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AUDIOVISUAL WORK AND TELEVISION FORMAT IN THE LIGHT OF COPYRIGHT LAW

Abstract

A format that is limited to the general concept of television programmes, being only a specific idea of them, does not enjoy copyright protection. On the other hand, the form of such a concept, already developed into an appropriate form, composed of creative elements that make it up and individualize it, will be subject to copyright from the moment it is established. Such an arrangement may also be made in a television programme based on the format. A television programme created on the basis of the format-work will constitute an audiovisual work within the meaning of copyright law. If such a format is a work of joint authorship, the authors of works contributing to the format established in this programme will also generally be co-authors of the audiovisual work. A format-work and an audiovisual work created on its basis are legally separate objects of protection. Therefore, the acquisition by the producer of the rights to both works also occurs separately.

KEYWORDS

format, broadcast, audiovisual work, copyright protection, copyright

SŁOWA KLUCZOWE

format, audycja, utwór audiowizualny, ochrona prawnoautorska, prawo autorskie

I. INTRODUCTION

The concept of an audiovisual work has not been defined in the Copyright Act.[1] The basic concept here is a cinematographic film, from which other types of similar productions have evolved.[2] Article 1(2)(9) of the Copyright Law clearly states that the subject of copyright is 'audiovisual works, including film works', thus indicating that a film work is only one of the subtypes of an audiovisual work. The Act on financial support for audiovisual production of 9 November 2018 also refers to a film work.[3] In the meaning of Article 2(8) of the said Act, an audiovisual work is 'a work consisting of a series of successive images with or without sound, recorded on a medium enabling multiple reproductions, creating the impression of movement and constituting an original whole expressing the action or content in an individual form, made in the form of a feature film, documentary or animated film or a feature, documentary or animated series, regardless of the field of exploitation referred to in the provisions of the Act of 4 February 1994'.

The cited provision, although it contains universal features of an audiovisual work, basically repeats the premises defining the notion of 'film' contained in Article 4(1), sentence 1 of the Cinematography Act of 30 June 2005,[4] whereby it defines the discussed notion for the purposes of determining the terms, conditions and procedures for granting and accounting of financial support constituting public aid in accordance with Article 107(1) of the Treaty on the Functioning of the European Union.[5] In order to clarify the concept of an audiovisual work within the meaning of copyright law, it is necessary to refer to the opinions developed in the literature and case law.

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[1] The Act of 4 February 1994 – Copyright and Related Rights, consolidatet text, Official Journal of the Republic of Poland 2023, item 217, hereinafter: the Copyright Law.

[2] See Małgorzata Świętczak in Wojciech Machała, Rafał M Sarbiński (eds), *Prawo autorskie i prawa pokrewne. Komentarz*, Warsaw 2019, 1054.

[3] Consolidatet text Official Journal of the Republic of Poland 2021, item 198.

[4] Consolidatet text Official Journal of the Republic of Poland 2023, item 130. According to Art 4 section 1 sentence 1 of the Cinematography Act, 'A film is a work of any length, including a documentary or animated work, consisting of a series of consecutive images with or without sound, recorded on any medium that allows for multiple playback, evoking the impression of movement and making up an original whole, expressing the action (content) in an individual form, and moreover, with the exception of documentary and animated works, intended to be screened in the cinema as the first field of exploitation within the meaning of the provisions on copyright and related rights'.

[5] See Article 1(1) and (2) of the Act on Financial Support for Audiovisual Production.

However, many more doubts are raised by the issue of the television format and its copyright protection, which is controversial in the subject literature (both in Polish and foreign science). The very determination of this concept for the purposes of conducting legal analyses presents a number of problems, which results from the fact that it was created by the media production industry.[6]

In Polish literature, the term proposed by Paweł Podrecki and Elżbieta Traple is often cited, according to which this notion includes 'serial broadcasts, always based on the same ideological and structural scheme, including the so-called reality-show. These programs are commonly called formats, because they are implemented in a certain frame, always the same structure, with established main conceptual assumptions and then developed individually in individual episodes'.[7]

The relationship between the television format and the audiovisual production based on it seems obvious – since the former can be the basis for the creation of the latter. However, this relationship is not reduced to a simple dependence – an audiovisual work and its script.

The author of the script for an audiovisual work is treated as a co-author of the audiovisual work (Article 69 of the Copyright Law), and the effect of his work is a contribution to the multi-layered whole that the audiovisual work constitutes. The format, on the other hand, is not such an element. It is an effect of intellectual activity separate from the audiovisual work, and its possible copyright protection is considered separately from the audiovisual work that was created on its basis.

However, the relationship between the two objects in question allows certain conclusions to be drawn with regard to important issues relating to the protection of the format in the light of copyright law. These are the issues to which the following considerations will refer.

