

**HISTORICAL REVIEW OF POLISH COPYRIGHT  
LEGISLATION AND RECENT DEVELOPMENTS OF  
PERMITTED USE IN EDUCATIONAL  
ESTABLISHMENTS**

A dissertation for the degree of Master of Laws by Research

by

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## **Abstract**

This dissertation examines the Polish Copyright legislation and recent developments of permitted use in educational establishments through a historical perspective. It focuses on legal history, codification processes and ways of unification reviewed in the context of successive periods during 1795-2012. The main issue being considered within this field of law is permitted use and its educational application. The dissertation seeks to answer the question whether developments in the scope of permitted use have been influenced by historical events and advancements in the education sector. It explores and analyzes those factors that help find a balance between providing wide access to educational materials, thus securing sustained input to education, as well as the authors' rights to protect their works and creativity.

The dissertation shows how the implementation of permitted use provisions in Polish education has traditionally been influenced by historical circumstances, national legal traditions and technological advancements in education, including publishing of educational materials. Permitted use has become increasingly significant as a result of the educational establishments' dynamic progress during the political and societal transformation of the 1990s. Further, the dissertation defines the scope of permitted use implemented in educational establishments in Poland, discussing the factors that shape it and the extent that educational institutions are entitled to benefit from permitted use regulations. It assesses the impact of permitted use on schoolbook publishing by examining two cases studies, schoolbooks published by Ossolineum in the 1930s, and the "Switch on Poland" online schoolbook project of 2011.

An evaluation of Polish permitted use regulations and comparison with those of the UK, France and Germany is provided. Polish permitted use regulations are further examined vis-à-vis the EU Information Society Directive (ISD, 2001/29/EC). There is no single or unified approach emerging as defining permitted use for educational purposes. Differences are identified in both understanding and balancing the societal need of accessing knowledge through education with protecting author copyright and creativity. This diversity of law flexibility among European countries, its implementation and current limitations occur as a result of different historical circumstances and societal needs shaping the scope of permitted use.

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## **List of Abbreviations**

**BBC:** British Broadcasting Corporation

**CLA:** Copyright Licensing Agency

**CNDP:** National Centre of Pedagogic Documentation (*Centre National de Documentation Pédagogique*)

**CURIA:** Court of Justice of the European Union

**EEC:** European Economic Community

**ERA:** Educational Recording Agency

**ESF:** European Social Fund

**EU:** European Union

**ISD:** Information Society Directive 2001/29/EC

**LEAs:** Local Educational Authorities

**ORPEG:** Centre of Polish Education Abroad (*Ośrodek Rozwoju Polskiej Edukacji za Granicą*)

**PRL:** Peoples' Republic of Poland (*Polska Rzeczpospolita Ludowa*)

**TRIPS:** Agreement on Trade Related Aspects of Intellectual Property Rights

**USA:** United States of America

**WCT:** WIPO Copyright Treaty

**WIPO:** World Intellectual Property Organization

**WPPT:** WIPO Performances and Phonograms Treaty

**WTO:** World Trade Organization

**WWI:** World War I

**WWII:** World War II

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## 1. Introduction and methodology

### *1.1 Explanation of research importance*

This research focuses on Copyright Law in Poland, its legal history, codification processes and ways of unification in various historical circumstances. The main issue being considered within this field of law is permitted use for educational purposes. I focus on evolution of the Polish legal doctrine of copyright emphasizing issues of permitted use and its influences on education. I analyze two cases studies on applying copyright law in the field of schoolbook publishing in two historically, socially and technologically different stages of social development. Firstly, I take into consideration the case of schoolbook publishing under the 1926 Copyright Act – the first Polish copyright legislation enforced after WWI, resulting from a law unification process. Secondly, I present the case of the “Switch on Poland” (*Włącz Polskę*) project, an online modular schoolbook for Polish pupils living abroad, built under the 1994 Copyright Act and Related Rights. I research how the legal basis of schoolbook publishing has been changed and developed, and identify the most important factors shaping these developments.

A historical approach to legal studies can significantly contribute towards understanding the processes underlying the creation of law according to social changes and demands. Law which does not reflect social needs may not only prove ineffective but can also adversely affect social stability. Thus, by revealing mechanisms and factors shaping copyright legislation in the past and its effectiveness, we are able to learn and draw conclusions for present and future law-making in the field.

The application of copyright law in education has been of increasing importance. Nowadays education plays a crucial role in shaping society. One of the emerging issues is to extend access to education and its social benefits, thus providing wider and easier accessibility to knowledge, learning and skills. That implies a necessity to effect legal protection of copyright at a greater scale. In order to protect authors’ rights and to give society appropriate access to knowledge, a good balance must be found between the public benefiting from copyright limitations, and protecting the authors’ rights and creativity in society. One of the main aims of this research is to explore and analyze factors shaping this balance.

Another reason to conduct this research is its importance in the field of copyright permitted use (limitation), as digitization within society is progressing at a fast pace. The digitization process within educational establishments including schools, universities, research institutes and libraries, highlights the challenges of copyright and permitted use towards achieving a more balanced digital society. The second case study taken into consideration in this research will examine the importance of adapting law to technology.

The historical approach taken to the above-mentioned issues shows that law evolution and development must allow for an understanding of society's needs, and its legal responses. This approach can be transplanted, adapted to another legal regime, or field of law.

## ***1.2 Methodology***

In order to study these issues in depth, the research uses qualitative and case study methods. This allows for a contextual approach to the historical review of Copyright Law and permitted use for educational establishments. The historical review itself focuses on successive periods in which the analysis can be conducted before and after major historical events or changes, in order to follow the effects of these in law-making and implementation.

The Polish case study provides several characteristics which justify its importance and usefulness to the field of Copyright. Poland can boast a fairly long and rich tradition in the field of Copyright law, which has been determined by extraordinary, uncommon and often unpredictable historical events and their consequences. Poland had to cope with demands of legal unification and harmonization, adapting its Copyright Law both domestically and with regard to international developments. Processes occurred that included transplantation of ideas of legal schools, approaches, acts and regulations, adopting elements of various legal jurisdictions which help to understand the process of development and law harmonization.

Another important reason for studying the Polish case in this research is a very dynamic and increasingly growing education sector in Poland, and issues currently emerging that are relevant to Copyright Law.

The research is thus conducted according to a qualitative research model combined with the case studies method. The objective is to explore the subject in a thorough and consistent manner. The steps that have been taken include: research preparation including exploring and reviewing relevant literature, selecting research topic and methodology; design – choosing sources of data to be collected; execution and reflection including collection of materials, summarizing data, identifying themes, verifying collected materials; and reporting – publishing findings and drawing conclusions (Hutchinson, 2006:101-102).

A formal model of data collection must be set up as a first step to conduct research. Data collection for this research has drawn on a wide range of methods and sources, including history recorded from secondary sources, content analyses, primary sources selection. Data has been gathered on the basis of their contribution to identifying observable implications for my theory in field of legal history, as well political history and social history.

In order to gather relevant materials the author visited the following archives, libraries and research institutes: the Faculty Library of Law and Administration of the University of Warsaw; the Intellectual Property Law Institute: an independent research unit, part of the Faculty of Management and Social Communication of the Jagiellonian University in Cracow; the University of Warsaw Library; the Faculty Library of Law and Administration at the Nicolaus Copernicus University; the State Archive in Poznan; Brunel Library; IALS Library; UCL School of Slavonic and East European Studies Library; Adam Mickiewicz University Library; The Raczyński Library, Poznan, Poland; Study-Museum of J. I. Kraszewski, Poznan, Poland; Faculty of Journalism and Political Science Library at Warsaw University; The Ossolinski National Institute, Wrocław, Poland. Also, the following electronic databases were used: HeinOnline, WestLaw, LexisNexis, CURIA, Berkman Center of Internet and Society at Harvard University, WIPO Lex, Social Science Research Network, and the Centre for Internet and Society at Stanford Law School.

The materials gathered have been divided into two main categories: primary sources and secondary sources. They have been categorized according to their relevance to each phase or period being analyzed and the case studies.

The research questions have been defined as follows:

- What are the main phases of Polish Copyright Law evolution since the end of the Kingdom of Poland in 1795 and how have historical events and factors defined these?
- How has the historical background to Polish Copyright Law determined the development of permitted use since 1795?
- How do permitted use and the 1926 and 1994 Copyright Acts influence schoolbook publishing?
- How does the online schoolbook project “Switch on Poland” relate to issues of permitted use within the current Polish copyright legislation?
- How are educational institutions entitled to benefit from permitted use regulations in intellectual property?

The dissertation is structured in six (6) chapters. Chapters 2-5 each present one area of the research, and chapter six offers a summary and conclusions.

## 2. A historical review of Polish Copyright Law

The 1795- 2012 period of Polish Copyright legal history can be divided into 4 phases, each revealing different historical circumstances and a specific background to legislation and implementation:

Phase I: The Partition Period, 1795-1918;

Phase II: The Second Republic of Poland, 1918-1945;

Phase III: Poland under Soviet control, 1945-1989;

Phase IV: The Third Republic of Poland, 1989-present.

The research is structured within these phases where the following hypotheses are being examined:

Specific historical conditions, cultural background, and legal tradition play significant roles in the protection of copyright and in defining the scope of permitted use rights.

In the case of Poland the process of establishing copyright legislation was disturbed by historical events, causing turbulence in implementation and lawful social attitude to copyright law within the education sector. This has caused confusion in defining scope of permitted use in the legal doctrine.

Technological development and digitization in society stimulates progress of copyright legislation including permitted use issues.

The level of the protection of intellectual property in the education sector has been gradually increasing by absorbing and implementing copyright law.

The sections below provide a clear review on the evolution of Polish Copyright Law throughout the centuries in distinct phases. They include the historical background to each phase, a legal history of Copyright developments, social changes and their impact on Copyright Law.



## 2.1 Phase I: The Partition Period 1795-1918

During the Partition Period Poland was incorporated into Russia, Austria, Prussia (German Empire after 1871). For a short time between 1807-1815 it was controlled by France. Therefore there were four different influential legal regimes occurring during the Partition Period, namely the Russian, Prussian, Austrian and French regimes. These have born influence on the establishment of the Polish legal regime after 1918 (Wagner, 1970:119-139).

The literature suggests that the most influential copyright legislation was that of Russia, Austria, and Prussia or the German Empire. I therefore present the Russian, Austrian and German copyright legislation applicable to Polish authors at that time, and subsequently its contribution to Polish Copyright Law.

### *2.1.1 Russia*

Despite the unfavourable political situation, Polish legal thought of the 19<sup>th</sup> century benefited greatly from the influences of the aforementioned legal systems, which were among the best developed at the time (Bleszynski, 2005:303). However, this also caused paradoxical legal situations in copyright. In the first half of the 19<sup>th</sup> century, during the time of Congress Poland (*Kongresówka*/the Kingdom of Poland under control of Russia) there was a gap in the regulations of copyright law. The Napoleonic Civil Code was implemented in Congress Poland, which was established as a result of the Duchy of Warsaw annexation by Russia after victory against Napoleon. The Civil Code did not contain provisions of copyright protection and, under original Polish civil legislation, copyright provisions did not exist as well. Thus, legislation in Congress Poland did not provide *de jure* copyright protection of literature and artistic works.

However, in 1847 the Russian Penal Code was implemented in Congress Poland including penal provisions for copyright infringement. In addition, Russia at the time was tied by copyright international conventions with France (1861) and Belgium (1862). This caused that the situation of Congress Poland citizens was worse in terms of copyright protection than the ones of the French and Belgians living in the Polish territories under Russian control. However, Polish artists' works were better protected in France and Belgium than in the Kingdom of Poland as result of the international conventions implementation. This

paradoxical legal situation caused confusions and uncertainty (Janowski, 1991:126-129). At that time many of Polish artists, writers, and composers moved to France to obtain better legal protection for their works.

The second half of the 19<sup>th</sup> and first decades of the 20<sup>th</sup> century has been a period when Polish literature flourished. The most famous and acclaimed writers and poets of this time were working under Russian legislation. Relevant acts of this period include the first act on copyright law in Russia introduced in 1828 and amended by the 1830 Censorship Act, which contained copyright provisions. This legislation was implemented in the Polish territories (Congress Poland) in 1870 and with the 1847 Russian Penal Code remained in force until 1911, when a new copyright act was introduced. There was no lawful translation of these acts in the Polish language.

The Polish Law Reports from this period point out the case of *Święcki* versus *Morgantiem* (5<sup>th</sup> November 1860), where the sculptor *Święcki* sued manufacturer *Morgantiem* for reproduction on mass scale *Święcki*'s Mickiewicz's statue. The court decision specified, among others issues, that despite the Civil Code not containing explicit provisions regulating protection of artistic works, it cannot change the reality of existing protection of artistic works *per se*. Thus, the court legitimated the existence of copyright law within Polish jurisdiction with this decision (Janowski, 1991:127). Nonetheless this indicates difficulties in protecting Polish authors' creativity within Russian legislation until 1911 when the new copyright law was introduced.

Moreover, Russian copyright law until the 1911 Act did not contain provisions defining the subject matter of copyright as well as provisions on co-authors' cooperation. It also did not define an entitlement to copyright protection for publishers. However, legal practice was proceeding according to rules accepted in other European countries. A good example has been the completion and publication of the Great Universal Encyclopaedia involving several authors. These authors were bounded by contracts and publishing requirements based on the Civil Code property law, including co-ownership rights.

The issue of defining entitlement to copyright protection of works was introduced in the 1911 Copyright Act, but without identifying conditions of protection. Art. 4 of this act contained the provision that all authors and their successors who published in Russia are entitled to copyright protection of their works, as well as authors and their successors of

dependent territories, published in Russia and abroad. Paragraph 3 (Art. 4) also entitled to copyright protection authors whose works were not published or announced in public. The intention of the legislator was to protect the authors' right from the unauthorized public dissemination of their works, what was a novelty in copyright law at that time. The 1911 Copyright Act regulated issues of co-authorship and rights of publishers whose works were being written collectively as dictionaries or newspapers.

In addition, Art. 35 of the 1911 Act introduced the right to translate foreign works to Russian and publish them without permission of authors, at least when a convention or other acts regulating that matter would not exist (Ferenc Szydelko, 2000:84-86). The 1911 Copyright Act clarified and unified copyright law, thus extending copyright protection towards Polish authors living and working in Russian-dependent territories.

The first provisions in Russian copyright legislation relating to permitted use were linked with reprinting rights, allowing exclusive reprinting rights for press publishers of collective articles. This was true only in the case where works were published in the same form, namely by publishing collections of Arts. in periodical magazines. However, this wide reprinting right did not allow authors' works to be used in other ways. The author could prevent reprinting his/her work by including a forbidding note in their works.

Further developments on public permitted use were introduced by allowing publishing articles and other printed works in collective works and schoolbooks, in cases where their content was longer than a sheet. The 1846 Tsar Order on Artistic Property Rights finally introduced quotation rights. It was permitted to use other authors' works for the purpose of adding value to the own work under two conditions. Firstly, a used fragment of the work should not be longer than one third of the whole content of the work if the work was longer than one sheet. Secondly, the content of a new work should be at least twice longer than that of the quoted work. This arithmetic approach to the quotation right and permitted use caused doubts, controversy and disagreement (Ferenc Szydelko, 2000:103-104).

Public permitted use was also extended on the author right to own created work, so called the moral or personal right of authors. The 1830 Tsar Order contained a provision allowing transfer of the moral (personal) rights of authors to the state, academia or other educational institutions. The order established appropriation of authors' basic right to ownership and the personal right to decide about their own work. The legislator argues convincingly that

the state or public institutions will manage these rights better than authors themselves (Ferenc Szydelko, 2000:105).

Russian copyright legislation did not contain provisions on personal (moral) rights of authors; there was not any developed doctrine of copyright personal right of authors, in contrast to other parts of Europe at that time. These issues were regulated by tradition. Thus, in the case of Russian copyright, the scope of copyright provisions and its implementation were strongly impacted by Russian legal tradition. In the case of Polish territories within Russia, copyright law was impacted by the tradition of the legal regime of the time, and the specific historical conditions of partition and occupation.

### 2.1.2 Austria

The Habsburg Monarchy took control of Polish territories in New Galicia including Cracow, and annexed these in the course of the third partition of Poland in 1795.

In the Habsburg Monarchy the first legislation regarding Copyright Law was part of the Civil Code introduced on 1<sup>st</sup> June 1811 addressing aspects of publishing literature works, copying, and authors' contracts. In 1846 a new act was introduced covering intellectual property in the fields of literature, music and other artistic fields. Also, at the same time the Emperor Patent on reprinting came into force. The Penal Code including provisions on copyright was also introduced in 1846. These three acts form the oldest regulation on Copyright Law in Austria. They were replaced by the Copyright Act for Literature, Art and Photography introduced in December 1895. This act was in force until 1926 also in Galicia and Cieszyn Silesia – Polish territories incorporated to Habsburg Monarchy (Ferenc Szydelko, 2000:76).

The legal acts prior to 1895 did not contain provisions regarding personal characteristics of authors as age, physical or psychological state. Therefore young artists could benefit fully from copyright protection. For example, Wojciech Kossak, one of the most talented and well acclaimed painters, completed his works and fully benefited from these at the age of sixteen. Another characteristic of the Austrian Copyright acts till 1846 was a lack of provisions on authors' cooperation (co-authorship), which caused problems to implement authors' co-authorship contracts. However there were implemented provisions of Civil Code regulating property law in this regard (Ferenc Szydelko, 2000:80).

The Copyright Act for Literature, Art and Photography implemented in December 1895 opened a new approach to copyright protection in the Habsburg Monarchy including Galicia and Cieszyn Silesia. Firstly the new copyright law contained provisions on authors' cooperation contracts (*co-authorship contracts*). At that time, a distinction between personal copyright and copyright economic rights did not exist in the legal doctrine. Therefore, very often authors did not differentiate between these two categories. Another novelty of the 1895 Copyright Law was the regulation regarding unnamed, anonymous works. According to paragraph 11 of the Copyright Act 1895, a publisher was entitled to the work in cases of unnamed works. Provisions were included on photography and

phonography works also. The 1895 Copyright Act was in force in the territories of the Habsburg Monarchy, including territories settled by Poles, and also could be applied to German citizens and foreigners who published their works in the German Empire.

