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Introduction

Polish copyright law, enacted primarily in the Copyright and Neighbouring Rights Act of 4 February 1994 ("CNRA" or "Copyright Act"), follows the requirements of the "triple" or "three-step" test[1]. This test is used to check if exploitation of works is within the regime of what in Polish law is called *dozwolony użytek*, or "permissible use", i.e. that it (i) involves only specific permitted uses (the permissible use regulation may not be too general or broad), (ii) does not breach the normal exploitation requirement, (iii) does not prejudice the legitimate interests of the author (or other copyright holder).

These requirements are reflected primarily in Article 35 CNRA, which reads as follows: *"Permissible use may not conflict with the normal exploitation of the work or prejudice the legitimate interests of the author".* As can be seen, this law applies only two of the three limbs of the three-step test, i.e. the normal exploitation limb and the legitimate interests limb.

Importantly, the terms "normal exploitation of the work" and "legitimate interests of the author" have no statutory definitions. As such, they are what is called "general clauses" and thus leave some interpretation leeway. Copyright law scholars propose different construals of the terms. For example, there seems to be a fair

[1] Internationally, the triple test is regulated mainly in Article 13 of the TRIPS Agreement and Article 10 of the WIPO Copyrights Treaty adopted in Geneva on 20 December 1996 (the "WIPO Treaty"). In the EU context, the applicable regulation is to be found in Article 5(5) of 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.

amount of agreement that "normal exploitation" includes such uses which the rightholder (author) could expect to bring him some income[2]. On the other hand, there is more controversy about the exact meaning of "legitimate interests of the author". Here, there are generally two parallel construals: (i) legitimate interests of the author are about his economic (pecuniary) expectations; or (ii) legitimate interests of the author include both economic (pecuniary) and non-economic (non-pecuniary) interests[3]. The first approach prevails so that "legitimate interests of the author" should be taken to mean the right to fair compensation (equitable remuneration)[4]. That naturally does not preclude the existence of charge-free statutory/compulsory licenses[5]. On the contrary, it is a rule of Polish law that permissible use is **charge-free** and the author will be entitled to remuneration only if specifically authorised by law. In addition, much as Article 13 of the TRIPS Agreement and Article 10 of the WIPO Treaty mention the interests of rightholders, the triple test's third limb in Polish law is (apparently) narrower as it only mentions the interests of the author (not of the author's legal successors, for example). However, according to legal literature, Article 35 CNRA should apply also to author's legal successors because limiting its application to only the author would unjustifiably and excessively narrow the proper scope of this law.

Article 35 CNRA itself does not fully reflect the triple test. As said above, it omits the first limb, which says that copyright restrictions are allowed only in certain special cases. This omission is said to follow from the lawmakers' view that this requirement is already reflected in the other provisions (Articles 23 to 35^{12} CNRA) governing specific instances of permissible use (which are formulated rather casuistically).

Note also that Polish courts have been very reluctant to rely on Article 35 CNRA in their decisions. For example, the Warsaw Court of Appeals held (somewhat *obiter*) on 18 September 2003[6] that applying the Article 35 CNRA test is moot if the uses to which the work has been actually put do not fall within the limits of the CNRA permissible use regulations in the first place.

List of exceptions

Permissible use of works is regulated only in the Copyright Act: Articles 23 to 35^{12}. These regulations make a closed list of instances where a work is allowed to be exploited under the permissible use regime. Use is permissible for these purposes only to the extent CNRA so provides[7]. Any uses or forms of exploitation which fall outside CNRA must be authorised by the right owner. In particular, there is no purpose in trying to devise any new forms of permissible use on the basis of any laws or regulations other than the Copyright Act[8].

It is permitted to use works to one's private personal purposes (Article 23(1) CNRA). However, Article 23(2) CNRA specifies that this exception applies to use of single copies within groups of people who have personal ties to each other, such as ties of affinity or consanguinity or social ties (Article 23(2) CNRA).

It is permitted to communicate certain journalistic works to the public for informatory purposes (Article 25 CNRA). The reason is that it is in the public interest to ensure access to information. This statutory license applies to the media, i.e. the press, the radio and the television, and covers the following works that have already been disseminated: (a) reports of current events; (b) articles on current political, economic or religious topics, unless such use has been expressly reserved; (c) current statements and photographs in the nature of news reports (*aktualne wypowiedzi i fotografie reporterskie*); (d) short extracts from articles on current political, economic or

[2] J. Marcinkowska, *Dozwolony użytek w prawie autorskim*, Kraków 2004, p. 252.
[3] W. Machała, *Dozwolony użytek*, Warszawa 2012, p. 99.
[4] J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, p. 281.
[5] P. Ślęzak, *Komentarz do art. 35 Prawa autorskiego*, [in:] P. Ślęzak (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.
[6] Case no. VI ACa 23/03.
[7] E. Ostapowicz, *Dozwolony użytek chronionych utworów w instytucjach kultury,* Legalis 2017.
[8] S. Stanisławska-Kloc, *Komentarz do art. 23 Ustawy o prawie autorskim i prawach pokrewnych*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz Lex*, Wolters Kluwer 2015.

religious topics; (e) short extracts from reports of current events; (f) reviews of publications or works that have been disseminated; and (g) short summaries of works that have been disseminated. The owners of copyright in articles on current political, economic or religious topics, or in current statements or photographs in the nature of news reports are entitled to compensation for such statutorily permitted uses of their works.

It is permitted to use public speeches, exclusive of published collections thereof (Article 26^1 CNRA). This copyright limitation is predicated on the right to information. The regulation applies to: (a) political speeches[9], (b) speeches given during public dissertations or disputations; (c) extracts from public speeches[10]; (d) extracts from lectures; (e) extracts from sermons. The permitted uses of such works are limited to the informatory purpose and the works may be so used by anyone participating in the given event.

It is permitted to use works for teaching or scientific purposes (Article 27 CNRA). This limitation is justified by the freedom to use works for education or science so as to bring variety to the teaching process and to support public education. Such use is available to educational institutions[11], schools of tertiary education[12] and scientific organisations[13], and only for the purpose of didactic illustration in the teaching process or for the purpose of scientific research. What is more, teaching or scientific purposes justify reproduction of small disseminated works or fragments of larger disseminated works.

It is permitted to incorporate small disseminated works or fragments of larger disseminated works in textbooks, collections (*wypisy*) or anthologies for teaching or scientific purposes (Article 27^1 CNRA). This restriction of copyright is justified by the need to safeguard access to education or simply the right to education, as established, for example, in Article 26 of the Universal Declaration of Human Rights, in Article 14 of the International Covenant on Economic, Social and Cultural Rights and in Article 28 of the Convention on the Rights of the Child.