II. DEFINITION OF THE CONCEPTS IN QUESTION

1. AUDIOVISUAL WORK

As Małgorzata Świętczak rightly emphasizes,[8] 'a common feature of the terms "audiovisual work" appearing in the literature is the inevitable reference to the

[6] See Zbigniew Pinkalski, *Prawna ochrona formatów telewizyjnych*, Warsaw 2015, 19.
[7] Paweł Podrecki, Elżbieta Traple, 'Wybrane prawne aspekty tzw. formatów telewizyjnych', ZNUJ PWiOWI, 2002/80, 173.
[8] Świętczak (n 2) 1056.

variously understood "creating the impression of movement"'. It should also be borne in mind that the reason for the separate regulation of specific issues relating to 'audiovisual works' is not that this type of work is perceived by sight, or even that that perception is based on the creation of the illusion of movement, but mainly that the method of production in order to produce such an impression is highly complicated and requires various types of – already typified – inputs of both creative and non-creative nature, from various fields of human activity, and these contributions merge into one specific whole.

According to Jan Błeszyński, Maria Błeszyńska-Przybylska and Michał Błeszyński, 'As a result of the process of creation of an audiovisual work, a separate work is created, constituting a uniform and multi-layered whole suitable for separate exploitation. Its characteristic feature is that individual contribution works, successively created for the purposes of audiovisual production or previously created works used for the purposes of this production, are used in whole or in part in the original form or in the form of elaborations and constitute an audiovisual work as a result of their creative synchronisation into an artistic whole.[9] Those authors rightly point out that 'an audiovisual work is a separate work from the contributing works'.[10]

The case law has pointed out that the concept of an audiovisual work undoubtedly includes various categories of copyright-protected works, created by using various and time-changing techniques, but such that can be specified and divided into subgroups.[11] The basic and common feature of all of them – in accordance with the approach developed in the case law and accepted by the Constitutional Tribunal in its judgment of 24 May 2006 – is that they constitute a manifestation of creative activity of an individual nature, expressed by means of a series of successive images, with or without sound, recorded on any medium enabling multiple reproduction, creating the impression of movement.[12] As for the prevailing opinion on the necessity of recording an audiovisual work (which is supposed to result from its specificity), it should be added, however, that different positions

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[9] Jan Błeszyński, Maria Błeszyńska-Przybylska, Michał Błeszyński, 'Status prawny utworów wykorzystanych w utworach audiowizualnych. Uwagi do wyroku Sądu Apelacyjnego w Warszawie z 17.08.2017 r., I ACa 837/16' in Krystyna Szczepanowska-Kozłowska, Ireneusz Matusiak, Łukasz Żelechowski (eds)*, Opus auctorem laudat. Księga jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej*, Warsaw 2019, 57.

[10] Ibid.

[11] The resolution of the Supreme Court of Poland of 15 March 2018, III CZP 105/17, OSNC 2019, No 2, item 16.

[12] The judgment of the Constitutional Tribunal of 24 May 2006, K 5/05, OTK-A 2006, No 5, item 59. See further Katarzyna Górecka, 'Pojęcie utworu audiowizualnego w ustawie o prawie autorskim i prawach pokrewnych', Przegląd Sądowy No 7–8/1997, 108.

are also represented. In particular, it is noted that in the process of broadcasting, creative contributions are combined in such a way that an 'establishment' is made. It is also important that for a television viewer who receives a series of moving images (and thus the work manifests itself in its final form), it does not matter at all whether or not it has been previously recorded.[13] The author of this study supports the view expressed by Świętczak[14] that 'Although in practice audiovisual works are usually recorded, it seems that the need to protect the rights of authors of unregistered works would require the assumption that in such situations the criterion is sufficient – in accordance with general principles – the mere establishment of the work, which occurs at the latest at the time of its manifestation (in this case, broadcasting). In reality, however, in the process of their creation audiovisual works are usually transferred to external media' and thus recorded.[15]

'In this approach, an audiovisual work will include all types of film (cinematographic) or television works (if they meet the criteria of Article 1(1) of the Copyright Law), music videos, advertising films, popular science, scientific or instructional films, but also, for example, computer-animated films or other similar productions that create virtual reality, audiovisual performances'.[16] The case law rightly emphasised that the very wording of Article 1(2)(9) of the Copyright Law clearly indicates that in the current legal status an audiovisual work must be defined more broadly than a 'classic' film. It was also pointed out that the offer in the field of television sports, news, current affairs or agricultural programmes also includes audiovisual works, and even that 'in the vast majority of cases a television programme by its very nature, includes audiovisual works'.[17]

2. TELEVISION FORMAT

Clarifying the definition of the television format proposed by them, Podrecki and Traple add that 'A format is a repetitive "schedule" or structure consisting in a combination of various features on the basis of which a series of television

