Poland

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Introduction to software protection under Polish law

The legal framework regarding software protection in the Republic of Poland comprises the Constitution of 2 April 1997, acts passed by Parliament, ratified treaties, and regulations issued by the Prime Minister or the Council of Ministers. As far as international treaties and agreements relating to copyright protection of computer programs/software are concerned, the Republic of Poland has acceded[1] to several international treaties which have the same legal effect as the legislation directly established by Parliament.

Unsurprisingly, legal norms affording protection of software are categorized in civil law as opposed to criminal law. However, the Polish Criminal Code (hereinafter the CRC) provides for protection of computer programs[2]. Copyright protection of software is regulated in Poland by the Act on Authors' Rights and Neighbouring Rights (hereinafter the ARNR)[3].

The ARNR is deemed *lex specialis* with regard to provisions of the Civil Code[4]. The Polish Codification Commission preparing the 1964 draft of the Civil Code (hereinafter the CC) did consider adding the new law on copyright to the CC, but the pragmatic view that it was best not to disturb the existing regulations of the separate law on copyright prevailed. Another reason to regulate this area of law outside the CC is that, although it focuses on private law matters, it also encompasses the closely related areas of administrative and criminal law[5].

The ARNR transposes Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs[6] into Polish national law (hereinafter the

[1]WIPO Copyright Treaty, December 20, 1996 (1997) 36 I.L.M. 65. Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

[2]The Criminal Code (in Polish: Kodeks Karny) of 6 June 1997, Journal of Laws (Dziennik Ustaw) No 88, item 553, with subsequent amendments. Chapter XXXV — Offences against Property — Article 278. § 1. Whoever, with the purpose of appropriating, willfully takes someone else's movable property shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. — § 2. The same punishment shall be imposed on anyone, who without the permission of the authorized person, acquires someone else's computer software with the purpose of gaining material benefit.

[3]The Act on Authors Rights and Neighbouring Rights (in Polish: ustawa o prawie autorskim i prawach pokrewnych) of 4 February 1994, published in Journal of Laws (Dziennik Ustaw) No 24, item 83, consolidated text of 16 May 2006, Journal of Laws (Dziennik Ustaw) No 90, item 631, with subsequent amendments.

[4]The provisions of Civil Code are treated as *lex generali*. If the legal relationships concerning copyright are not regulated by the ARNR, the provisions of the Civil Code may be applicable directly or with changes.

[5]Z. RADWAŃSKI, *GREEN PAPER An Optimal Vision of the Civil Code of the Republic of Poland*, Ministry of Justice Warsaw 2006, p. 25.

[6]OJ L 122, 17 May 1991, p. 42-46, special edition in Polish: Chapter 17 Volume 01 P. 114-118.

Software Directive).

In cases where international agreements to which Poland is a party provide for a higher level of protection than is envisaged under the ARNR, the international convention prevails. This rule is in compliance with the Polish Constitution, which provides that international treaties are self-executing[7]. The more beneficial rules under international conventions apply not only to beneficiaries under the relevant conventions, but also to works whose country of origin is Poland[8].

Copyright: Object of protection

Copyright is defined as any expression of creative activity having individual character and manifested in any material form, regardless of the value, intended purpose or manner of expression thereof (the work)[9]. Case law and the Polish legal doctrine share the view that an immaterial work under copyright law should demonstrate all of the following characteristics:

- it must be the result of the activity of a person, i.e. the creator of the work, whereby manifestation of activity means every manifested result of action,
- it must be a manifestation of creative activity,
- it must have an individual character[10].

The ARNR provides a non-exhaustive list of works that may be subject to automatic copyright protection[11] for which no formalities are required. The ARNR does not require the use of copyright notices, but such notices are very often used in order to identify protected works. The Polish Supreme Court has repeatedly indicated that copyrighted work can be of any kind, provided — in terms of form at least — it shows a minimum degree of creativity[12].

[7] Article 91 of the Polish Constitution. 1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

[8] Article 7 of the ARNR.

[9] Article 1 of the ARNR.

[10] See: J. BARTA, *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Dom Wydawniczy ABC, Warszawa 2001, p. 68.

[11] Article 1(2) of the ARNR.

[12] Judgement of the Supreme Court of 31 March 1953, case file II C 834/52. As a subject of copyright law have been considered health and safety instructions — judgement of the Supreme Court of 23 July 1971, case file II CR 244/71, unpublished, instructions for operating a machine — judgement of the Supreme Court of 25 April 1969, case file I CR 76/69, published at OSNCP 1970, No. 1, item 15, train timetables, cookbooks, patterns and forms — judgement of the Supreme Court of 8 November 1932, case file II. 1K. 1092/32, published in Zb. Orz. 1933/I item 7.

Polish copyright law provides no definition of a computer program or computer software. Computer programs are eligible for protection as literary works. The protection granted to a computer program should extend to all related forms of expression, including design, production and utilisation. The ideas and principles underlying any element of a computer program, including those underlying its interfaces, are not protected[13].

The program interface is protected in the same way as other components of a computer program. If it appears that information obtained through decompilation of the interface does not allow for the development of a substitute interface (for instance, to achieve interoperability with other programs), then the conclusion must be that such interface is "determined" and, therefore, it is not eligible for copyright protection and cannot legally be transferred to another program[14]. The Supreme Administrative Court has ruled that whether a given work is copyrightable is not determined by the will of the contracting parties, but by the findings of fact. A computer program cannot be copyrighted unless the activities of its creator have the characteristics of originality and individuality[15].

Authors/Beneficiaries

Copyright belongs to the creator, unless otherwise stated by law. The creator should be that person whose name is clearly marked on the copies of the work or whose authorship has in any other way been brought to the notice of the public in connection with the disclosure of the work.

Insofar as the creator has not revealed his authorship, he should be replaced in the exercise of his copyright by the producer or publisher, and in their absence by the appropriate organization for the collective administration of authors' rights[16].

Joint creators should have joint ownership of copyright and their shares are presumed equal. Each joint creator may demand to have the size of the shares determined by a court of law in proportion to the individual contributions of creative work. Each of the joint creators may exercise the copyright in that part of the work created by him, provided said part has intrinsic value, but without prejudice to the rights of the other joint creators. Exercising copyright in the overall work requires approval from all the creators. In the absence of such agreement, each creator may seek resolution of the dispute in court[17], which should reach a decision taking the interests of all the joint creators into consideration. Each of the joint creators may bring action claiming violation of copyright in relation to the whole work. Sums won in such action are awarded to

[13] Article 74 of the ARNR.

[14] Judgment of the Appellate Court in Poznań of 4 January 1995 case file I ACr 422/94, published in T. GRZESZAK, *Prawo autorskie w orzecznictwie (CD-ROM)*, Warszawa 1995.

[15] Judgement of 13 October 2005, case file FSK 2253/04, published in electronic database LEX, under the no. 173097.

