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The Church Institution's Purchase of the Foreign License for Publication of a Literary Creation in Poland[1]

Nabycie przez instytucję kościelną zagranicznej licencji na wydanie w Polsce utworu piśmienniczego

Abstract: Canonical law does not contain detailed regulations referring to the area of contracts concluded by church institutions in domestic and international trade. The church legislator refers to the norms of the current state law in this matter. This reception also includes copyright agreements, the subject of which is a foreign entity granting a license for publishing a literary creation in Poland. This study is an attempt to present the most important issues related to this. First, the notion of the literary work on the basis of Polish and international law was approximated. Next, the need to examine the possible termination of the author's economic rights in the country of the work's origins was pointed out. In such a situation, the work is widely available and there is no need to conclude a license agreement. In the following part, the issue of license in the canonical order was discussed and it was shown that it comes into the area of interest in the broadly understood Church property law. The normative bases, which give the possibility to choose Polish law as the law applicable to the performance of the license agreement, were given in the article. Afterwards, the connection between the payment of royalties to a foreign entity and the collection of a flat-rate corporate, as well as withholding income tax (i.e. withheld in Poland) is made. The article ends with an analysis of the translator contract key provisions.

Keywords: canonical law, church property law, copyright, work, book, license agreement, withholding tax, translation, publishing house, publication

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Abstrakt: Prawo kanoniczne nie zawiera szczegółowych regulacji odnoszących się do sfery umów zawieranych przez instytucje kościelne w obrocie krajowym i międzynarodowym. Prawodawca kościelny odsyła do obowiązujących w tej materii norm prawa państwowego. Ta recepcja obejmuje również umowy prawnoautorskie, których przedmiotem jest udzielenie przez podmiot zagraniczny licencji na wydanie w Polsce utworu piśmienniczego. Niniejsze opracowanie stanowi próbę przedstawienia najistotniejszych zagadnień z tym związanych. Po przybliżeniu pojęcia utworu piśmienniczego na gruncie prawa polskiego i prawa międzynarodowego wskazano na potrzebę zbadania najpierw ewentualnego wygaśnięcia autorskich praw majątkowych w kraju pochodzenia dzieła. W takiej sytuacji utwór jest powszechnie dostępny i nie ma potrzeby zawierania umowy licencyjnej. W dalszej części, po omówieniu licencji w porządku kanonicznym i wykazaniu, że problematyka ta wchodzi w obszar zainteresowania szeroko rozumianego prawa majątkowego Kościoła, podane zostały podstawy normatywne, dające możliwość wyboru prawa polskiego jako prawa właściwego dla wykonywania umowy licencyjnej. Następnie ukazany został związek, jaki ma miejsce między zapłatą należności licencyjnych podmiotowi zagranicznemu a poborem zryczałtowanego podatku dochodowego od osób prawnych „u źródła", czyli w Polsce. Artykuł kończy analiza kluczowych postanowień umowy z tłumaczem.

Słowa kluczowe: prawo kanoniczne, kościelne prawo majątkowe, prawo autorskie, utwór, książka, umowa licencyjna, podatek „u źródła", tłumaczenie, wydawnictwo, publikacja

Introduction

Church institutions, especially church publishers and universities, purchase licenses authorizing them to issue Polish translations of foreign written works concerning theology, philosophy and canon law, as well as religious works of fiction or hagiographic literature. Foreign licensors (ecclesiastical and non-ecclesial entities) may originate from various countries. The diversity of entities in international relations create far-reaching ramifications for the concluded license contracts. In order to fully comply with the requirements of the church property law and the provisions of Polish copyright law,[2] the law applicable to the work's country of origin and the international law, especially including the Bern Convention, should be considered when concluding such contracts.[3]

[2] Copyright and Neighboring Rights Act of 4 February 1994, i.e. Journal of Laws of 2018, item 1191, as amended (hereinafter: CNRA).

[3] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, revised in Berlin on 13 November 1908 and in Rome on 2 June 1928, Journal of Laws of 1935, no. 84, item 515, as amended, with the wording adopted by the Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works, drawn up in Paris on 24 July 1971, Journal of Laws of 1990, no. 82, item 474, with appendix.