[13] Jerzy Szczotka, 'Utwory audiowizualne – stan oczekiwania na nowelizację prawa autorskiego', Przegląd Sądowy 2009/1, 33. See further Świętczak (n 2) 1058 and the literature indicated therein.
[14] Świętczak (n 2) 1059.
[15] See Wojciech Machała, *Utwór. Przedmiot prawa autorskiego,* Warsaw 2013, 185.
[16] Świętczak (n 2) 1061; The author draws attention to a broader review made by Piotr Ślęzak, 'Pojęcie utworu audiowizualnego' in Krzysztof Lewandowski (ed), *Utwór audiowizualny. Zakres pojęcia i ochrony prawnej*, Poznań 2011, 26.
[17] The judgment of the Court of Appeal in Gdańsk of 20 November 2012, I ACa 176/10, Legalis No 1025262.

or radio programs can be produced. In general, the television format is a certain scheme that has to be filled with content depending on the country, audience requirements and other factors'.[18]

Zbigniew Pinkalski puts a similar view in his monograph on the legal protection of television formats: 'Generally, a television format is understood as a specific framework of a television program, on the basis of which it is possible to create a series of programs',[19] and in the long run, regional versions of the program. The format is therefore a set of main, repetitive features and elements of a television broadcast. Depending on the type of broadcast to which the format relates, the set of elements will obviously be different. And so, in the case of a TV series, typical elements will be the profiles and characterological features of the characters, the structure of a single episode and the setting, while in the case of, e.g., a reality show, the format will determine among others the number of participants, the rules for their selection and elimination, the role of the host, the possibilities of interaction with the audience (TV viewers) etc. (…). In principle, it can be considered that television formats are intended to define and describe the formula of a program by creating a framework for subsequent episodes of a series, which are filled with content at the stage of realizing a series of programs based on the format. Not all of the features described in the format will have the same significance for the entire program or will affect its uniqueness in the same way. The originality and quality of each individual element may vary, but the expectations of producers of television formats are, to a minimum extent, relevant to the will to protect individual features of the program. It is much more important for these entities to protect the format as a whole, i.e., the conglomerate of the above-mentioned elements. With this in mind, the individual elements must correspond with each other and mutually connect and supplement each other. Basically, it is the format as a whole that has a measurable value in business transactions and the realities of the media market. However, this does not change the fact that the protection of the format as a whole may be exercised by seeking protection with respect to its individual fragments. Questioning infringements of rights to individual elements

[18] Podrecki, Traple (n 7) 173.

[19] In footnote 9 to the monograph cited here, the author explains that 'Article 1(1)(b) of Directive 2010/13/EU of the European Parliament and of the Council on audiovisual media services (OJ L 95, 15 April 2010) A programme in the context of this study should be understood as 'a sequence of moving images with or without sound, constituting a separate whole in the layout or catalogue of programmes prepared by the media service provider and having a form and content comparable to the form and content of television broadcasting. Examples of broadcasts are: feature films, broadcasts of sporting events, comedy series, documentaries, children's broadcasts, and films and television series'.

of the format will, in principle, be able to constitute a form of indirect protection of the entire format, and thus will expand the sphere of legal protection'.[20]

The position expressed above on the protection of the television format by seeking protection of its individual fragments is particularly important, due to the fact that in relation to this 'product' it is justified to argue that the very concept and structure of the program should be put into the category of an idea that is not subject to copyright (cf Article 1(2)(1) of the Copyright Law). The point is, however, that this leads to a break with the concept of protection of the format itself in the sense indicated above, in favour of considering it in the context of the protection of an audiovisual work (which, after all, may also consist of elements that are not works and are not subject to copyright protection). However, it should be borne in mind that the implementation of a specific television format may lead to the creation of an audiovisual programme[21] (a series of such programmes), which, however, does not have to be an audiovisual work. The prerequisite for copyright protection is always the fulfilment of the conditions indicated in Article 1(1) of the Copyright Law. Neither the amount of labour input nor its nature is important for stating that the product of this labour has the feature of individuality.

First, the creative nature of an author's work can be determined primarily on the basis of an assessment of the features that his or her work inheres in comparison to other intellectual products (reverse inference, i.e., adjudicating on the creative nature of an intellectual product based on the specific features of its creation is based on criteria that are intersubjectively unverifiable and, therefore, useless in legal assessments). Secondly, characteristics of the process of creating an intellectual product are not sufficient to distinguish it from other results of intellectual work, because they do not indicate its specificity (individualized form) in relation to known, previously produced intellectual products. Based on assessments that justify the granting of copyright protection, not all

[20] Pinkalski (n 6) 19–20.

