Abstrakt

Práce se zabývá problematikou autorskoprávně volné složky díla nejen z hlediska jejího postavení v systému soukromého práva, ale také ústavněprávního zakotvení. Autor se nejdříve zaměřuje na autorskoprávně volné prvky díla v kontextu tzv. *commons*. Na základě *Drahosovy* a *Peukertovy* kategorizace *commons* dospívá k závěru, že existují dvě skupiny společných statků: statky, které „nepatří nikomu" (*negative commons*; *Gemeingüter*), a statky které „patří všem" (*positive commons*, *Gemeinschaftsgüter/Kollektivgüter*). *Peukertovo* vymezení jednotlivých částí *public domain* (strukturální *public domain*, časově vymezená *public domain*, autonomní *public domain*, výjimková *public domain*) aplikuje na české právo a rozebírá jednotlivé druhy společných nehmotných statků na vnitrostátní úrovni. Autorskoprávně volnou složku díla autor rozděluje podle objektového a právně-regulačního kritéria na: (i) abstraktní prvky; (ii) skutečnosti existující nezávisle na lidském vědomí; (iii) vědecké myšlenky, principy, teorie, matematické vzorce, statistické grafy a vědecké objevy; (iv) myšlenky a principy počítačových programů; (v) volná díla a (vi) díla vyloučená z ochrany z důvodu veřejného zájmu. Dále se autor zaměřuje na metodologické přístupy k autorskoprávně volné složce díla a v daném směru rozebírá metodu poměřování kolidujících zájmů, metodu rozlišování mezi individualizovanými a neindividualizovanými prvky a konečně metodu poměřování základních práv a svobod (test proporcionality, praktickou konkordanci).

Autor je toho názoru, že nehmotné statky, které jsou ze své přirozené povahy ubikvitní a nerivalitní, může každý volně užívat, pokud ohledně jejich užívání neexistuje žádný právní zákaz či příkaz. Právě v právní nezakázanosti či nepřikázanosti se projevuje obecná svoboda jednání („*Každý může činit, co není zákonem zakázáno, a nikdo nesmí být nucen činit, co zákon neukládá*"), která představuje ústavněprávní základ pro užívání nehmotných statků v jejich přirozeném stavu. Obecná svoboda jednání (*Handlungsfreiheit*) je nezávislá na státu a jedná se o základní strukturální princip demokratického právního státu. V českém právu je obecná svoboda jednání na ústavní úrovni zakotvena čl. 2 odst. 3 Listiny základních práv a svobod a v oblasti soukromého práva ji nacházíme v § 3 odst. 1 ObčZ.

V druhé části práce se autor zabývá jednotlivými ústavními principy, které obecnou svobodu jednání posilují (svoboda projevu), stejně jako principy, které ji naopak omezují (ochrana osobnosti, ochrana majetku, právo na přístup ke kulturnímu bohatství). V dané souvislosti autor dospívá k závěru, že ochrana osobnosti představuje nejsilnější limitaci obecné svobody jednání a může stanovit limity při užívání těch výtvorů, které jsou z autorskoprávního hlediska volné (vědecké myšlenky, teorie, principy, objevy). Osobnostní omezení se projevuje především v povinnosti citovat autory vědeckých poznatků, teorií či myšlenek, která nevyplývá z autorskoprávní ochrany, ale lze ji dovodit ze všeobecných osobnostních práv. Ohledně existence majetkových práv či kolektivních forem ochrany má autor za to, že u nehmotných statků může být obecná svoboda jednání těmito ústavními principy omezována pouze, pokud pro to existuje přesvědčivý a závažný důvod. U majetkových autorských práv je tímto důvodem například zajištění možnosti, aby jednotlivec mohl samostatně a nezávisle na kolektivu realizovat své zájmy, záliby, představy a touhy. Nicméně při zavádění některých nových majetkových investičních práv (například práv vydavatelů k tiskovým publikacím či práv provozovatelů sportovních utkání) může požadavek přesvědčivého a závažného důvodu absentovat. Z tohoto hlediska potom hrozí, že by zákonodárce mohl alokováním výhradních práv ve prospěch těchto subjektů zasáhnout do obecné svobody jednání neproporcionálním způsobem.

