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THE PROTECTION OF INTELLECTUAL PROPERTY IN RELATIONS BETWEEN ENTREPRENEURS

Abstract. The Deputies' bill amending the Labor Code and the Entrepreneurs' Law provides for the extension of the legal definition of an employee to entities performing their duties personally for remuneration, permanently for the same entity, for a period of not less than 6 months. The proposed modification of the aforementioned definition will cause some changes not only in the field of regulations regarding employee rights, but also in the protection of intangible assets, such as intellectual property. In particular, the certain modifications will be visible in the way of copyright protection and fair competition between entrepreneurs. Even the inalienable nature of moral rights will not protect this sphere of the author's rights from some transformations in the field of protection. The aim of the article is therefore to trace the current legal status, mainly based on the analysis of selected normative acts regarding labor law as well as intellectual property law and to try to answer the question of which legal status – current or postulated after the entry into force of the thematic amendment – would be more favorable in terms of protection of intangible assets that are part of the enterprise.

Keywords: intellectual property, employee, entrepreneur, author's economic rights, protection against unfair competition

OCHRONA WŁASNOŚCI INTELEKTUALNEJ W RELACJACH MIĘDZY PRZEDSIĘBIORCAMI

Streszczenie. Poselski projekt ustawy o zmianie ustawy – Kodeks pracy oraz ustawy – Prawo przedsiębiorców zakłada rozszerzenie legalnej definicji pracownika o podmioty wykonujące obowiązki zawodowe za wynagrodzeniem, osobiście, stale dla tego samego podmiotu, przez czas nie krótszy niż 6 miesięcy. Postulowana modyfikacja wspomnianej definicji przyniesie zmiany nie tylko w zakresie regulacji dotyczących praw pracowniczych, ale również ochrony dóbr niematerialnych, takich jak szeroko pojmowana własność intelektualna. W szczególności określone modyfikacje będzie można dostrzec w sposobie ochrony autorskich praw majątkowych oraz uczciwej konkurencji między przedsiębiorcami. Nawet niezbywalny charakter autorskich praw osobistych nie uchroni tej sfery uprawnień twórcy od pewnych przekształceń. Celem artykułu jest prześledzenie obecnie obowiązującego stanu prawnego, głównie na podstawie analizy wybranych aktów normatywnych z zakresu prawa pracy i prawa własności intelektualnej, oraz próba przeanalizowania potencjalnych

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zmian prawnych, a także odpowiedzi na pytanie, który stan prawny – obecny czy postulowany po wejściu tematycznej nowelizacji w życie – byłby korzystniejszy w aspekcie ochrony dóbr niematerialnych stanowiących skład przedsiębiorstwa.

Słowa kluczowe: własność intelektualna, pracownik, przedsiębiorca, autorskie prawa majątkowe, ochrona przed nieuczciwą konkurencją

1. INTRODUCTION

On 2 April 2021, the Legislative Sejm received a deputies' bill timing at the amendment of the Act of 26 June 1974 the Labor Code as well as the Act of 6 March 2018 the ntrepreneurs' Law (Paper No. 1120). According to the main postulate of the authors the presently applicable definition of an employee would be extended to entities providing work on the basis of other types of civil law contracts. Moreover, that regulation would be applicable if the mentioned people perform their duties in person, permanently for the same entity, for a period of not less than 6 months.[1] The proceeded law was supposed to enter into force at the beginning of 2022, but this design did not happen.[2] The main objective of the project was the improvement in the overall legal situation of persons providing long-term work for an economic entity, what could be manifested even in the possibility of the ability of introducing 14 days of so-called "holiday suspension of business activity," which would be synonymous with the institution of the employee leave regulated in Section Seven of the Labor Code or Chapter II A of this Act, where the legislator included some legal norms ensuring equal treatment in employment (Labor Code, 1974[3], Art. 2).[4] The thematic extension of the definition of an employee, which undoubtedly is tantamount to granting the above rights to persons performing work on the basis of civil law contracts, such as a contract for the provision of services or a contract for a specific work, would cause some changes in the ways of protecting inalienable assets, such as intellectual property. Due to the growing importance of these components of the company, the purpose of this article is a dogmatic analysis of the applicable legal provisions in the aspect of copyright and combating unfair competition, as well as the final attempt to answer the question of what legal status – current or postulated by the said amendment is more profitable for entrepreneurs – both contractors and contracting authorities in the context of protecting the products of the human mind.