[16] Article 8 of the ARNR.

[17] The judgement of the court will replace the declaration of intent.

the creators depending on their share of the copyrighted work. The provisions on joint ownership[18] apply similarly to the economic rights of joint creators[19].

Where the creators have assembled their separate works with a view to joint distribution, each may demand permission from the other(s) to distribute the entire work, except where there is a valid reason for refusing such permission or where the contract between them provides otherwise[20].

The economic rights in a collective work, particularly those in an encyclopaedia or periodical publication, should accrue to the producer or editor, whereas the rights in the separate parts of the work that have intrinsic value should accrue to the creators thereof. The right to the title is deemed to belong to the producer or publisher[21].

Exclusive rights

Copyright is deemed as an absolute right that protects the spiritual and material interests of the creator connected with his/her work. Traditionally, there are two groups of the so-called author's rights: personal rights and economic rights. The economic rights of a computer program/software consist of:

- the right to reproduce the program in its entirety or in part, either permanently or over a fixed period, by any means and in any form; where the installation/loading, display, running, transmission or storage of a computer program calls for such reproduction, those acts should not require the consent of the owner of rights;
- the right to translate, adapt, arrange or in any other way transform a computer program, without prejudice to the rights of the person who makes such modifications;
- the right to distribute the original or copies of a computer program to the public, including rental or lending. The first sale of a copy of the program made by the owner of the rights or with his consent cause the right of distribution for that particular copy to lapse, without prejudice to the right to monitor any subsequent rental or lending of a computer program or of copies thereof[22].

Exemptions to exclusive rights

Exceptions to the author's monopoly are usually accepted because of the public interest in free access to creativity[23]. The provisions on exercising copyrights

[18] Condominium/co-ownership/joint-ownership regulated in Articles 195-221 of the Civil Code.
[19] Article 9 of the ARNR.
[20] Article 10 of the ARNR.
[21] Article 11 of the ARNR.
[22] Article 74(4)1-3 of the ARNR.
[23] J. BŁESZYŃSKI, *Prawo autorskie*, Warszawa 1985, p. 132.

that apply to computer programs are very restrictive, compared to those applying to other objects of copyright protection. The following acts should not require authorization from the owner of rights:

- the making of a backup or reserve copy, provided such copy is necessary for using a computer program; unless otherwise provided in the contract, the copy may not be used at the same time as the computer program;
- analysis and study, as well as experimentation with the operation of a computer program by the person authorized under the contract to make use of a copy of the program, in order to ascertain its underlying ideas and principles, provided the person concerned performs the above acts in conjunction with the installation/loading, display, running, transmission or storage of the computer program;
- reproduction of the code or translation of its form where that is essential for obtaining the information required for achieving interoperability between an independently created computer program and other programs, provided that the following conditions are met: (a) the acts are performed by the licensee, or by another person enjoying the right to use the copy of a program, or, by a person authorized to do so on their behalf; (b) the information required for achieving interoperability is not already easily and rapidly accessible to the persons referred to under (a); (c) the acts are confined to those parts of the original program that are required for achieving interoperability.
- The information mentioned above may not be:
  - used for purposes other than for achieving the interoperability of the independently created computer program,
  - communicated to other persons, except where essential to the interoperability of the independently created computer program,
  - used for the development, production or marketing of a computer program of essentially similar form, or for any other act in violation of the copyright.

Contractual provisions contrary to these exceptions are deemed null and void. The ARNR makes no distinction between physical distribution and online distribution of computer programs. All the above-mentioned exemptions apply to all types/kinds of software, irrespective of the way in which it is received.

- Computer software is excluded from so-called "personal use" provisions, which grant the user the right to a copyrighted work without having to obtain consent from the copyright holder[24].

[24]See: for instance section 3 of the ARNR, entitled Lawful Use of Protected Works. Article 23(1). It shall be permissible, without the consent of the creator, to make use free of charge, for personal purposes, of a work that has already been disclosed. However, this provision shall not authorize the construction of a building based on an architectural work or a work of urban

Moral rights

According to the provisions of the Polish law, personal rights or moral rights protect the bond between the creator and the work. This bond is not limited in time or susceptible to renunciation or assignment, in particular with regard to the creator's right to claim authorship of the work and to make the work appear under his name or pseudonym, or to make his anonymous work available to the public. However, the right to make changes to the work (to supervise one's work), the right to safeguard the content and form of the work and its proper use, and the right to control the work's manner of use do not apply to computer programs[25].

Term of protection

The economic rights lapse on expiry of a period of seventy years, calculated:

(1) from the death of the creator, and in the case of works of joint authorship from the death of the last surviving joint creator,

(2) from the date of first publication if the creator is not known, and if the work has not been published, from its production in material form, unless — before that period expires — the name of the creator has been revealed with his consent,

(3) from the date of first publication if the economic rights belong by operation of law to a person other than the creator himself, and if the work has not been published, from its production in material form[26].

Copyright assignment

An employer whose employee has created a work under an employment contract acquires, on accepting the work, the economic rights of the work developed during employment, as contractually agreed by the parties.

If, within two years of acceptance of the work, the employer does not proceed with disclosure of the work as contractually agreed, the creator may grant the employer in writing a sufficient period of time for such disclosure. If that period expires to no avail, the rights acquired by the employer revert to the creator and the material object in which the work is embodied becomes the creator's property, unless the contract provides otherwise. The parties are free to contractually agree on their own disclosure period.

Unless otherwise provided in the contract, the economic rights in a computer program created by an employee during his or her employment belong to the

architecture made by another person. 2. Personal use shall extend to use within a circle of persons who are personally related, in particular by blood or marriage, or who entertain social relations.

[25]Article 77 of the ARNR.

[26]Article 36 of the ARNR.

employer[27]. This provision has specific nature and should not therefore be interpreted broadly. For instance, if computer software is created under a contract similar to an employment agreement (or any other contract such as a commission or work for hire), all copyrights remain with the creator, unless the contract stipulates otherwise.

Unprotected software and public domain software

As set forth above, only software that is original enjoys copyright protection. Non-original software is not eligible for copyright protection.

Analysis of FOSS under Polish law

The issue of free documentation

Polish law has not yet extensively handled the issue of software documentation not released under a free licence. Under German law for instance, as has been mentioned by legal commentators, provisions may be invoked under which an author acting in good faith may not refuse to allow the processing of documentation. However, there is a lack of support for this interpretation in Polish law, due to exclusion of the rule which states that, without the consent of the creator, a legal successor may not make any alterations to the work except where they are dictated by an obvious necessity and where the creator has no valid reason to object to them[28]. This should apply by analogy to works in which the economic rights have expired[29].

