PRIVATE FAIR USE: STRENGTHENING POLISH COPYRIGHT PROTECTION OF ONLINE WORKS BY LOOKING TO U.S. COPYRIGHT LAW

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INTRODUCTION

In 2008, Poland was sixth in the world in illegally publishing copyrighted works on the Internet, providing about 5% of the world’s pirated works.\(^1\) Such illegal activity in Poland is so pervasive that often movies or music albums are available online before the official date of release.\(^2\) With illegal computer software, the situation looks even worse. Poland contributes 8% of the world’s pirated computer games and programs.\(^3\)

Rampant piracy in Poland is possible due to the absence of legislation that prohibits downloading pirated files from the Internet. According to the fair use provision expressed in Article 23 of the Polish Copyright Act (“PCA”), downloading files from the Internet for personal use is permitted.\(^4\) This provision acts like an incentive for illegal activity among Internet users.\(^5\)

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\(^1\) According to Black’s Law Dictionary definition, piracy is “The unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.”; In Poland piracy is illegal. Art. 115.1 of Polish Copyright Act says that “Whoever usurps the authorship or misleads others as to the authorship of a whole or a part of another person's work or another person's artistic performance shall be liable to a fine, restriction of liberty, or deprivation of liberty of up to three years.” See Regina Anam Piractwo Internetowe: Polska na 6 Miejscu, EGOSPODARKA.PL (Dec. 7, 2008), http://www.egospodarka.pl/35989,Piractwo-internetowe-Polska-na-6-miejscu,1,39,1.html.

\(^2\) For example in September 2009, two weeks prior the official premiere of the newest album of music band Kult „Hurra!” the whole album was available on the Internet without consent and knowledge of the author or publisher. ANAM, supra note 1.Country with the highest piracy rate is a China (86% of all users in China download infringing content) Kamila Urbąńska 48% Polskich Internautów to Piraci Komputerowi, EGOSPODARKA.PL (Sep. 15, 2011), http://www.egospodarka.pl/70924,48-polskich-internautow-to-piraci-komputerowi,1,39,1.html.

\(^3\) Ustawa o Prawie Autorskim i Prawach Pokrewnych [Ustawa o Prawie Autorskim] [Copyright Act], Feb. 4, 1994, DZIENNIK USTAW [DZ.U.] art. 23 (Pol.)

\(^4\) On the other hand, uploading files online without the consent of a copyright owner is illegal under the polish law. Existing provision gives law enforcement a small opportunity to fight against online pirates, but in reality it does not work either. According to polish criminal code, if a person uploads files illegally he may be sentenced to a fine, a restriction of liberty or sent to jail for 2 years. In Poland so far, only one person was sentenced to prison for copyright infringement, while most online pirates are sentenced to fine or suspended imprisonment. In 2009 the District Court of Koszalin sentenced Armenian merchant to 2 years of imprisonment for selling infringed copyrighted works. The court decided such punishment, because Armenian was previously sentenced for the same crime in 2005 to suspended imprisonment. Most cases however end with fine and suspended imprisonment.
Publishing houses lose millions of zlotys each year because more and more people decide to acquire movies, music and books from the pirate websites. Consequently, publishing companies raise their prices or even withdraw from the Polish market. Accordingly, persons who want to buy music or movies legally must pay more. Inevitably many decide not to, turning the whole issue into a vicious circle.

Ipsos Public Affairs performed a survey among Polish Internet users, showing that more than 48% use illegal software and share other’s work without the creator’s consent. The survey was performed among different types of users, both low and high educated. The outcome showed that even business decision-makers admit to obtaining online content illegally.

Poland is not the only country struggling with illegal downloading. U.S. is another clear example of how big the problem is. The Recording Industry Association of America (“RIAA”) maintains statistics about the scope of the problem. According to the official information from the RIAA website dated October 2012, between 1999 and 2009, music sales income in the U.S. dropped 47%, from $14.6 billion to $7.7 billion. In the year of 2009 alone, 63% of all music in

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9 URBAŃSKA, supra note 3.
10 Id.
11 Such activity has a negative outcome on global market. A survey performed by International Data Corporation shows that online piracy inhibits the economic growth of the country and global market itself. According to this survey, in the year of 2009 every fourth computer user in the world had used illegal software and shared other’s works without consent, showing that the total value of these works and software was estimated at more than $51 billion USD. See URBAŃSKA, supra note 3 and BARANOWSKA-SKIMINA, supra note7.
U.S. that was acquired online came from illegal sources.\textsuperscript{13} Although the U.S. struggles with its own problems concerning online pirates, it has developed useful mechanisms to protect authors and copyright holders against unauthorized downloading from the Internet.\textsuperscript{14}

Considering the facts and statistics presented above, Poland needs to improve its existing copyright law in the field of Internet protection. This paper will focus on the need to change the existing fair use provision in Polish copyright law with the applicable U.S. model of fair use (within the possible scope granted by European Union directives) and explain why the U.S. approach will be the most appropriate for the Polish legal system. Part I will describe the current Polish online copyright law, present shortcomings of a fair use doctrine in Polish law, and compare it with U.S. law regarding this matter. Part II is dedicated to presenting the proposals of amending Polish law in the field of fair use provision, or creating a new one using the U.S model. Part II will also describe the process of implementing the proposed solution and describes their advantages. Part III will discuss potential critiques and concerns raised by these proposals.

