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

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I. 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. Such illegal activity in Poland is so pervasive that often movies or music albums are available online before the official date of release. With illegal computer software, the situation is even worse. Poland contributes 8% of the world’s pirated computer games and programs.

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 in Article 23 of the Polish Copyright Act (“PCA”), downloading files from the Internet for personal use is permitted. This provision is an incentive for illegal activity among Internet users.

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2 In Poland, piracy is illegal. Art. 115.1 of Polish Copyright Act provides that “[w]hoever 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.” Ustawa o Prawie Autorskim i Prawach Pokrewnych [Ustawa o Prawie Autorskim] [The Copyright Act] (consolidated text DZIENNIK USTAW RZECZPOSPOLITEJ POLSKIEJ [Dz. U.] [JOURNAL OF LAWS OF THE REPUBLIC OF POLAND],1994, vol. 24, item 83, art. 115.1), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=129378 (hereinafter Polish Copyright Act).

3 Anam, supra note 1. The country with the highest piracy rate is China (86% of users in China download infringing content). Kamila Urbasńska, 48% Polskich Internautów to Piraci Komputerowi [48% of Polish Internet Users are Software Pirates], EGOSPODARKA.PL (Sept. 15, 2011), http://www.egospodarka.pl/70924,48-polskich-internautow-to-piraci-komputerowi,1,39,1.html.

4 Polish Copyright Act art. 23.

5 On the other hand, uploading files online without the consent of a copyright owner is illegal under Polish law. Existing provisions give law enforcement a small opportunity to fight against online pirates, but in reality it does not work. According to the Polish criminal code, if a person uploads files illegally he may be sentenced to a fine, a restriction of liberty, or be sent to jail for two years. Polish Copyright Act art. 116-122. In Poland, so far only one person has been sentenced to prison for copyright infringement. Most online pirates are sentenced to a fine or suspended imprisonment. In 2009, the District Court of Koszalin sentenced an Armenian merchant to two years of imprisonment for selling infringed copyrighted works. The court decided on such punishment because the Armenian had been previously sentenced to suspended imprisonment for the same crime in 2005. In 2010, during continued . . .
zlotys each year because more and more people decide to acquire movies, music and books from “pirate websites.” Consequently, publishing companies raise their prices or even withdraw from the Polish market. Accordingly, individuals who want to legally buy music or movies must pay more. Inevitably many decide not to, which perpetuates this vicious cycle.

An Ipsos Public Affairs poll of Polish Internet users showed that more than 48% use illegal software and share other’s work without the creator’s consent. The survey included Internet users with varying levels of sophistication. The outcome showed that even business decision-makers admit to obtaining online content illegally.

Poland is not the only country struggling with illegal downloading. The state of piracy in the U.S. portrays how widespread the problem is. The Recording Industry Association of America (“RIAA”) maintains statistics about the size of the problem. According to one notorious case, a student was sentenced by the court to suspended imprisonment and returning two percent of the value of all pirated works he had. The total value of infringed works was almost $120,000. Ciężkie Czasy dla Piratów [Hard times for the Pirates], FAKT.PL (Jan. 5, 2010, 6:19 PM), http://www.fakt.pl/Ciezieczasy-dlapiratow,artykuly.61081,1.html.


Id. (providing that an average US music CD costs $17, in Poland the CD would cost 50zl, while an average monthly US income is around $2500, in Poland the average is 2000zl).

Urbańska, supra note 3.


Urbańska, supra note 3. See Baranowska-Skimina, supra note 6 (noting that such activity has a negative outcome on the global market). A survey performed by International Data Corporation shows that online piracy inhibits the economic growth of the country and the global market itself. Id. According to this survey, in 2009 every fourth computer user in the world had used illegal software and shared another’s works without consent; that the total value of these works and software was estimated at more than $51 billion USD. Id.
official information from the RIAA website, between 1999 and 2009, music sales income in the U.S. dropped 47%, from $14.6 billion to $7.7 billion.\(^\text{12}\) In 2009, U.S. consumers paid for only 37% of music downloads.\(^\text{13}\) Although the U.S. struggles with its own problems concerning online piracy, it has developed useful mechanisms to protect authors and copyright holders against unauthorized Internet downloading.\(^\text{14}\)

