



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI
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COPYRIGHT, COMPETITION AND INNOVATION

QUESTIONNAIRE – NATIONAL REPORT OF POLAND

Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.

Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.

Please, keep your answers short and factual.

Please send national report to rxalabarder@uoc.edu.

Deadline: 15 August 2021.

1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

Identify and explain any specific instances where market competition and innovation concerns haven't been specifically addressed by copyright law or caselaw in your country. This may include by means of:

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

It would be difficult to provide examples of Polish court decisions addressing competition concerns by way of re-defining the scope of exclusive rights. However, it does seem that concerns of this type may in a certain extent impact court rulings in certain specific scenarios. One example that may be mentioned are cases initiated by collective management organizations (CMOs) against the backdrop of failing negotiations concerning the amount of royalties. Defendants in these cases have not been typical copyright infringers, i.e. persons or entities who have no intention of paying for using copyright works. Rather, the defendants have been broadcasting organisations or cable TV operators who have not come to terms with the relevant CMO regarding the amount of remuneration. Since any use of copyright works without the right holder's consent constitutes infringement (there is no room in these cases for any exceptions of limitations), CMOs often request injunctive relief, as this would be a very powerful instrument to force users to agree on the proposed amounts. There is nothing in the provisions of the law in force that would directly address these situations, but courts often conclude that granting an injunction would be disproportionate. They may invoke a general theory of the abuse of rights, which makes it possible to avoid the automatic granting of injunctions (Supreme Court, 20.01.2016, IV CSK 484/15) and may be seen as meeting the standards of art. 3 of the Enforcement Directive). The same applies to the claim for a double appropriate remuneration (double license fee), which Polish copyright law provides to right holders in the case of any infringement, regardless of fault (Supreme Court, 10.11.2017, V CSK 41/14; the case law on this remains fluid and other decisions follow a more traditional route, i.e. apply double damages regardless of the circumstances. e.g. Supreme Court 20.07.2020, V CSK 108/18). This is, however, rather a method focused on the remedies and not the scope of exclusive rights as such. Nevertheless, the main reason to consider



such “exceptions” to the exclusive nature of copyright rights seems to have been the market (monopoly) power of the plaintiff CMOs.

In general, Polish courts are rather reluctant to address competition concerns resulting from the enforcement of copyright in civil/commercial litigation.

1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

So far, Polish case law has not provided any meaningful guidance regarding the interpretation of statutory provisions concerning copyright exceptions and limitations in the light of competition concerns or impediments to innovation.

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or “joint-tariffs”, “one-stop-shops” ... and explain their impact in the market

There have been no cases in which a copyright owner has been compelled to grant a license. Polish copyright law does not know compulsory licenses. The only sphere, in which such instruments exist is collective management. As regards licensing by CMOs, they have a statutory duty of non-discrimination and unfair conditions could be also considered an abuse of a dominant position. As regards compulsory collective management, these instances are fairly numerous (remuneration paid by producers and importers of certain devices and blank carriers, and reprography, broadcasting of minor (small) musical, textual (literary) or combined (including both text and music) works, cable retransmission, broadcasting and making available of works as parts of archival broadcasts, communication to the public of radio or TV by holders of the equipment used for reception of radio or television programmes (pubs, bars, hairdressers, hotels), out of commerce works).

According to art. 5 (1) of the Act on the Collective Management of Copyright and Related Rights it is presumed that a collective management organisation may exercise collective management within the scope of its authorisation and that it has procedural standing within this scope. In essence, this is a legal presumption of representation referring also to the sphere of substantive law (introducing a presumption that a CMO is authorised to represent a particular right holder). This may be beneficial for competition as it allows third parties to secure a license even if the right holder cannot be contacted. Since the presumption of representation is of a general nature, it may apply to all works and all types of uses (touching upon all the acknowledged exclusive rights).

If securing a license to use a work whose right holder cannot be approached or has not authorized the use directly were considered beneficial for competition, another mechanism in use by CMOs worth mentioning is a civil law theory of benevolent intervention in another’s affairs. CMOs have argued that a foreign right holder, whose works have been used (without paying) in Poland, is in a position of a person requiring assistance in managing their affairs and that the enforcement of copyright in such circumstances may be deemed in line with a hypothetical will of such a person. This fits with the “substantive” part of the presumption of representation, strengthening the standing of a CMO. Even if it were proven that a CMO has not been entrusted by a given right holder with the management of his or her rights, this still would not mean that the CMO in question could not rely on the concept of benevolent intervention. To reject the latter, one would have to prove that the represented right holder does not wish to be represented and opposes the CMO’s actions. Whether this has, in practice, contributed to new and innovative services relying on copyrighted material, remains doubtful.



1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)

We are not aware of any specific licensing practices that favour market competition and innovation.

1.5.- By any other means?

