




Employee's work on the grounds of Polish Copyright Law

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Abstract

Motivation: Employees' works are crucial in practice. The validity and need for discussions on the rights of the employer to the employee's work is justified by the increasing concern for the observance of copyright, and also for employee–employer relations. By entering into an employment relationship, both parties must be aware of their rights and obligations.

Aim: This article presents the issue of copyright status of an employee's work regulated in the Article 12 and 13 of the *Act on copyright and related rights*. The considerations focus on the legal relationship between the employer and the employee-author, and the issue of acquiring author's economic rights to the work created by the employee within the employment relationship. The article is based on the analysis of legal regulations and judicial decisions.

Results: Regulating rights to the work created by the employee is dependent on the will of the parties. It is only the absence of contractual terms in this respect that results in a reference to the statutory provisions, which define the rules of transferring copyright for the employee's work to the employer. Article 12 of the *Act on copyright and related rights* specifies grounds for secondary acquisition of copyright by the employer. One should remember that this regulation concerns solely author's economic rights because author's moral rights, which due to their nature are non-transferable, remain with the author or employee.

Keywords: *author's economic rights; employer; employee; work*
JEL: *K10; K11; K15*

1. Introduction

In accordance with the provisions of the *Act on copyright and related rights* (1994, Article 1), a work is any manifestation of creative activity of individual nature, established in any form, and copyright may be generally held by the author — that is, a person who created the work.

Author's moral rights are non-transferable, although one can oblige oneself to their non-performance. Author's economic rights are, however, transferable and one can dispose of them (Pakuła-Gawarecka & Stolarski, 2014, pp. 37–39).

Copyright introduces a particular exception from the above-specified rules in connection with an employee's works — i.e. works created by employees as a result of their performance of duties under the employment relationship. According to Article 12, unless an act or employment agreement state otherwise, an employer whose employee created a work as a result of performing duties under the employment relationship, acquires, on the receipt of such work, author's economic rights within limits resulting from the aim of the employment agreement and shared intention of the parties (*Act on copyright and related rights*, 1994). The above regulation is general in nature and applies to all works created by an employee as a result of performing duties under the employment relationship.

Additionally, a provision of Article 14 regulates the matter of scientific institutions acquiring the rights to scientific works created by the institution's employee, and Article 74, section 3 indicates the holder of the rights in a computer program created by an employee while performing duties under the employment relationship (Jujeczka-Sroka, 2019).

The above-mentioned rules of transferring copyright do not apply to mandate contracts and task-specific contracts. This was confirmed by the Supreme Court judgement (2011, IV CSK 504/10), in which the court claimed that in the above case the company did not have any rights to the work. The accuracy of this view of the judicial decisions seems obvious — after all, these agreements do not shape the employment relationship.

2. Legal nature of Article 12 of *Act on copyright and related rights*: literature review

Despite the profound practical importance of the transfer of copyright to the employer, this matter has not become the subject of in-depth analysis by the representatives of the doctrine of law.

There is no doubt that an employee's work is only a work created by an employee within the employment relationship. The terms 'employment relationship', 'employee', and 'employer' should be interpreted according to labor laws.

Copyright for the work is exclusive and as a rule is acquired by the author (*Act on copyright and related rights*, 1994, Article 8). The doctrine expresses

the homogeneous view that the transfer of copyright for the employee's work to the employer is secondary in nature and occurs under the provision of Article 12 (see Resolution of the Supreme Court, 2012, III UZP 4/11). It is emphasized that the provision of Article 12 of the *Act on copyright and related rights* (1994) regulates “specifically and autonomously the matter of transfer of author's economic rights to the employer” (Barta & Markiewicz, 2011).

The acquisition by the employer of economic rights in the work created by the employee shall take place upon meeting of the conditions specified in Article 12 of the *Act on copyright and related rights* (1994). Thus, it is not necessary to conclude a separate civil law agreement regulating the matter of employer's rights in the work created under the employment relationship.

The view prevails that the acquisition of rights takes place in the event of the requirement to conclude an employment agreement in writing not being met (see e.g., Traple, 2010, p. 170; a different view, however, is presented in Jaworski, 2003, p. 150). This position should be accepted, as the fact that the requirement to conclude a written employment agreement is not met does not cancel out the existence of the employment relationship from the legally substantive point of view.

