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RIGHT OF DISCLOSURE AND THE DIGITISATION OF LIBRARY COLLECTIONS

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ABSTRACT

This text examines the impact of moral rights to non-disseminated works on the permissibility of libraries to digitise collections in which such works are embodied. Of fundamental importance in this respect is the author's moral right of disclosure, consisting of the right to decide on the first making available of a work to the public. The article presents the genesis and development of the system of copyright, inter alia in Poland, which, in relation to the author's economic rights, may be described as proprietary, which justifies the use of the notion of propertisation of copyright. However, the essence of the copyright system includes the expiration of rights to the economic exploitation of a work as it passes into the public domain, thereby enabling its digitisation by a library. To a limited extent, cultural heritage institutions also enjoy the right to use materials that are outside of the scope of the public domain, although their digitisation is subject to substantial limitations. Protection of the author's economic rights is not, however, the only factor in the construction of these restrictions. They also result from the legal system's recognition of moral rights, which include the right of disclosure (right of divulgation). This article discusses the phenomenon of the institutionalisation of moral

rights, followed by their theoretical conceptualisation, resulting in the formation of two models in continental legal systems: a monistic one, in which moral rights belong to the content of copyright, and a dualistic one, in which they are derived from the protection of personal interests. The normative approach in force in Poland, starting from the first, pre-war copyright law, is based on the latter concept, which is a result of its author's being inspired by French legal thought. As a result, a dualistic model was adopted in Poland, which assumes that the moral rights of authorship are inextinguishable and subject to be exercised after the death of the author by the author's relatives. Moreover, it was the intention of the pre-war legislator to protect moral rights to arbitrarily old works, which meant that works created in the period before the existence of copyright protection were also covered. Such an approach was maintained in both the subsequent copyright law of the 1950s and the one in force today. This has a substantial impact on the permissibility to digitise unpublished material, significantly limiting the scope of the public domain, which is the primary source of objects made available digitally by cultural heritage institutions. Consequently, this article discusses the need to amend the copyright law by either shaping moral rights in a manner characteristic of monistic systems or changing the normative shape of the author's right of disclosure to remove doubts concerning the permissibility of digitising unpublished material that is not the subject of author's economic rights. Although this article focuses on the matter described above from the perspective of libraries, the points made herein apply to other types of cultural heritage institutions engaging in digitisation activity relating to their collections, i.e. archives and museums, collectively referred to as the GLAM sector.

KEYWORDS: digitisation of library collections, copyright law, right of disclosure, public domain

Introduction

In the light of Bronisław Malinowski's functional theory, culture must be understood as an integral whole, encompassing a number of material, human and spiritual elements, which help man cope with the problems he faces.[1] It includes, among other things, inherited material products.[2] Activity undertaken in the fields of arts and knowledge fulfils the integrative function of culture,[3] thus leading to the satisfaction, by way of gratification, of human needs going beyond those of a purely physiological nature.[4] Knowledge, according to Malinowski, serves to link different types of behaviour, enables the projection of past experiences into the future, integrates elements of human experience and allows the coordination of activities.[5] Art, on the other hand, should be perceived as a carrier of tradition, but also an agent for its processing.[6]

Carl Gustav Jung identified the activity drive as one of the main instinctual factors, consisting of the urge to travel, the love of change, restlessness and the play-instinct.[7] Man, in Jung's theory, is also characterized by a specific reflective instinct, which re-enacts the process of excitation and carries the stimulus over into a series of images. This, in turn, can manifest itself as a scientific achievement or a work of art.[8] Reflection, in Jung's view, is the cultural instinct *par excellence*, whose strength manifests itself in the power of culture to maintain itself in the face of untamed nature. Linked to the reflective instinct is the creative impulse in man, which, although not universal in character, like other human drives, is characterized by its compulsiveness.[9] Art, Jung ar-

1 See B. Malinowski, *Kultura i jej przemiany*, Warszawa 2000, p. 59.
2 See B. Malinowski, *Jednostka, społeczność, kultura*, Warszawa 2000, p. 82.
3 See B. Malinowski, *Kultura…*, p. 60.
4 See A. Waligórski, 'Bronisław Malinowski', *Przegląd Socjologiczny* 1976, vol. XXVIII, p. 273.
5 See B. Malinowski, *Kultura…*, p. 113.
6 Ibidem, p. 139.
7 See C.G. Jung, *Dynamika nieświadomości*, Warszawa 2014, pp. 135-136.
8 Ibidem, p. 136.
9 Ibidem.

gues, provides a way of speaking about archetypes, summoning up a voice stronger than our own, for what is described by primordial images, enthrals and overpowers, and what it describes, it lifts out of the occasional and the transitory and into the realm of the ever-enduring, transmuting our personal destiny into the destiny of mankind, thus enabling man to find a refuge from every peril.[10]

Since knowledge and art are fundamental to man's existence as both a psychological and social being, it should come as no surprise that, with the invention of writing, humans saw the need to collect and preserve cultural achievements. Among the great civilizations of the Near East, the Sumerian, Akkadian and Babylonian empires, located along the valleys of the Tigris and Euphrates rivers, provide rich archaeological material, which exists due to the durability of clay tablets used to record cuneiform writing.[11] On the other hand, the oldest Egyptian papyri, despite the relative sturdiness of this material, could not survive to the present day, so there are no archaeological discoveries that would help establish when the first library collections consisting of this type of media may have been created.[12] The oldest library so far discovered – a collection of several thousand clay tablets in Sumerian cuneiform script – was part of the furnishings of the palace at Ebla (now Syria) and is dated between 2,300 and 2250 BC.[13] The earliest catalogue of library collections, on the other hand, dated to the second millennium BC, also comes from the Mesopotamian civilization.[14] It is worth noting that during the period of the Ancient Eastern empires, the penalties for evading the obligation to return lent library materials, as well as their improper handling by users, were pronounced. Hence, clay tablets belonging to library collections included formulations that reminded the user of the need to return them, ref-

10 See C. G. Jung, *Archetypy i symbole : pisma wybrane*, Warszawa 1993, p. 398.

11 See L. Casson, *Libraries in the ancient world*, New Haven, 2002, p. 1.

12 Ibidem.

13 Ibidem, p. 3.

14 Ibidem, p. 4.

erences to religious motivations[15] and even curses aimed at those who would think of destroying lent materials.[16]

With the emergence of successive ancient civilizations, the idea of the library developed, and such institutions were successively established. Perhaps the most famous for the Hellenistic cultural sphere was the Bibliotheca Alexandrina,[17] which formed part of the Ptolemaic Museum. Its collection was so famous in the ancient world that Athenaeus of Naucratis, writing about the Museum during the much later reign of Marcus Aurelius, asked rhetorically if there was even the need to mention the enormous richness of its book collection.[18] Paradoxically, apart from the knowledge that it existed, nothing can be said about this institution with sufficient certainty.[19] The organizer of the first Roman public library, established in 39 BC, was Gaius Asinius Pollion.[20] During the Middle Ages, libraries of monastic congregations and universities were dominant, as was the case in Poland.[21] It was not until the Renais-

15 Ibidem, p. 13, where the following content of one of the tablets discovered at Uruk is pointed out: *He who fears Anu, Enlil, and Ea will return it to the owner's house the same day.*

16 Ibidem, where the formulation is pointed to as an example of this type of curse: *He who breaks this tablet or puts it in water or rubs it until you cannot recognize it [and] cannot make it be understood, may Ashur, Sin, Shamash, Adad and Ishtar, Bel, Nergal, Ishtar of Nineveh, Ishtar of Arbela, Ishtar of Bit Kidmurri, the gods of heaven and earth and the gods of Assyria, may all these curse him with a curse which cannot be relieved, terrible and merciless, as long as he lives, may they let his name, his seed, be carried off from the land, may they put his flesh in a dog's mouth*!

17 Ibidem, pp. 31-47.

18 See Athenaeus, G. Kaibel, *Athenaei Naucratitae Dipnosophistarum libri XV*, Lipsiae 1887, book 5, chapter 36 (περὶ δὲ βιβλίων πλήθους καὶ βιβλιοθηκῶν κατασκευῆς καὶ τῆς εἰς τὸ Μουσεῖον συναγωγῆς τί δεῖ καὶ λέγειν, πᾶσι τούτων ὄντων κατὰ μνήμην;)

19 See R.S. Bagnall, *Alexandria: Library of Dreams*, "Proceedings of the American Philosophical Society" vol. 146 No 4 (2002), pp. 348-362, where the author points out that it is uncertain who founded the Alexandrina, what might have been the scale of its papyri collection, while it certainly couldn't have been as vast as it is widely perceived, i.e. consisting of hundreds of thousands of items and what was the cause of its destruction or if it was, in fact, destroyed or just degenerated in a natural historical process and finally ceased to function without any sudden cause.

20 Ibidem, p. 80.

21 See J. Sadowska, K. Zimnoch, *Biblioteki i ich użytkownicy : od elitarności do powszechności?* in: H. Brzezińska-Stec, J. Żochowska (eds.), „Biblioteki bez użytkowników...? : diagnoza problemu : V ogólnopolska konferencja naukowa, Supraśl, 14-16 września 2015", Białystok 2015, pp. 21-23.

sance that the ancient idea of a public library returned, while a wider dissemination of this concept was to occur in the 17th and 18th centuries with the development of the Enlightenment ideology.[22] The 19th century was a period of the creation of national libraries, especially by the newly formed European countries.[23] Poland, however, had to wait until it regained independence after the First World War to formally establish a national library,[24] although as early as 1780, the Sejm – the lower house of the Polish parliament – granted the then Załuski Library the right to receive a legal deposit.[25]

The development of digital technology at the end of the 20th century gave libraries new, hitherto unknown possibilities, both in terms of the preservation, as well as the making available of their collections. Digitisation, initially on a small and later on a mass scale, together with the development of web technologies, made it possible to provide global access to library collections. In 2008, an initiative of the European Union led to the creation of the digital library Europeana, which aggregates the collections of a number of cultural institutions and today includes more than fifty million objects.[26] One of the key mass digitisation projects on a European scale is Polona, a digital library being developed by the Polish National Library, which makes available the digitised collections not only of this library but also of cooperating cultural institutions.[27] As of the end of 2022, Polona provided access to 3,814,571 digital objects.[28]

22 Ibidem, pp. 24-29.

23 See A. Żbikowska-Migoń, *Wiek XIX - stulecie bibliotek* in: ed. H. Tchórzewska-Kabata, „Droga do Okólnika 1844-1944 : w 160 rocznicę powstania Biblioteki Ordynacji Krasińskich i w 60. - spalenia zbiorów bibliotek warszawskich w gmach BOK na Okólniku", Warszawa 2005, p. 17.

24 See Decree of the President of the Republic of 24 February 1928 on the National Library (Polish Journal of Laws 1928 No. 21, item 183).

25 See A. Klossowski, *Biblioteka Narodowa w Warszawie: zbiory i działalność*, Warszawa 1990, p. 10.

26 See https://www.europeana.eu/pl/about-us [Accessed 20.07.2023].

27 See https://polona.pl/ [Accessed 20.07.2023].

28 See *Sprawozdanie Biblioteki Narodowej za rok 2022*, Warszawa 2023, p. 55.

The mass digitisation of library collections has caused libraries to face not only technical but also legal challenges, the most important of which is related to the normative shape of a number of copyright institutions. A comprehensive presentation of all aspects of copyright issues relating to digitisation activities in the GLAM sector would go beyond the scope of this paper; therefore, its subject is limited first and foremost to the institution of moral rights, in particular, the author's right of disclosure (right of divulgation), the significance of which, it seems, will gradually grow in the context of mass digitisation processes.

2. The Proprietary Model of Copyright

In order to clarify the origins and justification of the protection of moral rights, this matter has to be preceded by a presentation of the broader context of the emergence of copyright. Furthermore, it is important to establish the proprietary aspect of copyright known in continental legal systems as the author's economic rights, which constitute a subordinate and secondary category in relationship to copyright in general, the development of which only becomes comprehensible in the light of the conceptual and, consequently, also normative changes in the legal protection of creativity.

In antiquity, institutions providing this kind of protection did not exist.[29] However, according to one view, the perception of property in terms of natural law and the legal shape of this institution developed in classical Roman law[30] became the later theoretical and legal basis for the proprietary model of copyright and its legal-naturalistic justifications.[31] It has also been argued that the

29 See e.g. J. Błeszyński, *Konwencja berneńska a polskie prawo autorskie*, Warszawa 1979, p. 7.

30 However, the widespread view of the almost absolute character of this right is not reflected in its changing normative shape. See on this subject W. Wołodkiewicz, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*, Warszawa 2009, Part III, Chapter II, point 10, LEX, [Accessed 20.07.2023]; W. Pańko, *O prawie własności i jego współczesnych funkcjach*, Katowice 2016, p. 24.

