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MAKING AVAILABLE ARCHIVAL MATERIALS PROTECTED BY COPYRIGHT IN POLISH ARCHIVES OF UNIVERSITIES AND SCIENTIFIC INSTITUTIONS

Polish university archives have the status of historical archives, the so-called 'archives with entrusted collection'. Therefore they are entitled to keep the records which do not have to be handed over to the State Archives. Similar types of archives are two major archives of the Polish Academy of Science – in Warsaw and in Cracow. Moreover, there exist archives of several scientific institutions (e.g. institutes of the Polish Academy of Science, the Polish Geological Institute).

There are numerous archival documents in the historical archives that are protected by copyright. These are mainly various photographs, sound recordings, films, materials in private papers (particularly correspondence, scientific notes, unpublished texts of papers, lectures, presentations), as well as unpublished master's theses that make up (together with personal records) a major part of the university archives.

Records that are protected by copyright have reached the archives and continue to be received by them in various ways: as donations, through purchases, as the documentation of statutory activities pursued by universities and scientific institutions. It is necessary to say that private papers of contemporary scientists are usually dug out from their desks after their death; however, frequently there is no formal consent of their heirs to take them over, as there is no professional division between private papers and what has been produced further to the performance of official obligations (this relates to personal addressed correspondence, notes, official research queries).

The Polish legislator specifies the subject matter of copyright. It relates to any and all manifestations of creative activity of an individual nature, established in any form, irrespective of its value, designation, or manner of expression (work)¹. When further talking about the archival materials protected by copyright, the term *work* will be used. There are two groups of copyright: moral and economic rights. The author's moral rights provide protection that is unlimited in time and not subject to waiver or disposal of the author's bond with the work. These are rights to the work's authorship, integrity of form and contents of the work, deciding about making the work available to the public for the first time, supervision over the manner of using the work². The author's economic rights indicate that the author is entitled to the exclusive right to use and dispose of the work in all fields of exploita-

¹ *Ustawa o prawie autorskim i prawach pokrewnych z dnia 4 lutego 1994 r.* [Act on Copyright and Related Rights of 4 February 1994] (further: *Copyright Act*), "Dziennik Ustaw Rzeczypospolitej Polskiej" (further: Dz.U.), 24 (1994), poz. 83, article 1, clause 1. See commentary on the Act: J. Barta, R. Markiewicz, *Prawo autorskie [The copyright]*, (2010), pp. 25–63.

² *Copyright Act*, article 16.

tion and the right to remuneration for the use of the work, but such rights shall expire 70 years after the author's death³.

When reviewing the issue of how Polish archives operate to make their sources available in the context of copyright it must be said that there are two acts of law that are of specific importance: the Act on Copyright and Related Rights and the Act on National Archival Records and Archives⁴. These two acts of law are of equal importance; however, given the topic which is being reviewed here, they both exclude each other. The Archival Act provides for the possibility of common and unlimited accessibility to records for the purposes of science, culture, technology, and economy – with the only limitation that their access is possible 30 years after the moment of their creation⁵, though in certain cases it is permitted to have them accessible earlier⁶. Archival materials shall be understood under the Act as any records and charters, correspondence, financial, technical and statistical documentations, maps and plans, photographs, film and microfilms, sound and video recordings, electronic documents and other documentation, regardless of the manner in which they have been created, and of the importance as a source of information having a historic value⁷. Thus, the definition also encompasses

³ *Copyright Act*, article 36.

⁴ See note 1 and *Ustawa o narodowym zasobie archiwalnym i archiwach z dnia 14 lipca 1983 r.* [Act on National Archival Records and Archives of 14 July 1983], Dz.U., 38 (1983), poz. 173, (further: *Archival Act*).

⁵ *Archival Act*, article 17.

⁶ *Archival Act*, article 17, clause 2. *Rozporządzenie Ministra Kultury i Dziedzictwa Narodowego z dnia 13 grudnia 2000 r. w sprawie określenia szczególnych wypadków i trybu wcześniejszego udostępniania materiałów archiwalnych* [Directive of the Minister of Culture and National Heritage on the qualification of detailed cases and mode of making archival materials accessible earlier], Dz.U. 13 (2001), poz. 116.

⁷ *Archival Act*, article 1.

ses works that can be the subject matter of copyright. There is, however, no reference in the Archival Act to that type of protection. Meanwhile the Copyright Act says that archives (belonging to libraries and schools) might make their collections available free of charge, in accordance with their statutory activities, but this regulation refers only to copies of works that have been disseminated⁸. However, the problem is the fact that archives have works in the case of which it is hard to talk about dissemination as stipulated in the Copyright Act, where dissemination is defined as making the work publicly available, in any manner, upon the author's permission⁹.