Summary

General Conclusions and Methodology

The thesis deals with the issue of the non-protected parts of copyrighted works in the view of constitutional law protection. Firstly, the author focuses on the copyright-free elements of the author's works in the context of the commons. Based on the conclusions of *Peter Drahos* and *Alexander Peukert* we can divide the commons into two separate groups: goods which belong to nobody (*Gemeinfreiheit, negative commons*), and goods which belong to everyone (*Gemeinschaftsgüter, positive commons*). The author uses *Peukert's* structural approach to the public domain; especially his division of the public domain into four parts (*structural public domain*, *time-limited public domain*, *autonomous public domain*, and *exceptions public domain*) and from this perspective analyzes various forms of intangible assets at the national level. In this respect, he pays attention to the constitutional law regulation of intangible assets [Art. 2 (3), Art. 11, Art. 34 (1), (2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic].

In his habilitation thesis, the author achieves the same conclusions on the copyright-free elements, as we can find in the German jurisprudence. The public domain in the sense of copyright covers non-individual elements such as (i) abstract features (genres, general plots, general types of characters, typical scenes, ideas, chemical or mathematical formulas etc.) or (ii) facts existing objectively (news, facts, elements of nature, historical events, biographical data). On the other hand, other parts of the public domain can be individual per se, but the copyright law does not protect them, due to public interests, technological progress in the software development, or the nature of scientific discourse. In this regard, the public domain also entails (iii) scientific ideas, principles, theories, and discoveries, (iv) ideas and principles underlying computer programs, (v) free works, and (vi) works excluded from copyright protection in the public interest.

The last category (works excluded from copyright protection due to the requirements of public interest; Sec. 3 of the Czech Copyright Act) includes two not very cohesive groups of human creations. While official works (laws, governmental regulations, court or administrative decisions) can be considered as collective goods belonging to all (*positive inclusive commons*), "works of traditional folk culture" are common goods that do not belong to anyone.

The author deals with three methodological approaches to the copyright-free elements: the method of balancing competing interests, the method of distinguishing between individualized and non-individualized elements, and notably the method of balancing fundamental rights and freedoms (proportionality test, practical concordance).

The author holds the opinion that the use of intangible assets in their natural state is based on the principle of public domain [see also the decision of the EFTA Court in *Vigeland case, Municipality of Oslo v. Norwegian Board of Appeal for Industrial Property Rights* (E-5/16)]. Intellectual property rights are only islands of exclusivity in the sea of freedom. In the original state, intangible goods are ubiquitous and non-rival. If there exists no legal prohibition restricting their use, we consider them as goods that everyone can use freely. From the constitutional law perspective, we can regard the general freedom of action (Handlungsfreiheit) as basics of the public domain, which is expressed by a saying: "what is not prohibited by law is allowed" [Art. 2 (3) of the Czech Charter of Fundamental Rights and

Freedoms]. In some Central European countries (Germany, the Czech Republic), the general freedom of action is a human right that can be protected not only between individuals but also against state authorities. Based on *Peukert's* conclusions and the corresponding case law of the Czech Constitutional Court (particularly judgments No. I. ÚS 43/04, I. ÚS 546/03) the author considers the general freedom of action to be independent of the state power and to be the basic structural principle of a democratic state.

In the second part of the thesis, therefore, the author analyzes which constitutional principles strengthen the general freedom of action such as freedom of expression [Art. 17 (2) Charter of Fundamental Rights and Freedoms of the Czech Republic], but also principles that provide limits (protection of personality, property protection, and right to access cultural heritage). In this regard, the author concludes that personality protection represents the most significant restriction on the general freedom of action, and may limit the use of those elements, which are free from the copyright protection (scientific ideas, theories, principles, discoveries). The author especially highlights that scientists are required to cite another author's scientific findings, theories, methods or discoveries, even though it is neither needed nor prescribed by the copyright law.

On the other hand, when we focus on the existence of property rights or collective forms of protection such as traditional cultural expressions, the general freedom of action can be restricted to a much lesser extent. For the creation of individual or collective proprietary rights, there must exist convincing and compelling reasons for allocating exclusive rights to a particular subject. For the economic rights of the authors, this reason can be found, for example, in ensuring that an individual author can independently pursue his/her interests, hobbies, ideas and desires. However, when imposing new economic rights such as the rights of publishers or sports operators, the requirement of a convincing and compelling reason is doubtful. From this point of view, it is likely that by allocating rights to these intangible assets in favor of certain subject groups (press publishers, organizers of sporting events), the legislator may intervene into the general freedom of action disproportionately.

Selected Specific Findings

Individuality of Author's Work vs. Non-Protected Parts of Copyrighted Work

The Czech copyright law defines the individuality of an author's work (*autorskoprávní individualita; Individualität*) as well as free components of an author's work (*volná složka díla; Gemeingut*) in a normative way. Therefore, it is up to the legislator which elements will be protected and to which extent. The author highlights that we can use both notions to define the content of the corresponding term, since, for example, abstract elements, news or objectively existing facts cannot be individual per se. Thus, they cannot contribute to the individual parts of the work.

