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Polish law on copyright and related rights and the lesson of sharing

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The objective of this article is to provide an insight into Polish copyright law in a broader context of addressing new technologies and market development. The article starts with an introduction on general principles in Polish copyright law. The analysis then moves on to explain the structure of the Polish Act on Copyright and Related Rights of 1994 and its basic concepts, focusing on key issues such as the object of protection, the right holder, the scope of moral and economic rights and guidance to the provisions on permitted use. To the extent justified by the impact EU law on the Polish regulation, selected judgments of the Court of Justice of the European Union (CJEU) are also taken into account. The major interpretational problems encountered by Polish courts and Polish legal doctrine require a recourse to EU law. In some situations, as explained in the article, the problem linked to the interpretation and application of the Polish Copyright Act is a result of CJEU's dynamic interpretation of the provisions of EU law. Based on the analysis of the key provisions of Polish copyright law, the article attempts to explain how the shared concerns are approached in the application of copyright law. For example, various explanations are offered in the legal doctrine on how to understand the conditions of originality and individual character, and whether and how to distinguish one from another, without unequivocal conclusions. Another problem illustrated here is the necessity to assess *ad casum* every result of an activity, rather than the general type of expression, like lectures, or school lessons. This case law however may shape the general approach to such a category of potential works. It is also clear that the provisions of a contract do not have a normative effect on granting protection, which depends on the factual assessment.

Keywords: copyright, Polish Copyright Act, rights related to copyright, European copyright law, harmonization of copyright law.

Introduction

The Act on Copyright and Related Rights (hereinafter referred to as the Copyright Act) was introduced in the 1994[1], in a new market and political reality then in Poland. Market liberalization and Poland's aspiration to access European Communities were already effected in the context of the Association Treaty with the European Communities[2]. One of the priorities identified by Polish Authorities of the Polish way to EU membership was the

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[1] Polish Copyright Act of 4th February 1994, consolidated text: Dz. U. [Journal of Laws]. 2019. Item. 1231, with amendments. English translations not including recent amendments available at: http://www.copyright.gov.pl/media/download_gallery/Act%20on%20Copyright%20and%20Related%20Rights.pdf, or at: https://wipolex.wipo.int/en/legislation/details/16154 (accessed: 31.10.2020) with automatic translation tool.

[2] Association Treaty signed in 1991, entered into force in February 1994; Układ Europejski ustanawiający stowarzyszenie między Rzecząpospolitą Polską, z jednej strony, a Wspólnotami Europejskimi i ich Państwami Członkowskimi, z drugiej strony, sporządzony w Brukseli dnia 16 grudnia 1991 r. // Journal of Laws. 1994. No. 11. Item 38.

harmonization of law and preparations to participate in the internal market[3] as an area of free, cross-border provision of goods and services and free movement of capital and persons.

The 1994 Copyright Act replaced the Act of 1952. Its main objective is to ensure the protection of works and the subject-matter protected by related rights (such as artistic performances, phonograms or videograms)[4]. The protection of discoveries, ideas, procedures, methods and principles of operation and mathematical concepts is excluded. Copyright Act requires no formalities for copyright or related rights protection. Copyright encompasses moral and economic rights of authors, and violation of these rights is subject to civil and criminal liability. Copyright protection is of territorial character[5]. and the Act applies if an author or co-author is a Polish citizen, a citizen of a state party to the European Economic Area, or to the works firstly published in the Polish territory, or firstly published in Polish, or which are protected by international agreements[6]. As its name indicates, the Act covers not only copyright but also rights related to copyright. The objective of these provisions is to grant protection to intangible goods listed in the Copyright Act: artistic performances, phonograms, videograms broadcast programs, first editions (*editio princeps*) and scientific and critical editions of works. Though in many cases it is a pre-existing work that is subject to performance, recording, broadcast or edition, it does not mean that protection of related rights is granted only with respect to a certain form of dissemination of works. An object of the phonogram or videogram, broadcast or edition does not have to be a work, but may also be other material, e. g. "acoustic phenomena", "a sequence of moving pictures" (Art. 94 pp. 1–2), or a text that was never subject to copyright protection (Art. 99^3).

The Polish Copyright Act was subject to numerous amendments[7], to a large extent due to the requirements of the growing body of EU law, and the need to adjust Polish law and implement EU directives. The area of copyright law from the EU perspective is closely linked to the need to remove barriers on the internal market, ensure fair competition and promote innovation. This area belongs to the competence shared by the EU and its Member States[8]. Based on the subsidiarity principle, EU institutions legislate *only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.* It could thus be put simply that the EU has powers to solve the problems perceived from the perspective of the functioning of the internal market with i. a. a highly competitive social market economy and advancing scientific and technological progress as general objectives. As Polish economy is part of EU economy, and Polish cultural sector should be supported with EU actions, it is justified to say that we share the concerns about how copyright law develops. The objective of this article is to present the foundations of Polish copyright law, noting its evolution in the framework of its harmonization with EU law. This article is by no means limited to the analysis of the implementation of EU law. Bearing in mind, however, the shared competence in the area of internal market, it attempts to explain how shared concerns are approached in the application of copyright law.

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[3] EU-Poland relations, MEMO/95/122. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_95_122 (accessed: 31.10.2020).

[4] Chapter 11 of the Copyright Act.

[5] Basic principles for Polish copyright as identified by: *Barta J., Markiewicz R.* Prawo Autorskie. Warszawa: Wolters Kluwer Polska, 2016. P. 26–27.

[6] See WIPO-administered Treaty and Poland as a contracting party. Available at: https://www.wipo.int/treaties/en/ShowResults.jsp?country_id=141C (accessed: 31.10.2020).

[7] See the list at: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940240083 (accessed: 31.10.2020).

[8] Art. 2 (2) and Art. 4 (2a) of the Treaty on the Functioning of the European Union.

1. The notion of work and the "originality" requirement

Under Polish copyright law, authors' moral and economic rights arise at the moment of the "establishment" of a work as an intangible good. The work, as an object of copyright, is defined as "any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose or form of expression" (Art. 1 the Copyright Act). In comparison to the Act of 1952, in the current Act is elaborated on what should be considered as "a work" defined as a creative activity of individual nature resulting in a good (an object) manifested in the form accessible to the members of the public. There are no limits as to the forms of such a manifestation. The purpose in which the work is created, together with the value, including cultural or market value, are irrelevant. It is however required that the work be perceptible by the third parties. The work need not to be fixed, and may be incomplete (Art. 1 sec. 3, as long as it is possible to perceive its "artistic effect")[9].

It is further clarified, that only "the form of expression", and not ideas, discoveries, procedures, methods and principles of operations as well as mathematical concepts shall be protected. An exemplary list of different categories of works as a form of expression is included in Art. 1 sec. 2. In the Copyright Act of 1952 only four categories of works were listed i. e.: those expressed in print, words or writing; musical works, visual arts and choreography and cinematography with certain restrictions as to their fixation. Art. 1 sec. 2 now contains nine categories, reflecting the technological evolution and clarifications on the copyright protection. The latter include computer programs belonging to the category of "works expressed in words, mathematical symbols, graphic signs", separate categories of photographic and audiovisual works, industrial design works or architectural and urban planning works. Some of the types of works included in the general categories of Art. 1 sec. 2 are subject to special provisions either in the dedicated chapters, like audiovisual works (Chapter 6) or computer programs (Chapter 7), or in the chapters on the transfer of the economic rights of authors, for example Art. 56 (4), or on permitted use.

The starting point of the application of the statutory criteria for works in practice seems simple. Three or four premises are distinguished, depending on whether the condition, that we need to have the result of a human activity is included[10]. The role of man in the process of creating works with the use of artificial intelligence is more and more discussed based on the existing categorization of computer generated works[11]. The following three conditions to consider a certain result of an intellectual process as a work are: it needs to be a manifestation of a creative character, it needs to be of individual character and established (manifested) in any form, allowing for perception[12]. The doctrinal discussion on the first two conditions includes a reference to "originality" as a doctrinal criterion[13].