I. Comparative View of Polish and U.S. Online Copyright Law: Problems with Domestic Protection in Poland under the Current Regulations

In theory, the PCA appears to be very well organized and to include all necessary elements required to protect the rights of an author. It follows all the basic ideas of how authors should be treated and what rights they should have.\textsuperscript{15} Looking at the statute itself, it may seem that in Poland, an author’s rights are well protected against online infringement.\textsuperscript{16}

\textsuperscript{14} Copyright Act and Digital Copyright Millennium Act both cover the issue of protection of authors against unauthorized and unfair use of digital content.
\textsuperscript{15} Polish Copyright Act is in general very similar to U.S. Copyright Act from 1976. Section 106 of US Copyright Act covers the same rights as Articles 1 and 17 of Polish Copyright Act.
\textsuperscript{16} According to Black’s Law Dictionary (9th ed. 2009), infringement is an act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner. In reference to copyrights, infringement is the act of violating any of a copyright owner's exclusive rights granted by the federal Copyright Act, 17 USCA §§ 106, 602. In general, legislators did a tremendous work, including a whole copyright law in one uniform act. Legislator provided a transparent and well-organized structure of a statute. The entire act contains only 129 articles, divided into
Unfortunately what looks good in theory does not necessarily work in real life. Because of literally a single Article 23 of PCA, a whole concept of online copyright protection does not exist. Unfortunately, what was meant to provide a balance between the rights of authors and the interest of end users, created a gaping hole in a well crafted mechanism. Part I explores the shortcomings of the fair use provision in the Polish Copyright Act and compares the Polish system with the U.S. approach.

A. Polish Copyright Law for Online Works Fails to Adequately Protect Authors

The following subsection describes end user liability for online activity in light of the PCA and explains the general rights of authors in Poland. This subsection also explains the lack of sufficient provisions in Poland to prevent end users from exploiting the works of others.

1. Exclusive Rights of an Author

The most important statute regarding copyright law in Poland is the Act on Copyright and Neighboring Rights, which was enacted on February 4, 1994. The PCA has several general principles that are the very essence of the whole statute and Polish copyright law itself.

Under Article 17, “an author has the exclusive right to dispose, disseminate and exploit his work in any fields now known or arising in future.” Moreover, Article 6 defines a “disseminated work” as one which, “with the permission of the author has been available to the
Regarding online works, authors are entitled to use online shops like iTunes or Amazon to sell their songs or movies. They may also post their works on the websites like YouTube or Pandora. Most importantly, under this provision, authors are the only ones who can decide how to disseminate their works, unless they license the works to another individual. Thus, any person who wishes to use or copy an author’s work needs the author’s consent.

2. Permissible Use of Protected Works, or “Fair Use”

Before moving forward, one must understand that European countries, including Poland, do not generally use the term “fair use” to describe copyright limitations. In its place however, different States have developed domestic terminology to describe the same concept, including - private or public use, use of another’s work without permission, etc. In Poland, the preferred phrase is “Permissible use of protected works”, which is the title of Division 3 of Chapter 3 of Copyright Act. For the purpose of this paper however, the general term “fair use” will be used to address all copyright limitations in Poland.

The fair use provisions in Polish law follow the established worldwide approach of balancing the rights of an author with the public’s interest. Thus, the Polish legislature understands that, even though authors have exclusive rights to their own creations, to promote useful arts and science, there must be limits and exceptions to these rights. Providing such exceptions is important to enable the public to support education and to contribute to and benefit from scientific achievements.

20 COPYRIGHT ACT, art. 6.
22 COPYRIGHT ACT, art. 17.
23 Id., art. 17-19. This consent may take the form of price, private assent or license to use.
25 COPYRIGHT ACT, supra note 4, Division 3, Chapter 3.
26 Fair use provisions exist for instance in all European countries and United States of America.
Fair use is protected by Polish law in Articles 23-35 in Chapter 3 of the PCA.\textsuperscript{28} These provisions distinguish between two kinds of fair use: public and private fair use.

\textbf{a. Public Fair Use}

Public fair use is defined in a very clear and simple way. The ultimate goal of public fair use was to secure equal access to knowledge and the useful arts by many.\textsuperscript{29} According to the PCA, the public may use works of others in forms of comments, parody, news reports, and public debates.\textsuperscript{30} For the purpose of education, schools may use already disseminated works, teachers may make copies for class materials, and whole collections may be shared with third parties working on research objectives.\textsuperscript{31} Moreover, everyone is entitled to use already disseminated works for religious purposes, national security reasons, commercial advertising, and judicial proceedings.\textsuperscript{32}

Polish public fair use follows the general standards known and accepted by most countries and world international copyright organizations, and therefore is not a subject matter of this paper.