On the other hand, free works (Sec. 28 of the Czech Copyright Act) meet the requirements of the individuality. For this reason, the copyright-free elements need to be analyzed not only from the subject matter perspective but also from the perspective of exceptions and limitations provided by the legislature. Hence, the individual parts of the works, which everyone can use freely and on the same conditions as other subjects, cover different elements, such as official works, works of traditional folk culture (Sec. 3 of the Czech Copyright Act); principles and ideas which underlie any element

of a computer program [Sec. 65 (2) of the Czech Copyright Act]; free works (Sec. 28 of the Czech Copyright Act); and works which can be used under copyright exceptions (Sec. 29 ff. of the Czech Copyright Act).

Influence of the Swiss Copyright Doctrine on the Czech Concept of the Individuality of Author's Work

The Swiss Copyright doctrine had a significant impact on the theoretical writings of *Karel Knap*, the founder of the modern copyright jurisprudence in former Czechoslovakia. The conclusions of Swiss legal scholars can be found, among other things, in the concept of statistical uniqueness of the copyrighted work that comes from *Max Kummer's* monography *Das urheberrechtlich schützbare Werk*. *Knap* was also influenced by *Alois Troller's* distinction between the "*originality*" and the "*individuality*" of the outcomes of human creative activity, or *Troller's* aesthetic approach towards assessing the individuality of an author's work.

Thanks to *Karel Knap's* doctrinal conclusions, the so-called ontological concept of the copyright protection was extended to the Czech, and initially also the Slovak, copyright literature. However, the latest findings of the Slovak doctrine deny the notion of statistical uniqueness and reinterpret the concept of uniqueness of an author's work within the meaning of the CJEU case law. Compared to the Swiss doctrine, however, the latest Czech copyright doctrine (*Telec*), as well as the Supreme Court's case law, allow the protection of small coin works (*Werke der kleinen Münze*).

Influence of German Doctrine on the Czech Copyright

In addition to the teachings of Swiss legal scholars, the Czech conception of copyright also significantly reflects the impacts of the German copyright tradition. The conclusions of the German jurisprudence and the case-law of the German Supreme Court (*Bundesgerichtshof*), which enables the small coin works protection (*Werke der kleinen Münze*), were adopted by several decisions of the Czech courts (see among others the judgement of the Czech Supreme Court No. 30 Cdo 733/2016, No. 30 Cdo 360/2015).

On the other hand, the protection of double creations (*Doppelschöpfung*) is still not permissible. The author argues that if the Czech Supreme Court decided that we could consider even one word as a copyrighted work, then the judicature indirectly opened also the way to allow the protection of independently created outcomes.

Individuality in the Context of the CJEU case law

In the light of the case law of the Czech Supreme Court, we can reinterpret the traditional views on the individuality (uniqueness) of the author's work. We should consider the individuality of the authors' works under the case law of the Court of Justice of the EU which uses the notion of "author's own intellectual creation" when assessing the subject matter of the copyright protection. The concept of individuality, according to Court of Justice of the EU, includes (1) the differentiation of individualized creative elements from the abstract elements, (2) the objectively existing freedom of the author when creating his work, (3) the execution of creative choices and (4) the reflection of the author's personality, which must be present in the author's work. For a specific creation to be considered an author's work, the creative outcome must also fall (5) into the field of artistic or scientific creations.

The author of the thesis expresses the opinion that if we take the case law of the Court of Justice of the EU seriously, then we must admit that the EU law approach towards the copyright individuality lies somewhere between the traditional concepts of individuality (uniqueness) and originality.

Free Components of Copyrighted Work and their Justification

No matter how we assess the individuality of the author's work (Swiss / German / traditional Czech / modern Slovak / Union approaches), it will always happen that a specific component of the author's work falls outside the copyright protection.

If we compare the conclusions of the Czech legal scholars with the findings of their German colleagues, we can say that the copyright free elements are the same. They include (i) abstract elements, (ii) objectively existing facts, (iii) scientific ideas, principles, data, and discoveries, (iv) ideas and principles underlying any element of computer programs, (v) free works and (vi) works excluded from the protection due to the public interest.