The legal nature of Article 12 still remains a disputed matter. Most authors rightly assume that this norm is dispositive in its nature (Barta & Markiewicz, 2006, p. 156; Targosz, 2013, pp. 1291–1293; Widła, 2020). The relatively binding nature of these provisions results in them being applied only if the parties within the employment relationship do not shape in any other way the employment agreement with regard to the matters related to the use of the employee's works. This means that, in the first place, author's economic rights will go to the entity defined by the parties in the employment agreement, and only in the event that such a clause does not exist in the agreement will they go to the employer (Górnicz-Mulcahy, 2012, p. 50).

In accordance with the Supreme Court judgment (1998, I PKN 196/98): “the performance of duties under the employment relationship shall rely on the creative work of the employee, the parties decide who should own author's economic rights. If the specifics of such rights are not defined in the employment agreement, the author's economic rights to such works, within the boundaries resulting from the employment agreements and joint intention of the parties, are acquired by the employer upon receiving them” (*Act on copyright and related rights*, 1994, Article 12, section 1). In view of the foregoing, the employment agreement cannot be considered synonymous with the agreement of the transfer of author's economic rights. The employer acquired such rights under the laws upon receipt of the work. “If secondary acquisition (of author's economic rights) takes place by *cessio legis*, the agreement of the transfer of author's economic rights on the same field of exploitation seems redundant” (Bakalarz, 2013).

It is worth emphasizing that an employment agreement can include provisions that differ from the general rules. The Appellate Court in Poznań (2008,



I ACa 87/08), in its judgement, indicated also that “as permissible in the employment agreements should be considered the provisions that envisage that during the employment relationship author’s economic rights in all works of the employee or all works of a specified kind are transferred to the employer” (Jujeczka-Sroka, 2019).

However, one can find an opposite view in other literature. Such a position is taken by Stec (2008, p. 57), who claims that “different provisions” of the employment agreements cannot be less beneficial to the employee than the applicable provisions. It seems that adoption of the semi-imperative character of the regulation in question does not have its statutory justification (Flisak, 2018).

3. Research methods

To achieve research objective, to which the layout of this article is subordinated, the author used the method of analysis and critique of legal norms and court decisions.

The text is mainly based on the *Act on copyright and related rights* (1994), that regulates the issue of copyright status of an employee’s work. The article refers to rich jurisprudence, in particular the jurisprudence of the supreme court, in the discussed topic.

Also, it has been decided to apply the methods of analysis and criticism of the literature.

4. Employee’s work

The employer can acquire author’s economic rights to the works created by the employees as a result of performing duties resulting from the employment relationship, irrespective of the category to which we can qualify it. To acquire economic rights, it is not necessary for the work to be functional in its nature.

It is necessary for the work of the employee to meet the conditions specified in Article 1, section 1. According to this provision, “the object of copyright shall be any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose and form of expression” (Act on copyright and related rights, 1994).

“The statements that the work is a manifestation of ‘creative activity’ means that the work should be a result of activity that is creative in its nature. This condition, sometimes defined as the condition of ‘originality’ of the work, is met if there exists a subjectively new creation of the intellect” (Appellate Court in Poznań judgement, 2007, I ACa 800/07). At the same time “such manifestation of human mental activity which does not have sufficiently individual features, i.e. features that would differentiate it from other works of similar type and purpose, cannot be considered as a work and protected by copyright” (Supreme Court judgment, 2006, III CSK 40/05). “The determination

of the activity shall be made in a way that allows for unambiguous indication that the performed work is creative in its nature and its subject is creation” (Górnicz-Mulcahy, 2012, pp. 51–52).