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[9] *Barta J., Markiewicz R.* Commentary on Art. 1 // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / eds J. Barta, R. Markiewicz. Warszawa: Wolters Kluwer Polska, 2011. LEX/EL, para. 30 (the Authors recall the ruling of the Supreme Court (Sąd Najwyższy) of 1973. I CR 91/73. OSN 1974. No. 3. Item. 50. P. 34 on the artistic effect of floral composition).

[10] Ibid. LEX/EL, para. 4.

[11] See i. a.: *Flisak D., Matusiak I.* Ab homine auctore ad robotum auctorum // Opus Auctorem Laudat. Księga Jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej / eds K. Szczepanowska-Kozłowska, I. Matusiak, Ł. Żelechowski. Warszawa: Wolters Kluwer Polska, 2019. P. 74.

[12] *Barta J., Markiewicz R.* Commentary on Art. 1. LEX/EL, para. 4; *Flisak D.* Commentary to Art. 1 // Prawo autorskie i prawa pokrewne. Komentarz / ed. D. Flisak. Warszawa: Wolters Kluwer, 2015, para. 1; critical approach to whether "individual character" of a work should be considered as a separate statutory premise is expressed by: *Poźniak-Niedzielska M., Niewęgłowski A.* Przedmiot prawa autorskiego // Prawo autorskie. System Prawa Prywatnego: in 20 vols. Vol. 13 / ed. J. Barta. Warszawa: C. H. Beck, 2017. P. 10.

[13] *Grzybczyk K.* Commentary to Art. 1 // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / ed. P. Ślęzak. Warszawa: C. H. Beck, 2017. P. III (2).

Various explanations are offered in the legal doctrine on how to understand the conditions of originality and individual character, and whether and how to distinguish one from another, without unequivocal conclusions[14]. Leading Polish scholars, J. Barta and R. Markiewicz consider this as the key issue in copyright and probably the most difficult one, decisive for considerations of whether the result is a work, and which elements, or which parts of the work are protected[15]. If we use the example of a short text, say, an internet blog post the question is whether the post as a whole is "a work", and whether any particular sentence or phrase of it could be protected under copyright law? R. Sarbiński points out that the dominant scholarly position is that "creativity" is equaled with "originality"[16]. On the other hand J. Barta and R. Markiewicz explain that an intellectual result is "creative" when it is novel not in comparison with others, but from the subjective (creator's) perspective[17]. M. Poźniak-Niedzielska and A. Niewęgłowski expressed a differing opinion, claiming that the premise of individual character directs us to an objective perspective, and a work must, to some unidentified extent, differ from the existing ones[18]. The analysis of the definition of Art. 1 leads to the conclusion that to achieve a manifestation of a creative activity, there must be space for an artistic or intellectual expression and autonomous choices. Such a manifestation is then assessed as to its individual character, which seems the most problematic. In practice, however, it is not possible to exclude the subjective, or even intuitive assessment[19]. According to a liberal approach it is sufficient that the result of an intellectual work (as a form of expression) is not fully determined by its object and purpose[20]. This leads of a series of lectures as a contract of service, or a contract of a specific work, associated with questions on mandatory social security, a returning question was under what conditions a lesson or lecture could be considered a work. Sąd Apelacyjny (The Appellate Court)[21] in Wrocław, making a reference to a course of Polish language for foreigners observed that teaching is an educative process, the essence of which is the transfer of knowledge, and it is not a manifestation, result, of creative activity and of individual character. The Appellate Court considered teaching as a routine, typical activity, determined by its purpose which, in that particular case, meant the teaching of a foreign language. In an earlier case law of the Polish Supreme Court, it was held that a lecture might have been considered to be a work in the meaning of copyright law, if it were irreplicable and differing from the standard (form), and where if satisfied the criteria of creativity and individual character referred to in Art. 1 of the Copyright Act[22]. In another ruling of the Supreme Court it was found that the essence of a lecture as a specific copyrighted work (*dzieło autorskie*) is its content containing a message of a specific intellectual thought of the author/lecturer, the boundaries of which are determined by the topic of the lecture commissioned[23]. These rulings illustrate the problems encountered with differentiating a process — such as an education process, from the results/manifestations which were likely also parts of such a process. Another problem illustrated here is the necessity to assess *ad casum* every result of an activity, rather than the general type of expression, like lec-

[14] Ibid.

[15] *Barta J., Markiewicz R.* Prawo Autorskie. P. 48.

[16] *Sarbiński R. M.* Commentary to Art. 1 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. Warszawa: Wolters Kluwer Polska, 2019. P. 32.

[17] *Barta J., Markiewicz R.* Prawo Autorskie. P. 49.

[18] *Poźniak-Niedzielska M., Niewęgłowski A.* Przedmiot prawa autorskiego. P. 10.

[19] *Flisak D.* Commentary to Art. 1, para. 10 and 13; *Michalak A.* Commentary to Art. 1 // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / ed. A. Michalak. Warszawa: C. H. Beck, 2019.

[20] *Barta J., Markiewicz R.* Commentary on Art. 1. LEX/EL, para. 17.

[21] III AUa 1131/18. Judgement of 13 March 2019.

[22] SN III UZP 4/11. Judgement of 14 February 2012.

[23] My translation based on the original text: *Istotą wykładu jako dzieła autorskiego jest jego treść zawierająca przekaz określonej myśli intelektualnej twórcy, której granice wyznacza zamówiony temat.*

tures, or school lessons. This case law however may shape the general approach to such a category of potential works. It is also clear that the provisions of a contract do not have a normative effect on granting protection, which depends on the factual assessment[24]. The Supreme Court's interpretation that a lecture cannot be regarded as a standard academic lecture is ambiguous. The question that necessarily follows is what is and should be a standard academic lecture? Does it convey the basic knowledge without original thoughts and individual expression? The Court's approach in the above-cited cases should be read in the context of an examination and qualification of a contract, with a limited possibility to judge a lecture, course, teaching as such, which is possible in infringement cases.

Questions regarding the level of creativity and individual character of different forms of expression are at the heart of the application of Polish copyright law. They need to be answered in order to determine if we are dealing with a work, or whether altering the existing works will result in the protection for derivative works (Art. 2) or whether a collection of the existing items, whether other works or non-protected materials, deserve protection (Art. 3), or whether a participant in the creative process may be considered as a co-author (Art. 8). As it is obviously at the heart of any infringement case, this issue could not have been overlooked by the Court of Justice of the European Union (hereinafter CJEU), even though the definition of a work was not, as such, included in the EU Directives. According to the CJEU's interpretation it is not solely for the Member States law to decide what should be considered as a work, but this is rather a "shared" problem. The CJEU gave its guidance on qualifying photographs[25], extracts of press articles[26], or elements of audiovisual transmission[27], based on the existing provisions on the protection of computer programs, databases and photographs[28]. Member States including Poland, have to guarantee copyright protection if such a content is original in the sense that it constitutes the author's own intellectual creation.

Because the concept of a work is central to the harmonization of economic rights of their authors and to the limitation and exceptions provided for in the Directive 2001/29/EC (the InfoSoc Directive)[29] the CJEU eventually found that this concept need to be given autonomous and uniform interpretation in the EU[30]. To consider a certain subject matter a work, it needs to satisfy two cumulative criteria: it must be original in the sense that it is the author's own intellectual creation, and it needs to be the expression of the author's own intellectual creation[31]. With the interpretation that the concept of a work is an autonomous concept of EU law and has to be uniformly applied in all Member States, the CJEU rein-

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[24] Sąd Apelacyjny in Białystok, I ACa 827/11, judgement of 22 March 2013; invoked by the Naczelny Sąd Administracyjny (Supreme Administrative Court), II GSK 2651/17, judgment of 8 January 2020.

[25] C-145/10, Eva Maria Painer, ECLI:EU:C:2013:138.

[26] C-5/08, Infopaq International, ECLI:EU:C:2009:465.

[27] C-403/08 and C-429/08, Football Association Premier League and Others, EU:C:2011:631, para. 97.

