

*The use of press content by internet portals and companies monitoring media
– selected legal aspects*

KEY WORDS

copyright law, dissemination law, fair use, citation law, press monitoring, jurisdiction

ABSTRACT

The article presents different forms of using press content on the Internet in the light of prevailing legal regulations of Polish copyright law and the 2001/29/WE Directive of the EU Parliament. Detailed attention will be given to regulations on fair use of copyright work – the so-called dissemination law (art. 25 of Polish copyright law), quotation law (art. 29) and general clauses restricting these laws. In the second part of the article, the action of companies providing press clipping services have been discussed, since some Polish companies have based their functioning on art. 30 of the Polish copyright law and similar laws, forgetting that this exception concerns only analogous use of only parts of work. The activity of Polish companies has been presented in the light of European press clipping companies practice. The article is supplemented with the most accurate verdicts of European courts, which should be taken into account in amending Polish legal acts.

The development of new technologies, such as the Internet or WAP services¹, enabling fast access to information, is a big challenge for press publishers. Traditional printed press is at an increasing degree replaced by faster and newer technologies, especially multimedia². This new reality connected with the emergence of new communication channels requires special protection of copyright holders, while the increasing range of unauthorized, illegal use of publisher copyrights needs urgent support of the state, in terms of actions against piracy, but also in legislation on equal compensation for those entitled to use the works within permissible use and concerning preventing unfair competition³. These problems concern not

¹ WAP (Wireless Application Protocol) – a set of open, international standards defining the protocol for wireless devices.

² Cf. A. Matlak, *Prawo autorskie w społeczeństwie informacyjnym*, Kraków 2004, p. 12; the author states that “the development of technology, especially the more common large-scale use of digital technology, creates an ocean of possibilities in terms of broadening the offer of services from electronic mass media (e.g. radio, Internet press), based on the exploitation of different intellectual properties”.

³ Cf. idem, *Prawo autorskie i prawa pokrewne w społeczeństwie informacyjnym z punktu widzenia nowej dyrektywy UE*, “Radca Prawny” 2001, No. 1, p. 11; the author notices among others that “there is no doubt that

only Poland, but also other member states of the European Union. It seems necessary to take certain action on an EU level, and also further – on a global scale. The biggest portals and sites publish content produced by traditional press, resting on the permissible use of protected works, depriving press publishers internet services of viewers and income from the advertising placed on their sites. At the same time, single copy sales of press titles, among them those which did not open a parallel on-line version, are dropping. Additionally, other social mass media are more privileged than the press, e.g. through the implementation of the AVMS⁴ Directive and, included within it, i.e. “product placement” or the guaranteed right to short news reports⁵. Moreover, gradually introducing additional information obligations in advertisements⁶ leads to the transfer of advertising expenses to other mass media⁷.

This article will present legal regulations which have a negative influence on the functioning of the press sector in Poland. The first part contains an analysis of the relative Polish and European regulations describing the possibility of using press material on the Internet, while in the second part, the work of press clipping companies is described involving the Polish⁸ and European⁹ legal context, and a review of the most important jurisdiction is

the common use of digital technology causes a gradual change in the ways and terms of exploiting works and other subject-matters of related rights”.

⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) – “Official Journal of the European Union” (later as OJ) 2010, L 95, p. 1. More on the Directive – see among others: O. Castendyk, E. Dommering, A. Scheuer, *European Media Law*, Austin 2008, p. 797–1005.

⁵ These solutions were implemented in the Polish Broadcasting Act (Dz.U. [Journal of Laws of the Republic of Poland] 2011, No. 43, item 226) – respectively in Article 17a and 20c. For more on product placement see: *Prawo mediów*, ed. by J. Barta, R. Markiewicz, A. Matlak, 2nd ed., Warszawa 2008, p. 393–403.

⁶ For example, the necessity to include information on the use of energy and other resources by products connected with energy – *cf.* in this aspect Article 4 Point c of Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products (OJ L 153, 19.06.2010, p. 1). The Directive, overruling the previous Directive 92/75/EEG, increased the range of using so-called energy labeling, among others, on such products as tires or windows.

⁷ It is connected with the fact that press advertising in traditional newspapers and periodicals has a static character while in other mass media it is dynamic, and easier to “hide” the potential negative message concerning e.g. energy use or CO₂ emission.

⁸ In detail, provisions from the Act of 4 February 1994 on Copyright and Related Rights (Dz.U. 2006, No 90, item 631) will be presented (later as Act on Copyright).

⁹ Particularly included will be Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ L 167, 22.05.2001, p. 10, amended: OJ L 216, 2007, p. 24; OJ L 263, 2010, p. 15; OJ L 33, 2011, p. 9); later as the InfoSoc Directive). On permissible use and its construction in this Directive, Krzysztof Gienas claims, among others, that thoughts on the conflict between the contract in copyright and permissible use “is not made easier by the current construction of representations of permissible use, created in the currently in force EU Directives” – see *idem*, *Ograniczanie dozwolonego użytku w drodze kontraktowej – zarys problematyki*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego”. *Prace z Prawa Własności Intelektualnej*” Vol. 104 (2009), p. 65–73. Broadly on the entire regulation: *European Copyright Law. A Commentary*, ed. by M. Walter, S. von Lewinski, Oxford 2010, p. 921–1141; these authors notice that “in the process of implementing the Directive [InfoSoc – footnote

given.

Using press content on the Internet

Making a work available (Article 17 in relation to Article 50 Point 3 of the Act on Copyright) in a way so that third parties could access it at a place and time selected thereby (Internet), requires the permission of the author of the work. This strict nature of copyright law can be suppressed based on regulations on the permissible use of protected works (Article 23–35). Due to the limited scope of this article, issues connected with personal use (Article 23) have been omitted and detailed attention was given to so-called permissible public use. In relation to press content, there is the fundamental role of Article 25 (broadcasting for informative purposes), Article 29 (quotation) and Article 30 (activities of centres of information and documentation). Due to the detailed analysis of this last regulation, it will be discussed separately in the second part of the paper.

Referring to regulations concerning permissible use, one should not forget about so-called general clauses restricting the possibility of using regulations in Division 3 Chapter 3 of the Act on Copyright.

Reports on current events and current articles

The limits of permissible use established in Article 25 of the Act on Copyright are incredibly difficult to define. This is due to an unclear and imprecise provision of this regulation, referring to certain journalistic genres which are not defined in the Act on Copyright. Semantic differences between terms such as “reports on current events” and “current articles on political, economic or religious issues” are fluid and, in many cases, in order to accurately qualify certain material, specialist expertise or interpretation during a court trial is necessary. This qualification is very important because according to Article 25, the publisher (author) may prohibit further dissemination of the article, and if not, he has the right to remuneration for possible dissemination (reprint). In the case of a report, the publisher (author) cannot stipulate its further dissemination; he is also not entitled to any type of renunciation for the use of his intellectual property by another subject.

