

Copyright and Protection Thereof in Case of Operas

It is said about the opera that it is the most complicated work of art. Some people foretell its early end, since it came into being once by a nonsensical coincidence and it is an error in the culture history of the mankind, and others talk about the greatest synthesis in the field of art or about the greatest miracle in the art at all and believe that the opera will live for ever as long as the mankind lives.

For the purpose of this short explication, let us take from what was said above only the fact concerning the complexity of the opera, which is also reflected in legal relations connected with staging the opera and first of all with a television recording thereof, let alone a television opera film, which is created without any relation to a theatre stage. What copyrighted works and which authors are relevant? First of all the author of the music and the author of the libretto, whose work is expressed in the opera score and in related music materials (instrument music and piano scores), and in the event that the opera is not staged in the original, it is the author of the translation of the libretto, in the event that the opera is adapted in a creative manner, it is the author of the adaptation both of the music and the libretto, and also the stage designer, costume designer, properties designer or other designers and, as the case may be, the light designer. I do not mention the opera director, who in most European countries is designated as a performing artist; if, however, s/he creates a unique conception of an opera performance which processes or adapts the work, we cannot neglect him/her as the author of such conception.

If this discussion is to address grand rights, it should be mentioned that in Czech law, the division into grand and small rights has no terminological support whatsoever. On the last occasion, this term was used in a secondary legal act from 1958, which has been legally dead for a long time. Nonetheless, this division is still frequently used in practice in the following manner: grand rights relate to public theatrical performance of copyrighted works and small rights relate to non-public non-theatrical performance of copyrighted works, and a simplified system of license granting applied and applies to such performance, now within the framework of collective administration. If the opera is staged in a theatre as a theatrical performance, the organizer is to obtain an authorization directly from the authors, i.e. a license for communication of the work to the public, but if the opera is performed as a concert, the organizer obtains an authorization for communication to the public within the framework of collective administration.

If, however, somebody tries to use the term grand or small rights in the event that the opera performance or an opera performed as a concert is recorded as a sound and picture recording, the use of such term is not justified in any manner whatsoever. The type of licenses that the producer of such sound and picture recording needs to obtain, in particular for broadcasting of such recording, is entirely different from the type of licenses for live performance of the opera work, whether in a theatre or as a concert. And not only this. Since in this case the work is recorded on a substrate that can be copied, it is in an entirely different legal environment, which is even more complicated, since it is the environment of audiovisual works. Nonetheless, in the case of a recording of a theatrical or non-theatrical performance of an opera, it is impossible to use the term "audiovisual work". To be more precise, it is a sound and picture recording (the term "technical" recording is sometimes used in practice) in which copyrighted works are used and the rights thereto must be settled, i.e. the user must obtain an authorization to use the work from the property rights holders outside the framework of the regime applicable to audiovisual works. This problem comes to the fore more distinctly where

at issue is the fact whether or not it is possible to obtain such authorizations within the framework of collective administration. In the case of sound and picture recordings, we should rather forget about the division between grand and small rights.

The producer of a sound and picture recording of a theatrical performance of an opera or non-theatrical performance of an opera which in the Czech Republic is only the public Czech Television must suffer agony when licensing such recording. This difficult procedure is, however, derived from the multiplicity of licenses that the Czech Television wants to obtain. Unfortunately, it recently exerts efforts without prudence to obtain such circle of licenses as in the case of audiovisual works, which fact is often entirely counter-productive, since it cannot use them. I wish to give a short example. In the case of audiovisual works, the following licenses come into consideration: reproduction, distribution, lease, lending, communication of the work to the public by a computer network, performance from a recording, telecasting, transmission of a radio or TV broadcasting and performance of telecasting. Transmission of TV broadcasting in the form of cable retransmission is a mandatory collectively administered right, the performance is voluntary but in its consequences with the same regime as the mandatorily collectively administered right. If the Czech Television also wants to obtain this circle of licenses for sound and picture recordings of opera performances or concerts, it anticipates that, except for broadcasting, it will also suppose show this sound and picture recording in cinemas (one of the types of performance from a recording), place it on the Internet for downloading (communication of the work to the public by a computer network), lease on sound and picture recordings in video shops, lend such recording in libraries and moreover will also sell, i.e. distribute the recording in shops and elsewhere. Of course, a prerequisite for all such rights to use the work is to obtain the right to reproduce the work, i.e. to make even if only one copy of the original recording. Except for these authorizations, the Czech Television also wants to obtain the right to grant sublicenses, with the territorial range of licenses for the whole world for the period of duration of the property rights until 70 years lapse from the death of the authors.

These efforts are understandable, but harmful in practice, since the Czech Television in fact needs only a license for reproduction, broadcasting, communication via an electronic network and possibly for performance from a recording for such types of sound and picture recordings. They are harmful because such producer of a sound and picture recording may license certain rights directly from the authors, but the remaining rights from collective administrators and some rights only from publishers. Not only this, since in addition to the cited rights, there is also the right of the publisher of the note material, which is not contained in the Czech Copyright Act but it is consistently contractually protected, in particular in the case of works where the author's property rights persist. Therefore, the Czech Television must obtain not only the above-mentioned authorizations but also an authorization to use the note materials from which the opera is played and which constitute a reproduction of such work.

