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POLISH COPYRIGHT CONTRACT LAW AND ITS CURRENT DEVELOPMENT – FROM LICENSE TOWARDS LEASE[***]

The main objective of this paper is to outline the frames of the Polish copyright contract law and to describe one of the latest judicatories regarding lease of copyrights, which what indicates one of the directions of development. The problem of lease of economic copyrights needs to be considered in a broader context than only as an academic dispute. Acceptability for such contract, at least in Poland, should be seen as a manifestation of the global tendency to separate the economic copyrights from the creator (author and his personal rights). The tendency is that, once the economic copyrights are transferred, the creator loses control over them and their circulation becomes more and more similar to trade in items, not in intellectual property. The attempts to conclude contract of lease in the field of copyright is an example of this process and the legal justifications confirm that since they refer to the safety of the secondary turnover of the economic copyrights or securing the interests of the copyright's user. As a result, the aim of the copyright protection is being gradually moved towards the protection of the user/owner of the economic copyrights and this process is contradictory to the interests of the creator, regardless of the model of the copyright.

At the beginning, though, Polish regulations in copyright and civil laws need to be explained. There is a reason why there is a lease issue in the academic and doctrinal discussion in Poland. The source of it is the copyright model adapted in the Polish system and its consequences, especially the possibility of transferring of the copyrights. Polish copyright law is based on the dualistic model of copyrights.[1] In contrary to the monistic theory of copyrights, in the dualistic model the copyright law consists of two groups of rights:[2] the economic (material) rights and the personal rights. Same as in the French law, there is a possibility provided by the Polish legislator to transfer the economic (material) rights to another person interested in getting an entitlement to use a work in a scope mentioned in a transfer agreement. On the contrary, the latter group of rights has a personal character and are non-transferable and indefinite. In other words, the sphere of copyrights is divided into property economic rights and personal rights.[3] The latter are described by the Polish legislator as indefinite in time and are a manifestation of the non-renounceable bond between a creator and a work

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[1] E. Traple, in J. Barta (ed.), *System prawa prywatnego. Prawo autorskie*, Vol. 13, 2nd edition. Warszawa 2010, p. 202
[2] The dualistic model was described especially by H. Desbois, *Le droit d'auteur*. Paris 1950
[3] In German law there is no possibility to transfer some part of copyrights to other person (the monistic theory).

(Article 16 of the Copyright Act), which is determined especially in the right of authorship, the right to decide about the first publication of a work, the right of the integrity of a work or the right to control the manner of using a work. Therefore, there are some doctrine disputes, if there is even a possibility to fully separate the personal copyrights from the economic (material) rights:[4] the general redaction of Copyright Act's provisions arises the supposition, that in each copyright agreement, regardless of the fact that solely the economic side of copyright is involved, also the personal rights of the author are to be considered.[5] As it will be presented in this article, we think there is no such possibility for full separation of these two groups of rights.

To sum up, in the dualistic conception the copyrights consist of the limited in time and transferable economic rights and the personal rights, interpreted as the non-transferable and indefinite rights based on the immaterial bond between the author and the work. It is unequivocally determined by the particular regulations, especially those that initially grant others the ownership of the copyrights (*ex lege*) and refer to a collective work, computer programs or film entities (Articles 11 and 74 of the Copyright Act) or those that accept transfer and inheritance. Moreover, in the Act, the Polish legislator provides for a possibility, that the economic copyrights may arise in favour of another person than the creator (author). In the Polish system, there are two exceptions regarding this possibility (e.g. in the labour relations).[6]

