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Common position of Centrum Cyfrowe Projekt: Polska and the Interdisciplinary Centre for Mathematical and Computational Modelling of the University of Warsaw with respect to changes in the copyright system

The activities of Centrum Cyfrowe Projekt: Polska (Digital Centre at Project: Poland) and the Interdisciplinary Centre for Mathematical and Computational Modelling of the University of Warsaw (ICM) aims at using the full potential of information and communication technologies (ICT) for the purpose of increasing the level of development, exchange and application of knowledge, information and other forms of content, including in particular the ones of scientific, educational or cultural importance. We believe that in order to attain this goal in Poland it is necessary to introduce legal regulations which match the requirements of today's society and do not create any barriers for its growth. The debates around ACTA have clearly shown that current regulations and their amendments - in the direction most commonly chosen until now - hinder the development of the information society. Controversies related to the procedure of adoption of ACTA agreement prove that the creation of good law requires intensive common work, and, first of all, respect for democratic procedures.

Centrum Cyfrowe and ICM are partner institutions of the Creative Commons Poland project. One of the reasons for our involvement in the project is our conviction about the necessity to reform the copyright law, in order to develop a more flexible regulation governing the circulation of information, knowledge and culture. We treat the promotion of open models applied within the current copyright system and the reform of this system as mutually complementary measures aimed to attain more openness.

The discussion about the copyright law reform should focus on ensuring the freest

possible circulation of content, finding balance between the rights of content providers and users of these goods, and the respect for the basic rights, such as the right to study and the freedom of carrying out scientific research, the freedom to create and use goods of culture, the right to information and the ever more frequently recognized right to knowledge. The solutions applied up to date have focused on introducing progressively more severe sanctions and delegating the enforcement of copyright law to intermediaries, which leads to the violation of basic rights and freedoms without providing any guarantee of the increase of innovativeness, creativeness or competitiveness of the economy.

This is why we believe that ACTA agreement should not be ratified by Poland. According to us, the direction of changes set therein, which focuses on legal restrictions, is erroneous. Therefore we were pleased to hear the declaration of Donald Tusk, Prime Minister of Poland, about measures taken up in order to reject ACTA agreement and the need to carry out a debate on the form of a modern, sustainable copyright system.

At the moment the government's priority should be a systemic reform of the copyright law, which has been postulated for a number of years by NGOs. The reform should be based on a social agreement assuming fair treatment of interests of all the parties, including in particular creators and users. Such a social agreement will require in first priority the departure from unilateral extension of protection and introduction of excessive enforcement of copyright in the form of civil and penal sanctions. Instead, one should consider copyright as a tool which, when used sustainably, may serve the public interest. Such a balanced approach, supported by broad social consultations, should be the basis for all further reforms, both at the national, as well as European and international level.

Many key changes may be implemented already at the national law level, acting within the framework set forth by the European and international law. Such changes do not violate the interests of the entitled parties in any way, and even increase their freedom, increasing the users' freedom at the same time. However, there is no doubt that in many cases current regulations grant excessive protection, which is unnecessary or threatens public interests. This is why we also present our postulates aiming to determine a new point of balance between private interest of all stakeholders and the public interest. Sometimes it will require amendments of international provisions. However, it is not an insuperable obstacle, especially if the Polish government joins those of the European countries (the United Kingdom, the Netherlands) which already openly articulate the need for such

reform.

In the view of the foregoing assumptions, we present the following detailed proposals:

1. Protection of the public domain

Public domain is a pool of content which may be used by anyone without limitations arising of exclusive rights. It forms a crucial basis for the development of culture and serves as a ground for new works as well as a source of information and knowledge for the next generations. Meanwhile, currently the concept of the public domain does not appear in the Polish law. Instead, there is the “domaine public payant” institution, with payments for the use of works the rights to which have expired. One should add that in this respect Poland is an exception among European countries; there are also no international regulations which would impose an obligation to maintain this institution.

What is more, Polish copyright does not protect the public domain against appropriation. Such appropriation takes place through the use of exclusive rights or application of technical security measures. Often public domain goods circulate publicly in the form of derivative works subject to additional legal protection, scientific or critical editions of works or data bases. The protection of the public domain requires a precise definition of the scope of exclusive rights, seen as an exception from the rule of free availability of cultural works, and the introduction of a guarantee that such rights will not be abused.

We suggest:

- To introduce (within a broader prohibition of appropriation of the public domain) an obligation to make available unprotected originals by the publishers of derivative works, as well as critical or scientific editions. They should be made available without technical limitations which could prevent the actual use of the work, while formally it is not subject to protection.
- To remove the obligation to pay fees for the use of public domain content to the Creativity Promotion Fund (Fundusz Promocji Twórczości).
- The postulates of the Public Domain Manifesto (available at http://www.publicdomainmanifesto.org) should be debated publicly, as basis for copyright reform directed at the protection of the public domain.

