LIABILITY FOR UNLAWFUL MAKING PROTECTED WORKS AVAILABLE TO THE PUBLIC AND FOR PROVIDING HYPERLINKS TO SUCH WORKS ON SOCIAL NETWORKING WEBSITES

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There has been a rapid development of social networking sites in the last years and as a result, more and more people use them. Social networking services are a special type of Internet services within which it is possible to develop social networking websites. Social networking sites serve their users, e.g. to contact other people having the same interests. Users have an opportunity not only to give access to some materials but also share them with other users. It should be noted that those users create their own accounts which they administer and, depending on the type of service, they are offered various functions. For example, within those services, it is possible to form particular interest groups, to send materials, and to communicate on an Internet forum or directly (e.g. with the use of applications provided by a given web portal). The article does not aim to focus on all functionalities of social networking portals but only on the one, the use of which may potentially violate copyright. The problem is important because social networking portal users are convinced that the functionality making it possible to give access to materials by successive users one by one causes that they will not be held liable even if the materials they give access to are provided unlawfully.

The functionality of social networking portals consists not only in making materials available on one's account, which results in the opportunity to get to know ones that other users have, but also in the possibility of making them available by

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other users on their accounts. The functionality of their further provision results from the fact that the social networking service gives their users a tool that enables them to use and make available[1] on their accounts the material uploaded by another person. It should be emphasized that the person who makes the material available does not upload it to the social networking website but only uses what has already been uploaded by placing hyperlinks to such material. Users of social networking services unquestionably upload more and more materials that can be subject to copyright protection. As a result, quite often, uploading infringes the law. Taking that into account, it is necessary to consider what activities performed within the functionality of social networking portals may constitute a source of copyright violation. Not only uploading particular materials protected by copyright by the first user should be analysed, but also successive users' activity of re-posting the material to others. Summing up, it should be stated that in some cases not only a person who has posted the material first but also a person who makes it available (provides a hyperlink) shall be liable for the infringement of copyright. The analysis covers the liability of entities laid down in the Act on copyright and related rights[2]. Apart from those considerations, the article analyses the issue of social networking websites' liability as they are entities that provide electronic services but do not participate in the act of making materials available. Such a thesis raises a series of questions. First of all, it is necessary to answer a question whether an act of posting a material protected by copyright on a social networking website may constitute grounds for liability for the infringement of copyright. Next, it is necessary to consider whether the successive re-posting may also be the violation of law and if so, what the reasons for that liability are.

The specificity of social networking operations requires considering what the violation of copyright on the web portal may consist in. Undoubtedly, like in case of "traditional infringements", the violation of authors' economic rights on a web portal will occur when a particular user infringes another person's copyright. This means that if a user posts somebody else's work on his account, this activity is a direct violation of copyright. As a result, examining whether the violation of the author's economic rights has occurred, it is necessary to compare the concept of violation referred to in Article 79 para. 1 Act on copyright with the actual activity infringing somebody else's copyright.

The fact of infringement is independent of attribution of fault to a given entity, which means that the infringement alone may take place by intentional or unintentional fault and in a situation when the fault cannot be attributed to

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[1] In accordance with Article 6 para. 1(3) Act on copyright, dissemination of a work takes place when a work, with the author's consent, is made available to the public in any way. This means that dissemination is a special legal form of making a work available to the public. As a result, making available to the public may be lawful as well as unlawful. Taking that into account and realising the fact that the provisions of the Act on copyright often use those concepts inconsistently, in case of making a work available to the public unlawfully, I will use the concept of "making available" and not "disseminating".

[2] Act of 4 February 1994 on copyright and related rights, uniform text, Journal of Laws [Dz.U.] of 2018, item 1191, as amended; hereinafter: Act on copyright.

perpetrators of the infringement.[3] The recognition of an infringement does not mean that a copyright holder will always be able to make all claims referred to in Article 79 para. 1 Act on copyright. The recognition of an infringement is the first circumstance making it possible to bring a claim. At the same time, it is also a circumstance which should be proved in case of making claims. In practice, prints of Internet pages with unlawfully provided materials protected by copyright, the authenticity of which is confirmed by a professional proxy or a notary, may constitute evidence for such claims. Courts admit both forms of confirmation as sufficient evidence that the infringement has occurred. By the way, it is worth mentioning that not all social networking services are open to the public. Internet services, as a rule, are divided into open (public) ones that are accessible to all Internet users (external social networking) and those called closed (private) services, accessible to particular users (e.g. a given company's staff).[4]