[1] On the grounds of the current wording of Art. 2 of the Act of 26 June 1974 Labor Code, an employee is a person employed on the basis of an employment contract, appointment, election and cooperative employment contract

[2] *Kodeks pracy – zmiana definicji pracownika*, https://kadry.infor.pl/kodeks-pracy/przepisy-ogolne/5276780,Kodeks-pracy-zmiana-definicji-pracownika.html (accessed: 14.06.2021).

[3] Journal of Laws of 2020, item 1320, as amended.

[4] Print No. 1120 – Sejm of the Republic of Poland.

2. AUTHOR'S ECONOMIC RIGHTS

It seems that in the face of the discussed amendment, the issue of transferring copyright to works created by a natural person as part of the performance of the obligation, whose source is the civil law contract should be regulated by the Act of 4 February 1994 on Copyright and Related Rights. Article 12 of this act deals with the issue of employee works (act on copyright and related rights, 1994[5], Art. 12). The main function of presented article is an attempt of equalizing the interest of the creator who acquires the author's economic rights and the employer. In order for a given work to be considered an employee work within the meaning of the discussed legal act, it must jointly meet the following conditions: the creator needs to be a natural person perceived to be an employee in accordance with the legal definition contained in Art. 2 of the Labor Code and the specific work must be the result of the implementation of the obligation resulting from the employment relationship established with the employer (Ferenc-Szydełko 2016, 156–157; Ożegalska-Trybalska 2020). This change seems to be appreciable, cause now the employment relationship can be created on the grounds of the employment contract, appointment, election and cooperative employment contract, so civil law contracts are not counted (Maniewska, Jaskowski 2021, komentarz do art. 2). On the grounds of the discussed amendment, the entity the work would be performed for obtains author's economic rights at the time of the acceptance of the work.[6] As a final result, the entrepreneur would be entitled to freely dispose of the work as part of the exercising his subjective right in view of the fact of being the employer. In addition, this person would also be able to make claims in case of both culpable and non-culpable infringement of copyright caused by a third party. This solution may require the trespasser to remedy the effect of the infringement or to refrain from committing further infringements (act on copyright and related rights, 1994, Art. 12–13; Poźniak-Niedzielska, Szczotka 2016, 113–114). It should also be highlighted that the extent to which the employer accepting the work would acquire the author's economic rights would not only depend on the fields of exploitation specified in the contract. That indication is undeniably beneficial considering some possible disputes between the parties, but additionally would depend on two different factors – unless the mentioned fields of exploitation are not specified. The first one is the purpose of the employment contract determined by its wording and applicable customs among the society or, when the above – entioned factors turn out to be ineffective – analysis of the scope of

[5] Journal of Laws of 2019, item 1231, as amended.

[6] The only exception here are computer programs, in the case of which the legislator introduced the construction of the original acquisition – the employer simply gains author's economic rights already at the time of creating a given program.