[21] I understand the term 'audiovisual broadcast' in the meaning given to it by Article 4(2) of the Broadcasting Act of 29 December 1992 (Consolidated text Official Journal of the Republic of Poland 2022, item 1722, as amended). According to this provision, it is 'a sequence of moving images with or without sound, constituting a separate whole in a programme or catalogue of programmes made available to the public as part of an on-demand audiovisual media service created by the media service provider, hereinafter referred to as the catalogue'. On the other hand, according to Article 4(1) of the said Act, a media service is a service in the form of a programme or an on-demand audiovisual media service, for which editorial responsibility is borne by its provider and the primary purpose or the basic purpose of its separable part is to provide programmes to the general public through telecommunications networks for information, entertainment or educational purposes; A commercial message is also a media service.

self-produced intellectual products enjoy such protection, but only those of them that show sufficiently significant differences in comparison with previously produced intellectual products.[22]

Only the way of expressing may be protected (discoveries, ideas, procedures, methods and principles of operation and mathematical concepts are not protected – Article 1(2)(1) of the Copyright Law). In this sense, copyright protects only the form of the work,[23] although, of course, this form cannot be identified with the manner in which the work is recorded.[24] In the judgment of the Supreme Court of 5 March 1971,[25] it has been assumed that the emergence of copyright is not determined by the degree of value of the work developed, because even small studies may be subject to copyright protection, as long as they are characterized by an element of the author's work. Nevertheless, in subsequent jurisprudence, it was assumed that when assessing the occurrence of the prerequisites under Article 1(1) of the Copyright Law, the type of work should also be taken into account.[26] In the literature, it is therefore rightly pointed out that the television format, understood as 'a serial programme based on the same ideological and structural scheme',[27] will usually not be an audiovisual work.[28] 'Therefore, the format should also be treated rather as a ready-made concept of implementation (an "idea" is purchased, a project with documentation), but it is something different than the specific broadcast made on its basis. Whether it will be subject to copyright protection as an audiovisual work (and not, for example, as an artistic performance) depends on the degree of autonomy and creative freedom of the producers of a given programme; as usual, the qualification of such cases is possible only a casu ad casum'.[29]

[22] The judgment of the Court of Appeal in Cracow of 29 October 1997, I ACa 477/97, LEX No 533708.
[23] See Stefan Buczkowski, 'Założenia i rozwój historyczny ochrony prawnej twórczości technicznej', Annales Universitatis Mariae Curie-Skłodowska. Sectio G 1975, Vol XXII, 16. See further judgments of the Supreme Court of Poland: of 24 November 1978, I CR 185/78, LEX No 8151; of 8 February 1978, II CR 515/77, OSPiKA 1979, No 3, item 52.
[24] The judgment of the Supreme Court of Poland of 14 October 2021, IV CSKP 44/21, OSNC-ZD 2023, No 1, item 4.
[25] I CR 593/70, OSNC 1971, No 12, item 212.
[26] Judgments of the Supreme Court of Poland: of 27 February 2009, V CSK 337/08, LEX No 488738; of 6 March 2014, V CSK 202/13, LEX No 1486990.
[27] Ślęzak (n 16) 32.
[28] See Świętczak (n 2) 1062.
[29] Ibid.

III. LEGAL NATURE OF THE FORMAT AND THE CYCLICAL PROGRAMME CREATED ON ITS BASIS

In light of the foregoing considerations, two fundamental questions need to be answered. Firstly, whether the television format of the programme (series of programmes) was created as a result of a specific intellectual process and, if so, what was its legal nature, and secondly, whether the cyclical audiovisual programme produced on its basis is an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law?

In answer to the first question, it seems reasonable to assume (in the light of the above-mentioned terms) that in order to create a television format, it is necessary at least that in the process of shaping the original idea of creating a specific cyclical programme, a concept of a programme is created, within which each of its episodes will be based on the same ideological and structural scheme, implemented in a certain framework, structure, with established main conceptual assumptions.[30] Such an approach allows, in particular, to recognize the existence of formats of broadcasts of an informational and journalistic nature, which often defy such a ban assessment.

The problem, however, is the reference to the ability of such a work to receive copyright protection. The essence of this problem is the distinction between an unprotected idea and its form of expression. Protection can only be granted to the way of expression, i.e., the individual form in which the idea has been 'clothed'. No idea in itself, detached from its 'concretization' or 'fulfillment', will be subject to protection.[31] 'An idea, even if it is completely new, original and has a huge economic value, is not protected by copyright'.[32]

Therefore, there should be no doubt that the very idea of a cyclical programme, presenting its general concept, cannot be the subject of copyright, as it is only an idea within the meaning of Article 1(2)(1) sentence 2 of the Copyright Law. Referring, for example, to a series of broadcasts of an informational and journalistic nature, it cannot be concluded that the assumption that it will consist of conversations between the host and the guests invited by him to the program constitutes 'a manifestation of creative activity of an individual nature'. Of course, the fact is that the creation of a general concept is always the result of a certain intellectual process, which in itself, under certain conditions, can be a manifestation of the

[30] See Podrecki, Traple (n 7) 173.

[31] See Agnieszka J Schoen, 'Poszukiwanie prawnej ochrony tzw. formatów telewizyjnych na gruncie prawa autorskiego oraz prawa zwalczania nieuczciwej konkurencji', ZNUJ PPWI 2007/98, 97.