Considering the facts and statistics presented above, Poland needs to improve its existing copyright law in the field of Internet protection. This article will focus on the need to change the existing fair use provision in Polish copyright law to match the applicable U.S. fair use model (within the possible scope allowed by European Union directives) and explain why the U.S. approach would be 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 Polish law to U.S. law regarding this matter. Part II is dedicated to presenting proposals for amending Polish law in the field of fair use provisions, or creating a new solution using the U.S. model. Part II will also describe the process of implementing the proposed solutions and describe the advantages of each solution. Part III will discuss potential critiques and concerns raised by these proposals.

II. 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.\(^\text{15}\) Looking at the statute itself, it may seem that in Poland, an author’s rights are well protected against


\(^{13}\) Id.

\(^{14}\) The Copyright Act and Digital Millennium Copyright Act both cover the issue of protecting authors against unauthorized and unfair use of digital content. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112. Stat. 2860; Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (not disqualifying any medium from protection).

\(^{15}\) The Polish Copyright Act is generally very similar to the U.S. Copyright Act. Section 106 of the U.S. Copyright Act covers the same rights as Articles 1 and 17 of the Polish Copyright Act. Compare Polish Copyright Act art. 1, 17, with 17 U.S.C. § 106 (2012).
online infringement.\textsuperscript{16}

Unfortunately, what seems good in theory does not necessarily work in practice. Because of Article 23 of the PCA,\textsuperscript{17} 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, instead 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. \textbf{Polish Copyright Law Fails to Adequately Protect Authors of Online Works}

The following subsection describes end user liability for online activity in light of the PCA and explains the general rights of authors in their works under Polish copyright law. This subsection also explains the lack of sufficient provisions in Poland that could possibly prevent end users from exploiting the works of others.

1. \textit{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.\textsuperscript{18} The PCA has several general principles that are the very essence of the whole statute and Polish copyright law itself.\textsuperscript{19}

\begin{flushright}
\textsuperscript{16} According to Black’s Law Dictionary, infringement is an “act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner,” BLACK’S LAW DICTIONARY 851 (9th ed. 2009). 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 U.S.C. §§ 106, 602 (2012). In general, legislators did tremendous work, including a comprehensive copyright law in one uniform act. Legislators provided a transparent and well-organized statutory structure. The entire act contains only 129 articles, divided into chapters and subsections. Legislators also included definitions of the most frequently used terms. See Polish Copyright Act art. 6.1.

\textsuperscript{17} Polish Copyright Act art. 23.

\textsuperscript{18} \textit{Id}.

\textsuperscript{19} The subject matter under the Polish Copyright Act is “… any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose or form of expression,” usually called intellectual work. Polish Copyright Act art. 1. The work is protected if it is man-made and has an individual character, regardless of the form, shape or market value. An intellectual work is understood to be an expression, a non-material legal good embodied in a material object like a book, painting, sculpture, CD, DVD, software stored on computer hard-drive or files stored in cloud computing. Expression, however is the only thing protected by the act. Ideas, methods of procedure, and mathematical formulas are not continued . . .
\end{flushright}
Under Article 17, “an author shall have an exclusive right to use the work and to manage its use throughout all the fields of exploitation and to receive remuneration for the use of the work.”

Moreover, Article 6 defines a “disseminated work” as one which “has been made available to the public in any way by its author’s permission.”

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 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 use, use of another’s work without permission, etc. In Poland, the preferred phrase is “permissible use of protected works,” which is discussed in Chapter 3, division 3 of the Polish Copyright Act. However, for the purpose of this article, the general term “fair use” will be used to address all copyright limitations in Poland.

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

Fair use is protected by Polish law in Chapter 3, Articles 23-35 of the PCA. These provisions distinguish between two kinds of fair use: public fair use and private fair use.