31 Cf. B. Atkinson, B. Fitzgerald, *A Short History of Copyright*, Cham 2014, p. 6.

category of immaterial items (*res incorporales*),[32] already present in classical Roman law, and the personal servitude of usufruct (*usus-frutcus*), defined as the right to use and derive profit from a thing owned by a third party to the exclusion of the essence of that thing (*ius alienis rebus utendi fruendo salva rerum substantia*),[33] constituted those normative models which, accordingly, made it possible to apply the construction of ownership of a thing to an intangible good, such as a work, and to shape the right to royalties due the rightsholder for the permission to use this good.[34] However, there is no doubt that the very concept of authorship of a work was known both in ancient Greece and in Rome.[35]

The following medieval period did not see the development, either on a theoretical or consequently on a normative level, of institutions aimed to protect creative works. Neither the ideological climate of the epoch, with its theocentrism, which was expressed in the sphere of artistic activity by the emblematic maxim *ad maiorem Dei gloriam,* nor the nexus of economic relations and the institutions governing them, which can be with some level of simplification described as a feudal system,[36] with its typical double domain (*dominium directum et utile*),[37] could be conducive to the formation

32 See on this subject Dajczak, Wojciech, *Geneza określenia „res incorporalis" w prawie rzymskim*, in: ed. H. Olszewski, „Studia z historii ustroju i prawa : księga dedykowana profesorowi Jerzemu Walachowiczowi", Poznań 2002, p. 41.

33 Cf. S. Wróblewski, *Zarys wykładu prawa rzymskiego. [Cz. 2], Prawo rzeczowe*, Kraków 1919, p. 141.

34 See A.R. Emmett, *Roman Law, Private Property and the Public Domain: Lessons for Copyright Policy*, in: B. Fitzgerald, J. Gilchrist (eds), Copyright Perspectives, Cham 2015, pp. 17-27.

35 See B. Atkinson, B. Fitzgerald, *A Short History...*, p. 10. See the literature cited there on the view expressed by some authors of the existence of a prototype of literary property in ancient Rome, supposedly expressed in the trade in copies of certain dramatic works. Essentially, however, the economic mechanism of generating creative content was not based in antiquity on the recognition and protection of a subjective property right to exploit a work, but on the use by authors of other economic resources available to them, and sometimes also on the mechanism of patronage.

36 For doubts about the correctness of this term, cf. H.J. Berman, *Law and revolution: the formation of the Western legal tradition,* Cambridge, Mass 1983, pp. 41-42.

37 See K. Sójka-Zielińska, *Historia prawa,* Warszawa 2011, pp. 102-103.

of strong absolute subjective rights having as their object the products of human thought. There was, however, no atrophy of the very concept of authorship. While in early patristics, the very idea of property was identified with the realm of the contingency as a result of the fall into sin and the necessity to exist in an imperfect temporal world, which contaminated basically every human institution,[38] the conviction arose in late medieval thought, mainly in the teachings of St. Thomas Aquinas, that, insofar as co-ownership of goods is the principle inherent to the order of natural law, its nature does not oppose the exclusivity of property serving individual human beings on the grounds of positive law.[39]

The modern era brought the technological revolution ushered in by the invention and dissemination of the printing press. The emergence of the technical ability to quickly and inexpensively

38 See P. Baldwin, *The Copyright Wars*, Princeton and Oxford 2014, p. 6. The most prominent expression of this attitude is considered to be the view of St Irenaeus of Lyons, who pointed out that, whatever the size of the possessions, their acquisition is always from the mammon of iniquity: *[…] Omnes enim nos aut modica aut grandis sequitur possessio, quam ex mammona iniquitatis acquisivimus.* Cf. *Irenaeus* of Lyons, *Sancti Irenaei episcopi lugdunensis Quae supersunt omnia accedit apparatus continens ex iis, quae ab aliis editoribus aut de Irenaeo ipso aut de scriptis eius sunt disputata, meliora et iteratione haud indigna*, Lipsiae 1849, p. 248. The notion of mammon of iniquity used here by Irenaeus is by no doubt taken from Luke (Luke 16:9): Καὶ ἐγὼ ὑμῖν λέγω, Ἑαυτοῖς ποιήσατε φίλους ἐκ τοῦ **μαμωνᾶ τῆς ἀδικίας**, ἵνα, ὅταν ἐκλίπητε, δέξωνται ὑμᾶς εἰς τὰς αἰωνίους σκηνάς. For a more extensive discussion of the early patristic position with regard to property and its treatment in the teaching of St. Thomas, cf. H. Chroust, R.J. Affeldt, 'The Problem of Private Property According to St. Thomas Aquinas', *Marquette Law Review*, 1950-1951, vol. 34 no. 34.

39 St Thomas Aquinas put it this way: *Community of goods is ascribed to the natural law, not that the natural law dictates that all things should be possessed in common and that nothing should be possessed as one's own: but because the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law, as stated above (II-II:57:3). Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason.* Cf. *The Summa Theologiæ of St. Thomas Aquinas : Second and Revised Edition*, https://www.newadvent.org/summa/ [Accessed: 19.111023). II^{a}-IIae q. 66 a. 2 ad]. *([…] communitas rerum attribuitur iuri naturali, non quia ius naturale dictet omnia esse possidenda communiter et nihil esse quasi proprium possidendum, sed quia secundum ius naturale non est distinctio possessionum, sed magis secundum humanum condictum, quod pertinet ad ius positivum, ut supra dictum est. Unde proprietas possessionum non est contra ius naturale; sed iuri naturali superadditur per adinventionem rationis humanae).*Cf. *Sancti Thomae de Aquino Summa Theologiae secunda pars secundae partis a quaestione LXI ad LXXVIII*, https://www.corpusthomisticum.org/ [Accessed: 19.11.2023], II^{a}-IIae q. 66 a. 2 ad 1

reproduce written and graphic materials revealed three categories of actors whose partly common and partly conflicting interests in the creation and distribution of publishing production led to the development of the concept of legal protection of the products of human thought. These actors included creators, publishers and the audience – the recipients of creative works.

The first to recognize the need for the institutional protection of their interests were European publishers, who realised that the legal monopolisation of the technological process leading to the reproduction of materials was essential to ensure the stability of revenues flowing from their sales. Hence, the original normative forms of copyright protection were printing privileges, which were based on the granting of legal exclusivity for the production of materials by printing technology in the territory covered by the legislative authority of the entities establishing them, i.e. most often the monarch or other authority exercising this authority.[40] Violation of such a monopoly was punishable by criminal sanctions, and thus, unlike the modern construction of copyright law, its prototype was based on public rather than private law norms. Privileges were temporal and renewable, but in the event of definitive expiry, the material covered could be reproduced in print by anyone interested.

The growing drive in the 18th century to undermine this effect underpinned the emergence of a fundamental model of copyright law, which has remained relevant in Western legal systems to this day. Publishers began to question the extinction of the privileges granted to them by resorting to the well-known normative construct with which analogy most clearly justified their position, namely property. Provincial publishers, on the other hand, similarly challenged privileges in general as the exclusive basis for the permissibility of reproduction and distribution of works, as the

40 The first printing privilege was issued by the Venetian authorities (1486), followed by the French crown in favour of the booksellers of Paris (1507), the Holy Roman Empire (1512) and the British crown (1518), which established the office of King's Printer. Cf. B. Atkinson, B. Fitzgerald, *A Short History …*, p. 17.

beneficiaries of the monopolies granted were most often their capital city competitors. The essence of this reasoning was that just as the acquisition of the ownership of a thing permanently transfers the right to the purchaser, who is not temporarily restricted in his ability to use it, collect its benefits or alienate it, similarly, the acquisition of a manuscript by a printer from its creator should give rise to analogous rights with regard to its exploitation. However, it was necessary here to assume that the right acquired by the publisher originally came into existence on the side of the creator of the manuscript. Hence, in order to justify the independence of the derivatively-acquired right to print from the time-limited privilege, it was necessary to justify the original right of the creator, which the creator transferred to the publisher. On the other hand, the creator's desire was to secure influence over the renewability of the printing privilege, with a view to secondary exploitation of the work after the expiry of the original terms. Thus, the interests of creators and some publishers converged in the negation of printing monopolies, even though each group sought to secure a dominant position in the publishing market. In the absence of any clear basis for the creator's right to the economic exploitation of the work in the legal orders of the time, the source of their justification in continental Europe became the legal naturalism theories of the time, while in the Anglo-Saxon legal area, the relevant justifications were sought on the basis of utilitarian theories and the *common law* equity tradition.

Crucial to these views was J. Locke's theory of the fruits of labour derived in Chapter V of the *Second Treatise on Government*, according to which God, who has given the world to men in common, has also given them reason to make use of it to the best advantage of life, and convenience, so the earth, and all that is therein, is given to men for the support and comfort of their being.[41] The possibility of their appropriation, therefore, arose.[42] At the same time, man

41 See J. Locke, *Dwa traktaty o rządzie*, Warszawa 1992, p. 181.

42 Ibidem.

has property in his own person, which also extends to the labour he performs.[43] Thus, that which man removes out of the state that nature has provided and left it in and mixes with his labour, joining it to something that is his own, becomes his property.[44] However, this assumption has two limitations. The first, known as the L*ockean proviso,*[45] stems from the proviso that the acquisition of property by the appropriation of goods as a result of the labour assumption to extract them from their original state is possible only where "at least where there is enough, and as good, left in common for others."[46] The second restriction that Locke placed on the principle of appropriation of the fruits of labour is the prohibition against making its object goods in excess of human needs, which would have the effect of allowing their degradation.[47] In spite of the fact that Locke himself denied the possibility of relating the theory of property formulated in this way to immaterial goods,[48] and also that in modern science, there is a criticism of the "Lockean argument" as a philosophical and legal basis for copyright,[49] it remains the primary, naturalistic justification for the dominant property construction of this right in continental legal systems.[50]

43 Ibidem.

44 Ibidem.

45 See R. Nozick, *Anarchy, state, and utopia*, Malden, MA 1999, pp. 178-182.

46 See J. Locke, *Dwa traktaty...* , s. 182.

47 Ibid, p. 189, where it is said that before the appropriation of land, he who gathered as much of the wild fruit, killed, caught, or tamed, as many of the beasts, as he could; he that so imployed his pains about any of the spontaneous products of nature, as any way to alter them from the state which nature put them in, by placing any of his labour on them, did thereby acquire a propriety in them: but if they perished, in his possession, without their due use; if the fruits rotted, or the venison putrified, before he could spend it, he offended against the common law of nature, and was liable to be punished; he invaded his neighbour's share, for he had no right, farther than his use called for any of them, and they might serve to afford him conveniencies of life.

48 Cf. J. Peterson, 'Lockean Property and Literary Works', *Legal Theory* 2008, vol. 14, no. 4, pp. 272-273.

49 Cf.e.g. C. Sganga, *Propertizing European Copyright*, Cheltenham 2018, p. 20.

50 So C. Sganga, *Propertizing...*, p. 19; similarly M. Chatterjee, 'Intellectual Property, Independent Creation, and the Lockean Commons', *UC Irvine Law Review* 2022, vol. 12, no. 3, p. 755.

This justification later gave rise to two concepts, one emphasising the need to create incentives to undertake work that man, as an inherently unpleasant activity, tends to avoid, and the other emphasising the increase in the social value of goods resulting from work, thus justifying the need to remunerate it and, as under the first concept, to create incentives to perform it.[51]

Among other commonly invoked, naturalistic justifications of copyright, which do not, however, reference property theory, is the thought of Immanuel Kant, who attributed to the creator an inherent, inalienable right to the work considered as an expression of personality.[52] Reference is also made here to the views of G.W. Hegel, referred to as the personal theory of property, which grounds this institution in the free will striving for self-realisation, which occurs through the transformation of subjective freedom into objective freedom, through, inter alia, the appropriation of matter and its transformation into an external manifestation of the will by making it the object of a property right.[53] Indeed, Hegel saw the right of appropriation as an absolute expression of the personal will[54] while excluding the transferability of such goods which constitute the person's own person and the essence of man's self-knowledge.[55] Thus, it is possible to dispose of the thing constituting the medium of a product of thought, and thus, the purchaser becomes the owner of a copy, but the creator or inventor still remains the owner of the general means of reproduction of the product in question.[56] Hegel, therefore, seems to have allowed for the licensing of works, indicating that it is possible to convey their use to someone else for a limited period of time, but he ruled out the definitive alienation of everything (totality) that is thus pro-

51 Cf. C. Sganga, *Propertizing…*, p. 21.

52 Cf. I. Kant, 'Von der Unrechtmäßigkeit des Büchernachdrucks', *Berlinische Monatsschrift*, 1785, no. 5.

53 Cf. C. Sganga, *Propertizing…*, pp. 22-23 and the literature cited therein.

54 G.W.F. Hegel, *Zasady filozofii prawa*, Warszawa 1969, p. 64.

55 Ibidem, pp. 81-82.

56 Ibidem, p. 84.

duced, for this would be tantamount to a waiver of the substance of the creation and thus the personality of the creator.[57] The viability of this reasoning is confirmed by the normative model of German copyright, which is shaped as a non-transferable, albeit hereditary right.[58] Anchored in the thought of Locke, Kant and Hegel, naturalistic theories became the basis for the formation of the continental proprietary model of an author's economic rights, seen consequently at the level of positive law as a normative verbalisation of inherent human rights, which the legislator can only confirm, while they exist regardless of whether and to what extent such confirmation occurs in a given legal system.