The laws applicable to the distribution of copyrighted works

While analyzing the specific provisions of the GPL governing the distribution of copyrighted works, the issue of the waiver of rights arises. Polish copyright law has adopted the concept of dualistic author's rights (i.e. personal and economic rights), which includes the copying right. The waiver would be a consequence of a unilateral legal act that is communicated to the public by an author/creator. In the case of the GPL, the author/creator makes his software available under the GPL, thereby waiving all his rights in that particular work. Concurrently, Polish law contains provisions that conflict with the concept of waiving rights. Hence the conclusion is as follows: it is impossible to waive the right to remuneration[30] (among the author's economic rights) and then waive all other economic rights. There is also a prohibition on transferring economic rights for types of exploitation not known at the time the contract is concluded; another argument that economic rights cannot be waived under the Polish copyright law[31].

[27] Article 74(3) of the ARNR.

[28] J. BARTA, R. MARKIEWICZ, 'Oprogramowanie open source, w świetle prawa. Między własnością a wolnością', Zakamycze, Kraków 2005, p. 67.

[29] Article 49 (2) of the ARNR.

[30] Article 41(3) of the ARNR.

[31] J. BARTA, *Oprogramowanie (…)*, p. 81.

Concept of civil partnership

The legal nature of joint activity performed by people who are developing open source software has also been analyzed and treated as a unique form of civil partnership[32]. This follows from the conclusion that individuals who contribute to the development of open source software work together as a quasi-civil partnership[33]. One of the requirements is that the partners undertake to achieve a joint economic purpose[34]. However, as has been observed, the contractual obligation to support the goal of a civil partnership[35] does not arise by merely downloading open source software from the Internet. Moreover, no legal obligations are incurred by altering software for personal use[36].

Contract of donation or a sales contract

Ways of receiving open source software have been analyzed in order to determine whether it should be categorized as a donation or a sales contract, or whether it is an *ex-parte* action[37]. Undoubtedly, computer programs/ software are deemed economic assets of a given value and are treated as a different kind of "goods"[38]. The nature of a program allows it to be regarded as the autonomous subject-matter of the contract/licence[39]. So one must distinguish between the act of receiving software, and the licensing/contractual issues that focus on actual use of the software. First, a distinction is made between the act of acquiring a software program and the legal implications of such act (gaining possession) on the one hand, and the acquisition of a wide range of rights (of use/distribution, etc.) in the software under a licence agreement on the other[40].

Attention has to be drawn to two distinct steps: (i) acquisition of the actual program, and (ii) acquisition of the relevant rights. The first step may take place by legally downloading the open source software, permitting limited use of the software as indicated by the provisions of Article 75(1) and (2) of the ARNR.

[32] *Ibidem*.

[33] The civil partnership is the simplest form of conducting business by two or more entrepreneurs. This form has no legal personality and its functions are governed by contract law (Articles 860-875 of the Civil Code). Partners of civil partnership are subject of rights. The partnership itself is only a contract and does not constitute an independent legal entity. The consequence of lack of legal personality is that a partnership does not own property. All rights and obligations are contracted on behalf of partners and fall to their common property. Partners have the asset which constitutes their joint ownership of the total.

[34] Article 860 of the CC § 1 By a deed of partnership, the partners shall undertake to promote the attainment of a common economic objective by acting in a specified manner and, in particular, by making contributions. § 2. The deed of partnership shall be made in writing.

[35] Parties of the civil partnership agreement shall establish in the text of the agreement rules of cooperation and commitment to achieve a collective business purpose. These are *inter alia* essential aspects i.e. the minimum contents of a contract in order for it to be held effective and legally binding.

[36] J. BARTA, *Oprogramowanie (…)*, p. 83.

[37] *Ibidem*, p. 115.

[38] The "goods" in this context mean material items as well as other property rights.

[39] J. BARTA, *Oprogramowanie (…)*, p. 116.

[40] *Ibidem*, p. 117.

[41]. This is a *sui generis*, relatively obligatory, statutory licence. To date, the terms and conditions of open source software licences are not part of the legal relationship between an authorized user and the proprietor of the software.]. A licence agreement applies later on, when the user starts to use the software[42]. The separate nature and chronological order of these agreements are in relation to the user's familiarization with the provisions of the agreement[43].

The sole authorization to download the program can be characterized as a donation of property (the property of the proprietor of the program). It has been discussed whether in such cases an independent contract has to be concluded for the acquisition of the program, which is separate from the licence agreement and precedes it, and whether such an agreement should be treated as a donation agreement[44]. There is a statutory requirement that in order to maintain its validity, a donation agreement has to be issued in notarized form as a deed documenting the will of the donor[45]. However, the opposite may also be argued: a donation agreement is valid without notarization if the promised performance has been rendered[46]. Most convincing is the argument pointing out that a donation is made at the expense of a donor — namely the permanent depletion of the substance of the donor's property. This is not the case as far as free software is concerned. The logical conclusion is that an anonymous contract is concluded between the proprietor of the software and the user who downloads/acquires it[47].

[41] Article 75 of the ARNR. (1). Unless otherwise provided in the contract, the acts specified in paragraph 4(1) and (2) of Article 74 shall not require the consent of the owner of rights where they are necessary for the lawful acquirer to be able to make use of the program according to its intended purpose, including the correction of errors. (2). The following acts shall not require authorization from the owner of rights: (1) the making of a backup or reserve copy insofar as such a copy is necessary for the use of the computer program; unless otherwise provided in the contract, the copy may not be used at the same time as the computer program; (2) analysis and study of and experimentation with the operation of the computer program by the person authorized under the contract to make use of a copy of the program, in order to ascertain its underlying ideas and principles, if the person concerned performs the above acts at the time of the operations associated with the loading, display, running, transmission or storage of the computer program; (3) reproduction of the code or translation of the form thereof within the meaning of paragraph 4(1) and (2) of Article 74 where this is essential to the securing of the information necessary to achieve interoperability between an independently created computer program and other programs, and provided that the following conditions are met: (a) the acts are performed by the licencee or by another person enjoying the right to use the copy of a program or, on their behalf, by a person authorized to do so; (b) the information necessary to achieve interoperability was not already easily and rapidly accessible to the persons referred to under (a); (c) the acts are confined to those parts of the original program that are necessary to achieve interoperability.

[42] J. BARTA, *Oprogramowanie (…)*, p. 117-118.

[43] T. JAEGER, A. METZGER, *Open Source Software — Rechtliche Rahmenbedingungen der Freien Software*. München: C.H. Beck-Verlag, 2002, p. 147.

[44] J. BARTA, *Oprogramowanie (…)*, p. 116.

[45] Article 890 § 1 of the CC. The donor's declaration shall be made in the form of a notarial deed. However, a contract of donation concluded without the observance of that form shall become valid if the promised performance has been effected.

[46] Article 890 § 2 of the CC. The above provisions shall not overrule those provisions which in view of the object of the donation require the observance of a special form of the declarations of both parties.

[47] J. BARTA, *Oprogramowanie (…)*, p. 121.

