Kluwer Copyright Blog

Open access by law – proposal for a new regulation in Poland

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The Polish Ministry of Administration and Digitisation has initiated discussion on the law providing free access to public resources.

The Ministry has made available on its webpage a document entitled "Draft Guidelines for the Proposal of the Act on Open Public Resources" and has invited interested parties to comment. Thus a process of "open access by law" has begun. It has been long thought that public resources of various kinds should be, when possible, made available on the internet for free along the motto: what has been paid for by public money is public property. Usually such initiatives have been voluntary and have thus relied on either good will or political pressure. Now, however, the Ministry proposes legislation that would make opening public resources mandatory and would also regulate a lot of detailed issues related to making content open and available for all.

The Draft Guidelines are but a start, nevertheless one must say that it is quite difficult to predict how this will all turn out. To begin with, as the title reveals what has been now sent to the public is not a draft law, but just a premise (groundwork) for such an act. The 22 pages long document (but the actual proposal takes 16 pages) is, at least in its present state, more of a declaration of intentions than a concrete proposal. This is of course on one hand understandable, but on the other exemplifies serious difficulties in giving shape to generally applauded ideas. As the Polish attempt seems to be one of the first of its kind, certainly in the EU, insight from other countries could perhaps help to make it better and consequently to have a model law for the rest, which could be at least worth considering.

Being aware of the complexity of the problem cannot unfortunately fully justify the fact that this first step (i.e. the "Draft Guidelines") is a disappointment. To understand why it would be perhaps best to summarise the ideas the Polish government is currently contemplating, especially because I have not been able to find the English version of the proposal. The document begins with highlighting the importance of public resources as the source of information and knowledge and praising the benefits of open access. Some examples are also provided, but it is nothing new and not worth repeating. What seems to be much more relevant is what specific legal solutions the Ministry puts forward to help realise the open access dream. The proposal stresses that public

resources are not identical with “public sector information”, as they are rarely closely connected to the exercise of power. Access to public sector information is justified by the need to make public bodies and their operations transparent for citizens and enable the controlling function of democracy. Public resources on their part comprise cultural, scientific and educational content. It is certainly correct to notice that the current legal instruments related to the access to public information do not suffice to guarantee such access to all public resources, for example because public resources are very often protected by intellectual property rights (especially copyright). The Ministry explicitly states as its intention to provide a regulation for public resources modelled on the legislation concerning the access to and reuse of public information (Law on access to public information of 2001, Directive on the re-use of public sector information), which would mean the general obligation to make public resources available on request. The proposed legislation should create a framework for acquiring rights so that public resources could be made available to the public and for making them available (e.g. license contracts), while at the same time preserving adequate flexibility for public bodies to choose specific tools (e.g. the way IP rights are to be acquired). We are now on page 6 of the document and the level of generality hardly allows for any reasonable comments.

In p. II the Ministry names the goals of the proposed legislation: These are:

(a) realising the potential for development in publicly financed resources;
(b) differentiating public resources from public sector information and thus eliminating legal uncertainty (quite difficult to understand as since there is no legal concept of open public resources at present no legal uncertainty in differentiating these two concepts can exist. It can come to being when such differentiation starts to have legal consequences, i.e. after the law has come into force);
(c) maximising the availability of public resources (hard to argue with);
(d) making the conditions of making available public domain works more precise (unclear) and introducing rules on making available the protected subject-mattered created with public funds;
(e) making possible for public bodies to draft clear conditions of using the resources they control (why a law is necessary for that has not been explained); and
(f) introducing regulations making it impossible to restrict access to currently free resources (i.e. ‘reclaiming’ the public domain).

It is thought reaching these goals is indispensible to achieve the other set of objectives, namely the ones described in the government strategy “Poland 2030” and the “Development Challenges: Poland 2020”). The new law should inter alia increase the efficiency and innovativeness of scientific research, create new innovative products based on public resources, equalise educational chances due to easier access to knowledge, serve as a catalyst for social activities using publicly available resources and creating non-commercial solutions.

The law (and, it seems, the obligation to open resources) should apply to all entities possessing public resources, however the more precise legal definition should refer to the public procurement law. This means the scope of application of the new rules would be quite extensive. As to the subject-matter it is perhaps best to translate faithfully: “The proposed law will regulate the principles of acquiring, making available and re-using public resources, understood as end content, created by the obligated entity [the ‘obligated entity’ is the term used to designate public bodies covered by the proposed legislation] or funded with public means, regardless of the way of its creation or fixation, possessing cultural, scientific or educational value, in particular maps and plans, photographs, films and microfilms, audio and video recordings, opinions, analysis, reports and other works and subject-matter of related rights in the meaning of the law of 1994 on copyright

and related rights, as well as databases in the meaning of the law of 2001 on the legal protection of databases." This will not, however, include confidential or secret information and such protected subject-matter in which the public bodies have no rights allowing to make it available in open resources.

The law should provide for standard rules concerning the acquiring of rights and making the resources available, but it should also give to public bodies the right to depart from those rules, when the public interest so requires. As regards the problem of acquiring rights the law will introduce two options: acquiring all the rights or acquiring a share in the relevant right. The latter option is of limited avlue because as the co-owner the public body would not be authorised to make the work available without other co-owners' consent. The problem with acquiring the totality of rights is that it is hardly possible according to the Polish law currently in force. For example the Polish law prohibits copyright assignment with regard to future fields of exploitation. Here, it seems, the law would like to make an exception: it will be obligatory for the rightholders to transfer copyright with respect to the new fields of exploitation to the public body without additional remuneration.

