



Internet Piracy – Losses to the Culture and Economy

Analysis of the Internet Piracy Impact
on the Polish Economy on Selected
Cultural Markets

Warsaw, 2017

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Glossary

Access provider – entity providing the service consisting in ensuring access to the Internet.

Adserver – IT system for advertising campaign management and broadcasting on the Internet, with automatic targeting of advertising messages in real time and selection of publication site based on algorithms aimed at optimising the costs of the broadcast campaign.

Broadcasting – data transmission mode, consisting in sending data packages via a single network port (interface used for communicating in a computer network), which should be received by all the other ports connected to a given network.

Cloud – model of using IT resources (computing power, data space) leased from their provider instead of buying servers and disc arrays. Cloud services are available on the Internet and enable easy access sharing and service scaling.

Downloading – getting digital content in the form of files stored permanently on the target device.

InfoSoc Directive – 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 (OJEC L 167/10 of 22.06.2001 as amended).

E-commerce Directive – 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 (OJEC L 178/1 of 17.07.2000).

Embedding – publishing parts of other websites on certain websites to ensure

the content on the embedded website is consumed by the embedding website user without leaving it.

"Follow the money" approach – a form of combating copyright infringers on the Internet, assuming hindering or eliminating their sources of income.

Hyperlink – a reference to another website or another place on a given website, placed on the website in the form of an URL address, which can be clicked to proceed to the said address.

Hosting – a service of server space provision, offered by the hosting provider, to store data managed by the customer.

Iframe – a function of a website programming language used for embedding a part of another, usually external, website in one's own website.

Leakage effects – a situation where the capital or income leaves the economy instead of staying within it. In economy, leakage means leaving the circular flow of income model.

Notice and take-down – a procedure adopted by hosting providers if they have received credible information or official notice concerning illegal content stored in the servers made available to the customers.

Peer-to-peer – a model of communication between users' computers in a computer network, ensuring direct transmission, skipping the server.

Internet piracy – an activity consisting in publishing, circulating and enabling familiarisation, via the Internet, with certain works without obtaining consent of the authorised entities, contrary to the

agreed terms and conditions or to the applicable regulations.

File – a structured collection of data with a finite length, used for storing content in a digital format, e.g. software, images, sound, videos, which can later be used on IT devices.

Creative industry – a group of businesses organising the commercial exchange of copyright-protected works, starting from creation and production to promotion, marketing and distribution. In this report, it will also be referred to as creative industries, creative and cultural industries, creative sector, cultural and creative sector.

Creative goods market – all the relationships between the participants of the creative goods' exchange processes. In this report, selected creative goods markets were analysed, defined as follows:

Audiobook market – talking books or sound recordings, containing a published book text read by a speaker, available in a digital format, also radio dramas.

Book market – books in a printed or digital format (scanned image or PDF of the whole book or its part) and e-books (electronic books).

Music market – all music as well as music and text works (e.g. songs, popular music, art music, opera music, film music) in a digital format, and the production, publication and distribution of phonograms and videograms.

Press market – paper and digital issues of press as well as digital press materials (text, graphic images and photos), scanned paper versions in whole or in part, articles published on Internet websites.

Live broadcast market – live broadcasts of sports and other events, e.g. concerts, TV channels in whole.

Video market – (of audiovisual works) – feature films, TV series, TV programmes, other audiovisual works (e.g. animated films for children, theatre performances).

Simulcasting – programme or event broadcast in more than one medium (e.g. TV and radio) or in more than one service in the same medium at exactly the same time.

Streaming – reproducing works in real time on the end-user's device from a continuous data stream provided in real time without recording the work in the device resources.

BitTorrent – a protocol of file exchange and distribution via the Internet (in this report it is used also in an abbreviated version, i.e. "torrent").

CJEU, Court of Justice – Court of Justice of the European Union.

Upload – sending digital content in the form of files to an Internet server.

Copyright Act – the Act of 4 February 1994 on Copyright and Related Rights (uniform text Journal of Laws of 2016, item 666 as amended).

Work – every expression of creative activity of an individual nature, recorded in any form, regardless of its value, designation and way of expression, protected by copyright. In this report, it is also referred to as content/contents.

User – an Internet user aged 15–75 (in this report also: a consumer). This group can be divided into the following subgroups:

Occasional user – an Internet user aged 15–75 who looks for content on the Internet (audiobooks, books, music, press, live broadcast and video content) less frequently than the average for Internet users, which translates into a lower number of consumed works.

Heavy user – an Internet user aged 15–75 who looks for content on the Internet (audiobooks, books, music, press, live broadcast and video content) more frequently than the average for Internet users, which translates into everyday consumption of usually more than one work.



Foreword

This report is a comprehensive compendium of Internet piracy on selected markets in Poland with respect to demand, reach and losses.

The phenomenon of unauthorised distribution and consumption of content via the Internet has grown in recent years as a result of the clash of interests of the content owners and distributors, Internet users and a range of legal and illegal entities making profit through mass copyright infringements.

The forecasts made a couple of years ago with respect to piracy growth in Poland (on the video market) have come true. This happened even though the legal distribution market enriched its offers and developed access models, as well as initiated many campaigns promoting legal content trading. At the same time, legislative actions were not intensified with respect to legal market protection and improved legal protection of content despite the obligation to adapt the local law to EU standards.

The freedom of accessing technology and intermediary services made illegal content trading highly profitable and, what is more, it created many possibilities of avoiding liability by creating complex chains of related services. Piracy has become a well-organised ecosystem which, due to the absence of appropriate protective legal mechanisms, adversely affects not only the legal market, but also the national economy and consumers' budgets. This area, frequently beyond any control, has increasingly been a source of problems related e.g. to data security, malicious software and other irregularities.

The analysis covered creative markets of paramount importance to the economy and the most affected ones, i.e. video

content, online broadcast, music, books, audiobooks and press. These markets share similar content distribution models – a lot of common challenges can be identified as well as legal problems connected with efficient content protection. The study did not cover gaming and software markets since even though the infringement scale is significant here (it is estimated that every other software item used in Poland is illegal), the methods of illegal distribution are clearly different from those covered by the study, which would render it impossible to create universal models used by illegal websites. Moreover, there is no controversy concerning the legal status of games and computer programmes, the downloading of which is explicitly prohibited in the Penal Code.

One of the most alarming conclusions of this study is that the online content piracy, which is estimated to bring about PLN 3 billion of GDP losses to the economy and which can be compared to about 30 percent of cultural property export from Poland to third countries in 2016, is not given due attention by the legislators. It seems that the actual adverse effects on the Treasury and, more broadly, on the economy, including the creative industries and users, should provide an incentive to initiate urgent, but also considerate, legislative activities, which are likely to significantly reduce Internet piracy and related losses.

The analysis covered creative markets of paramount importance to the economy and the most affected ones:



VIDEO MARKET



LIVE BROADCAST MARKET



MUSIC MARKET



BOOK MARKET



AUDIOBOOK MARKET



PRESS MARKET

Key numbers

The total annual losses generated in the Polish economy (for 2016) as a result of Internet content piracy on the studied markets:



PLN 3 billion
of lost GDP



30 percent
of annual Treasury
spending on culture
and media for 2015

**4 cinema
tickets**

for every citizen
of Poland



27.5 thousand
lost jobs



**the number
of Zakopane
inhabitants**

over 13 percent

of the registered unemployed
in the Mazovian voivodeship



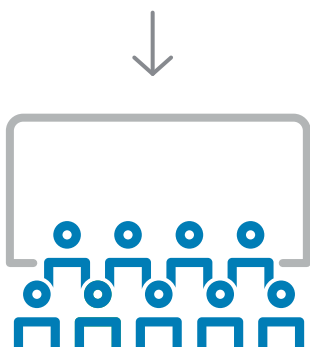
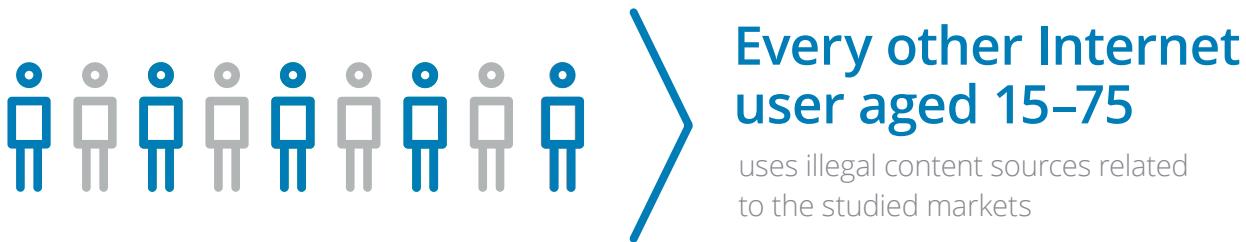
PLN 836 million
of losses for the Treasury



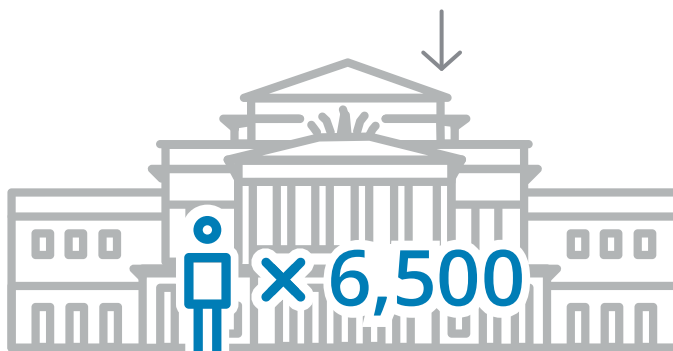
**over two
times more**
than the value of TVP S.A.
radio and TV licence fee
recorded in 2016

**amount
sufficient to buy**

over 33 million books
for the Polish libraries



almost **AS MANY AS THE NUMBER OF PEOPLE WHO BOUGHT TICKETS FOR POLISH FILMS SHOWN** in the cinemas in 2016



6,500 TIMES the number of people **SUFFICIENT TO FILL THE NATIONAL OPERA ROOM**

PLN 900 million

the estimated **VALUE OF CONTENT DOWNLOADED FROM ILLEGAL WEBSITES** by Internet users in 2016



this would enable buying almost **50 MILLION CINEMA TICKETS**



equals to a total of about **9 ANNUAL BUDGETS** of the National Library

PLN 30.4 billion

is the forecast **TOTAL VALUE OF ILLEGAL CONTENT CONSUMPTION** from illegal sources on the Internet in 2017-2024



this would enable covering about **70 PERCENT OF THE PUBLIC SECTOR DEFICIT** for 2015 at one go



value would enable covering **BUILD AROUND 730 KM OF MOTORWAYS** (this is more or less the distance from Rzeszów to Berlin)

PLN 745 million

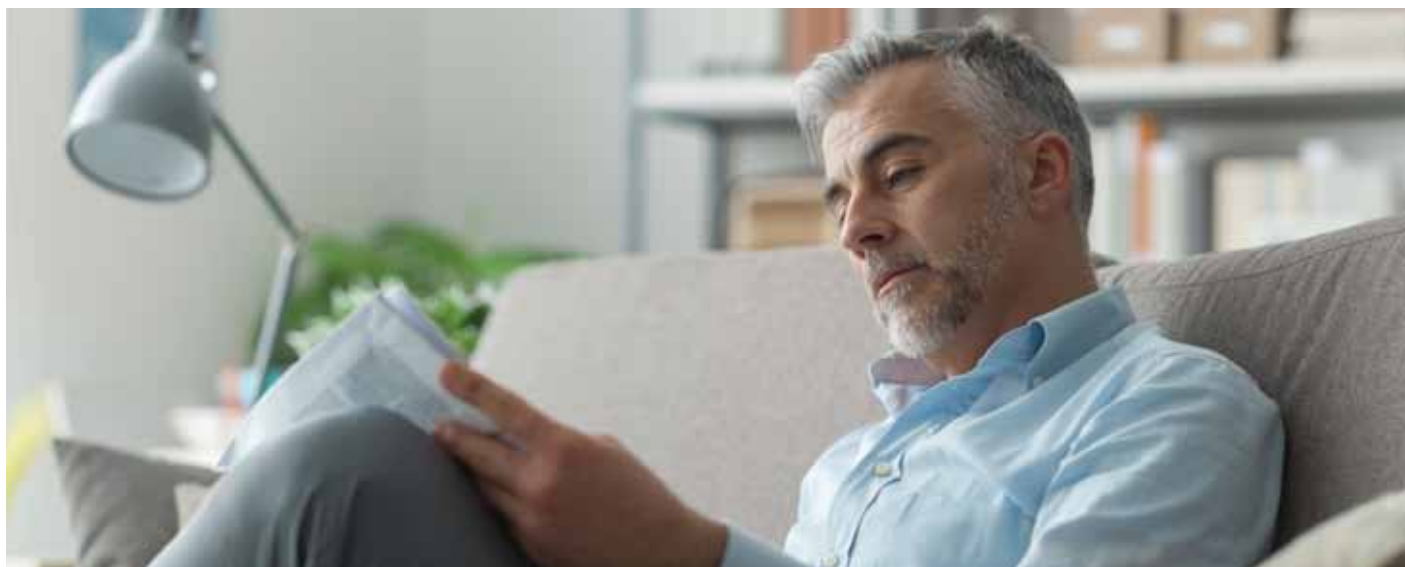
is the estimated aggregate **INCOME OF ILLEGAL WEBSITES** in 2016, generated by providing illegal content



this sum would enable paying over **3 MILLION OF ANNUAL RADIO AND TELEVISION LICENCE FEES**

Suggested solutions for limiting the scale of piracy

Internet piracy is multidimensional and has complex grounds. Its restriction necessitates both business actions related to content consumption on the studied markets (as presented below) and those connected with regulatory and legislative aspects (as presented in the second part of this chapter).



Suggested business and educational solutions

Content supply and business models

The analysis of Internet piracy in Poland has proved that it is not uniform on particular markets. The comparison of reasons for using illegal sources and the offer of particular markets proves, despite the differing nature of those markets, that the range of the piracy results from content accessibility. The suggested solutions to reduce piracy are as follows:

- increased supply of legal content and making it more accessible to improve users' experience in this respect and gain their trust in legal sources;
- further promotion of business models, including subscriptions which reduce the need to buy on a case-by-case basis and guarantee a more predictable revenue stream; and

- review and adaptation of licence windows to the customers' needs, considering the assumptions on the production ROI.

Support for and promotion of initiatives based on the *follow the money approach*

As shown by the United Kingdom, Portugal and other European Union states, it is not only possible to develop an agreement between the digital content market participants, but it also brings measurable results. This is why it is desirable to continue domestic discussions on the *follow the money approach*, including, but not limited to:

- dialogue with advertisers and payment intermediaries to initiate self-regulatory activities to adopt good practices;

- creation of a national database of websites used for mass copyright infringement.

An important role here should still be played by public authority representatives, being initiators or at least moderators of discussions devoted to specific practical solutions. The initiatives started in recent years by the President of the Office of Electronic Communication and the Ministry of Culture and National Heritage need recognition.

Social education

The studies reveal that 39 percent of respondents are not aware of or are indifferent to the fact that getting content from illegal sources is detrimental to the authors, performers and producers. This proves the necessity of further educational and informative

activities in that respect, including but not limited to:

- 1) advertising campaigns supported by the prestige of reputed authors, performers and producers;
- 2) incorporating meetings with representatives of authorities combating cybercrime in the educational programmes at all levels.

Suggested legislative solutions

The report below presents legislative solutions for Poland which need to be considered and are based on the review of domestic and international practices related to legal intellectual property protection and combating Internet piracy (as discussed in detail in chapters 10 and 11).



Revising legal grounds of hosting activity and hosting providers' liability

- I. The analysis of the Polish legislation and the entities' operations on the Internet brings about the conclusion that the recommended direction of changes should be **regulating**

the hosting providers' liability in compliance with the e-commerce directive. This should include but not be limited to:

- regulating **the premises of releasing hosting providers from liability in compliance with the requirements of the 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 (Directive on electronic commerce).

The Article 14(1) of the Act on Providing Services by Electronic Means in its current version

introduces premises more lenient than in the Directive to release the hosting provider from the liability for damages and, consequently, it does not achieve the primary objective of the e-commerce directive. As per section 41 of the directive recitals, this objective consists in balancing the interests of entities providing the hosting service and the copyright holders; for more information see p. 101 and subsequent;

– precise indication in the Act on Providing Services by Electronic Means that **the hosting provider's exemptions from liability do not prevent any courts or administrative bodies from demanding the hosting provider to stop or prevent infringements**. This would bring the Act on Providing Services by Electronic Means closer to Article 14(3) of the e-commerce directive;

– explicit indication in Article 15 of the Act on Providing Services by Electronic Means that **the absence of any obligation to monitor content refers solely to the general and not specific obligation of monitoring the content stored**. This would bring the Polish act closer to the requirements resulting from Article 15 of the e-commerce directive; and

– extending the scope of application of Article 14(4) of the Act on Providing Services by Electronic Means by **also covering cases of actual service provider's control over the content provider**, which would bring the said provision closer to the requirements of the e-commerce directive.

II. Moreover, the legislative activities should include also **regulating the notice and take-down procedure**.

The following aspects need greater precision:

– specification **of the minimum content of reliable message**, as mentioned in Article 14 of the Act on Providing Services by Electronic Means;

– specification of the **way of handling messages with illegal content by hosting providers**. It should be stated particularly if the inspection of such a message should be limited solely to formal aspects or should it comprise its reliability assessment.

III. The legislators should also review the **definition of the hosting provider's liability for any third-party rights infringement** (including proprietary copyright) by deciding whether a hosting provider shall be held liable for the infringement of any third-party rights or only for indirect infringement (e.g. accessory).

Introduction of explicit legal grounds for issuing warrants vis-a-vis access providers and hosting providers

In our opinion, to ensure protection of copyright holders without penalising the end-users' behaviours, **it is necessary to implement Article 8(3) of the InfoSoc Directive in Polish legislation**.

This would grant the following competences to courts or administrative bodies:

- 1) prohibiting the access provider from providing access to specific Internet platforms which offer copyright-protected content in an unauthorised and large-scale manner;
- 2) preventing the Internet platform operator from its further operation if it is proven that it is used by third parties

largely for uploading illegal content and the hosting provider's fault is demonstrated.

Limiting the scope of permissible private use as per the EU standard as a contribution to increase legal awareness of Internet users

The interpretation of Polish regulations concerning the permissible private use in compliance with the decision in the ACI Adam case (e.g. copying of illegally distributed copies excluded from permissible private use) is viable in our opinion. This, however, raises many doubts in the legal doctrine, which is why **it would be advisable to introduce regulations to the Polish legislation, shaping it unequivocally in line with the stance assumed for the decision in the ACI Adam case**.

Introduction

Report objective

This report attempts at estimating the losses incurred by the Polish economy due to Internet piracy, affecting creative industry on the TV and video, music, book and press markets.

This report commissioned by Stowarzyszenie Kreatywna Polska (Creative Poland Association) and prepared by Deloitte Advisory Sp. z o.o., attempts at estimating the losses incurred by the Polish economy due to Internet piracy, affecting creative industry on the TV and video, music, book and press markets.

This is a significant extension of analyses carried out in recent years (including e.g. the report called *Analiza wpływu zjawiska piractwa treści wideo na gospodarkę w Polsce* [Analysis of the impact of video content piracy upon the economy in Poland] prepared by PwC in 2014). Periodic studies enable capturing the dynamic development of piracy, which includes many creative industry markets. The development of digital technology accelerates the changes in this respect. This technology brought about new service types and business models in a digital world, which affect entities from the creative sector to a significant degree. On the one hand, the inherent properties of that sector, i.e. innovation and creativity, formed its perception as a key knowledge economy component to which the technology offers additional support, creating the opportunities to reach new recipient groups and distribution channels. On the other hand,

however, the described technological and socio-economic changes give rise to many threats resulting from mass copyright infringements on the Internet which, in turn, leads to reducing the sector revenues and hampers its growth.

In this study, Internet piracy refers to the activity consisting in publishing, circulating and enabling familiarisation with works (on the analysed markets, i.e. audiovisual, books, live broadcast, press, music and audiobook markets) via the Internet without the authorised entities' consent, contrary to the agreed terms and conditions or the applicable regulations. Thus, the list of activities classified as piracy in this report comprises:

- file sharing;
- stream sharing;
- sharing works from unlicensed sources (linking) both through embedding, iframe and hyperlinks;
- any forms of unlicensed or illegal work distribution;
- technical intermediation for the benefit of illegal entities, including hosting, streaming, cloud, network services;
- business intermediation for the benefit of illegal entities, including sales and advertisement placement;

- payment processing (SMS, electronic transfer, sale of pre-paid cards, vouchers, access codes, etc.);
- accessory and incitement to do the above.

The list of activities classified as piracy is long but not all of them have been exhaustively regulated in the applicable regulations. This results largely from the fact that the existing regulations were created in entirely different technology-related circumstances. This makes it difficult to carry out legal assessment of certain phenomena in the digital environment. For this reason, it is advisable to adapt the legislation to the new situation on the technology market.

Scope of the report and methods

In this study, the phenomenon of piracy is characterised, with the definition of key methods of content sharing and their monetization, as well as estimation of the scale and impact of piracy on the Polish economy. Additionally, forecasts concerning further development of this phenomenon were prepared. Moreover, key causes of piracy were identified and selected legal solutions presented, as adopted by the following European countries: United Kingdom, Germany, Austria, Portugal, France, Denmark.

ANALYSED MARKETS*



1. VIDEO MARKET (OF AUDIOVISUAL WORKS)

– feature films, TV series, TV programmes, other audiovisual works (e.g. short animated films for children, theatre performances).



2. BOOK MARKET

– books or parts thereof in a printed or digital format (scanned or PDF) and e-books (electronic books).



3. PRESS MARKET

– paper and digital issues of press as well as digital press materials (text, graphic images and photos), scanned paper versions in whole or in part, articles published on Internet websites.



4. LIVE BROADCAST MARKET

– live broadcasts of sports and other events, e.g. concerts, TV channels in whole.



5. MUSIC MARKET

– all music as well as music and text works (e.g. songs, popular music, art music, opera music, film music) in a digital format, and the production, publication and distribution of phonograms and videograms.



6. AUDIOBOOK MARKET

– talking books or sound recordings, containing a published book text read by a speaker, available in a digital format, also radio dramas.

* The order is based on revenues on particular markets in 2015.

Wherever possible, the results of studies carried out were broken into particular markets. It should be kept in mind that the study covers access to content solely via the Internet, i.e. no illegal activities were included with respect to physical data storage devices (e.g. CDs,

DVDs, books). The study also did not cover content search engines or social media, which are important in terms of spreading information.

Study methods

The following study methods were used to prepare this report:

ANALYSIS OF REFERENCE WORKS	A critical review of empirical studies devoted to piracy's impact on economy, paying special attention to generated economic and social effects. The review comprised Polish and foreign studies. Moreover, a detailed review of law books and other documents, e.g. court decisions, was carried out for the legal section.
QUANTITATIVE STUDIES	Survey based on the CAWI method (Computer Assisted Web Interview), encompassing a group of 1,500 Internet users aged 15–75 using the following content types shared on the Internet: video, live broadcast, books, audiobooks, music, press.
INTERVIEWS	Individual interviews with experts in this field, to make the quantitative studies on the analysed problems more exhaustive.
ECONOMIC MODEL	Estimating the direct, indirect and induced impact of piracy on the Polish economy using a model based on the Input-Output table for the Polish economy, i.e. analysis of per capita GDP decrease, reduced employment and lowered fiscal income due to piracy.
ECONOMETRIC MODEL	Estimated scale and impact of piracy on the economy in several years' perspective in the social and economic dimension for the studied markets, prepared on the basis of the econometric model.
EXPERT PANEL	A critical analysis of the results and outlook, complementing said results with qualitative and quantitative components.

To ensure the reliability of the presented analyses and calculations, the following rules were adopted:

● independence ● impartiality ● constructivism

– the report was prepared by an entity which is not an immediate participant of the studied market but solely its observer;

– to ensure an accurate and balanced description of the studied phenomenon, the analyses were made without evaluating the particular aspects and carried out activities; what is more, due to the methodology employed, e.g. involvement of experts, different perspectives were considered during the works;

– the report concerns problems vital from the studied markets' perspective and, even more importantly, the impact of the phenomenon on the Polish economy. It contains also legislative recommendations based on the existing legislation and comparative review of other markets.

Report structure

This report is composed of 11 chapters: chapters 2–9 refer to the socio-economic aspects of piracy, while chapters 10–11 – to related legal aspects.

The most important aspects from the perspective of piracy's impact on the Polish economy are presented in the initial chapters of this report. The presented order of content does not correspond to the order of particular stages of studies and analyses carried out for this report.

Chapter 2 describes the ties between the creative industry and the economy, indicating how it contributes to value creation. Given the important role of funding in the ecosystem of supporting the cultural and creative sector, the key forms of funding culture from public sources in Poland were described.