[28] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, Art. 1 (3). A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.03.1996, p. 20–28, Art. 3 (1)). Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (OJ L 372, 27.12.2006, p. 12–18, Art. 6). Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Art. 1.

[29] 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 (OJ L 167, 22.06.2001, p. 0010–0019).

[30] C-310/17, Levola Hengelo BV, ECLI:EU:C:2018:899, para. 33.

[31] Para. 36–37.

forced the impact of its case law on the rulings of national courts. It has been noted that the criterion of "author's own intellectual creation" as such is of no particular importance for the interpretation of Polish law, because of the vague and general meaning of both terms included in the Directives and Polish law[32]. Yet, the problem how to approach the assessment of particular forms of expression as author's own intellectual creation deserving copyright protection is now shared by the CJEU and Polish courts. Even though it is for the courts of the Member States to actually grant protection, the CJEU provides for an interpretative guidance. More and more guidance influencing interpretation of the basic premises of creativity, originality and individual character should be expected.

2. Authors, producers and publishers

The author is, as a rule, the primary owner of rights in a work. According to the presumption included in Art. 8 sec. 2 "the author is the person whose name has been indicated as the author on copies of the work or whose authorship has been announced to the public in any other manner in connection with the dissemination of the work". The presumption can be rebutted if it is actually another individual who created the work. The Copyright Act regulates the way in which two or more individuals exercise their rights in one work (Art. 9). Joint authorship arises under the condition that two or more individuals contributed to the creation of a single work, and such a cooperation was agreed upon, in the sense of an expression of intent to create a work, and a mutual agreement as to the final shape of the work[33]. Whether or not a work is a work of joint authorship depends on the facts, not on what was agreed by the parties in a contract. If there was no intent to create a single work, depending on the circumstances, a work may still be considered as a derivative work, in the case of creative altering of an existing work (Art. 2) or a collective work (Art. 11)[34]. In all cases the Copyright Act provides for certain rules on exercising the rights, when the interest of more than one individual involved in the process of creating a work is at stake. In the case of joint authorship, it is presumed that the shares in copyright are equal is equal, and the consent of all co-authors is required in order to exercise copyright with respect to the whole work (Art. 9 sec. 1 and 3). Each of the co-authors may exercise the rights in his/her autonomous contribution, provided, however, that it is not to the detriment to other co-authors (Art. 9 sec. 2). Each of the co-authors may claim infringement with respect to the whole work, and the right to receive compensation is received in proportion to their shares. The rules on joint-authorship (Art. 9 sec. 2–4) apply also when the originally separate works are combined for the purpose of their dissemination. In this case however, as the works were intentionally combined for the exploitation on the market, any of the authors may request from other authors permission for the dissemination of

[32] *Barta J., Markiewicz R.* Prawo Autorskie. P. 44. — E. Laskowska-Litak comments therefore, that the interpretation provided in the Infopaq case raises no objections from the perspective of Polish copyright law, in: Prawo Autorskie. Komentarz do wybranego orzecznictwa Trybunału Sprawiedliwości UE / eds E. Laskowska-Litak, R. Markiewicz. Warszawa: Wolters Kluwer Polska, 2019. P. 100.

[33] The view is that the will of the authors to create a work of joint authorship is necessary to apply Art. 9: *Błońska B.* Commentary to Art. 9 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 320–321; *Barta J., Markiewicz R.* Commentary on Art. 9. LEX/EL, para. 4; *Flisak D.* Commentary to Art. 9 // Prawo autorskie i prawa pokrewne. Komentarz / ed. D. Flisak, para. 5, — should be accepted, even though different opinions are also expressed.

[34] The distinction between a work of joint-authorship and a collective work poses some problems in practice. Polish Courts emphasize that in the latter case there is no agreement upon the final form/shape of the work, and a different degree of publisher's (or producer') engagement in the process of creating a work. Sąd Apelacyjny in Warsaw (Appellate Court) I ACa 780/02, and Sąd Apelacyjny (Appellate Court) in Wrocław. I ACa 1344/11.

"a whole" in the sense of a combination of works, "unless there are reasonable grounds for withholding such permissions and the contract does not state otherwise" (Art. 10).

Apart from providing for a basic set of rules governing the relations between co-authors or two authors whose works are merged for dissemination, Polish Copyright law addresses also the relations between an author and an employer (Art. 12) and in various statutory provisions the relations between a publisher and an author. In this area the objective is not to reconcile the sometimes differing interest of two or more individuals with creative contributions to the disseminated work or a combination of works, but to reconcile the interest of economically oriented, and often more powerful party who organizes a process of the creation and dissemination of works, and the author. Art. 12 addresses a situation when to create works lies within the scope of the duties of an employee. According to the semi-imperative norm contained in Art. 12, in such a case, an employer "shall, upon acceptance of the work, acquire the author's economic rights within the limits resulting from the purpose of the employment contract and the congruent intention of the parties". The author-employee's interest in the dissemination of work is protected by a two-year timeframe for an employer to start dissemination. If not, the rights return to the author (Art. 12 sec. 2)[35].

The Copyright Act provisions addressing publisher and producers can be generally divided into two groups: those that govern author-publisher relations particularly in the area of contracts[36] and a resulting obligation imposed on publisher/producer to represent the author who wishes to stay anonymous (Art. 8 (3)), and those in which the publisher's contribution is recognized and results to some extent in granting protection. According to the rebuttable presumption established in Art. 15, the producer and the publisher "is the person whose surname or business name has been shown as such on the objects in which the work has been fixed or whose name or business name has been disclosed to the public in any other manner in connection with the dissemination of the work". The role of a publisher is traditionally associated with the print industry, or more broadly with a text and image either in print or in electronic form, and the role of a producer is associated with audiovisual works and the music industry. This differentiation is to a limited extent reflected in the Copyright Act. Art. 11 is applicable to a producer or a publisher of a collective work, the examples being encyclopedias or periodical publications. On the other hand there is a reference to a producer only in the special provisions on audiovisual works (Art. 70). In the area of related rights, a producer is granted rights in phonograms or videograms (Art. 94), while the publishers are granted rights in first editions of potentially any work, notwithstanding if it is published, i. e. by producing and making available to the public of copies of work (Art. 6.1 (1)) or otherwise disseminated. The typical differentiation based on different business sector may be of less and less use with the continuous convergence and development of electronic publications.

From the presumption in Art. 15 and the definition of a published work in Art. 6 sec. 1 Copyright Act it can be inferred that a publisher/producer is somehow engaged in the process of producing and distributing copies, or in the dissemination of a work in an intangible form, such as for example online transmissions[37]. The role associated with the publisher is typically the one of organizing and financing such a process. It should however be noted, that in the area of related rights no particular input or contribution is required. Rights in phonograms and videograms are granted upon the "first fixation", thus presum-

[35] Other rules apply in the case of employment in higher institutions, in this case priority of publication is ensured for employing research institution, though it may be differently regulated in an employment contract.

[36] Chapter 5 of the Copyright Act.

[37] *Błońska B.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 349.

ably to those who were the first to "fix the sound layer of a performance of a piece of work or other acoustic phenomena, and respectively, a sequence of moving pictures, with or without sound", whether or not it constitutes an audiovisual work (Art. 94 (1 and 2)). No creative contribution to grant protection is required in the case of related rights in general, though it should be noted that only "artistic" performance is protected in the context of Art. 85 Copyright Act.

