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## MAKING CONTENTS PUBLIC AS A WAY OF PREVENTING THEIR INFORMAL DISTRIBUTION

The subject of this article is an economic analysis of the effects of the Act on the re-use of public sector information, mainly its impact on the behaviour of the Internet users. According to specialists, an economic analysis of the law should take interests of all stakeholders into account, that is, in the event of the discussed act, the producers of information, its users and distributors.

The goal of passing the Act of February 25, 2016, on the re-use of public sector information<sup>1</sup>, which is an implementation of the EU law<sup>2</sup>, was the development of digital society, that is, providing the highest possible, legal accessibility of cultural goods, art, science, education on the Internet, created with the aid of public funds and stimulating people and business entities, as well as involving economic and social capital for the investments related to the Internet.

The act has not provided full access to cultural legacy and has not increased capabilities of re-using it for educational, professional or entertainment purposes due to numerous exclusions. The access to public information is limited due to, among others, the protection of freedoms and rights of other people (e.g. their privacy<sup>3</sup>) and business entities<sup>4</sup>, as well as the protection of public order, security or important

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<sup>1</sup> The act of February 25, 2016 on the re-use of public sector information (Dz.U. [Journal of Laws] of 2016, item 352).

<sup>2</sup> Directive of European Parliament and Council 2013/37/UE of June 26, 2013 amending directive 2003/98/WE on the re-use of public sector information, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:PL:PDF> (accessed: 19.09.2017).

<sup>3</sup> However, protection of privacy does not include issues connected with holding public functions or spending public money.

<sup>4</sup> The regulations limiting the right to information include, for example, attorney-client privilege, bank secret, journalistic confidentiality, trade secret, stock market secret, doctor-patient privilege, no-

economic interest of the state. The act does not provide access to the resources of, for example, universities, Polish Television, Polish Press Agency and Polish Academy of Sciences. Using, on the basis of the Act, shall also not refer to those works possessed by the libraries, archives and museums, of which underlying rights of copyright owners have not expired. The act has not introduced the rule of purchasing or licensing the copyright by the bodies of the public sector from third parties; therefore, the interests and rights of the authors are the basis for refusal to provide the access for the purpose of re-using.

Such legal solutions, to the limited extent, provide free access to public information and resources of national heritage. Introducing many limitations paradoxically make them less protected against informal (unauthorised) distribution and, as a result, does not secure the interests and rights of the authors. The same situation refers to many media goods and cultural resources.

The digitisation of the society enabled an unhindered flow of information goods, usually in the form of mass copying of someone else's intellectual property. In Poland, 62% of the Internet users used the Internet for unauthorised copying of the works<sup>5</sup>. In the United States and Germany, nearly half of the citizens copied, without the authorisation of the authors, music pieces and movies, as well as TV shows and other digital contents<sup>6</sup>.

Using someone else's works within fair use – being in the interest of the authors (dissemination of contents) and consumers (access to culture and knowledge and free flow of information within the freedom of speech) under circumstances of easy copying and distribution has brought the authors and producers of the contents more and more losses.

Even if copying and making someone else's contents available to other people is not associated with gaining financial benefits, it causes spreading information goods (cultural, media) beyond the control and without permission of the owners. Sławomir Czetwertyński wrote that:

(...) the practice of copying someone else's intellectual property is mostly trivialised. It is not as controversial as theft, economic frauds or abusing substances. There is a general consent among members of the society to copy the works, even when it is prohibited or illegal. A large number of the resources on such portals as YouTube is uploaded illegally. Numerous files containing documentary and feature films, as well as TV shows are published overtly by the portal users. Whereas, copyright owners are not determined in the reactions for uploading their contents<sup>7</sup>.

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tarial secret, state secret, preparatory proceedings secret, psychiatric secret, legal adviser secret, fiscal secret, confidential information, seal of confession, statistical, insurance secret.

<sup>5</sup> Cf.: M. Filiciak, J. Hofmokl, A. Tarkowski, *Raport Obiegi Kultury. Społeczna cyrkulacja treści*, Warszawa 2012, p. 33.

<sup>6</sup> Cf.: J. Karaganis, L. Renkema, *Copy Culture in the US and Germany*, New York 2013, p. 5.

<sup>7</sup> S. Czetwertyński, *Kultura kopiowania a pozarynkowy obrót dobrami informacyjnymi w erze internetu*, "Społeczeństwo i Ekonomia" 2015, nr 1(3), p. 153.