Chapter 3 is based on the results of the survey conducted among Internet users, which enabled which were used to estimate the scale of piracy in Poland on selected creative industry markets. This

scale was measured in several ways, e.g. based on the amount of illegal content consumed and the size of the groups of users visiting illegal websites.

Chapter 4 discusses the revenues earned by illegal websites, identifying both their forms and estimated values in 2016.

Chapters 5–7 present the methodology and results of calculating piracy's impact on the Polish economy, referencing the obtained values to the broader economic context. Due to the dynamic growth of piracy, chapter 7 presents also its growth forecast on specific markets.

Chapter 8 describes piracy on particular markets, identifying basic website types offering illegal access to content online. The results of completed studies served to present user preferences with respect to website types broken into particular markets. To offer a more comprehensive picture, income sources were identified in the illegal content trading chain.

Chapter 9 is a synthesis of the results of the study on piracy in Poland. It also describes key competitive advantages of websites offering legal content as well as websites with illegal content. What is more, the chapter contains a summary of studies on foreign markets, indicating the key reasons for using illegal sources.

Chapter 10 attempts to identify individual entities, or links in the chain of services related to sharing and using content on the Internet, from the access providers to the content users. With respect to each of the entity types, the legal framework of their operation on the digital content market was outlined.

Chapter 11 describes selected legal and self-regulatory solutions used nowadays in chosen European countries, i.e. Austria, Denmark, France, Germany, Portugal and the United Kingdom. Particular emphasis was put on solutions likely to inspire the Polish legislators and the digital content market participants.



Creative industries' role in the economy

The creative and innovative potential in creative industries is an important causal factor of economic competitiveness. Cultural and creative projects result in social capital development, increase the intellectual potential of regions as well as support the shaping of open, conscious and innovative civil societies.

Creative industries have also a growing share in building the competitiveness of the Polish economy on foreign markets, with the positive balance of cultural property trading in 2010–2015 growing by 21 percent a year on average, reaching the highest value in 2015, when the export to import ratio was 51 percent. Cultural property export not only strengthens the Polish position internationally, but also creates additional production and contributes to increased employment, as well as generates positive outcomes in the form of diffusion of knowledge, skills and standards throughout the entire domestic economy.

The intellectual property laws and dynamically developing digital information and communication technologies are crucial for the growth of creative industries. The technology opens up new opportunities in the entire value chain, from creation, through production and distribution, to cultural property consumption. At the same time, as a result of the demand for the goods and services of entities in that sector, it can be indicated that the cultural entities, forcing adaptation and technological progress, provide incentive to develop and innovate to the technology manufacturers. This is termed feedback.

The creative sector entities are strongly linked both inside the sector, and to entities in other economy sectors. Owing to that, besides the undeniable social and educational benefits, the activity of the cultural industry brings about also measurable economic benefits in the form of added value, generated workplaces, pay in the economy or taxes and charges paid to the central or local budgets.

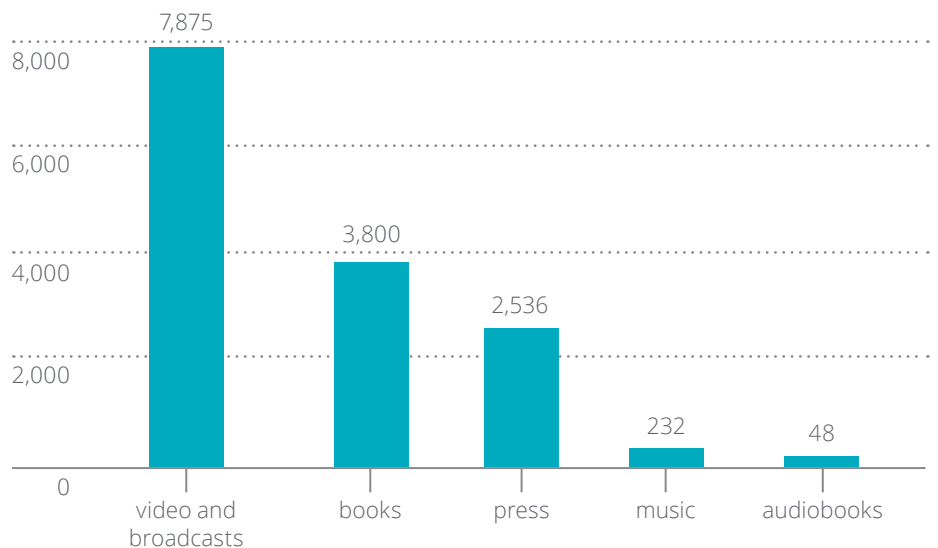
For the last decade, the creative sector share in GDP has grown gradually, achieving 3 percent of global GDP in 2013. The estimates for Poland point to the generation of 1.6 percent of GDP by the cultural sector and 1.9 percent of GDP by creative industries (data for 2010)¹.

In the context of creating economic value, it is also worth looking at the sales value on particular markets within the cultural sector, covered by the analysis.

To ensure that the entities operating in the cultural sector and creative sector are able to earn revenues, generate

added value and workplaces, or pay taxes, an appropriate ecosystem supporting their development must exist. Because of the specific nature of the mentioned sectors' activities, which is referring to the multitude of business activity forms and operating areas, but is also characterised by high unpredictability of work results and, consequently, uncertainty concerning the reported demand size, and requires advanced knowledge and innovation, the creative market may be classified as a high-risk business activity form. This is a challenge with respect to obtaining funds, which is of the utmost importance in the technological development era as the transfer to digital technology requires much capital involvement.

Revenues on particular markets in 2015 (in PLN million)*



* Due to the absence of detailed data, the value of the online broadcast market was presented together with the entire video sector. The revenue earned on particular markets is based on retail prices.

Source: Compiled by Deloitte based on interviews with experts representing particular markets

Culture funding from public sources in Poland

The government budget, including ministry schemes adopted on a year-by-year basis as well as multi-annual schemes

Budgets of local self-government bodies

European funds

Funds from non-budgetary institutions, including government special purpose funds and government legal funds

The culture is funded also from European funds, by means of the following programmes:

- Operational Programme Infrastructure and Environment 2014–2020,
- Creative Europe Programme 2014–2020,
- EEA Financial Mechanism 2014–2020,
- Europe for Citizens Programme,
- Operational Programme Infrastructure and Environment 2007–2013.

Sponsorship

The subsidies are aimed at the performance of substantial tasks. They can be applied for solely by the local government units to finance tasks carried out as part of programmes executed by the film and cultural institutions.

Scholarships

Scholarships are intended for people dealing in artistic activities, spreading (including folk art) and animating culture as well as care of historical monuments.

Culture funding by the state is a tool of broadly defined cultural policy. For many areas of the creative industry it is an invaluable support in their activity and development. Due to the growing phenomenon of using illegal sources of access to content, it seems reasonable to accompany the funding with appropriate legal defences for the cultural industry and emphasise social education with respect to intellectual property protection.

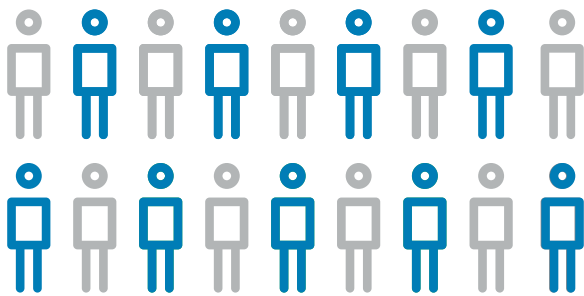
In Poland, culture is funded not only from public, but also private sources.



Piracy scale in Poland

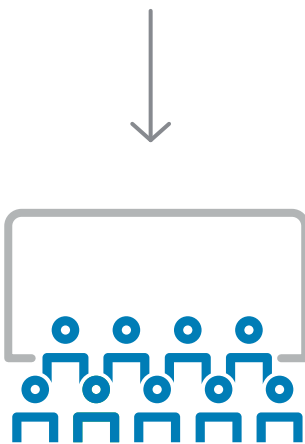
Key conclusions

- ▶ The use of illegal sources is declared by over 12 million Poles, which means every other Internet user aged 15–75 obtains content from illegal sources. This group is predominated by people who use both legal and illegal sources.
- ▶ Most users benefit both from legal websites and those offering illegal access to content. People using solely websites offering illegal access to content are a minority and their number ranges from 6 percent (audiobooks) to 17 percent (books) of users, depending on the market.
- ▶ The most intense consumption of content from illegal sources with respect to the number of works is found on the video and audiobook market.
- ▶ The highest share of those using solely illegal sources is attributed to respondents looking for books (17 percent) and video content (14 percent) on the Internet.

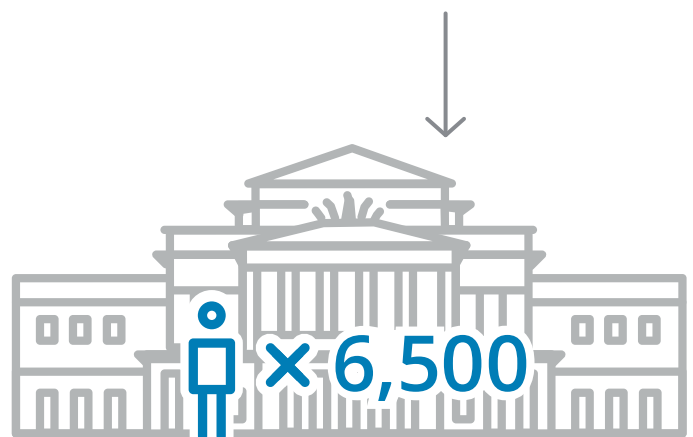


Every other Internet user aged 15–75

uses illegal content sources on the Internet.



almost **AS MANY AS THE NUMBER OF PEOPLE WHO BOUGHT TICKETS FOR POLISH FILMS SHOWN** in the cinemas in 2016



the number of people **SUFFICIENT TO FILL THE NATIONAL OPERA ROOM** over **6,500 times**

Introduction

To identify the scale of piracy on the studied markets of the cultural industry, a comprehensive opinion survey was carried out on a group of 1,500 Internet users aged 15–75.

It should be stressed that a similar survey, which would refer to so many creative industry markets, has never been carried out in Poland before and, consequently, the opportunity to compare the results obtained with other study results was limited.

Piracy scale in Poland

The number of Polish Internet users aged 15 to 75 is 23.6 million people. This means about 77.9 percent of the Polish population in that age group uses the Internet on a regular basis and 14 to 73 percent of them use the Internet to obtain content from one or more markets in the studied creative sector.

The Poles are most eager to read the news or listen to music online. In both cases, the abundance of groups is much higher than 50 percent of Internet users in a given age group. The market of video content users is also close to that boundary (48 percent of all Internet users in the studied age group). Comparing recipients of all content types, the least abundant is the group of audiobook users. It includes, however, as much as 3.2 million people, which means 8.3 percent of the Polish population and close to 13.6 percent of Internet users in the studied age group (15–75 years).

Unfortunately, however, 51 percent of Internet users on average², i.e. more than 12 million Poles, use websites offering

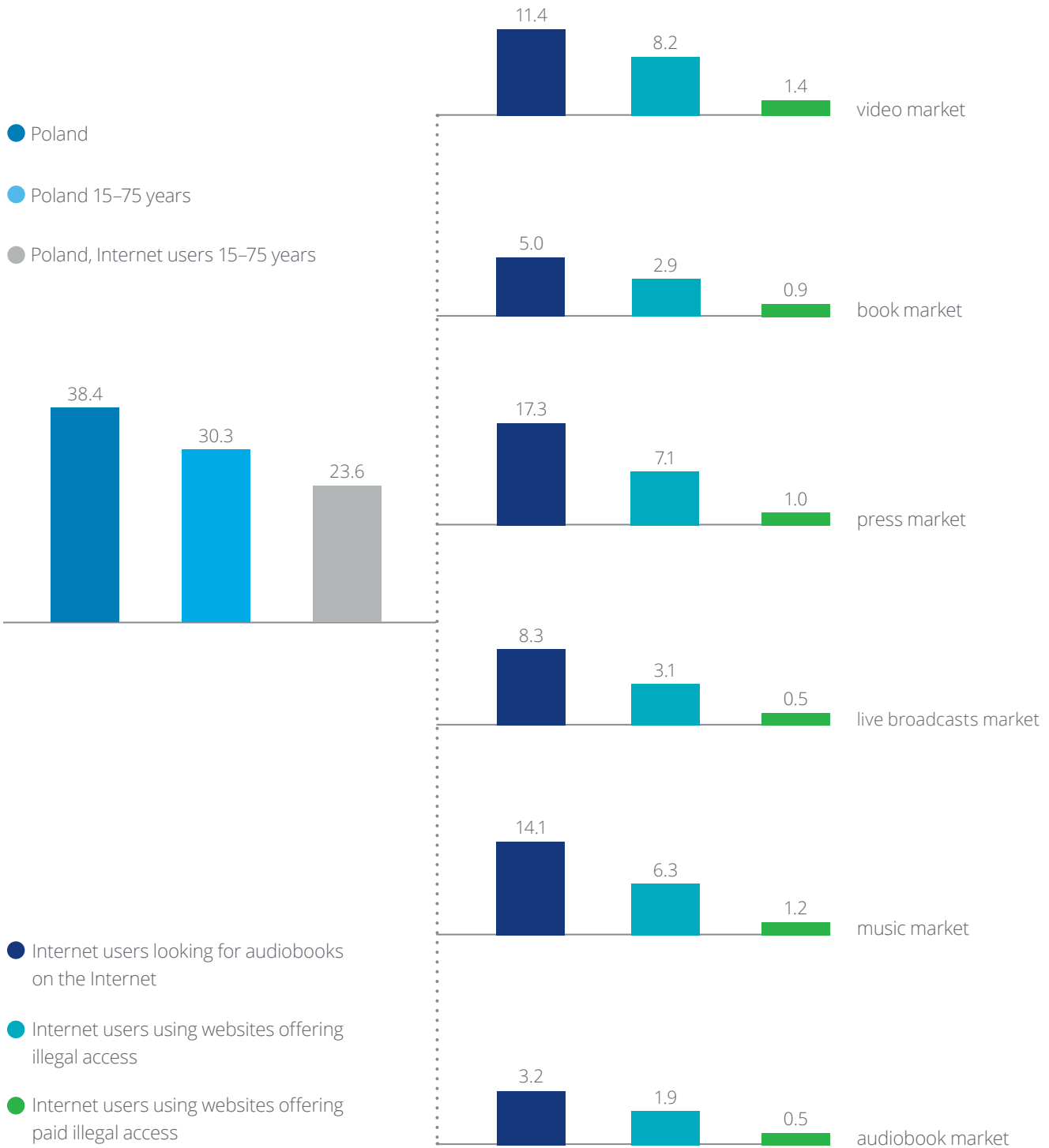
illegal access to content. Slightly above one half of respondents indicated they use both website types, legal and illegal (this is 59 percent of video watchers, 55 percent of audiobook listeners and 45 percent of book readers).

It is worth paying attention to the fact that despite the broad, cheaper offer and easy accessibility of illegal sources, a significant part of respondents does not abandon legal sources entirely. The highest share of respondents using solely legal sources is observed on the broadcast market (61 percent), press (57 percent) and music (55 percent), and the lowest with respect to videos (27 percent).

The majority of declarations concerning access to content solely from illegal sources came from book readers (17 percent). Interestingly, as much as 31 percent of book readers using both legal and illegal sources pays for content downloading. This is the highest share when compared to the other markets.

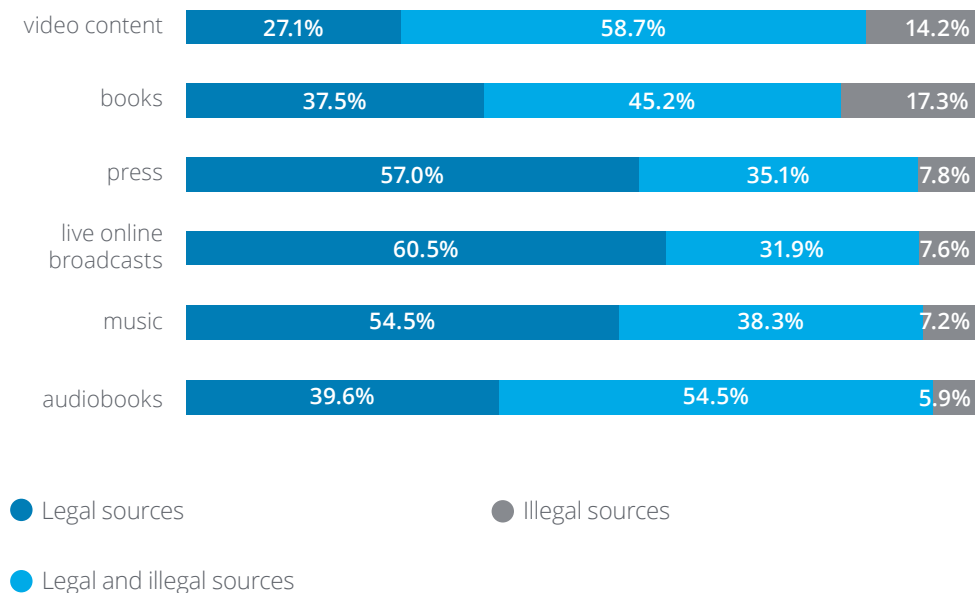
It is worth paying attention to the fact that the presented results refer to the respondents' declarations concerning the use of illegal sources specifically to obtain content. When we consider consumption of illegal content in broader terms, it should be stressed that the content obtained is very frequently³ consumed by more than one person. Consequently, it should be expected that the actual share of people using illegal content is much higher.

The number of Internet users using websites offering illegal content on the audiobook market compared to the entire population of Poland (in million people)



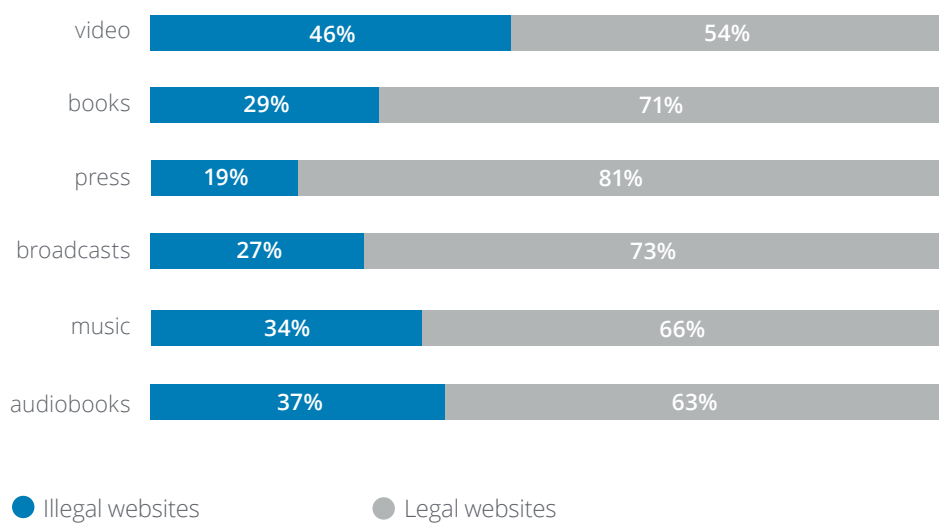
Source: Deloitte analysis based on users' opinions, CAWI, N=1,500

Distribution of users obtaining content from the Internet based on the legality of websites visited



Source: Deloitte analysis based on users' opinion study carried out for the report

Obtaining content on the Internet, measured by the number of content, based on the legality of source of availability (% of content obtained from a given source)



The structure of the number of users using illegal sources to a certain extent reflects the share of content obtained illegally. Based on the estimates derived from the study, illegal sources provide the most video content, as much as 46 percent. Subsequently: 37 percent of audiobooks and 34 percent of musical works come from illegal websites. The group with the smallest frequency of illegal sourcing is press articles (19 percent).

Source: Deloitte analysis based on users' opinion study carried out for the report



Introduction

In the digital reality, the prosecution of individual infringements of intellectual property law is expensive and ineffective. Instead of struggling with end-users, some of the injured parties pursue the perpetrators and organisers of infringements, tracing the financial flows. The illegal activity is encouraged by the opportunity to achieve high profits, the

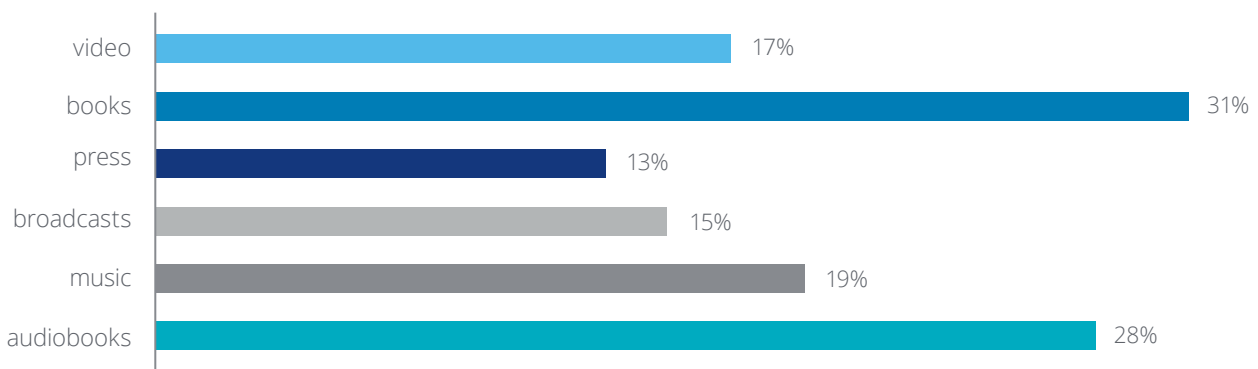
absence of which renders illegal websites indefensible. In this part of the study, the estimates concerning the profits generated by illegal websites on making content accessible to Internet users in Poland will be presented.

Payments on illegal websites

The analysis of the study results proves the highest share of the studied Internet users who pay for accessing illegal content is among audiobook listeners (28 percent) and book readers (31 percent). The payments for specific content result largely from their accessibility in the paid model when compared to the advertising or mixed model (payments and advertisement).

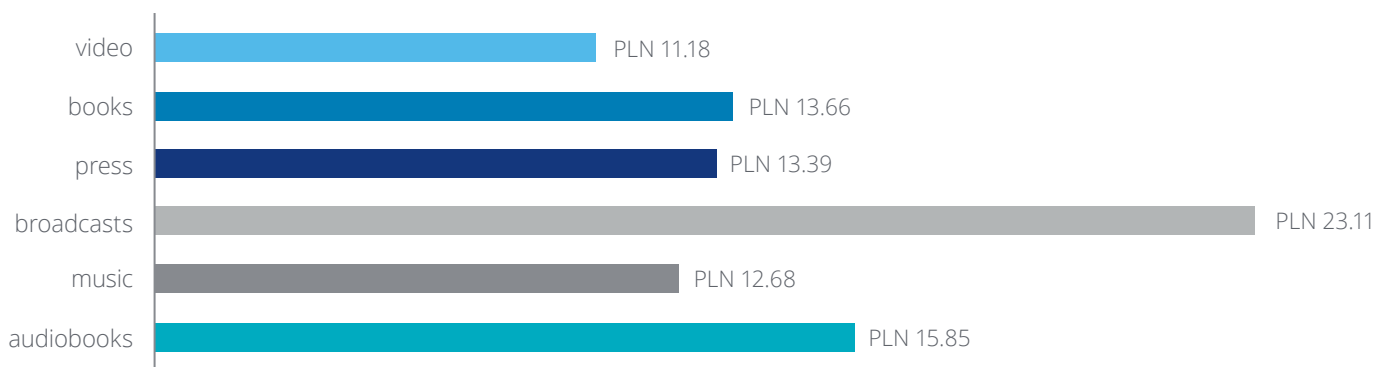
The middle group covers users of paid video, live broadcast and musical work websites. The lowest share of people paying for access to illegal websites is among press news readers (13 percent).

Share of users paying for access to content on websites offering illegal access



Source: Deloitte analysis based on users' opinion study carried out for the report

Average monthly expenditure declared by users on paid websites offering illegal access



Source: Deloitte analysis based on users' opinion study carried out for the report

13–31 percent of users pay for access to content on websites offering illegal access.