\textbf{b. Private Fair Use}

Articles 23 and 24 of the PCA address a separate group of fair use regarding private entities. The original intention of these provisions was to secure the right of a buyer to the purchased products.\textsuperscript{33} It was understood at the time of enactment, that everyone should have the right to dispose of previously purchased products without inconvenient legal boundaries. According to the original intentions, a person should have the right to make, for his own use,

\textsuperscript{28} \textsc{Copyright Act}, art. 23-35.  
\textsuperscript{29} \textsc{Podrecki}, \textit{supra} note 27, at 399.  
\textsuperscript{30} \textsc{Copyright Act}, art. 25.1, 26.  
\textsuperscript{31} \textit{Id.}, art. 28.  
\textsuperscript{32} Every work used for these purposes must be properly acknowledged with the name of an author and source it was taken from. \textsc{See Copyright Act}, art. 33, 34.  
\textsuperscript{33} \textsc{Podrecki}, \textit{supra} note 27, at 402.
copies of purchased books, CD’s, movies, photos, and maps, and to share them with a family and close friends.\textsuperscript{34}

Unfortunately, the construction of Article 23 in particular causes a lot of discrepancies of interpretation. The English translation of this provision, as provided by the World Intellectual Property Organization, is as follows:

[I]t shall be permitted to use free of charge the work having been already disseminated for purposes of personal use without the permission of the author . . . the scope of the personal use shall include the circle of people remaining in personal relationship and in particular family relations, kinship, or social relationship.\textsuperscript{35}

This provision means that one is allowed to use free of charge a work for personal use without the permission of the author if the work already has been disseminated.

By the time of implementation of the act, the Internet in Poland was emerging, thus legal reasoning of the Article 23 regarding private fair use was accurate and up to date. Since the technology moved forward and broad access to the Internet became a standard, especially in cities, the Article 23, however, remained the same. During the creation of the Article 23, the legislature did not predict the technology will change so fast, thus the Article 23 is now outdated and works contrary to the original intentions of the legislature.

Article 23 refers to already disseminated works, which Article 6 defines as works that have been made, with the permission of the author, available to the public in any way.\textsuperscript{36} And once it is disseminated, a work will always be “already disseminated.” Thus, Article 23 in connection with Article 6 allows to anyone to use the work of others, once it appears in any

\textsuperscript{34} PODRECKI, supra note 27, at 402.
\textsuperscript{35} COPYRIGHT ACT, art. 23.
\textsuperscript{36} Id., art. 6.
medium, whether radio, television, or YouTube.\textsuperscript{37}

The creators of the act did not limit Article 23 to permitting only personal uses of the works of others that were previously legally purchased. As a result, there is a gaping hole in PCA. What was supposed to be a facilitation for rightful buyers, has become a gate to immoral and exploitative activity. Downloading movies, music, and books is allowed without paying the price for them. Moreover, according to the same article, the person who downloads music or movies may share them with family, friends, and even work mates.\textsuperscript{38}

Some scholars argue that, to understand the true meaning of Article 23, one should refer to Article 35, the last article in the “Permissible Use” section of the PCA.\textsuperscript{39} Article 35 provides that a fair use “may not infringe the normal use of the work or violate the rightful interests of the author.”\textsuperscript{40} Scholars argue that, reading these two articles together, the creators of the PCA specifically say that no one should exploit the permissible use of another’s work and interests of authors. Scholars understand “violation of rightful interests of an author”, to include downloading and using other’s work without remuneration.\textsuperscript{41}

Notwithstanding this reading, courts tend to choose a different approach. According to “Rzeczpospolita Prawo”, a popular and respected Polish daily newspaper about legal matters,\textsuperscript{42} there is no single judgment concluding that downloading files from the Internet is a violation of the law.\textsuperscript{43} Conversely, there is no record of any judgment regarding whether downloading files

\textsuperscript{37} Comment on Article 23 of the Polish Copyright Act by Adam Wasilewski, (available at) http://lponline.lexpolonica.pl/plweb-cgi/main.pl?test_cookie=1.

\textsuperscript{38} COPYRIGHT ACT, art. 23.

\textsuperscript{39} PODRECKI, \textit{supra} note 27, at 402-403.

\textsuperscript{40} COPYRIIGHT ACT, art. 35.

\textsuperscript{41} PODRECKI, \textit{supra} note 27, at 403.


from the Internet is valid or not. Accordingly, it appears that, no one ever has been accused of violating of Article 23 of PCA. Likewise, it does not appear that any case has been filed alleging a violation of Article 35. The only time that Article 35 appears in courts rulings is when courts use it in a supplementary form, in order to explain their reasoning in particular cases, none of which involve a claim of illegal downloading of online works.45

c. Protection of Computer Programs in Copyright Act

In contrast to its treatment of online works, the PCA dedicates a separate chapter of the Copyright Act to a particular kind of work – software – and adequately protects it against infringement. In general, computer programs are not subject to the permissible use exception. According to Article 74 “computer programs shall be subject to protection as literary works, unless the provisions of this chapter provide otherwise,” and Article 77 adds that “article . . . 23 . . . shall not apply to computer programs.” Consequently, no one may download computer programs without consent of the owner, even for a private purpose. Downloading software like Microsoft Word or Quake without paying the price is illegal and can be the subject of civil and criminal liability. Rightful owners cannot lend their copies of a computer program to a friend,

