Notwithstanding more liberal regime of licence contracts under the Civil Code, there is still significantly more regulation present in Czech Republic compared to Britain. Majority of Civil Code provisions on licence agreements is directory, which resembles regulatory policy of "nudging." Nudging is a regulatory technique with both liberal and paternalistic features. Parties that conclude licence contracts under the Civil Code are free to opt-out from most provisions and stipulate as suits them best – in this regard, the Civil Code is liberal. Nevertheless, by introduction of directory provisions, the parties are "nudged" to follow the provisions contained in the Civil Code. The contractual parties do not do so exclusively because they find these provisions the best for their licensing needs, but frequently by omission or lack of expertise. Nevertheless, findings of behavioural economics say that "nudging" is a valuable regulatory tool allowing the government to affect social conduct. However, nudging is still a paternalistic tool that evokes a metaphor of a governmental shepherd pointing its herd wherever it sees greener grass.

Building on my distrust for unnecessary regulation, I believe that Czech law would do better without certain provisions regulating licence agreements, e.g. provisions on sublicensing and, at least partially, special provisions on copyright, publishing licence agreements and rights related to copyright and rights of an author of a database. I understand the legislator's well-meant will to protect specific character of these licence agreements, but these provisions complicate licensing and interfere with contractual freedom. After all, overly casuistic character of the Civil Code is criticized throughout its whole content.

What I appreciate on contemporary licensing in Czech law is simplification of gratuitous licence contracts. British insistence on consideration does not reflect actual needs of everyday contractual practice and forces the society to find its ways around it, such as offering symbolic consideration. The Civil Code allows entering into valid licence contracts without consideration, which I find highly convenient and practical.

To support my fondness of liberal contractual law, I described franchise agreements as a concurring contractual type generally free of regulation. The popularity of franchise contracts and alternative licensing schemes, such as Creative Commons, conclusively witness that modern licensing demands simple, flexible and customizable licensing. Needless to say, any stringent regulation is in opposition to this modern tendency.

Finally, transfer of economic rights in copyright was discussed in chapter 4.2. In this matter, I find the prohibition of transferability enacted in the Copyright Act as contrary to new private law principles adopted by the Civil Code. The Civil Code promotes individual choices and freedom of will, while the Copyright Act limits these by forbidding real (translativní) transfers of economic rights in copyright. It is frequently argued that permission of transferability puts authors, who usually represent the weaker contractual party, in danger of abusive negotiating conduct by their business counterparts. Notwithstanding this reasonable argument, Czech law provides protection against abuse of power via consumer law, sections 433 or 1796 of the Civil Code and many other legal tools. Generally dismissing real transfers of economic rights by the

265 Section 2363 of the Civil Code is absolutely redundant and could be omitted without any consequences.
266 See more at https://creativecommons.org/.
Copyright Code, including fiduciary transfers\textsuperscript{267}, is therefore excessively stringent and disrespectful of private law liberty. After all, economic rights are the gateway to capitalization on ideas and jurisdictions that do not allow transfers of these will hardly ever contribute to maximized profits.

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Úvod

Cílem této diplomové práce je nabídnout uspokojivou analýzu právní úpravy licenčním smluv podle dvou fundamentálně odlišných právních systémů. Právní rodina kontinentálního práva je v této práci reprezentována právním řádem České republiky, zatímco historické území Británie nabízí nejklasičtější příklad země angloamerického právního typu. Věřím, že bližší zkoumání výše zmíněných jurisdikcí nabízí unikátní příležitost nejen k porozumění práva a jeho úpravy, ale zároveň slouží jako podklad pro hlubší ilustraci důvodů, které stojí za současným právním stavem ve dvou výše uvedených zemích.

Vedle popisu rozmanitých aspektů licencování si tato diplomová práce klade za úkol odhalit dopady střetu a koexistence dvou rozdílných právních rodin. Současné právo České republiky a Británie má své kořeny v odlišných politických základech a společenských vlivech. Výsledné rozpory jsme byli schopni více či méně úspěšně ignorovat po stovky let, spoléhající na územní účinnost jednotlivých právních řadů. Zásadní zvrat můžeme ovšem pozorovat s nárůstem naléhavostí ekonomických zájmů v post-koloniální éře. Když nazrál čas k otevření hranic jednotlivých zemí, zákonodárci museli vystoupit ze zaběhnutých tradic a dospět k nevyhnutelně problematickému kompromisu. Ve snaze vypořádat se s nezbytnou potřebou kooperace v oblasti práva duševního vlastnictví a jejími důsledky tato práce nabízí základní dopady rozhodnutí přijatých jak na úrovni evropské, tak na úrovni mezinárodní. S velkou opatrností a váhavostí budou také nastíněny některé konsekvence vyplývající z rozhodnutí Spojeného království opustit EU.

