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Copyright Law Aspects of the Electoral Process in Poland

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Abstract

In this paper an attempt is made to determine the material, subjective and temporal scope of application of an electoral exception provided for under Art. 31 (3) of the Copyright Law. To this end, normative acts, judicial decisions, and doctrinal views were examined. Also, the author analyses the concept of “election event” and the relevance copyright law has to it. In conclusions, a postulate *de lege ferenda* is formulated.

Streszczenie

Prawnoautorskie aspekty procesu wyborczego w Polsce

Celem niniejszego artykułu jest próba ustalenia zakresu przedmiotowego, podmiotowego i temporalnego zastosowania w procesie wyborczym w Polsce wyjątku wynikającego z art. 31 ust. 3 Prawa autorskiego. Dla realizacji tego zamierzenia poddano analizie akty

normatywne, orzecznictwo sądowe i poglądy doktryny. Autor analizuje również pojęcie „impreszy wyborczej” i znaczenie, jakie ma dla niej prawo autorskie. W konkluzji formułuje postulat *de lege ferenda*.

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I. Introduction

As a social phenomenon, elections attract the attention of a specific group: voters. The actors involved in electoral competition use a variety of means to stimulate interest among the potential electorate. Political parties are special actors in this competition. They are organizations representing the interests of social groups and have a significant impact on public life. They have different platforms, they have many roles and engage numerous social groups¹. In this connection, it is worth examining the provisions of copyright law that guarantee legal protection for works. The purpose of the paper is to establish the concept of “election event” and the scope in which copyright law applies to it.

II. Essence of Article 31 (3) in the light of the Copyright Law

The provision of Art. 31 (1) of the Act of 4 February 1994 on Copyright and Related Rights² refers to permitted public use, allowing the use of works for the purpose of celebrating public events, such as religious or state ceremonies. Paragraph 1 provides that “works may be used during religious ceremonies and official ceremonies organized by public authorities if there is no direct or indirect financial gain involved”. Permitted public use includes works which carry a high social value for various reasons and concerns the possibility of achieving informational goals by means of them – journalistic, literary, scientific, musical, artistic and other works named by the Law³. In con-

¹ *Ludowcy i problematyka agrarna na początku XXI wieku*, ed. Ł. Tomczak, Wrocław 2010, p. 7.

² Con. text: Dz.U. 2022 item 2509, hereinafter cited as “Copyright Law”, “Law” or “CL”.

³ R. Gołat, *Prawo autorskie i prawa pokrewne*, Warszawa 2021, p. 155.

trast, under paragraph 2, “distributed works may be publicly performed or reproduce gratuitously using devices or media located at the same site as the audience during school and academic events, if there is no direct or indirect financial gain involved and the performing artists and persons reproducing the works do not receive remuneration”.

According to Art. 31 (3), “the provisions of paragraphs 1 and 2 shall not apply to the use of works during advertising, promotional and election events”. Interestingly, the act which was passed at the session no. 11 of the Second Sejm of the Republic of Poland on 4 February 1994, in Art. 31 – despite its slightly different wording⁴ – also excluded advertising, promotional and election events.

This provision should attract our attention given the legal regulation of the electoral process in Poland. Its linguistic structure alone permits the use of works. Therefore, the literal interpretation raises no doubts. As regards its *ratio legis*, the matter looks different. It follows from the systemic interpretation that our reasoning should rely on *argumentum a contrario* since the provisions of paragraphs 1 and 2 permit the use, performance or reproduction of works, as well as paragraph 3. Therefore, what is the sense of excluding the application of paragraphs 1 and 2 to the use of works during election events? In my opinion, attention should be paid to the “common denominator” connecting paragraphs 1 and 2 of Art. 31, which is the stipulation that the use of a work does not directly or indirectly bring a financial benefit. It happens that paragraph 2 refers to the gratuitous public performance or reproduction of works already distributed and the fact that artists, performers or persons reproducing these compositions are not remunerated for that. In my opinion, the legislator decided to disapply paragraphs 1 and 2 in respect of election events, because using works during them indirectly leads to material benefits if electoral success is achieved in the form of winning seats or taking office and hence the financial gains resulting therefrom.

