**Country report Poland**

Annual report to the IFLA CLM committee

Lyon 2014

**Copyright**

***New legislation***

No developments to report.

***Proposed legislation***

In January 2013 the Minister of Culture and National Heritage launched the Copyright Forum intended as a permanent channel of public debate held with representative bodies, including professional associations of individual creators and performers, copyright collecting societies, creative industries, chambers of commerce, cultural institutions, NGOs and commercial users. Five sessions within the Forum have already taken place with the agenda covering the following topics: 1) orphan and out-of-commerce works, 2) financing of the Fund for Promotion of Creative Activity, 3) exceptions and limitations for public interest purposes and implementation of the public lending right into Polish law, 4) criminal liability for copyright infringement, 5) the EU copyright reform. Each session was preceded by a discussion paper and a questionnaire on the topic to get feedback from the invited participants. The sessions were held throughout 2013 until the early 2014. The stakeholders who contributed to the Forum included the National Library, the Polish Librarians’ Association, the Conference of Academic Libraries Directors, the EBIB Association and the Poznan Foundation of Research Libraries. Submissions to discussion papers produced within the Forum are available at <http://www.prawoautorskie.gov.pl/pages/strona-glowna/zmiany-w-prawie/prawo-autorskie/forum-prawa-autorskiego.php>. No legislation has followed as yet.

The most tangible proposals from the Ministry which would have a direct impact on libraries and have been discussed at the Forum refer to the issues of orphan and out-of-commerce works. Apart from implementing provisions which will cover orphan works within the framework of the Directive and permit the use of orphan works for public interest purposes as a statutory exception to copyright for beneficiaries specified in the Directive the Ministry is about to allow for the use of orphan works for other purposes, either commercial or non-commercial, under orphan-specific licences granted by copyright collecting societies appointed by the Minister of Culture and National Heritage – on a one stop shop basis. Licenses are to be non-exclusive and for a fixed term. A diligent search will be necessary under all circumstances prior to the use of any orphan work. The search within the licensing model will be carried out by the relevant collecting society. Beneficiaries of a statutory exception to copyright will carry out the search on their own. A fee will be charged for the license by the collecting society granting the license. The fee will be based on the type of work, the nature and the scope of the use concerned and the revenue earned from such use and will be deposited in case a rightholder reappeared. The license will be effective until the expiration date even if the rightholder in the orphan work subsequently reappeares. The rightholder will be entitled to remuneration equal to the license fee. A compensation due to the reappearing rightholder for the use of an orphan work within the statutory exception will depend on the purpose and the scope of the use concerned.

Each work will be presumed to be available in commerce for a set time limit following the date of its publication (the Ministry has proposed it to be 25 years) and it will be considered to be out of commerce only afterwards unless proven otherwise. Anyone willing to use the work beforehand will be able to verify its availability in commerce with the publisher, the National Library and the relevant collecting society and to apply to the collecting society in question to have the work registered as “out-of-commerce”. Following the expiry of the time limit the interested party will be able to get the work registered as “out-of-commerce” unless the publisher in response to their request proves the work available in any statutory-defined channel of commerce. The proposed procedure for granting the license to the interested party by the relevant collecting society involves asking the rightholder if they wish to use the work, and then, if the publisher is not willing to use the work or does not bring it to the market within a statutory time limit, asking the author or their legal successor for permission. The use of out-of-commerce works, whether commercial or non-commercial, will be charged according to regulations on orphan works.

It is but recently that more active steps have been taken to implement the public lending right. Proposals that have been put under consultation refer to suggestions from some of the last year’s submissions to the Copyright Forum that the public lending right be approached as a right to remuneration for loans from public libraries and based on a statistical sample of actual library loans. The public lending right is supposed not to apply to on-site reference use. The payment scheme will be set up as part of the national cultural policy. Eligible creators are therefore expected to include authors of literary works written and published in Polish, translators of literary works into Polish, illustrators and photographers who have contributed to the publication of eligible literary work or translation as well as publishers of literary works issued in Polish. Payment will be made from government funds. All funding will be allocated by the Minister of Culture and National Heritage and distributed on a pro rata basis by a relevant copyright collecting society.