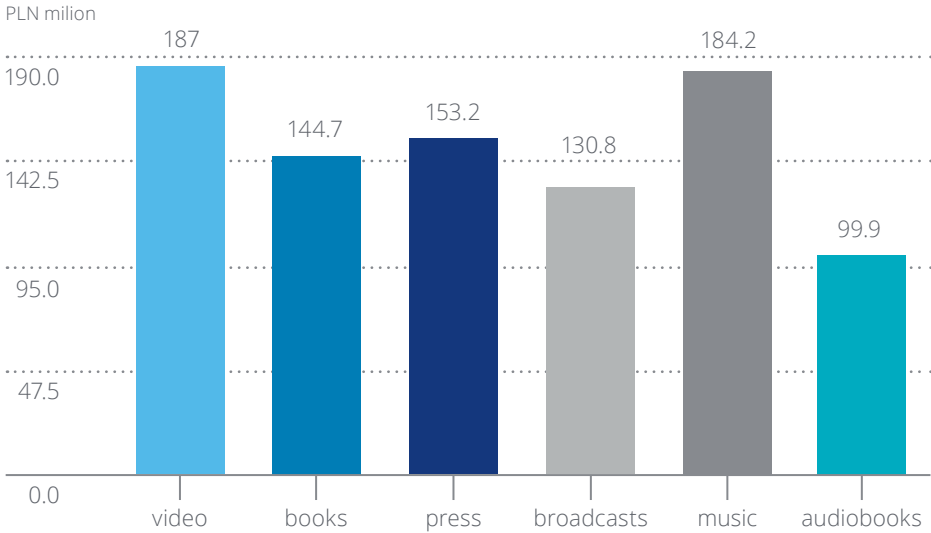
The average expenditure of those paying for access to content on websites offering illegal access ranges from PLN 11.18 to 23.11 a month.

The declared amounts spent on accessing illegal websites are distributed quite differently. On average, the most money is spent on illegal access by a user looking for a live broadcast on the Internet (PLN 23.11). In the middle group, PLN 12.68 to 15.85 is paid for illegal access by the users of websites offering audiobooks, press articles, musical works and books. An average Internet user spends the least on illegal access to video content (PLN 11.18).

Annual illegal website revenues

Poles spend PLN 900 million a year on illegal Internet websites. This corresponds to about 9 annual budgets of the National Library.

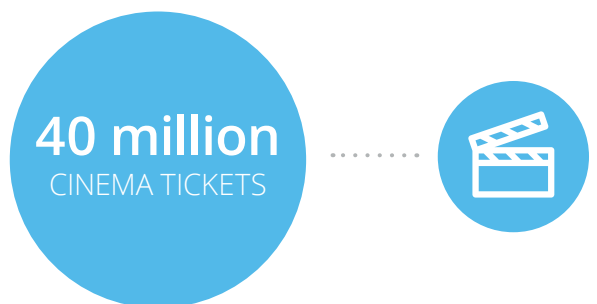
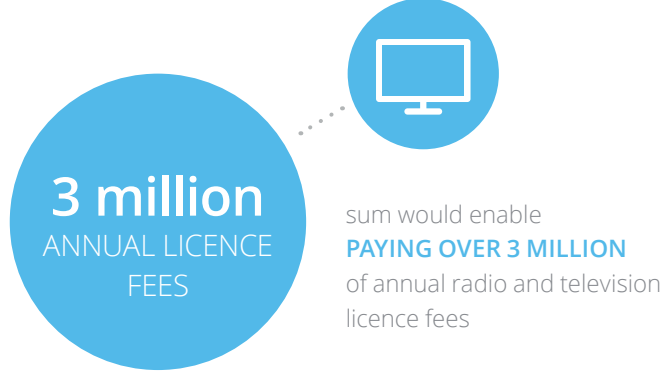
Annual expenditure of Poles on websites offering illegal access to content (in PLN million)



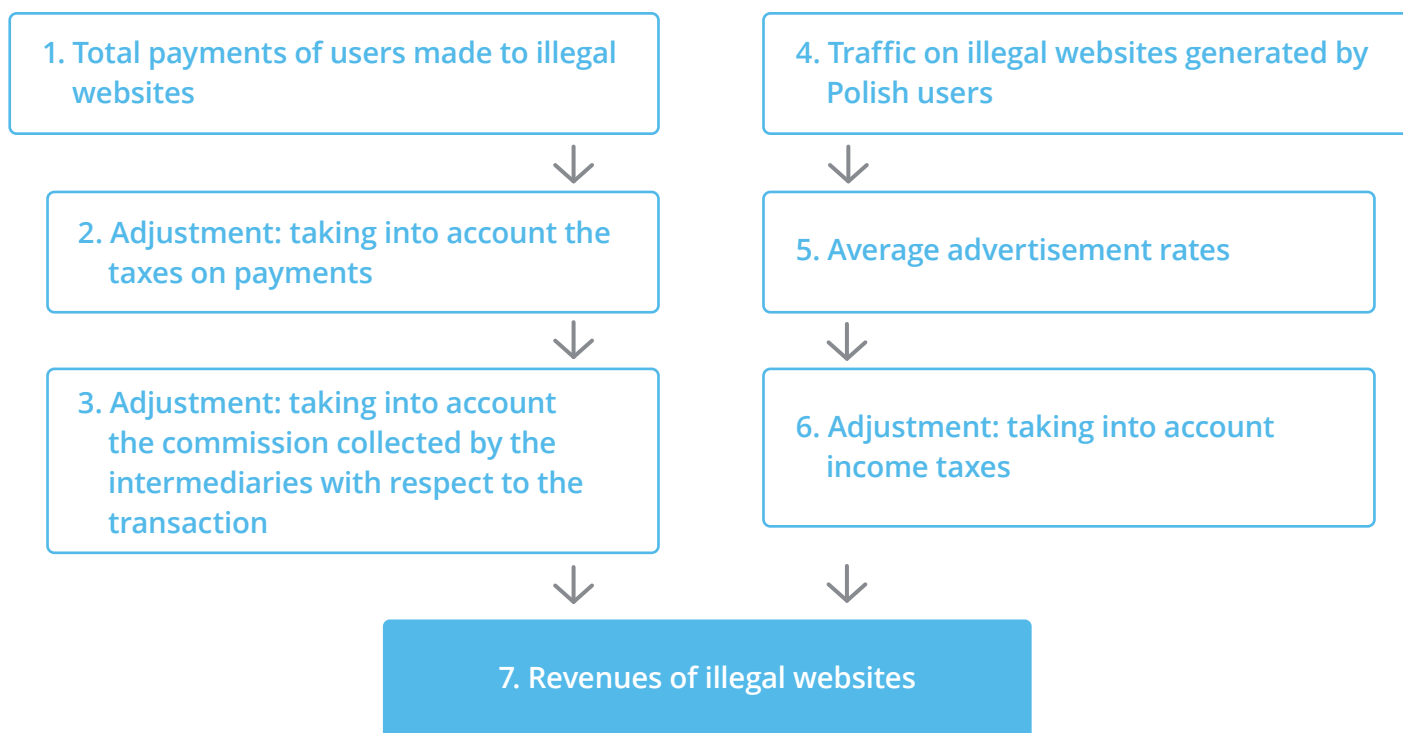
Source: Deloitte analysis

Business models of websites offering illegal access to content are based on payments from users or on earnings from advertisements. User payments differ depending on the model assumed. Those can be subscription fees, one-off fees or payments for the used data transfer. Illegal websites often employ also the opportunity to donate, encouraging their users to support their activities in a voluntary fashion. The study results enabled to estimate the revenues of illegal websites derived from payments from Polish users.

Estimated revenues obtained by illegal websites reached PLN 745 million in 2016.



Methodology used for estimating the earnings of illegal websites derived from their use by the studied Internet users



Source: Deloitte own compilation

Steps specification

- 1 Respondents answered questions concerning payments on particular websites from which they obtain content. The list of portals included those which offer legal content as well as websites offering illegal content (an important assumption of this study was that it did not reveal the fact of referring to Internet piracy). The collected responses concerning spendings on consuming content from illegal sources were summed up (annual figures). Then, the aggregate values obtained for the study sample were applied to the studied population.
- 2-3 The value of taxes and commissions for payment operators, considering the positive effect of the websites' activity on the Polish economy, was deducted from the total amount of payments made by users.
- 4 Based on respondents' answers, average traffic (daily number of visits) on illegal websites was calculated. The values obtained for the study sample were applied to the studied population.
- 5 The actual mean rates of advertising revenues were identified based on the applied content share model⁴ employed by the website and, combined with the daily number of visits to the websites, the total advertising receipts were estimated.
- 6 The taxation of revenues earned from advertising space provision was considered.
- 7 The illegal website receipts from users' payments and advertisement placement were summed up, obtaining the estimated income of those websites generated due to use by Polish Internet users.



Piracy's impact on the economy

Key conclusions

- ▶ The losses resulting from piracy on the studied creative industry markets may be ascribed to two key streams:
 - the first of them refers to payments made by the users on illegal websites to obtain access to content which, due to the foreign registration site of the website, do not enter the Polish economy, even though they could support its particular branches;
 - the second is related to a prospective demand for goods in the studied creative industry markets,
- ▶ which could be generated if it were not for the access to sources in illegal online circulation.
- ▶ The total estimated losses related to the existence of piracy on the studied market reached over PLN 3 billion of lost GDP, close to 27.5 thousand lost workplaces and PLN 836 million of Treasury losses in 2016.
- ▶ The losses resulting from payments to illegal sources or within the first stream reached: PLN 526 million of lost GDP, about 5.9 thousand of lost workplaces and about PLN 150 million of Treasury losses.
- ▶ The losses directly for the studied creative industry markets reached over PLN 2 billion 570 million of lost GDP, over 21.5 thousand workplaces and PLN 690 million of Treasury losses.

Introduction

Obtaining content from illegal sources leads to a number of adverse effects for the economy. To quantify them, two key loss streams were analysed.

The first refers to payments made by the users on illegal websites to obtain access to content. As the majority of those websites is registered abroad, the finance streams (so-called "leakage effects"), which would otherwise support the branches of the Polish economy, should they be spent in it, are lost.



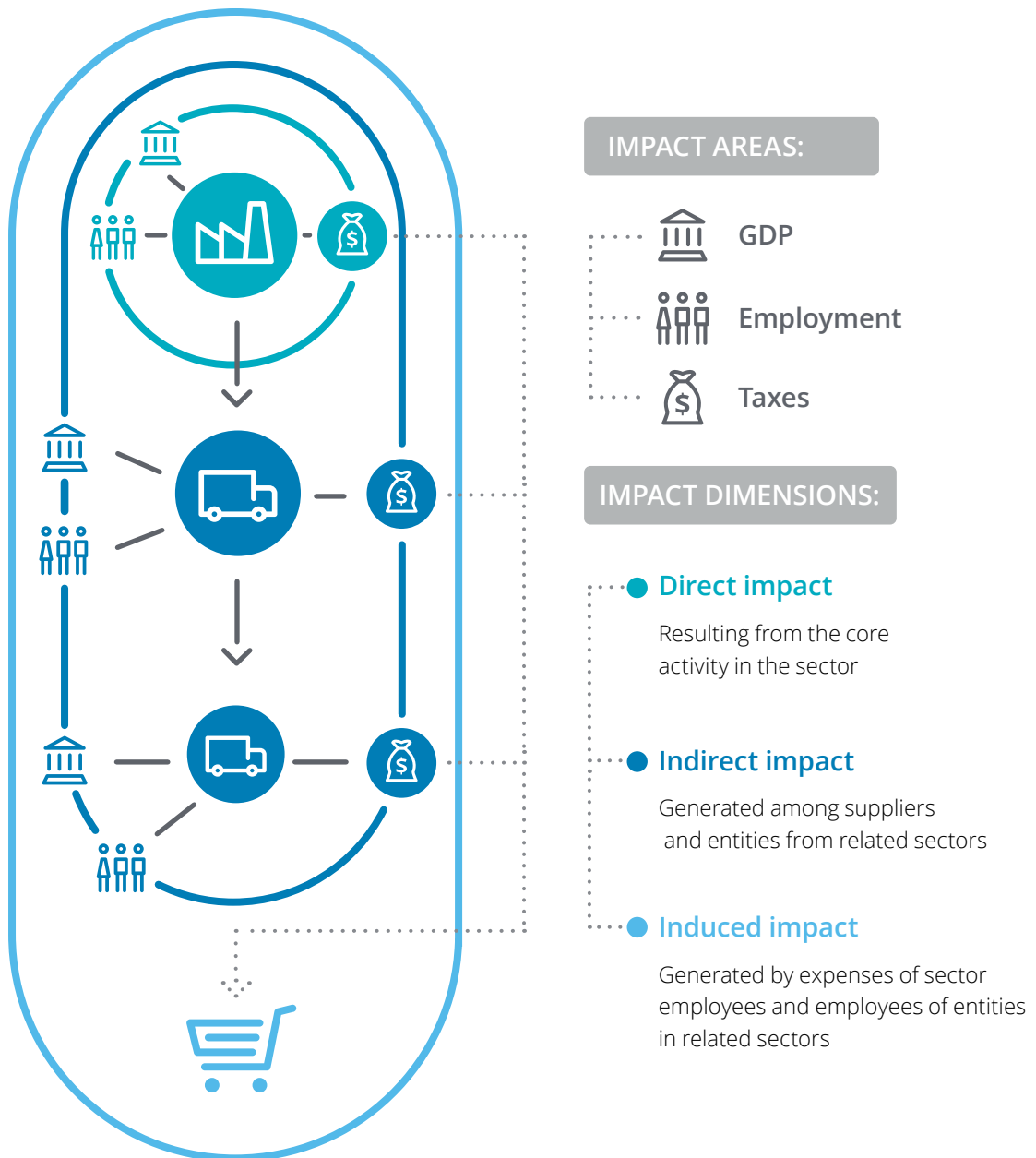
The second loss stream is related to a prospective demand for goods in the studied creative industry markets, which could be generated if it were not for the access to sources in illegal online circulation. Calculations concerning that stream were based on the key assumption that not every person currently using content from illegal sources would decide to obtain them in a legal stream (for cash or even for free, e.g. due to their inaccessibility). The estimates are based on declarations of people reporting willingness to pay for the obtained content in legal circulation.

A key role for estimating the losses related to the above streams was played by the following study tools and data sources:

- a survey carried out using the CAWI method, encompassing a group of 1,500 Internet users aged 15–75 using the following content types shared on the Internet: video, live broadcast, books, audiobooks, music, press (for more information on the study see chapter 9),
- Input-Output model.

Input-Output relationship model

INPUT-OUTPUT RELATIONSHIP MODEL



Source: Deloitte own compilation

The **Input-Output**⁵ model reflects the internal ties and relationships between particular economy branches. It enables studying how the activity in a given branch affects the development of other branches of the economy. Higher demand for creative industry products causes **a direct effect** within that industry, in the form of increased production.

To offer products and services for which demand was reported (e.g. books, live broadcasts), the creative sector purchases additional goods and services both internally (32 percent of the total purchase of goods and services for production) and from entities in other economic branches, offering primarily:

- printing and reproduction services, of utmost importance for the press and book market;
- professional and business services, including services related to software and consulting in the field of IT, services related to programme broadcasting (important especially for the audio-video and broadcast market), advertising services, market research services as well as leasing services.

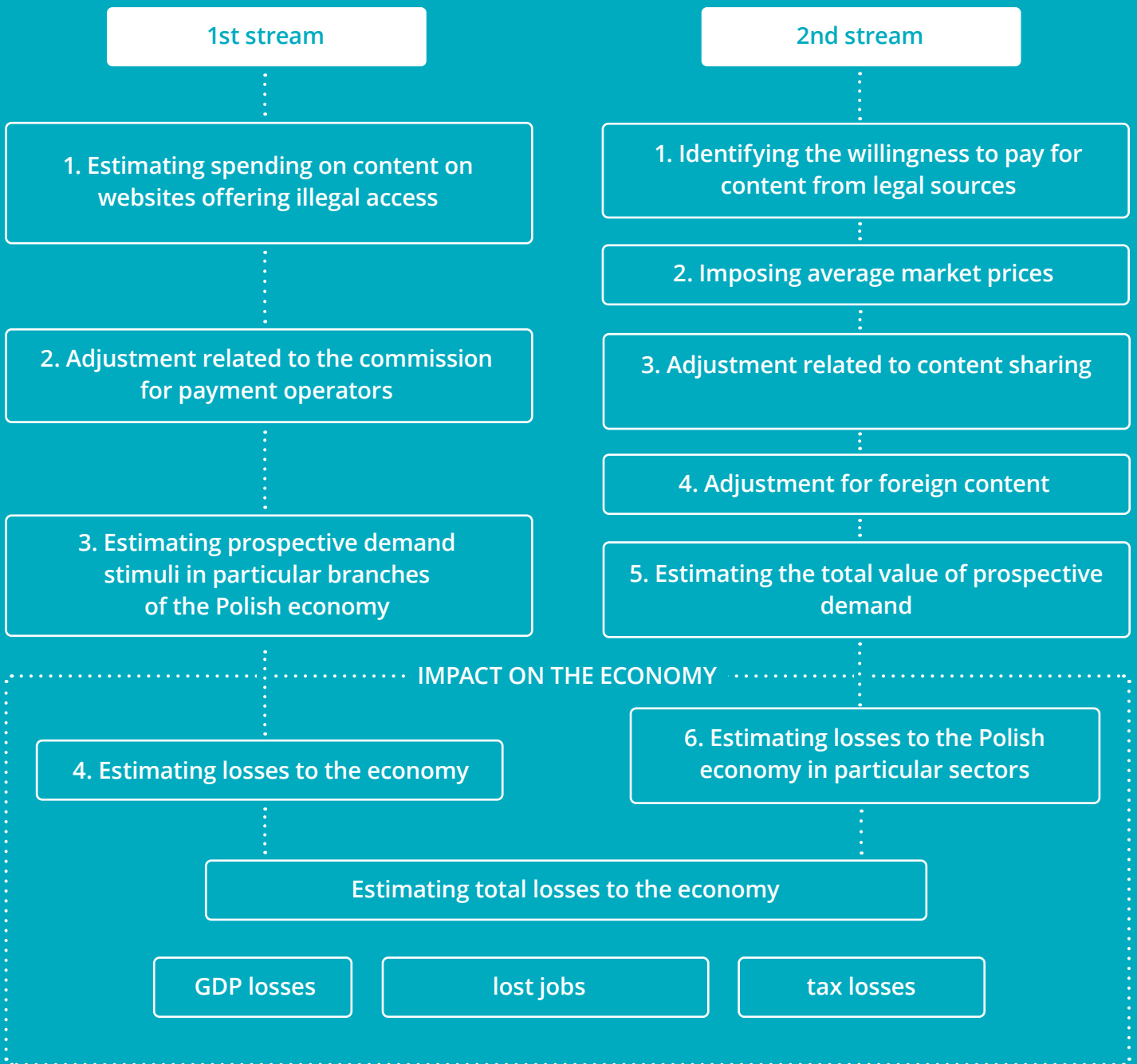
Providers offering the above mentioned services and products have their own contractors and subcontractors who obtain goods from other branches to create the product or service, creating feedback in the whole economy. Owing to that, the increased demand for cultural property supports creation of added value, workplaces and, consequently, also salaries and budget earnings (e.g. VAT, PIT and CIT) not only in branches directly related to the creative industry, but also throughout the entire economy. Such effects are called **indirect effects**.

What is more, the increased income both of the creative industry employees and the employees of contractors and subcontractors leads to increased consumption in the economy and, consequently, provides a demand stimulus reflected in increased production, which affects the creation of added value and generation of workplaces and taxes. **Such effects are called induced effects**.



Methodology of calculating the existing losses

Methodology of calculating the impact of piracy on the Polish economy



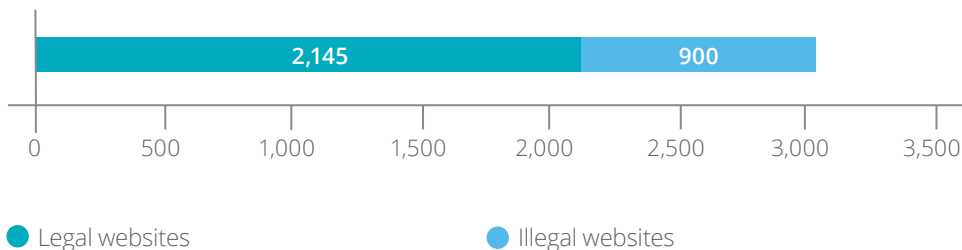
The first stream

1. Estimating spendings on content on websites offering illegal access

Respondents answered questions concerning payments on particular websites from which they obtain content. The list of portals included those which offer legal content as well as websites offering illegal content (an important assumption of this study was that it did not reveal the fact of referring to Internet piracy).

Distribution of payment amounts on legal and illegal websites

Estimated value of downloaded paid content (PLN million)



Source: Deloitte analysis based on users' opinion study carried out for the report

The collected responses concerning spendings on consuming content from illegal sources were summed up (annual figures).

The aggregate values obtained for the study sample were applied to the studied population.

2. Adjustment concerning commission for payment operators

The value of taxes and commissions for payment operators, considering the positive effect of the websites' activity on the Polish economy, was deducted from the total amount of payments made by users.

3. Estimating prospective demand stimuli in particular branches of the Polish economy

Since most websites offering illegal access are registered abroad, there is a negative transfer of cash, which could otherwise support the Polish economy.

To estimate the prospective cash flows which could occur in the Polish economy thanks to the amounts paid by users on illegal websites, the final demand (consumption) structure reported by households was assumed, adjusted with the consumption of imported products.

4. Estimation of economy losses

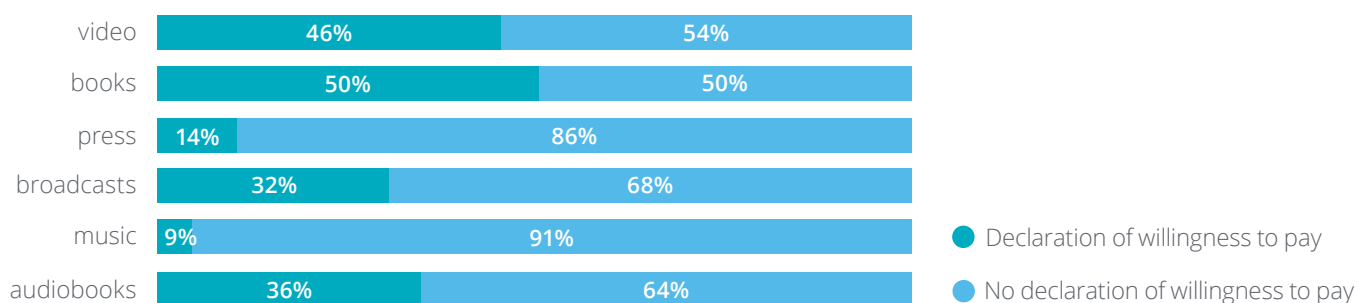
The received demand stimuli assigned to particular economy branches (aggregated for this study) were entered into the model, enabling the estimation of losses in the Polish economy related to: GDP, employment as well as taxes and other payments.

The second stream

1. Identifying the willingness to pay for content from legal sources

Respondents answered the question concerning an alternative choice related to obtaining content from a legal source, for cash or for free, in the absence of websites offering illegal content.

Willingness to pay (percentage user share) on websites offering legal access to content not available in illegal sources



Source: Deloitte analysis based on users' opinion study carried out for the report

At subsequent stages of the analysis, solely the results for the consumers who declared willingness to obtain content for cash in legal sources were considered.

2. Imposition of average market prices

In order to estimate the total revenues achievable from consuming content in illegal sources, the data concerning the amount of consumed content, as declared by respondents, and the average market prices determined for each of the of the alternative content consumption options (e.g. Buying CDs, buying access to an Internet music website) were used.

3. Adjustment concerning content sharing

While determining average market prices, the fact that particular content consumption options enable simultaneous content consumption by more than one person and/or access can be provided to other people who can use it any time (e.g. with respect to Internet websites with paid access models) was taken into consideration. The adjustments were made based both on the respondents' declarations and on the available studies concerning content sharing, decreasing the unit prices of particular content as appropriate.

4. Adjustment concerning foreign content

Calculating losses in the Polish economy requires not only using the Input-Output diagrams for domestic production, but also reducing the demand shock entered into the model with the expenditure on imported products, including, but not limited to

foreign licences. The adjustments were made on the level of particular content consumption option on each of the analysed creative industry markets.

5. Estimating the total value of the prospective market

Based on the data from respondents who declared the willingness to pay for content in case it could not be obtained from illegal sources, referring to the number of the consumed content and following the imposition of average market prices, as well as the introduction of the above adjustments, the total value of prospective demand on particular markets was calculated.

The estimated total value of prospective demand on particular markets was further verified by comparing with the Poles' expenses on cultural products and services (data for 2015) with respect to the studied markets.

The size of the so-called demand shocks was verified also with respect to the substitution effect, i.e. the inclination to finance the declared additional expenses from savings and not from reduced consumption of products from other economy branches was confirmed.

6. Estimating losses for the Polish economy in particular sectors

The data concerning prospective demand on particular markets were introduced into the model based on the Input-Output table, which makes it possible to quantify the relationships between particular economy branches. This helped to illustrate the total economic effects of the inaccessibility of illegal content sources. Those are the so-called negative effects which are considered in this study as economic losses, defined by lost GDP, lost workplaces and reduced tax receipts.

Estimation of total economy losses

To illustrate the total effects of Internet piracy in every studied sector, the results obtained in the first and second calculation stream were summed up and presented as broken into the perceived losses, i.e. lost GDP, lost workplaces and lost taxes.