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44 LexPolonica is a Polish equivalent to the West Law and LexisNexis in United States. For the purpose of this paper, there has been performed a research on LexPolonica, in order to find judgments regarding violation of Articles 23 and 35 of PCA. None judgments have been found. LEXPOLONICA: SERWIS PRAWNICZY LEXISNEXIS (Nov. 2, 2012). http://lexpolonica.lexisnexis.pl.
45 According to the research performed on LexPolonica, there are only three cases where Article 35 of PCA appears. None of them regards violation of Article 35. Said article is mentioned only in the context of different subject matter. See Sąd Apelacyjny w Warszawie [Court of Appeals in Warsaw] Jan. 19, 2007, WYROK SĄDU APELACYJNEGO W WARSZAWIE I ACa 882/2006 (Pol.), Sąd Apelacyjny w Warszawie [Court of Appeals in Warsaw] Aug. 28, 2009, WYROK SĄDU APELACYJNEGO W WARSZAWIE VI ACa 159/2009 (Pol.), Wojewódzki Sąd Administracyjny w Warszawie [Regional Administrative Court in Warsaw] Apr. 4, 2008, WYROK WOJEWÓDZKIEGO SĄDU ADMINISTRACYJNEGO W WARSZAWIE III SA/WA 301/2008 (Pol.).
46 COPYRIGHT ACT, art. 74.
47 COPYRIGHT ACT, art. 77.
48 Under the civil liability ,The author may request from the person who infringed his author's economic rights to cease such infringement, to render the acquired benefits, or to pay double or, where the infringement is culpable, triple the amount of respective remuneration as of the time of claiming it. The author also may claim the repair of the inflicted damage if the action of the infringing party was culpable.” The same act constitutes the criminal liability of the infringer. “1. Whoever, without authorization or against its terms and conditions, disseminates another's work, artistic performance, phonogram, videogram, or broadcast, in the original or derivative version, shall
nor can they make another copy for their own use.

There are many cases involving situations of illegal downloading of computer programs in Poland. In most situations where persons acquire illegal copies of software, courts find them guilty of breaching Articles 74 and 77 of the PCA.49

Computer programs are protected in a superior way to music, movies and books. This discrepancy is wrong and dangerous. Not only in relation to authors, but also to the public. Because of this distinction, courts may understand that Article 23 is how it is suppose to be and that allowing everybody to download files from the Internet without their creators consent was the ultimate goal of the legislature in the first place. Moreover, people learn that they do not have to pay for certain types of goods, while they have to provide remuneration for others, and they act accordingly.50

B. U.S. Copyright Law for Online Works Sufficiently Protects Authors

American and Polish laws are similar in that they both set forth the exclusive rights of a copyright owner. Section 106 of the U.S. Copyright Act (“USCA”) and Articles 17-22 of the PCA adopt similar approaches, stating that copyright holders have the exclusive rights to use, reproduce in copies or phonorecords, disseminate, prepare derivative works based upon previous

50 The work of authors who make music, movies or computer software cannot be graded. It is very harmful to create a situation where certain entities are treated in a superior way to others. This happens when music and movies are subject of free personal use, while computer software is not.
works, and distribute copies with the receipt of remuneration.\textsuperscript{51} The major difference between the American and Polish approaches however, is Section 107 of the USCA (in contrast to Article 23 of the PCA).\textsuperscript{52}

Fair use in the U.S. is a doctrine that limits the exclusive rights granted by copyright law and provides that in some circumstances, people should not be liable for actions otherwise infringing copyrights.\textsuperscript{53} A reason for that can be found in the U.S. Constitution, where creators of the act expressed that “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”, which in fact is the basis for copyright protection in general.\textsuperscript{54} The emphasis however, should be placed on the expression “To promote the Progress of Science and useful Arts . . . “, because every creation made by a man is somehow derivative, influenced by works of others and therefore fair use is necessary to secure that progress.\textsuperscript{55} If fair use did not exist, no one could have ever written a research paper or created a love story about two young kids, whose family hated each other that eventually led to their death.\textsuperscript{56}

Although first not codified, fair use emerged from court rulings and finally found its place in Section 107 of the USCA in 1976.\textsuperscript{57} Section 107 provides an exception to copyright infringement where the use of the work is “for purposes such as criticism, comment, news

\textsuperscript{52} 17 U.S.C. § 107; COPYRIGHT ACT, art. 23.
\textsuperscript{54} U.S Const. art. I, § 8, cl. 8.
\textsuperscript{56} See Nichols v. Universal Pictures Corp., 45 F.2d 119 (1930) (ruling that there have to be some limits to protection of work, otherwise people would be unable to express new ideas).
\textsuperscript{57} Even though fair use is mostly an outcome of a common law, U.S. courts looked also on British approach, especially The Statute of Anne from 1709.
reporting, teaching, scholarship, or research.” 58 To determine whether the use is fair use, a court must consider four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work. 59

