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COLLECTIVE ADMINISTRATION OF GRAPHICAL USER INTERFACES (GUI) IN THE LIGHT OF THE BSA DECISION*

by

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In this paper the author addresses the issue of collective administration of graphical user interfaces according to the impact of the CJEU decision in BSA v. Ministry of Culture on the case-law in one of EU Member states (Czech Republic). The author analyses the decision of the Czech Supreme Court where this Court concluded that visitors of Internet cafés use graphical user interface actively, which represents relevant usage of a copyrighted works within the meaning of Art. 18 the Czech Copyright Act. In this paper, attention is first paid to the definition of graphical user interface, its brief history and possible regimes of intellectual property protection. Subsequently, the author focuses on copyright protection of graphical user interfaces in the Czech law and interprets the BSA decision from the perspective of collective administration of copyright. Although the graphical user interfaces are independent objects of the copyright protection, if they are used while running the computer program the legal regulation of computer programs has priority. Based on conclusions reached by the Supreme Administrative Court of the Czech Republic in the BSA case, the author claims that collective administration of graphical user interfaces is neither reasonable nor effective.

KEY WORDS

Graphical User Interface, BSA v. Ministry of Culture, Communication to the Public, Rental Right, Collective Administration, Computer Program

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1. INTRODUCTION

Graphical user interfaces (hereinafter also referred to as "GUI") can be found almost everywhere in the 21st century. Due to mobile phones, tablets and laptops, graphical user interfaces, which are closely associated with the computer programs and their functions,[1] have become an object of everyday consumption, especially as far as consumers' usage of the visual aspects of electronic devices is concerned.

The aim of this paper is to provide a brief legal analysis of the copyright protection[2] of GUI referring to the Decision of the CJEU in *BSA v. Ministerstvo kultury (Ministry of Culture)* (hereinafter also referred to as *"BSA"*)[3] and to the current case-law of the Czech Supreme Court (*Nejvyšší soud*). In the first part of this article we will focus on the development of graphical user interfaces. Then we will continue with a description of the gradual legal separation of graphical user interfaces from computer programs and we will try to answer the question what are the implications of the BSA decision for the collective administration of graphical user interfaces. Finally, we will try to defend the thesis that the legal differentiation between graphical user interfaces and computer programs cannot lead to the conclusion that the collective administration of graphical user interfaces is reasonable or effective.

2. THE NOTION OF GRAPHICAL USER INTERFACE

Before starting the analysis of the copyright protection of graphical user interfaces, it is first necessary to define this notion. The starting point in defining the notion of GUI is the noun *"interface"*. Stigler defines GUI as a

> *"computer environment that allows a user to interact with the computer through visual elements such as icons, pull-down menus, pointers, pointing*

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[1] Samuelson, P. 1989, Why The Look and Feel of Software User Interfaces Should Not Be Protected by Copyright Law. *Communications of the ACM*, vol. 32, no. 5., p. 563, 571; Samuelson, P. Glushko, R.J. 1990, What the User Interface Thinks of the Software Copyright "Look and Feel" Lawsuits (and What the Law Ought to Do about it). *ACM SIGCHI Bulletin*, vol. 22, no. 2, p. 13, 16.

[2] The author's original intention was also to analyse the industrial property protection of GUIs, especially the protection of industrial designs. As it turned out, these legal issues would have probably gone beyond the reasonable scope of this article and would have led to a dilution of the text. Therefore, the author considers it necessary to focus particularly on the collective management of rights related to graphical user interface.

[3] The Decision of the CJEU in *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v. Ministerstvo kultury* (C-393/09).

devices, buttons, scroll bars, windows, transitional animations, and dialog boxes".[4]

Samuelson goes further to the legal aspects of this term on the basis of the legal definition of computer programs in the USA,[5] and defines GUI as the *"non-literal elements of computer programs"*.[6] As a visual phenomenon GUI might also be defined as

"function-related screens which have in their layout bars with instruction sequences, menus and windows which lead to further menus or certain program content, such as application files, graphics or texts".[7]

In this sense we will analyze the notion of graphical user interface. We will consider the graphical user interface primarily as the *"look and feel"*[8] of a computer program.

Different levels of a computer program can be reached through GUI via a vertical tree or a structure of menus. At the same time, horizontally positioned displays can be linked together and can open up in tree structures. These vertical and horizontal sequences form in their respective totality a coherent *"display"*. In such a visual interface we can also find

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[4] Stigler, R. 2014, Ooey GUI: The Messy Protection of Graphical User Interfaces. *Northwestern Journal of Technology and Intellectual Property*, vol. 12, no. 3, p. 216.

[5] The US Copyright Code defines *"computer program"* as *"a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"* 17 U.S.C. § 101.

[6] Samuelson, P. 1991, Computer Programs, User Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of Lotus v. Paperback. *Berkeley Technology Law Journal*, vol. 6, no. 2, p. 218 ff., 243. This approach seems to be criticised by Šavelka who suggests to distinguish between the graphical user interface as one of several computer program interfaces and the *"look and feel"* of the computer program. Šavelka, J. 2012, *Autorskoprávní ochrana funkcionality softwaru*. Rigorózní práce. Masarykova univerzita, Brno [online], p. 27, 70. Available at: <http://is.muni.cz/th/134449/pravf_r/>

[Accessed on 3 December 2015].