[32] See Podrecki, Traple (n 7) 174.

creative activity of the creator of the concept. However, as it is rightly emphasized in the case law, 'the mere manifestation of creative activity is not a sufficient condition for qualifying a specific work as the subject of copyright, because it is necessary that the work is also characterized by individuality. (…) A work within the meaning of copyright law is always a manifestation (result) of certain activities, and not a creative process of the author that may lead to the creation of a work in the future'.[33] With regard to the general idea of the broadcast series, it is necessary to indicate what exactly its individualism, otherness, innovation or originality would be about, what it would contain and what it would specifically consist of. It is difficult to see uniqueness, innovation and individuality in the concept of broadcasts based on conversations with invited guests on current social or political issues, which is a typical and repetitive pattern of this type of current public affairs broadcasts. In this context, it can also be added that literature has noticed that from the negative point of view, a work cannot be banal, typical, routine, standard.[34] In the case law, it has been emphasized that 'only a description of a future work that may hypothetically arise cannot be considered a work. Such a description could at most be considered a concept or an idea, not subject to protection due to the content of Article 1(2)(1) of the Copyright Law. (…) Such a description is also not a work "expressed in words" within the meaning of Article 1(2)(1) of the Copyright Law'.[35]

A separate reference should be made to a situation in which the general concept of a series of programmes becomes more detailed as it develops. This is when the possibility of presenting the author's creative choices as to the shape of such a format is activated.[36] And as noted in the case law, the premise of individuality of a work is met when shaping the form and/or content of the work, its author used the space of freedom in the selection and arrangement of the components of the work. Making protection dependent on the presence of an individuality feature in a work does not mean that this feature should manifest itself to a certain degree of its intensity. Moreover, in the case of a minimum degree of individuality, it is possible to qualify a work revealing this feature as a subject of copyright.[37] 'Creative activity of an individual nature should also be considered the product of

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[33] The judgment of the Court of Appeal in Warsaw of 12 April 2017, I ACa 173/16, Legalis.
[34] Marian Kępiński, Aurelia Nowicka, glosa do uchwały składu siedmiu sędziów NSA z 12 października 1998 r., OSP 1999, No 9, item 162.
[35] The judgment of the Court of Appeal in Poznań of 12 December 2009, I ACa 893/09, LEX No 628228; see further the judgment of the Court of Appeal in Katowice of 9 October 2012, V ACa 175/12, Legalis, and the judgment of the Court of Appeal in Warsaw of 15 September 1995, I ACr 620/95, Legalis.
[36] Schoen (n 31) 105.
[37] The judgment of the Court of Appeal in Cracow of 29 October 1997, I ACa 477/97, LEX nr 533708.

the intellectual process of a human being, which was created as a result of compilation using publicly available data, provided that their selection, segregation, and way of presentation have the hallmarks of originality'.[38]

Taking the above into account, it should be assumed, following Agnieszka J Schoen, that 'although the idea for a television program itself is not subject to copyright protection, its creative development, detailing, shaping (elaboration), and thus the development of an identifiable form of expression, separate from the underlying idea – the format taking on a form of at least a concrete project, description (the so-called treatment), script of a series of programs to be created, insofar as it is characterized by originality and individuality, it is the subject of copyright – a protected work'.[39] The cited author points to formats 'in the sense of a detailed concept, a meticulously presented description, a plan, a specific scheme of a series of television programs along with additional elements characteristic of the entire series, such as scenographyn, music, graphics (including the program's logo), choreography, constant "catchphrases", the so-called jingles, etc.'.[40] In such situations, we would be dealing with such an advanced concretization of the idea that arguments of its abstract nature would cease to be justified.[41]

A television format developed in such an elaborate and extensive form as mentioned above may already constitute a work protected by copyright. Its overall formation, including individual elements, can take place as a result of the cooperation of a team of people. The format of the programme, developed in this way by a team of cooperating people, compiled from its constituent elements, will form a single work, constituting an intellectually homogeneous whole, being 'an individual set of creative values, separate from the values of individual components'.[42] The nature of cooperation between the people involved in the creation of the format, in particular as part of joint arrangements, may support the assumption that the format was created as a result of the joint creative work of the authors of its individual components, and thus may lead to the creation of a work of co-authorship.

Answering the second of the above questions, I believe that the production of a cyclical programme on the basis of a format enjoying copyright protection will

[38] The judgment of the Supreme Court of Poland of 25 January 2006, I CK 281/05, OSNC 2006, No 11, item 186.

[39] Schoen (n 31) 102.

[40] Ibid, 105.

[41] See Damian Flisak in 'Komentarz do wybranych przepisów ustawy o prawie autorskim i prawach pokrewnych', LEX/el. 2018, Article 1, thesis No 24.

[42] Ryszard Markiewicz, 'Dzieło literackie i jego twórca w polskim prawie autorskim', Rozprawy Habilitacyjne Uniwersytetu Jagiellońskiego, Kraków 1984, 176.

lead to the creation of an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law. The realization of creative elements of an individual nature contained in the format will result in their reflection in the audiovisual work in this way. In this context, attention should be paid to the fact that the format itself is not always externalized as a whole, taking into account the combination of all its constituent elements, in the form of a uniform and self-contained 'framing' that allows it to be communicated in its full form to other persons besides the creator. In particular, it does not have to be put in a uniform written study describing in detail all the elements that make it up (which consequently would lead to the creation of a specific work of a literary nature). Its establishment as a whole may take place within the framework of an audiovisual work. If we consider a given television format to be a work, then the audiovisual programme produced on its basis, which is also a form of establishing this format, will constitute an audiovisual work.