Courts must always consider at least these four factors but may consider additional elements important for a particular case. 60

The first factor, the character and purpose of the use, is considered to be “the heart of the fair use”. 61 It addresses the issue of whether the use was justified because it stimulated the artistic creativity or benefited the public, the core goal of copyright. 62 In order to answer this question, courts usually divide each case into two questions: whether the use was for commercial or nonprofit educational purposes, and whether the use was transformative. 63

Commercial use is less likely to be found non-infringing; nevertheless this element is not decisive and depends on the particular circumstances surrounding a case. 64 Courts are unlikely however, to conclude that the use is non-infringing, if it led the copyright owner to lose profits. 65 Noncommercial use, on the other hand, is usually considered to fair use, because the user does not strive to gain profit. One should remember however that, even though the use may not be

59 Id.
65 Id.
oriented to gain profit, it may still cause the owner to detract his monetary gain and therefore lead to exploitation of his work.  

The other issue regarding the first factor is whether the use was transformative or merely derivative. To answer that, the court will examine if the use of the copyrighted work added any new expression or meaning to the original work. Transformation of a work may include comments, parody, summary of the facts, or aesthetic declaration. The audience however, must be aware of a transformative character of a new work.  

The second factor, the nature of the copyrighted work, is directed to the principle that only expressions, and not ideas may be a subject of protection. Thus, the concept of a superhero wearing a mask is not protected, as long as the characters are presented in a different way sufficient to determine that the new concept was not derived from the original. The second factor refers also to the nature of bare facts, which are not protected as well. Reported news or facts covered in a biography can be used to write different stories, as long as the expression of the original story is not copied. However, the scope of fair use is narrower in the case of unpublished works because the author has the exclusive right to control the first appearance of his work.  

The third factor, the amount and substantiality of the work taken, considers how much of the original work was used to create a new one. Usually, the larger the amount of original work

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66 For example, if someone put a copy of author’s book on the Internet, only to prove how good it is and encourage others to buy one, it may still lead to loss of author’s income because others may take the „free copy”, rather than buy legal one. See A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).
67 In the case Campbell v. Acuff-Rose Music, the U.S. Supreme Court found that this element is the most important to determine, whether the use was fair. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
68 LEVAL, supra note 56, at 1111.
used, the more likely that copyright infringement will be found. But this factor refers not only to the amount used, but also to the substantiality and quality of the portion taken. Even copying a small part of a work may be found infringing if it is a key component—“the heart” of the original work.

The last factor, the effect of the use upon the potential market, has its basis in the economic value of the creation. This factor is used to evaluate whether the new use can deprive the author of the original work of income. In other words, courts will determine if the new use results in monetary harm to the original creation. If the new use damages the market value of a copyright owner, there most likely will be no fair use. The same rule applies even if the new use does not compete with the original work. If the new creation could affect the potential market of the original work, it will be found infringing.

Fair use in U.S. copyright law is very broad and has characteristic open-ended standards. Courts have vast discretion in evaluating whether one act constitutes fair use or not, following the four required factors and using their own reasoning. Fair use recognizes a broad spectrum of possibilities of using the works of others without being liable of infringement. Private use, however, is not specifically addressed in Section 107. In order to claim private use is a fair use, one must prove that the four-factor test weight in his favor, and/or court may apply different standards in a particular case.

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74 In the case involving President Ford’s memoir, the court found that using less than 400 words from the book was actually “the heart of the book” and thus infringing. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985); LEVAL, supra note 56, at 1122.
76 Id.
77 See Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
79 See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). Even thought that case was decided in 1984, courts still refer to it as an example of private use.
In most cases, end users will not be allowed to download and share files on the Internet without the copyright owner’s consent. In the recent case of BMG Music v. Gonzales, the defendant downloaded (using KaZaA) 30 songs without the authorization of the authors. The defendant claimed that she only acquired samples to check whether she wanted to buy whole albums. However, the court held that downloading unauthorized copies of musical files using KaZaA software infringes copyrights of the owners and awarded remedies in the amount of $22,500 to the plaintiff. This ruling applies to all circumstances of downloading and sharing illegal files over the Internet. Apart from the case mentioned above, there are other examples where courts found that downloading files from the Internet without the consent of the authors was an infringement.

C. European Union Directives Permit Poland to Change its Copyright Laws to Close the Loophole Created by Article 23

In order to introduce revisions or amendments into Polish copyright law, they must comply with the applicable EU directives. Any changes may be performed only within the scope granted by those directives. The following subsection will describe the relevant EU directives.