Při dotyku s právem duševního vlastnictví je nezbytné mít na paměti jeho dynamický charakter a proměnlivý obsah. Předměty chráněné právem duševního vlastnictví jsou typicky způsobilé k využití miliony rozdílných uživatelů v časovém horizontu pouhých sekund. Spojitost s rozvojem moderních technologií včetně internetu je z tohoto důvodu dalším aspektem, který se v této práci těší pozornosti.

268 Pojem "Británie" je v této diplomové práci používán jako tradiční označení území Anglie a Walesu, byť v praxi se označení "Británie" používá promisque.
Právo je komplexním společenským jevem, přičemž zákonodárci napříč zeměmi využívají různé regulatorní techniky. Odůvodnění, legitimita a praktičnost jednotlivých legislativních metod se zásadně liší, stejně jako okolnosti (ne)souhlasu odborné veřejnosti s jejich užitím. Regulativní nástroje, jejich charakteristika a související kritika jsou další metodou výzkumu aplikovanou v této práci.

Licenční smlouvy jsem jako předmět své práce zvolil z důvodu smluvní svobody, kterou svým profílem nabízejí. Licencování je převážně liberálním právním institutem a jakákoliv interverce veřejné moci musí být dostatečně vyvážena na základě příslušných právních testů. V této práci bude popsáno a zhodnoceno, jaké restrikce uvrhují dvě popsané jurisdikce na proces licencování. Vedle normativní stránky se tato práce zabývá také nejčastějšími ujednánními licenčních smluv, které nabízí každodenní smluvní praxe. Licenční smlouvy zároveň nejsou zdáleka jediným smluvním typem, který umožňuje dispozici se statky chráněnými právem duševního vlastnictví. Konkurující smluvní typy jsou adresovány v návaznosti právě na smluvní ujednání vyvinutá smluvní praxí.

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Po vymezení licencí adresovaných touto prací následuje podkapitola věnovaná obecné problematice duševního vlastnictví. Licencí převáděnou licenční smlouvu, jak již bylo rozebráno výše, autorizuje poskytovatel nabyvatele k výkonu práv duševního vlastnictví – tedy nastupuje právní okolnost bránící vzniku deliktní odpovědnosti za výkon práv zahrnutých v licence. Pro existenci licencí je tedy klíčové vymezit, jaká práva a v jakém rozsahu jsou chráněna právem duševního vlastnictví. Právě v této části diplomové práce poprvé narážíme na fundamentální rozpory mezi jurisdikcemi dvou zkoumaných států.

Oddíl 1.2.1 diplomové práce je věnován právnímu oboru duševního vlastnictví a nabízí rozličné právní názory na legitimitu a důvodnost ochrany práv z intelektuálních nehmotných statků. Blíže je adresována zejména potřeba ochrany času, energie a prostředků investovaných do jejich vytvoření, způsoby zneužívání práv duševního vlastnictví nebo uvalování restrikcí na obecně přístupné nehmotné statky. Diskuze je systematicky dělena do dvou větví. Prvním společným jmenovatelem je etický a morální charakter práv z duševního vlastnictví, tj. legitimita ochrany jejich předmětu. Druhou rovinou je potom otázka stimulace společensky žádoucích činností prostřednictvím ochrany práv duševního vlastnictví, například motivační prvek patentové ochrany vedoucí ke zvýšení finančních toků do vědeckého rozvoje nebo ochranná funkce práv na označení směrem ke spotřebitelům. Závěrem tohoto oddílu je presentována lidskoprávní rovina ochrany práv duševního vlastnictví.