In this context, attention should be drawn to Art. 11 of Copyright Act, as it provides that a producer/publisher of a collective work shall have the economic rights in a collective work, and authors shall have the rights in their specific parts/contributions[38]. The concept of a collective work is not defined in the Copyright Act, but examples such works as an encyclopedia and a press publications are given. It is thus commonly accepted that the term "collective work" refers to a work where a number of authors and other contributors on the part of a publisher/producers are involved, and it consists of works, and potentially other contributions[39]. It should be accepted that a collective work encompasses the works and other contributions, and works may be exploited, for example, republished separately (articles in the periodical publications) or are merged with the others. Apparently, online exploitation makes it more and more feasible that also separate definitions of a word, and even a brief encyclopedic entry may be published. Although not expressly recognized in the Copyright Act the role of the editor coordinating different contributions is emphasized[40]. Rather than reflecting a horizontal relation between co-authors, Art. 11 refers to "vertical" relations between the producer/publisher and the authors. Authors, according to the general rule, have their own rights in their autonomous contributions. The latter phrase is understood by some authors as referring to all works included in a collective work[41], and not as parts that may be separately published or otherwise exploited. The result of this interpretation is that the publisher/producer does not acquire rights in any work included in the collective work, but only in a collective work as a whole. For the purpose of publication the publisher needs to make sure the rights in all contributions to the collective work are and ensured and provided for in a contract. There is, however, a differing view according to which the publisher acquires *ex lege* economic rights in those parts of a collective work that cannot exist independently[42]. For example a journal's layout was considered as a part of a collective work that cannot exist independently, and if it is of creative nature the rights are acquired by a publisher[43]. The case law supports the commentators' opinion that the publisher acquires rights in the selection and arrangement of the content[44]. The question whether the selection or arrangement of content needs to be of creative charac-

[38] The translation of the Copyright Act uses the phrase "which may exist independently". It is also presumed that the producer or publisher has the right to the title, Art. 11.

[39] *Błońska B.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 349–350, based on the concept of T. Grzeszczak: *Grzeszak T.* Autorskie prawa majątkowe wydawcy dzieła zbiorowego a prawa jego twórców // Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej. 1996. No. 67. P. 38.

[40] *Sokołowska D.* Utwory zbiorowe w prawie autorskim, ze szczególnym uwzględnieniem encyklopedii i słowników // Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej. 2001. No. 76. P. 269–274; *Błońska B.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 349.

[41] *Nowicka A.* Podmiot prawa autorskiego // Prawo autorskie. System Prawa Prywatnego. T. 13 / ed. J. Barta. P. 111; *Błońska B.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 346.

[42] *Flisak D.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / ed. D. Flisak, para. 4.

[43] Judgement of the Sąd Apelacyjny in Katowice, of 24.06.2016. V ACa 878/15.

[44] *Flisak D.* Commentary to Art. 11. P. 3; *Michalak A.* Commentary to Art. 11 // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / ed. A. Michalak, para. 4; *Błońska B.* Commentary to Art. 11 // Prawo autorskie i prawa pokrewne. Komentarz / eds W. Machała, R. M. Sarbiński. P. 355.

ter is however subject to further divergent opinions. As a result, "collective works" would constitute a subgroup of a collection of works as rights in the latter works arise "in so far as the nature of their order, arrangement or composition is creative" (Art. 3). This problem is difficult to solve as protection is undoubtedly granted in a collective work, which is why a new "creative quality" of a resulting work is required[45]. On the other hand, a publisher is not considered an author (a publisher may also be a legal person). Granting economic rights in collective works to a publisher aims at rewarding the publisher for the input, recognized as initiating, financing and organizing a process that leads eventually to the dissemination of a collective work[46]. It is also submitted that the publisher's contribution includes the creative and conceptual works of his/her employees[47], or that the publisher's creative activity cannot be excluded[48]. The most divergent opinions would be that it is only for *sui generis* regimes (such as database protection[49]) that creative input is not required, and the organizational or financial burden is of secondary importance in the assessment of whether protection should be granted[50], as well as the opinion that a collective work as a compilation does not need to be of creative character, as for instance when organized in an alphabetical order[51].

This issue should be growing in importance as the protection of press publications, listed as a notable example of a collective work in Art. 11 has become a shared concern of both the Polish and the European legislator. According to Art. 15 of the new Digital Single Market (hereinafter DSM) Directive[52], publishers of press publications shall be granted rights to reproduction and making available to the public "for the online use of their press publications by information society service providers". This provision has been broadly debated as granting new related right to publishers, that aims at reinforcing the publishers in their disputes with those information society service providers that aggregate the news[53], and the media monitoring services[54]. According to Recital 55 of the preamble to the Directive, the harmonization of a new related right is necessary, because "the organizational and financial contribution of publishers in producing press publications needs to be recognized and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information". The concept of a press publication is defined in Art. 2 sec.4 DSM Directive, as "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter", subject to further conditions that a press publication "constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine", its purpose is to provide the general public with information related to news and other topics and it is published in any

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[45] *Sokołowska D.* Utwory zbiorowe w prawie autorskim… P. 142; *Flisak D.* Commentary to Art. 11. P. 6.

[46] *Błońska B.* Commentary to Art. 11. P. 355; *Michalak A.* Commentary to Art. 1, para. 1.

[47] *Barta J., Markiewicz R.* Commentary on Art. 11. LEX/EL. P. 1; *Flisak D.* Commentary to Art. 11. P. 1.

[48] *Michalak A.* Commentary to Art. 1. P. 1.

[49] Ustawa z dnia 27 lipca 2001 r. o ochronie baz danych (Act on the protection of databases) consolidated text with amendments // Journal of Laws. 2019. Item 2134.

[50] *Flisak D.* Commentary to Art. 11. P. 9.

[51] *Błońska B.* Commentary to Art. 11. P. 355.

[52] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.201. P. 92–125).

[53] As exemplified with the Case C-466/12 *Nils Svensson*, ECLI:EU:C:2014:76 see also: *Priora G.* News Aggregation and the Reform of EU Copyright Law. Available at: https://cmds.ceu.edu/article/2018-07-03/news-aggregation-and-reform-eu-copyright-law (accessed: 31.10.2020).

[54] In Poland the dispute on media monitoring services raised the questions on the application of permitted use provisions: Judgment of Sąd Najwyższy (Supreme Court) of 9th August 2019. II CSK 7/18. Legalis No. 2195814.

media under the initiative, editorial responsibility and a control of a service provider. The provisions of the DSM Directive on the protection of press publications raise numerous questions on the scope of the new related right[55]. In Polish law the question how to implement Art. 15 of the DSM Directive is partly dependent on the question whether the protection of a press publication is already provided in Art. 11, provided that Art. 15 constitutes minimum harmonization[56]. First and foremost, the protection of press publications in EU law is ensured by the introduction of a new related right, while in Polish law the protection of press publications is part of a broader framework for the protection of collective works. In EU law, a press publication is defined as "a collection", yet there is no requirement that the selection or arrangement of their contents constitute the author's own intellectual creation, as is in the case of the copyright protection of databases (Art. 3 of Directive 96/9). The Polish Appellate Court while considering the publishers' rights to a journal layout as part of the arrangement of the content in a press publication, pointed out that it is irrelevant, for the purpose of application of Art. 11, if it is a work or not[57]. The judgement does not confirm however, that no assessment should be made as to whether a press publication is a work and as such constitutes an "intellectual creation" of the contributors involved. It cannot be considered as certain that every press publication shall be protected under Art. 11, though in practice this is the most likely solution. It should, in the light of Art. 15 of DSM Directive be ensured that publishers are granted protection notwithstanding if their contribution was of creative character. EU law also introduces the definition of a press publication for the purpose of granting related rights protection. This should be reflected in Polish law prompting to rediscuss the scope of protection for collective works and for press publications as a subject matter protected by related rights. This is thus a new concern for the Polish lawmaker, although already in 2014 the introduction of new related rights was advanced by Polish publishing industry[58]. Thus, both the European and the Polish lawmaker share the concern about how to reinforce publishers. The recent DSM Directive confirms also that it is compatible with EU law that when the author's rights are transferred or licensed, publishers are entitled to a share of the compensation for the use of work made in the framework of the limitations and exceptions (Art. 16 of the DSM Directive). In Polish law doubts concerned Art. 20 sec. 2 of the Copyright Act, stating that publishers and authors participate on equal basis in "the amount received in the form of fees from the sale of video recorders and other similar devices as well as blank carriers related thereto". The doubts expressed by Polish scholars[59] were reinforced by the CJEU judgment in Hewlett-Packard[60] which found the granting of 50 % of remuneration from copyright levies to publishers without securing the rights of authors in this share incom-

[55] Periodicals published for scientific or academic purposes, such as scientific journals are excluded from the protection (Art. 2 sec. 4). The protection does not extend to private or non-commercial uses of press publications by individual users, nor to acts of hyperlinking, nor in respect of the use of individual words or very short extracts of a press publication (Art. 15).

