



**NEW COPYRIGHT LAW OF POLAND  
ANALYSIS OF LIBRARY-RELATED PROVISIONS**

**Act No. 83 of February 4, 1994, on Copyright and Neighboring Rights  
(as amended up to May 20, 2016)**

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On 20 November 2015, Poland's new copyright law entered into force bringing library services in Poland into the twenty-first century.

This document sets out to analyze the key amendments related to libraries.

The centrepiece for libraries of the new legislation are provisions that enable digitization for socially beneficial purposes, such as education and preservation of cultural heritage.

The new law also implements two important European Union Directives, the Directive on orphan works and the Directive on public lending right.

The Polish copyright reform process, which began in 2012, was characterized by its transparency and multi-stakeholder engagement. The library community participated for the first time in high-level policy discussions on copyright, and librarians became recognized as important stakeholders in a national reform process.

While it is early days to assess the impact of the new legislation, and some practical processes have yet to be put in place, the library community is working hard to raise awareness and train librarians on what the changes will mean for library activities and services in Poland.

We hope that this document serves as a useful analysis for librarians and policy-makers involved in copyright law reform around the world.

**Copyright reform in Poland**

EIFL provided assistance from 2012-2016 to ‘Copyright reform in Poland’, a project to support libraries and the national copyright reform process. The Project Manager was Barbara Szczepańska, EIFL Copyright Coordinator in Poland.

Read more: <http://www.eifl.net/eifl-in-action/copyright-reform-poland>

**About the EIFL Copyright and Libraries Programme**

The EIFL Copyright and Libraries Programme builds capacity of librarians in copyright and develops useful resources on copyright issues. The programme advocates for global rules to benefit libraries and campaigns for national copyright law reform.

Read more: [www.eifl.net/programmes/copyright-and-libraries-programme](http://www.eifl.net/programmes/copyright-and-libraries-programme)

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The full title of the new law is the **Act No. 83 of February 4, 1994, on Copyright and Neighboring Rights (as amended up to May 20, 2016)**.

The 1994 copyright act was amended extensively by the **Act of September 11, 2015, on Amendments to the Copyright and Related Rights Act and Gambling Act**.

The new law is implemented by a series of ordinances or regulations.

The consolidated version of the new copyright law is available on the WIPO website here: <http://www.wipo.int/wipolex/en/details.jsp?id=16154>

## **TIMELINE: COPYRIGHT REFORM IN POLAND**

- 2012** Five stakeholder meetings on copyright law reform initiated by the Prime Minister's office
- 2013** Four meetings of the Copyright Forum on the topics orphan works, out-of-commerce works, public lending right, criminal liability for copyright infringement. The Ministry of Culture opens consultation on the scope of copyright exceptions and limitations.
- 2014** Two meetings of the Copyright Forum on the topics European copyright law reform and licensing.
- Public consultation announced on the draft copyright law.
- 2015** 11 September: the Copyright Bill adopted by the Lower House of Parliament.
- 1 October: public consultation on regulations accompanying the Copyright Bill.
- 20 November: entry into force of the Act of 11th September 2015 on amendments to the Copyright and Related Rights Act and The Law on Gambling.
- 4-20 November: regulations adopted on out-of-commerce works, orphan works, public lending right

Detailed timeline: <http://www.eifl.net/eifl-in-action/copyright-reform-poland>

## OVERVIEW

The Polish copyright act - [the Act of September 11, 2015, on Amendments to the Copyright and Related Rights Act and Gambling Act](#) - entered into force on 20th November 2015.

The reasons for the new legislation were threefold.

First, the new law implements the European Union (EU) Orphan Works Directive (2012), and revises Polish implementation of the Directive on Rental and Lending Right (2006).

Second, it settles legal matters for commonplace activities, such as the reproduction of short works for educational purposes and the use of whole works, such as photographs.

Third, it addresses current cultural policy objectives of the Republic of Poland. The new provisions respect the balance the interests of rightsholders, business and citizens as set out in the European Copyright Directive<sup>1</sup>. Where possible, the Polish government sought to implement the Directive in a manner that supports the promotion, development and popularisation of Polish national culture.

