

A Model Framework for publishing Grey Literature in Open Access

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Abstract: In this paper we present a model framework for placing grey literature documents into an online, publicly accessible repository, providing an effective mechanism to avoid liability for a grey literature repository operator. ‘Grey literature’ is a term (originating in library and information science) referring to documents that are not published commercially, e.g. research and technical reports, governmental documents and working papers. Despite their undeniable value (usually derived from their originality and from containing recent and up-to-date information), these documents are often difficult to access. This creates an obvious problem of not providing the public with valuable information associated with the necessity to fund the production of particular information that already exists and could have been easily offered to the public. One of many possible solutions to make grey litera-

ture available seems to be the establishment of centralised on-line repositories of grey literature supported (or maintained) by official agencies. Putting aside the most important issue of financing such an effort, the agency has to face many difficult legal issues, among others. As the task of the agency would be to actively seek the documents to be placed into the repository, it also has to deal with several legal issues. In this paper we try to identify and discuss these legal problems and design a framework for obtaining GL documents from various subjects in such a way that the risk of copyright infringement would be minimised. The proposed framework is based on the practical experience gained from the efforts of the National Library of Technology (of Czech Republic) to establish the National Repository of Grey Literature.

Keywords: Grey Literature, Open Access, Repository, Public Licences

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A. Introduction

1 Grey literature (hereinafter referred to as ‘GL’) and its usage is an emerging phenomenon that is gradually drawing more and more academic attention.¹ In the first section of this paper we will define GL, its value and its importance. In the second section we will discuss the issues of accessibility of GL, including its

relation to the Open Access movement. These sections should provide for a theoretical introduction to the GL concept. Next the mode of operation for making GL available will be described. The main focus lies in identifying the possible problematic legal issues (namely, copyright, liability for infringement and personal data processing) and proposing solutions for how to tackle them. Thus the system and workflow for rights clearing of GL documents

will be presented. The further parts then focus on the case study of a publicly funded GL repository in Czech Republic, namely the National Repository of Grey Literature (hereinafter referred to as 'NRGL'). The paper concludes with remarks on the main issues identified with both the NRGL and making the GL available to the public in general.

B. Defining grey literature

2 Due to the various types of documents and materials that could be marked as GL, it is not an easy task to provide a comprehensive and all-encompassing definition of GL. The currently most-used one is the 'New York definition' of GL from 2004, which reads as follows: '[Grey literature is] that which is produced on all levels of government, academics, business and industry in print and electronic formats, [...] but which is not controlled by commercial publishers, i.e., where publishing is not the primary activity of the producing body'.² Contrary to traditionally published 'white literature' (i.e. books and journals), GL is therefore not primarily aimed at commercial dissemination and is not circulated by conventional distribution channels. This is indeed a very broad definition, leading some scholars to go as far as proclaiming that 'virtually everything we read outside of journals and books can be considered grey literature'.³ Thus GL may entail diplomas and doctoral theses, research studies, various government reports, supplementary teaching materials, corporate prints (like manuals, product catalogues, annual reports, product handbooks) but also tweets, blog entries, programs of cultural events or even satellite data.⁴ This plethora of documents that could be marked as grey literature poses a serious challenge to the attempts to regulate its use explicitly by law. Polčák⁵ developed a legal classification of GL based on the goals achieved by the production of the GL. Any GL may therefore fall under one of the following categories: (1) fulfilment of academic or qualification obligations; (2) reporting academic activities; (3) exchanging ideas for academic discussion; (4) developing technical standards; or (5) compliance with legal obligations. Correspondingly, there is a significant multitude of producers of GL. The spectrum ranges from mere individual researchers to organised teams employed by a university/research institution or governmental bodies. Consequently, the subject entitled to exercising the economic rights to the GL may vary. According to Polčák's legal classification of GL,⁶ the typical situations in GL production as regards the entity exercising the economic rights are the following: (1) works created by students or candidates; (2) works created by a researcher or a research team for its employer or subsidy provider or created by a hired agency; (3) works created by a single author; (4) works/public documents created by an official or employee of a professional organi-

zation; (5) works created by an employee for a private or public employer. The term 'grey literature' itself is not reflected in any national, European or supranational act; it does not constitute any special category of copyrighted works, and therefore the standard copyright rules apply. However, there are certain special peculiarities stemming from the various types of documents involved and from the producers of GL as will be practically demonstrated further in this paper.