The research conducted by Deloitte, commissioned by the Creative Poland Association (Stowarzyszenie Kreatywna Polska) showed that every second Polish Internet user at the age between 15 and 75, that is, more than 12 million people make use of illegal sources of the contents. Total losses of Polish economy due to Internet piracy in 2016 amounted to over PLN 3 billion, and the losses of the State Treasury amounted to about PLN 836 million. The piracy on such scale means also 27.5 thousand lost jobs<sup>8</sup>.

It is in the interest of the authors of the contents to protect their rights through, among others, extending copyright protection, decreasing the number of exceptions in copyright law, toughening the regulations allowing to penalise Internet users for breaking the copyright law, more effective technical protection of the works against unauthorised copying. The authors of the contents are also in favour of legal distribution based either on licence system, or system of compensations for the entities that invest in the works protected by intellectual property rights.

The opponents of increased protection for copyright owners claim that it hinders the free flow of information and knowledge, curbing social development, because only global distribution, accessibility, and dissemination of knowledge make it grow. Włodzimierz Szpringer claimed that: “The economy does not answer the question about the optimal degree of copyright protection. How to balance dynamic efficiency (stimuli to the works) and static efficiency (access to knowledge)? In the efficiency in „production, the author receives proper remuneration for his/her work. In the efficiency in „distribution”, the access to knowledge is free”<sup>9</sup>. He also emphasised the role of the very distributors (the Internet platforms), who incur, among others, the costs of digitisation, registration, archiving, supplying with metadata, dissemination. “The catalyst of the development of an open model of science, culture and education is the development of new, universal forms of communication (e.g. mobile communication, social networking services) and new forms of controlling the use of the works”<sup>10</sup>.

The majority of the researchers dealing with market aspects of copyright law tried to reconcile the interests of the authors and owners of related rights with the interests of the users. A thesis that knowledge and information are not property in legal meaning and should not be a source of financial benefits, does not stand in contradiction to the conviction that efforts to create them should be remunerated<sup>11</sup>. Admitting

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<sup>8</sup> Cf.: Deloitte, *Piractwo w Internecie – straty dla kultury i gospodarki. Analiza wpływu zjawiska piractwa internetowego na gospodarkę Polski na wybranych rynkach kultury*, <https://www2.deloitte.com/pl/pl/pages/zarzadzania-procesami-i-strategiczne/articles/piractwo-w-internecie-straty-dla-kultury-i-gospodarki.html> (accessed: 19.09.2017).

<sup>9</sup> W. Szpringer, *Koncepcja open access z perspektywy ekonomicznej analizy prawa – doświadczenia niemieckie*, “E-mentor” 2011, nr 2(39), <http://www.e-mentor.edu.pl/artukul/index/numer/39/id/820> (accessed: 19.09.2017).

<sup>10</sup> W. Szpringer, *Regulacja a compliance na rynkach nowych technologii*, “Annales Oeconomia” 2016, nr 2, p. 97.

<sup>11</sup> Cf.: L. Lessig, *Wolna kultura*, Warszawa 2005.

that unauthorised use of information and knowledge is not tantamount to the loss for their authors does not belie the fact that it deprives them of potential profits<sup>12</sup>.

In order to provide a livelihood for the authors and encourage them to create more, without limiting the access to cultural goods, including information and media contents, the propositions of including the whole works to the public domain<sup>13</sup> and introducing charges for the authors have emerged<sup>14</sup>. However, it would require active state policy to increase publicly available resources and subsidising the works, or even purchasing proprietary copyrights.

The supporters of such concept claimed that development of public domain is economically justified. Free access to the works with appropriate compensation for the authors may be more cost-effective than restrictive protection. Adam Grzegorzczuk even wrote about the paradox of protection: the better protection of the works, the lower accessibility of them, and the higher costs of production in sale unit price<sup>15</sup>. The costs that the system and individual authors must incur to protect their intellectual property resources are often higher than benefits achieved on account of intellectual property. Restrictive copyright protection additionally stimulates the development of the grey market, including alternative models of public uploading of the works by the authors or substitution of protected someone else's intellectual property in the form of copying.

