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**PUBLIC ACCESS TO COPYRIGHTED MATERIALS IN LIGHT OF THE ACT ON
COPYRIGHT AND RELATED RIGHTS IN POLAND:
POSSIBILITIES AND DIFFICULTIES**

Abstract: The Polish law-maker specifies the subject matter of copyright. It relates to any and all manifestations of creative activity of an individual nature, established in any form, irrespective of its value, designation, or manner of expression (work). The Polish Act on Copyright and Related Rights is strongly protecting author's rights and authorised entity. There are two groups of copyright: moral and economic rights.

The Copyright Act says that cultural institutions (libraries, archives and schools) might make their collections available free of charge, in accordance with their statutory activities, but this regulation refers only to copies of works that have been disseminated. The problem is that the fact that especially archives, but libraries too, have works of which it is hard to talk about dissemination within the meaning of the Copyright Act, where dissemination is defined as making the work publicly available, in any manner, with the author's permission.

Very important issue is the possibility of making available material protected by copyright (after their digitalization) in an on-line mode. Polish laws, in principle, exclude the possibility of such actions (naturally, it does not apply to cases whereby the owner of a copyright has expressed the consent to such actions).

Another problematic issue are so-called "orphan works". Although this term is not defined by the provisions of the copyright law, it shall be understood to mean works of which it is impossible to establish the subject of economic copyright or of which the identity of the subject of copyright is known (creator or successor of the rights), but it is impossible to establish contact with him (the place of stay is unknown, there is no valid address available).

The paper focuses on problems and limitations resulting from law regulations in issues related to availability and digitalisation of copyrighted materials in cultural and scientific institutions.

Keywords: copyright, orphan works, archives materials, making available on-line

1. Introduction

The collection, long-term preservation and public access pose challenges to the intellectual property regime within which libraries and archives and museums must operate. How to achieve an appropriate balance between copyright owners and users is a topic of discussion in cultural institutions.

Copyright legislation varies from country to country, but in general, through the implementation of international treaties, it gives copyright owners an almost exclusive right to publish, reproduce, publicly perform or play, communicate, adapt, broadcast, and in some cases rent, their copyright materials. In many countries there are public interest exceptions allowing specific uses such as preservation, educational instruction, critique and news reporting, however these are typically very specific and do not provoke the conflict of interests of copyright owners with exclusive rights to control the exploitation of their materials and archives with the objective of making material freely accessible.

This paper describes copyright rights and exceptions in public access to copyright materials in light of the Act on Copyright and Related Rights in Poland. The goal of this paper is to provide basic information about copyright law in Poland in the context possibilities and difficulties making available materials protected by copyright which especially are collected in archives.

2. The Polish Copyright Act

The Act on Copyright and Related Rights was passed into a law in 1994. That was is a long time ago, but it has many amendments.

The Polish law-maker specifies the subject matter of copyright. It relates to any and all manifestations of creative activity of an individual nature, established in any form, irrespective of its value, designation, or manner of expression (work) [1]. As an example, the copyright law of the USA specifies that copyright exists only in “original works of authorship” [3]. But the term “original” is not defined in the law, as is the case of the Polish term „individual nature of creative activity”. It issue is included in the very complicated legal provisions of copyright.

The Copyright Act contains a list of the types of works that can receive protection; however the list is not exhaustive. The subject matters are especially:

- works expressed in words, mathematic symbols, graphic signs (literary works, journalistic, scientific, cartographic and computer programs),
- artistic works,
- photographic works,
- works of violin-making,
- works of industrial design,
- architectural, architectural-town planning and town planning works,
- stage, stage-musical, choreographic and pantomimes works,
- audio-visual works (films, sound recordings)¹.

Only the manner of expression is protected under the copyright, not discoveries, ideas, procedures, methods and principles functioning, mathematic conceptions. But on the other hand the Polish copyright system protects the author even if the material hasn't been published, or if it exists only in unfinished form.

Thus, the Polish Copyright Act applies to a wide range of works, including books, films, diaries, music, letters, sound recordings, photos, and many other items found in the holdings of archives and libraries.

The Polish Copyright Act applies to works if:

- the author is a Polish citizen;
- the author is citizen of a European Union Member State, or of the European Free Trade Association (EFTA) Member State;
- the work was first published in the Republic of Poland;
- or has been first published in the Polish language;
- the work is protected under international agreements (e.g. the Berne Convention, the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS Agreement)².

The class of works that are expressly excluded from copyright protection (even though some of them are likely to fall in one of the categories listed above) are: normative acts and official projects, official documents materials, signs and symbols, published patent descriptions, simple press information [7]³.