To build the definition of the economic copyrights, the Polish Copyright Act uses a property model – „Unless this Act states otherwise, the author shall have an exclusive right to use the work and to dispose of its use in all the fields of exploitation and to receive remuneration for the use of the work" (Article 17). Therefore, the Copyright Act uses *the negative definition similar to the definition of a property* – anything that is not forbidden (or limited) by the law is allowed. The broad scope of copyrights consist of positive rights, *erga omnes* effective, which allow to determine exclusively the usage of a work, as well as protective rights, when the unlawful usage of a work has to be banned. Only exceptionally the copyrights are limited, when, for example, it is justified by the social or public reasons (for instance the regulation of the permissible use). Polish legislator uses a synthetic definition, in which the most important is the right to use a work (which includes any factual and legal actions[7]), as well as the right to dispose of a work, which is in fact the right to dispose of the economic rights ('dispose' means all actions that allows others to use a work). The economic copyrights are divisible territorially and in time. Furthermore, the usage is possible only in precisely indicated fields of exploitation.

In consequence, *in the Polish legal system there is a possibility to enter into a (economic) copyrights transfer agreement with the rightholder* (or his/her legal

[4] A. Niżankowska, *Prawo do integralności utworu*. Warszawa 2007, p. 46; E. Traple, in J. Barta (ed.), *Supra* note 1, p. 120; E. Traple, *Umowy o eksploatację utworów*. Warszawa 2010, p. 162-167; K. Włodarska-Dziurzyńska, T. Targosz, *Umowy przenoszące autorskie prawa majątkowe*. Warszawa 2010, p. 23; A. Wojeciechowska, *Autorskie prawa osobiste twórców utworu audiowizualnego*, ZNUJ, PWiOWI. Kraków 1999

[5] A. Niżankowska, *Supra* note 4, p. 46

[6] Article 12 of the Copyright Act as an example.

[7] E. Traple, in J. Barta (ed.), *Supra* note 1, p. 129

successor). In fact, the Polish Copyright Act, in Art. 41 paragraph 1, states that unless contract provides otherwise, the economic copyrights may have been transferred to any other person through inheritance or contract, and that the legal successor of these copyrights may transfer them to the other person.[8] In paragraph 2 of this Article, the Polish legislator stated, that the copyright transfer agreement or agreement on the use of some copyrights (known as 'license') includes only these manners of use (in the Copyright Act: 'fields of exploitation'), which are clearly expressed in the agreement.

The literature and Polish jurisdiction distinguish several typical contractual relations that arise on the basis of contracts concluded in Poland. Firstly, there are the so-called primary legal relations known as the agreements made solely between a creator of a work and a second party. In this case, a special legal protection of a creator is needed – since there is a legal possibility to transfer the copyrights, the role of the legislator is to protect a creator of a work intensively because of his/her inexperience and unawareness of legal provisions. Therefore there are several provisions in the copyright act that grant priority to the personal rights. The most common cases are publishing agreements or exhibition contracts entered into by inexperienced rightholders, which particularly justifies the wider legal protection in favour of the creator. Secondly, the Polish literature also distinguishes contracts with so-called collective management organizations, created especially to protect the interests of rightholders.[9] The topic and the legal problem analyzed in this article do not apply to this category of contracts. Thirdly, there are the agreements in the so-called derivative circulation (turnover):[10] contracts between, on the one side, the secondary rightholder (not a creator), who purchased the rights and, on the other side, a third-party, often a professional, who is interested in using the work on specified fields of exploitation. In this scenario, the primary rightholder (a creator) is not a party of such agreement, although his/her personal rights must be taken into consideration.

The real paradox of the dualistic model of copyrights in the Polish system is namely the fact, that the separation of the economic and personal rights is not precise. Although there are two groups of rights, which allows to transfer the economic rights, there is no possibility to fully separate them from the personal rights to a work. In other words, the personal roots cannot be erased, even in the derivative circulation. The Polish Copyright Act, as well as many other Acts that use the dualistic model, obliterates the boundaries between two beams of rights – particularly to protect the creator more intensively. For example, Article 43 regulates the presumption of the separate remuneration for transferring the copyrights. Article 44 regulates 'copyright' *rebus sic stantibus* clause that enables the creator to demand an increase of remuneration when the disproportion between the initial remuneration and the profits is flagrant. The act includes also the provisions that favor the creator, permit supervision over a work and obtaining information about a work and remuneration, grant a right

[8] Consequently, not only the rightholder is authorized to transfer the material copyrights, but also each (next) successor (de facto: next rightholder).

