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Music Trademarks and Their Protection in Trademark and Copyright Law

Abstract. The changes recently introduced in both European regulations (article 4 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 of the European Union trade mark, article 3 of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of Member State relating to trade marks), as well as in Polish national regulations (article 120 of the ustawa – prawo własności przemysłowej of 30 June 2000 Dz. U. no 49 position 508 with changes) make registering a sound trademark not only possible on the base of its graphical representation (musical score or sonogram) but also its recording. On the one hand, it will make registration easier, but on the other, it will significantly change the nature of the subject of registration. Especially, it will concern signs which could be called musical trademarks. Their recording shall be seen as a kind of process in which each step is created by another person: the creator of the work, its performer and finally producer. What is the most important, each of them has his/her own right, i.e. copyright or related right. The article will present the characteristics of musical trademarks, rights to them vested in their "creators" on the basis of Polish law and the relationships between those rights, including some specifics of musical trademark both as a trademark and musical work.

Keywords: musical trademarks, sound trademarks, Polish copyright law, rights to artistic performance, rights to phonograms

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Introduction

The lastest changes in European trademark law made it possible to register a trademark on the basis of any of its representation, not only the graphical one (article 4 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 of the European Union trade mark, article 3 of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of Member State relating to trade marks). The main purpose of this regulation was to facilitate the registration of non-conventional trademarks, such as colour, shape or sound. With regards to the last of these groups of signs, the Regulation specified above shall be seen as a kind of legalization of the practice which existed before: lots of sound trademarks were registered on the base of notation and recording in the past. However, the abandoning of the requirement of graphical representation probably increases entrepreneurs' interest in these kinds of trademarks because it will make registration easier and, in some cases, possible. On the other hand, it should be noted that the possibility of granting the trademarks right only for recording, without its graphical representation, significantly changes the subject of the protection. The score or any other type of sound notation is always an indirect way to communicate a sound. It leads to a situation in which most of them, especially scores, are imperfectly and incomplete because not every sound can be written down (only audio spectrum visualisation may be seen as a precise graphical representation of a sound, but it is also impossible to read for a common person, so it should be considered as unclear and hardly accessible). At the same time such incomplete notation can be performed each time in a different way. As a consequence of this characteristic of sound notation, it shall be noted, that the subject of protection by trademark right if the sign was registered on the basis of its notation includes any and all sound realizations of this notation. In the case of granting the right only for a recording, only this one, specific realization will be protected. On the one hand, that may suggest that the right results from sound notation is broader that the one based on recording but from the other one, only recording facilitates the granting of a protection for some unwritable sound elements, especially timbre.

The above considerations have particular relevance for a specific group of sound trademarks, i.e. musical trademarks. The criterion of their distinction is a method of creation of such signs relies on intentionally combining individual sounds according to some rules, in contrast to unintentionally, "natural" sounds, such as lion *roar* registered under the EUTM number 000143891). For musical trademarks in this meaning, differences between the subject of protection granted on the basis of notation and recording have an impact not only on the scope of protection but also on types and number of other rights, which may be entitled to the same subject: copyrights and related rights. This issue shall be seen as essential for the entrepreneurs' trademark right because conflict between this right and the rights

of other persons may effectively cause opposition or even the invalidation of the registration.

The probable increase in the popularity of registring musical trademarks, which is a result of the simplification of the procedure and the consequences of possibility of registering such signs on the basis of notation (score) and recording, prompt one to reflect on the following issues: the definition and characteristics of musical trademarks, their types, other rights which may be entitled to such trademarks and their mutual relationship. Discussing issues related to copyrights and related rights will be limited to the regulations of ustawa o prawie autorskim of 4 February 1994 (Dz. U. no 24 position 93 with changes; the abbreviation pr. aut. will be use in this text), so to the situations in which the works whose author or co-author is a Polish national, whose author is a national of a Member State of the European Union or a Member State of the European Free Trade Organisation (EFTA) – party to the Agreement on the European Economic Area, that were originally published in the territory of the Republic of Poland or were simultaneously published in that territory and abroad, which were originally published in Polish, which are protected under international agreements, to the extent that they are protected by those agreements (article 5 of Act on Copyright).