According to the Copyright Act and judicial decisions in this field works are strongly protected. If the statutory definition of a work includes “mild terms”, it is imprecise. For example in the USA

¹ Copyright Act, article 1.

² Copyright Act, article 5.

³ Copyright Act, article 4.

Copyright Act, as already mentioned above, a copyright exists in any original work of authorship fixed in tangible medium. That medium can be almost anything, including paper, computer disk, clay, canvas, and so on. Work is “original”, if it meets two qualifications: it cannot be copied from another work; and it must exhibit at least a small amount of creativity [5]. The Polish Copyright Act uses the term “individual nature”, the term “original”. The judicial decisions show that interpretation of “individual nature” can be different; this presents a problem in deciding which criteria to use to identify “the original”.

The Polish copyright legislation distinguishes two groups of copyright: moral and economic rights. The author’s moral rights provide protection that is unlimited in time and not subject to waiver or disposal of the author’s bond with the work.⁴ The author’s economic rights indicate that the author is entitled to the exclusive right to use and dispose of the work in all fields of exploitation, and the right to remuneration for the use of the work, but such rights shall expire 70 years after the author’s death⁵. Moral rights are non-transferable and economic rights are inalienable – are subject to waiver, sale, inheritance. After an author’s death, moral rights can be exercised by a third party, according to the Copyright Act⁶.

In generally, the author of a work is the first owner of a work copyright. Where a work is made by an employee in the course his/hers employment, the employer is the first owner of a work copyright⁷.

The Copyright Act provides the so-called “fair use” as statutory limitations on the economic rights of the copyright owner; it is covered by the articles 23-35. It has fundamental meaning in the context of public access to copyrighted materials in cultural institutions. “Fair use” distinguishes between private and public use. The Act provides that fair use is not an infringement of copyright. It permits to use the works for purposes of research, private study, criticism, review, or news reporting in the press, radio and TV.

Some major groups of exemptions in the Copyright Act there are in the table below.

Table 1: Exemptions in the Copyright Act

Exemption	Application
private fair use	use of a single copy of works by a group of persons remaining in a personal relationship (kinship, affinity, social relationship); article 23
cable and satellite television broadcasts	special permission for secondary transmissions of television signals originally transmitted by someone else; article 24
news reporting in press, radio, television	possibility of publishing in press, radio, TV: reports on current events; updates on political, economic or religious issues, current articles on political, business, religious subjects; current statements and reporter’s photographs; short excerpts from reports and articles; publications of assessments and works disseminated; speeches made during public meetings and trials; short abstracts of disseminated works; article 25
“right of quotation”	quoting a part of a work or all short work in educational and

⁴ Copyright Act, article 16.

⁵ Copyright Act, article 17.

⁶ Copyright Act, article 78.

⁷ Copyright Act, article 12-14.

	scientific purpose; article 29
educational and scientific use	possibility of using works by scientific and educational institutions and centres of information and documentation, and making copies for educational purposes; articles 27, 30
eligibilities of libraries, archives and schools	libraries, archives and schools may make their collections available free of charge, in accordance with their statutory activities; article 28
public performance of works	performing works during religious ceremonies, school events, state celebrations – without financial benefits; article 31
use works exhibited on roads, streets, squares, in museums, galleries ⁸	possibility of using works exhibited in public places where they are available to the general public; article 33

3. Dissemination in the Polish Copyright Act

But very important issue is that these regulations refer only to works that have been disseminated. Within the meaning of the Copyright Act dissemination is defined as making the work publicly available, in any manner, upon the author's permission.

The public cultural institutions (libraries, archives and schools) can make their collections available free of charge, in accordance with their statutory activities. The Copyright Act provisions allow libraries and archives to reproduce a collection items under certain specific circumstances without payment, or without the permission of the copyright owner. These circumstances are: supplementing, preserving and protecting a library's own collections [6]⁹. The copyright Act does not apply to museums in this field, although these institutions collect material protected by copyright. However, museums are currently not eligible to benefit from these exceptions. Libraries and archives located in museums would be able to use them. This position can be identical with that in the USA; it is not the case in Canada and in Australia where libraries and archives can rely upon the same provisions as museums and galleries [7].

It is obvious that almost all library collections consist of copyrighted materials and in archives many materials can be subject to copyright. Records that are protected by copyright available in archives that are obtaining new materials in various ways: as donations, by purchases, as documentation of statutory activities of universities and scientific institutions, as documentation of activities carried out by state offices; in accordance with the Act on National Archival Records and Archives [2], they are handed over to the state archives. However, private archives and private papers have been given to the state archives primarily in compliance with the provisions of the Decree of the Polish Committee of National Liberation (6 September 1944), according to which land estates were nationalized. After the World War I, the Decree on Archives of 1919 was adopted according to which endangered private archives were handed over to the State to be kept in safety. As a result, there are many valuable works in the archives.