An alternative theoretical basis for the recognition and protection of the economic aspect of copyright, which in turn influenced its model shaped in Anglo-American law, are theories derived from the doctrine of utilitarianism.[59] Rooted in the thought of J. Bentham and J.S. Mill, they assume that individuals are characterized by a tendency to maximize their benefit and thus maximize pleasure and minimize suffering.[60] The common benefit should, therefore, be understood as the sum of individual benefits, which justifies the introduction of social institutions that create incentives to take actions that are beneficial from this point of view, while refraining from actions that reduce the overall sum of benefits.[61] In this view, the creator does not have an inherent, absolute right to the creations of the intellect, but its establishment as a kind of prerogative at the level of positive law fosters the generation of creativity, which serves to increase the scope of this common benefit.[62] The philosophical underpinning behind the insti-

57 Ibidem, p. 83.

58 See § 28(1) and § 29(1) of the German Copyright Law (Gesetz über Urheberrecht und verwandte Schutzrechte, Gesetz vom 09.09.1965, BGBl. I S. 1273).

59 M. Senftleben, *Copyright, limitations and the three-step test: an analysis of the three-step test in international and EC copyright law*, The Hague 2004, p. 6.

60 See C. Sganga, *Propertizing…*, p. 24.

61 Ibidem.

62 See M. Senftleben, *Copyright…*, p. 6.

tutionalisation of Anglo-Saxon *copyright* described here, although based on a decidedly different reasoning than the naturalistic essence of continental copyright, does not, however, change the fundamental postulate, common for both these approaches, of shaping these rights as firstly serving the creator, and, secondly, as being based on the normative model of the right of ownership of things; therefore, one is fully justified in using the notion of propertisation of copyright.[63]

At the same time, as pointed out in the literature, elements of both of the above-described theoretical justifications[64] are present in the historical approach, as well as in the current model of Western copyright, which is uniform in its essence. This does not mean, however, that one cannot discern originally significant and subsequently receding differences between the Anglo-Saxon and continental systems, which are precisely rooted in the different theoretical rationalisations of creators' rights. In particular, the shorter initial term of copyright protection in the Anglo-Saxon copyright model, as well as the requirement to fulfil certain formal steps in order to obtain this protection, broadens possibilities to transfer the right under copyright than in the continental systems of author's rights as well as the possibility for these rights to arise originally in the property of an entity which is not a natural person (the author). Above all, this results in the long absence of moral rights in the Anglo-Saxon model.[65]

Notwithstanding the gradually vanishing differences between Anglo-Saxon copyright and continental rights of authorship, the basic normative template for the creator's right of economic exploitation of creativity became, and remains to this day, the ownership of things. Already in the first normative act introducing this protection, i.e. the English Statute of Anne of 1710, the provisions of which clearly represented the spirit of utilitarian theories,

63 See C. Sganga, *Propertizing…*, p. 24.

64 See cf. M. Senftleben, *Copyright…*, p. 7.

65 See P. Baldwin, *The Copyright …*, pp. 22-29.

a universally binding right was introduced for the creator of a book to reproduce it in print in principle for a period of fourteen years from the date of publication.[66]

Several trends can be observed in the course of the development of the author's economic rights based on the ownership model from the 18th century until the present day; these include the constant strengthening of the rights of authors at the expense of the audience, the privileging of intellectual property, also as regards tax, as there is no equivalent of real estate tax in relation to it, and the increase of rights resulting from author's economic rights in relation to any derived creation and thus their extension to so-called derivative rights.[67]

At the same time, this phenomenon has the opposite vector to the transformations of ownership *sensu stricto*, i.e. of ownership which has movable and immovable property as its object. The social theories of ownership, developed since the end of the 19th century, among which the most significant is the one formulated by L. Duguit,[68] perceived that ownership as an institution performs a specific social function and hence must be subject to restrictions connected thereto. Ownership cannot, according to this view, have the character of *ius absolutissimum*, stemming from Romanistic theories considering the classical Roman institution of *dominum* in such a limitless way. Instead, it should be subject to the limitations arising from the function mentioned above, which should be expressed in a prohibition to exercise this right in a certain way or even in a positive legal duty to exercise it in the interest of the owner himself or of the collective.

The idea of the social function of property has gradually found expression in civil legislation, especially in continental Europe. In Polish civil law, its current expression is the wording of Article

66 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned'. *The Statutes of the Realm* No. 8 Ann. c. 21.

67 See cf. P. Baldwin, *The Copyright …*, pp. 3-8.

68 See L. Duguit, *Kierunki rozwoju prawa cywilnego od początku XIX wieku, Warszawa 1938*.

140 of the Civil Code,[69] which establishes as the limits of ownership the provisions of statutory law, the principles of community life and the socioeconomic purpose of this right. Concurrently, the Polish legislator, beginning with the first Copyright Law of 1926[70] [CL1926], through the Copyright Law of 1952[71] [CL1952], which replaced it, up to the Copyright Law of 1994[72] [CL1994] currently in force, consistently represents the proprietary model of author's rights in a dualistic variant modelled on the Romanistic model, which will be discussed later. It must be kept in mind that the universality of this normative model, and thus its maintenance by the Polish legislator, results not only from the convergence of copyright regulations in a globalised world but also from international legal obligations,[73] as well as those resulting from Poland's membership in the European Union,[74] which in principle impose the proprietary shape of the institution of copyright. However –

69 Law of 23 April 1964. - Civil Code (Polish Journal of Laws 2022, item 1360, as amended).

70 Law of 29 March 1926 on copyright (Polish Journal of Laws of 1935, No. 36, item 260, as amended).

71 Law of 10 July 1952 on copyright (Polish Journal of Laws No. 34, item 234, as amended).

72 Law of 4 February 1994 on copyright and related rights (Polish Journal of Laws 2022, item 2509).

73 In this respect, multilateral international agreements are of key importance, namely the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, reviewed in Berlin on 13 November 1908 and in Rome on 2 June 1928 (Polish Journal of Laws of 1935, No. 84, item 515, as amended), as well as the Convention on the Establishment of the World Intellectual Property Organisation, drawn up in Stockholm on 14 July 1967 (Polish Journal of Laws of 1975, No. 9, item 49).

74 The ownership model of copyright is already confirmed at the level of fundamental rights of the European Union, as Article 17(2) of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391–407) explicitly states that intellectual property is subject to protection. When it comes to EU secondary law, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10–19), as well as Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.2019, p. 92–125).

despite criticism[75] – this normative model is already so deeply rooted in institutional culture that it has resulted in the acceptance of intellectual property in everyday language as denoting principally the objects of copyright.

The proprietary model of copyright law adopted by the Polish legal system is expressed by the shaping of the author's fundamental rights in a way that reflects the rights of the owner in relation to a thing. The author, through the very act of establishing the work, obtains the monopoly of its exploitation and the possibility to transfer his rights by way of legal acts.[76] These rights are also hereditary in nature.[77] Therefore, the author's economic rights have the character of effective *erga omnes* subjective rights of a prohibitory nature, the correlate of which is the prohibition, addressed to all other participants of legal intercourse, of encroaching on the author's or his legal successor's monopoly.[78] This monopoly is not absolute, however.

75 See e.g. A. Peukert, 'Intellectual Property as an End in Itself?', *European Intellectual Property Review* 2010, vol. 33, no. 11.

76 Pursuant to Article 8(1) of the Law on copyright and related rights, the owner of the copyright shall be the author unless this act states otherwise, whereby Article 1 section 4 of the act provides that the work shall be in copyright from the moment it is established, even though its form may be incomplete. In turn, pursuant to Article 17 of the cited act, unless it states otherwise, the author shall have an exclusive right to use the work and to manage its use throughout all the fields of exploitation and to receive remuneration for the use of the work. Examples of fields of exploitation of a work are listed in Art. 50 pts. 1-3 of the act, including among them, within the scope of fixing and reproduction of works - production of copies of a piece of work with the use of specific technology, including printing, reprographics, magnetic fixing and digital technology; within the scope of trading the original or the copies on which the work was fixed -introduction to trade, letting for use or rental of the original or copies; within the scope of dissemination of works in a manner different from defined in item 2, public performance, exhibition, screening, presentation and broadcast as well as rebroadcast, and making the work publicly available in such a manner that anyone could access it at a place and time selected thereby.

77 The principle of transferability and inheritance of author's economic rights is introduced by Article 41 section clause 1 pts. 1-2 of the act, which provide that the author's economic rights may devolve upon other persons through inheritance or by contract and that the person who acquires the author's economic rights may transfer them to other persons, unless the contract stipulates otherwise. .

78 Cf. A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne: zarys części ogólnej*, Warszawa 2020, pp. 164-165.

Firstly, the author's economic rights are limited in time, yet this limitation is currently rather illusory, owing to the generally applicable expiry date of copyright, which is usually seventy years after the death of the creator.[79] Secondly, despite the general tendency to strengthen the scope and degree of protection of the author's economic rights, as mentioned above, as well as the lack of formulation of the general limits of copyright, as is the case, inter alia in the Polish legal system in relation to classical property, positive law formulates a number of exceptions to the principle of exclusivity of the rightsholder as to the use of the work in order to ensure minimum protection of the public interest or legitimate private interest.[80] These exceptions, commonly labelled in legal English as fair use, yet referred to in the Polish legal system as permitted use of protected works and in Polish jurisprudence also as statutory licenses, allow cultural heritage institutions, including

79 Cf. Art. 36 of CL1994, providing that, subject to exceptions provided for in this act the author's economic rights shall expire after the lapse of seventy years:
1) from the death of the author, and in case of joint works - from the death of the coauthor who has survived the others;
2) in the case of a piece of work the author of which is not known - from the date of the first dissemination, unless the pseudonym does not raise any doubts as to author's identity or if the author disclosed his/her or her identity;
3) in the case of a piece of work with respect to which the author's economic rights are, under statutory law, enjoyed by a person other than the author - from the date of dissemination of the work and if the work has not been disseminated from the date of establishment thereof;
4) in the case of an audio-visual work - from the death of the last of the following: the main director, the author of screenplay, author of dialogues, composer of music written for the audio-visual work.

80 See the provisions of Articles 23-35 of CL1994, grouped in Section 3 of Chapter 3, entitled "Permitted use of protected works". It is worth noting at this point that, in contrast to the normative content of the classical property right, explicitly including the limitations indicated in Article 140 of the Civil Code, the limitations referred to above (statute, principles of social co-existence, socio-economic purpose of the right), CL1994 treats the possibility of limiting the rightsholder's exclusive use of a work not as an intrinsic determinant of its boundaries, but as an exception that cannot be interpreted expansively (*exceptiones non sunt extendandae*), the normative expression of this assumption having been set forth in CL1994 in its Article 35, which states that the permitted use must not interfere with the normal use of the work or harm the legitimate interests of the author, implementing in this respect the so-called three-tier test present in Article 9(2) of the Berne Convention and Article 4(5) of Directive 2001/20/EC. See more on this subject M. Senftleben, *Copyright…*, pp. 43-96.

libraries and archives, to lend within the scope of their statutory tasks, copies of published works, to reproduce works in their own collections for purposes of supplementation, preservation and protection of such collections and to make their collections available for research or private study via dedicated terminals on the premises of such institutions – so long as these activities are not performed to achieve a direct or indirect economic benefit.[81] The latter two rights allow libraries to digitise their collections and make them available via internal web networks. However, an essential source of library resources for digitisation processes, apart from materials not constituting the carriers of any creative works, are those materials which – although they do encompass works – were not covered by copyright protection due to the time of their creation or are no longer covered by such protection due to the expiration of applicable copyright protection time limits. Therefore, these materials belong to the public domain, which means that, *prima facie,* any interested party may use them in any manner, including by reproducing or disseminating them, including via web networks. Their digitisation may, therefore, be carried out by the cultural heritage institutions in whose collections the materials are located, as well as by other interested persons.[82]

81 See Article 28 section 1 item1-3 of CL1994.

82 The case of Italy is interesting in this respect, where the provisions of the Cultural Heritage Code (Codice dei beni culturali) are in force, which allow cultural institutions to set fees for the commercial use of objects from their collections, even when these objects are in the public domain. This issue is highly controversial especially in the context of the implementation of the DSM Directive. See e.g. R. Caso, *Michelangelo's David and cultural heritage images. The Italian pseudo-intellectual property and the end of public domain,* "Kluwer Copyright Blog", https://copyrightblog.kluweriplaw.com/2023/06/15/michelangelos-david-and-cultural-heritage-images-the-italian-pseudo-intellectual-property-and-the-end-of-public-domain/, [Accessed 20.07.2023]; D. De Angelis, B. Vézina, *The Vitruvian Man: A Puzzling Case for the Public Domain*, "Communia", https://communia-association.org/2023/03/01/the-vitruvian-man-a-puzzling-case-for-the-public-domain/, [Accessed: 20.07.2023]; G. Dore, *The puzzled tie of copyright, cultural heritage and public domain in Italian law: is the Vitruvian Man taking on unbalanced proportions?,* "Kluwer Copyright Blog",https://copyrightblog.kluweriplaw.com/2023/04/06/the-puzzled-tie-of-copyright-cultural-heritage-and-public-domain-in-italian-law-is-the-vitruvian-man-taking-on-unbalanced-proportions/, [Accessed: 20.07.2023].