3 The *value and importance* of grey literature lies mainly in its complexity, topicality and financial availability. As noted by Schöpfel and Farace, GL 'represents a substantial part of the scientific production'.⁷ As GL is not published in a 'traditional way', it logically contains information not available/searchable/indexed by the standard librarian tools (e.g. standard library catalogues). Due to this fact, GL should always be included in literature searches as it limits the potential bias.⁸ A mere reliance on the officially published sources may lead to a 'subjective one sided research path'.⁹ GL also contains more detailed information, an example being a technical report with detailed descriptions, diagrams and data sets that would be never published in traditional journals.¹⁰ Compared¹¹ to 'white literature', GL tends to be more up-to-date as it is usually not subject to traditional and time consuming pre-publishing processes. The quality of GL literature is still debatable¹² as it is usually not subject to a quality process like peer-reviewing, in the case of published papers in traditional scientific journals. However, Seymour¹³ claims that grey literature is subject to various levels of internal quality assessment – an example being the review process in the case of master's or PhD theses. Also the 'publishing' institution's name and reputation is at stake, so a certain quality check is to be expected. Lastly, due to its non-commercial character, GL is usually available for free as in 'free beer'¹⁴, i.e. without monetary compensation. As discussed in the next section, the emergence of the Open Access movement is also opening up GL, with 'free' in the sense of 'free speech'.

C. Making grey literature available

4 The seminal disadvantage of GL, stemming logically from its definition mentioned above, is its complicated availability.¹⁵ Boukacem-Zeghmouri and Schöpfel characterised GL even as 'underground literature',¹⁶ and called searching for it a 'time-consuming, sometimes expensive and even frustrating experience'.¹⁷ One of the main reasons for the status quo of GL is the absence of a long-term archiving institution. Compared to 'white literature', where a deposit of a published work is a statutory obligation of the publisher, no such obligation is foreseen for the 'publishers' of GL.¹⁸ Thus GL cannot be obtained

in one place (i.e. bought or subscribed to like books and journals) because the multitude of GL 'publication' platforms corresponds to the numerous types of GL producers as described above. The development of the Internet provided for yet another way to make GL available, e.g. on company or personal websites, blogs or in institutional repositories. Standard general search engines (e.g. Google) do not provide a solution to this problem because GL is mainly located in the 'deep web' that is not wholly indexed.¹⁹ Further, there is no centralised and standardised access point like the standard brick-and-mortar library. This is caused mainly by the absence of interoperability standards, missing or incomplete metadata or restricted access to full-text. Systematic collection and making available of GL, therefore, requires 'specific attention, competency and procedures'²⁰ and, as will be elaborated further, a specific legal approach.²¹

- 5 One possible solution, at least at the national level, seems to be a publicly funded national GL repository (as described in detail in the following sections).²² Using appropriate standards and a common interface, the national repositories could then be linked together and accessible via a unified (e.g. European GL) search engine. Such a theoretical concept, however, adds other legal issues that have to be tackled. Apart from the legal questions identified,²³ the acquisition and making available of GL constitutes a further use of the work. In addition, the *sui generis* database rights would need to be cleared because the collecting of GL could be facilitated in an automated manner and would equal extraction or re-utilisation of the whole or parts of the database content.²⁴
- 6 Another challenge to GL is posed by the development of the Open Access movement,²⁵ whose foundations were formulated in the famous BBB Statements.²⁶ Accordingly, an Open Access document (contribution) should be: (1) accessible to the reader without any obstacles, preferably online; (2) granting the user a wide set of rights;²⁷ and (3) deposited in a suitable form and in a repository ensuring long-term archiving.²⁸ The aim of the Open Access movement was aptly summarised by Bargheer et al. as 'providing for an access to all the relevant information to all the researchers, students and teacher no matter of their location and/or financial situation'.²⁹ Primarily the Open Access principles and the related effort of making scientific results openly available are targeted at the standard peer-reviewed journals published by traditional publishing houses like Springer, Wiley or Elsevier. GL is characterised by its primarily non-commercial means of distribution and thus meets the first of the above-mentioned Open Access conditions as regards availability without remuneration. The application of the remaining conditions – i.e. rights granting and long-term accessibility – could be seen as the much-needed development in collecting and making GL available. From a legal point of