Educational institutions, schools of tertiary education, research institutes, scientific organisations of the Polish Academy of Sciences, libraries, museums and archives may: (i) lend copies of disseminated works to the extent this is in compliance with their charters; (ii) reproduce any works that are part of their collections in order to add to, preserve or protect those collections; (iii) make their collections available for research or study through terminals on the premises of those institutions. Such acts of those institutions are permitted unless they are done for direct or indirect economic or commercial advantage (Article 28 CNRA). The lending by public libraries of works expressed in words and published in print in Polish (including translations) entitles the rightholders to compensation, except where the works are lent for use exclusively within library premises. The rightholders include authors of original Polish-language works, translators of works originally created in foreign languages, co-authors whose creative contribution involves photographic works or works of visual art, and publishers of works expressed in words and published in Polish.

It is permitted for works that are intrinsic wholes to quote fragments of disseminated works or disseminated works of visual arts, photographic works or small works in whole, to the extent justified by the purposes of the quotation, such as explanation, polemical argumentation, critical or scientific review, teaching, or by the principles of the genre concerned (Article 29 CNRA). This limitation of copyright (often called the "right of

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[9] This means long official speeches delivered by politicians for large audiences (see, e.g., P. Ślęzak, *Komentarz do art. 26^1 Prawa autorskiego,* [in:] P. Ślęzak (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz., Legalis 2017.

[10] This means eulogies, speeches during public disputations or debates, funeral speeches, speeches during strikes or manifestations (*Ibidem*).

[11] By CNRA and the System of Education Act of 7 Sep 1991, these include, without limitation, kindergartens, primary schools, middle schools, post-middle schools, schools of art, psychological or educational counselling centres, youth education centres, continuation training centres for teachers, etc.

[12] The law mentions both public and private schools of tertiary education.

[13] In accordance with the Science Funding Act of 30 April 2010, scientific organisations include: basic organisational units at schools of tertiary education (e.g. departments), scientific organisations of the Polish Academy of Sciences, research institutes, international scientific institutes, and the Polish Academy of Sciences.

quotation") is justified by the need to protect such values as freedom of thought, of information exchange and of expression.

Moreover, you are allowed to unintentionally incorporate one work into another, as long as the incorporated work is irrelevant for the work into which it is incorporated (Article 29^1 CNRA).

It is permitted to use works during religious celebrations or official celebrations organised by public authorities, on condition that no direct or indirect economic or commercial advantage is achieved (Article 31 CNRA). It is permitted to publicly perform, play or display, using media or devices located at the same place as the audience, disseminated works during school or academic events on condition that no direct or indirect economic or commercial advantage is achieved and that the performing artists or the persons who play or display the works receive no compensation.

It is permitted to use works for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (Article 33^2 CNRA). The mere fact that a work becomes evidence, e.g. in judicial or administrative proceedings, does make this work an official publication excluded from copyright protection under Article 4 CNRA. This calls for a dedicated regulation of permissible use in such proceedings. On its literal reading, Article 33^2 CNRA purports to exclude pre-trial criminal proceedings (*karne postępowanie przygotowawcze*) which are conducted by the prosecution service and which naturally precede the judicial proceedings of the criminal court[14]. Such legislative imprecision is unacceptable as it precludes use of copyright works at the stage of pre-trial criminal prosecution. Importantly, the uses mentioned in Article 33^2 pertain also to works which have not been published or otherwise disseminated before. For example, Article 33^2 allows for the copying of extracts from scientific expert opinions or studies, and for quoting draft legislation.

It is permitted to use works for the purpose of advertising a public exhibition or sale of works, to the extent necessary to promote the event, excluding any other commercial use (Article 33^3 CNRA). This refers especially to publicly accessible exhibitions in museums, galleries or exhibition halls and involves use of works in advertisements, announcements, brochures or other literature published for the purpose of promotion or sale, as well as exhibiting or otherwise making available copies of works for those purposes.

It is permitted to use works in connection with the demonstration or repair of equipment (Article 33^4 CNRA) and to use a work in the form of a building or a drawing or plan of a building for the purposes of reconstructing or refurbishing the building (Article 33^5 CNRA).

The law regulates the permissible use of orphan works (Articles 35^5 to 35^9 CNRA), being works whose authors (rightholders) have not been identified or found even though a search has been conducted in accordance with CNRA procedures. The intent behind this regulation is to increase access to culture. The National Library alone has approximately 300 thousand orphan works (e.g. a large part of the Polish underground press from the times of the World War Two or the communist regime)[15].

The law also regulates the permissible use of commercially unavailable works (Articles 35^{10} to 35^{12} CNRA). This is intended to ensure that there is an appropriate level of domestic commercial supply of works which were published in print in the past but, due to inaction of the rightholders (mainly publishers), are now commercially not available to readers to an extent that would reasonably satisfy their needs[16].

Strict or flexible character of permissible use of works

[14] K. Gienas, *Komentarz do art.* 33^2 *ustawy o prawie autorskim i prawach pokrewnych* [in:] E. Ferenc-Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.
[15] M. Brzozowska, *Nowelizacja Prawa autorskiego z 11.9.2015 r.,* Monitor Prawniczy 2016, Nr 5, Legalis 2017.
[16] M. Ożóg, *Komentarz do art.* 35^{10} *ustawy o prawie autorskim i prawach pokrewnych*, [in:] P. Ślęzak (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.

Some forms of permissible use under the Copyright Act are so strictly regulated as to severely restrict any freedom of interpretation or of practical application. This pertains, for example, to permissible use of orphan works (Articles 35^5 to 35^9 CNRA) or commercially unavailable works (Articles 35^{10} to 35^{12} CNRA). The definition of the subject-matter concerned and the list of those eligible for such uses are so precise that there is no freedom of application. Also, the law expressly describes the permitted purposes of these forms of exploitation. Orphan works are works whose authors cannot be identified or found despite a search, and comprise works published in the form of books, journals, newspapers, magazines or other printed publications; audiovisual works or works ordered or incorporated into audiovisual works or fixed in videograms, with respect to exploitation of the audiovisual work or videogram as a whole; works fixed in phonograms. What is more, these works must be contained in collections held by establishments whose charters make them responsible for such missions as the preservation or renovation of, or the provision of cultural and educational access to, their collections. The establishments in questions are archives, educational institutions, schools of tertiary education, research institutes, scientific organisations of the Polish Academy of Sciences, libraries, museums, institutions of culture, public radio or television broadcasting organisations. The Office for the Harmonization in the Internal Market keeps a database of orphan works. Commercially unavailable works are works published in books, journals, newspapers, magazines or other printed publications and not commercially available to the readers with the authorisation of the copyright holders, whether as copies distributed in numbers that are sufficient to satisfy reasonable needs of the readers or by being made publicly available in such a way that anybody could have access to them at a time and place of their choosing. The list of unavailable works is kept by the Polish minister competent for culture and heritage protection. A work can find its way onto this list even without any prior search. Commercially unavailable works may be reproduced or made publicly available only by the establishments listed in the law, such as archives, educational institutions, schools of tertiary education, scientific organisations and institutions of culture[17].