Tomasz Kulisiewicz calculated hypothetical costs of compensation of proprietary copyrights if they were taken over by the state<sup>16</sup>. Based on the total income of 15 Organisations for Collective Copyright Management operating in Poland, he determined that, in the years 2014 – 2020, they will pay over PLN 1,8 billion to the authors. Adding up the costs of compensation of proprietary copyrights, expansion of the infrastructure of broadband access and digitisation and archiving of the works, he claimed that they will be lower than social benefits at the same time, including: economic use of educational and art resources, savings in the access to the resources

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<sup>12</sup> The authors and producers of the contents were inclined to equate every illegal copy of the work protected by copyright with the loss equal to its market price. The Internet users think it is unjustified to claim that the number of people who read a press article on the Internet is equal to the number of people, who resigned from buying a newspaper, in which such article was published. An example of opposition to such way of counting the loss of the authors and producers of cultural goods was a website, *stratakazika.pl.*, where author encouraged to permanently copy (and delete every copy) of Kazik Staszewski's records, in order to make the artist's "loss" absurdly high.

<sup>13</sup> Public domain includes the works that are not protected due to expiration of proprietary copyrights or waiving of such protection by the authors. The works included in the public domain are available for free.

<sup>14</sup> That's the character of an idea of digital public domain. Cf.: „Public domain manifesto” created within COMMUNII, <http://www.publicdomainmanifesto.org>.

<sup>15</sup> Cf.: A. Grzegorzczuk, *Technologia, wolność i prawo ochrony własności intelektualnej*, “Kwartalnik Naukowy Uczelni Vistula” 2014, nr 1(39), p. 107–116.

<sup>16</sup> Cf.: T. Kulisiewicz, *Otwarcie zasobów kultury – szkic modelu kosztów i korzyści*, “Roczniki Kolegium Analiz Ekonomicznych SGH” 2014, z. 33, p. 305–323.

and – hard to estimate – socio-educational effects of the access to cultural goods and its promotion in the international arena<sup>17</sup>.

The opponents of full openness to public information, understood as the resources of knowledge and information financed from public funds and generated by public entities, claimed that copyright levies (levies on blank videograms and devices for copying the works) charged on the basis of art. 20 and 20<sup>1</sup> of the Copyright Act<sup>18</sup>, have a faint relationship with remuneration for the authors for using their works within fair use on the Internet<sup>19</sup>. They also raised the issue of proper estimation of the costs of opening the access to data, including:

- the costs of purchasing rights from authorised people, including the supplementary purchase of the rights in the case of existing works,
- the costs of digitisation and cataloguing collections of such large group of obliged entities,
- the costs of expansion and maintenance of the infrastructure of uploading collections (including adjustment to the standards of the central repository).

They also presented the threats connected with dispossessing the authors of their proprietary copyrights<sup>20</sup>. However, they did not take into consideration significant changes in distribution and consumption of cultural goods, media products and resources of public information, occurring under the influence of their digitisation and online communication.

Due to the overproduction of the contents and a large number of distribution channels, competition between private, social networking, commercial and public producers and providers of the contents is increasing. The public producers are marginalised<sup>21</sup>. The authors of the report entitled “The awareness and needs of Polish Internet users in the context of digitisation of culture” determined that in March 2015, over 274 thousand unique users browsed four largest Polish portals containing digital resources of cultural legacy (Polona, Ninateka, Szukaj w archiwach, nac.gov.pl).

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<sup>17</sup> *Ibidem*, p. 319–320. The costs and benefits of opening the access to public resources of knowledge, education, culture and art were also calculated by Włodzimierz Szpringer and Wojciech Rogowski, „The law and economy of regulating open access to public resources of knowledge (economic and legal analysis for the assessment of the effects of regulations), the expert opinion ordered by the Ministry of Administration and Digitization”, Warsaw 2012.

<sup>18</sup> Copyright and Related Rights Act of February 4, 1994 Dz.U. [Journal of Laws] of 2006, no. 90, item 631 t. 1. as amended.

<sup>19</sup> Cf., among others, J. Matczuk, *Analiza możliwości prawnej regulacji niekomercyjnej wymiany utworów Polsce*, maj 2014, [http://prawokultury.pl/media/entry/attach/J\\_Matczuk\\_Analiza\\_niekomercyjnego.pdf](http://prawokultury.pl/media/entry/attach/J_Matczuk_Analiza_niekomercyjnego.pdf) (accessed: 19.09.2017); E. Adamczyk-Woźniak, *Oplaty inkasowane przez organizacje zbiorowego zarządzania jako rekompensata za dozwolony użytek chronionych utworów oraz zasady podziału tych opłat*, “Kwartalnik Naukowy Prawo Mediów Elektronicznych” 2012 nr 1, p. 18–26.