[7] Koch, F. A. 1991 Rechtsschutz für Benutzeroberflächen von Software. *GRUR*, no. 3, p. 181.

[8] A different approach is taken by Šavelka (Šavelka, 2012, p. 70). See also note no. 26. The reason why we are focusing on the GUI as the *"look and feel"* of the computer program is the fact that the CJEU in the BSA decision makes no difference between the *„look and feel"* concept and the *„graphical user interface"*. The CJEU (BSA, Para. 39-51) has approved the statement of the Advocate General Yves Bot who argues that *„at the heart of software interfaces, I find interconnection interfaces, which are internal to the software and permit dialogue with other elements of the computer system, and interaction interfaces, of which the graphic user interface forms part. The graphic user interface, commonly referred to as the 'look and feel', enables communication between the program and the user. It is in the form, for example, of icons and symbols visible on the screen, windows or drop-down menus. It makes interaction possible between the program and the user. That interaction can consist of the mere provision of information, but can also enable the user to give instructions to the computer program using commands. That is so, for example, in the case of a file dragged by the mouse and dropped into the recycle bin or the commands 'copy' and 'paste' in a word processing program"* [The opinion of Advocate General Bot delivered on 14 October 2010, Case C-393/09 (online). Para. 55-56. Available at: <http://curia.europa.eu/> (Accessed on 3 December 2015)].

auxiliary functions such as drawings, calendars, clocks, calculators, remote data transfer routines, etc.

It is important to emphasize that GUI covers visual (i.e. non literal) effects of the functioning of a computer program. On the other hand, GUI as such contains neither codes (e.g. the source or object code) that stand in the background nor functional components of the software application. As an example of GUI we can mention the visual side of computer operating systems (e.g. Microsoft Windows), *"smart phones"* operating systems (e.g. Apple iOS, Windows Phone 8), computer programs that provide interaction between elements of software and hardware (e.g. Microsoft Word or Adobe Photoshop), mobile applications (e.g. Facebook for Android), or television screen menus.[9]

Graphical user interfaces can be further divided into static (common graphical user interface which is normally displayed on a computer screen or tablet) and dynamic ones[10] that can be found especially in computer games. Although in the case of computer games GUI is more dominant (*de facto* it represents the *"computer based audio-visual work"*),[11] the nature of the interface is the same in both cases: the main function of the graphical user interface is to enable an interaction between the computer program and its user.

3. A BRIEF HISTORY OF GUI

The first signs of GUI appeared as early as the 1960s in the project of Doug Engelbart´s augmentation of human intellect at the Stanford Research

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[9] Stigler, 2014, p. 217.

[10] Janssen, Ch., Weisbecker, A., Ziegler, J. 1993, 'Generating User Interfaces from Data Models and Dialogue Net Specifications' in *Proceedings of the INTERACT '93 and CHI '93 Conference on Human Factors in Computing Systems*, ACM Press, New York, p. 419.

[11] See the decision of the United States Court of Appeals (Second Circuit) in *Stern Electronics, Inc. v. Harold Kaufman d/b/a Bay Coin*, et al. [online]. Available at: <http://openjurist.org/669/f2d/852/stern-electronics-inc-v-kaufman> [Accessed on 5 December 2015];

The Decision of the Federal Court of Australia in *Sega Enterprises v. Galaxy Electronics* [online]. Available at: <http://everything2.com/title/Sega+Enterprises+v+Galaxy+Electronics+1996+761+FCA+1> [Accessed on 7 December 2015].

The Decision of the German OHG Hamburg from 31 March 1983, File No. 3 U 192/82 ("Puckman") [online]. Available at: <https://beck-online.beck.de/> [Accessed on 7 December 2015].

See also Loewenheim, U. 1989, Legal Protection for Computer Programs in West Germany. *Berkeley Technology Law Journal*, vol. 4, no. 2. p. 187; Pilarski, J.H. 1987, User Interfaces and the Idea-Expression Dichotomy, Or, Are the Copyright Laws User Friendly. *AIPLA Quarterly Journal*, vol. 15, no. 4, p. 325; Stamatoudi, I. A. 2001. Are Sophisticated Multimedia Works Comparable to Video Games Part II. *Journal of the Copyright Society of the U.S.A.*, vol. 48, no. 3, p. 482.

Institute (SRI). This project was called "On-Line System (NLS)" and contained hardware devices and the basic structure of GUI software.[12] Until the 1970s, the computer was not anything but a huge calculator. However, since then a major technological achievement have occurred: the transition of the interface from command lines (based on the communication with the device through various written commands) to a graphical interface made computers available to the general public.