The first provisions on permitted use were introduced in the 1846 regulations and continued in the 1895 Copyright Act. There were also provisions mentioned on permitted use for educational purposes, however these were not precisely articulated (Ferenc Szydelko, 2000:96-98). Nonetheless, the education sector was recognized as a field where the level of intellectual protection should be increased.

The Austrian 1895 Copyright Act had a great impact on Polish literature and its development. Under the 1895 Copyright Act many very well acclaimed writers and poets created their works, for example Adam Asnyk, Piotr Chmielowski, Adolf Dygasinski, Maria Konopnicka, Eliza Orzeszkowa, and Wladyslaw Reymond. Cracow and Lviv became centres of Polish science and art with their intellectual elite, which was expanding due to immigration of Polish intellectuals seeking autonomy from territories controlled by Russia and Prussia. These circumstances caused that the greatest part of Polish literature and art was bound by Austrian copyright legislation.

The 1895 Copyright Act expanded the catalogue of fields under copyright protection. The basic rule of the Act regarding artistic works was that only authors were entitled to the exclusive rights of public publishing, replicating and dissemination their works (§36). The rights of authors were widened and permitted use in public domain, including industry, was limited (Ferenc Szydelko, 2000:121-122).

There were also fields where copyright protection was still not well developed. For example copyright protection of painting works in the Habsburg Monarchy before the 1895 Copyright Law was rather poor, not providing a long enough period for author protection. Artists could benefit only of a two-year protection period on their works. Moreover the law gave full right to use painting works as models for industrial replication. This situation caused frustration and protest among artists during that period.

The historical condition of freedom of expression and autonomy of Polish cultural creativity in the Habsburg Monarchy impacted the scope of copyright among authors, generating needs towards its protection and taking a form of copyright regulations.

Therefore, the hypothesis that specific historical conditions and cultural background play a significant role in the protection of copyright and in defining the scope of permitted use rights is applicable to the Austrian copyright evolution process, its application and relevance to Polish society in Austria.

### 2.1.3 Prussia and the German Empire

Germany developed early legal thinking on copyright. In the 1730s, a legal opinion existed in German states that copying books should be banned. However the concept of copyright including a ban on copying books was introduced across German States much later, in 1835. It was the result of Napoleon's wars in Europe and a strong link between copyright and censorship at that time.

In 1835 copying of books was banned across all German states, what was a great step towards unification of copyright law in Germany. The German Confederation established in 1815 (when copyright law was introduced) was an association of 41 (1847), and later 33 (1866) German states including Prussia. The Poznan region, West and East Prussia were not included until 1848 when the Grand Duchy of Posen was incorporated to Prussia. Therefore, from 1848 German copyright legislation was introduced in those Polish territories which were under German influence. Therefore, the changing political status of this region was the cause for the application of advanced intellectual property protection towards Polish authors.

Unified Copyright Law in the German Confederation was implemented in 1837 with the the Science and Art Works Protection Act against Copying and Counterfeit (*Gesetz zum Schutze des Eigentums an Werken der Wissenschaft und Kunst gegen Nachdruck und Nachbildung*). German copyright law developed dynamically in the next decades, providing an important contribution to the European copyright doctrine. The following acts were introduced and implemented: the 11<sup>th</sup> June 1870 Copyright Law on Literature, Drawings and Music Compositions; the 9<sup>th</sup> January 1876 Copyright Law on Painting Art; the 10<sup>th</sup> January 1876 Photography Protection Law against Counterfeit; the 19<sup>th</sup> June 1901 Publishing Act; the 19<sup>th</sup> June 1901 Copyright Law (*Urheberrechtsgesetz*); and the 9<sup>th</sup> January 1907 Art Protection Act (*Kunstschutzgesetz*). These stages of developing German copyright legislation indicate a growing number of copyright exploitation fields emerging due to technological advancement.

This dynamic and important development of legal instruments was caused by unification of the civil law after the unification of Germany (1871), and by developing technology during that time (Ferenc Szydelko, 2000:73-75). Consequently, Polish authors living under

German jurisdiction benefited from the existing, very advanced copyright legislation. It shows that both the political situation and developing technology accelerated the formulation and implementation of copyright protection, shaped the scope of permitted use.

The Science and Art works Protection Act against Copying and Counterfeit of 1837 gave to universities, academia, public educational and scientific institutions and other defined associations, exclusive right to publish new editions of works under their supervision. German copyright legislation, first to do so in Polish territories, introduced the term of coherent, consistent co-ownership of parties, being previously contained in the Civil Code (Ferenc Szydelko, 2000:79).

The 1837 Act was one of the first in Europe containing provisions regarding permitted use.: copyright is not defined for the following: 1) literal quotations of previously published fragments; 2) attaching papers, dissertations, particular poems etc. in critiques, literature and historical works for educational, school purposes; 3) publishing translations of already published works with exception of works taken as a copy if: a) a work published in a 'dead' language was translated without permission of author into German language b) an author of book published in several modern languages, when without permission a new translation is done to one of the previously translated languages.

The novelty of these permissions was that, for the first time, permitted use was introduced to copyright law in Polish territories, and the scope of permitted use was thus defined. However the term 'permitted use' was not used yet. There was also a gap in the above-mentioned provisions, namely users were not obliged to publish names of authors of quoted works. This gap was addressed in the 1870 Copyright Law on Literature, Drawings and Music Compositions (Ferenc Szydelko, 2000:88).

The 1870 Copyright Act established the large fragments quotation right, and introduced the broad right of reprinting from newspapers Arts. and telegrams, even on large scale. This right of permitted use did not extend to reprints of novels, scientific works and longer publications when marked in the headline by the publisher against reprinting.

This very broad reprinting right was amended and made narrower by the 1901 Copyright Law introducing the provision that reprinting of scientific works, technical works and

novels was banned, even when a copyright note was not included. Public permitted use was also applied to all public documents including codification of law and public speeches. The 1901 Copyright Act introduced broad permitted use in the press allowing reprinting all Arts. if not marked against doing so and not modified content.

The Act contained provisions on permitted use for educational purposes regarding quotation and publishing fragments of works or short works. Permitted use was introduced for using poems for musical purposes. However this regulation was opposed as unfair towards poets and their author rights. One of the artists impacted from this provision was the famous Polish composer Karol Szymanowski (Ferenc Szydelko, 2000:89-90).

Polish literature had thus found copyright protection in the Prussian partition of Polish territories. However, in this part of Polish territories it was difficult to create and develop Polish works of art because of censorship restrictions. The most developed field of Polish creative work was scientific research. Several Polish scientists worked at German universities, for example Aleksander Bruckner a very well acclaimed historian and linguist worked at the University of Berlin. Nevertheless Polish science was restricted by political circumstances. In the second half of the 19<sup>th</sup> century, in Polish territories under Prussian control a few Polish scientific institutions and associations operated. These include the Good and Cheap Books Publisher (1853), the Scientific Association of Polish Youth (1865), the Poznan Society of Friends of Sciences (1857), the Association of Scientific Support and the Association of Scientific Lectures.

Despite the existence of a complex and well developed copyright law in Polish territories under Prussian legislation, a period of recess in Polish cultural development ensued. Most of Polish artists and authors preferred to publish their works under Austrian or Russian copyright law because they enjoyed greater freedom of expression (Ferenc Szydelko, 2000:90). The political regime and circumstances had strong influences on defining the scope of copyright law, and impacted on the creativity of Polish authors. The artists were more likely to make the choice for freedom of expression for their works, than benefit from more advanced copyright legislation.

The 1870 Copyright Act also protected public speeches, and lectures delivered to enhance knowledge or provide entertainment. Therefore the social need and tendency towards education provided widely by teaching in verbal form was addressed. This supported the

early development of the education sector. One of characteristics of the 1870 Copyright Law in Prussia was a broad scope of permitted use, emphasizing access and more openness to culture and knowledge in the public domain than primarily protecting creativity of authors. Therefore, the level of the intellectual property protection in education was gradually increasing by implementing a more advanced form of copyright law.

The next Copyright Act in Germany was introduced in 1901, which continued reliance of copyright protection on moral value of works. The 1901 Copyright Act introduced as a novelty in Germany, including Polish territories under German control, the copyright protection of phonograms (Ferenc Szydelko, 2000:94).

During the period 1795-1918 in territories settled by Poles, several dynamic and crucial developments occurred in copyright law. In the second half of the 19<sup>th</sup> and at the beginning of the 20<sup>th</sup> century the core of the modern copyright legal system was designed and implemented. The developments of the legal thoughts in copyright were progressing both in domestic legal systems and internationally. The Bern Convention was the crowning of the achievements in copyright law at the time. The authors' rights to protect their intellectual property were introduced and, at the same time, the process of defining limitations in the form of permitted use was launched. The main reason to introduce permitted use was to broaden access to education and knowledge.

#### *2.1.4 Comparative analysis of copyright legislation applicable to Polish society during 1795-1918 and its international dimension*

The historical conditions, cultural background, and legal traditions applicable to Polish society significantly impacted on the protection of copyright, defining within it the scope of permitted use rights. The process of shaping copyright legislation in Polish territories under Russian, Prussian and Austrian control was determined by the development of societal needs to access intangible goods. Advancements in technology intensified the process of developing copyright protection both for works' creation and their dissemination.

In the early phase of copyright formation, at the start of the 19<sup>th</sup> century, all legislations applied to Polish society were limited in capacity in terms of their provisions and exploitation fields covered. However, the basic role of protecting intellectual property was addressed and implemented. Both Russian and Austrian copyright legislation were based on provisions of Penal Codes and referred to Civil Codes. The first act entirely dedicated to copyright protection was introduced in Prussia in 1837; this was the Science and Art Works Protection Act against Copying and Counterfeiting. This act provided a good platform to advance progression of intellectual property protection, its legislative forms in Germany, and at European level.

In the process of shaping copyright protection, differences in its scope emerged. The German copyright law contained provisions on permitted use for educational establishments. Permitted use provisions were also introduced by Russian and Austrian legislation, however these were not precisely articulated and there was no specification addressing educational purposes. Nonetheless, in the analyzed period of copyright legislation formation in Russia, Austria and Prussia, there were tendencies towards strengthening authors' rights, and limiting the unlawful public and industrial use. The quotation right was the first form of permitted use introduced and developed within those legal regimes.

Russian copyright legislation in its first form was part of the Censorship Act. This demonstrates the influence of the political regime onto the legal system, emphasizing the dominant role of political system in law formation. Another

characteristic of Russian copyright law was its institutional approach to the authorship expressed by allowing the transfer of the personal rights of authors to the state, or an educational institution. This indicates an impact coming from the Russian cultural background with its emphasis on institutions, underlining the importance of institutionalization on intellectual property legislation.

One of the original characteristics of Austrian copyright during the first phase of its formation was its two years protection of painting works. This was deemed unfair and unacceptable by artists. This shows the irrelevance of this provision to a societal expectation, and at the same time emphasizes the differences among national copyright legislations at that time. The novelty of the Austrian copyright legal doctrine was to introduce rights for publishers to be entitled to unnamed works.

Since the early stage of copyright formation, law-makers were aware of the international dimension of intellectual property protection. International conventions were signed to extend protection of works and authors' rights. Russia was bounded by copyright conventions concluded with France (1861) and Belgium (1862). In 1886, during a diplomatic conference the multilateral Bern Convention was signed to protect literature and artistic works. The Bern Convention had an immense impact on shaping European standards of copyright protection. It introduced the first system of equal, internationalised copyright treatment among signatories, which at the same time required from them to provide a minimum of standardized copyright provisions.

The application of three different copyright legal regimes to Polish society during 1795-1918 impacted Polish copyright legal thought, and introduced an international approach in forming the first Polish Copyright Act. The first Polish Copyright Act was greatly benefited by access to the international copyright legal doctrines, not only in terms of accessibility of acts, but (what is more important) by the prior implementation and practice of several copyright legal concepts and structures within society.

## **2.2 Phase II: The Second Republic of Poland 1918-1945**

### *2.2.1 Start of Polish law unification*

In the second half of the 19<sup>th</sup> century, a process of establishing a Polish lawyers' society began and was supported by Jagiellonian University and the University of Lviv. The first Conference of Polish Lawyers and Economists was organized in 1887. Until the start of WWI there were five more of these conferences. The periodic organization of these conferences indicates an existing, well consolidated and organized Polish lawyers' society addressing problems of Polish Law unification (Mohyluk, 1999:285).

However, at the beginning of the 20<sup>th</sup> century the legal literature on copyright law in Polish territories was very limited. In the literature the term "literary and artistic works property" (*własność literacka i artystyczna*) was used, introduced by J. K. Wolowski to express a copyright law term. Copyright law (literary and artistic works property) was defined as the property of intellectual results of the human mind which were announced and published, thus added to the public domain: for example printed works, paintworks, or sculptures (Dbalowski and Litauer, 1922:3-4).

Political independence and the introduction of a democratic republic as a political regime in Poland brought an opportunity to establish a new copyright legislation, meeting societal needs and requirements arising from advancements in technology.

### *2.2.2 Unification of Copyright Laws applied to Polish authors*

The main issues with regard to copyright in the Second Republic of Poland were associated with the unification of the diverse laws into a coherent legal system. Legislative work on the Polish first copyright law began by 1920 and six years later a modern statute was enacted, the Copyright Act of 1926. It was modelled on the most progressive copyright laws then in force in Europe, but it also adopted several innovative indigenous solutions regarding copyright protection (Bleszynski, 2005:303).

The draft of the Copyright Act was prepared by Professor Fryderyk Zoll, one of the best acclaimed lawyers in Poland at that time. The proposed law was widely discussed within

those institutions representing copyright interest and legal committees (Civil Section of Codification Committee 1920-1923). The act was submitted to the Ministry of Justice in November 1923; it then proceeded to Parliament in 1925 (Ritterman, 1937:13).

Professor Zoll intended to base a new copyright regulation on previously existing law in Polish territories under Russian, German and Austrian control, namely the Austrian 1895 Copyright Act, the German 1901 and 1907 Acts, and the Russian 1912 copyright regulation. In the process of designing a united Polish Copyright Law, it was also necessary to take into account the provisions of the 1908 Bern Convention, by which Poland was bound since 1920 (Zoll, 1920:4). The proposed act corresponded closely with the German copyright law (Ferenc Szydelko, 2000:244).

Work on the act was divided in two parts: the first part contained the main ideological thoughts and direction, the second part contained rules and hypotheses which could be written down as Arts. and provisions of the act. The proposed rules were evaluated by a reviewer, Jakob Litauer, and passed on to Parliament in May 1920. The act was also subject of the debate with leading experts on civil and copyright law (Zoll, 1920:4).

In 1920 during the creation of Poland's first Copyright Act, the subject matter of copyright law was defined as any manifestation of mental activity of personal nature (be it a verbal expression, writing, print, solid, sound, mimicry or rhythm) from the moment of its creation. During the parliamentary debates on the 1926 Act the phrase 'of a personal nature' was abandoned in favour of 'bearing the features of personal creative activity'. Pre-war legal commentators, however, used to point out that every creative activity is, by definition, of a personal nature (Bleczynski, 2005:307).

The Polish Copyright Act 1926 was based on achievements of Western European legal culture. However in many significant points the Copyright Act was a result of the novel legal approach with regard to the provisions content and construction. The most significant features of the Copyright Act 1926 were:

1. a dual structure of copyright: the authors' economic rights and the author's moral rights;
2. the subject matter of copyright positively defined;
3. the differentiation between adaptation works rights (*prawa niesamoistne*) and original works rights (*samoistne*);

#### 4. the introduction of copyright Related Rights.

The other important basis of copyright law in Poland was the Bern Convention of 1886, amended in Berlin (1908) and in Rome (1928). The convention has been published as a “Governmental Statement” and has been in force in Poland, cited in the Official Journal of Laws of the Republic of Poland (No 3 item 16).

In May 1922 Professor Zoll delivered a paper, presented during a lecture to the Economic Society in Cracow, on “The Bern Convention and its impact on Polish Copyright Law”, where provisions of the convention were examined regarding authors’ rights. Poland signed the convention due to the obligation arising as a part of the Little Treaty of Versailles, also called the Minority Treaty. The Bern Convention was criticized by Zoll as not relevant to the economic and social needs of Polish society at that time, especially its provisions on translation works and theatrical and music plays (Zoll, 1922: 6-7).

The new copyright law of Poland after WWI had to be unified towards designing a coherent law applied within three parts of Poland that were differently developed in terms of economy and infrastructure. In addition, the new copyright legislation had to be harmonized with the Bern Convention provisions. During the period 1918-1945, the key legal codification were unified and introduced: the Penal Code, the Commercial Act, the Civil Code having impact also on copyright law. At the same time there were occurring changes in terms of general social developments and applied technology bringing about new legal needs in society.

The 1926 Copyright Act was amended twice. Firstly to a minor extent, by the Ordinance of President of Republic of Poland (the Official Journal of Laws of the Republic of Poland No 36, item 318) in April 1927, and secondly by the amendment act in March 1935 (the Official Journal of Laws of the Republic of Poland No 26, item 176) which substantially changed copyright regulations in Poland (Sieczkowski, 1937:10). The new Constitution of Republic of Poland has been enacted in 1935, changing the political system into a presidential regime and shaping a semi-authoritarian system in Poland.

The main legal construction of the 1926 Copyright Act was not changed, and was to some extent even strengthened, for example protecting the personal (moral) rights of authors (Art.63). The amended Copyright Act provided progression towards meeting new societal

needs. New terms in copyright were also introduced: a mandatory licence (Art.16) and provisions on continuity of copyright law (*droit de suite* – Art. 29) (Sieczkowski, 1937:10).

The Polish Copyright Act was amended in 1935 according to a project initiated by Stefan Sieczkowski, Deputy Minister of Justice at the time. A need to amend the Copyright Act occurred due to the necessity to harmonize Polish copyright legislation with the Bern Convention amended in Rome (1928), and also with a newly unified Penal Code and Civil Code introduced in Poland (Ritterman, 1997:14-16).