view, it has to be emphasised that Open Access principles require more than just simply placing a document online in an online repository.³⁰ By doing so, GL could be used merely in the regime of copyright exceptions (limitations) and/or free use as provided for in the relevant national acts.³¹ The user of this GL would not be able to disseminate, re-use or build upon this document. Thus another expression of will of the subject exercising the rights to the work is needed – namely, a licence. According to the Berlin Declaration, such a licence shall grant 'to all users a free, irrevocable, worldwide, right of access to, and a licence to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship'.³² Usually a licence is agreed upon between two individual parties; however, this mode of contracting is unfeasible in the online environment. The practical use of such tailored individual licensing would bring a significant raise in transactional costs both to the licensor and licensee. A viable solution to address this problem would be 'public licences'.³³ As the discussion of the legal nature of public licences is outside the scope of this article,³⁴ we could very simply characterize them as a contract offered to an unspecified group of offerees that is concluded by use of the work. The terms of such a contract are specified in the chosen version of the 'ready-made' licence. To make the contracting process simpler, the terms (or a link directing to the full text of the licence) are attached to the respective work. Further, the usage of a specific public licence can also be emphasised by using a graphic logo symbolising the respective licence. A plethora of standardised 'ready-made' licences have been made available online for public use, the most prominent being the Creative Commons licensing suite.^{35,36} The author (or the subject entitled to exercise the rights to the copyrighted work) could choose from a variety of licensing options by using one of the pre-determined variants of the licensing agreement wording. The author may therefore prohibit/allow making of derivative works by opting/not opting for the licensing feature NoDerivs (ND). A special option of this condition is the allowance of making of derivative works only if the resulting work is licensed under the same or a similar public licence (Share-Alike - SA). A further option is the exclusion or allowance of commercial use of the work, which is achieved by including/omitting the NonCommercial (NC). Every time the user is obliged to properly attribute the work to the author (Attribution - BY) and thus respect its moral rights. The first two conditions of the abovementioned Open Access principles are fulfilled by granting the user the relatively broad 'worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright)³⁷ licence to reproduce, distribute and publicly perform the licensed work. It must be noted that only the most permissive version of the Crea-

tive Commons licence is compliant with the Open Access principles as noted above.³⁸ However, using the Creative Commons licences in the context of making GL available under the Open Access principles again complicates the function of the GL repository from a legal point of view. Offering a work under one of the Creative Commons licenses itself means logically the granting of the licence, and thus has to be regarded as an exercise of economic rights that is reserved only for the properly entitled person. As no one is generally entitled to transfer more rights than he himself has, such use constitutes a perpetuating copyright infringement because the Creative Commons licences are irrevocable.

D. Legal issues

- 7 Building up a centralised GL repository, however, raises some serious legal issues that will be addressed in this section. These risks can be identified and will be discussed below in detail as follows: (1) copyright issues (GL as copyrighted work, school works, databases) and liability for copyright infringement and (2) personal data processing.

I. Copyright and liability for copyright infringement

- 8 We provided a thorough exposition of the concept of grey literature in the second section of this paper. At this point, it is our intention to develop the account with respect to legal issues surrounding GL. The first question concerns the subject matter of copyright protection. Despite the term used – grey literature – not all the GL documents can be automatically regarded as ‘literary works’ within the meaning of Articles 2(5) and 8 of the Berne Convention. Moreover, the term ‘grey literature’ also encompasses other types of works apart from literary works, e.g. graphic works, motion pictures, sound recordings or mixes (interactive presentations, texts accompanied with graphics, etc.). Thus the conditions in the national legal orders have to be individually examined in every document that is to be placed in the GL repository. On the European level, the Court of Justice of the European Union has taken quite a broad approach³⁹ in the Infopaq case,⁴⁰ stating that the decisive criterion of ‘the author’s own intellectual criterion’ has to be applied. Under Czech law (Sec. 2 of the Czech Copyright Act⁴¹), however, a work has to be expressed in an objectively perceivable manner and be an outcome of the author’s own creative activity in order to enjoy the full copyright protection. These distinguishing traits are often difficult to evaluate, especially the creative nature of an author’s activity.⁴² The following definition may be used as a guide: ‘creative activity (...), the core concept of copyright law, can be characterised as an activity that