It should even be added here that in European jurisprudence and in literature, including Polish literature, there is a view that copyright protection of a format may apply not so much to the format itself as to a programme based on it. 'In fact, by declaring the theoretical possibility of obtaining copyright protection for a format, we grant protection to specific independent works that are part of a larger whole, or to programs that have already been developed according to the scheme'.[43]

At the end of this section of the study, it should be emphasized that an audiovisual work can only be a particular programme (episode) of a cycle, and not a series of episodes as a whole.[44] The issue of copyright in a series of programmes must, therefore, be considered separately for each individual episode of the series. In the case where individual programmes of a series are broadcast live (which may apply in particular to those implementing the format of public affairs and news programmes), it should be assumed that a specific audiovisual work (episode of a series) is established by its broadcasting (broadcast in a television programme).[45] In the process of broadcasting, creative contributions are combined in such a way that the audiovisual work is 'established'.

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[43] Podrecki, Traple (n 7) 174.

[44] See Shoen (n 31) 127.

[45] See Maria Poźniak-Niedzielska, Adrian Niewęgłowski, 'Pomysł jako przejaw twórczości w świetle prawa autorskiego' in Andrzej Matlak, Sybilla Stanisławska-Kloc (eds), *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi*, Warsaw 2013, 841.

IV. ACQUISITION OF ECONOMIC RIGHTS TO THE CO-AUTHORED FORMAT AND THE CYCLICAL PROGRAMME PRODUCED ON ITS BASIS BY THE PRODUCER

1. RIGHTS TO FORMAT

According to what has been said above, the format of a cyclical broadcast may have the character of a co-authored work. It may also be established in the audiovisual work itself produced on its basis (from the moment of establishing, provided that the above-mentioned premises are met, allowing it to be considered a manifestation of creative activity of an individual nature, the format becomes the subject of copyright – Article 1(1) of the Copyright Law).

Pursuant to Article 9(1) of the Copyright Law. ‘Co-authors are entitled to copyright jointly’, whereby according to paragraph 5 of this article, ‘The provisions of the Civil Code on co-ownership in fractional parts shall apply accordingly to the economic copyrights of co-authors’.[46] Therefore, Article 198 of the Civil Code will apply to the issue discussed here, according to which each of the entitled persons (co-authors) may dispose of a share in the right without the consent of the other co-authors.[47] Thus, the producer acquires the rights to the format to the extent that the co-authors have granted to him on the basis of agreements binding him with them. These agreements may concern either the transfer of the economic copyright to a share in a co-authored work (Article 41(1)(1) of the Copyright Law) or the granting of a license to use such a share (Article 41(2) of the Copyright Law). It should be noted that pursuant to Article 65 of the Copyright Law, ‘In the absence of an express decision on the transfer of the right, it is considered that the creator has granted a license’. ‘The word “explicit” used in the provision should be understood as unambiguous and clear. The regulation of Article 65 of the Copyright Law (…) contains an interpretative norm adopted in the interest of the author. It results in a situation where ambiguities in the contract regarding the transfer of copyright lead to statutory conversion. An agreement that does not contain an express provision on the transfer of rights is converted into a license contract’.[48] Pursuant to Article 67(2) of the Copyright Law, the license may be exclusive or non-exclusive. An exclusive license agreement must be made in

[46] The Act of 23 April 1964, consolidatet text Official Journal of the Republic of Poland 2024, item 1061, hereinafter: the Civil Code.

[47] See Barbara Błońska in Wojciech Machała, Rafał M Sarbiński (eds), *Prawo autorskie i prawa pokrewne. Komentarz*, Warsaw 2019, 337.

[48] Adrian Niewęgłowski, *Ustalenie statusu logotypu w świetle prawa autorskiego. Przeniesienie autorskich praw majątkowych a problem spółki cywilnej.* Glosa do wyroku s. apel. z dnia 16 grudnia 2020 r., V AGa 652/18, OSP 2022, No 5, 41.

writing or else it will be void (Article 67(5) of the Copyright Law). The same requirement applies to an agreement on the transfer of copyrights (Article 53 of the Copyright Law). Failure to comply with the written form of the agreement may, therefore, at most lead to the granting of a non-exclusive license to use the creative contribution to the format.

A producer may also acquire copyrights to a format under Article 12(1) of the Copyright Law, i.e., as part of the so-called employee creativity (if the creators of this format created it as a result of the performance of duties under the employment relationship between them and the producer).