It should be emphasized that under Polish law, free transfer of ownership of a tangible medium containing open source software (DVD, CD — the so-called *corpus mechanicum*) is without a doubt a contract of donation. The provisions of Article 75(1) and (2)[48] of the ARNR govern specific forms of software exploitation, and so it is unnecessary to issue a software licence in the shape of either an agreement or a unilateral legal act.

The specificity of FOSS licences under Polish law

Software as a subject of FOSS licences

After some deliberation, Polish legal doctrine acknowledged that the existence of open source licences is based on the assumption that this kind of software uses copyright protection[49]. This is nothing new, because even though Stallman himself once strongly criticized the notion of intellectual property (IP), he also supports the main principles of copyright law[50]. It is widely acknowledged that all GPL licences are built upon the framework of copyright law. As was once said, "to stay free, software must be copyrighted and licensed"[51] — assuming that the program can be copyright protected i.e. that it is a creative work of individual nature as defined by Polish law. It should also be mentioned that there is no presumption that the results of actions/works are copyright protected, unless counter-proof is furnished[52].

The owner/licensor/employee as a subject of FOSS licences

The basic issue is to determine who is entitled to the economic author's rights (right to copy etc.) as the primary copyright owner, and whether these rights can also be enjoyed by successors in title[53]. Copyright is vested in the creator/author (creators/authors) at the time of the creation of the work — this principle is transferred to computer programs. The situation is different with employees' works — copyright is passed to the employer *ex lege*.

An employer using open source software to which one of his employees has made changes should make the altered software available on the same terms on which the original software was distributed and licensed[54].

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[48] See: footnote 42.

[49] J. BARTA, *Oprogramowanie (…)*, p. 86.

[50] T. RYCHLICKI, *GPLv3: New Software Licence and New Axiology of Intellectual Property Law*, E.I.P.R. 2008, 30(6), pp. 232-243, citing R.M. Stallman, *Misinterpreting Copyright*, available at http://www.gnu.org/philosophy/misinterpreting-copyright.html — last accessed 26 July 2010.

[51] *What Does Free Mean? or What do you mean by Free Software?*, available at http://www.debian.org/intro/free — last visited 26 March 2010. The discussion whether GNU GPL is a contract or a licence was published in E. Moglen, *Free Software Matters: Enforcing the GPL I*, available at http://emoglen.law.columbia.edu/publications/lu-12.html — last visited 26 July 2010.

[52] J. BARTA, *Oprogramowanie (…)*, p. 86.

[53] *Ibidem*.

[54] J. BARTA, *Oprogramowanie (…)*, p. 87.

In this case, the issue of payment for making changes to the program is not recognized as a fee for the licence or for the transfer of rights in the software, but only as remuneration for the employee's work[55].

Software copyright cannot be encumbered or restricted if a program is distributed/published under an open source licence by an authorized person (successor) at the time when such person holds all the rights in the wake of general succession.

Legal issues on co-authorship

The situation regarding ownership of the program is more complicated when an undefined number of persons is involved in working on the program. The following questions may arise: who is the author, and how does someone come to be regarded as the author? This is certainly the outcome of the bazaar approach in developing FOSS. The concept of co-authorship was adopted with the in casu legal construction of "combined work"[56]. However, this situation poses certain problems relating to, *inter alia*, the exercising of the copyright in the whole work, because that should require the agreement of all the joint creators. In the absence of such agreement, each joint creator may seek settlement of the dispute by a court, which should rule taking the interests of all the joint creators into consideration[57]. In any such case the principle of a majority vote cannot be applied, and the only effective solution to this problem may be a Fiduciary Licence Agreement[58].

Minors and FOSS

FOSS is and should be used by minors[59] but there are some important issues to be considered. The Civil Code requires the consent of a guardian to acts done by a minor[60]. As a rule the licensee may be a minor and the minor may also accept a donation, but without creating any encumbrance on the minor's part[61]. The question arises however as to whether the minor can effectively participate in the development of open source software, and whether under Polish law the distribution of FOSS should be limited to adults only[62]. Unfortunately, Polish law and legal doctrine have failed to make a more thorough analysis of the legal issues relating to the participation of minors in using and developing free

[55] *Ibidem*, p. 88

[56] J. BARTA, *Oprogramowanie (…)*, p. 89.

[57] Article 9(1-3) of the ARNR.

[58] J. BARTA, *Oprogramowanie (…)*, p. 90.

[59] Article 12 of the CC provides that one who has not attained the age of thirteen and who is completely incapacitated has no legal capacity. Under article 15 of the CC, minors who have completed thirteen years old have limited legal capacity.

[60] Article 17 of the CC. Subject to the exceptions provided by civil code, the validity of a transaction, whereby a person of limited legal capacity incurs a liability or disposes of its laws, requires the consent of his or her legal representative.

[61] In this aspect the copyleft clause is very "restrictive" when it comes to imposing an obligation on minor's.

[62] J. BARTA, *Oprogramowanie (…)*, p. 92.

software. Allowing a minor to exercise the privileges of an open source licence is justified by the concept that permission from his or her statutory representative has been issued implicitly (by implication), a general assumption in the sphere of legal actions relating to the use of free software[63]. This issue is also very interesting in view of the fact that work or other paid activities may only be performed by a child under the age of 16 for the benefit of an entity that is involved in cultural, artistic, sporting or advertising activities, and only with the prior consent of his or her statutory representative or guardian as well as permission from the competent labour inspectorate[64].

Concluding individual FOSS licences under Polish law

An agreement is concluded when an offer[65] is submitted and then accepted[66]. Such an agreement has many unusual characteristics[67] indicated by the manner in which the contract is concluded. A statement is made offering non-exclusive rights to every user, so an offer is directed to all (*ad incertas personas*) to use the work (the reproduction, distribution, alteration rights, etc.). It is considered a definite offer to conclude a contract when the author or other entitled party makes software available under similar conditions and enables the downloading of a program. This is not considered a typical invitation to call for bids (*invitatio ad offerendum*[68]). The offer to conclude an agreement may also be submitted in other circumstances, i.e. if there is a third party between the offeror (licensor) and offeree (licensee), and if such third party is deemed a messenger or representative who provides information about the contract offer[69].

The individual contract is not concluded on commencing use of the software, but when distribution of the program begins. The user accepts the offer by performing such actions as modification or distribution[70]. It is not important for the conclusion of the contract that the licensor has to receive an approval

[63] *Ibidem*, p. 93.

[64] Article 304^5 of the Polish Labour Code, providing rules for exceptional performance of work by children.

[65] Article 66 § 1 of the CC. A declaration made to another party of the intent to conclude a contract shall be deemed an offer if it determines the essential provisions of the contract.

