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Katarzyna Chałubińska-Jentkiewicz[1]

The Legal Protection of Digital Content as an Element of Constitutional Rights

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Słowa kluczowe: Treści cyfrowe, ochrona danych, prawa człowieka, wolność słowa, prawa autorskie, prawa konsumenta

Abstract

Digital content is another important concept which helps to assess what cyber responsibility is in the context of the issue of protection, and what problems arise with its definition in the constitutional rights sphere. The distribution of digital content, especially in the social media, is by definition characterised by its cross-border nature. The condition for the preservation and development of this asset as digital content is not only the innovative management of the content disseminated through new media, but also the guarantee of the right of the protection of this content as a human right.

Streszczenie

Prawna ochrona treści cyfrowych jako element prawa konstytucyjnego

Treści cyfrowe to kolejne ważne pojęcie, które pojawia się w obszarze praw konstytucyjnych. Dystrybucja treści cyfrowych ma z definicji charakter transgraniczny. Korzy-

[1] ORCID ID: 0000-0003-0188-5704, Associate Professor, Department of Cybersecurity Law and New Technologies Law, Law Institute, War Studies University, Warsaw, Poland. E-mail: k.jentkiewicz@akademia.mil.pl.

stają na tym ich twórcy, a przede wszystkim odbiorca. Kiedy mówimy o treściach cyfrowych, myślimy o konieczności ich konstytucyjnej ochrony. Warunkiem zachowania i rozwoju tego dobra jest gwarancja prawa do ochrony tych treści jako prawa, które stanowi prawo człowieka.

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In today's network society, there are two trends which find themselves in an internal conflict – the globalisation of broadly understood media activities, for which the editorial responsibility is borne by its provider, and whose primary purposes are to provide programmes to the general audience through telecommunications networks, for informational, entertainment or educational, as well as for commercial purposes, and activities undertaken by individual countries aimed at the legal and organisational arrangement of the contemporary network society, often contradicting the cult of technology and market logic, which is associated with globalisation[2]. Thus, the scope of State regulation can be in conflict with the constitutional values of the democratic state of law, by creating limitations on the right to obtain information and making it available. Restrictions on the freedom of speech and access to information can arise in place of activities which should contribute to the creation of a new cultural policy which would encourage the emergence of a new informationism policy, based on the contemporary values and problems of the network society. This applies, in particular, to attempts to adapt regulatory measures typical of the traditional public media, which are anachronistic in the context of digitalisation, at least in some fields, and to the new conditions and level of technical advancement. Due to the specific nature of the ICT network and the multifunctionality of increasingly cheaper and improved mobile devices (Moore's law), this type of adaptation can lead to restrictions on the freedom of speech and the right to communicate. The digital processes have created a new society, i.e. the information society, and the so-called

[2] K. Chałubińska-Jentkiewicz, *Treści cyfrowe jako przedmiot obrotu gospodarczego – zagadnienia definicyjne*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2020, no. 2(9), p. 33.

digital democracy, which is at the same time a response to the challenges of living in the digital reality. In this way, the protection of digital content involves special needs and tasks in the future regulation.

I. The definition of digital content

Originally, the definition of digital content was included in the draft Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services. According to this definition, digital content means data produced and delivered in a digital form, regardless of whether their properties have been determined by the consumer, including visual and audio content, images or written content, digital games, and software and digital material facilitating the personalisation of the existing equipment or software. Obviously, this definition can be validated differently by the national legislator. For example, in the Polish legislation, the Act of May 30, 2014 on consumer rights[3] defines a new category of "goods", which is digital content. Thus, according to Art. 2 point 5 of this Act, digital content means data generated and delivered in a digital form. Until now, the law referred only to physical items delivered to the consumer, and to services rendered within the scope of liability. Currently, digital content is an inseparable and significant element in the everyday interactions of network users. All information contained in the form of electronic files, such as e-books, computer programs, apps for mobile devices, files with music, movies, and photos, are examples of digital content.

In December 2015, the Commission issued a communication to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions – Towards a modern, more European copyright framework[4]. In the context of the permitted public use, the Commission has identified three areas of regulatory intervention:

[3] Dz.U.2020, item 287.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – Towards a modern, more European copyright framework COM/2015/0626 final Brussels, 9.12.2015 COM(2015) 626 final.

the cross-border use of digital content in education, in the field of scientific research, and for the purpose of preserving cultural heritage. As regards the availability of audio-visual works on video-on-demand platforms, the rule for organising negotiations has been applied, with the mechanism for conducting negotiations requiring development at the level of the Member State. In relation to the content remaining outside commercial circulation, the principle of extending the scope of negotiations to all, and not only to selected works of this type, has been adopted. In the case of using works and other objects protected in digital and cross-border teaching activities, some freedom is left to the Member State, which may decide on the permitted public use, depending on the possibility of obtaining a licence. The same provisions are in new directive (EU) 2019/790 of the European Parliament and of 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[5].