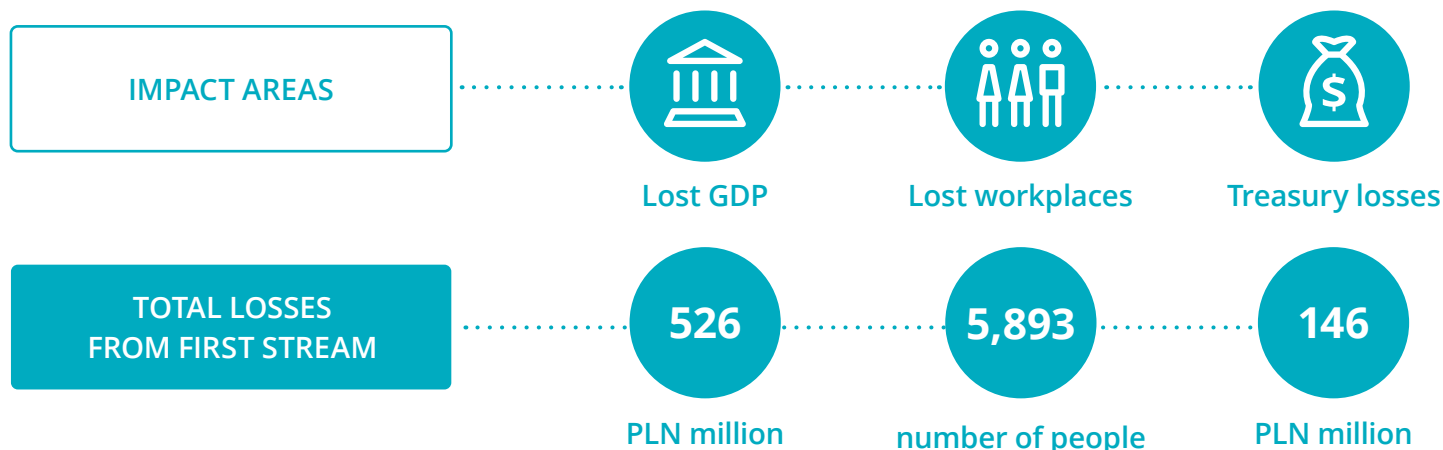


Current impact of piracy on the economy

In order to calculate total losses generated by the Internet piracy an analysis of two revenue streams was performed. The first stream is related to payments for access to content made by users on illegal portals. Due to the

fact that most of these services are registered abroad leakage effects occur – the financial flows could otherwise supply individual branches of the Polish economy. The second stream of losses is related to the potential demand for

goods in the explored market of creative industries, which could be generated in the absence of access to sources in illegal online circulation.



Source: Deloitte analysis

Total losses

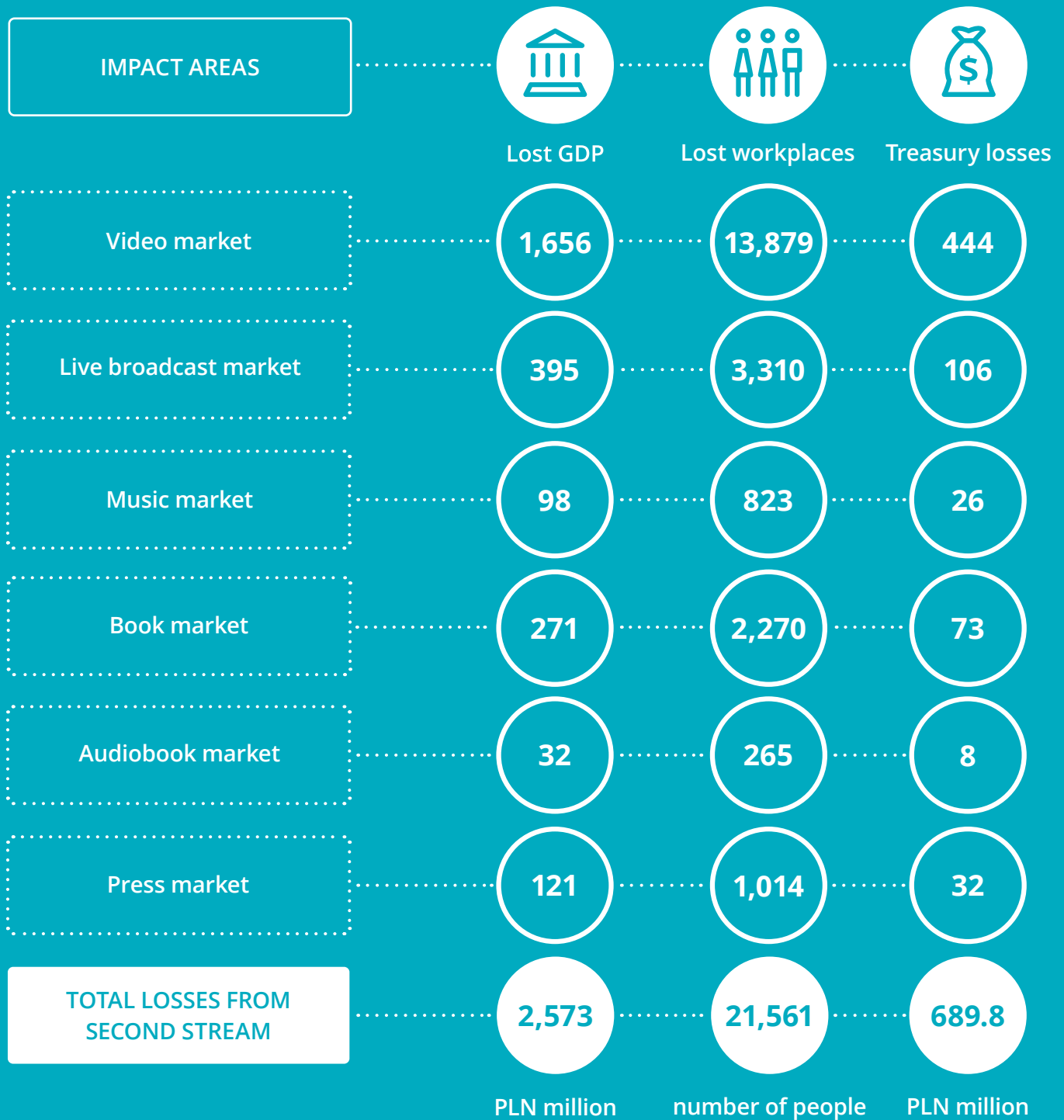
The total annual losses generated in the Polish economy (for 2016) as a result of Internet content piracy on the studied markets:

- **over PLN 3 billion of lost GDP** is the amount covering about 30 percent of annual Treasury spendings on culture and media for 2015 or sufficient to buy 4 cinema tickets for every citizen of Poland;

- **27.5 thousand lost jobs** – this is the number of Zakopane inhabitants or over 13 percent of the registered unemployed in the Mazovian voivodeship;

- **PLN 836 million of losses for the Treasury** – this is over two times more than the value of TVP S.A. radio and TV licence fee recorded in 2016 or an amount sufficient to buy over 33 million printed books for the Polish libraries.

The annual losses resulting from piracy on particular markets



Source: Deloitte analysis

Impact of piracy on production size and quality

Cultural and creative activity stimulates creativity and innovation, improves the quality of life and alleviates social inequalities and, consequently, promotes sustainable development⁶.

In EU-27 countries, the cultural and creative sectors (CCS) provide employment to over 3.2 million people, generating close to EUR 403 billion in revenue and EUR 153 billion in added value⁷. Their positive role in the EU socio-economic development is particularly visible in the SME sector, enjoying the highest share of CCS employees.

Benefits for local communities

Dynamic artistic activities support the economy not only on the national, but also regional level, contributing to the creation of local clusters characterised by high economic competitiveness and quality of life⁸. In practice, this means that the more musicians, writers or actors live and create in a given location, the higher the living standard of its inhabitants is. Examples of such locations include Barcelona, Amsterdam, Vienna and Milan, and in Poland those are Poznań, Krakow and Warsaw.

The significance of CCSs for the socio-economic development is frequently underestimated due to difficulties in measuring their positive effects on the surroundings. Opening a theatre in a given district may generate measurable benefits in the form of increased revenues of neighbouring restaurants. However, the total influence of that institution on its surroundings is far more comprehensive and refers e.g. to the impact on the living standard of residents, social integration level or the willingness to start some artistic activity⁹.

Difficulties in obtaining funds

The distinct nature of the effects of the cultural and creative sector, differing significantly from the consumption goods enjoying a relatively stable demand, makes it difficult to forecast its accurate economic results. This leads to problems related to obtaining external funds by CCSs, especially in the periods of increased reluctance to invest. In such circumstances, an alternative action could consist in obtaining public resources from the national or local budgets. However, in practice the government and local government funding does not apply to most of the six markets analysed in this report¹⁰.

The external funding accessibility for CCSs may be further limited by the absence of any effective intellectual property protection. Investors are less eager to spend their savings (e.g. by crowdfunding), knowing piracy has an adverse impact on revenues or significantly increases the risk of failure to obtain the planned results.

Losses to human capital and public debate

Piracy results in reduced creativity as well as slowdown in the development of talents, skills and knowledge. The artists and entrepreneurs, exposed to reduced revenue, spend less time and resources on creating, distribution, promotion and marketing of works. This is evidenced by a smaller number of works created and

published and by their reduced quality, diversity and uniqueness. According to studies, extended copyright validity may increase film production from close to 2 percent to as much as 13 percent¹¹.

The media sector is particularly exposed to the effects of illegal content circulation. The actions of illegal competition reduce the revenue from advertisements for opinion-forming newspapers, TV channels or Internet websites. Weaker economic standing of publishers may result in reduced quality of their professional activity results. What is more, this endangers key media functions in democratic societies, limiting access to reliable information and hampering public debate.

Forecast impact of piracy on the economy

Key conclusions

- ▶ In connection with the ongoing technology development and social digitisation, the digital skills of Poles will improve gradually and the share of consumer expenses on culture and recreation will increase from 7.7 percent in 2015 to 8.2 percent in 2024.
- ▶ Due to lower market maturity and saturation than in many other European countries, further Internet popularity increase as a source of information, entertainment and relaxation is possible in Poland. It can also be expected that technological development, e.g. the more and more effective user authorisation, will help to reduce the piracy popularity dynamics.
- ▶ In view of the assumptions on technological, social and market trends, it can be expected that in 2017–2024 the average piracy growth rate will be 3.3 percent and will be higher than the average GDP increase in that period.
- ▶ In 2017–2024, the total value of consumed goods from illegal sources may reach PLN 30.4 billion in Poland, increasing from PLN 3.28 billion in 2017 to PLN 4.13 billion in 2024¹². Considering the time value of money and the target inflation of the National Bank of Poland of 2.5 percent, this should reach PLN 27.1 billion.

Introduction

The forecast of the scale of piracy and its effect on the economy in 2017–2024 was prepared based on macroeconomic and structural factors, sector factors and consumption patterns as well as macroeconomic factors on the following six markets:



VIDEO MARKET



BOOK MARKET



PRESS MARKET



LIVE BROADCAST MARKET



MUSIC MARKET



AUDIOBOOK MARKET

Methodology of calculating the forecast losses

GDP dynamics

Because of the medium-term piracy scale forecast horizon and its economic effect, as well as the significant unpredictability of the Polish GDP dynamics, for this study it was assumed that **there will be a slight acceleration of the growth rate of the Polish economy and consumption in the time to come. This will, however, slow down the growth dynamics of GDP and all its key components after 2020.**

The key factors affecting GDP growth in 2017–2024:

- low investments of entrepreneurs and households, and low probability of permanent increase in the rate of investment;
- uncertainty concerning the efficiency of public investments, including those with EU funding, which may be visible especially with respect to lasting supply effects resulting in improved economy productivity;
- uncertainty concerning public investments, aggravated by the difficult situation of the public budget, which may result in reduced expenses on investment in the case of economic slowdown;
- economic policy promoting consumption at the expense of savings and investments (increased transfers and parts of taxes, besides the taxes on consumption, including VAT);
- high employment with simultaneous low professional activity and unfavourable demographic structure (adverse effect further strengthened with lowered retirement age).

Consumer spending

Given the economic policy promoting increased expenditure in short time, it can be assumed that in a couple of years, the **share of household consumption in GDP will return to the average for 1995–2015 and reach 61 percent**. The share increase will be further promoted by demographic factors, including but not limited to society ageing¹³. The Central Statistical Office of Poland forecasts that the population of Poland will reduce

gradually from 38.44 million in 2015 to 37.73 million in 2024.

Based on the anticipated demographic changes and further GDP growth, it can also be assumed that the share of spending on culture and recreation will grow gradually in the total consumption spendings of households. **In 2024, it is expected to reach 8.2 percent when compared to 7.7 percent in 2012 and the average of 7.8 percent in 2000–2015.**

Also with respect to the share of the other goods and services, it can be assumed it will tend to return to the long-term mean¹⁴. In 2000–2015 it was 12.1 percent, and only in 2015 it reached 13.3 percent.

Sector factors and consumption patterns

Using the Internet

According to the data of the Ministry of Digital Affairs, **in 2015, 63 percent of Poles used the Internet on a regular basis. To compare, the average in EU-28 was 75 percent at that time. It should be expected that the current EU level can be achieved by Poland in 2024.**

The increase in the number of people using the Internet on a regular basis should be supported e.g. by public investments and programmes, aimed at increased accessibility of broadband network, activities to counteract digital exclusion, anticipated increase in profits and changed demographic structure (with a decreasing share of people who have never used a computer or lack

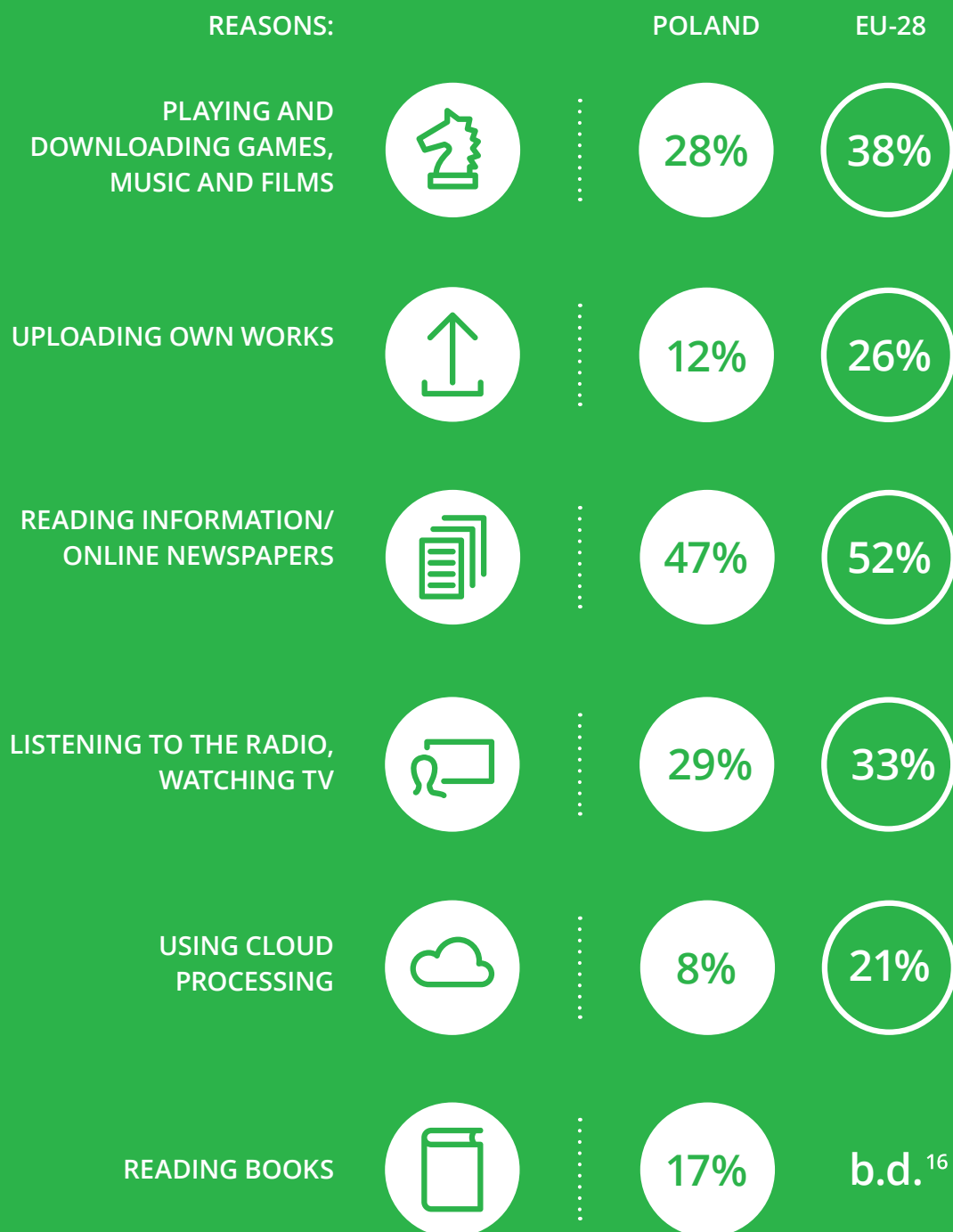
basic skills in that respect). The factor limiting the ability of comprehensive equalization of the share of those using the Internet on a regular basis with the level in the most developed EU countries is the moderate urbanisation of Poland and still a high share of people working in agriculture.

The Poles use the Internet mostly for information, visiting websites and portals as well as online newspapers. Close to 30 percent of Poles listen to online radio or watch online TV, but also play and download virtual games as well as music and films. Less than 20 percent of regular Internet users use it to read books. This data is convergent with the information on the total readership, with as few as 56 percent of Poles reading at least one book a year, while in EU countries this is 68 percent.¹⁵

Due to the lower market maturity and saturation than in many European countries, further Internet popularity increase as a source of information, entertainment and relaxation is possible in Poland. This will be conditional on:

- expected dynamics of consumer spending on culture and recreation among regular Internet users,
- levelling differences between Poland and EU-28 countries with respect to the use of Internet (the higher the difference is, the smaller chance for increased share in Poland).

People using the Internet in 2014, by reasons for use, in Poland, in EU-28 (%) and the percentage share of Poles who read at least 1 book a year



Source: Społeczeństwo informacyjne w liczbach, 2015 [Information Society in Numbers], Ministry of Administration and Digitization, 2015

Prospective impact of piracy on the Polish economy

Piracy growth rate in 2017–2024

In view of the assumptions on technological, social and market trends, it can be expected that in 2017–2024 the average piracy growth rate will be

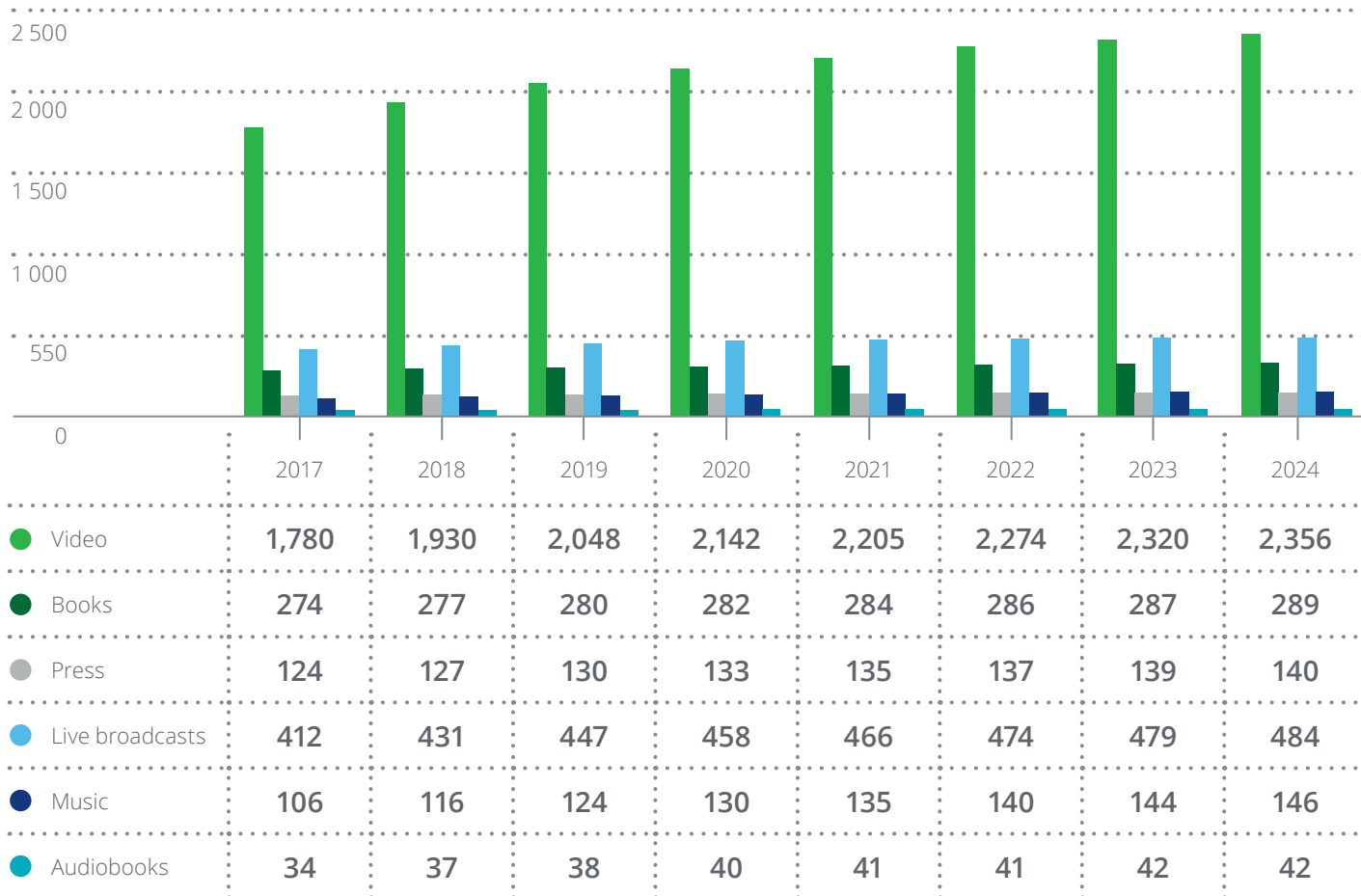
3.3 percent and will be much higher than the average GDP increase in that period.

PLN 30.6 billion is the forecast total value of illegal content consumption from illegal sources on the Internet in 2017–2024. This would enable

covering about 70 percent of the public sector deficit for 2015 at one go or build around 730 km of motorways (this is more or less the distance from Rzeszów to Berlin).

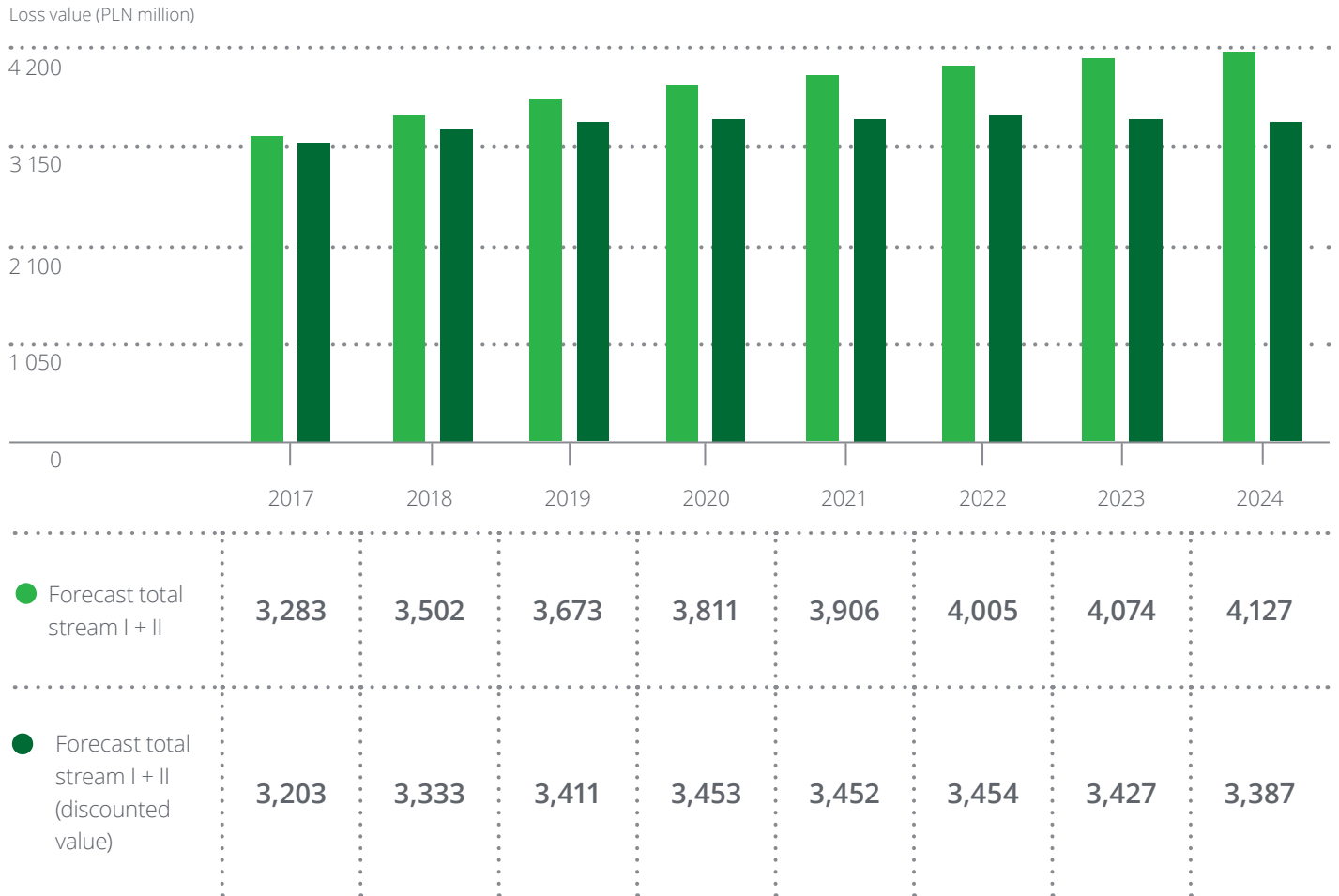
Forecast yearly losses resulting from piracy on particular markets in 2017–2024 (in PLN million)

Loss value (PLN million)



Source: Deloitte analysis

Forecast aggregate yearly losses resulting from piracy in the Polish economy in 2017-2024 (from I and II stream, in PLN million)



Source: Deloitte analysis

The differences between the amounts shown in the diagrams result from the inability to ascribe the losses and their forecasts for the second stream to particular markets, as it cannot be assumed that the payments to illegal websites would be fully spent on cultural property consumption from the studied markets. Nonetheless, it is possible to present the effect on the entire economy as the sum of values from the two streams.