[56] Taking into account the limitations of the protection included in the Directive it may not be a minimum harmonization.

[57] Judgment of Sąd Apelacyjny in Katowice of 24 June 2016. V ACa 878/15.

[58] See: *Klafkowska-Waśniowska K.* Zestawienia wiadomości (ang. News aggregators) i spory o korzystanie z artykułów prasowych — problemy zakresu autorskich praw majątkowych w Unii Europejskiej // Własność Intelektualna w obrocie elektronicznym / eds M. Kępiński, J. Kępiński, K. Klafkowska-Waśniowska, R. Sikorski. Warszawa: C. H. Beck, 2015. P. 119.

[59] The view, that only publishers acting as ex lege rightholders should be entitled to such a compensation presented by I. Matusiak (*Matusiak I.* Commentary to Art. 20 // Prawo autorskie i prawa pokrewne / ed. P. Ślęzak. Para III. 5), based on the opinon expressed by M. Czajkowska-Dąbrowska (*Czajkowska-Dąbrowska M.* Opłaty reprograficzne — osobliwości konstrukcji, dylematy praktyki // Studia i Analizy Sądu Najwyższego. 2012. No. 6. P. 153).

[60] C-572/13, Hewlett-Packard Belgium SPRL, ECLI:EU:C:2015:750.

patible with EU law. In the light of Art. 16 of the DSM Directive, providing for the share in remuneration to publishers albeit without specific guidance as to the amount of such a share is in principle compatible with EU law. The remains open for consideration, in accordance with the Hewlett-Packard judgment.

3. Economic and moral rights of authors

Authors are granted moral (Art. 16) and economic (Art. 17) rights in works. The moral rights protect the link between the author and his or her work. This link, or "bond" is found to be inalienable and unlimited in time[61].

Economic rights protect the author's interest in the course of the exploitation of the work, and their protection is limited to 70 years after the death of the author[62]. The non-exhaustive list of moral rights of authors provided for in the Copyright Act include: the right to be acknowledged as author (attribution), the right to sign the work with the author's name or pseudonym, or to disseminate the work anonymously, the right to have the contents and form of the author's work inviolable and properly used (right of integrity), the right to decide on the first publication of a work and to control the manner of using the work. Art. 17 contains no exemplary list of economic rights assigned to authors, but provides generally that the author has an exclusive right "to use the work and to manage its use throughout all the fields of exploitation and to receive remuneration for the use of the work"[63]. Economic rights are alienable, transferrable (*inter vivos* and *mortis causa*) and licensing and contracts of transfer are regulated in a separate provisions, with the general objective to protect the author as the weaker party to the contract[64]. The Copyright Act provides for separate claims in the case of endangering or infringing moral rights (Art. 78) and infringing economic rights (Art. 79). The author may claim to cease actions threatening the moral rights, and when the infringement occurred, to eliminate all the consequences of the infringement, in particular to make a public statement of the appropriate content and form. If the infringement was culpable, the author may claim a certain amount of money to repair the damage suffered, or that the defendant pay the specific amount of money for a social cause[65]. In the case of infringement of the economic rights, the right-holder may claim to cease the infringement, to eliminate all consequences of the infringement, to repair the inflicted damage, either on the general terms provided for in the Civil Code, or by payment of a double amount of the respective remuneration, and to render the benefits acquired. It is worth noting that the Polish Constitutional Tribunal found the claim to a triple amount of remuneration in the event of culpable infringement was culpable, unconstitutional[66]. As of July 1st 2020, the jurisdiction in the intellectual property cases, including copyright cases has been allocated to five selected appellate courts

[61] According to Art. 78 sec. 2 after the author's death "the suit for the protection of moral rights of the deceased may be brought by the spouse, and if such does not exist, by descendants, parents, siblings, and descendants of siblings, in that order".

[62] Rules applicable to the term of protection can be found in the chapter 4, Art. 36 and the following.

[63] According to Art. 2 (2) the author of a derivative work cannot use or manage the use of his/her work, without the permission of the author of the original works; Polish Copyright Act provides also for a right to remuneration, *droit de suite,* to authors and their heirs, in the case of certain works of arts, subject to professional resale. Art. 19–19 (5) Polish law was amended to implement the Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

[64] Chapter 5 of the Copyright Act.

[65] Rules on protecting and exercising the moral rights of author after his/her death are provided for in Art. 78 (2)–(4).

[66] See: *Gęsicka D. K.* The Judgment of the Polish Constitutional Tribunal of 23 June 2015 (No. SK 32/14) — Case Note (Partially Approving) // Comparative Law Review. 2015. No. 1. P. 205–218. Available at: https://www.ceeol.com/search/article-detail?id=478120 (accessed: 31.10.2020).

where specialized divisions are created in order to ensure specialization of judges and efficiency of the proceedings[67].

The area of moral rights is not subject to harmonization in EU law the main objective of which is to eliminate barriers in trade. The economic exploitation of work may in some cases be in conflict with the right to integrity of a work. The successor in title may not alter the work without the consent of the author unless the amendments are obviously necessary and the author has no reason to object[68]. In practice, clauses incorporating the obligation not to exercise the moral rights or authorizing the other party to exercise the moral rights are inserted in contracts and effective between the parties to the contract[69]. The right of the translation, adaptation, arrangement and any other alteration is harmonized only with respect to computer programs[70] and databases[71]. Polish Copyright Act regulates rights in computer programs in separate provisions, and those rights include the "right to the translation, adaptation, arrangement or any other modification of a computer program"[72].

The impact of EU law on the issues concerning modifications of other works should be considered in the framework of a general reproduction right. In *Art and Allposters* case[73], the dispute before the national court concerned a poster that was transferred from paper to canvass and in this form put on the market. The main question was, how such a transfer, modification of a medium affected the distribution right in the context of its exhaustion. One of the arguments put before the CJEU was that those canvasses, as a significant alteration of the works, are adaptations, and the general right to adaptation is not harmonized in the EU law. However, the answer to the questions referred by the national court was based on the interpretation of reproduction and distribution rights as harmonized in EU Directives. According to the CJEU, a replacement of a medium *results in the creation of a new object incorporating the image of the protected work, whereas the poster itself ceases to exist,* and such an alteration is sufficient *to constitute a new reproduction of that work*[74]. This ruling is in line with the CJEU's broad interpretation of the reproduction right.

Such an alteration as in the *Art & Allposters* case is possible thanks to the use of advancing technology. Technology facilitates also other ways of altering or modifying works and subsequently disseminating the results. In copyright we encounter a growing number of problems resulting from the broad interpretation of the scope of the reproduction right on the one hand, and the harmonization of limitations and exceptions on the other. One of the practices illustrating this problem is "sampling" in musical composition, particularly, but not limited to, in hip-hop, electronic music and pop. In the *Pelham* case concerning the use of a sample, the CJEU also considered the concept of reproduction, and found that it does not encompass "taking a sample from a phonogram, most often by means of electronic equipment, and using the sample for the purposes of creating a new work", if it

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[67] Amendment in the Polish Civil Procedure Code of 13.02.2020 // Journal of Laws. 2020. Item. 288; Rozporządzenie Ministra Sprawiedliwości w sprawie przekazania niektórym sądom apelacyjnym rozpoznawania spraw własności intelektualnej z właściwości lub części obszarów właściwości innych sądów apelacyjnych (Regulation of the Ministry of Justice of 29.06.2020 // Journal of Laws. 2020. Item 1151). See also: *Solyga-Zurek A.* Poland jurisdiction report: Poland welcomes new IP rules. Available at: https://www.worldipreview.com/contributed-article/poland-jurisdiction-report-poland-welcomes-new-ip-rules (accessed: 31.10.2020).

[68] Art. 49 sec. 2 of the Copyright Act.