Important amendments were introduced in terms of shaping the scope of permitted use. Art. 16 of the amended 1926 Copyright Act established the right of the state to expropriate copyright in the field of radio broadcasting for public purposes (Ritterman, 1997:15). Mandatory licence was introduced in Polish copyright law to extend access to the information and knowledge.

### 2.2.3 Polish copyright legislation during WWII

A review of legal developments in Poland during WWII (1939-1945) requires a closer examination of the political situation of Poland during this period. Poland during WWII was occupied by the Nazis and the Soviets. According to the Ribbentrop-Molotow Pact of August 1939 between Nazi Germany and Soviet Russia, Poland was divided between these countries. The Nazis incorporated a part of Polish territory directly into the 3<sup>rd</sup> Reich, and they established the so-called General Government (*Generalgouvernement* or *Generalna Gubernia*) in other parts of Poland.

Despite occupation, Poland had an independent government in-exile in Paris and then in London, and domestically in Poland in the form of the Polish Underground State. This provided for continuity of the Polish State including its legal system. However Poland did not have the possibility to implement laws independently within society. Poles were forced to implement Nazi and Soviet jurisdiction. Between the German invasion and early 1940, no courts operated in Poland besides German military tribunals. After 1940, the Polish court system was reinstated and allowed to continue decision-making in cases not concerning German interests or citizens, for which a parallel German court system was created. The German system was given priority in cases of overlapping jurisdiction (Pospieszalski, 1958:13)

After the Soviet invasion, territories of Poland occupied by Soviets were annexed to the Soviet Union and immediately started being sovietized, including running staged elections to legitimize the annexations. These Polish territories were treated as an integral part of the Soviet Union also in terms of law implementation. No further developments in copyright legal thought were possible.

The historical situation which Poland was facing during WWII shows clearly that the process of establishing copyright legislation was disturbed by the historical event of WWII. The war disrupted implementation and further development of the legal regime introduced after 1918.

### **2.3 Phase III: Poland under Soviet control 1945-1989**

After WWII, a crucial transformation of Polish legal system, including copyright law, occurred. This was part of the political, social and economic changes resulting from the establishment of a communist system of government.

The Copyright Act of 1926 amended in 1935 was replaced by the Copyright Act of 10<sup>th</sup> July 1952, which was largely dictated by political considerations, intended to shape copyright regulations according to a communist, Soviet mould. The 1952 Act was conceptually similar to the 1926 Act and replicated many of its provisions. However three of its provisions were clearly regressive: shortening from 50 to 20 years the term of copyright protection after the author's death, authorizing the Council of Ministers to publicise standard forms of copyright law agreements including mandatory remuneration schedules for using artistic works, and nullifying all previous publication agreements (Bleszynski, 2005:303).

A very significant factor determining the quality of protection of intellectual property was a ubiquitous presence of preventive censorship, which did not respect the personal rights of artists. Certain authors' rights of publication were forbidden, while some topics were forbidden to be developed in books and newspapers. A special index of forbidden names and topics, as well as a catalogue of censorship's failures and achievements were published by the censors on a regular basis (Kurczewski, 1993:260). Additionally, freelance business and professional activity were practically non-existent, as all such activity was to be performed on a regular employment basis (Bleszynski, 2005:304).

The status quo in copyright started changing in the 1970s. The change was the result of the adoption of a relatively more liberal policy and economic openness, a considerable reduction in ideological indoctrination, and lessening of state control of public life. It was also linked with the Soviet Union amending its copyright law and acceding to the general text of the Geneva General Copyright Convention, in both its 1952 Geneva and 1971 Paris versions. Poland was bound by both the pre-WWII 1928 Declaration on Manual Copyright protection between Poland and the USA, and also by the General Copyright Convention (the so-called "bridging" convention) which regulated relations between Polish and other European legal systems. This provided copyright protection for the author's entire lifetime

(in the most countries, for 50 years thereafter) and established statutory copyright protection with respect to personal copyrights (Bleszynski, 2005:305).

During the period 1945-1989, Polish copyright legislation was generally limited by the communist ideological approach. Copyright law had to match and fulfil communist ideas of an equal society, where private property including intellectual property was not appreciated. This period in Polish copyright history shows that law was not matching societal needs, but rather the opposite: society was forced to fulfil the communist ideology requirements through legislation. This shows the immense impact that the communist political regime has had on forming and implementing intellectual property protection.

#### ***2.4 Phase IV: the Third Republic of Poland 1989-present***

After the end of communism in central and eastern Europe in 1989, Poland became a fully independent and democratic country. The need to reconstruct, update and reform the Polish juridical system emerged within many fields and branches of law, including copyright law. Existing law was failing in the sense that it proved incapable of responding to the changes that were taking place in society. The transition period after communism has been marked by deep reconstructions of the political, economic and legal systems of Polish society.

Nowadays Poland is a signatory of nearly all the important conventions safeguarding the protection of intellectual property rights: the Paris Convention (1883), the Bern Convention (1886), the Rome Convention (1961), the WIPO Convention (1967), the Madrid Agreement (1891,1989) the Patent Convention (1970), the Budapest Convention (1977), the WTO Convention (1994) including the TRIPS Agreement (Kieszkowska & Nozykowski, 2003:485).

The Bern Convention provides for copyright protection on countries and territories other than the original country of the work. Therefore, in the original country of the work the scope and legal basis of copyright protection are regulated by national legislation. However, in the case of Poland, this provision is excluded because of Art. 7 of the 1994 Copyright Act. The Bern Convention based its provisions on the following rules: the minimum of protection adopted by the Convention; the assimilation, automated protection, and autonomy of protection.

The Rome Convention (1961) provides a scope of protection in the frame of related rights (neighbourhood rights). The Convention regulates rights of performers, producers of phonograms and broadcasting organizations. This multilateral international convention addressed a need for protection in new exploitation fields due to technological change and advancement.

The WIPO Convention (1967) established the World Intellectual Property Organization and designed tools to coordinate the development of copyright legislation and its implementation. Poland is also a signatory of the Agreement on Trade-Related Aspects of Intellectual Property Rights focusing on trade and commercial aspects of intellectual property protection.

The current domestic copyright legislation is based on the Act of 4<sup>th</sup> February 1994 on Copyright and Neighbouring Rights which has been amended in 2000, 2002 and 2003. The 1994 Act contains a broad definition of the term 'work', which has its roots in concepts formulated in the 1920s during the creation of the first Polish copyright law act. The Act says that the scope of copyright encompasses any manifestation of creative activity of an individual nature, no matter in what form it comes into existence and regardless of its value, purpose or manner of expression. This definition appears to be very broad (Bleszynski, 2005:307).

In recent years the Polish copyright legislation has been adjusted a few times. The need for amendments has been driven by technological progress giving rise to new and diverse ways of exploiting works. There was also an obligation to bring Polish copyright law in line with EU regulations and the other relevant international law standards. This need for harmonization with respect to both the level of protection provided under the different legal systems and to specific legal provisions is determined by the freedom of movement of people, goods and services (Bleszynski, 2005:339).

## ***2.5 Processes of unification, harmonization and its implications on shaping permitted use***

The scope of permitted use provisions was influenced by the process of shaping copyright legislation itself. A close look into the history of establishing copyright law in Polish territories allows a better understanding of the approach to permitted use and related provisions, not only by legislators but also by society. The preceding historical review shows how important a role historical events have played in establishing permitted use as part of copyright legislation. Understanding how Polish copyright legislation been shaped shows that access to education and culture were increasingly important for society. Therefore, a need for defining permitted use more precisely emerged.

The specific historical conditions, cultural background, national legal traditions of other countries and legislation regimes have shaped Polish copyright legislation and protecting intellectual property of authors. The Partition period brought territorial division and differentiation of copyright law applicable within Polish society, but at the same time provided access to the most developed copyright legislation at the time. A lack of an independent state did not result to a lack of copyright legislation. Polish authors were creating their works under three different copyright legislations and had a choice of which one would be applied to them by moving to a particular part of the partitioned Polish territories. The creator decision on what copyright regime should have been applied to them was determined by the level of copyright protection offered by the law, but was also often based on the freedom of expression and creation allowed by each regime to Polish society and authors.

The three existing different copyright legislations regulating Polish authors and creators until 1926 resulted to having a robust base for shaping a first Polish Copyright Act in 1926. The process of copyright law unification started once the partition period in Polish history had ended. Besides government, organizations, institutions and lobbies were taking part in the unification process, having interest in and exerting influence on those fields where copyright would apply. A Legislative Committee (*Komisja Kodyfikacyjna*) was established with Professor Fryderyk Zoll as the main referent (*referent*) and author of copyright drafted act, and Jakob Litauer as a co-referent (*koreferent*). In addition, many well acclaimed lawyers were working on the new copyright legislation: Leon Petrazycski (*Leon Petrażycki*), Stanislaw Wroblewski (*Stanisław Wróblewski*), Włodzimierz Dbalowski, Zenon Przesmycki, A. Gorski, J. Markiewicz, Henryk Konic and others. The following organizations were involved in the process of building the final act: the Academy of Fine Arts in Cracow (*Akademia Sztuk Pięknych*), the Architects Society in Warsaw (*Koło*

*Architektów w Warszawie*), the Trade Union of Polish Writers in Warsaw (*Związek zawodowy Polskich Literatów w Warszawie*), Polish Academy of Arts and Sciences, University Teachers' Society including schoolbooks publishing authors section, cinematography experts. Opinions and conclusions were also submitted by the Bar Association in Warsaw, the Bar Chamber in Cracow and *Przemysł*, the Primary Schools Inspectorate (*Naczelny Inspektor Szkolnictwa Elementarnego*), the Writers and Journalists Society in Warsaw.

The history of Polish copyright legislation has deep roots in European Copyright Law history. Through the enforcement of foreign copyright into Polish territories, Polish society, authors and creators were directly associated with European achievements in this field, especially through German copyright which at that time was leading European legal standards. Therefore it was not surprising that Professor Fryderyk Zoll based in many aspects his Polish Copyright Act project on German copyright law (Ferenc Szydelko, 2000:243).

Polish authors, publishers and producers accepted and respected foreign copyright law excluding censorship and did not reduce their artistic activities. Therefore, a lack of unified and national copyright law is not thought to have adversely affected on cultural development within Polish society.

In the case of Poland the process of establishing copyright legislation was disturbed by historical events, causing disruption and turbulence in implementation. Due to WWII the work on developing or amending copyright law was stopped, and it was not possible to implement Polish law in territories incorporated or being occupied by the Nazis or Soviets.

After WWII Poland became a state controlled by the Soviets. The approach to intellectual property changed as communism did not allow private property to exist. The State was controlling intellectual property not only through censorship but also through copyright law. During the period 1952-1989 the social approach to copyright and intellectual property was subject to change. The social attitude to use intellectual property was shaped in the shadow of the communist system, where there was no a clear link between the author and their right to protect their authored property. Communism assumed that all property should belong to the state, and through the state to everyone. The implication of this political doctrine was that using intellectual property of others became an automatic

process, not taking into consideration any legal implications which may arise. Private and public permitted use of works expanded. Social attitude transcended prior legal limits, and society's legal behaviour towards copyright changed. The Polish education sector was fully state-controlled and educational establishments benefited from this broad scope of permitted use. After 1989, this created confusion in defining the scope of permitted use within society.

After the collapse of communism Poland started its transition to a democratic state and market economy. Transition required deep legal reforms also regarding copyright law. A new Copyright Act was introduced in 1994 and contained provisions unified with European Union (EU) copyright legislation. The Copyright and Related Rights Act passed by Polish Parliament on 4<sup>th</sup> February 1994 replaced the Act of 10<sup>th</sup> July 1952 on Copyright Law, deemed inadequate with regard to the ongoing economic situation in a country undergoing far-reaching transformations. However, despite the new copyright regulations, attitudes towards using intellectual property in society were still connected to those developed during the communist era. This supports the hypothesis that political and historical factors can cause turbulence in the implementation of law, and the development of lawful social attitudes to copyright law within society, including in education. In turn, this has also impacted the process of defining the scope of permitted use in the legal doctrine.

The new copyright law incorporated the principles of protection included in international conventions. It also took into consideration the reality resulting from the new techniques of recording and reproducing images, sounds, data processing, storing and transforming. The scale and structure of the exploitation of author's works was enlarged and created conditions for free access to them (Kierzkowska and Drozdowska, 1994:8). Moreover, the development of technology and digitization within society stimulated progress of copyright legislation including permitted use issues. The Act also addressed harmonization of the interest of authors with those of the public who want to have the easiest possible access to cultural goods, and the opportunity to utilise the latest technological advances to this end.

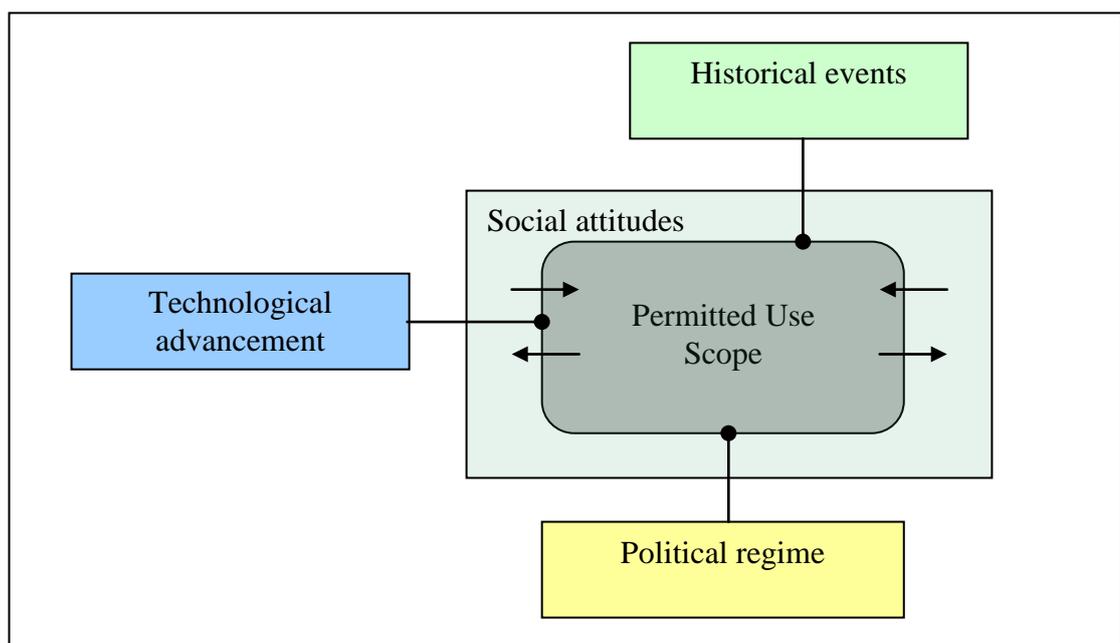
Harmonization manifests itself above all in the provisions concerning private use and public permitted use of cultural goods. This solution fulfils the basic provisions of Art. XVI of the International Covenant on Economic, Social and Cultural Rights, adopted by

United Nations' General Assembly (1966) and ratified by Poland. The obligations resulting from that Covenant impose upon its Member States the duty to secure free access to cultural achievements, libraries, museums, etc. Meeting these requirements has become possible by including statutory licenses in the Act, in the first place for public libraries, research institutes, and centres for scientific and technical information and documentation, which allow them to access copies of published works, and make them accessible to the public, within their statutory tasks (Kierzkowska and Drozdowska, 1994:10-11). The provisions pertaining to permitted personal use and public use by scientific and educational institutions and libraries for educational purposes are likewise not applicable to computer programs (Kierzkowska and Drozdowska, 1994:19). Thus, the level of the protection of intellectual property in the education sector has been gradually increasing by absorbing and implementing copyright legislation. At the same time, the scope of permitted use has expanded, and has also become more rigid.

### 3. Permitted use in Polish Copyright Law through the 20<sup>th</sup> century

This chapter focuses on the issue of permitted use in educational establishments during the 20<sup>th</sup> century in Poland. Permitted use as a part of copyright law is strongly affected by various historical, political and technological developments. The historical and political conditions and the advancement of technology created a requirement for defining the scope of permitted use and its implementation relevant to societal needs and its stage of progress. The historical review of permitted use in Polish legislation during the 20<sup>th</sup> century shows that copyright law responds to the historical circumstances and political systems. There is also a strong link between the stage of technological development and the scope of permitted use.

Moreover, social attitudes shape the scope of permitted use provisions and *vice versa*: the scope of permitted use creates social attitudes towards using copyright materials within that permitted use scope. However, social attitudes are also shaped themselves by the factors mentioned, namely historical events, technological advancement, and the political regime. Thus, factors affecting the scope of permitted use formed within copyright legislations can be illustrated in the following figure:



**Figure 1: Factors Affecting the Scope of Permitted Use**

### *3.1 Definition of permitted use in Polish Copyright Law*

In order to define permitted use, there is a necessity to explain copyright first. A crucial issue for our research on the historical developments of Polish Copyright is to clarify the term of copyright law within Polish legal tradition and literature.

The first use of the term of copyright was in the 1861 convention between Russia and France, and on the 1862 convention between Russia and Belgium, which were also implemented in Polish territories controlled by Russia in so-called Kingdom of Poland (Dbalowski and Litauer, 1922:3-4). Further work to define the term ‘copyright law’ in Polish legislation was done by a Senate decision (the lower Chamber of Parliament) in 1867. This introduced a definition of copyright as a right to possess intellectual and artistic outcomes termed ‘property’, which cannot be fully understood according to the Art. 544 Civil Code, but having a special kind of legal property attribute which should be respected.

The definition of copyright law and its essence was academically analyzed for the first time by Jerzy Markiewicz. The understanding of copyright by Markiewicz underlined a necessity caused by social interest to create copyright law as a new branch of law (Dbalowski and Litauer, 1922:5). The first stage of defining copyright law was to place this term within the legal system.