[9] The European equivalent is European Grouping of Societies of Authors and Composers (GESAC) and the worldwide: the International Confederation of Societies of Authors and Composers (CISAC).

[10] Or: secondary circulation, but it does not mean that this category includes only the next agreement made after the contract with the creator has been signed.

to oppose changes in a work or to oppose public dissemination of a work in inappropriate form. The Act includes also a clause that regulates the collision of the permissible use and just creator's interests and a regulation that even allows a creator to renounce a contract because of important artistic interests. Furthermore, some of the rights, such as the right to allow the disposal and use of a derivative work, have mixed, personal and economic character. Despite the fact, that this right is usually transferred in contracts, ~~a~~ free circulation of it is not possible. In fact, it is impossible also to transfer all economic copyrights – the law requires precise provisions that indicate fields of exploitation and does not allow to transfer the rights on the fields of exploitation that were not known while concluding a contract. The regulations described above indicate that the personal rights often limit the economic copyrights and that Polish copyright act approaches in some solutions the monistic model.[11]

To sum up, Polish copyright regulates two ways of a disposal of a work. Firstly, through a transfer of economic copyrights precisely indicated fields of exploitation. Secondly, through the contracts that entitles others to use a work – exclusive and non-exclusive licenses. Besides these two, the Polish Copyright Act does not regulate any other types of contracts. It also does not include a direct reference to the civil code, which started a dispute whether it is possible to apply the provisions of civil code to the copyright and which provisions can be applied. However, it is not a subject of this paper – the authors agrees with the opinion that whenever the copyright regulation is incomplete, it is acceptable to apply the civil code (in its general, as well as specific part).

Therefore the relatively limited regulation of the Polish Copyright Act awakes many legal questions, especially in matters of protection of the licensee. As mentioned before, due to the provisions of Copyright Act, a contract entitling others to use a work, regardless if exclusive or non-exclusive, is defined as a license. Therefore, since the Polish legislator stated these provisions, we should assume that the regulation of the contract law in the area of copyrights has an exclusive character in relation to the Polish general contract law (it this case – the Polish Civil Code) and, as a consequence, the Polish Copyright Act regulates solely all the matters related to the licenses (contract law). However, many legal questions arise, because the exclusive copyright regulation is not complete, especially when it comes to the legal protection of the licensee.[12] The only regulation is Article 67 paragraph 4, according to which, unless the agreement states otherwise, a licensee under an exclusive license may raise claims against an infringer only within the scope of the license (with the fields of exploitation indicated in the contract).

The problem is, firstly, that the Polish legislator mentioned solely an exclusive licensee, regardless of the fact that in most cases the non-exclusive licenses are concluded. Secondly, there are several problems related to the question how the licensee is authorized to raise claims against the infringer (e.g. procedural problems or a question whether he/she is acting in his/her own name or if he/she is acting in the interest of the rightholder etc.).[13] Thirdly, the licensee has the right

[11] E. Traple, in J. Barta (ed.), *Supra* note 1, p. 118
[12] M. Kępiński, in J. Barta (ed.), *Supra* note 1, p. 513
[13] The most questions related to this regulation are discussed by M. Kępiński, in J. Barta (ed.), *Supra* note 1, p. 521

to claim solely the damages he has received in connection to the infringement of intellectual property rights in the fields of exploitation specified in the license agreement. If the damage related to the copyright infringement exceeds the scope of the license agreement (e.g. the infringement affects not only the fields of exploitation from the license contract), there are some doubts if the licensee is authorized to raise a claim against the infringer.[14] But probably the most important problem that forced the legal practice to seek alternative contractual solutions (lease) is the fact that licensee (no matters if exclusive or non-exclusive) is not entitled to use a work if a rightholder (licensor) transfers the economic copyrights to another party. The licensee may only raise claims for damages, but is not authorized any further in any of the fields of exploitation specified in the license.[15] Despite the fact that this problem should be solved by appropriate provisions of the contracts prepared by legal advisors, legal practice started to seek alternative solutions. One of them was a lease contract.

