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ORPHAN WORKS – A POLISH PERSPECTIVE

Definition – legal regulations based on the Polish Copyright and Related Rights Law

The currently binding Polish Copyright and Related Rights Law (Journal of Laws, 2006, no. 90, pos. 631 as amended) does not define the term „orphan works” and also does not include detailed solutions concerning such types of works.

Literature on this subject states that two categories should be distinguished within the term „orphan”: first, works toward which no copyright or personal rights entity can be established, and second, works for which the entity accorded such rights is known, but with which contact is very difficult or impossible to establish.

The first category can include works initially disseminated in an anonymous manner or under a pseudonym. In particular, these are works whose creator when alive was not represented by a publisher, producer or collective copyright management organization from which information concerning his identity can be obtained. In the case of works disseminated anonymously or under a pseudonym, there is no assumption under art. 8 sec. 2 of the Copyright Act that the creator is a person whose name in this context appears on copies of a work or whose authorship is made publicly known in any other manner through dissemination of a work.¹

The Polish Copyright Act only contains one regulation specifying principles governing utilization of works in instances when there are difficulties in establishing contact with their creator. Specifically, this is art. 33 point 3, which effectively is a statutory license. This provision states that „published artistic and photographic works may be disseminated in encyclopedias and atlases if efforts to reach an accord with their creator to obtain consent encounter obstacles that are difficult to overcome.” Legal commentators² underscore that the guiding principal should be receipt of creator consent and only if an accord with the creator encounters insurmountable obstacles does the possibility arise of reproduction in an atlas or album without appropriate consent. It is also foreseen in this provision that the obligation to pay an appropriate royalty always exists. It is emphasized in literature that the meaning of

¹ S. Stanisławska-Kloc in „*Work of the Intellectual Property Institute at UJ- intellectual property law yesterday, today and tomorrow*”; 2007, Volume 100 ISSN 0137-236X; „Orphan Works”.

² E. Traple in „*Commentary on the Copyright and Related Rights Law*”; collective worked edited by J. Barta and R. Markiewicz; Zakamycze 2005.

atlas should be broadly understood and include illustrations, sketches, drawings, photographs, cartographic works, tables and illustrations. Dissemination within the meaning of Polish law encompasses the broadest scope of use of a work. Therefore, it is possible on the basis of a statutory license to also utilize works in multimedia or digital encyclopedias.

Polish commentators state that the concept of free use cannot be cited as a regulation enabling use of orphan works without legal consequences. Statutory licenses have been regulated in the Polish copyright law, which may constitute a basis to utilize works without the need to obtain consent of a copyright entity, and therefore the need to determine such an entity. This concerns art. 29 sec. 2 and 3 and art. 33 point.1 and 2 of the Copyright Law. Art. 29 sec. 2 states that „it is allowed for educational and scientific purposes to include disseminated minor works or fragments of larger works in textbooks and extracts.” However, sec. 3 of this article states that the creator in such case is entitled to compensation. The need is vital in the cited article to achieve an educational or scientific goal.

Under art. 33 sec. 2 „it is possible to disseminate works issued in publicly available collections such as museums, galleries, and exhibition halls, but only in catalogs and publications to promote such works, as well as in reports on current events in the press and television, but only within bounds justified by informational purposes. This regulation could have significance from the standpoint of digitizing works. However, it is also significant that the use allowed under this article is limited solely to promotion of works exhibited in public collections.

In light of the above, the cited provisions undoubtedly cannot constitute an „antidote” to problems related to use of orphan works.

Problems of a practical nature

The lack of regulations in this subject area undoubtedly raises numerous problems of a practical nature, particularly from the standpoint of creating digital libraries. The problem of orphan works mainly rests on the fact that the publication of such a work or its digitization may constitute a serious problem, since from a legal standpoint this may signify a violation of copyrights. Currently, librarians and publishers most frequently encounter the problem of orphan works. Librarians because they are unable to determine the entity possessing rights to a work that they wish to utilize in a digital library or audiovisual archives. Publishers, in turn, encounter this problem when print runs are depleted, since a new edition or other manner of disseminating works is not possible without consent of the entitled entity. Moreover, past agreements on works with copyright entities do not, as a rule, cover new and previously unknown areas of use.