2. Increasing the creator's freedom

Authors should be able to manage their rights independently. More and more often creators want to manage their works on their own, with the use of the Internet. They act without any intermediaries, or at least without intermediaries operating on the traditional market of creative works. What is more, the authors increasingly often take advantage of free licenses. Frequently they want to combine these innovative forms with traditional ones (e.g. publishing in the Internet under a free license and requesting a collective management organisation to manage the remaining fields of exploitation).

The copyright law does not grant the authors full freedom necessary to take such steps. Often the regulations whose aim was to protect the creators turn out to be obstacles. We believe that copyright should not limit creators in management of their works. We suggest the following changes increasing the creators' freedom:

- The transfer of rights should not prevent the creator from recovering control over their work in a situation where the acquirer blocks the use of the work or in other way infringes the creator's interest. In this case the rights should automatically return to the creator – the current legal solution of this problem should be extended.
- The transfer of rights should not lead to the expiry of previous licenses granted in relation to the work if the fact of granting them has been manifested in an appropriately clear way.
- The requirement to explicitly list fields of exploitation in agreements should be softened by clearly allowing the application of the rules of the interpretation of statements of will.
- The obligatory intermediation of a collective management organisation should be excluded in the case of the internet (repealing Articles 21(2) of the copyright law), especially if the creator himself manifests such a wish (e.g. by awarding a free license to the work). Furthermore, the assumption of representation by a collective management organisation, especially in relation to the use of works in the Internet, should no longer exist.
- Taking advantage of collective rights management should not exclude independent management (including granting free licenses). The copyright law should contain a precise regulation of a contract on granting the rights to an organisation, which should specify in particular the creator's right to manage their works on their own.
- The permission for the use of derivative works and managing them by the creator should be deemed as a limitation of their personal copyright to integrity. Also an

adaptation of a work published in the Internet with the creator's consent and made for non-commercial purposes should not result in the infringement of the moral rights of the author of the original.

Waiver of copyrights. The exclusive character of the copyright law is to serve the interests of the entitled parties. One cannot speak of the existence of such interest in a situation where the entitled parties themselves do not want to take advantage of such protection. Meanwhile, the Polish law does not give the entitled parties the option to waive the protection on their own. Such a waiver would form a very desirable method for enlarging the public domain, as otherwise the entire society must wait for the lapse of an excessively long period of copyright protection. Therefore we suggest the introduction of an option for the entitled parties themselves to waive their copyrights in full. The Creative Commonz Zero (CC0) mechanism may be a useful tool in this respect.

Extension of public domain by public resources

In our opinion, resources owned by public institutions or financed with public funds constitute a special kind of content which should be treated as a common good and should be available in the public domain. Article 4 of the copyright act in its current wording excludes many goods belonging to public entities, such as legal acts, official documents and official materials from protection. However, there is a noticeable trend among public authorities to ignore or apply a narrowing interpretation of this regulation.

Apart from public goods developed internally, public entities acquire rights from third parties on the basis of agreements or inheritance. However, there is no substantiation for retaining the exclusive copyrights following the acquisition of such rights by a public entity, and thereby limiting access to the content. In practice, limiting access to rights held by public entities takes place not only by taking advantage of exclusive rights. Frequently, public entities are not aware which rights they hold and what their scope is. There is no coherent policy of acquiring rights from private persons in a scope sufficient for their problem-free disclosure.

We suggest:

- The rights belonging to public entities should be automatically transferred to the public domain (e.g. by the extension of the scope of Article 4 of the copyright law, or the introduction of an obligation to waive such rights).
- To continue work on the act on access to public information, and to adopt an act on

the openness of public resources - on the basis of a rule that the resources of public entities should be publicly available for use by anyone.

- Public authorities should count and manage the rights they acquire, as well as apply uniform policy of acquiring rights from third parties in the scope appropriate to the postulated release of these rights to the public domain.
- To restore the rule of inheritance of the copyrights by the State Treasury in the case of the lack of heirs. Following the acquisition of rights by the State Treasury, they should be immediately released to the public domain. In the view of technical difficulties related in particular to the complexity of proceedings on the division of inheritance, we suggest that the first step should involve publishing the names of people whose rights have been acquired by the State Treasury as inheritance together with the information that they have been transferred to the public domain. This will facilitate problem-free use of the objects of those rights by people who will gain possession of them. Nonetheless, one should aim at a situation where the State Treasury (and currently also communes - “gminas” - that inherit the rights) would make best efforts to gain awareness of the rights they inherit and make the objects of such rights directly available.
- In relation to the rights which are not owned by public entities but arise as a result of public financing, one should introduce a rule of making them openly accessible, preferably on the basis of free licenses.

