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QUESTIONNAIRE

During the writing of the national report, it is requested that the relevant sources (norms, legal literature, Case-Law) be accurately cited, whenever possible, in footnotes, indicating the main abbreviations used and using consistent terminology.

When mentioned for the first time, specific national concepts and institutions that may not be known outside their legal system should be made explicit.

The answers should be concise, and the structure of the questionnaire should be preserved, as much as possible, to facilitate the work of comparative analysis and presentation by the rapporteurs at the Congress.

As questions regarding remuneration and collective management may have already been answered in previous national reports, it is kindly requested that a reference is made to the relevant report, including a link in case it remains online, provided that it is still up to date. If that is not the case, national groups are kindly requested to update the information given by previous reports.

MAIN THEME: COPYRIGHT, NEIGHBOURING AND SPECIAL RIGHTS - STATE OF AFFAIRS AND

FURTHER OUTLOOK

POLAND

PANEL I - PERFORMER'S RIGHTS - A COMPARATIVE OVERLOOK

1- What types of performers are there according to your legal framework?

All types of performers may be protected. The Polish regulation does not define or restrict the concept of performers but refers to an “artistic performance” of a copyright work or a work of folk art as the subject-matter of protection.

2- Do all types of performers enjoy Neighbouring Rights protection?

Yes, in principle, the catalogue of performers listed in the Copyright Act 1994 (CA) is non-exhaustive and provides only examples. However, the concept of “performance” may limit the scope of eligible “performers”. For example, if one considers that stuntmen or circus artists do not “perform” copyright works, then, typically they will not count as “performers”. Another contentious area is the category of persons “creatively contributing to the performance”, covered by the wording of Art. 82.2 CA. It is for example controversial whether sound engineers belong in this group.

3- Does the law distinguish between featured/non-featured performers? How?

No, there is no such distinction in the law.

4. Which rights are awarded to each type of performer?

I- *Live performances:*

- a) *Fixation - yes;*
- b) *Broadcasting - yes;*

II- *Fixed performances:*

- c) *Reproduction - yes;*
- d) *Distribution - yes;*
- e) *Rental - yes;*
- f) *Making Available to the public; - yes*
- g) *Communication to the Public - yes*
- h) *Public performance - yes ;*
- i) *Broadcasting - yes;*
- j) *Retransmission - yes*
- k) *Direct Injection – in principle yes, although before the implementation of the directive 789/2019 Polish law does not specifically mention “direct injection”. The current implementation proposal considers “direct injection” as a subtype of “retransmission”, and so provisions on retransmission would correspondingly apply to direct injection. The opposing view considers “direct injection” to be a type of broadcasting.*
- l) *Any other rights (for example: remuneration in case of use of performances fixed in tangible object – we understand that this question refers to all the rights regardless of their type (exclusive-remuneration, as this distinction is then addressed in Q6. In the case of broadcasting, retransmission and public performance using performances fixed in a tangible object, performers have been granted the right to remuneration, but no exclusive rights. Apart from that, Art. 70. 2¹CA states that performers are entitled to the so-called “additional remuneration” with respect to revenues from screening audiovisual works in cinemas, rental of copies and their public presentation, broadcasting the work on TV or other mass media and compensation for reproductions covered by the private use exception.*

III. Are moral rights attributed to performers? Which prerogatives does it comprehend?

Yes, moral rights have been granted to performers. Three types of these rights have been explicitly listed in CA. According to Art. 86.1 CA performers have the exclusive right to: a) being identified as the performer, except where the omission is customary practice; b) deciding how the performer should be named, including maintaining anonymity or using a pseudonym; c) raising objections to any distortions, misrepresentations and other changes in the performance which could harm the performer's good name/reputation (integrity of the performance). This catalogue is open which means that there can exist other moral rights than those explicitly named in Art. 86. Examples include the right to decide about the first making of the performance available to the public (an analogue to the right of divulgation with respect to copyright works) or the right to decide whether the performance should be fixed, although the both are controversial.

4- What is the nature of those rights? - Statutory? Contractual?