1. Free Private Use Can Be Redesigned

Directive 2001/29/EC refers to the issue of fair balance between the interests of right holders and Internet users. The Directive provides the possible scope of exceptions and limitations on the rights of authors. According to Article 5 of the Directive, a Member State may

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81 BMG Music v. Gonzales 430 F.3d 888 (7th Cir. 2005).
82 Id.
provide exceptions and limitations to reproduction rights in regards to use by a private entity.\textsuperscript{85} Such use occurs when natural person reproduces a work in any medium for non-commercial private use.\textsuperscript{86}

Any Member State may or may not decide to implement exceptions or limitations to reproduction rights. Moreover subsection 5 of Article 5 expressly states that exceptions and limitations should be applied only in very certain and special cases, so not to disturb the interests of right holders and not to conflict with the normal exploitation of the works.\textsuperscript{87}

In addition, the Preamble of the Directive provides a guide of how to implement provided solutions in a domestic legal system. Section 31 of the Preamble states that “the existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment” because they may have a possible negative impact on the internal market and commerce.\textsuperscript{88} Another section of the Preamble, Section 38, states that digital private copying may have greater economic impact on a market and therefore Member States should take into account “the differences between digital and analogue private copying and a distinction should be made in certain respects between them.”\textsuperscript{89}

The current Polish copyright law’s implementation of Article 5 of the Directive does not fulfill the true principals of European Union law presented in the Preamble and is harmful to copyright owners in Poland. It therefore should be changed. Moreover, the Directive allows the Polish government to change the existing shape of Article 23 of the PCA, which is necessary to cure copyright protection.

\textsuperscript{85} Id., Article 5.
\textsuperscript{86} Id. As was explained earlier, Polish government enacted an article 23 of Polish Copyright Act which allows any natural person to use and copy the work of others, as long as that use is for private and non-profit purpose.
\textsuperscript{87} Id., Article 5, § 5, 31, 38 of the Preamble.
\textsuperscript{88} Directive 2001/29, § 31 of the Preamble.
\textsuperscript{89} Directive 2001/29, § 38 of the Preamble.
2. **Poland May Apply More Restricted Sanctions for Copyright Infringement**

The Directive 2004/48/EC in Article 16 states that, without the conflict with other principals provided by this Directive, “Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.”\(^9\) This provision gives an opportunity to increase liability for copyright infringement in Poland in addition to the sanctions proposed expressly in the Directive.

II. **Closing the “Gaping Hole” in the Polish Fair Use Provision**

In order to cure the problem created by Article 23 of the PCA, there is a strong need to amend or replace the existing provision. This Part presents two possible solutions. The first solution does not change the existing law dramatically, but rather proposes an amendment to Articles 6 and 23 of the PCA. The second solution proposes an entirely new approach to Polish fair use. The second solution is borrowed from the U.S. law of fair use.

The first solution, the “Simple Solution”, should be considered as a better remedy for the existing problem and the Polish legislature should choose this path. On the other hand, taking into account all advantages of the first proposal, amending an existing provision is usually a short-term solution; therefore, in the future the legislature should take steps to introduce the second proposal as a permanent solution.

A. **“Simple” Solution: Amend the Offending Laws**

Poland is a civil law country, and as a member of the family of civil law countries, it has developed its own legal standards and methods of legal interpretation. That situation applies also to copyright law and fair use regulations. The following subsection will describe a method of resolving the current problem by amending the existing regulations in the Polish Copyright Act.

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1. **A Proposed Amendment of Articles 23 and 6 of the Polish Copyright Act**

At the outset, it is important to remember that existing law had developed some kind of legal standards of interpretation. Thus, it may be advisable, only to add additional provisions to the existing Article 23 of the PCA instead of changing it entirely so not to confuse and create another dilemma with interpretation.

The current Article 23 reads as follows:

1. It shall be permitted to use free of charge the work having been already disseminated for purposes of personal use without the permission of the author. This provision does not authorize building constructions according to other authors' works in the field of architecture and town planning.
2. The scope of the personal use shall include the circle of people remaining in personal relationship and in particular family relations, kinship, or social relationship.\(^{91}\)

In order to maintain the general shape of the current regulations, an amendment should be performed in a subtle way so not to perturb overall construction. Thus, the Article 23 should not be rewritten as a whole. Rather, adding one additional paragraph referring only to digital works is sufficient.

Amended, Article 23 of PCA would read as follows:

1. It shall be permitted to use free of charge the work having been already disseminated for purposes of personal use without the permission of the author.\(^1\) This provision does not authorize building constructions according to other authors' works in the field of architecture and town planning.\(^1\) In relation to online digital works, this Article applies only where one has legally purchased a copy of the work or where the authors of those works have stated that they do not expect remuneration.\(^1\)
2. The scope of the personal use shall include the circle of people remaining in personal relationship and in particular family relations, kinship, or social relationship.

The first paragraph has been separated into two subparagraphs in order to simplify the understanding of the provision. The key meaning of the added regulation is to express that

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\(^{91}\) **COPYRIGHT ACT**, art. 23.
Article 23 refers only to works acquired in a legal way. This presented solution is clear and simple, does not interfere with the rest of the act, and is easy to interpret. If the work was legally acquired, one may use it for private purposes, like making backup copies or sharing with family or friends. This paragraph also provides a clarification regarding online digital works, especially ones available over the Internet. No more may one argue that since the work was already disseminated, he or she can download a movie or music from a website for free unless the author of the work has stated otherwise.