The general rule for the functioning of social networking services is that they provide their users with the possibility of determining the level of privacy and adjusting it to their needs. This means that a user, posting a particular material, may decide to what extent it will be made available. He may make it available to the public or a predefined group of people, or only one person, or "hide" it in the way that no other user will get access to it. In the light of that, a question is raised when an infringement occurs. This question requires an analysis of the scope of infringement through the prism of the regulations of the Act on copyright concerning the principle of allowed use. Doubtless, if an entity, making some work available to the public with the use of a social networking portal, can efficiently refer to the principle of allowed public or private use, infringement does not take place. Due to the fact that the provisions of the Act on copyright limit considerably the allowed public use, it is worth examining whether a web portal user may refer to the principle of allowed private use.

Discussing the possibility of applying the principle of allowed private use referred to in Article 23 Act on copyright, first of all, it is necessary to determine entities to which the regulation is applicable. Article 23 para. 2 Act on copyright answers the question indicating that the scope of private use covers the use of single copies of a work by people being in personal relationship, especially blood kinship, affinity or social relationship. As a result, there is no doubt that private use concerns natural persons. What suggests it is the description of the circle of "persons being in personal relationship". Blood kinship, affinity or social relationship may refer only to natural persons. Moreover, attention should be drawn to the fact that the provision is not applicable to all natural persons. According to the stand expressed by the Appellate Court in Warsaw, it cannot be assumed that the above-mentioned regulation is applicable to a person doing business and obtaining profits from that

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[3] See P. Podrecki, *Komentarz do art. 79*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz*, LEX 2015.

[4] See A. Szewczyk, *Popularność funkcji serwisów społecznościowych*, Zeszyty Naukowe Uniwersytetu Szczecińskiego. Studia Informatica (at present: Studia Informatica Pomerania) No. 28, 2011, p. 384.

activity.[5] In the context of social networking services functionality, it should be indicated that some of those services provide users with an opportunity to open a company account, i.e. one that is connected with the performance of professional activities. It must be noted, however, that in case of natural persons doing business, it is sometimes difficult to distinguish their professional activity in the service from the private one. Nevertheless, it is necessary to state that a person who makes a work available to a potential customer will not be able to refer to the principle of allowed private use. The nature of the website cannot determine whether a given person may apply the principle or not. What is decisive is the purpose for which a work is made available and an entity given access to it (being in the circle of people in personal relationship, especially blood kinship, affinity and social relationship).

Regardless of the above-presented considerations concerning the possibility of referring to the principle of private use by an entity making a work available, it is necessary to determine facts related to making a work available to the public that may indicate an infringement. In general, as it has been indicated above, two ways of making content available with the use of social networking services may be distinguished. The first one consists in posting the material protected by copyright in the social networking service directly. The second one consists in making available of hyperlinks to formerly posted materials (re-posting). Undoubtedly, both forms of dissemination may be related because there are situations in which a user posts material protected by copyright and, at the same time, provides other users with a possibility of making it available to more users. On the other hand, another user makes the material available providing a hyperlink to the source on his account.

The analysis of the issues requires appropriate interpretation of the provisions of national law through the prism of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[6] and case law of the Court of Justice of the European Union (hereinafter: CJEU or the Court of Justice). While the rules of liability of a person unlawfully posting material protected by copyright in a social networking service do not raise doubts, the issue concerning liability of a person making the material available with the use of a hyperlink is controversial. Depending on whether the material to which a link has been posted was formerly made available to the public lawfully or not, the liability of a person re-posting it is based on different rules.

In case of re-posting, the material protected by copyright, which was formerly made available to the public in compliance with law (i.e. disseminated in the

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[5] In accordance with the judgement of the Appellate Court in Warsaw of 5 February 2003, I ACa 601/02, LEX No. 1680981, "Pursuant to Article 23 para. 2 Act on copyright and related rights, the scope of private use covers the circle of persons having a personal relationship, especially blood kinship, affinity or social relationship. It cannot be assumed that the above-mentioned provision is applicable to the defendant involved in business activities and obtaining profits from that". The opinion that the allowed private use does not concern the so-called commercial use is also expressed in the doctrine; see W. Machała, *Dozwolony użytek prywatny w polskim prawie autorskim*, Warsaw 2003, p. 68; J. Barta, R. Markiewicz, *Prawo autorskie*, Warsaw 2010, pp. 169–161.