<sup>20</sup> The fears related to opening public resources, among others, B. Lenkowski, *Otwarte zasoby publiczne – jak nie wylać dziecka z kąpielą?*, <http://liberte.pl/otwarte-zasoby-publiczne-jak-nie-wylacz-dziecka-z-kapiela/> (accessed: 19.09.2017).

<sup>21</sup> *European Agenda for Culture*, 2012, p. 86, [http://ec.europa.eu/culture/policy/strategic-framework/documents/omc-report-access-to-culture\\_en.pdf](http://ec.europa.eu/culture/policy/strategic-framework/documents/omc-report-access-to-culture_en.pdf) (accessed: 19.09.2017).

At the same time, the five largest commercial VoD websites were browsed by more than 10 million Internet users<sup>22</sup>. Disproportion in the popularity is particularly high among young Internet users, who satisfy their information and cultural needs mainly in the non-institutional world. For example, they are looking for audio-visual contents mainly on YouTube, not on the websites of public television or film studios. The public broadcasters and authors of Polish cinema achieve high audience ratings of their productions, when they upload them to the largest websites containing video files.

Despite that, the research on the attitude of the Internet users towards digitisation of the resources of cultural legacy showed that 90% of the respondents thought that cultural institutions should make their resources available on the Internet, and this process should be financed from public funds (61,7% of the answers). The Internet users want access to the resources digitised by cultural institutions to be free and to be used both for private and commercial purposes<sup>23</sup>. Therefore, it is obvious that, with reference to the presence of information and cultural contents on the Internet, it is expected from the state to fulfil the following functions:

- a broadcaster of high-quality contents,
- a populariser of national heritage with the use of archives,
- a producer directing contents to the citizens that create niches unattractive for the market, for example, seniors,
- a regulator mediating between the interests of the citizens and business (e.g. through shaping copyright law in a way that protects the interests of the authors, but leaves some space for creative processing and sharing) and also affecting supra-national rules<sup>24</sup>.

Apart from the quality of delivered contents and the options of using them further, what matters is their distribution and the place of dissemination of the contents and the way of remunerating the authors, omitting direct payments from the users.

Although it was estimated that Polish administration structure possesses about 1,5 million collections of information (excluding resources of cultural legacy)<sup>25</sup>, their use was at a low level. It is reflected in the small amount of data at [danepubliczne.gov.pl](http://danepubliczne.gov.pl), which was supposed to be the Central Public Information Repository and a small number of applications for disclosure of information for the purposes of re-using submitted in the public institutions<sup>26</sup>.

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<sup>22</sup> Cf.: W. Kowalik et al., *Świadomość i potrzeby polskich internautów w kontekście digitalizacji kultury*, s. 13, [http://ekultura.org/wpcontent/uploads/2015/11/ekspertyza\\_swiadomosc-2015.pdf](http://ekultura.org/wpcontent/uploads/2015/11/ekspertyza_swiadomosc-2015.pdf) (accessed: 19.09.2017).

<sup>23</sup> *Ibidem*.

<sup>24</sup> D. Batorski, M. Filiciak, J. M. Zając, *Znaczenie internetu w promocji i dystrybucji treści kultury*, "Studia BAS" 2016, nr 2(46), p. 200.

<sup>25</sup> Cf.: S. Buchholtz et al., *Rynek produktów, usług i treści cyfrowych opartych na ponownym wykorzystaniu informacji sektora publicznego (ISP) w Polsce*, [https://www.polskacyfrowa.gov.pl/media/1215/POPC\\_WISECC\\_ISP\\_raportkoncowy\\_922015.pdf](https://www.polskacyfrowa.gov.pl/media/1215/POPC_WISECC_ISP_raportkoncowy_922015.pdf) (accessed: 19.09.2017).

<sup>26</sup> Cf. Centrum Cyfrowe, *Raport 2017. Ustawa o ponownym wykorzystywaniu informacji sektora publicznego rok po wejściu w życie*, <https://centrumcyfrowe.pl/blog/2017/06/28/ustawa-o-reuse-raport-na-pierwsze-urodziny/> (accessed: 19.09.2017).