Následující oddíl se od obecných úvah o duševním vlastnictví posouvá do roviny positivního vymezení obsahu pojmu duševní vlastnictví. Prostřednictvím odborné
literatury a právních pramenů vnitrostátních i mezinárodních jsou čtenáři nabídnuty více či méně korespondující výčty a definice práv duševního vlastnictví. Dílčí závěr této kapitoly lze spatřovat v konstatování absence přesvědčivého vymezení pojmu práv duševního vlastnictví jak v právu České republiky, tak v právu Anglie a Walesu.

**Komparace českého a britského duševního vlastnictví**

Obsah druhé kapitoly hlouběji proniká do dvou pozorovaných jurisdikcí a jejich pojetí práva duševního vlastnictví. Zkoumaný předmět této práce, licenční smlouvy, je existenčně závislý na obecné úpravě duševního vlastnictví a jako autor jsem se rozhodl věnovat obecné úpravě práv duševního vlastnictví značnou pozornost. S ohledem na rozsah problematiky duševního vlastnictví a cíl diplomové práce byly vybrány dvě typické oblasti práva duševního vlastnictví:

- autorské právo, jako relativně svěbytná část práva duševního vlastnictví, a
- patenty, zastupující průmyslové vlastnictví.


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Rozbor autorského práva je v diplomové práci rozdělen do tří oddílů. První oddíl nabízí rozbor českého autorského práva a jeho zařazení do kontinentální právní kultury. Důraz je kladen zejména na striktní rozlišení práv majetkových a osobnostních, jejich vývoj a současný stav. Bližšího zpracování se dočkal také pojem autorského díla, jeho charakteristika a náležitosti. Podstatnou částí oddílu diplomové práce zaměřeného na české autorské právo je také rozdělení na práva autora k jeho autorskému dílu a práva s právem autorským související.

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**Patentové právo**

Koncepce analýzy patentového práva se od výše popsané podkapitoly o právu autorském liší integrací dopadů evropské regulace přímo do dvou oddílů věnovaných jednotlivým zkoumaným jurisdikcím. Klíčovou otázkou adresovanou v podkapitole věnované patentovému právu je výklad patentových nároků. Zjevně praktické příklady ze soudní praxe nejvyšších anglických soudních orgánů umožňují čtenáři lépe pochopit klady a zápory doslovného a účelového výkladu patentových nároků. Predikce vývoje evropského patentového práva jsou, stejně jako v případě předchozího pojednání o právu autorském, značně ostýchavé s ohledem na vystoupení Velké Británie ze společenství států EU.

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Třetí kapitola diplomové práce je věnována výhradně samotnému ústřednímu tématu, tedy licenčním smlouvám. Po shrnutí poznatků dosažených v předchozích
kapitolách se pozornost obrací na základní náležitosti a praktické účely licenčních smluv jako zvláštního smluvního typu uznávaného v obou předmětných jurisdikcích. Konkrétně se jedná o vymezení smluvních stran, předmětu licenční smlouvy, tržních souvislostí aj.

Podkapitola věnovaná české úpravě licenčních smluv je téměř výhradně orientována na příslušná ustanovení občanského zákonníku. Po zařazení licenční smlouvy do systematiky občanského zákonníku je stručně shrnuta potřebnost jednotné úpravy a výhody překonání dvoukolejnictví úpravy z doby před účinností rekodifikace soukromého práva. Struktura diplomové práce respektuje členění úpravy licenční smlouvy v občanském zákonníku, tedy nejprve pojednává o obecných ustanoveních a poté navazuje popisem jednotlivých zvláštních licenčních typů.

Podkapitola 3.3 ve svém úvodu počítá se zvlášťnostmi anglického smluvního práva a stručně se zaměřuje na zvláštnosti od těmi nejduležitějšími principy a východisky ovládajícími britské kontrakty. Speciální úprava licenčních smluv je uvedena s odkazem na jednotlivá ustanovení příslušných právních předpisů britského právního řádu.

Jiné formy dispozice s právy duševního vlastnictví

Kapitola čtvrtá je východiskem jedné z metod zkoumání uvedené v úvodu diplomové práce, konkrétně komparativní analýzy smluvních typů konkurujících licenční smlouvy. První podkapitola se věnuje franšíze, zejména jejím odlišnostem od licenční smlouvy a výhodám z nich plynoucích. Vzhledem k typicky nadnárodnímu charakteru franšízování jsou ve zkratce představeny nejdůležitější národní a nadnárodní franšízové organizace, včetně jejich hlavních úkolů a aktivit.