Extension of the scope of permitted use

Current provisions on the permitted use (by which we mean the range of exceptions and limitations to exclusive rights, sometimes described as “fair dealing” rules) prevent the use of information technologies for private, information, scientific and educational purposes. The basic assumption of these provisions is to limit exclusive rights where it is contradictory to public interest. We believe that the current point of balance is not set correctly and we find it necessary to commence a Polish, European and worldwide debate on setting this point of balance anew.

We suggest the following amendments to the permitted use rules:

Permitted personal use. The permitted personal use should be explicitly extended (extending it to software), while the criterion for application of this provision should be the non-commercial use, instead of the use of the term “copy” or “personal and social relationship”. It is also necessary to specify that the source from which the work has been obtained is of no importance for permitted personal use, unless such work has been

legally disseminated in some place.

Permitted public use. Libraries, galleries and museums should enjoy an extended scope of permitted use so as to enable them to fulfil their public mission also with the use of the Internet. Educational institutions should not be obliged to apply for licenses of the authorized entities in order to use the works in education with the use of information technologies (e.g. e-learning). One should also explicitly allow for Internet reprints for information purposes. We suggest resignation from listing specific entities in the provisions on permitted use. Instead, the law should specify permitted activities which could be performed by anyone (e.g. instead of “academic institutions” use the term “didactic or scientific activity”).

Orphaned works. Permitted use should be also extended to orphaned works, i.e. works in the case of which the entitled entity has not been found despite appropriate search or cannot be contacted for other reasons. However, the search procedures required by the law should not be too time-consuming or expensive. Of course, private (non-commercial), informational, educational and scientific use of orphaned works should be permitted. Meanwhile, in relation to the remaining ways of use, the entity entitled to the orphaned work should not have the full catalogue of claims. Therefore, the entitled entity could either prohibited the use of the work or demand the payment of a reasonable remuneration, without any right to compensation.

What is more, to avoid the accumulation of the problem, it is recommended – following the global debate – to return to the obligation of registering works in order to obtain protection or at least marking them with a copyright note or a relevant licence mark (as e.g. CC licenses).

Technical security measures. Permitted use should not be a legal fiction. The law should not protect activities involving technical restriction of permitted use – e.g. blocking the possibility of performing private copies – with the use of technical security measures (DRM – Digital Rights Management). Therefore the cases of DRM removal or evasion in order to enable the use in compliance with the permitted use (and, more broadly – with the license agreement) should be explicitly allowed. They cannot constitute a violation of the copyright law or the penal code provisions.

Reducing restrictiveness of the copyright

We are worried to observe a tendency of increasing the restrictiveness of the copyright system manifested by strengthening the protection and increasing the scope and effective period of copyrights. This approach is manifested by treating the protection of copyright as a state policy, instead of supporting sustainable management of these rights. In order to reduce the restrictiveness of the copyright we suggest:

Civil sanctions. Currently the entitled person may request the payment of two or three-fold value of remuneration even if they have not suffered damage in this amount as a result of the violation. This sanction violates the basic rule of civil liability – adequacy of the compensation to the damage. We postulate the removal of this sanction and introduction of a rule stipulating for a compensation commensurate with the damage.

Penal liability. We also postulate the revision of some penal provisions of the act from the perspective of reducing or waiving penal liability for acts prohibited by the copyright law, but committed in relation to works disseminated in the Internet. This pertains in particular to repealing the provisions of the act introducing penal liability for the possession of devices used for breaking measures securing works (DRM). This is related to a postulate of introducing a possibility of evading such securities for the purposes of permitted use. These provisions should be made more specific. Currently, it is prohibited to disseminate a work without authorisation, while the scope of the authorisation is frequently determined by vague provisions on permitted use or the content of a license. Penal provisions must be precise and clear.

Shorter protection period. Consecutive amendments extend the period of protecting works and related rights and create new categories of exclusive rights. We postulate that in the global debate on the copyright reform Poland should advocate the need to radically reverse this tendency and shorten the effective period of exclusive rights.

Revision of the scope of the term “work”. We also suggest a revision of the term “work” which is currently extended to all types of creative activity in a very broad sense. We suggest a discussion on extending the catalogue of exclusions from the protection of the copyright, inter alia by excluding the “usable” works, such as data bases, maps, building designs, menus, directories, etc. from protection.

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