STUDIA PRAWNO-EKONOMICZNE, T. CXXXIV, 2025
PL ISSN 0081-6841; e-ISSN 2450-8179 s. 9–30
https://doi.org/10.26485/SPE/2025/134/1

Cezary BŁASZCZYK*
https://orcid.org/0000-0003-4095-600X

FINANCIAL MARKET BENCHMARKS. BETWEEN PERMEABLE INTELLECTUAL PROPERTY AND *QUASI*-MONOPOLY

Abstract

Background: Benchmarks are crucial instruments of financial markets. They allow financial institutions to operate and create new products and services while their administrators profit by licensing them. However, it is unclear on what grounds administrators' claims of benchmark ownership rest, which in turn may prompt benchmark users to challenge the licensing regime.
Research purpose: The article is aimed to seek for those grounds and argues that the economic interests of benchmark administrators in the EU are protected through a *quasi*-monopoly resting on two foundations. First, Intellectual Property to trademark a given benchmark; second, an obligation (and a power) to control the process of provisioning and publishing a benchmark (or making it available). However, neither the national nor the EU laws establish a sui generis, a direct property right to a benchmark.
Methods: Methodologically, the paper rests on analysis of legislation and relevant acts of soft law.
Conclusions: The legal basis for benchmark licensing can be found in two sources: 1) trademark law (both national and European); 2) and on the grounds of Art. 6 Section 1 and Art. 29 Section 1 of the BMR; however, only the latter leads to a *quasi*-monopoly over a benchmark's use. Both the scope and the level of protection are significantly smaller than they would be in the case of a proprietary, exclusive right to a benchmark.

Keywords: benchmark, benchmark administrator, BMR, index licence, philosophy of intellectual property.

1. Introduction

Benchmarks, or "reference rates", are crucial instruments of the financial markets as they reflect the behaviour or value of a measured market (or a sector, equity, or financial obligations). They allow for an assessment of the

* Ph.D., habil., University of Warsaw, Faculty of Law and Administration, Department of History of Political and Legal Doctrines; e-mail: c.blaszczyk@wpia.uw.edu.pl

Received: 26.10.2024. Revised: 28.12.2024. Accepted: 9.01.2025.

economic situation and drive the economy. They are commonly used in almost every activity on the financial market – from developing and issuing derivatives to measuring the performance of an investment fund or a pension fund to calculating amounts due in financial agreements. Among many kinds of benchmarks, there exist interest rate indices (e.g., EURIBOR), currency benchmarks (e.g., WM/Refinitiv FX), stock indices (e.g., DAX) and commodity indices (e.g., EU HICP). They are so essential and valuable that the private sector uses them in attempts at green and just transformations of the economy.[1]

Consequently, the stability of the financial markets and the protection of consumers require benchmarks to be determined with accuracy, robustness and integrity. In the past, cases of manipulation of LIBOR and allegations of manipulating commodity prices hit the antitrust European policies and undermined the public's trust in law and order.[2] For this reason, the European Union decided to penalise benchmark manipulation and regulated the process of benchmark provision, publication, and usage (including a contribution of input data and computation methodology).[3] The fundamental act of law in this regard is Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, widely known as the "BMR".[4] The legislative environment has constantly been evolving, the BMR not only being amended but also complemented by tens of delegated and implemented acts.[5] They are supplemented by the recommendations and

---

1 In the form of so-called ESG benchmarks (e.g., Euronext Equileap Gender Equality Eurozone 100) and climate transition benchmarks (e.g., EURO STOXX CTB).

2 **N. Moloney**, *EU Securities and Financial Markets Regulation*, Oxford University Press, Oxford 2014, pp. 744–750.

3 In fact, in the current EU law of capital markets, benchmark manipulation is one of the three categories of manipulative practices.

4 Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJL 171/1 of 2016 and Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJL 173/1 of 2014.

5 E.g. Commission delegated regulation (EU) 2018/65 of 29 September 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation, OJL 12/9 of 2018; Commission delegated regulation (EU) 2018/67 of 3 October 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or

positions of the European Securities and Markets Authority ("ESMA") and national supervisory authorities. Especially helpful are ESMA's explanations and interpretations on the BMR's application in the form of the so-called "Q&A".[6] Moreover, the detailed rules on the calculation and publication of a particular benchmark, as well as rules on using it, are set out by benchmark administrators themselves in the various documents (rules, regulations, statements, *etc*.) issued in compliance with peremptory law and supervisory authorities' recommendations.[7]

2. Benchmarks and their administration

According to Art. 3 Sec. 1(6) of the BMR, the benchmark administrator is responsible for providing a benchmark. This function entails management and control over the process of determination, setting the methodology, collection and analysis of data, calculation, and, finally, making the benchmark available for use (the actual performance of these activities may be outsourced).[8] As a part of its duties, an administrator may develop several legal types of benchmarks: regulated-data benchmarks, interest rate benchmarks, commodity benchmarks; critical benchmarks; as well as significant and non-significant benchmarks; finally, benchmarks may

change to existing benchmarks, OJL 12/14 of 2018; Commission delegated regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function, OJL 274/1 of 2018; Commission implementing regulation (EU) 2018/1105 of 8 August 2018 laying down implementing technical standards with regard to procedures and forms for the provision of information by competent authorities to ESMA under Regulation (EU) 2016/1011 of the European Parliament and of the Council, OJL 202/1 of 2018; Commission implementing regulation (EU) 2016/1368 of 11 August 2016 establishing a list of critical benchmarks used in financial markets pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council, OJL 217/1 of 2016.

6 Questions and Answers on the Benchmarks Regulation (BMR), v. 27, 15 December 2023, https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf; accessed 6.01.2025.

7 Provisions on benchmarks may also be found in other acts, e.g., in Art. 2(2)(c) of the Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJL 173/1 of 2014.

8 An administrator is defined in Art. 3 Sec. 1(6) as a natural or legal person who controls the provision of a benchmark. Usually, it is the latter. Hence, the administrator shall be further referred to as "it".

be shared as a family of benchmarks. Of course, the mere publishing or referring to a benchmark, e.g., as part of journalistic activities, without control over the provision of a benchmark, is not administration in terms of the BMR.