In the case of using digital content for research purposes, the possibilities of free use have been limited to a specific group of entities. In the case of activities related to the protection of cultural heritage, a rule was introduced consisting of the mandatory provision of copies of the work for the purpose

[5] OJ L 130, 17.5.2019, pp. 92–125. The Republic of Poland seeks the annulment of Art. 17(4)(b) and Art. 17(4)(c), *in fine* (i.e. the part containing the wording 'and made best efforts to prevent their future uploads in accordance with point (b)') of Directive (EU) 2019/790. The Republic of Poland raises against that the contested provisions of Directive 2019/790, alleging the infringement of the right to the freedom of expression, and information guaranteed by Art. 11 of the Charter of Fundamental Rights of the European Union.

The Republic of Poland claims specifically that the imposition on online content-sharing service providers of the obligation to make their best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information (point (b) of Art. 17(4) of Directive 2019/790), and the imposition on online content-sharing service providers of the obligation to make their best efforts to prevent the future uploads of protected works or other subject matter for which the rightsholders have lodged a sufficiently substantiated notice (point (c), *in fine*, of Art. 17(4) of Directive 2019/790) make it necessary for the service providers – in order to avoid liability – to carry out the prior automatic verification (filtering) of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms. Such mechanisms undermine the essence of the right to the freedom of expression and information, and do not comply with the requirement that limitations imposed on that right be proportional and necessary. OJ C 270, 12.8.2019, pp. 21–22.

of safekeeping the content by the cultural institutions responsible for protecting this heritage. However, the application of exceptions to the requirement to obtain a permit specified here has been limited to a few situations only. The construction indicated above seems obvious when it comes to the regulations regarding the content transmitted as part of audio-visual activities. However, doubts arise when we ask a question as to which audio-visual policy issues in the scope of cultural activities, including digital content (as well as their protection and terms of transmission), taking into account such values as public morality, national identity, or other goals of the public interest, also implemented as part of the media market regulation, should remain within the responsibility of the Member States themselves, and to what extent certain elements of audio-visual policy, constituting part of the digital single market, should be the subject of the EU concept.

II. The protection of digital content as a constitutional value

The convergence of the means of social communication makes us speculate on how the system of responsibility should be shaped when the traditional roles of its users begin to interpenetrate. It should be noted that in documents referring to copyright issues, the EU legislator uses the concept of a work or content, while the scope of the future regulations in the digital single market covers a broader context, which also includes infrastructure (hardware), as well as digital content and digital services (software). So far, important questions have arisen about the limits of subjecting the content to infrastructure regulations, where the dominant issue is market regulation. It seems that the new direction is the opposite situation, in which we assign infrastructure regulation to digital content regulation.

It seems that the proposed reform has been created based on this kind of regulation. The issue of regulating these two fields within the scope of audio-visual policy as an important sphere of cultural policy has long been the subject of consideration and doubt, including in the EU forum. However, the basic principle behind the issue of responsibility for activities in cyberspace is the concept of digital content. Generally speaking, any asset which does not exist physically but does in the form of a digital record can become the target

of cyber criminals, and the subject of cyber responsibility as a protected asset, especially as an asset connected with copyright[6]. According to A. Potempa, "intellectual property means various products of the human mind, such as inventions, literary and artistic works, and symbols, names, graphics, and designs used in the broadly understood economy. It covers both products and designations used for business purposes (industrial property) and works subject to copyright, i.e. works of a scientific, literary, and artistic nature "[7]. This definition shows that intellectual property is closely related to the processes of the creation, development, and use of acquired knowledge, and is also the result of human creativity and creativeness, as well as all inventions which are the subject of business trading. So, on the one hand, we have the media industry, the audio-visual market for digital services, and on the other, the market for digital services related to the distribution and all other uses of digital content. Authorisation procedures, particularly in fields related to works whose copyright holders are difficult to identify, could clarify certain legal issues, or simplify digitisation itself, and the making available of these materials through different parts of the network. Problems with identifying authorship or with determining the rights to digital content make it impossible to use them.

III. The protection of digital content as a consumer right

The regulations regarding digital content are mainly related to the protection of consumer rights. The Digital Single Market Strategy[8] adopted by the Commission on 6 May 2015 announced a legislative initiative on harmonised rules for the supply of digital content and the online sales of goods. Changes to viewing the consumer as an entity under special protection in the EU regulations, as well as in domestic law, are evidence of how, as a result of changes in cyberspace, the roles of participants in the global services market are

[6] A. Matlak, S. Stanisławska-Kloc, *Spory o własność intelektualną*, Warszawa 2013, p. 34.

[7] A. Potempa, *Zarządzanie prawami własności intelektualnej i ich wycena w przedsiębiorstwie*, [in:] *Własność intelektualna w działalności przedsiębiorców*, ed. U. Promińska, Łódź 2014, p. 40.