***Pending legislative issues***

In May 2014 the Ministry of Administration and Informatization issued a consultation paper with provisional proposals for implementing Directive 2013/37/EU on the re-use of public sector information. Previous attempts to create a legal framework for wider opening and re-use of information resources held by public sector bodies (including public libraries) date back to December 2012, when the same Ministry published a consultation paper with provisional proposals for a draft open public resources bill. The proposed new law was highly discussed by both public institutions and NGOs. Major points of criticism included an obligation of public sector bodies to acquire the author’s economic rights (or a share in them) to any work financed or co-financed with public funds together with a corresponding obligation of the author (to be enforced before civil courts) to transfer their economic right to use the work on new fields of exploitation, unknown at the time of conclusion of the initial agreement, to the public sector body without any separate remuneration. The public sector body would have been obliged to ensure that public information resources falling within the scope of the proposed law were legally and technically available for copying in whole or in part, for creating works protected under related rights as well as for communicating copies and works protected under related rights to the public. The author would have been allowed to use the original work only in a way that could be reconciled with the use and the management of the work by the public sector body concerned. Corresponding rules would have applied to databases. The 2012 consultation paper was not developed any further.

Most concepts introduced into this year’s consultation paper have been taken from Directive 2013/37/EU. The stakeholders who contributed to the consultation included the National Library, the Polish Librarians’ Association, the Conference of Academic Libraries Directors, the EBIB Association and the Poznan Foundation of Research Libraries. The library institutions had questions on types of libraries to be affected by the proposed regulations (the consultation paper refers to public libraries and research libraries vs libraries with no further specification and university libraries as set out in the Directive). There were controversies regarding whether all research libraries as identified by the Polish Libraries Act (including but not limited to university libraries and operating under various legal structures) should be integrated into the prospective new law (whereas school and pedagogical libraries are supposed to fall outside of its scope).

There were also comments on the scope of documents to be exempted from re-use under Article 1(2) points (a)and (b) of the Directive. It was noticed that the consultation paper ignored the exemption of works protected under related rights. As regards libraries it was remarked that documents subject to re-use regime should be limited to library materials and to digital files together with their metadata already existing at the time of making of a request for re-use.

All responses to the consultation are available at <http://mac.bip.gov.pl/projekty-aktow-prawnych/projekt-zalozen-projektu-ustawy-o-ponownym-wykorzystywaniu-informacji-sektora-publicznego.html>.

On 10 to 11 July 2014 a follow-up coordination conference was held at the office of the Ministry of Administration and Informatization. It has been agreed that new provisional proposals on the re-use of public sector information held by libraries, archives and museums will be drafted by the Ministry of Culture and National Heritage.

Public consultation conducted in 2013-2014 by the Ministry of Culture and National Heritage included in particular:

* the Communication from the Commission on content in the Digital Single Market – in January-February 2013,
* multi-territorial licensing – in February 2013,
* civil enforcement of intellectual property rights – in February-March 2013,
* draft Programme for Protection of Copyright and Related Rights for 2014-2016 – in March-April 2014,
* limitations and exceptions for public interest purposes – in May-June 2013,
* the Copyright Commission – in June-July 2013,
* EU copyright law reform – in December 2013 and January 2014.

**Legal Matters**

***New legislation***

Following the amendment of the Libraries Act the profession of a librarian has become deregulated with effect from 23 August 2013. Unlike the previous wording of the Act the current law does not specify professional librarian positions in public libraries. At the same time regulations on minimum qualifications for librarians have been abolished. As a result heads of libraries have gained competence to detail eligibility requirements for education, skills and work experience within the recruitment process.

The Public Procurement Amendment Act came into force with effect from 16 April 2014. Under the new legislation contracts for supplies or services concerning acquisition of library or museum materials where the value of the contract does not exceed the equivalent in PLN of EUR 207,000 are exempted from the scope of the law and from tendering procedures for awarding contracts. The provision on library materials has been included in the amendment act upon an initiative by the National Librarian of Poland and with a support by the Minister of Culture and National Heritage. The new law promotes and simplifies the development of library collections and makes it easier for libraries to address the demand for current and new offerings. The English translation of the Public Procurement Act as amended is available on the official webpage of the Public Procurement Office at <http://www.uzp.gov.pl/cmsws/page/?F;370>.