The total value of consumption of goods from illegal sources (the sum of values from the first and the second stream) may reach PLN 3.28 billion in 2017, PLN 3.50 billion in 2018, PLN 3.67 billion in 2019, PLN 3.81 billion in 2020, PLN 3.91 billion in 2021, PLN 4.01 billion in 2022, PLN 4.07 billion in 2023 and PLN 4.13 billion in 2024. This will amount

to the total value of PLN 30.4 billion¹⁷. Considering the time value of money and the target inflation of the National Bank of Poland of 2.5 percent, this is estimated to reach PLN 27.1 billion.

The forecast dynamics of illegal consumption on the analysed markets:

video, books, press, live broadcast, music and audiobooks, results from the forecast legal consumption dynamics and the assumptions on the key economic, social, technological and regulatory trends which may exert particular impact on the demand for property from illegal sources.

Key trends from the perspective of piracy growth in Poland by 2024

- The ageing society will bring about the increase in the number of people having free time which could be used for culture and entertainment, including illegal sources.
- The GDP increase will translate into higher household budgets, including those spent on culture and entertainment, which will increase the ability to buy legal property.
- The growing competition will make the relative legal property prices decrease when compared to illegal sources. This is promoted by the rapid development of new, more and more effective markets and platforms, e.g. streaming, improved price comparison websites or the ability to select the purchased property. For example, a consumer will buy solely the works or broadcasts from a particular artist's performance and not entire albums or concerts. The effect of falling unit prices will be offset by increased sale volume, as the customers will be able to buy more goods they find interesting.
- A growing flexibility of consumption of cultural and entertainment property will bring about increased available free time, e.g. thanks to the ability to consume on the go, on tablets or smartphones during travel.
- The reduced prices of mobile devices, resulting from rapid technological progress and lower data transmission prices, promote increased consumption of digital works, both legal and illegal.
- Digital skills will improve gradually, though the difference will not be entirely levelled when compared to EU-28 states by 2024 (according to the ratio of economy and information society).
- Active forms of spending free time can become even more popular. Although an average inhabitant of Poland still does sport less frequently than an average inhabitant of EU countries, significant changes concerning life style and hygiene have taken place in recent years¹⁸. This trend is followed by the market, which is reflected e.g. in the growing number and offer of fitness clubs or dance schools.
- Popularity of biometrics as a way of authorising access to works and user profiles, which may make trading in illegal works more difficult¹⁹.



Specification of Internet piracy

Key conclusions

- ▶ During the analyses, five basic models of content sharing by websites offering illegal access were identified: live streaming, streaming on demand, file hosting, exchange in torrent network, linking.
- ▶ In the perspective of the entire studied market, the highest popularity among the users of content published on the Internet is enjoyed by websites offering the file hosting model. They are followed by websites offering streaming on demand and those supporting exchange over the torrent network. The popularity of particular models depends on the type of content disseminated.
- ▶ The models enable earning financial profits from two sources: by direct payments from users and broadcast of advertisements. Not only Internet service providers, but also payment intermediaries and advertising agents are eager to cooperate with illegal websites.

Introduction

To assess the impact of piracy on the economy, it is necessary to learn the ties and specific relations between particular entities on markets covered by this phenomenon. This comprises the analysis of tools available to owners of illegal websites, content sharing models and ties with intermediaries.

The following subchapters discuss particular illegal website models and the employed methods of earning financial benefits in illegal content circulation.

The presented models are described in general to capture any aspects common to all the studied markets. In practice, in the particular categories of models presented, it is possible to identify several smaller models, differing in terms of ties between particular participants.

Illegal websites using the models described below can further be divided into those where the administrators publish the content themselves and those using content sent or broadcast by users.

Types of content sharing models

Illegal websites usually offer a broader range of content access opportunities as they are not subject to any licence restrictions and ignore regulations.

Within this analysis, the main models of accessing content offered illegally by websites infringing copyright were identified.

Live streaming

The popularity of broadband Internet access was accompanied by the popularity of watching live content²⁰. This service consists in the reception of a broadcast signal by the end-user from the server which receives it from the broadcaster's devices. Simultaneous availability of broadcast services for ordinary users, not having their own servers, led to the emergence of websites broadcasting linear channels and sports broadcasts provided by end-users via streaming platforms. Content protected with copyright (e.g. live events, films or TV programmes)

are re-broadcast from own cable TV decoders or Internet channel by users infringing copyright in this way. Mostly, those actions are aimed at financial gain.

Streaming on demand

Internet websites offering content streaming on demand enable the users to consume content at any time and, consequently, to ignore specific broadcast times. Streaming on demand makes it possible to receive content instantaneously without recording it on the end device. The content shared in this model is stored on the service provider's server from which data is sent to every individual user.

File hosting

Internet services offering space to store digital files on dedicated servers. A link to the user file stored on such a server is automatically communicated to the

public. Access to the files is usually paid and features several options, including subscription and charge for the number of files downloaded or the transfer size. Frequently, the files can be downloaded free of charge, but this imposes certain restrictions, e.g. smaller transfer, necessity to wait or a daily limit of files which can be downloaded. People uploading the files are frequently awarded by the hosting websites which employ partner schemes. They consist in sharing some of the revenues generated by the file with the user who uploaded it to the server. Commission depends on the number of file downloads. Hosting websites escape legal liability, presenting themselves as platforms which do not filter content added by users but only react to any infringement notices.

The file hosting model seems similar to the Internet drive models (i.e. cloud). The key differences include the way of accessing the files and the service provided. Internet drives usually offer access to the file solely to the software

who uploaded it there. Hosting websites have different assumptions and usually they make all the files available. The service offered by Internet drives consists in offering drive space to be used by the user for their own files, while a hosting website offers the opportunity to download someone else's files.

Sharing in the BitTorrent network

BitTorrent is the most popular technology based on the P2P (peer-to-peer) model, i.e. a model of direct exchange of content among end-users, as opposed to the customer-server model, which is uni-directional. Access to the BitTorrent network is provided by websites containing repositories of works with their metadata (e.g. description, cover, cast) and unique signatures for files in the network. Content files are distributed over end-users' computers in numerous multiplied copies and managed by a command and control server, called tracker. To download the content, it is necessary to install software clients, which are requested at the level of the website containing the content repository, which initiates download of the selected file. For that purpose, the computer of the downloading user is connected to the torrent network in the background and participates in the exchange under the control of the tracker. This means that during content downloading every downloaded section is automatically made available to other users of the network.

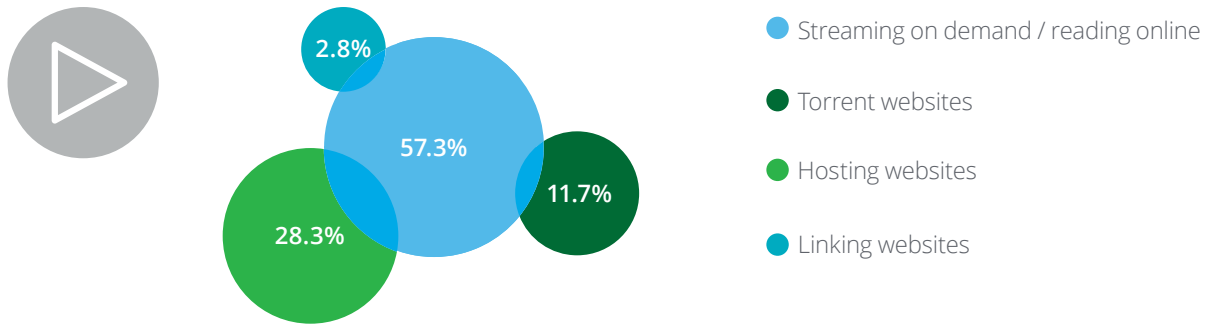
Linking

Among the models of accessing illegal content, linking websites were distinguished as sites which do not have content in their Internet resources and do not present content from someone else's resources (so-called embedding)

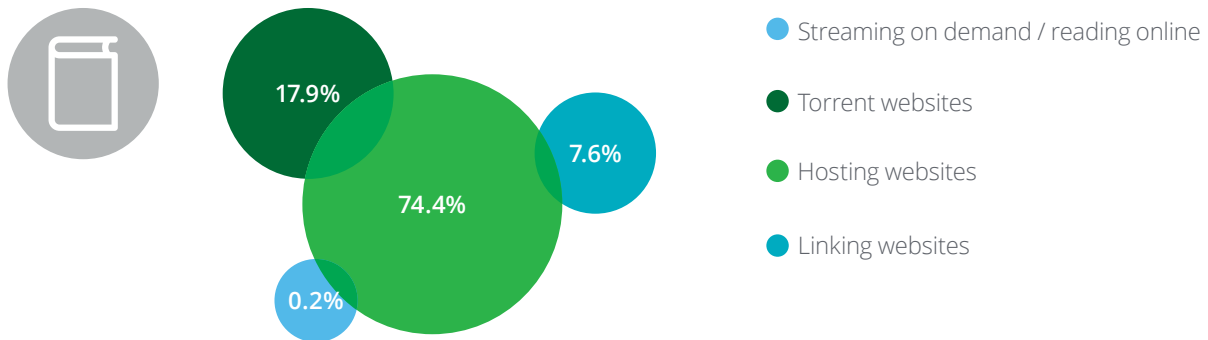
but only accumulate links to external websites. Those may be standard Internet hyperlinks which redirect to another, unrelated Internet domain, opened in a new or the same browser window. The linking websites make it possible to find works on the Internet. They aggregate or catalogue illegal content repositories which are scattered over the Internet among different, sometimes varying domains, for different reasons. One of such reasons is the use of hosting websites, which are not indexed by browsers – which means they are hidden from content owners and companies combating piracy, but are available to the users of link repositories, sometimes protected from straightforward access. An analogous reason is linking to websites with illegal sports broadcasts which also try to stay concealed and appear in the Web under different temporary domains right before sports events and disappear when they end. They can be found solely using a familiar link aggregator on the linking website.

The analysis of the study result enabled to determine the preferences of illegal website users on every market. It should be stressed that linking websites, not ensuring content consumption as such, should be analysed together with other content sharing models which they link to (for more information on linking, see chapter 9, section "Liability of content providers").

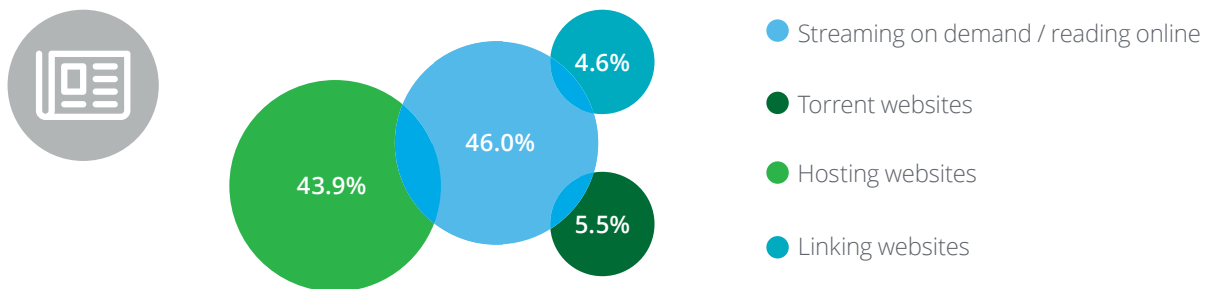
Obtaining videos from illegal websites by the website type



Obtaining books from illegal websites by the website type

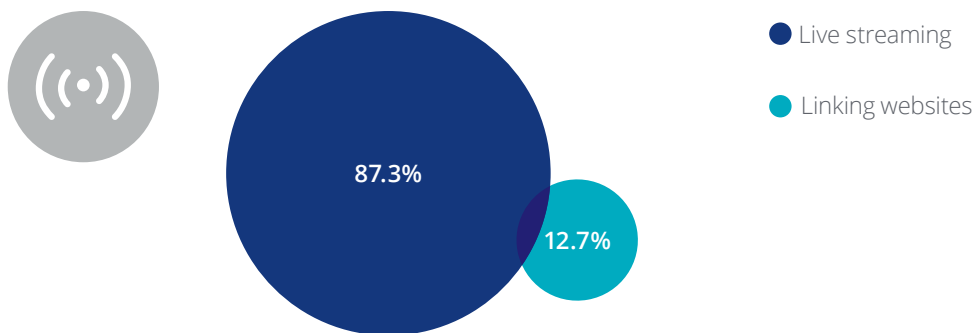


Obtaining press articles from illegal websites by the website type

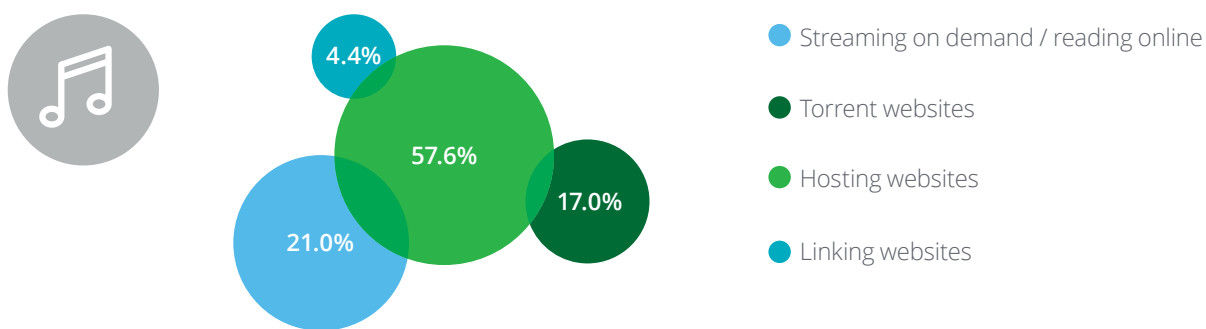


Source: Deloitte analysis based on users' opinion study carried out for the report

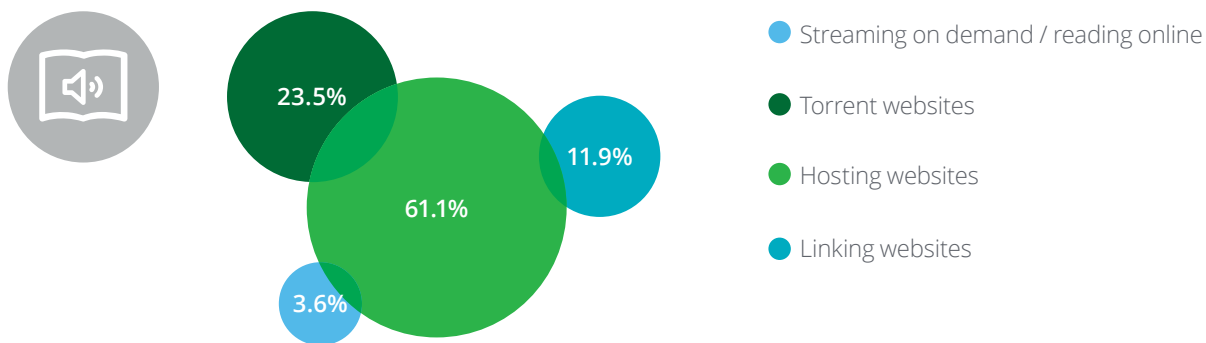
Obtaining live broadcasts from illegal websites by the website type



Obtaining music from illegal websites by the website type



Obtaining audiobooks from illegal websites by the website type



Source: Deloitte analysis based on users' opinion study carried out for the report

The above list illustrates that hosting websites are the most popular source of obtaining illegal content on most studied markets. Audiobook and music listeners, as well as book readers, pointed to that source most frequently. Hosting websites are also highly popular with press readers (the second place in popularity, right behind article reading directly on the website, the result is somewhat below 44 percent) and with video watchers (also the second most frequently selected model of obtaining content, with 28 percent, preceded solely by streaming on demand).

The second most popular method of obtaining content is streaming on demand, which prevails among video watchers and press readers (reading online). Access on demand is also a highly popular method of accessing music.

The third position is taken by torrent websites. To use this access method, it is necessary to install a recipient programme, which may be one of the key factors reducing its popularity. Torrent websites are used primarily by readers of illegal digital books, listeners of audiobooks and music.

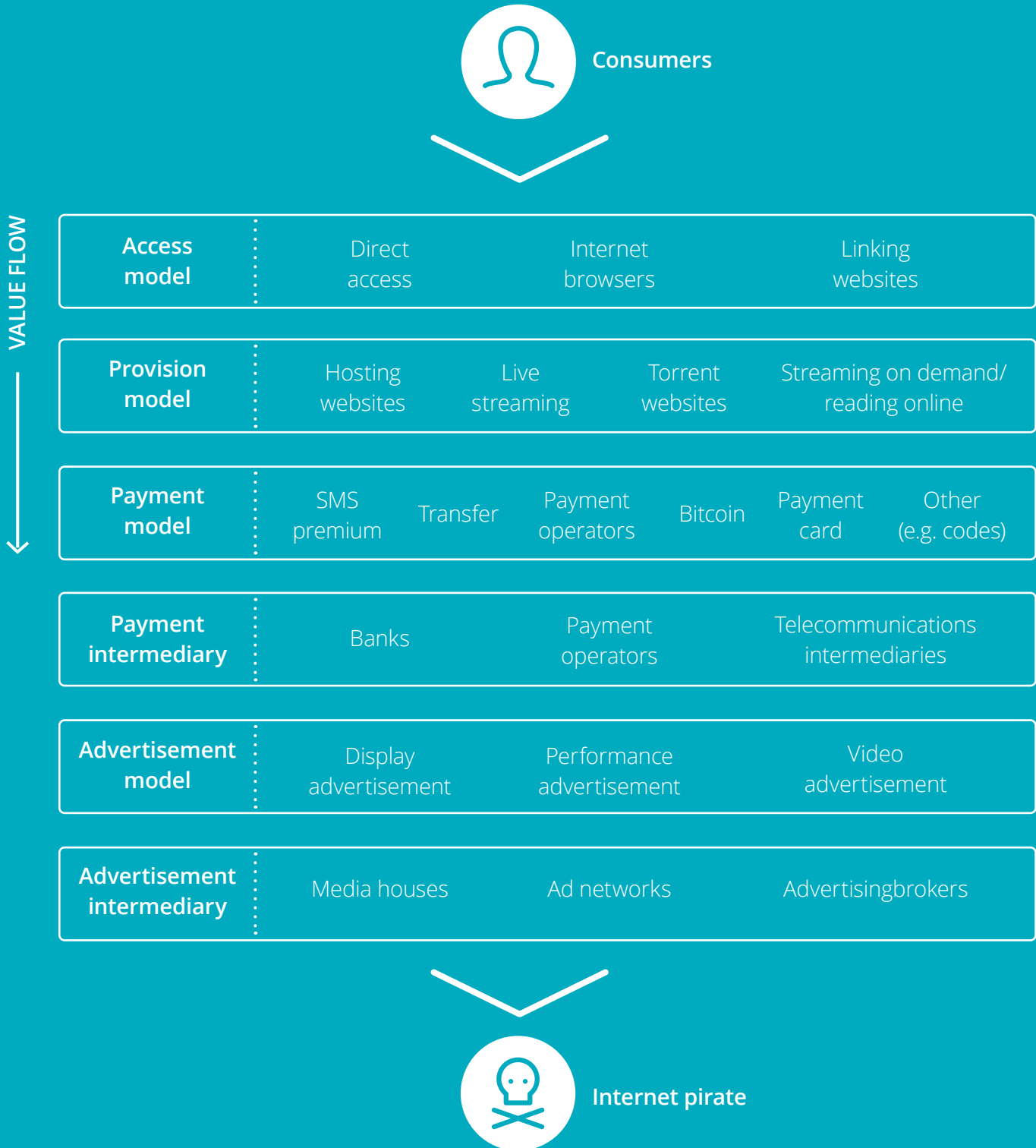
Linking websites play a certain role on every market. Respondents pointed to using those sources most frequently when looking for audiobooks, books and illegal online broadcasts on the Internet. If specialised and popular websites offering a given type of content are not present on the Internet, linking websites play a crucial role in searching for them.

Diagram of operations of websites offering illegal access to content

The financial flow model is to present the method of obtaining revenue by websites offering illegal access to content on the studied creative industry markets. Presenting value flows, the diagram of illegal website operations was considered, based on the selection capacities which may be offered by the illegal website to a consumer and on individual consumer decisions.

The diagram attempts at capturing a universal model for websites with differing content sharing models and nature of distributed materials. It should be kept in mind that the diagrams for particular websites may differ from the universal model.

Diagram of operations of websites offering illegal access to content on the studied markets



Source: Deloitte own compilation

Access model

A consumer looking for content on the Internet may use three access models. Selecting direct access refers to users who know the name and address of a specific website from which they wish to obtain content on the Internet. Frequently, however, an Internet user does not know where to look for titles interesting to them and decides to use Internet browsers or linking websites.

Sharing model

Four major models of content sharing on illegal websites are described at the beginning of chapter 3.

Payment model / payment intermediary

If the illegal website chosen by the user requires payment, the payment is made most frequently via three kinds of entities: banks, payment organisations and telecommunication intermediaries. The most popular payment model is SMS Premium and bank transfers. In certain cases the transactions are paid for using the bitcoin currency or other methods, e.g. payment codes. Payment intermediaries, cooperating with websites infringing copyright, contribute to supporting piracy.

Advertising model

Advertising rates on illegal websites are usually lower than on legal sites, which makes the websites more appealing to prospective advertisers. Most illegal websites, i.a. to reduce costs and escape liability for advert broadcast in an illegal context, do not sell advertisements themselves but join advertising networks or use automatic advertisement broadcast systems on their website.

Three advertisement types were distinguished for this analysis. Display, video and performance advertisement. A display advertisement (or graphic ad) is most frequently broadcast on the surface of the website in the form of an advertising banner. Display advertisements may be static or animated. Video advertisements are similar to graphic adverts with the static or animated image replaced with video clips. Performance advertisements are a type of Internet adverts where the advertising space owner receives remuneration from the advertiser solely for obtaining a specific effect, or action by the user. This can be e.g. Registering at the advertised website or doing shopping online. The advertisement display itself is not paid for. Remuneration for that advertisement type is usually the highest.

Advertising agent

An important role in the chain of advertising space trading on illegal content websites is played by advertising agents. On the part of the advertising customer, those are advertising networks aggregating several hundred or more websites of differing subject and target groups (not only illegal), offering together a reach greater than even the largest single entity on the local market. On the part of the illegal website publisher, this is a broker representing a group purchasing organisation of advertising customers, having high budgets and not available to individual Internet publishers, even if they are large operators. Advertising space on websites belonging to a given network is managed by a broker-controlled adserver, which uses the parameters of customers' orders to determine e.g. the target group and reach of the advertising message of every broadcast campaign. Adserver decides on the websites and timing of

broadcasting a given advertisement. It carries out arbitrage pricing in real time, trying to purchase the ordered reach for the lowest price within the assumed target group. This means that neither the advertising customer knows in advance which websites their advertisement will be broadcast on, nor the website publisher is aware what advertisements are going to be displayed on their site. Following the campaign, the parties receive settlements. This means the advertising customer pays the broker for the executed campaign and the broker remunerates, on a pro-rata basis, the websites in their network, the advertising space of which was used to execute the campaign.

