

Blocking Injunctions Against Online Intermediaries: Between EU Standards and National Peculiarities

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Abstract The paper describes EU standards which set out the rules of applying one of the most effective tools used for combating online piracy – namely blocking injunctions issued against various types of online intermediaries due to copyright infringements. The author analysed the rules which have been shaped in European law and the case law of the Court of Justice of the European Union (CJEU). Against this backdrop, the differences which have emerged in the process of applying injunctions in some EU Member States have been discussed. The paper also describes the specific nature of Polish circumstances in this respect, based on the judgements of Polish courts, referring directly or indirectly to injunctions issued against online intermediaries.

Keywords: • blocking injunctions • online intermediaries • infringement of copyright • internet piracy

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1 The factual and market background of blocking injunctions

One of the numerous spheres for which the emergence of the internet posed a considerable challenge was the enforcement of exclusive rights, in particular copyrights. The challenge resulted from the development and dissemination of new methods of distribution and the use of works, engaging in the process of an entire chain of new types of intermediaries – internet service providers, hosting providers, and website operators. New models of providing access to content were not only more complicated than traditional ones, but also reflected the web-like nature of the internet. As a general use technology – regardless of the spheres it has transformed – it operates on a cross-border basis, and digital use is liberated from the need to use any tangible storage medium, with substantial anonymity given to service providers, and the easy change of location from where such services are rendered. The possibilities in this respect further expanded along with the development of broadband internet, allowing the easy streaming of works, including audiovisual works.

This new ecosystem of providing access to copyrighted content revealed the limitations of the legal instruments which have previously been used for the protection of exclusive rights. In addition to the aforementioned factual circumstances, the legal status was further complicated by the introduction of legal provisions which greatly facilitated the exclusion of online intermediaries' responsibility (Articles 12-14 of the Act 18 July 2002 on the Provision of Services by Electronic Means – Journal of Laws of 2002 No. 144, Item 1204, as amended), where their services are used or directly intended for providing access to content protected by copyright.

The domestic provisions governing this sphere have their source in European law, which continue in force to this day (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ EU L 178/1 of 17.07.2000) – the E-Commerce Directive) laying down the rules applicable to the operations of online intermediaries. The provisions were drawn up over twenty years ago and set out the circumstances in which it is possible to exclude the liability of so-called passive online intermediaries, including liability arising from the infringement of copyright. The provisions of the same legal act allowed the introduction in sector-specific regulations of the legal grounds for the adoption of measures by judicial or administrative authorities with a view to resolving individual cases of law infringement and preventing their occurrence in the future. Basic EU solutions concerning copyright, including its application in the digital sphere, were adopted almost at the same time (Article 18(1) of the E-Commerce Directive). As sector-specific regulations, they introduced legal grounds to issue injunctions against online intermediaries, including blocking injunctions (Article 8(3) of the InfoSoc Directive in respect of copyright, and Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the

enforcement of intellectual property rights, further referred to as the IPRE Directive, in respect of other intellectual property rights).

Taking advantage of unexpected interference of the two groups of legal norms, some intermediaries would abuse the possibility to evade liability for the infringement of intellectual property rights on the basis of exemptions which have been established with passive online intermediaries in mind (in particular, hosting service providers), despite the fact that their services were of a different nature. To this end – in numerous court proceedings – online intermediaries claimed that they had not infringed any copyright laws because private internet users were the ones who provided access to copyrighted content, and the intermediaries' role was limited to providing online space or technical tools which were neutral in respect of such content and allowed access to all types of content. They also noted that since they were not allowed to engage in pre-screening of content, it was impossible for them to distinguish between copyright-protected content and any content which was not subject to copyright prior to providing access to such content.

Moreover, it soon became clear that from economic, legal and political perspectives, it was pointless to prosecute private web users who illegally provided access to protected content. The costs significantly exceeded possible compensation in this case. And it was often impossible to obtain the personal data of natural persons, and the social reception of legal actions which were directed against private internet users was clearly negative.