Předmětem zkoumání druhé podkapitoly je převod autorského práva. Převod autorského práva je dispozičním úkonem nejblížším poskytování licence – zároveň je ale úprava převodu autorských práv diametrálně odlišná podle práva České republiky a Británie. V souvislostech se opět vracíme k tradičnímu dělení na práva osobnostní a majetková se všemi souvisejícími otázkami. Čtenáři je v tomto ohledu poskytnuta bližší

269 Naproti tomu obecná znalost českého smluvního práva je u čtenářů předpokládána a z toho důvodu vynechána.
diskuze ohledně monismu a dualismu chápání autorského práva včetně současné situace ve dvou analyzovaných právních řádech. Druhá podkapitola čtvrté kapitoly je poté zakončena úvahou nad charakterem konstitutivního a translativního převodu práv, přijímaných odlišně v České republice a Spojeném království.

Závěry


Následující strukturu této práce, věnoval jsem se v hodnocení nejprve definici duševního vlastnictví formou otevřeného seznamu a zapojení širokého spektra právních oblastí do ochrany nehmotných statků. Tyto dva elementy jsou vlastní oběma zkoumaným zemím a hned z několika důvodů v diplomové práci bliží adresovaných je přijímám souhlasně.

Daleko více kontroverze vyvstalo při zkoumání odlišnosti úpravy práva autorského. Nejprve jsem vyjádřil svou skepse vůči evropskému autorskému právu jako kompromisu mezi kontinentálním a angloamerickým pojetím autorského práva. Domnívám se, že EU nebere dostatečné ohledy na výrazně pragmatičtější britskou doktrínu a zejména prostřednictvím Soudního práva EU čím dál výrazněji posouvá evropskou úpravu autorského práva do kolejí kontinentální úpravy. Kromě porušení slibu dříve vysloveného orgány EU vnímám tento trend jako promarnění příležitosti k vytvoření lepšího autorského práva spojením silných stránek obou zúčastněných právních rodin.
Co do předmětu rozhodování Soudního dvora EU svůj souhlas víceji vyjadřuji s rozhodnutími rušicími uzavřený charakter osmi kategorií autorských děl chráněných britským autorským právem. Na druhé straně zásadně nesouhlasím s unifikací požadavku originality a systémově se klóním k tradiční anglické doktríně *skill, labour and judgment*.

Ještě o poznání více kontroverze shledávám v rozsahu ochrany osobnostních práv v právu autorském. Opět se klóním k britské úpravě, a to z důvodu vyšší úrovně smluvní svobody, kterou nabízí. Kontinentální pojetí osobnostních práv, tedy i to české, podle mého názoru představuje příliš extenzivní a nedostatečně odůvodněný zápas zákonodárce do soukromých práv.

Výše uvedené závěry týkající se autorského práva jsou v diplomové práci následně poměřeny s relativně úspěšným výsledkem spojení angloamerického a kontinentálního pohledu na patentové právo. V návaznosti na kladné hodnocení evropské úpravy patentového práva musím konstatovat obavu vyplývající ze ztráty pragmatického britského pohledu na vývoj evropské legislativy.

Kapitola čtvrtá nabídla porovnání regulace licenčních smluv, přičemž shodné a veskrze kladné znaky můžeme identifikovat v dlouhodobě posilující smluvní svobodě a sjednocení úpravy licenční smlouvy. Bez ohledu na posílení smluvní svobody občanským zákoníkem stále můžeme na české straně pozorovat podstatně více regulace vzhledemící na licenční smlouvy. Většina ustanovení upravujících licenční smlouvy v občanském zákoníku má dispozitivní charakter, nicméně jejich praktický dopad může být identifikován jako paternalistická metoda regulace známá v anglicky psané literatuře jako „nudging“. Závěrem této úvahy konstatuji nadbytečnost některých ustanovení občanského zákoníku upravujících licenční smlouvy a kritizuji obecně příliš kazuistický charakter občanského zákoníku.

Českému právu naopak kvituji zjednodušení poskytování bezúplatných licenčních smluv. Britské smluvní právo naopak vždy vyžaduje jako základní náležitost smlouvy protiplnění, což ve svém důsledku vede k absurdním závěrům a nekoresponduje s každodenní smluvní praxí.
Obdobně přijímám s povděkem liberální charakter franšízování a alternativních licenčních schémat, např. Creative Commons. Vzrůstající popularita těchto dvou institutů nejlépe svědčí o moderních požadavcích na dispozici s právy duševního vlastnictví: jednoduchost, flexibilitu a přizpůsobení dispozice na míru konkrétním potřebám.