From a practical standpoint, it is significant during the course of search for an entitled entity to rationally balance, on one hand, the interests of „lost” authors (and their heirs), thus avoiding an overly hasty qualification of a work as „orphan” that may deprive an entitled entity the ability to decide on the manner of its utilization, and, on the other hand, the interests

of works beneficiaries for the purpose of relieving them of duties of diligent search such that they are not discouraged in undertaking actions to reach an entitled entity. This has particular meaning for planned use of works of great significance for culture, science and the national heritage. Publishers and collective copyright management organizations³ often prove helpful in the search for entitled entities.

Community postulates

On 3 January 2008, the European Commission published a Commission Communiqué to the European Parliament, Council, European Socio-Economic Committee and the Committee of Regions concerning creative online content in a unified market.⁴ It stated that one of the most serious problems concerning availability of creative content for online dissemination is the issue of orphan works. The communiqué describes them as works whose owners are difficult or impossible to identify or locate. The identification and location of parties entitled to works is in many cases time-consuming and costly. At the same time, it was emphasized that in many cases orphan works cannot be utilized and do not bring financial benefits to an unknown and unidentified author. In its recommendation dated 24 August 2006 concerning digitization and availability on the Internet of cultural assets, as well as on the protection of digital resources,⁵ the Commission called on member states to create a mechanism facilitating use of orphan works. The Council in its conclusions dated 13 November 2006 supported the Commission approach and underscored the need to ensure effectiveness of national solutions within the scope of orphan works in a transnational context.

Proposals for solutions

In Poland, librarians are most active in addressing the issue of orphan works. One of their most important postulates is to have the law allow inclusion of orphan works in Internet libraries. They underscore that the inability to determine a copyright entity prevents or significantly hinders determination of copyright length and principles governing use of such works. As a consequence, in connection with the uncertain copyright status of orphan works, they are not digitized and, furthermore, not available to the broader public.⁶

It must be emphasized that there are approximately only a dozen digital libraries in Poland. This number in comparison with Western countries is minimal. The main reasons for this state of affairs lie with an overly restrictive copyright law that defends the interests of creators and publishers, a lack of clear regulations on orphan works as well as minimal interest in the problem of the part of Polish authorities together with a lack of funds for development of such types of libraries.⁷

³ S. Stanisławska-Kloc. op.cit.

⁴ European Commission, Brussels, dated 3.01.2008, KOM (2007) 836 final version; Commission Communiqué to the European Parliament, Council, European Socio-Economic Committee and the Committee of Regions on the subject of creative online content on a unified market {SEC(2007) 1710}.

⁵ Commission recommendation dated 24 August 2006, EU Official Journal, L236/28 (2006/585/WE).

⁶ EIFL: Copyright guidebook for librarians: <http://www.eifl.net/cps/sections/services/eifl-ip/docs/handbook-p/>.

⁷ A. Makosz „Regulations blocking development of digital libraries”; Gazeta Prawna, no. 20 (2142), 9.01.2008

The drafting of strict regulations or principles governing proceedings that prevent qualification of a given work as orphan would be impractical or even unrealistic to achieve. It would be wise to introduce flexible regulations, whereby the search for an entity should be conducted with due diligence and good faith.

Solutions for use of orphan works may lie, among others, in brokerage by collective copyright management or private or governmental organizations that could grant licenses for use of such works, the introduction of a special statutory license, use of a Creative Commons type license, utilization of information serving to administer copyrights (DRM), or the creation of a national transparent register or database of orphan works.⁸

One of the postulates, among others, of librarians concerning regulation of use of orphan works is limited application of civil liability regulations on copyright violations toward entities utilizing orphan works, as well as the full exclusion of criminal liability.

Polish lawmakers should undoubtedly perceive the problem of orphan works. The lack of regulations in this sphere may as a consequence deprive users of access to many valuable works, including the national heritage. Thus, it will be impossible to achieve one of the Community postulates, which is online access to creative content in a unified market.

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