consists in creation of an intangible artefact. Such a result depends on the personal traits of its creator in absence of which it would not have occurred’.⁴³ To put it simply: if the outcome of an activity performed by various people has to be different, then by necessity the concerned activity is most likely creative. In the case of identical or similar outcomes, it is probably not possible to speak about an involvement of creative activity – therefore, the criterion of statistical probability applies. In order to mitigate the risk of copyright infringement, it is reasonable to treat the GL documents as copyrighted works rather than unprotected information. If a document which in fact does not qualify to be a literary work is considered to be protected by copyright, the negative outcome consists in either abstaining from its use or unnecessary activity connected with asking for a licence. Such results are therefore not detrimental to the operator of the repository. However, the other scenario – i.e. treating the copyrighted work as mere unprotected information – may consequently result in the liability of the GL repository operator. Thus in order to avoid the related negative consequences (i.e. lengthy court proceedings, judgement ordering the payment of damages and unjust enrichment) it makes sense to anticipate the existence of copyright protection in cases in which it is difficult to assess the nature of the individual document.

- 9 Additionally, the copyright and *sui generis* protection of databases has to be taken into account.⁴⁴ This issue would be relevant primarily in cases of the placement of large document volumes into the repository. The database protection also comes into play when the GL repository plans to extract and re-utilize the GL producer’s databases of GL documents. In these cases it would not suffice to analyse the legal status of the individual documents. Additionally, it needs to be determined whether database rights are vested in the used collection or not. With respect to copyright protection, it is again advisable to take the same defensive approach as in the case of individual GL documents and treat the database as a copyrighted work. And it also needs to be decided whether *sui generis* protection applies. In this area, Czech law is completely harmonised by Directive 96/9/EC and does not deviate from the already-established case law.⁴⁵ Thus the protection is available for the database that is ‘a collection of independent works, data, or other items arranged in a systematic or methodical manner and individually accessible by electronic or other means, irrespective of the form of the expression thereof’.⁴⁶ Rights *sui generis* are held by the maker of the database. However, this is the case only if ‘the formation, verification or presentation of the content of the database represents a contribution, which is substantial in terms of quality or quantity, irrespective of whether the database or the contents thereof are subject to copyright protection or any other type of protection’.⁴⁷ If the *sui generis* rights exist, the maker of the data-

base has the exclusive rights to 'extraction or re-utilisation of the entire content of the database or of its part substantial in terms of quality or quantity, and the right to grant to another person the authorisation to execute such a right'.⁴⁸ In order to clear the above-mentioned rights, the GL repository operator needs to enter into contract with the GL producer, not only as regards the particular contained works but also as regards respective database.