On the other hand, the Copyright Act contains permissible use provisions which are more flexible (less casuistic). See, for example, the private use provision in Article 23 CNRA. Although the list of those entitled to such use is a closed one, it is also quite a broad one. By Article 23(2) CNRA, personal private use comrpises use of single copies within groups of people bound by personal ties, including without limitation ties of affinity or consanguinity or social ties (*więzi towarzyskie*). While there are no problems with construing affinity or consanguinity, the term "social ties" is given a broad meaning, there being no statutory definition or construal guidelines for it. Accordingly, Article 23 CNRA should be interpreted to take into account also current means of interpersonal communication (e.g. social media) and cannot exclude relationships born out of the internet[18]. Therefore, if you put a link on Facebook for your friends to see a work, this should be permissible use for private purposes. What is more, Article 23 CNRA does not prescribe any purpose that private use must have. Therefore, the use could be for such purposes as entertainment, leisure, hobby, relationship maintenance, education. The principal restriction on private use is that the work cannot be disseminated for commercial purposes or gain.

While it is true that some of the permissible use provisions are less casuistic and as such allow some leeway in application, any use formally falling within any of the permissible use provisions will always be subject to the three-step test under Article 35 CNRA. What is more, as permissible use provisions impose limitations on the author's monopoly, they must always be interpreted strictly and any doubts must be resolved in favour of the rightholder. In particular, Polish copyright law does not endorse the general construal guideline that permissible use cases should be interpreted in favour of free access to information[19].

Commercial exploitation is expressly excluded in some of the permissible use provisions (e.g. Article 23 CNRA). But others do allow certain entities to generate revenue in course of permitted uses of copyright works.

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[17] These may reproduce or make available to the public commercially unavailable works in their collections under contracts with a collective rights management organisation designated by the minister for culture and national heritage protection.

[18] K. Gienas, *Komentarz do art.* 23 *ustawy o prawie autorskim i prawach pokrewnych* [in:] E. Ferenc-Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.

[19] E. Traple, *Komentarz do art. 23 ustawy o prawie autorskim i prawach pokrewnych* [in:] J. Barta. R. Markiewicz (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Lex 2011.

For example, educational institutions or scientific organisations may generate revenue in course of exploiting commercially unavailable works as long as these revenues are used exclusively to cover the direct costs of digitizing such works and making them available to the public.

Who is entitled to permissible use depends on whether this is private use (Articles 23, 23^1, 34, 35 CNRA) or public use (Articles 24 to 33^5 CNRA). Private use means the work may be used only by natural persons. Permitted public use provisions allow exploitation of works in the service of public-interest missions or to fulfil the cultural or educational needs of the people[20], so those entitled include not just natural persons, but also legal entities and certain categories of institutions, e.g. institutions of culture.

Mandatory or optional character of permissible use of works

The character of the law on permissible uses is not clearly stated. However, it has been firmly established that these generally are not mandatory rules so that permissible use may be modified by contract[21]. This is said to be justified by the need to respect one of the fundamental principles of civil law, i.e. freedom of contract, and by the fact that the law does not clearly prohibit the option of permissible use provisions being contractually limited or disapplied.

Importantly, while permissible use law can be modified by contract, any restriction or prohibition of permissible use imposed **unilaterally** by the rightholder will be ineffective. Such statements sometimes can appear in practice, such as on book covers (*"All rights reserved. This publication may be reproduced without the consent of the publisher"*) or during film shows (*"This film may not be copied. Copying is piracy"*). You can also see physical media "equipped" with technological protection measures[22] preventing the content from being reproduced. However, these safeguards raise controversies as they sometimes make it impossible for users to put the works to lawful uses that are consistent with permissible use requirements.

The scope of permissible use of works

Some types of permissible use involve only exploitation (including reproduction) of a work for personal purposes but without making it publicly available (e.g., Article 23 CNRA on private use). Others involve making the work available to the public but without the right of reproduction (e.g., Article 24 CNRA on rebroadcasting). There are also permissible use provisions in the Copyright Act which confer both the right of reproduction and the right to make the works available to the public (e.g., Article 27 CNRA on use by educational institutions, scientific organisations and schools of tertiary education, Article 35^5 CNRA on permissible use of orphan works, Article 35^{12} CNRA on permissible use of commercially unavailable works). This distinction usually hinges on the **purpose** of the use.

For example, it is accepted that the purpose of private use is to satisfy user's **personal needs**. It is thus obvious that private use covers such situations as lending a book to your friend or making a photocopy (for your own uses) of a research paper or a copy of a CD. Private use in the internet most often involves viewing or downloading a work or uploading files to the internet[23]. In this sense, it is permitted to listen to music files lawfully uploaded to YouTube. However, private use does not include making the work available **to the public**

[20] E. Ostapowicz, *Dozwolony użytek chronionych utworów w instytucjach kultury,* Legalis 2017.
[21] K. Gienas, *Komentarz do art. 23 ustawy o prawie autorskim i prawach pokrewnych,* [in:] E. Ferenc-Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.
[22] *Ibidem.*
[23] L. Marcinoska, *Dozwolony użytek w praktyce,* article available at http://www.codozasady.pl/dozwolony-uzytek-w-praktyce/ [access on 05.05.2017].

(meaning anyone other than those close to the user: friends, acquaintances, family). Peer to peer networks[24] are considered to go beyond private use[25]. File exchanges in such networks (e.g. in Napster or KazaA) typically involve complete strangers. A user of such a service downloads a work but also uploads "his" works to make them available to an unlimited group of other users (strangers).

Permitted public uses are to serve **public-interest missions**, such as to ensure a broader access to culture. Such missions would not be achievable without a statutory right of reproducing certain works and making them available to the public. Such permitted public uses include, for example, borrowing a book from a reading room, quoting fragments of a book in a scientific paper or using political speeches for informatory purposes.

Whoever goes beyond permissible use limits may be held liable under Articles 78 and 79 CNRA. In such a case, the rightholder is entitled to demand that: (i) the actual or threatened infringement be ceased; (ii) the infringement be cured; (iii) the damage done to him through the infringement be recompensed either pursuant to the general law of damages or through payment of a sum of money reflecting double the fair compensation which at the time of the claim would otherwise be due to him if the use had been lawfully licensed; (iv) the infringer disgorge the profits of his infringement. In addition, the rightholder may seek an order compelling the infringer to publish apologies or admission (once or more times) or to publish the full decision of the court that adjudicated on the infringement. Where it would be disproportionately onerous for the infringer to cease or cure the infringement, the court may – on application of the infringer and with the consent of the rightholder – order the infringer to pay an appropriate sum of money to the rightholder. When adjudicating on the infringement, the court may, on the rightholder's application, make an order as to any items that have been unlawfully produced or any means or materials used for the purpose, and in particular may order that they be destroyed, recalled from the market or granted to the rightholder on account of damages.