3. Moral Rights: Institutionalisation, Conceptualisation

The development of copyright, both in continental Europe and in Anglo-Saxon countries, led to the development of a number of institutions related to creativity, which were finally conceptualised normatively in the first half of the 20th century as author's *moral* rights (French: *droit moral,* German: *Persönlichkeitsrech*). The recognition of the work as a subject of proprietary and transferable rights gave rise to rules under which the author was entitled to demand that his authorship be attached to that work, to oppose changes to the work, to decide on its dissemination and to renounce the authorship of the work after its publication. Originally, such rights were treated as part of either the rules governing the author's contract or those relating to tort rights when it came to works that the author had not disposed of.[83] These rules thus flowed from the general law of obligations, being an adaptation of them to the particular type of legal interest that was a work.

In the period leading up to the First World War, it was primarily in Germany where the search for a theoretical basis justifying the validity of the above rules began. This was principally due to the predominance of the Pandect system of private law norms, i.e. their division into personal law, property law and contract law. The difficulty in clearly qualifying the author's economic rights as belonging to one of these categories led to the emergence of two opposing views. According to one, the interests that are the subject of these rights should be considered as an element inherent to the person of the author, which would lead to qualifying the rights referred to above as an emanation of the right of personality, or personal rights.[84] However, this theory was not able to sufficiently explain the transferability of the author's economic rights. Ultimately, therefore, both French and German private legal theory

83 Cf. C.P. Rigamonti, 'The Conceptual Transformation of Moral Rights', *The American Journal of Comparative Law*, 2007, vol. 55 no. 1, pp. 71-72.

84 Ibid, p. 97.

considered them, from the point of view of the pandect classification, as belonging to the category of property rights,[85] which was an expression of the theoretical concept of the propertisation of copyright described above. What remained to be resolved, however, was the legal nature of the author's specific rights indicated above relating to the work, i.e. related to authorship, deciding on the first publication, its integrity and the possibility to waive authorship. Two competing concepts emerged in this respect. According to the first, these rights do not belong to the scope of copyright, which has only the economic aspect of a work as its subject matter, thus, they remain in the domain of the author's personal interests. Consequently, irrespective of the issue of their explicit, separate regulation, they constitute the subject matter of personal rights or the right of personality in a broad sense. This concept, referred to as the dualist theory, developed in the French theory of copyright, which named the aspect of personality rights associated with creativity as *droit moral,* which eventually found normative expression in the French Copyright Law.[86]

An alternative theory was later developed by Germanic jurisprudence. Due to the fact that the great German civil code of 1896 (*Bürgerliches Gesetzbuch* - BGB), which is still in force today, did not provide for the general protection of personal interests, and a condition of tort liability was – just as it is nowadays also under Polish law – the illegality of the tortious act, it was necessary for positive law to explicitly recognize a specific subjective right in order for its infringement to become a prerequisite for such an *ex delicto* liability. As a consequence, initially in case-law, and later in jurisprudence, a view emerged, according to which those specific rights related to creativity, which cannot be directly qualified as economic

85 Ibidem, p. 98.

86 See the French law of 11 March 1957 on literary and artistic property (Loi du 11 mars 1957 sur la propriété littéraire et artistique), in particular Article 19 which regulates the right of the author to decide on the first release of a work to the public. For a more extensive discussion, see M. Rushton, 'The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?', *Journal of Cultural Economics* 1998, vol. 22, no. 1, pp. 15-32.

rights, do not constitute a subcategory of personality rights, but a non-economic aspect of copyright, which consequently has a uniform character and regulates two spheres of the author's interests: one economic, the other non-economic. This concept, described as monistic, found its ultimate expression in the German Copyright Law of 1965.[87]

The development of the theory of moral rights in the two structural variants presented above coincided with work on the revision of the Berne Convention. In the course of the 1928 Rome conference on this subject, the Italian delegation led by Eduardo Piola Cassele sought to supplement the provisions of the convention with such a regulation of the above rights that would be modelled on article 16 of the Italian Copyright Law of 1925, i.e. a provision regulating the moral rights to authorship and integrity of a work on a strictly monistic basis.[88] The Italian proposal sought to introduce into the text of the Convention the right of disclosure in addition to the above-mentioned rights. The opposition of the delegations of the Anglo-Saxon countries resulted in the abandonment of this proposal, but the text of the Convention was nevertheless supplemented by Article 6bis, which, although it did not explicitly represent either the monistic or the dualistic theory, introduced the protection of the right to authorship and the right to the integrity of the work.[89]

87 See footnote 7.

88 The literature points to an interesting relationship in Italy between the regulation of moral rights and the fascist ideology in force at the time, an essential component of which was the primacy of the spiritual over the material, the myth of the power of the individual will, also expressed in creativity, but at the same time the omnipotence of the State in accordance with Benito Mussolini's famous saying "Everything in the State, nothing outside the State, nothing against the State". Consequently, the Italian law, on the one hand, introduced a broad protection of moral rights of authorship in the name of safeguarding the interests of the creator and, on the other hand, allowed the State to exercise these rights after the creator's death in the event that his family members remained passive on the subject. Cf. P. Baldwin, *The Copyright …*, pp. 163-170.

89 According to the current wording of this provision of the Berne Convention, as agreed under its Stockholm Act of 1967, still only the right to authorship and the right to the integrity of the work are protected, while, according to paragraph 2 of Article 6bis, the rights granted to the author under paragraph 1 of this pro-

The period of the above-described discussion on the introduction of moral rights into the Berne Convention took place shortly after the enactment of the Polish CL1926. Poland's regaining of independence in 1918 resulted in the need to introduce new, uniform legislation in many areas, replacing different laws in force under the former partitions. Such separate normative acts inherited from the Russian, Austrian and German legal systems were also in force in the area of copyright law.[90] From the very beginning of the reborn Republic of Poland, the artistic milieu demanded the legal unification of this area, through the introduction of a unified copyright act, which resulted in its adoption on 29 March 1926.[91] The final shape of this law was substantially influenced by the views of the main rapporteur of the bill, Fryderyk Zoll. As far as the approach to the main problems of copyright law was concerned, Zoll was strongly influenced by the theories developed in French legal thought, which he expressed in statements made both at the stage of work on the bill and subsequently.[92] Consequently, CL1926 introduced a dualistic model of copyright,[93] based on the separation of *droit moral* as a separate category of author's rights, subject to essen-

vision shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of ratification or accession to this act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

90 See W. Dbałowski, J.J. Litauer, *Ustawodawstwo autorskie obowiązujące w Polsce*, Warszawa 1922.

91 On this subject, see P. Dabrowski, *Geneza Ustawy o prawie autorskiem z 29 marca 1926 roku*, "Studia Iuridica Toruniensia", 2010 no. 7, pp. 66-89.

92 See S. Gołąb, *Ustawa o prawie autorskiem z dnia 29 marca 1926 r.z materiałami*, Warszawa 1928; F. Zoll, 'Polska ustawa o prawie autorskiem i konwencja berneńska', Warszawa 1926; E. Ferenc-Szydełko, 'Prawo autorskie na ziemiach polskich do 1926 roku' in: *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z wynalazczości i ochrony własności intelektualnej*, Zakamycze 2000, z 75, pp. 75-76.

93 However, cf. C.P. Rigamonti, *The Conceptual Transformation...*, p. 113, who takes the position that CL1926 was conceptually based on a dualistic model, but formally represented a monistic approach, and this in view of the standardization of author's moral rights within the act, and not outside it - as belonging to the category of law or rights of personality.

tially unlimited protection.[94] Despite the radical political transformation resulting from Poland's inclusion in the Eastern Bloc after the Second World War, the legislator at the time based the regulation of *droit moral* in the provisions of CL1952 on assumptions analogous to those predicating the pre-war law.[95] The viability of the concept of copyright law adopted in Poland in the pre-war period became apparent in the changed post-1989 legal and political reali-

94 The normative expression of this approach was the provision of Article 12 of CL1926, which stated that the author disposed of his work exclusively and in all respects; in particular, he decided whether the work was to be published, whether it was to be reproduced, disseminated and in what manner, with the protection of moral rights serving every author regardless of the existence or non-existence of copyright. The pre-war law did not introduce a closed catalogue of moral rights, using the legislative technique of indicating the most important of these rights in the provision regulating their protection, i.e. Article 63 sentence 3, which stated that personal harm in terms of the creator's relationship to the work occurred when someone: appropriated the author's authorship, the author's name or a pseudonym; did not indicate in his or her work the author or the source from which he or she had taken content or extracts, so that a misconception of authorship could arise, or falsely stated the author or the source; published a work not intended for publication by the author; made changes, additions or abridgements to the publication which have distorted the content or offended the dignity and value of the work; published the work in a grossly inadequate manner; made changes to the original work, marked the original work of art with the creator's name against their will or otherwise revealed the authorship against their will; diminished the value of the work in criticism by deliberately misrepresenting the facts, etc. See on the genesis and justification of the regulation of *droit moral* in CL1926 from the point of view of the main author of this *Act*, F. Zoll, *Znamienny objaw umoralnienia prawa w polskiej ustawie o prawie autorm*, Lwów 1936; on this subject also *Droit moral* w polskiej ustawie o prawie autorskim z 1926 roku na tle uregulowań Francji i Niemiec, „Rynek - Społeczeństwo - Kultura" 2018, no. 2, pp. 181-185 and J. Słyszewska, 'Ochrona praw twórców w świetle ustawy o prawie autorskim z 29 marca 1926 roku', *Civitas et Lex*. 2020, vol. 26, no. 2, pp. 43-58. For a general discussion of the genesis of the pre-war act, see P. Dabrowski, *Geneza...*, pp. 66-89.

95 Article 15(1) of CL1952 stated that copyright included, within the limits set by this act, the right to protection of the authors' moral rights. The open catalogue of the author's rights flowing from this protection was in turn covered by Art. 52 of CL1952, which provided that an infringement of the author's moral rights was committed by a person who appropriated the author's authorship, name or pseudonym (item 1), omitted the author's name when publishing or reproducing the work (item 2), placed the author's name on the work against his will or otherwise disclosed the authorship (item 3), failed to indicate in his work the author or the source from which he derived the content or exceptions, or falsely indicated the author or source (Section 4), published a work not intended by the author to be published (Section 5), made changes, additions or abridgements to the work which distorted the content or form or diminished the value of the work (Section 6), or otherwise acted to the detriment of the author's moral rights (Section 7).

ties. This is because CL1994, which is currently in force, has clearly distinguished the author's moral rights – for the first time explicitly calling them so (in Polish verbatim as *author's personal rights* – "autorskie prawa osobiste") – as a separate category of rights serving the author, autonomous from the author's economic rights. A separate provision – Article 16[96] – has been devoted to these rights, and in order to emphasise the importance of their regulation and the dualism of copyright, a separate chapter 3 of CL1994, entitled *Of Author's Moral Rights,* containing only this single provision, has been introduced, yet it should be noted that it does not cover the whole scope of author's moral rights, which pertains, for instance, to the right of an author to repurchase an original of a publicly displayed artistic work in case the owner decides to destroy it.[97]

Although the provisions regulating *droit moral* have been in force in Poland for almost a century in a largely unaltered wording, they still give rise to a number of controversies, and consequently remain a significant topic of legal scholarship, generating many contradictory opinions. To date, there is no consensus on such issues as, inter alia: the relation of the author's moral interests to general personal interests, the unity of the author's moral right or the multiplicity of such rights, the actual subject of the author's moral rights, the possibility of their expiration, the nature of the rights of the legal successors of a deceased author to exercise moral rights, the nature of the author's right of disclosure, the manner of exercising this right, the scope of the consent granted in this respect and a number of other minor issues.[98]

96 See Article 16 of CL1994. Pursuant to its content, unless it provides otherwise, moral rights protect the author's relationship with the work, which is unlimited in time and not subject to waiver or sale, and in particular the right to: authorship of the work (1), signing the work with one's own name or a pseudonym or making it available anonymously (2), inviolability of the content and form of the work and its proper use (3), deciding on the first making available of the work to the public (4 – right of disclosure) and supervising the way the work is used.

97 See Article 32 (2) of CL1994.

98 A general overview of the most important issues of concern against the background of moral rights was formulated by B. Gisen and E. Wojnicka, see B. Gisen, E. Wojnicka in: ed. J. Barta, *System prawa prywatnego. T. 13 : Prawo autorskie*, Warszawa 2013. 300-454.

It has been observed in Polish jurisprudence that shaping moral rights as an indefinite *droit moral*, autonomous in relation to the author's economic rights, does not correspond to the realities of the contemporary intellectual property market.[99] The framing of this autonomy, which found expression in the provisions of CL1926 and subsequent copyright laws, neglected to acknowledge the connection between the subject of moral and economic author's rights even though the recognition of such a relationship resulted in regulating those first as the personal aspect of the author's unitary rights in monistic systems. Consequently, in dualistic models, the exercise of moral rights necessarily entails an interference with the so-called *vinculum spiritualis*, a spiritual knot, which authors of the pre-war CL1926 – influenced by personalistic and idealistic concepts discussed above – aimed to regulate as absolute. This relationship has a significant impact on the possibility of both the exercise of the author's economic rights acquired by third parties and the use of works on the basis of statutory exceptions, i.e. within the framework of fair use.

