

OBLIGATIONS OF ONLINE CONTENT SHARING PLATFORMS –
PROBLEMS AND SOLUTIONS. THE PROPOSAL FOR A DIRECTIVE ON
COPYRIGHT IN THE DIGITAL SINGLE MARKET

The printing press, telegraphy, and radio broadcasting are landmark inventions that accelerated the spread of knowledge, facilitated the sharing of ideas and speeded up technological progress. However, each of these inventions raised the issue of intellectual property rights and their protection. The reason is that before the printing press was invented it had been hardly conceivable to think of the author's rights to a book since manual production of copies took too much time to be economically meaningful. Similarly, no protection of musical works and the rights of composers and performers was needed before the development of recording technologies.

The wider the access to information, the more complicated the protection of intellectual property rights since a proper balance should be struck between the free circulation of information and the guaranteed rights of authors, performers, producers, etc. The development of the internet put this issue high on the agenda and the regulation of intellectual property needs to be reassessed because it is not just copyright and related rights that could be infringed. Thus, for instance, infringements of the rights to trademarks or industrial designs could occur in e-commerce when it is carried out across geographical regions.

The change in the way of thinking about intellectual property shared online is already underway in the European Union. It builds on the understanding that the digital economy is associated with visits to websites and the web traffic can be turned into a source of income in many different ways, the simplest example of which is advertising. Hence if there is content that is freely accessible on a given website, there exist no obstacles to downloading it. However, sharing it with a new public is a different matter, as stated in the judgment of the EU Court of Justice in Case C-161/17. The Court ruled that the communication of works, e.g. a photograph, musical performance, a movie or another work, to a new public would be an infringement of copyright and/or related rights even where the rightholder made it freely accessible on that website. This is a solution in principle that applies to the transmission of radio or TV programmes on commercial premises but the judgment states explicitly that there is an infringement also when works that are freely accessible on a website are posted on another website. To illustrate this, the use of a hyperlink leading to the original website would not be considered to be an infringement since the original website would not lose

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visits.

The proposal for a Directive on copyright in the digital single market could be viewed as another step along the same lines. The European Parliament voted on the proposal in September 2018 but the legislative process has not been completed yet.

The proposal regulates several important issues relating to the online sharing of works and some texts seem controversial. First and foremost, it is the wording of Article 11 which provides for the inalienable right to remuneration when “snippets” or short excerpts are posted. This right to remuneration became known as “the link tax”, although this term is rather inaccurate since it is not a tax, in the first place, and then it is not levied on links as it applies to the publication of excerpts. In fact, the objective of Article 11 of the proposed Directive is to ensure the right to remuneration of websites which share content when this content is used by other websites. The simplest example is the use of news headlines and excerpts in some Google services, in which the excerpts are sufficient for users to lose interest in that piece of news and to decide not to visit the original website. It is in these cases that the owner of the original website will have to be compensated. The inalienability of the right means that a contract may not envisage non-payment of the remuneration due. On the other hand, the person entitled to receive the payment might decide not to pursue the case if this makes more economic sense.

Another controversial provision is Article 13 of the proposed Directive, envisaging the obligation of content sharing platforms to introduce rules for handling intellectual property and mechanisms for recognition of content that is shared in violation of its author’s rights. Here the emphasis is laid on the development of rules for the removal of content that is suspected to be in violation of copyright or related rights. However, these rules should provide equal guarantees for the rights of the person alleging the infringement and the person whose content is to be removed. As a result, the rules will lead to higher standards of responsibility of content sharing platforms because they will have to exercise more stringent control on the shared content. In this connection, most platforms apply the rules of the U.S. Digital Millennium Copyright Act, including the cases in which there exist no grounds *prima facie* to apply this legislation, e.g. when an infringement of the right of a German author is alleged in relation to the content shared by a Polish website.

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Many platforms have already introduced certain rules in this respect and the novelty in the proposed Directive is the emphasis laid on the protection of the original authors of works at the expense of more obligations envisaged for content sharing platforms. Furthermore, the Directive introduces the requirement for complaints and redress mechanisms to be put in place in case of disputes over the removal of content.

At present, it is unclear whether the Directive will be adopted and what its final wording will be since the Member States still fail to agree on compromise texts concerning the controversial issues. However, the change in the EU policy in the field of intellectual property rights is already visible. Even if the proposed Directive on copyright in the digital single market is not eventually adopted, the change of policy will be reflected in the legislation in one or another way.