The dissemination of material is of fundamental importance when discussing copyright in libraries and archives. According with the Polish Copyright Act, works which not have been disseminated may not be made available by libraries, archives and other entities within fair use. In the USA the copyright system for example, the scope of fair use is narrower for unpublished works than for published works, although the fact that a work is unpublished (has not been disseminated) does not itself bar fair use [5]. There all works created more than 120 years ago that have never been published

⁸ In this point there is once reference to museums and galleries in all the Copyright Act.

⁹ On the subject in other countries see K. Crews.

with the authority of the copyright owner; however, they have entered public domain and can be used without copyright restriction in the United States. They may still be protected, however, in other countries [7] – in Poland, too. In the Polish Copyright Act, there is no direct specific way of treatment of unpublished (non-disseminated) works. Maybe that is so because the law-maker envisages possibility of dissemination after author's death by a third party (as exercising moral rights)¹⁰.

Works which have been printed do not create problems - in the context of making available them, of course. But a problem arises if a non-printed work has been disseminated. This assessment isn't easy and clear, because materials can be received by archives and libraries in various ways, often by a non-authorized entity with no copyrights.

It is also difficult to detect a person who has disseminated a work. Without this information, a work can't be legally used. According to various estimations, the origin of 50 % protected collections can be troublesome [8]. So, we deal with so-called "orphan works". Although this term is not defined by the provisions of the copyright law, it refers to works of which it is impossible to establish the subject of economic copyright, or of which the identity of the subject of copyright is known (creator or successor in right), but it is impossible to establish contact with him (the place of his stay is unknown, there is no valid address available). It seems that given the context of on-line availability, the case of "orphan works" may be of fundamental importance. The problem has been dealt with by the European Commission in the Recommendation on the digitalization and on-line accessibility of cultural material and digital preservation of 24 August 2006; the document recommends that Member States should create procedures to facilitate the use of "orphan works", and support the accessibility of the list of known "orphan works" [4].

It should be emphasized that relocating any copyrighted materials to archives or libraries do not constitute the transfer of rights. Donation of a work to an archival repository does not seem to have anything to do with what we normally consider a publication; a work status remains the same, it should not be "dissemination" [7]. But if a copyright owner puts unpublished works into an archival repository, this would constitute an offer to lend a copy to the public, and thus it can be (in copyright terms) disseminated. Archives and libraries would make it available on the basis of fair use. It seems that the adoption of such a principle would be possible in the case whereby the evidence his (copyright owner) intent would be in a hand-over report, signed by the donor and a representative of the archives or libraries that take over such a work. These are, however, exceptional situations in practice now. In the case of private papers (the majority of all works), it is rarely that the donor is the copyright owner, as a rule, they are handed over by a third person, or they are already in the state archives, especially taken over in situations when their existence was threatened. In the case of the private papers of contemporary scientists, these are usually records found in their desks after their death. However, there is frequently no formal consent of their heirs for takeover, as there is no professional boundary between private papers and those resulted during performing official obligations (this relates to personally addressed correspondence, notes, and official research queries). It can be assumed that the copyright owner is the same even if an unpublished work is deposited into an archival repository. Regardless who hands over the material there must be a special written agreement specifying the fields of exploitation of such works.

In the context the present-day activities in the area of digitalization, and making collections available on-line, it should be stressed that the Polish Copyright Act requires consent of the copyright owner. The relevant article of the Copyright Act states that libraries and archives might make their collections available for research or learning purposes through information technology system terminals (endings); however only those are located at the premises of such units¹¹. This provision

¹⁰ See Copyright Act, article 78, especially clause 3.

¹¹ Copyright Act, article 28.

applies to works that have been already disseminated, of course. Thus, there is no *de iure* permission to make works available on the Internet network (naturally, it does not apply to cases for which the copyright owner has expressed the consent to such actions).

4. Conclusions

To summarize - the Polish Copyright Act within the framework fair use offers possibility to public access to copyrighted materials in libraries, archives and schools (not in museums); however this is only the case if works have been disseminated. As it is a considerable limitation, especially for archives, it raises discussions on the Polish Copyright Act and archival law. Due to limitation, materials cannot be available on on-line after their digitalization, except – with the consent of the copyright owner. There is a great need for a change and the amendment of the Copyright Act in Poland so that availability and access to copyrighted materials in libraries, archives and museums would be clearly defined.

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