4. Impact of the Author's Moral Right of Disclosure on Lawful Access to Library Collections

Without taking a stance in the ongoing debate between adherents of the unity and those of the multiplicity of author's personal interests, and consequently the unity of the author's personal rights versus the multiplicity of such rights, it should be pointed out that under CL1994, currently in force, the author has the right of disclosure, that is to decide on the first making available of the work to the public, said right being unlimited in time and not subject to waiver or transfer. The statutory notion of making available to the public is equivalent to the dissemination of a work.[100] The

99 Ibidem, p. 310.

100 This follows from the legal definition of a distributed work introduced by Article 6 (3) of CL1994, which states that a distributed work is a work that has been made available to the public in any way with the author's permission.

right of disclosure, defined in CL1994 as the right to decide on the first making of the work available to the public, is considered to be a cornerstone of the theory of *moral* rights; by some authors of the idea of *droit moral,* it is considered even more important than the right of authorship itself.[101] It is an absolute subjective right,[102] which is based on the creator's unlimited power to decide on the dissemination of the work. This is because the creator makes the ultimate decision as to whether his work deserves to be made public and whether it has already acquired a shape mature enough for it to be revealed to the audience. This right is prohibitory in nature, which means that it corresponds to a prohibition on interfering with the protected interest. Such a prohibition is addressed to all other participants of the legal sphere. Hence, it can be said that the subject of the right in question is, in fact, not to disseminate the work. The autonomous nature of the author's moral rights, resulting from the dualism of copyright, makes the above prohibition function completely separately from the author's economic rights to a work; therefore, the existence or expiry of these economic rights in addition to any legal basis for using the work is irrelevant to the author's entitlement to the right of disclosure. As long as this right of disclosure is not exercised by the author or after the author's death by a spouse or the author's descendants, parents, siblings or descendants of siblings – unless the author expressed a different will – any form of exploitation of the work which infringes this right, be it dissemination of the work or anything which results in such dissemination, is illegal, giving rise to economic

101 See the statements of O. v. Gierke quoted by B. Gisen and E. Wojnicka, B. Gisen, E. Wojnicka *Prawo autorskie…*, p. 360.

102 The notion of subjective right (e.g. 'droit subjectif' in French legal system, 'subjektives Recht' in German, 'diritto soggetivo' in Italian etc.) is a core concept in continental private law theory, developed in the XIX century. According to the classical definition developed in Polish jurisprudence, it should be understood as a sphere of possibility to behave in a certain way, conferred and safeguarded by the legal norm. See A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne…*, p. 155. For a comparative analysis of the subjective right concept see H. Dedek, *Subjective Right(s)* in: J. M. Smits, J. Husa, C. Valcke, M. Narciso (eds.), *Elgar encyclopedia of comparative law*, Northampton 2023.

claims on the part of the person entitled to exercise the right of disclosure – i.e. the author himself or his successors – and, in theory, giving rise even to the criminal liability of the disseminator.[103]

One of the primary tasks of libraries is to make their collections accessible to the public.[104] In relation to non-digitised collections, this involves public lending, i.e. lending library material to library users, either for use on-site or with the possibility of taking it outside the premises of the library. With regard to digitised collections in libraries, access to them is made via web networks and relies on the possibility for users to display the digital form of the library material on a device with a network connection (computer, smartphone, tablet). On the other hand, any public availability of library collections implies the dissemination of works established in such collections.[105] These include both materials comprising works that remain under copyright protection and materials that are unprotected because the author's economic rights have expired or never came into existence in the first place. The permissibility of disseminating public domain materials by libraries – in the realm of the author's economic rights – is a consequence mainly of the expiration of these rights (already described above), which has the effect that after a specified period, usually 70 years after the author's death, the exclusive right to use and dispose of the work in all fields of exploitation and to receive remuneration for the use of the work ceases to exist. This also applies if the economic rights to the work have not arisen at all, due to its establishment in the period prior to the introduction of copyright protection. With regard to works protected by unexpired economic rights, libraries

103 See Articles 78 (2) – (3) and Article 116 (1) of CL1994.

104 See Article 4(1)(2) of the Law of 27 June 1997 on libraries (Polish Journal of Laws 2022, item 2393).

105 This results from the fact that, firstly, as it has already been pointed out, Article 6 (1) – (3) of CL1994 relates the concept of dissemination to any manner of making a work available to the public, and secondly, provisions of Article 50 (2) – (3) of this act qualify as dissemination both the lending or leasing of the original or copies of the work and making it available to the public in such a manner that making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them

are entitled to enter into the sphere of the exploitation monopoly of the author or his successors on the basis of permitted public use, i.e. express statutory exceptions, granting permission to use these works in a specific manner regardless of the will of the rights holder, as mentioned above.

The dualistic model of copyright, on which the norms of CL1994 are based, means that the lack of infringement of economic rights by a certain behaviour does not imply that there is no infringement of moral rights. Hence, the use of a work on the basis of a valid and effective contract, being the basis for the acquisition of economic rights, as well as the use of a work to which such rights have expired, or the exploitation of a work on the basis and within the limits of a statutory exception, does not preclude *per se* an infringement of moral rights along with such exploitation. This principle is fully applicable to the right of disclosure (*verba legis* of Article 6 (4) of CL1994), which may be exercised only by the author and, after the author's death, by statutorily-defined persons; hence, in the case of non-exercise of this right by the entitled, any exploitation of the work qualified as its dissemination constitutes an infringement.

In the context of libraries' rights, the above rule means that they may disseminate only those works that do not infringe the moral right of disclosure when made available, i.e. works that are already disseminated in the legal sense. This applies both to works to which economic rights have already expired and those that remain within the scope of such rights, being used on the basis of statutory exceptions granted to GLAM institutions. It should be emphasized that all ways of making collections publicly available that take place on the basis of such a statutory license serving those institutions constitute, at the same time, the dissemination of the works being subject to such statutory exception from a rightsholder economic monopoly. As already indicated, the lending of copies or originals of works also qualifies as dissemination, and this pertains with no exception to the fair use of libraries, i.e. public lending. Also, making works available on publicly accessible ter-

minals located on the premises of GLAM institutions, although not explicitly indicated within the fields of exploitation covered by the category of distribution under Article 50 (3) of CL1994, belongs to the normative scope of dissemination, as they are available to the public, i.e. anyone interested may familiarize themselves with the content of the work, but must do so on the premises of a given library, similarly to traditional collections, since a work is considered disseminated when it is accessible to the public in any way, including through library facilities.

The need to respect the author's moral right of disclosure is most evident in the area of public lending, as this form of permitted public use only concerns copies of disseminated works. With regard to the statutory exception enabling access to collections on library terminals, it should be noted that the subject matter of this license includes the collections in general, without the reservation that it concerns materials being media of disseminated works. There are doubts as to whether the legislator's intention to allow GLAM institutions to make available in such a manner works that are not strictly defined as disseminated – as is the case with the public lending license – was to broaden the scope of the exception creating the right to share GLAM collections via on-site terminals, so that it would also include non-disseminated materials. Similar doubts arise with respect to the exception enabling reproduction of works from the GLAM institutions' own collections, which also includes their digitisation. The current wording of the above-mentioned license, codified in the 2015 amendment to CL1994,[106] provides that its subject matter covers works in general not limited to those which are disseminated, while according to the previous wording, the license permitted the making and commissioning of copies of disseminated works, thus limiting the subject matter of the GLAM institution's right to use the works whose commu-

106 Article 1 (10) of the Law of 11 September 2015 amending the Law on copyright and related rights and the Law on gambling (Polish Journal of Laws 2015, item 1639).

nication to the public was made with the author's permission, as was – and still is under the current law in force – the case with the public lending license. At the same time, the grounds of the bill introducing the said amendment[107] indicate that the scope of the statutory license allowing for the reproduction of works is extended, but doubts arise as to whether it has such an effect without the direct simultaneous amendment of provisions establishing the right of disclosure.[108] These doubts seem legitimate, considering that there are no grounds under the current law to assume that libraries may make non-disseminated works publicly available via their terminals, despite the fact that such a conclusion may be drawn by comparing the subject of the license providing for this right with the public lending license. It should be observed that under CL1994, if the legislator wants to establish a statutory exception to the author's economic rights, which interferes with the author's moral rights, the legislator does so explicitly.[109] An example of the normative tendency described here is the admissibility of making changes to a work by the acquirer of the author's economic rights,[110] although, as a rule, the acquisition of these rights does not result in the admissibility of violating the author's personal right to the integrity of the content and form of the work.

Consequently, it should be pointed out that where CL1997 allows an intrusion into the area protected by personal rights within the framework of fair use, this is expressly stipulated in the specific provision regulating the respective form of use. If the act is silent on this, there are no grounds for assuming that the interference

107 Parliamentary Paper No. 3449, 7th Term of Parliament, Government Bill to amend the Law on copyright and related rights and the Law on gambling with draft implementing acts, p. 21.

108 See B. Błońska in: W. Machała (ed.), R. M. Sarbiński (ed.), *Copyright and Related Rights. Commentary*, Warszawa 2019, Article 28, LEX, [Accessed 21.07.2023].

109 This applies, for example, to the right to non-infringement of the content and form of a work (Article 16(3)), which is subject to impairment under the right of quotation (Article 29), which allows the use of excerpts of works, or under teaching or scientific use, which also allows such use (Article 27(1)).

110 See Article 49 of CL1994.

in question is permissible. Moreover, according to the three-step test applicable under CL1994, fair use must not infringe the normal use of the work or harm the legitimate interests of the author, so it may be argued that the need to respect moral rights may justify the view that the making available by libraries to the public of non-disseminated works whose term of protection has not yet expired, even in a manner consistent with the content of the statutory licence under Art. 28(1) of CL1994, not only results in an infringement of moral rights, as it interferes with the author's right of disclosure, but also constitutes a transgression of the boundaries of fair use and thus also constitutes an infringement of the author's economic rights.

Thus it has to be stated that regardless of the status of a work in the light of economic rights and irrespective of the way in which it is made available to the public by libraries, i.e. by means of public lending of a physical copy, making a digital copy publicly available via website or only internally available through on-site terminals, each such act should be considered a dissemination of the work, which means that it is permissible only if the author – or persons entitled after the author's death – exercised the right of disclosure, that is decided on the first making available of the work to the public. With regard to a non-disseminated work, any public communication by a cultural heritage institution may result, in a formal sense, in an infringement of moral rights.[111]

5. The Problem of Protection of Moral Rights to So-Called Arbitrarily Old Works

The above-mentioned principle has no limitations under CL1994, which means that works established after entry into force (24 May 1994) enjoy the absolute protection of the author's right of disclosure. The question arises, however, as to the retroactive scope of this right, given that library collections contain numerous materials created under old laws, i.e. CL1952, the preceding CL1926, under

111 According to the legal definition in Article 6(3) of CL1994 *a contrario*.

earlier laws of the partitioning states, and even during the apparent absence of any copyright protection. This problem has not been analyzed in depth by Polish jurisprudence. It is noteworthy that a number of issues related to the inter-temporal aspects of CL1994 have been the subject of numerous and extensive statements by copyright scholars, yet this particular problem has remained somewhat on the margins of mainstream academic discussion. Perhaps this is due to the fact that the practical importance of this issue has not yet been recognized by copyright scholars, having increased dramatically only in the last few years with the development of information technologies as well as the initiation and implementation of mass digitisation processes in the GLAM sector, which have only recently started to focus on the old unpublished materials. It also seems that interpretative efforts, aimed at defining a clear point in time from which the protection of moral rights is initiated, cannot bring satisfactory conclusions, and those that appear to be the most convincing are irreconcilable with common sense, the requirements of usage of trade and the values of protection and dissemination of cultural heritage, so Polish copyright jurisprudence is in no rush to justify these efforts more extensively even though they were directly formulated under the old regulations.

In order to properly analyse this issue, it is necessary first to go back chronologically to the first normative act that expressly established *droit moral* in the Polish legal system, with one of its emanations being the right of disclosure, i.e. CL1926. This right arose with respect to works established from the date of entry into force of this law, i.e. 14 June 1926. However, the question arises as to the possibility of applying the provisions of CL1926 to moral rights to a work established prior to its entry into force, specifically with respect to this particular right, which may be framed as the question of whether works being non-disseminated as at the above date also became subject to the right of disclosure which CL1926 granted to the author and, after his death, enabled the members of his family to enforce the resulting claims. It may appear that the

resolution of this controversy should be sought in the transitional provisions of CL1926. They provided that the act also applied to copyrights existing on the day of its entry into force, which, however, did not shorten the duration of the rights, as specified by the previous laws, yet extended it only if the copyright was still held by the author or the author's heirs.[112] The conclusion that the above rule also applied to moral rights should, however, be rejected. The 1926 Copyright Law did not use the notion of moral rights at all, and the concept of copyright under its provisions referred exclusively to the author's economic rights.[113] Consequently, the abovementioned transitional norm could not regulate the retrospective effects of the establishment of the right of disclosure.