[8] COM (2015) 192 final http://ec.europa.eu/priorities/digital-single-market (access 11.11.2021).

evolving, especially electronically provided services[9]. These works have become even more intense as a result of the changing conditions resulting from the technological development and popularisation of the so-called information society. With the entry into force of the Consumer Rights Act, there have been further changes governing consumer rights in relation to the entrepreneur. Regarding the change introduced by the Consumer Rights Act, the provisions of the Polish law referred mainly to the supply of services and physical objects delivered to the consumer. The introduction of the new legal regulations has changed the understanding of the concept of digital content, which has become a new economic category. Until now, the legal regulations referred only to physical items delivered to the consumer, and to the provision of services. Currently, digital content is an inseparable and significant element in everyday transactions carried out by the consumers.

When analysing the EU approach to digital content, one cannot oversee the definition contained in the draft Regulation of the European Parliament and of the Council on the Common European Sales Law 2011/0284 (COD)[10], in which the concept of digital content was defined differently from in Directive 2011/83/EC, and, hence, differently from in the Polish Consumer Rights Act. Therefore, the category of digital content may include all information contained in the form of electronic files, also including books in an electronic form, mobile apps – in general, anything which can have a form of trade in money and goods, but is in the form of a digital record, with the exception of: financial services, including online banking services, legal or financial advice in an electronic form, electronic health services, electronic communications services and networks, and related resources and services, gambling, creating new digital content, and changing the existing digital content by consumers, or other forms of interaction with the works of other users.

Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019, on certain aspects concerning contracts for the supply of digital content and digital services[11] introduced harmonised consumer-contract-law

[9] See E. Kacperek, P. Zawadzki, *Charakter umów o pobranie z sieci treści chronionych prawem autorskim*, „Przegląd Prawa Handlowego" 2009, no. 10, p. 29.

[10] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final, 2011/0284 (COD).

[11] OJ L 136, 22.5.2019, pp. 1–27.

rules in all Member States which made it easier for businesses to supply digital content or digital services across the Union. It also prevented legal fragmentation which otherwise would arise from new national legislation regulating specifically digital content and digital services.

IV. What about future regulation?

In today's conditions of the functioning of an individual in cyberspace, it seems necessary to take new actions in the field of establishing norms, and previously rules and values, which are standard in the real world. Freedom in the Internet environment also requires security and protection, and thus regulatory restrictions (see Art. 31 sec. 3 of the Polish Constitution). However, the nature of cyberspace applies in particular to defining the roles of network users, as well as the rules of responsibility for network activities. However, this is only one aspect of a very complex issue, which is the development of modern technologies in the context of the law-making process, which affects virtually every State, society, and the weakest link – the individual – which can be observed in the policy of protecting digital content (not protected by copyright or consumer rights).

As part of tackling online hate speech and hate, and the monetisation of our data and digital content, digital services should enable parents and educators to restrict access to harmful content, and protect young people from the influence of unidentified content providers/authors. Imposing on intermediaries the obligation to define the limits of the freedom of online expression is not only an organisational and financial burden for them, but it also raises fundamental constitutional reservations. There should always be a possibility of appeal to a court, where the parties to criminal or civil proceedings (for the infringement of personal rights) should settle the dispute. It will also be necessary to make a clear distinction between illegal and harmful content. It is sometimes difficult for an intermediary to judge when the right to freedom and the freedom of expression on the Internet are being abused. The rules regarding the removal of illegal content should be clear, and as precise as possible, and the scope of obligations should take into account the size and type of entity which would be subject to them. Developing effective solutions in

this matter would certainly require coordinated actions and cooperation between entrepreneurs, social organisations, and entrepreneurs providing digital services. It is required to develop a new concept, taking into account the realities of today's digital services, including the "Good Samaritan" clause. All brokers, regardless of their size and type of content stored/shared by them, should be included. The existing distinction between the passive and active roles of intermediaries is no longer sufficient in the context of the new digital services and business models[12].

The legal framework which will apply to the functionality of new techniques for the exchange of digital content, as well as any kind of restrictions on media freedom, must be clearly defined, and justified by democratic control. There is a perennial conflict between the goal of the freedom of expression and the right to disseminate information, and the need to implement accountability in respect of the need to safeguard the public interest in the new digital environment, such as the legal protection of users' digital content. As a consequence, the scope of the impact on society through the media is significantly increasing. It is broad, not only in terms of space, but also of the ways in which the individual resorts to these resources. Although this significant change clearly indicates the separation of regulations relating to programming content, it also triggered another very important process consisting of differentiating procedures related to the legal protection of digital content. Procedures such as monitoring, blocking, and removing digital content are closely related to the notion of the public interest, or the general interest, as the European legislator prefers to call it.

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[12] K. Chałubińska-Jentkiewicz, *Cyberodpowiedzialność*, Toruń 2019, p. 56.

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