The author's moral rights

Article 34 CNRA expressly requires respect for the moral rights of the author during permissible use, i.e. requires that the author's full name be mentioned and the source identified. While this provision admittedly does not specifically refer to the other moral rights, such as the right of artistic integrity (see also Article 16 CNRA), it is said that permissible use must respect also these other moral rights[26]. This was confirmed by the Supreme Court, holding that *"moral rights reflect a personal relationship of the author to their work as well as a rational tie between the two, said tie being protected by the moral rights mentioned in an open-ended list in Article 16 CNRA. But Article 16 is not the only law that specifies such rights and the values protected by them. These include also: (...) the right of the author of a work of visual art to have the last say on the original of his work where its owner wishes to destroy it".*[27] The decision to destroy a work is precisely an example of a permitted use of the work pursuant to Article 32(2) CNRA. That permissible use requires respecting all the moral rights of the author was also held in an early (but still relevant) case before the Supreme Court[28]. In its judgment of 14 March 1928, the court ruled that the publication of a press article which was freely changed (breach of integrity) would go beyond permissible use and as such would require specific authorisation from the author. Absent such authorisation, the article may not published.

As regards the requirement to identify the author and the source, Article 34 CNRA only mentions that this should be done to the extent possible. It is said that this is about the actual technical possibilities or the very sense of making such identification. For example, in a case before the Warsaw Court of Appeals[29], the court considered the implications of the failure to identify the author's name on photographs shown in accordance with

[24] Currently, the most popular of these include eMule, DirectConnect, Bittorent.
[25] O. Wrzeszcz, *Trolling prawnoautorski,* [in:] Zeszyty Naukowe Uniwersytetu Jagiellońskiego 2016, Nr 4, Lex 2017.
[26] S. Stanisławska-Kloc, *Komentarz do art. 23 ustawy o prawie autorskim i prawach pokrewnych*, [in:], D. Flisak (ed.), Prawo autorskie i prawa pokrewne. Komentarz, Lex 2015.
[27] Supreme Court judgment dated 6 December 2013 r., I CSK 109/13.
[28] Supreme Court judgment dated 14 March 1928 r., Kr 474/27).
[29] Judgment of the Warsaw Court of Appeals dated 28 June 2007, VI ACa 447/07.

permissible use provisions. It was held that because (i) the news feed in which the photos were used was very short and (ii) the photos themselves were shown for just 1.5 to 2.5 seconds, there was indeed no way or even sense to mention the author's name in the circumstances. Generally, a mention of the author must be made if the author himself signed the work or otherwise claimed authorship in an unquestionable manner. Interestingly, a dedication is not considered to be such a signature[30].

As regards the requirement of identifying the source, it seems this will be particularly relevant when referring to works available on-line. Such references should state the home page and the specific location of the resources used[31].

In conclusion, the limits of permissible use are defined by the moral rights of the author. Where these rights are breached, the use is not longer "fair" or "permitted". Some examples of conduct which infringes on the author's right to have his work used properly: biased choice of quotations to give a false impression of the work[32], improper translation, showing films in such a bad quality as to hinder the viewing process, breaching the integrity of a film by reducing its on-screen time, changing the physical medium so that cuts ensue, adding sound tracks, putting colour on a black and white film, showing news or advertising tickers when screening a film[33].

It seems the requirement to indentify the author by their full name is a proportionate solution as it does not excessively burden the user or prevent him from using the work.

The technological protection measures

As mentioned in section *"Mandatory or optional character of permissible use of works"*,, technical protection measures may effectively prevent permissible uses34. There are certain software solutions which not only prevent any reproduction of a work but even block access to it. This issue was in the spotlight at the EU level so that the EU legislature inserted Article 6(4) in Directive 2001/29/EC, which reads as follows: "*Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned."* The regulation is an attempt to find a middle way between the interests of users in being able to enjoy permissible use exceptions and the interest of authors in being protected against unlawful use of their creations.

However, the Polish legislature remains passive on this issue. For example, nowhere does the Copyright Act expressly prohibit such protection measures. Indirectly, the matter of protection measures is touched upon in Article 118[1] CNRA, which imposes criminal liability for the **production, trade or advertising** of equipment or components indented for **unlawfully** removing or circumventing such measures. Apparently, to ensure that the interests of users and of authors are balanced in the spirit of the Copyright Directive, it would be advisable to rework that regulation to make it clear that it does not impose criminal liability on users which make lawful use of the work, such as within the limits of the permissible use law.

Issues with technical protection measures that restrict permitted uses are noted and discussed by legal commentators writing about Polish law or Directive

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[30] Judgment of the Warsaw Court of Appeals dated 24 May 2016, VI ACa 293/15, Legalis 2017.
[31] K. Gienas, *Komentarz do art. 34 ustawy o prawie autorskim i prawach pokrewnych,* [in:] E. Ferenc-Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.
[32] Judgment of Kraków Court of Appeals dated 6 December 2016, I ACa 931/16.
[33] Judgment of the Supreme Court (Civil Chamber) dated 6 December 2013, I CSK 109/13.
[34] K. Klafkowska-Waśniowska, *Ochrona zabezpieczeń technicznych a granice prawa autorskiego,* [in:] M. Kępiński (ed.), J. Kępiński (ed.), K. Klafkowska-Waśniowska (ed.), R. Sikorski (ed.), Granice prawa autorskiego, Warszawa 2010, p. 63.

„Catch all" exception

No permissible use provision in the Copyright Act is general enough to catch any broader range that would comprise many widely different uses. As said, Polish permissible use law is, as a rule, casuistic and inflexible. Permissible uses are exhaustively regulated in Articles 23 to 25 CNRA, which specify the purpose and scope of permissible uses and the categories of eligible entities. In addition, the limits on permissible uses are indirectly provided for in Article 35 CNRA, which lays down the Polish version of the triple test (see above).

Polish law does not allow for developing any new "hybrid" kinds of permissible use. For example, you cannot take different permissible use regulations and pick up selected use requirements from them to form a "combination" creating a new use category that would also be permissible[35].

The fundamental rights in permissible use of works

The Polish law on permissible use is a broad regulation. Each form of permissible use provided for in the Copyright Act has it own axiological justification in a constitutionally protected value, such as privacy, personal sphere, or access to education or culture. However, the statutory regulation of permissible use is exhaustive in that, generally, any use that goes beyond the statutory limits will be unlawful, **even if it were justified in the light of any of those constitutional values**.

Importantly, though, the Copyright Act does make it possible to invoke Article 5 of the Civil Code[36], i.e. the law on abuse of rights. This is applicable where the rightholder takes action to narrow down uses that are otherwise statutorily permitted. As such, the action would be contrary to the commercial or social intent behind intellectual property rights and would be inequitable (would breach the rules of social co-existence)[37]. However, such conflicts would in each case be resolved by the court under the specific circumstances.

Compensation for permissible use of works

As said, the Copyright Act distinguishes among various types of permissible use, each of them specifically regulated in Articles 23 to 35^{12} CNRA. We have also mentioned that Polish copyright law endorses the principle that permissible use is **charge-free** (with no compensation due to the rightholder from the user on that account). Any remuneration for permissible use must always be expressly authorised by specific regulations, such as: (i) Article 25(2) CNRA, specifically authorising compensation to rightholders for reprints; (ii) Article 29 CNRA, specifically authorising compensation to rightholders for use of their works in quotations; (iii) Article 33(3) CNRA, specifically authorising compensation to rightholders for dissemination of photographic works or works of visual art in encyclopaedias and atlases. The compensation element of permissible use is also introduced to some degree in Article 35^{8}(5) CNRA as it entitles the author of an orphan work to claim what is called "fair compensation" from research institutes or scientific organisations for using his work.