In 1869, the Russian censorship act was enforced in the Kingdom of Poland, officially introducing a term of “literary and artistic works property”. After that, for 40 years until the 1911 Copyright Act, there were a very limited number of sources, juridical and academic, published on copyright issues in territories of the Kingdom of Poland (Dbalowski and Litauer, 1922:6).

In the Galicia region which was under Austrian rule, despite the existence of the 1895 Copyright Act, the situation regarding the theoretical base of copyright was similar. Only certain academics and lawyers, such as Professors Rosenblatt, Gorski, Zoll, and Till analyzed these issues. The main contribution to the field was introduced later by Professor Zoll who pointed out, in his drafting of the first Polish Copyright Act, that copyright is transferable when involves economic property rights, but is permanent regarding authorship (Dbalowski and Litauer, 1922:8).

At the beginning of the 20<sup>th</sup> century, defining copyright law focused on the issue of exceptions and limitations of related legal provisions. The educational purposes and accessibility to knowledge was a fundamental base to develop and introduce permitted use.

Nowadays, the regulation of permitted use is defined as a set of provisions permitting to use works protected by copyright without the authors' permission (free of charge or payable). Regulations of permitted use are introduced in copyright acts to protect the public interest in education, scientific research, freedom of speech, promoting cultural goods and accessing information (Barta and Markiewicz, 2010:133). Permitted use is introduced in two forms: public and private. This is a limitation of the scope of authors' economic rights, but not a limitation of its implementation *per se*.

In the English copyright legislation, the concept of permitted use is known as the copyright exceptions and limitations. Exceptions are defined as provisions allowing a person to carry out an exclusive act regarding a copyright work, without having to remunerate the author and owner, whereas limitations are provisions that allow a person to do an exclusive act, in return for paying remuneration of some kind (Aplin and Davis, 2009:146).

Art. 35 of the 1994 Copyright Act has a significant role for the interpretation of permitted use in the Polish legal doctrine: "the permissible use must not infringe the normal use of the work or violate the rightful interests of the author." The source of these provisions lays in the "Three-Step Test" setting boundaries to the limitations and exceptions on the copyright holders' rights. Exploitation of works within permitted use provisions can be allowed under the following circumstances:

- 1) in certain special cases;
- 2) in cases that do not come to conflict with the normal exploitation of the work;
- 3) in cases where use does not unreasonably prejudice the legitimate interests of the author / holder of rights (Barta and Markiewicz, 2010:136 -137).

The three-step test appears in the Bern Convention, Art. 9 (2), Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Art. 13), the WIPO Copyright Treaty (WCT, Art. 10), the WIPO Performances and Phonograms Treaty (WPPT, Art. 16), and several European Directives to which Poland is a signatory.

The interpretation of the three above-mentioned conditions, and in particular the second condition, seems to be heavily in favour of the interests of the author. However the interest of users of copyrighted materials should be taken into account if copyright laws are to maintain the delicate balance between the interests of authors or those holding property rights of works, and the interests of users (Sikorski, 2010:52). The three-step test has been criticized for not providing a balance between public interest and copyright holders. Critics argue that the public interest is not emphasized enough (Barta and Markiewicz, 2010:138 - 139).

### ***3.2 Permitted use under the main Polish Copyright Acts***

The education sector plays an increasingly significant role in modern society. Therefore there is a need to understand how the process of making works accessible for educating a new generation is regulated by copyright law. A historical review of these issues is presented below, with an emphasis on pertinent legislation enacted during the 20<sup>th</sup> century.

The scope of permitted use has been developed and precisely defined through the ages. In this chapter, the focus is on presenting and analyzing three of the most significant Polish acts on copyright in 20<sup>th</sup> century, through a perspective of permitted use provisions and related content. Firstly, the 1926 Copyright Act provisions including the 1935 Amendment Act are presented. Then, a presentation of the 1952 Copyright Act follows. Finally, the 1994 Copyright and Related Rights Act is discussed together with a comparative analysis of those three acts with regard to permitted use issues.

### *3.2.1 Permitted use under the 1926 Copyright Act*

The 1926 Copyright Act contains provisions on permitted use in the second chapter, Arts. 13-19. The Act emphasizes the importance of permitted use issues covering the fields of literary production (Art.13), music (Art.14), drawing, painting, sculpturing, architectural works and photography (Art.15). Art. 16 permits the use of the quotation right for fields identified in Arts. 13-15, under the condition that the work's source and name of its creator are provided.

Art. 13(3) permits the quotation of short parts of lectures, speeches and other scientific and literary works for explanatory and teaching purposes. There is also permission to quote a maximum of three short works from one work, under the condition that they were already published in books; in the case of anthologies (books with collection of works linked by the same factor or author), it is permitted to copy fragments of works of other authors from both books and newspapers, but only after the author's death.

The fundamental condition to lawfully incorporate works in learning and teaching activities was their earlier publication and dissemination. In addition, regarding anthologies the condition of incorporating works after the author's death had to be met (Ritterman: 1937:101).

Art. 13(3) had a crucial importance for disseminating knowledge and scientific and cultural development. The aim of law-makers was to make scientific works and literature accessible for society. Therefore it is permitted to incorporate to autonomous work a minor work or fragments of a work. There must be relevant links between a new autonomous work and the incorporated work. Mechanical or automatic work incorporation is not allowed by Art. 13 (3) (Ritterman: 1937:101),

Art. 13(4) allows publishing short extracts of published or announced works. Art. 13(5) says that a play can be performed, but not in theatre and not for commercial purposes.

Art. 13 (6) allows the incorporation of minor fragments of poems or short poems as lyrics of music compositions. This provision was transferred from German copyright legislation to stimulate development of song compositions. The provision limits the rights of poets

and was not fully compatible with Art. 8 (2) establishing co-ownership of authors. Copyright of a music composition with a lyric incorporated from a poem was an exclusively property of composers. Therefore the composers could independently decide on the dissemination of the work and all economic rights belong to them (Ritterman: 1937; 103- 104).

Art. 14 contains provisions regarding music works: clause 14(1) permits to quote already published fragments of music composition or short music pieces in scientific works and in literature or in schoolbooks. Arts. 15 and 16 contain provisions on painting, sculpture, works of architecture and photography. Permitted use is granted under the following provisions of Art. 16:

1. to exhibit works but not for commercial purposes;
2. to include works' reproduction in scientific works and schoolbooks or using for explaining lectures if the work was already made available to the public;
3. to copy works in temples or museums which were purchased directly for them, however copying should be done according to rules established by the appropriately entitled body;
4. to reproduce artistic works permanently exhibited in public roads, streets, squares, gardens by any of artistic or reprographic technique; however not in the same size and not for the same use; architectural works can be reproduced but only their facade; inside fields of temples and public buildings can be reproduced;
5. to change forms of exploitation from sculpture to painting or graphic and vice-versa;
6. to build according to published plans, descriptions, models and building pictures if their author did not reserve exclusive right to build;
7. to allow reproduction of photographic works, but not in their exact photographic form or similar.

Art. 17 introduces a private permitted use right applying to all works excluding building according to architectural work of others. Art. 18 contains provisions on making portraits and permission of their displaying. Art. 19 contains provisions on applying copyright to correspondence and letters.

The 1926 Copyright Act was amended in 1935, when significant changes to permitted use regulations were made. A new term in copyright of a mandatory licence (Art. 16) was

introduced containing the following provisions. The Minister of Education and Religious Affairs could authorize a dissemination of published work by radio broadcasting in case where there would be significant public interest and utility, even without permission of an author or an owner of economic copyrights. The decision of the Minister of Education and Religious Affairs for the authorization sets a just compensation for authors or economic right holders, delivered in written form. The decision could be implemented by the entitled body after the compensation has been paid or sent to a deposit at the court.

Art. 16 was based on provisions of Art. 99 of the 1921 Polish Constitution and harmonized with Art. 11 of the Bern Convention amended in Rome 1928. Expropriation was permitted only for high public utility purposes. High public utility in a field of works is defined as the works' social, educational, cultural and political value for society and the state, whose dissemination is in the interests of the whole society. The aim to deliver sufficient and fast dissemination of works to the public could be met by using radio broadcasting. That was the reason for introducing mandatory licence in this field of exploitation (Ritterman, 1937:110-111).

### 3.2.2 Permitted use under the 1952 Copyright Act

A new copyright act was introduced in 1952 to meet the requirements of the communist political system and its societal visions. In contrary to the 1926 Copyright Act, there was no separate chapter devoted to permitted use regulation. However, these issues were regulated as a part of the chapter on defining the content and scope of copyright protection. A novel approach was introduced by giving the right to convey authors' rights to the communist government. Art. 16 (1) pointed out: "in those cases justified by need of dissemination of knowledge and culture, the Government Council can allow without an authors' permission or their lawful successors:

1. to disseminate work in a defined way;
2. to allow for an overhaul or modification of a work in order to adapt it to a stage performance, film or radio broadcast. However an author has priority to overhaul or adapt his/her work".

Art. 16 (4) says that an author or his/her successors are entitled to remuneration by a person who disseminates a work or performs an adaptation upon a Government Council Order. The amount of remuneration is regulated by rules stipulated in the authors' remunerations schedule. This schedule was issued by the government.

From the perspective of permitted use applied in the education sector, the relevant provisions contained were the following. Art. 17 says that the Government Council can grant an exclusive right of publishing particular individual works or collective works of the same author to community organizations or units of the societal economy (*jednostka gospodarki uspołecznionej*) with retaining provisions of Art. 16 (2-4). Art.18 (3, 6, 7) allowed in literary activity (i) quotations of short fragments of already published lectures, speeches, others works and whole short published works for explaining or teaching purposes; (ii) dissemination of a published work by lending out, delivering lectures or recitation in the case of not charging a fee for those; (iii) performance of a published stage work by amateurs if not charging a fee. Art. 19, in fields pertaining to music, allows (i) quotations of short fragments of already published work or whole published short works in radio broadcasting, scientific works, literature and schoolbooks; (ii) dissemination of published music pieces by lending out, delivering lectures or performing in the case of not charging a fee, for teaching purposes or performing for public celebrations if there is no

remuneration for performers; (iii) performance of already published pieces in club rooms, cultural houses (*domach kultury*), clubs when not charging a fee. Art. 20(2) in the field of arts allowed the use of reproductions for teaching purposes if the work was exhibited to the public.

The communist regime applied censorship widely in every sphere of public and social life, regulating the content of artistic works and related dissemination rights. Essential authors' rights were abandoned. Therefore, the scope of copyright protection given by the 1952 Copyright Act was not adequate. This evidences the influence of a particular political situation and conditions imposed on the actual scope of copyright protection applied within society, which in this case was considerably reduced by censorship.

Lack of respect towards copyright protection by the communist regime caused turbulence in the development of lawful social attitudes to copyright law within society. The case *Bozena B vs Publishing Office "Ruch"* (dated 22.10.1976 III CRN 150/76 OSNCP 1977/9 item 150, LexisNexis no 352533) indicates a glaringly evident lack of copyright protection awareness and legal limits of a defendant. The plaintiff sued the Publishing Office for photographing, publishing and disseminating the plaintiff flowers' composition in the form of a post card, presented at an exhibition without including the author's name. The court decision was issued in favour of the plaintiff.

The 1952 Act was not a piece of Polish legislation that was concluded and implemented freely and independently. It was strongly influenced by the communist approach to the role of law within society as enforced by Soviet Russia in all their satellite states after WWII. However, the structure and most of its provisions were based on previous Polish copyright law. The act extended public and private permitted use considerably, not only by the above-mentioned provisions but also by significantly shortening the time of copyright protection to 20 years after the authors' death (Art. 26). This gave society broad access to cultural and educational goods, but at the same time compromised the authors' intellectual property. Based on this legislation, changes occurred in attitudes within society towards using published works.

### 3.2.3 Permitted use under the 1994 Copyright and Related Rights Act

One of the main premises in Copyright Law proposes that the right of the author can be limited because of the public interest. This can take the form of private and public permitted use (Maciąg, 1996:76).

Current legislation on permitted use for educational establishments in Poland is contained in the 1994 Copyright Act. Art. 29 of this act defines two forms of works' incorporation that can also be used for educational purposes. The first of these provisions has been formulated in Art. 29 (1) as follows: it shall be permissible to reproduce in the form of quotations, works that constitute an integral whole, fragments of disclosed works or the entire contents of short works to the extent justified by explanation, critical analysis or teaching, or by the laws of the creative genre concerned.

An analysis of the limits to quotation within permitted use referring to Art. 29 (1) reveals four important dimensions: i) the quoted work properties; ii) the position of quotation; iii) the purpose of using the quotation; and iv) supplying references of the quotation (Barta and Markiewicz, 2010: 162). The quotation must be already disseminated to be lawfully used and the quotation right applies to whole works or fragments of works forming an individual piece of creative work. The essence of quotation is incorporating unchanged fragments of others works. However it is lawful to use a fragment of work being translated by the user themselves. Legislation and law courts decisions do not provide regulations regarding the size of quoted works. However, "the quoted fragment or whole work must be used in proportion to the created work, securing the creation of a new, independent work." (Supreme Court decision, 23.11.2004, I CK 232/04 OSNC 2005, no 11, item. 195, OSP 2006, v. 5, item. 54; LexisNexis no 370502).

According to Art. 29 (1) the quote can only be used in one work. There is allowance for incorporating quotations of various forms. A quote can be incorporated only to constitute an integral whole work. This causes an interpretational lack of clarity when this provision is applied to anthologies and collections. In this case, the leading interpretation is that the phrase "to constitute an integral whole work" is a form of work defined by Art.1 of the 1994 Copyright Act excluding works defined by Art. 3 of the Act. According to this interpretation the law court decision on case *Andrzej vs "A" SA* dated 14.06.2006 (VI ACa

1012/05, OSA 2007, no 12, item 36. p. 56; LexisNexis no 402601) points out that “ using a quotation in anthology by its definition is allowed within the scope of permitted use only for educational and scientific purposes.”

According to Art. 29 (1), a quotation can only be used in the case when it is closely related to the topic of work being created. Otherwise the conditions of Art.29 (2) must be met. Additionally, the quotation is not allowed when the purpose is to reduce the amount of work in creating one’s own discourse or building an argument. Further, Art. 35 does not allow the use of quotations in a form which could eliminate the need to refer to and read the original work.

Another important aspect of purposeful use of quotations is the definition of rights governing a given kind of creative activity. The term of “rights governing a given kind of creative activity” used in Art. 29 (1) implies accepting “rights” in their meaning as “recognized customs” of quoting in the particular kind of creativity. It does not mean a general freedom of quotation based on a need of a certain kind of creative activity. This implies that a quotation can be used to modify the original meaning or character of the quoted work, for example in form of a parody.

A quotation should be recognizable and it must be indicated in a way that provides information to the readers about which part of the original work is quoted. The author name and source of every quoted work must be provided. Users of quotations must respect not only the author’s copyrights but also their personal rights. Using a quote in deviated forms infringes Art. 16 (3) of the 1994 Copyright Act (default use of work). This law interpretation has been approved by a decision of the Court of Appeals in Warsaw on case *Tomasz P. vs Publisher of “P” and Jerzy B.* (18.09.2003 VI ACa 23/2003 23/2003; LexisNexis no 374260). A plaintiff sued a press publisher and its chief editor for using his election poster as a front cover of their magazine issue, without providing the name of the author and paying any remuneration. The defendants referred to Art. 29 (1) of the 1994 Copyright Act. The Court decided that the prerequisites laid down by the Art. were not met and decided in favour of the plaintiff.

To make use of the quotation right without infringement, the following aspects should be observed:

- a) length (size) of the quote;

- b) the way of its exploitation;
- c) its role in, and its importance for the new work.

The second form of quotations allowed by Art. 29 (2) concerns short disclosed minor works or fragments of more extensive works in manuals and anthologies. However, according to Art. 29 (3), the creator shall be entitled to remuneration in the cases referred to Paragraph 2.

One field where the permitted use concept is applied is in publishing works in schoolbooks, encyclopaedias, dictionaries etc. These issues are regulated by Art. 29 (2) of the 1994 Copyright Act, which allows the use of disseminated minor works or fragments of larger works for didactic, teaching and scientific purposes in schoolbooks and reading books (*wpisach*). In practice, this is causing interpretation problems, as it does not provide answers to the following questions. What does “minor work” mean, and how long can the fragments be used for?

Important provisions for educational permitted use are further contained in Art. 34 and Art. 35. Art. 34 stipulates that it is lawful to make use of works within the recognized limits of use, on the condition that the creator and the source are expressly mentioned. Their creator shall not be entitled to remuneration unless the law provides otherwise.

However there is a question how does the word “source” should be interpreted and what information should be supplied - in particular whether providing the source title is satisfactory or more detailed information should be supplied, including full references. Referring to the case *K.T. vs. Department of Organization Health Economics* dated 29.12.2000 I ACa 768/2000; LexisNexis no 3118799, extensive interpretation should be applied, but with the limits set by information accessibility. A plaintiff sued a publisher and authors of a book for not supplying the plaintiff surname, providing a mistaken title of her work, and not supplying full and correct reference to her work. The court passed a sentence in favour of the plaintiff based on Art. 34 of the 1994 Copyright Act.

Also, regarding copyright related rights, there are regulations applying copyright exemptions, and thus permitting use. For example, Art. 100 of the 1994 Copyright Act stipulates that the exercise of rights in artistic performances, phonograms, video grams and programme broadcasts, first editions or scientific and critical editions, shall be subject to the restrictions included in Arts. 23-35.

One of the main forms of using works is reprography, used widely in education within the scope of permitted. Art. 29 (2) includes the expression of, “more extensive works in manuals and anthologies” to describe where permission for teaching and scientific purposes can be applied by inserting minor disclosed works or fragments. However, there is no legal definition of “manuals” and “anthologies”. Therefore, there is a need to rely on linguistic interpretation (Marcinkowska and Bukowski, 1997:92).

The conditions which have to be met in order to publish authors’ works in manuals and anthologies are that:

- (i) the work must be already made available to the public (Art. 6 (3));
- (ii) disseminated work shall mean a piece of work which has been already made available to the public in any way by its author's permission (Art. 6 (3));
- (iii) collection of incorporated works must be in the form of anthologies, schoolbooks (manuals) or reading books (*wpisów*);
- (iv) collection of incorporated works must be used for didactic or scientific purposes;
- (v) incorporating of works must meet the conditions laid down by Art. 34 and 35 of the 1994 Copyright Act;
- (vi) an author shall be entitled to remuneration.