Doug Engelbart´s results helped the Xerox company to develop a program in the Xerox Palo Alto Research Center (PARC) which formed the basis of GUI. At that time the company mainly dealt with photocopying and feared bankruptcy due to a greater use of computers and related tendency to read those documents only while using a computer. The company thus invested considerable amounts of money into technological development which was supposed to replace *"real"* paper by the *"virtual"* one.[13] In 1973, PARC developed the very first personal computer called Alto that demonstrated GUI, enabling the user to "see" what is happening in the computer by entering a command (the so called WYSIWYG system).[14] GUI transformed the traditional, physical desktop into a virtual desktop which enabled the end user of the computer program to use effectively the main functions of the software. The primary tools of the GUI operation mode are in particular PARC buttons, icons, and windows or menus which are operated by the mouse, fingers (with the combination of the touchscreen technology), or, in a limited way, by the keyboard. By clicking or touching these visual elements GUI starts the command functions of the computer program (e.g. opening, deleting, or removing files, installing programs, etc.)

The Alto computer was not a real commercial product since the XEROX company used this item mainly for internal purposes. However, the GUI from PARC subsequently became an inspiration for creating the first commercially successful GUI developed by the Apple Computer in the form of a computer called the Apple Macintosh.[15] The screen of this computer

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[12] Saffer, D. 2010, *Designing for Interaction, Second Edition: Creating Innovative Applications and Devices.* New Riders, Berkeley, p. 12.

[13] Engelbart, D., Lehtman, H. 1988, *Working Together: The "Human System" and the "Tool system"* [online], p. 245. Saffer, 2010, p. 213. Stigler, 2014, p. 219. Available at: <http://dougengelbart.org/pubs/seminars/sembinder1992nov/R.pdf> [Accessed on 3 December 2015].

[14] Engelbart/Lehtman, 1988, p. 246.

[15] Saffer, 2010, p. 13.

included the famous "dustbin", overlapping strips (windows) and file components.[16]

Since then GUI has extended well beyond computer operating systems[17] and can be found in *"smartphones"*, tablets, cars, etc. The main advantage of GUI lies primarily in its intuitiveness, because it helps end users communicate with the computer using a visual language. GUI's flexible dictionary is based on a simple set of actions with the mouse and intuitive operations (click, double click, click and move, deleting a file by removal to the "recycled bin", etc.) In principle, the user is using the keyboard only in a limited way (particularly for data input), but not for specific commands which are used in order to perform the program functions.

The legal protection of GUI includes copyright protection and protection of registered or unregistered sui generis regimes of protection.[18] In the US jurisdiction, we can find copyright protection, protection provided by trade secrets or design patents.[19] In the EU, graphical user interfaces are also protected by copyright law and industrial property protection which covers registered and unregistered designs.[20] These regimes of protection may overlap one another[21] and each of them has its advantages and disadvantages. The optimal form of protection may then depend on their combinations.[22]

4. COPYRIGHT PROTECTION OF GUI IN THE CZECH REPUBLIC

The Czech Republic is known in the field of IP protection especially due to the protection of industrial property concerning geographical indications

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[16] Reimer, J. 2005. *A History of the GUI* [online], p. 10. Available at: <http://www.cdpa.co.uk/UoP/Found/Downloads/reading6.pdf> [Accessed on 3 December 2015].

[17] Other GUIs which entered the computer market during the 1980s were VisiOn (a product of the VisiCorp) and Windows 1.0 (a product of the Microsoft Corp.). Reimer, 2005, p. 12. See also Terry, P.M. 1994. GUI Wars: The Windows Litigation and the Continuing Decline of *"Look and Feel"*. *Arkansas Law Review*, vol. 47, no. 1, p. 117 ff.

[18] Stigler, 2014, p. 227 ff.

[19] Dinwoodie, G., B., Janis M.D. 2010. *Trade Dress and Design Law.* Wolters Kluwer, New York, p. 14-24, 41 ff.; Terry, 1994, p. 93 ff.; Rolling, J.M. 1998. No Protection, No Progress for Graphical User Interfaces. *Marquette Intellectual Property Law Review*, vol. 2, no. 1, p. 157.

[20] Eichmann, H., Falckenstein, R.V. 2010. Geschmacksmustergesetz, kommentar. C.H.Beck, München. p. 52, 78, 80; Suthersanen, U. 2010. *Design Law: European Union and United States of America. 2nd edition.* Sweet&Maxwell, London, p. 87 ff. Howe, M. 2010, *Russel-Clarke and Howe on Industrial Designs. 8th edition.* Sweet&Maxwell, London, p. 32 ff., 267.

[21] Dereclaye, E., Leistner, M. 2011. *Intellectual Property Overlaps, European Perspective.* Hart Publishing, Oxford, p. 7, 32 ff.