[6] OJ L 167/10, 22 June 2001; hereinafter: Directive 2001/29/EC.

meaning of the provisions of the Act on copyright), the interpretation of the provisions of Directive 2001/29/EC expressed in the Court of Justice judgement of 13 February 2014 in the case C-466/12[7] is of key importance. The Court of Justice ruled that: "Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute 'an act of communication' to the public, as referred to in that provision".[8] Referring the above suggestion to a situation in which a user of a social networking website places a link to such materials on his account in the service, it is necessary to draw attention to his conduct that cannot be classified as a violation when an entity posting the material addresses it to an unlimited number of people. In accordance with the CJEU stand, such conduct cannot be recognised as making works available to the public at all within the meaning of Article 3(1) Directive 2001/29/EC. A situation is different when a link is made available to a bigger number of people than the entity posting the material protected by copyright originally intended. In the quoted judgement, the Court of Justice directly indicated that "(…) in order to be covered by the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, a communication, (…) concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public" (para. 24). It seems that such a situation can be extremely rare. It results from the fact that most social networking services provide a possibility of determining the circle of persons who may have access to material posted by a particular user (privacy settings). As a result, a person posting a hyperlink to the material would have to circumvent the service privacy protection (changing its functionality) or upload the material after prior downloading it. This would certainly be making the material available to the public recognised as the infringement.

A situation when the material protected by copyright is made available without the copyright holder's consent remains another issue. What is important in such a situation is whether a person making a link available did it within their commercial activity or not.

First of all, it is necessary to note that the considerations concerning links to the content posted on the net unlawfully because they are subject to copyright protection must be preceded by general comments concerning the nature of the

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[7] CJEU judgement of 13 February 2014 in case *Nils Svensson and Others v. Retriever Sverige AB*, C-466/12, LEX No. 1424770.

[8] In accordance with Article 3(1) Directive 2001/29/EC, "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

Internet and its role. The comments are important for the comprehension of the meaning of the rights guaranteed in the Charter of Fundamental Rights of the European Union,[9] i.e. on the one hand, the right resulting from Article 11 CFR, freedom of expression and the right to information, and on the other hand, the rights of entities entitled under copyright. In the judgement of 8 September 2016, C-160/15, the CJEU directly stated that "(…) the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information".[10] In addition, the CJEU noted that "(…) it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it".[11] The above statements made the CJEU conclude that "Article 3(1) of Directive 2001/29/EC (…) on the harmonization of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed".[12]

Referring the above statement to the national legislation, it is necessary to consider whether an entity making available of a hyperlink to the materials protected by copyright, which have been posted in the social networking service without the consent of the copyright holder, should be treated as the direct perpetrator of the infringement or as an accessory (Article 411 Civil Code).

Discussing the possibility of recognising a person making available of a link to materials protected by copyright as an accessory, it is necessary to state that the person cannot be classified as one. One should highlight an opinion expressed in case law that the conduct of an accessory should help a perpetrator cause damage, i.e. create circumstances for it to take place. It does not matter, at the same time, whether an accessory obtains financial profit from somebody else's

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[9] OJ C 303/01, 14 December 2007, as amended; hereinafter: CFR.

[10] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV*, *Playboy Enterprises International Inc.*, C-160/15, LEX No. 2099013, para. 45.

[11] *Ibid.*, para. 46.

[12] *Ibid.*, cf. the ruling.

prohibited act; on the other hand, an entity acting in this role should be aware, i.e. have the knowledge, that their activity may contribute to causing damage.[13] Moreover, somebody who has not cooperated with a perpetrator in causing damage cannot be recognised as an accessory,[14] which means a person whose activity was preceded by the perpetrator's activity,[15] because as a rule it applies to assistance in causing damage that can take place only before actually causing it.[16] Based on the above judicial opinions, one can assume that a person making a hyperlink available starts implementing an act, regardless of an activity of a perpetrator, who directly and unlawfully posted material protected by copyright on the Internet. Since the next person making a hyperlink available cannot be recognised as an accessory within the meaning of Article 422 Civil Code, it is necessary to consider in what situations the person may be recognised as a perpetrator of the direct infringement. In accordance with the stance expressed in the above-quoted CJEU judgement,[17] in specified situations it will be recognised as the violation of copyright, i.e. posting links to materials formerly unlawfully posted on the Internet by another user will be recognised as making works available to the public without the consent of the copyright holder.[18] However, in accordance with the interpretation adopted in this judgement, liability depends on whether a particular person has committed the act within their commercial activity and on the type of offence that can be attributed to them.