Written work

There are no normative grounds for defining the term "literary work" in Polish and international law. In art. 1 sec. 2 point 1 of the CNRA, the State legislator provides an approximate indication of the types of works expressed in words or characters, describing them as: "literary, journalistic, scientific, cartographic." A slightly more extensive catalogue is contained in art. 2 sec. 1 of the Berne Convention, specifying that the term "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other written works; lectures, addresses, sermons and other works of the same nature.

In this situation, a synthesized definition of a work as an object of copyright protection (art. 1 sec 1 of the CNRA), according to which a work is "any manifestation of creative activity of individual nature,[4] established in any form, irrespective of its value, purpose or form of expression," becomes crucial. The use of the phrase "creative activity" means that a written work resulting (being a manifestation of) from such an activity should at least marginally differ from other results of the same activity, and, therefore, possess a new quality, the degree of which is insignificant, as indicated, among other things, by the use of the word "any." Copyright protection is granted regardless of the purpose or function of the work5 or the author's performance, effort, workload, education or qualifications.[6]

The subject literature notes that the creativity and individual nature of a work are vague concepts, the boundaries of which are not easy to define.[7] It also points to the fact that "the concept of a work has become difficult to grasp and comprehend not only for the usual transaction parties, but also for the specialists."[8] In addition, it is indicated that:

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4 See: judgment of the Poznan Court of Appeal, 31 December 2014, I ACa 989/14, Legalis.

5 Cf. judgment of the Supreme Court of 30 June 2005, IV CK 763/04, OSNC 2006, no. 5, item 92.

6 Cf. M. Poźniak-Niedzielska, *Przedmiot prawa autorskiego* (Subject of Copyright Law), [in:] *System prawa prywatnego* (Private Law System), t. 13: *Prawo autorskie* (Copyright Law), J. Barta (ed.), Warsaw 2017, pp. 10–11.

7 Ibidem, p. 13.

8 W. Machała, *Utwór. Przedmiot prawa autorskiego* (A Work: The Subject of Copyright Law), Warsaw 2012, p. 158.

> the current tendency to seek and demand copyright protection for every manifestation of human intellectual activity leads not only to a large number of disputes, but is also the primary cause of the "distortion" of the principles of copyright protection (...)[9]

Expiry of economic rights to a foreign work

When considering publication of a foreign written work in Poland, church institutions should first make sure that the author's economic rights in the country of origin of the work have not expired. Their duration term may vary, even within the European Union.[10] Expiration means that the work has entered public domain and is not protected by copyright. In such a case, it is not necessary to purchase a foreign license to publish a work in Polish.

The verification of the applicability of economic rights to a foreign work in its country of origin should be preceded by an analysis of the prerequisites for the application of Polish law.[11] As stated in art. 5 of the CNRA, the provisions of the Act shall apply to works:

a) whose author or co-author is a Polish citizen or whose author is a citizen of a EU member state or member states of the European Free Trade Association (EFTA) – parties to European Economic Area agreement, or

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[9] J. Kępiński, *Critical Gloss to the Supreme Court judgment of 6 March 2014*, V CSK 202/13, "Acta Iuris Stetinensis" 2/18 (2017), pp. 135–136.

[10] In France, as a special provision, the standard copyrights protection term (70 years after the author's death) has been extended by 30 years for authors who fought and died for France in combat: *les droits mentionnés à l'article précédent sont prorogés, en outre, d'une durée de trente ans lorsque l'auteur, le compositeur ou l'artiste est mort pour la France, ainsi qu'il résulte de l'acte de décès* (art. L. 123-10. Le Droit D'auteur).

[11] In accordance with art. 36 of the CNRA, in Poland, economic rights protection period expires, as a rule, after 70 years. It was introduced through the Act of 9 June 2000 amending the Copyright and Neighboring Rights Act (Journal of Laws no. 53, item 637), already before Poland's accession to the European Union, as an implementation of Council Directive 93/98/EEC concerning the harmonization of copyright protection term and certain neighboring rights (Official Journal L, 24 November 1993, p. 9.), subsequently repealed by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of copyright protection and certain neighboring rights (Official Journal L 372, 27 December 2006, p. 12; Directive 2006/116/EC is a consolidated version of the original Directive 93/98/EEC). It is, therefore longer, than the global standard term of economic rights protection, which, under the Berne Convention, expires 50 years after the author's death.

b) which were published for the first time on the territory of the Republic of Poland or simultaneously on that territory and abroad, or
c) which were published in Polish for the first time; or
d) which are protected under international agreements, to the extent to which their protection results from those agreements.