business activity performed so far by the entrepreneur would help. The second one is consensual intention of the parties, considered to be just an auxiliary agent. In such a structure, the entrepreneur would acquire copyright also in relation to future fields of exploitation, unless the contract or the act provide otherwise, and if only they are consistent with the purpose of the contract, which is not possible when concluding transfer agreements or license agreements (Barta, Markiewicz 2016, 55). Moreover, author's economic rights to the work created by the employee are vested in the employer's sphere of rights also after the termination of the employment contract, what in this aspect is not legally relevant, since it does not causa any changes in employer's economic rights to the employee work. Eligibility that derives from the copyright acquired by the employer, based on the general principle expressed in Art. 36 of the Act on Copyright and Related Rights, expires with the passage of 70 years from the end of the calendar year of the contractor's death. Similarly, when the termination of the employment relationship takes place during the period of the employer's entitlement to the work – from the moment of the official acceptance, through the duration of the creator's life presenting the period of 70 years from the end of the calendar year of the artist's death is superfluous in this aspect – the author might not distribute or present it himself, since such an action would constitute a violation in the sphere of employer's subjective rights, as in accordance with the provisions of the applicable Act on Copyright and Related Rights he obtained at the time of acceptance of the work (Golat 2018, 145; act on copyright and related rights, 1994, Art. 36). Interestingly, according to the judgment of the Supreme Court, the renumeration for the author of the certain work reflecting the contribution of his creative effort due for the transfer of author's economic rights on the basis the employment contract cannot be considered as one of the components of the minimum wage for work within the meaning of the legal provisions of the Act of 10 October on the Minimum Wage for Work (judgment of the supreme court, 2017, I PK278/16).[7] With reference to the literal wording of the Art. 2 of the mentioned act, the minimum wage for work is being negotiated by the members of the Social Dialogue Council every year. If the council does not agree on the amount of the minimum wage, it shall be fixed by the Council of Ministers by way of a regulation. On the other hand, according to the Art. 4, which is visibly related to the Art. 2, the amount of the minimum wage of the work, generally speaking, needs to correspond with the forecast price of the index for the certain year, what is the preventive measure for the natural persons being the part of the society (act on the minimum wage for work, 2002,[8] Art. 2, 4; Florek, Pisarczyk 2021, 207). The applicable system of transferring the copyright to the work performed under civil law

[7] http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20pk%20278-16-1.pdf

[8] Journal of Laws of 2018, item 2177, as amended.

contracts is based on transfer agreements or, for the most part, license agreements, which are regulated in Chapter 5 of the copyright act entitled "Transfer of copyrights." The regulations specified in this chapter constitute *a lex specialis* with regard to contractual solutions mentioned in the third book of the Civil Code. Agreements concerning the transfer of copyrights are based on the principle of freedom of contract and the equality of the parties to the civil law relationship, by the will of the legislator contain provisions protecting the creator as an economically weaker party to the relationship (Michniewicz 2012). The first visible difference when comparing this method of transferring copyrights to the solutions adopted in the case of recognizing the manifestation of creative activity of an individual nature as an employee work in the scope of rights to the work that might be acquired by an entrepreneur. The second paragraph of Art. 41 of the Act on Copyright and Related Rights indicates that both the agreements transferring the author's economic rights and the license agreements cover only the fields of exploitation expressly indicated in the contract – it is therefore necessary, during the preparation of the contract to clearly indicate the fields of exploitation to which the future legal relationship is to relate, since in that case the parties of the agreement cannot rely on the purpose of the contract or the scope of the business activity conducted by the acquirer of the right. The fourth paragraph of the same article also indicates that it is impossible to point in the content of the contract the future fields of exploitation, what additionally limits the scope of the entrepreneur's rights and may result in the need to conclude in the future subsequent contracts with the same author regarding the same work, which may causa the risk of unfavorable development of negotiations, which is the frequent element preceding the conclusion of the copyright agreements (act on copyright and related rights, 1994, Art. 41).

The agreement transferring the author's economic rights, concluded in writing under pain of nullity, at the moment of the acceptance of the work transfers the right to exclusive use of the work to the entrepreneur's sphere of rights, which means that the author no longer owns that rights in terms of the fields of exploitation indicated in the contract. The process of indicating these fields of exploitation should be made scrupulously, as it is not possible to make a provision indicating the transfer of all fields of exploitation, which would be a beneficial solution for the entrepreneur, considering the probable lack of awareness about the number of all fields of exploitation existing at the time of concluding the contract, since new, often very advanced and specialized fields of exploitation may constantly arise, deficiencies in discernment of some people not professionally engaged in a specific artistic activity are fully justified. It is also worth noting that this provision does not impose on the author the necessity to inform the opposite party which fields of exploitation may be used. Perhaps that was not taken into account during the legislative process, or maybe the silence of that issue poses a deliberate procedure that protects the author's financial interests (Michniewicz 2012; 2019, 40).