It should be highlighted that in the light of the above interpretation, the liability of people who make available hyperlinks to the material protected by copyright and are not involved in commercial activities depends, inter alia, on proving intentional

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[13] Judgement of the Appellate Court in Gdańsk of 21 May 2015, I ACa 39/15, LEX No. 1953163.

[14] In accordance with the judgement of the Appellate Court in Warsaw of 13 June 2014, I ACa 1754/13, LEX No. 1488728, "An entity that, without the element of cooperation, only allows or in another way facilitates other people's activities cannot be recognised an accessory within the meaning of Article 422 Civil Code. Thus, in order to attribute accessory conduct to an entity, it is necessary to prove that they were aware they assisted a principal in unlawful conduct that may cause damage".

[15] Judgement of the Appellate Court in Warsaw of 13 June 2014, I ACa 1754/13.

[16] See the Supreme Court judgement of 20 September 2013, II CSK 657/12, Legalis. Also see M. Kondek, *Komentarz do art. 422*, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Warsaw 2017, Legalis.

[17] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

[18] In the light of the above stance of the CJEU, it is not possible to assume this to be right that "with regard to the right to make a work available to the public regardless of whether there is a possibility of (a) 'exact absorption' of CJEU judgements concerning (...) the issue of [referencing with the use of click-links to works posted on the Internet] or only (b) their partial implementation (...), it is necessary to adopt the interpretation of national law based on a different construction (indirect infringement of copyright instead of the direct one) from the one adopted by the CJEU while interpreting Directive 2001/29/EC of 2001". Thus, R. Markiewicz, *Zdezorientowany prawnik o publicznym udostępnianiu utworów*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego No. 4, 2016, p. 5 ff. In accordance with the interpretation by the CJEU, a perpetrator posting hyperlinks to works unlawfully posted in the net makes them available to the public, which violates copyright. If "making available to the public" is attributed to a person, it means he is a direct not an indirect perpetrator.

or unintentional fault in the form of negligence. However, in case of business entities, the provisions of copyright should be interpreted as meaning that the Directive 2001/29/EC imposes special duties on those entities as they are professionals operating in the market. Thus, their operations should be characterised by special diligence in checking whether the hyperlinks direct them to materials that have been posted on the Internet lawfully.[19]

In the light of the above statements, a few comments must be made in connection with what circumstances should be proved in a situation when copyright holders claim compensation based on general rules (Article 79 para. 1(3a) Act on copyright) as well as when they claim damages referred to in Article 79 para. 1(3b) Act on copyright.

In case of claiming compensation pursuant to general rules, it is necessary to provide evidence of the following circumstances: that in case a plaintiff is entitled as a holder of the author's economic rights, an unlawful infringement of copyright has occurred (a prohibited act); the infringement of copyright is caused by the fault (intentional or unintentional); financial loss has occurred and its amount is defined. In addition, it should be proved that there is a reason-cause relation between infringement of copyright and the damage.[20] The proper interpretation of Article 79 para. 1(3a) Directive 2001/29/EC leads to a conclusion that a copyright holder, in order to properly provide grounds for their claims, must prove that a person who has infringed their rights acted intentionally or unintentionally in the form of negligence.

By the way, it should be highlighted that intentional fault takes place in a situation when a perpetrator intends to infringe copyright (direct intent) or predicts the possibility of such an infringement and agrees for the result (oblique intent).[21] There is an opinion in literature that the assessment of a situation is much more difficult if a perpetrator acts unintentionally. According to A. Olejniczak, unintentional fault occurs when "a perpetrator does not want to act unlawfully and, although he takes into account such a possibility, does not agree for a result, groundlessly thinking that he may avoid it (recklessness, flagrant negligence). Negative assessment also concerns a situation when a perpetrator is unaware of the fact that his conduct

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[19] Also see T. Karaś, S. Żółtek, *Bezprawność w prawie cywilnym i karnym*, Prokuratura i Prawo No. 11, 2006, p. 115 ff.

[20] P.F. Piesiewicz, *Dochodzenie odszkodowania na podstawie art. 79 ust. 1 pkt 3a i 3b pr. aut. ze szczególnym uwzględnieniem wykładni pojęcia „stosownego wynagrodzenia"*, Palestra No. 1–2, 2018, pp. 71–75.