However, the view that CL1926 did not have such effects would be unjustified. Such effects were, in fact, intentionally introduced by the creators of this act and even considered so significant that they were set out in its material provisions rather than in its closing provisions, wherein the continental legislative tradition transitional norms are typically found. The said law stated[114] that the protection of moral rights serves every author regardless of the existence or non-existence of copyright itself. Consequently, in formulating the prerequisites for claims for infringement of *droit moral*, CL1926 provided that they served even if the copyright did not exist at all, had expired, had been transferred or was ineffective.[115] This means that the pre-war legislator introduced retroactive protection of the *droit moral,* and therefore also of the right of disclosure, without any *caesura temporis*. The protection of moral rights referred not only to works with expired copyrights, an obvious conclusion of the temporal indefiniteness of moral rights, but also to works to which copyrights – i.e. in the nomenclature of the present CL1994 author's economic rights – did not exist at the mo-

112 See section 75 of CL1926.

113 See F. Zoll, 'Tzw. „droit moral" w dziedzinie prawa autorskiego', *Czasopismo Prawnicze i Ekonomiczne* 1929, Yearbook XXV, p. 286.

114 See Paragraph 12 sentence 2 of CL1926.

115 See Paragraph 62 of CL1926.

ment of CL1926's entry into force. The question arises, therefore, as to which works could be referred to by this term, i.e. which works could be qualified as works to which no author's economic rights arose at all. In response to this question, it should be pointed out that such works include precisely those which were established in the absence of any copyright legislation. Thus, the pre-war law protected moral rights to indefinitely old works, which was a legislative solution fully intended by its authors. The legal and theoretical trends of the first half of the 20th century, which have already been mentioned, influenced the shaping of *droit moral to* such an extent that it was deemed appropriate to introduce their unlimited protection regardless of the moment of establishment of the work, demanding the protection of moral rights to even the most ancient works.[116]

116 In this respect, the position expressed by F. Zoll is significant, which, both because of its value for the interpretation of the above-mentioned provisions and because of its manner of expression, characteristic of the approach discussed here, is worth quoting *in extenso*. According to this author: [...] *That is so, Horace is not all dead, neither are Mickiewicz, Sienkiewicz, Dante, Shakespeare, Moliere, Beethoven, Mozart. They are still alive among us, they speak to us with their masterpieces, they teach us, educate us, raise our spirits, develop our feelings, and we are constantly obliged to be grateful to them for this. The law must take this into account: It must also reckon with the fact that the personal interests of deceased authors remain valid: their love for these works, their fame as authors, the success of their ideas expressed and recorded in the work, the power of their propaganda, expansions, making people happy, instructing and uplifting them - and therefore these interests should continue to receive legal protection. The law must also take care that these Great Departed should be able to speak to us - as they did when they were alive - in a pure and unadulterated form, as this is demanded not only by reverence for their memory, but also by the cultural interests of society, and even of all mankind. And the fact that they are not physically alive and do not fulfil the functions that various authors living among us can fulfil, cannot stop the law from fulfilling its task.* [...] It is worth mentioning that the need to protect the moral rights to works of deceased authors was perceived by F. Zoll as important to the extent that he postulated that these works should be granted legal personality so that they could themselves pursue claims for violation of droit moral . See F. Zoll, *Polska ustawa...*, op. cit., pp. 56-57. Also noteworthy is the view of J. Brzechwa, not only a famous Polish poet, but also a lawyer, working for the enactment of CL1926, who stated: [...] *Norwid's copyright in the posthoumous works continues to this day*. Brzechwa was to go on to argue that [...] *the protection of the* author's moral *rights is enshrined in Article 62 in such a universal manner that it cannot be subject to any limitation on the basis of the author's person or nationality ("even if the copyright is extinguished"). This is because it is not only about the protection of the personal interest of the author, but also about the public interest, to which the second paragraph of Article 63 is devoted in its entirety. Starting from such assumptions, it should be established*

There should be, therefore, no doubt that CL1926 protected moral rights to indefinitely old works, which, of course, included the author's right of disclosure. However, in 1952, this act was replaced by its successor, so the issue arises as to the relation of this later act to the question at hand. Copyright, according to CL1952, included the right to protect the author's moral rights.[117] In turn, an infringement of the author's moral rights was committed by anyone who published a work not intended by the author for publication.[118] At the same time, the provisions of this act also applied to copyrights existing on the date of its entry into force.[119] This determines that CL1952 upheld the rule established by the preceding CL1926 that moral rights include limitlessly old works, and these rights include, of course, the right to decide on the first communication of the work to the public. The legislative technique adopted by the legislature at the time was similar to that adopted with respect to the pre-war law but with some differences. The law of the Polish People's Republic period did not yet use the concept of the author's moral rights, as was the case with its predecessor, providing only for the author's moral interests. It made the right to their protection an element of the general copyright, which brought the implemented solution closer to monistic systems. Analogous to the pre-war law, the content of the rights constituting *droit moral* was defined indirectly by indicating the grounds for claims for their protection. Of key importance here, however, is the extension of the provisions of CL1952 to copyrights existing on the date the normative act entered into force. Since the protection of moral rights

that the protection of personal rights is not limited by the periods of statutory copyright protection under Article 21. Thus, the concern for the public interest, for the interest of the "ideal consumers" (Prof. Zoll) of works of art will justify the protection of personal rights of Żeromski, Matejko or Moniuszko as much as those Chopin Shakespeare or Raphael. Distortion of any work of art, whether new or very old, Polish or foreign, can create in the minds of Polish consumers a false, and thus harmful, image of the *artistic, literary or scientific* qualities *of a given work of art*. See J. Mazurkiewicz, *Non omnis moriar: ochrona dóbr osobistych zmarłego w prawie polskim*, Wrocław 2010, p. 189.

117 See Article 15(1) of CL1952.

118 See Article 52(5) of CL1952.

119 See Article 61 of CL1952.

belonged to the scope of copyright law, consequently, this protection, which was enjoyed by works on the basis of the repealed provisions of CL1926, fell within the notion of copyright existing on the date CL1952 entered into force. As a result, during the period in which CL1952 was in force, i.e. until 23 May 1994, the author's right of disclosure, which had as its subject indefinitely old works, was still protected.

The next normative act chronologically was the act currently in force – CL1994, so the question of the relation of this act to the protection of moral rights to such works should be formulated. The author-work bond subject to protection by moral rights is normatively defined as unlimited in time.[120] The transitional provisions, on the other hand, do not explicitly determine the fate of the moral rights granted by the former act, but this does not seem to stand in the way of reconstructing the legislator's stance in this respect. Of key importance here is the transitional provision of CL1994,[121] stating that its provisions apply to works established for the first time after entry into force as well as to works whose copyright according to the previous provisions has not expired, and to works whose copyright according to the previous provisions has expired, but which according to this act continue to enjoy protection, excluding the period between the expiry of protection under the previous act, i.e. CL1952, and the entry into force of CL1994.

In order to resolve the issue of moral rights in relation to indefinitely old works under the current state of copyright law, i.e. CL1994, the key issue is the rule providing for the protection of works whose copyright, according to the preceding provisions, did not expire. If it is assumed that what is at issue here are works whose moral rights did not expire under CL1952, it is obvious that

120 See Article 16 *in princ.* of CL1994.

121 See Article 124(1) of CL1994. On the interpretation of this provision in relation to author's economic rights see e.g. M. Czajkowska-Dąbrowska, *Zasięg przedmiotowo-temporowy ustawy o prawie autorskim i prawach pokrewnych a zasady intertemporalne* in: A. A. Nowicka (ed.), 'Private Law of the Time of Change. A memorial book dedicated to Professor Stanisław Sołtysiński', Poznań 2005, pp. 653-670.

the invoked provision maintains moral rights in all works whose rights were protected by CL1952. Since CL1952 maintained the scope of protection of the author's moral rights as defined by the provisions of the former CL1926, it must be considered that this scope continues to apply in its original form, which means that the author's moral rights to indefinitely old works are still protected under CL1994, currently in force.

If, on the other hand, it is assumed that the notion of copyright, whose expiry is provided for under the said transitional provision of CL1994, should be construed as encompassing exclusively the author's economic rights, owing to the fact that only such rights can expire, then it would follow that its provisions on moral rights apply only to (1) works established for the first time after this act came into force, (2) works whose copyrights have not expired according to the provisions previously in force and (3) works whose the copyrights have expired according to the provisions previously in force, but which were still protected on the day the current act entered into force. The consequence of such a view would have to be the assumption that the legislator decided to correlate the protection of moral rights to works established prior to the entry into force of CL1994 with the period of protection of the author's economic rights to these works under the former CL1952 as extended by the new act. Generally, the former CL1952 provided for a period of protection of the author's economic rights of twenty-five years, calculated accordingly from the death of the author or the publication of the work.[122] In contrast, the current CL1994 in its original version extended this period to fifty years. This would lead to the conclusion that moral rights would have been maintained for works to which the author's economic rights had not expired on 24 May 1994, i.e. works by authors who died at the earliest in 1945, and anonymous or pseudonymous works disseminated at the earliest in that year. Of course, from the point of view of the right of disclosure, only the former date would be relevant. However, such an understanding of

122 See Article 26(1) and (2) of CL1952.

the transitional norm of CL1994 must be rejected. If nothing else, the rules of linguistic interpretation demand this. The relevant provision speaks of copyright in general and not of the author's economic rights. Meanwhile, CL1994, unlike the two preceding copyright acts, explicitly introduced the notion of moral rights. If the legislator had intended to include only economic rights within the scope of the transitional rule discussed here, this would have been done explicitly, using the nomenclature consistently employed in the act. As there is no such limitation of copyright to the author's economic rights, then, in accordance with the principle *lege non distinguente nec nostrum est distinguere*, such an interpretation should be rejected.

Further, it should be observed that, although the wording of the transitional norm present in the provisions of CL1994 is certainly not the clearest one, it is possible to reconstruct its material scope as covering not only economic but also moral rights. This results not only from the use of the general notion of copyright but also from the reference to the notion of its expiration, which does not have to be read as indicating that only rights that by their nature may expire are at issue. Since moral rights are unexpirable, copyrights, which are unexpired within the meaning of the law in force,[123] should be considered to encompass not those whose non-expiration is due to the lack of expiry of the statutory term of protection, i.e. economic rights, but a *minori ad maius,* but also those which cannot expire at all due to their nature, i.e. moral rights. The non-expirable character of the latter has been expressly confirmed under both the current and pre-war laws. The previous copyright act, i.e. CL1952, lacked an explicit norm establishing such an attribute, but it was unanimously accepted by the jurisprudence at the time.[124] Therefore, it should be accepted that the notion of unexpired rights on the grounds of the transitional norms of CL1994 should be understood as also referring to moral

123 See Article 124(1)(2) of CL1994.

124 See S. Grzybowski in: S. Grzybowski, A. Kopff, J. Serda, *Zagadnienia prawa autorskiego,* Warszawa 1973, p. 243.

rights, which means that this act is applied within the scope of the provisions regulating these rights to works for which the said rights were protected (not expired) on the grounds of CL1952, and – as a consequence – also under the provisions of the earlier CL1926. As the latter included indefinitely old works within the scope of moral rights, and this scope was maintained under CL1952, so also according to CL1994, these works are the objects of moral rights, which includes the personal right of disclosure.[125]

In conclusion, it may be stated that moral rights under the provisions of CL1994 pertain to indefinitely old works, which means that the legal premise for their dissemination in any manner, including making them publicly accessible by libraries, is that they must qualify as having been disseminated, i.e. as works in respect of which the author or persons entitled to exercise moral rights after the author's death have exercised the right of disclosure.

125 The above view is present in jurisprudence. It is formulated explicitly by J. Barta and R. Markiewicz. See J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, p. 122. The same authors expressed the above view, albeit without further justification in a previous edition of their commentary publication, see J. Barta, R. Markiewicz in: M. Czajkowska-Dąbrowska, Z. Ćwiąkalski, K. Felchner, E. Traple, J. Barta, R. Markiewicz, *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2011, Article 124, LEX, [Accessed: 21.07.2023]. The same position was taken by R. Markiewicz in monographic publication, see R. Markiewicz, *Ilustrowane prawo autorskie*, Warszawa 2018, Nb. 3.3., LEX, [Accessed 21.07.2023]. A similar view was expressed by S. Stanisławska-Kloc, also pointing to the correctness of interpreting the notion of unexpired copyright, on the grounds of Article 124(1)(2) of CL1994, as including moral rights. See S. Stanisławska-Kloc in: ed. D. Flisak, *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2015, Article 16, LEX, [accessed 21.07.2023]. A somewhat different view was expressed by T. Targosz, but it is difficult to find it convincing. The author, in principle supporting the correctness of the above interpretation of the normative content of the quoted provision, points out, however, that *since both this law and the law of 1926 provided in their transitional provisions that they apply to the rights existing on the date of their entry into force, it would be necessary (in the case of older works) to go back to the subsequent regulations in force in the past. It is almost certain that by this route it would be impossible to justify the existence of moral rights in most known works created in the 17th century or earlier (probably only in the case of 19th century works would there be some hope, but this would also depend on a number of additional circumstances).* See T. Targosz in: ed. D. Flisak, *Prawo autorskie…*, Article 124, LEX [Accessed 21.07.2023]. This view is inaccurate, because it ignores the provisions of CL1926, discussed above, which introduced universal protection of the author's moral rights to arbitrarily old works, so there is no need to go back to older regulations and the transitional provisions of this act cannot be the basis for such a procedure.

