



Date: 24th June 2015

Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

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Date	09-06-2015

I. Current law and practice

1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) reproduction and/or distribution for the purpose of preservation or replacement;

yes

Please comment:

Article 28 of currently binding Polish copyright law states that *libraries, archives, and schools may:*

1) *make available free of charge, within the framework of their statutory tasks, copies of distributed works;*

2) *copy or commission the copying of distributed works for the purposes of supplementing, preserving, or protecting their own collections.*

3) *make collections available for research or cognitive purposes via the information system terminals located in their premises.*

b) reproduction and/or distribution for the purpose of interlibrary lending;

yes

Please comment:

- c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes

Please comment:

- d) any other activities, and if so, what activities?

yes

Please comment:

- 2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

Currently binding Polish copyright law sets forth only a general norm (it does not specify types of libraries, archives or other organizations using the exceptions) (see also answer to question 9). The proposed amendments to copyright law provide that the principles set forth in Article 28 will be applicable only where these actions are not taken in order to gain direct or indirect profit.

- 3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

The proposed amendments further provide that the author of a work, translator into the Polish language, co-author of the work whose contribution is an artistic or photographic work shall be entitled to remuneration for the lending by public libraries of copies of such works expressed in words, created or published in the Polish language provided that these copies are not made available within the area of public libraries.

The only exception is the Polish National Library to which the above provision does not apply.

- 4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

No.

- 5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

no

If not please comment:

No; but it results from the construction (wording) of the currently binding law that rights of libraries, archives and schools, specified in the cited Article 28 copyright law applies to their own collections/archives.

Art. 27 of the currently binding Polish copyright law states that *the scientific and educational institutions may, for educational purposes or for the purpose of conducting their own research, use the original and translations of distributed works and make, for the same purpose, copies of fragments of a*

distributed work.

As results from the cited regulation, the current Polish copyright law seems to regulate only the issues included in points a. and b. of the Question, whereas point e. applies only to parts of a disseminated work.

The proposed amendments provide that the discussed right may also be applied to e-learning, but only for a limited group of personally identified users.

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

No.

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

No.

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

No.

For the questions below, please provide an answer for each exception or limitation mentioned above.

9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

Within the scope covered by the question, relevant statutory provisions regarding the availability of institutions and availability of their collections are set forth in the Act on Public Libraries and the Act on Museums. However, said acts do not provide comprehensive regulations in respect of public admissibly of works and subject matter of related rights.

Case law is not a source of law in Poland.

10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

In the currently binding Polish copyright law Three - Step Procedure is not formally adopted (however being a party to the Bern Convention we could use it).The procedure is likely to be included in the new regulation.

11)	Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).
	No, there are not any specific criteria / procedure.

12)	Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?
	No, in the existing Polish system of copyright law the special remuneration in the subject matter is not set forth. The future system provides for such remuneration but the draft of amendments does not specify the amount thereof. The proposed system also provides that financial means for the above purpose will be secured by a special governmental fund, and disbursements from this fund will be made by collecting societies.

13)	Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.
	No.

14)	Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?
	No.

15)	Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?
	no If not please comment. :
	No, in the currently binding Polish copyright law special treatment for orphan works does not exist. It is planned that this issue will set forth as part of new regulations implementing Directive 2012/28/UE. It is assumed that the entities entitled to use orphan works will include educational institutions, higher education schools, research institutes, scientific institutes of the Polish Academy of Sciences, museums, national and local institutions of culture, public radio and TV.

II. Policy considerations and proposals for improvements of the current law

16)	Should there be any exceptions or limitations to copyright protection for libraries and archives?
	yes If yes, in relation to what activities?:
	and 17. Considering the fact that the solutions regarding exceptions or limitations set forth in the currently binding Polish copyright law are lagging behind developments in this area in other countries which have already implemented the solutions set forth e.g. in the EU directives, the advancements in the legislative process aimed to introduce changes is slow and consequently there is no relevant

practice in this area, it is not possible to provide an adequately substantiated answer: "yes" or "no".

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

and 17. Considering the fact that the solutions regarding exceptions or limitations set forth in the currently binding Polish copyright law are lagging behind developments in this area in other countries which have already implemented the solutions set forth e.g. in the EU directives, the advancements in the legislative process aimed to introduce changes is slow and consequently there is no relevant practice in this area, it is not possible to provide an adequately substantiated answer: "yes" or "no".

