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## COPYRIGHT IN SERMONS AND HOMILIES

The literature on the subject rightly indicates a negligible amount of texts and studies covering the area of copyright and its impact on the manner in which religious practices are performed, including the aspect related to the teaching of the faithful, in particular preaching, homilies and conferences [Broński 2010, 133]. However, when analyzing the wide range of issues covered by copyright, under national and EU law, as well as those arising from international agreements and conventions to which the Republic of Poland and the Holy See are parties, special attention is paid to the issue of the general lack of understanding of the limits of lawful activities, as well as interpretation of provisions allowing free use of the achievements of other preachers. And although there are a number of issues that require extensive analysis and interpretation under copyright, the subject of this article will be solely the copyright assessment of sermons, homilies and conferences as a particularly important form of communicating the Word and teaching the faithful, and the possibility of using sermons, homilies and conferences developed by other people.

Guaranteed in the Constitution<sup>1</sup> the guarantee of freedom of conscience and religion (Art. 53, paras 1 and 2) and the Church's autonomy and independence (Art. 25, para. 3), as well as the guarantee of free and public exercise of the mission by the Catholic Church indicated in the Concordat<sup>2</sup> (Art. 5), provide a solid basis for the unrestricted exercise of religious practices and the preaching of ministers. Despite such a broad framework, the limits of free action are also set by the provisions of generally

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<sup>1</sup> *The Constitution of the Republic of Poland* of 2 April 1997, Journal of Laws of 1997, No. 78, item 483.

<sup>2</sup> *Concordat between the Holy See and the Republic of Poland*, signed at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

applicable national law, including copyright, creating a framework for the use of another author's work, including for the purposes of religious worship and religious practices.

### **1. The work within the meaning of copyright**

In order to consider the importance of copyright for preaching more widely, one should first answer the question about the object covered by copyright. And so, in accordance with Art. 1, para. 1 of the Act of 4 February 1994 *on Copyright and Related Rights* "The object of copyright shall be any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose or form of expression (work)."<sup>3</sup> Hence, not every sermon in the broad sense of the word, including homilies, will be subject to copyright protection, but only those which, according to the premises specified in the Act, can be called work. Therefore, this sermon must have creative features, not just a duplication of the pattern or reading of a ready template or letter, it must also carry a manifestation of individual character which is often a reflection of the preacher's personality, experience and thoughts. It is irrelevant for the work whether it will be recorded, because its externalization is sufficient. It is also irrelevant whether the sermon will be completed, preached in its entirety or read out.

Granting the status of a work does not require fulfillment of any formal conditions, including it is not necessary for anyone to be able to get acquainted with the external form of the work (e.g. its content). Thus, the work should also be considered as sermon draft (in whole or in part) even if they were written, but never preached by the preacher. At this point it should be emphasized that in accordance with Art. 1, para. 2, subpara. 1 CRR "Protection may apply to the form of expression only and no protection shall be granted to discoveries, ideas, procedures, methods and principles of operation as well as mathematical concepts." Therefore, the work is not the conception of the sermon, the keynote, or the specific idea, but the way the preacher realizes it by giving them the appropriate form. The protection granted by copyright to the author is by no means burdened

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<sup>3</sup> Journal of Laws of 2019, item 1231 [henceforth cites as: CRR].

with the requirement to comply with any formalities or additional actions, as it arises *ipso iure*. As a result, copyright protection also applies to sermons that were not previously publicly presented, but were only written and submitted for publication in homiletic collections.

In homiletics, attention is drawn to the distinction between a sermon and a sermon text, indicating that the sermon is not an edited text, but a dynamic reality that occurs during the preaching [Broński 2010, 136]. This in turn takes the form of a meeting, not an act dependent solely on the manifestation of the creative activity of one person. Copyright does not differentiate sermons in this regard, granting the same legal protection to sermons preached, regardless of the scope and group of potential recipients, as well as the text of the sermon itself. Copyright protection also applies to sermons that have not been recorded anywhere or written down but have only been given by a preacher [Kroczek 2016, 66].