The nature of all the above-mentioned rights, both economic and moral, is statutory. This is obvious with respect to exclusive rights as such rights cannot be created by contracts. Remuneration rights must also have this nature though, since these rights are effective against every person using the performance in a legally relevant manner. It would be unthinkable for such a right to have a contractual nature as it would, by definition, affect persons who have not entered into any contractual arrangement with the performer.

5- Which of them are exclusive rights/remuneration rights?

Moral rights are all considered exclusive (absolute subjective rights). As regards economic rights, the rights of reproduction, distribution, rental, lending and communication to the public, including the making available have been conceived as exclusive rights, except for broadcasting, retransmission and public presentation using a distributed copy of the performance. In the latter case performers have been granted a remuneration right.

6- Which exceptions/limitations generate remuneration rights for performers?

Only a few exceptions/limitations generate remuneration, because in principle exceptions/limitations are free of charge (art. 34 CA: It shall be permitted to use the works, within the limits of permissible use, on the condition that the author (name and surname) and the source have been indicated. The author and the source should be named subject to existing possibilities. The author shall not be entitled to remuneration unless the Act provide otherwise.”). Remuneration is provided in Art. 25 CA – press

use (mainly articles, photo) which is usually inapplicable to performers, because copyright works relevant for this provision are rarely “performed”. Art. 27.1 CA covers the use in textbooks, school excerpts, anthologies; Art. 28.4 provides for remuneration for the lending of copies, however while this also covers copies of e.g. audiovisual works, art. 28.5 CA limits the scope of persons entitled to remuneration in such a way that it is difficult to imagine it being applied to performers.

Performers participate in the revenues conceived as compensation for reproductions allowed under the private use exception (levies for devices and carriers). It should be noted at this point that in Poland these revenues are notoriously low, partly due to the outdated list of covered devices and carriers that no longer reflects market reality.

7- Which rights are transferred to music/audiovisual producers? For how long?

According to Art. 87 CA “The contract concluded by a performer with the producer of an audiovisual work for joint production of an audiovisual work, unless it provides otherwise, shall transfer to the producer the rights to manage and to use the performance as part of the audiovisual work, in all fields of exploitation known on the time of entry into the contract.” This provision introduces what may be labelled a presumption of transfer. If such a transfer takes place, it is unlimited in time, but limited in scope, meaning that it only applies to the use of the performance as part of the whole audiovisual work.

8- Are there any legal presumptions of transfer or is it voluntary/contractual?

See above the answer to Q7. In all circumstances in which Art. 87 CA does not apply, any transfer must be contractual and hence voluntary.

9- Are there any unwaivable and inalienable remuneration rights?

The rights to remuneration for private use (device and carrier levies) as well as the “additional remuneration” for audiovisual works (Q4 I)) cannot be waived or assigned.

10- What type of compensation is paid in exchange? How is it set? For how long?

There is no special regulation on the types of compensation paid for performers’ rights. Contractually, these can be agreed as lump sum payments or royalties or a combination of both. When it comes to statutory remuneration rights, the law does not specify precisely how the remuneration is to be calculated. The provisions of the so called “additional remuneration” applicable to audiovisual works provide that this remuneration should be proportionate or appropriate, however both are very general terms. There is no time limit for remuneration rights, so they should be in principle applicable as long as performers’ rights exist.

11- How is "streaming" qualified in your Country for rights awarding purposes?

Streaming is a type of communication to the public. It may be mentioned at this point that the CA does not use the term "communication to the public". It either uses a broader term "dissemination", which includes different forms of communication, both when the public is present where the act of communication is taking place (e.g. a theatre performance) and when the public is somewhere else (e.g. broadcasting, Internet). In some provisions the CA refers to the making available right, but then the choice of time is required, and live streams will not qualify. It is however important to stress that because Polish copyright law espouses the property theory of copyright (all uses are in principle covered), it cannot be argued that a live stream is not covered. It will simply be a different type of use, but still subject to the copyright monopoly. Theoretically, because of the wording of Art. 86.1 p. 2) c) CA there could be a controversy regarding live streaming from the perspective of performers' rights as this provision does not repeat the property theory of copyright but instead names the modes of exploitation subject to the exclusive right of the performer. It will be, however, possible to claim that a live stream is a type of (online) broadcasting for these purposes.