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2. A STUDY CASE: DATA ECONOMY

Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)

Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc) available either online, in digital form or in analogue form.

2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

There has been – to our best knowledge – no decision addressing this issue in Poland. However, because of the text and data mining exceptions introduced by the DSM directive it would be difficult to argue that “machine reading” is not an act of reproduction. This is regrettable, but also consistent with a very technical approach to reproduction that has for many years prevailed in EU law and which has not been contested in Poland.

The DSM directive has not been implemented in Poland yet, but one must assume that the text and data mining exceptions/limitations will be introduced in line with the directive. Currently, no existing exception would be – as such – applicable to machine reading. It is possible to argue that “machine reading” could be exempted if it were done for the purpose covered by one of the already present exceptions. For example, a private use involving machine reading would be covered by art. 23 of the Copyright Act (CA); transient reproductions should be covered by art. 23¹ (implementing art. 5 (1) of the InfoSoc Directive); perhaps to some extent educational use (art. 27 CA).

2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

The main law in this area is the Act of February 25, 2016 on the re-use of public sector information (implementing directive 2003/98/EC, now replaced by Directive (EU) 2019/1024); Directive 2019/1024 has been implemented by the new Act on open data an re-use of public sector information of August 11, 2021. The Act has not yet entered into force and hence there is no case law or licensing practices based on the new Act.

So far, the Act on the re-use of public sector information has been relied on for two sets of purposes:



- for the purposes of creating new services relying on public sector data (e.g. meteorological data), including smartphone weather apps or apps informing about air quality (a particularly grave issue in many Polish cities, especially in the autumn and winter);
- as a way of getting access to public sector information, where the subsequent use is practically immaterial or has obviously secondary significance (e.g. an attempt to receive the entry log books of a Ministry building or a source code of a computer program).

The new Act (in line with the directive 2019/1024) should broaden the scope of data subject to re-use requests (including data from publicly owned undertakings) and enhance the availability of data through API interfaces as well as the so-called dynamic data. As a result, there should be more public sector information produced and made available in ways facilitating its re-use and integration into software-based products.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

There is no evidence to this effect.

3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:

3.1.- “Essential facilities” doctrines to foster the development of downstream markets

Competition concerns raised by the CMOs have been addressed mainly by the Office for the Protection of Competition and Consumers (UOKiK), especially in a string of cases between 2002 and 2008 (Dz.Urz.UOKiK.2002/5/214 – decision 25.11.2002 concerning the abuse of a CMO’s dominant position vis-à-vis users by imposing the costs of holograms attached to packaging of records on phonogram producers (abuse denied); 16.07.2004 Dz.Urz.UOKiK.2004.4.320, concerning an agreement between two CMOs determining the amount of remuneration, DOK-6/2008 z 29.08.2008, concerning the abuse of dominant position vis-à-vis CMOs members by imposing an excessively broad scope of rights members had to submit to collective management). Some of these concerns (e.g. the rights of CMOs members) have been later addressed by legislation (e.g. the implementation of the directive 2014/26/EU). None dealt with the more “modern” issues related to the scope of copyright monopolies or the essential facilities doctrine. There is, to our best knowledge, no Polish equivalent of a Microsoft case or similar.

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

Vertical integration and tying may be addressed by competition law principally through merger control and sanctioning the abuse of a dominant position.

In merger control exercised by the Polish Office for the Protection of Competition and Consumers the aspects of vertical integration as a source of competition concerns have been recently addressed in two major cases relevant to “copyright markets”. In the first the Office blocked a merger between Agora



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(and undertaking active in the media sector, as a press publisher and radio broadcaster) and Eurozet (a radio broadcaster) citing concerns about both the national and local radio broadcasting markets and the national radio advertising market. The relation between advertising and broadcasting markets may be perceived as an aspect of vertical integration (decision of Jan. 7, 2021, DKK-1/2021). In the other the Office approved a merger consisting in the taking over control by PKN ORLEN, a petrochemical giant, of Polska Press, a publisher of mostly local press and owner of printing presses (offering printing services also to their parties). The issue here was that PKN ORLEN had previously acquired a controlling interest in RUCH S.A., the second largest press distributor in Poland and the owner of multiple “Tabak” style retail venues. Having acquired Polska Press, PKN ORLEN thus integrated printing, press publishing, press distribution, and press retail sales. However, this time (decision of Feb. 5, 2021, DKK-34/2021) the Office did not find any real competition related concerns, stressing that vertical mergers usually pose much smaller risks for competition than the horizontal ones. Both cases had a clear political flavour: Agora owns the largest opposition newspaper (Gazeta Wyborcza) and PKN ORLEN is government-controlled.

As regards tying, this can be addressed by competition law in principle only as a form of an abuse of a dominant position (especially when bundling or tying make it possible to leverage a dominant position onto yet undominated markets). Since dominant position is relatively rare in the media sector (or the copyright industry in general, with the exception of software and perhaps some databases), it is difficult to point out to high profile cases of this type in Poland.