[69] *Traple E., Grzybowski P.* Copyright 2020. Poland. Law and Practice. P. 4.6 on Moral Rights. Available at: https://practiceguides.chambers.com/practice-guides/copyright-2020/poland (accessed: 31.10.2020).

[70] Art. 4 (1) (b) Directive 2009/24.

[71] Art. 5 (b) of the Directive 96/9.

[72] Chapter 7, Art. 74 sec. 4 (2).

[73] C-19/13, Art & Allposters International, ECLI:EU:C:2015:27.

[74] C-419/13, para. 43.

is modified in a way that makes it unrecognizable to the ear[75]. Such an act is thus outside the scope of the reproduction right. This interpretation applies to the rights of the phonogram producers, and it remains to be seen to what extent it is applicable in the area of the economic rights of authors.

The scope of economic rights of authors in Polish law is determined primarily with the reference to the "fields of exploitation". The authors' exclusive control encompasses using the work on all fields of exploitation, and for such a use an authorization is required, unless the user may rely on provisions on permitted use [Chapter 3]. It is not defined in the Copyright Act what exactly "the fields of exploitation" are and the Polish legal doctrine struggles with clarifications on the matter, based on the combined interpretation of Art. 17 and 50. The latter contains an open list of fields of exploitation, divided into three groups: 1) in the area of fixation and reproduction of a work: *production of copies of a piece of work with the use of specific technology, including printing, reprographics, magnetic fixing and digital technology*; 2) in the area of trade in tangible copies of a work: distributing work by placing the copies on the market by sale or otherwise with the transfer of ownership[76], rental and lending or original and copies of a work; 3) in the area of dissemination in a manner different from subparagraph 2: public performance, exhibition, screening, presentation and broadcast as well as rebroadcast, and making the work publicly available in such a manner that anyone could access it at a place and time selected of their own choice (on-demand).

It is not unanimously accepted that the reference to the "fields of exploitation" in Art. 17 is aimed at any limitation of the scope of the economic rights of authors. It is rightly submitted that new fields of exploitations emerge due to technology and market changes, and author's rights should encompass any way the works is exploited, if it appears in the future[77]. Beyond doubt, the reference to "fields of exploitation" is required in the licensing and transfer of copyright contracts, due to the principle, or rule, of specification: the need to specify the fields of exploitation relevant for licensing or transfer of economic rights (Art. 41 sec. 2) or the rule that remuneration is due separately for the exploitation on each "field" (Art. 45). In the disputes on whether there was an unauthorized use of works, or whether the economic rights were transferred, and what is the scope of such a transfer, Polish courts use Art. 50 as an important point of reference. Polish Supreme Court, and lower courts in Poland consider listing the fields of exploitation in the contract as *essentialia negotii,* and Art. 50 is the key point of reference[78]. Even when a liberal approach to the requirement to name the fields of exploitation in the contract is presented, Art. 50 is still the broader framework to analyze the effects of the contract[79].

It cannot however be overlooked that the three groups of the "fields of exploitation" listed in Art. 50 correspond to the three broadly interpreted rights harmonized in the EU: the reproduction, distribution and communication to the public rights. Determining the scope of author's economic rights is the shared problem of the CJEU and Polish courts. The harmonization does not encompass all economic rights of authors, leaving space for some national solutions, for example in the case of a public performance. The right of dis-

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[75] C-476/17, Pelham and Others vs Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624, para. 35–36.

[76] The translation of the Copyright Act refers to the "introduction to trade". Available at: http://www.copyright.gov.pl/media/download_gallery/Act%20on%20Copyright%20and%20Related%20Rights.pdf (accessed: 31.10.2020).

[77] *Flisak D.* Evolution of copyright — reality or illusion? // Experientia Docet, Księga Jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple / eds P. Kostański, P. Podrecki, T. Targosz. Warszawa: Wolters Kluwer Polska, 2017. P. 129–130.

[78] Judgment of Sąd Najwyższy (Supreme Court) of 23 September 2004. III CK 400/03. LEX No. 174201; Judgment of Sąd Apelacyjny (Appellate Court) in Warsaw of 9 March 2010. I ACa 1216/09. LEX No. 1120064.

[79] Judgment of the Supreme Court of 03.12.2008. V CNP 82/08. LEX No. 484683.

tribution is not fully harmonized, however an extensive interpretation of the distribution to the public as "a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public" is provided by the CJEU[80]. The analysis of the evolving EU law framework, and its dynamic interpretation by the CJEU leads to the conclusion that if any new way of exploiting a work important from the economic perspective appears, it shall most likely be subject to the CJEU interpretation within the framework of reproduction, communication to the public or distribution. The impact of EU law is clearly visible in the area of information and communications technology, aiding new forms of publication and distribution of works to reach the EU public.

New channels of distributing works impact the established concepts based on the distinction between tangible and intangible copies. This distinction underlies the categorization provided for in Art. 50 subparagraphs 2 and 3, but is blurred with the CJEU's concept of "lending", within the meaning of Directive 2006/115/EC, as covering "the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user"[81]. In the context of definitions included in Art. 6 of the Polish Copyright Act "lending" has traditionally been considered as applicable only to tangible copies of books[82]. The concept of an exhaustion of the distribution right is also based on the circulation of copies as tangible objects, and the co-called "community" or "union" exhaustion rule is implemented in Art. 51 (2): "The marketing of an original or a copy of a piece of work on the territory of the European Economic Area shall exhaust the right to permit any further marketing of such copy on the territory of the Republic of Poland, except for rental or letting for use thereof".

In the EU law context, there was an attempt to advocate that selling electronic copies of books on the online secondary books market does not infringe copyright, as the distribution right is exhausted according to Art. 4 (2) InfoSoc Directive[83]. The CJEU found? that "the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' and, more specifically, by that of 'making available to the public…" as harmonized in Art. 3.1 of the InfoSoc Directive. This interpretation, based on the application of the distribution right to tangible objects[84] is in line with the interpretation accepted under Polish law.

As the CJEU clarified in *Funke-Medien*[85], both Art. 2 (a) on reproduction right, and Art. 3 (1) of the on communication to the public right constitute the means of full harmonization. The right of communication to the public is essential practically for any media and/or internet use of work. In the growing body of rulings, the CJEU elaborates on what to "communicate" and communicate "to the public" means. Most controversial cases are those on hyperlinking[86] and on communications done by platform operators. Addressing the latter problem is the shared concern in the context of the implementation of Art. 17 of

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[80] C-5/11, Donner, ECLI:EU:C:2012:370, para. 26; see also: C-572/17, Imran Syed ECLI:EU:C:2018:1033 (on the situation when the storage of goods may amount to the infringement of exclusive distribution right).

[81] C-174/15, Vereniging Openbare Bibliotheken, ECLI:EU:C:2016:856.

[82] *Traple E.* Commentary to Art. 50 // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / eds J. Barta, R. Markiewicz. Warszawa: Wolters Kluwer Polska, 2011. LEX/EL, para. 8.

[83] C-263/18, Nederlands Uitgeversverbond i Groep Algemene Uitgevers, ECLI:EU:C:2019:1111.

[84] C-263/18, para. 45.

[85] C-469/17, Funke Medien NRW GmbH vs Bundesrepublik Deutschland, ECLI:EU:C:2019:623.

[86] See: *Klafkowska-Waśniowska K.* Communication to the public of works and freedom to receive and impart information in the Charter of Fundamental Rights // Intellectual Property Law and Human Rights / ed. P. Torremans. Alphen aan den Rijn: Wolters Kluwer, 2020. P. 310–314.

the DSM Directive. The qualification of linking infringement to copyright is however left basically intact in the recent revision of the EU copyright framework. Application of the national law needs to be in conformity with the CJEU's case law, requiring that, generally, hyperlinking to works "works freely available on another website" does not constitute the infringement of copyright law[87]. However linking to the content to which access was restricted, for example with password and/or paywall, or the content that was uploaded without the authorization of a right holder may be considered a copyright infringement. The CJEU formulated further conditions related to the liability of a user. If a user did not know, and was not reasonably expected to know, for example upon a notice from rightholders, that a link gives access to a work freely available, and posted it without the consent of the right-holders, the latter may not enforce their right[88]. In the case of commercial users, when posting of hyperlinks is carried out for profit, it is presumed that the user should have known if the work was published without the right-holder's consent. Full implementation of this ruling would require amending Polish copyright law. Some clarifications may be included in the Copyright Act with the implementation of the DSM Directive, as Art. 15 (1) requires ensuring that protection of press publications is not applicable to hyperlinking, although the rights of publishers encompass the right of making them available to the public. CJEU rulings in the important cases concerning the communication to the public right are awaited, and may provide more guidance[89].