**a. Public Fair Use**

Public fair use is defined in a very clear and simple way. The ultimate goal of public fair use is to secure equal access to knowledge and the useful arts by many. According to the PCA, the public may use works of others in the form of comments, parodies, news reports, and public debates. 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. Moreover, everyone is entitled to use already disseminated works for religious purposes, public security reasons, commercial advertising, and judicial proceedings.

Polish public fair use follows the general standards accepted by most countries and the World Intellectual Property Organization (“WIPO”), and is therefore not a subject matter of this article.

**b. Private Fair Use**

Articles 23 and 23¹ of the PCA address a separate group of fair use provisions regarding private entities. The original intent of these provisions was to secure the right of a buyer to purchased products.

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29 Polish Copyright Act art. 23-35.
30 Pawel Podrecki et al., supra note 28, at 399.
31 Polish Copyright Act art. 25.1, 26.
32 Id. art. 28, 29.
33 Every work used for these purposes must be properly acknowledged with the name of the author and the source it was taken from. Polish Copyright Act, art. 33, 34.
34 Polish Copyright Act art. 23, 23¹.
35 Pawel Podrecki et al., supra note 28, at 402.
It was understood at the time of enactment, that everyone should have the right to dispose of previously purchased products without inconvenient legal obstacles. According to the original intent, a person should have the right to make, for his own use, copies of purchased books, CD’s, movies, photos, and maps, and to share them with family and close friends.\(^\text{36}\)

Unfortunately, the construction of Article 23 has caused a lot of discrepancies in interpretation. The English translation of this provision, as provided by the World Intellectual Property Organization, is 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…

2. The scope of personal use shall include use of single copies of works by a circle of people having personal relationships, and in particular any consanguinity, affinity, or social relationship.\(^\text{37}\)

This provision means that for works already disseminated, a person may use the work for personal use free of charge and without the permission of the author.

At the time the Copyright Act was implemented, the Internet in Poland had only recently emerged, and thus, the legal reasoning of Article 23 regarding private fair use was accurate and up to date.\(^\text{38}\) However, as technology moved forward and access to the Internet expanded rapidly, particularly in cities, Article 23 remained the same. As it was drafted, the legislature did not predict that technology would change so quickly; thus, Article 23 is now outdated and operates contrary to the original intent of the legislature.

Article 23 refers to already disseminated works, which Article 6 defines as works that have, with the permission of the author, been made available to the public in any way.\(^\text{39}\) Once a work is disseminated, it will always be considered “already disseminated.” Thus, Article 23 in connection with Article 6, allows anyone to use the work of another once that work appears in any medium, whether radio,

\(^{36}\) Id.

\(^{37}\) Polish Copyright Act art. 23


\(^{39}\) Polish Copyright Act art. 6.
television, or YouTube.  

The drafters of the PCA did not limit Article 23 so as to only permit personal use of works that were previously purchased legally. As a result, there is a gaping hole in the PCA. What was supposed to be a facilitation for rightful buyers has become a gateway for immoral and exploitative activity. Downloading movies, music, and books without paying for them is allowed. Moreover, according to the same article, a person who downloads music or movies may share them with family, friends, and even workmates.  

Some scholars argue that, to understand the true meaning of Article 23, one should look to Article 35, the last article in the "Permissible Use" section of the PCA. Article 35 provides that a fair use “must not infringe the normal use of the work or violate the rightful interests of the author.” Scholars argue that when read together, these articles show that the creators of the PCA specifically stated that no one should exploit the permissible use of another’s work and the interests of authors. These same scholars believe downloading and using other’s work without remuneration to violate the rightful interests of an author.  

Notwithstanding this reading, courts tend to choose a different approach. According to “Rzeczpospolita Prawo,” a popular and respected Polish daily newspaper about legal matters, there is no single judgment that concludes downloading files from the Internet is a violation of the law. Conversely, there is no record of any judgment that determines whether downloading files from the Internet is valid or not. Accordingly, it appears that no cases have been filed alleging violations of Article 23 or 35. The only time that Article 35 appears in court rulings is when it is used in a supplementary form, in order to explain the court’s reasoning in particular cases, none of which involve a claim of illegal downloading of online works.