A license agreement is nowadays one of the most popular agreements in polish copyright law. This fact was noticed by the legislator in Art. 65, where the presumption of a license was used, indicating that if there is no clause explicitly stating the transfer of rights, the author is deemed to have granted the license. This way of transferring author's economic rights is very flexible, as a draft of the contract provided by the contractor does not oblige to sign the contract in its original wording – just creates the basis for negotiations between the parties, as an opportunity to shape the contract the way they wish (Kępiński 2017, 704–706; Barta, Markiewicz 2016, 53). The license agreement, unless the parties have agreed otherwise, entitles the licensee to use the work only in the territory of the country in which the license holder has its registered office. In addition, if the choice of an applicable law is not stated in the contract, on the grounds of the Art. 4 of the Rome I, the law of the country in which the licensor has its registered office becomes applicable in such a case. The license agreement therefore authorizes the use of the work for a period of five years from the date of its granting. However, this is a relatively binding norm, so the parties may provide otherwise. It is also possible to conclude the contract for an indefinite period (Golat 2018, 198–201; regulation of the European parliament and of the council on the law applicable to contractual obligations, 2008[9], Art. 4). An exclusive license reserves the use of the work by only one entity, except for its creator, while a non-exclusive license allows the creator to grant licenses to countless licenses. In polish copyright law, there is a presumption of granting a non-exclusive license, also very fruitful for the creator. Moreover, the exclusive license must be concluded in writing under pain of nullity. This type of license seems to be advantageous in relation to the status of entrepreneur, as it enables the authorized entity to pursue claims for infringement of copyright in the scope covered by the contract (act on copyright and related rights, 1994, Art. 67).

3. ISSUE OF MORAL RIGHTS

Moral rights in Poland pose an important element of the copyright protection. The purpose of them is to protect the inalienable, unlimited in time bond between the artist and his work, even if the author does not feel any attachment to his work (Michniewicz 2012; Ferenc-Szydełko 2021, 110–115). As follows from the literal wording of Art. 16 of the Act of Copyright and Related Rights, the author's bond is not transferable, what means that, by analogy, moral rights protecting this bond are also inalienable. Therefore, it is no surprising that in the case of acquisition of the author's economic rights to a work created by an employee as part of the performance of obligations

[9] Journal of Laws of the European Union of 2008, item 177.6, as amended.

arising from the employment relationship, moral rights are excluded from this transfer. Despite some changes in the economic rights of the entities, moral rights to the work remains an inviolable, impossible to compensate attribute of the creator of the work (act on copyright and related rights, 1994, Art. 16). On the other hand, according to the principle expressed in Art. 353^1 of the Act of the 23 April 1964 – the Civil Code, entities may freely shape an effective *inter partes* legal relationship – the only limiting condition here is the need for its content or purpose to be consistent with the nature of the relationship, applicable law and the general clause of the principles of social coexistence (Civil Code, 1964[10], Art. 353^1). Hence, it is an ordinary practice to implement the clause into the contract constituting the author's obligation not to exercise moral rights, the violation of which is mostly associated with the need to pay the contractual penalty. Moral rights are therefore still an attribute of the creator, however, this person does not have the possibility to exercise them, which for the other party to the contract is equal to the disposal by the creator or, to some extent, transfer of such rights and allowing him the use the work more effectively.[11] It seems that the possibility of applying such a contractual clause, despite the essence of the importance of moral rights in the civil law legal system, is also worth looking for, in addition to the mentioned principle of freedom of contract as well as the assumed equality of parties to a civil law relationship, also in the construction of subjective rights. In the doctrine of civil law, many definitions of this concept have been formed. For example, S.N. Bratuś believes that the subjective right is "the sphere of the possibility of acting granted and and secured by the legal norm," while according to S. Grzybowski with the subjective right the society might identify "the sphere of possibility of proceeding in the manner specified in this norm, in accordance with the content of the subject law" granted by the legal norm as the part of the legal relationship. These definitions have a common denominator – each of them defines a subjective right as a certain possibility of a proceeding, which logically results from the use of the word "right," not "duty." Making use by the holder of a subjective right is therefore his privilege, not an obligation, proving that no one can be forced to exercise the subjective right – a person who owns such a right may of his own will freely conclude the contract with another entity, from which it will follow that he undertakes not to exercise his subjective right, because, as it has already been pointed out, this is not an obligation, and the legislator, even by marking the role of moral rights, cannot order the author to make use of them (Pyziak-Szafnicka 2012, 780–783; Radwański, Olejniczak 2019, 86).