It thus seems that the aforementioned provision should be applied in conjunction with art. 46 sec. 1 of the Act of 4 February 2011 on Private International Law[12] (hereinafter referred to as "PIL"), which states that "the creation, content and termination of an intellectual property right shall be subject to the law of the country in which the right is exercised." Although the publication of a foreign work in Poland involves utilizing the original work, it cannot be concluded with certainty that Polish law, rather than the law of the work's country of origin, should apply. Private International Law can only be applied if the expiration of economic rights is not regulated by an international convention binding a given country. Given the universality of the Berne Convention, to which 167 States[13] are signatories, this will only apply to rather isolated cases. The issues addressed in the current paper require a thorough analysis of the factual and legal circumstances, considering not only the law of the work's country of origin, but also the provisions of international law.

Licensing in Canon Law

In the Code of Canon Law of 1983, there are[14] no provisions directly referring to intellectual property law. The Code of Canons of the Eastern[15] Churches refers to this area of law, stating in canon 666 § 1, that: "The fruit of an author's intellectual efforts is under the protection of the law whether as the expression

[12] *Notice of the Speaker of the Sejm of the Republic of Poland of 13 October 2015 on the publication of the consolidated text of the Act – Private International Law*, Journal of Laws no. 1792, item 1792.

[13] The list of Berne Convention for the Protection of Literary and Artistic Works parties can be found at http://ippanorama.uprp.pl/05/down/05_Lista_stron_konwencji_bernenskiej.pdf [access: 13.042019].

[14] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25 January 1983), AAS 75 (1983), pars II; text in Polish [in:] *Code of Canon Law*, Polish translation approved by the Episcopal Conference, bilingual text, E. Sztafrowski (translation) and scientific commission edited by K. Dynarski, Poznań 2008 (hereinafter referred to as CCL/83).

[15] *Codex Canonum Ecclesiarum Orientalium auctoritate Joannis Pauli PP. II promulgatus* (18 October 1990), AAS 82 (1990); polish translation by L. Adamowicz, M. Dyjakowska, Lublin 2002 (hereinafter: KKKW).

of the author's personality or as the source of patrimonial rights." The ecclesiastical legislator supplemented this, rather general, standard by adding § 3 to the aforementioned canon, which states: "More detailed norms about this matter may be issued in the particular law of each Church *sui iuris*,[16] in accordance with the civil laws concerning the rights of authors."

Undoubtedly, it should be assumed that the provisions mentioned above have a normative meaning in the Latin Church as well, because the principles of law interpretation refer to the entire legislation of the Church.[17] Thus, the reception of the provisions of intellectual property law to the canon law is possible on this basis.[18] The reception should consider the ultimate goal of the Church's property right, namely, the human person, their integral promotion, and the upholding and safeguarding of their dignity.[19] This is confirmed by the canon 22 CCL/83, which provides the general principle that "Civil laws [leges civiles[20]] to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise." The Church's reception of civil law is not static but dynamic.[21] This means that it is essential to observe the amendments to legislation, as well as to consider the judicial decisions of courts and the perspective of doctrine.

Church institutions are obliged to comply with the norms of civil law and they cannot excuse themselves by being unaware of them. This principle has been reflected in particular in canon 1290 CCL/83 that states that:

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16 The term indicates the relative autonomy of churches (taking into account the highest authority of the Pope). Cf. M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne* (Roman Private Law), Warsaw 2008, pp. 96–97.

17 See: J. Mantecon, [in:] A. Marzoa, J. Miras, R. Rodriguez-Ocaña (eds.), *Comentario Exegético al Código de Derecho Canónico*, Pamplona 1997, t. 4/1, pp. 151–153.

18 Canon law as a complexus legum, a certain legal system, is better described as canon order (ordinamento canonico) than a system. Cf. E. Baura, *Parte generale del diritto canonico. Diritto e sistema normativo*, Roma 2013, p. 159.