During the period when regulations in Article 25 concerned only printed press, as there are no news radio stations, television channels or internet portals, the impreciseness of the provisions in the article did not cause such negative outcome as they do now. Today, we

J.W.] to the Act on Copyright, the catalogue of permissible use has been expanded” [in cooperation with M. Barczewski and M. Czajkowska-Dąbrowska – p. 1123].

are dealing with Internet sites, radio stations and television channels presenting – as early as in the morning hours or before noon – articles and other information in current press issues. Unfortunately, certain press subjects do not gain anything from this procedure (apart from prestige). It is difficult to see this as advertising in the case of a visible, ongoing decline of single copy sales of papers and periodicals¹⁰.

Another problem resulting from the unclear provisions in Article 25 of the Act on Copyright concerns the term “comments” (§ 1 Point 1 (c) of the article). Is this term identical with an interview? Similar doubts are aroused by the term “short excerpts from reports and articles” in Article 25 Point 2. Is it a term identical with a quote described in Article 29 § 1 of the Act on Copyright, or is it a different kind of right? Is such an excerpt, even short, containing the key information and punch line, disseminated for news purposes, not contradictory with the usual use of a work (*cf.* Article 35 of the Act on Copyright), as it substitutes the need to familiarize oneself with the original work?

A similar problem concerns short summaries of disseminated works (Article 25 § 1 Point 5). In essence, a summary of an article, report or other journalistic form (all journalistic forms fit the term “work”) exhausts the need to familiarize oneself with the article in question. It is both the term “excerpts”, and also “summary”, that cause publishers the most trouble. These are the forms most often published on Internet sites, increasing their number of viewers and claiming advertising income from publishers¹¹.

Amending the law on copyright in April 2004¹², § 4 was added to Article 25 of the Act on Copyright, which required the provisions described in § 1–3 to also include dissemination on the Internet. This imprecise provision brought out the shortcomings of the regulation, while its use in another environment (Internet), restricted the legal protection of editorial content

There is also doubt as to the proper implementation of the InfoSoc Directive. According to Article 5 § 3 of the Directive, member states may provide exceptions or limitations to the reproduction right and distribution right. In the case of press, exceptions

¹⁰ According to data published in the “Statistical Yearbook” in the years 2005–2010 press circulation decreased by 18.8 per cent and periodicals by nearly 16.1 per cent – “Statistical Yearbook of the Republic of Poland” 2010, p. 433 (data from the Zakład Statystyki Wydawnictw Biblioteki Narodowej [The Department of Publication Statistics of the National Library]).

¹¹ According to data courtesy of the Chamber of Press Publishers, from the research of Zenith Optimedia, shares in the advertising market in the years 2005–2012 changed according to the means of communication in the following way: TV +4 per cent, radio –2 per cent, periodicals –7 per cent, papers –8 per cent, outdoor –1 per cent, internet +14 per cent, cinema – no changes.

¹² See: Amendments to the Act of 4 February 1994 on Copyright and Related Rights (Dz.U. 2004, No. 91, item 869).

must be limited to public distribution or making available articles on current economic, political or religious topics, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated. It is also possible to make exceptions in both reproduction and distribution rights in terms of using works connected with presenting current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible – Article 5 § 3 Point c of the InfoSoc Directive. This means that regarding the Internet, the proper use of regulations from § 4 Article 25 of the Act on Copyright, can be referred only to Article 25 § 1 Point 1 (b). The Polish legislator in the Act on Copyright did not add an analogous exception for the press, allowing the broadcasting of work created by radio or television. This leads to the discrimination of traditional press and its electronic or internet versions, which cannot use the collected radio and television works, even though there are exist technical possibilities allowing the presentation of audio and audiovisual works on press sites.

The above mentioned InfoSoc Directive does not provide any definitions which would facilitate the interpretation of regulations discussed in this article. An exception is motive (44), in which it has been concluded, that due to “the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.” From this provision, one could draw the conclusion that potential exceptions used in the electronic domain should be closely interpreted, however, it only proposes the direction of interpretation, and in practice has hardly any meaning at all.

It should be underlined that the question of common and unauthorized use of press content by different subjects is a European issue. In reality, in each country, different types of companies base their business model, among other things, on posting on their own websites information and other press content to which the editors possess sole rights. Due to this practice these subjects gain users, increase viewership of their own pages and – by placing ads – commercialize the copied press content, increasing only their own income. Publishers, however, despite their expenditures to create the given content, do not receive any renunciation. It should be noticed that this is not about the end-users, that is, the average Internet users, who place parts of the newspaper or periodical on their website, hence this is not a case of restricting user access to press materials. This concerns restricting the practices of companies, professional subjects which in an unauthorized way draw profits at the expense

of press content authors; hence a B2B and not B2C relation¹³. In the case of audio or audiovisual works (e.g. music or film files), there are mechanisms and procedures of prosecuting even a single end-user, but there is no such procedure in the case of press content. This difference, depending on the type of work, is surprising – to all legal intents and purposes, each work is under the same copyright protection.

We encounter the use of press content on Internet sites with diverse types of content aggregation; software that aggregates information from publisher's Internet sites and summarizes it, ultimately placing it on websites. The best-known example of such practices is Google News. These types of pages usually contain titles and leads of current articles. Taking into account the changing habits of users, this type of information usually satisfies their need for news. Thus, in order to get current news, the Internet user reviews only titles and short press information about articles in e.g. Google News, and does not visit the publisher's site (from where the content was taken). These practices lead to the decrease in the advertising income of a specific publisher. More curious "readers", for whom article titles and leads are not enough, have the possibility – by clicking a link – to access the content of the entire article. The referenced reader does "open" the editor's page of the given article, but skips the home page. Omitting it automatically means decreasing advertising income, because ad rates on the homepage are higher than for publishing on later pages.

The described problem concerns the whole of Europe, it is therefore necessary to precisely define certain European laws (e.g. supplementing the InfoSoc Directive with appropriate definitions or including them in other documents with force in the entire European Union).

Quotation law

In the case of the so-called quotation law, we are dealing with a similar situation – both national and international regulations are not precise and do not constitute sufficient basis for a straightforward definition of the size of a quotation, according to the law and within the limits of permissible use, and one which has exceeded it, and is thus a breach of the law.

In times when the Internet was not a widespread communication tool, this issue was not a great concern, or at least its economic dimension was insignificant. Now, this situation has changed completely. Using someone's work in different types of activities (among them often business) means no adequate income from using the given work of the original author or

¹³ B2B – *business to business*, B2C – *business to consumer*.

right-holder. Thus, there is a real threat of deterioration of the economic situation of the author or right-holder, which can result – in a longer perspective – in the necessity of reducing costs connected with producing another piece of work, and, in extreme cases, discontinuing creative activity altogether. In the case of press content, where quoting is a common practice, undefined boundaries of permitted quotation will result in the necessity to reduce costs, cut the number of employed journalists, and what follows – decrease the quality of created content and restrict its diversity (media pluralism), which in turn directly limits their role in building civil society, the basis for developing democracy.