12- Whose authorization is it required for the "streaming" of music/audiovisual content?

There are no special provisions concerning this type of use, so it will have to the right holder's authorization.

13- What is the estimated level of copyright infringement in your Country?

There is no reliable data. Anecdotal evidence would suggest that this level is relatively high. However, according to the Online copyright infringement in the European Union 2021 published by EUIPO the level of piracy in Poland is supposed to have been the lowest in the EU.

14- What is the current level of disclosure on economic returns from digital platforms?

There are no statutory instruments that would mandate such disclosure and the data is not publicly available.

15- How is performer's compensation determined for each business model?

We are not sure what business models are meant here. Again, there are no statutory compensation schemes. CMOs apply their tariffs and they provide for various factors. For example, for retail outlets the relevant CMO (SAWP) offers different rates based on the surface of the establishment and the location (small towns, larger cities, etc.).

16- Are there minimum amounts due? Any other economic benefits?

There are no minimum amounts or other comparable requirements.

17- Do UGC platforms contribute to such compensation schemes? How?

There are no “compensation schemes” as such. UGC platforms may enter voluntary arrangements, but since the DSM directive has not been implemented yet (the draft of the implementing act has been published in June 2022 and is under discussion) UGC platforms are not in principle considered to be “users” and therefore directly liable for the making available of protected content.

18- Has the Beijing Treaty been implemented in your Country, at least, in part?

Formally, the Treaty has not been ratified. However, Polish law already provides many of the solutions introduced by the Treaty. A comparison of the Polish regulation with the Beijing 2012 WIPO Treaty shows differences in the literal wording, but usually without significant practical consequences.

19- Which rights are collected by Collective Management Organisations (CMOs)?

CMOs manage the “additional remuneration rights” for audiovisual performances, the levies (device and carrier compensation), the retransmission rights. In these instances the management by a CMO is obligatory. Any performer who has retained their rights may entrust their management to the competent CMO.

20- Which CMOs represent performers in your Country?

STOART-Collective Management Organisation for artistic performances of music and words-and -music pieces (<https://stoart.org.pl/>); SAWP (<https://www.sawp.pl/en/about-us/>) ; ZASP (<https://www.zasp.pl/>)

21- Do these CMOs comply with transparency principles?

Yes – they are all subject to the Act on collecting management of copyright and related rights. The Act has implemented the directive 2014/26/EU and is compliant with EU law as regards transparency obligations.

22- Is it possible to find out how much income is provided by each type of rights?

To some extent yes, based on CMOs annual reports.

23- What is the current litigation level for performers' rights in your Country?

There is no reliable data.

24- Are there any relevant Court Decisions concerning performer's rights?

It of course depends on what "relevant" means in this context. There are quite a few court decisions concerning performances and performers' rights, but the vast majority of the recent ones seems to be of little interest to an international audience. The reason is that their focus is whether a performance may be the subject matter of a mandate/service contract or a contract for a work, which has certain tax-related implications.

25- Does the Principle of National Treatment apply to all foreign performers?

According to Art. 90 CA the provisions of the Act shall apply to performances which: a) have been made by a Polish national or a person residing in the territory of the Republic of Poland; or b) made by a national of a Member State of the European Union or Member States of the European Free Trade Agreement (EFTA) – parties to the Agreement on the European Economic Area, or c) have been established for the first time in the territory of the Republic of Poland; or d) have been published for the first time in the territory of the Republic of Poland; or e) are protected under international agreements, to the extent of protection granted under these agreements.

26- Are there "appropriate and proportionate remuneration" provisions?

Currently, only the provisions on the „additional remuneration” for audiovisual works use these terms (proportionate and appropriate remuneration).

27- Are CMO's mandates always exclusive and encompassing all rights?

When CMO's management is obligatory, this applies to all rights subject to the mandatory management. When rights are entrusted to a CMO by a performer, the mandate may be limited to certain rights, though will usually be exclusive. In the past, excessively broad mandates have attracted attention of the Competition Office.

28- Are there any partial/global revocation of transfer of rights agreements provisions?