## **2. A derivative work and an inspired work**

Operating in the modern world, rich in science, culture and literature, having almost unlimited possibilities in the area of flow and obtaining information thanks to Internet access, it is increasingly difficult to create a work that is completely detached from other available sources, free from derivation and inspiration. As a result, there are fewer self-contained works, and the vast majority are talking about the formation of derivative or inspired works. This distinction is of great importance from the point of view of the possibility of free use of another author's work or the need to obtain the consent of the author of the original work. In order to make the appropriate qualification, it is necessary to determine the extent of the influence of the original work on the work, which was created with his participation as a derivative work or as an inspired work. A derivative work is often also referred to as a study. According to the dominant view expressed in legal literature: "The essence of the study is, generally transformed (and in particular cases through incorporation), the acquisition of creative elements within the meaning of copyright from another work to a new one, assuming that the author's own contribution also contains such creative elements" [Markiewicz 2019, 147]. Art. 2, para. 1 CRR clearly indicates that "The work derived from another author's work, in particular

its translation, modification or adaptation, shall be copyrighted without detriment to the original work.” However, what is important, to dispose of and use the derivative work in a lawful manner, it is necessary to permit the author of the original work (from which the creative elements were taken over). This permission is not required when the author’s economic rights to the original work have expired, and therefore in principle after the lapse of seventy years from the death of the author of the original work (Art. 36 CRR). In addition, the copies of the derivative work shall indicate the author and the title of the original work (Art. 2, para. 5 CRR).

To assess the correct use of another author’s work and act in accordance with the law, the issue of the definition of an inspired work is also not without significance. From Art. 2, para. 4 CRR shows that the work produced under the inspiration of another author’s work shall not be considered as the derivative work. There is no doubt in the current case-law that for the use of a motif, complextion, its definition is not required the consent of the author of the inspired work. As the Supreme Court pointed out in its Judgment of 10 July 2004: “the essence of an inspired work is its formation as a result of a creative motive provided by an inspirational work. Elements of an inspirational work in a newly created inspired work are and can be recognizable, but not dominant, being the effect of an emotional and intellectual impulse caused by another author’s work. The creative criterion is such a creative transformation of the elements of an inspirational work that the nature of the inspired work is already determined by its own individual elements, not the elements taken over.”<sup>4</sup> Therefore, to use the complextion or motif, the author of the original work’s consent is not required. Importantly, to distinguish whether a given work is a derivative or an inspired work, the key issue is the extent to which the elements from the original work are taken over and the possible existence of the work itself, without any possible impact of the original work on its content and form. It is not disputed that the characteristics of the liturgical year and the recurrence of the readings determine the need for some kind of borrowing and inspiration in preached sermons, especially in homilies, which often makes them similar [Kroczek 2016, 68]. Therefore, it

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<sup>4</sup> I CSK 539/13, Legalis/el.

should be recognized that to this extent homilies will almost always be inspired works.

### **3. Author's economic and moral rights**

As indicated above, the copyright belongs to the author from the moment the work is established and externalized, without the author having to take any action. As a rule, the author belong to both moral and economic rights. Author's moral rights are intended to protect the author's bond with the work and as such are inalienable and unlimited rights. The content of this right includes the right: 1) to be an author of the work; 2) to sign the work with the author's name or pseudonym, or to make it available to the public anonymously; 3) to have the contents and form of the author's work inviolable and properly used; 4) to decide on making the work available to the public for the first time; 5) to control the manner of using the work (Art. 16 CRR). These rights cannot be transferred to another person, however, taking into account the nature of the attribute due to the author, it is a right, not an obligation, hence the author may withdraw from the exercise of these rights and never exercise them.

Author's economic rights include the author's exclusive right to use the work and to manage its use throughout all the fields of exploitation and to receive remuneration for the use of the work (Art. 17 CRR). This right protects the author's financial interests and allows him to obtain benefits from his authoring activities. This right is transferable and subject to inheritance. The possibility of free use of the work and its disposal also includes the transfer of this right to another person, as well as the granting of a license (exclusive or nonexclusive), on the basis of which a third party will be entitled to use the work, including use as part of his business (e.g. homiletic, retreat, etc.). Granting a license, unless it is an exclusive license, does not require any particular form. Importantly, such a license can also be free of charge – which is often used by authors for whom it is more important to disseminate their content and reach the widest possible public than to receive remuneration for the use or dissemination of their work.

#### **4. The permissible use and its limits**

An exception to the rule requiring the author's consent to use the work created by him is the institution of permissible use provided for by the copyright regulations. Permissible use only applies to works that are already widespread (and therefore sermons, e.g. preached or published) and is possible only to the extent provided by law, including as part of permissible personal use (Art. 23 CRR), right to quote (Art. 29 CRR), permissible use of speeches, public presentations and lectures (Art. 26<sup>1</sup> CRR) and permissible use of works during religious ceremonies, school and academic events or official state ceremonies (Art. 31 CRR).

Each of the forms of permissible use analyzed below requires compliance with the requirements specified not only in the provision stating the form of permissible use, but also indicated in the general regulations. In accordance with Art. 34 CRR it shall be permitted to use the works, within the limits of permissible use, on the condition that the author and the source have been named. Importantly, the permissible use must not infringe the normal use of the work or violate the rightful interests of the author – leading, e.g. to the depletion of the author's assets or depriving him of the opportunity to earn.