There is no doubt that the employee’s work can be only work created by an employee in the course of the employment relationship. The terms ‘employment relationship’, ‘employee’ and ‘employer’ are interpreted on the basis of labor laws. In accordance with Article 22, section 1 of the *Labor Code* (1974): “by establishing an employment relationship, an employee assumes the obligation to perform specific work for the employer and under the employer’s direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee against payment of remuneration”. What is crucial is that the acquisition of author’s economic rights by the employer remains effective even after the employment relationship ceases. This is highlighted in the judgement of the Appellate Court in Warsaw (2007, I ACa 116/07). The termination of the employment agreement at a later time does not change anything. In particular it does not result in the employer losing the copyright in the work, or the employee acquiring (‘recovering’) it (Barta & Markiewicz, 2016).

According to the adopted position, the rule of acquiring author’s economic rights by the employers, expressed in Article 12 of the *Act on copyright and related rights* (1994) applies only to employees employed on the basis of the employment agreement. It does not apply to works created by employees employed by means of appointment, selection, nomination or cooperative employment agreement (Więzowska-Czepiel, 2017). A similar position is expressed in the judicial decisions. The Supreme Court judgment (2011, IV CSK 504/10) states that “the creation of a work by the partner in a commercial law company, who is a member of its board and is not bound with the company by an employment agreement covering the duty to undertake creative activity, does not justify the right of the company to the work under Article 12 of the *Act on copyright and related rights* (1994)”.

“The lack of absolute personal obligation to provide work excludes the possibility to qualify the legal relationship as an employment agreement” (Supreme Court judgment, 1998, I PKN 416/98). “The labor law aspect of the established legal relationship does not preclude the employee to sporadically use the help of another person (another employee or — in specific conditions of work provision — also a person not employed by the same employer). Such help is necessitated by various frequent reasons and circumstances, both objective and on the side of the employee” (Supreme Court judgment, 2007, I UK 221/06).

The mere creation of the work in the course of the employment relationship is not a sufficient condition to assume that the work is an employee’s work. It is necessary for the work to be created “as a result of performing duties under the employment relationship”. Creation of a given work should thus be within the scope of tasks (duties) of the employee. “Such duties can be defined

in the very employment agreement, in direct official orders (however, only those issued within the limits of the employee duties of the given author)” (Appellate Court in Katowice judgment, 2011, V ACa 422/11).

The remaining circumstances are not relevant for the acquisition of economic rights by the employer. For example, it is irrelevant whether the work was created during office hours or on the company premises, or whether it was created using materials and equipment provided by the employer. “Creating creative work boils down to the mental work which cannot be constrained in place or time (Więzowska-Czepiel, 2017).

If an employee breaches their employee duties, this puts them at risk of disciplinary liability; however, this does not affect who has exclusive rights to the created work. This position is confirmed by judicial decisions. One decision states that “using in the creative process equipment or materials belonging to the workplace, preparing the work during office hours of the author, financing the creative work by the workplace or participation in the creative process of other people employed at the same workplace or tolerating by the author of the fact of exploiting the work by the workplace without agreement with the author, is a sufficient basis for the work to be considered ‘employee’s work’” (within the meaning of the *Act on copyright and related rights* (1994, Article 12)) (Appellate Court in Katowice judgment, 2011, V ACa 422/11). “Preparation of the work during office hours, financing creative work by the workplace or even tolerating by the author of the fact of exploiting the work by the workplace without agreement with the author is without crucial importance. (...) Qualification of work as an employee’s work requires for the work to be created as a result of the employee’s obligation to create the work, including creative duties within the meaning of copyright. Article 12, section 1 of the Act can be on the other hand applied in the event of other connections between the work and the employment relationship, and it does not include, among others, the situation in which the work was created only in connection with the time, place, by the way of performing work, or thanks to the contribution of the employer (...)” (Appellate Court in Gdańsk judgment, 2012, I ACa 602/12).

Rules that are more beneficial for the authors are expressed in Article 14 of the *Act on copyright and related rights* (1994), applicable to scientific works created at scientific institutions in the course of performing duties under an employment relationship. The employer has the priority to publish (in which case the author has the right to additional remuneration) and the right to use the scientific material included in the work and to share the work with third parties, within the limits resulting from the circumstances of creating the work. The literature emphasizes the marginal significance of the latter from the rights granted to the employer (Barta & Markiewicz, 2011, pp. 60–61).