Importantly, even if the law is silent on any remuneration to authors for permissible use of their works and, therefore, such use is considered to be charge-free, the authors are not left without any compensation at all. They are recompensed indirectly via the blank media and private copying levy which is imposed under Articles 23 and 23^{1} CNRA on manufacturers and importers of blank media and copying devices and on holders of reprographic devices[38].

The calculation of remuneration due for permissible use is considered to be fully governed by the general guidelines specified in Article 43(2) CNRA. In accordance with these guidelines, the amount of remuneration should always be based on the range of uses and the benefits (profits) associated with such uses. Importantly,

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[35] S. Stanisławska-Kloc, *op. cit*., p. 334.
[36] The Civil Code Act of 23 April 1964 (Dz. U. 1964, nr 16, poz. 93, as amended).
[37] J. Barta, R. Markiewicz, *Prawo autorskie,* Warszawa 2010, p. 145.
[38] For more on these levies (which are imposed in Article 20 and ff CNRA), see section *"Private copies"*.

while the Copyright Act does not impose any specific calculation model, it is agreed that the remuneration should never be "overestimated" in that it would exceed the actual market value of the work[39]. Thus, the remuneration should take into account the rates offered in the market for similar works. For these purposes, reference can be made to rates adopted by collective rights management organisations in their rate schedules[40].

Remuneration for permissible use remains due to the rightholders until the expiry of the related copyrights. These in principle expire seventy years after the author's death.

Temporary or incidental reproduction of works

One of the forms of permissible use under the Copyright Act is specified in Article 23^1 CNRA, which reads as follows:
"No authorisation from the author shall be required for temporary acts of reproduction having no independent economic significance which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:
1) a transmission in a network between third parties by an intermediary, or
2) a lawful use."
This regulation, which implements Article 5(1) of Directive 2001/29/EC, successfully fills a legal gap and is fully compatible with the commercial reality that has been changing due to technological progress. Undoubtedly, this law applies above all to **digital** copying as precisely this kind of copying can be temporary (short-lived). The explanatory memorandum in support of the implementing act specifically indicates that Article 23^1 CNRA will be applicable mainly to such uses as caching and browsing. Also, commentaries on this article suggest the following uses to which it would apply: (i) reproduction in a computer's RAM when a CD is being played; (ii) making copies during internet browsing; (iii) storage in cache memories, proxy servers or internet routers[41].

The test for a permitted use under Article 23^1 CNRA has three limbs: (i) the act of reproduction must be temporary (short-lived) and transient or incidental, and must be an integral and essential part of a technological process [**the technological limb**]; (ii) the act of reproduction may not have independent economic significance [**the economic limb**]; (iii) the sole purpose of the act must be to enable a transmission of the work in a network between third parties by an intermediary or a lawful use of the work [**the purpose limb**][42].

The technological limb of Article 23^1 test applies to any category of work which is reproduced in whole or merely in fragments, whether or not already communicated to the public before. The requirement for such reproduction (which must be "an integral and essential part of a technological process") to be "temporary" and "transient" or "incidental" means that the copies must be **removed automatically** (without user's involvement) while the act itself must be **necessary** for the whole process to run properly. In the economic limb, the most important thing is that the act may not generate any **additional** economic benefit that would be on top of that ordinarily achieved through such reproduction. In other words, the user may not "make money" on such use. As regards the purpose limb, it applies mainly to reproduction that occurs during the performance of internet provider's services.

As said, it is possible to restrict or exclude the application of Article 23^1 CNRA to any work through a contract between the rightholder and the user.

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[39] Note, however, that if a work's market value is understated (i.e. too low comparing to the actual scope of uses to which it is put and to the benefits for the user), it cannot be relied upon to calculate the remuneration due to the author, at least not without adjustments. See Supreme Court judgment of 4 February 1965 (case no. II CR 536/64), where it was held that it would be improper and contrary to fair practice to calculate such remuneration on the basis of understated market rates.
[40] T. Targosz, *Komentarz do art. 43 ustawy o prawie autorskim i prawach pokrewnych*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz Lex*, Wolters Kluwer, p. 671.
[41] S. Stanisławska - Kloc, *op.cit*, p. 361.
[42] *Ibidem*, p. 362.

The freedom of expression - right of quotation

Freedom of expression, including artistic expression, is safeguarded primarily through the permissible use provision in Article 29 CNRA, which confers the "right of quotation":
"It is permitted for works that are intrinsic wholes to quote fragments of disseminated works or disseminated works of visual arts, photographic works or small works in whole, to the extent justified by the purposes of the quotations, such as explanation, polemical argumentation, critical or scientific review, teaching, or by the principles of the genre concerned."

Accordingly, the law lays down the following framework for the right to quote exception. First, somebody else's work may only be quoted in a work that constitutes "an intrinsic whole", which means you can make such a quotation only in your own work which you yourself are creating. Secondly, you can quote fragments of other people's works or whole works if that are "small", provided the works have already been communicated to the public. Importantly, it is accepted that the right of quotation allows for referring to **any** works of others, whatever their kind or category. In practice, references are most often made to literary, musical or cinematographic works and to works of visual art. It is also permissible to quote co-authored or collective works. Equally important are the following considerations: (i) the quoted work has been communicated to the public (so that there is no breach of the author's moral right of divulgation), and (ii) if the work is quoted in whole (and not just in fragments), it is a "small" work. That last requirement certainly leaves the largest space for controversy. While there is no interpretation guidance in the Copyright Act or the related case law, it is generally accepted that it should be tested against the "size" of the work, i.e. its volume, duration or physical dimensions. The requirement will be more restrictively construed with respect to architectural and photographic works and works of visual art (miniatures, maquettes and other small-scale models)[43].

There are further, equally important requirements for a permissible quotation: (i) the quoted work or fragment must be in a reasonable proportion to the work in which it is quoted, and (ii) the quotation must be justified by its purposes, such as explanation, polemical argumentation, critical or scientific review, teaching, or by the principles of the genre concerned. Much as the first requirement is not surrounded by any larger controversy, the other one (including especially the terms "explanation" and "the principles of the genre") calls for interpretation. The purpose of "explanation" is properly applied where the quoted matter is **necessarily** related to the message or argument of the author of the host work. In other words, the quotation is necessary to better illustrate the author's views or creative output. And the principles of the genre are properly invoked where quotation (reference) is a customary device in the given kind of art, such as in a motto, quotes used to beautify a text, a collage, found footage, photomontage[44].

Also, works may be used for the purpose of pastiche, parody or caricature. This is a separate form of permissible use that is regulated in Article 29^1 CNRA as follows:

"It is permitted to use works for the purposes of parody, pastiche or caricature to the extent justified by the principles of such genres."

The three major conditions to be satisfied here are the following: (i) the use is to be made of **works** (unlike in the right of quotation exception, the works need to be ones that have been communicated to the public before); (ii) the only allowed purposes of the use are those of **pastiche, parody or caricature**; (iii) the works may be so used only to the extent justified **by the principles of such genres** (such use is necessary to create a pastiche, parody or caricature).