The contract of lease is regulated in the Polish law in a specific way – by referring to the regulation of lease. Moreover, the lease of rights refers to the lease in general and, as indicated above, to the regulation of lease. Such model of regulation, as well as lack of judicatory and literature, does not allow describing the contract of lease of rights in detail. The doctrine indicates that the lease of rights may only apply to those economic rights that are transferrable, usable and bring profits.[16] Since the subject of the contract is a right, not a thing, there is not such action as release of thing, but only making the right accessible.[17] The contract of lease is always a paid and permanent agreement.[18] The major difference between the contract of lease and contract of lease is that the essence of the lease is acquiring profits from a thing (right) that is the subject of the contract.

The civil law doctrine generally accepts the lease of economic copyrights – though without any deeper analysis. Usually the economic copyrights are just listed among other examples of rights that can be objects of the lease agreement, whereas there are three different conceptions.

According to the first, it is possible to lease out the copyrights and also even any intellectual property rights. The Polish Supreme Court in the judgement presented below and most of the commentators currently declare this conception. However, this statement is not particularly argued by its followers. The argument is based on the fact, that economic copyrights can bring profits and this is *essentialia negotii* of the lease agreement. Therefore, it is admissible to enter into a copyright lease agreement.[19] The followers of the conception also point out, that copyright law does not exclude the freedom of contract so as long as the binding regulations are preserved, either the contract of lease or for example usufruct is possible to conclude. The main advantage benefit from

[14] Ibidem
[15] B. Baliga, M. Kućka, *Korzystanie z praw autorskich. Użytkowanie i dzierżawa a licencje*, (in): „Transformacje prawa prywatnego", No. 2/2008, p. 12
[16] K. Pietrzykowski, commentary to the art. 450, in K. Pietrzykowski (ed.), *Kodeks cywilny, Komentarz*, vol. II. Warszawa 2011
[17] Ibidem
[18] Judicatory of the Court of Appeal in Katowice, 17.01.2007, I ACa 1440/06
[19] A. Niewęgłowski, *Gloss to the Supreme's Court Judicatory from 26th January 2011, IV CSK 274/10*, (in): "Glosa", No. 1/2012, p. 95-96; B. Baliga, M. Kućka, *Supra* note 15, p. 21

concluding such contract is its broader effectiveness, because in case of a transfer of the copyrights the tenant is protected and has a legal title to use the work on the rented fields of exploitation. It is also possible to apply provisions regulating defects of the rented item.[20]

According to the second, so-called "indirect" opinion of prof. Elzbieta Traple, the lease of copyrights is generally admissible, but with additional reservations.[21] First of all, because the regulation of lease of rights does not mention any reservation for binding laws, the contract may be concluded only among parties from the second circulation, because only between such parties the copyright protection of an author is excluded. In other words, it is not possible for an author to conclude the contract of lease and exclude the obligatory regulations. Secondly, the protection that lease offers to the lessor is not that strong. He/she is protected in case of a transfer of copyrights, but the purchaser may terminate the lease contract. The situation, when the contract cannot be terminated assumes, that the contract must be concluded with a certified date and also that the subject of lease will be released to the tenant. This condition, however, cannot be fulfilled in respect of the copyrights, as their subject are intangible assets, which may be used by unlimited number of people, completely independent of each other. According to prof. Traple, then, the protection of the lessor is weak and the contract of lease has no significant practical meaning.