40 Id. art. 23.
41 Id.
42 PODRECKI ET AL., supra note 28, at 402-03.
43 Polish Copyright Act art. 35.
44 PODRECKI ET AL., supra note 28, at 403.
47 For purposes of this paper, research was performed on LexPolonica, the Polish equivalent of LexisNexis, in order to find judgments regarding violations of Articles 23 and 35 of the PCA. At the time of this Article, no judgments were reported.
48 At the time of this Article, only three cases mentioned Article 35 of the PCA, continued...
c. Protection of Computer Programs in Copyright Act

In contrast to its treatment of online works, the PCA dedicates a separate chapter of the Act to a particular kind of work, software, and adequately protects it from infringement. In general, computer programs are not subject to the permissible use exception. According to Article 74, “[c]omputer 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 payment to the owner is illegal and can result in civil and criminal liability. Rightful owners cannot lend their copies of a computer program to a friend, nor can they make another copy for their own use.

There are many cases involving illegal downloading of computer programs in Poland and in most cases, courts find the downloaders guilty of violating Articles 74 and 77 of the PCA.


49 Polish Copyright Act art. 74.

50 Id. art. 77.

51 See Id. art. 79, 116. Article 79 of the PCA states that: "1. The rightholder may request from the person who infringed his/her economic rights to: 1) cease such infringement; 2) eliminate the consequences of the infringement; 3) repair the inflicted damage: a) on the general terms or b) by payment of double, or where the infringement is culpable, triple the amount of respective remuneration that would have been due as of the time of claiming it in exchange for the rightholder’s consent for the use of the work; 4) render the acquired benefits.” Id. art. 79. Article 116 constitutes the criminal liability of the infringer: “1.) Whoever, without authorization or against its terms and conditions, disseminates other persons’ work, artistic performance, phonogram, videogram or broadcast in the original or derivative version shall be liable to a fine, restriction of liberty or imprisonment for up to 2 years. 2.) If the offender commits the act specified in paragraph 1 above in order to gain material benefits, he/she shall be liable to imprisonment for up to 3 years. 3.) If the offender commits the offence specified in paragraph 1 above a regular source of income or organizes or manages a criminal activity as specified in paragraph 1, he/she shall be liable to imprisonment for 6 months to 5 years. 4.) If the offender of the act specified in paragraph 1 above acts unintentionally, he/she shall be liable to a fine, restriction of liberty or imprisonment for up to one year.” Id. art. 116.

52 There are many cases involving the violation of Articles 74 and 77 of the PCA. See, e.g., Sąd Najwyższy [Supreme Court of Poland] Aug. 19, 2009, WYrok continued . . .
Computer programs are protected in a superior way to music, movies, and books. This discrepancy is adverse to the interests of authors and the public. Because of this distinction, courts may understand the legislative purpose of Article 23 to permit anyone to download files from the Internet without their creators’ consent. People learn that they do not have to pay for certain types of goods, and model their behavior accordingly.\(^{53}\)

**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 and Articles 17–22 of the PCA adopt a similar approach, stating that copyright holders have the exclusive rights to use, reproduce copyrighted works in copies or phonorecords, disseminate, prepare derivative works based upon previous works, and distribute copies for remuneration.\(^{54}\) The major difference between the American and Polish approach, however, is Section 107 of the U.S. Copyright Act (in contrast to Article 23 of the PCA).\(^{55}\)

Fair use in the United States 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.\(^{56}\) A reason for this limitation can be found in the U.S. Constitution, which states that “[t]he Congress shall have Power . . . [t]o 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 is the basis for copyright protection in general.\(^{57}\) The emphasis however, should be placed on the expression “[t]o promote the Progress of Science and

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\(^{53}\) The work of authors who make music, movies or computer software cannot be organized into a hierarchy. It is very harmful to create a situation in which certain works are treated as superior to others. This occurs when music and movies are subject to free personal use, but computer software is not.


\(^{55}\) Contrast 17 U.S.C. § 107 (2012), with Polish Copyright Act art. 23.