Definition and Characteristics of Musical Trademarks

As indicated above, the musical trademark is a sequence of sounds intentionally organised by a human. The definition of this category is similar to the most common dictionary definitions of the term "music" (Nettl, 2014). However, it should be noted that within these definitions attention is consistently drawn to the existence of certain general aspects of combining sounds, i.e. melodics (succession of sounds at different pitches), rhythm (temporal sequence and mutual temporal relations between individual sounds) and harmonics (vertical relations between individual sounds) (Nettl, 2014). An important element, indicated in attempts to determine what music is, is also timbre, that is, the perceived sound quality of a sound, which causes two sounds of the same pitch and length to be perceived by humans as different (Campbell, 2001). Taking into account the development of technology that has occurred in recent decades, resulting inter alia in constructing complex devices for generating synthetic sound, timbre shall be considered an element of a musical composition as important as melodics, rhythm and harmonics.

However, attention should be paid to the fact that not every sequence of sounds that is music in this meaning must be contain all four elements. For example, music performed on percussion instruments with an indeterminate pitch of sound will be deprived of melody and harmony, while some compositions of the twentieth century avant-garde, including sonoristic may not have melodies and rhythm. It is difficult to

imagine a sequence based on only one of the above-mentioned elements, due to their mutual coupling with each other (melodics devoid of rhythm is basically a theoretical construct, harmonics are often the resultant of melodics, etc.), and the fact that timbre is a physical property of every sound, makes it impossible for a sound to exist without timbre. At the same time, music will only be sound sequences in which at least two of these elements are organised in an intentional way. Thus, the described category will not include recitation because it is organised intentionally and creatively only rhythmical[2]. This leads to the conclusion that musical trademark is a kind of sound trademark which is intentionally created by a person and this combining sounds includes at least two of four elements: melodic, rhythm, harmony and timbre. From the perspective of the main scope of this article, the indication of those four elements shall be seen as a main scope of discussion. Any of them may be copyrighted on the base of Polish law (Sewerynik 2013), but not all of them can be written down by Western staff notation, which shall be seen rather as a set of guidelines and rules dedicated to the performer, not precisely instruction how to play (Breuneis, 2014). This problem applies especially to timbre, which can be noted in the score only if it is determined by some typical musical instrument, such as piano or violin, but not when it is created directly to the given composition. At the same time, this specific of music notation turns its realization into a kind of creative process which consists of the following steps: composing (which may be, but not has to be written down) – performing, recording and producing. It should be clearly emphasized that any of these steps may be realized by another person who can be entitled to other rights. This conclusion affects the current topic; however, it should be noted that the category of musical trademarks is strongly diversified. Consequently, proposals for the division of musical trademarks which are useful for further legal analysis will be presented.

Types of Musical Trademarks

First of all, musical trademarks can be divided by their length into short marks (several-note) and long marks (at least one bar or more). The first group will include, for example signals characteristic for mobile phone networks, such as Deutsche Telekom AG trademark (EUTM no 001416858) composed of only five notes. A long mark can be considered the several-bar melody registered as a Tetris Holding LLC sign (EUTM no 002289049). Another possible criterion for the division of musical trademarks is the time of creation of a musical composition. In this respect, one can distinguish historical marks, such as the trademark owned by European Broadcasting Union (EUTM no 000907527), which is the initial fragment of *De Teum* by Marc-

2 It should be noted that it is hypothetically possible to create such a recitation, in which the tone is also organised in an intentional way, e.g. when except of the specific voice of a given person, specified, specific capabilities of this persons vocal apparatus are used.

Antoine Charpentier, a French composer 1643-1704, and contemporary marks that include all the signs created in our time. The next useful criterion for the division is, on what basis was a given composition shaped, i.e. which of the above-mentioned main elements of the musical work – melody, rhythm, harmony and timbre – is the main form-determining factor of a composition. In this respect, most signs are based on melody and rhythm, such as, for example, Nokia's signal owned by Nokia Corporation (EUTM no 001040955), or on melody, rhythm and harmony in the case of polyphonic compositions, such as the fanfare of the 20th Century Fox (EUTM no 001312008). It may happen, however, that a composition that is a musical trademark is created on the intentional organization of timbre. It is the case of THX sound effect (USPTO no 74309951) owned by THX Ltd., in which there is no melody, while the whole composition is based on a synthetically obtained (so-called *deep tone*), intensifying sound (so the timbre determines the character of the sign). It is interesting, but expected, that this trademark is not registered in EUIPO, probably because of its character, which makes it difficult to write down in a musical score. Musical trademarks can also be divided in regard to their relationship to the whole composition. In this context, a trademark may be both the entire composition and a selected, or even a very short fragment of the same piece. This latter situation applies for example to the European Broadcasting Union sign mentioned above. Finally, it is more useful from a legal perspective to divide the trademarks by the intention in creating them. In this respect, one can distinguish trademarks intentionally created for the purpose of using them as a sound logo of a specific entrepreneur, or created for a different purpose, and only after that registered as a trademark.