[66] Article 70 of the CC § 1. In case of doubt, a contract shall be considered concluded at the moment when the maker of the offer receives the declaration of its acceptance, and if it is not required that the maker of the offer receive the declaration of its acceptance at the moment when the other party proceeds to perform the contract. § 2. In case of doubt, a contract shall be considered concluded at the place where the maker of the offer received the declaration of its acceptance, and if it is not required that the maker of the offer receive the declaration of its acceptance or the offer is made electronically at the place of residence or in the seat of the maker of the offer at the moment of conclusion of the contract.

[67] J. BARTA, *Oprogramowanie (…)*, p. 93.

[68] *An expression of willingness to negotiate. A person making an invitation to treat does not intend to be bound as soon as it is accepted by the person to whom the statement is addressed*, See: A. BURROWS, Casebook on Contract (Hart Publishing, 2007) Ed. See also: http://en.wikipedia.org/wiki/Invitation_to_treat — last visited 15 August 2010.

[69] J. BARTA, *Oprogramowanie (…)*, p. 94.

[70] See: Section 5 of the GPL2.

message[71]. This is implicit conclusion of a contract performed. There is also the issue of how to assess the nature of distribution of a computer program that is based on an order placed by a potential user by e-mail. It is assumed that this constitutes the conclusion of an agreement to transfer intangible rights that has the characteristics of a contract of donation or an innominate contract, to which the statutory regulations pertaining to donation agreements should apply. Article 75(1) of the ARNR regulates the permissible exploitation of the program.

The characteristics of an individual open source licence

This is an individual non-exclusive licensing agreement[72]. The rights to use open source software are provided on a resolutive condition[73].

The scope of rights/content of FOSS licences under Polish law

It has been discussed whether the scope of rights under the GPL2 can be extended to the lease right that is not explicitly mentioned in this licence. The popular opinion issued by J. Marly[74] has also been accepted by Polish legal commentators[75]. As regards the distribution right, it has been agreed that this right may be exercised under a donation contract or a special form of innominate contract, but definitely not under a sales agreement[76].

Obligations

The program's author or developer is required to grant non-exclusive rights free of charge. There is a conflict here with the copyright of works created during an employment relationship, because under statutory regulations the entitled party is *ex lege* the employer. As already mentioned, the issue of copyleft also conflicts with the provisions of the Civil Code concerning minors[77].

Termination of license contract

The licence expires *ex nunc* if the licensee violates the conditions of Section 4 of the GPLv2. This means that continued use/exploitation constitutes a violation of absolute copyright laws. However, this does not grant entitlement to assert

[71] Article 69 of the CC provides for the so-called "silent adoption of the offer". A statement of the acceptance of offer is not required, particularly where an offerer requests the immediate implementation of the contract. The contract takes effect, if the other party in time for its implementation will proceed, otherwise the offer ceases to be binding.

[72] J. BARTA, *Oprogramowanie (…)*, p. 89.

[73] Article 89 of the CC defines the "resolutive condition". Subject to the exceptions provided by Civil Code or under the properties of legal action, the creation or termination of the effects of legal action can be dependent on future and uncertain event (condition).

[74] J. MARLY, *Software Überlassungsverträge*, 2nd ed. Munich 1997, p. 204.

[75] J. BARTA, *Oprogramowanie (…)*, pp. 101-102.

[76] *Ibidem*, p. 106.

[77] See: J. BARTA, *Oprogramowanie (…)*, p. 108, and previously mentioned issues on FOSS and Minors.

the claims provided for such cases when Article 75 of the ARNR is applied. The problem of the principle of exhaustion of rights arises. If it is assumed that a licence agreement is not disposable, then the provisions of Article 365^1 of the CC should be applied[78]. However, under Polish law the nullity of a legal action involving the termination or rescission of a licence agreement has to be considered, taking into account the rules on open source movement, if a licence agreement is terminated or a unilateral licence is withdrawn without the provisions of such agreement having been infringed by the licensee. This would be a declaration of will that is clearly contrary to the rules of social coexistence as defined in Article 58 § 2 of the CC[79]. If this interpretation is not feasible, an alternative would be to invoke the abuse of rights by the holder of the open source software[80].

Distribution of open source software by 3rd parties

The messenger[81] who passes on an offer, as defined in the GPL and submitted by the author or producer of open source software, is regarded in Polish law as being the distributor of the open source software. In any such case, the offer is accepted *per facta concludentia* (both parties have voluntarily started to render their contractual performance) by starting the exploitation of the program[82]. A legal relationship is then brought about between the author/entitled person and a third party (distributor). The parties may be bound by any of the following contractual relationships: a licence agreement for reproduction, distribution and circulation; a sub-licence agreement; a sales contract; a consignment agreement; or an agency contract[83].

Breach of the conditions of FOSS licence

Any breach of the licence automatically renders it void. However, termination in this manner will not affect the interests and rights of third parties if they acquired the right to use the software from the party who violated the licence. The question arises as to whether the party who violates the GPL also loses the status of "the lawful user of the program". i.e. the party entitled to use a copy of the program, meaning that it is not allowed to exercise the rights conferred by Article 75 of the ANRN. After obtaining a program released under an open source licence/GPL, this applies both to the stage following conclusion

[78] Continuous obligations unlimited in time shall expire after a notice has been given by the debtor or creditor with the observance of contractual, statutory or customary time limits, and where there are no such time limits, immediately after said notice has been given.

[79] Article 58 of the CC § 1. Any legal action that is contrary to law or intended to circumvent the law is null void, unless the relevant rule provides a different result, in particular, this, that in place of the invalid provisions of the legal transaction includes the relevant provisions of the Act.

[80] J. BARTA, *Oprogramowanie (…)*, p. 113.

[81] The messenger is a person who only passes already prepared declaration of will of another person to the addressee.

[82] J. BARTA, *Oprogramowanie (…)*, pp. 126.

[83] *Ibidem*, p. 127.

of the licence agreement and to the stage preceding conclusion of an individual contract under the provisions of the GPL. Any violation of the GPL beyond the permitted limits effectively terminates not only the agreement itself, but also the ability to use the program[84].

The conditions of the GPL are also breached if software is installed on embedded systems where the source code is not made available/shared, and/or if a written offer to supply the software has not been released/submitted[85]. If an open source licence agreement is breached, all the claims relating to copyright infringement may be asserted. The entitled party whose economic rights have been infringed, may demand that the person infringing these rights:[86]

1) put an end to the infringement;

2) eliminate the consequences of the infringement;

3) compensate the losses:

a) either on the basis of general principles[87], or

b) by paying a sum of money equal to twice — or, if the infringement is culpable, three times — the equitable remuneration, which at the time of enforcement would be due to the entitled party in return for granting permission to use the work;

4) surrender any benefits received.

Regardless of the aforementioned claims, the entitled party may demand:

1) a one-off or repeated press announcement of appropriate content and form, or (part) publication of the court ruling in the case at issue, in accordance with the court's specifications;,

2) payment by the infringer of an appropriate sum of money, not less than twice the amount of the benefit attained by the infringing party, to the Fund for the Promotion of Artistic Creation, if the infringement is culpable and occurred during business activities carried out in the infringer's own name or for third-party account.

