Kluwer Copyright Blog

The long and bumpy road to copyright for the digital market – the implementation of the CDSM in Poland – Part I

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Introduction

It took more than three years after the deadline to implement the CDSM Directive in Poland. The new copyright law, the amended Polish Copyright and Related Rights Act of 1994, entered into force in the early autumn of 2024.

Poland is the last country, after Bulgaria, to implement the CDSM Directive. During the five years since the Directive was adopted, risks and challenges, doubts and criticism of the Directive have been the subject of fierce international discussion. In Poland too, it was a time of debate on numerous thorny issues related to the CDSM Directive. That time should have been used to propose an optimum implementation, or maybe even the best implementation in the EU – but is that actually the result we have? This post presents the implementation of the

CDSM Directive in Poland and discusses some of the controversies linked to the new provisions in Polish law. Part I will give an overview of the implementation, including the new provisions on TDM, and the implementation of Article 17 of the CDSM. Part II shall then discuss the right to remuneration and the rights of press publishers.

The history of the DSM implementation in Poland

After the Directive was adopted in April 2019, Poland brought an action to invalidate parts of Article 17, claiming that it was contrary to the EU's Charter of Fundamental Rights. After the implementation deadline passed in June 2021, and after the CJEU's ruling in April 2022, the first draft Polish proposal was submitted for public consultation. In February 2023, the European Commission referred 11 Member States, including Poland, to the CJEU for failure to implement the Directive on time. The first draft proposal did not lead to the successful implementation of the Directive in Poland, and after national elections in 2023, the new government submitted a new proposal for an implementing law in February 2024. This reignited the discussion, during which the most prominent issue was arguably remuneration rights for the online exploitation of works, rather than the problem of freedom of expression or safeguarding rights for users.

The act implementing the Directive in Poland was adopted in July 2024 and entered into force in September of last year. The implementing law amended three acts: the Copyright and Related Rights Act, the law on the protection of databases, and the act on collective management. It also includes the amendments required by Directive 2019/789 (the NetCab Directive).

Overview of the implementing act

Following the complex scope of application of the CDSM Directive, the Copyright and Related Rights Act was extensively amended: it added new definitions, extended the scope of rights, introduced a new related right in press publications, and introduced amendments in the area of contracts and licensing and to the chapter dedicated to limitations and exceptions (or 'permitted uses' as they are labelled in Poland), including out-of-commerce works. It also introduced new mechanisms in the area of negotiating contracts (for the making available of audiovisual works in audiovisual on-demand services, see new Article 73^{1}) and negotiating remuneration due (as in the case of press publishers, see new Article 99^{12}).

Discussion concerning the CDSM Directive focused not only on matters directly related to market problems, but also those concerning the public interest in education, research and culture. The

CDSM Directive provides for new mandatory provisions on limitations and exceptions. Among these, only the text and data mining (TDM) exception was previously entirely unknown to the Polish Copyright Act. The initial proposal that the implementation exclude uses for the purpose of AI training was widely criticised. In the event, the new Article 26^2 allows for the reproduction of works (and databases, according to the amended act on *sui generis* protection of databases) in the course of TDM for the purpose of research, if those activities have no direct or indirect commercial purpose. The exception for uses for research is restricted to cultural heritage institutions and research institutions, as regulated by the Act on Higher Education and Research. Works can be stored for the purpose of research and verification of research results. The new Article 26^3 provides that anyone can reproduce works for the purpose of TDM, unless the right-holder has opted out. The opt-out should be clear, unambiguous and adequate for the mode of distribution of the work. In the case of online dissemination, opt-outs must be in a machine-readable format. Works and databases used for TDM under this framework can be stored for as long as necessary for TDM. The provisions adopted no longer exclude AI training from the scope of TDM, yet the fact that the scope of the use is limited to non-commercial purpose has caused concern.