The division criteria proposed above refers to any musical trademarks, so both registered on the base of notation and recording are included. However, it should be remembered that in the case of recorded trademarks their constitutive element is also performance and recording. Therefore, it is reasonable to propose some typologies of this type of marks referring to the creative processes that accompany recording. From this perspective, it is possible to divide musical trademarks according to the way they are performed, into trademarks performed by specific persons (vocalists, instrumentalists) or synthetically generated. By using the examples cited above, the first of these groups includes the fanfare of 20th Century Fox, and the other the THX sound effect. It is also possible to distinguish musical trademarks due to the character of the process of their performing, for this performed only on the base of the previously existing composer's composition (which may be but does not have to be noted) and improvised by musicians during performance.

All the above-mentioned divisions are relevant for the classification by what rights – copyright or related right – the given sign may be protected and what person – composer, performer or some other person – they are entitled to.

Copyright to Musical Trademarks

The specificity of musical trademarks creates a situation where they may be but do not have to be copyrighted. Moreover, because of the internal diverseness of this group of signs, it is possible that one person will own the copyright, but also a few people, whose role in creating the given sign is the same, similar or even completely different. Both of this aspects will be discussed below.

First of all, it should be indicated that most of the signs defined as a historical ones will not be copyrighted on the base of Polish law, as a musical composition. That results of article 36 of pr. aut according to which an author's economic rights expire seventy years after the death of the composer and in the case of works of joint authorship – from the death of the last surviving co-author. However, that does not mean that the recording of such a sign because of the way it is performed can nonot be copyrighted – this interesting issue concerns situations when a performer may be the author in the meaning of pr. aut will be developed further in this text.

Copyright to any other musical trademarks shall be analysed taking into account article 1 of pr. aut. The following premises commonly derive from this provision: the object must be created by a human, must have individual and creative character, and must also be embodied in some form (Barta & Markiewicz, 2011). Both the first and third requirement do not require discussion as they result of the proposed definition of a musical trademark. However, the question remains if all musical trademarks may be seen as an individual and creative object. In this context, it should first of all be pointed out that each time an assessment of the existence of these elements should be made *in concreto* and to recognize the individual and creative character of a composition; it is sufficient that these features occur even in minimal intensity. Nevertheless, it is possible to present some general rules that may be helpful in determining whether a given sign may be thought as an individual and creative one.

The starting point for these considerations is the function of a trademark, which is distinguishing the goods (services) of one entrepreneur from the goods (services) of another entrepreneur, making this sign an instrument of communication between the entrepreneur and the consumer of his goods (Administrative Court in Warsaw called in the Verdict of March 5, 2014., VIII SA/Wa 141/14, Dima Basma 2016). Each message should be formulated in such a way as to be readable, clear and understandable for the recipient, and in the case of trademarks, additionally sufficiently characteristic to have a distinctive feature. All these elements stand in a certain opposition to individualism and creativity, because as a rule, a too complicated and creative trademark will not fulfil its functions. However, as already indicated, it is enough that these features, required the recognition of a given subject copyrighted, exist in it to a minimal extent. Doubts as to the qualification of a given mark as a musical composition may, however, arise in the case of the