- 10 This defensive approach is not needed with the GL documents that do not fulfil the above-mentioned conditions for copyright protection. These documents could therefore be considered mere information not protected by copyright. These include GL documents that fall under the definition of an official work within the meaning of Sec. 3 CCA that excludes copyright protection for such works. In the sense of Article 2(4) of the Berne Convention, the Czech Republic does not consider the following documents ('official texts') copyrighted: legal regulation, court decision, public charter, publicly accessible register and collection of its documents, and also any official draft of an official work and other preparatory official documentation including the official translation of such a work, Chamber of Deputies and Senate publications, a memorial chronicle of a municipality (municipal chronicles), a state symbol and symbol of a municipality, and any other such works where there is public interest in their exclusion from copyright protection. However, the absence of copyright protection does not logically exclude other protective regimes (such as trade secrets, know-how and personal data protection) as will be elaborated further.
- 11 Under Czech law, special attention has to be paid to one category of GL documents, namely, school works produced as a fulfilment of academic obligations. A special exception is stipulated in Section 47b of the Czech Act No. 111/1998 Sb. on Higher Education Institutions⁴⁹ Czech Republic.⁵⁰ According to this provision, the higher educational institutions are 'obliged to make public, at no profit to themselves, the doctoral, Master's, Bachelor's and advanced Master's ('rigorózní') theses that have been defended at their institutions, including the readers' reports and results of the defence'. It is basically up to the educational institution which means are used to fulfil the requirement – this provision is a blanket norm providing that the further details of making available should be stipulated in an internal regulation of the institution.⁵¹ The institution could therefore decide to use the GL repository as a way to fulfil its statutory obligation. The higher educational institution (i.e. the GL producer) may also use the online repository. The consent of the author of the thesis for this use is not needed as it is presumed to be given at the time when the student hands in the thesis. However, no other uses are permitted. It must be noted that this exception to the reproduction right as stipulated on the European level in Article 2 of the InfoSoc Directive⁵² was not undisputed. The Copyright Department of the Ministry expressed in its Opinion⁵³ that such a use is contradictory to the three-step test – that is, unlike in the other Member States, regulated directly in the national Copyright Act (Sec. 29 CCA). However, no national court has yet ruled that such use of the theses constitutes an infringement on the basis that it conflicts with a normal exploitation of the work and unreasonably prejudices the legitimate interests of the right holder.
- 12 As explained above, GL documents are better treated as copyrighted work and thus fully protected by the relevant national copyright laws (e.g. Czech Copyright Act). Thus any unauthorised use of the work results in copyright infringement. In order to avoid such infringement, the operator of a GL repository needs to enter into a proper licence agreement with the GL producer (i.e. in most cases, the proper subject entitled to exercise the economic rights). This agreement shall cover at least the reproduction rights, the making available right and the right to include the copyrighted work in a database. Further, if the GL operator plans to offer the GL documents under the Open Access principles, the agreement should also include the possibility to make use of the above-mentioned public licences. In practice this condition means that the copyright holder should vest the GL repository with enough rights to make use of the above-mentioned public licences.
- 13 The modus operandi of acquiring of the GL documents also plays a significant role in determining the liability for potential copyright infringement. The operator of a GL repository may acquire the GL documents either ad hoc or on a permanent framework agreement basis. In the first case, the GL operator acts as the sole 'publisher' of the documents and is directly liable for potential copyright infringement. The possibility to regress the possible negative results of such proceedings shall be stated in the licence agreement between the GL repository operator and GL producer. This agreement shall consequently contain a provision stipulating the empowerment of the GL producer to license the work and also the proclamation that no third party's rights are vested in this work. However, the possibility to regress is generally regulated in the respective national civil law codices (as in Czech Act No. 40/1964 Sb., Civil Code, as further amended). The role of the GL repository operator changes when the operator provides only for a platform that allows publication of the GL documents directly by the GL producer. Practically, such a situation emerges when the GL repository operator establishes a direct publication access into the system to the GL producer, typically an educational institution. This is convenient, however, only if a permanent cooperation between the GL producer and GL repository is planned. In this case, the GL repository may qualify in the sense of

'hosting' an information society service provider and benefiting from the liability exception provided for in Sec. 5 of Act No. 480/2004 Sb., Act on Certain Information Society Services, as amended⁵⁴ that implements Article 15 of the E-Commerce Directive.⁵⁵ However, the Czech implementation is a rather peculiar one. Whereas the E-Commerce Directive provides for 'safe harbour', ensuring that the ISP is not liable unless the foreseen circumstances arise, the Czech legislator took the reverse approach, stating that the hosting information society service provider is liable unless the conditions of safe harbour are fulfilled. These include either the absence of constructive knowledge of the infringing conduct (unconscious negligence: Sec. 5(a) Act No. 480/2004 Sb., Act on Certain Information Society Services, as amended) or failure to remove or disable access to the infringing information (Sec. 5(b) of the same Act). The Czech provisions on ISP liability, however, should be interpreted to conform with the *acquis*, i.e. the ISP is to be held liable after the loss of safe harbour according to special laws, not just merely because he lost it. The aim of the Directive, as Husovec⁵⁶ notes, should be to delimit the moment to which the ISP is not liable. The Czech courts have not dealt with the liability of the ISP provider specifically in the case of copyright infringement. However, in the *Prolux*⁵⁷ case that concerned the responsibility of the operator of a website for defamatory remarks contained in the discussion below an article, the High Court in Prague ruled that for liability under Sec. 5(a), the illegality of the information must be apparent to the ISP. In the case of the actual knowledge, the mere disputability of the illegal nature might be enough. For the GL repository operator, who should have a certain degree of knowledge about copyright law, this would mean, for example, that he could be held liable for placing the clearly marked final theses under one of the public licences.