A layman who imagines that it is no problem for the television to obtain all authorizations from a theatre or from an organizer of a concert performing the opera is deeply mistaken. In the case of an opera performance, the theatre has usually an authorization from the authors only for a live theatrical performance, and in the case of a non-theatrical performance of an opera, such authorizations are obtained through collective administration, but only for this performance, since pursuant to Czech law, authorizations for granting sublicenses cannot be collectively administered. It is thus up to the television to obtain all authorizations itself.

This, however, is not all. The collective administration of the copyright in the Czech Republic, similarly as in all EU countries, consists of mandatory and voluntary collective administration of the copyright. Within the framework of the mandatory collective administration, use is licensed which is exhaustively listed directly in the Czech Copyright Act, and, as concerns sound and picture recordings or, as the case may be, copyrighted works, it is “only” a cable retransmission, and in other cases so-called “fair compensation”. Certain further types of granted licenses can be provided within the framework of voluntary collective administration, which, however, is specified by authorizations to perform collective administration, which are granted by the Ministry of Culture of the Czech Republic, and not by an exhaustive listing in the Copyright Act, and also by the fact whether the collective administrator performs such activity on the basis of such license, of course on the basis of agreements with authors, who, however, in the event of conclusion of a collective agreement between the collective administrator and the user, in this case with the television, can exclude effects of such collective agreement, and may exercise their rights directly. There are two collective administrators in the Czech Republic which have the relevant authorizations from the Ministry of Culture of the Czech Republic, which, however, can pervade in the case of operas. The administrators are Ochranný svaz autorský (OSA) (Union for Protection of Authors) and DILIA, a theatrical and literary agency. The problem is that DILIA has an authorization for performance of collective administration for certain types of use for authors of musical and dramatic works, and OSA, in a larger volume of the types of use, has an authorization to perform collective administration for authors of musical works with or without a text. Moreover, these two collective administrators, in the event of performance of collective administration, are bound by the fact whether, in the case of foreign operas, they have an authorization to grant the right to use the work from foreign entities, mostly from collective administrators, whether in the negative sense (listing of works that are excluded from granting consent to use) or in the positive sense (listing of works to which it is possible to grant consent to use). The authorization is most likely necessary to be interpreted in such a manner that a musical and dramatic work constitutes *sui generis* a subset of musical works with or without a text, and where DILIA’s authorization applies, it is not possible to exercise OSA’s authorization, and on the contrary, where DILIA’s authorization does not exist, OSA’s authorization applies. The biggest problem of the conflict of these two authorizations is, however, a sound and picture recording of a non-theatrical performance, where OSA’s authorization applies to the performance itself (i.e. non-theatrical performance of musical works with or without a text), and to the recording itself, for example for the purposes of broadcasting, most likely DILIA’s authorization applies (i.e. the right to broadcast musical and dramatic works), since the opera does not cease to constitute a musical and dramatic work if performed as a concert. It must be added that in the case of grand rights, collective administration is excluded in the Czech Republic, and therefore the theatre must obtain the relevant licenses directly or through an agency for a live theatrical performance of an opera. For the confusion to be perfect, it must be emphasized that no collective administrator has an authorization for performance for collective administration of stage and costume designers whose works were recorded as a sound and picture recording.

As mentioned above, note materials constitute a separate issue. Note materials are always somehow outside the main negotiations on licenses, nonetheless use thereof sometimes plays a key role in the entire licensing process. It often happens that the publisher that leases note materials is also a holder of a license obtained from the music composer and the librettist. We can certainly imagine a scenario where authors or copyright holders exercise their rights outside the publisher. Thereafter, the publisher typically binds license agreements to an agreement on lease of note materials so that the publisher could negotiate conditions that the

theatre would otherwise not provide to the publisher. As a rule, a clause appears in the lease agreement that the lease is agreed only for live theatrical performances of the work, and in the case of a sound and picture recording, a further agreement on lease of note materials must be concluded. In the case of free works, it is significantly more difficult to push such clause through (at the moment of lease of note materials for live theatrical performances, it is never clear whether the recording of the performance will be realized), let alone heaps of copies of note materials lying around in archives of opera theatres, which are usually used for playing without any agreements. After all, it is no problem today to go to Vienna and to buy cheaply note materials of a free opera work into possession. Pursuant to the Czech Copyright Act, the position of note materials is a sad matter. If the work is free, pursuant to the Copyright Act the publisher has no right, even if it is a reproduction of such work, and the publisher can protect its rights only contractually pursuant to the Civil Code, i.e. it can reserve use of note materials only for the purpose agreed in such agreement. In the case of a work where property copyright persists, it is of course also a reproduction of the work. The lease itself of such reproduction, however, cannot be agreed pursuant to the Czech Copyright Act, since lease of a copyright work is understood only as lease for a temporary personal need. Licensing of note materials thus “shrinks” to a license for live performances of the work, but no lease of note materials is contained therein. An agreement on lease of a material substrate for a certain purpose pursuant to the Civil Code is a mere substitute, and the fact itself of lease of a reproduction of a copyrighted work is not and cannot be contained in such agreement.

The facts mentioned above also apply to the same extent to producers of sound and picture recordings of an opera, who must in some way deal with the problems of note materials.

We wish to present hereby a couple of words to open a panel discussion, which of course do not represent an exhaustive analysis of the above issues and, in view of the time that is available, cannot represent such an analysis.

In Prague, on May 2, 2005, JUDr. Jiří Srstka, Managing Director of DILIA