



Out – of – commerce works in Polish legislation and practice

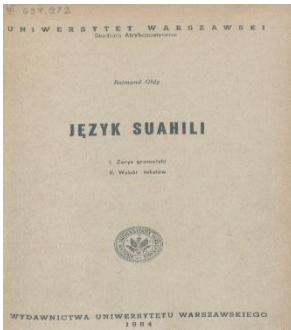
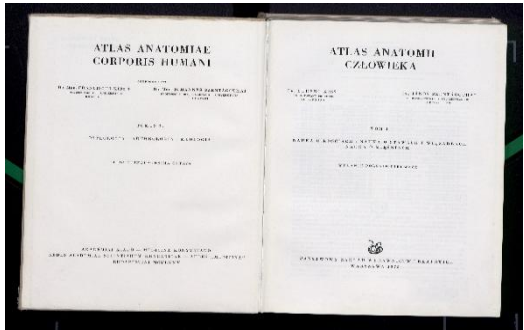
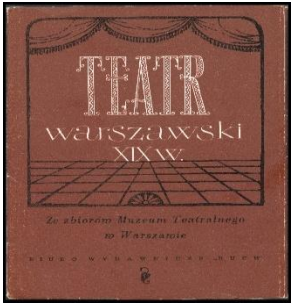
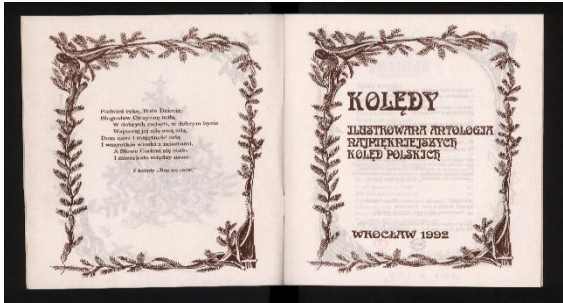
Ministry of Culture and National Heritage

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I. 1. The need for legislative intervention





I. 2. The need for legislative intervention – general remarks

- **mass digitalisation** in progress – last four years approx. 30 mln euro for this purpose (more than 55 mln scans) – in December 2016 Polish National Library received 96 mln euro for presentation of Polish national heritage - Patrimonium Project;
- no real interest of CMOs, publishers and libraries in negotiating of voluntary agreements on the general basis of Memorandum of Understanding (2011);
- **no applied rights clearance standards or procedures** in such instances in Poland;
- **side effect of the political and economical transformation after the fall of communism** - some rightholders do not exist and have no legal successors/ sometimes scope of such succession unknown or unclear;
- **serious doubts, whether existing rightholders obtained all necessary rights under the Copyright Act 1952** – especially rights to make content available (obligation to list all the fields of exploitation in the agreement under which rights are transferred vs. general rules on interpretation of declaration of will).



II. Definition of out – of – commerce work in Polish Copyright Act.

- works published in **books, journals, magazines** or in **other forms of printed publication**;
- works published for the first time on the territory of the Republic of Poland **before 24 May 1994** – when binding Copyright Act entered into force;
- **works are not available for buyers** - with authorisation of the rightholders – in the number of copies in a quantity fulfilling their reasonable needs neither:
 - in customary channels of commerce (second hand bookshops not taken into account) nor
 - via internet.



II. Definition of out – of – commerce work – experience during implementation phase

- **Out-of-commerce work or out-of-commerce edition of work** (inter alia: how shall we treat extended or changed editions when we check its commercial availability ?)
- Does the **print on demand** shall be treated as one of customary channels of commerce when we check commercial availability ?
- Does the **availability of illegal copies** matter ?



III. Who and how will be entitled to use out-of-commerce works?

- **publicly accessible cultural institutions** – archives, libraries, museums, educational and scientific institutions;
- **scope of rights – right of reproduction/ making available via internet** – open the possibility to create thematic collections of works;
- **limitations :**
 - **institutions may use content only in order to perform their statutory tasks** - preserve, restore and make available of works included in the collections for cultural and educational purposes;
 - revenues for such use can only cover direct costs of digitalisation and making works available to the public.

IV. 1. Mechanism which allows to use out-of – commerce works

- framework statutory regulation gives a designated CMO right to grant the institution a licence also in the name and on behalf of rightholders not represented by such CMO – extended effect of licence derived from Copyright Act;
- protection of rightholders guaranteed by two possible opt – outs:
 - **general opt-out** – rightholder submits the organisation written objection against management of his rights by this organisation (within 90 days after his work is disclosed in list of out – of – commerce works maintained by Ministry of Culture);
 - **specific opt-out** –rightholder renounces from entrusting intermediation with regard to specific works (no time limit).





IV. 2. Mechanism which allows to use out-of –commerce works

1. **Motion** from the designated CMO to add certain works to list of out-of-commerce works maintained by Minister of Culture.





2. **List open to the general public** – published via internet (no significant transactional costs/ source of information about rightholders – possibility to get a licence directly).



3. **Work is added to the list.**
4. **90 days for general opt – out (no opt – out – licence).**
5. **Specific opt – out - only regarding specific works** ((institution has a chance to get a individual licence from the rightholder or may stop the exploitation without legal risk).



IV. 2. Mechanism which allows to use out-of – commerce works – experience during implementation phase

- determine the **flow of information before the licence**: library (data about publications)  CMO (commercial availability check)

motion to the Ministry
- determine the **flow of information between CMO and library during the period of cooperation** (for example: data about exploitation of concrete work, frequency of data exchange)
- the **usage of the information** from the list maintained by the Ministry of Culture (possibility to use data for other purposes)



IV. 2. Mechanism which allows to use out-of – commerce works – experience during implementation phase

- determine in the licence **how the beneficiary makes the out-of commerce works available** and what kind of **technical measures** are used to prevent from possible illegal exploitation by end-users;
- decide how to determine the **remuneration for rightholders** whose rights are covered by granted licence - relation to remuneration in customary channels of commerce/ connection with actual exploitation of concrete work - **CMO's contractual rights of control** in this area;
- determine additional **information obligations** of CMO in relations with rightholders.



Thank you for your attention

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