marks referred to above as short ones. Several-note sequences are very often built on simplest musical structures, such as single interval (distances between two notes) or triad (a set of three notes that are stacked vertically in thirds). Such structures can be compared to words in natural language, because like them, they constitute a systemic basis for constructing larger sequences (sentences, longer statements, etc. and analogically phrases, musical sentences, etc.). Such marks will not be protected as a work in terms of their melodic structure, due to the lack of individuality and creativity, just as commonly used words are not subject to copyright protection (see inter alia the Verdict of the Supreme Administrative Court of November 17, 2016., II GSK 872/15, Verdict of the Court of Appeal in Warsaw of July 10, 2014, I ACa 56/14). It is however not excluded that in certain specific cases, such signs will constitute a work. It results from the fact that each of the previously mentioned elements of a musical composition, i.e. melodics, rhythm, harmonics and timbre, can be subject to separate protection, as long as it meets the requirement of creativity and individuality (Sewerynik, 2013). If, therefore, a non-individual melody is captured in an individual, creative timbre, then such a mark may be a work. An example of this type of sign may be the "Surface" logo, owned by Microsoft Corporation (EUTM no. 007421316), in which the sound is repeated three times and not only in the original, individual timbre, but also the harmony that can be considered as qualifying this sound sequence copyrighted.

When analysing the problems of creativity and individuality determining the existence of copyright, one should also refer to the question whether the entire composition - procedural in nature and largely schematic - is protected. This issue is of particular importance when using only a fragment of a composition as a musical trademark. In the interpretation of such a situation, the doctrine positions around the problem of musical plagiarism are extremely helpful, indicating that the use of a fragment that uses a commonly accepted scheme, and therefore non-specific, will not constitute entering into the copyright monopoly (Mania, 2016). It should be emphasized that such fragments will be generally unidentifiable, i.e. for the average listener they will not constitute part of a specific composition but rather an independent structure. In any other case, it should be assumed that part of a work, used as a musical trademark, may also be protected.

Assuming that certain musical trademarks will be copyrighted as musical work, it should be indicated who will be entitled to those rights. First of all, it should be noted that the person of the "composer" (so the author in the meaning of pr. aut.) should be interpreted broadly. The requirement to embody the composition, as specified in art. 1 section 1 pr. aut. does not impose any particular form of this embodiment – it is only sufficient for a given work to become perceptible to the senses. Thus, the author of a musical work will be both the composer in the common sense of the word, i.e. a person who has saved specific acoustic phenomena in a perceptible form in a way that allows them to be read, but also the person who set

the schema and related it to performers in a different way, including verbally – in the latter case the determination will only take place during a performance, but it will undoubtedly take place.

It may also happen that the author of a musical composition does not act alone. From this perspective, the institution of co-authorship is significant, regulated in art. 9 pr. aut. In the case of sound works, the commonality of rights, at least in theory, can take a twofold form. First of all, as previously indicated, each of the four basic elements of a musical composition may in certain situations be the subject of separate protection. Theoretically, each of them can be the work of different people. In practice, however, this will only apply to certain configurations. For example, the separate authorship of melodics and rhythm may refer to polyphonic songs in which rhythm accompaniment occurs – as it is the case in widely defined popular music. In monodic compositions, on the other hand, such a division is rather unlikely. Separate authorship of the melody and the characteristic timbre is also possible, in particular when it is obtained in a synthetic way, but only in a case of using very precisely notation, which facilitates noting the timbre and at most of situations of recorded signs. To such shaped co-authorship applies art. 9 para. 2 pr. aut. that allows for independent trading of independent parts of a composition. Such a situation will have two consequences for an entrepreneur wishing to use a given sign as a trademark. First of all, he will be able to acquire only the part that interests him (e.g. a melody without the tune). Secondly, in order to acquire the rights to the whole composition, he will have to conclude a contract with all the co-authorized persons. The second of these situations will also occur in the form of co-production, in which the unambiguous determination of the boundaries of the individual elements of a musical composition will be impossible. Such a composition will be fundamentally indivisible, which does not mean that it will have only one author.

All the above-mentioned situations concern both signs, registered on the basis of recording and notation. However, discussing the issue of co-production in the field of musical works, one should also pay attention to the fact that an intuitive admission that its creators will only be composers may turn out to be misleading. It is possible that a composer and a performer will cooperate during the performance, and this cooperation may be different than by providing some instructions by composer to the performance. That may happen in a case of compositions improvised it some way, so the jazz and aleatorism. A situation that may also be quite interesting is when a composer creates only the melody and rhythm, and a performer chooses the harmony and instrumentation, so the timbre. When the musical trademark in created this way, which is common in popular music, the question of their copyrighted would be much more difficult.