[10] Journal of Laws of 2020, item 1740, as amended.

[11] *Zobowiązanie do niewykonywania praw autorskich*, https://legalnitworcy.pl/zobowiazanie--do-niewykonywania-praw-autorskich/#:~:text=Zobowi%C4%85zanie%20do%20niewykonywania%20praw%20autorski (accessed: 2.08.2019).

4. PROTECTION AGAINST UNFAIR COMPETITION

The protection against unfair competition, according to Art. 2 of the Industrial Property Law is treated as a part of the concept of the industrial property (Osajda, Żelichowski 2021, komentarz do art. 2). In addition, Art. 479^{89} § 2 of the Act of 17 November 1964 the Code of Civil Procedure[12] completed the procedural catalogue of intellectual property cases, adding to it cases in the field of preventing and combating unfair competition (Sieńczyło-Chlabicz 2021, 961). In the face of some potential extension of the Labor Code's definition of an employee, the protection against unfair competition should be based on Chapter II a of the Labor Code containing Articles 101^{1}–101^{4}. That change would pose a kind of novelty, as in the current legal status, according to which a person providing services in the creative industry on the basis of civil law contracts is not considered an employee within the meaning of the Code definition. It is possible to state that currently, with regard to the protection of the interests of entrepreneurs against unfair competitive behavior, the general provisions contained in the Act of 16 February 2007 on Competition and Consumer Protection and in the Act of 16 April 1993 on Combating Unfair Competition should be applied, what does not seem to be a bad solution, because each of these Acts regulates this subject in a fairly comprehensive way. To illustrate, based on of the Act on Competition and Consumer Protection, agreements that object or effect of which is to eliminate, limit or otherwise distort competition on the relevant market are prohibited, which extensively ensures very broad protection of the interests of entrepreneurs, creating the possibility of classifying a specific determination in a casuistic manner as an agreement prohibited by the provisions of the Act. The concept of these agreements, in accordance with the literal wording of the legal definition contained in Art. 4 of this normative Act, should be understood as agreements, resolutions or other acts of business associations (act on competition and consumer protection, 2007[13], Art. 4). The general principles of protection the market practices in accordance with applicable law are also regulated in the Act on Combating Unfair Competition. According to the first article of the said Act, it regulates the prevention and combating of unfair competition in economic activity. An undoubted advantage of the application of the Act is the fact that its Art. 3 § 2 specifies the definition of an Act of unfair competition by indicating an open list of conduct considered to be such an act. The above clause means that the assessment of whether a given proceeding not typified in the Act may be considered an act of unfair competition within the meaning of the legislator is carried out each time through a detailed analysis of the facts, which allows to classify a given procedure if the conditions contained

[12] Journal of Laws of 2022, item 1967, as amended.