The reasons why the legislator leaves certain elements not protected a priori, or which he / she puts posteriorly into the public domain, are different. The reason why the law excludes abstract elements (ideas, style, genre, artistic method, general plots, etc.) from the copyright protection can be seen in their abstractness. The same applies to the features existing independently of human consciousness (facts of nature, historical events, news). These elements are not copyrightable because they cannot be individual in the copyright sense.

However, other components, such as scientific thoughts, methods, principles or discoveries, can be individual because we know their authors. The reason for excluding scientific results from the copyright protection is, therefore, a general interest in the functioning of scientific discourse. The same conclusions apply mutatis mutandis to the ideas and principles of computer programs [Sec. 65 (2) of the Czech Copyright Act] where the exclusion of these features comes from the general interest preventing the monopolization of ideas due to the requirements of the technological progress.

The fact that the legislator limits the copyright protection in time and enables, 70 years after the author's death, the work to enter the public domain reflects the needs to promote the progress of art and science. No author builds his / her work ex nihilo, and therefore it is necessary that the so-called general fund exists.

Free Components of Copyrighted Work in the Context of Commons

The copyright free elements fall into the so-called common assets (*Gemeingüter*) which belong to nobody. However, official works (Sec. 3 Czech Copyright Act) are collective goods, which belong to all.

We can derive the distinction between common and collective goods from *Locke's* property theory and *Pufendorf's* division of estates in their natural state (*positive* and *negative community*). While *Locke* anticipates that all assets were in common in the original state, *Pufendorf* is of the opinion that the assets belonged to nobody and that their appropriation was subject to the consent of all other persons.

Based on the differences between *Lockean* and *Pufendorf's* concept of the common goods (commons) *Peter Drahos* defines four categories of commons : (i) *positive inclusive commons*, (ii) *exclusive positive commons*, (iii) *negative inclusive commons*, and (iv) *exclusive negative commons*.

Alexander Peukert uses a similar methodology and concludes that there are commons which belong to nobody such as public domain works (*Gemeinfreiheit*, *common goods*), and goods which belong to everyone (*Gemeinschaftsgüter*, *collective goods*).

We may conclude that the public domain in the sense of copyright is based on liberal teachings like the *Kantian* concept of freedom ("*law is a set of conditions under which one can arbitrarily unite with one another below the general law of liberty*"). The Czech legislator, who used *Kantian* philosophy as the primary inspiration source for the new Civil Code (Law No. 89/2012 Coll), also used this approach.

The author of the thesis agrees with *Peukert* that the public domain includes four parts (*structural public domain*, *time-limited public domain*, *autonomous public domain*, and *exceptions public domain*). All these parts of the public domain are built on the same equal freedom, which allows to freely use intangible assets that are ubiquitous and non-rival. They can be in the best way defined as negative inclusive commons. On the other hand, collective goods require the creation of the collective will.

In other words, we can characterize the public domain as the free sea (*Mare liberum*) within which everyone can carry out his/her activities. *Hugo Grotius* concluded that every nation could travel freely to other nations and trade with them. The sea is not subject to the appropriation, but it is free and does not belong to anyone. In the same way, every person can develop his/her personality in the sea of cultural and scientific freedom, which is called the public domain.

At the constitutional law level, the public domain is guaranteed by the general freedom of action [Art. 2 (3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic]. We can see the protection of the public domain also in the field of civil law. Here it is based on the Sec. 3 (1) of the Czech Civil Code, which stipulates that "*Private law protects the dignity and freedom of an individual and his natural right to pursue his happiness and the happiness of his family or people close to him in a way that does not unreasonably harm others*".

That view, which regards the general freedom of action [Art. 2 (3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic, Sec. 3 (1) of the Czech Civil Code] as the primary one, while intellectual property rights constitute only the exception because they restrict the freedom in favor of subjective rights, is perhaps somewhat unusual. However, we believe this conclusion has its liberal philosophical reasoning, which comes from our constitutional law traditions confirmed by the case law of the Constitutional Court and reflects the liberal philosophical wording of the recent private law.

Method of Balancing Competing Interests

The method of balancing competing interests is one of the general rules of the interpretation of legal texts, which we can use in the field of copyright protection. The range of interests is defined by the communication dimension of an author's work and includes four groups of interests protected by law: (i) personal and economic interests of the author, (ii) interests of intermediaries (publishers, producers), (iii) interests of users and (iv) general interests of the society.

The method of balancing competing interests has an impact on future legislation and determines how the copyright law is to be regulated (collisions *de lege ferenda*). Besides, they also specify how we should interpret and apply the law (collisions *de lege lata*). In the area of public domain the competing legitimate interests frame, for example, the subject matter of the copyright protection (what is, and is

not protected), the duration of the author's rights (moral, economic) or the scope of copyright protection (exceptions and limitations).