[22] Stigler, 2014, p. 246.

and trademarks in disputes between Budejovicky Budvar NP and Anheuser Busch.[23] In the field of copyright protection the Czech contribution to the definition of copyrighted objects and the "originality" criterion is based on the findings of the CJEU in the dispute between BSA and the Ministry of Culture. This case has become widely known[24], even though the copyright protection of graphical user interfaces was not an issue of special interest in the Czech legal literature on copyright or in the court practice.[25]

However, the BSA decision had significant implications for the decision of the Supreme Court (Nejvyšší soud) in the case of OOA-S v. P.F.[26] which

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[23] Groves, P.J. 1997, *Sourcebook on Intellectual Property Law.* Cavendish Publishing Limited, London, p. 704; Smith, J. 1999. Budweiser or Budweiser? *John Marshall Law Review*, vol. 32, no. 4. p. 1251. Muchlinsky, P.T. 1996. A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies. *The Modern Law Review*, vol. 59, no. 5, p. 658 ff.

[24] Polanski, P.P. 2013, Some Reflections on the Duality of Regime for Software Protection in the European Union. *Computer Law & Security Review*, vol. 29, no. 3, p. 284; Griffiths, J. 2013.,Dematerialization, Pragmatism and the European Copyright Revolution. *Oxford Journal of Legal Studies,* vol. 33, no. 4, p. 780; Kur, A., Dreier, T. 2013. *European Intellectual Property Law*, Edward Elgar, Cheltenham, UK, Northampton, MA, USA, p. 292, 293; Rosati, E. 2010. Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision. *Journal of the Copyright Society of the U.S.A.*, vol. 58, no. 4, p. 810 ff; Derclaye, E. 2014, *Assessing the Impact and Reception of the Court of Justice of the European Union Case Law on UK Copyright Law: What Does the Future Hold?* [online], p. 7, 25. Available at:
<http://eprints.nottingham. ac.uk/3613/> [Accessed on 3 December 2015]

[25] The most relevant commentary on the Czech copyright law deals with the issue of the copyright protection of graphical user interfaces only very briefly: *"Visual and audio-visual expressions which are perceivable on the computer screen ('look and feel') may meet the legal definition of a copyrighted work and they are different objects of protection than computer programs... These different creations can be objectively perceived as artistic works, in concreto as works of fine art or audiovisual works. However, the assessment of their non-legal nature exceeds more or less the interpretation of the Copyright Act. Related legal conclusions can be similar also for computer games expressed through computer multimedia technology. Computer games as such can be considered also as audio-visual works within the meaning of Art. 62 of the Czech Copyright Act, and thus be a separate subject to copyright protection"*. Telec, I., Tůma, P. 2007. *Autorský zákon, komentář.* C.H.Beck, Praha, p. 40. The copyright protection of GUI was later analyzed also by Šavelka who is of the opinion that there is an essential difference between the GUI as an element of the computer program and GUI as the visual outcome of the software product: *"As time went the academics started to use for the designation of the notion in question two words - 'Look & Feel' and 'graphical user interface'. Although these terms are often used inaccurately their usage indicates what the nature of the problem is. There is a fundamental difference if some authors speak about the 'Look & Feel', which is regarded to be an expression concerning the external appearance of the software product and how the product appears is perceived by the user, and if others speak about 'graphical user interface'. This notion indicates a specific interface, which is included in the software among other interfaces (interface for communication with other applications, operation system, etc.) This interface is included in the software product, however, the action of the software is forming 'Look & Feel'"*. Šavelka, 2012, p.70, 71.

[26] The Decision of the Supreme Court of the Czech Republic from 25th March 2015, No. 30 Cdo 5008/2014 [online]. Available at: <http://www.nsoud.cz/> [Accessed on 3 December 2015]. Ochranná organizace autorská - sdružení autorů děl výtvarného umění, architektury a obrazové složky audiovizuálních děl, z.s. (hereinafter referred to as "OOA-S") is one of the collecting societies operating in the Czech Republic. OOA-S collectively manages rights of graphic designers, cinematographers, architects, painters and sculptors [online]. Available at: <http://www.ooas.cz/>.

brought to the Czech copyright practice various questions concerning the collective management of graphical user interfaces.

5. BSA DECISION AND COLLECTIVE MANAGEMENT OF COMPUTER PROGRAMS

Each case which is submitted for an answer to a preliminary question by the Court of Justice of the European Union has its own national history. The official version of the legal dispute between BSA and the Ministry of Culture of the Czech Republic (*Ministerstvo kultury*) was briefly described in the reasoning to the Court's decision (BSA, Para. 15-22) and in the opinion of the Advocate General (Opinion of Advocate General Yves Bot,[27] Para. 24-28,) and was generally discussed in many scholarly papers.[28]

However, it is necessary to point out that the real legal problem in the BSA case was neither whether graphical user interfaces are independent objects of copyright protection, nor whether their television broadcasting constitutes communication to the public within the meaning of Art. 18 of the Czech Copyright Act[29] (Art. 3 of the InfoSoc Directive[30]), but if the collective management of computer programs is reasonable and effective.

The Czech Copyright Act distinguishes compulsory collective management (Art. 96 of the Czech Copyright Act), under which certain rights must be managed by the collecting societies ex lege (Ministry of Culture is obliged to grant such authorization for collective management) and voluntary collective management (Art. 98 of the Czech Copyright Act)[31] where the authorization for the collective management in relation to specific objects of protection is at the discretion of the Ministry of Culture.[32]

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[27] See fn. no. 9 above.