In the case of archives of universities and archives of scientific institutions (which have the right to confer Ph.D. degrees) it is a very important issue to make master's, bachelor's or doctoral theses available. It is necessary to say that theses with personal records make c.a. 80% all records collected in archives of universities.

The availability of master's, bachelor's, or doctoral theses is a separate issue, as master's and bachelor's theses are treated differently from doctoral theses in this respect¹⁰. This is due to the fact that before they are defended, doctoral theses are made available in university libraries where each reader may become

⁸ *Copyright Act*, article 28, clause 1.

⁹ *Copyright Act*, article 6, clause 3. As disseminated can be recognized texts of unpublished lectures, speeches, because the author made them available publicly.

¹⁰ J. Barta, R. Markiewicz, *Autorskoprawne problemy prac magisterskich i doktorskich* [Problems on the protection of the copyright master's and doctoral theses], in: *Księga pamiątkowa ku czci Profesora Janusza Szwaji*, ed. by J. Barta, E. Nowińska, M. du Vall, (*Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Instytutu Prawa Własności Intelektualnej* 88, 2004), p. 107 and next.

acquainted with them¹¹. This status is recognized as dissemination, which is the same as specified in the Copyright Act. Issuing master's and bachelor's theses looks different because before they are defended they have not been made available anywhere, they have not been disseminated. In the light of the law only the author can decide about the dissemination of their own thesis. At present it is a standard, written into the acts of the law of universities, that a statement of intent shall be obtained from the author of a bachelor's or master's thesis so as to make it available. However, such statements have been commonly required for only a few years now. Thus, a further problem is created as to the possibility of making available those theses whose authors have not made statements in that respect. The rules of universities (availability regulations), which in principle violate the copyright law, provide that a thesis supervisor or the head of the faculty where a thesis has been written, or the director of a relevant institute shall decide about the possibility of making a specific thesis available¹². Free access to such theses is provided in the rules for independent researchers. It may be said that the adoption of such a position, though non-compliant with copyright, is a choice made between the general principle of common access to records, and limitations in making works available stemming from the protection of co-

¹¹ According to *Ustawa z dnia 14 marca 2003 r. o stopniach naukowych i tytule naukowym oraz o stopniach i tytule w zakresie sztuki* [Act about scientific degrees and scientific title and about degrees and title in the field of art of 4 March 2003], Dz.U., 65 (2003), poz. 595 and internal legal articles of universities.

¹² For example regulation of making available the following archives of universities: University of Wrocław, Nicolaus Copernicus University, University of Szczecin, University of Łódź, University of Warmia and Mazury in Olsztyn, Maria Curie-Skłodowska University in Lublin (regulations available on websites).

pyright. But in my opinion this clearly unlawful position should not take place¹³.

Another solution to the problem may still be seen here, namely the so-called *orphan works*¹⁴. Although this term is not defined by the provisions of the copyright law, it shall be understood to describe works for which it is impossible to establish the subject of economic copyright or in which the identity of the subject of copyright is known (creator or successor in right), but it is impossible to establish contact with him (the place of residence is unknown, there is no valid address available). The second premise for the majority of users wishing to inspect master's theses is satisfied¹⁵.

The Copyright Act also creates the possibility of giving priority to the university to publish the master's thesis of a student within 6 months from its defense¹⁶. The authors of a commentary to the act of law, however, do not see the possibility of making it

¹³ In recent months universities have started to change their regulations on this subject. Only authors can decide to make theses available (e.g. in the Archives of Jagiellonian University in Krakow, the Archives of the University of Silesia).

¹⁴ S. Stanisławska-Kloc, *Utwory „osierocone”* [‘Orphan’ works], (*Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 100, 2007), pp. 453–476; A. Vetulani, *Dzieła osierocone – w poszukiwaniu europejskiego rozwiązania* [Orphan works – in search of European solution], (*Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 103, 2009), pp. 26–50. See a discussion on this subject in http://kongreskultury.pl/title,Prawo_autorskie,pid,34,oid,32,fsid,42.html (visited on 15 December 2010).

¹⁵ It should be added that archives of universities cannot make addresses of authors available (according to *Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych* [The Act about the protection of the personal data of 29 August 1997], Dz.U., 133 (1997), poz. 883).

¹⁶ *Copyright Act*, Article 15a.

available on-line¹⁷. Nonetheless, in the light of the etymology of the verb *publish*¹⁸, it may be discerned that the provision establishes a statutory permit to publish it on the Internet as well. The problem, in my opinion, lies in the relatively short period of time that the legislator allocated to universities for such actions, which makes such tasks logistically impossible to perform with regard to all theses that are created. Certainly such a task could not be handled by university archives, since, as a rule, they receive documentation (master's theses included) two years after the completion of the matter, after the defense in this instance.