Unlike authors (art. 56 CA), performers do not enjoy any general revocation grounds. However, according to art. 90⁵ CA if, 50 years after the publication of a phonogram or its distribution in any other way, the phonogram producer does not make available on the market a sufficient number of copies of the phonogram to meet the reasonable needs of the public, taking into account its nature, or does not make it available to the public in such a way so that members of the public may access it from a place and at a time individually chosen by them, the performer or his heir may terminate the contract whereby the rights in the performance are transferred to a phonogram producer in this regard, or the contract whereby the phonogram producer is granted an exclusive licence to use the performance in this regard. Such a termination takes effect if the

phonogram producer, within one year from the date on which the phonogram producer or his heir serves notice of termination of the contract, does not start to exploit the phonogram in any of the ways referred to in this provision.

29- Are there any provisions on contractual remuneration adjustments?

The provision on copyright works (the so-called bestseller clause) does not apply to performances. However, according to art. 95³ CA if the transfer of rights in the performance to the phonogram producer or the grant of an exclusive licence to exploit the performance is made for a lump sum remuneration, the performer shall be entitled to an annual supplementary remuneration from the phonogram producer for each year after the 50th year following publication of the phonogram or its distribution in any other way. This right is unwaivable and inalienable.

PANEL II - PHONOGRAM PRODUCERS' RIGHTS

1- Which rights are awarded to phonogram producers?

- a) *Reproduction; - Yes*
- b) *Broadcasting; - Yes (remuneration)*
- c) *Communication to the public; - Yes (although literally only the making available when the public have the choice of time)*
- d) *Distribution; Yes*
- e) *Rental; Yes*
- f) *Making available to the public; Yes*
- g) *Cable Retransmission; Yes (remuneration)*
- m) *Direct Injection; in principle yes, although before the implementation of the directive 789/2019 Polish law does not specifically mention “direct injection”. The current implementation proposal considers “direct injection” as a subtype of “retransmission”, and so provisions on retransmission would correspondingly apply to direct injection. The opposing view considers “direct injection” to be a type of broadcasting.*
- h) *Any other rights?*

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2- What is the nature of those rights? - Statutory? Contractual?

These rights are statutory.

3- Which of them are exclusive/remuneration rights?

The rights of reproduction, distribution, rental and lending and the making available rights are exclusive rights. The other rights are remuneration rights.

4- Which exceptions/limitations generate remuneration rights for phonogram producers?

Apart from the compensation scheme for private use (levies for equipment and carriers, as mentioned notoriously low in Poland), few exceptions and limitations generate revenues for phonogram/videogram producers. Such remuneration may apply to using small works or fragments of larger works in textbooks, anthologies, etc. (art. 27¹ CA), however the practical significance of this rule is minimal, as it would need to apply to multimedia “textbooks” and these are extremely rare. Remuneration for public lending is due only to certain types of right holders and phonogram/videogram producers remain outside the scope of the intended beneficiaries (art. 28 p. 5) CA).

5- Are there any legal presumptions of transfer or is it voluntary/contractual?

The rights in question are granted to producers. There are no presumptions resulting in transfers to persons other than producers.

6- What type of compensation is paid in exchange? How is it set? For how long?

We understand that this question refers to compensation paid by users/persons using phonograms in legally relevant ways. As far as contractual arrangements are concerned, parties are free to determine the remuneration as they see fit.

7- How is producer's compensation determined for each business model?

We are not sure which business models are meant here.

8- Are there minimum amounts due? Any other economic benefits?

No

9- Is digital piracy/streamripping still a major concern for phonogram producers?

One would have to say that yes, but this is practically usually bundled with copyright infringements.

10- Which rights are currently being collected via CMOs?

Mandatory collective management applies to retransmission, broadcasting or making available of small musical, word or word-musical works (unless a broadcaster is authorized by another contract), broadcasting, making available and reproduction for these purposes of archival programmes by TV and radio broadcasters (unless a broadcaster is authorized by another contract), public presentation of broadcasts (unless the user, e.g. a pub owner, is authorized on the basis of another contract).

11- Which CMOs represent phonogram producers in your Country?

ZPAV (<http://zpav.pl>)

12- Do these CMOs comply with transparency principles?