Two areas closely linked to the question of managing economic rights and securing profits for copyright and related rights holders are subject to harmonization: collective management organizations and certain issues of contracts. Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works was implemented in a separate Act on Collective Management of copyright and related rights of 2018[90] amending the Copyright Act. It regulates the organization, licensing and supervising collective management organization and functioning of a special Commission on Copyright approving tariffs applied by Collective Management Organisations (CMOs)[91]. The DSM Directive contains a chapter dedicated to further facilitating collective licensing of works, and a chapter aiming at ensuring fair remuneration in exploitation contracts of authors and performers (Art. 18–23). The DSM Directive is still waiting implementation in Poland[92].

4. Limitations and exceptions

In the copyright disputes a defense of acting within the scope of permitted use is often raised. An example may be the case of uploading the copy of a photo (thus making the photo available on-demand) of a Polish film director on the website presenting and promoting Polish cinematography. The Polish Appellate Court found that uploading the photo in the circumstances of the case might be considered with reference to the provisions on quotations[93].

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[87] C-466/12, Nils Svensson, ECLI:EU:C:2014:76.

[88] GS Media, para. 49–50. The court uses the phrase: rightholders "may act" against certain users.

[89] See opinion of AG SAUGMANDSGAARD ØE, Joined Cases C-682/18 and C-683/18, YouTube and Cyando and AG Szpunar in the Case C-392/19, VG Bild-Kunst.

[90] Ustawa z dnia 15 czerwca 2018 r. o zbiorowym zarządzaniu prawami autorskimi i prawami pokrewnymi // Journal of Laws. 2018. Item 1293.

[91] Komisja Prawa autorskiego — informacje ogólne. Available at: https://www.gov.pl/web/kultura/komisja-prawa-autorskiego-informacje-ogolne (accessed: 31.10.2020).

[92] Comunia Association Implementation Tracker. Available at: https://www.notion.so/Poland-21284c332fad47159d3fa751fb7c2f25 (accessed: 31.10.2020).

[93] Judgment of the Appelate Court in Kraków of 10 June 2016. I ACa 275/16.

The objective of the provisions on the permitted use included in the Chapter 3 Section 3 of the Copyright Act is to ensure the balance between copyright protection and public interest[94]. Those provisions are divided as addressing uses in the private (Art. 23) and public sphere (Art. 23^1–33 (5))[95]. The provision on private or personal use is drafted in the general way as encompassing any use of "single copies" of any work (Art. 23 sec. 2) free of charge and without the permission of the author. The conditions for such a use are as follows: the work used needs to be already disseminated, the purpose of the use is personal, and the use is limited to "a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship"[96]. Limiting personal use to single copies of the work is understood as precluding a greater number of copies, however more than one copy of a whole works is acceptable[97]. According to the seminal judgment of the CJEU in ACI ADAM[98], national legislation that does not distinguish the situation where the source of reproduction for private use is lawful and unlawful is not compatible with the EU law. In Polish law, the condition that the work is a work already disseminated, leads to the definition of the latter provided for in Art. 6 (3) Copyright Act. It refers to works made available to the public in any way, with author's permission. It is however submitted that necessary amendments should be made in the Copyright Act to clarify when the use is outside the scope of the provision on personal use, and to limit the exclusion to the obviously unlawful source[99].

The section on permitted use in the public sphere provides the legal framework for the uses in media and ensuring the free flow of information. (Art. 23^2–26^1, Art. 33). Art 23^1, implementing Art. 5 (1) of the InfoSoc Directive may also be considered as part of the legal framework ensuring the free flow of information in the online communication. According to this provision, the author's permission is not required in the case of temporary reproductions of works which are transitory or incidental. The author's permission is not required if such a reproduction has no independent economic significance and constitutes an integral and fundamental part of a technological process, the sole purpose of which is to enable: 1) transmission of work through the data transmission system between third parties by an intermediary; or 2) the lawful use of work. Based on Art. 5 (1) of the InfoSoc Directive, doubts as to website browsing were clarified in EU Law[100]. Another important objective of the provisions on the permitted use in the public sphere is ensuring proper framework for education (Art. 27–27^1, Art. 29) and the functioning of libraries, museums and archives (Art. 28)[101]. Ensuring freedom of expression and freedom of arts lies at the heart of the provisions on quotation (Art. 29), parody, caricature and pastiche (Art. 29^1) and in-

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[94] Based on Art. 100 of the copyright Act provisions on permitted use are applicable to related rights. According to Art. 77, Art. 23 on private use, and certain other provisions of sec. 3 is not applicable to the use of computer programs.

[95] *Stanisławska-Kloc S.* Oddział 3. Wprowadzenie // Prawo autorskie i prawa pokrewne. Komentarz / ed. D. Flisak. LEX/EL, para. 8.

[96] Further limitations concern uses of certain works: building constructions according to other authors' architectural works as well as architectural and urban planning works and use of electronic databases is limited only to one's own scientific use not connected with any profit-gaining purposes.

[97] See: *Stanisławska-Kloc S.* Commentary on Art. 23 // Prawo autorskie i prawa pokrewne. Komentarz / ed. D. Flisak. LEX/EL, para. 13–14.

[98] C-435/12, ACI Adam BV and Others, ECLI:EU:C:2014:254.

[99] S. Stanisławska-Kloc supports the view presented by prof. R. Markiewicz: *Stanisławska-Kloc S.* Oddział 3. Wprowadzenie. LEX/EL, para. 19. — Sceptical approach to overly rigorous interpretation based on the EU law is presented also by M. Czajkowska-Dąbrowska: *Czajkowska-Dąbrowska M.* Commentary to Art. 6 Copyright Act // Ustawa o prawie autorskim i prawach pokrewnych. Komentarz / ed. J. Barta, R. Markiewicz. LEX/EL, para. 14.

[100] C-360/13, Public Relations Consultants Association Ltd vs Newspaper Licensing Agency Ltd et al., ECLI:EU:C:2014:1195.

[101] Provisions on the public lending right were implemented to Polish Copyright law in 2015 in chapter 4.

cidental use of the works (Art. 29^2). The needs of people with disabilities are recognized in Art. 33^1, and in section 3a implementing the provisions of Directive 2017/1564/EU[102]. The above description is an introduction into the area of provisions on permitted use, without however attempting at providing the exhaustive explanation. What should be underlined is the general conditions for any permitted use included in the final provisions of section 3. Pursuant to Art. 34, as a rule, the author's name and the source must be is indicated by the user, and the author is not entitled to any remuneration, unless the Copyright Act stipulates otherwise. The so called three-step test is included in Art. 35 which provides that "the permissible use must not infringe the normal use of the work or violate the rightful interests of the author".

As section 3 of the Copyright Act was amended to ensure compliance with EU law, it should be explained that the EU law framework in this area is a particular combination of mandatory and optional limitations and exceptions. The Polish lawmaker is limited in the decisions on the particular forms of permitted use by Art. 5 (2) of the InfoSoc Directive[103] which leaves this decision up to the national law, allowing to add its exceptions and limitations?[104] As confirmed by the CJEU in the Pelham case "a Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29"[105]. Furthermore, the new DSM Directive makes exceptions and limitations allowing for quotation, criticism, review and the use for the purpose of caricature, parody and pastiche mandatory at least in the context of use on the online content sharing platforms (Art. 17 (7)). With the development of EU secondary law and the CJEU's interpretation including freedom of expression, freedom of arts, right to education and other fundamental rights context, the problem of providing an adequate, balanced legal framework for public interest and users rights has become a shared concern. A shift towards the leading role of the CJEU is notable. In the developing line of cases the CJEU considers key terms, such as "parody" or "quotation" as autonomous concepts of EU law, further influencing the interpretation of the national law[106].