Generally, it follows from judicial decisions that the defendant will not be able to refer to circumstances related to permitted use to justify his or her use of works outside election events. Any manifestation of permitted use is subject to CL Art. 34, whereby “works may be used within the limits of permit-

⁴ The Government Draft Act on Copyright and Related Rights (Sejm Paper no. 86, 6 Nov. 1993). On the course of the legislative process, see: <https://orka.sejm.gov.pl/proc2.nsf/opisy/86.htm> (3.05.2023).

ted use provided that the name of the author and the source are indicated; moreover, the principle of preserving the integrity of the work and its fair use must be respected. Celebrations organized by public authorities, but whose purpose is either to promote a particular place (city, region) or to provide entertainment to the participants, cannot be regarded as official state ceremonies⁵. We may ask about whether Art. 31 (3), which disapplies paragraphs 1 and 2 in respect of compositions during election events, excludes the obligation to credit the creator by his or her full name and the source, and also to respect the principle of preserving the integrity of the composition and fair use. At first blush, it seems so, therefore organizers of election events are free to disregard these requirements.

Article 34 of the Copyright Law lists the obligations with respect to permitted use: “It is permitted to use works within the limits of permitted use on condition that the name of the creator and the source are indicated. Crediting the creator and source should take into account the existing possibilities. The creator shall not be entitled to remuneration, unless otherwise provided by the law”. Case law emphasizes that Art. 34 is a condition of permitted use⁶.

It follows from the placement of paragraph 3 in Art. 31 that works can be used during election events, but this does not constitute permitted use. The use of works during election events will not present a significant social value, because their use may prevent the attainment, for example, of informational purposes.

On the other hand, according to the court, “failure to observe Art. 34 constitutes at the same time an infringement of author’s economic rights, since the author is entitled to the exclusive right to use and dispose of the work in all fields of exploitation and to remuneration for the use of the work (Art. 17), and since the defendant uses the claimant’s work beyond the limits of permitted use, the claimant is no doubt entitled to remuneration for such use of his work”⁷. Article 34 of the Copyright Law allows

⁵ Judgement of the Court of Appeals in Gdańsk of 28 January 2019, file ref. no. V ACa 492/18, LEX no. 2673413.

⁶ Judgement of the Court of Appeals in Warsaw of 20 January 2014, file ref. no. I ACa 1214/13, LEX no. 1451840.

⁷ Judgement of the Court of Appeals in Szczecin of 21 September 2018, file ref. no. I ACa 218/18, LEX no. 2578896.

the use of someone else's work provided that the name of the author and the source are mentioned. This does not require the author's permission to use the work⁸. In light of this judgement, the lack of the author's permission to use the work at an election event will not constitute an unlawful act – on condition that the organizers of the event exercise due diligence in mentioning the author's name and title of the work, providing this information truthfully. It follows from the court's jurisprudence that: "in order to qualify an intangible good as an object of copyright, it must be demonstrated that it is the result of human work, a manifestation of creative activity as an externalized result of intellectual process, that it has an individual character, and is embodied. Embodiment in this case does not mean that a work is fixed by giving it a material form, but that it is externalized so that it can be identified and perceived by people other than the author. Works meeting these criteria are subject to protection regardless of value, purpose, and manner of expression. The intention to create them, their purpose, and possible utility are irrelevant (cf. Supreme Court's judgement of 21 February 2020, file ref. no. I CSK 513/18, LEX no. 3044356)"⁹. The most typical answer to the question what constitutes an infringement of author's economic rights would be that it is using a work (its creative elements) without the consent of the authorized party or without being able to cite a relevant regulation (concerning permitted use). Using a work without the author's consent, and without legal grounding – that is, provisions on permitted use which would allow the defendant to use the work – means unlawful infringement of author's personality rights, such as the right to label the composition with one's name or pseudonym or to make it available anonymously, or to supervise how the work is used¹⁰. Article 33 (3) of the Law implies that there is a basis that allows the use of a composition. The question is, within the framework of the permitted use provisions? It is clear from the provision of CL Art. 35 that even permitted use of a work must not harm the legitimate

⁸ Judgement of the Court of Appeal in Lublin of 31 May 2006, file ref. no. IACa 281/06, LEX no. 1642484.