Another problem connected with archival materials and copyright is the fact that in the case of universities and scientific institutions most documents protected by copyright are created as a result of employment. But then, according with the Copyright Act, the employer shall acquire the economic copyright and may, within two years from the acceptance of the work, disseminate it, which consequently will result in the possibility of making it available through the archives¹⁹. The fact that the author has created the work under such circumstances does not deprive them of the right to exercise their moral rights, including the right to supervise the manner in which the work is used, unless a given work has already been disseminated.

The above list of various cases – limitations and attempts at overcoming them in order to have works available – shows how many legal intricacies exist in Polish conditions of making records protected by copyright available in the traditional form. A few remarks are necessary about the possibility of making such re-

¹⁷ See: *Prawo autorskie i prawa pokrewne* [The copyright and related rights], introduction J. Barta, R. Markiewicz, (2008), p. 51.

¹⁸ A. Brückner, *Słownik etymologiczny języka polskiego* [Etymological Dictionary of the Polish Language] (2000).

¹⁹ *Copyright Act*, articles 12–14; *Prawo autorskie*, pp. 76–78.

cords available (after their digitalization) in an on-line mode. The Polish law, in principle, excludes the possibility of such actions. A relevant article of the *Copyright Act* states that archives might make their collections available for research or learning purposes through information technology system terminals (endings), but this applies only to those that are located at the premises of such units²⁰. This provision applies to works that have already been disseminated. Thus, there is no *de iure* permission to make works available on the Internet network (naturally, it does not apply to cases where the owner of the copyright has expressed the consent to such actions).

In practice there are attempts to pass this regulation over as seen in the Archives of the Jagiellonian University, which are developing their Digital Archives of the Jagiellonian University. This Archive is the pioneer in Poland in terms of providing on-line access to master's theses and other archive records that are protected by copyright. They shall contain the list of all theses collected by the Archives: doctoral, master's, and bachelor's theses (with full access to works whose authors have given their permission). In addition, there will be a list and display of all photographs held in the Archives, and their collections will be progressively digitalized²¹.

²⁰ *Copyright Act*, article 28, clause 3.

²¹ <http://www.archiwum.uj.edu.pl/projekty-auj/cyfrowe-auj> (visited on 15 October 2010), A. Cieślak, *Databases in Archives of Jagiellonian University in Krakow*, (lecture given on the conference in Budapest 24–26 August 2008 entitled *50 Éves a Budapesti Eötvös Loránd Tudományegyetem Levéltára. Egyetemi levéltárak az Európai Unióban. "Az informatika alkalmazása az egyetemi levéltárakban. Adatbázis készítés, elektronikus iratok, digitalizálás, honlapok"* [50 Years Archives of University of Eötvös Loránd University. Archives of universities in the European Union. 'Information technology and the use of electronic data processing in archives of universities. Electronic databases, electronic documents, digitalization, website'], text in printing).

It seems that given the context of on-line availability the presented case of *orphan works* may be of fundamental importance, both with regard to master's theses, and also in the case of other archive records that are protected by copyright. The problem has been dealt with by the European Commission in the Recommendation on the digitalization and online accessibility of cultural material and digital preservation of 24 August 2006, which recommends that the Member States create procedures that facilitate the use of *orphan works* and support the accessibility of the lists of known *orphan works*²². In the case of master's theses, the first step might be to make public the lists of such theses that are in the archives in order to localize potential eligible subjects²³.

The principles governing access to the records that archives should be guided by, are, among others, provided in a recommendation prepared by the Council of Europe and the International Council on Archives in 1998 and included in the Code of Ethics for Archivists adopted at 13th International Congress on Archives in Peking²⁴. The recommendation points out that access to public

²² *Zalecenie Komisji z dnia 24 sierpnia 2006 r. w sprawie digitalizacji i udostępnienia w Internecie dorobku kulturowego oraz w sprawie ochrony zasobów cyfrowych (2006/585/WE)* [Commission Recommendation of 24 August 2006 on the digitalization and online accessibility of cultural material and digital preservation], UE L 236/28, available on the Internet

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0208:0030:PL:PDF> (visited on 15 December 2010).

²³ Examples databases: *The Pontifical University of John Paul II in Krakow* <http://www.pat.krakow.pl/fidkar/inwentarz.html> (visited on 15 December 2010); *The John Paul II Catholic University of Lublin* http://www.kul.pl/prace-dyplomowe-zwiazane-z-dziejami-kul/art_8287.html (visited on 15 December 2010).