[28] Šavelka, 2012, p. 84 ff.; Griffiths, 2013, p. 16, 24; Rosati, 2011, p. 811, 812 Derclaye, 2014, p. 6, 8.; Guarda, P. 2013. Looking for a Feasible Form of Software Protection: Copyright or Patent, is that the Question? *European Intellectual Property Review*, vol. 35, no. 8, p. 447.

[29] Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act), as amended [online]. The English translation available at: <http://www.wipo.int/wipolex/en/details.jsp?id=5067> [Accessed on 3 December 2015].

[30] The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. [online]. Available at: <http://eur-lex.europa.eu/> [Accessed on 3 December 2015].

[31] Šalamoun, M. 2004. Kolektivní správa – formace a deformace autorské vůle. *Právní rozhledy*, vol. 7, no. 6, p. 208 ff.

In the BSA case the CJEU answered the question whether computer programs can be used in television and cable broadcasting (BSA, Para. 52, 57). However, under normal circumstances [i.e. without the statutory definition of collective administration (Art. 96 and 98 of the Czech Copyright Act)] such a question would have never arisen since a reasonable person would probably had never thought that citizens could be interested in *"watching computer programs"* on their TV sets instead of watching popular soap operas or football matches. But due to the legal definition of compulsory collective management[33] and the broad interpretation of voluntary collective management, which was sought by the applicant,[34] the complex administrative and judicial proceedings had to be conducted by the Czech public and court authorities. Although these proceedings ended up with the refusal of the application,[35] a larger number of various legal problems arose.

Instead of considering the very core of the dispute which had nothing in common with the EU law (the definition of the scope of collective administration has not been harmonized even after the adoption of the Directive on collective management of copyright and neighboring

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[32] This issue was the main subject matter of the administrative proceedings held before the Ministry of Culture and of the judicial review of the Supreme Administrative Court (*Nejvyšší správní soud*) [Decision of the Supreme Administrative Court from 2nd February 2011, No. 5 As 38/2008 (online). Para. 7, 16, 27, 75, 76. Available at: <http://www.nssoud.cz/files/SOUDNI_VYKON/2008/0038_5As__080_20110209091118_prevedeno.pdf> [Accessed on 3 December 2015], as the applicant (BSA) sought authorization not only for the compulsorily collectively administered rights but also for the voluntarily collectively administered rights, in particular the rights to broadcast computer programs and to expose them to the public.

[33] Among the compulsory collectively administered rights is e.g. the right to remuneration for the use of works by cable retransmission (Art. 96, Para. 1c, the Czech Copyright Act).

[34] Originally, the application was filed by the consortium ZASTUDENA.CZ, and later, by its legal successor Bezpečnostní softwarová asociace - Svaz softwarové ochrany (transl. Business Software Association - Union of Software Protection). Both applicants tried to apply an extensive interpretation of the communication to the public (Art. 18 ff. of the Czech Copyright Act) and the exposure (Art. 17 of the Czech Copyright Act) of computer programs [see Decision of the Supreme Administrative Court No. 5 As 38/2008, Para. 2].

[35] The Supreme Administrative Court of the Czech Republic, referring to the CJEU preliminary rulings, upheld the decision of the Ministry of Culture which had previously rejected the BSA application for authorization to exercise the collective management of computer programs (Decision of the Supreme Administrative Court No. 5 As 38/2008, Para. 3, 4, 6, 77).

rights)[36] the judges of the Supreme Administrative Court decided to *"ask for help"* from the CJEU.[37]

In this context it must be noted that the Supreme Administrative Court did not need to obtain an answer from the CJEU in order to decide that administrative dispute. If someone reads the decision of the Supreme Administrative Court carefully, the key legal arguments can be found in Para. 75 and 76, in which the Court deals with the effectiveness and reasonability of collective administration of rights related to computer programs.

It is useful to point out the decision of the Supreme Administrative Court that the applicant sought an authorization for collective administration only in relation to computer programs, not in *"other objects arising in connection with the developing of the software"* (Decision of the Supreme Administrative Court No. 5 As 38/2008, Para. 68). The Supreme Administrative Court thus had to be aware of the possibility that in the future it would be necessary to address the question of effectiveness of collective management in relation to the graphical user interfaces as *"separate objects of protection"*.

The Czech legal practice had to deal with this issue quite soon, since the collective society OOA-S (see further, fn. no. 46, 47) began to apply the collective administration of rights to graphical user interfaces immediately after the BSA decision had been issued. The legal question which was necessary to consider was:

> *"How the copyright law is to deal with this new object of protection from the perspective of the collective administration?"*

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[36] 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 [online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0026> [Accessed on 3 December 2015].

[37] The Supreme Administrative Court decided to refer two preliminary questions to the CJEU: *"1. Should Article 1(2) of [Directive 91/250] be interpreted as meaning that, for the purposes of the copyright protection of a computer program as a work under that directive, the phrase 'the expression in any form of a computer program' also includes the graphic user interface of the computer program or part thereof? 2. If the answer to the first question is in the affirmative, does television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitute making a work or part thereof available to the public within the meaning of Article 3(1) of [Directive 2001/29]?"* (BSA, Para. 21).