19 W. Wójcik, *Dobra doczesne Kościoła* (Temporal Goods of the Church), [in:] W. Wójcik, J. Krukowski, F. Lempa, *Komentarz do Kodeksu Prawa Kanonicznego* (Commentary on the Code of Canon Law), t. 4, Lublin 1987, pp. 44–45.

20 "*Leges civiles* are not civil law in the contemporary understanding of one area of law, but secular law, i.e. all objective legal norms (including customary norms, international law) in force in the territory of a given state." Cf. R. Sobański, [in:] J. Krukowski, R. Sobański, *Komentarz do Kodeksu Prawa Kanonicznego. Księga I, Normy ogólne* (Commentary on the Code of Canon Law. Book I, General Standards), t. 1, Poznań 2003, p. 77. Idem, *Prawo kanoniczne a krajowy porządek prawny* (Canon Law and the Domestic Legal System), "Państwo i Prawo" (State and Law) 6 (1999), p. 10.

21 Cf. R. Sobański, [in:] J. Krukowski, R. Sobański, *Komentarz do Kodeksu...*, op. cit., p. 77.

> The general and particular provisions which the civil law [the code term *ius civile* is used to refer to generally applicable law[22]] in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church unless the provisions are contrary to divine law or canon law provides otherwise (...).

On this basis, one might assume that the legal provisions governing contractual relations relating to intellectual property essentially constitute auxiliary sources of law in canon order. This leads to the following conclusion: all legal regulations related to contracts for the acquisition of a foreign license to publish a written work fall within the scope of interest of the broadly understood property law of the Church.

Choice of law clause in the license contract

Generally speaking, the acquisition of a foreign license means that the licensee obtains a legal title to use the work (or, in fact, the rights to the work in general, not the work as a "copy") in the fields of exploitation specified in the contract, in a specified time and in a specified territory. In other words, under a license contract, the foreign licensor authorizes the Polish licensee to use their economic rights.

When purchasing the rights to use a foreign work, a church institution may, in agreement with the licensor, indicate in the provisions of the license contract the applicable law (Polish, or that of a given country) for resolving disputes related to the performance of the contract. This issue is regulated by the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the so-called Rome I Regulation).[23] Its preamble (note 11) emphasizes that: "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations." This principle is normatively provided in art. 3 sec 1 of the Rome I regulation, which states: "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has

[22] See: art. 87 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 no. 78, item 483, as amended.

[23] Official Journal L 177, 4 July 2008, p. 6.

been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement." The above regulations are worth mentioning because, with the entry into force of the Rome Convention, its provisions took precedence over the national norms of Private International Law.[24]

Considering the necessity to ensure legal security, the church entity should strive to include an explicit provision in the license contract concerning the choice of the Polish law as the competent law for resolving any disputes related to the performance of the contract.[25] This is especially important when the foreign licensor has prepared a model contract and the Polish licensee has limited possibilities to identify the meaning of the contract and influence its content. It cannot be ruled out that the licensor country's copyright law regulates important contractual issues in a different manner (for instance, it differs with respect to the permissible degree of general indication of the fields of exploitation[26]). Indicating the Polish law in the contract also creates the possibility to refer to art. 67 sec. 4 of the CNRA, according to which: "Unless otherwise stated in the contract, the holder of the exclusive license[27] may make claims for infringement of copyright in the scope of the license contract. According to Polish law, only one exclusive license for the use of a given work in a specific field of exploitation may exist. A foreign licensor may not grant a subsequent license to a different entity in the same scope. If they did, such a license would be legally defective. The church institution may then request to prohibit the use of the work, remedy the effects of the infringement and claim damages and compensation, provided that the contract does not prevent that.[28]

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[24] This is explicitly stated in art. 28 sec. 1 of PIL, referring directly to the provisions of the Rome I Regulation.

[25] See: K. Grzybczyk, *Prawo właściwe dla autorskoprawnej umowy licencyjnej* (Law Applicable to Copyright License Contracts), Warsaw 2010, p. 132 ff.