According to the third opinion, the applicability of lease contract in respect of copyrights is fully excluded. This statement is argued only on the basis of literal interpretation of the provisions of the Polish Copyright Act and Related Rights.[22] According to Article 67 of the Act, the rightholder may authorize a person to use the work in specified fields provided in the agreement, and in accordance with Article 42 paragraph 2 "license" is an agreement to use the work. Therefore, any agreement, regardless of the title, whose subject is the authorization for using the work, is to be interpreted as a license. Moreover, from this provisions is to be concluded that the legislator provides the dichotomy between a copyright transfer agreement and a license agreement. Consequently, any contract relating to the copyright or using the work is to be interpreted as a license agreement or copyright transfer agreement. From this point of view the use of the work without a purchase of the copyrights is possible only under the license agreement (whose main features are stated in Chapter 5 of the Copyright Act). On the other hand, in a dispute about the nature of the agreement, is to interpret it as a license agreement.

As mentioned above, the problem of applicability of copyright lease appeared quite recently in the decision of the Polish Supreme Court of 26 January 2011. The following facts were relevant for the judgment: parties, both self-employed and with long experience in organizing events and art exhibitions, entered into an agreement whose subject were counter obligations connected with the organization of the exhibition of photographs about the Pope (Jean Paul II) in Poland and abroad. In the contract, the plaintiff stated that he is the rightholder of these photographs and has the right to use them as the collection in form of art

[20] A. Niewęgłowski, *Supra* note 19, p. 98
[21] E. Traple, *Supra* note 4, p. 22
[22] A. Pązik, *Gloss to the Supreme Court's Judicatory from 26th January 2011, IV CSK 274/10*, Lex/el., 2012, No. 150055

exhibitions. It was also stated that the plaintiff "will rent to the tenant [the defendant] the Exhibition and the tenant will rent from the [plaintiff] the Exhibition and will pay rent at the following rate (…) and also is obligated to take part in organizing the Exhibition of the photographs". The agreement contained also a number of detailed provisions specifying the obligations of the parties related to the of organization other exhibitions and the amount and terms of payment of rent. The agreement was concluded for the next 5 years. The following case was however complicated by the fact, that the plaintiff was not the holder (was not entitled to) of the rights to the Pope-photographs. He was only entitled to use them on the basis of license agreement with the rightholder, the owner of the photographs. In the license agreement, entered between the real rightholder and the plaintiff, it was stated, that "all pictures are protected under copyright law and the license contains the right to use them only for one exhibition" and that the agreement does not contain other rights to use the photographs for other purposes (such as publication, advertising or souvenirs). Despite this license regulation, the plaintiff entered into a lease agreement with the defendant. The dispute between the parties arose due to improper performance of obligations, and in the process the defendant argued the plaintiff's *lack of locus standi*.

The Polish Supreme Court made a statement that the copyright regulation does not exclude the possibility of applicability of the provisions of Polish Civil Code, including its particular part (Law of Obligations). Therefore it is possible to enter into any other than provided in copyright law contracts, that is other than a transfer or license agreement. As a consequence, the Supreme Court allowed for the applicability of Civil Code regulations, at least the part about Law of Obligations for contracts referring to copyright works.

In this context the Polish Supreme Court stated, that the agreement made between rightholder and the plaintiff was a license agreement for usage of the photographs of Pope for exhibition, however it did not cause that the plaintiff was not allowed to use those photographs also in a wider range, for example, for commercial use with the defendant. Therefore there is no reason to assume that the plaintiff was not entitled to enter into a lease agreement with the defendant, in which he entitled him to use the photographs for other exhibitions. In the Supreme Court's opinion, the exhibitions made with the defendant were *de facto* included in the matter of the first license agreement between the plaintiff and the rightholder. The most important point of reference for this paper is, however, the statement of the Supreme Court that there is no reason to exclude the applicability of Civil Code regulations in the field of copyright law, especially its Law of Obligations – despite the view in the literature that the legal regulation of copyright law is complete and any different contracts other than specified in the Copyright Act may be interpreted as a law circumvention.[23]