Abstract

The objective of this diploma thesis is to render a comprehensive analysis of licence contracts in two countries – the Czech Republic and England and Wales. The effort to highlight differences between the two scrutinized jurisdictions and related criticism are the most important methods applied in this work and, hopefully, the most recognizable benefits of it.

The thesis consists of a short introduction, followed by four descriptive chapters and author's subjective conclusions. The introductory part presents methods of research used throughout the work and implicitly hints what can the reader except when studying this diploma thesis.

The first chapter splits into two mutually linked subchapters. The first one defines the very term licence, its etymology and classification. The following subchapter describes general characteristics of intellectual property, a crucial topic to licence contracts and thus indirectly to this thesis.

This thesis promises a comparison of two legal systems and the second chapter fulfils this aim. Consisting of two additionally divided subchapters, the author engages in an analysis of the copyright and patent law respectively. Both examined intellectual property rights are looked at via optics of Czech, British and European intellectual property law.

After being familiarized with two typical intellectual property rights, the third chapter focuses on the core subject of the thesis, licence agreements. After a subchapter elaborating on licence contracts rationales, two subchapters illustrating Czech and British licence agreements respectively follow.

The forth chapter takes a step aside from licencing while introducing two related subjects. Firstly, franchise agreements are addressed, pinpointing common and alien features. Secondly, transfer of copyright under the Czech and British law gets attention.
The final chapter is based on the previous analytic findings, summarizing those under the author's personal preferences. Beside comparison of distinctions between the two scrutinized jurisdictions, suggestions towards future amendments are presented.
Abstrakt

Cílem této diplomové práce je poskytnout komplexní analýzu licenčních smluv ve dvou zemích – České republice a Anglii a Walesu. Snaha zdůraznit rozdíly mezi dvěma zkoumanými jurisdikcemi a související kritika jsou nejdůležitějšími metodami aplikovanými v této práci a zároveň jejimi největšími přednostmi.

Práce sestává z krátkého úvodu, následovaného čtyřmi deskriptivními kapitolami a autorovými subjektivními závěry. Úvodní část představuje metody výzkumu užité v této práci a naznačuje, co může čtenář očekávat při studiu diplomové práce.

První kapitola je dělena do dvou vzájemně propojených podkapitol. První definuje samotný pojem licence, jeho etymologii a klasifikaci. Navazující podkapitola popisuje obecnou charakteristiku duševního vlastnictví, klíčového tématu licenčních smluv a z toho titulu nepřímo také této práce.

Diplomová práce slibuje porovnání dvou právních systémů a druhá kapitola naplňuje tento názor. Skládá se ze dvou podkapitol, ve kterých se autor zabývá analýzou autorského práva a patentu. Obě zkoumaná práva k duševnímu vlastnictví jsou nahlížena optikou českého, britského a evropského práva duševního vlastnictví.

Po seznámení se dvěma typickými právy duševního vlastnictví se třetí kapitola soustředí na centrální téma této práce, licenční smlouvu. Po podkapitole věnované základům licenčních kontraktů následují dvě podkapitoly zaměřené na české a britské licencování.

Čtvrtá kapitola vybočuje z tématu licencování a představuje dvě související oblasti. Prvně jsou adresovány franšízové smlouvy, s vyzdvihnutím společných a cizích prvků. Zadruhé je věnována pozornost převodu autorských práv v českém a britském právu.

Poslední kapitola je založena na předchozích analytických poznatcích, které shrnuje s ohledem na autorovy osobní preference. Vedle srovnání rozdílů mezi dvěma zkoumanými jurisdikcemi jsou nabídnuta doporučení ohledně budoucího vývoje.
Název práce v českém jazyce
Licenční smlouva v právním řádu České republiky a Anglie a Walesu

Klíčová slova
Licenční smlouva, Česká republika, Anglie a Wales

Název práce v anglickém jazyce
Licence agreement in the legal systems of the Czech Republic and England and Wales

Key words
Licence agreement, Czech Republic, England and Wales