##### **4.1. The permissible personal use**

Determining the attribute of permissible use as 'personal,' as indicated in Art. 23 CRR, however, does not mean that the purchaser may use the work only because, as indicated by Art. 23, para. 2 CRR "The scope of personal use shall include use of single copies of works by a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship." As part of permissible private use, it is possible to use the works both in whole and in fragments. The limits of permissible personal use, determined in particular by the extent of relationships, remain ambiguous and are often discussed in doctrine and jurisprudence. An indication for determining the limits of permissible use remains Art. 35 CRR, according to which the permissible use must not infringe the normal use of the work or violate the rightful interests of the author. The doctrine indicates that the social relationship includes a circle of people known to the right holder and it is relatively narrow, however,

there is no clear indication as to the number of people within the social relationship enabling the use of the work by third parties as part of permissible personal use. In order to protect the author's economic interests and at the same time balance the legitimate interests of the entity that acquired the copy of the work, it should be recognized that the group run by the pastor is within the scope of permissible personal use, and therefore it is possible to play recordings of homilies, sermons or conferences, e.g. as part of formation meetings. Playing such content to a wider congregation (e.g. the entire parish during church fairs, festivities or other gathering large numbers of faithful) would, however, exceed the limits of permissible personal use and would require the consent of the author of the work being used.

#### **4.2. The right to quote**

A commonly used form of permissible use is also provided for in Art. 29 CRR institution of the right to quote. Pursuant to the aforementioned regulation, "it shall be permitted 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 or the rights governing a given kind of creative activity." Insofar as the content authored by other people is used as part of a homily, sermon or conference, they are cited for the purposes indicated in the content of the norm, it is possible to use them, with the indication, however, that they should only be fragments of already distributed works, and not the whole of the work as such. It will not fit within the right to quote to recall the entire extended work (e.g. the entire publication), even if the purpose of such recall is critical analysis, explanation or teaching. The jurisprudence indicates that "the size of the cited work should be as small as possible, but spacious enough that the purpose of the quotation can be achieved and that the quote itself and the conclusions derived from the quotation are understood by the recipients of the work. The quote should be subordinate to the main work."<sup>5</sup>

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<sup>5</sup> Judgment of the Supreme Court of 22 February 2019, III CSK 11/17, Legalis/el.

Regulation of Art. 29 CRR by stating the right to quote, it provides for ‘quoting’ the cited work, but it does not define what exactly this wording means. Thus, the colloquial or dictionary definition should be used, according to which quotation should be understood as ‘recalling’ someone’s utterance, words of the work [Sikorska-Michalak and Wojniłko 1998, 207], or “giving in the literal or approximate meaning of one’s utterance” [Sobol 1997, 757; Michalak 2019]. Hence, in order to exercise the right to quote, it is not necessary to literally use someone else’s statement, it is important to preserve its sense and meaning, to faithfully reproduce the author’s thoughts.

The doctrine’s purpose of ‘teaching’ required by law is related to conducting educational or didactic activity. And although teaching is essentially limited to conducting educational activity, there is no reason to limit it to only the institutionalized education system (schools, institutions reporting to the ministry, teachers, colleges, etc.) [Michalak 2019]. Thus, it seems right that the teaching of preaching, homilies and conferences also falls within the teaching objective required to apply the right to quote.

By its very nature, the quote is intended to convey information, to make own arguments more convincing or understandable. For this reason, if the quote does not fulfill its function and there is no internal, necessary connection between the author’s arguments using the quote and the quote itself, it should be considered that there is an unlawful use of the quoted work. “The purpose of explaining means that without a quote, the work would be unclear or at least difficult to understand for the average recipient in a given passage. In any case, however, the quoted passage or even the entire small work must be in such proportion to the contribution of its own creation that there is no doubt as to the fact that its own, independent work was created.”<sup>6</sup>

### **4.3. The permissible use in speeches, public presentations and lectures**

CRR only uses the concept of sermon only once, stating the right of permissible use in speeches, public presentations and lectures. In accor-

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<sup>6</sup> Judgment of the Court of Appeal in Kraków of 12 July 2016, I ACa 238/16, *Legalis/el*.



dance with Art. 26<sup>1</sup>: “It is allowed to use, within justified limits, for information from political orations and speeches delivered at public presentations, as well as fragments of public speeches, lectures and sermons. The provision does not authorize the publication of collections of such works.” The doctrine indicates that “in most cases, it should also include speeches given as part of ecclesiastical ceremonies, especially various sermons, homilies, etc. [Michalak 2019]. However, the element connecting all types of speeches cited in the provision is their public nature. As a result, it is not possible under this permissible use form to use sermons that have not been given publicly, but only written and forwarded, e.g. for publication as part of homiletical collections. The purpose of using the content is also important – as part of the information purpose it is assumed that the legislator understands as providing information without the necessity to keep the criterion of timeliness. Information does not have to concern new, actual or current content.