The weaknesses of the copyright protection instruments at the time were related to the rules of tort liability (Article 415 et seq. of the Act of 23 April 1964 - the Civil Code consolidated text, Journal of Laws of 2021, Item 1509, further referred to as “the Civil Code”), which is conditional upon proof that the infringer has been actively involved in the infringement and is at fault. They require the application of the same criteria as in the case of accessories to a prohibited act (Article 422 of the Civil Code), which, in the context of the infringement of exclusive rights, in theory could be a construct capacious enough to cover the relationship between online intermediaries and private users of their services.

In such circumstances, the response of those with the right to claim the infringement of exclusive rights was usually significantly belated, at times depending on the engagement of law-enforcement authorities and the application of penal law norms, or ineffective administrative procedures (with French HANOPI being the best example here), and sometimes simply impossible. This meant that the owners of copyrights to work with the highest economic value were particularly exposed to considerable losses at the initial stage right after providing public access to them, in particular audiovisual works, TV shows, and, to a smaller extent, pieces of music and textual works. It is not a coincidence that the representatives of this group of rightsholders have begun to request injunctions against online intermediaries whose services are used by a third party to infringe exclusive

rights. (Husovec, 2017: 3 – 5). Such injunctions, including blocking injunctions which are special types of this instrument, allowed the reduction of the illegal use of specified content after a short time of their providing access to it. That way, they mitigated the financial loss incurred by rightsholders, where full compensation might not be attainable, may be limited, or where the granting of compensation might be considerably postponed.

2 The main purpose of blocking injunctions against online intermediaries, their types and the grounds for their introduction in European law

The evolution of this seemingly inconspicuous instrument which, unlike Western European countries and a dozen or so of the most developed non-European countries (the USA, Australia, Argentina, India, Indonesia, Singapore, Malaysia, South Korea, and Turkey), is not widely used in the states of our region, would surely surprise the authors of the European regulation which constitutes the grounds for its introduction across the EU. The source of said surprise would be, for instance, the laconic nature of the provisions under which EU Member States are only obligated to create the possibility to apply for the issue of the injunction. The provisions do not define the range, the content, the conditions for granting the injunction, the group of addressees or – which seemed obvious back in 2001 – any procedural issues related to the cross-border enforcement of the injunctions. EU legislators made the pragmatic assumption that online intermediaries, in many cases, simply had the real technical capabilities to effectively, and at relatively low cost, bring the infringement of exclusive rights to an end. In fact, the measures directed against them were not even referred to as sanctions but cooperation instruments (Recital 59 of the InfoSoc Directive).

In 2001, when business models for providing access to content on the internet began to evolve, few could predict what type of detailed solutions would be created on the basis of such a general norm. After ten years, or just over, it became clear that blocking injunctions represented one of the most effective and most frequently used measures, also outside of the EU, placing obligations on online intermediaries to implement technical measures to block access to specific content or websites. There is no legal definition of blocking injunctions in legal acts (Riis, Elholm, Nordberg, 2018: 5 -8).

The evolution of this legal measure led to the development of three types of injunctions, which are now applied in practice in various situations. The first type is a static blocking injunction, mostly used for websites which were created to provide access to content protected by exclusive rights. An entity which starts such a website is either not interested in cooperation with rightsholders, or has not been identified by them. In such an event, the addressee of such an injunction is not the operator of the pirate service concerned, but an internet service provider, and the result is blocked access to a specific website.