### **Two-year consultation process**

The draft copyright bill was the subject of a two-year consultation process that took place under the Copyright Forum (Forum Prawa Autorskiego), a platform established on a permanent basis by the Ministry of Culture and National Heritage to discuss copyright issues. The Copyright Forum includes representatives of multiple stakeholder groups, including libraries.

During the time between when the Act was adopted by the Polish Parliament on 11th September 2015 and when it entered into force two months later, public consultations on implementing regulations took place, such as diligent search requirements for orphan works,

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<sup>1</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of aspects of copyright and related rights in the information society

designation of the libraries responsible for providing statistical data for Public Lending Right (PLR), and criteria for the selection of the collective management organization (CMO) responsible for managing PLR.

The relatively short time between the adoption of the Act and its entry into force, as well as the quick adoption of the regulations, meant that the library community had to work fast to prepare for the major changes brought about by the new legislation. A series of webinars, presentations and training materials for librarians on the new law were rolled out across Poland during 2016.

### **Key Amendments For Libraries**

The key amendments for libraries relate to the following:

- permitted uses by libraries;
- permitted uses in education and science;
- permitted uses of orphan works;
- permitted uses of out-of-commerce works;
- introduction of a public lending right (PLR);
- abolition of the paying public domain.

## PERMITTED USES BY LIBRARIES

Article 28, that provides the legal basis for permitted uses by libraries, was substantially amended in the new law.

### **Scope and application**

The list of entities that may avail of the exception has been extended. As well as libraries, archives and schools, a range of other entities including museums, universities, research institutes, scientific institutes of the Polish Academy of Sciences, and educational institutions other than schools, may also use the exception.

The activities of the institutions must not be for direct or indirect financial gain. Institutions can however charge for services that are based on other legal provisions. For example, under the Act on Libraries (2012), a library may charge a fee for issuing a library card.

The wording of the scope of the exception has changed from making copies for the purpose of “providing access” to “lending for use”. Since the phrase “providing access” is semantically broader than “lending for use”, it remains to be seen what impact this change will have.

### **Library digitization enabled**

The new law brings about three major changes with regard to digitization by libraries.

First, libraries in Poland are permitted for the first time to make digital copies for preservation purposes (Article 28.1.2). Under the 1994 provisions, libraries were allowed to make preservation copies in analogue (paper) format only. This is because the Polish word for ‘copy’ (‘egzemplarz’) that was used in the exception means a physical copy. In the new act, the word ‘copy’ has simply been removed thereby removing the restriction on the format of the copy.

Second, libraries may now copy unpublished works for preservation, safeguarding and backup purposes. The old act permitted the preservation of ‘disseminated works’ (in Polish

‘rozpowszechnionych utworów’). In the new act, the word ‘disseminated’ has been removed from the exception.

*“This means offering, e.g. to librarians, the possibility of digitisation – in order to protect own collections – of works that have not been made publically available in any form with the consent of their author. This provision may also apply to manuscripts which were discovered only after the death of their author”*. Ministry of Culture and National Heritage<sup>2</sup>

Both changes, that were facilitated by the removal of two words<sup>3</sup> from the new exception, will have a major impact on library digitization and preservation activities in Poland. It means that Polish cultural and literary heritage, especially for unique or rare works, is legally safeguarded for the future.

### **The first country to legislate for the ‘TU Darmstadt’ case**

Third, Poland became the first country to legislate for the [European Court of Justice \(CJEU\) ruling in the case](#) known as ‘TU Darmstadt’. Libraries in Poland may now, under certain conditions, digitize works in their collections and make them available to users on so-called ‘dedicated library terminals’.

In accordance with the CJEU ruling, Article 28.3 of the new law permits libraries to digitize works in their physical collections, irrespective of whether the publisher offers a digital version of the work or not. In return, the number of copies made available at electronic reading points must not exceed the number of physical copies held by the library.