It is theoretically possible that a tying effect can be achieved contractually. Back in 2007 the Polish Competition Office made inquiries into the conditions of sale of laptops with a pre-installed Windows operating system that may have resulted from an anticompetitive agreement entered into by Microsoft and some laptop producers. The findings were forwarded to the European Commission. So far, the Office has not open proceedings into Google or Facebook. Neither have there been cases tackling the so-called vendor lock-in issue.

Polish Unfair Competition Act provides for an act of unfair competition consisting in restricting access to the market (art. 15 of the Act). Correctly understood, the Act should not be, however, interpreted as expanding antitrust rules onto businesses who do not enjoy a dominant position or, more generally, have less market power. There have been some attempts to use this instrument to address e.g. servicing restrictions resulting from the ownership of copyright in software, but without much success.

3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

No decisions have dealt with these specific issues.

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...

As mentioned earlier, licensing practices of CMOs were confronted by the Competition Office in the early 2000s. Since then, there have been no antitrust cases of this sort.

The Act on CMOs explicitly requires them to apply objectively justified and non-discriminatory criteria in contracts (licenses) with users (art. 44.1) and allows to refuse a license only if there are “valid reasons”. This way what could be addressed as anticompetitive behaviour under the antitrust law, has



been directly integrated into the collective management law. This does not mean that competition law would be inapplicable, but it will be seldom necessary.

As mentioned when answering the first question, unfairness is often perceived in the amount of the remuneration determined and claimed by CMOs. Polish law provides for a procedure of tariff approval by a specialized body (the Copyright Commission), whose decision may be appealed to a court. The Commission consists of members designated not only by CMOs but also representatives of users. Consequently, a CMO may have two sets of tariffs: the approved ones and the unapproved ones (not subject to approval or not yet approved). In the former case, the situation is rather straightforward, and the established tariffs will be applicable. The procedure is supposed to guarantee that the amount of remuneration is not excessive and takes into account legitimate interests of various stakeholders. In the latter case users often challenge CMOs proposals as unfair, which usually leads to litigation.

No comparable disputes have yet emerged where CMOs are not the licensors. Theoretically, apart from cases, in which the fees or other licensing conditions would be so abusive as to go beyond the limits of the freedom of contract (art. 353¹ of the civil code) and thus be invalid (art. 58 of the civil code), the only way to challenge such conditions would be to argue their invalidity because of antitrust law. This is, however, extremely difficult without a prior decision of the Competition Office and is not a viable option in practice.

4. ONLINE MARKETS: “VALUE GAPS” (ONLINE PLATFORMS)

Notice that complete and valuable information resulting from the stakeholders’ dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591

<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>

Please include only information that is specific to your country.

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

If you are an EU country, have you addressed the transposition of Art.17 CDSM Directive?

The DSM Directive (including art. 17) has not been transposed yet. No official draft or proposal have been published.

The only high-profile case of this type is the Chomikuj case. The Regional Court in Kraków and the Appeal Court in Kraków (18 Sep. 2017 case file no. I ACa 1494/15) have ruled against a file sharing service provider Chomikuj. Especially the decision of the appeal court is interesting since the court considered Chomikuj to be a direct infringer of copyright. The reason for this were several features of the service, such as the fact that users paid a micropayment for downloading larger files (i.e., the payment was associated with a specific file and not e.g., a type of subscription) and that there were elements in the service suggesting Chomikuj encouraged infringements (e.g., a system of awarding points to users whose content had the most downloads). The case is currently pending before the Supreme Court (case file no. III CSKP 2/21)



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4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

If you are an EU country, have you addressed the transposition of Art.15 CDSM Directive?

The DSM Directive (including art. 15) has not been transposed yet. No official draft or proposal have been published.

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

For instance, regarding cloud storage and compensation for private copying

Polish law provides for fees on devices for recording or reproducing copyright works or the subject matter of related rights and on media for recording or copying such works or subject matter as well as for reprography (art. 20 and 20¹ of the Copyright Act). Case law related to the former (apart from VAT tax issues, which led to the CJEU's decision in the case C-37/16 (ECLI:EU:C:2017:22) has mostly focused on the amount of fees and the accompanying issues such as the scope of the right of information granted to CMOs. The current regime, including the catalogue of devices subject to copyright levies, has been often criticised as insufficient and outdated. For example, the catalogue of devices has not been updated since 2011 and does not include smartphones, PCs, tablets or laptops. However, a draft (May 3, 2021) of a law on the rights of a professional artist seeks to extend this catalogue by including electronic devices allowing to reproduce works. This would cover the currently omitted devices, mentioned above. The draft additionally clarifies who and when should pay the levies, transfers the enforcement from CMOs to tax authorities and introduces reporting duties for the persons required to pay the fees.