2. RIGHTS TO CYCLICAL BROADCASTING

A cyclical audiovisual broadcast created as a result of the implementation of a format which is the subject of copyright will constitute an audiovisual work within the meaning of Article 1(2)(9) of the Copyright Law. As noted by the Court of Appeal in Warsaw,[49] an audiovisual work is a work of co-authorship, as referred to in Article 9 of the Copyright Law. It is, therefore, one integral whole, not a collection of contribution works, and at the same time it is something more than a simple sum of the works that make it up. The opposite position stating that, in addition to the author's economic rights to the audiovisual work as a whole, the authors of contribution works are entitled to parallel rights to individual works included in the audiovisual work is unfounded. It does not seem that the legislator's intention was to regulate economic copyrights in such a way that the rights to an audiovisual work are duplicated. Such consequences would be achieved if it were assumed that, in addition to the right to an audiovisual work as an integral whole, there is a set of rights to contribution works exploited as part of an audiovisual work, and the exploitation of an audiovisual work means the simultaneous exploitation of each of the contribution works.

On the other hand, pursuant to Article 69 of the Copyright Law, 'Co-authors of an audiovisual work are people who have made a creative contribution to its creation, in particular: the director, the cinematographer, the author of the adaptation of a literary work, the author of musical or verbal-musical works created for the audiovisual work, and the author of the script'. Therefore, only a person who has contributed to the process of creating such a work can aspire to be a co-author of an audiovisual work, and not to the preceding stages, which means that authors of

[49] Judgment of 7 February 2014, I ACa 452/13, Legalis No 1062393.

the so-called prior works should be excluded from the group of co-authors.[50] Of course, a format whose realization is a cyclical broadcast, which is an audiovisual work, cannot be considered a prior work. Nor will an audiovisual work implementing a format be an adaptation of the format (i.e., a work dependent on the format, although it seems that such cases could occur under certain circumstances).

A special situation that, in my opinion, is worth considering here is the possibility of shaping the format within the framework of a series of audiovisual broadcasts produced on its basis. A certain general idea of a series of broadcasts can be developed (expanded, diversified) in the course of their implementation, filling the original scheme with new content and elements. These contents and elements can give the expanded scheme a creative character of an individual feature. Such a process would ultimately create a certain format of broadcasts, which as a work would be established as a defined whole in the produced (or broadcast – for example, in the case of a 'live' news and current public affairs broadcast) series of broadcasts. The model (format) of the programme created in this way would constitute a work separate from the audiovisual works establishing it and created on its basis. Each episode of the series would constitute a separate audiovisual work and the television format ultimately developed in the way indicated above would constitute a single work (although often, if not mostly, co-authored). This issue is important in view of the fact that the producer acquires the rights to both categories of works, as the rights to both would have to be acquired separately.

The situation described here could, in my opinion, have another important consequence. Namely, in the course of the creation of the format established in the programmes created on its basis, the authors of the creative elements of such a format would usually have a creative influence on the creation of the individual character of the television programmes themselves. Since the applicable law does not provide grounds for assuming that, in relation to an audiovisual work, the premises of co-authorship should be understood in a different or specific way,[51] the authors of these elements of the format would also become co-authors of the programme as an audiovisual work. This, of course, does not exclude the existence of other co-authors of the broadcast-work, provided that there is cooperation between them and the co-authors of the format in the production of a specific programme of the series (e.g., the image operator). If there was no such cooperation, and an element having the character of work would be included in a specific audiovisual

[50] Judgment of the Court of Appeal in Warsaw of 2 November 2015, VI ACa 543/14, LEX No 1994430. See further Krzysztof Lewandowski, 'Utwór audiowizualny. Zakres pojęcia i ochrony prawnej', Poznan 2011, 65; Monika Czajkowska – Dąbrowska in Janusz Barta (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Cracow 2005, 528.
[51] Jan Błeszyński, 'Reemisja w świetle art. 21(1) Prawa autorskiego', PUG 2009, No 11, 6–20.

broadcast, then we would be dealing not with co-authorship, but with a combination of works (Article 10 of the Copyright Law). 'An audiovisual work may be mixed, hybrid and, depending on the factual circumstances, it may be dominated by elements of co-creation (separable and inseparable), features of a collective work, or manifestations of combined works, collections of works, elaborations or inspirations, and it is not justified to consider the construction of an audiovisual work on a horizontal plane (which dominates in the case of co-creation), because due to its multi-threading and spread over time of the creation of an audiovisual work, its structure is vertical in nature, where the idea of creating a work, which is not protected by copyright, is at the basis of the emerging legal relations'.[52]

Pursuant to Article 70(1) of the Copyright Law, 'The producer of an audiovisual work shall be presumed to acquire, by virtue of a contract for the creation of a work or an agreement for the use of an existing work, exclusive economic rights to exploit those works within the framework of the audiovisual work as a whole'. Thus, 'the rights to use the contribution works in an audiovisual work are used by the audiovisual producer to the extent that they were acquired from the original rightholders. This applies both to works commissioned for the purposes of an audiovisual production, as well as to those created without connection with that production, but only used in the audiovisual work, as well as to contributions of a co-authored nature, regardless of their ability for independent exploitation'.[53] Until the possible refutation of the presumption under Article 70(1) of the Copyright Law, therefore, it should be assumed that it is the producer, and not the authors of individual contribution works, who is entitled to exploit the audiovisual work as a whole.[54]