Performer's Right of a Musical Trademark

As a rule the role of the performer in the performance of a musical composition will be limited and will not allow such a person to be considered an author. This does not mean, however, that such a person will be deprived of any protection because this kind of activity is protected by the performer's right under art. 85 et seq. pr. aut.. However, as in the case of copyright, this right will not pertain to all signs that may constitute a musical trademark. First of all, it shall be clearly indicated, that a performer's right concerns only recorded trademarks. Of course, any musical trademark has to be used in the market as a recording, so this way it will be almost always protected by performer's right. However, if the given sign was registered only on the basis of the notation, any illegal use of its recording may be discussed only on the grounds of copyright not performer's right. As a consequence, infringement of performer's right in such a case will not risk the invalidation of the trademark. At the same time, if a sign is registered on the basis of its recording such a risk will almost always exist. It is therefore reasonable to consider to what signs performer's right entitled to.

According to the literal wording of art. 85 section 1 pr. aut. only persons who perform a work or composition of folk art will have a performer's right. In the light of the above proposed characteristics of musical trademarks, the right to artistic performance will not arise in the case of a person performing a sequence that is not a work, in particular historical ones, too short to meet the requirement of individuality and creativity. Secondly, art. 85 section 2 pr. aut. excludes from protection non-creative performance. This feature will apply to activities that contribute to the performance of a given composition but only of a technical nature (Kurosz, 2015). When transferring this on the grounds of musical trademarks, it should be assumed that a performance subject to the composer's directions to such an extent that their character is solely reproduced, devoid of any interpretation, in terms of articulation and dynamics shall not be protected. Although this situation seems unlikely, it may occur, especially when a composition constituting a trademark is very simple; the correct performance of which will be focused only on faithful reproduction of the melody, e.g. on an electronic keyboard instrument.

The above situations, due to the fact that they result directly from the regulations, are relatively clear and easy to grasp. However, in the light of this, the question should be asked, whether all other performances being a performance of sign comprising musical trademarks will constitute an object protected by the performer's right. *Prima facie*, it seems that: yes, nevertheless, one should consider some issues, resulting from the interpretation of the term "artistic" created on the basis of the doctrine. It is assumed that to recognise an activity as an artistic performance, it is necessary to assume that a specific person performs the composition in a way that allows it to be received by an audience in the so-called artistic context (Kurosz, 2015). The artistic

context should be captured through the prism of how a given activity is perceived by its recipients and what the purpose of its perception is (Kurosz, 2015). Meanwhile, as previously mentioned, the basic function of each, not only musical trademarks, is to communicate to the consumer the origin of given goods (service). Even if contact with such a sign, by the way, evokes artistic impressions, it is assumed in the doctrine that the decisive factor should be the dominant goal of a given performance (Kurosz, 2015). The simplest conclusion here would therefore be that any performance of a sign that could be a musical trademark is not protected by a performer's right.

However, it is difficult to agree with such a statement; especially when one considers that a given sign can be created both with the specific intention of using it as a trademark as well as without that intention. In the latter case, if such a composition (for example a pop-song), before its acquisition by the entrepreneur, functioned in the market as an "artistic work", it will not raise any question that the performer's right was created and should be protected. In consequence, attributing an excessive weight to the "artistic context" could lead to unjustified privilege of one category of performers (disposing of already determined performance) in relation to the other (executing a performance as ordered by the entrepreneur). It seems, therefore, that this concept, despite its certain elegance, does not match the reality of the facts to which it may apply.

Alternatively, it could be modified by recognizing that the "artistic context" should be regarded broadly, i.e. regardless of the goal of the recipient's perception, but only by considering what the recipient consciously accepts. In this case, the fact that a given performance is primarily intended to help distinguish the goods (services) of one entrepreneur from the goods (services) of another will not matter since the recipient will intuitively perceive this distinction through the prism of a specific composition. It seems that such an interpretation of the premise of artistry is much better suited to the current market situation, even more so, as it will allow to unquestionably give artistry traits not only to musical trademarks, but also to compositions used for broadly defined marketing purposes.