Importantly, the right of quotation exception (Article 29 CNRA) and the parody, pastiche or caricature exception (Article 29^1 CNRA) pertain to any manner of exploitation and the authors of the works so used are not entitled to compensation.

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[43] S. Stanisławska - Kloc, *op.cit*, p. 450.
[44] K. Gienas, *Komentarz do art. 29 ustawy o prawie autorskim i prawach pokrewnych,* [in:] E. Ferenc-Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Legalis 2017.

The manner of use under Articles 29 or 29[1] CNRA may be modified (e.g. restricted or entirely prohibited) by contract between the rightholder and the user.

Distribution of press content

Under Article 4 CNRA, the following are not copyright works: (i) normative acts and official drafts thereof; (ii) public documents or other official materials, signs and symbols; (iii) published patent or design descriptions; (iv) **simple press news**. This list is closed only *prima facie*. Some of its items are vague enough to allow the list to cover a whole host of "works" indeed. The most controversial of these terms is "simple press news". It is said to include primarily factual press items without any analysis or commentary by the author, such as exchange rate quotations, stock exchange quotations, weather reports, TV or radio listings, movie or theatre schedules. Importantly, this category can include also more "complicated" or "sizeable" news items provided that their only and core benefit is **to give information that some fact(s) occurred** (news of natural catastrophes, poll results, sports results, staff changes in law firms, etc.)[45].

Also, as said above, there are some limitations to the protection of press items enjoying the status of copyright works. In accordance with Article 25 CNRA, it is permissible to communicate the following to the public without authorisation from the author ("the right of reprint"): (i) reports of current events; (ii) articles on current political, economic or religious topics, unless such use has been expressly reserved; (iii) current statements and photographs in the nature of news reports (*aktualne wypowiedzi i fotografie reporterskie*); (iv) short extracts from articles on current political, economic or religious topics; (v) short extracts from reports of current events; (vi) reviews of publications or works that have been disseminated; and (vii) short summaries of works that have been disseminated. And under Article 26[1] CNRA, you can use public speeches, being: political speeches, speeches given during public dissertations or disputations, extracts from public speeches, extracts from lectures, extracts from sermons. These lists, as the list in Article 4 CNRA, are closed only apparently as they use terms that are similarly vague and leave relatively large room for interpretation.

Article 26 CNRA is even more controversial. It reads that *"[r]eports of current events may quote works made available during such events, to the extent justified by the informatory purpose."* Many interpretation issues surround particularly the term "current events". It is considered to generally apply to public events and only exceptionally to private events (where news of the private event has been made available to the public). Examples include social events (manifestations, contest results, charitable campaigns), religious events (pilgrimage, anniversary mass), political events (elections, presidential visits), artistic events (concerts, music festivals, film premieres, arts exhibition openings), scholarly events (conferences, conventions). These events must (i) be current (they have occurred recently or lately, which for internet reports means not more than one or two days ago) and (ii) relate principally to the work which is to be used for the report (such as where an extract from a theatre play is quoted in an account of its first night).

Permissible use for the purpose of teaching

Permissible uses for the purpose of ensuring the development of science and education and broadening the access to arts and knowledge are regulated mainly in Article 27 CNRA, quote:

"1. Educational institutions, schools of tertiary education and scientific organisations as defined in the Science Funding Act of 30 April 2010 may, for the purpose didactic illustration during the teaching process or for the purpose of scientific research, use the originals or translations of disseminated works or reproduce small disseminated works in whole or fragments of larger works.

2. Where any such use as referred to in para. 1 involves making the work available to the public so that anyone can have access to it at a time and place of their choosing, the use shall be permitted only for the limited range

[45] T. Targosz, *Komentarz do art. 43 ustawy o prawie autorskim i prawach pokrewnych*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz Lex*, Wolters Kluwer, Warsaw 2015, p. 671.

of people who are engaged in the learning process, the teaching process or the conduct of the scientific research, as identified by the entities referred to in para. 1."

Accordingly, the statutory test here is about the purpose of the use, namely: (i) to illustrate what is being taught, or (ii) for scientific research. The former exception covers, for example, collecting and presenting, whether in whole or in fragments, scientific publications, popular science publications or the like; presenting spoken papers, lectures or similar speeches, including with the use of multimedia; preparing teaching resources/study aids to facilitate the educational process[46]. "Scientific research" is to be understood in accordance with Article 2(3) of the Science Funding Act as: (i) **basic research**, which means original inquiry, whether experimental or theoretical, taken up for the primary purpose of acquiring new knowledge about the basis of phenomena or observable facts, without a direct commercial orientation; (ii) **applied research**, which means inquiry taken up for the purpose of acquiring new knowledge and oriented primarily towards practical applications; or (iii) **industrial research**, which means inquiry designed to acquire new knowledge and skills for the purpose of developing new products, processes or services, or significantly improving existing ones.

The other limbs of the Article 27(1) test are clear and do not require elucidation. For the avoidance of any doubt, the term "small" work should be given the same meaning as under the right of quotation exception[47].

The benefit of Article 27(1) CNRA is available to any educational institutions, schools of tertiary education or scientific organisations, whether they are for-profit or not-for-profit.

Article 27 CNRA covers also **distance learning** (e-learning). By Article 27(2) CNRA, it is permitted to make works available to people involved in the learning process, teaching process or scientific research, who have been identified by the given institution. Importantly, however, this law does not permit organising open mass participation on-line courses, being on-line courses open to an unlimited number of participants who are not known even to the educational institution that is organising the course. This is a safeguard designed to ensure that the Polish educational use exception, which is broad comparing to many other Member States, is not abused and allow the eligible educational institutions to control the scope within which this exception is made use of in its educational processes[48].

Also, the law not conferring any express entitlement to any remuneration for such permitted use, it should be assumed to be charge-free.

The manner of use under Article 27 CNRA may be modified (e.g. restricted or entirely prohibited) by contract between the rightholder and the user.

As a side note, the exception under Article 29 CNRA (right of quotation, see section *"The freedom of expression – right od quotation"*) can also be classified as serving educational purposes because the right of quotation is often used in scholarly or scientific endeavours.

Exceptions supporting big data related activities

Polish copyright law does not offer a catch-all framework to exhaustively regulate use of databases or specific data in those bases. Copyright law is only about works, so if it applies to databases, it will be only those which are works of authorship. Accordingly, pursuant to Article 3 CNRA, a database may be considered a work only if it is characterised by some degree of "creativity" in the "original" selection, layout or structure of its elements.

Obviously, where a database is considered a work, its creator will have all the author's rights to and in (author's monopoly over) that database as a whole. As such, the creator is exclusively entitled to use or dispose of the database in all manners of exploitation and to be remunerated for that. However, as in the case of any author, that is not to say that the monopoly of the creator of a copyright database is unlimited. Article 17^1 CNRA says this:

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[46] E. Ferenc-Szydełko, *op.cit*.
[47] See section *"The freedom of expression – right od quotation"*
[48] E. Ferenc-Szydełko, *op.cit*.