According to Article 74, section 3 of the *Act on copyright and related rights* (1994), economic rights in a computer program created by an employee in the course of performing duties resulting from the employment relationship are owned by the employer, unless the agreement states otherwise. The acqui-

sition by the employer of author's economic rights in a computer program is primary in nature. This occurs under the laws, and therefore there is no need to perform any other legal action, in particular a statement of receiving the program by the employer; the acquisition by the employer of author's economic rights occurs automatically upon the creation of the computer program.

Exceptions specified in Article 14 and Article 74, section 3, however, are not the subject of detailed analysis in this article.

5. Conditions for acquiring copyright by the employer

Acquisition of economic rights for the work takes place upon the receipt of the work, and not its creation. It is important to note that the provision of Article 12 of the *Act on copyright and related rights* (1994) is dispositive in nature, and the acquisition by the employer of the author's economic rights is permissible if the parties did not agree otherwise in the employment agreement. Until the receipt of the work (from the moment it is established), author's economic rights remain entirely on the side of the author-employee.

The receipt of the work means a unilateral declaration of will directed by the employer to the employee, the subject of which is the receipt of the work, i.e. declaration that the employer accepts the results of work as consistent with the employment agreement (Sarbiński, 2019). If there is no explicit indication of the way in which the receipt is performed and approved, it is in the interest of the employer to formulate such work receipt procedures in order for this fact to be able to be subject to verification.

The parties can specify the moment of transferring author's economic rights to the employer differently. The employer can acquire economic rights at the moment when the work is created or at a later time, such as when the work is disseminated. There exists a valid opinion in the literature that "if a specific agreement determined the time for transferring economic rights onto the employer in a way that is less beneficial for the employee than under Article 12 of the *Act on copyright and related rights* (1994), then Article 53 applies to such an agreement. Thus, it will be necessary to conclude an employment agreement in writing, otherwise it will be null and void. For the analyzed cases the transfer of author's economic rights takes place under the provisions of employment agreement (modifying, to the detriment of the employee, the provision of Article 12 of the *Act on copyright and related rights* (1994)), and not under the provision of Article 12" (Pażik, 2011).

Article 13 of the *Act on copyright and related rights* (1994) also introduces an alleged transfer of the work by the employer, if the employer does not notify the author, within six months of the receipt of the work, of non-receipt of the work or making the receipt dependent on the implementation of specific changes.

This period of employer's inactivity may be prolonged or shortened under the provisions of an employment agreement. However, if the circumstances

do not explicitly point to the fact that the employer performed successful receipt of the work before the end of the period, the statutory transfer of rights does not take place and economic rights remain with the employee. The above regulation removes, to some extent, “undesirable results of the prolonged state of uncertainty on the side of the employee as to the person who owns the rights” (Ożegalska-Trybalska, 2021).

An employer can demand that the employee makes changes to the created work. The nature of such changes will depend on particular circumstances and the type of the work. They might take the form of removing small defects or errors or involve more thorough content changes. The employer should notify the employee about the need to make specific changes and determine a deadline for their implementation. Should the employee fail to make changes, it is assumed that the receipt of the employee’s work did not take place, and the only person with the rights to it is the author. Undoubtedly such action is a breach of the employee’s obligations, and this can result in the employee’s liability in the view of labor laws (Flisak, 2018).

There emerges the question over whether a six-month period, as specified in Article 13, is appropriate. On the one hand, it is unfavorable for the employee, as it prolongs the period of uncertainty as to the legal fate of the created work. However, on the other hand the need to introduce modifications to the work can arise even after the six-month period specified in the Act has passed (Ożegalska-Trybalska, 2021).

6. Scope of employer’s rights

As a result of acquiring author’s economic rights in the employee’s work by the employer under Article 12, section 1, the employer obtains the status of the subject of author’s economic rights. The employer thus becomes an entity entitled to exclusive use of the author’s economic rights and can dispose of them freely. Moral rights, which are non-transferable by nature, remain with the author (i.e. the employee).