General clauses restricting permissible use

The term “general clauses” restricting permissible use, is described in Article 34 and 35 of the Act on Copyright and in Article 5 of the InfoSoc Directive, but it is also an obligation to name the source, mentioned in certain regulations of this Directive.

The importance of these general clauses – which in practice are often forgotten (and most likely on purpose) – is fundamental. Regulations in Division 3 Chapter 3 of the Act on Copyright and Article 5 § 3 of the InforSoc Directive are exceptions from the absolute rights the author is entitled to¹⁴ and should be rigorously interpreted¹⁵.

According to the first sentence of Article 34 the Act on Copyright, “it shall be permitted to use the works, within the limits of permissible use, on the condition that the author and the source have been named”, whereby (second sentence of Article 34 of the Act on Copyright) “the author and the source should be named subject to existing options”¹⁶. In cases clearly defined in the Act, authors shall not have the right to remuneration (*cf.* third sentence of Article 34 of the Act on Copyright)¹⁷. This provision is often forgotten, and it is

¹⁴ Here it must be noted that using the term “author” by the legislator can cause many interpretation doubts, which could be omitted by using the term “right-holder” or “authorized by copyright”, while de facto we can only mention economic rights, because the second type of rights – so-called the author’s moral rights (Article 16 of the Act on Copyright) – are eternal and non transferable. These last rights – having an “honorary” nature – are not meaningful in the business field (material).

¹⁵ This is a common sentence of the doctrine, presented among others by Elżbieta Traple in the work: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, J. Barta et al., 5th ed., Warszawa 2011 (comments to Article 23, side No. 2); *cf.* J. Preussner-Zamorska, § 33. *Dozwolony użytek na gruncie obowiązującego prawa autorskiego*, [in:] *Prawo autorskie*, ed. by J. Barta, 2nd ed., Warszawa 2007, p. 420 – the author claims that “the postulate to broaden the interpretation of provisions on permissible use [...] should [...] without doubt be met with strong disapproval”; *cf.* R. Golat, *Prawo autorskie. Komentarz dla praktyków*, Gdańsk 2010, p. 118. More on the restrictions of copyright see: A. Matlak, *Prawo autorskie w europejskim prawie wspólnotowym*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego”. *Prace z Wynalazczości i Ochrony Własności Intelektualnej* Vol. 79 (2002), p. 232–275.

¹⁶ A similar provision will be found in the above quoted regulations of the InfoSoc Directive.

¹⁷ This provision can be one of the examples arousing doubt, as the “author” and not the “right-holder” is mentioned. It is about the royalties due to the “author”, even if, based on the contract or other legal regulations (e.g. Article 12, Article 74 § 3) his economic copyrights have been transferred or dismissed onto a third party.

worth noticing that in reference to the work of so-called content aggregators, which give the source (e.g. “Gazeta Wyborcza”, “Wirtualna Polska”) and accordingly refer to the work (link), the name and surname of the author are not given. Hence, the question whether these “existing options”, stated in the Act, prevent mentioning the author. It seems that there exist technical possibilities to place such information next to the article or excerpts used. The practice of content aggregation is therefore an infringement of the first sentence of Article 34 of the Act on Copyright.

Article 35 the Act on Copyright also has fundamental meaning in defining the boundaries of permissible use, according to which “permissible use must not infringe the normal use of the work or violate the rightful interests of the author”¹⁸. Both these blurred terms require greater precision. A similar provision is found in Article 5 § 5 of the InfoSoc Directive, based on which the so-called three-step test is formulated as follows – according to the content of the regulation – “the exceptions and limitations [...] shall only be applied 1) in certain special cases 2) which do not conflict with a normal exploitation of the work or other subject-matter and 3) do not unreasonably prejudice the legitimate interests of the right-holder”¹⁹.

The primary question is: what is the normal use of a work – in this case the press articles. There is no doubt that articles are published in order for readers to become familiar with them – therefore the normal use of a work is its “reading” or – in other words – “familiarizing oneself with the content” of a certain article, collection of articles or the content of a paper or periodical. In that case, any form of using the article/collection of articles leads to a case where it becomes unnecessary to reach for a paper or periodical in order to become familiar with the message, “infringes the normal use of the work” (therefore permissible use is “excluded”, restricted under Article 35 of the Act on Copyright and, respectively, Article 5 § 5 of the InfoSoc Directive).

By analogy, the term “rightful interests of the author” – in our case – the publisher, onto whom the proprietary rights have been transferred, should be more precise. The idea of copyrights is for the author to make a profit from the work he created. These benefits could be numerous – e.g. presenting and distributing opinions, promotion which would make the author recognizable and famous (indirect material profits), but also receiving direct material profits (financial). In Polish, the work “proper” (Pol. *sluszny*) means being right, accurate,

¹⁸ Here again the term “author”, not “right-holder” is used. However, even with this ring, it is easy to argument that any actions, which can expose the journalist to losses or restrict the rights passed-on to his employer – in our case – the publisher, are against his best interests.

justified, reasonable²⁰. Other sources also give meanings such as: appropriate, meeting certain conditions, sensible, decent, large and honest, according to law²¹. One can agree, and this should raise no doubt, that the decent, honest, and therefore justified interest of the publisher depends on obtaining income from content sales (single-copy) or advertising space (also online) of the title containing the article used. If however the consequence of using a certain article form, based on the regulations on permissible use, would be a lack of reader interest in buying the paper or entering the publishers site – it would infringe Article 35 of the Act on Copyright.

In the case of crossing the line of permissible use of copyright works (and this is the case with not meeting the terms in Article 34 and 35 of the Act on Copyright), to use somebody else's content, e.g. created by the publisher's money, it is necessary to obtain the consent of the content right-holder²². The same interpretation, leading to similar conclusions, can be made based on regulations of the InfoSoc Directive and the above-mentioned three-step test²³.

The scale of the described illegal use of press content, and even whole issues of papers and periodicals, is overwhelming. For example – the publisher of the Polish edition of “Newsweek” – Ringier Axel Springer Polska – conducted relevant research, which concluded that the full version of each Monday edition becomes accessible as a pdf file that very same day on almost 300 Polish Internet sites, among which the daily download is between 78 and 170. On average, assuming that this type of scan of the entire “Newsweek” issue is downloaded on each site by 100 users, and calculating that each user would have to buy an issue of the weekly – the publisher could have sold an additional 30 000 issues a week²⁴.

There are nearly 300 such pages in Poland and close to 1000 in Europe. This problem requires urgent action on the European Union level, which would eliminate the illegal use of content from papers, periodicals and books.