**Law cases**

In a ruling of 7 May 2014 the Court of Appeal in Warsaw (I ACa 1663/13) referred to the judgement in Case C-466/12 of the Court of Justice of the European Union. The Court of Appeal decided on the case of an election spot displayed by means of a clickable link provided on a Facebook profile of a candidate to the lower chamber of the Polish Parliament during the election campaign of 2011. The spot was a composition of a video featuring young women candidates from a competing party and a song popular at that time in which the plaintiff held the copyright. The access to the spot was afforded directly on the profile page after the user had clicked on the link. The profile page was freely available. The Court made a judgement in favour of the defendant as the plaintiff in the case did not claim illegal use of his song in the spot whoever had made it and argued that his copyright had been violated by mere providing a link to the spot. With reference to arguments of the defendant the Court addressed the issue of a “new public”, but resolved it differently from the way the Court of Justice had done. The Court of Appeal did not agree with the opinion of the Court of Justice that a clickable link to a work was not a copyright violation unless a new public was involved, a requirement which could be met quite easily due to the broad meaning of a “public” applied by the Court of Justice. Whereas the Court of Justice assumed that the copyright holder who authorised free access to their work on a website must have taken into account all Internet users as the public of the work concerned, including users who could have access to the work communicated on the original website by means of clickable links provided on other websites, the Polish Court of Appeal viewed users of various Internet portals as separate targets. As the Court explained, people who viewed Polish websites were different from those who viewed Italian websites. Any clickable link enhanced the number of addresses from which the work was available to Internet users including those who otherwise might be unlikely to reach the original site. What is more if a new public as construed by the Court of Justice was an essential qualification of any act of “communication to public” where the same work and the same technical means of communication were concerned than publication of any book by the same technical means as originally applied by someone other than the original publisher could not in any case be considered illegal.

**Advocacy/Lobbying activities**

As discussed in other parts of the report.

**Educational activities**

In 2013 the EBIB Association launched an open educational platform with four courses for distance learners including the Deep Web mining, copyright basics, editing and proofreading for digital media and open Internet search. The platform was co-financed by the Ministry of Culture and National Heritage. All courses are available at <http://moodle.ebib.pl/>.

In January 2013 Centrum Cyfrowe Projekt: Polska (The Projekt: Polska Digital Center is operating as a part of The Projekt: Polska Foundation, see more at <http://projektpolska.pl/english/>) issued “Legal analysis of copyright law provisions concerning libraries. Draft Amendment” by Krzysztof Siewicz as a follow-up to workshops for librarians run by EIFL in 2012 within the programme “Copyright Reform for Libraries”. Amendments put under discussion include in particular deletion from the current law of a provision which puts a limitation on the use covered under limitations and exceptions to copyright by reference to two (out of three) conditions of the three-step test (the “normal exploitation of the works” and “prejudice to legitimate interests of the author”). The ambiguity of both conditions concerned results in uncertainty as to the actual scope of rights under limitations and exceptions. Introducing the three-step test into the national law as a mere formal principle shifted to courts decisions on when the test is met.

As libraries performing various functions face legal uncertainty as to which group of legitimate beneficiaries of limitations and exceptions they belong to the analysis proposes a replacement of a target beneficiary approach applied in the existing legislation with a single regulation common for all beneficiaries. Limitations and exceptions should be technologically neutral so that beneficial effects of the application of new technologies in education are not jeopardized. Limitations and exceptions for libraries should be extended to cover the use of orphan works so that they may be made available on the same conditions as other works (that is without a requirement to search for a rightholder).

Among other proposals the analysis calls for national legislation to prohibit contracting-out of statutory limitations and exceptions and advocates the exemption from liability for circumvention of technological protection measures that secure the access to copyrighted works where it is for the purpose of the use of a protected work under limitations and exceptions. It also supports taking account of the impact of libraries on promotion of culture and benefits received by authors for the purpose of measuring remuneration under the public lending right (when implemented into Polish law).

The analysis is available at <http://centrumcyfrowe.pl/reforma-prawa-autorskiego-dla-bibliotek-streszczenie-raportu/> under CC BY 3.0 PL license.