⁹ Judgement of the District Court in Katowice of 30 July 2021, file ref. no. XXIV GW 134/20, LEX no. 3245547.

¹⁰ *Ibidem*.

interests of the author, which happens, first and foremost, when one fails to identify the author of the work¹¹.

III. The essence of Article 31 (3) of the Electoral Code

A Polish dictionary defines “event” as “a concert, sports competition, etc., organized for entertainment purposes; a game, a social meeting; a venture, an idea”¹². However, norm-wise, the term “electoral event” presents interpretative difficulties.

In accordance with Art. 3 point 1 of the Act of 20 March 2009 on the Security of Mass Events¹³, a mass event is to be understood as a mass art and entertainment event, a mass sports event, including a football match, referred to in points 2–4, with the exception of events designated by the legislator. Thus, the legislator did not include “election events” under this label. As the court noted, “the definition of a mass event is not closed, since the legislator only specifies in Art. 3 (1)(a)–(g) which types of events do not have a mass character. Therefore, this means that any event related to cultural, entertainment or sports activity should be considered a mass event, if a large number of people can participate in it”¹⁴.

The concept of “election event” is not featured in the Electoral Code, either¹⁵, so it is necessary to ask whether, and if so, how this term should be interpreted on the grounds of the Code? As part of an electoral campaign or in a broader context? To answer this, it is important to note that Art. 31 (3) of the Law entered into force on 24 May 1994¹⁶, which was earlier than the

¹¹ Judgement of the Court of Appeal in Gdansk of 28 January 2019, file ref. no. V ACa 492/18, LEX no. 2673413.

¹² *Słownik języka polskiego* (online), <https://sjp.pwn.pl/szukaj/impreza.html> (3.05.2023).

¹³ Cons. text: Dz.U. 2023 item 616.

¹⁴ Judgement of the Supreme Administrative Court of 11 July 2022, file ref. no. III OSK 2851/21, LEX no. 3368423.

¹⁵ Act of 5 January 2011 – The Electoral Code (cons. text: Dz.U. 2022 item 1277), hereinafter cited as “Code” or “EC”.

¹⁶ According to Art. 129 of the Law, “the Act shall enter into force 3 months after the date of its promulgation, except for Art. 124 (3) which shall enter into force on the date of promulgation”.

Electoral Code. Therefore, for the issues at hand, we need to look at similar provisions therein.

According to EC Art. 94, “the name, acronym and graphic symbol used by the electoral committee is protected by provisions on intellectual property rights”. In a case where one organisation disseminated on its website the artwork of an electoral committee with accompanying information about the latter’s alleged joining the former and encouraging the sharing of the artwork so that as many people as possible would learn about the latter’s plans, the court noted that electoral campaigning can also have a negative character, i.e. consist in discouraging people from voting for certain persons or parties acting through electoral committees. This falls within the broad concept of voting in a specific way referred to in EC Art. 105 § 1¹⁷. In addition, such an understanding of the provision corresponds to the needs arising from the structure of electoral campaigns, in which a large proportion of activities is intended to ascribe negative behaviours or characteristics to political opponents. The questionable information that was posted on the social network profile constitutes in fact agitation as it presents information about entities associated with or at least supporting future candidates running on the participant’s list. It can, therefore, impact the decisions of individual voters, i.e., discourage or encourage them to vote. The court noted that the objectionable graphic sign cannot be identified with the symbol submitted to the National Electoral Commission by the applicant. However, it was not established in the course of the proceedings that the symbol was proper to the participant, the voter who created it, or the organization supporting it. The symbol, through its colour scheme and combination of markings, may refer to a concept also contained in the applicant’s name. Although the incriminated information does not directly refer to the Electoral Committee, it can be identified with it. After all, it is posted on the social profile of another electoral committee and refers to EP elections with the words “upcoming elections”. Therefore, the applicant has a legal interest in obtaining a resolution of interest. The information under consideration is subject to true-false evaluation, since it refers to verifiable activities of a certain group of socially and politically involved people. At the same time,