¹⁹ 1), 2), 3) – an own underline.

²⁰ *Słownik języka polskiego*, ed. by: M. Szymczak, Warszawa 1981, Vol. 3, p. 261.

²¹ Source: www.wikisłownik.pl.

²² Obtaining this type of permission is also necessary while “elaborating on somebody else's work”. In this case, we are dealing with so-called “related rights” (Article 2 of the Act on Copyright), a situation, in which the author has the copyrights to a work (among others an adaptation, remake, translation), but the right to dispose of them are only by the consent of the author, right-holder of the original work, which in our case – is the consent of the editor (*cf.* Article 2 § 2 of the Act on Copyright).

²³ For more on this text – *cf.* R. Sikorski, *Ocena dozwolonego użytku w prawie autorskim w świetle kryteriów testu trójstopniowego*, [in:] *Granice prawa autorskiego*, J. Greser et al., ed. by J. Kępiński, K. KłaŃkowska-Wiśniowska, R. Sikorski, Warszawa 2010, p. 25–52; J. Barta, R. Markiewicz, *Trzystopniowy test z Article 35 pr.aut. i pr.pokr.*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego”. *Prace z Prawa Własności Intelektualnej* Vol. 106 (2009), p. 5–16.

²⁴ With an average sales of around 120 00 issues, it is a significant loss of potential income.

Press reviews – *press clipping*

One of the symptoms of illegal use of content is practices used in press clipping. Press clipping is a service based on media monitoring and providing clients with copies of articles (in the form of photocopies or in their digital version) or other press and publication content, selected according to the client's key words. Other forms of this service also function, based solely on monitoring and indicating the place of publication of the searched article and providing an issue of the publication (paper version of the paper/periodical), or its part containing the desired article (so-called clipping). These two last forms do not infringe editor rights, provided that, during the process leading to achieve the ultimate result, there is no unauthorized reproduction through digitalization, allowing an automatic search of the scanned and processed text files of newspapers and publications.

The "specification of essential terms of contract" published by the Bulletin of Public Information in tenders announced by public offices prove that modern press clipping is based on providing files containing articles on Internet platforms, owned by companies monitoring the media, to which the client has access through a login and password²⁵.

Press clipping companies use two techniques of acquiring content: scanning paper editions and electronic files (mostly accessed as pdf files or using so-called e-editions or the publisher's Internet sites).

Scanning paper editions is done on industrial document scanners with a capacity of 20–100 pages a minute in an A3 format, color and 300 dpi. The number of pages scanned daily can reach 3000–5000. These images are processed with OCR software, which converts them into text files in txt or xml format (with or without picture elements). The most advanced text recognition systems to a great extent also distinguish image layout on a page and facilitate its reconstruction. In the case of unsophisticated layout, they can even automatically cut out certain articles. Next, key words and strings of signs ordered by the client are searched for in text files (highlighted on the operator's monitor).

The processing of electronic files and e-editions is similar, with the difference that pdf files (so-called editable) contain the full text and information on the layout. At times – due to

²⁵ Cf. specification of important order conditions in tenders announced by the Ministry of National Education or the Ministry of Sport and Tourism accessed at the address: http://bip.men.gov.pl/index.php?option=com_content&view=article&id=961%3Aogoszenie-o-zamowieniu-na-usug-monitoringu-mediow-drukowanych-i-elektronicznych&catid=3%3Azamowienia-publiczne&Itemid=46 (for MNE) and (for MST) http://bip.msit.gov.pl/portal/bip/113/845/ZAKONCZONE_sygn_42usl2011_Wykonanie_uslugi_codziennego_monitoringu_prasy_radia.html [accessed: 26.04.2012].

the specific file format of the pdf standard – text is processed into image files and recognized in OCR systems.

Cut and supplied with key words, articles are collected in data bases. Most often a single record in the base, in separate fields, contains the following data: source (periodical title), information about the source (publisher, print circulation, distribution, advertising price), issue date, date and time of entry in the base, image file (in different formats: jpg, tiff, pdf or png, txt or html), context qualifier (negative, neutral, positive) and advertising equivalent (size in cm² multiplied by price of 1 cm² of advertising). Articles from the data base sorted according to client needs are distributed or made available on Internet sites.

Legal conditions connected with press clipping

Making works accessible (Article 17 in connection with Article 50 Point 3 of the Act on Copyright) in such a way so that third parties could access them at a place and time selected thereby (Internet), as it has been pointed out above, requires the permission of those entitled to the work by means of held copyrights.

In the case of using collective works, which are papers and periodicals (periodic publications), both the collective work, and its part have independent meaning, and so does press material, as a work in the understanding of the Act on Copyright).

In terms of using works in this field of exploitation, Polish law is harmonized with the InfoSoc Directive. It describes exceptions and restrictions in copyright concerning making works available on Internet platforms. There is no exception in this Directive for companies monitoring media by providing press reviews in the form of articles. Moreover, the Directive in Article 5 § 3 (o) defines that limitations in the legislature of member countries in copyright existing before harmonization and other than those described in the Directive, can refer only to non-digital forms of using works accessed by analog devices, and an Internet platform is not one of them²⁶. Therefore, a media monitoring company cannot refer to a plausible statutory license present in the national law of member states in the case of accessing electronic files of press articles.

It should additionally be noted that the activities of media monitoring companies are not press activities in the understanding of press law, as they do not create press material, and therefore they cannot claim the exception stated in Article 25 of the Act on Copyright.

²⁶ It is worth mentioning here that the initial Polish version of the Directive was incorrectly translated and in the quoted regulation referred to “analogous” (Pol. *analogicznych*) and not – as it should be – “analogue” (Pol.

Press clipping companies, in order to confirm that their activities are in accordance with the provisions in the Act on Copyright, claim that they use the statutory license described in Article 30 and pay the required – foreseen in § 2 of the Article – fees for KOPIPOL, the Association of Copyright Collective Administration for Authors of Scientific and Technical Works²⁷. Yet the exception described in Article 30 of the Act on Copyright concerns only the possibility of preparing and disseminating the documentation studies and single copies of centres of information and documentation not larger than one publishing sheet of excerpts of the published works. It should however be accepted – as stated in doctrine – that this exception does not allow using works with a total size over one publisher’s sheet²⁸. Analyzing this regulation further, it should be concluded that whole works cannot be used or digitalized (scanned), databases containing these works cannot be made, or files made accessible by third parties at a place and time selected thereby²⁹.

The same opinion is presented by Elżbieta Traple, who writes that “Article 30 allows information and documentation institutions only to create, without the consent of the copyright subjects, their own documentary studies and distribute them, however it does not permit these institutions to collect the works themselves in databases. Increasingly more information institutions are using computer software to aggregate and process data, while Article 30 does not qualify them to, without the proper consent of the copyright subjects, enter works »into computers«. This activity is a way of recording or reproducing a work, and as such falls under exclusive copyright”³⁰.