Regardless of the above, it should be noted that, as in the case of authors, on the part of performers there may also be a multi-entity characterization, which results directly from the reference contained in art. 92 pr. aut. In this case, the relationship between them will be shaped by art. 9.

Phonogram Producer's Right

The last of the rights to a music recording is the, regulated in art. 94 et seq. pr. aut., the phonogram producer's right. A phonogram is the physical representation of the recorded performance of a composition or another acoustic phenomenon - visible here is a distinct separation regarding the rights discussed above; resulting

in the necessary assumption that the rights to phonograms will be applicable not only to musical but also to other sound trademarks. Hence, it is pointless to consider whether a musical trademark will always be subject to protection on the basis of a phonogram producer's right. At the same time, it should be noted that in the case of signs intentionally recorded in order to be used as trademarks, the producer himself will often be the entrepreneur who wants to obtain a protective right. In such a situation, it may be mistakenly believed that he acquired the full rights necessary for the implementation of economic goals, which however would contradict not only the content of the other exclusive rights already regulated, but also their normative relationship to each other.

Relationship Between Copyright and Related Rights to Musical Trademarks

As was suggested, the problem of the relationships between copyright, the performer's right and the phonogram producer's right will concern only trademarks registered on the base of their recording, so in the light of the facilitation of the registration process with recent changes in European law; it is reasonable to discuss the topic. These relations are governed by the provisions of art. 88 pr. aut. and art. 94 para. 4 pr. aut. Nonetheless, the wording used in those articles should be considered rather inadequate. What it means, is that the performer's right "does not infringe" copyright, and the phonogram producer's right is inherent "without prejudice" to the rights of authors and performers.

It seems that these regulations essentially refer to the so-called *Kuchentheorie*, according to which all three types of rights accumulate in one object but protects other types of activity. As already indicated in this text, preparing a music recording is a kind of process consisting of three steps. On the other hand, this procedural character causes that each of the rights discussed above essentially concerns different normative constructs: the work, the performance of this work and the permanent embodiment of the work and performance (phonogram). In this context, the regulations of art. 88 and 94 para. 4 pr. aut. may be considered redundant, even more so that on the basis of the Polish doctrine and jurisprudence there is no doubt about the independent character of all these rights (Ghazal, 2012).

From the perspective of the issues analysed in this text, this circumstance has extremely important practical consequences. Since each of the three entities: author, performer and producer, have their own rights, the effective acquisition of the rights from only one of them, by an entrepreneur who wants to use a given sign, will not protect him from the consequences associated with potential objections and claims from the others. There would be a situation in which the use of one type of rights also breaches other rights within the same action: legal in relation to part of the entities,

and illegal in relation to others. One can also imagine a situation in which one entrepreneur acquires rights from the producer, while another one from the author and performer. It should be noted, however, that the subject of registration will each time be a recording, as concretized preservation of certain sounds made in a certain way. An entrepreneur acquiring the right only from the author and performer must himself prepare a phonogram which may differ from the originally prepared, especially on the ground of mastering. This will apply in particular to marks that are songs or polyphonic compositions. A different interpretation will not remove mutual similarity, however the specificity of music, especially popular music, may result in an attempt to prove that the similarity is only coincidental.

At this point, only as a side note, the question arises as to when an entrepreneur who uses complex musical trademarks should generally acquire the right. Until now, due to the requirement of its graphic representation, it was essentially a composition. As already indicated however, its specific and unambiguous manifestation is only a specific performance. Since a mark can be registered by recording, the object of protection in this case will be the interpretation of a given composition and therefore something less than the entire composition. This leads to an difficult question as to whether a different interpretation of a given composition could in this light be the subject of separate protection under a trademark.