[26] J. Barta, R. Markiewicz, *Obowiązek wymienienia pól eksploatacji w umowie licencyjnej* (Obligatory Listing of Fields of Exploitation in License Agreements), "Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace z Wynalazczości i Ochrony Własności Intelektualnej" (Scientific Papers of the Jagiellonian University. Dissertations on Intellectual Property Law) 100 (2007), p. 21 ff.

[27] It should be assumed that if the contract reserves the exclusive right to use the work in a manner consisting in the publication of the original work in the Polish language, it is, therefore, an exclusive license.

[28] Cf. J. Barta, R. Markiewicz, *Prawo autorskie* (Copyright Law), [in:] J. Barta, M. Czajkowska-Dąbrowska, Z. Ćwiąkalski, R. Markiewicz, E. Traple, *Prawo autorskie i prawa pokrewne. Komentarz* (Copyright and Neighboring Rights: a Commentary), Krakow 2005, p. 521.

It is also advisable to ensure that the Polish translation of the license agreement is given the attribute of authenticity. This can be done by including a provision stating that the two versions of the agreement (licensor country's and Polish) are equivalent. This may be significant in case of a dispute over interpretation of the contract between the parties, but also in the course of administrative or judicial proceedings, since the Polish version of the contract may then be regarded as evidence in the court.

License fees and public-law liabilities of a church institution

Acquisition of a foreign license to publish a written work by a church entity in Poland may occur with or without remuneration. Under the Polish Copyright and Neighboring Rights Act, the obligation to remunerate the licensor is not absolute. As stated in art. 43 sec. 1 of the CNRA: "If the contract does not state that the transfer of economic rights or the licensing was made free of charge, the author[29] shall be entitled to remuneration." As a general rule, the licensor is, therefore, entitled to remuneration, provided that it is not otherwise stated in the contract. The acquisition of a license free of charge is not merely a removal of the obligations towards the foreign licensor. If a foreign entity does not receive license fees, there are no tax obligations resulting from the lump-sum corporate income tax in the place (country, namely, in Poland) from which the license fees are transferred, hence the name "withholding tax."

The transfer of license fees by a church legal entity to a foreign entity may go beyond the scope of a bilateral contract with a foreign licensor. Such an event results in a tax liability under the Corporate Income Tax Act of 15 February 1992.[30] A foreign licensor is treated as a taxpayer who is subject to the income tax on income generated on the territory of the Republic of Poland (art. 3 sec. 2 of the CIT Act). This provision contains the principle of limited

[29] The term "author" should be understood as any entity entitled by virtue of economic rights. It also includes the legal successors of the author. After: M. Bukowski, D. Flisak, Z. Okoń, P. Podrecki, J. Raglewski, S. Stanisławska-Kloc, T. Targosz, *Prawo autorskie i prawa pokrewne. Komentarz*, op. cit. See also: J. Barta, R. Markiewicz, *Prawo autorskie* (Copyright Law), Warsaw 2016, p. 206.

[30] *Notice of the Speaker of the Sejm of the Republic of Poland of 10 May 2018 on the publication of the consolidated text of the Corporate Income Tax Act*, Journal of Laws no. 1036, item 1036, as amended (hereinafter: CIT Act).

tax liability, according to which the country in whose territory the source of income is located (in this case – Poland), has the sovereign right to tax entities which are not its tax residents (who do not have their registered office or management board in Poland) with regard to income obtained from such a source. This will be the case even if the provisions of the contract state that the law of the licensor's country apply to license fees.[31]

A foreign licensor who agreed to the translation and paid edition of a written work in Polish becomes a taxpayer of withholding tax upon receiving the license fees, and the Polish publisher (licensee)[32] acts as a remitter. This means that the economic burden of paying the tax can be placed on the church legal entity if it conducts a business activity.[33] This interpretation results directly from art. 26 sec. 1 of the CIT Act, according to which legal persons-entrepreneurs, who pay the amounts due resulting from art. 21 sec. 1, and consequently from the copyrights[34] mentioned in point 1 therein, are obliged as payers to collect lump-sum income tax on those payments on the day of payment in the amount of 20% of income, with consideration of double taxation treaties, to which the Republic of Poland is a party (art. 21 sec. 2).[35] If there are no capital ties between the church entity and the foreign licensor referred to in art. 21 sec. 3 of the CIT Act, and, therefore, there is no basis for the application of the exemption from withholding tax set forth in this provision, the receivables transferred to the

[31] J. Sekita, *Rozliczanie podatku u źródła* (Withholding Tax Settlement), Warsaw 2017, p. 210.