II. Personal data processing

14 As mentioned earlier, even if the GL documents do not enjoy copyright protection, further legal protection regimes may apply, the most common being the protection of personal data. The GL documents may contain various data and metadata related to authors and other individuals.⁵⁸ First, it must be assessed whether this data constitutes personal data. On the European level, the guidance is to be found in Directive 95/46/EC.⁵⁹ Czech law relied very heavily on the original text of this Directive, and thus, for example, the definition of personal data in Sec. 4(b) of the Czech Act on Protection of Personal Data (hereinafter referred to as 'PDPA'),⁶⁰ 'personal data' is basically a literal translation of the definition in the Directive. Therefore, 'personal data' shall mean 'any information relating to an identified or identifiable data subject. A data subject shall be considered

identified or identifiable if it is possible to identify the data subject directly or indirectly in particular on the basis of a number, code or one or more factors specific to his/her physical, physiological, psychological, economic, cultural or social identity'. The name itself is not always able to identify the data subject. However, the further metadata may make the subject quite easily identifiable. Also the Czech Office for Personal Data Protection employs a rather broad notion of the term 'personal data' as expressed in the Position of the Office for Personal Data Protection No. 3/2012 - On the Notion of Personal Data.⁶¹ According to this opinion, the decisive factor for marking data as personal is the possibility to identify a subject even only indirectly, i.e. with the help of other publicly available information. Especially in the case of academia, a simple name and academic position are usually sufficient to identify the respective individual. Therefore, the data and metadata gathered by the GL repository operator in the process of acquiring the GL (apart from the above-mentioned date of birth, e-mail address, etc.) could be linked to an individual and therefore constitute personal data, but rarely sensitive data. Thus the gathered data about the authors should be, for the sake of mitigating the possible legal risks,⁶² regarded as personal data; its collection should be regarded as personal data processing and must comply with the legal obligations stipulated in the Personal Data Protection Directive (hereinafter referred to as 'PDPD') or national law (referred to as PDPA). Article 24 of the PDPD found its reflection in Chapter VII of the PDPA that bans the unlawful processing of personal data as an administrative offence that is punishable by significant financial fines (up to CZK 10,000,000). In the context of processing personal data, the legal roles of the GL producer and the GL repository operator have to be distinguished. The personal data stem primarily from GL producers who also act as personal data controllers (Art. 2(d) PDPD - Sec. 4(j) PDPA) of GL authors' data or third persons.⁶³ This processing has to be legitimate, therefore based upon consent of the data subjects or law or without consent if prescribed by law. The data controller transfers personal data to the GL repository operator who is consequently to be regarded as the data processor (Art. 2(e) Personal Data Protection Directive - Sec. 4(j) PDPA).⁶⁴ An individual agreement on such personal data processing needs to be concluded pursuant to Sec. 6 PDPA (which implements Article 17 PDPD) between the GL repository operator and the respective GL producer. This agreement must be made in writing and shall 'explicitly stipulate the scope, purpose and period of time for which it is concluded'. Furthermore, the agreement must contain guarantees by the processor related to technical and organisational securing of the protection of personal data. A similar agreement must be concluded if the data processor (GL repository operator) intends to transfer the personal data to a third party. Lastly, if the GL repository ope-

rator obtains the GL documents from the authors/ other natural persons acting as GL producers then as a data controller, thus a proper notification to the Personal Data Protection Office is needed.