It should however be noticed that rights to accessing periodical publications or their elements of an independent meaning in such a way so that third parties could access them at a place and time selected thereby, are not under the collective regulation of KOPIPOL. According to the consent granted by the Ministry of Culture on August 16 1995, the association has the right to collect fees for distributing copies of only parts of works. In the field of exploitation, which is making works accessible in such a way so that third parties could access them at a place and time selected thereby – KOPIPOL’s right is restricted to

analogowych) formats. This error was deleted in the correction to the Directive, published on October 6, 2010 (OJ L 263, 6.10.2010, p. 15).

²⁷ Pol. *Stowarzyszenia Zbiorowego Zarządzania Prawami Autorskimi Twórców Dzieł Naukowych i Technicznych* – translator’s note.

²⁸ Cf. among others: K. Gienas, [*Uwagi do Artykułu 30*], [in:] *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. by E. Ferenc-Szydełko, Warszawa 2011, p. 233; E. Traple, [*Uwagi do Artykułu 30*], [in:] *Ustawa o prawie autorskim...*, p. 291.

²⁹ Here it should also be noticed that there exist doubts as to whether press clipping companies can be recognized as centres of information and documentation in the understanding of Article 30 of the Act on Copyright. Due to limitations of the herein article, this issue will not be further debated.

managing scientific and technical works, which are not the subject of conflict in dealing with press material turnover³¹

The press clipping market in Poland

There are a dozen or so companies on the Polish market monitoring media, out of which – from an economic point of view – five have significant meaning. The largest companies in terms of financial outcome are: Instytut Monitorowania Mediów (IMM), PRESS-SERVICE Monitoring Mediów, Agencja Prasowo-Informacyjna “GLOB” (the oldest company, active on the Polish market for over 50 years), NEWTON Media (the youngest company, present in Poland since 2004) and Wydawnictwo „JaR” – eprasa.com.

Advertising and public relations agencies have more than once also claimed significant income from monitoring services, but most often these are offered in packages with other services (an example may be the “Promotion-Advertising Agency SIGMA”).

The largest monitoring companies claim an income of close to a dozen million PLN per year. The entire commercial market of media monitoring services (including monitoring radio and television) can be estimated at 35–40 million PLN. The five above mentioned largest companies in terms of income, in 2010 had the following profit³² (in millions of PLN): IMM – 14.72; PRESS-SERVICE – 14.17; NEWTON – 3.31; e-prasa.com – 1.74; “GLOB” – 1.64³³.

Of course, the scale of reproducing, scanning and photocopying press clippings for personal³⁴ and public use in companies or offices is much different. One might suspect that the value of the market, framed as such, should be many times larger. However, due to a lack of suitable legal regulations in these terms, it is rather difficult to assess. While it seems hard to imagine a situation in which each secretary, prior to photocopying a press clipping for

³⁰ E. Traple, [Uwagi do Artykułu 30], p. 290.

³¹ Cf. Promulgation of the Ministry of Culture and National Heritage of 26 March 2009 on announcing by the Ministry of Culture and National Heritage granting and withdrawing consent to undertake the activity of collective management of copyright and related rights – (M.P. [Official Journal of the Republic of Poland] 2009, No. 21, item 270).

³² Data comes from the report delivered to the National Court Register.

³³ Market value in 2010 was therefore 35.58 million PLN. It is worth noticing here that over 80 per cent of the market belongs to only two companies whose position has been strengthening – in 2008, 75 per cent of the market value (amounting to 34.41 million PLN) belonged to IMM and PRESS-SERVICE. This state is probably connected with the fact that neither company pays any fees (with small exceptions) to publishers for using their content, due to which they can offer cheaper services than others, who transfer the relevant renunciation. A case before the District Court in Poznań against PRESS-SERVICE is in progress – cf. among others: Ele, *Wydawcy walczą z firmą obsługującą ministerstwo*, “Rzeczpospolita” 01.03.2011, p. B6; Ele, *Sąd Apelacyjny w Poznaniu [inc.]*, “Rzeczpospolita” 09–10.04.2011, p. B4; S. Kucharski, *Monitorowanie sporu*, “Press” 2011, No. 5, p. 6; K. Jedliński, *Interesy wydawców pod ostrzałem*, “Puls Biznesu” 04.05.2011, p. 9.

company use would seek the approval of the editor of the piece, this type of action – which is a breach in copyright law – is probably quite common. Due to difficulties with providing evidence, these actions remain without consequences. Until the Act on Copyright is not amended, clearly and unanimously placing an obligation first and foremost on companies and institutions to obtain a license from collective management organizations, authorized to represent the interests of right-holders, this state will not change, and the so-called gray-zone will continue to exist.

The Polish market of media monitoring, as reviewed by FIBEP³⁵, is one of the most competitive in Europe. Lack of legal regulations in the field of so-called public use, the grey-zone, has in the last years led to drastic cuts in the industry. For several decades, there was only one company functioning commercially: Biuro Wycinków “GLOB” – part of RSW Prasa–Książka–Ruch. After liquidating RSW, “Glob” turned into a work cooperative and has been functioning in this form till this very day.

The early rates and standards of press monitoring were based on services offered by “Glob”. At the end of the 1990s, it was a 300-PLN monthly subscription fee for physical press clippings sent by post, and single clippings were priced at 2 PLN. With the introduction of email and Internet, there emerged companies which offered such services on an online platform. The ease of scanning and sending files caused a dramatic drop in prices and at the same time, a problem with copyright. At present, all companies monitoring media or offering information brokering and PR services already function online.

With no clear-cut legal regulations concerning commercial and public use, few information broker companies and press agencies care to obtain or buy the copyrights to content they redistribute.

The market price of media monitoring is the cost which the company or institution would have assumed while preparing an independent press review. In the minimal version, it is the cost of one work-post or the cost of purchasing newspapers and periodical subscriptions – in total at least 4000–5000 PLN monthly. In large companies – due to the need for quick and promptly prepared “briefs” – teams of a several people handle the processing of material, which increases costs in an obvious way.

Press clipping companies could therefore demand much lower rates for their services than costs required to prepare a press review independently. Tough market competition makes

³⁴ For more on the subject of personal use see among others: A. Matlak, *Prawo autorskie i prawa pokrewne...*, p. 17.

prices drastically drop. On the one side, this was the result of technology – cheaper scanning processes and computer-aided searches of large information bases, on the other, by clients – easy access to sources of information, competing with the press, such as the Internet. These factors released the understandable drive for lowering costs and further price cuts. In the last five years, because of tenders, the average prices for media monitoring services fell by around 50–60 per cent³⁶.