The second type is a dynamic blocking injunction which serves to facilitate the resolution of cases where content which has been shared in violation of exclusive rights on one

website appears again on another website. The outcome of such an injunction is the blocking of access to a website which might have another IP or URL address, but serves the purpose of sharing the same content as the previous one. The website is often related to its predecessor through a domain name, to ensure higher visibility and for the convenience of the users of the content who find it easier to search for a given website in a browser. A dynamic injunction must be formulated in a way which allows the rightsholders to add a new IP or URL address without the need to institute new court proceedings to obtain a new injunction. Alternatively, if given domain names and/or IP addresses are unknown to a court at the date of issuing a ruling, the courts define only the time frame (as a given period of time or until a specified date) for the rightsholders to submit to service providers a list of websites which are to be blocked on the basis of a given injunction. This way, a rightsholder does not have to apply for separate injunctions each time given protected content appears on other websites, thus allowing the reduction of costs and other inconveniences related to the proceedings. In effect, the system of exclusive rights' protection regains the necessary balance, which is only disturbed where the protection of rights is costly and long-lasting, and the breach itself, involving merely the creation of a new website and the provision of illegal access to the same content, is easy and inexpensive.

The third type is a live blocking injunction applied in real time in respect of content that is provided live. Such an injunction was used in the United Kingdom for the first time in a matter concerning the broadcasting of football matches (*The Football Association Premier League Ltd. vs. British Telecommunications Plc & Others* [2017] EWHC,480 (Ch)). The use of such an injunction serves its purposes only during transmission, and the response of rightsholders and legal protection authorities must be swift and strictly limited in time. The technical measures indicated in the injunction are only applied each time a given server is used to provide access to a live broadcast. This means that the injunction is granted only for a strictly defined time frame, of which the rightsholder is obliged to inform the online intermediary in advance (for example by way of an electronic message from the rightsholder concerned or a third party authorised to act on the rightsholder's behalf).

Not all types of blocking injunctions are awarded, even in those Member States which introduced the general legal grounds for applying for the issue of such instruments. The possibility of applying blocking injunctions – whatever their type – was confirmed in the case law of Austria, Belgium, France, Finland, Greece, Ireland, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, and Norway. In Germany and Lithuania, decrees granting blocking injunctions can be appealed against. In some jurisdictions, the option to apply dynamic injunctions or injunctions in respect of live broadcasts has not been examined by courts yet. It was attempted on several occasions but with negative effects. Case law pointed to the need to specify in greater detail the national legal grounds for applying injunctions in a situation where a simple transposition of EU law has proven to be insufficient.

Regardless of the type of injunction a rightsholder applies for in given circumstances, from a technical point of view, in practice they entail the blocking of a domain or a specific website, or the blocking of data transferred by an internet service provider. An private user's computer is then unable to locate a specific domain or website (blocking of DNS, URL or IP number), which in consequence leads to the blocked transmission of, e.g., work protected by copyright, or to the refusal of access to an entire website through which the specified content has been shared. Consequently, the content in question is not removed at source, which solves the problem of insufficient legal instruments to eliminate pirate websites operating in territories in which copyright is not protected at all, or the protection is only illusory. Any such content is simply made unavailable to recipients in the place of destination by the operator of a given pirate website. Injunctions are usually issued against several major internet service providers operating in the territory of a given Member State – if this is the case, the scale of infringement elimination is the most noticeable.

The aforementioned flexibility of EU laws might prove to be an advantage at times, as it does not exclude the possibility to use other technological measures other than the ones generally applied in blocking injunctions, allowing rightsholders and courts to adapt to changing infringement methods. On that basis, the French Supreme Court (judgement of 6 July 2017 SFR et al. vs the Association of Film Producers, No 16-17.217, 16-18.298, 16-18.348, 16-18.595, ECLI:FR:CCASS:2017:C100909) upheld injunctions under which search engines were required to de-index and block access to websites whose structures had been designed to infringe exclusive rights.

3 Standards for applying blocking injunctions in the case law of CJEU

Regardless of its potential advantages, the general wording of Article 8(3) of the InfoSoc Directive resulted in the fact that the practical application of the injunctions in individual Member States was, to a large extent, shaped on the basis of the case law of national courts and its verification by CJEU. All the more so due to the fact that in many cases the legislators who implemented EU provisions into domestic legal systems, before checking how injunctions against intermediaries could be used in practice, simply and directly rewrote this general EU legal provision in national legal acts.

