Kluwer Copyright Blog

Private Copying Levy for Social Purposes – Draft Changes in Poland and Compatibility with EU Law – Part II

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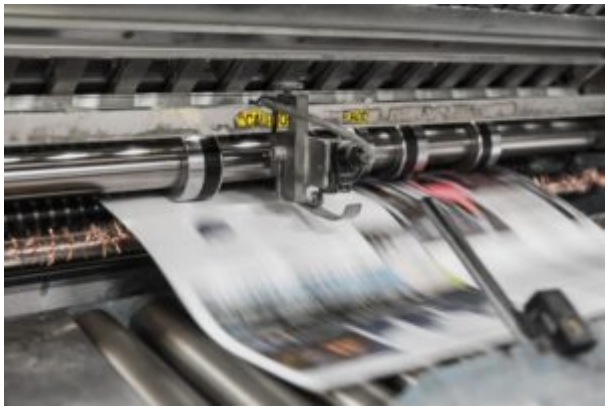

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The Polish Ministry of Culture has announced draft changes to the Polish copyright law on the collection and division of the private copying levy. The **draft law** on the rights of professional artists will significantly change how the private copying levy system has been functioning in Poland so far. In Part I of this blog post I described the draft changes to the Polish copyright law. In this Part II, I turn to the compliance of the draft changes to the Polish copyright with EU law.

The public consultation on the draft law, which ended at the end of May 2021, raised doubts concerning the compatibility of the project with the law of the European Union. Among various allegations, particular attention should be paid to the potential transfer of funds collected from the private copying levy for social purposes to groups other than creators. The critics of the project state that this means that the private copying levy collected under the provisions of Polish copyright will be transferred in a large part to entities whose works are subject to none or minimal "reproduction" rights within the scope of personal use. The circle of "professional artists" does not coincide with the circle of people ("creators") who are given exclusive rights over the copying of their works for private purposes. It is argued that the State's willingness to achieve social policy objectives and the desire to financially support cultural activities should not be based on proceeds from the private copying levy to the extent that the beneficiaries of these measures would be artists whose works are not subject to an exclusive right over reproduction for private use as referred to in Article 2(b) of Directive 2001/29.

It should be stressed that the new rules do not make the payment of funds or the size of the financial support from the private copying levy conditional on the "reproduction" of the works of beneficiaries. Similarly, the amount of money to support individual professional artists has been made independent of the extent of losses suffered by these artists as a result of the reproduction of their works for personal use.

It is worth pointing out that, in addition to the **draft law** on the rights of professional artists that amends Polish copyright, the Polish Ministry of Culture has announced a draft Regulation on

artistic professions for which representativeness is established (bill of 3 May 2021). This includes a list of artistic professions which, by their nature, do not lead to the creation of works within the meaning of the Copyright Act or which cannot be the subject of “reproduction.” Entities entitled to receive support from the private copying levy include, for example, circus artists, makers of musical instruments, exhibition curators and tuners. Interestingly, designers of computer games have also been mentioned, although, according to Article 77 of the Polish copyright law, computer programs do not fall under the exception concerning permitted personal uses described in Article 23 of the Polish Copyright Act. This type of solution, in which the private copying levy will go to artists whose works are not subject to the Copyright Act and do not involve ” reproduction “, is contrary to the Article 5(2)(b) of Directive 2001/29 of the European Parliament and of the Council of 22 May 2001.

In the current legal regime, the main premise for the payment of funds collected through the private copying levy was the claim that the recipient of the levy has created a work or related rights subject matter which is reproduced and that this reproduction is carried out for personal use. The amount of benefits paid is determined on the basis of statistical surveys providing information on the quantity and structure of works copied within the permitted personal use of works. This important aspect of the functioning of the private copying levy as compensation for creators has disappeared from the draft law.

The text of the explanatory memorandum of the draft act on the rights of a professional artist states that: [1]

the admissibility of allocating part of the funds from the private copying levy to promote culture or benefits for artists has already been examined by the Court of Justice in Case C-572/14, Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch musikalischer Urheberrechte Gesellschaft mbH v. Amazon EU Sarl and others, and has not been challenged. It should therefore be acknowledged that, in the light of the above, the allocation of part of the private copying levy to support the Professional Artists Support Fund, from which they will subsequently receive systemic support, is legally acceptable.

Critics of the proposed solutions argue that the judgment cited above (as well as the verdict in the case *Amazon.com International Sales Inc.,v Austro-Mechana* Case C-521) does not justify the new Polish legal solutions, as it deals with the assessment of a factual situation in which the private copying levy was collected by CMOs representing creators where those organisations were obliged under national law to give part of the income allocated to the financing of fair compensation for the rightholders indirectly, through social and cultural institutions set up to promote their interests. This kind of situation is clearly described in the judgment *Amazon.com International Sales Inc.*,v *Austro-Mechana* Case C-521, where it was stated that:

the fact that the fair compensation must be regarded as recompense for the harm suffered by holders of the exclusive right of reproduction by reason of the introduction of the private copying exception, and must necessarily be calculated on the basis of the criterion of such harm, does not constitute an obstacle to the indirect payment to those entitled, through the intermediary of social and cultural establishments set up for their benefit, of a part of the revenue intended for fair compensation. (…)the fact that a part of the revenue intended for fair compensation under Article 5(2)(b) of Directive 2001/29 is intended for social and cultural establishments set up for the benefit of those entitled to such compensation is not in itself contrary to the objective of that compensation, provided that those social and cultural establishments actually benefit those entitled

and the detailed arrangements for the operation of such establishments are not discriminatory (…).

It seems, therefore, that the judgments of the Court of Justice should not be invoked as a justification for the Polish draft bill because, as mentioned above, this does not guarantee that the fee transferred through the 'Polish Chamber of Artists' will go to rightholders whose works and related rights subject matter were actually "reproduced" for personal use and that the amount of payments or support will be linked to the extent of the damage suffered by those entities as a result of such "reproduction".

The proposed changes to the Polish copyright law are accompanied by a rather intense media debate in which representatives of the Ministry of Culture and most artistic circles try to convince of the need to introduce new regulations supporting Polish artists and Polish national culture. Representatives of groups of producers and importers of copying equipment together with consumers concerned about price increases for electronic equipment protest the proposed changes. It can be assumed that if the Polish , they will be challenged by a strong lobby of manufacturers and importers of electronic equipment as inconsistent with EU law for the reasons described in this post.

References[+]

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