The condition that the number of digital copies must not exceed the number of physical copies was added at the request of rightsholders. In practice it means that if a book is digitized, the tangible copy and its digital surrogate should not be available (in use) at the same time. Thus

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<sup>2</sup> Explanatory note p.16 (paragraph 4)

<http://legislacja.rcl.gov.pl/docs//2/12268850/12274235/12274236/dokument162024.pdf>

<sup>3</sup> From ‘egzemplarzy rozpowszechnionych utworów’ in the old act (1994) to ‘utwory’ in the new act (2015).

if the physical copy is on loan, the digital copy should not be available at the same time on the library terminal, unless the library owns two paper copies, and only one of them is on loan.

Librarians report that it may be difficult to comply with this requirement since library systems for loans of physical items are often separate from digital library platforms.

Another condition is that the digitisation and making available of physical in-copyright works on library terminals is permitted only if the resource is not *already* available in the library in digital form (through a publisher licence agreement). In other words, if a library *already* has access to the item via a subscription-based database package, the library may not digitize a print version of the same item and make it available on library terminals.

The question arises about the status of digitized works that *subsequently* become available to the library through a publisher licence agreement. In this scenario, the library might either have explicitly chosen to subscribe to the item, or it might be in a bundle of content in a ‘Big Deal’ arrangement (whereby publishers bundle their entire content into a large database package)<sup>4</sup>. To avoid confusion between what is permitted under the exception and what is allowed in the licence, the library should ensure that such dedicated terminal use of digitized items is excluded from any publisher agreement.

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<sup>4</sup> <http://lj.libraryjournal.com/2013/05/opinion/peer-to-peer-review/the-big-deals-damage-peer-to-peer-review/>

## PERMITTED USES IN EDUCATION AND SCIENCE

Article 27, that provides the legal basis for permitted uses in education and science, has been extended in several ways.

### Scope and application

The list of entities that may avail of the exception has been extended to cover entities that fall within three other acts – the Act of 30 April 2010 on the Principles of Financing Science, the Act of 7 September 1991 on the Educational System, and the Act of 11 September 2003 on military service for professional soldiers.

The entities now covered include research institutes, universities and research units, other educational institutions, schools, educational courses organised by Polish consular offices abroad (see [here](#) for example), military representative offices of the Republic of Poland, as well as non-commissioned officer schools and training centres.

The activity of such entities must not be of a commercial nature and their primary objective should not be to obtain financial gain. Privately funded entities, such as private schools, are entitled to use the exception: the Polish Ministry of Culture and National Heritage held that excluding private entities would unduly restrict educational uses.

Under the exception, disseminated works may be used in the original and in translation. Parts of larger works may be copied. Standalone works, such as photographs and poems, may be used in their entirety.

The purpose of the permitted uses is illustration for educational purposes or conducting scientific research. The making of electronic copies is permitted.

In addition, minor disseminated works or excerpts from larger works may be included in textbooks, readers and anthologies. These uses are subject to remuneration.

### **E-learning enabled**

A very important change to the education exception supports the development of e-learning and distance education.

Works that are digitized may be made available to closed user groups, for example, specific learners, teachers or researchers studying in virtual learning environments (VLEs) at educational or research institutions. Identification of eligible users may be via passwords, logins or in any other form of moderated access.

## PERMITTED USES OF ORPHAN WORKS

A work is described as an ‘orphan work’ if it is in copyright, and if the holder of the copyright cannot be identified, or cannot be found.

The new Polish copyright law implements the European directive on orphan works – full title ‘Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works’<sup>5</sup>.

The orphan works directive does not leave EU member states much room for manoeuvre, and so Poland implemented the Directive in quite a literal way.

### Beneficiaries

A range of entities may benefit from the orphan work provisions, namely publically accessible educational institutions, universities, research institutes and scientific institutes of the Polish Academy of Sciences, libraries, archives and museums.

The beneficiaries also include government and local authority organizations with a statutory obligation to collect, protect and promote film and phonographic heritage. These include, for example, the National Film Archive, the Institute of Music and Dance, the National Audiovisual Institute, the Fryderyk Chopin Institute, the Warsaw Documentary Film Studio, as well as public national and regional radio and television organisations (e.g. Telewizja Polska S.A., Polskie Radio S.A.).