Incidentally, it is also worth noting that it follows from the legal presumption mentioned above that the acquisition of economic rights to the exploitation of an audiovisual work is related to the very fact of concluding a contract for the creation of a work. Therefore, the failure of the parties to make the contract for the creation of the work in writing does not constitute a circumstance excluding the possibility of the existence of rights to exploit the work obtained as a result of the order by the ordering party. As indicated above, in the light of copyright law, the requirement of written form is a prerequisite for the effective and valid conclusion of an agreement concerning the transfer of copyright (Article 53 of the Copyright Law) and the granting of an exclusive license (Article 67(5) of the

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[52] Dorota Sokołowska, 'O właściwościach utworu audiowizualnego "jako całości"', Ruch Prawniczy, Ekonomiczny i Socjologiczny, Year LXXXII, 2020, No 4.

[53] Błeszyński (n 51) 6–20.

[54] See the judgment of the Court of Appeal in Gdańsk of 20 November 2012, I ACa 176/10, Legalis No 1025262.

Copyright Law). However, it does not include a non-exclusive license. Therefore, the parties' declaration of intent in the case of a non-exclusive license agreement may be made in any way expressing their will in a sufficient way, in accordance with the general rule arising from Article 60 of the Civil Code.[55] The conclusion of an oral agreement for the creation of a contribution work to an audiovisual work allows us to assume the existence of an implied authorisation of the author of that work to exploit it as part of the audiovisual work as a whole. 'A license agreement is a binding agreement. Its subject is the licensor's authorization to the licensee to use the work. The conclusion of this agreement creates an obligation on the side of the licensor to endure the use of the work by the licensee to the extent covered by the license. Therefore, this use takes place with the consent of the rightholder and thus does not constitute an infringement of his copyrights'.[56]

According to Article 66 of the Copyright Law a license agreement entitles you to use the work for a period of five years in the territory of the country in which you have your registered seat, unless otherwise provided in the agreement. After this period, the right obtained under the license agreement expires.

V. SUMMARY

The above considerations lead to several important conclusions regarding the legal status of the television format and the consequences that may arise from the relationship between it and the cyclical program created on its basis.

First, there should be no doubt that a format may be subject to copyright. This does not apply, of course, to the initial, general concept itself, because, as a mere idea/concept, it is not subject to copyright protection. On the other hand, the form of such a concept, already developed into an appropriate form, composed of the creative elements making it up and individualizing it, will constitute a work within the meaning of Article 1(1) of the Copyright Law.

Secondly, the format may be determined as a work in a programme based on it, which may occur in particular in the case of a public affairs and information programmes (including those broadcast 'live').

Thirdly, a television programme created on the basis of a format which is a work within the meaning of copyright law will be an audiovisual work referred to in Article 1(2)(9) of the Copyright Law.

[55] See the judgment of the Court of Appeal in Warsaw of 20 June 2018, V ACa 18/17, Legalis.
[56] Judgment of the Court of Appeal in Warsaw of 14 October 2016, VI ACa 1001/15, LEX No 2157764.

Fourthly, in the case of a format-work which is a piece of co-authorship, the authors of works contributing to the format established in the television programme created on its basis will also usually also be co-authors of the audiovisual work, which will be the programme.

Fifthly, the format-work and the audiovisual work created on its basis are legally separate objects of protection. Therefore, the acquisition by the producer of the rights to both works takes place separately, also in a situation where the authors of the works contributed to the format are co-authors of the audiovisual work as well. It is only with regard to an audiovisual work that the presumption under Article 70(1) of the Copyright Law applies.

Finally, it should be added that the format must be specified to such an extent that it constitutes a recognizable element of the work created on its basis. 'In relation to a series of television broadcasts, recognition can be manifested in the fact that each episode has identical graphics, set design, music, which gives all episodes a common character. However, it should be noted that the above-mentioned elements are independent works and as such are subject to protection. (…) The assumption that only the concretization of a format can be protected means that the consideration of copyright protection in relation to formats requires a comparison not between the concept and the program, but between two completed programs. This means that as long as individual episodes do not take over elements belonging to the form from another program and are based only on the same idea, there is no copyright protection'.[57] Typical for such an understanding is the decision of the Amsterdam District Court of 7 June 2000, in which the court held that the selection of individual elements constituting the whole of a repetitive scheme is sufficiently original and elaborate to be the subject of copyright. Nevertheless, the detailed comparison between the programs, made by the court, showed that the characteristic, protected elements from the first program were not taken over together with their form of expression, so there was no infringement of copyright.[58]

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[57] Podrecki, Traple (n 7) 178.

[58] Cf Castaway/John de Mol (*Survive v Big Brother*), Mediaforum 2000, No 7/8, 260–263 (quoted in Podrecki, Traple (n 7) 178).

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