\(^{57}\) U.S. CONST. art. I, § 8, cl. 8.
useful Arts . . .,” because every creation made by a man is somehow derivative or influenced by works of others, and therefore, fair use is necessary to secure that progress.\textsuperscript{58} If fair use did not exist, no one could ever write a research paper, or create a love story about two young kids whose families’ hate of each other eventually led to their death.\textsuperscript{59}

Although at first not codified, fair use emerged from court rulings and finally found its place in Section 107 of the U.S. Copyright Act in 1976.\textsuperscript{60} Section 107 provides an exception to copyright infringement: where the use of the work is “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”\textsuperscript{61} To determine whether the use is fair use, Section 107 states that 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.\textsuperscript{62}

Courts must always consider at least these four factors, but may consider additional elements that may be important to the particular case.\textsuperscript{63}

The first factor, the character and purpose of the use, is considered to be “the heart of the fair use doctrine.”\textsuperscript{64} It addresses the issue of whether the use was justified because it stimulated artistic creativity or

\textsuperscript{58} Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1108-09 (1990).
\textsuperscript{59} See Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (ruling that there has to be some limits to the protection of works, otherwise people would be unable to express new ideas).
\textsuperscript{60} Even though fair use is mostly an outcome of the common law, U.S. courts have also looked to a British approach, especially The Statute of Anne from 1710. Statute of Anne, 1710, 13 Ann., c.19 (Eng.). See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 (11th Cir. 2001).
\textsuperscript{62} Id.
benefited the public, the core goal of copyright.\textsuperscript{65} 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.\textsuperscript{66}

Commercial use is more likely to be found as infringing, but this element is not decisive and depends on the particular circumstances surrounding a case.\textsuperscript{67} Courts are likely to conclude that a use is infringing if it led the copyright owner to lose profits.\textsuperscript{68} Noncommercial use, on the other hand, is usually considered to be fair use, because the user does not strive to gain profit. One should remember, however, that even though the use may not be oriented to gain profit, it may still detract from the owner’s monetary gain, and therefore lead to exploitation of his work.\textsuperscript{69}

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.\textsuperscript{70} Transformation of a work may include comments, parody, summary of the facts, or aesthetic declaration.\textsuperscript{71}

The second factor, the nature of the copyrighted work, is directed at the principle that only expressions, and not ideas, may be protected by Copyright.\textsuperscript{72} Thus, the concept of a superhero wearing a mask is not protected, as long as the character is presented in a different way that is sufficient to determine that the new concept was not derived from the original. The second factor also refers to the nature of bare facts, which are also not protected. Reported news or facts covered in

\textsuperscript{67} See Campbell, 510 U.S. at 583.
\textsuperscript{68} Id. at 590-91.
\textsuperscript{69} For example, if someone put a copy of an author’s book on the Internet only to prove how good it is and encourage others to buy a copy, it may still lead to loss of the author’s income because others may take the “free copy,” rather than buy the legal one. See A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001).
\textsuperscript{70} See Campbell, 510 U.S. at 569.
\textsuperscript{71} Leval, \textit{supra} note 58, at 1111.
\textsuperscript{72} See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 350-51 (1991) (holding that a compilation of facts can be copyrighted, provided that there is sufficient originality in the compilation, but that the copyright only protects the original elements added by the author and cannot be applied to cover the facts themselves).
a biography can be used to write different stories, as long as the expression of the original story is not copied.\textsuperscript{73} 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.\textsuperscript{74}

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 used, the more likely that copyright infringement will be found.\textsuperscript{72} But this factor refers not only to the amount used, but also to the substantiality and quality of the portion taken.\textsuperscript{73} Even copying a small part of a work may be found infringing if it is a key component – “the heart” – of the original work.\textsuperscript{74}

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 original work’s author of income.\textsuperscript{75} 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, this will most likely not be fair use.\textsuperscript{76} 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 to be infringing.\textsuperscript{77}