In the case of broadcast organizations, permitted uses only cover works produced prior to 1 January 2003.

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<sup>5</sup> For more information, see [The European Orphan Works Directive - an EIFL Guide](#)

Entities may charge for the use of orphan works provided that any income is limited to covering the direct costs of digitisation and the making available of the works.

### **Types of uses of orphan works**

There are two main types of permitted uses: reproduction, for purposes of preservation, cataloguing and digitisation of collections, and for making available on the Internet for the purpose of supporting culture and education.

### **Categories of orphan works**

Only works that belong to the collections of the beneficiary institution can avail of the orphan works provisions.

The categories of orphan works include works published in the form of books, newspapers, magazines and in other types of printed publications, audiovisual works and other works fixed on video and on phonograms.

Standalone photographs and works of art, in accordance with the directive, are not included.

In addition, so-called embedded works - works such as photographs and pictures embedded in an orphan work - must be treated as individual works in their own right (whether or not they too are orphan works).

Both restrictions, that come from the orphan works directive, limit the effect of orphan works legislation.

In Poland, works that are published anonymously or under a pseudonym are also not covered by the legislation.

Orphan works apply to unpublished works, such as manuscripts, on two conditions.

First, the works must be publicly available in the institution with the consent of the rightsholder.

Second, it is reasonable to assume that the rightsholder would not oppose digitisation and making available online. In an explanatory note<sup>6</sup>, the Polish Ministry of Culture and National Heritage states that the fact that a deceased author entrusted his works during his lifetime to an institution, and therefore exercised the right to decide upon the first making available of the work to the public, is deemed as consent.

### **Diligent search requirements**

In order to use an orphan work, a good faith diligent search for the rightsholder must first be carried out by the library or other beneficiary organization.

The sources to be used in the diligent search are listed in an appendix to the orphan works regulation that emulates the list of sources cited in the orphan works directive. In addition, the appendix sets out how the results of the diligent search are to be documented.

During the public consultation, library organisations advocated not adding further to the list of sources to be consulted. The Ministry of Culture and National Heritage decided however to extend the list of sources in order to provide “legal certainty for institutions carrying out diligent searches”. It remains to be seen how increasing the number of resources to be consulted increases legal certainty for libraries.

The library community felt strongly that Polish sources should be specified in the diligent search requirements rather than international versions of databases, such as ISSN<sup>7</sup> databases. This is because local versions are more likely to contain local data and are free to access.

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<sup>6</sup> <http://legislacja.rcl.gov.pl/docs//2/12268850/12274235/12274236/dokument162024.pdf> p.46

<sup>7</sup> International Standard Serial Number (ISSN)

Consequently the orphan works regulation states that databases ‘*managed by the National Library of Poland*’ are to be used.

The Ministry of Culture and National Heritage also responded to library concerns that online sources specified for searching for films should not be behind paywalls. The regulation states that the listed online movie databases should be used only if they are publicly accessible.

The European Commission funded EnDOW project that looked at requirements for diligent search in the United Kingdom, the Netherlands and Italy recommends „*In practice, when a source recommended by legislation is not freely accessible online, even a Diligent Search not including the consultation of such source must be considered exhaustive and compliant with the law. In other words, a Diligent Search must be considered as carried out in good faith if all relevant freely and easily accessible sources have been consulted*”<sup>8</sup>.

### **Diligent search - databases v ‘information possessed’**

The orphan works directive indicates that the sources of information should include publisher and author associations in a given country and *databases* of appropriate collecting societies, in particular collectives that deal with reproduction rights.

In the Polish implementation, however, not all the mandatory diligent search sources are in the form of databases. Instead libraries must to use ‘information possessed’ by publishers and collecting societies (rather than ‘databases of collecting societies’).