[32] Pursuant to art. 8 of the Tax Ordinance Act, i.e. Journal of Laws 2018, item 800 as amended, the remitter is a natural person, a legal person or an organizational unit without legal personality, obliged under the tax law to calculate and collect tax from the taxpayer and transfer it in due time to the tax authority. Pursuant to art. 30 § 1 and 3 of the Tax Ordinance Act, a remitter who has not fulfilled the obligations set out in art 8 shall be liable for uncollected and collected but unpaid taxes with all of their assets.

[33] As stated in art. 3 point 9 of the Tax Ordinance Act, business activity is understood as "any gainful activity within the meaning of the Act of 6 March 2018 – Entrepreneurial Law (Journal of Laws no. 646), including the pursuit of a liberal profession, as well as any other gainful activity in one's own name and on one's own account or on the account of others, even if other acts do not consider this activity as business activity, or a person performing such activity – as an entrepreneur."

[34] "The application of art. 21 sec. 1 of the CIT Act in legal practice is simplified. It is based on the assumption of equivalence of Polish and foreign copyright regulations – which allows for the assessment of a contract's subject on the basis of Polish law. The statement above results from the interpretative clause, contained in international conventions, which refers to the significance of legal concepts in the source State." Cf. J. Sekita, *Rozliczanie*..., op. cit., p. 210.

[35] See: R. Mastalski, *Prawo podatkowe* (Tax Law), Warsaw 2014, p. 144 ff.

beneficial owner[36] are subject to taxation in Poland at the rates specified in the double taxation treaties, provided that the place of residence of the taxpayer for tax purposes is documented with a certificate of residence obtained from them.[37] For example, under the double taxation treaties concluded by Poland with Germany,[38] Italy[39] and the USA,[40] the tax is calculated in the following way:

a) 5% of the gross amount of license fees paid to the German counterparty,
b) 10% to Italian or US counterparties.

It should be noted that Poland has not signed double taxation treaties with all countries. For church entities, the absence of such a treaty with the Vatican City State may prove to be important. For a licensor with residence in the Vatican, the provisions of the aforementioned agreement with Italy do not apply. Therefore, receivables transferred to a recipient located in the Vatican City State will be taxed in Poland at the rate of 20%. Then, there is no obligation to have a certificate of (tax) residence because the statutory tax rate applies.

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36 In accordance with art. 4a point 29 of the CIT Act, the term "beneficial owner" describes an entity which meets all of the following conditions: a) receives the receivable for its own benefit, which includes determining its intended use and bears the economic risk associated with the loss of the receivable or of part of it, b) is not an intermediary, agent, trustee or other entity legally or factually obliged to transfer all or part of a receivable to another entity, and c) conducts real economic activity in the country of tax residence if the receivables are obtained in connection with the economic activity conducted.

37 Certificate of (tax) residence is a declaration of the place of residence of a taxpayer for tax purposes issued by the competent tax administration of the taxpayer's country of residence. (art. 4a point 12 of the CIT Act).

38 Treaty on the avoidance of double taxation in respect of taxes on income and wealth, concluded between the Republic of Poland and the Federal Republic of Germany, signed in Berlin on 14 May 2003, Journal of Laws of 2005 no. 12, item 90.

39 Treaty on the avoidance of double taxation in respect of taxes on income and the prevention of tax evasion between the Government of the Polish People's Republic and the Government of the Italian Republic, concluded in Rome on 21 June 1985, Journal of Laws of 1989 no. 62, item 374

40 Treaty on the avoidance of double taxation and the prevention of tax evasion with respect to taxes on income between the Government of the Polish People's Republic and the Government of the United States of America, signed in Washington on 8 October 1974, Journal of Laws of 1976 no. 31, item 178.