- 15 With the new proposed regulation⁶⁵ ahead, changes to the processing of personal data are to be expected.⁶⁶ However, the legislative text is still in a state of flux and constantly debated. A prime example is the notion of consent defined in Article 4(8) of the proposed Regulation. Originally it was 'explicit', but lately it was changed back to the 'specific and informed' (i.e. 'unambiguous' which is the current definition in the PDPD and the current PDPA). As regards the GL repository, the newly proposed duties for a data processor stipulated in Article 26 are to be taken into account. The current status quo (both on the European level and in Czech law) is that the obligations need to be imposed on the data processor from the data controller contractually (see *supra*). The new Regulation introduces direct regulation of the obligations of data processors, such as the obligation to maintain appropriate documentation (Art. 28(2) of the Regulation), co-operate with the supervisory authority (Art. 29), appoint a data protection officer (Art. 35) of the Regulation) and direct liability for data breaches (Art. 79) of the Regulation).
- 16 The above-mentioned issues were identified as the basic legal issues any GL repository has to deal with in general, with a special focus on the Czech law. In the next section we will take a closer look at how these issues have been solved practically in the National Repository of Grey Literature of the National Technical Library in Czech Republic.

E. National Repository of Grey Literature

- 17 In these three general sections we have shown that, despite its peculiarities, making GL available raises relatively complicated legal issues. Next, it was important to find out which organizations were about to carry the most important legal duties within the framework that was about to be established. In the following case study, we provide an overview of how these issues have been addressed in the Czech National Repository of Grey Literature. Between 2008 and 2011, the National Technical Library of Czech Republic (hereinafter referred to as 'NTL') played a pivotal role in the establishment of what is today known as the National Repository of Grey Literature. It is an online search engine that allows searching through a repository of grey literature documents.⁶⁷ Both the search engine and the repository are maintained and supported by the NTL. Furthermore, the NTL spreads awareness regarding grey literature, its value and the possibilities NRGL opens. Also, the NTL engages in negotiations with producers of grey literature

and established a mechanism of placing their documents into NRGL. Finally, the NTL maintains and keeps up the repository and leads negotiations with those who would like to use NRGL in ways that exceed simple acquiring of documents.

- 18 In 2009, when NRGL was about to be launched, extensive preparatory work was culminating, including a legal assessment of the status of the NRGL. The legal analysis was prepared by the researchers at the Institute of Law and Technology, Masaryk University, Brno, and is available online in Czech.⁶⁸ This analysis and the accompanying template contract documents later became the central reference materials for dealing with legal issues that appeared immediately after the launch. The main purpose of the analysis was to place the above-mentioned issues in all their complexity on solid legal ground.
- 19 As the key players in the NRGL system, the NTL and the GL producer were identified. Whereas there is no legal problem regarding the position of the NTL, the term 'GL producer' needed to be specified. As was also briefly sketched out in part A of this paper, the GL producer may comprise different parties with different interests and levels of empowerment to exercise the economic rights.
- 20 Least complicated is the situation where the GL producer is a sole author who is unlimited in the exercise of his rights. Here the licence agreement is concluded directly between the two parties. Logically, in the case of a co-authored work, the consent to use the work is needed from all the authors. In the case of employee work, the subject entitled under Czech law to exercise the economic rights is the employer, unless agreed otherwise in the employment contract (Sec. 58 CCA). As regards the moral rights, according to Sec. 58(4) CCA it is presumed that the employee 'has given his consent to the work's being made public, altered, adapted (including translation), combined with another work, included into a collection of works and, unless agreed otherwise, also presented to the public under the employer's name'. In this case, the NTL has to enter into negotiation with the respective representative of the employer/employing institution. In the case of school works (Sec. 60 CCA), the simple making available by the GL producer (in this case by definition an educational institution) is covered by the above-mentioned exception of Sec. 47b, Act No. 111/1998 Sb. on Higher Education Institutions as amended. However, the inclusion into other database (such as NRGL) is considered a separate use of work, and offering the work under public licence has to be authorised by the author (in this case, the student) in a licence agreement with the GL producer.
- 21 As regards the personal data protection and consent to process them, again the situation is dependent on the subject of the GL producer. A sole author may

freely give consent to process her personal data. As stated above, in this case the GL repository acts as a data controller and has to fulfil all legal duties. If the GL producer has already amassed the personal data, the GL repository operator will then act solely as a data processor. Here an appropriate written contract would be one as described above. The GL producer (e.g. a university) can process the data only on the basis of the consent of data subjects (Art. 7 PDPD; Sec. or if it is foreseen by law (Sec. 5(2)(a) and (d) PDPA that correspond to Art. 7 PDPA). An illustrative case where no consent of the data subject is needed and where the GL producer is fulfilling its legal obligations is the situation discussed above concerning the making available of the theses stipulated in Act No. 111/1998 Sb. on Higher Education Institutions as amended.