¹⁷ “Canvassing is defined as inducing or encouraging the public to vote in a specific way, including, in particular, to vote for a candidate of a specific electoral committee”.

the information is false”¹⁸. Thus, the law protects such values in the electoral process as the veracity of the message, the symbol also being an element of it. It follows from the wording of Art. 94 of the Copyright Law that the protection of the name and abbreviation of the name and graphic symbol of an electoral committee is granted from the time the committee is formed. This protection is not the competence of the electoral authorities, since electoral committees enjoy the legal protection provided for personal rights (Art. 23, 24 and 43 of the Civil Code¹⁹). Protecting the symbol of electoral committees, especially political parties, is of great practical significance. Political parties in Poland have been constantly undergoing changes²⁰. In this connection, the symbol is an important identifier and factor in making a party’s programme remembered, which is why protecting it legally is vital.

Although the Electoral Code does not use the concept of “election event”, this normative act uses the term “election material”. According to EC Art. 109 § 1, it is “any publicized and recorded information issued by an electoral committee that is related to the elections ordered”. Electoral material can be, among other things, a poster, leaflet, radio or television spot. Such materials are used in the course of the electoral campaign to make it effective²¹. The Code states in Art. 109 § 3 that “electoral materials are subject to legal protection”. At the same time, paragraph 2 requires that these materials “clearly identify the electoral committee from which they originate”. Ferdinand Rymarz pointed out that “it was not specified what this special protection should be under the electoral law”²².

Therefore, Art. 31 (3) of the Copyright Law may apply to compositions in the form of, for example, a poster, leaflet, radio or television spot, used as electoral materials as part of the election campaign. In my opinion, protection for the use of a work during an “election event” will also cover other forms of

¹⁸ Decision of the District Court of Warsaw dated 3 April 2019, file ref. no. II Ns 14/19, LEX no. 3027734.

¹⁹ Act of 23 April 1964 – The Civil Code (cons. text Dz.U. 2022 item 1360).

²⁰ Ł. Tomczak, *Polska lewica – konsekwencje podziałów i konsolidacji* [in:] *Polska lewica u progu XXI wieku*, ed. Ł. Tomczak, Wrocław 2008, p. 7.

²¹ B. Michalak, s. v. *materiał wyborczy* [in:] *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, eds. A. Sokala, B. Michalak, P. Uziebło, Warszawa 2013, p. 129.

²² F. Rymarz, *Komentarz do art. 109* [in:] *Kodeks Wyborczy. Komentarz*, eds. K.W. Czaplicki, B. Dauter, S.J. Jaworski, A. Kisielewicz, F. Rymarz, J. Zbieranek, Warszawa 2018, p. 289.

expression as works, also with respect to the mode of communication, since the Electoral Code does not define the term “election event”.

In Poland, only such gatherings, marches, demonstrations or speeches that involve public inducement or encouragement to vote in a certain way or for a certain candidate should be considered as a form of electioneering. All other activities that do not qualify as electoral campaigning are permissible as not breaking the election silence (cultural, sports, religious, etc. activities²³). In practice, separating electoral from information campaigns is difficult, if not impossible. To make matters worse, exceptions to election silence rules are not infrequently exploited to go round statutory prohibitions. Undoubtedly, campaigning becomes highly competitive in the run-up to elections²⁴ (voting, to be precise²⁵). Polish law defines electioneering broadly²⁶.

As Adrian Niewęglowski notes, “the use of works during assemblies, marches, demonstrations that serve an electoral campaign does not fall under free use. This applies in particular to meetings with voters of politicians running for office. They cannot be regarded as official ceremonies, even if the meeting with politicians is organized and held responsible by state and local authorities”²⁷. The purpose of election events is to manifest political leadership, which consists in influencing the behaviour of others²⁸. An elec-

²³ Explanations of the National Electoral Commission on the organization of special events in the period from the end of the electoral campaign until the end of voting in the election of the President of the Republic of Poland ordered for 20 June 2010, i.e., during the so-called “election silence”, ZPOW- 603–22/10; M.M. Wiszowaty, *Instytucja ciszy wyborczej – geneza, regulacja prawna, ratio existendi*, “*Studia Wyborcze*” 2012, no. 14, pp. 13–14.