Libraries are concerned about the important difference between the act of searching a database, and the far wider task of obtaining information from an organization. In the first situation the library has direct access to the information while in the second, libraries have to request the information and are thereby dependent on a third party.

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<sup>8</sup> [http://diligentsearch.eu/wp-content/uploads/2016/05/EnDOW\\_Report-1.pdf](http://diligentsearch.eu/wp-content/uploads/2016/05/EnDOW_Report-1.pdf)

## **Diligent search in practice**

Neither the copyright act nor the implementing regulation set out mechanisms governing relations between rightsholder groups and beneficiary organizations or standards of service, for example, reasonable time limits for receiving an answer to a diligent search enquiry.

In the absence of guidance, the library community may deem itself to have fulfilled its obligation after a reasonable amount of time, such as one month, after requesting information from the rightsholder.

Collecting societies are not obligated to establish a central contact point for enquiries from institutions carrying out diligent searches. During the public consultation, an organization expressed interest in doing so but would require additional external funding.

Neither the act nor the regulation provide protection for entities that have carried out a diligent search and where the sources to obtain the information are no longer in use e.g. the database is no longer available or the organization no longer exists.

## **Diligent search - documentation**

The orphan works regulation sets out how the results of a diligent search should be documented.

Documentation is important for two reasons. First it is the basis for declaring a work an orphan work. Second, as contained in the explanatory note from the Ministry of Culture and National Heritage in the draft regulation of Orphan Works, it may also serve as evidence in court in the event that one of the parties is sued.

Therefore it is highly desirable that standardized documentation is developed - library organisations advocated unsuccessfully for a template to provide such guidance.

Therefore according to the regulation, when a diligent search is carried out the results shall be recorded in an unspecified way. The information should include the sources checked, search efforts made and the results. The document must be signed by the head of the entity carrying out the search. The format of the form (print or electronic) shall depend on institutional practices. However, in order to reduce storage costs, accompanying documentation shall always be in electronic format.

The length of time for which an entity should retain the diligent search records is not specified. Legal academics, supported by libraries, had proposed that documentation should be kept for no longer than the statute of limitation applicable to the use of the works.

Another important matter left open is the cost of undertaking diligent search enquiries. The danger of leaving the issue of payment to the invisible hand of the market may lead to uncontrolled costs being foisted on beneficiary organizations.

### **Diligent search - third party liability**

The issue of third party liability is considered, but not resolved, in the regulation. A diligent search may be carried out either by the beneficiary institution itself, for example, by searching the required sources.

Alternatively it may be sub-contracted to a third party, for example, a collecting society that manages reproduction rights on behalf of the rightsholder.

Where the search is undertaken by a third party, it is unclear where liability for lack of due diligence in the diligent search would fall.

In an explanatory note to the copyright amendments, the Ministry of Culture and National Heritage states “*commissioning a diligent search with a third party shall not exclude liability of a cultural heritage institution for any infringement of author’s economic rights to a work*”

*which was unjustifiably deemed orphan work and which was used based on searches carried out in a neglectful manner or in bad faith. It is the entity using an orphan work that assumes the exclusive rights of the rightholder. However, in the event of commissioning diligent searches with third parties, the matter of contractual liability for neglectful searches could easily be regulated in a contract”<sup>9</sup>.*

### **Registration of a beneficiary organization**

An institution that wishes to avail of the orphan works legislation must be approved by the Ministry of Culture and National Heritage in a three-step process.

First, the institution registers online at the European Union Intellectual Property Office (EUIPO)<sup>10</sup>, formerly Office for Harmonization in the Internal Market (OHIM).

Second, the Ministry of Culture requests statutes and other documentation from the institution to establish its credentials.

Third, the Ministry of Culture confirms with EUIPO that the organization is a beneficiary according to Polish law.

### **Registration of an orphan work**

Once a work is deemed to be orphan, the beneficiary organization registers the work in the EUIPO database<sup>11</sup>.

Information provided by the beneficiary includes the results of the diligent search, the manner of use of the orphan work, possible changes to the status of the orphan work (e.g. status expiry), and contact information for the institution that benefits from use of the orphan work.