In order to avoid future misinterpretation, Article 6 of PCA should be amended as well to provide a clear definition of the term “online digital work”. In its current form, Article 6 reads as follows:

Whenever this Act mentions:
(1) published work, it shall mean a work which, with a permission of its author has been reproduced and its copies made available to the public;
(2) simultaneous publication, it shall mean publication of a work within the territory of the Republic of Poland and abroad within 30 days from the date of its first publication; and
(3) disseminated work, it shall mean a work which, with a permission of an author, has been made available to the public.92

To provide a transparent understanding of Article 23, the following definition should be added to Article 6:

(4) online digital work, it shall mean a material that resides on a system or a network controlled or operated by or for an internet service provider.

The above definition will clarify a term used in the amendment to the Article 23 to avoid problems regarding interpretation of such article. The term “digital work” was chosen based upon the language used in the “Agreed statement concerning Article 1(4)” of the World Intellectual Property Organization Copyright Treaty (hereinafter WIPO WCT).93 Since Poland is

92 COPYRIGHT ACT, art. 6.
93 See footnote 1 of the WIPO Copyright Treaty.
the member of WIPO WCT, using the term “digital work” is appropriate. The word “online” however, was added to clarify that the amendment to Article 23 should refer to works published in an online environment.

The construction of the definition itself was taken from U.S. Digital Millennium Copyright Act (DMCA).\textsuperscript{94} Section 202 of the DMCA defines “online material” as “material that resides on a system or the network controlled or operated by or for the service provider.”\textsuperscript{95} Although the DMCA is concerned with the liability of Internet service providers rather than downloading, its definition of “online material” still fits into the concept presented in the proposal.

2. Advantages of the First Approach

The purpose of every policy proposal is to provide a simple, effective, and clear solution to the existing problem. The idea presented above meets all of these goals. The amendment as a whole is efficient; the total outcome gives only two new paragraphs to the entire body of the statute. The language is plain and simple, does not leave room for ambiguity, and provides clear definitions of terms. The proposal does not create its own language, but rather takes it from verified sources like international treaty and U.S. legislation. This means that the amended PCA could be easily understood by foreign lawyers and copyright holders, which is important given that worldwide scope of copyright law.

On the other hand, domestic regulation would not be affected, causing new problems. The presented solution simply clarifies existing approach and helps protect legitimate interests of both authors and buyers.

B. The Complex Solution: Replace the Offending Laws with American–Style Fair Use Provisions

\textsuperscript{94} 17 U.S.C. § 202 (2010).
Alternatively, the legislature might consider adopting a totally new approach to fair use in Poland. The following subsection will introduce and discuss such an approach, which includes elements derived from U.S. approach.

1. Fair Use Provision Based on the U.S. Approach

Taking into account the advantages of the American approach, Poland might incorporate a U.S.-style fair use provision into the existing PCA. More specifically, Article 23 of the PCA could be replaced with entirely new formula based on Section 107 of the USCA.96 A new version of Article 23 could read as follows:

Article 23

Notwithstanding articles 17 – 22 of this act, the permissible use of a copyrighted work, for the purpose of personal use is not an infringement of copyright. In determining whether the use made of a work in any particular case is a permissible use, the factors to be considered shall include:

1. the purpose and character of the use;
2. whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable; and
3. whether the effect of the use upon the potential market for or value of the copyrighted work does not harm the copyright owner.

The structure of the above provision is very similar to Section 107 of the USCA. The factor-based test and open-ended standards of interpretation would allow Polish courts to address fair use on a case-by-case basis. This is advantageous given that technology will always be one step ahead of the legislature. What is up to date now, may be obsolete tomorrow. The best example is the current Polish fair use provision. Even though it was enacted in 1994, it does not reflect current needs for copyright protection. U.S. fair provision on the other hand, despite the fact that is almost 20 years older, is flexible and still works.

Although the above solution is derived form the U.S. approach, it has few major differences. First, it applies only to private use. As was stated in the previous section, public use

in Polish copyright law does not require any changes. Second, each factor in the factor-based test is slightly different from the U.S. test. The first factor refers to the character and purpose of use but does not distinguish between a commercial or noncommercial use to allow each court to determine the character and purpose of the use in a particular case. Thus, courts would not have to determine whether in a particular case a commercial aspect was important or not. For example, based upon the meaning of the first factor, if someone makes a copy of a movie borrowed from a movie rental, such purpose and character of the use does not constitute a fair use defense. But, if the same person purchases a movie from a legal source and later make a backup copy for personal use, that constitutes a fair use of protected work.

The second factor is almost an exact copy of Section 107 of the USCA, with one exception: the addition of “reasonable”. This word was added to emphasize that even though the amount and substantiality of use are important, each use must be reasonable. Therefore, in one situation using the whole work may be a reasonable fair use, while in an other situation, only a small portion may be enough to constitute fair use. Courts in each case will focus on the reasonableness of the use, as well as measuring the amount and substantiality of the taken work.

The last factor appears the same as it does in Section 107 of the USCA. According to this factor, courts would make sure that use of the protected work does not harm the work’s potential or existing market.

Like U.S. courts, Polish courts would not be limited to factor-based test. Rather courts would maintain a wide discretion to apply additional factors, as each case demands.