The described situation may have an adverse effect on the perception of the advertiser and their brand by customers who, knowing the advertiser supports illegal actions, may refuse to buy their products or services. Moreover, in extreme circumstances, the illegal websites display advertisements of legal content. In such a situation, the website user does not know if they deal with a legal or illegal website.

Piracy causes in Poland

Key conclusions

- ▶ The distribution of piracy causes is not identical for particular content types, but on most markets the cause of using websites offering illegal access to content named most frequently by respondents is the ease and swiftness of accessing interesting materials.
- ▶ An important factor, selected by respondents, is also the extensive offer of content provided by illegal websites, combined with the absence of the need to pay. Additionally, respondents point to the ability to consume the content at any time of their choice.
- ▶ Internet users have a growing awareness of the effects of particular illegal website users' actions on the losses incurred by authors, performers and producers of content. The opinions that the areas are linked and that the link is marginal are distributed evenly.
- ▶ The presented determinants are based on the users' opinions and not on objective evaluations of illegal websites when compared to legal services. This means they present the way of perceiving particular website types by their users, not necessarily reflecting their actual properties.

Introduction

This chapter presents the results of the piracy study, with piracy causes and scale. Improved understanding of the reasons why users decide to choose content from illegal sources may significantly help in designing and matching tools to combat piracy on particular markets.

Study implementation

- The study was carried out in January 2017 by an independent research entity.
- Due to the subject matter of the analysed phenomenon, the CAWI method was used in an Internet panel. The panellists' structure reflects the structure of Internet users in Poland accurately. To ensure the highest quality of the study, the participants who filled in the survey in a careless or unreliable way were removed from the panel.
- The study covered a representative sample of 1,500 Internet users aged 15–75, using the following content types shared on the Internet: video, books, press, live broadcast, music and audiobooks. The study sample was stratified based on gender, age, income, size of the place of abode and region of the country.
- To confirm an appropriate sample selection, an established measurement was carried out for the sample N=1,500 before the full study was performed.
- Those qualified for the study included people who, in the so-called screening question (asked in a neutral way, not suggesting any response to a panellist), declared that one of the important areas of their activity on the Internet is watching/obtaining complete audio content / live broadcasts, listening to / downloading songs, reading/ downloading press.
- To ensure the study reliability:
 - The survey did not indicate it referred to Internet piracy.
 - The respondents' replies were verified for inconsistency by adding control questions to the questionnaire. Also the duration of filling in the survey was monitored and respondents whose replies were doubtful were further checked.
 - The list of websites which the respondents could select as the source of content on particular markets was prepared to include a similar number of legal and illegal websites. What is more, respondents had a chance to enter another response which was then classified as a legal or illegal source and included in the result analysis.
 - 5 percent of extreme answers in the upper and lower range, related to infeasible declarations, were prepared statistically to improve the accuracy of the results obtained.

- The key objectives of the study included:
 - Estimation of the Internet piracy scale in Poland among Internet users on six online markets related to the cultural sector.
 - Identification of habits and preferences related to paying for access to content.
 - Identification of the inclination to pay for content on the Internet if there is no access to illegal sources.
 - Identification of piracy determinants (Internet users' motives related to obtaining content).
 - Identification of the degree of awareness regarding the existence of Internet piracy among Internet users (ability to identify websites offering legal access to content).

For this report, the analysis covered the socio-demographic properties of a standard Internet user in the studied age group as well as narrower groups of respondents, i.e.:

- users of illegal sources;
- users prone to paying for access in legal sources if the content is not available in illegal ones; and
- users of solely legal sources.

The analysis enabled the specification of a typical profile of a user looking for content on the Internet.

This analysis revealed that the majority of properties is identical regardless of whether the respondent uses illegal or legal sources. The key conclusions may include differences vis-a-vis the profile of a typical user looking for content on the Internet:

- Most respondents declare everyday Internet use, but there is a large group of those who use the Internet 4 to 5



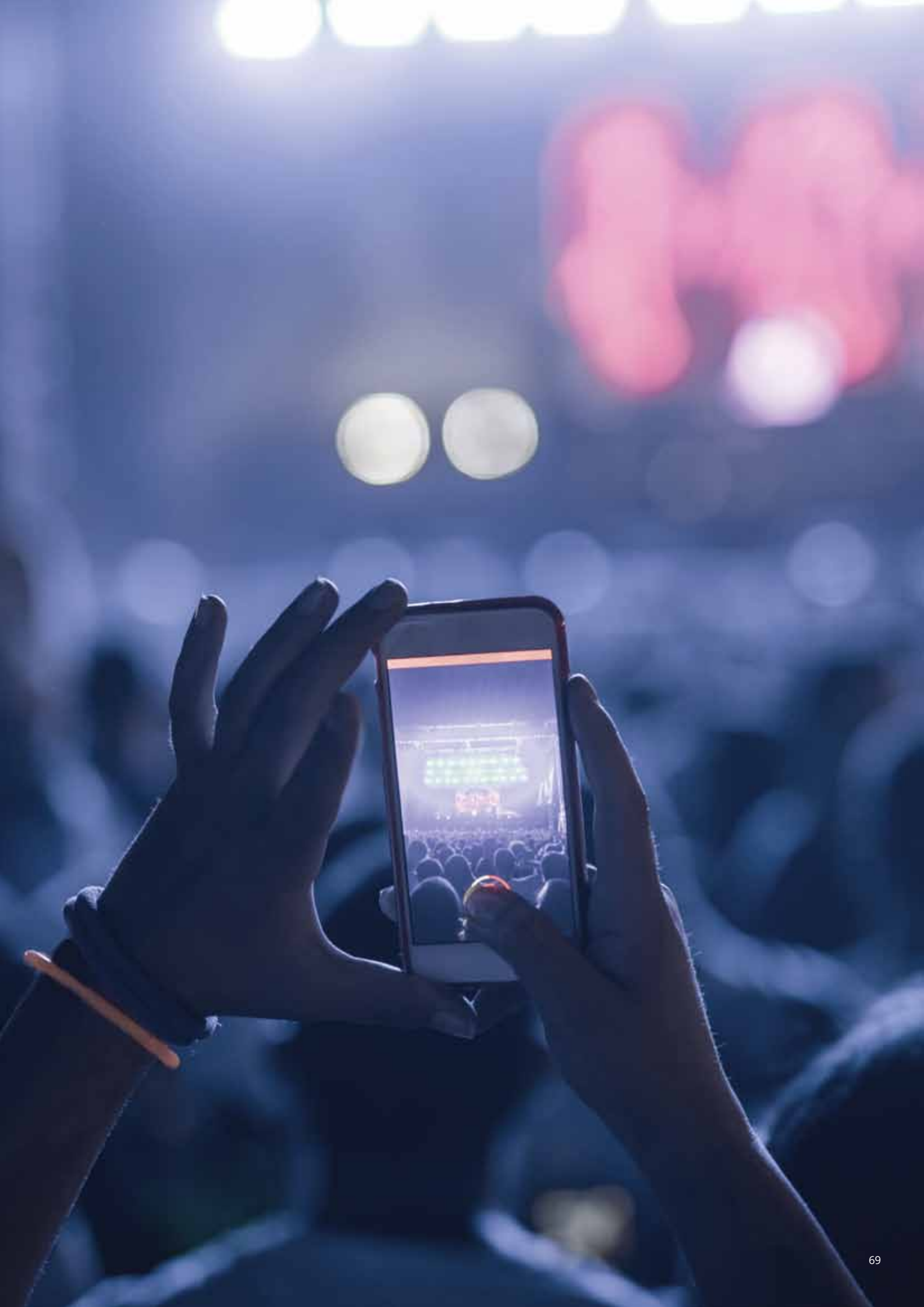
Typical profile of a user looking for online content

GENDER	Male
EDUCATION	University, MA/MSc
PROFESSIONAL SITUATION	Permanent job for an indefinite period of time
INCOME PER CAPITAL IN A HOUSEHOLD	0–600 and 1,001–1,600
FINANCIAL STANDING (BASED ON AN INDIVIDUAL'S OPINION)	We have enough money for everyday purposes, but cannot afford any greater expenditure
INTERNET USE FREQUENCY	Every day
DEVICE USED MOST FREQUENTLY FOR INTERNET ACCESS	Laptop computer and smartphone

days a week among those declaring the willingness to buy legal content.

- Among respondents declaring use of illegal sources, the share of people with university education is 26 percent lower.
- The share of people with permanent employment for an indefinite period of time is 21 percent higher among respondents declaring willingness to buy legal content.
- Users declaring willingness to buy legal content frequently point to a tablet as the device used to play the content.
- The level of declared per-capita income

in a household is similar, regardless of the type of sources used by the respondent and whether they declare purchase of legal content in the absence of illegal sources.



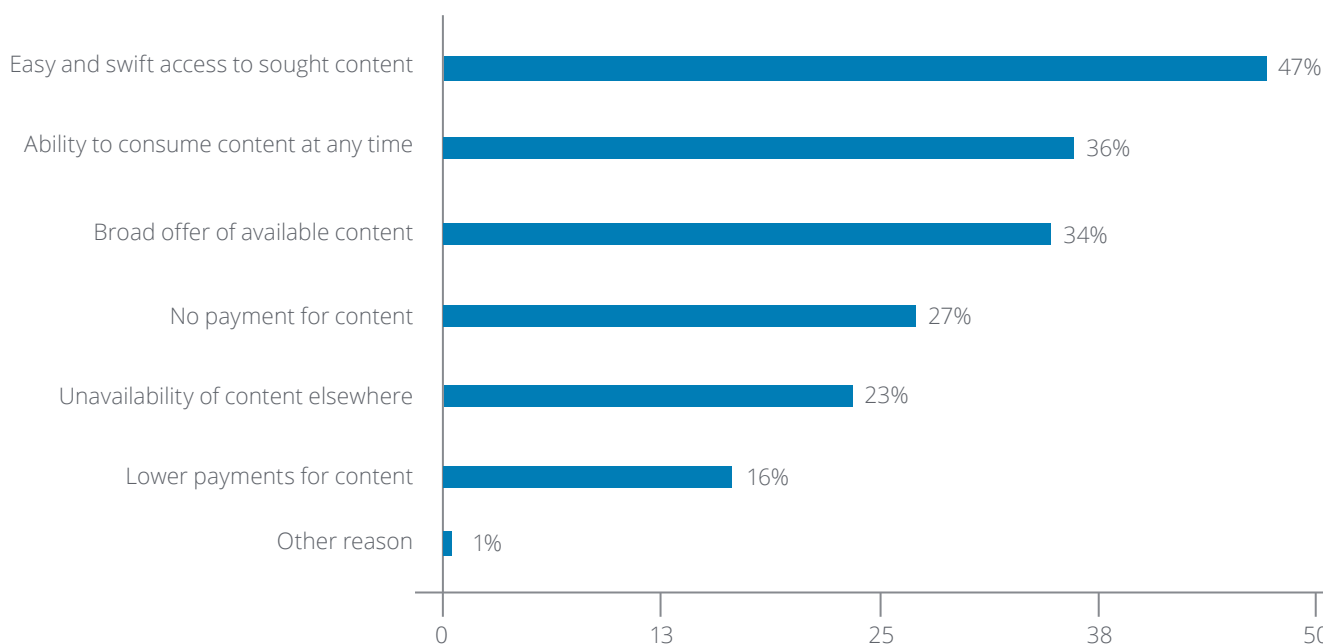
Reasons for using websites offering illegal access to content

The results of the completed study prove that the most frequent causes of using websites offering illegal access to all content types include:

- ease and swiftness of access,
- broad offer,
- ability to consume content at any time,
- lack of required payment.

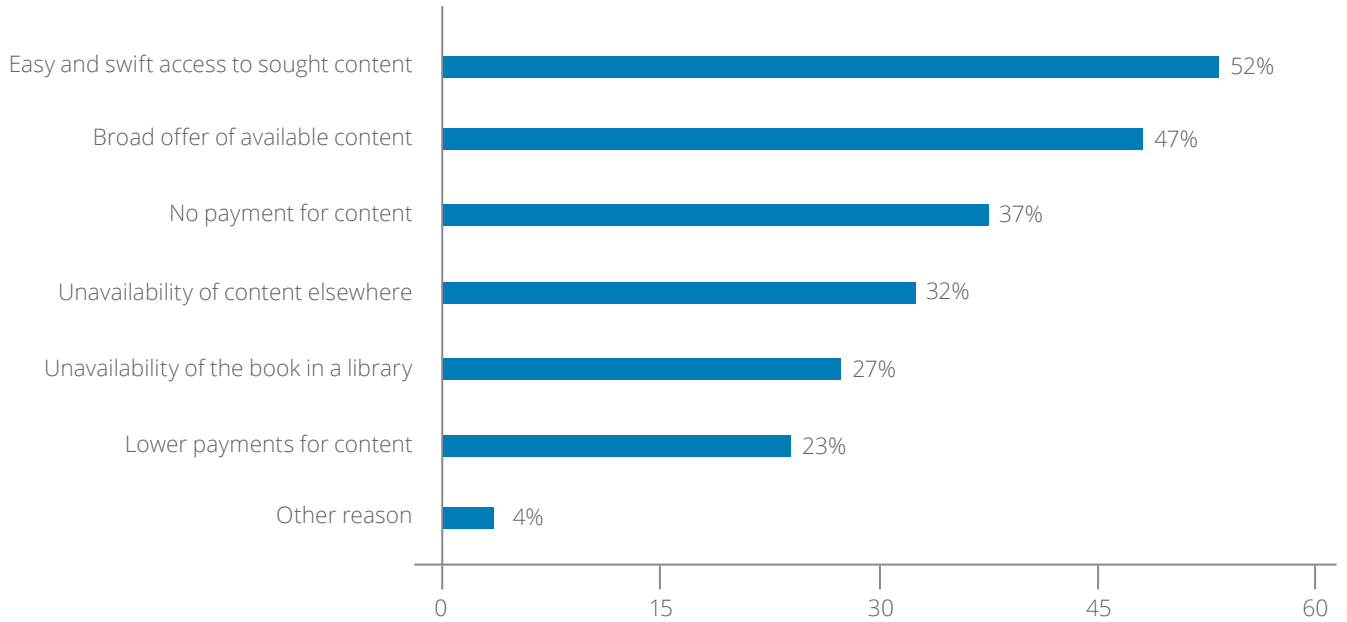
The distribution of piracy causes differs, though only slightly, for particular content types (the presented distributions do not sum up to 100 percent as respondents could select up to five answers).

Reasons for using websites offering illegal access to audiobooks



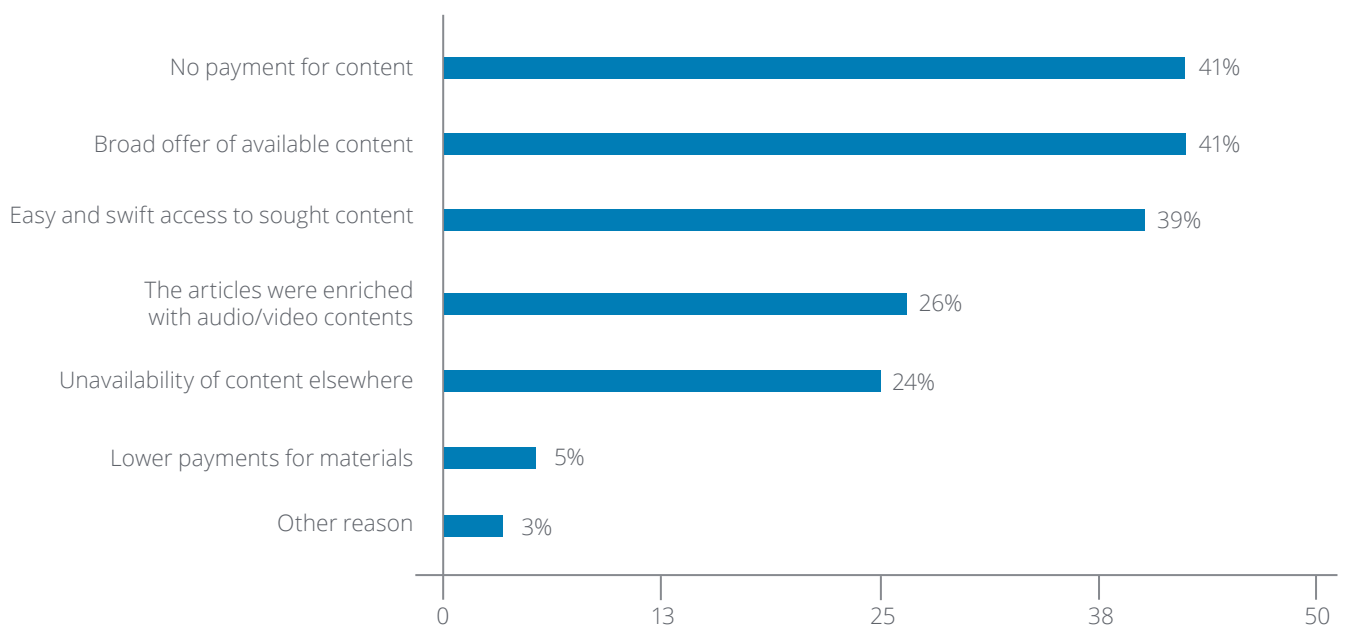
Source: Deloitte analysis based on users' opinion study carried out for the report

Reasons for using websites offering illegal access to books



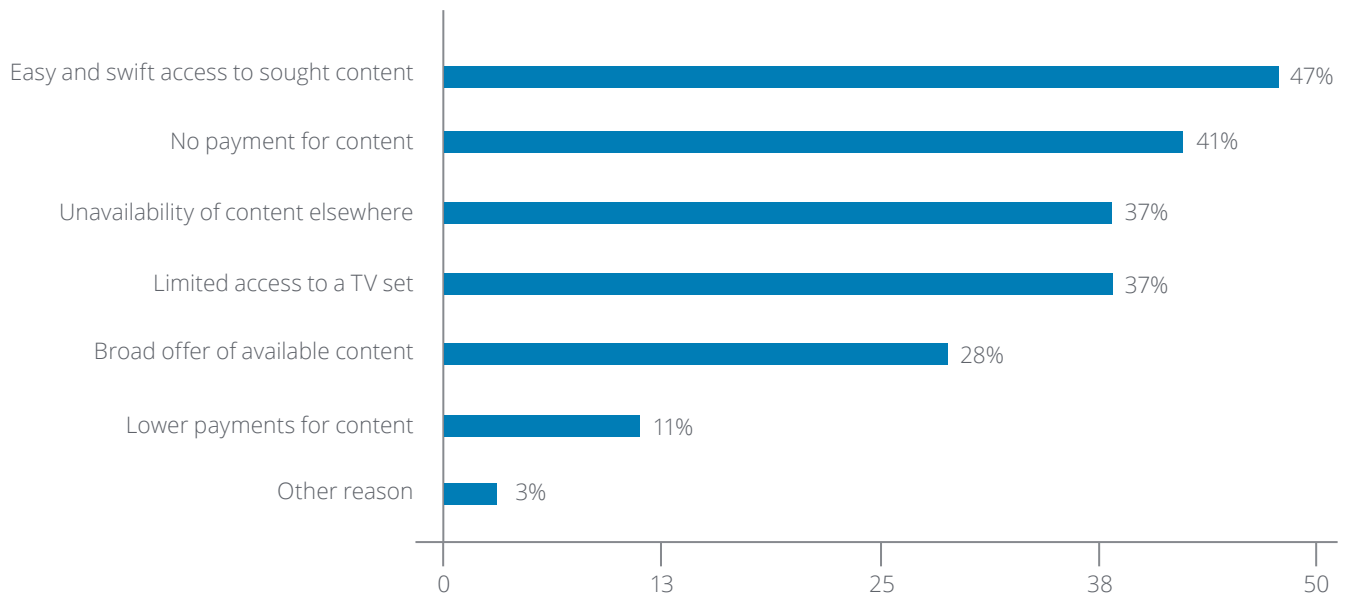
Source: Deloitte analysis based on users' opinion study carried out for the report

Reasons for using websites offering illegal access to press



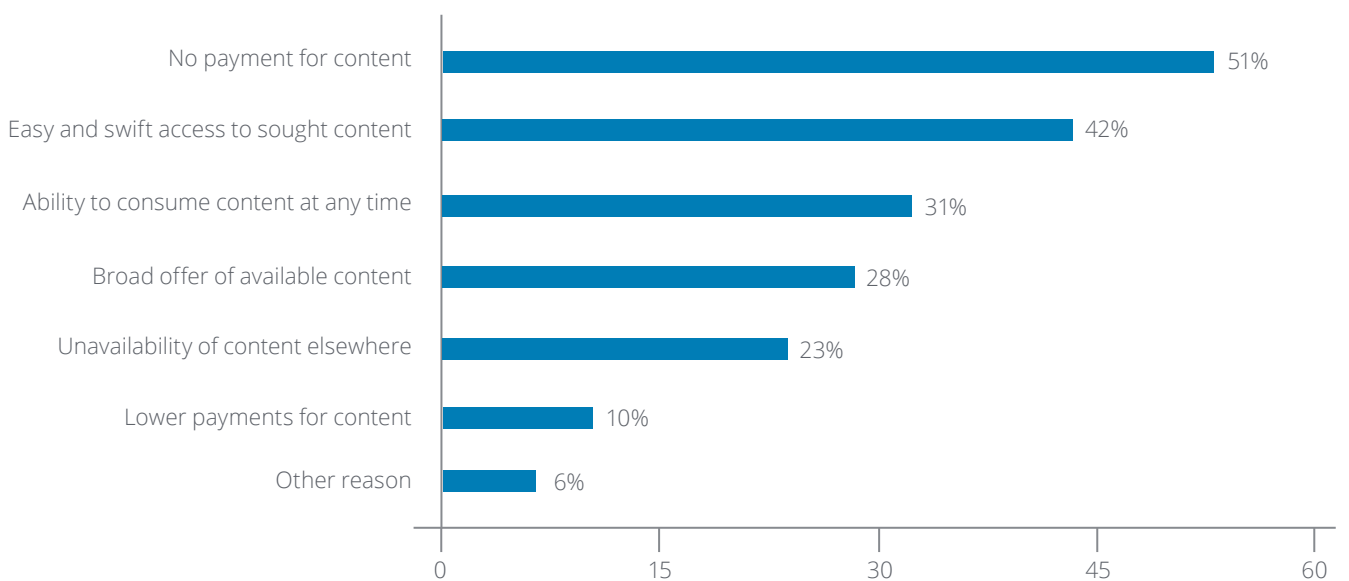
Source: Deloitte analysis based on users' opinion study carried out for the report

Reasons for using websites offering illegal access to live broadcasts



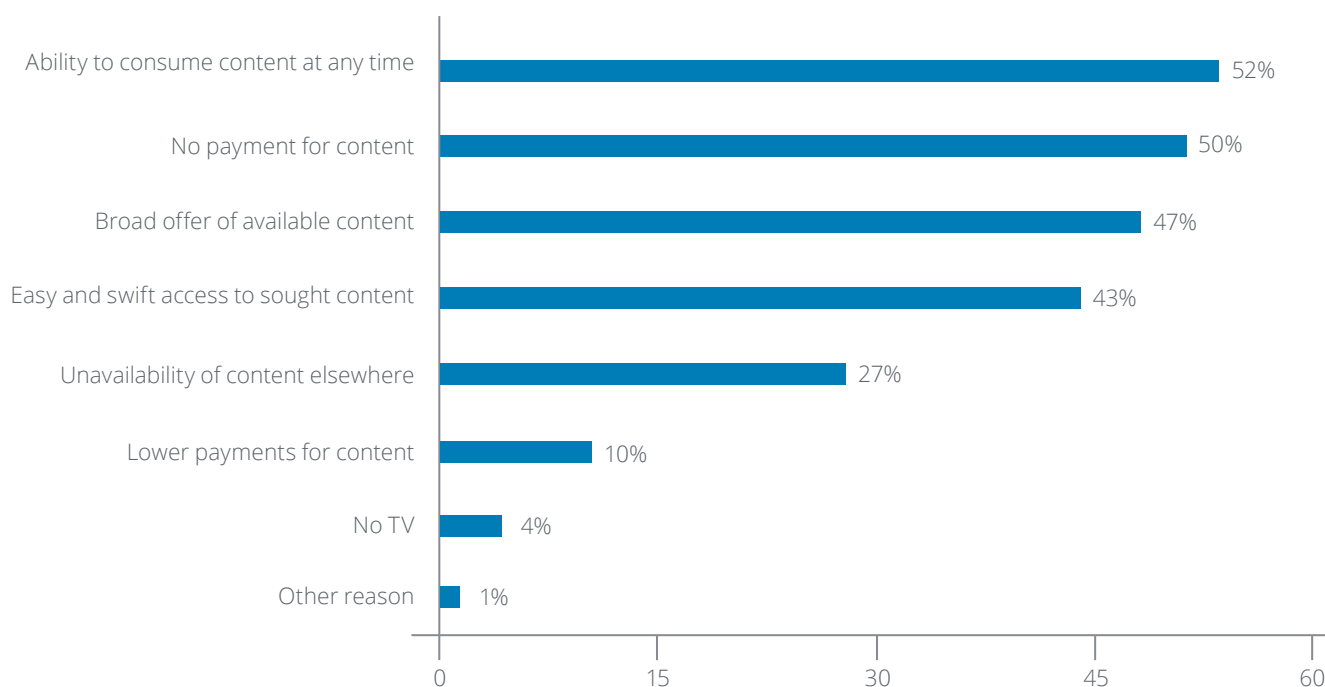
Source: Deloitte analysis based on users' opinion study carried out for the report

Reasons for using websites offering illegal access to music



Source: Deloitte analysis based on users' opinion study carried out for the report

Reasons for using websites offering illegal access to video



Source: Deloitte analysis based on users' opinion study carried out for the report

According to respondents, illegal websites are perceived as offering easy and swift access to sought materials. As much as 52 percent of respondents who read books, 47 percent of those who listen to audiobooks and 47 percent of broadcast watchers decided this was the most important reason for using illegal websites. For the other content types, i.e. video, music and press, this reason takes the second or third position, and was considered important by 43, 42 and 39 percent of respondents respectively.