To secure the abovementioned accuracy, stability and integrity, an administrator shall have in place robust governance arrangements, which include a clear organisational structure with well-defined, transparent, and consistent roles and responsibilities for all persons involved in the provision of a benchmark (Art. 4). It shall establish and maintain a permanent and effective oversight function (Art. 5) and incorporate in its organisation framework necessary for control over the process of determination and use of benchmarks (Art. 6), and its accountability (Art. 7). The process of acquiring an input data (Art. 11), and adequacy and transparency of methodology (Art. 12) are also set by the BMR. Finally, an administrator shall have in place public complaints-handling mechanisms (Art. 9).

By contrast, benchmark users are supervised entities that use the benchmarks (resp. combination of benchmarks). According to Art. 3 Section 1(7) and Art. 29 Section 1 of the BMR, activities such as issuing a financial instrument referring to a benchmark, determining the amount payable under a financial contract referring to a benchmark, or measuring the performance of an investment fund with reference to a benchmark may be conducted on the EU financial market under certain conditions. A benchmark or a combination of benchmarks ought to be provided by an administrator located in the EU and obtained an entry in the register of administrators and benchmarks maintained by the ESMA (art. 30 et seq. provide rules on the equivalence of third-country benchmarks and recognition of a third-country administrators).

It should be noted that the BMR uses the term "to use of a benchmark" when describing the activities set in Art. 3 Section 1(7) of the BMR. Since BMR is silent on the matter of Intellectual Property rights to benchmarks, and the issue is crucial to administrators' legitimate business interests, I propose to introduce alongside yet another term – "to apply a benchmark", describing a use of an Intellectual Property that could consist of some manifestations of a benchmark. Hence, a benchmark could be used and applied (if protected through IP rights) or only used (if unprotected) by a financial institution referring to benchmarks on the financial market. The proposed terminology is based on the practice of some of the administrators.[9]

[9] Licence Agreement, consistent with GPW Benchmark S.A. standard effective December 1, 2022, https://gpwbenchmark.pl/en-stosowanie_stawek_referencyjnych; accessed 6.01.2025.

It is customary for administrators to require users of their benchmarks to acquire a licence (usually by entering into a separate written licensing agreement). From the legal perspective, the main object of such a contract is to authorise (entitle) the user to apply and use selected benchmarks according to regulations set by the administrator and to oblige the administrator to provide the benchmarks according to the peremptory laws and standards established in the benchmark documentation. From the economic point of view, however, the contract allows an administrator to commercialise the benchmarks it provides (as a licence is almost always payable).

Naturally, the concept of a licence entails permission, either contractual or statutory (compulsory), to use a particular intellectual good which is a legal power or a factual possession of the licensor. A licence may be qualified as a type of contract mentioned and regulated by a code of law or a statute (as in the case of a copyright license in the Polish Act on Copyright and Related Rights – Art. 41 Section 2, Art. 66 et seq.),[10] or not (e.g. know-how licensing). However, there is always a kind of exclusivity of disposition of an intellectual good – either secured through law or factual situation – which allows a licensor to limit public use of the licensed goods. If not for the monopoly of an administrator (its power to control the use, or use and application of a benchmark), benchmarks could be used freely without compensation or infringement of any rules.

Interestingly, Intellectual Property (or, precisely speaking, one of the legal regimes of Intellectual Property, such as the abovementioned copyright, trademark, or database law)[11] is not the only source of subjective rights allowing for the commercialisation of goods. The monopoly may be achieved through a pseudo-right (legal position in practice resulting in a situation as if a licensor would be empowered with a subjective right) or a factual advantage of possession. The latter is the case of market data, which is economically valuable only shortly after being produced, and market operators profit from its licensing before they are obligated to publish it (usually after the elapse of 15 minutes).[12]

[10] Act of 4 February 1994 on Copyright and Related Rights, OJ 2509 of 2022, amended.

[11] Other IP regimes, such as patents, topographies of integrated circuits, and utility models may be excluded *ab initio* because of the nature of benchmarks.

[12] Art. 8 of the Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012, OJL 173/84 of 2014 ('MIFIR'). See also Directive (EU) 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJL 173/349 of 2014 ('MIFID II').

Administrators must have some rights to "their" benchmarks, at least a right to control the use of "their" benchmarks, results from a close reading of the acts of law. Firstly, Art. 37 Sec. 1 of the MIFIR, which regulates non-discriminatory access to benchmarks and the corresponding obligation to licence benchmarks, mentions "a person with proprietary rights to the benchmark". Secondly, recital (38) and Art. 22 of the BMR speak of the "licenses of the benchmark" while respecting "the right to property" (recital 53). At the same time, the current text of the BMR does not provide for a statutory licence on benchmarks (Art. 22 speaks only of non-discrimination in licensing the critical benchmarks). None of those acts specifies, though, what kind of a right the administrators have in their benchmarks (what makes the benchmarks "theirs" and whether the benchmarks may be deemed "their" Intellectual Property).

Furthermore, soft law documents, such as Principles for Financial Benchmarks issued by the Board of the International Organization of Securities Commissions, refer to "intellectual property relating to the benchmark".[13] Academics also seem to believe in a right to a benchmark. For example, before discussing punitive measures against benchmark administrators, Gina-Gail S. Fletcher mentions a need for proportionality in her paper so the benchmarks, being "the property of the administrator", would not get destroyed.[14]

In this situation, the question arises: What gives the administrators a right to limit the unrestricted use of benchmarks and license them? As there is no factual monopoly over benchmarks – which, by their very definition, are published or made available to the public – there must be some legal grounds for licensing; otherwise, the common opinion of the legislators and jurists would be wrong, and the practice of licensing would be an imposition. This paper concentrates on answering this problem.

The thesis here is that there are, in fact, two sources of the legal control that administrators have over benchmarks: the BMR and trademark law. Hence, an administrator in practice grants two licenses: to use a benchmark in the terms of the BMR and to apply it within the realm of Intellectual Property law. However, as the BMR – as already mentioned – does not establish a subjective right to a benchmark, and the only Intellectual Property regime available to the administrators is trademark law (protection of a graphical or lexical indication of a benchmark), administrators are not benchmark owners (in the continental

[13] In Annex A, the definition of an administrator. Principles for Financial Benchmarks, IOSCO, FR07/13, July 2013.