Courts developed standards for applying the injunctions at the intersection of the interpretation of vague EU law provisions, setting out the criteria in which the measures for the protection of intellectual property rights must meet (e.g., they must be effective, fair and equitable – Article 3(1) of the IPRED Directive, they must be dissuasive, cannot be unnecessarily complicated or costly, or entail unwarranted delays, and should provide for safeguards against their abuse – Article 3(2) of the IPRED Directive), and of the fundamental rights stipulated in Treaties. As regards the latter provisions, the aim was to balance the interests of rightsholders, intermediaries and users in the circumstances of an

imminent conflict between the protection of ownership rights, including intellectual property rights (Article 17(2) of the Charter of Fundamental Rights of the European Union of 7 June 2016, OJ EU C 202/391, further referred to as the Charter of Fundamental Rights), the right of access to information (Article 11 of the Charter of Fundamental Rights), and the freedom to conduct business (Article 16 of the Charter of Fundamental Rights). Users' rights might be infringed if, for instance, the authorities issue blocking injunctions whose objective scope or duration is excessive, and which impose obligations that are impossible to fulfil, or injunctions concerning content which should not be blocked at all (over-blocking). In consequence, as regards renewals or the extension of such injunctions, some national courts require the prior assessment of injunction effectiveness and an examination of whether the extension of the term is appropriate (Cf. *The Football Association Premier league Ltd vs. Eircom Ltd (Trading as Eir) & Others (Approved)* [2020])

The final outcome of CJEU's activities is a catalogue of standards which allows the assessment of individual cases of injunctions, and some of them can be applied to all measures of this type, while others are of special significance where blocking injunctions are applied. All these standards are addressed mostly to judicial authorities, as they decide what actions, if any, the addressee of the injunctions will be obligated to take.

CJEU case law, which was partly recapitulated in the most recent Communication of the European Commission on the enforcement of intellectual property rights (Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights; COM (2017) 708 final):

- specified the term “intermediary – injunction addressee”
- indicated that the injunction applies regardless of any potential liability of the intermediary for the infringement of exclusive rights, including fault;
- specified the purpose of injunctions;
- specified in detail the circumstances which should be taken into account in the assessment of whether the issued injunction is proportional;
- indicated how courts should balance the interests of rightsholders, intermediaries and users.

The notion of an intermediary against which an injunction can be issued should be understood comprehensively. It may be any economic operator providing a service which can be used by at least one person to infringe exclusive rights (CJEU judgement in the case of *L'Oréal v. eBay* (C-324/09), Par. 131; C-70/10; similarly, CJEU judgement in the *SABAM* case – 360/10, Par. 29). This way the list of potential intermediaries remains open-ended, and it is not necessary for the infringer and the intermediary to maintain a specific relationship (CJEU judgement in the case of *Tommy Hilfiger Licensing LLC et al. v. DELTA CENTER* - C-494/15 paragraph 23). The CJEU also expressly confirmed

that intermediaries include internet service providers who are the most typical addressees of blocking injunctions. From an evidence-based perspective, the fact whether private users of addressees' services have actually gained access to protected content is outside the scope of proof. It is enough to demonstrate that such content is available.

As no form of intermediary's participation in infringement is required, rightsholders are not obliged to prove the intermediary's fault to obtain an injunction. In this situation, it is enough for the intermediary to provide services which might potentially be used for infringement, even if no such circumstances have occurred yet (Husovec, 2017: 132). Consequently, this also means that the intermediary cannot rely on one of the grounds for exemption of liability, as they are intended for the exclusion of fault, which is entirely beyond the scope of examination when issuing an injunction. Despite other possible interpretations (the Opinion of the Advocate General, M. Szpunar, in the *Stichting Brein* case (C-527/15), such solutions resulted in the fact that blocking injunctions became a convenient legal remedy from a court procedure perspective. The issue of involvement, or lack thereof, on the part of an injunction addressee, in the infringement of exclusive rights might be of key significance for the assessment of whether the obligations imposed under the injunction are excessively burdensome or costly (Piech, 2019: 337). The greater the intermediary's involvement, the more difficult it is for them to claim that the injunction constitutes a significant burden to them.