- 22 In practice, the procedure for obtaining and making GL available should aim at mitigating (eliminating) the most legal risk (i.e. the liability) in the beginning with reasonable personal and time costs. The first step is the establishment of initial contact between NTL and the GL producer. The librarian inquires about the possibilities of obtaining the producer's consent to make the GL document available. If a mutual desire for cooperation arises, the librarian tries to outline the details of further cooperation.
- 23 What follows depends on the volume of the documents that are about to be made available. If their number is rather limited, the librarian produces the list of GL to be acquired and fills in the most appropriate template contract prepared by the lawyer. These two documents are then forwarded to the lawyer. The lawyer usually identifies documents that are in some way risky – usually those documents whose making available would require the consent of persons who have not yet been involved in the process – and instructs the librarian regarding what further information should be gathered. Once the librarian gathers the necessary information or recognizes its unavailability she immediately informs the lawyer about the result. Consequently, the lawyer informs the librarian about the risks associated with making the documents available that have been recognised as potentially 'harmful'. Taking this particular information into account, the librarian informs the lawyer about the final decisions regarding the set of GL documents that is going to be made available.
- 24 If a continual placement of the GL documents in the NRGL based on the quantity of the GL documents is foreseen (for example, as in the case of making the bachelor, diploma and dissertation theses available in the sense of Sec. 47b), a permanent cooperation framework has to be established. In this case, the involvement of legal and IT staff is significantly higher. The template cooperation agreement that includes the appropriate licence agreement and specific clause regarding the personal data processing/trans-

fer and appropriate safeguards is gradually tailored based upon the requests and remarks of the parties involved. As mentioned earlier in this phase, it is crucial for the GL producer to succeed in obtaining the respective rights to the intended GL documents, as well as the proper consent to transfer personal data to the NTL. The technical conditions of obtaining the GL documents (i.e. the parameters of the interface) prepared by the NRGL IT technician form an annex to the aforementioned contract.

F. Conclusions

- 25 'Grey literature is here to stay',⁶⁹ and so is the Open Access movement.⁷⁰ Even though the access, collecting and making available are regarded as problematic and remain a constant challenge from a librarian's point of view,⁷¹ the emerging legal issues (i.e. the legal nature of GL, the licensing issues and personal data processing) are solvable by setting up a proper process, including adequate contractual arrangements of rights as we have tried to show in this paper.
- 26 However the further making available of the GL documents under the terms of selected public licences such as the Open Access principles foresees additional requirements on the scope of the entitlement the right-holder has to have, and thus the risk of third parties' rights violations increases. Taking into account the irrevocability of the public licences, the infringement is perpetual – any other party obtaining the licence may use the work as stipulated in good faith. However, this is not a problem of the legal regulation of public licences but a simple lack of knowledge on the side of the parties involved. Due to the public licences' 'free connotation', these are especially regarded as a panacea to all of the emerging legal question of GL. One reason for this seems to be the relative suppression of the importance of the economic rights to GL. Because they are not primarily aimed at commercial distribution, the GL documents are prone to be treated as not qualified enough for copyright protection. As we have found out in this paper, the copyright protection applies fully, provided that they fulfil the needed legal conditions no matter the economic or social value of GL. The inclusion of the trained lawyer in the described model of placing the GL documents into a repository (the NRGL in particular) should minimize the risk of copyright infringement and control the 'making available' enthusiasm, though one can never guarantee that a document that should not be placed into the NRGL will one day pass the protective procedure and be made available, even under public licence. As this situation has not yet occurred, one can only speculate what the results of the respective copyright infringement proceedings will be. The emer-

ging case law, however, will provide an optimal subject for further researches.

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- 37 As stated in Art. 3 of the Creative Commons Attribution 3.0 Unported licence. Available at <<http://creativecommons.org/licenses/by/3.0/legalcode>>.
- 38 Specifically online, the Creative Commons Attribution and Creative Commons Attribution-ShareAlike are truly Open Access-compliant.
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