Yes – they are all subject to the Act on collecting management of copyright and related rights. The Act has implemented the directive 2014/26/EU and is compliant with EU law as regards transparency obligations.

13- Is it possible to find out how much income is provided by each type of rights?

Possibly, based on the CMO's annual reports

14- What is the current litigation level for phonogram producers in your Country?

There is no reliable data, but the small amount of available court decisions would suggest that most cases are rather simple (collection of royalties by the CMO).

15- Are there any relevant Court Decisions concerning phonogram producer's rights?

There is very little case law, almost none addressing any legally vital issues concerning phonograms and producers' rights.

16- Are there any revocation of transfer of rights' agreements provisions?

Yes, though referring to performers' rights. According to art. 90⁵ CA if, 50 years after the publication of a phonogram or its distribution in any other way, the phonogram producer does not make available on the market a sufficient number of copies of the phonogram to meet the reasonable needs of the public, taking into account its nature, or does not make it available to the public in such a way so that members of the public may access it from a place and at a time individually chosen by them, the performer or his heir may terminate the contract whereby the rights in the performance are transferred to a phonogram producer in this regard, or the contract whereby the phonogram producer is granted an exclusive licence to use the performance in this regard. Such a termination takes effect if the phonogram producer, within one year from the date on which the phonogram producer or his heir serves notice of termination of the contract, does not start to exploit the phonogram in any of the ways referred to in this provision.

17- What is considered a "phonogram published for commercial purposes"?

The law does not distinguish between phonograms published for commercial purposes and other phonograms.

18- Is there any type of phonograms that is published for non-commercial purposes?

See above.

19 - Which rights are involved in audiovisual synchronization ("production music")?

Always reproduction and such uses as are planned for the audiovisual content (distribution, communication to the public, etc.).

20- Which rights are involved in mood music/sound branding licensing?

There are no special provisions. One must establish which types of uses will take place and who owns the rights with respect to them.

PANEL III- BROADCASTERS AND FILM/AUDIOVISUAL PRODUCERS RIGHTS

1- Which rights are awarded to broadcasters in your Country?

We understand that this questions refers to the broadcaster's right (related right)

- a) *Fixation; Yes*
- b) *Reproduction; Yes*
- c) *Communication to the public (with /without admission fees); There is no general communication to the public right in the Polish CA. E.g. broadcasting and retransmission are types of communication to the public.*
- d) *Distribution; Yes, with regard to fixations of broadcasts;*
- e) *Simultaneous retransmission by wire or wireless means; Yes*
- f) *Deferred retransmission by wire or wireless means; No specific mention, but it can be qualified as broadcasting by other broadcasting organization;*
- g) *Making available to the public by wire or wireless means; Yes, with regard to fixations of broadcasts;*
- h) *Pre-broadcast program carrying signal protection; No*
- i) *Any other rights?*

2- What is the nature of those rights? - Statutory? Contractual

Statutory

3- Which of them are exclusive/remuneration rights?

Exclusive rights

4- Which exceptions/limitations generate remuneration rights for broadcasters?

The only applicable provision would be remuneration for communicating to the public articles on current economic, political or religious topics, in cases in which such communication thereof is not expressly reserved, as well as photographs for the purpose of reporting current events (art. 25.1 a) and b) in conj. with art. 25.2 and 25.4 CA.

5- Are there any legal presumptions of transfer or is it voluntary/contractual?

There are no legal presumptions of transfer.

6- What is the relevance of copyright infringement in relation to broadcasters' rights?

There is no reliable data.

7- Is digital piracy/streamripping still a major concern for broadcasters?

Probably yes, but there is no reliable data.

8- Do UGC platforms contribute to broadcasters' rights? How?

No

9- What is the current litigation level for broadcasters' rights in your Country?

There is very little case law, which would suggest that the litigation level is low.

10- Are there any relevant Court Decisions concerning broadcasters' rights in your Country?

No

11- Are broadcasters acting as One-Stop Shop in relation to retransmission operators?

No

12- Which rights are awarded to audiovisual producers in your Country?