This is consistent with the purpose of the injunction, as broadly described in the case law of the CJEU. The purpose is not only to resolve existing infringements, but also to prevent future infringements involving the illegal use of copyrights; this way, blocking injunctions also play a preventive function (CJEU judgement in the case of *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH* (C-484/14); similarly in the aforementioned judgement in the case of *L'Oreal v. Ebay* (C-324/09)). In practice, such objectives of an injunction have opened the door to the application of dynamic blocking injunctions. Furthermore, with the further evolution of case law, it has allowed the determination of whether it is possible to block identical or equivalent websites of different IP or URL addresses, instead of a more restricted obligation to apply specified technical measures to block a specific IP or URL address. It is important to assume here that an equivalent website is one whose content remain essentially unchanged or diverge very little from the content which had resulted in identifying the original infringement (Cf. CJEU judgement in the case of *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd* (C-18/18) which applies to the protection of personal interests, but also has implications for intellectual property rights).

On assessing which blocking injunctions are proportional, first and foremost it is important to analyse whether the measures arising from a specific injunction are possible for the intermediary concerned to undertake in practice. Here, the first group of circumstances entails the organisational and financial capabilities of the injunction addressee, including those related to potential complaints from consumers which may be

filed if the blocking of specific content proves to be unfounded. Potentially contested issues might also include the situation in which costs are imposed only on the intermediary (CJEU judgement in cases *Scarlet v. Sabam* (C-70/10) and *Scarlet v. Netlog* (C-360/10), in particular where the intermediary itself does not infringe exclusive rights. It is a more reasonable solution to split the costs between two parties, or even have the costs incurred by the rightholder, in particular considering that it is surely the rightholder that draws economic benefit from enforcing the injunction.

In some cases, the distribution of the costs arising from injunctions is governed in a given EU Member State by laws concerning enforcement proceedings. The effectiveness of a given injunction is the second criterion through which its proportionality can be examined. (Cf. CJEU judgement in the *Telekabel Wien* case - C-314/12). It would be utopian to believe that a given injunction must be fully effective or that there is no possible way to circumvent the technical measures indicated in the injunction. It is enough to ensure that the injunction partly prevents infringements or significantly hinders such conduct. The standard of expectations towards the addressees of injunctions is connected with the obligation to take reasonable and justifiable efforts in the circumstances of a given case, to at least discourage infringement. Consequently, an injunction which, in given circumstances, is completely ineffective or requires unacceptable efforts on the part of the addressees, cannot be issued.

It is clear that the criteria taken into consideration in the context of blocking injunctions for the assessment of fundamental rights are mostly open-ended. In fact, it is criticised by some legal commentators as an expression of the excessive discretion left to the judge who makes a ruling in a given case (Husovec, 2017: 190). As regards the right to information, a significant boundary is marked out here by the prohibition to issue injunctions which would not serve their purpose while unreasonably depriving users of legitimate access to given content. In practice, it was found to be acceptable to block access to a given website if only some of the works available there have been shared illegally, with other content being considered legal. The laws of individual EU Member States usually provide private users with the possibility to file a complaint against the actions of intermediaries who have infringed a users' right to information when fulfilling obligations imposed on it under an injunction. Users may also request a judicial authority to withdraw or amend blocking injunctions. In practice, users seldom turn to these type of measures. One of the reasons might be the insubstantiability of such complaints where it is clear that the blocked website was designed to infringe exclusive rights. Another factor includes the costs of such proceedings which might simply discourage private users. Leaving aside the issue of exercising remedies by private users in practice, there is no doubt that their interests may be give due regard both at the stage of issuing injunctions and thereafter. As regards the protection of the freedom to conduct business, as a rule, it was assumed that blocking injunctions are without prejudice to its essence if they are clearly specified (Piech, 2019: 356). Besides, the intermediary itself can reduce the costs

it has incurred by adopting reasonable measures to meet its obligations (Shapiro, 2019: 29).