²⁴ Available on the Internet <http://www.ica.org/5555/reference-documents/ica-code-of-ethics.html> (visited on 15 December 2010). See: *Kodeks Etyczny Archiwisty uchwalony na XIII Międzynarodowym Kongresie Archiwów* [Code of Ethics for Archivists adopted at 13th International Congress on Archives in Peking], "Archiwista Polski", 1 (1997), pp. 10–14.

archives is one of the civic and human rights. Legislators should pass acts providing the complete opening of archives or specify the time and reason for their inaccessibility. According to the recommendation, private records (also protected by copyright) should be treated as part of the national heritage, being openly accessible, however, having regard to any possible reservations²⁵. The Code imposes the obligation of having the cultural heritage available to the broadest possible extent (which also includes records protected by copyright) in various ways, not only directly, which allows access via the Internet²⁶. Treaties of the World Intellectual Property Organization (WIPO) ratified by the European Union Members and non-associated states, stress the author's right to participate in the decision of making their work available²⁷.

In the context of the above deliberations it must be recognized that the Polish law governing copyright protection and regulations applied to archives slightly diverge. As an archivist and as a user too I can declare that archives (or rather employees of archives) do not seem to be concerned about this problem. A clear regulation is necessary that would decide about the possibility of having archives that are protected by copyright legally available. The idea behind archives and the purpose of their existence should also be taken into account in the case of works and copyright. On-line access remains outside the field of legal regulations in general

²⁵ D. Nałęcz, *Europejska polityka dostępu do archiwów* [European policy on access to archives], "Archeion", 99 (1998), p. 54; Recommendation No. R (2000) 13 of the Committee of Ministers to member states on the European policy on access to archives, available on the Internet <https://wcd.coe.int/ViewDoc.jsp?id=366245> (visited on 15 December 2010).

²⁶ *Kodeks Etyczny Archiwisty*, clause 6.

²⁷ WIPO treaties: Copyright Treaty and Performances and Phonogram Treaty, available on the Internet <http://www.wipo.int/treaties/en/ip/wct/> and <http://www.wipo.int/treaties/en/ip/wppt/> (visited on 15 December 2010).

being a major element of making the cultural heritage available. Therefore, an animated discussion, also on an international forum, is needed to work out a model consensus as to how archives should operate and how copyright should be protected.

This paper does not address all the issues relating to the topic – it is only a single contribution to a broad review of the topics discussed here.

UDOSTĘPNIANIE MATERIAŁÓW ARCHIWALNYCH
PODLEGAJĄCYCH OCHRONIE
Z TYTUŁU PRAW AUTORSKICH W POLSKICH ARCHIWACH
UNIwersYTETÓW I INSTYTUCJI NAUKOWYCH

(STRESZCZENIE)

Archiwa uniwersytetów w Polsce posiadają status archiwów historycznych, podobnie jak archiwa Polskiej Akademii Nauk w Warszawie i Krakowie. Poza nimi istnieje szereg archiwów instytucji naukowych, które przez określony prawem czas także przechowują i udostępniają materiały archiwalne. W archiwach tych znajduje się wiele materiałów, które podlegają ochronie z tytułu praw autorskich: fotografie, nagrania dźwiękowe, filmy, materiały tworzące spuścizny, a także niepublikowane prace licencjackie i magisterskie (stanowiące dużą część zasobów archiwów uniwersyteckich). Polska *Ustawa o prawie autorskim i prawach pokrewnych* określa, kiedy wspomniane dzieła mogą być utworami w rozumieniu ustawy i w związku z tym podlegać ochronie. Mówi również o zasadach i okresie ich ochrony. Ustawa dopuszcza udostępnianie przez archiwa utworów, lecz tylko tych, które zostały wcześniej rozpowszechnione. Takiego statusu w większości nie posiadają materiały archiwalne. Polska *Ustawa o narodowym zasobie archiwalnym i archiwach* nie odnosi się do materiałów archiwalnych, które mogą podlegać ochronie z tytułu praw autorskich. Problematyczne staje się zatem w archiwach uniwersyteckich udostępnianie prac licencjackich i magisterskich (prace doktorskie mogą być udostępniane, gdyż posiadają statut rozpowszechnionych), przy czym wyjściem może być uznanie ich w określonych przypadkach za „utwory osierocone”. Innym problemem, zwłaszcza w archiwach instytucji naukowych, jest kwestia utworów pracowniczych. Międzynarodowe postanowienia idą w dwóch kierunkach. Rada Europy i Międzynarodowa Rada Archiwów opowia-

dają się za powszechnym dostępem do materiałów archiwalnych, traktowanych jako dziedzictwo kulturalne. Natomiast traktaty Światowej Organizacji Własności Intelektualnej wskazują na konieczność ścisłego respektowania ochrony prawnoautorskiej utworów.

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