Fair use in U.S. Copyright law is very broad and has characteristic open-ended standards. Courts have vast discretion in evaluating whether or not one act constitutes fair use, following the four required factors and using their own reasoning. Fair use recognizes a broad spectrum of possibilities of utilizing the works of others without being liable of infringement. Private use, however, is not specifically addressed in Section 107.\textsuperscript{78} In order to claim private use is a fair use, one must prove that the four-factor test weighs in his favor, and/or that the court should apply different standards in a particular case.\textsuperscript{79}

\textsuperscript{73} Id. at 353-54.
\textsuperscript{74} See Sundeman v. The Seajay Soc’y, Inc., 142 F.3d 194, 204-05 (4th Cir. 1998).
\textsuperscript{72} See Campbell, 510 U.S. at 587-88; Leval, supra note 58, at 1122.
\textsuperscript{73} Campbell, 510 U.S. at 587.
\textsuperscript{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, 564-65 (1985); Leval, supra note 58, at 1123.
\textsuperscript{75} See Campbell, 510 U.S. at 590.
\textsuperscript{76} Id. at 593.
\textsuperscript{77} See Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
\textsuperscript{78} 17 U.S.C. § 107 (2012).
\textsuperscript{79} See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496-97 continued . . .
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. Gonzalez*, the defendant used Kazaa, a file sharing website, to download 30 songs without the authorization of the artists. The defendant claimed that she only acquired samples to determine whether she wanted to buy whole albums. However, the court held that downloading unauthorized copies of musical files using Kazaa software infringed on 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 these directives. The following subsection will describe the relevant EU directives.

1. *Free Private Use Can Be Redesigned*

Directive 2001/29/EC (“the Directive”) 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 provide “exceptions or limitations” to reproduction rights in regards to use by a private entity. Such use occurs when a natural person reproduces a work in any medium for non-commercial

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81 *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

82 Id. at 890.

83 Id.

84 Id. at 889.


87 Id. art. 5.
private use.\textsuperscript{88}

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 as not to disturb the interests of right holders and not to conflict with the normal exploitation of the works.\textsuperscript{89}

In addition, the Preamble of the Directive provides a guide on 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 potentially negative impact on the internal market and commerce.\textsuperscript{90} Another section of the Preamble, Section 38, states that private digital copying may have a 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{91}

Current Polish copyright law’s implementation of Article 5 of the Directive does not fulfill the true principles 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.

\textbf{2. Poland May Apply More Restrictive Sanctions for Copyright Infringement}

Directive 2004/48/EC in Article 16 states that, without conflicting with the other principles provided in this Directive, “Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.”\textsuperscript{92} This provision gives an opportunity to increase liability for copyright infringement in Poland, in addition to the sanctions expressly proposed in the Directive.

\textsuperscript{88} Id. As explained earlier, the Polish government enacted Article 23 of the Polish Copyright Act, which allows any natural person to use and copy the work of others, as long as that use is for a private and non-profit purpose. Polish Copyright Act art. 23.


\textsuperscript{90} Id. pmbl. § 31.

\textsuperscript{91} Id. pmbl. § 38.

III. 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. Part III of this Article presents two possible solutions. The first solution does not dramatically change the existing law, 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 of the 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. This situation also applies 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.

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

At the outset, it is important to remember that existing Polish law has developed legal standards of interpretation. Thus, to prevent confusion and another dilemma with interpretation, it may be advisable to only add additional provisions to existing Article 23 of the PCA, instead of changing it entirely.

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 shall not authorize to build constructions according to other authors' architectural works as well as architectural and urban planning works and to use electronic data bases possessing the features of a piece
of work unless this applies to one’s own scientific use not connected with any profit-gaining purposes.

2. The scope of the personal use shall include use of single copies of works by a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship.\(^{93}\)

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

\(^2\) 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.

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 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, such as making backup copies or sharing with family or friends. This paragraph also provides a clarification regarding online digital works, especially those available over the Internet. No longer 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.

\(^{93}\) Polish Copyright Act art. 23.
In order to avoid future misinterpretation, Article 6 of the 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:

Pursuant to this Act:

(1) published work shall mean a piece of work which has been reproduced and its copies have been made available to the public by its author’s permission;

(2) simultaneous publication shall mean publication of a piece of work on the territory of the Republic of Poland and abroad within the period of 30 days from the date of its first publication;

(3) disseminated work shall mean a piece of work which has been made available to the public in any way by its author’s permission.