The successive reason for using websites offering content illegally, indicated equally often, is the broad offer of materials accompanied by the absence of any need to pay (about 40 percent of respondents on average indicated these reasons).

It is worth taking a closer look at the other characteristics on particular markets:

- For audiobooks, the second property indicated most often is the ability to consume content at any time (36 percent of indications). In the era of growing digitization of society, this consumption method will be more and more popular thanks to mobile devices, which make access to content significantly easier. However, it should be stressed that this cause does not depend much on whether the content was obtained from a legal or an illegal source.
- Book readers indicate that a frequent problem, and also a reason for obtaining materials from illegal sources, is the unavailability of content in other locations/libraries. Importantly,

on websites offering illegal access to content, those advantages are combined with the absence of payment for the content. This was the third most frequently selected factor (37 percent of indications).

- It is worth paying attention to the results obtained on the video market with respect to relevant studies carried out in 2013.²¹ Three years ago, the key importance was attached to: extensive offer of access to content (88 percent of answers), no need to pay for the content (74 percent of answers on average) and the convenience and ease of accessing content (50–68 percent of answers). In the study carried out for this report, the most frequently selected reason was the ability to consume content at any time (52 percent of answers), with the

absence of the need to pay as the second most frequently selected answer (50 percent of answers). The third most frequent answer was the extensive offer of available content (47 percent).

- For broadcasting, an important reason for obtaining illegal content was a limited access to a TV set (37 percent). Interestingly, with respect to video

content, the lack of a TV set is a reason for using illegal sources solely for 4 percent of respondents.

- Convenience perceived as the ability to consume content at any time was selected primarily as the reason for using illegal sources for video content and music (52 and 31 percent respectively).

Reasons for selecting legal websites

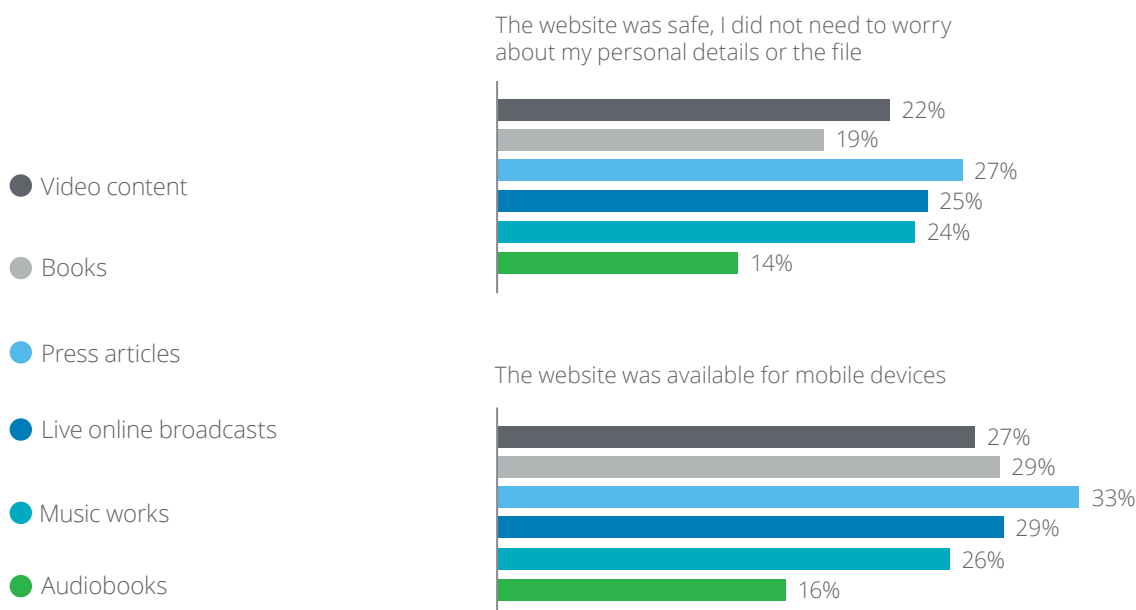
- Consumers are encouraged to use legal websites primarily due to easy operation and navigation. This property refers especially to the market of videos, music, online broadcasts and press articles.
- A high share of respondents also appreciates the high quality of content offered by legal websites. For music

works, this is close to one half of respondents (49 percent).

- The availability of sought content and the ability to watch it on mobile devices takes the third position among the determinants of using legal sources.
- The other factors, e.g. security offered by the website, the downloading speed

and the offer of solely legal content are important for more or less every fourth respondent.

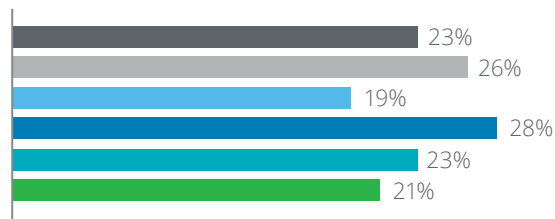
The major causes of selecting websites offering legal access to content (% of all answers)



I did not find contents of interest for me elsewhere

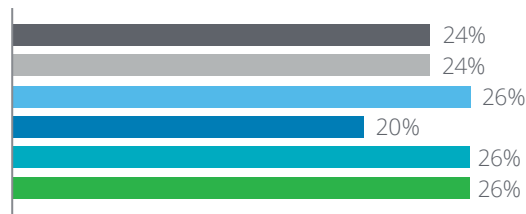


The website offered only legal content

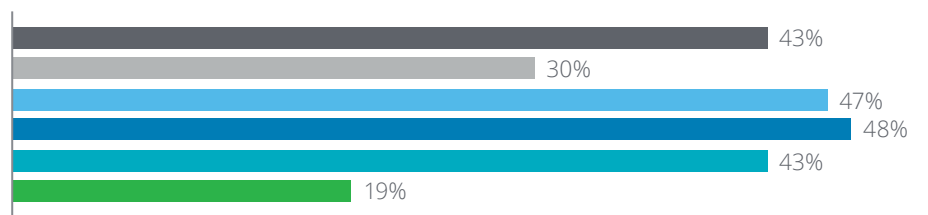


- Video content
- Books
- Press articles
- Live online broadcasts
- Music works
- Audiobooks

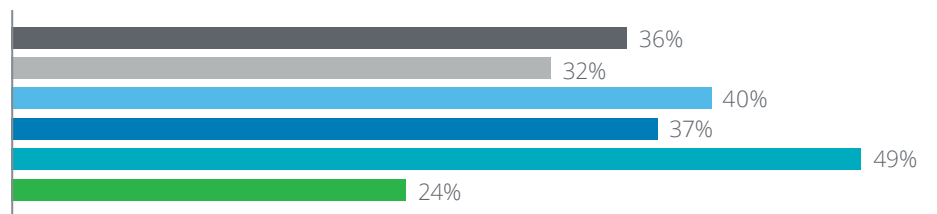
I downloaded content of interest to me quickly



The website was easy to operate and navigate



The content I looked for was available on that website in high quality



Source: Deloitte analysis based on users' opinion study carried out for the report

Analysis of key piracy causes

To understand the reasons for using both illegal and legal websites, it is worth considering the most important factors which determine the use of a particular source.

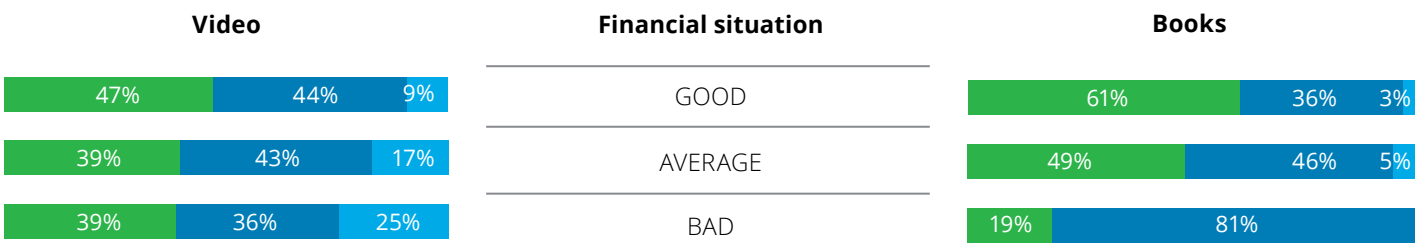
Price

The amount of payments which must be made to purchase specific products largely determines our consumer preferences. The completed study shows that, also for a digital cultural market, consumers are not indifferent to price. During the study, the aspects related both to payment value and the need to pay were considered. It turned out that the absence of any need to pay was a key factor for selecting an illegal website on most markets.

In the completed study, the respondents were asked about their declared behaviour in a situation when it became impossible to use websites offering illegal access. The respondents could select preferred behaviours, including those related to declared purchase of content sought in legal sources and those not assuming such a declaration (e.g. abandoned consumption).

The results of those declarations were compared with the financial situation of respondents' households in their own opinion.

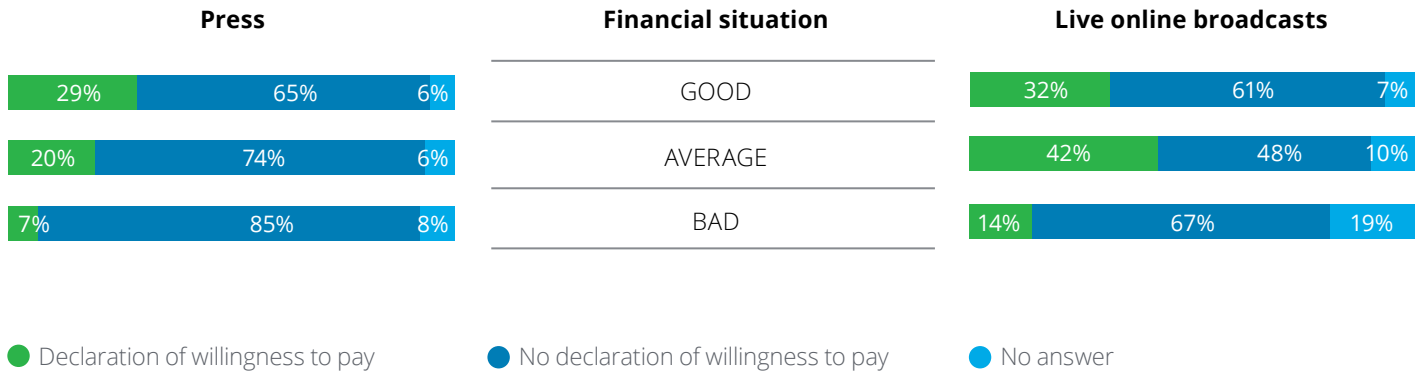
Inclination to pay for content in legal sources when faced with the inability to use illegal sources on the video market and on the book market



● Declaration of willingness to pay ● No declaration of willingness to pay ● No answer

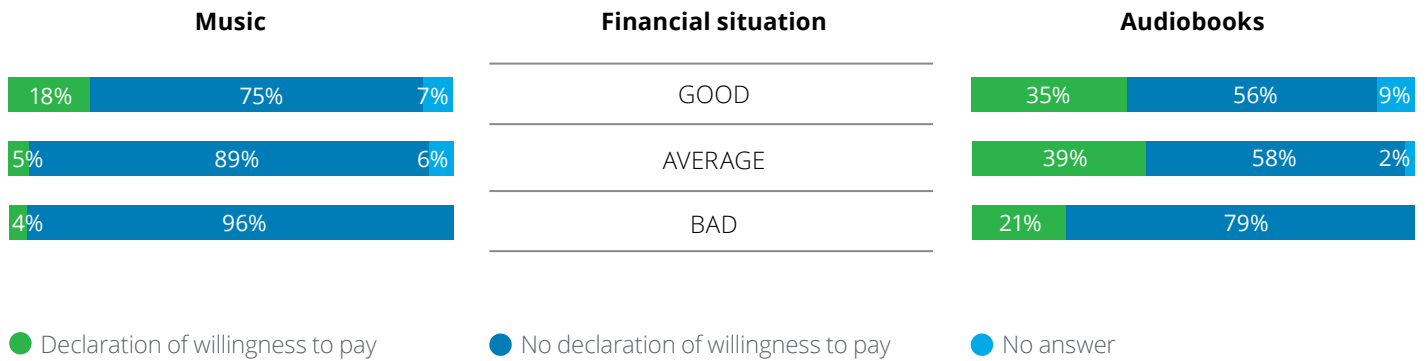
Source: Deloitte analysis based on users' opinion study carried out for the report

Inclination to pay for content in legal sources when faced with the inability to use illegal sources on the press market and on the live online broadcast market



Source: Deloitte analysis based on users' opinion study carried out for the report

Inclination to pay for content in legal sources when faced with the inability to use illegal sources on the music market and on the audiobook market



Source: Deloitte analysis based on users' opinion study carried out for the report

The presented results prove that for most markets there is a significant correlation between the financial situation in the respondent's household and a declaration of willingness to purchase legal content. The better the financial situation in the respondent's

opinion, the higher the willingness to pay for content when faced with the inability to use illegal sources. It is worth paying attention to the fact that on the video market the group of respondents who consider their financial standing poor shows an equal willingness

(39 percent) to pay as those considering their standing average. This result is also only slightly lower than in the group of people in good financial standing (47 percent).

Ease and swiftness of access to content

Legal websites usually lead in terms of quality and transparency of their sites. Illegal websites rarely decide to invest in a professional site design. In such circumstances, the professional menu structure, browsers, directories and subpages related to payment largely contribute to making the website more appealing. This may attract a group of customers for whom quality is a factor determining their consumer choices.

Swiftness of access to content is another factor likely to determine the choices of some users. Websites requiring time-consuming sign-up and log-in procedures may lose customers for whom time is an important aspect. The requirement to create an account, confirm sign-up via the mail box, to make payment and verify it are examples of time limitations imposed both by legal and illegal websites on users. Usually, websites using the advertising model of content monetization use the least complicated procedures. It should be stressed that not all websites offering legal content are able to use this

model due to its low profitability when selling certain content. This means illegal websites, which do not incur any distribution costs, may be successful applying the advertising form for all types of content offered.

Broad content offer in a single source

An extensive repository of content in a single access source minimises the time required to look for and obtain it, improving the source attractiveness. Moreover, the greater the selection of items in the website repository, the more profitable it becomes to buy subscription access to it and the less time must be spent for searches and sign-ups on other websites. The highest share of respondents most frequently indicated the absence of extensive content offer on the video and book market as the incentive to use illegal sources.

Content availability

Availability of content in legal sources is one of the key factors determining legal consumption of digital culture. Unavailability of content on legal

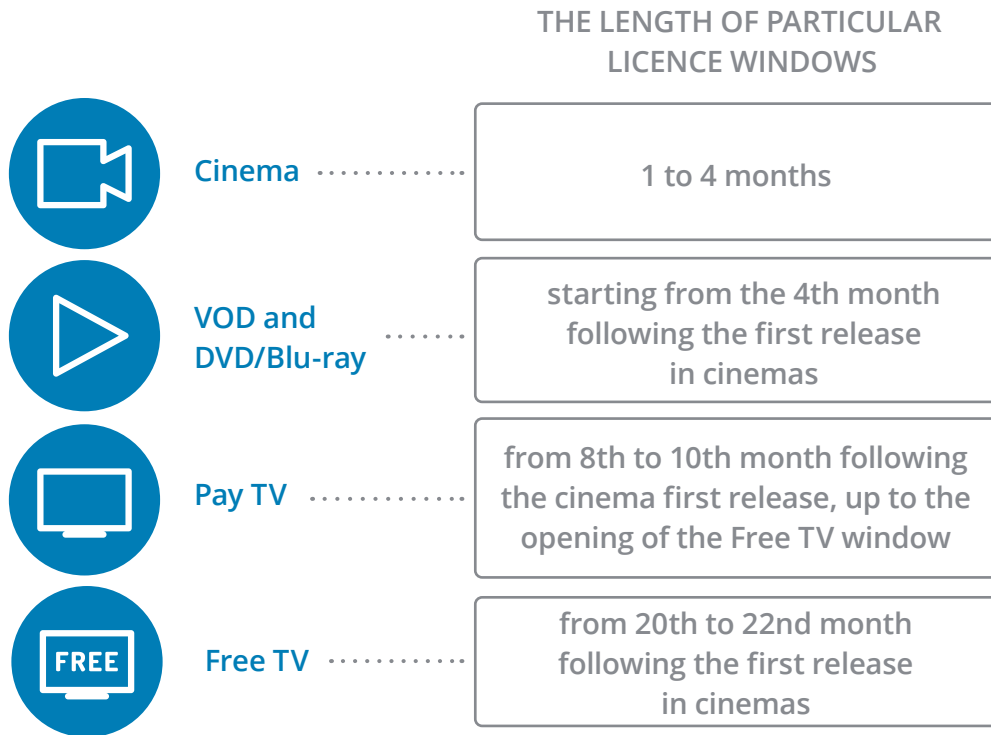
websites should be considered a likely stimulus for piracy growth on a given market. Illegal websites have the ability to fill in prospective niches in content distribution rapidly and it should be expected that if content is not available in legal sources, at least some consumers interested in a given title will decide to visit an illegal website.

One of the key sources generating return on expenditure incurred for content production is legal distribution. With respect to music, books or audiobooks we can speak of repeated content consumption and its topicality is not highly important. With respect to the press, the users expect news and content to be topical and fresh, with short time of content circulation. On the video market, the users expect rapid and often one-off access. Broadcasts are usually designed for real-time distribution.

To better illustrate the causes of content unavailability in legal circulation, it is worth using the example of the so-called licence window model on the video market.



Dates of first releases of Polish films and the length of particular licence windows on the film market, as well as approximate share of windows in the earning stream



Source: Own compilation based on interviews with video market experts

Licence windows are based on the regulations governing sales of licence rights on all available distribution fields. This concept is based on the assumption concerning the need to diversify the distribution sources and impose time limitations to monetize content to enable return on investment related to content production, distribution and promotion. Film producers share the opinion that only two out of ten produced films generate profits, the next five are projects incurring losses, and the following three reach the profitability threshold.

The film distribution path starts in the cinema and in more or less 4 months the film is available in digital distribution (VOD) and appears on digital media (DVD, Blu-ray, UHD Blu-ray). Only then it

is offered in pay and free TV.

From the perspective of the above distribution windows, which the business model of film exploitation is based on, 3 timeframes are of key importance for the activity of illegal websites:

• **Before the first release in cinemas and around it**

– at that time viewers display the highest interest in the content, with the maximum viewership recorded. This period is attractive for pirates, assuming they are able to obtain a good quality copy (as a last resort, they use a recording made during the cinema display).

• **Period between the first release in cinemas and the first release in VOD and DVD/Blu-ray**

– this is when a relatively high viewers' interest is recorded.

• **Around the DVD/Blu-ray release**

– in that period the availability of illegal copies grows significantly as pirates gain access to high-quality material from an original Blu-ray.

From the time of DVD/Blu-ray/VOD release, the interest in and availability of illegal copies remains, but it is much lower than in the above three periods, as the film is no longer new.

In the context of a particular licence windows' length, it is worth mentioning changes on the film production market. For 2 recent years, some film studios and producers introduced short windows (7 to 21 days) between the TV/VOD and the DVD/Blue-ray release. In practice, depending on the market, this means a shortening of the exclusive right to 4-month film display in the cinema by 7–21 days, with retained availability of media after 4 months from the first cinema release. It can be expected that this will be the direction for the market to evolve, which can be confirmed by specialist consultations by American film studios considering to make films available in the digital distribution model 2–3 weeks after the first cinema release in return for higher charges paid by consumers.

Quality

On the digital market, similar to the material goods and services market, quality is one of the major factors affecting competitiveness. This refers both to the quality of image and of sound. In this category, legal websites take the lead. Thanks to distributing content from official sources, they are able to ensure high quality. Illegal websites frequently offer content obtained by copying from the original source, which may cause serious deterioration of content quality. A key example of that are illegal film copies obtained by recording a cinema display with a video camera.

According to the study, the quality factor is important for 24–49 percent of consumers depending on the studied market. A given work's quality is most important for people looking for music on the Internet. This is related to the growing tendency to consume music in premium quality.

Security

The risk of getting the device infected with malicious software is 28 times higher when using websites offering content which infringes copyright.

The Internet is not free from threats. Visiting an improper website, clicking an inappropriate link or filling in an inopportune form may bring about adverse effects both for the user and for the device.

Carelessness on the Internet may have different effects. This may include the installation of malicious software which displays adverts or redirects to specific pages, generating profits for the software owner. This can also involve software stealing our private details which may be sold or used for financial fraud (e.g. payment card details). Eventually, this may also be software rendering our device inoperable or even damaging it.

According to the report Digital Bait by RiskIQ and Digital Citizens Alliance, Internet users visiting illegal websites are exposed to risk of getting malware installed which is 28 times higher than for those using solely legal sources. According to estimates, malware is distributed by every third illegal website.²²

Another aspect related to security is getting payments under false pretences. It consists in collecting payment for content which, ultimately, the user is not

able to consume. This can be based also on applying fraudulent market practices by distributing information on the price in a way which may be misleading for consumers. This is more and more frequent for illegal websites which do not attach any importance to their users' trust.

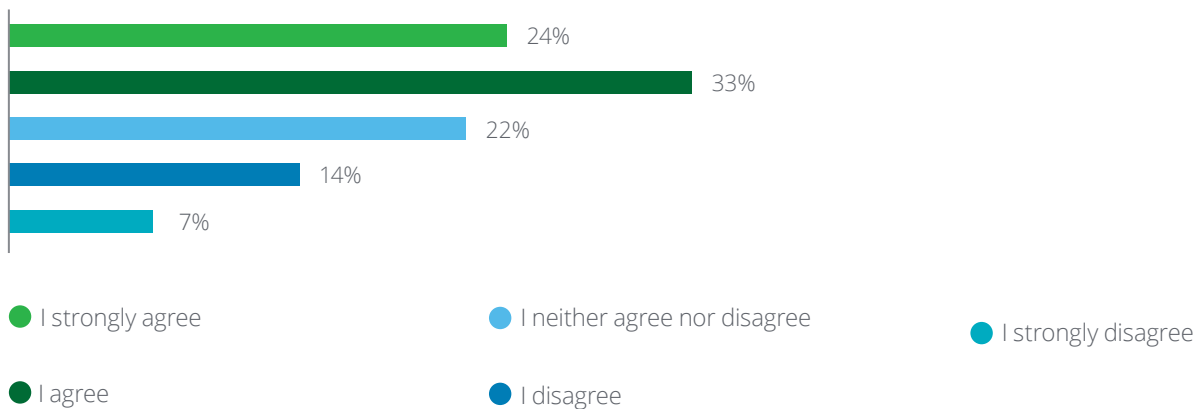
Security on the Internet is a more and more important aspect, determining the choice of Internet websites visited by the users. According to estimates, every fourth respondent declares they chose a given legal system as they could be sure of the security of both their personal details and of the device used. Trust may be an important factor thanks to which official websites may gain popularity in the time to come.



Perception of piracy

The results of the completed survey show that the respondents have a relatively low awareness of website legality. As much as 57 percent of respondents²³ declare consumption of content solely from legal sources, but those claims are inconsistent with actual data concerning the content obtained. The study results prove only 49 percent of Internet users obtain content solely from legal sources²⁴.