[14] **GG.S. Fletcher**, *Benchmark Regulation*, Indiana University Maurer School of Law 2017/102, p. 1976.

systems, Intellectual Property is not an ownership) and their control results from a *quasi*-monopoly. To prove this thesis, benchmarks shall be viewed dogmatically from the perspective of the most relevant regimes of Intellectual Property law (copyright, databases, and trademarks); then, the relevant provisions of the BMR shall be analysed.

Prima facie, the former seems problematic, as Intellectual Property law was harmonized in the EU only fragmentarily,[15] and the EU Trademark ("EUTM") was introduced alongside the national trademarks, not to replace them.[16] Nevertheless, harmonisation of trademark law and databases ought not to be taken lightly, especially in the light of the pro-Union interpretation of the national law. Moreover, the undergoing process of IP-globalisation resulted in the development of universally recognised principles of Intellectual Property law. It is presumed here, then, that it is possible to generalise Intellectual Property without engaging in national-specific dogmatic analysis.[17] Where an example will be needed, Polish domestic law will be referred to in order to illustrate the benchmarks" legal status.

No academic work on benchmark ownership in the EU financial markets (as defined by the BMR) was identified. There exist, of course, monographic works in law which discuss benchmark regulations in the EU, not to mention immense economic literature on benchmarking.[18] However, neither includes the subject

[15] E.g., Directive (EU) 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJL 077/20 of 1996; Directive (EU) 2015/2436 of the European Parliament and the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, OJL 336/1 of 2015 ('the Trademark Directive'); Directive (EU) 2015/2436 of the European Parliament and the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, OJL 336/1 of 2015; Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJL 130/92 of 2019 ('LPDD').

[16] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark, OJL 154/1 of 2017.

[17] Similar stance was taken by Graham Dutfield and Uma Suthersanen in: **G. Dutfield**, **U. Suthersanen**, *Global Intellectual Property Law*, Edward Elgar, Cheltenham–Northampton 2008, pp. 3 *et seq.* See also: **B. Giesen**, *Umowa licencyjna w prawie autorskim. Struktura i charakter prawny*, C.H. Beck, Warszawa 2013, p. 68; **C. Błaszczyk**, *Propertarianistyczne teorie prawa autorskiego*, C.H. Beck, Warszawa 2018, pp. 74 *et seq.*

[18] E.g., **J. Floreani**, **M. Polato**, *The Economics of the Global Stock Exchange Industry*, Palgrave Macmillan, Houndmills–New York 2014, pp. 215 *et seq*. **M. Haentjens**, **P. de Gioia Carabellese**, *European Banking and Financial Law*, Routledge, London–New York 2020, pp. 73–74, 199–200; **N. Moloney**, *EU Securities and Financial Markets Regulation*, Oxford

of benchmark ownership.[19] Moreover, the case law on benchmark ownership is also virtually non-existent, thus making court decisions relevant only per analogiam while referring to the general principles of protection. Consequently, apart from answering the central question of this paper, its findings may give rise to a broader discussion on the function of Intellectual Property, especially in the European financial market.

3. Benchmark application

Issues of the admissibility of establishing Intellectual Property rights to benchmarks and licensing their application have been discussed for years. For example, a Report of ESMA-EBA on principles for benchmark-setting in the EU issued in 2013 (before the BMR) mentions "concerns about the protection" of the economic value of benchmarks and competitive fair play.[20]

Now, undoubtedly, benchmarks are goods. As said in the introduction, they are used by actors of the financial market, often to the great benefit of their users. They are produced and offered – either for a fee, or openly to the public. Moreover, benchmarks are intangible – they have no physical manifestation, instead assessing and presenting a result of measuring the market, sector, equity, or financial obligations in a highly accurate, reliable, and organised manner. Consequently, benchmarks appear as "intellectual goods".

Nevertheless, specifying what kind of intellectual goods are benchmarks is demanding. One might invoke a legal definition of a benchmark from the BMR[21] or a description used by economists (an estimation "of an asset's market value that is based on reported transaction prices or other data"),[22] though neither

University Press, Oxford 2014, pp. 744–750; **F. Pennesi**, *Equivalence in Financial Services. A Legal and Policy Analysis*, Palgrave Macmillan, Cham 2022, pp. 120–126.

[19] Perhaps the closest to being relevant is Louise Boulter's paper on the problematic legality of benchmark commercialisation (**L. Boulter**, *Legal Issues in Benchmarking*, Benchmarking: An International Journal 2003/10, pp. 528–537).

[20] Final Report ESMA-EBA Principles for Benchmark-Setting Processes in the EU, June 6, 2013, ref. 2013/658, pp. 11, 23, 28 *et seq.*

[21] "Any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees" (Art. 3(3)).

[22] *Vid.* **D. Duffie**, **P. Dworczak**, *Robust Benchmark Design*, Journal of Financial Economics 2021/142, pp. 775–802.

of them speaks about what elements constitute a benchmark. In other words, regarding Intellectual Property, what makes a benchmark a benchmark needs to be clarified. Considering this, one must first distinguish between a benchmark and the data reflecting its value.[23] Data licensing is another business activity of administrators and trading platforms, making the data subject to separate proprietary claims. The law differentiates between them, too (benchmarks themselves are regulated by the BMR, while MIFID II and MIFIR legislation regulate the data). Secondly, a benchmark is neither a mere list of indexed companies (or input data contributors). Benchmarks are rather a complex set of ideas and solutions. They consist of choosing a base subject and adequate criteria of measurement, but also of selecting and processing of input data, application of an invented mathematic formula (the 'method'), and creation of accompanying documentation.

As already suggested, due to their informative nature, once made public, benchmarks circulate freely in society. From the economic point of view, they are public goods: they cannot be solely possessed after being made known (non-exclusivity), they cannot be depleted through use (inexhaustibility), and an unlimited number of people can even use them at the same time (non-rivalry).[24] Thus, only peremptory laws can protect the legitimate interests of administrators, granting them universal rights and forbidding unlicensed use and copying. Hence, Intellectual Property Right, or at least a legal provision with a similar effect, is needed to commercialise benchmarks.