[84] J. BARTA, *Oprogramowanie (…)*, p. 134. It was noted that the provisions of the CeCILL licence agreement explicitly provide for the prevention of further use of the program in breach of the provisions of this agreement.}

[85] *Ibidem*.

[86] Article 79 of the ARNR.

[87] The claim for compensation for the damage caused is fully based on the principles of tort liability as provided in Article 415 of the Civil Code. See J. BARTA, R. MARKIEWICZ (in:) J. BARTA, M. CZAJKOWSKA-DĄBROWSKA, Z. ĆWIĄKALSKI, R. MARKIEWICZ, E. TRAPLE, *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2003, p. 559). However, the legal nature of these claims is still debatable. Polish law knows contractual, statutory or tortious/penal nature of legal claims. According to the judgment of the Polish Supreme Court of 22 October 1974 published in OSN 1975, no 10-11, item 153, these claims may be enforced jointly.

Each of the joint creators may bring action claiming violation of copyright in relation to the whole work[88]. The FSFE's Fiduciary Licence Agreement is a perfect solution for all problems connected with co-authorship and joint ownership[89].

FOSS licences and private international law

The provisions of standard open source licence are within the limits and scope of contractual freedom as adopted in civil law in Article 353$\hat{}$1$ of the CC[90]. In accordance with the provisions of the Polish Act of 12 November 1965 on Private International Law (hereinafter the PIL), in the absence of the choice of law, an obligation is subject to the law of the state in which the contract was concluded[91].

Interpreting the provisions of Article 7 of the PIL, it may be argued that Polish law applies to contracts/agreements permitting use of open source software in Poland[92]. It may also be assumed that a contract/agreement on using open source software is brought about on saving the software to the computer memory, and in conjunction with the provisions of Article 70 § 2 of the CC[93] the conclusion is that the location of the computer determines the location of the conclusion of the contract[94].

FOSS licences and consumer law

The GPL has been the subject of analysis from the point of view of Polish consumer law. The first important issue to be raised is the fact that only the English-language version is legally binding[95]. This situation makes the GPL subject to application of the provisions of the Act of 7 October 1999 on the Polish Language[96]. According to Article 7 of the Act, all contracts to which a Polish entity is a party and which are to be executed on Polish territory must be written in Polish. Although versions of such contracts may also exist in a foreign language, the Polish version of the contract prevails for interpretation purposes, unless the parties expressly stipulate otherwise in the contract. The

[88] Article 9(4) — first sentence, of the ARNR.

[89] J. BARTA, *Oprogramowanie (…)*, p. 136.

[90] Contracting parties may establish legal relationship at their discretion, so long as the relationship or its purpose are not against to specific (kind) of this relationssship, the Act nor the rules of social coexistence.

[91] Article 29 of the PIL in connection with Article 27 of the PIL.

[92] Article 7. Where it shall prove impossible to establish circumstances which determine the governing foreign law, or where it shall prove impossible to indicate the substance of the governing foreign law, the Polish law shall apply. See: J. BARTA, *Oprogramowanie (…)*, p. 149

[93] See: footnote 67.

[94] J. BARTA, *Oprogramowanie (…)*, p. 150.

[95] See: http://www.gnu.org/licenses/gpl-faq.html#GPLTranslations — last visited 18 Agust 2010.

[96] Published in Journal of Laws (Dziennik Ustaw) of 1999 No 90 item 999 with subsequent amendments.

Act explicitly forbids using a foreign language version of a contract to provide evidence of the contract's existence. This means that in a dispute before a Polish court, parties to a contract executed only in a foreign language are denied the right to furnish evidence to prove the existence of the contract. For goods and services, all product manuals and specifications, terms and conditions of warranties, invoices, bills and receipts must be in Polish. The Act requires the names of merchandise to be in Polish, although individually designated names, brands and trademarks — despite their foreign wording — do not have to have Polish equivalents. The Act requires that offers, advertisements and descriptions of merchandise and services which are in a foreign language be accompanied by a Polish translation[97]. If the obligations laid down in Article 7 of the Act are violated, the relevant provisions of Article 74 § 1 sentence 1 and 74 § 2 of the CC apply[98].

This does not imply the invalidity of such an agreement, but it has an effect in the sphere of evidence — *ad solemnitatem*[99]. The documents referred to in Article 7 also relate to standard contract forms, and that is what the GPL and other open source model licences undoubtedly are[100].

The obligation to use the Polish language cannot be eliminated by indicating that the applicable law is other than Polish law[101]. Polish courts are obliged to apply the provisions of Articles 7 and 8 of the Act on Polish language[102]. Thus a Polish court is bound to settle any dispute arising from the contractual provisions by invoking the restriction pursuant to Articles 7 and 8, which will always be applied even if under Polish Private International Law the law governing the standard contract form is foreign law[103].

The issue of concluding an open source licence/contract has been analyzed from the point of view of the protection of consumer interests, based on the provisions of Act of 27 July 2002 on Specific Terms and Conditions of Consumer Sale and Amendments to the Civil Code[104]. However, the application of these provisions has been questioned, due to the fact that this Act should be applied to the sale — in the context of an enterprise's business activities — of a movable chattel/tangible asset to a natural person who purchases the item for a purpose

[97] See: J. BARTA, *Oprogramowanie (…)*, p. 168.

[98] Article 74 § 1. The reservation that a contract has to be in writing without invalidity rigor if such contract has not been made in writing, has the effect that in case of failure to comply with restricted forms, the evidence of the witnesses or evidence of hearing are not allowed in disputes arising from the contract. This provision does not apply when the written form is reserved only for given effects of legal action.

[99] Article 73 § 2 of the CC. The failure to use a particular form of legal act/action makes it void. The specific formalities that are required or otherwise the contract is valid.

[100] See: J. BARTA, *Oprogramowanie (…)*, p. 169.

[101] The application of these provisions are forced by the Act on Polish language and are deemed as *ius cogens* — one can not contractually disable/exclude this provisions.

[102] See: J. BARTA, *Oprogramowanie (…)*, p. 170.

[103] *Ibidem*, p. 190.

[104] Published in Journal of Laws, No 141, item 1176 with subsequent amendments.

other than carrying out professional work or business (consumer goods)[105].

Another aspect of consumer law is the analysis of contractual provisions of open source licences in terms of distance dealing, and the provisions of the Act of 2 March 2000 on the Protection of Consumer Rights and Liability for Damage Caused by a Dangerous Product (hereinafter the PRCLL)[106]. Such contracts are concluded in a situation where the two parties are not simultaneously present in one place, and methods or means of distance communication — including electronic means of communication within the meaning of Article 2 pt. 5 of the Polish Act of 18 July 2002 on Providing Services by Electronic Means — PSEM — (in Polish: ustawa o świadczeniu usług drogą elektroniczną)[107] — are used to conclude the agreement. Downloading a program from the Internet that is distributed under the GPL satisfies the conditions of a contract/agreement/licence concluded at a distance. The application of these laws is limited due to the fact that the consumer is acting as licensee, whilst the other party is the entrepreneur/professional entity doing business operations. The burden of proof that an agreement has been concluded at a distance lies with the consumer.