[21] As the Appellate Court in Łódź rightly indicated, "civil law does not define the concept of fault. With the use of the Criminal Code output in this area, it is assumed that the concept contains two components: an objective and a subjective one. The objective element means the conduct is not in conformity with the binding norms (unlawfulness *sensu largo*). The subjective element concerns the relation between the actor's will and consciousness and his act. In other words, fault may be attributed to a subject only in case there are grounds for negative assessment of their conduct from the point of view of both those elements: the so-called conduct chargeability". See the judgement of the Appellate Court in Łódź of 4 February 2014, I ACa 915/13, LEX No. 1438084. Also see M. Serwach, *Wina jako zasada odpowiedzialności cywilnej oraz okoliczność zwalniająca z obowiązku naprawienia szkody*, Wiadomości Ubezpieczeniowe No. 1, 2009, p. 84 ff and the literature and case law referred to therein.

may be unlawful, although he had an opportunity and a duty to carry out a proper assessment if he acted with due diligence (negligence)".[22] Undoubtedly, the above opinion blurs the difference between recklessness (conscious unintentionality) and negligence (unconscious unintentionality), because that author indicated "flagrant negligence" as a synonym of recklessness. It must be firmly emphasized that recklessness and negligence are two different forms of unintentional fault. The above differentiation is of key importance for the proper interpretation of Article 79 para. 1(3) Directive 2001/29/EC in the context of the above-quoted CJEU judgement of 8 September 2016.[23]

Referring to substantive criminal law, it should be indicated that the element distinguishing intentional fault from unintentional one is the lack of a perpetrator's intention. A wish to commit a tort is a form of direct intent. On the other hand, oblique intent occurs when a perpetrator agrees for his conduct to become a tort. As a result, it should be assumed that the essence of oblique intent is not the fact that a perpetrator of an infringement does not want to obtain the effect in the form of a tort but also does not want it to take place. This means that the realisation of a possible result has been indifferent to him and has not played an important role in the motivational process. The oblique intent takes place when two negative conditions are fulfilled. On the one hand, a perpetrator is not willing to commit a tort (the will is a decisive factor for direct intent), and on the other hand, he is not convinced that he may avoid the commission of an offence, which is typical of recklessness.[24] According to the above-quoted judicial opinion, "the most important element of the assessment whether a particular case involves oblique intent or recklessness is determination of an objective level of probability of committing a prohibited act and a perpetrator's awareness of this probability, which should be assessed with regard to the perpetrator's experience and common evaluation of a given incident. If the level is objectively high and is reflected in the perpetrator's awareness and, at the same time, he is convinced that a criminal result will not occur, the issue of *dolus eventualis* is unquestionable".[25]

Referring the forms of fault recognised in the Polish law to the above-quoted CJEU judgement,[26] it is necessary to highlight that in a situation when hyperlinks are made available without a commercial aim, the liability of a person concerned is limited to intentional fault with both direct and oblique intent, and unintentional fault in the form of recklessness. The above belief results from the fact that, in its judgement, the CJEU expressed the opinion that a person making a hyperlink available without a commercial aim who did not know or could not rationally know about unlawful nature of a publication of the material on a different website cannot

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[22] A. Olejniczak, *Komentarz do art. 415*, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. 3: *Zobowiązania – część ogólna*, 2nd edition, LEX 2014.

[23] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

[24] See the judgement of the Appellate Court in Szczecin of 15 January 2015, II AKa 219/14, LEX No. 1999331.

[25] *Ibid.*

[26] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

be subject to liability (negligence or lack of fault). The essence of negligence is that the perpetrator of the infringement does not predict, i.e. does not know, that his conduct may constitute an activity infringing somebody's copyright. However, he might predict that if he were diligent enough.

In order to assess the fault in the form of negligence, the measure of diligence adopted as a pattern of proper conduct is decisive.[27] It is necessary to notice that the concept of "a pattern of proper conduct" should be understood in a different way in relation to a person involved in commercial activities connected with the operation of the social networking website and in a different way in relation to a person who is not involved in such activities. No provision of the Act on copyright imposes an obligation on a person posting a hyperlink to materials protected by copyright to check whether a particular material has been made available lawfully or not. The measure of due diligence in relation to a person who is not involved in commercial activities should be understood as meaning that the person, although not having the knowledge about unlawful posting of the material to which hyperlinks are provided, could presume their unlawful posting based on all accompanying circumstances (negligence, the so-called unconscious unintentionality).