To provide a transparent understanding of Article 23, the following definition should be added to Article 6: (4) online digital work 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 Article 23 to avoid problems regarding interpretation of the article. The term “digital work” was selected based upon the language used in the “Agreed statement concerning Article 1(4)” of the World Intellectual Property Organization Copyright Treaty (hereinafter “WIPO WCT”). Since Poland is a member to the 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 the U.S. Digital Millennium Copyright Act (“DMCA”). 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.” 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.

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94 Polish Copyright Act art. 6.
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 above-presented idea meets all of these goals. The amendment as a whole is efficient; the total outcome adds 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 borrows from verified sources like international treaties and U.S. legislation. This means that the amended PCA could easily be understood by foreign lawyers and copyright holders, which is important given the worldwide scope of copyright law.

On the other hand, domestic regulation would not be affected, causing new problems. The presented solution simply clarifies the 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

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 the 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 an entirely new formula based on Section 107 of the United States Code.98

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

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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 United States Code. 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. The U.S. fair use provision on the other hand, despite the fact that it is almost 20 years older, is flexible and still works.

Although the above solution is derived from the U.S. approach, it has a 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, which would allow each court to determine the character and purpose of the use in a particular case. Thus, courts would not have to determine whether a commercial aspect was important or not in any particular case. For example, based upon the meaning of the first factor, if someone makes a copy of a rented movie, the 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 makes 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 United States Code, with one exception: the addition of “reasonable.” This word was added to emphasize that even though the amount and substantiality of the use are important, each use must be reasonable. Therefore, using the whole work may be a reasonable fair use in one situation, while in another situation, only a small portion may be sufficient 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 directly as it does in Section 107 of the United States Code. 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 the 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 copyrighted work.” That factor considers whether one copies ideas, expressions, or bare facts. As was previously stated, 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 entirely change the scope of the current regulation. Courts would no longer have to deal with the narrow existing regulation. Further, 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 the fair use provision every time a new medium of fixation appeared.

IV. 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 first reason is because the current law allows downloading copyrighted content. The most important step is to state that this is no longer allowed. Both solutions provide a mechanism to do this. Regardless of the method selected, downloading files from the Internet without the owners consent would no longer be allowed.

Second, either solution will become a tool for authors, giving them a legal basis for protecting their works in court. It will be possible to prove in court that not every use is fair and therefore lawful. The outcome will be similar to the U.S. situation, where one must have a good reason to use the works of others; otherwise, one faces 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 a U.S. approach to the Polish legal system, perhaps the most compelling criticism would concern its foreign nature. One could argue 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 feasible 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 the U.S. legal system.100 According to information acquired by the 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.101 The judge would


101 Id.
become a referee, ensuring the fairness of the trial. The current inquisitorial role of the 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, such as Germany, Russia or the U.S. The current Polish Civil Code, for instance, was enacted in 1964, at a time when Poland was governed by communists, and as a result, was inspired by Soviet ideas of that period. Although the code was vastly amended in 1990, adding all necessary elements of a democratic system, the general structure remained the same.

Current Polish regulations have several examples that implement U.S. law. The biggest impact of the 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 the U.S. model. The U.S. origin of some provisions in Polish law is particularly 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, research conducted did not show any evidence of Polish politicians opposing the idea of implementing solutions taken from other legal 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

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102 Id.
103 Id.
104 See id.
105 Id. According to current regulations, to become a judge in Poland, one must attend the National Judicial School after graduating from law school. The vast majority of appointed judges in Poland are around the age of 30, without experience.
106 Ustawa Kodeks Cywilny [KC] [Civil Code], Apr. 23, 1964 (Pol.).
107 Ustawa Kodeks Postępowania Karnego [KPK] [Code of Criminal Procedure], June 7, 1997 (Pol.).
108 Domagalski, supra note 100.
a law does not necessarily mean that another country would have similar issues.

V. 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 the Polish copyright law.