No less important is the scope of individual rights and their impact on the possibility of registering and using a given trademark. It is assumed in the literature that the owner of trademark should have the right to decide about the registration of a given sign, which means that it should be considered a separate field of exploitation within the meaning of art. 50 pr. aut. Meanwhile, the actual use of the mark will be based in particular on the multiplication of a given sign by any technique and making it available to the audience. Both of these rights are specified in art. 17, 86 para. 1 point 2 and art. 94 par. 4 pr. aut. Respectively, and are inherent to the author, performer and producer, which is why it is important to include them in all contracts. There are no obstacles to concentrate all these property rights in the hands of one representative of all co-creators, whether by selling certain rights to such person or by establishing such person as a proxy. A seemingly different situation presents itself regarding personal (moral) rights, which can constitute an effective basis to raise objections. They are only available to the author and performer and are inherently non-transferable. In case law, it is assumed that an obligation not to use specific rights by a given entity is acceptable. Such action should be made personally. This is particularly important from the practical perspective because using a musical trademark is essentially about publishing it without indicating the name and surname of the creator and performer. No less important is which product (service) is being designated. Going beyond the frameworks specified in the contract (to be noted - they should be as precise as possible) may result in claims for infringement of the creative interest, both under art. 78 pr. aut. and 23 k.c.

Conclusions

To summarize, the following conclusions should be highlighted. First of all, it shall be clearly noted that the characteristic of musical trademarks and their internal diversity make them interesting but a difficult subject of legal analysis and interpretation. It is even more important on the base of current regulations, which facilitate their registration on the base of notation or recording. This duality changes the scope of trademark protection. In the case of a noted sign it is only the work, so the musical composition. However, if the recording is registered, trademark right jointly protects this work, its performance and phonogram on which all this elements are protected. It significantly changes the scope of other rights which may be in conflict with trademark right: the notation may be only copyrighted and the recording may be also protect by some related rights. At the same time, the complexity mentioned above necessitate the answering of questions about situations in which such a right existed. Solutions and interpretations discussed in this text have a general character and may be used for most of the commonly used trademarks; however, it shall be noted that the current musical market is much more complicated and new conceptions and ideas of how to create music are formed. From this perspective, the provisions of Polish copyright law may be seen as a favourable solution because they make possible specific interpretations in actual circumstances.

Onthe other hand, these interpretations shall be made in the judgment by a court and this may happen only after the breach of some rights by any person. At this moment it shall be seen as difficult for entrepreneurs, who want to use musical trademark, to conclude agreements with relevant entitles, the more so because the kind of rights and participation in them in a case of any cooperation is a matter of facts not a law, so it can not be regulated in the contract by its parties. This may lead to a discussion about current shape pr. aut.'s provisions concerns copyright and related rights which are specific for music.

REFERENCES

Barta, J., & Markiewicz, R. (2011). Przedmiot prawa autorskiego *[Subject of Copyright]*. In: J. Barta, R. Markiewicz (Eds.). *Ustawa o Prawie autorskim i prawach Pokrewnych. Komentarz* (pp. 3-124) wyd. V. Warszawa: Wolters Kluwers.

Breuneis R., Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance. Washington DS: The Georg Washington Law Faculty Publications & Other Works.

Campbell, M. (2001) Timbre. In: *Oxford Music Online. Grove Music Online* (http://www.oxfordmusiconline.com/). https://doi.org/10.1093/gmo/9781561592630.article.27973

Ghazal, N. (2012). Problem relacji pomiędzy majątkowymi prawami autorskimi a prawami pokrewnymi *[The Issue of Relationships Between the Author's Economic Rights and Related Rights]. Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z prawa własności intelektualnej*, 116(2), 5-16.

Kępiński, J. (2015). Czy znak towarowy może być utworem *[Can a trademark be copyright protected?]. Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 77, (2),177-191. https://doi.org/10.14746/rpeis.2015.77.2.12

Kurosz, K. (2015). Artystyczne wykonanie jako przedmiot ochrony – uwagi na tle najnowszego orzecznictwa sądowego *[Artistic Performance as the Object of Protection. Remarks Against the Background of the Latest Case Law]. Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z prawa własności intelektualnej*, 130(4), 26-45.

Mania, G. (2016). Plagiat Muzyczny *[Plagiarism in Music]. Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace z prawa własności intelektualnej*, 133(3), 54-69.

Nettl, B. (2014). Music. In: *Oxford Music Online. Grove Music Online*. https://doi.org/10.1093/gmo/9781561592630.article.40476

Sewerynik, A. (2013). Ochrona elementów składowych utworu muzycznego *[The Copyright Protection of the Components of Musical Works]. Przegląd Ustawodawstwa Gospodarczego*, 776(2), 21-32.

Tagg, Ph. (1982). Analysing popular music. *Popular Music*, *2*, 37-67.