Finally, it is important to note that the new provision does not include the second factor of the U.S. fair use test – “the nature of the protected work”.\footnote{17 U.S.C. § 107.} That factor considers whether one copies ideas, expressions, or bare facts. As was stated before, however, Polish fair use provides
sufficient protection in the matter of public fair use. Therefore, inclusion of the second American factor might interfere with existing regulations and eventually cause ambiguity or contradiction.

2. Advantages of the Second Approach

Introducing a U.S.-style fair use provision to the Polish system would change entirely the scope of the current regulation. Courts would no longer have to deal with the narrow existing regulation. And no more could one say that it is not clear whether he or she may download content from the Internet. If an act of downloading would not be fair use according to the factor-based test or additional elements applied by the court, it would be an infringement. Moreover, ever changing technological conditions could be applied to a new provision, according to current needs. The legislature would not have to amend fair use provision every time a new medium of fixation appeared.

III. Criticisms of the Proposed Solutions

The following section will describe potential criticisms to the presented proposals and respond to them.

A. Criticisms of Both Solutions

The obvious objection to both solutions is that they will not work. As noted in the Introduction, even though the PCA explicitly states that downloading and uploading computer programs without consent is prohibited, it still takes place. Why, then, would amending the PCA or adding an entirely new provision make a difference regarding copyrighted works?

The reason is, first, because right now the law allows downloading copyrighted content. The most important step is to state that this is no longer allowed. Both solutions provide do this. Regardless of the method chosen, downloading files from the Internet without their owners consent would not be allowed anymore.
Second, either solution will become a tool for authors, giving them a legal basis for protecting their works in courts. It will be possible to prove in court that not every use is fair and therefore unlawful. The outcome will be similar to the U.S. situation, where one must have a good reason to use works of others; otherwise one faces a possible liability.

B. Criticisms of the Complex Solution

The following subsection will describe criticisms of the complex solution and responses to them.

1. Political Infeasibility

Because the complex solution introduces U.S. approach to the Polish legal system, perhaps the most compelling criticism would concern its foreign nature. One could say that Poland has its own legal and political traditions and that they should not be mixed with foreign customs and ideas.

It is true that Poland is a civil law country and did not develop a fair use provision similar to the American model. However, as was described in the previous section, implementation of a U.S.-style fair use doctrine is very much doable from a technical point of view. It is also politically feasible, as evidenced by recent statements of the Polish government. In October 2012, the Polish Minister of Justice declared that the government is working on a proposal to introduce changes into Polish law, similar to U.S. legal system. Based upon the information acquired by a Polish law newspaper “Rzeczpospolita Prawo”, the government plans to introduce more adversarial proceedings into the Polish law system, where the burden of proof would be put on parties, instead of the judge. The judge would become a referee, ensuring the fairness of the law.

99 DOMAGALSKI, supra note 102.
The current role of inquisitorial judge would be abolished. Moreover, professor Roman Tokarczyk, a well known and respected Polish scholar, specializing in American law, believes that Poland could adopt a U.S. approach to the appointment of judges. He believes, specifically, that one who has demonstrated exemplary work in other legal professions over years of practice may apply for judicial nomination.

Adopting legal standards from other countries is not a new idea in Poland. The existing Polish codification contains ideas and approaches taken from different legal systems, like German, Russian or U.S. The current Polish Civil Code for instance was enacted in 1964, during the time when Poland has been governed by communists. It was inspired by Soviet ideas from that period. Although the code was vastly amended in 1990, adding all necessary elements of democratic system, the general structure remained the same.

Current Polish regulations have several examples of implementing U.S. law. The biggest impact of U.S. model can be found in Polish criminal procedure. For instance, the Polish Code of Criminal Procedure provides for plea-bargaining, requesting a conviction without trial, and voluntary submission to penalty, all of which are inspired by U.S. model. U.S. origin of some provisions in Polish law is especially important because it already exists and functions without any problems. Therefore, introducing a regulation based on U.S. fair use would not interfere with the spirit of Polish law in any matter. Moreover, a conducted research did not show any evidence of Polish politicians opposing the idea of implementing solutions taken from other legal

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100 DOMAGALSKI, supra note 102.
101 DOMAGALSKI, supra note 102.
102 Id. According to current regulations, to become a judge in Poland, one must attend to the National Judicial School once he graduated from law school. As a result of this, vast majority of appointed judges in Poland are in the age of 30, without experience.
103 Ustawa Kodeks Cywilny [KC] [Civil Code], Apr. 23, 1964, DZIENNIK USTAW [DZ.U.] (Pol).
105 DOMAGALSKI, supra note 102.
heritages.

2. **Ineffectiveness**

   A final concern that may be raised is that the U.S. approach will not help, because the U.S. has its own problems with online piracy. However, the fact that one country has problems with enforcement of a law does not necessarily mean that another country would have similar issues.

**CONCLUSION**

   Poland faces a serious problem with the unauthorized downloading of copyrighted works from the Internet. Therefore the current Polish copyright law requires a change. The proposed solutions answer the problem of online piracy in Poland, and one of them should be implemented into the Polish Copyright Act. Changing the law is the first step to closing the gaping hole in Polish copyright law.