Although the lease contract has many practical advantages, especially for the copyrights purchasers, there are no legal frames for accepting this type of agreement in this branch of law. As indicated at the beginning of the paper, in the Polish, system the separation between the personal and economic rights is not complete. Therefore, even though the economic copyrights are fully

[23] Ibidem

transferable, the personal rights of a creator limit them, even if the contract of transfer was concluded in the second turnover. What is more, there is no legal justification for differentiating the legal situation of the participants of the first and second turnover, as there is no single regulation that diversifies the two markets. Moreover, the copyright regulation of copyrights agreements seems to be complete – whenever there are doubts whether a contract is transferring the copyrights, the act requires license-presumption. The act therefore recognizes and accepts two types of agreement and as a specific regulation it excludes other general civil regulations such as civil code.

Streszczenie

Tematyka niniejszego referatu odnosi się do różnic między umową dzierżawy a umową licencji – zagadnienia, w zakresie którego stosunkowo niedawno w orzecznictwie polskim powstał problem do rozstrzygnięcia. Artykuł omawia również polskie prawo autorskie ze szczególnym uwzględnieniem umów oraz możliwości stosowania do tej części prawa autorskiego konstrukcji znanych z prawa cywilnego. Proponowany przez nas referat sprowadza się zatem do odpowiedzi na pytanie, w jakim zakresie, na gruncie prawa autorskiego dopuszczalne jest stosowanie postanowień części szczegółowej zobowiązań polskiego kodeksu cywilnego i w konsekwencji w jakim zakresie dopuszczalna jest swoboda dysponowania prawa autorskimi. Artykuł omawia trzy stanowiska doktryny w tym zakresie. Poddane analizie jest również orzeczenie Sądu Najwyższego zezwalające w istocie na zawieranie umowy dzierżawy w stosunku do autorskich praw majątkowych.

Summary

The paper refers to the differences between the contract of lease and license – the issue that most recently appeared in Polish jurisdiction. The paper also describes Polish copyright law, focusing especially on contract law. Since the Act of Polish copyright law regulates two types of contracts: a contract that transfers the copyrights and the license that entitles the licensee to use a work in exchange for proper remuneration, the question appears – how wide the application of Polish civil law to the Polish copyright law is possible and – in the consequence – how flexible may be the disposal of the economic rights to a work. The paper analyzes three dogmatic conceptions formulated by the doctrine, as well as describes and discusses most recent Polish Supreme Court's judgment, which – despite the vital doubts signalized in the paper – allowed to conclude the contract of lease of the economic copyrights.

Bibliography

1. Baliga B., Kućka M., *Korzystanie z praw autorskich. Użytkowanie i dzierżawa a licencje*. (in:) „Transformacje prawa prywatnego", No. 2/2008
2. Barta J. (ed.), *System prawa prywatnego. Prawo autorskie*. Vol. 13, 2nd edition, Warszawa 2010
3. Desbois H., *Le droit d'auteur*. Paris 1950
4. Niewęgłowski A., *Gloss to the Supreme's Court Judicatory from 26th January 2011, IV CSK 274/10*, "Glosa", No. 1/2012

5. Niżankowska A., *Prawo do integralności utworu*. Warszawa 2007
6. Pązik A., *Gloss to the Supreme Court's Judicatory from 26th January 2011, IV CSK 274/10*. Lex/el., 2012, No. 150055
7. Pietrzykowski K. (ed.), *Kodeks cywilny, Komentarz*. vol. II, Warszawa 2011
8. Traple E., *Umowy o eksploatację utworów*. Warszawa 2010
9. Włodarska-Dziurzyńska K., Targosz T., *Umowy przenoszące autorskie prawa majątkowe*. Warszawa 2010
10. Wojeciechowska A., *Autorskie prawa osobiste twórców utworu audiowizualnego*. ZNUJ, PWiOWI. Kraków 1999