

Bill on the openness of public resources – description of the draft proposal.

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On the 31st of December 2012 the Ministry of Administration and Digitalization in Poland has published a draft proposal for the Bill on the openness of public resources (in Polish law, such a draft proposal does not yet include precise legal language - but rather just general assumptions and concepts for the Bill). At the same time it has launched a process of public consultation of the proposal that lasts until the 21st of January.

Our general comment on the draft proposal for the Bill

The Bill on the openness of public resources is on one hand an important and long-anticipated legislative proposal. The goal of the Bill is to create a unified, standard framework for managing the copyrights in public resources, in order to make them openly available and reusable. In this, it can be compared to similar frameworks, such as [AUSGoal](#) or [NZGoal](#). If the rule of openness for public resources defined in this proposal is adopted, Poland will be among countries leading in the implementation of such solutions in the world.

However, the current proposals in our opinion also contains flaws and ambiguities. One fundamental flaw is the large degree of freedom given to public institutions in choosing the extent, to which resources will be made open. This includes the possibility of a full opt-out, long embargo periods (up to seven years) and partial opening of content in legal terms. While these varied “levels of openness” are important from the perspective of a successful, gradual framework - they can also be seen as opportunities created for public institutions to avoid in practice the goals of this regulation. This presents a risk that the actual change will be insignificant, because institutions will use available exemptions from the principle of openness and ultimately will not share resources with the public. For this reason, the general framework for managing intellectual property proposed in the draft should be strengthened by a guarantee of openness for key public resources and as clear as possible delimitation of cases, in which the exemptions from full openness will apply. As important is some form of institutional oversight and guidance that should be provided to institutions opening public content - currently this is missing from the proposal.

What are the general objectives of the Act?

The starting point for proposed legislation is the idea of extending the principles of access and re-use of public information (called Public Sector Information in Europe, and understood to be the type of public information to which freedom of information requests apply) to include those public resources that today do not fall within the definition of public information.

The new law proposes the opening of resources from the sphere of science, education and culture - which currently are excluded from the Bill on access and reuse of public information

(there is some ambiguity in the proposal, which can also be understood to cover any public resource that is not considered public information, no matter what administrative field it falls into). From this perspective, the work on the bill is the expression of a changing approach to defining public information. Traditionally defined as "information about public affairs", today it also includes "information made with public money or owned by public institutions," such as public data. The proposed extension is similar in spirit to the changes proposed currently to the European Directive on the re-use of public sector information.

The Bill can be also regarded as an application, on the statutory level, of the open model postulated by proponents of free culture, open education and open access. These models were initially implemented from the bottom up - in the case of science by scientific journals or institutions, in the field of education by teachers and non-governmental organizations, in culture by the creators. In the last several years it became increasingly clear that the idea of openness fits well within public service mission of ensuring the availability and use of public resources, especially with the help of digital technology. The Polish Bill is an expression of this approach, in which public institutions enforce top-down regulation of openness.

What are the key elements of the Bill?

The general outline of the Bill covers all public entities and resources in the sphere of education, science and culture, for example: publicly funded scientific articles and research, public media resources or textbooks and educational materials paid with the public money.

The law will regulate the rules for acquiring, sharing and re-use of public resources, defined as the final content, produced by the public entity or publicly funded, regardless of the manner of creation and preservation, and covering mainly the area of culture, education and science - for example analyses, reports, studies, data sets, maps, videos, audio-visual content, databases or others works, protected under copyright law.

The Bill also provides a possibility of an opt-out from its provisions by a public institution in exceptional cases, in particular because of a particular public interest. The proposal also includes a list of exemptions and access restrictions due to the protection of classified information and secrets, privacy and business confidentiality (which copies the restrictions that apply to access to public information).

An institution that does not opt-out from the regulation is required firstly to obtain necessary rights to the content, and afterwards to make the content available.

The project provides two types of transfer of economic rights to public resources, the choice will depend on the will of the entity possessing or funding the public resource. The first model involves the assignment of full economic rights. In case of a new form of exploitation, unknown at the time of conclusion of a contract, the creator will not be able to unreasonably refuse to grant a license. A second, alternative model of the acquisition of shares in economic rights refers in particular to the resources that were funded not just with public funds. The institution that will be a holder of shares in the public resource will be entitled to put work in a content

repository and may grant non-exclusive license without the consent of the author, but only under certain conditions (for example after few years from the date of publication).

Instead of having one standard, the project involves a number of different levels of openness. Public institutions can choose the degree or may even waive the statutory rules (in particular, but currently undefined cases).

There are three degrees of openness: "basic", which is equivalent of Gratis Open Access, "full" meaning a free license is being applied (or the work is not being subject of copyright) and "intermediate" involving a license providing a certain degree of freedom of access and use, but which does not meet the definition of a free license.

In addition, the law provides the possibility of an "embargo period" - designed to enable commercial exploitation of the work for a limited period of time.

The Act defines a fully open resource as not only available under a free license (in practice, CC BY, CC BY SA or equivalent - meeting for example the definition of Free Culture License or the Open Knowledge Definition), but is also made available immediately, in an open file format, machine readable, and made available along with metadata.

The proposal includes the option of charging fees for access and reuse for certain works, but only for commercial use and only in case of basic and intermediate option.

The proposal defines preferred degrees of openness in the three designated areas (science, education, culture), at the same time assuming that the final decision belongs to particular public institutions.

For science, the document states that "In the field of science, because of clearly defined standards of openness and the relatively homogeneous nature of the emerging resources (scientific articles or monographs), it is possible to adopt uniform rules of openness for the entire area, by ensuring at least open access (basic option). However, efforts should be made to ensure full access to these resources."

For education, the document states that "In the area of education, it is recommended to not only provide open access, but also the ability to processing and re-using of educational resources, because of the importance of content adapted to the needs of the students in the digital environment [...] However, efforts should be made to provide these resources available under the free license (full option)".

For culture, the document states that "In the area of culture, due to the diversity content [...] regulations will require flexibility, allowing use of the full range of modes of acquisition and sharing the content. In this area, the draft law will allow the possibility of charging fees for access to public resources, for the commercial purpose[...] and the implementation of an embargo period (up to 7 years)"