[13] Journal of Laws of 2020, item 1076, as amended.

in the first paragraph are met as an act of unfair competition (act on combating unfair competition, 1993[14], Art. 3). Once an act of unfair competition has been established, it is possible for the entrepreneur to enforce protection under both civil and criminal law, depending on the nature of the act, which further strengthens the protection of legitimate the holders and is an advantage of introducing the proposed change. In the current form of the Labor Code, there are also legal regulations that would also be applied to entities providing services on the basis of civil law contracts in the case of the postulated extension of the subjective circle of persons considered by the legislator as an employee.[15] These provisions were introduced into the Act as a result of an amendment that took place in 1996 due to the change in the economic system, the main purpose of which was to honor the essence of freedom of competition in the conditions of a market economy.[16] The mentioned rules are closely linked to Art. 100(2) of the Code, which contains an open catalogue of the employee's duties. Point 4 of this paragraph provides that the employee is obliged to keep confidential information, the disclosure of which could expose the employer to harm (Labor Code, 1974, Art. 100). Representatives of the doctrine of labor law give this type of information the name of the so-called company secret. That regulation is of a preventive nature, since the decisive factor in classifying a given type of information within the scope of the name "occupational secrecy" is therefore only the possibility of exposing the employer to harm, and not the fact that damage has occurred. Moreover, it is worth noting that the legislator uses here a general statement of the possibility of damage, without specifying even its amount (Florek, Pisarczyk 2021, 169).

In addition, due to the need to ensure proper protection of fair competitive behavior in employee-employer relations, it is helpful for interested entities, such as the employee and the employer, to conclude a written contract under pain of nullity, which actually results from the regulation contained in Art. 101^3 of the Labor Code. By submitting joint declarations of will, the employee undertakes not to perform activities competitive to the employer to the extent specified in this agreement, which means that in order for the submission of consensual declarations of will to fulfill its function, it is necessary for the parties to precisely determine and indicate the said scope (Labor Code, 1974, Art. 101^3). The performance of competitive activity by an employee is tantamount to a violation by him of the employee obligations contained in Art. 100 § 2 point 5 of the Labor Code[17]. The legal norms expressed in the provisions of the Labor Code do not specify the date on which such a contract

[14] Journal of Laws of 2020, item 1913, as amended.

[15] Only if the other conditions contained required in the draft amendment are met.

[16] Articles 101^1–101^4 of the Labor Code.

[17] Separate provisions may in the present case constitute regulations contained in the Act of 16 April 1993 on combating unfair competition.

should be concluded, therefore it should be stated that it can be concluded at any time during the employment relationship. A non-competition agreement is undoubtedly a useful way of protecting the employer's interests, but its conclusion is not obligatory. Its introduction is only optional and is certainly not the only means of effective protection of employers, because according to the case law of the Supreme Court, in the event that an employee undertaking additional economic activity that, due to its object or nature, violates or threatens to damage the good name of the employer, the employer has the right to terminate the employment contract regardless of the culpable or non-culpable nature of the employee's activity (I PKN 223/97). Article 101^2 also extends the protection of the employer's legitimate interests by introducing the possibility of concluding a non-competition reciprocal agreement even after the termination of the employment relationship. This contract is concluded only if the employee during the employment relationship had access to particularly important information, the disclosure of which could expose the employer to harm. Similarly as in the previous case, the parties to the contract specify the duration of the non-competition clause and, in addition, the amount of compensation that the employer is obliged to pay to the employee, which is equivalent to the restriction of the employee's freedom of action (min. 25% of the remuneration that the employee would receive if he was still in the employment relationship for a period corresponding to the period of non-competition). When an employer fails to meet its obligation to pay the compensation due, the non-compete clause ceases to apply *ex lege*. The same effect is exerted by the fact that the reason for which the contract was concluded ceases to exist (judgment of the Supreme Court IPKN 223/97; Labor Code, 1974, Art. 101^2; Pochopień-Belka 2021, 45).

5. CONCLUDING PART

The postulated extension of the code definition of an employee will undoubtedly cause many legal changes, also in the aspect of intellectual property protection, what may be predicted through the full-size analysis of the current legal status. All in all, both positive and negative aspects of the proposed change can be observed, but it is impossible to unequivocally state what kind of wording of the definition of an employee would be more lucrative for the entrepreneurs. Undoubtedly, if the discussed definition of an employee was extended, both representatives of the doctrine of intellectual property law and practitioners of law would be challenged to adapt to the new legal situation and cooperate for the sake of the good of entrepreneurs.

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