The author’s remuneration for the transfer of author’s economic rights or granting a license to use the employee’s work is included in the remuneration for employment. The employee does not have right to additional remuneration, as Article 12 of the *Act on copyright and related rights* (1994) excludes application of Article 43 of the *Act on copyright and related rights* (1994) (Bakalarz, 2013). This is because, in accordance with the *Resolution of the Supreme Court* (2012, III UZP 4/11): “if the performance of the work (subject to copyright) takes place under employment agreements, then it is the employment relationship and not the agreement for transfer of author’s economic rights that serves as the basis for remuneration for the use of the work by the employer”.

According to Article 41, section 2 of the *Act on copyright and related rights* (1994), the transfer of author’s economic rights may include only those fields of exploitation that were clearly indicated in the agreement. The agreement

can relate to only those fields of exploitation that are known in the moment of the agreement's conclusion. At the same time, in accordance with Article 49, section 1, if the agreement does not specify the way in which the work is used, it should be consistent with the nature and purpose of the work and adopted customs.

There is a more clearly liberal position emerging from the doctrine and the judicial decisions, in accordance with which using in the agreement other specifications of fields of exploitation than in the statutory provisions should not result in the agreement being null and void. The parties can freely determine the way of using the work, e.g. implicitly, or by joining several fields of exploitation. However, critical opinions on this matter still appear (Żerański, 2007). The Supreme Court stated that “according to Article 41, section 2 of the Act on Copyright the parties can freely determine the scope of using the work by the purchaser of the licensee, unless it does not raise doubts. As permissible one should also consider determination by the parties in the agreement a part of one of the fields of exploitation, as well as joining several fields of exploitation in the agreement” (Supreme Court judgment, 2005, III CK 124/05).

“Thus, valid seems the statement that there is no need for specifying in the agreement the ways of using the work by the employer. However, of course a detailed indication of ways of exploitation of the work can facilitate determination of intentions of the parties in contentious situations and increase the safety of intellectual goods trading” (Szymura, 2017, p. 486).

In order to assess the scope in which the employee's work can be used by the employer, one has to take into account the statutory scope of the employer's activity, the purpose of the work and the methods of work commercialization used by the employer at the workplace. “Also, customs adopted at the workplace and for the given professional group can be of significance in this case” (Appellate Court in Białystok judgment, 2012, III APa 7/12).

It should be assumed that the employer also acquires related rights in the employee's work, which is justified by the work's functional nature. The use of the work by third parties (e.g. clients) often causes a need to introduce changes to it at a later time (Ożegalska-Trybalska, 2021).

According to Article 12, section 3 of the *Act on copyright and related rights* (1994), the employer acquires, upon receipt of the work, also the ownership of the medium on which the work was fixed.

In the case of works intended for dissemination, the acquisition of the work by the employer results in the obligation to disseminate the work arising on the side of the employer. “According to Article 12, section 2 of the *Act on copyright and related rights* (1994), in the event of the failure of the employer to disseminate the work within two years of its receipt, the rights acquired by the employer, including *corpus mechanicus*, return to the author, unless the agreement states otherwise. The return of the rights to the employee takes place with the force of law, without the need for the parties to perform any specific legal actions. The statutory condition of the return transfer of the rights is an ineffective



lapse of the period for work dissemination specified by the author in writing” (Więzowska-Czepiel, 2017).

7. Conclusion

Knowledge related to the scope of the acquisition of copyright for a work is significant in view of the fact that most employers take it as a certainty that they are the sole owners of copyright to an employee’s work, which is undoubtedly incorrect.

Regulation of the employer’s rights with respect to the work created by the employee, as a rule, depends on the will of the parties.

Only if there are no contractual provisions in this respect should one refer to statutory provisions specifying rules for transferring the author’s economic rights in an employee’s work onto the employer. Article 12 of the *Act on copyright and related rights* (1994) specifies the conditions for secondary acquisition of copyright by the employer. One should remember that such regulation concerns solely author’s economic rights, as moral rights, which are non-transferable in their nature, remain with the author, i.e. the employee.

The employer and employee should be aware of their copyright position with regard to the work created in the course of the employment relationship, in case the matter is not regulated by the employment agreement. On the other hand it is worth sensitizing employers to the matter of respecting the copyright of employees and introducing appropriate solutions in a company’s internal documents, as these can minimize the number of disputes on that matter.

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