For the interpretation of these preliminary questions see also Rosati, 2011, p. 811; Šavelka, 2012, p. 85.

From the text of the BSA decision we only know that GUI cannot be communicated to the public through television broadcasting (*BSA*, Para. 57) and that certain elements of that object are not subject to copyright protection if they are determined by their technical function (*BSA*, Para. 49 and 50).[38]

However, for the answer about the possible collective administration of graphical user interfaces it should be pointed out the CJEU findings that graphical user interfaces per se can fulfil their main function, which is "to enable communication between the computer program and the user" (BSA, Para. 40).

In other words, although the computer program is objectively perceivable only in source or object codes (BSA, Para. 34), the communication interface (GUI), which according to the CJEU may be protected as a separate copyrighted work,[39] has one main purpose: to allow the end user to use functions of the computer program. Instead of typing commands onto the command line the user clicks on the software icon on the monitor screen.

Furthermore, CJEU explains that graphical user interface is

> *"one element of that program by means of which users make use of the features of that program"* (*BSA*, Para. 41).[40]

For these reasons it makes little sense to consider the collective management of rights related to graphical user interfaces, because the key function of graphical user interface may be performed only while running the computer program (see argumentation below).

6. CRITICAL REMARKS ON THE DECISION OF THE CZECH SUPREME COURT IN THE CASE OOA-S V. P.F.

The Czech collecting society OOA-S has the authorization to perform collective administration in relation to works of fine art and works

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[38] For an interpretation of the BSA decision in relation to the requirements of originality of copyrighted works, see Rosati, 2011, p. 812; Derclaye, 2014, p. 8.

[39] Similarly Telec/Tůma, 2007, p. 40. Concerning the level of originality, see Rosati, 2011, p. 798, 813; Griffiths, 2013, p. 19; Derclaye, 2014, p. 8; Husovec, M. 2012. Judikatórna harmonizácia pojmu autorského diela v únijnom práve. *Bulletin slovenskej advokácie*, No. 12. p. 16 ff.

[40] See also the Opinion of Advocate General Yves Bot, fn. no. 9, Para. 65.

of applied art. This collecting society is authorized[41] to manage compulsory administered rights to using the works by cable retransmission (Art. 96, Para. 1c of the Czech Copyright Act) and is also entitled to enforce the right to adequate remuneration for the rental of the original piece of work or copies of works which are fixed in audio-visual recordings (Art. 96, Para. 1b of the Czech Copyright Act; hereinafter also referred to as *"rental right"*).

Although the OOA-S has not been expressly granted an authorization to manage rights to graphical user interfaces,[42] it began to pursue monetary claims against operators of Internet cafés. OOA-S argued that graphical user interfaces belong to the category of works of fine art[43] and that rights related to these objects of copyright protection are administered by this collecting society.

The OOA-S argued that graphical user interfaces of computer (video) games meet the definition of audio-visual recordings (Art. 79, Para. 1, the Czech Copyright Act)[44] and thus they are to be considered as *"works that are recorded as audio-visual recordings"* in accordance with Art. 96, Para. 1b, the Czech Copyright Act.[45] Furthermore, visitors to Internet cafés use graphical user interfaces actively (i.e. through the GUI they are utilizing functions of a computer program; *BSA*, Para. 40-41). Such a use may constitute the communication of copyrighted works and audio-visual recordings to the public in the sense of the Art. 18 of the Czech Copyright Act (Art. 3, Para. 1, the InfoSoc Directive) and the rental of such protected objects (Art. 15 of the Czech Copyright Act; Art. 2 Para. 1.a, the Rental

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41 The authorization is based on the Decision of the Ministry of Culture from 5th August 2009, No. 2797/2009 [online]. Available at: <http://www.ooas.cz/> [Accessed on 3 December 2015].

42 An authorization granted by the Ministry of Culture includes the collective administration of rights related to *"works of fine art such as paintings, graphic and sculptural works, photographic works and works expressed by a process analogous to photography, works of applied art, works utilized audio-visually such as works of cameramen, stage and costume designers, and architectural works, including urban works"*, Decision of the Ministry of Culture from 5th August 2009, No. 2797/2009, Ibid.

43 See Telec/Tůma, 2007, p. 40. Similarly Koch, A. F. 2010 'Webseiten und Websites als Erstellungsprodukte' in Loewenheim, U. *Handbuch des Urheberrechts*. C.H.Beck, München. p. 1963.

44 *"Audio-visual fixation is the fixation of an audio-visual work or a fixation of another series of fixed and connected images evoking the impression of movement, both accompanied by sound and mute, perceivable by sight and, if accompanied by sound, perceivable also by hearing"* (Art. 79, Para. 1, the Czech Copyright Act).