Translation as a derivative work

In accordance with art. 2 sec 1 of the CIT Act, the translation of a written work has the status of a transposition[41] that, as an independent work, is also subject to legal protection.[42] It is assumed that, for idiomatic reasons, translation to another language is always creative, even if the translated texts were devoid of individuality.[43] However, the actual replacement of a human being by a machine, for example, using translation software to translate a text, will not result in the creation of a work, since the final result in the form of translation will not be a result of the human intellect. Rather, it will be a computer-generated work.[44]

The translation itself does not require the permission of the original work's author. However, in order to be able to distribute[45] and use a translation, a church entity must obtain permission from the author or another authorized foreign entity (e.g. an inheritor, a publishing house), provided that, as already stated, the copyright to the original work has expired (art. 2 sec. 2 of the CNRA).

In view of the requirement laid down in art. 53 of the CNRA, the contract with the translator should be concluded in written form. The church publisher (the ordering party) should list the fields of exploitation in the contract (art. 50 of the CNRA), i.e. the ways of using the work (translation).[46] It is also crucial to clearly specify that the ordering party will be the holder of copyrights to the translation. In the absence of such a provision, it will be reasonable to presume that the translator has granted a non-exclusive license and may continue to dispose of the translation (art. 65 and 67 sec 2 of the CNRA). In general, contracts for the publication of translations specify a lump-sum remuneration,

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41 The essence of transposing someone else's work is the fact that "its creation is to some extent based on a work previously made by another author." Cf. E. Ferenc-Szydełko, [in:] *Ustawa o prawie autorskim i prawach pokrewnych*, *Komentarz*, E. Ferenc-Szydełko (ed.), Warszawa 2016, p. 78.

42 See: judgment of the Supreme Court of 24 July 2009, II CSK 66/2009.

43 M. Czajkowska-Dąbrowska, Z. Ćwiąkalski, K. Felchner, E. Traple, *Ustawa o prawie autorskim. Komentarz* (Copyright Act. A commentary), J. Barta, R. Markiewicz (eds.), Lex 2011, commentary to art. 2.

44 M. Bukowski, D. Flisak, Z. Okoń, P. Podrecki, J. Raglewski, S. Stanisławska-Kloc, T. Targosz, *Prawo autorskie i prawa pokrewne. Komentarz*, op. cit.

45 A distributed work is a work that, with the permission of the author, has been made available to the public in any way (art. 5 sec. 1 point 3 of the CNRA).

46 For translation, the fields of exploitation can be defined in the following way: preservation of a work using any technique, reproduction (multiplication) of the work in print and distribution of reproductions of the work.

which is based on the assumption that the success of a work depends not only on the quality of the translation but, above all, on the success of the original.[47] With regard to art. 44 of the CNRA, which provides that in the event of a glaring discrepancy between the remuneration and the benefits to the assignee of the economic rights or the licensee, the author may request a corresponding increase in remuneration from the court, the publisher may predetermine further remuneration for the translator if the sale of copies exceeds a certain level.[48]

Even if the translator has transferred all his economic rights to the publisher, they will be entitled to unlimited in duration and non-transferable moral rights to the translation (art. 16 of the CNRA). However, nothing prevents the contract from specifying a person (preferably connected with the publisher) who will be authorized to dispose of the translation, i.e. to exercise moral rights on behalf of the translator.[49] If such a clause is not introduced, the translator's consent to further disposal of the translation will always be required.

Conclusion

The acquisition, carried out abroad, by a church institution of a license to publish a written work in Poland is finalized by the provisions of the license contract. Its conclusion should be preceded by a thorough and comprehensive analysis of issues that, due to their complexity, were merely outlined in the current article. Among them, the need to align the rights and obligations of the contracting parties with the level of statutory liabilities connected with obligatory collection of withholding tax on license fees becomes a priority. It is important to stress once again that the financial consequences of legal unawareness in this respect will be borne primarily by the Polish licensee as an income tax remitter. For this reason, a church entity should consider this issue at the initial stage of negotiating the amount of license fees.

47 E. Traple, *Umowy o eksploatacje utworów w prawie polskim* (Exploitation Contracts Under Polish Law), Warsaw 2010, p. 223.

48 Ibidem.

49 Cf. P. Białecki, *Nadużycie praw podmiotowych w związku z wykonywaniem praw autorskich* (Abuse of Subjective Rights in Connection with the Exercise of Copyrights), "Monitor Prawniczy" (Legal Magazine) 17 (2005), p. 833.

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