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<sup>9</sup> <http://legislacja.rcl.gov.pl/docs//2/12268850/12274235/12274236/dokument162024.pdf> p.50

<sup>10</sup> <https://euipo.europa.eu/orphanworks/#register>

<sup>11</sup> <https://euipo.europa.eu/orphanworks/>

## **Works that cease to be orphan works – fair compensation**

A work may cease to be an orphan work if, for example, the relevant rightsholder is identified and located. In this case, the rightsholder is entitled to fair compensation to reflect the nature and manner of use of the work, possible income derived from its use, and any damage suffered by the rightsholder due to such use.

The automatic entitlement to compensation differs from an earlier draft text<sup>12</sup> when it had been proposed that the re-appearing rightsholder was entitled to appropriate remuneration only when the entity using the work had derived income from its use. In determining the amount to be paid, the public interest was to be taken into account. This proposal was eventually withdrawn after opposition from rightsholders.

## **Resources for orphan works procedures**

The Ministry of Culture has issued a handbook for institutions on the EUIPO database that includes information on the process for registering a beneficiary organization, registration of an orphan work, and changing the status of an orphan work.<sup>13</sup>

An infographic for libraries and other cultural heritage institutions that illustrates the main steps necessary to perform a diligent search for orphan works has been produced by Barbara Szczepańska and Centrum Cyfrowe<sup>14</sup>.

On 1st August 2016, more than eight months after the introduction of legislation, no orphan works from Poland are recorded in the EUIPO orphan works database.

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<sup>12</sup> From March 2015

<sup>13</sup> <http://www.prawoautorskie.gov.pl/pages/posts/baza-danych-utworow-osieroconych---podrecznik-szkoleniowy-891.php>

<sup>14</sup> <http://centrumcyfrowe.pl/wp-content/uploads/2016/01/CC-Dozwolony-u%C5%BCytek-dzie%C5%82-osieroconych-infografika-3.pdf>

## PERMITTED USES OF OUT-OF-COMMERCE WORKS

Out-of-commerce works are works that are protected by copyright but are no longer available in customary channels of commerce<sup>15</sup>. By definition, an out-of-commerce work is a published work. It may or may not also be an orphan work<sup>16</sup>.

For out-of-commerce works, Poland implemented the European Memorandum of Understanding (MoU) entitled “*Key Principles on the Digitisation and Making Available of Out-of-Commerce Works*”. The MoU was agreed on 20th September 2011 by organisations representing libraries, authors and publishers in cooperation with the European Commission.

The goal of the MoU is to facilitate the making available of online works whose copyright holders are known, but that are no longer available on the commercial market, for example, due to low economic returns. Since the historical and research value of such works may be highly significant, cultural heritage institutions have a great interest in digitizing and making such works available to the public.

France and Germany have also implemented the MoU into their national law. The Polish regulation on out-of-commerce works is modelled on the German implementation, as stated in the explanatory note.

### Scope and application

Out-of-commerce provisions apply only to those works published for the first time in the territory of the Republic of Poland prior to 24 May 1994.

Polish translations of works originally created in a foreign language are excluded.

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<sup>15</sup> [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

<sup>16</sup> Read more: EU Out-of-commerce works Memorandum of Understanding  
[http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

Works published in books, newspapers, magazines or other forms of print publishing may obtain out-of-commerce status. Works that are part of a collection of works, for example, separate articles published in a single volume, must be treated individually.

Responsibility for assessing the out-of-commerce status of a work lies with a collective management organization.

In assessing if a work is commercially available, the number of copies available on the market through official channels, in print and digital formats, compared with the demand for such copies will be assessed. Secondary trade i.e. sale of tangible copies in second-hand bookshops and online will not be taken into account.

Out-of-commerce works may only be used for non-commercial purposes.

### **Permission to use out-of-commerce works**

Use of out-of-commerce works is based on a contract agreement between the library (or other cultural heritage institution, as defined in the Act of 30 April 2010 on the Terms of Financing the Science) and the collective management organization.