Another issue which should be considered in defining the scope of permitted use in light of Art. 29 (2) is the definition of “minor disclosed works” and “fragments”. The act does not define any criteria of how to differentiate “minor works” and those “longer ones”, relying on examples only. Consequently, there is a need to build further on the definition of “minor disclosed works”, taking into account not only the length but also the type of the work in question, for example literary works, artistic works or photography (Marcinkowska and Bukowski, 1997:92).

Better regulation in this respect can deliver enhanced, more appropriate and adequate ways of using works by educational establishments. Taking into account a wider spectrum of criteria in defining “minor disclosed works” can result to better management of authors’ rights, and more reliable tools becoming available to the educational establishment to access scientific and cultural works.

Similar difficulties with interpretation have occurred regarding the phrase “fragment” in Art. 29 (2). The literal (word-for-word) interpretation of the Art. indicates that there is a

necessity to relate the particular fragment used to the whole work (Marcinkowska and Bukowski, 1997:93).

Interpretation of Art. 29 (2), (2<sup>1</sup>) has caused legal confusion with regard to the necessity of referring to the Art. 35. Provisions of Art. 29 (2), (2<sup>1</sup>) have not been based on precise terms as “minor works”, “normal use of the work”, “the rightful interest of the author”. There are also no legal cases and no thorough analysis of the legal doctrine in this respect.

Another interpretational confusion of Art. 29 (2), (2<sup>1</sup>) is caused by term “fragments of larger works”. It can be assumed that it is permissible to use one fragment or more than one fragment from the same work. Both versions can be applied however, which results to confusion in this regard.

Permitted use stipulated in the provisions of Art. 29 (2), (2<sup>1</sup>) can be restricted referring to the Art. 35 of the Act in following circumstances:

- (i) size of the incorporated work: according to the 1994 Copyright Act, in the case of longer works such as novels or longer narrative stories it is necessary that the incorporated fragments will not substitute for the value of reading the whole original work;
- (ii) incorporating works not relevant to officially published national curriculum;
- (iii) incorporating works or its fragments which are pointed out by officially published national curriculum as needed to be read in full form;
- (iv) incorporating no more than three works of the same authors with exemption allowed by national curriculum;
- (v) incorporating more than three fragments of the work of the same author should be limited in the same way as full works used;
- (vi) incorporating works dedicated by authors for educational purposes. (Barta and Markiewicz: 2010; 172 – 173).

Legal interpretation of Arts. 29 (1) and 29 (2) (2<sup>1</sup>) applies especially to schoolbook publishing, where works or their fragments can be incorporated as a quotation without remuneration for authors (Art. 29 (1)) or incorporation can be based on provisions of Art. 29 (2) (2<sup>1</sup>) with paid remuneration. The leading interpretation in this respect leads to the conclusion that works or its fragments incorporated in the descriptive part of schoolbooks

should be analysed in the light of Art. 29 (1), and Art. 29 (2) (2<sup>1</sup>) is relevant to the sources' part of the schoolbook.

A creative work of authors is strongly linked with the cultural background and heritage which were created by previous generations. Cultural development requires the exchange of ideas based on the 'giving and obtaining' rule. Therefore, there is a clash between the rights of authors to benefit from their work and the right of whole society to be entitled to benefit from cultural heritage, thus progressing towards making further cultural contributions to culture.

### ***3.3 Conclusions***

Looking at Polish copyright legislation, and focusing on the permitted use concept and related issues through a review of the historical background and recent developments, the following conclusions can be derived.

Firstly, the scope of permitted use was expanding due to the ever-increasing growth of the education sector and its influences, as well as social transformation towards the information society. In 1935, mandatory licensing was introduced in radio broadcasting to provide wider access to information and knowledge.

In 1952 the communist state exercised regulatory control over the balance between the public interest and intellectual property protection of individual authors. However an equitable relationship between the authors' rights and the public domain benefits was not reached. The individual authors' rights were limited and, at the same time, public access to creative achievements was broadened, but remained under the control of the state. Education, understood as a process of transmitting accumulated knowledge, skills, customs, experiences and values from one generation to another, was considered throughout the 20<sup>th</sup> century as the most important reason to limit copyright law. The communist regime legislative effort to make works accessible to the public, also for education purposes, did not seem to improve on this aspect, as the relationship between authors' property rights and the public interest was once again structured in a biased manner.

After communism collapsed and a new capitalist economy was introduced in Poland, copyright legislation started to be harmonized with European and global standards. Protecting individual creative works became once again the central point of copyright law. The three steps test has been applied regarding the scope of permitted use and setting up its limits. At the same time the education sector in Poland has been expanding in terms of infrastructure, types of establishments, and available curricula.

Looking at developments of permitted use through this historical perspective a conclusion can be drawn that permitted use provisions were becoming more and more detailed and precise, subsequently making permitted use narrower in its provisions and less flexible towards its interpretation and implementation. The demands of society to cover new fields of exploitation of permitted use implementation, also within the education sector, resulted to adding new regulations which were shaped narrowly so as not to violate authors' rights.

However, in the information society, where there is an accelerating pace of technological changes occurring, there is a strong need for more openness in copyright law, including permitted use regulations.

## 4. Permitted use in the light of developments in Polish education

### 4.1 The main developments in the Polish education sector since the 20<sup>th</sup> century

The education sector in Poland has been progressively developing throughout the 20<sup>th</sup> century. At the start of the 21<sup>st</sup> century curricula and programmes are understood to be well designed and implemented at a European standard. The last two decades are viewed favourably in terms of good progress achieved with building educational infrastructure, forms of education and related services, and the societal impact of education.

Below a brief outline of major developments in the education system is presented as a basis to an analysis of copyright law influence in educational establishments.

#### 4.1.1 *Education in Interwar Poland*

After WWI Poland had no unified school network, no common educational traditions, and the country was in a bad economic situation. Therefore, the implementation of comprehensive compulsory education was influenced by: the under-developed network and low level of organization of primary schools, low number of teachers, and a difficult economic situation. The number of schools grew very slowly (Zasztowt, 1990:390-391).

In the years 1918-1922 some organizational capacity to support universal education was established, which survived largely unchanged till 1932. Small progress was noted in improving the organizational level of schools but in rural areas it remained rather low. However, despite the slow growth in the number of children falling within the umbrella of universal education, a large part of them did not benefit from schooling. This was due to the children's frequent involvement in agricultural community work, lack of financial resources for clothing, shoes, school aids, often living at a long distance from schools, difficult weather conditions, and especially a low level of awareness among the rural population of their children's need for education.

In the school years 1921-1928 there was a significant decrease in the number of compulsory school age children. The decreasing number of children in connection with a slow increase in the number of children attending school resulted in the nominal

improvement of compulsory education implementation. Since the school year 1927/1928, greater numbers of compulsory school age children came in comprehensive education as a result of increased birth rates during the first postwar years. The increase in the number of compulsory school age children and the beginning of the economic crisis of the 1930s negatively affected Polish education. Serious reductions of financial expenditure on education were mainly responsible for that (Zasztowt, 1990:391).

The reform of the Polish education system was introduced by the Act of 11 March 1932. It was called the Jedrzejwicz Reform after its creator, Jerzy Jedrzejwicz. The reform established a uniform school system at the primary level which existed until the end of World War II. Three types of 7-year elementary schools were introduced and created, each of which had a different academic structure (Krasuski, 1985:180).

Rural children were disproportionately placed in Level I Schools (*szkoły I stopnia*). These offered the most reduced curriculum and whose graduates were not allowed entrance into secondary schools. Between the 1935-1936 school years, 75% of rural schools were of this type (Krasuski, 1985: 181). In particular, the vast majority of working-class or peasant children ended their schooling with elementary school because they had little or no access to continued schooling, and sometimes lacked access to even the mandatory levels of schooling prescribed by the government. For example, according to statistical reports from 1937, 77% of village schools only went up to the fourth grade, a situation that did not provide any real chance for peasant children to move on to the secondary level, particularly in the east of Poland (Wroczynski 1996:262-3).

The reform introduced three types of schools – Levels I, II, and III – each providing a different scope of education. Level I schools offered the shortest program, and were the most common type of school in rural fields. Level III schools offered the most thorough, 7-year, educational program, and were most likely to be found in urban fields (Parker, 2003:136).

#### *4.1.2 Education in the Peoples' Republic of Poland (PRL)*

The educational system of Poland was under Soviet control during 1945-1989. Its administrative structure and the goals of schooling were codified in 1961. This was less of a reform than a legal acknowledgement of the *de facto* existence of a socialist system in

which Marxist ideology reigned supreme. The primary goal of education was to create good citizens who, above all, were of service to the state (Kwiecinski, 1982:123).

The attainments achieved by Polish education during the PRL period should not be overlooked. The communist system came closer than any previous system to bringing universal literacy to Poland, and secondary education became more accessible to poorer students than ever before. However, the spread of mass education also came at a cost in terms of lowering of overall quality of education (Hejnicka-Bezwinska, 1996: 29), the general loss of independent scholarly freedom, and the lack of development of analytical and critical thinking skills that are highly valued in education (Hejnicka-Bezwinska 1996: 11). Additionally, educators lost any sort of meaningful control over education, school leadership, or curriculum content.

#### *4.1.3 Education in the 3<sup>rd</sup> Republic of Poland: 1989 till present*

Currently the legal basis for the school education system in force is provided by the Act on the School Education System of 7<sup>th</sup> September 1991, including later amendments. In accordance with the above-mentioned Act, the school education system includes the following establishments: nursery schools, including integration divisions and special nursery schools; primary schools, gymnasiums, general and vocational post-gymnasium schools, including integration divisions, and special schools, sports schools, sports championship schools and schools of the arts; extra-school activity establishments, including artistic centres, continuing education and practical training establishments; psychological and educational guidance services; educational and correctional education establishments which organize care and education for children and young people entirely or partially deprived of parental care; adoption and care centres which initiate and support various substitute forms of family education; voluntary labour corps; initial and in-service teacher training institutions and establishments; educational libraries (Jung Miklaszewska, 2003:6).

Until the end of school year 1998/99, the school education system was organized within the following structure: nursery schools; 8-year (compulsory) primary schools; post-primary schools (3-year basic vocational schools, 4-year general secondary schools (*średnia szkoła ogólnokształcąca*), vocational secondary schools, 4-year technical and

vocational secondary school, 5-year technical vocational school, lyceums and equivalent schools, 5-year post-secondary schools.

After 1<sup>st</sup> September 1999, the compulsory system was reformed according to the Act of 8<sup>th</sup> of January 1999 on Provisions for the Reform of the School System. The following types of schools were introduced: 6-year primary school; 3-year gymnasium. The process of the implementation of the reform of the post-gymnasium school system, spread over several stages, was initiated on 1<sup>st</sup> September 2002 and will last till September 2005.

According to the Act on School Education in force, primary schools, gymnasiums and post-gymnasium schools may all be public or non-public. The turn of the '80s and '90s saw the establishment of a considerable number of non-public schools, hardly known in Poland previously. These schools were set up by various associations and private persons. Non-public schools are established and administered by legal or natural persons and public schools by public administration and local government agencies (Jung Miklaszewska, 2003:6-7).

#### *4.1.4 Links between historical developments in education and permitted use*

The Polish education system and Polish Copyright Law have been evolving through the ages. One of the main factors shaping education and copyright legislation was the occurrence of historical events changing social needs and demands. By analyzing the evolution of Polish copyright legislation within a historical context, and taking into account developments in education, four main phases in the evolution of Polish Copyright Law can be identified.

Looking at the period from 1795 to the present, I identify four phases, each with different historical circumstances which shaped structures and standards of education, and changed social needs towards the scope of permitted use in educational establishments. Phase I: the Partition Period 1795-1918; Phase II: the Second Republic of Poland 1918-1945; Phase III: Poland under Soviet control 1945-1989; Phase IV: the Third Republic of Poland 1989 till present. In these four periods of Polish history, changes occurred in political and ideological systems, economic and social circumstances. Societal independence also changed, shaping the links between and impacting education and permitted use.

In the first phase, Polish society was under Russian, Prussian and Austrian control. Three different copyright legal regimes were applied to the cultural creations of one nation. At that time, copyright legislation was in the process of being established and taking shape by responding to social needs. In terms of building a legal approach to the protection of copyrighted materials including permitted use, Polish society benefited during that time by accessing three different and well developed copyright legal regimes. The Partition period of Poland challenged society to its retain culture, traditions, and language. Education became a tool in this process, despite that there were no independent Polish educational establishments.

During this first phase, the scope of permitted use became important for educators and especially publishers in part due to a difficult economic situation. However, there was low awareness of the necessity to extend permitted use in educational establishments either among lawmakers or society. Permitted use provisions had an institutional dimension, impacting on institutions including publishers, rather than emphasizing benefits for society's individual members.

In the second phase of 1918-1945 (Second Republic of Poland), significant developments in copyright legislation occurred. There was a law unification process, and a growing importance of permitted use issues within society. There was also the need to establish and enhance education after a long period of non-existence of a national education system. During this phase the national education system was restored, however accessibility to schooling, especially in rural areas, remained rather poor. Educational establishments were challenged by financial difficulties. This situation did not serve to reveal the scope of influence on copyright limitations. Despite significant progress made in the field of copyright and introducing permitted use for educational purposes, there were rather limited direct and real benefits from permitted use in educational establishments. This remained so until WWII, despite an evident need and demand for providing education within society, and making this process easier for educators by offering benefits from limitation of copyright law. This aim was supported by introducing provisions on the quotation right and the reproduction right that applied to educational establishments and schoolbook publishers.

In the third phase of 1945-1989 when Poland was under Soviet control, the main influence on shaping copyright protection including permitted use came from the communist

regime's ideological approach to law. The full control role of the state was applied both to copyright law and the education sector. Thus the scope of permitted use and its usefulness for educational purposes were on the whole dependent on governmental decisions. The educational sector in Poland at that time went through a growth phase in terms of reducing illiteracy and building infrastructure. This created demand for accessing sources on large scale. However the centralized management of intellectual property often resulted to ineffectiveness and inefficiency in managing copyright protection and its limitations.

The Third Republic of Poland phase is marked by a wide social transformation process from communism to a democratic political system. This had an immense impact on the law system including copyright legislation, influencing the scope of permitted use. Another factor defining the scope of permitted use in educational establishments in this phase was the rapid and multifaceted development of technology. Maintaining the institution of permitted private and public use in the emerging reality of wide use of information technology is an issue with far-reaching practical consequences.

Education in Poland has been evolving in several aspects. Institutional changes occurred while systems, curricula, the effectiveness of education provision, ideological influences, and legal regulations have also been changing. From a copyright point of view, those factors have had their impact on shaping the scope of permitted use for educational purposes, as well as the scope of its implementation. Developments in education resulted to the introduction of better developed and accurate permitted use provisions, and their inclusion in copyright acts.

## **4.2 The case of schoolbook publishing by Ossolineum under Polish Copyright Law during the period 1934-1939**

This section presents the schoolbook publishing legislation under Polish Copyright Law during 1934-1939 and its implementation. The research provides an analysis of primary sources on schoolbook publishing contracts during this period concluded by the Ossolinski Institute Publishing House (Ossolineum) in Lviv, which at that time was located within Polish borders.

Ossolineum was established in 1817 in Lviv by Józef Maksymilian Ossoliński to form a cultural centre for the Polish nation. Until 1939 Ossolineum operated a library, publishing house and the Lubomirski Museum. In 1873 Ossolineum became a publisher of schoolbooks. Between 1878-1918 it had the exclusive right to publish schoolbooks in the Galicia region. After 1918 when Poland became independent, Ossolineum started publishing scientific works, and from 1933 onwards it resumed schoolbook publishing.

The table below presents several selected publishing contracts concluded between Ossolineum and schoolbook authors during the period 1934-1939. An analysis of the content and the structure of these contracts helps to identify links between the scope of permitted use and access of published educational materials.

Ossolineum reserved exclusive rights to the author's publications as the scope of transferred economic copyright was expanding and strictly executed, exercising control over the schoolbooks' publishing market and accessibility within education. Any author requirements of keeping their exclusive right to their work were not acceptable.

Publishing houses therefore played a very important role in regulating access to educational materials, especially at a time when there was no developed technology, e.g. reprographics, enabling the reproduction of works on a mass scale by individuals.

Therefore the dimension of permitted use in educational establishments was influenced by the scope of accessibility of schoolbooks and other educational materials. The level of accessibility depended both on the legal regime, and the technology available within the publishing sector.

The analysis of the Ossolineum contracts proves that publishing and disseminating educational materials were strictly controlled by publishers. It further shows that the implementation of permitted use provisions was based on extant legislation on educational materials' accessibility. The 1926 Copyright Act provisions on quotation and reproducing rights was of great importance for educational establishments. In particular, they seem to have supported schoolbook publishers to begin shaping the scope of educational materials.