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

Yes, the Three-Step Test is a useful test for determining exceptions or limitations to copyright protection.

Exceptions and limitations interfering with the author's freedom of exploitation of his work and interest of the author at one side and public function of libraries, archives or educational and research institutions from other side should be balanced by such instrument.

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

No. See also answer for question 29.

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

Yes. See answer for question 27.

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

As it was explained in the introduction Polish copyright law is under deep changes according to the implementation process of the mentioned above EU Directives. Please see introductory explanations and answers for part I.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

It seems expedient to review the practice of using the existing solutions that are consistent with currently binding international regulations, and based on the results of such review consider the option of harmonization, if any, and possible legal form (international treaty or convention), which would legitimize the required changes.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

yes

Please comment:

It seems expedient to review the practice of using the existing solutions that are consistent with currently binding international regulations, and based on the results of such review consider the option of harmonization, if any, and possible legal form (international treaty or convention), which would legitimize the required changes.

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

see answer for questions 16 and 17.

b) to what activities should these exceptions or limitations apply;

see answer for questions 16 and 17.

c) under what conditions should the activities be undertaken or the copyrighted work used?

see answer for questions 16 and 17.

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

see answer for questions 16 and 17.

b) to what activities should these exceptions or limitations apply;

see answer for questions 16 and 17.

c) under what conditions should the activities be undertaken or the copyrighted work be used?

see answer for questions 16 and 17.

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

26)	Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?
	<p>Use under the exception or limitation should be permitted automatically (without any further action) for libraries and archives, taking into the consideration that especially libraries are institutions of the mass culture.</p> <p>If any such criteria should be set, they should depend on the educational or research destiny (profit or non-profit).</p>

27)	How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?
	<p>It seems that the amount of remuneration for public lending rights shall be set according to the criteria specified in the judgment of the European Court of Justice in the case C-271/VEWA, which concluded <i>inter alia</i> that the remuneration shall be allow the author to obtain adequate income, and the amount of the remuneration shall not be merely symbolic and it should also take into account the frequency of using the collections. Remuneration shall be provided from special public funds, it should be consistent with the rates of comparable remuneration in given region (obviously, the level of such remuneration is different in Central-Eastern Europe, Western Europe and the USA). Remuneration should be paid by collecting societies to the authors and editors of literary works, artworks and photographic works, and in smaller amounts - to translators thereof.</p>

28)	What special treatment, if any, should there be for use of orphan works within such exception or limitation?
	<p>Use of orphan works in the context of exceptions or limitations for libraries, archives and educational or research institutions, apart from taking into account the specific nature thereof, should also pay more attention to careful investigations aimed at establishing entities authorized to use works, not only in the country of origin of such works but also in other countries, and to establishing precise rules for proper compensation for authors/owners should they be found after given work has been declared orphan.</p> <p>Likewise, more specific rules should be set forth in the case of "partially orphaned works".</p>

29)	In what circumstances should the exception or limitation be capable of being overridden by contract?
	<p>In the opinion of Polish group, exceptions or limitations should not be capable of being overridden by contract.</p> <p>Clear statutory regulations guarantee the equality of rights to all copyright owners, also in the area of exceptions or limitations of such rights. Borders of limitation should be supervised according to the law.</p> <p>Adopting a scheme different from the one provided by law may threaten the equality and may lead to unjust and uncontrolled excessive use of exceptions or limitations.</p>

30)	How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?
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Any deviation from the equality of 'exceptions and limitations' system established in the copyright law should be extremely limited, but it should also take into consideration free access to the mass culture and educational products.

For this reason our Group does not promote the proposals of better outcomes than a strictly legal approach in the subject matter.

Summary

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.

Introduction - general comment

At the moment of preparing this report the Polish copyright law is on a path leading to significant changes aimed to adjust it to the European law, in particular to Article 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 (Official Journal EC L 367 of 22 June 2001); and Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

The majority of issues considered by the Questions below have not been regulated in the currently binding version of the Polish copyright law. At the same time the relevant legislative process is still at its early stage (draft amendments to be introduced in the Law were sent to the Parliament on 22 May, 2015). That is why the Polish AIPPI group have decided to provide responses to the Questions in the form of both detailed information on the present state of legislative proceedings and more general information describing directions of proposed changes (the text of proposed amendments is not an official parliamentary version yet).