4 Key similarities and differences between EU Member States in their application of blocking injunctions

The standards governing blocking injunctions which arise from CJEU case law impose certain evidence-related obligations on entities seeking to protect their rights through this measure.

As a rule, the obligations are similar in every jurisdiction, but due to, for instance, the differences in procedural laws, they may be fulfilled in various ways. To some extent, they arise from the essence of the injunction itself – as a targeted legal measure, related to a strictly defined online intermediary, and individualised, at least to some degree, websites or content. Its application must be limited in time; it is another manifestation of the targeted nature of the injunction which constitutes a kind of security against disproportionate measures, at the same time imposing additional obligations related to the proceedings.

In the course of an injunction procedure, the rightsholder should precisely indicate the service which is used for the infringement of exclusive rights and the addressee of the injunction, namely the entity providing such a service. In addition, the applicant must present evidence showing they are entitled to intellectual property rights which are to be protected, and circumstances confirming the infringement itself or the possibility of its occurrence. No special rules as regards evidence have been provided in the course of this procedure – applicants mostly use screen shots, various types of technical reports or testimonies, but also notifications of recurring infringements which have been sent to future injunction addressees prior to applying for this legal measure. As confirmed multiple times by courts in Member States, there is no reason to provide evidence showing the type of the intermediary concerned (access provider versus content provider) or the degree of its engagement in the process of copyright infringement (Cf. Court of Milan, Ordinance No. 42163/2019 R.G. of 5 October 2020, *Sky Italia, Lega Serie A v. Cloudflare et al.*).

Blocking injunctions issued by national courts usually apply to internet access providers under the jurisdiction of a relevant Member State and to illegal actions having consequences in the same territory. Courts may order the blocking of illegal content regardless of the place where the infringement of Intellectual property rights has taken place or the location where users having access to the content stay, unless the illegal actions are addressed to users in a given Member State. Injunctions are legal instruments with a specified territorial scope, which corresponds to the territorial nature of copyright protection, and at the same time, as already noted, solve the problem of their protection, omitting the resulting limitations. The procedures for the issue of injunctions are currently

conducted in each EU Member State in line with national procedural laws. An additional source of divergence in this respect may also come from the method of transposing European legal provisions to national legal systems, as not all countries did this by simply rewriting specific European laws to national regulations.

In this case, the consequences are burdensome to rightsholders. Even if all such actions refer to the same intermediary, the same protected content and the same period of use, it is necessary to conduct separate procedures in each jurisdiction. From the perspective of rightsholders, this requires them to coordinate their legal actions if, at the same time (e.g., during a film premiere), an injunction is to exert real influence across a larger territory than the one delimited by the boundaries of one EU Member State. The systemic consequence is the lack of cross-border enforcement of injunctions. Perhaps the introduction of new rules as part of the so called Digital Service Act will change this state of affairs (Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services – COM(2020)825 in a version proposed by the European Commission, further referred to as the Draft DSA Regulation) The Draft sets out the minimum conditions an injunction should meet to be enforced in a Member State other than the issuing country (Article 8 of the Draft DSA Regulation) and establishes a network of Digital Services Coordinators who are to facilitate the cross-border enforcement of legal protection measures on the internet, including blocking injunctions (Article 38 of the Draft DSA Regulation).

In addition to the issue of cross-border enforcement of injunctions, other procedural differences include:

- the scope of determining the circumstances of a case;
- the participation of both parties in proceedings aimed at issuing injunctions;
- the possibility for an online intermediary to suspend the application of a relevant injunction;
- the scope of remedies available to users and online intermediaries.