*<please turn to the next page>*

<b>Date and place of contract</b>	<b>Name (s) of authors</b>	<b>Title of book (s)/ work</b>	<b>Scope of transferred economic rights</b>	<b>Additional conditions shaping a scope of economic right transferred</b>	<b>Comments</b>
26 <sup>th</sup> January 1939, Lviv	Zenon Alexandrowicz; Juliusz Balicki; Aleksander Brückner; Juliusz Kleiner; Stanisław Maykowski	Polish Literature High School Schoolbook Levels I – II	Exclusive economic rights transferred to Ossolineum	Prohibited: a) independent publishing; b) transfer economic right to third parties; c) create comparable schoolbook both independently or as a team	
19 <sup>th</sup> August 1935, Lviv	Antoni Wereszczyński	Knowledge about Contemporary Poland	Exclusive economic rights transferred to Ossolineum		Reprinted
31 <sup>st</sup> August 1934, Lviv	Antoni Wereszczyński	The Ancient State	Exclusive economic rights transferred to Ossolineum		Reprinted
15 <sup>th</sup> May 1935, Lviv	Antoni Wereszczyński	New Polish Constitution	Exclusive economic rights transferred to Ossolineum		Reprinted
2 <sup>nd</sup> December 1937, Warsaw	Wincenty Burek	Primary Schoolbook Level VI: part: Shop	Exclusive economic rights transferred to Ossolineum	Work cannot be published in any other periodical or anthology	
15 July 1937, Poznan	Stanisław Wasylewski	Readings about Poznan and Lviv for Primary Schoolbook level IV	Exclusive economic rights transferred required by Ossolineum	n/a	Author asked for exemption from transferring exclusive rights to publisher. Request was rejected by publisher; contract not proceeded.
31 <sup>st</sup> May 1937, Lviv	P. Gorasiczyński	Primary Polish Schoolbook Level V: fragment: Going to work	Exclusive economic rights transferred to Ossolineum	Work cannot be published in any other periodical or anthology	
2 <sup>nd</sup> June 1937, Lviv	Benedykt Hertz	Primary Polish Schoolbook Level V: fragment: New Scout	Exclusive economic rights transferred to Ossolineum	Work cannot be published in any other periodical or anthology	

30 <sup>th</sup> March 1936, Lviv	Joanna Broniewska	Primary Polish Schoolbook Level II: 13 fragments <i>(titles not readable from script)</i>	Exclusive economic rights transferred to Ossolineum; right to publish work in other Ossolineum's publications	Work cannot be published in any other periodical or anthology	
7 <sup>th</sup> March 1936 , Lviv	Józef Czechowicz	Primary Polish Schoolbook Level IV: 9 fragments <i>(titles not readable from script)</i>	Exclusive economic rights transferred to Ossolineum; right to publish work in other Ossolineum's publications	Work cannot be published in any other periodical or anthology	
11 <sup>th</sup> March 1936, Lviv	Halina Huszczyńska Hoffmanowy	Primary Polish Schoolbook Level III: 8 fragments <i>(titles not readable from script)</i>	Exclusive economic rights transferred to Ossolineum; right to publish work in other Ossolineum publications	Work cannot be published in any other periodical or anthology	
14 <sup>th</sup> February 1939, Lviv	Stefan Baley	Pedagogical Schoolbook vol. I: About Teaching	Exclusive economic rights transferred to Ossolineum	Prohibited: a) independent publishing; b)transfer economic right to third parties; c) create comparable schoolbook	
6 <sup>th</sup> March 1939, Lviv	Ludwik Chmaj	Two vol. of Pedagogical Schoolbook: 1) Community Role in Education; 2) National Pedagogic	Exclusive economic rights transferred to Ossolineum	Prohibited: a) independent publishing; b)transfer economic right to third parties; c) create comparable schoolbook	
26 <sup>th</sup> January 1939	Maria Dzierzbicka	1 vol. of Pedagogical Schoolbook: System of Education in Poland	Exclusive economic rights transferred to Ossolineum	Prohibited: a) independent publishing; b)transfer economic right to third parties; c) create comparable schoolbook	
27 <sup>th</sup> January 1939	Maria Hessen	1 vol. of Pedagogical Schoolbook: Education Abroad	Exclusive economic rights transferred to Ossolineum	Prohibited: a) independent publishing; b)transfer economic right to third parties; c) create comparable schoolbook	

**Table 1: Analysis of Copyright Contracts in the Ossolineum Case**

The Ossolineum case study also serves the aim of analyzing implementation of the 1926 Copyright Act as amended in 1935 and its impact on authors within the education field. The 1926 Act regulated publishing contracts issued according to Chapter IV of the Act – Publishing Contract (Art. 35-54). Another purpose of including this case study is to present the extent of which permitted use influences schoolbooks publishing within the 1926 Copyright Act.

Chapter IV of the Act on publishing contracts contained detailed provisions regulating relations between authors and publishers. Arts. 35-48 referred to literate and artistic works. Other fields of exploitation were separated and regulated by Arts. 49-54. This indicates the importance and relevance of publishing as an exploitation field at that time.

Art. 47 stipulated that despite the existing stock volume an author is allowed to publish a new edition of a work after 5 years from the published last edition, and 10 years in the case of schoolbooks and scientific works. These provisions supported the interests of publishers including Ossolineum. The right to publish new editions by authors was limited by time requirements, especially regarding educational materials where a long period of exclusion was applied.

The 1926 Copyright Act put publishers in a favourable and pivotal position with regard to educational works' accessibility and dissemination. The users and authors rights and their implementation were influenced to a large extent by developments in the publishing sector and technological advancement.

### **4.3 The “Switch on Poland” online schoolbook project**

Since the late the 19<sup>th</sup> century copyright and related rights have been evolving, as new technology was introduced and related changes in the marketplace occurred. Photography, sound recording, cinematography, broadcasting, photocopying, satellite, cable transmission and video recording have all posed their own challenges to the legislator. Several recent examples emerge from the convergence of computing and digital communication technologies. It therefore becomes crucial to adjust the legal system to new technologies in an appropriate way, so as to sustain and encourage the development of those sectors such as education, where culture and information benefit from the protection of copyright and related rights (Lung, 2008:77-78).

These new technology and law challenges apply to education by way of securing both creativity development and the authors’ rights and, at the same time, supporting educational establishments in delivering a robust platform for knowledge and skills attainment by society members. A good example of the application of information technology in education is the online schoolbook “Switch on Poland” project. The “Switch on Poland” project started on 1<sup>st</sup> of July 2011. It has been designed and developed by the Centre of Polish Education Abroad (*Ośrodek Rozwoju Polskiej Edukacji za Granicą/ORPEG*), implemented as part of the Operational Programme “Human Capital”, funded by the European Social Fund (ESF) in Poland. “Switch on Poland” is an online modular schoolbook for Polish pupils living abroad and attending Polish classes in a wide range of supplementary schools, such as Polish Embassy Schools or Saturdays’ Polish Schools all over the world.

The novelty of the project lies in the accessibility and modular structure of the schoolbook. Teachers, parents and pupils have easy access to the database of learning materials of Polish language, history and geography of Poland at three different levels of age and Polish literacy. The system allows one to create and print an individual, own schoolbook containing appropriate materials to the age and literacy of pupils. The content of the “Switch on Poland” schoolbook is based on a curriculum specifically designed for Polish pupils abroad.

One of the most important issues in the process of designing and building the educational internet platform “Switch on Poland” was dealing with the legal side of providing access to materials. The need emerged for providing a copyright law framework to the project. Accessible materials on the “Switch on Poland” platform can be used according to the Creative Commons license, excluding materials which are not covered by the license.

The Creative Commons copyright licenses create a balance regarding permitted use within the traditional “all rights reserved” setting that copyright law creates. The licenses give everyone, from individual creators to large companies and institutions, a simple and standardized way to grant copyright permissions to their creative work. The combination of tools and users is a vast and growing digital commons, a pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law.

Technical developments have thus brought about a new approach to legislation regarding the scope of basic fields of exploitation of works – dissemination and reproduction, private permitted use and provisions from public permitted use, first sale, collective management and many others. For the purpose of adjusting the law to the dynamically changing reality of new technical developments, many legal solutions were established and implemented. One of them is the open movements and licenses, namely open source and open content licenses (Wasileski, 2008:183). The aim of establishing these legal tools is to give authors an option to make their works accessible not only through permitted use provisions, but to go beyond their scope, thus expanding access to them in order to increase their influence and provide knowledge.

Creative Commons licenses are supplementary to the permitted use legal concept as follows. Permitted use has been introduced and implemented within copyright legislation in order to balance authors’ rights and the societal need of access to intellectual and cultural goods. However, the scope of permitted use in the legal doctrine, in both private and public affairs including permitted use for educational purposes is limited, especially in the digital environment. Therefore, Creative Commons has been introduced as a private agreement between authors and users to complement the existing legal standard of permitted use, towards meeting the rapidly growing need of information and knowledge accessibility more effectively.

Users of the internet can easily access materials published and disseminated on the basis of Creative Commons licenses, and can use them to a broad extent including commercial purposes. Therefore, permitted use of intellectual property is based upon i) copyright law and ii) a private agreement within the institutionalized system of Creative Commons. Those bases do not exclude each other and can co-exist, building a sphere of lawful public accessibility to intellectual goods.

The idea of using Creative Commons licenses took form in the Berlin Declaration on Open Access to Knowledge in Science and Humanities (2003). The main goal of the Declaration is to facilitate “ (the) disseminating (of) knowledge not only through classical forms but also and increasingly through the open access paradigm via the internet” (Berlin Declaration, 2003). The Declaration is based on two presumptions: 1) the author(s) or right holder(s) grant all users a free and irrevocable right to access, use, distribute, transmit and display the work publicly and to make and distribute derivative works in any digital medium for responsible purpose, subject to proper attribution of authorship; 2) provision of at least one online repository using suitable technical standards supported by an academic institution, scholarly society or government agency (Berlin Declaration, 2003).

Creative Commons licenses have thus been identified as an effective tool in extending accessibility to educational materials and supplementing permitted use in educational establishments. Creative Commons has been a thought out attempt to produce a more fine-tuned copyright structure, and replace the “all rights reserved” paradigm with a “some rights reserved” approach for authors who wished to do so. Indeed one of its purposes was to open access to educational materials (Boyle, 2008: 182-183). The Open Content and Open Access movements promote free exchange of knowledge and creative works. The Creative Commons organization, established in 2001, developed and made available a tool to facilitate individual administration, the so-called free licenses (Jastrzebska, 2010:34). Authors and creators of works have chosen to share their works with others under generous terms, at the same time reserving certain rights for themselves. Creative Commons licenses vary in terms of freedom given to the users. They can allow 1) to copy materials but not changing them; 2) to use freely but not for commercial purposes; 3) to use works completely free respecting personal copyrights of authors (Boyle, 2008:180-181).

Using Creative Common licenses by educational establishments indicates that permitted use provisions for educational purposes within the digital society do not secure an adequate

level of free access towards knowledge dissemination and teaching use. The organizations in charge of collective management of copyright and neighbouring rights were established to facilitate effective exercise of authors' rights. The reason why the first collective management organizations appeared in Poland at the beginning of the 20<sup>th</sup> century was the authors' inability to exercise personal control over the use of their work. The development of new technologies and the emergence of the internet enabled a return to individual administration.

The collective management organizations and Creative Commons have the same goal, namely to safeguard the authors' interests. However, their activities are different with regard to their assumptions concerning copyright management. Despite certain discrepancies, there are attempts by both organizations to create a model of exercise of rights that is beneficial for authors, especially in cases of making works available online. Both organizations have already undertaken cooperation in the Netherlands and Denmark, while in other European countries negotiations are conducted with a view to commencing similar processes (Jastrzębska, 2010:34).

The analysis of the "Switch on Poland" project within its legal copyright framework enables the following observations to be made. Legal permitted use provisions towards securing a sufficient and easy access to the educational materials does not fully meet this demand in the era of the digital society. Theoretically, the tool of Creative Commons can significantly support using works in educational purposes. However, in practice there is a rather reserved approach of authors and creators to transfer their rights towards educational establishments, due to the risk of losing economic benefits from publishing within the educational sector.

#### **4.4 Impact of permitted use on schoolbook publishing within the education sector**

The schoolbook publishing field has significant importance for the development of education, and at the same time is closely related to copyright law and permitted use. The content and forms of educational materials distributed by publishers are affected by the scope of permitted use. Permitted use provisions also regulate dealings among educational establishments, publishing houses and authors on educational materials.

The 1926 Copyright Act introduced provisions on private and public permitted use. These were applied in two main fields: the right of quotation, and the right of copying or reproducing. From a schoolbook publishing market perspective, at that time the quotation right was more significant. It was more important to secure the lawfulness of the content of books than protecting them against copying on a mass scale, which was technically difficult to achieve. Schoolbooks publishers did not assume that books can be replicated or copied by users on a mass scale, as neither the appropriate technology nor the resources to do so were available within society. The 1926 Copyright Act contained a broad and detailed chapter on publishing contracts protecting the economic rights of authors, and shaping transparent rules of publishing in the education sector.

At the start of the period of Poland being under Soviet control (1945-1989), the education sector was dynamically developing, as one of the communist government aims was to reduce illiteracy. Schoolbook publishing was fully controlled by the state and censorship was imposed. Implementation of permitted use in educational establishments was mainly dependent on governmental ordinances. In a situation that the publishing sector and application of permitted use provisions depended on an ideologically shaped communist approach, there was no clear correlation between permitted use scope and development of schoolbook publishing during that time.

After 1989 and the start of transition to a capitalist economy in Poland, there was a very dynamic growth of the publishing sector, including a market for schoolbooks. In 1994 the new Copyright Act was implemented. Developments in technology have been changing the way Copyright Law was implemented to address permitted use in educational establishments. Moreover Creative Common licenses were introduced and offered a supplement of permitted use rights within the education sector.

## 5. Permitted use legislation and its benefits for educational establishments in selected European countries

### 5.1 Scope of permitted use and its benefits for educational establishments

#### 5.1.1 *Scope of permitted use in educational establishments in Poland*

There has been an ever increasing expansion of fields of exploitation and implementation of Copyright Law in the education sector. At the start of the 20<sup>th</sup> century, the main fields of implementation of permitted use provisions were publishing and reproduction. Nowadays, exploitation has expanded to include the advanced and diversified digital forms of works used by educational establishments.

In defining the scope of permitted use applied to the educational establishments, two aspects should be taken into consideration. On the one hand there is the schoolbook publishing sector and related quotation rights to examine. In addition, reprography and photocopying materials for educational purposes should also be considered. The 1926 and 1952 copyright acts focused more on the first aspect, as reprography and photocopying technologies were not developed for use on a mass scale. Therefore, the 1994 Copyright Act was the first act dealing with using copied works in various forms on a mass scale within education.

The 1994 Copyright Act contains Arts. introducing regulations towards making copies for educational purposes, so that the need of materials accessibility in Polish society is addressed. Art. 27 points out that research and educational institutions shall be allowed, for teaching purposes or in order to conduct their own research, to use disseminated works in their original form and in translation, and to make copies of fragments of the disseminated work. Art. 28 points out that libraries, archives and schools shall be allowed: 1) to provide free access to copies of disseminated works as stated in their statutes; 2) to make or mandate making copies of disseminated works in order to supplement them, maintain or protect their collections; 3) to make the collection available for research or learning purposes through information technology system terminals located at their premises.

The 1952 Copyright Act did not contain a dedicated chapter to permissible use of protected works. Permitted use provisions were placed in the Subject Matter of Copyright chapter. This situation indicates that permitted use provisions were not particularly emphasized by the legislator who was ideologically orientated towards building a communist society. Permitted use scope was controlled and delivered not only by copyright law but to a large extent by the state, managing it through governmental ordinances. A substantial shortening of the copyright protection time was also introduced, from 50 years as stipulated in the 1926 Act, to only 20 years under the regulations of the 1952 Act. In most of its other provisions the 1952 Act was similar to the 1926 Copyright Act that was considered a model instrument enforcing a new copyright legislation. Those significant changes introduced and implemented had been towards applying the ideology of communism to the law, and thus to society.

With regard to permitted use, the 1926 Copyright Act introduced a clear structure of copyright limitations. Provisions on permitted use took shape in a dedicated chapter of the Act, thus emphasising its importance. Education and research were included as fields of applying permitted use regulations, and the reasons to establish limitations of economic copyrights were identified.

During the 20<sup>th</sup> and at the beginning of the 21<sup>st</sup> century, provisions on permitted use applied to educational establishments were evolving and transforming, becoming more precise and responsive to societal needs. However, in recent years, permitted use has not been matching information society demands fully.

#### *5.1.2 Benefits from permitted use in educational establishments*

To reach the aims of creativity popularization, knowledge dissemination, cultural goods and education accessibility, free access to works of other creators is required. These goals have crucial significance for society. This significance justifies the introduction of limits in the economic copyrights of creators by lawmakers. At the same time there are important and basic reasons for allowing the lawful use of authors' works. Permitted use related provisions relevant to educational purposes are included in Arts. 27-33 of the 1994 Copyright Act and Neighbouring Rights. For example, educational establishments can be broadly defined as all types of schools, research institutes, museums, libraries, archives, cultural centres and others institutions providing educational services. These institutions

are entitled to use and make copies of fragments of disseminated works including translations, without author permission (Art. 27).

Libraries, archives and schools are additionally benefited from being allowed, according to Art. 28, 1) to provide free access to copies of disseminated works within the scope of their tasks as stated in their statutes; 2) to make or mandate making copies of disseminated works in order to supplement, maintain or protect their own collections; 3) to make collections available for research or learning purposes through information technology.

One of the main research questions of this study concerns the extent that educational establishments are entitled to benefit from permitted use provisions. In order to provide a full and accurate answer to this question, a distinction should be made between long-term and short-term benefits.

It is important to emphasize the fact that the use of materials in education has been a prime and essential reason to establish permitted use within copyright. The long-term benefits for educational establishments from permitted use go beyond providing statutory services.. They have a substantial impact on shaping educational development within society and contributing to its progress. The most evident benefit from permitted use in educational establishments is creating and supporting the growth of science and education. Another crucial long-term benefit is the facilitation and advancement of research in all fields of science.

Further benefits such as the advancement of creativity within society, expansion of cultural goods which can be achieved thanks to applying permitted use provisions in education, are even more universal, and beneficial, for society. Therefore implementing permitted use in education results to an overall better educated, and thus more balanced, society.

In addition and besides the long-term perspective of assessing the beneficial impact of permitted use on education and its institutions, there are also short-term benefits which contribute towards creating well developed educational establishments providing a high standard of service.

Firstly, existing provisions of permitted use allow educational establishments to operate and offer teaching and learning. Without allowance to use the works of others within the

bounds of permitted use, educational institutions would not be able to deliver their statutory tasks and services. An immediate benefit from permitted use in educational establishments is the support provided to individuals to achieve their educational and career aims, by having fast and efficient access to information and knowledge. Educational permitted use also supports the improvement of the quality of educational services by providing more accurate tools and ways to access knowledge.