"Where a database meets the definition of a work, no authorisation of the database's author shall be required for a lawful user of the database or of a copy thereof to alter or reproduce it if doing so is necessary for the purposes of access to the contents of the database and normal use of the contents. Where the lawful user is authorised to use only part of the database, this provision shall apply only to that part."

This law, which was introduced into the Copyright Act to implement Article 6(1) of the Database Directive (96/9/EC), introduces two major requirements: (i) the permitted uses are available only to the "lawful user" of the database; (ii) the permitted uses include only reproduction or alteration (*opracowanie*). As regards the first requirement, while the Copyright Act does not explain what a "lawful user" means, it is accepted that this should be taken to include any natural or legal person using or accessing the database in accordance with the law, e.g. pursuant to the permissible use regulations. As regards the other requirement, note that the entitlements conferred by Article 17^1 CNRA are somewhat narrower than those under Article 6(1) of the Database Directive as the latter also permits communication to the public of the database itself or of the results its alteration process.

Article 17^1 CNRA is mandatory law so any contractual term barring these uses to a lawful user will be invalid.

In addition, the monopoly enjoyed by the author of a database may be limited by the permissible use framework, especially by Articles 23 or 23^1 CNRA, except that Article 23 will not be applicable to electronic databases. Furthermore, electronic and non-electronic databases may be used to exercise the right of reprint (Article 25 CNRA) or by educational institutions or scientific organisations (Article 27 CNRA). It has been noted that these provisions are not mandatory so that such permissible uses may be modified by contract. Also, such uses do not entitle the database's author to remuneration (except for remuneration pursuant to Article 25(2) CNRA – see above).

Exhaustion of a right

Currently, the Copyright Act provides for what is called the international "Community" exhaustion model (Article 51(3) CNRA). Under this model, copyright in a specific copy of a work will be exhausted in Poland when it is distributed, whether in Poland or in any other country of the European Economic Area (EEA)[49]. Exhaustion means that the copy concerned may now be freely distributed further (with no control by the original rightholder).

Generally, exhaustion as above will occur as a result of **distribution of a copy of the work** (*wprowadzenie egzemplarza utworu do obrotu)*[50], i.e. whenever the following is the case: (i) there is a transfer of ownership of the physical media in which the work is fixed, and (ii) the transfer is by the rightholder. To clarify, the term "transfer of ownership" must be interpreted in accordance with Polish civil law so it may occur through a contract of sale, of gift or of exchange, whether with or without a consideration. The terms and purposes of the transfer are irrelevant, either. As regards point (ii), the media may be transferred only by the holder of the right of distribution, i.e. a person specifically entitled to distribute the original or copies of the work. A transfer of ownership without permission of the rightholder will not count as "distribution" and therefore will not result in exhaustion.

Also, as said, under Polish copyright law exhaustion results from a transfer of ownership of **the physical media** in which the work has been recorded (fixed). For that reason, Polish copyright scholars used to consistently take the view that exhaustion does not occur where the "sale" involves making the work available over the internet. It was argued that in such situations there is no exhaustion because there has been no transfer of ownership of any

[49] J. Barta, R. Markiewicz, *Przejście autorskich praw majątkowych*, [in:] J. Barta, R Markiewicz (ed.), *Prawo autorskie i prawa pokrewne. Komentarz,* Warsaw 2011, p. 360.

[50] Under Article 6(6) CNRA, distribution of a work means the making available of its original or copies to the public through a transfer of ownership thereof by the rightholder or with his consent.

physical media, and that, therefore, if the "seller" has not given the purchaser any specific right of distribution, the latter will not be authorised to transfer the work any further.

This rather firm approach to the issue of on-line exhaustion has been somewhat weakened after CJEU case C-128/11 *UsedSoft v. Oracle Iternational Corp*. The Court ruled in July 2012 that the making available by the rightholder of a copy of a computer program in an **intangible form** (e.g. where the rightholder allows the user to download it via the internet) will exhaust the right of distribution. However, exhaustion in this case occurs if the rightholder has received payment of a fee for making the copy available to the acquirer so that the transaction becomes similar to a sale. Consequently, the acquirer may freely effect a transfer to a third party even in the absence of any license from the "seller", on condition the acquirer has deleted his own copy and no longer uses it. Importantly, it has been argued after the Court that the requirement to make the copy available in a way that is similar to "sale" means that there is no exhaustion where the software is provided as a service (e.g. cloud services).

While Polish copyright scholars do share CJEU's conclusions on exhaustion of the distribution right to computer programmes, there continue to be doubts whether the Court's approach is applicable also to other categories of works (music files, films, e-books). The prevailing view is that the term "copy" should be given a **liberal** construal allowing for on-line exhaustion, and that is for two principal reasons: (i) because there is no equivalence between computer programs and other works in terms of the purposes of the doctrine of exhaustion, and (ii) because (anyway) there is the Article 23 CNRA exception, which in most cases permits the further acquirer to use the work without any specific license.

Polish copyright law has not developed any approach to the issue of whether the "seller" of a digital copy may in any way restrict the right of the "purchaser" to transfer the copy further. It seems viable to rely here on CJEU's argument, which runs that any such restrictions imposed at the initiative of the original "seller" could not apply to any further "purchaser".

Panorama-exception

Pursuant to Article 33(1) CNRA, it is permissible to disseminate works which are permanently exhibited on or in generally accessible roads, street, squares or gardens, but such dissemination cannot be for the same purpose. This "panorama exception" is designed to enable free use, including primarily fixation and dissemination, of the general landscape[51].

The panorama exception pertains to works "exhibited permanently", which means the works must be capable of being seen directly by sight (without the need for any transmission or similar devices) and must be made available permanently (rather than in such situations as temporary exhibitions). Usually these will be architectural works or works of visual art, such as sculptures or murals.

The panorama exception law does not identify anyone specifically eligible for making use of the exception. Therefore, any natural or legal person may be considered to be eligible. Also, there is no limitation as to purpose, i.e. that it must be non-commercial. The law not conferring any express entitlement to any remuneration for such permitted use, it should be assumed to be charge-free.

The manner of use under Article 33 CNRA may be modified (e.g. restricted or entirely prohibited) by contract between the rightholder and the user.

Private copies

As mentioned above, Article 23(1) CNRA provides for the right to exploit a disseminated work for one's personal private uses without the author's permission. Article 23(2) specifies that this involves use of single

[51] S. Stanisławska - Kloc, *op.cit*, p. 524.

copies by groups of people who have personal ties to each other, such as ties of affinity or consanguinity or social ties.

The Polish law governing the private use exception allows for **any manner of use**, not just copying. The only thing is that Article 23 CNRA does not apply to erecting a structure according to somebody else's architectural or urban planning work and to use of electronic databases that are copyrightable. In practice, the most relevant form of private use is copying, including internet copying, copying one's own or borrowed copy and broadcasts copying.