In December 2013 Centrum Cyfrowe Projekt: Polska finished its two-year research project attempted to examine common practical knowledge and social representations of copyright law in Poland with a focus on using the Web content. The project was financed with a grant support from the Ministry of Culture and National Heritage within the programme “Cultural Education and Diagnosis of Culture”. The two-step research procedure included focus group interviews with more than 140 people (high school and university students, school and university teachers, librarians and bloggers) aimed at gaining first insight into common-sense thinking and ideas related to copyright law and followed by CAWI and CAPI surveys. The research findings have been collected in a report “Copyright Law in Transition. On Social Norms related to Content Usage” by Michał Danielewicz and Alek Tarkowski (for a summary in English see <http://www.ngoteka.pl/handle/item/203>).

The study shows that it is difficult to obey the law one does not understand (as it is in Poland). The research revealed that a common understanding of intellectual property was grounded in the language itself which inclined to perceive copyright law as premised on the concept of “property”. More than half of interviewees could not tell any difference between intellectual property rights and the ownership of physical items. This inclined them to contest the very concept of public domain which was perceived as unfair infringement of individual rights. On the other hand the Internet, where a traditional tangible embodiment of rights was missing, appeared as a space of greater liberty where at least some copyright law requirements were suspended. For most respondents, irrespective of differences in education, place of residence, age or intensity of using the Internet, it was hard to assess what was lawful or against the copyright law when facing everyday situations. This common confusion together with a common misconception on copyright law resulted in reluctance to comply with the rules which were viewed as severe and excessively complex. The bad news is that most educational activities aimed at increasing legal awareness miss the target as those behind them mistakenly assume that people violate copyright law because they lack information. Contrary to conventional wisdom the authors say that most people either choose to ignore copyright or adapt information on copyright requirements to their everyday lives. For these reasons a more restrictive approach to prosecuting intellectual property crimes is likely to have limited impact.

On 9 June 2014 a seminar “Models for Exceptions and Limitations For Public Interest Purposes with Regard to Library and Audiovisual Collections” was held in the National Library in Warsaw. The seminar was co-organized by the Polish Committee for UNESCO, the Polish Committee for the UNESCO Information for All Programme, the National Library and the National Audiovisual Institute under the auspices of the Minister of Culture and National Heritage. The seminar gathered representatives of public administration, institutions of culture holding collections of library and audiovisual materials, copyright collecting societies, NGOs and lawyers specializing in intellectual property law. Topics covered included the review of the legislative process, the European framework for the national legislation and the reconstruction of the meaning of limitations and exceptions for public interest purposes illustrated by examples from library practice. In a following panel discussion speakers focused on digital collections held by public institutions and how to make them available, taking account of social and technological changes, including text and data mining, language for specific purposes corpora, user-generated contents and self-publishing. Even if no accord was reached on the scope of expected changes all participants agreed on the need to respect rights of creators and users, to balance interest of various stakeholders, to work on copyright law terminology with a view to limit either narrowing or broadening of limitations and exceptions for public interest purpose under the existing law and to facilitate implementation of Directive 2001/29/EC.

Other educational and academic meetings in 2013-2014 included in particular:

* the 2nd conference of Konsorcjum BazTech (a consortium of 23 academic and special research libraries cooperating on development of engineering, scientific and technical databases) “Bibliographic Databases and Their Role in the Development of Science” held on 17 to 19 April 2013 in Poznan. The conference was organized by the Library of the Poznan University of Technology, the Library of the Cracow University of Technology and the Main Library of the University of Technology and Life Science in Bydgoszcz. Abstracts and full papers are available under the CC BY 3.0 PL license at <http://open.ebib.pl/ojs/index.php/Mat_konf/issue/view/4>;
* a conference “Opening Science to Meet Future Challenges” held on 11 March 2014 in Warsaw. The conference was organized by the Centre of Open Science working within the University of Warsaw. For details on the programme together with corresponding presentations and videos in English see <http://conference2014.ceon.pl/conference/>. Presentations and videos are available under the CC BY 3.0 PL license;
* a conference “E-explosion: tools – methods – users” targeted to librarians, information workers and library users held on 27 March 2014 in the Jagiellonian Library in Cracow. See post-conference publication at <http://jbc.bj.uj.edu.pl/dlibra/publication/290555?tab=1>. Presentations and papers are available under the CC BY-NC-SA 3.0 PL license.