The modern world, thus also European countries, are battling the consequences of an economic crisis, which is why all the more often media monitoring is becoming a cheaper alternative to subscriptions. The cost of a monthly subscription to a daily paper in an electronic version is 25–80 PLN. Ordering 5 dailies for 10 employees would give publishers an income between 750–4000 PLN. Meanwhile, the cost of monitoring these same dailies and reproducing the articles most relevant to the company is at least half of this sum for a few hundred employees, and most often provides zero income for the publisher. Using media monitoring services helps reduce costs, because one does not have to purchase a subscription or hire employees to prepare a selection of articles.

The difference in costs would be even greater if the service concerned monitoring a total of 130 press titles. In 2009 the Ministry of Justice ordered the monitoring of 127 press titles³⁷, where the estimated annual subscription value of one copy of each title was 50–700 PLN. In this case, it was important that the contract included the possibility of simultaneous access from 50 computer posts³⁸. This means that if the Ministry of Justice had subscribed 50 issues of each title, it would have had to spend 2.5 million PLN. However, according to the tender, it paid an annual lump sum of 57 169.20 PLN, which is slightly different from the

³⁵ FIBEP (Fédération Internationale des Bureaux d'Extraits de Presse) – an international organization uniting companies monitoring media.

³⁶ Calculations are based on the analysis of tender results obtained by the author from the company eprasa.com.

³⁷ The relevant part of the contract prepared for signing was the following:

“1) Nationwide press includes the following titles:

a) Daily press – 11 (eleven) titles: *Gazeta Prawna*, *Dziennik, Fakt*, *Gazeta Wyborcza*, *Nasz Dziennik*, *Parkiet*, *Puls Biznesu*, *Rzeczpospolita*, *Super Express*, *Trybuna*, *Życie Warszawy*, *Polska* and nationwide dailies with a circulation exceeding 100 000 issues, which will appear on the market while the contract is in force.

b) Weeklies and periodicals – 13 (thirteen) titles: *Forbes*, *Gazeta Polska*, *Najwyższy Czas*, *Newsweek*, *Polityka*, *Press*, *Przegląd*, *Przekrój*, *Tygodnik »NIE«*, *Tygodnik Powszechny*, *Tygodnik Solidarność*, *Wprost*, *Gość Niedzielny* and weeklies indicated by the Ordering party with a circulation exceeding 100 000 issues, which will appear on the market while the contract is in force.

2) Regional and local press including 103 (one hundred and three) titles, mentioned in attachment 1 to the contract.” Source: <http://bip.ms.gov.pl/pl/ministerstwo/zamowienia-publiczne/rok-2009/news,1487,bdg-ii-3820-3609.html> [accessed: 26.04.2012].

³⁸ According to § 5 Point. 4 of the contract: “Technical parameters of the Internet platform should provide the possibility of simultaneous access to user accounts by 50 users”.

price of purchasing the subscription for one issue of each monitored title³⁹. On the margin, it should be noted that this price also contained radio and television monitoring and providing the files with the recordings of programmes on an Internet platform⁴⁰. Only after the protests of publishers questioning the possibility of choosing a service provider who does not pay fees to the right-holders of content published in the press was the “specification of essential terms of contract” changed. As a result, in the tender announced by the Ministry of Justice in 2011, the offer chosen was that of NEWTON Media Sp. z o.o.⁴¹.

Press clipping market in Europe

Companies offering services in media monitoring operate in many countries, among them in all EU member states. The legal basis for functioning of these type of companies is however different, which is connected with, among others, straightforward state regulations or the preciseness of provisions concerning so-called permissible use, which do not leave room for ambiguous interpretation⁴².

In most European countries, there exist collective management organizations, which collect fees from companies using press content in the interest of publishers. Commercial companies are equally efficient in this field as well.

Sums which certain organizations and companies receive depend to a great extent on the domestic legal regulations. In England, most of the income of the Newspaper Licensing Agency (NLA)⁴³ comes from the sale of license fees for distributing electronic clippings and reproduction license for larger companies. The English law places an obligation on each company and institution, which employs more than 5 people, to buy photocopying licenses,

³⁹ According to the document tender results published on the page: <http://bip.ms.gov.pl/pl/ministerstwo/zamowienia-publiczne/rok-2009/news,1487,bdg-ii-3820-3609.html> [accessed: 26.04.2012]: “The Ministry of Justice as the ordering party informs, according to Article 92 § 2 of the Act of 29 January 2004 – Public Procurement Law (Dz.U. 2007, No. 223, item 1655 as amended), that by the decision of the General Director of the Ministry of Justice, according to the only criterion – the lowest price – the offer of the company PRESS-SERVICE Monitoring Mediów Sp. z o.o., ul. Grunwaldzka 19, 60-782 Poznań (offer nr 1), with the gross price of 57 169.20 PLN has been chosen – it is the offer with the lowest price”.

⁴⁰ Cf. the specification of important order conditions found at the address: <http://bip.ms.gov.pl/pl/ministerstwo/zamowienia-publiczne/rok-2009/news,1487,bdg-ii-3820-3609.html> [accessed: 26.04.2012].

⁴¹ Cf. material in this case is available at the address: <http://bip.ms.gov.pl/pl/ministerstwo/zamowienia-publiczne/rok-2011/news,3574,bdg-ii-3710-4311.html> [accessed: 26.04.2012].

⁴² It is worth mentioning here that a similar issue as in Poland is being leveled also by Portuguese publishers.

⁴³ The NLA is a company created in 1995 to manage the copyrights of press publishers in terms of licensing press clipping agencies, which supply clients with copies of articles; the NLA has a status of a collective management organization according to the provisions of Article 116(2) of the Copyright Designs and Patents Act 1988; press publishers are shareholders and members of the NLA. In 2010, the company had an income of 23,5 million GBP (nearly 101 million PLN). Data comes from the report prepared by the Federation of Reproduction Rights Organizations (IFRRO), which can be accessed at: www.ifro.org/sites/default/files/ifro_directory_2011.pdf [accessed: 26.04.2012].

and only schools are discharged from this type of fee⁴⁴. This is different in Norway, where 75 per cent of the income comes from fees from educational and public administration, and only 10 per cent from businesses.

Each year, IFRRO, which unites reproduction rights organizations, publishes their financial statements. According to their data, the income of companies or organizations working in Europe, was substantial and mostly exceeds the value of the Polish media monitoring market⁴⁵. For example, in 2010 the Copyright Licensing Agency based in the United Kingdom, had an income of 62 million GBP (nearly 266 million PLN), the Austrian Literar-Mechana – 24.3 million EUR (97 million PLN), Finnish Kopiosto – 25.2 million EUR (100 million PLN), Swiss ProLitteris – 34.9 million CHF (93 million PLN), Belgian Reprobel – 25 million EUR (100 million PLN), Norwegian Kopinor – 237 million NOK (109 million PLN), Swedish BonusPresskopia – 170 million SEK (66 million PLN), Hungarian HARR – 337 million HUF (4.5 million PLN), Romanian CopyRo – 972 000 RON (845 000 PLN). In Poland, two large associations are active in the field of reproduction – Polska Książka, which in 2010 had an income of nearly 2 million PLN, and KOPIPOL, which collected 2.5 million PLN.