The use of contemporary educational materials definitely contributes to the intellectual development of students in educational institutions. However permitted use adopted for the benefit of educational institutions varies widely from one country to another (Guibault, 2002:71).

## **5.2 Evaluation of Polish permitted use regulations and comparison with selected European copyright legislations**

This section discusses permitted use and its application in educational establishments in selected countries. The reason for presenting the educational permitted use regulations of other countries is to place and view Polish copyright in the European context, and provide a brief comparative review of Polish permitted use regulations in education. The countries whose copyright legislation is reviewed include the UK, France, and Germany.

Public permitted use was introduced in the copyright legislation of all three countries. It was applied in many fields and in different forms due to the need for accessing and using works *pro publico bono*, i.e. for public benefit. One of these fields is education, where the aim to disseminate knowledge and skills justifies limitations on the rights of authors. In this respect, one form of public permitted use is permitted use in education, or educational permitted use (Maciąg, 1996:76).

This review confirms that the concept of educational permitted use is relatively new. The first regulation for educational purposes was introduced in the second half of 19<sup>th</sup> century, regarding the right of quotation. Further forms of works exploitation via reprographics, sound and video recordings were introduced to adequately cater for dissemination through the use of new technologies. Therefore there is a short tradition of these provisions in copyright acts. For example photocopying for educational purposes in Germany was introduced in 1985.

Moreover, the time of protection for works was extended by the EU directive 93/98/EEC of 29<sup>th</sup> October 1993 (Official Journal L 290, 24/11/93) to 70 years after the authors' death. The scope of protected works potentially used for educational purposes was thus significantly expanded (Maciąg, 1996:77).

The main fields of exploitation of works relevant to the educational establishments are photocopying, recording radio and television programmes, public performances during schools events, publishing and disseminating fragments of works in schoolbooks. These field regulations of permitted use in the UK, France, and Germany are reviewed in order to provide a comparison with Polish copyright.

### 5.2.1 United Kingdom

English Copyright Law seeks a balance between authors' rights and the societal right to access of knowledge and creativity. Provisions on educational permitted use are put together in the dedicated section *Education* of the 1988 Copyright, Designs and Patents Act, which includes regulations on “*things done*” for the purposes of instruction or examination.

Section 32 (1) stipulates that Copyright in a literary, dramatic, musical or artistic work is not infringed by the work being copied in the course of instruction or of preparation for instruction, provided the copying (a) is done by a person giving or receiving instruction, and (b) is not by means of a reprographic process.

Section 36 concerns reprographic copying by educational establishments of passages from published works. It stipulates that reprographic copies of passages from published literary, dramatic or musical works may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement. However, not more than one per cent of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter. Copying is not authorised by this section if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

In British copyright a licensing system was introduced and implemented in educational establishments. Rights of authors and publishers are represented and executed by the Copyright Licensing Agency (CLA). Educational establishments are represented by their Local Educational Authorities (LEAs) which act on behalf of schools, reaching agreements with CLA.

The 1988 Copyright, Designs and Patents Act introduces permission of recording all kinds of materials. The provisions of paragraph 35(1) allow that a recording of a broadcast or cable programme, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment, without thereby infringing the copyright in the broadcast or cable programme, or in any work

included in it. However this section does not apply in the case of, or to the extent that there is a licensing scheme certified for the purposes of this section under section 143 providing for the grant of licences (35 (2)). Consequently, copies made under these conditions cannot be sold to other parties (35 (3)).

The Educational Recording Agency (ERA) was established to manage a licensing scheme by representing associated organizations and companies entitled to the economic copyrights of works, for example the BBC. In practice, the existence of the licensing scheme managed by ERA results that section 35 (1) is not being implemented in educational establishments. Moreover, there is no prohibition regarding the number of copies or collections of recordings to be made in case a proper inventory is made. However use of these recordings is banned for all other uses except of educational use.

With regard to performing, playing and showing work in the course of activities of an educational establishment, section 34 (1) points out that the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment, and other persons directly connected with the activities of the establishment, or by any person for the purposes of instruction at the establishment, is not a public performance for the purposes of infringement of copyright. The same regulation is implemented into playing or showing of a sound recording, film, broadcast or cable programme only for educational purposes.

Regarding the quotation right, section 33 permits the quotation of a short passage from a published literary or dramatic works in collections intended for educational use. However for the permissions to be obtained, certain quite demanding conditions have to be met. The work must be already published and cannot be taken from any already published educational materials. Anthologies must be used for educational purposes and this has to be described in their title or issued advertisement. Also, by contrast to the German regulations reviewed below, materials published in anthologies cannot be already copyrighted. What is more, it is forbidden to publish more than two fragments by the same author during a period of 5 years.

In practice, those rather strict regulations do not find implementation as, in the case of quotation in anthologies, publishers make efforts to obtain permission from authors or previous publishers.

### 5.2.1 France

In contrast to the English permitted use regulations, use of copyrighted materials by educational establishments in France is limited to the right of making analyses and short quotations justified by the educational character of the work in which they are included (Guibault,2002:72). After the introduction of a system of compulsory collective administration of reprography rights in 1995, educational establishments were allowed to make reproductions of works for educational purposes under the general reprography regime and against payment of remunerations to owners of rights. Before then, illegal photocopying in educational establishments had grown out of proportion (Guibault, 2002:72).

Beyond the right of short quotation and making reproductions by means of reprography, there is no other permitted use provisions in the French Intellectual Property Code for the benefit of educational establishments. As a result, performances, exhibitions, broadcasts of works within educational establishments in the most cases occur according to the terms of contractual agreements between rights owners and French public authorities (Guibault, 2002:72). French copyright legislation strongly favours the rights of authors and rights owners; there are no dedicated provisions on permitted use in educational establishments. Therefore, an analysis of educational permitted use has to be based on interpretation of provisions on private permitted use (Maciag, 1996:79).

Provisions on reprography copying are introduced only within private permitted use in Art. L.122-5. However, these provisions cannot be lawfully applied to educational establishments. Also in the exploitation fields of radio and video recordings, there are no provisions of educational permitted use. Radio and television recordings for school use are produced by the National Centre of Pedagogic Documentation (*CNDP-Centre National de Documentation Pédagogique*) and broadcasted by public channels. CNDP has right to sell and rent recordings to educational establishments. With regard to using others' recorded materials, no relevant regulation has been introduced (Maciag, 1996:84).

An even more critical situation occurs in the field of performing, playing and showing work in the course of activities in educational establishments. French legislation does not contain any such limitations of authors' rights which could apply to educational

establishments. Moreover, there are no agreements with any appropriate or relevant organizations on these matters.

With regard to the quotation right applied to educational establishments, French copyright legislation points out only in Art. L122-5(a) that, once a work has been disclosed, the author may not prohibit analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated. There are no further regulations in this respect.

### 5.2.3 Germany

With regard to photocopying educational materials, the current German Copyright Act (Art.53 (3)) introduces mandatory licensing for making copies of works' fragments with its public and private permitted use regulations, including educational permitted use. Photocopying of whole books or magazines is not allowed at all.

Photocopying must be done only for educational purposes which are defined by teachers or examiners. Permitted use in educational establishments is limited by defining precisely those institutions entitled to its benefits, namely all types of schools excluding higher education institutions, e.g. universities. There is also a limitation in the number of copies which must be equal to the number of pupils plus one copy for a teacher's purpose. Remunerations for making copies must be paid to the authors in the form of fees from producers and importers of photocopying technology. The so-called *Betreiberabgabe* fee must be paid by organizations giving access to reprography services, including schools and other educational institutions.

Regarding recordings of radio and television programmes, the German Copyright Act allows the making of a single copy of radio and video recordings for educational purposes by schools and other educational institutions, including universities and teachers' colleges. The copy must be prepared at the institutions, for example at the school.. There is no regulation on the number of copies that can be made but the recording can only be used during learning activities and has to be deleted at the end of the academic year, unless the author remuneration has been paid (Maciąg, 1996:83).

Art. 47 of the German Copyright Act stipulates that, 1) schools and institutions for the training and further training of teachers may make individual copies of works included in a

school broadcast, by recording the works on a video or audio medium. The same shall apply to youth welfare homes, and to the official regional pictorial materials' services, or similar publicly owned institutions. Also, 2) any video or audio recordings may be used only for instructional purposes. They must be destroyed not later than the end of the school year following the transmission of the school broadcast, unless an equitable remuneration has been paid to the author.

These regulations seem rather impractical as teachers cannot use the recordings year after year. Moreover, establishing and managing a system of deleting and checking payments of recordings seems problematic, and there also a lack of provisions regulating remuneration to authors.

In public performances during school events, Art. 52 of the German Copyright Act stipulates that it is possible to perform works without permission of authors, but with remuneration paid to them, under the following conditions: the performance is not commercial, it is free of charge, it has societal and educating purposes, and is accessed by a limited number of attendees. In a case of showing films or performing plays by educational establishments it is necessary to obtain permission and make a remuneration payment. In practice, a license is available to educational institutions in this respect.

In terms of rights to publish and disseminate fragments of works in schoolbooks, Art. 46 stipulates: (1) reproduction and distribution shall be permissible where limited parts of works of language and musical works, individual works of fine art or individual photographs are incorporated after their publication in a collection which assembles the works of a considerable number of authors and is intended, by its nature, exclusively for religious, school or instructional use. The purpose for which the collection is to be used shall be clearly stated on the title page or some other appropriate place. Moreover, (2) paragraph (1) shall apply to musical works incorporated in a collection intended for musical instruction only if the collection is intended for musical instruction in schools that are not schools of music.

In addition, (3) reproduction may begin only if the intention to exercise the rights afforded by paragraph (1) has been communicated by registered letter to the author or, if his permanent or temporary residence is unknown, to the holder of an exclusive exploitation right, and two weeks have elapsed since the dispatch of the letter. If the permanent or

temporary address of the holder of the exclusive right is also unknown, the communication can be made by publication in the Federal Official Bulletin (*Bundesanzeiger*).

Furthermore, Art. 46 (4) stipulates that the author shall be paid equitable remuneration for the reproduction and distribution of their works. Art. 42 (5) suggests an author may prohibit reproduction and distribution if the work no longer reflects his conviction, and he can therefore no longer be expected to agree to the exploitation of his work and he has for that reason revoked any existing exploitation right. The provisions of Art. 136 (1) and (2) shall be applicable *mutatis mutandis*.

The right of quotation does not contain dedicated provisions on educational permitted use. Art.51 regulates this issue in a general way: reproduction, distribution and communication to the public shall be permitted, to the extent justified by the purpose, where 1) individual works are included after their publication in an independent scientific work to illustrate its contents; 2) passages from a work are quoted after its publication in an independent work of language; 3) individual passages from a published musical work are quoted in an independent musical work.

#### *5.2.4 Polish permitted use regulations vis-à-vis selected countries and EU law*

In the light of the selected countries' educational permitted use regulations reviewed above, differences and similarities of the Polish provisions on these matters will now be discussed.

According to Art. 27 of the Polish Copyright Act, educational establishments are entitled to make copies by reprography only in the case of works that are already disseminated. In the above analyzed legislations, permission applies to the publicly published works that are not necessarily officially published and disseminated, but also publicly announced and replicated on a mass scale with permission of author.

From the point of view of permitted use entitlements for educational establishments, what is important is the definition of these entitlements. In French copyright legislation there is no focus on this issue, as there are no provisions contained that are specific to education. By contrast, in English copyright law there is a clear differentiation between the entitlements of educational and those of other institutions, such as libraries and archives.

The Polish 1994 Copyright Act uses the term “educational institutions”, which can be interpreted to include public as well as private schools, but with an exclusion of those institutions that are independent from the education system managed by the Ministry of Education. However, in Art. 27 the term “scientific institutions” (*instytucje naukowe*) is used which allows these institutions to be entitled to the permitted use benefits. In addition, institutions offering educational services only are not entitled to educational permitted use benefits.

In contrast to the German regulations, Polish copyright does not oblige educational establishments using works within permitted use to pay remunerations to authors. Although Art.20 of the act regulates charges from producers and importers of reprography technology, this is only in regard to private permitted use, and not public permitted use that includes educational use. Therefore, in this respect the authors’ rights of obtaining remuneration are not fulfilled. As a result there is a lack of consistency in the Copyright Act: Art. 35 stipulates that permissible use must not infringe the normal use of the work or violate the rightful interests of the author. In this respect, the Polish 1994 Copyright Act favours public rights of access than the interests of authors. A balance between public benefits from permitted use and authors rights is not reached in this regard.

By analogy to the German and English copyright legislations, the Polish copyright act does not allow photocopying of the whole content of a work (Art. 27, 28). This provision applies also to the exploitation field of recording all kinds of educational materials. In this field, the Polish act corresponds with the French approach. It does not provide directly applicable regulations on using radio or video recordings for educational purposes. Nonetheless Art. 27, 28, and Art.100 should be taken into consideration, pointing out that the exercise of rights in artistic performances, phonograms, videos and programme broadcasts, first editions or scientific and revised editions, shall be subject to restrictions referred to in Arts. 23 and 35, regulating private and public permitted use respectively.

Therefore, educational establishments are allowed to use already published recordings; only their fragments can be replicated and used. In practice the usefulness of such incomplete materials for educational purposes is rather low. In addition there is not a licensing system in place in this respect, as provided by the English legislator. As a result, infringements in this exploitation field of works occur.

In the exploitation field of public performances during school events, Art. 31 regulates that it shall be permitted to perform in public without charge any disseminated works during religious ceremonies, school and academic events or official state ceremonies, provided that it is not, directly or indirectly, connected with any material benefits and the artists do not receive any remuneration, except for any advertising, promotional or election events. The obligation, as in the case of German and English regulations, that the performance has to have an educational or instructive purpose does not exist.

Regarding the quotation right, the Polish copyright act does not essentially differ from the above-mentioned countries' regulations. Art. 29 introduces two kinds of quotations 1) to quote, in works constituting an independent whole, fragments of disseminated works or minor works in full, within the scope justified by explanation, critical analysis, teaching; 2) for teaching and research reasons it is permissible to include disseminated minor works or excerpts from larger works in textbooks and reading books including also anthologies, for teaching or research purposes, minor works or fragments or larger works which have already been disseminated. Nonetheless, the author shall have the right to remuneration.

Based on the analysis of the above copyright acts with regard to permitted use in educational establishments, a conclusion can be drawn that there is no single or unified approach identified to shaping the scope of permitted use for educational purposes. Moreover there are differences in both (i) understanding and (ii) implementing a balance between the societal need of accessing knowledge through educational establishments, and protection of the authors' creativity and copyright. For example the French legislation is in favour of primarily securing the interests of authors and rights' holders, than educational requirements. The differences in defining the term and scope of permitted use in educational establishments were influenced by country legal traditions and the growth of the education sector, resulting from the ever-increasing educational needs of society.

This diversity of permitted use in educational establishments and its implementation among European countries occurs as a result of different historical and social circumstances shaping the scope of permitted use. Another reason has been the absence of EU copyright legislation regarding educational permitted use (Maciąg, 1996:94). Only under the Directive of Copyright in the Information Society introduced by the EU in 2001, member states may provide for permitted use of copyrighted materials for the purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by a non-commercial aim to be achieved. Recital 42 of the Directive

specifies that applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by examining that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

However, the possibility for educational establishments to make reproductions of works applies only to analogue means of production. Under Art. 5 (2)(a) of the Directive, Member States may only provide reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation (Guibault, 2002:73).

The EU Information Society Directive (ISD) contains a complete list of permitted use provisions giving the Member States room for its interpretation. These permitted use provisions are not compulsory, thus member states are not obliged to adopt the full scope of the proposed regulations. Therefore, copyright law of member states differs in terms of adopted and implemented scope of the ISD provisions permitted use provisions. This situation does not support a process of copyright law harmonization and unification regarding permitted use standards across Europe.

The question is to what extent the Polish copyright law is harmonized with the ISD permitted use provisions and their application to educational establishments. Polish permitted use regulations contain, in a similar manner to the ISD, a long and enumerated catalogue of permitted use provisions. Therefore, the flexibility of Polish permitted use provisions is limited.

Art. 5 of the ISD contains permitted use regulations which, to a large extent, match the 1994 Polish Copyright Act provisions. The EU Information Society Directive has been adopted and implemented to the Polish copyright legislation to a broad extent. The major part of the ISD provisions finds its articulation in the Polish 1994 Copyright Act. However there are areas where Polish regulations are not fully compatible with the directive, going either beyond the scope of the ISD, or not implementing some of its provisions.

Art. 23 of the 1994 Copyright Act does not exclude from permitted use sheets of music, as the IDS does. Art. 25 (1) permits, for informative purposes, to use already disseminated works, when the IDS only allows the establishment of a license regarding these works. Art. 28 (3) contains provision to make works available for research or learning purposes through information technology systems located in libraries, archives and schools. However this omits an instruction to exclude this licence when contracts are applied, in contrast to ISD Art. 5 (3). Moreover, Art. 29 (1) has been structured too broadly in respect to the right of quotation within the scope of the right governing a given kind of creative activity, especially taking into account the enumerated character of the ISD Art. 5 (3). In addition, provision of the Art. 33 (3) applies to all kinds of works, whereas the ISD relates only to the artistic works. (Barta & Markiewicz, 2010: 395).

Despite the effort to achieve a complete harmonization of Polish copyright law with European standards, there are still issues demanding analysis and revision. In the field of permitted use applied to educational establishments at both national and European level, there is still a requirement to develop provisions that cater for advancements in technology, and the expansion of educational services in the information society.

The scope and level of copyright protection is increasingly expanding. This trend is revealed by the following aspects of current Copyright Law in Poland: the expanding catalogue of the exclusive rights areas; the emergence of new exploitation fields where exclusive rights are introduced; lengthening of the copyright protection timeframe; introducing information requirements and simplifying prosecution; adopting limits of forming unlimited rules of exhaustive copyrights; narrowing permitted use provisions in new fields of exploitation.

This expansion and intensification of copyright protection has as its main aim the reduction of piracy in Poland, and it is in many cases justified. However, these trends in Polish copyright affect and disrupt the balance between the interest of authors and producers, and those of users and customers. These trends can be observed also at the European level.