²⁴ A. Frydrych, B. Michalak, M. Sobczyk, *Zagadnienia prawnej regulacji ciszy wyborczej i dopuszczalności prowadzenia w okresie ciszy wyborczej kampanii społecznej na rzecz podwyższenia partycypacji wyborczej* [in:] *Prawo wyborcze: analizy, interpretacje, rekomendacje*, ed. J. Zbieranek, Warszawa 2009, pp. 18–19; B. Michalak, *Czy polski model ciszy wyborczej wymaga zmiany?* “*Przegląd Prawa Konstytucyjnego*” 2017, no. 3, p. 11.

²⁵ R. Zych, *Legal aspects concerning the need to distinguish between the concepts of “election” and “voting”*. *State de lege lata and postulates de lege ferenda*, “*Teka Commission of Legal sciences Polish Academy of Sciences Branch in Lublin*” 2023, vol. 16, no. 1, p. 418.

²⁶ Ł. Buczkowski, *Uwagi w sprawie propozycji zmian Kodeksu wyborczego*, “*Przegląd Prawa Konstytucyjnego*” 2018, no. 3, p. 120.

²⁷ A. Niewęglowski, *Prawo autorskie. Komentarz*, Warszawa 2021, p. 392.

²⁸ P. Antkowiak, Ł. Scheffs, *Teoria i praktyka przywództwa politycznego na przykładzie bezpośrednich wyborów wójta, burmistrza i prezydenta miasta*, Poznań 2016, p. 116.

toral campaign is a period of very intense political competition, when all kinds of methods and forms of competition are used. These take the form of, for example, direct marketing, such as rallies, pre-electoral meetings, conversations with voters²⁹. Mass events (sports, cultural, or special ones) are typically organised, where the presentation of candidates is a supporting event³⁰. The purpose of field meetings, usually in smaller towns, is to integrate party members and supporters and demonstrate their strength³¹. As Leszek Garlicki noted, “the law interferes in these undertakings to a very limited extent. The electoral law regulates only the final stage of this competition to win voters, when it becomes necessary to put it into a tighter normative framework”³².

Therefore, the time frame for the term “electoral event” is not directly determined; however, the EC specification of the legal framework for election campaigns (which are characterised by intensive activity) can be of help³³. Nonetheless, a comprehensive and holistic assessment of the possibility of applying Art. 31 (3) of the Copyright Law should be made *in concreto* each time.

IV. Conclusions

The Electoral Code lacks a mirror regulation corresponding to that under Art. 31 (3) of the Copyright Law. Clarifying the understanding of the term “election event” and the concept it refers to raise various difficulties. In light of the foregoing, I propose *de lege ferenda* an amendment to the law clarifying the time frame of the application of Art. 31 (3) of the Copyright Law in a manner that does not raise interpretive doubts under both the Copyright Law and the Electoral Code.

²⁹ A. Rakowska, *Formy i granice kampanii wyborczych według kodeksu wyborczego* [in:] *Kodeks wyborczy. Wstępna ocena*, ed. K. Skotnicki, Warszawa 2011, p. 112.

³⁰ W. Sokół, *Kampania wyborcza* [in:] *Słownik samorządu terytorialnego*, ed. M. Chmaj, Lublin 1997, p. 64.

³¹ R. Laskowski, *Kampania wyborcza 2007 – uwarunkowania i konteksty* [in:] *Wybory parlamentarne 2007. Marketing polityczny, media, partie*, ed. M. Jeziński, Toruń 2012, p. 154.

³² L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2009, p. 164.

³³ J. Raciborski, *Instytucjonalne uwarunkowania zachowań wyborczych* [w:] *Wykłady im. prof. dr Wacława Komarnickiego*, eds. A. Frydrych, A. Sokala, Toruń 2012, p. 27.

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