In public statements, disclaimers and openly accessible documents, the administrators claim the former, pronouncing benchmarks to be their "property".[25] For example, the standard Licence Agreement used by Polish benchmark administrator GPW Benchmark S.A. mentions a licence to apply selected benchmarks (or their combination) and to use copyrighted documentation for

[23] On the discussion of property rights to benchmark data ("price quotations") and its commercialisation, see: **R.I. Webb**, *Transitory Real-time Property Rights and Exchange Intellectual Property*, The Journal of Futures Markets 2003/23, pp. 891–913. On the court decision protecting a pre-BMR administrator's interests through database, see: Judgement of the Rechtbank Den Haag, 22 July 2015, Case C-09-442420–HA ZA 13-512 *Euronext N.V. et al. v. Tom Holding N.V. et al.*, ECLI:NL:RBDHA:2015:8312.

[24] **P.A. Samuelson**, *The Pure Theory of Public Expenditure*, Review of Economic Statistics 1954/36, pp. 387–389; **B. Bouckaert**, *What Is Property?*, Harvard Journal of Law & Public Policy 1990/13, pp. 775–816.

[25] E.g., Foxberry Index Management Index Correction Policy & Procedures, release date: 12 April 2023, www.foxberry.com/static/assets/docs/governance/index_correction_policy.pdf; accessed 6.01.2025.

the purposes of, among other things: developing financial products for which the benchmarks are a reference; issuing, releasing, offering or introducing to trading financial instruments for which the benchmarks are a reference; calculating amounts due in respect of financial products or financial agreements by reference to the benchmarks; measuring the performance of investment funds or pension funds employing the benchmarks; measuring, monitoring and marking risk in relation to employing the benchmarks; provide clearing services.[26]

Since there is no distinct Intellectual Property regime for benchmarks (a *sui generis* right), one needs to identify which general regime, or regimes, administrators base their claims[27] upon. Now, as benchmarks are neither the data reflecting their value, nor a mere list of data contributors, benchmarks are not protected as a database.

Incidentally, the list of data contributors is unlikely to be deemed protected on its own as a database, as the number of contributors is usually limited and unstructured. However, it cannot be ruled out. Art. 2 Sec. 1 (1) and Art. 5 of the Polish Act on Databases, implementing Art. 1 Sec. 2 of the LPDD, does not establish a quantity condition, requiring a database to be a set of methodically or systematically gathered elements which exist independently, and which were gathered, processed or displayed with a significant cost and effort for its

[26] Licence Agreement, consistent with GPW Benchmark S.A. standard effective December 1, 2022, https://gpwbenchmark.pl/en-stosowanie_stawek_referencyjnych; accessed 6.01.2025. Similarly, in case of Zagreb Stock Exchange, directly administrating its own indices (Products & Services: Indices, zse.hr/en/indices-552/551, 6.1.2025).

[27] Interestingly, administrators rarely specify which "Intellectual Property rights" they claim. E.g., the Licence Agreement used by GPW Benchmark S.A. mentions trademark law for benchmarks and copyright for benchmark documentation. At the same time, Sec. 2.6 of the agreement protectively compels the user to "acknowledge that the using and applying of the benchmarks and their word and figurative marks beyond the scope or in breach of the terms of the granted licence shall be an infringement of the Intellectual Property rights of the administrator or a third party and may result in liability for damages". At the same time, Intellectual Property Rights are understood, according to Sec. 1.1.10 of the Licence Agreement, as "patents, trademark rights (including word and figurative trademarks), copyrights including derivative copyrights and related rights, sui generis rights in databases and rights in industrial designs and utility models, and any other similar rights in intangible goods of similar nature, as well as trade secrets and know-how". *C.f.* Refinitiv TERM €STR Consultation Paper, release date: 26 June 2023, www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/consultation-paper-june-2023.pdf; accessed 6.01.2025 – where the intellectual property to a trademark is explicitly referred to.

producer (considering either quantity or quality of the set).[28] The protectability of the list of data contributors relies on the ad hoc test of significant cost and effort. It seems improbable in the case of value price indices, such as Euro Stoxx 50, consisting of the 50 biggest stock companies in the Eurozone. However, it cannot be excluded in the case of a very sophisticated, multiple-criteria sectoral-behavioural index.[29] Still, this potential protection would apply only to an element of a benchmark, not a benchmark itself.

Similarly in the case of copyright. Even though, it seems feasible to protect benchmark documentation through copyright law (provided a given document meets statutory requirements for protection), documentation is not a benchmark but merely a description of its underlying idea, formula, and rules of determination and use. Moreover, a benchmark user may employ in its business documentation that it was presented by an administrator on a fair use basis, and only a further commercial publication or dissemination of the documentation requires a licence.

A benchmark, on the other hand, is not a copyrightable work, i.e., it is not eligible for copyright protection. Take for example, the prerequisites for protection set out in Art. 1 Sec. 1 of the Polish Act on Copyright and Related Rights. According to the provision, a copyrighted work is a product of a human's intellectual effort fixed in any form (material or not). Furthermore, it should retain a feature of creativity and individuality (evoking vaguely the common-law notion of originality). At the same time, the statute does not require a work to represent any artistic level, value, or utility (there is a crossing ratio between copyrighted works and art – not every work is artistic, and not every piece of art is copyrightable).

First, it is doubtful that a benchmark is a product of an individual creative effort since neither its determination nor provision entails an input of authorial personality to be expressed in a particular form. Instead, it is constrained by logic and regulatory standards, as the former dictates a solution to an economic problem of adequately measuring a given market or market behaviour[30] while the latter dictates rules on how to do it fairly. Consequently, a benchmark's

[28] *Vid.* (Polish) Act of 27 July 2001 on Databases, OJ 1769 of 2024 implementing Directive (EU) 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJL 077/20 of 1996.

[29] *Per analogiam* Judgement of the Court (Grand Chamber), 9 November 2004, Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB*, ECLI:EU:C:2004:696.