According to the analyses conducted by the Ministry of Digitisation, public sector information are used mainly for scientific and educational purposes, as well as for controlling public authorities. The categories of data that the respondents used more frequently include statistics (57.1%), public administration (48.7%), budget and public finances (41.6%)<sup>27</sup>. According to the Ministry of Digitisation, the cause of failure to use the potential of public data was technical issues: low degree of digitisation, incompleteness, outdatedness and accessibility in the formats that make re-using more difficult and impossible<sup>28</sup>. According to independent experts, the Polish legislator implemented the Directive 2013/37/EU in the narrowest possible scope, omitting the obligation of making resources available by the scientific and cultural institutions. It has not introduced the rule of copyright licensing by the state, which limits the number of available resources and makes people afraid that re-using them may constitute law infringement. The universal standards concerning the obligation of publishing data, their interoperability and updating have not been applied<sup>29</sup>.

The lack of mechanisms monitoring the use of public sector information makes it more difficult to assess economic effects of the Act on the re-use of public sector information. However, the first months when this Act was binding have not increased investments related to opening the access to public data. Its impact on the behaviours of Internet users seems to be imperceptible. The activity of the Internet users is focused on non-institutional sources of information and knowledge, there are not many examples of using public data.

The idea of open data for increasing involvement of the citizens in social, political or cultural life requires to reduce the catalogue of exclusions in the access to public information, solving copyright issues in the use of the resources of information and knowledge and introduction of good practices in making public resources available.

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<sup>27</sup> Ministerstwo Cyfryzacji, Program otwierania danych publicznych. Załącznik do uchwały nr 107/2016 Rady Ministrów z dnia 20 września 2016 r.

<sup>28</sup> *Ibidem*.

<sup>29</sup> Cf. among others, Centrum Cyfrowe, *Raport 2017*; J. Papińska-Kacperek, K. Polańska, *Analiza zaawansowania realizacji idei open government data w wybranych krajach*, “Zeszyty Naukowe Uniwersytetu Szczecińskiego nr 874, Studia Informatica” 2015, no. 37.

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Ustawa z 25 lutego 2016 r. o ponownym wykorzystywaniu informacji sektora publicznego, Dz.U. z 2016, poz. 352.

### Summary

The subject of this article is an economic analysis of the effects of the Act of February 25, 2016, on the re-use of public sector information and its impact on the behaviour of the Internet users. The goal of this normative act was the development of digital society, that is, providing the highest possible, legal accessibility of cultural goods, art, science, education on the Internet, created with the aid of public funds and stimulating people and business entities, as well as involving economic and social capital for the investments related to the Internet.

The lack of mechanisms monitoring the use of public sector information makes it more difficult to assess the economic effects of the Act on the re-use of public sector information. However, the first months of when this Act was binding have not increased investments related to opening the access to public data. Its impact on the behaviours of Internet users seems to be imperceptible. The activity of the Internet users is focused on non-institutional sources of information and knowledge, and there are not many examples of using public data.

### UPUBLICZNIE TREŚCI JAKO SPOSÓB ZAPOBIEGANIA ICH NIEFORMALNEJ DYSTRYBUCJI

#### Streszczenie

Przedmiotem niniejszego artykułu jest ekonomiczna analiza ustawy z 26 lutego 2016 r. o ponownym wykorzystywaniu informacji sektora publicznego i jej wpływie na zachowanie użytkowników internetu. Celem tego aktu normatywnego był rozwój społeczeństwa cyfrowego, czyli zapewnienie jak największej, legalnej dostępności dóbr kultury, sztuki, nauki oraz edukacji w internecie, stworzonych za pomocą środków publicznych i stymulujących ludzi oraz podmioty gospodarcze, a także angażowanie kapitału ekonomicznego i społecznego w inwestycje związane z internetem.

Brak mechanizmów monitorujących wykorzystanie informacji sektora publicznego utrudnia ocenę ekonomicznych skutków ustawy. Jednak pierwsze miesiące jej obowiązywania nie zwiększyły inwestycji związanych z otwarciem dostępu do danych publicznych. Jego wpływ na zachowania internautów wydaje się niezauważalny. Działalność użytkowników internetu koncentruje się na nieinstytucjonalnych źródłach informacji i wiedzy, a nie ma wielu przykładów wykorzystania danych publicznych.