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JUDICATURE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND «DISTRIBUTION OF WORKS» IN POLISH COPYRIGHT LAW

Summary. The rapid development and creation of the new ways of distributing copyrighted material makes it difficult for both European, and Polish lawmakers to keep pace with it. The article mentions recent changes in the jurisprudence concerning important aspects starting with the extended definition of piracy. It handles also the intricacies of public communication vs. public sharing and resulting criteria for a copyright infringement. The civil and criminal responsibility of providers of different Internet services e.g. peer-to-peer is also discussed.

Keywords: distribution of works, copyright law, intellectual property, public communication, peer-to-peer network administrators.

Art. 116 of the Act of 4 February 1994 on Copyright and Related Rights (Journal of Laws 2017.880, consolidated text as of 5 May 2017) stipulates that anyone who distributes a somebody else's work in its original form or developed, an artistic performance, phonogram, videogram or broadcasting without authorisation or against its conditions, shall be subject to a fine, penalty of restriction of liberty or imprisonment of up to 2 years. The amendment, which entered into force on 1 September 1998, changed the threat for the underlying misdemeanour from fine, penalty of restriction of liberty or imprisonment for up to one year, to the current threat of fine, restriction of liberty or imprisonment for up to two years[1]. Although this provision, apart from the threat of punishment, has not been changed in its content, it should be pointed out that, with the development of technology, its application has changed significantly. Challenges related to the development of the Internet, as well as the possibility of making works publicly available have significantly influenced not only the civil law aspect of copyright protection, but also the understanding of hallmarks of the types of prohibited acts indicated in criminal regulations of the Act on Copyright and Related Rights (hereinafter referred to as "copyright"). The abundant judicature of the Court of Justice of the European Union, which actively develops the understanding of concepts such as distribution of a work or making it available, is also important for understanding and interpretation. This, in turn, directly influences the shape of national judicature and current trends in the application of criminal

[1] Journal of Laws 1997.88.554 Art. 5 s. 2 subpara. 36.

copyright laws.

Art. 116 para. 1 of the copyright act penalizing distribution of a work without permission refers to the phenomenon of "piracy", which most often, today, terms the manufacture or distribution of products infringing intellectual property rights (copyright and related rights, patent, trade mark, utility model)[1]. The doctrine states that piracy is also considered to be an illegal interception of radio and television broadcasts, as well as other services provided in information society[2]. In the age of information society, illegal copying and using intellectual property on the Internet are also regarded as piracy. The Internet also creates new opportunities for forms and ways of distributing works of others. For the purposes of this study, it should be pointed out that the doctrine takes into account the terminology used in various legal acts, and consequently distinguishes two general categories of on-line distribution, namely public communication and public sharing[3].

The form of distribution of a work on the Internet, which is the public communication, has repeatedly been the subject of considerations of the CJEU. What is important, in the current jurisprudence, there is a tendency to extend the responsibility for infringements of copyright on the Internet. To see the development of understanding of the distribution of a work by public communication, it is important to analyse the key judgements of the CJEU, forming, and often substantially altering the interpretation of the concept of "distribution" of a work.

In the first place, it should be pointed out that the activity of the CJEU in terms of understanding the distribution of a work on the Internet and possibility of assigning responsibility for a distribution was reflected in the judgement of 13.02.2014, where, referring to linking works, the court indicated that sharing, on a website, of clickable links to protected works generally available on another website, was not an act of public sharing (C-466/12)[4]. At the same time, the Court emphasized that this did not preclude Member States from granting wider protection to copyright holders. This ruling has had a significant impact on the perception of distribution of works on the Internet, since it is clear from its content that linking is, in principle, an "act of sharing" of a work, but it requires consent from the author only if it leads to sharing of the content with a new audience, i.e. an audience that originally did not have access to the work[5].

In the verdict issued to the case C-466/12 the Court did not, however, refer to the significant problem of linking to works distributed in violation of copyright. This problem was raised in the decision of the CJEU of 12.10.2014 issued to the case C-348/13. The ruling was issued based on a dispute regarding embedding of content of a web site in another web site, which can be viewed without having to change the web site

[1] Cf. Z. Ćwiąkalski [in:] Barta Janusz (ed.), Markiewicz Ryszard (ed.), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz,* fifth edition, Lex/el.

[2] J. Barta, R. Markiewicz, *Prawo autorskie i prawa pokrewne,* Kraków 2004, p. 189.

[3] J. Barta, R. Markiewicz, *Prawo autorskie,* Warszawa 2013, p. 400.

[4] http://curia.europa.eu/juris/document/document.jsf?docid=147847&doclang=PL

[5] Ibidem.

as it is in the case of linking. In the aforementioned judgement, the CJEU considered that in the case of embedding the content infringing copyright, no copyright infringement was committed, since the film (work) had previously been uploaded to YouTube, and thus embedding it on another web site had not presented it to a new audience, and embedding itself is not using of a new technology or means of communication, so it cannot be distinguished as a new form of distribution. The embedding entity cannot be held responsible for copyright infringement committed by the original infringer, who infringed copyright while uploading the video on YouTube.