45 The rental right is a compulsorily administered right: *"Rights subject to mandatory collective administration are the following [...] the right to the appropriate remuneration for the rental of the original or a copy of the work, or of a performance by a performer fixed in an audio or audio-visual fixation"* (Art. 96, Para. 1b, the Czech Copyright Act).

and Lending Directive[46]) as well. For these reasons, operators of Internet cafés should pay an equitable remuneration for the *"rental of GUIs recorded on audio-visual recordings"*, because the protected object is recorded on the hard drive of the computer which is connected to the Internet.

The Regional Court in Pilsen (*Krajský soud v Plzni*) dismissed the action of OOA-S which sought an injunctive relief and payment of 15,200 CZK (560 EUR) against P.F., the operator of an Internet café. The Regional Court held that graphical user interfaces are only an element of a computer program (*BSA*, Para. 41) and not audio-visual recordings in the sense of the Art. 79, Para. 1, the Czech Copyright Act. For this reason the plaintiff is not entitled to pursue such claims against the defendant [i.e. the OOA-S has no *locus standi* (active legitimation)].

The High Court in Prague (*Vrchní soud v Praze*) upheld the decision of the Regional Court. Unlike the first instance court this Court decided that graphical user interfaces are considered a copyrighted subject matter, but in Internet cafés people just passively use GUI and their needs are not satisfied by the GUI itself but by the computer program for the use of which potential customers probably come to Internet cafés. The main purpose of the GUI is then just to disclose the function of the computer program to the potential user.

Judges of the High Court quoted findings contained in the *BSA* decision that the graphical user interface cannot be effectively used by the television broadcasting. According to the conclusions of the High Court it is hardly possible to speak about the effective use of the GUI in an Internet café, and therefore the OOA-S cannot pursue the rental right pursuant to Art. 96, Para. 1b, the Czech Copyright Act.

In its appeal addressed to the Supreme Court (*Nejvyšší soud*), the plaintiff argued that (*i*) graphical user interfaces are independent objects of copyright protection, (*ii*) the OOA-S has the authorization to exercise the collective administration of the rental right, and therefore (*iii*) it is entitled to pursue claims against a defendant for an adequate compensation if the defendant provides (*"rents"*) the graphical user interface to the public. In relation to the graphical user interfaces the same principle should be applied as to video rentals or public libraries. These institutions also pay

[46] The Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115> [Accessed on 7 December 2015].

an adequate remuneration to the collecting society for the renting of films and other audio-visual works. The OOA-S has opposed the interpretation of the BSA judgment provided by the High Court and emphasized that in the given case the graphical user interfaces were used in an active way.

The Czech Supreme Court annulled the judgment of the High Court and noted that the CJEU in the *BSA* decision had held that the reason why the graphical user interface could not be used in the form of television broadcasting was that the GUI was communicated to potential viewers only in a passive way without having a chance to intervene (TV viewers thus cannot benefit from the main function of the interface, which is to enable an interaction between the computer program and the user). Given that such use of the GUI does not constitute the communication of the GUI to the public in the sense of Art. 3, Para. 1, the InfoSoc Directive. In the given case, however, the Prague High Court had overlooked the fact that when the visitors to an Internet café interact with the GUI in order to achieve the desired functions of the computer program, such use constitutes the communication to the public within the meaning of the Art. 18 of the Czech Copyright Act. With the use of the argument *a contrario*, no other interpretation is possible. The Supreme Court stated that in the context of the given case it is not possible to speak about passive use of the GUI by visitors of an Internet café.

The author of this paper is of the opinion that the Supreme Court decision in the OOA-S case is problematic for several reasons. Graphical user interfaces, although being able to represent separate objects of copyright protection (*BSA*, Para. 51) in the sense of the InfoSoc Directive (or Art. 2, Para. 1, the Czech Copyright Act), form an element of a computer program (*BSA*, Para. 41) whose main purpose is to allow the interaction between the user and the computer program (*BSA*, Para. 40). Although GUI as such can be used separately (e.g. in a printed form in computer games magazines), its main function is satisfied in conjunction with the computer program.

The first problematic issue in the reasoning of the Supreme Court is that it did not decide on the issue of *locus standi* (active legitimation), even though this was the crucial point in the given legal dispute.

As the Supreme Administrative Court decided that the collective administration of computer programs is neither reasonable nor effective

(5 As 38/2008 Decision, Para. 75, 76)[47], and as the OOA-S does not have an express authorization provided by the Ministry of Culture to perform collective administration of rights related to graphical user interfaces, the OOA-S cannot have locus standi to enforce those rights. An authorization to exercise the collective administration must be interpreted restrictively, since it is the state (a public authority) that must explicitly enable the collective management of certain objects of protection. The extensive interpretation, which is based on the classification of the graphical user interface as works of fine art, should be found as an excessive one.