[30] *Vid.* **D. Duffie**, **P. Dworczak**, *Robust Benchmark Design*, Journal of Financial Economics 2021/142, pp. 775–802; **A. Baig**, **D.B. Winter**, *The Search for a New Reference Rate*, Review of Quantative Finance and Accounting 2022/58, pp. 939–976.

distinctiveness suffers from a high probability of being repeated in parallel, lacking a significant individuality.[31]

Second, the universal principle of a difference between a (protected) form of expression and an (unprotected) idea applies in the case of benchmarks. The principle is expressed in Polish law by Art. 1 Section 21 of the Act on Copyright and Related Rights, which explicitly excludes procedures, methods and mathematical formulas from the scope of protection. Consequently, the underlying concepts that make up the benchmark are excluded from copyright protection. A benchmark does not exist without them. It has no fixed expression – it is a changing value of measurement.[32]

Thus, one cannot argue for a benchmark to be the case of kleine Münze (or small changes), that is, works with little creative input with a specific utility function on the verge of copyrightability. Nor is it possible to invoke per analogiam the case of computer program protection, as such protection is not automatic but relies on a program's meeting prerequisites for protection. Thus, a copyrightable program cannot be a mere mechanical-technical application of reasoning. As stated by the Advocate General in Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury, "where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable".[33]

Finally, in droit d'auteur systems of copyright (such as the Polish copyright system), copyright protection entails not only economic rights (Art. 17 of the Act on Copyright and Related Rights) but also personal rights (Art. 16 Act on Copyright and Related Rights). Personal rights include a right of authorship, a right to sign a work (or to share it anonymously), and a right to decide whether a work will be published for the first time. These rights are inalienable and perpetual. In contrast, administrators' employees do not act as authors. Benchmarks are identified by their administrator, while the BMR

[31] *Per analogiam* Judgement of the Court (Third Chamber), 1 December 2011, Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ECLI:EU:C:2011:798; Judgement of the Court (Grand Chamber), 4 October 2011, Case C-403/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631.

[32] Even though stability is not a premise of protection in Polish law, as it is, for example, in American law, benchmark is not a case of "changing" or "flowing" work, it has no fixed expression.

[33] Judgement of the Court (Third Chamber), 22 December 2010, Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, ECLI:EU:C:2010:816, at § 49. See also Judgement of the Court (Grand Chamber), 2 May 2012, Case C-406/10 AS *Institute Inc. v World Programming Ltd*, ECLI:EU:C:2012:259.

requires the administrators to publish a benchmark's documentation, including its description, the list of data contributors, the method and the rules. Clearly, benchmark practice and legislation do not correspond with copyright law.[34]

Consequently, the only Intellectual Property regime left is trademark law. In compliance with the Trademark Directive (Art. 2), any sign that makes it possible to distinguish the goods or services of one entrepreneur from the goods or services of another and can be presented in an unambiguous and precise manner may be a registered and protected trademark (in Polish law, trademark is defined and regulated by Art. 120 Sec. 1–2 et seq. of the Industrial Property Law[35]). A trademark may be, in particular, a word, a drawing, a letter, a number, a colour, a spatial form, including the shape of goods or packaging, and even a sound. Contrary to the literal wording of the cited provision, trademarks do not have to apply only to products or services (there are also trademarks differentiating companies' names and logos, *etc*.). A benchmark fits the scope of trademarkable goods as one can register a benchmark's name or logo. Benchmarks similarly fit in the regional system of EUTM, regulated by the abovementioned Regulation on the European Union trademark (vid. Art. 4).[36]

Thus, the European Union Intellectual Property Office registered trademarks such as "DAX" (the word), which is owned by Qontigo Index GMbH, the administrator of the DAX indices.[37] It is worth noting, though, that an administrator does not have to be a trademark owner. It may actually sub-license the application of a benchmark (as is often the case of administrators determining indices for stock exchanges).[38]

As a rule, trademark registration confers exclusive rights on its owner to use the mark. An owner may license their trademarks for some or all the goods

---

[34] Contrary to what the Vienna Stock Exchange or Prague Stock Exchange might claim about their own indices (see: Indices of Prague Stock Exchange, www.wienerborse.at/en/indices/services/stock-exchanges/prague; accessed 6.01.2025).

[35] Act of 30 June 2000 Industrial Property Law, OJ 1170 of 2023.

[36] Although the provisions on the national and the EU trademarks differ, the rules governing both regimes are similar (including the duration of the right and its extension, and the exclusion of the proprietors' right to prohibit the free use of their trademarks).

[37] Application number: 000042390.

[38] E.g., WIG20 is a stock exchange index of Giełda Papierów Wartościowych w Warszawie S.A. It is administered by GPW Benchmark S.A., but Giełda Papierów Wartościowych w Warszawie S.A. owns the trademark. See the national trademark issued by the Polish Patent Office for the name "WIG20" (application number: Z.154039; registration number: R.093878). Similarly, in case of STOXX, being a benchmark administrator for DAX stock exchange (Trademarks, www.stoxx.com/trademarks; accessed 6.01.2025).

or services it is registered for. It may permit the use (in general, non-BMR meaning) of it for a chosen period and on a selected territory, making a licence either exclusive or not (Art. 163 of the Polish Industrial Property Law; Art. 25 Section 1 of the Regulation on the European Union trademark).

Generally, a person who applies a trademark without a licence infringes upon the owner's right. However, statutory limitations or exceptions cover some unlicenced forms of application. Thus, a trademark holder is not entitled to prohibit application by other persons of a trademark that indicates a kind, quality, intended purpose, value, or other characteristics of the goods or services or to identify or refer to goods or services as those of the proprietor of that trademark (in particular, where the use of the trademark is necessary to indicate the intended purpose of a product or service) – provided it is applied in compliance with honest practices in industrial or commercial matters.[39] This means that the mere application of a benchmark by a user in documents relating to a financial product, or in a financial contract referring to a benchmark, does not necessarily require the consent of a trademark owner. Hence, registering a benchmark as a trademark protects an administrator from unfair competition from other administrators but does not allow commercialising the benchmark effectively.[40] This is where the BMR comes in.

4. Benchmark use

According to Art. 3 Section 1(7) of the BMR, using a benchmark (or combination of benchmarks) means 1) issuing a financial instrument which references to a benchmark; 2) determining the amount payable under a financial instrument or a financial contract by reference to a benchmark; 3) being a party to a financial contract which references to a benchmark; 4) providing a borrowing rate calculated as a spread or mark-up over a benchmark; 5) measuring the performance of an investment fund through a benchmark. The definition is contextual and does not provide a clear answer to the question of what use is per se. Instead, it enumerates *all* cases of usage.

---

[39] Art. 156 of the Polish Industrial Property Law; Art. 14 Section 1 of the Regulation on the European Union trademark.

[40] This contention is confirmed by the Judgement of the Higher Regional Court of Frankfurt, 13 February 2007, Case 11 U 40/06 *Deutsche Börse AG wishing to protect the "DAX" stock indices*, ECLI:DE:OLGHE:2007:0213.11U40.06KART.0A.