There is one exception to this rule, however. It concerns photographic works created under both previous copyright acts in respect of which no copyright is expressly reserved (the so-called copyright note). Under the provisions of CL1952, a work made by a photographic method or by a method similar to photography was subject to copyright if a copyright reservation was clearly visible on the work.[126] An analogous provision was contained in CL1926, which stated that copyright existed in photographic works or works obtained in a manner similar to photography, provided that the reservation was clearly visible on the prints.[127] This requirement was abolished by the current CL1994, which recognizes photographs as works on a general basis, i.e. if they fulfil the prerequisite of creativity and individuality[128] without requiring any formal assertion to invoke their protection.[129] This means that under the formerly existing laws, photographs without a visible copyright note did not constitute works at all. Consequently, they do not fall within the scope of the transitional norms of the act in force, which means that none of its provisions, including those providing for moral rights, apply to such photographic works fixed before 24 May 1994. Thus, the formalities provided for in the cited provisions of the old acts were not adhered to. Consequently, these works are not subject to any moral rights, including the right of disclosure. Such works may, therefore, be disseminated if they have entered the public domain or if they adhere to the standards of fair use. In practice, however, the possibilities of their exploitation appear to be limited, as the mere fact that the photographic print whose dissemination is being considered does not contain a copyright note does not mean that no such reservation was made on other prints of the same photograph. In favour of this position, the Polish Supreme Court (*Sąd Najwyższy*) adopted the position that failure

126 See at. 2 § 1 of CL1952.

127 See Article 3 sentence 1 of CL1926.

128 See Article 1(1) of CL1926.

129 See Article 1(4) of CL1926.

to make a copyright note visible on later prints does not result in the termination of the copyright acquired by making such a note on earlier prints. Therefore, the possibility of making unpublished photographs available to the public without making a copyright note on prints created under old regulations could only concern those situations where the owner of the prints had grounds for believing that the note was not visible on any other prints.[130]

6. Possibilities for Libraries to Use Non-Disseminated Works Under CL1994

As already stated, any public communication of a work of which the entitled person has not exercised the author's right of disclosure constitutes, in a formal sense, an infringement of moral rights. Only the author enjoys such rights as long as he or she remains alive; and after the author's death, these rights are enjoyed by the author's statutorily-defined relatives, unless the author has expressed a different wish. Moral rights, including the right of disclosure, protect indefinitely old works. Any way in which libraries make their collections publicly available, i.e. public lending, whether in a reading room or with the possibility of taking the material outside, as well as making collections available in digital form, regardless of whether this is done via the Internet or in closed internal networks of libraries, constitutes a dissemination of the works embodied in the individual materials.

It is irrelevant whether the library only allows the content of the original or a copy, possibly a digital object, to be consulted, or whether it also allows copies, notes or photographs to be taken. Copyright infringement, in the aspect of moral as well as economic rights, is based on the construction of a tort.[131] As a result, a library making a non-disseminated work available to the public in any manner exposes itself to the claim of infringement of moral rights, while the actions of the library user who uses such mate-

130 See the judgment of the Supreme Court of 6 June 2002, I CKN 654/00.

131 See Article 415 et seq. Civil Code.

rial are subject to separate assessment. It is difficult to see any grounds for declaring the actions of such a user as being unlawful, however, one should remember the three-step test, the content of which may be read as establishing a premise for the legality of any form of fair use, so long as it is exercised in accordance with the author's moral rights. Seen in this way, the legality of the actions of a library user themselves, undertaken within the framework of personal fair use serving not the institution, but the user, may be questioned based on the assumption that these actions had as their object a work disseminated in violation of the moral right of disclosure, which places such actions beyond the realm of legality. However, this view seems too far-fetched, since the infringement is connected with the mere dissemination of the work without the consent of the author or legitimate persons after the author's death and subsequent actions of the recipients of the work that do not infringe the above-mentioned personal right nor violate author's economic rights can hardly be deemed prohibited. The situation should be assessed differently, however, when it comes to actions taken by a library user that would consist of additional acts that make a non-disseminated work available to the public, e.g. if a reader photographs the original work and shares it online. Such actions would constitute an independent, subsequent infringement of moral rights and, in the case of a work protected by unexpired economic rights, of these rights as well.

The use of works by libraries to the extent that they do not involve making them available to the public, i.e. in particular digital reproduction (digitisation), is permissible also as regards those works which are not disseminated. Reproduction of works in the public domain is an act of exploitation that is not the same as dissemination; therefore, such acts are permissible owing to the absence of copyright protection. On the other hand, for protected works, an explicit basis for digitisation is contained in the provisions of fair use in libraries, allowing the digitisation of works in the libraries' own collections in order to supplement, preserve or protect these collections. It is only to this extent that the 2015

amendment to CA1994 brought non-disseminated works within the scope of the public fair use provided for by the cited provision, allowing libraries to digitise unpublished materials; but, as indicated above, this does not affect the possibility of making them available to the public in digital form.

Some doubt arises with regard to making works available, whether protected by unexpired economic rights or in the public domain, if such exploitation would be carried out by libraries whose collections are not available to the public, e.g. scientific, school, pedagogical, professional, company or private libraries. If the dissemination of a work, for which the consent of the author or persons exercising moral rights after the author's death is required, involves *ex definitione the* making available to the public of this intangible good, it may be argued that the activity of certain libraries which consists in lending or making library materials available in digital form in a manner that cannot be qualified as public nor as addressed to anyone interested, but rather to specified persons or groups of persons, falls outside the scope of this concept. However, it should be noted that the statutory right of fair use granted to GLAM institutions makes its beneficiary libraries in general, without excluding from its scope those whose collections are not publicly accessible.[132] Thus, it can be argued that in relation to public lending of materials covered by unexpired economic rights, the legislator has additionally limited the possibility to make available works that have not been disseminated, because fair use by libraries includes only the copies of those works that have already been disseminated, i.e. previously made available to the public with the author's consent and copied, which is indicated by the use of the notion of a copy by the relevant statutory provision, despite the fact that, in relation to libraries whose collections are not available to the public, it is difficult to accept the occurrence of an intrusion into the author's moral right of disclosure. It should also be observed that it is difficult to see such a limitation with respect to

132 Article 28(1) *in princ.* CL1994.

works in the public domain, so their non-public communication by libraries can hardly be considered as interfering with this right.

The restrictive and indefinite protection of the author's moral rights, including the right of disclosure, radically curtails the making available to the public the unpublished materials from the collections of cultural institutions. However, the task of making them available to the public is not impossible. Indeed, it should be borne in mind that the above-mentioned right may be exercised only once, in the sense that it is consummated in a single act of consent to make the work available to the public for the first time. Without attempting to resolve the dispute concerning the nature of the declaration of such consent, i.e. whether it constitutes a declaration of will,[133] or merely a manifestation of will,[134] it should be noted that the will of the author, or the person entitled after the author's death, may be manifested in various ways. When adopting the position equating the creator's statement with a declaration of will, one should refer to the basic premise of the Polish civil law according to which, subject to the exceptions provided for by the law, the will of the person performing a legal act may be expressed by any behaviour of that person which reveals his or her will in a sufficient manner.[135] It is, therefore, also permissible to express said will *per facta concludentia*.

The above conclusion is all the more justified on the grounds of the view equating consent to the first public making available of a work with a manifestation of will, for which, after all, not all prerequisites conditioning a valid and effective declaration of will *sensu stricto* are required. Consequently, it is possible to argue that an author, or a person entitled to exercise the moral rights of a dead author, may also express consent to the first making of a work publicly available simply by transferring the ownership of its material medium to the organization statutorily entitled or even

133 See, for example, J. Mazurkiewicz, *Non omnis…*, op. cit. p. 157.

134 E.g. B. Gisen, E. Wojnicka, *Prawo autorskie …*, op. cit. p. 366.

135 See Article 60 of the Civil Code.

obligated to publicly share its collections.[136] There is no doubt that, regardless of the existence or wording of the laws regulating their activities in detail, the primary task of libraries has been, from the very inception of these cultural heritage institutions, to make their collections available to users. With regard to public libraries *sensu largo*, such making available was and is public in its nature. Therefore, if a person entitled to exercise the right of disclosure willingly transfers the original or a copy of a work not yet disseminated to an organization entitled to make its collections available to the public, it is difficult to qualify such a fact otherwise than as – depending on the accepted view – a declaration of will or a manifestation of will aimed at exercising the above-mentioned right.

The adoption of the position outlined here, which does not seem particularly controversial, may allow libraries to make available to the public some non-disseminated materials from their collections. This would, of course, apply to those materials in respect to which there are grounds for assuming that it was the legitimate person who made the transfer to the library, or that this was done with his or her consent, or at least with their knowledge. In this respect, a separate determination would have to be made for each individual non-disseminated work, said determination based on the supporting paperwork attached to them, in particular donation or sales contracts, other acquisition documents, surviving correspondence with the persons donating the materials, or internal documentation relating to the acquisition of the materials (minutes, service notes, inventory books, etc.). It must be borne in mind that in a possible dispute over the legality of the library's making the material available to the public, the burden would be on the library to prove the circumstances confirming that the right of disclosure has been consummated in respect of the work fixed in the library material in question.[137] Since libraries and other enti-

136 This is also the case of B. Gisen and E. Wojnicka, who point out that the *manifestation of such a will is certainly the transfer of a copy of a work to an entity entitled to economic exploitation*. See B. Gisen, E. Wojnicka, *Prawo autorskie …*, loc. cit.

137 See Article 6 of the Civil Code.

ties of the GLAM sector are considered generally risk-averse, they would prefer not to share collections when such proof is absent or insufficient rather than risk the consequences of an adverse outcome in litigation.

The approach described above – the assumption that the transfer of the medium of a non-disseminated work to a library by the person entitled to execute the right of disclosure constitutes an expression of such a decision – may make it possible to exploit some of the non-disseminated materials from library collections, but certainly not all of them. Particularly with regard to the oldest collections, there will, in practice, be a lack of any supporting documents that would provide a basis for reconstructing the circumstances surrounding the acquisition of these materials by libraries. In addition, due to historical circumstances, especially due to losses suffered by Polish Glam institutions during the first half of the 20th century, many collections are held by libraries in the absence of formal acquisition documents, which would prove consent for disclosure by persons entitled to exercise moral rights to the works established in these materials. Therefore, the position presented here is by no means alleged to be a comprehensive solution to the problem of making available non-disseminated works by libraries. Such a solution would require a legislative intervention, as discussed below.

It is, however, worth indicating one more institution present in Polish copyright literature that offers a possible means of defence against an overreaching protection of the author's moral rights. This institution is the abuse of a subjective right, which assumes that one cannot exercise a right in a manner that would contradict its socioeconomic purpose or the principles of community life and that such an act or omission on the part of the person entitled shall not be considered an exercise of that right and shall not enjoy protection.[138] Despite the fact that copyright is an absolute subjective right, unlike the regulation of property, which is a model for this

138 See Article 5 of the Civil Code.

type of right, the provisions regulating an author's moral rights are limited to specifying their content without formulating any limits for exercising these rights.[139] Such limits should be found in general civil law norms, including the prohibition of abuse of subjective rights. This could, therefore, be applicable in a dispute over the protection of moral rights, in particular, if the legitimate entity were to claim infringement of the right of disclosure of an old work, in respect of which the bond with the author has been radically eroded by the passage of time, and its dissemination should be considered to be in the interest of the national cultural heritage. For the time being, there is no available case law to verify this type of defence, so the possibility of raising it must remain an undoubtedly interesting, but still only theoretical, proposition.