Existing provisions on the use of works for the purposes of teaching and research already included online teaching activities but were amended to integrate the country-of-origin principle, applicable to cross-border situations (Article 27 (2)). The amendments also limited the possibility of copying works to 25% of their volume, in cases other than minor works. As a result, minor works, such as poems or songs, may be reproduced in their entirety, while textbooks only to a limited extent. Limiting uses to a certain percentage of the work is not clearly required by the Directive and quantitative limitations are a novelty in the Polish Copyright and Related Rights Act. Article 28 of the Copyright and Related Rights Act, which allows for public lending, the reproduction of works for the purpose of preservation of cultural heritage, and making works accessible via information system endpoints at the premises of a set of listed institutions, was amended to clarify the entities covered by the provision and to underline that the works copied for the purposes of preservation of own resources need to be permanently included in the collection of an institution. Article 7 of the CDSM Directive prohibiting contractually overriding exceptions and limitations was not specifically implemented. It was explained in the draft proposal that there is no need for a provision that would expressly confirm the imperative character of the provisions on permitted uses.

Three other controversial issues include: the liability of online content sharing service providers (OCSSPs), the implementation of the principle of appropriate and proportionate remuneration, and the rights of press publishers. All these areas can be linked to the problem of a potential value gap and the issue of remuneration of rightholders for the online exploitation of works or other protected subject matter, such as artistic performances or press publications.

Implementation of Article 17 CDSM – liability of OCSSPs, and users' rights.

After the battle fought before the CJEU and concerns about the possibility of restricting lawful content through the application of upload filters, the implementation of Article 17 CDSM Directive in Poland follows the wording of the Directive quite closely.

Article 17 is implemented in Articles 22^1- 22^8 of Section 2^1 of Chapter 3 of the Polish Copyright Act on the scope of the rights of authors. The definitions of the fundamental concepts of OCSSPs

and service recipients are provided in Article 6 of the Copyright Act, with reference to the definitions of service providers and service recipients included in the Act on Provision of Services Electronically (implementing the E-Commerce Directive). According to Article 22¹(1), OCSSPs (in Poland the abbreviation DUUTO is informally used) make a work available (communicate the work) to the public, when they provide access to content uploaded by service recipients. In short:

1. The service provider (DUUTO) must meet the definition of Article 6 para 25; this contains a number of exclusions.
2. It needs to provide access to content; however, providing access to content is at the same time a condition to be considered to be a DUUTO by definition.
3. The content is uploaded by a service recipient.

According to Article 22², if the DUUTO has not obtained the right-holders consent (and the Act uses the term "consent" – in Polish, *"zgoda"*, instead of "authorisation", – *"zezwolenie"* –, as used in the Polish version of the CDSM Directive) it may shield itself from liability if:

1. it acted diligently to obtain consent;
2. it was duly diligent in disabling with accessible technological tools access to the work, for which the right-holder provided necessary and adequate information, which in particular makes it possible to establish who the right-holder is and to identify the work;
3. it acted expeditiously after receiving from the right-holder a sufficiently justified request to block content or take down content, and was duly diligent in disabling access to this content in the future, if it was provided with the necessary and adequate information.

This liability exemption is not applicable, according to Article 22^6, to those service providers whose main purpose is violating or facilitating the violation of copyright. Article 22^7 clearly states that DUUTOs have no general obligation to monitor the lawfulness of uploaded content.

Addressing the issue of the rights of service recipients of DUUTOs, the Polish implementation repeats the text of Article 17(7) CDSM Directive, according to which the cooperation between right-holders and DUUTOs must not result in the prevention of the availability of works uploaded according to the law, including permitted use. There is no reference to either "manifestly illegal" or "presumably lawful" content, as encountered in other national implementations. The Polish Copyright and Related Rights Act specifies that users firstly need to be informed about the possibility of using exceptions and limitations in the terms of service (Article 22^6 (2)), secondly, need to be informed of any disabling of access to, blocking or removal of content (Article 22³ (2)) and, thirdly, need to have access to internal complaint mechanisms (Article 22^5). Complaints may be submitted in the case of disabling access to, blocking or removing content and are free of charge for users. Complaints cannot be decided solely with the use of algorithmic tools. The Copyright Act is silent on any out-of-court dispute settlement mechanism and leaves the issue of the "right to court" to be decided based on the general rules. Although minimum safeguards for users are in place, the obligation to ensure the availability of lawful content is transferred from the state (as the addressee of the Directive) to the service providers and right-holders, and thus is subject to assessment by the courts, based on the general rules. This solution does not sufficiently reinforce the position of users in relation to platforms and limits external control to cases where users actually decide to bring their case to court.

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