In the first case, if an injunction is to be permanent, it is necessary to examine all circumstances of infringement to assess the facts in terms of general rules formulated in the case law of the Court of Justice of the European Union. In cases of interim injunctions in urgent matters, the courts are equipped with a broader scope of judicial freedom; they can rely on prima facie evidence of certain circumstances to a greater extent (Mapping report on the national remedies against online piracy of sports content: 2022:⁸⁰).

In the second case, in some countries (Greece, Ireland, and Spain) procedural laws stipulate mandatory participation of all the parties involved in proceedings aimed at issuing injunctions. However, in some Member States, ex-parte proceedings are possible under certain conditions. The conditions include an urgent need to issue an injunction (Germany), a situation where the infringement of exclusive right has already occurred (the Netherlands), or the online intermediary concerned has been previously informed

about infringements / the rightsholders' intention to resort to an injunction (the United Kingdom).

In turn, the suspension of injunctions, which is not a European standard, but has been developed under the case law in Ireland and the United Kingdom, is of a temporary nature. Suspension or blocking may be requested in order to correct or investigate the possible over-blocking of material, to maintain the uninterrupted operation of the service provided by the intermediary concerned or from a technical point of view (e.g., to preserve the integrity of the service, for maintenance or removal of direct threats to the security of the network, service or the intermediary).

As regards the fourth point, the laws of all EU Member States provide for remedies which allow addressees to contest blocking injunctions in line with traditional rules of civil procedure. Remedies are available to intermediaries and alleged infringers affected by an injunction. In addition, several Member States have the right to remedies vested in private internet users affected indirectly by a given injunction (e.g., in Finland, Germany, Greece, Ireland, the Netherlands, and in the United Kingdom). According to the German Supreme Court (Frosio, 2021:627), private internet users have the right to a legal remedy by starting an action against their access provider on the basis of their contractual relationship. Moreover, in a few cases (the Netherlands), class actions by internet users against blocking injunctions are available, or internet users' rights are protected under consumer protection laws.

In addition to the issues related to court proceedings, significant differences between EU Member States in respect of blocking injunctions are related to the possibility of their issue by administrative authorities (such options can be exercised in Greece, Italy, Spain and Lithuania), or to the facilitating of their enforcement through self-regulatory solutions (for instance, in Belgium, joint contact points have been established by the rightsholders and the potential addressees of blocking injunctions with a view to receiving and examining complaints, i.a., against the infringement of exclusive rights). As regards the former solution, the relationship between proceedings conducted before administrative and judicial authorities may vary: usually, both measures are not mutually exclusive, although there are instances where the institution of an administrative procedure excludes the possibility to bring civil action. In the latter case, these are solutions of limited scope and applicability, which are only intended to facilitate protection, supplementing official proceedings or ensuring appropriate solutions before formal procedures are instituted.

5 No grounds for applying blocking injunctions in Polish law

Apart from Lithuania, blocking injunctions are not used in EU Member States in our region. As confirmed by one of the few rulings that discuss the issue, there is no specific legal basis which would allow for such injunctions to be requested at courts (Cf. judgement of the Court of Appeal in Warsaw in the case of Wolters Kluwer Polska S.A.

v. FS File Solutions Limited based in Nicosia (Cyprus) – Case file No. ACz 164/17). In the discussed ruling, the court found that preventive measures imposed by judicial authorities may only refer to a specified infringement of copyright, and should not expand to multiple infringements, even in respect of the same right, infringements which occur at the same moment or might occur in the future. Furthermore, the court has pointed to the fact that specified infringement means an infringement which was made or which can be made by a specific infringer, not the existence of an abstract threat related solely to the business profile of a given online intermediary. Thus, the court decided that it was not possible to impose a general or abstract injunction which would cover all audio-visual work, even if they are the property of a given rightsholder.

The absence of a proper provision allowing the issue of blocking injunctions – similarly as in several other EU countries – is subject to a complaint submitted with the European Commission by rightsholders concerning the failure to implement European law in the domestic system, which has not resulted in the institution of a formal procedure in this respect so far.