Press publishers receive a relatively small income from the collected assets (compensation for reproduction). The European Newspaper Publishers' Association (ENPA)⁴⁶ gives the following data: in Germany, publishers of dailies and periodicals receive around 730 000 EUR (3 million PLN), publishers in Denmark – 700 000 EUR (2.8 million PLN), in Finland – 222 000 EUR (900 000 PLN), in the Netherlands – 300 000 EUR (1.2 million PLN), in Sweden – 478 000 EUR (2 million PLN), in Austria – 300 000 EUR (1.2 million PLN) and in Poland – 370 000 PLN.

Press publishers gain a much larger income from selling licenses for the use of press material, e.g. in the Netherlands, they charge 1.3 million EUR a year for a license for digital clippings, and only 300 000 EUR for reproducing (which is respectively 5.2 million and 1.2 million PLN). In Polish companies monitoring printed press, over 75 per cent of clippings comes from dailies, 10 per cent from opinion weeklies, and the remaining from industry and

⁴⁴ More information on the subject of diverse licenses and fees used in England can be found on the Internet site of the NLA: www.nla.co.uk [accessed: 26.04.2012].

⁴⁵ What is meant is the estimated possible value (without the so-called grey-zone or activities of PR companies), but noticing that most of the organizations in IFRRO collect fees mainly for reproducing. Data comes from the IFRRO report, which can be accessed at: www.ifro.org/sites/default/files/ifro_directory_2011.pdf [accessed: 26.04.2012].

⁴⁶ ENPA – European Newspaper Publishers Association; more information on the organization at: www.enpa.be.

local press⁴⁷. The basis of applying for a license in Europe is usually the rate for one clipping reproduced analogically or digitally for one post. In Great Britain, the rate is 8–9 p (40 GR). In Norway, the rates differ depending on the subject buying the license – for the education and public administration sector, it is 0.044 EUR (17 GR)⁴⁸ and for business 0.17 EUR (70 GR).

Review of judgments on using press clipping services

With so many different systems and rates for charging license fees for media monitoring services, it is worth mentioning three of the newest and relatively meaningful European judgments connected with the activity of press clipping companies.

It is worth looking at the verdict of the District Court of the Hague, from 2 March 2005, in the case of *NDP versus De Staat*. In this case, 39 Dutch press publishers filed a lawsuit against the Dutch State Treasury Agency (in the form of Dutch ministries) on discontinuing the practice of electronic press clipping used in ministries and central offices. According to the publishers, electronic press reviews, which substituted the previously exercised reviews in the form of paper press clippings, to a great extent violated the economic rights of the publishers. The plaintiff accused the Dutch government of improper and delayed implementation of the InfoSoc regulations in domestic law. Provisions of the Directive came into force on 1 September 2004, while the Directive anticipated its adaptation into legal systems of member states by 22 December 2002. Publishers also brought up the case that the practice of electronic press clippings used in Dutch ministries is inconsistent with Article 5 of the Directive. Indeed, the article states in § 3 Point c that member states can provide exceptions or limitations to exclusive reproduction rights and the public use of works (provided for in Articles 2 and 3)⁴⁹. However, according to the publishers, electronic press clippings do not meet the conditions of the three-step test resulting from § 5 Article 5 of the Directive, which states that “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal

⁴⁷ Own estimates based on the statistics of page views in 2011 obtained from eprasa.com.

⁴⁸ It is worth mentioning that this relatively low rate was negotiated after strong protests of academic circles in 2006.

⁴⁹ Indeed, this is possible – according to Article 5 § 3 (c) of the Directive – in cases of: “reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author’s name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author’s name, is indicated, unless this turns out to be impossible”.

exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder”.

The court ruled in favor of the publishers, claiming that using electronic press clippings causes a threat to the “normal exploitation” of press articles by publishers holding copyrights. It defined “normal exploitation” by publishers also as the possibility of electronic exploitation of press title content in economic turnover. This entitlement of publishers is threatened by the practices of electronic press reviews, which search and store certain articles. The court claimed that publishers lost their potential license income, also from the private sector, as they too began to copy the practice of the government, which was the daily, systematic, off-license scanning of press, and proved a complete lack of interest in contracting publishers.

In the judgment, the court recalled – the above quoted – motive (44) of the InfoSoc Directive and pointed to other differences in the use of exceptions and limitations in a digital and analogue environment. In the digital environment, reviews of press articles gain independent economic meaning through the function of searching and storing certain files or the ease of adjusting services to client needs, by means of which, if unauthorized, are a infringement of the “normal exploitation” of objects under the protection of copyright and therefore an infringement of interests of right-holders.

In the judgment from 2 March 2005, the court ordered the government to discontinue any type of scanning (also by third parties) and prohibited the electronic distribution through an internal network of any kind of texts from press titles under copyright law, unless granted permission by the publisher. The court also ordered the amount of compensation. Each ministry not abiding to the above regulation was obliged to pay 1000 EUR for each day. At the same time, the court allowed ministries to have traditional press reviews, distributed in the form of paper press clippings, excluding their transfer through email, intranet or other electronic forms. The court ordered the government to pay publishers appropriate compensation for the damage they caused, as a result of infringing their economic rights through the use of electronic press clippings. The compensation was counted from 22 December 2002 (the InfoSoc Directive implementation date), up to the moment of issuing of the verdict.

Another important judgment was that of the Court of Justice of the European Union in the case *Infopaq International A/S v. Danske Dagblades Forening*. Because the services of Infopaq are based on interfering in copyrights of publishers to a much smaller degree than the activities of press clipping companies in Poland, the conclusion from the judgment evaluating

the legitimacy of services offered by companies monitoring press in Poland is clear. On the basis of harmonized EU law, which also concerns Poland, press materials in the understanding of copyright law cannot be used in press monitoring services without the consent of the legal subject of the copyrights. It should be noted that the process of obtaining data by Infopaq in the initial stage is identical with the process described above⁵⁰, as well as with the activities of Polish press clipping companies. It is however a temporary process because both scans and stored text files enable searching through the text of the article and finding keywords (along with their context, which constitutes five subsequent and five preceding words – 11 consecutive words altogether), are deleted from computer memory. Before scanning, the clip file with eleven words is printed and a note is made of its content. In a case where these eleven words are an expression of the author's own intellectual creativity (and according to the court, it could be the case), the process of reproducing and entering in computer memory deprives it of this temporary nature. Set against the activities of Polish press clipping companies, these are purely theoretical assumptions, as Polish companies themselves admit on their websites that they possess full archives of press material⁵¹. Therefore in these cases, we are surely not dealing with a temporary process, which Article 2 of the InfoSoc Directive allows (in Polish law, it is reflected in Article 23¹ of the Act on Copyright).