- In addition, if the open source licence/agreement/contract is concluded at a distance and is subject to regulations laid down in the PRCLL, other legal standards provided in this Act may be applicable. The rights of the consumer may not be excluded or limited under a contract, even where foreign law has been chosen[108]. A consumer who concludes a distance contract may withdraw from it without giving reasons, by issuing a written statement to that effect within a period of ten days after conclusion of the contract[109]. This right is not conceded in the provisions of the GPL, but this does not have any serious legal implications[110].

FOSS licences and model contracts

The general terms of licence agreements on open source software, such as the GPL, satisfy the conditions for applying the provision laid down in Article 384

[105]See: J. BARTA, *Oprogramowanie (…)*, p. 171.

[106]Published in Journal of Laws, No 22, item 271 with subsequent amendments. Article 6(1). The consumer contracts concluded without simultaneous presence of both parties, by way of a use of means of communication at a distance, in particular order form without the address or addressed, serial letter, press advertising with a printed order form, catalogue, telephone, radio, television, automatic calling machine, videophone, videotext, electronic mail, facsimile machine, shall be considered distance contracts, provided that the party to the contract with the consumer is the entrepreneur who organised in such a way his business activity. 2. The proposal to conclude the contract in a form of an offer, invitation to offer or order, or to start negotiations should univocally and clearly indicate the intention of the person making such proposal to conclude the contract. 3. Making use of videophone, facsimile machine, electronic mail, automatic calling machine and telephone in order to propose the conclusion of a contract may be done only upon the prior consent of the consumer.

[107]Published in Journal of Laws of 2002, No 144, item 1204 with subsequent amendments.

[108]Article 17 of the PRCLL.

[109]Article 7(1) of the PRCLL.

[110]See: J. BARTA, *Oprogramowanie (…)*, p. 172.

of the CC[111] and are deemed "previously formulated contractual terms". There is no special treatment for general licence terms drawn up as standard contracts with international scope[112]. The provisions of Articles 384-3854 of the CC are applied regardless of the nature of the contract, and no matter whether the contract/agreement is paid or free of charge.

Polish law also distinguishes recognition of a standard contract from the question of its approval and inclusion in the wording of an individual agreement on using a software program. This is not precluded by the fact that the standard contract is drawn up in English[113]. The provisions of Article 385 §2 of the CC require only that the standard contract be formulated explicitly and clearly.

Polish legal doctrine favours liberal and flexible interpretation of the term "delivery/service" of a standard contract following its conclusion, under provisions laid down in Article 384 §1 of the CC in conjunction with Article 384 §4 of the CC. The provisions of a standard contract are implemented in an individual agreement at the time of its conclusion[114].

However, general acknowledgement that the terms of the GPL effectively apply in Poland, does not rule out doubts and questions regarding the effectiveness of certain provisions of the GPL[115]. It has also been noted that the abusive nature of these provisions is subject to specific presumption[116].

Tax law

The Polish tax system is divided mainly into tax on earnings and tax on turnover[117].

Tax on legal entities and private income

The Polish Undersecretary of State has issued an opinion[118] regarding tax consequences associated with the use of free software programs. The circular was addressed to the directors of all tax offices and chambers in order to ensure uniform application of the law under Article 14 § 1 no. 2 of the Tax Code and convey an explanation of Article 12(1) no. 2 of the Polish Act of 15 February 1992 on Legal Entities' Income Tax (hereinafter the LEIT)[119].

[111] A model contract, in particular the general provisions of the terms of an agreement, sample contract, regulations, determined by one party, is binding for another party if it was served before the conclusion of the contract.
[112] See: J. BARTA, *Oprogramowanie (…)*, p. 173.
[113] *Ibidem*, p. 174.
[114] *Ibidem*, p. 177.
[115] *Ibidem*, p. 178.
[116] *Ibidem*, p. 179.
[117] The Act on Goods and Services Tax — GSTA — (in Polish: ustawa o podatku od towarów i usług) of 11 March 2004, Journal od Laws (Dziennik Ustaw) No. 54, item 535 with subsequent amendments.
[118] The letter of 10 March 2006, case file PB3/GM-8213-12/06/144.
[119] The Act of 15 February 1992 on Legal Entities' Income Tax (in Polish: Ustawa o podatku dochodowym od osób prawnych) consolidated text published in Journal of Laws (Dziennik

The opinion stated that in the case of rights obtained free of charge, income is determined on the basis of prices used in market sales of similar rights, in particular in terms of their condition and degree of use and the time and place of such use. Tax law provisions establishing the value of taxable income for performance received gratuitously do not foresee a situation where such performance is free for all stakeholders. Article 12(6) of the LEIT covers cases where the value of gratuitous performance can be compared to other paid performance by the taxpayer. The value of "comparable" performance of a given kind — in this case, of free software that is available to all on an equal (free-of-charge/gratuitous) basis — cannot be determined, and so there is no basis for ascertaining earnings. If certain performance (including the transfer of rights) is inherently free-of-charge to all taxpayers, and not an individual case applying to a single entity, establishing taxable income from such performance is not permitted pursuant to Article 12(1)(ii) of the LEIT. This does not mean, however, that in assessing the possible tax consequences associated with the use of such software, there is no need to examine all the circumstances connected with it. Each case therefore requires individual analysis. This explanation of the tax consequences associated with using free software applies to individuals engaged in non-agricultural business operations who are liable to income tax[120].

Tax on civil law transactions

The Tax Office in Tarnowskie Góry[121] has ruled that the unconditional free sharing of a computer program with unlimited recipients is not a civil law act, and that donations sent to its creators by users of the program are not a form of payment for its use. There is therefore no legal relationship between the creators of the program and its users, and no rights are transferred by the creator to the user, and so this form of activity is not liable to tax on civil law transactions[122].

Tax on goods and services (VAT)

The Tax Office in Chorzów[123] has ruled that publishing a computer program free of charge in the Internet, enabling it to be used by anyone, is not necessarily based on any legal title incurring the obligation to provide service and demand payment, and that the amount of donations does not depend on the actual service provided, and so this act is not deemed performance for remuneration. Furthermore, the Office has ruled that there is no reason to believe that such actions are services provided free-of-charge, and so they are not subject to tax

Ustaw) of 2000, No. 54, item 654 with subsequent amendments, and the Act on Personal Income Tax — PITA — (in Polish: ustawa o podatku dochodowym od osób fizycznych) of 26 July 1991, Journal of Laws (Dziennik Ustaw) No. 80, item 350, with subsequent amendments.