The collecting society has the right to permit the use of works not in their repertoire - a form of extended collective licensing – subject to the following conditions.

The right is granted to the collecting society on an opt-out basis, that is, provided that the unrepresented rightsholder does not object in writing within 90 days of their work being entered into the register of out-of-commerce works.

In addition, the rightsholder retains the right to withdraw his work at any time upon written notification with a three-month notice period effective from the end of a calendar year.

## **Register of out-of-commerce works**

The Ministry of Culture and National Heritage shall maintain the register of out-of-commerce works on its website.

An application to have a work entered in the register shall be submitted to the Ministry by a collecting society on behalf of the cultural heritage institution that wishes to use the work.

The application shall include the following information:

- title of the work;
- name and surname, or pseudonym of the author, or mention that it's an anonymous work;
- publisher of the work;
- date of first publication of the work;
- details of the collecting society that submitted the application.

The application shall also include information on any objections lodged by the rightsholder about inclusion of the work in the out-of-commerce register; information on the withdrawal of any such objection, resignation from membership of the collecting society with regard to the selected work, and the effective dates thereof.

## **Out-of-commerce regulation not yet in use**

The legislation on out-of-commerce works is yet to have practical effect.

A public competition to select a collective management organization to conclude agreements on behalf of rightsholders with libraries and other institutions, expected before the end of 2015, is still to be announced<sup>17</sup>.

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<sup>17</sup> As of 1st August 2016

In addition the legislation offers little by way of practical guidance to libraries and other entities wishing to use out-of-commerce works, for example, on procedures, time limits and terms of use.

Therefore it may be some time before out-of-commerce works start to be used on any scale in Poland.

## **INTRODUCTION OF PUBLIC LENDING RIGHT (PLR)**

A public lending right (PLR) grants a copyright owner the right to authorize or prohibit the public lending of a protected work after the work has been distributed to the public.

In Europe, public lending is regulated by the 2006 rental and lending Directive<sup>18</sup>. Poland was one of the last countries in the EU to fully implement the PLR directive that enables rightsholders to receive payment for the lending of tangible works by certain types of libraries.

PLR in Poland is introduced by way of a regulation.

The introduction of PLR was subject to intense discussion between stakeholders. For example, rightsholders wanted to subject all types of libraries and all types of collections, including reading room materials, to the PLR payment system, while library organizations wanted to limit the types of libraries and materials affected.

### **Scope of the Public Lending Right**

Public lending right in Poland applies to works ‘expressed in words’ that are created or published in the Polish language.

PLR applies only to books. Other types of library materials are not covered as the Ministry of Culture and National Heritage deemed as insignificant the percentage share of other materials that would be subject to lending.

To ensure that the lending of audio-books, films and e-books by public libraries is not under doubt, library representatives wanted these items to also come within the scope of PLR.

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<sup>18</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115>

However according to the Polish legislator, the lending of e-books does not fall within the scope of European law<sup>19</sup>.

### **Type of libraries subject to PLR**

PLR in Poland applies to public libraries only. Other types of libraries, such as school and university libraries, and the National Library of Poland are excluded from its scope.

### **PLR payment calculations**

PLR payments are calculated on the basis of how often a work is lent out - a loans-based system. (In some other countries, calculations are based on the number of copies of an author's work in the library's collection).

The loans data is provided annually by designated public libraries.

The first payments shall be made for the year 2016. The amount to be paid shall be equal to 5% of the purchase value of library materials in the previous calendar year. Approximately four million Polish zloty (PLN) (c. €909,000 / USD\$ 1,028,440) is earmarked for this purpose.

The minimum annual payment per rightsholder is estimated at PLN 20 (€4.50/USD\$ 5), and the maximum payment is PLN 20,000 (€4,500/USD\$ 5,000).

PLR is paid for by a public fund - the Fund for the Promotion of Creativity – that is financed by a tax on gambling and betting, hence the reference to the Gambling Act in the 2015 amendments<sup>20</sup>.