The Court of Justice of the European Union concluded that – primarily – “An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC [...], if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination”. Second, it stated that “the act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfill the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the

⁵⁰ In the part Press reviews – *press clipping*.

⁵¹ For example, IMM on their website claims, that “only IMM has the archive of the entire press (not just selected clippings) from the beginning of 2003” – www.institut.com.pl/dlaczego_monitoring [accessed: 21.03.2012]. However, PRESS-SERVICE informs that it “offers services of searching and granting access to archive materials from past years”, which is “possible due to a unique on the Polish market base of over 15 million pieces of information from press, Internet, radio and television, digitally processed and archived” – www.press-service.com.pl/pl/uslugi/monitoring-prasy/ [accessed: 26.04.2012].

consent of the relevant right-holders”⁵².

The last verdict worth reviewing is that of the Royal Courts of Justice (Strand, London) from 26 November 2010 in the case of *NLA and others vs. Meltwater*⁵³ and *others*⁵⁴.

The case considered by the England and Wales Court of Appeal on the actual state of affairs examined the accordance of the services provided by Meltwater News⁵⁵ with licenses introduced by the NLA. This organization as of 1 September 2009 introduced a license for media monitoring organizations (MMOs), which offer similar types of services as Meltwater News, and on 1 January 2010 – a license for those subjects, who receive and use this type of service (so-called WEB End-user License).

NLA and others raised a claim of infringing copyrights of publishers for business purposes without obtaining consent from these publishers. The defendant filed for dismissing the claim by assuming that the service offered by him in Meltwater News is within the limits of permissible use of copyrights.

In her judgment, Justice Proudman stated, among others, that the court did not analyze the conditions of the license because they are the subject of recognition of the Copyright Tribunal⁵⁶. The Tribunal claimed that a headline used as a link has the capability of being a protected independent work or being protected as a part of the article it comes from. After analyzing the example press clippings presented by the representatives of both sides, the court agreed that most of them reflected the expression of the whole article. After analyzing the relations of Article 10 of the Berne Convention⁵⁷ to the circumstances on the Internet, the court agreed that it cannot displace the explicit provisions of the InfoSoc Directive or exceed

⁵² The full text of the judgment in the case of *Infopaq International A/S vs Danske Dagblades Forening* (C-5/08) is available on the websites containing the verdicts of the Court of Justice (<http://curia.europa.eu/juris/recherche.jsf?language=pl>).

⁵³ Meltwater News UK Ltd is a registered in Great Britain, a subsidiary of the Dutch company Meltwater Holding BV, which is the “mother” of multinational companies that deliver commercial media monitoring services to business clients and also online, under the name Meltwater News.

⁵⁴ On the claimant side were also, apart from NLA were: MGN Ltd, Associated Newspapers Ltd, Express Newspapers Ltd, Guardian News and Media Ltd, Telegraph Media Group Ltd and Independent Print Ltd. The defendant were: Meltwater Holding BV, Meltwater News UK Limited and the Public Relations Consultants Association Ltd (a professional association uniting and representing the interests of PR companies, using the services of Meltwater News).

⁵⁵ The service is based on supplying clients with information on the subject of articles containing key-words – determined in the order – in the form of a collection of leads, article fragments along with active deep links to editor pages on which the relevant texts are published.

⁵⁶ Copyright Tribunal – a body with a similar function as the Copyright Commission in Poland, with the difference that it does not approve the tables of remuneration, which substitute contracts between parties, but analyses, based on motions issued by users, the terms and conditions of licenses and remuneration proposed by collective licensing bodies.

⁵⁷ Article 10 of the Berne Convention: “It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their

what has been accepted by the Court of Justice of the European Union in the Infopaq case. The court also analyzed the exceptions foreseen in the InfoSoc Directive (among them, quoting for purposes such as criticism or review, and for the purpose of reporting current events) and stated that in this case, it is without relevance. Meltwater News is not intended for public consumption; but is tailored and addressed exclusively to particular end-users for their clients' purposes and dedicated to their personalized interests. Taking into account the scale and range of services (the end-user could receive around 50 000 abstracts from articles), the court also analyzed the entire case on the grounds of fair dealing, and ruled that copying done by Meltwater News services does not stand within the limits of fair dealing⁵⁸.

In all the circumstances, the Court found that without a license from the publishers there is infringement of the publishers' copyright by the end-users in receiving and using Meltwater News. The case was sent to the Court of Appeal, which supported the judgment⁵⁹.

Final conclusions

There is no doubt that press content remains one of the basic sources of information. The development of technology has committed to creating new communication channels, due to which content once accessible only by means of traditional, printed forms is now distributed also by an Internet network, mobile technologies etc. The ease and speed of data transmission in a digital world, and also the possibility of quick processing, copying and further distribution became a chance for publishers, but also a challenge, which they have to face in order to monetize the content whose creation they financed. Without an efficient system of protecting and executing copyrights, and a change in public assumption of everything online being free, this goal will not be achieved. Meanwhile, we lack both an efficient jurisdiction, and proper legal solutions, and those in force – due to their ambiguity or faulty implementation of EU regulations in national law – are often abused by many for business purposes. In Poland, there exists a number of Internet portals copying press content and distributing it on their own sites alongside their advertising. Many Internet intermediaries

extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”.

⁵⁸ In the context of the discrepancy between the freedom of competition and the ruthless nature of copyright see: E. Traple, *Oddziaływanie przepisów gwarantujących wolność konkurencji na wykonywanie majątkowych praw autorskich. Uwagi na tle orzeczenia Europejskiego Trybunału Sprawiedliwości z 6 kwietnia 1995 roku w sprawie „MAGILL”*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego”. Prace z Wynalazczości i Ochrony Własności Intelektualnej Vol. 67 (1996), p. 121–136.

⁵⁹ Judgment of the Court of Appeal from August 27 2011 case no: A3/2010/2888/CHANF – the document is available at the address: www.scribd.com/doc/61038292/PRCA-Meltwater-vs-NLA-appeal-judgement [accessed: 26.04.2012].

based their business models on providing legal or illegal exchange of all kinds of content, among it press content. Additionally, the legal nature of activities of some Polish press clipping companies, which do not transfer any remuneration to publishers for using content they finance, is hazardous. Without taking action by the legislator both on the national and EU level, but even – against the global nature of the digital world – on a world scale, improving the situation seems impossible. No changes in these aspects will force publishers to minimize costs, i.e. by reducing employment and firing employees and journalists, which will directly transfer to limiting the diversity and decreasing the quality of press content.