**Strategic plans for the future**

Key legislative goals and priorities have been reviewed in the post-legislative scrutiny report on the Copyright and Related Rights Act which was released by the Ministry of Culture and National Heritage in October 2013. These include in particular the implementation of Directive 2012/28/EU on orphan works and Directive 2006/115/EC with regard to the public lending right. Among other objectives the Ministry has defined the adaptation of traditional copyright terminology to most common practices in the digital environment, the review of copyright enforcement legislation and provisions on criminal liability for copyright infringement, the establishment of a specialized intellectual property court.

In March-April 2014 the Ministry of Culture and National Heritage conducted public consultation on the draft Programme for Protection of Copyright and Related Rights for 2014-2016 worked out by the Advisory Group to Prevent Copyright and Related Rights Infringement. The Advisory Group was established by the Ministry in 2000 with responsibility to provide the situation analysis, to identify problems and to come out with proposals for preventive actions and legislative initiatives. The document reports that copyright violations on the Internet have become a nagging concern for Poland since 2007 while the frequency of violations involving production or distribution of physical carries has been dropping. Key issues are online intermediaries providing access to copyright infringing materials and new business models operating in the digital environment which are based on and profit from the use of copyrighted works without permission of copyright holders. Public consultation on civil enforcement of intellectual property rights conducted by the Ministry of Culture and National Heritage in February-March 2013 revealed that many intellectual property violations were petty in nature but common and frequent which made them both detrimental and hard to counter before civil courts. Most difficulties faced by plaintiffs are due to shortcomings in the administration of justice in cases involving intellectual property-related issues. Submissions to the public consultation show a necessity of less expensive court proceedings, quicker and more effective resolution of cases, specialized intellectual property courts, highly experienced judges with knowledge in intellectual property issues and more consistency in litigation. Due to inefficiency of civil proceedings rightholders are more inclined to seek protection under criminal proceedings. The statistics indicate however a falling number of convictions which is explained by specific characteristics of copyright violations in the Cyberspace and insufficient international cooperation.

Along with a brief analysis of the current state of affairs the draft Programme for 2014-2016 specifies basic objectives for public sector bodies. The documents focuses on the need for creation of subject matter expertise on digital content distribution on the Internet as well as on social practices followed by consumers of culture. Two expert working groups are to be initiated. One of them is expected to address reasons for inconsistency in case outcomes under civil proceedings, to identify most common mistakes and to examine cases when either copyright holders or users abuse their rights. The other one is supposed to examine online digital access platforms and to make practical recommendations on how to reduce intellectual property violations by cutting off their revenue supply. Meetings held within the Copyright Forum are to be continued. Judges, the prosecution and public administration staff are to be provided with continuing training to keep up with intellectual property laws. No specific actions are planned to reduce copyright violations on the Internet or to increase general awareness of intellectual property issues among the public.

*Legal deposit*

Following the complaint submitted in 2012 to the Minister of Culture and National Heritage and the Polish Ombudsman by Polish publishers the Ministry of Culture and National Heritage has been drafting a consultation paper on proposed changes to the existing legal deposit legislation.

**Other issues**

In December 2013 the Polish Ombudsman submitted a request to the Constitutional Tribunal to adjudicate whether differentiated VAT rates applied to e-books and e-magazines (on which VAT is charged at the standard rate of 23%) vs publications issued in physical formats (charged at the reduced rate of either 5% for books or 8% journals, magazines and other periodicals) were in conformity with the Constitution of Poland. The Ombudsman argues that where the same content is at stake there are not relevant differences between publications, whatever their formats. Therefore differences in VAT rates are not justified and infringe constitutional principles of equality and universality of taxation. They cannot be considered to be in line with the principle of fiscal neutrality either as they have an effect on competition and result in unequal treatment of publishers. They may also bear implications on cultural and educational rights of citizens. The Ombudsman argues that electronically supplied services enhance readership just as do books and magazines in traditional formats. Additional accessibility options such as magnification and zoom functions or text-to-speech support reading among readers with various print disabilities.

No date has been set for a hearing of the matter.

On 24 June 2013 Poland signed the Beijing Treaty on Audiovisual Performances.

On 24 June 2014 Poland signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

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