#### **4.4. The permissible use during ceremonies and events**

Another possibility of using the work as part of permissible use is to use it during ceremonies and events. According to the content of Art. 31, para. 1 CRR. “It shall be permitted to gratuitously perform in public 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 indicated form of permissible use does not require an explanatory or scientific purpose, as is the case with the right to quote, or an information purpose, as is the case with speeches, public presentations and lectures. It is a prerequisite, however, that the ceremony does not involve any financial gain, either directly or indirectly.

The definition of a religious ceremony as such is of key importance for the applicability of this permissible use form. On the basis of language and semantic rules, it is assumed that ceremonies are solemn rites and events that follow a predetermined plan respecting previous traditions in a given field. Representatives of the doctrine indicate that “This sphere will therefore include, above all, Masses, processions, baptisms, weddings,

communions, funerals and other traditionally established or ordained by ecclesiastical authorities official forms of celebrating religious services and rites, although some also include, e.g. pilgrimages [...], which can be somewhat controversial” [Michalak 2019]. Interestingly, doubts regarding the inclusion of pilgrimages in the category of religious ceremonies, and due to the often occasional performance of works that are not subject to strict order and rhythm, are also raised in relation to events such as *Youth Meeting in Lednica* or *World Youth Day* [ibidem]. It is noteworthy here that in relation to the *World Youth Day* held in Poland in 2016, the Polish *Society of Authors and Composers (ZAiKS)* together with the Archdiocese of Kraków concluded an agreement according to which it was established not to collect the author’s due remuneration on the vast majority of works.<sup>7</sup> The content of the concluded license agreements is confidential, however, it is worth noting that it was reported that in the absence of relevant agreements full remuneration would be due and therefore the institution of permissible use during religious ceremony as provided for in Art. 31, para. 1 CRR.

Therefore, the doctrine’s position should be considered right in this context, according to which “the permissible use of works does not fall within the concept of a religious ceremony when it concerns a prayer or religious event that is not a narrowly conceived ceremony (as a kind of rite shaped by tradition or internal regulations of a given church or religious community)” [Tylec 2016, 99].

## Conclusions

Copyright regulations have a significant impact on the form and manner of manifesting religion, in particular as regards preaching, homilies and conferences. Although the sermons themselves are indicated only in one provision of CRR, a great part of copyright regulations applies to the activity of preachers. Hence, both those who prepare sermons themselves and those inspired by the activities of other preachers should be familiar with the regulations in this regard, in particular in the form of permissible

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<sup>7</sup> *Wspólny komunikat Archidiecezji Krakowskiej i Stowarzyszenia Autorów ZAiKS*, <https://zaiks.org.pl/1254,196> [accessed: 18.12.2019].

use, which awareness should be widely disseminated among those engaged in pastoral activities. This will lead to teaching both in accordance with the teaching of the Church and the provisions of current law.

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## Copyright in Sermons and Homilies

### Summary

Preaching sermons and homilies is a key form of teaching the faithful and spreading religious worship, subject to the regulations of canon and secular law. The article focuses on Polish copyright law and regulations resulting therefrom enabling lawful creation of preaching, as well as the use of works, including preaching previously disseminated by other pastors. In this respect, the fair use institution should be included, including fair use, quotation, fair use in speeches, external presentations and lectures, and fair use during ceremonies and events.

**Key words:** copyright, permissible use, homiletics, polish law, preaching

## Prawo autorskie w kazaniach i homiliach

### Streszczenie

Głoszenie kazań i homilii jest kluczową formą nauczania wiernych i szerzenia kultu religijnego, podlegającą regulacjom prawa kanonicznego i świeckiego.

Artykuł koncentruje się na polskim prawie autorskim i wynikających z niego regulacjach umożliwiających zgodnie z prawem tworzenie kazań, jak też korzystanie z utworów, w tym kazań wcześniej rozpowszechnionych przez innych duszpasterzy. W tym zakresie szczególne znaczenie posiada instytucja dozwolonego użytku obejmująca m.in. dozwolony użytek osobisty, prawo cytatu, dozwolony użytek w ramach przemówień, publicznych wystąpień i wykładów oraz dozwolony użytek podczas ceremonii i uroczystości.

**Słowa kluczowe:** prawo autorskie, dozwolony użytek, kaznodziejstwo, prawo polskie, kazanie

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