The scope of copyright protection varies from one country to another, and is also implicitly affected by each country's membership of international conventions. The most complex and expanded level of protection is afforded by the EU directives. Polish Copyright Law includes most of their provisions, and in some respects goes beyond EU legislation.

Permitted use regulations within the EU are not implemented in a coherent and unified manner within member states. There is not a single EU Copyright Act, and differences occur in the adopted scope of directives and their implementation. The lack of a consistent European system in this regard causes difficulties in the application and implementation of the law in the interests of European citizens. This situation affects economic growth, and increases legal and judicial costs arising from the interpretation and implementation of permitted use, both domestically and internationally.

There is an emerging need for regulating copyright protection and permitted use at the European level, in the form of a single European Copyright Act. The main issues causing a lack of progress with this process are the differences in legal systems throughout Europe (common law and case law), differences in social and political circumstances, and in technology use and media advancement.

Taking into account the above-mentioned circumstances, and contrasting them with the current situation of Polish copyright legislation, the view can be expressed that any legislative work on a new national Copyright Law should not be conducted until the European copyright legislation will be fully harmonized and unified. Polish Copyright Law should correspond closely to the European directives. However, the scope of authors' rights should be limited, taking into consideration that Poland is primarily an importer of intellectual goods. One of the reforms towards achieving this aim would be to extend the scope of public and private permitted use.

Our historical review shows that both Polish and European Copyright Law are gradually losing flexibility in terms of copyright provisions. The information society with its dynamic technological changes requires more openness in copyright law, both at the EU and national level.

All EU member states should secure an equitable scope of copyright protection and its implementation. Hence the need arises to unify EU copyright legislative works in the form of a single EU Copyright Act, which would then be introduced in national copyright systems. However to create one act that is adequate and applicable to all member states, requires reaching consensus in a vast number of areas. EU member states are very diverse

in terms of their legal doctrines and traditions, stage of technological development and use of technology, and social and political circumstances.

Member states should also work simultaneously on their national copyright reforms, taking into consideration developments in the EU policy space. New national legislations following an approach established at the European level can provide a platform to build more flexible and unified Copyright Law in Europe. Therefore, the process of forming a single European Copyright Act should be conducted in two streams of national and European legislative work. Cooperation should take a consensual approach, and aim at finding a good balance between copyright protection and openness to knowledge accessibility in the information society.

## 6. Summary and Conclusions

One of the most important factors of securing development and prosperity for society is providing support for creativity. Therefore originality, imagination, inspiration and creation should be endorsed within the educational process. In order to achieve this aim, there is a necessity to enhance awareness of copyright regulations, and their exceptions and limitations, towards benefiting educational establishments.

The question of how Polish copyright legislation was formed and developed towards shaping and keeping a balance between the educational establishments' access to the copyrighted materials, and securing and protecting the rights of authors, has been a key motivation for completing this dissertation. The dissertation has thus focused on Copyright Law in Poland, and permitted use of materials for educational purposes. It provides a historical review and analysis of Polish Copyright legislation, and discusses recent developments of permitted use in educational establishments. The research defines and analyses the scope of permitted use within Polish legislation, taking a historical approach and providing an analysis of legal history, codification processes, and ways of copyright law unification in the historical context of successive periods of Polish history since 1795.

The case of Poland has been selected as the implementation of copyright law in the education sector has been of increasing importance in this country. After the transformation of the Polish political and economic system in the 1990s, the education sector has grown considerably in terms of its infrastructure and public and private services. The Polish case includes a fairly long and rich tradition in copyright law, which has been impacted by uncommon and often unpredictable historical events and their consequences. A historical review of Polish copyright law and analysis of educational advancements show that the phases of development in these two fields are parallel.

The dissertation is presented in five chapters discussing the following matters: the establishment and evolution of Polish Copyright Law, the process of shaping the scope of permitted use in Polish Copyright Law in the 20<sup>th</sup> century; permitted use in the light of developments in the Polish education sector; benefits for educational establishments from implementing permitted use provisions; an evaluation of Polish permitted use regulations

in comparison with selected European copyright legislations, and the EU Information Society Directive (2001/29/EC).

The first chapter discussed the novelty and importance of the research, and presented the methodology used throughout the research process, the research questions and hypotheses examined in the study. Chapter two has been designed and included in the research in order to historically approach the evolution of copyright law and permitted use developments, and thus provide a deep understanding of recent achievements in this field. This chapter shows that historical circumstances have played a very important role in establishing permitted use as part of copyright legislation. At the same time, access to culture and educational goods were becoming increasingly significant for society. Thus, the need emerged for defining and implementing permitted use legislation for educational establishments more precisely.

The historical conditions, cultural background, legal traditions and legislation regimes present in each period studied have strongly impacted the process of shaping Polish copyright legislation and permitted use provisions. They also influenced its implementation towards meeting the educational and cultural needs of society. In addition the research shows how the developmental phases of copyright correspond to the main stages of educational advancement in Polish society.

The third chapter of the dissertation presents the issue of permitted use in educational establishments in Poland during the 20<sup>th</sup> century. It offers a definition of the term 'permitted use'. It discusses factors shaping the scope of permitted use within Polish copyright legislation and presents permitted use under the main Polish Copyright Acts implemented. The scope of permitted use was expanding as a result of, and further influenced by, the growth in the education sector, as well as the social transformation towards the information society. The permitted use provisions were becoming detailed and specific, subsequently making permitted use narrower in its provisions, and less flexible in its implementation.

The development of the Polish scope of permitted use in domestic copyright protection is presented, starting from the first Copyright Act and commentary to the Act by S. Ritterman. The doctrinal achievements of the second half the of 20<sup>th</sup> century are then analyzed, first by focusing on the 1952 Copyright Act and the work on a new act

responding to challenges arising from technological advancement. The extent of applying permitted use has been gradually increasing as its scope has been expanded by the emergence of additional exploitation fields. However, at the same time the implementation of permitted use provisions has become more rigid and inflexible.

The first three chapters of the dissertation offer a solid platform for further analysis of scope of permitted use and its benefits in educational establishments, as well as provide a discussion on the impact of permitted use regulations on schoolbook publishing. The fourth chapter presents a further analysis of permitted use in the light of developments in the education sector in Poland. During the period examined, dynamic developments in education were occurring in terms of institutional changes, evolving systems of providing public and private education, curricula, the efficacy of education provision, ideological influences, and legal regulations. All these developments resulted to the process of emerging and expanding needs of using copyrighted materials in educational establishments on a great scale, and led to the introduction of more well-defined and accurate permitted use provisions in copyright acts.

Furthermore, the developmental phases in copyright law and permitted use are parallel to the stages of educational advancement in Poland. Therefore, in the case of Poland there is a better intelligibility of the links between historical developments in education and permitted use. This underscores the utility of the selected country case. This chapter also presents two schoolbook publishing case studies, one from the start of the 20<sup>th</sup> century and the contemporary online schoolbook project “Switch on Poland”. These show that the content and forms of educational materials distributed by publishers are affected by the scope of permitted use. Permitted use in its provisions towards securing sufficient access to educational materials does not fully meet this demand in the era of information society. Alternative solutions in support of lawful accessing of educational materials have arisen, in the forms of e.g. Creative Commons licenses and open access sources.

The last chapter presents and discusses short-term and long-term benefits from permitted use legislation applied to educational establishments, and defines the scope of permitted use entitlements for educational establishments within Polish copyright legislation. There is a distinction between long-term and short-term benefits applied to educational establishments as a result of permitted use regulations. The main benefits emphasised include: making possible and advancing progress of research in all fields of science,

advancement of creativity within society, expansion of cultural goods, providing a high standard of service by educational establishments, gaining educational and career goals by individuals, and creating an overall better educated, and thus more balanced, society.

The analysis of Polish permitted use implemented in educational establishments in comparison with UK, French and German regulations shows that there is no unified way to shape the scope of permitted use for educational purposes. Moreover there are differences in understanding and implementing a balance between the societal need to access educational materials, and the requirement to protect the authors' rights. In the Polish case, copyright legislation has been harmonized with the ISD 2001/29/EC. However permitted use provisions remain rather inflexible with regard to materials use by means of new technologies.

In summary, this dissertation shows how historical circumstances, country legal traditions and the growth of education sector due to educational needs of society influence the definition and scope of permitted use. Consequently, they impact on the ways that both users and publishers deal with copyright materials. Copyright lawmakers in the case of Poland have responded to this by building more detailed and enumerated copyright acts, which do not seem to adequately cater for educational requirements arising in the information society.

## **Bibliography**

### *List of acts and legislation*

The Paris Convention (1883)

The Bern Convention for the Protection Literary and Artistic Works (1886)

The Berlin Declaration (2003)

The Rome Convention (1961)

The Convention Establishing World Intellectual Property Organization (1967)

The Madrid Agreement (1891, 1989)

The WTO Convention (1994)

The Agreement on Trade – Related Aspects of Intellectual Property Rights (1994)

The 1926 Copyright Act, Poland

The 1935 Copyright Act, Poland

The 1952 Copyright Act, Poland

The Act of 4 February 1994 on Copyright and Neighbouring Rights (1994)

The Law on Copyright and Related Rights (1965) as amended December 17, 2008,  
Germany

The International Covenant on Economic, Social and Cultural Rights (1966)

The Copyright, Designs and Patents Act (C. 48) (1988), the United Kingdom

The Act of the 7 September 1991 on School Education System

The Intellectual Property Code (1992), France

The Act of 8 January 1999 on Provisions for the Reform of the School System

The 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

### *Secondary sources*

Aplin, T. Davis J. (2009) *Intellectual Property Law. Text, Cases and Materials*, Oxford, Oxford University Press.

Barta, J. Markiewicz, R. (2010) *Copyright Law [Prawo autorskie]*, Warsaw, Wolters Kluwer Business.

Barta J. Markiewicz R. (2007) *The interactive television and Copyright Law [Telewizja interaktywna a prawo autorskie]*, Warsaw, Wolters Kluwer.

Bently L., Sherman B. (2008) *Intellectual Property Law*, Oxford, Oxford University Press, 199-240.

Bleszynski, J. (2005) *Intellectual Property*, [in]: Stanislaw Frankowski (ed.) *Introduction to Polish Law*, Hague, Kulwer Law International, 303 – 340.

Borghi M., *Copyright and Truth*, *Theoretical Inquiries in Law* 2011; 12 (1): pp. 1- 27.

Borghi M., Montagnani M. L., *Positive Copyright and Open Content Licenses: How to Make a Marriage Work by Empowering Authors to Disseminate Their Creations*, *International Journal of Communications Law and Policy* 2007; 12: pp. 1-30.

Boyle, J. (2008) *The Public Domain. Enclosing the Commons of the Mind*, Yale University Press.

Chatterjee Ch. (1997) *Methods of Research in Law*, Kent, Old Bailey Press.

Colston, C.(1999) *Principles of Intellectual Property Law*, London, Cavendish Publishing Ltd.

Davies N. (2006) *God's Playground: a history of Poland*, the 5<sup>th</sup> ed. Cracow, Znak.

Dbałowski, W. Litauer, J.J. (1922) Copyright legislation in Poland [Ustawodawstwo autorskie obowiązujące w Polsce], Warsaw, F. Hoesiecka Bookshop.

Drozdowska, T. (1994) Introduction. [in]: Danuta Kierzkowska, Teresa Drozdowska (eds.) Polish Copyright and Neighbouring Rights Act, Warsaw, TEPIIS Publishing House, 7 -21.

Ferenc-Szydełko, E. (2000), Prawo autorskie na ziemiach Polskich pod zaborami, *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 76, 11- 46; 73 – 278.

Gienas, K. (2009) Imperative character of permitted use?,[ Imperatywny charakter dozwolonego użytku?] *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 106, 17-36.

Guibault, L.M.C.R. (2002), Copyright limitations and contracts. An Analysis of the Contractual Overridability of Limitations on Copyright, The Hague, Kluwer Law International.

Hugenholtz, P. B, Eechoud M., Gompel S, Guibaut L., Helberger N. (2009) Harmonizing European Copyright Law: The challenges of better lawmaking, Austin, Wolters Kluwer.

Hugenholtz, P. B, Senftleben M., Fair Use in Europe. In search of flexibilities [Online] 2011; pp 1- 30. Available from:  
<http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf>  
[Accessed 15<sup>th</sup> September 2012].

Hutchinson, T. (2006) Researching and writing in Law, Sydney, Lawbook co.

Janowski, M. (1991) *Studies in copyright law in The Kingdom of Poland (Congress Poland) in the period 1815 – 1914*, [Ze studiów nad prawem autorskim w Królestwie Polskim 1815 – 1914.] *History and Legal Journal*, 43 (1-2), 125-139.

Jarzebska, A. (2010) Collective Management organizations and Creative Commons, *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 108, 20-34.

Jung Miklaszewska, J. (2003), The System of Education in the Republic of Poland. Schools and diplomas. Trans. Kolanowska E. [Online] Available from: <http://www.buwiwm.edu.pl/publ/edu/System.pdf> [Accessed 5th June 2012].

Kieszkowska, P. ,Nożykowski, R. (2003) Intellectual Property Law, [in]: Zdzisław Brodecki (ed.), Polish Business, Hague, Kluwer Law International, 485 – 506.

Klaffkowska-Wasnowska K. (2008) The right of radio and television broadcast in Copyright Law [Prawa do nadaw programów radiowych i telewizyjnych w prawie autorskim], Warsaw, Wolters Kluwer.

Krasuski, J. (1980) Schooling in the fields of occupation In: The history of education in the twentieth century, (ed.) Miesio J. [*Oświata i szkolnictwo w okresie okupacji w: Historia wychowania wiek XX*] Warsaw: PWN

Kruszynski, M (2008) Permitted personal use of works in the light of technical security means [Dozwolony użytek osobisty utworów w świetle stosowania zabezpieczeń technicznych] *Prace Instytutu Prawa Własności Intelektualnej UJ* , Issue 102, 53-91.

Kurczewski J. (1993) The Resurrection of Rights in Poland, Oxford, Clarendon Press.

Kwiecinski, Z. (1982) Necessity – uncertainty – hope. Educational problems in the 1970s [*Konieczność – niepokoje – nadzieja. Problemy oświaty w latach Siedemdziesiątych*] Warsaw, Ludowa Spółdzielnia Wydawnicza

Lung, G. Copyright and related rights – WIPO developments and digital challenges. In: Barczewski M, Milosz M, Warner R. (eds.) *When Worlds Collide: Intellectual Property, high technology and the law*. Warsaw, Wolters Kluwer business; 2008. pp 77 – 78.

Maciąg, J. (1996) Copyright Law and permitted use for schools. [Prawo autorskie a użytek szkolny.], *Prace Instytutu Prawa Własności Intelektualnej UJ* , Issue 67, 75 – 96.

Malek, L. (2008), Statutory objectives of the right to quote, [Ustawowe cele prawa cytatu] *Prace Instytutu Prawa Własności Intelektualnej UJ* , Issue 102, 91-116.

Marcinkowska, J. Bukowski, M. (1997), Limitations of Copyright for educational institutions [Dozwolony użytek szkolny], *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 69, 91 – 96.

Matlak, A. (2004) Copyright in the Information Society [Prawo autorskie w społeczeństwie informatycznym], Cracow, Zakamycze.

Mohyluk, M. (1999) *The orderliness of law in The Second Republic of Poland: the Codification Committee and the Legal Council*. [Porządkowanie prawa w II Rzeczypospolitej: Komisja Kodyfikacyjna i Rada Prawnicza] *History and Legal Journal*, 51 (1-2), 285 – 300.

Pacek G. J. (2007) Permitted use for trademarks (comperative study) [Dozwolony uzytek znakow towarowych (prawo polskie na tle porownawczym)] *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 98, 179-237.

Pospieszalski, K. (1958) *Nazi „Law” during occupation in Poland. Part II General Government. Selection of documents and synthesis* [Hitlerowskie “Prawo” okupacyjne w Polsce. Part II Generalna Gubernia. Wybór dokumentów i próba syntezy], Poznan, West Institute.

Ritterman S. (1937), *Commentary on Copyright Act* [Komentarz do ustawy o prawie autorskim], Cracow, Leon Frommer.

Rosenthal Kwall R. (2010) *The soul of creativity. Forging a moral right law for the United States*, Stanford, Stanford University Press.

Rubisz, S. (2006) An essence and developing process of permitted use [Istota i proces kształtowania się instytucji dozwolonego użytku w prawie polskim] *Prace Instytutu Prawa Własności Intelektualnej UJ*, Issue 93, 167-199.

Samuel G. (2003) *Epistemology and Method in Law*, Aldershot, Ashgate Publishing.

Sieczkowski S. (1937), *Introduction [in]: Ritterman Stefan (ed), Commentary on Copyright Act* [Komentarz do ustawy o prawie autorskim], Cracow, Leon Frommer.

Sikorski, R. (2010) *Fair use in copyright law in the light of the three –step test* [Ocena dozwolonego użytku w prawie autorskim w świetle kryteriów testu trójstopniowego], [in]: Marian Kępiński (ed), *Copyright limitations*, Warsaw, C.H. Beck, 25- 52.

Thomas P. A. (1997) *Social-Legal Studies*, Aldershot, Dartmouth Publishing.

Wagner, W. J. (1970) *Polish Law throughout the Ages*, Stanford, Hoover Institution Press.

Wasilewski, P. (2008), *Open content licenses as an example of web-wrap contracting* [in:] Barciszewski M., Miłosz M., Warner R. (2008) *When Worlds Collide: Intellectual Property, High Technology and the Law*, Waszawa, Wolters Kluwer, 182 - 202.

Wroczynski, R. (1996) *History of Polish Education. Volume II* [Dzieje oświaty polskiej. Tom II], Warsaw, Zak.

Zasztowt, L. Recent studies of Polish education in the Interwar period. *History of Education Quarterly*1990; 30(3): pp. 389-394.

Zoll, F. (1920) *Copyright Law in draft by Fryderyk Zoll* [Prawo autorskie w projekcie Fryderyka Zolla] Cracow.