We understand that this question refers to the rights to videograms. In Poland, the same provisions apply to the rights of producers of phonograms and videograms, therefore the answers provided above regarding phonograms remain applicable to videograms.

a) Reproduction;

- b) Broadcasting;
 - c) Communication to the public;
 - d) Distribution;
 - e) Rental;
 - f) Making available to the public;
 - g) Retransmission;
 - h) Direct Injection;
 - i) Any other rights?
- 13- What is the nature of those rights? - Statutory? Contractual?
 - 14- Which of them are exclusive rights? Which of them are remuneration rights?
 - 15- Which exceptions/limitations generate remuneration rights for audiovisual producers?
 - 16- Which rights are transferred to audiovisual producers? For how long?
 - 17- Are there any legal presumptions of transfer towards audiovisual producers?
 - 18- What type of compensation is paid in exchange? How is it set? For how long?
 - 19 - How is audiovisual producer's compensation determined for each business model?
 - 20- Are there minimum amounts due? Any other economic benefits?
 - 21- Do UGC platforms contribute to such compensation schemes? How?
 - 22- Is digital piracy/streamripping still a major concern for audiovisual producers?

23- What is the most recent estimation of rights' loss on account of digital piracy in your Country?

24- What is the current rule in terms of audiovisual exploitation windows in your Country?

There are no legally binding rules in this respect.

25- Which CMOs represent audiovisual producers in your Country?

ZPAV (<http://zpav.pl>)

26- Do these CMOs comply with transparency principles?

27- Is it possible to find out how much income is provided by each type of rights?

28- What is the current litigation level for audiovisual producers' rights in your Country?

29- Are there any relevant Court Decisions concerning audiovisual producer's rights?

30- Are audiovisual producers acting as One-Stop Shop in relation to retransmission operators?

No

PANEL IV - DATABASE PRODUCERS' AND PUBLISHERS RIGHTS

1- Are Databases legally protected in your Country? How?

Yes, databases can be protected as a copyrightable work under art. 3 CA (if the copyright protection criteria, here mainly regarding the selection and arrangement, have been met), and as a sui generis database under the Database protection act (27 July 2001, last version: Official Journal of Law: 2021, item. 386).

2- Is there a Sui Generis Database producers' right or equivalent protection in your Country?

Yes, the sui generis protection is provided (the Database protection act, implementing the directive 96/9/EC).

3- Is it possible to evaluate its efficiency and level of enforcement?

It is unfortunately difficult. There have been few court cases and only one decision of the Supreme Court – dated 9 May 2013 r., case file no. II CSK 466/12).

4- Is there any different form of protection for Database producers or for ownership of data?

There are (apart from copyright – see Q1) no other exclusive rights applicable as such

to databases. However, to a certain extent it is possible to protect databases under unfair competition law either as trade secrets or based on the general clause of an unfair competition tort (extraction as contrary to good business morals - a form of parasitic competition).

5- How does it work? Is it effective?

It is difficult to say. Usually, cases of this type are hard to prove before courts. In trade secret cases the plaintiff may find it difficult to prove unlawful access and parasitic competition is usually a last recourse type of claim, when no more specific legal ground is available.

6- How do the courts of your Country balance the *sui generis* right with freedom of information and freedom of competition?

The only cases where one may find traces of such analysis have been dealt with by administrative courts, in the context of requests for access to public information and the reuse of public sector data (e.g. II SAB/Wa 461/18 - WSA Warsaw, IV SA/Wa 178/18 – WSA Warsaw).

7- Is the *sui generis* right protected against circumvention of TPM designed for controlling access?

No, the database law does not provide protection similar to art. 6 of the directive 2001/29/EC.

6- Is there a special protection against online uses of press publications in your Country?

Not yet, but a new law, which will implement the directive 2019/ 790 will provide a new press publishers right (bill dated 6 June 2022 – available: <https://legislacja.rcl.gov.pl/docs//2/12360954/12887995/12887996/dokument561488.pdf>)

7- Does it apply to scientific journals and hyperlinks? How does it work?

According to draft law referred to above the new provisions will apply neither to scientific journals (art. 99⁷ 1)) nor to “hyperlinks” (art. 99⁷, 3)).