To understand the institution, one must consider the already mentioned Art. 29 Sec. 1 of the BMR. According to it, almost every institution of the financial market in the European Union (the so-called supervised entity defined in Art. 3 Section 1(17) of the BMR) may use a benchmark (or a combination of benchmarks), which is either provided by an administrator located in the Union and included in the register referred to in Art. 36 of the BMR, or included in the register referred to in Art. 36. Furthermore, Art. 6 Sec. 1 of the BRM requires an administrator to have a control framework and ensure that its benchmarks are provided, published, or made available under the BMR.

By requiring the administrator to exercise control over the provision of benchmarks and publishing them (or making them available), the BMR a fortiori authorises an administrator to exercise this control. Otherwise, it would be impossible to fulfil the obligation. That means an administrator is a custodian of the benchmarks it develops. Within the scope permitted by law (in compliance with the BMR) and under the supervision of a competent authority (ESMA or/and national supervisors such as the Polish Financial Supervision Authority), it determines the rules of said provision and publishing (or making available). Consequently, users are subject to provisions of peremptory law, supervisory recommendations, and documentation of benchmarks issued by the administrators. As noted, at the same time, the BMR does not provide for a statutory licence, which would deprive the administrator of a right to decide on what terms it makes its benchmarks available for use. Thus, benchmark regulations included in the documentation allow an administrator to establish specific rules on its use and to require users to pay a fee. For example, the already mentioned Polish administrator GPW Benchmark S.A.'s regulation requires every benchmark that it provides enter into a licence agreement.[41]

The form of a written agreement seems the most efficient and legally safest way of licencing benchmarks. Users can rely on the accuracy of data and application of the methodology, as well as complaints procedures, or claim damages in case of unlawful or culpable defective provision of benchmarks. At the same time, the administrator may require benchmarks to be used in a lawful manner, as well as to pay the remuneration.

Thus, granting an administrator the power of control over the provision and publication of benchmarks (or making them available) leads to establishing

[41] E.g., § 7.1 of the Regulations for the WIBID and WIBOR Reference Rates, adopted by the Management Board Resolution No. 16/2020 of 3 March 2020 (as amended) (Consolidated text as of: 17 July 2023).

a *quasi*-monopoly. This interpretation is confirmed indirectly by the phrasing of Art. 22 and recital no. 38 of the BMR, both mentioning licensing of use and mitigating the dominant position of an administrator. The situation of a benchmark licensor and licensee (in the context of BMR's use) may resemble a relationship between parties of an Intellectual Property license contract. However, the BMR does not establish any subjective right to a benchmark.

The monopoly is a *quasi*-monopoly because the BMR limits it by introducing certain exclusions – either subjective or objective. For example, the BMR does not apply to central banks (which might determine and publish their benchmarks) – Art. 2 Sec. 2(a); or public authorities – Art. 2 Sec. (b); or the media merely publishing or referring to a benchmark as part of their journalistic activities with no control over the provision of that benchmark – Art. 2 Sec. 2(e); or certain commodity benchmarks – Art. 2 Sec. 2(g). As a result, entities such as central banks or public authorities are not bound by Art. 29 Sec. 1 of the BMR and may use benchmarks outside the administrators' control. In such cases, the administrators have no legal power to limit or control their use of the benchmarks. Hence, the control is fragmentary.

5. Conclusions

To conclude, the legal basis for benchmark licensing can be found in two sources: 1) trademark law (both national and European); 2) and on the grounds of Art. 6 Section 1 and Art. 29 Section 1 of the BMR. The former relies on the registration of a trademark. It protects a mark, not the benchmark itself, and goes only as far as to protect it from the unfair competition of other administrators. The latter allows legal control of using a benchmark in specific cases of business activity in the EU financial market without establishing any subjective right. The contractual form of licences to apply and use benchmarks is established within the freedom of contract, universally recognised by member states' legal systems (e.g., art. 353^1 of the Polish Civil Code[42]).

Clearly, from the point of view of administrators, their legal situation is imperfect, and their interests are insufficiently protected. Granted, the findings confirm the feasibility of benchmark commercialisation. Moreover, applying or using benchmarks without a licence may result in legal liability. In case of the application, general provisions on infringement of trademark may apply, such as

[42] Act of 23 April 1964 Civil Code, OJ 1601 of 2024, amended.

Art. 296 section of the Polish Industrial Property Law.[43] In case of their use, the user risks administrative sanctions provided by Art. 42 of the BMR and member states' domestic laws of the financial market, such as Art. 176i Section 1(12) of the Polish Act on Trading in Financial Instruments.[44]

Nevertheless, both the scope and the level of protection are significantly less than they would be in the case of a proprietary, exclusive right to a benchmark. If anything, the peremptory laws produce a limited *quasi*-monopoly, which is derived, or deduced, from the provisions on control and protection of a trademark. This indirectness may prove problematic if the benchmark users start questioning the administrator's pseudo-ownership of benchmarks, thus disrupting current practices and perhaps even destabilising the EU financial market.

Undoubtedly, a true monopoly resulting from *legal* status is needed to control benchmarks. By their nature, intangible goods, which are intended for dissemination and rely on transparency in the regulator's aim to ensure their accuracy, stability, and integrity, can be adequately protected only through universal (effective erga omnes) laws. Hence, the conclusion of this paper is that, even though there are legal grounds for licensing the use and application of benchmarks, they are insufficient.

Since the aim was to uncover the existing grounds for the commercialisation of benchmarks, the question of whether benchmarks ought to be commercialised and to what degree (even if relevant) lies outside of the scope of this paper.[45] Still, the concluding remark might be reinforced by an observation from the theory of Intellectual Property most relevant to benchmark, namely economic-utilitarian theory.[46] It suggests that clearly established property rights (in a broad

[43] An administrator whose trademark was infringed may demand the infringement to cease, handing over the unjustly obtained profits, and – in the event of a culpable infringement – damages (either on a general basis or by payment of a sum corresponding to three licensing fees for the use of a trademark).

[44] Act of 29 July 2005 on Trading in Financial Instruments, OJ 722 of 2024, amended. According to this provision, the Polish Financial Supervision Authority may impose on a financial institution a fine of up to 2.212.750 PLN (for natural persons) and either up to 4.425.5000 PLN or up to an equivalent to 10% of the total annual revenue shown in the last audited financial statement if it exceeds 4.425.5000 PLN (for legal persons).