Conclusions

The objective of this article was to provide an insight into Polish copyright law in the broader context of addressing new technologies and market development. To achieve this that objective, the analysis presented necessarily includes references to EU law. If we identify the greatest challenges for modern copyright framework as sustaining the creative sector, ensuring the free flow of information and quality journalism, providing for modern education and access to culture, and dealing with the impact of platform economy and technology driven business models, it becomes obvious that they cannot be addressed without the recourse to EU law. The implementation of EU law has shaped the provisions of the Copyright Act in the past twenty years. In its application, Polish courts need to follow

[102] On the EU Directive 2017/1564 and Regulation 2017/1563 in the context of WIPO Marrakesh Treaty, See: *Sztobryn K.* The new provisions on access to protected works for visually impaired persons — one small step for copyright, one giant leap for people with disabilities // Białostockie Studia Prawnicze. 2018. No. 4. P. 163–165. Available at: http://bsp.uwb.edu.pl/wp-content/uploads/2019/02/23-4-14-eng.pdf (accessed: 31.10.2020).

[103] Directive 2006/115/EC introduces the provisions on the permitted use in the area of related rights.

[104] The "grandfather clause" allows Member States to continue to apply existing limitations and exception "in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community" (Art. 5 sec. 2 (o)).

[105] C-476/17, Pelham and Others vs Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624.

[106] C-201/13, Johan Deckmyn, ECLI:EU:C:2014:2132; C-516/17, Spiegel Online, ECLI:EU:C:2019:625.

the CJEU's guidance, especially when the CJEU declares full harmonization of economic rights or finds certain basic terms as autonomous concepts of EU law. This leads to further approximation of national laws in the European Union and affects important concepts established in Polish copyright law. This has been shown in this article with the analysis of the key issues concerning the originality requirement, the scope of the related rights and economic rights of authors and protecting public interest through the provisions on private use.

References

Barta, Janusz, Markiewicz, Ryszard (eds), Czajkowska-Dąbrowska, Monika, Traple, Elżbieta. 2011. *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. Warszawa, Wolters Kluwer Polska.

Barta, Janusz, Markiewicz, Ryszard. 2016. *Prawo Autorskie*. Warszawa, Wolters Kluwer Polska.

Czajkowska-Dąbrowska, Monika. 2012. Opłaty reprograficzne — osobliwości konstrukcji, dylematy praktyki. *Studia i Analizy Sądu Najwyższego* 6: 153–189.

Flisak, Damian (ed.), Stanisławska-Kloc, Sybilla. 2015. *Prawo autorskie i prawa pokrewne. Komentarz*. Warszawa, Wolters Kluwer.

Flisak, Damian, Matusiak, Ireneusz. 2019. Ab homine auctore ad robotum auctorum. *Opus Auctorem Laudat. Księga Jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej*, eds Krystyna Szczepanowska-Kozłowska, Ireneusz Matusiak, Łukasz Żelechowski: 73–96. Warszawa, Wolters Kluwer Polska.

Flisak, Damian. 2017. Evolution of copyright — reality or illusion? *Experientia Docet, Księga Jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, eds Piotr Kostański, Paweł Podrecki, Tomasz Targosz: 128–137. Warszawa, Wolters Kluwer Polska.

Gęsicka, Daria K. 2015. The Judgment of the Polish Constitutional Tribunal of 23 June 2015 (No. SK 32/14) — Case Note (Partially Approving). *Comparative Law Review* 1: 205–218.

Grzeszak, Teresa. 1996. Autorskie prawa majątkowe wydawcy dzieła zbiorowego a prawa jego twórców. *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej* 67: 37–52.

Kępiński, Marian, Kępiński, Jakub, Klafkowska-Waśniowska, Katarzyna, Sikorski, Rafał (eds). 2015. *Własność Intelektualna w obrocie elektronicznym*. Warszawa, C. H. Beck.

Laskowska-Litak, Ewa, Markiewicz, Ryszard (eds). 2019. *Prawo Autorskie. Komentarz do wybranego orzecznictwa Trybunału Sprawiedliwości UE.* Warszawa, Wolters Kluwer Polska.

Machała, Wojciech, Sarbiński, Rafał M. (eds), Błońska, Barbara. 2019. *Prawo autorskie i prawa pokrewne. Komentarz*. Warszawa, Wolters Kluwer Polska.

Michalak, Arkadiusz (ed.). 2019. *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. Warszawa, C. H. Beck.

Nowicka, Aurelia. 2017. Podmiot prawa autorskiego. *Prawo autorskie. System Prawa Prywatnego.* In 20 vols, vol. 13, ed. Janusz Barta: 79–128. Warszawa, C. H. Beck.

Poźniak-Niedzielska, Maria, Niewęgłowski, Adrian. 2017. Przedmiot prawa autorskiego. *Prawo autorskie. System Prawa Prywatnego.* In 20 vols, vol. 13, ed. Janusz Barta: 7–28. Warszawa, C. H. Beck.

Priora, Giulia. *News Aggregation and the Reform of EU Copyright Law*. Available at: https://cmds.ceu.edu/article/2018-07-03/news-aggregation-and-reform-eu-copyright-law (accessed: 31.10.2020).

Ślęzak, Piotr (ed.), *Grzybczyk, Katarzyna*. 2017. *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. Warszawa, C. H. Beck.

Sokołowska, Dorota. 2001. Utwory zbiorowe w prawie autorskim, ze szczególnym uwzględnieniem encyklopedii i słowników. *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej* 76: 269–274.

Solyga-Zurek, Aleksandra. 2020. *Poland jurisdiction report: Poland welcomes new IP rules*. Available at: https://www.worldipreview.com/contributed-article/poland-jurisdiction-report-poland-welcomes-new-ip-rules (accessed: 31.10.2020).

Sztobryn, Karolina. 2018. The new provisions on access to protected works for visually impaired persons — one small step for copyright, one giant leap for people with disabilities. *Białostockie Studia Prawnicze* 4: 159–168.

Torremans, Paul (ed.), Klafkowska-Waśniowska, Katarzyna. 2020. *Intellectual Property Law and Human Rights*. Alphen aan den Rijn, Wolters Kluwer.

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Авторские и смежные права в Польше и опыт общей компетенции

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В статье в широком контексте рассматриваются проблемы введения в польское законодательство об авторском праве изменений, продиктованных новыми технологиями и развитием рынка. Сначала описываются общие принципы, на которых основано польское законодательство об авторском праве. Далее представлена структура Закона Польши 1994 г. об авторском праве и смежных правах и его основные правовые конструкции с акцентом на вопросы об объекте защиты, уполномоченном лице, объеме личных и имущественных прав и допустимом использовании. В той степени, в которой это оправдано влиянием права Европейского союза на польское право, представлены избранные решения Суда ЕС. Указано, что ключевые проблемы в толковании закона об авторском праве требуют ссылки на право Европейского союза. В некоторых ситуациях, как выяснилось, проблемы с толкованием и применением польского законодательства являются результатом динамичного толкования права Европейского союза Судом ЕС. На основе анализа ключевых положений польского законодательства об авторском праве предпринимается попытка указать, какой подход используется при решении типичных проблем в сфере применения авторских прав. Например, в правовой доктрине предлагаются различные объяснения того, как понимать условия оригинальности и индивидуального характера произведения, а также следует ли (и как именно) отличать одно от другого. Другая проблема заключается в необходимости оценивать ad casum каждый результат деятельности, а не общий тип его выражения (например, лекции или школьные уроки). Однако упомянутое в статье прецедентное право может сформировать общий подход к такой категории потенциальных работ. Также очевидно, что положения контракта не оказывают нормативного воздействия на предоставление защиты, которая всегда зависит от оценки сложившейся фактической ситуации.

Ключевые слова: авторское право, польское законодательство об авторском праве, смежные права, европейское авторское право, гармонизация авторского права.

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