The liability of people who made the above-mentioned hyperlinks available for commercial purposes is totally different. The discussion of the matter requires that two issues are explained: the issue of fault and the interpretation of "commercial purpose". As far as fault is concerned, it should be highlighted that the appropriate interpretation of Article 79 para. 1(3a) Act on copyright leads to a conclusion that an entity claiming his rights resulting from the infringement does not have to prove the fault of the perpetrator. Pursuant to the above-quoted CJEU judgement, Article 3(1) Directive 2001/29/EC constitutes the presumption of intentional and unintentional fault in the form of recklessness (conscious unintentionality). The Court of Justice states that when a hyperlink was made available for commercial purposes, it should be presumed that there was knowledge that the posted hyperlinks were to the materials unlawfully provided in the network. It does not raise any doubts that in case of direct intent (i.e. a will to commit a tort), oblique intent (i.e. agreeing for the commission of a tort) and recklessness (prediction of the commission of a tort, called conscious unintentionality), a perpetrator must know about the unlawful nature of his activity. As a result of the presumption, a person posting a hyperlink to materials protected by copyright and unlawfully provided in the net will have to prove that he is not at fault.

As far as determining the scope of the term "commercial purpose" is concerned, it seems that it should not only cover situations in which posting a hyperlink makes it possible to obtain direct income. Making a hyperlink available for commercial purposes should be interpreted in a broader sense, i.e. as meaning that a perpetrator obtains, e.g. benefits by drawing the attention of other users of the social networking site and their interest in his account, and as a result interest in his commercial activity.

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[27] See the Supreme Court judgement of 15 December 1954, 1 C 2122/53, Przegląd Ustawodawstwa Gospodarczego 1956, No. 7, p. 276.

The liability of a perpetrator in case of claims in accordance with the rules laid down in Article 79 para. 1(3b) Act on copyright looks totally different. The plaintiff under the above-quoted Article does not have to prove a perpetrator's fault but must prove that he is the holder of the author's economic rights; that his economic right has been infringed (a prohibited act); economic loss has occurred and, in case of claiming damages, provide the basis adopted for the calculation of the amount claimed. Moreover, he must prove that there is a cause-result relation between the incident resulting in the loss (infringement of the author's economic rights) and the loss incurred.[28] The lack of the obligation to prove fault does not have impact on the liability of a person who has made a hyperlink available for commercial purposes for, as it has been indicated above, the presumption of knowledge of the unlawful nature of the materials should be connected with intentional and unintentional fault in the form of recklessness (conscious unintentionality).

The liability of a person who has made a hyperlink available for no commercial purpose will be different. In the context of the above, a question is raised whether, if the liability laid down in Article 79 para. 1(3b) Act on copyright is not the one based on fault, such a person may be an entity legitimated passively. The answer to the question seems to be positive but a few reservations should be made. Undoubtedly, Article 79 para. 1(3b) Act on copyright is the entitlement for an entity whose economic rights have been infringed to make claims that are indicated therein. The interpretation made in the above-quoted CJEU judgement cannot annul this right. Thus, another question is raised concerning the rules laid down in the provision based on which a perpetrator may be held liable for making hyperlinks available for no commercial purposes if his liability depends on the occurrence of his intentional or unintentional fault in the form of recklessness (conscious unintentionality). The necessity of the occurrence of the perpetrator's fault within the scope described in the previous sentence does not change the scope of the evidence-taking proceedings. This means that the plaintiff claiming his rights still does not have to prove the perpetrator's fault. However, the formulation of claims indicates the scope of the other party's defence, which means that the entity legitimated passively (the perpetrator) will be able to raise a charge making him exempt from liability, i.e. that he has acted within his unintentional fault in the form of negligence (unconscious unintentionality); obviously, he will have to prove this circumstance.