Probably because the transfer of copyright would negatively affect the author (he/she would cease to be the righholder), the Ministry proposes that the author should have more rights than the average user. If the work is made available without any restrictions, such special rules are not needed, if however there are restrictions, the author is to be granted a license of a wider scope (a sort of grant-back, it seems, no further details have been mentioned). The author, even though now just a holder of a non-exclusive license, would be also allowed to sue infringers (only an exclusive licensee can do so under the current law). What would be the scope of this exceptional remedy the draft does not explain. The acquisition of shares in copyright has been probably envisaged for cases where the public body has made only a part of the financial contribution. Nevertheless, as already mentioned, a share in copyright does not allow making the work available without the other co-owners' consent. In passing the draft mentions the proposed law will also deal with the problem of licensing contracts, namely that the assignment of copyright renders the license ineffective (since the licensor is no longer the owner of copyright). Interestingly, the draft does not apparently intend to amend the law, but seeks to have the provision on the contract of lease applied by analogy (!). It is not the only place in the document when one asks oneself whether any trained lawyer had actually read it before it was posted online.

As far as the making available part is concerned the law will make it mandatory for public bodies creating public resources or financing their creation to acquire rights allowing them to make the resources available, copy and modify (this will probably include derivative works). There will be 4 degrees of openness. In other words, the public body under obligation to make its resources available should be able to choose one of 4 models (options):

(a) The basic option – making the resources available without granting any further exploitation rights. I am afraid it is not entirely clear – perhaps it means there will be no licenses for users, so that users would have to rely on copyright exceptions.
(b) The intermediate option – a license with restrictions, e.g. prohibiting commercial use, excluding derivative works, territorial limitations, etc.
(c) The full option – license without restrictions, allowing all use, sublicensing, modifying, etc.
(d) "Embargo" – making resources open after a certain period of time, for example allowing for commercial exploitation (such as publishing in a journal). The embargo period should not exceed 12 months after publication or 20 months from submitting the work for publication. "Embargo"

would be only allowed in justified cases, i.e. should be treated as an exception, however it is also noted that in some cases it may be necessary, as otherwise private parties could be reluctant to cooperate with public bodies.

Public resources should not only be made available – they should be also kept up to date.

Public resources protected by IP rights (esp. copyright) will be made available under license contracts, other resources under 'normal' civil law contracts. The public body will be considered an 'offerer" and the terms of conditions would have to conform to regulations on unfair contract terms. However, it is also proposed that the detailed templates of licensing contracts should be introduced by a regulation issued by the Council of Ministers.

The proposal deals not only with the legal side of the making available process, but also with its technical and functional aspects. It is recommended that all public resources should be made available in a central repository and in other repositories but in the latter case they should employ technical standards allowing for their 'federation' with the central repository and with European systems (such as EUROPEANA or DRIVER). Metadata must be used, indicating authors, type of license, origin of the work. No further details have been provided.

The public bodies will be obligated to designate resources protected by copyright. If there is no such mark, the resource will be considered an official document or material in the meaning of art. 4 of the Polish Copyright Act, or subject-matter not protected by copyright. In Poland official documents and materials are excluded from copyright protection. It is I think impossible for this idea to become law, because it would mean that copyright works could be excluded from copyright protection due to deliberate or negligent omission by a public body (failure to mark correctly the copyright status of a work).The public body will have to clearly define the terms and conditions of making its resources available.

As to the problem of fees, the draft states that public bodies will have a 'certain' leeway in determining the conditions (including remuneration) of re-use for commercial purposes. They will be also allowed to introduce some restrictions such as the obligation to indicate source, to make the recourses further available to other users in an unchanged form, to indicate the scope of modifications, to prohibit modifications, to regulate the scope of liability of the public body. The proposal does not offer any details as to how and to what extent such restrictions should be allowed.

Finally, in p. III.6 the draft lists the general principles/guidelines of making public resources available: the principles of openness, availability, quality, usefulness, non-discrimination, transparency and non-exclusivity, while acknowledging that they cannot be always fully implemented.

What seems interesting is that when naming laws/statutes that should be amended by the new proposed legislation the draft fails to mention the Copyright Act, or any other laws concerning intellectual property for that matter. The period for public bodies to adjust to the requirements of the new law should be 12 months.

Although the above described proposals are only the beginning of discussion (of course this is a short summary, but I believe, including all the most important elements) their fuzziness should not be overlooked. If you would like to get a clearer picture of what is intended here you would probably end up with something like this: the law will generally obligate to make public resources

publicly available, but does not really define what these public resources are. Public bodies should always acquire IP rights necessary to make protected subject-matter available online, but how this will look like in practise is difficult to tell and may cause quite substantial costs for the state (public bodies). What is public should be made publicly available, but there are to be degrees of openness and binding contract templates. There may be fees, but only in certain cases. In between one may find rather controversial solutions concerning intellectual property, but no IP legal acts are to be amended.

The consultation period ends on the 5th of February 2013. Since the document was made available on December 21, 2012 this is a very short time, especially considering the vagueness and "openness" of the draft proposal (here not necessarily a welcome trait). Now there are probably many more questions than answers.

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