The second problem[48] is that the CJEU had specifically dealt, in the BSA decision, only with the issue whether the GUI might be used in the form of communication to the public (TV broadcasting). The Supreme Court, however, on the basis of an argument *a contrario* decided that the active use of GUI probably represents a *"rental of copies of a copyrighted work"*. Such a conclusion, however, is not substantiated neither by any provision of the Czech Copyright Act nor by provisions of the Rental and Lending Directive. [49] The right to remuneration from rental right has always been associated just with material carriers[50] of copyrighted works (i.e. the original work or a physical copy of the work).[51] Making works available to the public on-line has always been considered to be a communication of the work to the public, even though the members of the public paid directly a fee to the right holder. *"Renting of works on-demand"* on the Internet is not considered as renting in the sense of the Art. 1, Para. 1, and Art. 2, Para. 1a, the Rental and Lending Directive.[52]

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[47] Similarly Telec/Tůma, 2007, p. 751. Towards a rationale of collective management in general, see also Fiscor, M., *Collective Management of Copyright and Related Rights* [online], p. 16-18. Available at: <http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf> [Accessed on 5 December 2015].

[48] For this comment I would like to express my gratitude to my colleague Matěj Myška who pointed out this loophole in the argumentation of the Czech Supreme Court.

[49] An explicit exclusion of computer programs from collective management of rental right is stipulated e.g. in Art. 63, Para. 5, the Latvian Copyright Act (Autortiesību likums) [online]. Available at: <http://likumi.lv/doc.php?id=5138> [Accessed on 5 December 2015].

[50] Telec/Tůma, 2007, p. 208. Loewenheim, 2010, p. 311.

[51] However, the ECJ has not decided on this issue yet. In the *Technische Universität Darmstadt v. Eugen Ulmer KG* (C-117/13; Para. 35) the CJEU explicitly dealt only with the licensing of copyrighted works. The preliminary ruling concerning the question if the rental right relates also to e-books is still pending (Referral C-174/15 from the 17 April 2015; *Vereniging Openbare Bibliotheken* [online]. Available at: <http://ipcuria.eu/details.php?t=2&reference=C-174/15> [Accessed on 5 December 2015].

The third problem concerns the question of reasonability and effectiveness of the collective administration of graphical user interfaces. As has been stated above, the main function of the GUI is fulfilled only while running the computer program. In this respect we have to consider the finding of the CJEU that the GUI

> *"merely constitutes one element of that program by means of which users make use of the features of that program"* (*BSA*, Para. 41).

Then, if the Supreme Administrative Court held that the collective administration of computer programs was ineffective, these findings must also apply to potential collective administration of the graphical user interfaces. The legal regime of computer programs seems to be dominant in the determining of the collective administration of all copyrighted objects which are created within the process of the software development. For this reason, not only the rental right but also other compulsory administered rights, such as right to remuneration for making copies of a work for personal use, may hardly be collectively administered.[53]

To sum up, we can state that the decision of the Supreme Court in OOA-S v. P.F. is incorrect in many aspects. Not because the Supreme Court judges using the argument a contrario found that in Internet cafés the graphical user interfaces were used actively (which is obvious and in this aspect the decision of the High Court in Prague was wrong), but because they paid no attention to the prevailing legal regulation of computer programs when assessing the possibility of collective administration of graphical user interfaces. The appeal of the OOA-S should have been rejected since the OOA-S had no locus standi (active legitimation) to claim monetary compensation for the use of graphical user interfaces in the Internet café of the defendant.

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[52] Similarly *"the rental of the original or a copy of the work shall mean making the work available in a physical form for the purpose of direct or indirect economic or commercial advantage by providing the original or a copy of the work for a limited period of time for personal use"* (Art. 15, the Czech Copyright Act).

[53] *"The making of a reproduction for personal use on the basis of a graphic expression by its transfer by means of a technical device for making printed reproductions to another material support, and that also through the facilitation of a third party"* (Art. 96, Para. 1a, Section 4, the Czech Copyright Act). In this context it should be noted that computer programs cannot be legally copied for personal use (Art. 30, Para. 3, the Czech Copyright Act), with the exception of a back-up copy [Section 66, Para. 1c, the Czech Copyright Act]. If it is legally impossible to make a copy of a computer program for personal use, it is not permissible to collect the remuneration from blank media carriers, either (Art. 25, Para. 1b, the Czech Copyright Act), and this conclusion also applies to graphical user interfaces.

7. CONCLUSION

We have tried to show the impact of the BSA decision on the case-law of the Supreme Court in one member state of the EU (Czech Republic) and to point out the possible misinterpretation of the BSA decision. The reasoning of the Czech Supreme Court in the OOA-S decision leads to an absurd conclusion that even though the collective administration of computer programs is neither reasonable nor effective the independent collective administration of GUIs is permissible, and this is substantiated by an *a contrario* interpretation of the Para. 57 of the BSA decision.

Graphical user interfaces, when assessing their main function, serve to an easier operation of a computer program by the end user. For this reason, it makes no legal sense to consider the separate collective management of GUIs. In contrast to the findings of the Czech Supreme Court the author of this paper concludes that when legally assessing the possible collective administration of graphical user interfaces the legal regulation of computer programs has priority. If the Supreme Administrative Court in the BSA case held that the collective administration of computer programs was neither reasonable nor effective, the same conclusion should have been applied on the collective management of graphical user interfaces.

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