Both the existence of copyright protection and the public domain lead to the creation of new artistic and scientific works. An excessive emphasis on the property interests of authors (or intermediaries), such as prolonging the extension of the protection period, the establishing of new subject matter of the protection, or the application of the unfair competition protection to elements which can be freely used under the copyright regime, can weaken the conditions for creating new works. The method of balancing competing interests, therefore, leads to the conclusion that copyright protection should not be robust, but balanced.

Method of Distinguishing Individualized and Non-Individualized Parts of Work (Abstraction-Specification)

The distinction between the inner (*innere Form*) and outer form (*äußere Form*) and its content (*Inhalt*), which comes from *Kohler's* teachings and which was brought to the Czech copyright law by *Karel Knap*, should be used not to define the subject matter of the copyright protection, but rather to determine its scope. The individual components of an author's work (the outer form, the inner form, the content) help us, in particular, to determine how the work of the author affects our senses and how the individualized elements of the work are reflected in derivative works. We can say that while the external form of the work concerns the human senses like seeing or hearing, the inner form or the content of the work touches human reason.

However, both the form of the work and its content may be sufficiently individual to be subject to copyright protection. We believe that the traditional views of the copyright law, consisting in the fact that the content of the author's work is free because the copyright does not protect thoughts, but only their creative expressions, is not correct. Similarly as in German copyright law, also in the Czech system of author's rights protection, we should instead distinguish between individualized elements and elements that constitute the general fund (public domain). However, even in case of personalized elements, there may also be situations where, for example, scientific works are excluded from copyright protection due to the functioning of the scientific discourse.

We cannot protect scientific knowledge, theory, methods or discoveries by copyright for other reasons than the literary genre or general descriptions of literary characters. In the latter case, the purpose is the uttermost abstraction, while the former concerns the requirements of the functioning of the scientific work, which is based on the free flow of thoughts, their constant acceptance, and confrontation. If the author of a scientific work had exclusive rights to the content of his/her work, then the other scientists, without his consent, could not write about the scientific ideas (i. e., the knowledge, theories, methods, discoveries) that he formulated.

While copyrighted works cover the use of individualized content in literary works of art, especially in case of so-called continuing novels or individualized descriptions of literary characters, it is permissible for scientists to take over scientific ideas without violating the copyright in the original work.

The difference between the possibility to use the content of scientific and artistic works also follows from the principles of semiotics. The differing pragmatics of scientific and artistic discourse leads us to the conclusion that, while copyright protects the signs in the semantic dimension in works of art, the signs in the semantic aspect of scientific results are copyright free.

Semiotics can also lead us to the conclusion that the use of a word (such as a robot) which was initially protected by copyright but later has become generic is subject to constitutionally guaranteed freedom of expression [Article 17 (2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic).

Balancing Competing Constitutional Principles

Fundamental rights and freedoms also play a role in the sphere of private law and indirectly influence the application and interpretation of the legislative texts (*mittelbare Drittwirkung*). If a conflict of fundamental rights and freedoms occurs, we must address such a collision by the proportionality test. Due to the explicit mandate of the legislator [Article 2 (1) of the Czech Civil Code] to interpret the provisions of private law in a constitutionally-conforming manner, it is necessary to use this method in all situations, not only in difficult cases.

Although the Charter of Fundamental Rights and Freedoms of the Czech Republic does not contain a general limitation clause, the Constitutional Court has decided in several occasions that non-qualified rights and freedoms (i. e., the rights that do not have a specific limitation clause) may be restricted in the interest of other fundamental rights or constitutional principles. These conclusions have an impact on the assessment of both the content and the scope of the public domain because we can use standard proportionality tests, such as those used by the Constitutional Court in the "*Anonymous witness*" (judgment No. Pl. ÚS 4/94) case or the practical concordance (judgments No. II. ÚS 3/06, IV. ÚS 4684/12, II. ÚS 165/11, Pl. ÚS 10/16).

While the general freedom of action does not require further justification, because it is independent of the state and the state only recognizes liberty as a primary structural principle, the creation of exclusive rights of economic nature does. If the legislator aims to restrict the general freedom of action and seeks to create new intangible assets such as press publications, sporting events, or the collective goods like the traditional cultural expressions, he must comply with the requirements of the test of proportionality. In particular, he must justify why the colliding principle (the protection of private or collective property) is so severe that it is necessary to restrict the general use of intangible assets.