[45] Another argument here is philosophical, i.e., whether benchmarks can be property from the ontological sense. *Vid.* **D. Scott**, **A. Oliver**, **M. Ley-Pineda**, *Trademarks as property: A philosophical perspective*, in: **L. Bently**, **J. Davis**, **J.C. Ginsburg** (eds.), *Trademarks and Brands. An Interdisciplinary Critique*, Cambridge University Press, Cambridge 2008, p. 285.

[46] The other main theories are propertarian-deontological and personalist. See: **J. Hughes**, *The Philosophy of Intellectual Property*, Georgetown Law Journal 1988/77, pp. 330–350; **W. Fisher**, *Theories of Intellectual Property*, in: **S.R. Munzer** (ed.), *New Essays in the Legal and*

sense) save market participants possible conflicts and costs while excluding free-riding.[47] Not only the Intellectual Property but also the European legislature aim to avoid such disadvantages of unregulated market and ensure legal certainty.[48] It seems, the ESMA and the EU legislature would do well to take it under advisement in the future amendments of the BMR.

References

Cases

Judgement of the Court, 12 December 2002, Case C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt*, ECLI:EU:C:2002:748.

Judgement of the Court (Grand Chamber), 9 November 2004, Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB*, ECLI:EU:C:2004:696.

Judgement of the Court (Grand Chamber), 4 October 2011, Case C-403/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631.

Judgement of the Court (Third Chamber), 22 December 2010, Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, ECLI:EU:C:2010:816.

Judgement of the Court (Third Chamber), 1 December 2011, Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ECLI:EU:C:2011:798.

Judgement of the Court (Grand Chamber), 2 May 2012, Case C-406/10 AS *Institute Inc. v World Programming Ltd*, ECLI:EU:C:2012:259.

Political Theory of Property, Cambridge University Press, Cambridge 2001, pp. 168–200; **P. Drahos**, *A Philosophy of Intellectual Property*, Ashgate, Aldershot 2001, pp. 41–95; **R.P. Merges**, *Justifying Intellectual Property*, Harvard University Press, Cambridge–London 2011, pp. 31–101.

47 **W.M. Landes**, **R.A. Posner**, *The Political Economy of Intellectual Property Law*, The Journal of Legal Studies 1989/18, pp. 325–363; **R. Cooter**, **T. Ulen**, *Law and Economics*, Pearson Addison Wesley, Boston–Columbus–Indianapolis 2014, p. 55. Cf. **Ch. Handke**, *Economic Effects of Copyright. The Empirical Evidence So Far*, Commissioned Paper Prepared for the Committee on the Impact of Copyright Policy on Innovation in the Digital Era, National Academies of the Sciences, Engineering, and Medicine 2011, p. 12 *et seq.*; **W.R. Johnson**, *The Economics of Copying*, Journal of Political Economy 1985/93, pp. 158–174; **H. Demsetz**, *Information and Efficiency. Another Viewpoint*, Journal of Law and Economics 1969/12, pp. 1–22. Even if economic or ethical reasons for open use of benchmarks prevail, this could be achieved through the so-called 'implied licence' without giving up the certainty of clearly established property rights. After all, the EU competition law, the BMR, and the MIFIR prevent the administrators from discriminating against singled-out financial institutions. Moreover, the very idea of Intellectual Property is to make the information free for all to use eventually.

48 E.g., Judgement of the Court, 12 December 2002, Case C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt*, ECLI:EU:C:2002:748, at §§ 46–66.

Judgement of the Higher Regional Court of Frankfurt, 13 February 2007, Case 11 U 40/06 *Deutsche Börse AG wishing to protect the "DAX" stock indices*, ECLI:DE:OLGHE:2007: 0213.11U40.06KART.0A.

Judgement of the Rechtbank Den Haag, 22 July 2015, Case C-09-442420–HA ZA 13-512 *Euronext N.V. et al. v. Tom Holding N.V. et al.*, ECLI:NL:RBDHA:2015:8312.

Acts of law

Act of 23 April 1964 Civil Code, OJ 1601 of 2024, amended.

Act of 4 February 1994 on Copyright and Related Rights, OJ 2509 of 2022, amended.

Act of 30 June 2000 Industrial Property Law, OJ 1170 of 2023.

Act of 27 July 2001 on Databases, OJ 1769 of 2024.

Act of 29 July 2005 on Trading in Financial Instruments, OJ 722 of 2024, amended.

Commission implementing regulation (EU) 2016/1368 of 11 August 2016 establishing a list of critical benchmarks used in financial markets pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council, OJL 217/1 of 2016.

Commission delegated regulation (EU) 2018/65 of 29 September 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation, OJL 12/9 of 2018.

Commission delegated regulation (EU) 2018/67 of 3 October 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks, OJL 12/14 of 2018.

Commission delegated regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function, OJL 274/1 of 2018.

Commission implementing regulation (EU) 2018/1105 of 8 August 2018 laying down implementing technical standards with regard to procedures and forms for the provision of information by competent authorities to ESMA under Regulation (EU) 2016/1011 of the European Parliament and of the Council, OJL 202/1 of 2018.

Directive (EU) 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJL 077/20 of 1996.

Directive (EU) 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJL 173/349 of 2014.

Directive (EU) 2015/2436 of the European Parliament and the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, OJL 336/1 of 2015.

Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJL 130/92 of 2019.

Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJL 173/1 of 2014.

Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012, OJL 173/84 of 2014.

Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJL 171/1 of 2016.

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark, OJL 154/1 of 2017.

Literature

Baig A., **Winter D.B.**, *The Search for a New Reference Rate*, Review of Quantative Finance and Accounting, 2022/58, pp. 939–976.

Błaszczyk C., *Propertarianistyczne teorie prawa autorskiego*, C.H. Beck, Warszawa 2018.

Bouckaert B., *What Is Property?*, Harvard Journal of Law & Public Policy 1990/13, pp. 775–816.

Boulter L., *Legal Issues in Benchmarking*, Benchmarking: An International Journal 2003/10, pp. 528–537.

Cooter R., **Ulen T.**, *Law and Economics*, Pearson Addison Wesley, Boston–Columbus–Indianapolis 2014.

Demsetz H., *Information and Efficiency. Another Viewpoint*, Journal of Law and Economics 1969/12, pp. 1–22.