However, the law restricts private use to: (i) only **single copies** (mass copying will never be considered private use); (ii) a **group of people** which is defined rather broadly and generally comprises persons connected by social ties, i.e. those who maintain mutual relationships for a longer time. It is accepted that a person eligible for the private use exception is permitted to use the services of a third party not belonging to the person's family or acquaintances (e.g. a professional photocopying service) to make the permissible copy(-ies) and this will not be a breach of Article 23 CNRA.

That said, the Copyright Act contains no other limitations on private use. In particular, there is no limitation on the size of the copy, meaning that private copies may be made of whole works and not just their extracts. Other than the issue of architectural or urban planning works or electronic databases (see above), there are no regulations that would ban private use in relation to any categories of works. Accordingly, private use applies to works expressed by words, musical works, works involving a combination of words and music, works of visual art, films, etc. As the law does not impose any specific purpose, private use should be interpreted to have many purposes, such as entertainment, collecting, scholarly pursuits[52], provided the purposes are not commercial.

Article 23 CNRA clearly says that private use is **charge-free**. However, authors are entitled to remuneration for such uses indirectly pursuant to Articles 20 and 20^1 CNRA. As mentioned above, these articles provide for a degree of compensation for authors in the form of levies which are collected by collective rights management organisations from manufacturers and importers of blank media and copying devices and from holders of reprographic devices, and are then distributed to authors.

Overall assessment

Generally, the Polish permissible use framework is not free from defects. Criticism is particularly deserved in relation to: (i) the regulation on use of orphan works; (ii) the scope of copyright granted to press publishers with respect to collective works; (iii) the language of Article 23 CNRA where it applies to works from "illegal sources"; and (iv) the language of 27 CNRA as it excessively narrows down the range of those eligible for the exception.

As regards the orphan works regulation, the newly introduced Articles 35^5 to 35^9 CNRA continue to fail to fully address this issue. The way this law has been formulated makes it unfavourable for both authors and users of these works. The main problem is that it faithfully reflects Directive 2012/28/EU, which endorses a very narrow approach. Even though a directive is that type of secondary law which only directs the Member States to a certain desired legal configuration and leaves them substantial freedom as to the measures to be used to achieve it, Poland did not use that opportunity and chose not to enact an orphan works framework that would be more comprehensive than Directive 2012/28/EU. Consequently, the Polish framework reproduces all the weaknesses of the EU solutions. In particular, the Polish Copyright Act continues to offer no guidance on use of orphan works of the categories which it does not expressly mention (being works other than works published in print, audiovisual works or works fixed in phonograms, which are part of public collections) or by anyone other than just archives, educational institutions, schools of tertiary education and research institutes. What is more, the Copyright Act is very unclear about the "diligent search" procedure which is required before a work may be

[52] E. Traple, *Komentarz do art. 23 ustawy o prawie autorskim i prawach pokrewnych*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz Lex*, Wolters Kluwer, p. 239.

called orphan. The Copyright Act is even more laconic about "fair" compensation to the authors. Under Article 35^9(5) CNRA, the amount of the compensation should refer to the nature and scope of the use, the amount of revenues generated and any damage done to the author through such use. These being quite general guidelines, it is yet to be seen how the compensation will be assessed in practice.

A host of problems arise due to the rather scant copyright regulation applicable to press publishers. While the publisher has copyright in the published collective work as a whole (see sentence one of Article 11 CNRA), he has no copyrights in any of the contributing works. One practical consequence is that the publisher, who incurs the principal expenditure of money and effort to produce the publication, does not have any tools to ensure proper copyright protection for the individual creative contributions, e.g. against illegal copying and dissemination of these parts without the publication as a whole (the enforcement rights with respect to these contributions are vested solely in their particular authors). This has had important consequences, including financial, for the publishers with the advent of the various on-line journalistic aggregation services using selected press articles or photographs on a mass scale. As this issue is not unknown to a wide range of EU Member States, there has for quite some time been a discussion at the EU level about two proposed measures to be introduced nationally: (i) a presumption that the particular contributing authors have authorised the publisher to enforce also their copyrights to the contributions; (ii) specific neighbouring rights for press publishers (akin to those held by publishers of phonograms and videograms). Now that press publishers have been widely complaining of large losses due to aggregation and use of their content on a mass scale, questions have arisen whether the Copyright Act properly regulates the right of re-print (Article 25 CNRA). The largest controversies involve two questions: (i) Isn't the re-print exception too broad?, and (ii) Does the group of those eligible (press, radio, television) also include news aggregators and web browsers? The prevailing answer to the latter question is that use by aggregators and browsers goes beyond the permissible limits of the exception.

There are a number of issues with the interpretation of the private use framework under Article 23 CNRA, especially after CJEU's judgment of 10 April 2014 in case C-435/12 *ACI Adam BV et al. v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopievergoeding*. The European court held that private use is available only for works which come from lawful sources. On the other hand, the predominant view among Polish copyright scholars has been that the private use exception applies whether the work downloaded from the internet found its way there lawfully or not[53]. That view is shared by the Polish general public, who believe that you do not infringe copyright where you download a work from the internet or create a digital copy of a work solely for your private purposes, whatever the origin of the file (the way in which it was first uploaded). The ultimate construal of Article 23 CNRA is important in the context of the current substantial uncertainty among both users and rightholders as to the actual scope of the private use exception. It seems the most reasonable approach is that Article 23 CNRA should be interpreted to mean that the private use exception will apply in each case where the user has an at least reasonable belief that the work he is using was made available in a lawful manner.

Finally, criticism is deserved also with respect to Article 27 CNRA regulating the educational use exception (use for didactic purposes or for scientific research). It is universally argued that this law is formulated in such a way as to prevent its benefits from being claimed by non-governmental organisations, while unreasonably privileging only educational institutions, schools of tertiary education and scientific organisations. Such unfortunate formulation of Article 27 CNRA is usually said to be necessary in order to ensure that the educational use exception is available only to organisations which are engaged in non-commercial activities. This is unconvincing because Article 27 CNRA gives the benefit of the exception to, for example, privately-owned schools of tertiary education, which are generally for-profit institutions. There are no reasonable arguments to justify the exclusion of NGOs from the group of those eligible to enjoy the benefits of Article 27.

In conclusion, many permissible use provisions in the Copyright Act are too imprecise or, *a contrario*, too narrow. A number of these provisions are also incompatible with the fast changing reality and the requirements

[53] Ł. Gołba, W. Rodak, *Nowa przesłanka dozwolonego użytku prywatnego? Legalność kopii źródłowej w świetle art. 23 ustawy o prawie autorskim i prawach pokrewnych*., Transformacje Prawa Prywatnego, 1/2017 ISSN 1641–1609 – www.transformacje.pl/wp-content/uploads/2017/05/tpp_1-2017_golba_rodak.pdf

of technological progress. It seems the best way to avoid such mistakes in future is to have a public debate before any potential changes are made to the Copyright Act. There is a clear need for a platform for the exchange of views on copyright law among all the stakeholders. We believe such a platform is necessary to strike a proper balance between the interests of the authors and rightholders on the one hand, and the users of their works on the other.