Another significant decision that clearly influences the understanding of distribution in the form of public sharing is the judgement of the CJEU of 26.04.2017 in the Stichting Brein case, C-527/15[1]. In that judgement, the Court, referring to its settled judicature, stated that recognition that "public sharing" required the protected work to be shared based on using of a special technology other than those used so far, or — in the event of non-fulfilment of the above condition — to a "new audience", i.e. an audience who had not yet been taken into account by the copyright holder allowing for the original public sharing of the work. It was important that it was enough for the work to be shared with the public in a manner that gave its members an access to it — at the place and time they chose — regardless of whether or not they made use of it[2]. Such an understanding of sharing corresponds also to an adopted in the Polish doctrine conception on the analysed Art. 116 s. 1 of the copyright act, according to which the fact that the legislator, in the rule, used an imperfective form of "distributes" and not "distributed", determines that to satisfy the criteria of a prohibited act, the behaviour of the violator is important, and not the result of his behaviour[3]. Otherwise, it would be necessary to show that any person became acquainted with the distributed work.

From the point of view of responsibility for distribution of works on the Internet, the judgement of the CJEU of 14 June 2017, issued in case C-610/15, is also very significant[4]. Making a preliminary ruling, the Court analysed the responsibility of the peer-to-peer network administrators and pointed out that the concept of "public sharing" included on-line management and giving access to an exchange platform, which, by indexing protected works' metadata and providing a search engine, enabled users to find these works and exchange them within a peer network. This ruling may be a breakthrough in the current understanding of the concept of distribution of a work, and in particular, it unfairly, in the view of the author of this work, opens the possibility to assign responsibility for distribution to peer-to-peer networks' administrators. All the more so as, as stated by Advocate General Maciej Szpunar in

[1] http://curia.europa.eu/juris/document/document_print.jsf?doclang=PL&text=&pageIndex=0&part=1&mode=lst&docid=186069&occ=first&dir=&cid=349428.

[2] Ibidem.

[3] Cf. Z. Ćwiąkalski [in:] Kardas Piotr (ed.), Sroka Tomasz (ed.), Wrybel Włodzimierz (ed.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla,* Vol. II, Lex/el.

[4] http://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=353526.

his opinion in case C-610/15, operators of peer-to-peer web sites create a system that allows users to access works that are communicated by other users. Their participation can therefore be considered essential[1].

By analysing the aforementioned judgements, there can be noticed an emerging tendency to clarify the understanding of the notion of distribution of a work - by introducing the requirement of sharing on the basis of a special technology other than technologies used until now or the requirement of sharing with a new audience. This tendency should be considered right - allowing to mark boundaries more precisely when it comes to distribution.

On the other hand, it should be noted that, particularly in the last judgement (C-610/15), the Court is gradually seeking to extend the scope of entities which, in its opinion, distribute works by sharing them. Such an interpretation may affect the way of assigning responsibility for the performance of features of a prohibited act under Art. 116 s. 1 of the copyright act, because, following the Court's interpretation, there can be considered the assignment of perpetration of the criminal offence under Art. 116 s. 1 of the copyright act to the intentionally acting peer-to-peer network administrator, and not, as previously presupposed, a mandate in committing the forbidden act. Considering such significance, an ongoing observation of national judicature in the short term, in particular as regards the possible taking into account of the Court's deliberations in the issuance of criminal judgements concerning the assignment of performance of criteria of offence to the perpetrators of a forbidden act under Art. 116 s. 1 of the copyright act.

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9. Opinion of Advocate General Maciej Szpunar of 08/02/2017, c-610/15.
10. Act of 4 February 1994 on Copyright and Related Rights (Journal of Laws 2017.880, consolidated text as of 05/05/2017).

[1] http://curia.europa.eu/juris/document/document.jsf?text=&docid=187646&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=353526.

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Судочинство Суду Європейського Союзу та "розповсюдження творів" у польському авторському праві.

Анотація. Швидкий розвиток і створення нових способів розповсюдження матеріалів, захищених авторським правом, ускладнює європейським і польським законодавцям можливість йти з ним в ногу. У статті згадуються останні зміни в судовій практиці щодо важливих аспектів, починаючи з розширеного визначення піратства. Вона охоплює також тонкощі протиставлення публічного спілкування публічному обміну і отримані критерії порушення авторських прав. Також обговорюється цивільна та кримінальна відповідальність постачальників різних Інтернет-послуг, наприклад, мережі рівноправних вузлів.

Ключові слова: розповсюдження творів, авторське право, інтелектуальна власність, публічне спілкування, адміністратори мережі рівноправних вузлів.