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<sup>19</sup> On 16 June 2016, the Court of Justice of the European Union issued an opinion in the case of VOB v Stichting Leenrecht (C174/15) stating that the public lending right is applicable also to e-books. A ruling is expected later in 2016.

<sup>20</sup> Act of September 11, 2015, on Amendments to the Copyright and Related Rights Act and Gambling Act

This means that the burden of payment does not fall on individual readers, libraries or to local governments responsible for public libraries.

### **Administration of PLR payments**

On 10th June 2016, the Minister of Culture and National Heritage announced that Copyright Polska - Association of Authors and Publishers had been appointed to manage the collection and distribution of PLR payments for the period 2016-2020<sup>21</sup>.

Under the PLR regulation, the collecting society is chosen through a public competition and shall administer the PLR fund for a period of no longer than five years.

The collective shall have the right to deduct costs related to bona fide activities provided these are justified and documented. The administrative costs of the collecting society must not exceed 10% of the PLR budget for the same year.

The funds shall be disbursed in the following proportions: 75% to authors (including authors of graphical or photographic elements) and translators into Polish, and 25% to publishers.

### **Libraries designated to provide statistical data**

A total of sixty public libraries were selected to provide statistical loans data for the PLR system.

The selection was based on two criteria: geographic spread and diverse size of the population served (catchment areas serve between 6,000 and 46,000 inhabitants). The technical ability of the library to efficiently collect the data and to make the required reports was also important.

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<sup>21</sup> <http://www.prawoautorskie.gov.pl/pages/posts/minister-wyznaczyl-stowarzyszenie-copyright-polska-do-dokonywania-podzialu-i-wyplaty-wynagrodzen-z-tytulu-public-lending-right-934.php>

Forty-seven of the designated libraries use the MAK+ automated library system managed by Instytut Książki (The Book Institute)<sup>22</sup>, including the circulation module. The remaining thirteen libraries are larger public libraries using the ALEPH integrated library system<sup>23</sup>.

Library organizations sought assurances from the government that libraries would not be required to incur extra costs, for example, by having to commission the development of new software or to purchase extra system modules in order to provide data in the format required.

The data to be provided to the collecting society by the designated libraries includes the following:

- 1) total number of book loans in a given calendar year;
- 2) list of book titles lent out in a given calendar year, with the following information for each item loaned:
  - a) ISBN;
  - b) author or authors of the work;
  - c) authors of artistic or photographic works if such works are connected with works expressed in words, for example, picture books;
  - d) translator, if a translation is from Polish into a foreign language;
  - e) publisher;
  - f) number of loans per copy of a work in a given calendar year.

### **Annual declaration by the rightsholder**

To be considered to receive payment, rightsholders must file an annual declaration with the collecting society. The declaration should include the following information:

- name and surname of the author/authors and pseudonym – if used
- name and surname of translator and pseudonym – if used

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<sup>22</sup> established by the Ministry of Culture to promote Polish literature worldwide and to popularize books and reading within Poland.

<sup>23</sup> <http://www.exlibrisgroup.com/category/Aleph>

- title of the work
- name of the publisher
- a copy of contract with the publisher
- publication year
- name, surname or business name and residential address or address of the registered office of the person or entity submitting the declaration.

A publisher should also include the ISBN<sup>24</sup> number.

If the application is submitted by the heir of an author, it should include together with the declaration, documentation that confirms transfer of the author's economic rights in the work by inheritance, and the share of such transfer.

## **ABOLITION OF THE PAYING PUBLIC DOMAIN**

The paying public domain (or [domaine public payant](#)), a remuneration right for the use of works no longer protected by copyright, was removed from new Polish copyright law as part of the copyright reforms.

The decision to remove the paying public domain abolished the payment of royalties collected from the sale of works in the public domain. The royalties had been paid into the Fund for the Promotion of Creativity, mentioned above under PLR payments.

Current cultural policy goals of the Republic of Poland are aimed at providing wide legal access to creative content. The paying public domain system was viewed as an anachronism that discouraged access and did not provide value for money today.

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<sup>24</sup> International Standard Book Number (ISBN)