Summing up, it is necessary to emphasize the significance of the CJEU judgement concerning posting hyperlinks to materials protected by copyright. As a consequence of the extraordinary nature of the judgement, it does not have impact on the general interpretation and application of the national law, i.e. Article 79 para. 1(3) Act on copyright, but exclusively concerns facts connected with posting links, including those on social networking websites. The judicial practice will show whether the appropriate interpretation of the CJEU judgement will result in the modified interpretation of Article 79 para. 1(3) Act on copyright. There is no doubt that the issue will require that adjudicating courts thoroughly analyse Directive 2001/29/EC and the conditions for liability laid down in the Act on copyright, especially

[28] P.F. Piesiewicz, *Dochodzenie odszkodowania…*, pp. 71–75.

concerning perpetrators' fault. It should be remembered that the liability laid down in Article 79 para. 1(3b) Act on copyright concerns liability that does not depend on fault. The interpretation of Article 3(1) Directive 2011/29/EC does not limit the possibility of claiming rights based on this regulation, however, since the liability of a perpetrator who is not involved in commercial activities is limited to intentional or unintentional fault in the form of recklessness (conscious unintentionality), the person may make himself exempt from liability formulating a charge and proving at least his negligence. What is also important is the presumption of infringement which, based on national legislation, results in the presumption of fault. If the perpetrator wants to free himself from liability, in case of claims against him under Article 79 para. 1(3a) Act on copyright, the presumption imposes on him an obligation to prove that he has acted without fault. On the other hand, in case of claims under Article 79 para. 1(3a) Act on copyright against a person who has provided links unrelated to professional activity, it is necessary to prove that his fault has been intentional or unintentional in the form of recklessness (conscious unintentionality). However, the perpetrator's negligence (unconscious unintentionality) cannot result in liability for the infringement of an author's economic rights.

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LIABILITY FOR UNLAWFUL MAKING PROTECTED WORKS AVAILABLE TO THE PUBLIC AND FOR PROVIDING HYPERLINKS TO SUCH WORKS ON SOCIAL NETWORKING WEBSITES

Summary

Users of social networking sites post more and more materials that may be subject to copyright and related rights. As a result, these activities quite often constitute a breach of law. The article describes what activities – carried out as part of the functionality of social networking websites – can result in copyright infringement. The analysis covers not only the issue of posting a specific material protected by copyright on the website by its user, but also subsequent activities consisting in making the material available (re-posting) by providing reference (hyperlinks). The author puts forward a hypothesis that in some cases not only the person who places material on a social networking website but also the person who makes the material available by posting a hyperlink to it is liable for the infringement of copyright.

Keywords: Internet, hyperlink, copyright, European law, subject of copyright, work, protection of author's economic rights, redress for the inflicted damage, social media

ODPOWIEDZIALNOŚĆ ZA BEZPRAWNE PUBLICZNE UDOSTĘPNIANIE UTWORÓW ORAZ ZA PUBLICZNE UDOSTĘPNIANIE HIPERLINKÓW DO TAKICH UTWORÓW W SERWISACH SPOŁECZNOŚCIOWYCH

Streszczenie

Użytkownicy serwisów społecznościowych zamieszczają coraz więcej materiałów, które mogą stanowić przedmiot ochrony prawem autorskim. W konsekwencji niejednokrotnie na skutek takiego umieszczenia dochodzi do naruszenia prawa. Niniejszy tekst opisuje, jakie czynności – realizowane w ramach funkcjonalności portali społecznościowych – mogą stanowić

źródło naruszenia prawa autorskiego. Analizie poddano nie tylko zagadnienie związane z umieszczeniem określonego materiału objętego ochroną prawa autorskiego na portalu przez użytkownika, lecz także czynności kolejne, polegające na dalszym udostępnianiu tego materiału (re-post) poprzez umieszczenie odsyłaczy (hiperlinków). Autor stawia tezę, iż w niektórych przypadkach odpowiedzialnym za naruszenie prawa autorskiego będzie nie tylko osoba, która umieściła określony materiał na portalu społecznościowym, lecz także osoba, która ten materiał dalej udostępniła poprzez zamieszczenie hiperlinku.

Słowa kluczowe: Internet, hiperlink, prawo autorskie, prawo europejskie, przedmiot ochrony prawa autorskiego, utwór, ochrona autorskich praw majątkowych, naprawienie szkody, media społecznościowe

Cytuj jako:

Piesiewicz P.F., *Liability for unlawful making protected works available to the public and for providing hyperlinks to such works on social networking websites [Odpowiedzialność za bezprawne publiczne udostępnianie utworów oraz za publiczne udostępnianie hiperlinków do takich utworów w serwisach społecznościowych]*, „Ius Novum" 2018 (12) nr 4, s. 131–144. DOI:10.26399/iusnovum.v12.4.2018.39/p.f.piesiewicz

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