Drahos P., *A Philosophy of Intellectual Property*, Ashgate, Aldershot 2001.

Duffie D., **Dworczak P.**, *Robust Benchmark Design*, Journal of Financial Economics 2021/142, pp. 775–802.

Dutfield G., **Suthersanen U.**, *Global Intellectual Property Law*, Edward Elgar, Cheltenham–Northampton 2008.

Fisher W., *Theories of Intellectual Property*, in: S.R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge 2001, pp. 168–200.

Fletcher GG.S., *Benchmark Regulation*, Indiana University Maurer School of Law 2017/102, pp. 1929–1982.

Floreani J., **Polato M.**, *The Economics of the Global Stock Exchange Industry*, Palgrave Macmillan, Houndmills–New York 2014.

Giesen B., *Umowa licencyjna w prawie autorskim. Struktura i charakter prawny*, C.H. Beck, Warszawa 2013.

Haentjens M., **de Gioia Carabellese P.**, *European Banking and Financial Law*, Routledge, London–New York 2020.

Handke Ch., *Economic Effects of Copyright. The Empirical Evidence So Far*, Commissioned Paper Prepared for the Committee on the Impact of Copyright Policy on Innovation in the Digital Era, National Academies of the Sciences, Engineering, and Medicine 2011.

Hughes J., *The Philosophy of Intellectual Property*, Georgetown Law Journal 1988/77, pp. 330–350.

Johnson W.R., *The Economics of Copying*, Journal of Political Economy 1985/93, pp. 158–174.

Landes W.M., **Posner R.A.**, *The Political Economy of Intellectual Property Law*, The Journal of Legal Studies 1989/18, pp. 325–363.

Merges R.P., *Justifying Intellectual Property*, Harvard University Press, Cambridge–London 2011.

Moloney N., *EU Securities and Financial Markets Regulation*, Oxford University Press, Oxford 2014.

Pennesi F., *Equivalence in Financial Services. A Legal and Policy Analysis*, Palgrave Macmillan, Cham 2022.

Samuelson P.A., *The Pure Theory of Public Expenditure*, Review of Economic Statistics 1954/36, pp. 387–389.

Scott D., **Oliver A.**, **Ley-Pineda M.**, *Trademarks as property: A philosophical perspective*, in: L. Bently, J. Davis, J.C. Ginsburg (eds.), *Trademarks and Brands. An Interdisciplinary Critique*, Cambridge University Press, Cambridge 2008, pp. 285–305.

Webb R.I., *Transitory Real-time Property Rights and Exchange Intellectual Property*, The Journal of Futures Markets 2003/23, pp. 891–913.

Other sources

Annex A, the definition of an administrator. Principles for Financial Benchmarks, IOSCO, FR07/13, July 2013.

Final Report ESMA-EBA Principles for Benchmark-Setting Processes in the EU, June 6, 2013, ref. 2013/658.

Foxberry Index Management Index Correction Policy & Procedures, release date: 12 April 2023, https://www.foxberry.com/static/assets/docs/governance/index_correction_policy.pdf; accessed 6.01.2025.

Indices of Prague Stock Exchange, https://www.wienerborse.at/en/indices/services/stock-exchanges/prague; accessed 6.01.2025.

Licence Agreement, consistent with GPW Benchmark S.A. standard effective December 1, 2022, https://gpwbenchmark.pl/en-stosowanie_stawek_referencyjnych; accessed 6.01.2025.

Products & Services: Indices, https://zse.hr/en/indices-552/551; accessed 6.01.2025.

Questions and Answers on the Benchmarks Regulation (BMR), v. 27, 15 December 2023, https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf; accessed 6.01.2025.

Refinitiv TERM €STR Consultation Paper, release date: 26 June 2023, http://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/consultation-paper-june-2023.pdf; accessed 6.01.2025.

Regulations for the WIBID and WIBOR Reference Rates, adopted by the Management Board Resolution No. 16/2020 of 3 March 2020 (as amended) (Consolidated text as of: 17 July 2023).

Trademarks, http://www.stoxx.com/trademarks; accessed 6.01.2025.

Cezary BŁASZCZYK

WSKAŹNIKI REFERENCYJNE. MIĘDZY SZCZĄTKOWĄ WŁASNOŚCIĄ INTELEKTUALNĄ A *QUASI*-MONOPOLEM

Abstrakt

Przedmiot badań: Wskaźniki referencyjne są kluczowe dla rynków finansowych. Umożliwiają instytucjom finansowym działanie i tworzenie nowych produktów i usług, podczas gdy ich administratorzy czerpią zyski z ich licencjonowania. Nie jest jednak jasne, na jakiej podstawie opierają się roszczenia administratorów dotyczące praw do wskaźników referencyjnych, co z kolei może skłonić użytkowników wskaźników referencyjnych do zakwestionowania systemu licencjonowania.

Cel badawczy: Artykuł ma na celu poszukiwanie tych podstaw i podnosi, że interesy ekonomiczne administratorów wskaźników referencyjnych w UE są chronione poprzez *quasi*-monopol oparty na dwóch fundamentach. Po pierwsze, własność intelektualna do znaku towarowego danego benchmarku; po drugie, obowiązek (i uprawnienie) do kontrolowania procesu udostępniania i publikowania benchmarku (lub jego udostępniania). Jednakże ani prawo krajowe, ani prawo UE nie ustanawiają *sui generis*, bezpośredniego prawa własności do punktu odniesienia.
Metoda badawcza: Metodologicznie artykuł opiera się na analizie ustawodawstwa i odpowiednich aktów prawa miękkiego.
Wyniki: Podstawę prawną licencjonowania wskaźników referencyjnych można znaleźć w dwóch źródłach: 1) prawie znaków towarowych (zarówno krajowym, jak i europejskim); 2) oraz w uprawnieniach i obowiązkach administratora wynikających z art. 6 ust. 1 i art. 29 ust. 1 rozporządzenia BMR; jednakże tylko te drugie prowadzą do *quasi*-monopolu na wykorzystanie wskaźnika referencyjnego. Zarówno zakres, jak i poziom ochrony są znacznie mniejsze niż w przypadku majątkowego, wyłącznego prawa do wskaźnika.

Słowa kluczowe: wskaźnik referencyjny, administrator wskaźnika referencyjnego, BMR, licencja na indeks, filozofia własności intelektualnej.