[120] T. RYCHLICKI, *Tax law, case file PB3/GM-8213-12/06/144,* available at http://rychlicki.net/en/2006/05/21/4678/ — last visited 17 August 2010.

[121] The decision of 10 February 2006 case file PO/005-1/06.

[122] T. RYCHLICKI, *Tax law, case file PO/005-1/06,* available at http://rychlicki.net/en/2006/05/21/4699/ — last visited 17 August 2010.

[123] The interpretation of 27 March 2006 case file USPP-IV-440/30/06/P-I/23717.

on goods and services[124].

The above-mentioned position of the Polish tax authorities is undoubtedly beneficial to those involved in the production and use of free software. In principle, it also includes closed source software, because that primarily concerns software that is distributed "free of charge" and not the rights granted to users. Of course, it must be remembered that interpretations by the tax authorities do not apply universally and are not binding: they are merely issued with regard to a specific taxpayer and the circumstances relating to that taxpayer[125].

FOSS and legal issues of open standards

Polish administrative courts have ruled that requests concerning access to public information relating to open standards may be excluded, because protection of secrecy (other than state secrets) is a matter for the civil courts and not subject to administrative jurisdiction[126]. The civil courts have held that in accordance with the obligation to disclose public information laid down in Article 13 of the Act on the Informatization of Activities Undertaken by Entities Fulfilling Public Tasks[127], the President of the Social Insurance Institution (hereinafter the ZUS, in Polish: Zakład Ubezpieczeń Społecznych) has to disclose public information concerning the technical specifications of the KSI MAIL format that is used in Płatnik software[128].

FOSS cases in Poland

No cases have been reported so far (April 2014).

Legal procedures

Copyright holders in the Republic of Poland may protect their rights in civil and criminal proceedings. Moreover, they may also resort to procedure before

[124]T. RYCHLICKI, *Tax law, case USPP-IV-440/30/06/P-I/23717,* available at http://rychlicki.net/en/2006/04/21/4701/ — last visited 2 August 2010.

[125]K. SIEWICZ, *Opodatkowanie wolnego oprogramowania,* available at http://ksiewicz.net/?p=35 — last visited 10 August 2010.

[126]The Voivodeship Administrative Court in its order of 30 January 2004 case file II SA 3732/03 http://orzeczenia.nsa.gov.pl/doc/504405F483. The judgment of the Supreme Administrative Court of 3 March 2004 case file OSK 600/04 http://orzeczenia.nsa.gov.pl/doc/C49E291A37 — See: T. RYCHLICKI, *Access to public information, case OSK 600/04*, available at http://rychlicki.net/en/2006/09/12/4627/ — last visited 16 August 2010.

[127]The Act on the Informatization of Activities Undertaken by Entities Fulfilling Public Tasks (in Polish: ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne) of 17 February 2005, published in Journal of Laws of 2005 No 64, item 565 with subsequent amendments.

[128]Płatnik is a free software but not open source. It is used to fill in and send a statement of payment declarations to the Social Insurance Institution. It works only with MS Windows. See: T. RYCHLICKI, *Access to public information, case V Ca 454/07*, available at http://rychlicki.net/en/2007/07/30/4812/ — last visited 17 August 2010.

the customs authorities. The Republic of Poland is not a common law country and the courts are not bound by the decisions of other courts. However, Polish judges tend to recognize widely the decisions and verdicts of the Polish Courts of Appeal and the Polish Supreme Court. Only rulings by the Supreme Court that are issued as a legal norm are universally binding. The decisions of foreign bodies such as the General Court and Court of Justice of the EU may be recognized only as so-called "persuasive precedents".

Action for infringement of copyright is brought before a District Court in the first instance. There are no special courts which have exclusive jurisdiction for resolving copyright disputes, except for matters relating to the criminal prosecution of copyright infringement. These cases are brought before the regional courts located in cities where particular district courts are also seated. The litigation costs depend on the amount in dispute.

Protection of databases

Poland has also adopted *sui generis* protection for databases in a separate law, entitled the Act on Protection of Databases (hereinafter the APD)[129]. The Polish Supreme Court has held[130] that acquiring an electronic database and selling it to customers under a different name is a tortious act of unfair competition.[131]

Recommended literature

- J. Barta, R. Markiewicz, Oprogramowanie open source, w świetle prawa. Między własnością a wolnością, Zakamycze, Kraków 2005.
- K. Siewicz, Towards an Improved Regulatory Framework of Free software, Protecting user freedoms in a world of software communities and eGovern-

[129]The Act on Protection of Databases (in Polish: Ustawa o ochronie baz danych) of 27 July 2001, Journal of Laws (Dziennik Ustaw) No. 128, item 1402 with subsequent amendments. This Act transposed the Directive 96/9/EC of 11 March 1996 on the legal protection of databases (OJ L 77, 27 March 1996).

[130]Judgment of 7 January 2004, case file II CK 174/02.

[131]As defined in Articles 3 and 13 of the Polish Act of 16 April 1993 on Combating Unfair Competition. Article 3 of the CUC. (1) The act of unfair competition shall be the activity contrary to the law or good practices which threatens or infringes the interest of another entrepreneur or customer. (2) The acts of unfair competition shall be in particular: misleading designation of the company, false or deceitful indication of the geographical origin of products or services, misleading indication of products or services, infringement of the business secrecy, inducing to dissolve or to not execute the agreement, imitating products, slandering or dishonest praise, impeding access to the market and unfair or prohibited advertising and organising a system of pyramid selling. — Article 13 of the CUC (1) Imitating a finished product by way of technical means of reproduction, to copy an external image of such product where it may mislead customers as to the identity of the producer or product, shall be the act of unfair competition. (2) Imitating functional features of a product, in particular its make, structure and form ensuring its usefulness shall not be deemed the act of unfair competition. Where the imitation of functional features of a finished product requires including its characteristic form, which may mislead customers as to the producer or product identity, the imitator is under obligation to adequately mark the product.

ments, Universiteit Leiden, EM Meijers Instituut voor Rechtswetenschappelijk Onderzoek 2010.

Relevant legislation

- The Civil Code of 23 April 1964, Journal of Laws No. 16, item 93, with subsequent amendments.
- The Act on Authors Rights and Neighbouring Rights of 4 February 1994, published in Journal of Laws No. 24, item 83, consolidated text of 16 May 2006, Journal of Laws No. 90, item 631 with subsequent amendments.
- The Act on Specific Terms and Conditions of Consumer Sale and Amendments to the Civil Code.
- The Act of 2 March 2000 on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Dangerous Product.
- The Civil Proceedings Code of 17 November 1964, Journal of Laws No 43, item 296, with subsequent amendments.
- The Criminal Proceedings Code of 6 June 1997, Journal of Laws No 89, item 555, with subsequent amendments.