When considering the broader legal environment in which moral rights exist, it must finally be borne in mind that the protection of subjective rights of private law with regard to the claims arising therefrom is based on the principle of a complaint being brought before the court by an interested claimant, who by this act initiates civil proceedings. It is the subject of a specific subjective right that may demand its protection, and its enforcement is, as a rule, carried out in an adversarial process, in which the burden of proof with regard to the circumstances justifying the claim rests on the party filing the lawsuit. It is no different with the protection of the author's moral rights. Whoever demands their protection in relation to a specific work must prove these rights, i.e. prove that he/she is the author or one of the persons entitled to exercise moral rights after the author's death. Formally speaking, the possibility of a claim being brought before the court by a collective management organization[140] exists, yet there is no information available that CMOs engage in the protection of moral rights, including the right of disclosure. The same is true of the right of the public

139 See B. Gisen, E. Wojnicka, *Prawo autorskie…*, p. 333

140 See Article 78(4) of CL1994.

prosecutor to initiate such proceedings.[141] Moreover, criminal-law protection of the right of disclosure may only be invoked on the initiative, or at least with the consent of the victim or the CMO, as the infringement of moral rights is not defined as a crime that is prosecuted *ex officio*. It should also be considered that such a crime may only be committed with direct intent for financial gain.[142] This excludes criminal liability of persons responsible for making works available to the public by libraries. At the same time, as indicated in jurisprudence, the criminalization of the infringement of the author's moral rights is, in practice, non-existent.[143]

7. Conclusions

The restrictions on the use of non-disseminated works by libraries and other participants of the GLAM sector are radical, given that making any work available to the public requires the consent of the author or persons entitled to exercise the author's moral rights, and that the subject of these rights are arbitrarily old works. The current legal situation in this respect seems difficult to accept, while its practical consequences are downright anachronistic. The proposals of pre-war legal jurisprudence and the creative milieu to protect Horace's moral rights appear today to be a legal oddity, completely unsuited to the realities of the modern information society. Such claims could possibly also be considered to have a strong axiological basis nowadays with regard to the right to authorship itself or the right to the integrity of a work, although, for example, the disclosure of Adam Mickiewicz's authorship in relation to a work that the poet wished to disseminate anonymously – or, conversely, the publication of such a work without recognition of authorship – seems to be an event more suited to the field of literary studies than legal relations. However, with regard to the moral right of disclosure, shaping it as absolute and unlimited, ap-

141 See Article 7 of the Code of civil procedure.

142 See Articles 115(3), 122 and 1221 of CL1994.

143 See J. Mazurkiewicz, *Non omnis…*, p. 160.

plying to all works regardless of the time at which they were established, appears unnecessary, not serving the purpose of moral rights and preventing the fulfilment of certain values related to the dissemination of cultural heritage.

Even within the formula of an inextinguishable legal bond between the author and the work, characteristic of the dualist model of copyright, this bond must erode over time, becoming a mere historical fact. Regardless of the dogmatic assumptions of the protection of moral rights after the death of the author, i.e. whether one accepts the concept of the indirect substitution effected by the entitled family members who are authorized by law to seek protection of these rights, or the equally exotic concept of "subjective rights without subject,"[144] which is adhered to by some copyright scholars, it must be stressed that these are the strictly personal rights of the author which must expire after his/her death and in connection to this occurrence, one can only speak of a particular kind of cult of memory of the deceased, which must itself gradually succumb to the passage of time.

Even under the French legal system, which is a model construction for the dualistic conceptualization of copyright, the indefinite protection of moral rights arising from this conception has been weakened by case law, a well-known example being the ruling on the claims of Victor Hugo's successor for infringement of the right to the integrity of *Les Miserables*, which acknowledged these claims but compensated them in a symbolic amount.[145] The gradual degradation of this bond has also been recognized in the jurisprudence of the German courts, i.e. on the basis of the monist system, which provides for the timeliness of moral rights.[146]

144 See J. Mazurkiewicz, *Non omnis...*, , p. 146. On this subject on the grounds of CL1952, see also M. Szaciński, 'Autorskie dobra osobiste po śmierci twórcy', *Palestra* 1987, no. 2, pp. 31-37.

145 See decision of the Court of Cassation of 30 January 2007, Appeal No. 04-15.543, https://www.legifrance.gouv.fr/juri/id/JURITEXT000017627153/ [Accessed 21.07.2023].

146 See J. Pierer, 'Authors' Moral Rights after Death', *University of Vienna Law Review* 2019, no. 8, p. 15.

It must also be borne in mind that the progression of time always impacts the existence, content and exercise of subjective rights of private law. The regulation of this correlation is covered by several institutions of time limitation known to private law, inter alia the statute of limitations. Of course, absolute rights can theoretically reach into the past without any limitation in time, and their succession can be derived from legal events of a historical nature, as is the case, for example, with respect to ownership of real property. The problem, however, is that moral rights are not attached to any material object – a thing, for lack of a better term – that may remain in existence for centuries, nor even to an intangible asset such as a work, but rather to a specific person and, after said person's death, to his or her family members. This bond, as has been pointed out, is perforce weakened in successive generations. On the other hand, public considerations in favour of the dissemination of cultural works no longer protected by author's economic rights, particularly in the digital age when this dissemination is possible on an unprecedented scale, call for a limitation of the protection of moral rights, and, above all, the right of disclosure. This right is of key importance from the point of view of the legality of public access to previously unknown works, including those whose commercialization is no longer possible due to the expiry or non-existence of economic rights.

The indefinite moral right of disclosure makes the public domain in Poland a limited phenomenon, in contrast to countries that have adopted a monistic model of copyright, such as Germany, which results in the temporal nature of moral rights. In the current dualistic model, the termination of economic rights, which should theoretically "free" the work, thus enabling its free exploitation, has such an effect only with respect to works that have been disseminated and, in practice, published. Non-disseminated works are excluded from such use, even if non-commercial, by cultural heritage institutions. The problem is particularly significant with regard to libraries but should not be overlooked with regard to other entities constituting the GLAM sector, in particular archives

with their vast collections of private records, which in copyright terms are non-disseminated works and therefore fully affected by the limitations discussed here. Their existence as one of the fundamental obstacles to the full use of the digitisation potential of such institutions is also recognized in current statements by non-Polish copyright scholars.[147] The provisions implemented into the Polish legal order regulating the use of orphan works, as well as the rights of first editions, lose their practical significance due to the fact that only disseminated works can be the subject of use allowed by these provisions. Finally, the same applies to the statutory license itself, established for cultural heritage institutions. Rendering only disseminated works subject to being made publicly available, while at the same time protecting indefinitely old works, excludes a huge number of library collections from public access.

Therefore, a revision of the normative construction of the author's moral rights, as it is currently in force, should be considered – a departure from the historical dualistic model of copyright, which anchors moral rights in the domain of inalienable, inextinguishable and perpetual moral rights, in favour of the present day monistic model, which is more suited to the realities of modern life. This would have the effect of extending the temporal boundaries that now mark the limits of economic rights protection to personal rights as well, including, of course, the right of disclosure.

An alternative limited legislative intervention that would be sufficient here is the normative introduction of a time limit for the protection of the right of disclosure without extending such a limit to other moral rights. Such a solution is known to CL1994, as it is applied to the protection of the rights of the recipient of correspondence and the protection of the right to an image.[148]

147 See e.g. Y. Benhamou, J. Ferland, 'Digitisation of GLAM Collections and Copyright: Policy Paper', *GRUR international* 1 May 2022, vol. 71, no. 5, pp. 24-25.

148 See Article 82 of CL1994, which provides that unless the person to whom correspondence is addressed, has not declared his/her will otherwise, dissemination of the correspondence within twenty years after his/her death shall require the permission of the spouse, or in absence thereof the permission of descendants, parents or siblings, in that order. Article 83 of CL1994, on the other hand, states

An analogous preclusion period could be introduced for claims for infringement of the author's personal right of disclosure. This would not lead to an internal contradiction within CL1994, in particular to a violation of the principle of perpetuity of the author's moral rights. This is because, firstly, the act allows for a narrowing of their content.[149] Additionally, there are already provisions in place that limit the exercise of these rights.[150] The legislative intervention described here could, therefore, be limited to the introduction of a provision stating that claims for the protection of moral rights, in the case of a threat or infringement of the right of disclosure, cannot be brought after a certain period of time after the death of the author. A time limit of seventy years, i.e. one correlated with the term of protection of the author's economic rights, seems to be the most reasonable. A shorter term would lead to the unacceptable result of a theoretical possibility of publishing the work, which would, however, infringe the unexpired economic rights, including the right to disseminate the work.

Another legislative approach could be to introduce a provision stating that the right to bring an action for the protection of moral rights, in the case of a threat or infringement of the right of disclosure, expires after a certain period of time after the death of the author. Also, in this legislative option, a term of seventy years seems to be the most appropriate. For such a change to have any real effect, the respective amendment to CL1994 would have to include an inter-temporal provision expressly stating that the amending act also applies to works established before its entry into force. This is because only then would the protection of the right not to

that the provisions of its Article 78(1) shall apply respectively to claims brought due to the dissemination of the image of the person presented in it and the dissemination of correspondence without the required permission of the person to whom it was addressed; such claims may not be brought after the lapse of twenty years from the death of those persons.

149 See Article 16 *in princ.* of CL1994, which regulates the content of moral rights unless otherwise provided by this law.

150 E.g. the right of the owner of a copy of an artistic work to display it publicly without the author's consent (Article 32 (1) of CL1994), or the right to make obviously necessary alterations to the work (Article 49 (2) of CL1994).

distribute arbitrarily old works cease and the term of protection of this right would be correlated with the current expiry dates of the author's economic rights. In practice, this would mean that, just as the economic rights to works of authors who died no later than 1953 expired with the current year, it would be possible to make public any non-disseminated works of their authorship. A slight disadvantage of the above-described legislative solution is the apparent lack of explicit coverage of non-disseminated works that are anonymous or pseudonymous. However, the very assertion of the protection of moral rights to these intangible works after the death of the author is invoked by the relatives, so the burden of proof as to the authorship of a given work would rest on them, a burden which in practice would often be difficult, if not impossible, to bear. Moreover, with regard to old works, even if anonymous or pseudonymous, the very period of origin of the material in question would allow, even with a wide margin of safety, to attribute it to an author for whom the preclusion of the right of disclosure has already occurred. It should be noted that such a legislative amendment would not only positively affect the scope of access to the collections of libraries and archives, but would also allow for a wider range of commercial exploitation of works in the public domain, which primarily concerns the right to previously unpublished works provided for as a non-obligatory exception in Directive 93/98/EEC and in accordance with its provisions introduced as a neighbouring right under art. 99^1-99^6 of CL1994, which uses in this regard the notion of "right to first editions."

Yet another possible solution would be an alteration of the normative shape of the statutory license granted to cultural heritage institutions, particularly by expressly stating that the public lending rights can apply to originals or copies of works, including those that are non-disseminated, instead of just to copies of disseminated works for which the license currently provides. Similarly, it would be necessary to replace the word "collections" with the words "works, including those non-disseminated" within the provision establishing this license (art. 28 (1) (1) of CL1994), thus

also allowing non-disseminated works to be made available on the internal terminals of cultural institutions. This, by the way, would make the act more internally consistent, because even under the current wording, to the extent that the collections of authorized institutions do not include works, there are no grounds for making them subject to the statutory license at all. The option of a possible amendment described here is, on the one hand, narrower than the first one described earlier because it refers only to authorized institutions, including libraries, and, on the other hand, broader because it would make it possible to exploit non-disseminated works to which economic rights have not expired. However, due to the close relationship between the moral right of disclosure of a given work and the possibility of its economic exploitation, which is the subject of the author's economic rights, it does not seem feasible to bring about legislative changes in the scope described above as the second option, which would allow libraries to make available to the public works protected by unexpired economic rights.

A change in the normative shape of the right of disclosure is not hindered by restrictions arising from the provisions of EU law, nor binding international legal obligations.[151] The need to amend

151 The harmonization of UE copyright law concerns only authors' economic rights. This is apparent, for example, from Recital 19 of the preamble to Directive 2001/29/EC, which provides that moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive. Consequently, recital 23 of the preamble to Directive 2019/790 states that Member States should be free to require that the moral rights of authors and performers are respected when works or other protected subject matter are used. See T. Dreier in: T. Dreier, P. Hugenholtz, *Concise European Copyright Law*, Alphen aan den Rijn,, 2016, p. 35, where the author clearly indicates that moral rights are outside the scope of copyright harmonisation in the European Union. As already mentioned, the Berne Convention provides for the protection of the personal right to authorship and to the integrity of the work for a period after the death of the author at least equal to the period of protection of the economic rights, but it does not stipulate the protection of the moral right of disclosure which is, according to some authors, in the light of the convention an emanation of economic rights, which places this personal right outside the scope of copyright harmonisation under said convention. See T. Dreier, ibid. Moreover, the provisions of the WIPO Treaty do not prevent the Polish legislator from altering the normative

CL1994 in this respect will grow with the depleting stock of public domain materials that constitute disseminated works and are subject to the possibility of digitisation without legal pitfalls. It should be borne in mind that with the advent of each successive calendar year, the economic rights to works authored by successive creators who died seventy years earlier expire. However, the development of mass digitisation technology, with the acceleration of processes that this will entail, will result, as may be reasonably assumed, in the inexorable reduction of this category of material as a possible digitizable resource, especially since this type of material is mostly of a unique nature owing to prior dissemination, and it will be sufficient for a digital version of a given edition to be made publicly available by one digitising organization. This will present cultural heritage institutions with the problem of the large-scale digitisation of non-copyrighted yet also non-disseminated material from their own collections, which will require the normative environment to be reconsidered and consequently reshaped by establishing clear rules of digitisation and making publicly available non-disseminated materials which are not protected by the author's economic rights.

Translated by Tymoteusz Barański

shape of the right of disclosure, so as to ensure a wider availability of library collections from the public domain. Article 1 (4) of the WIPO Copyright Treaty only confirms the applicability of the aforementioned provision of the Berne Convention, while according to Article 14 (2) of this treaty, its parties should ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this treaty, which includes, inter alia, the enforcement of the rights conferred by the Berne Convention and thus, as far as moral rights are concerned, the protection afforded by its Article 6bis. See M. Senftleben in: T. Dreier, P. Hugenholtz, *Concise European…*, p. 98.