In such circumstances the only provision which would be used for obtaining similar, though limited in effect in respect of copyright, is Article 79(1)(2) of the Act of 4 February 1994 on Copyright and Related Rights, stipulating that a claim for remedying infringement may be filed. The enforcement of such claims may consist in, i.a., the removal of content shared by infringing exclusive rights. It is worth mentioning here the decision of the Court of Appeal in Kraków of 18 September 2017 (Case file No. I Ca 1494/15), in which the court ordered internet service providers to delete a user's account with a link to illegal content. In the statement of reasons, the court found that online intermediaries were not passive as they charged fees for the downloading of content, thus attributing fault to these entities for the infringement of exclusive rights. Therefore, the court focused on the intermediary's participation, and consequently on the liability for infringement, and not on the possibility to impose a specific obligation aimed at protecting rights, regardless of such participation and fault on the part of the intermediary. Yet this is the essence of blocking injunctions. It is worth stressing that this single instance of a ruling does not confirm that the possibility to issue blocking injunctions exists in Poland. Rather, it constitutes an attempt to propose a temporary substitute measure of limited scope of application in anticipation of necessary legislative intervention.

6 Conclusions

1. In Polish law, there are no grounds for courts to apply injunctions against online intermediaries which are not directly involved in copyright infringement. This means that full compliance of Polish copyright laws with European regulations (Article 8(3) of the InfoSoc Directive) has not been provided. Due to the planned entry into force of the DSA Regulation and the resulting need to indicate the authority responsible for the fulfilment of obligations related to the cross-border enforcement of injunctions against online

intermediaries, the implementation of European legal norms governing blocking injunctions is even more important. It is difficult to substantiate a situation where Polish judicial authorities will be obliged to enforce injunctions protecting the rights vested in rightsholders from other EU Member States, and, at the same time, Polish rightsholders will be deprived of the possibility to use such a protective measure, both in Poland and across the EU.

2. Some courts try to fill this gap by applying provisions that allow for the exclusion of liability for online intermediaries', in line with their original scope, solely in respect of passive intermediaries, which results in imposing specific obligations on intermediaries. However, this solution does not provide rightsholders with effective and expedient tools for limiting the scale of internet piracy, and requires a complex investigative procedure. In addition, court rulings in this respect are scarce, and it is difficult to speak about any case-law practice here.

3. Relying on the experience of more advanced EU Member States, Polish legislators should introduce to the Copyright Act a legal basis creating the possibility for courts to issue blocking injunctions against online intermediaries. Such legal regulations should take into account the standards developed by CJEU case law which were partly confirmed in the Communication of the European Commission on the enforcement of intellectual property rights. The most important elements to consider here include:

- developing a comprehensive group of injunction addressees;
- making the possibility to issue an injunction no longer contingent on the intermediary's participation in respect of the infringement of copyright
- the determination that courts are authorised to issue dynamic injunctions and orders addressed to live streaming websites.

Given the solutions included in the Draft DSA Regulation, it is also advisable to define the minimum elements of an injunction in a way consistent with the Regulation to assure the possibility of the cross-border enforcement of injunctions issued by Polish courts.

4. Taking into consideration the negative experience of some EU Member States with overly laconic laws governing the issue of injunctions against online intermediaries, and potential public debate on the laws aimed to block access to internet content, the proposed Regulation should include provisions which clearly define available remedies as part of the appeals procedure. Legislators should also provide the possibility to apply for suspending an injunction, if it has ceased to perform its function, if such need arises from technical circumstances or changed facts related to the operations of a given intermediary and results in the over-blocking of content.

5. The laws should also specify the rules for splitting the costs of blocking injunctions, at least in the situation where an injunction is issued against an intermediary which is by no means engaged in the infringement of copyright (i.e., access providers). Imposing

injunction enforcement costs exclusively on intermediaries is not justifiable from the perspective of equity rules, and will not contribute to the development of long-lasting relationships between rightsholders and online intermediaries.

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