Declarations concerning the use of solely legal sources ("I use solely legal sources on the Internet")



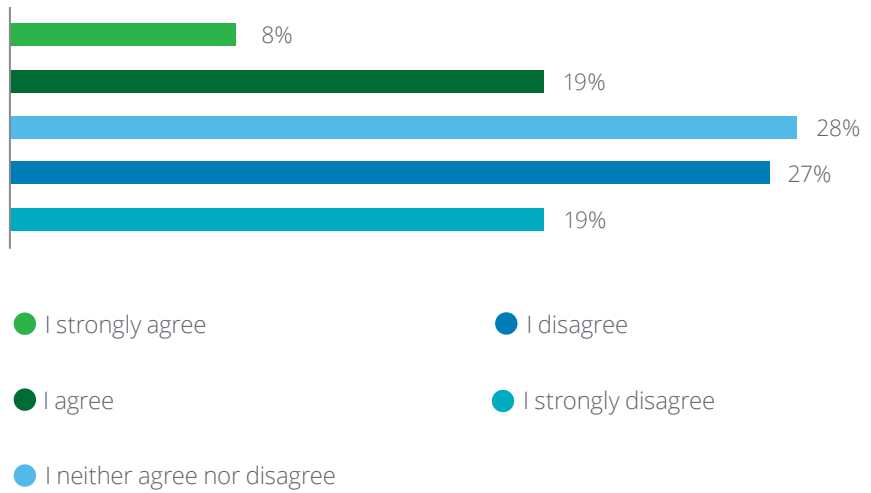
Source: Deloitte analysis based on users' opinion study carried out for the report

An important influence on perceiving the legality of the content source is exerted by paid or unpaid access. Close to 1/3 of respondents believe that paid websites offer solely legal content. Users who assume the above make up as much as 27 percent²⁵ of respondents. Moreover, 28 percent of respondents cannot assess that claim. This means that more than a half of the studied population is not aware that by paying for the content they watch they may support illegal websites. Perhaps some consumers use that to justify themselves (i.e. if I paid, nobody can blame me for using the content illegally). The perception of source legality may be largely determined by familiar logos and brands of payment organisations which frequently appear also on illegal websites.

Still, close to a half of respondents (46 percent)²⁶ is aware that the need to pay does not mean the source is legal.

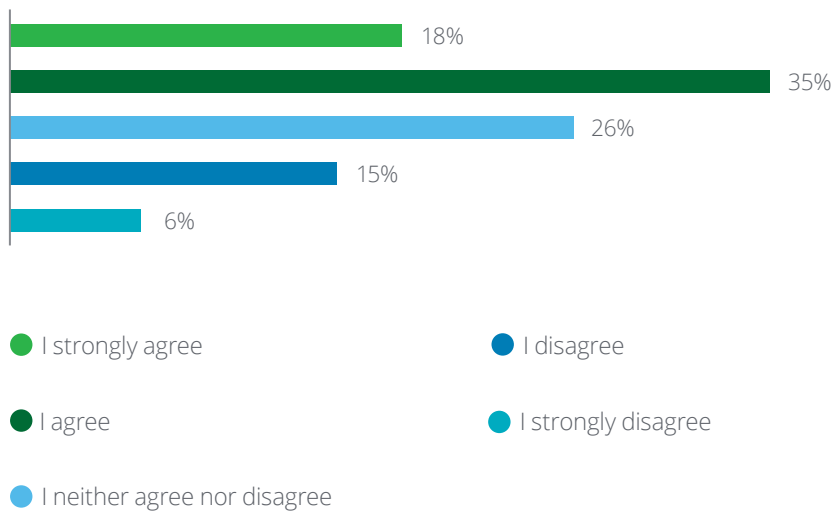
According to the respondents' declarations, most of them would stop using illegal sources if they knew the content is circulated illegally. Such an answer was selected by 53 percent of respondents in total. 21 percent of respondents disagreed with that statement and 26 percent did not have a clear opinion in that respect. This proves that users' education concerning source legality, e.g. by employing a system of certifying or marking them clearly for the users, may still play a significant role.

Belief that only websites offering legal access to content collect charges for access ("Only websites offering legal access to content collect fees for access")



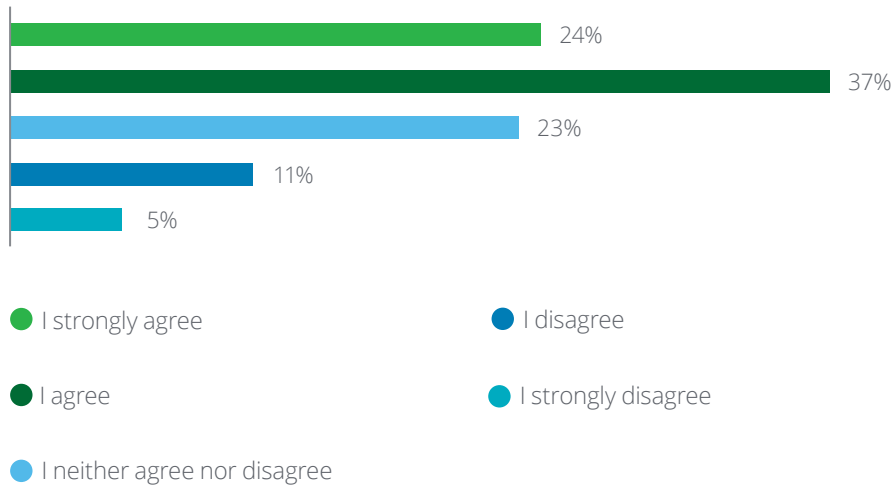
Source: Deloitte analysis based on users' opinion study carried out for the report

Declaration of ceasing to use a website when the user has learned that the content offered by it is illegal ("Declaration of ceasing to use a website upon learning that the contents offered are illegal")



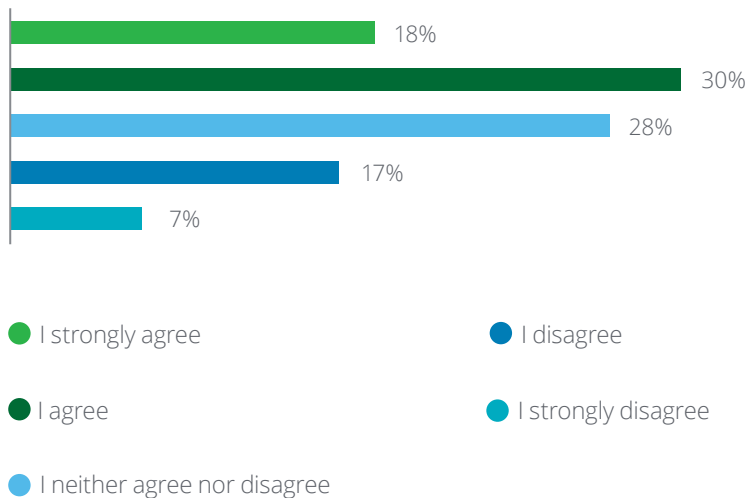
Source: Deloitte analysis based on users' opinion study carried out for the report

Awareness of the harm caused by piracy ("Websites offering illegal content should not be used because the authors, performers and producers do not receive fees for their work in this way")



Source: Deloitte analysis based on users' opinion study carried out for the report

Awareness of the adverse effect of piracy on investments in this sector ("Using websites offering illegal content negatively affects the quantity and quality of new productions")

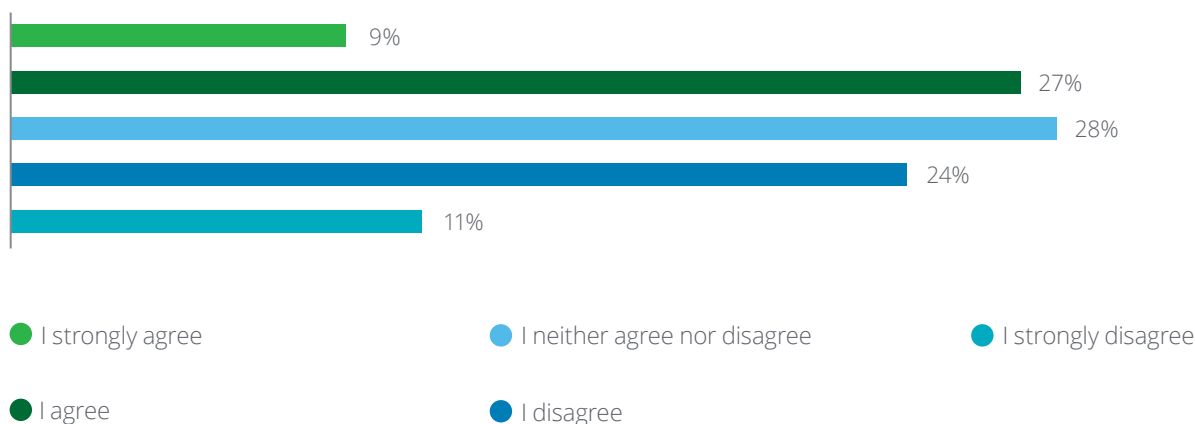


Source: Deloitte analysis based on users' opinion study carried out for the report

The ethical dimension of using illegal sources is connected also with the awareness of losses caused by them to authors, performers and producers, as well as the direct relationship between using illegal sources and opportunities to invest in new productions. Those aspects were also studied. On the declaration level, most respondents expressed support for ethical behaviours, with every fourth person not being able to express their opinion clearly. Altogether, 61 percent of respondents believe that using websites offering illegal content translates into the absence of fees for authors, performers and producers for their work. Simultaneously, 48 percent claim using websites offering illegal content affects the quantity and quality of new productions in an adverse manner.

Respondents were not able to assess the influence of a single user's actions on the scale of this phenomenon. Almost every third respondent was not able to express their opinion in that respect, while 36 percent agreed that downloading single illegal content is marginal for the situation of authors, performers and producers of content, with 35 percent having the opposite opinion.

Awareness of the adverse effect of piracy on authors and performers ("Obtaining individual illegal content is marginal for the situation of content authors, performers and producers")



Source: Deloitte analysis based on users' opinion study carried out for the report

This data proves that users do perceive the immoral dimension of using illegal websites and the adverse effect of piracy on the situation of authors, performers, producers and content quality. Notwithstanding, they are not willing to concede that their personal actions also contribute to the ultimate

scale of that phenomenon. This proves that educational activities addressed to users should focus on direct tasks, e.g. making users trying to use an illegal website aware that the website infringes copyright. Similar campaigns organised in several European countries (e.g. France and Spain) were successful as

they made the users aware the source is illegal and encouraged to change their behaviour at the most appropriate time.

Selected causes of piracy worldwide

Using illegal websites offering content is a common problem both in Poland and Europe, and also worldwide. The growing scale of this phenomenon gradually transforms it into an economic and political problem.

The reasons for using content from illegal sources are similar in various environments and countries. The reasons for mass piracy may be traced to economic, market, socio-cultural and organisational factors. Based on

the study²⁷, which includes a synthesis of piracy determinants in different countries, i.a. in the U.S., Canada or the U.K., the reasons exerting significant impact on piracy were identified.

Reasons for using illegal sources (based on results of studies carried out on foreign markets)

Reasons or a group of reasons	Description
ECONOMIC REASONS	
Price	Offered access to various options, consumers are likely to select the cheapest ones.
Cost reduction	Consumers are prone to saving money by buying cheaper products and reducing costs related to spending time searching for the product and going to a standard shop.
Customer benefit	Consumers are encouraged to participate in the grey zone, e.g. by convenient delivery time, after-sales services, easy access to information.
MARKET REASONS	
Product availability	Consumers appreciate convenient access to products and services at any time, in short notice, and 24/7.
Extensive offer	Consumers prefer an extensive offer of available content, ensured by access to many sources of purchase.
Convenient way of buying	Easy buying, immediate delivery and high security assessment of the source contribute to increased usefulness, as perceived by consumers.
SOCIAL REASONS	
Lack of knowledge on source legality	Difficulties in differentiating clearly between legal and illegal Internet sources promote piracy.
Low level of social awareness	Social acceptance of illegal activities on the Internet in a specific social group or society promotes grey-zone consumption.
Social bonds	Exchange of the available resources within a community promotes criminal/illegal behaviours of consumers.
Relativity	Interpretation of moral, cultural and social standards as relative is a factor justifying illegal consumption.

Reasons or a group of reasons	Description
RISK-RELATED REASONS	
Minimum investment	Consumers are prone to buying a specific product or service online for a lower prices even if they are aware the provider's legality is doubtful.
Insignificant fear of penalty	Little fear of penalty and positive social attitude to illegal actions online contribute to participating in illegal consumption.
Anonymity	Anonymous connection with purchase platforms reduces the fear of penalty.
MORAL REASONS	
Apparent lack of any wronged parties	The illusion that grey-zone consumption does not incur any losses for a specific entity promotes illegal consumption.
No awareness of consequences	No awareness that the phenomenon is harmful and adversely affects entities involved in the creation and distribution of content, as well as the state budget, makes illegal consumption seemingly justified.
TECHNOLOGICAL REASONS	
High technological advancement level	Widespread access to the Internet increases the attractiveness of piracy.
ORGANISATIONAL REASONS	
Insufficient measures discouraging using the content on the Internet illegally	No appropriate control measures over markets and no penal instruments to prosecute for using illegal sources online increases the scale of piracy.

Source: L. Gaspareniene, R. Remeikiene, F.G. Schneider, The factors of digital shadow consumption, Mykolo Romerio Universitetas, February 2016.

It should be stressed that an important factor which was not mentioned in the presented study is also the large number of websites offering illegal access to content, which increases the likelihood that a person looking for content, upon

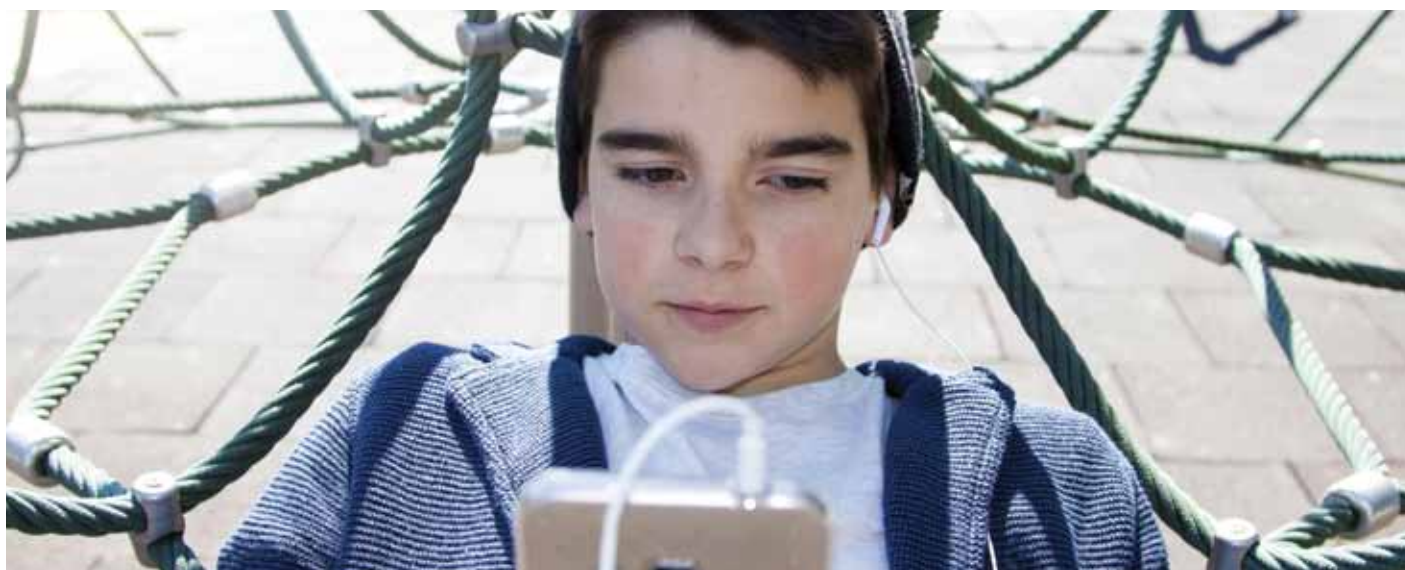
entering the title in an Internet browser, will get a list of sources with an immense share of illegal websites (also due to their high search-engine optimization).



Liability of selected participants on the market of services related to content sharing on the Internet

Introduction

Technological changes, easier access to the Internet and rapid development of services provided online are challenging both for market regulators (legislators) and participants.



In the last dozen or so years, Europe has witnessed a rapid development of technology. The development of legal regulations has not always kept up with dynamic changes on the market. Consequently, the regulations are more and more maladjusted to contemporary forms of using content on the Internet and to new challenges.

The problems appear in many areas, as the insufficient development of regulations brought about a situation where the interests of market participants are not balanced, given that those interests may be conflicting. Similarly, the development of technology makes it possible to share content in many ways. Actions to improve balance for the interests of particular participants of the market of sharing digital content and using it on the Internet have been undertaken both by EU and domestic legislators. This chapter is an attempt to sum up the existing legal environment of the phenomenon related to content sharing on the Internet and the situation of particular entities participating in the process of sharing and using such content. Needless to say, this is not an exhaustive recapitulation, but a selection of important or controversial

phenomena which may contribute to further discussion. Because of the constant growth of the Internet's significance both for the economy and for Web users, such discussions are and will remain necessary for a long time.

This study aims to identify particular entities as links in the chain of services related to providing copyright-protected content on the Internet. The legal status for each of them, related to the analysed phenomenon, was specified in European Union acts, including, but not limited to, the following:

- 1) 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;
- 2) Directive 2001/31/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 (Directive on electronic commerce);
- 3) Directive 2004/48/EC of the European Parliament and of the Council of

29 April 2004 on the enforcement of intellectual property rights.

Regulations included in these acts are more or less precisely reflected in Polish regulations, which will also be mentioned in this analysis.

Due to the extent of this problem, this report is aimed solely at outlining the legal environment of protecting works on the Internet, focusing on Internet piracy. For example, it is obvious that copyright holders have the right to protection both under civil and criminal law. Nevertheless, due to the limited scope of this report section, the authors decided to focus solely on civil law protection measures.

We would also like to emphasize that this study does not aspire to be comprehensive and exhaustive. Particularly, because of many controversial aspects still not explained clearly by the judicature or outstanding experts in this field, the authors have not tried to answer many questions which are important enough to be decided by competent bodies, including, but not limited to, the judiciary.

The problems mentioned above will be discussed with respect to particular categories of entities participating (in a broadly understood manner) in the process of sharing and using content on the Internet, i.e.:

- 1) content providers;
- 2) hosting service providers;
- 3) access providers;
- 4) providers of broadly taken electronic payment services and advertisers;
- 5) search systems providers; and
- 6) end-users.

The legal environment of works on the Internet will be presented first from the perspective of the Polish regulations and second from the point of view of the European legislation and the decisions of the Court of Justice of the European Union. The aspects of key importance for this report were harmonized to a small or large extent, which means that the EU context may be important in many cases.

Next, legal solutions and self-regulatory initiatives, used in selected European countries and aimed at combating

Internet piracy, will be presented.

The methodological grounds for the analysis included in this report section will consist of the review of public sources, including, but not limited to, specialist reference works, court decisions and other published official materials (reports, standings, projects, assumptions, etc.).

Because of the form of service provision on the Internet, it is not appropriate to limit the analysis solely to content providers and end-users. The service provider chain will also encompass many other entities, including those which provide access to networks or browsers to end-users and server space to content providers. They play different roles in the process of copyright infringement. Hence, the rules of ascribing liability to them must be different. The comments below refer equally to all content categories covered hereby, as all of them constitute works under copyright and benefit from identical protection.

Conclusions

1

Despite the relatively high protection level of copyright holders guaranteed by the EU legislation, the same is not true for Polish legislation. This results from the incomplete or even defective implementation of certain solutions under the InfoSoc directive and e-Commerce directive, including, but not limited to, Article 8(3) of the InfoSoc directive and Article 12, 14 and 15 of the

e-Commerce directive. This requires copyright holders to look for protective measures in legal solutions already present in the Polish law but not adapted to Internet reality, which, consequently, are highly ineffective. For this reason, it is justified to advocate the introduction of necessary legislative amendments aimed, firstly, at adapting the Polish law to the requirements under the European

Union law and, secondly, to ensure that copyright holders obtain access to tools and legal solutions to protect their interests.

2

For some time, there has been a tendency to strengthen the protection enjoyed by copyright holders in the decisions of the Court of Justice of the European Union. It can be observed especially with respect to cases where the court considered the problem of legal classification of new technological solutions on the digital content market. The same refers, even to a higher degree, to the opinion-related activity of the Advocates General for the Court. The observed phenomena can be seen as an attempt at a reasonable approach to copyright use in the Internet reality, aimed at the appropriate balancing of interests of content consumers and authors as well as other authorised entities. Maintaining the observed tendency should translate into a strengthened protection of the latter.

3

Market regulators, including EU bodies, are becoming more interested in innovative solutions referred to as the "follow the money" approach. Faced with the unsatisfactory effectiveness of actions addressed directly to content providers or other market participants, who can be collectively termed Internet intermediaries, it would be purposeful to change the approach in this respect. The success of this undertaking will depend, however, largely on the development of appropriate self-regulatory arrangements among stakeholders and on their practical effectiveness.

4

Under the Polish law, works shared via the Internet benefit from identical protection as those distributed over traditional channels. The works are protected by copyright and the author or another authorised entity has the exclusive right to use them and dispose of them. Exceptions to that rule, just as in all the other cases, must result from specific legal regulations, and their interpretation must not lead to their unauthorised extension.

Subsections



Liability of content providers



Responsibility of the hosting service provider



Liability of network access providers



Responsibility of payment service providers and advertisers



Responsibility of the search engine provider



End-user responsibility



Liability of content providers

Assigning liability to entities who provide content protected by copyright on the Internet without proper authorisation, as a rule, causes little controversy.

It is indisputable that uploading or providing content to other network users or placing them on public servers **is the act of "distribution" pursuant to the Copyright Act and, consequently, infringes the exclusive rights of the author (or another authorised entity).**

Under Article 17 of the Copyright Act, the author has, as a rule²⁸, an exclusive title to use the work and dispose of it in all fields of exploitation and to receive remuneration for using the work. The distribution of works, as a field of exploitation named in Article 50 of that act, should be considered an important factor of the author's exclusive right. Consequently, it is the copyright holders who are authorised to permit

the distribution of protected content, including distribution via the Internet. Polish law does not include any solutions limiting the rights of the authors and other authorised entities to decide on the fate of a work in cyberspace. All the same, using that type of content on the Internet is subject to basically the same legislative rules as using works in any other way.

Doubts, however, arise when it is necessary to define the scope of the distribution (or the public sharing under the InfoSoc directive, though the two terms should be construed as identical). Recently, a tendency to extend the scope of this term is visible in the decisions of the Court of Justice of the European

Union, which translates into an increased protection level enjoyed by copyright holders. Decisions concerning that aspect will be discussed chronologically, starting with the two widely discussed and controversial decisions in the Svensson and BestWater case, where the court decision employed a narrowing interpretation of public sharing, through the GS Media case, where the court broke the previous, controversial case law, as well as further decisions advocating the broad interpretation of public sharing. This will allow an understanding of the evolution of the court standing, especially with respect to so-called linking.

Linking as a public sharing activity – Svensson, BestWater and GS Media



Decision in the Svensson case – controversial "new audience" criterion

An aspect giving rise to much emotion among Internet users and authors is the legal classification of so-called linking. In this study, linking shall mean placing references to other websites where works protected with copyright can be found on the Internet (e.g. on websites, social media).

The decision in the Svensson case²⁹ was a highly important judgement concerning the legal classification of linking. According to the basic thesis of this judgement, Article 3(1) of the InfoSoc directive, related to communicating works to the public, should be interpreted to the effect that placing clickable links, directing to protected works, which are available to the public on another website, is not an act of communicating works to the public.

Regardless of the reasoning of the judgement which advocates the "linking freedom" rule at first sight, its justification, where additional conditions for the legality of such practice are specified, also requires a closer analysis.

Namely, according to the court, it is of key importance to determine if redirecting to the work through a clickable link means it is made available to a new audience, i.e. the "audience which was not considered by the authorised entities when they initially allowed to communicate it to the public". Consequently, only when it is believed the link results in communicating the work to the "new audience", can placing such a link be considered as an act of communicating the work to the public and an ingress into the zone of exclusive titles of the copyright holder. The solution suggested by the court limited to a certain degree the authors' competence to decide on the fate of

a work placed on the Internet, as it will usually be difficult to prove any "new audience" exists. In the substantiation, it was decided a work made available on one website without any access limitation may be "linked" without the authorised entity's consent on other websites, as we still have the "general group of Internet users" as the target group of recipients.

The court's line of reasoning was criticised by representatives of copyright doctrine. With respect to the new audience, there is an objection that it does not result from the directive provisions³⁰. It is also not clear how to perceive linking to content which is on Internet portals available to the public but was placed there without the authorised entity's consent. There is also no uniform assessment of the legitimacy of considering linking a form of communicating a given work to the public³¹. The above problems are, however, too extensive to analyse in detail in this study. To sum up, it is impossible to escape the impression that the said decision, though solving some problems, provokes new questions at the same time.



Decision in the BestWater case – embedding legality

In relation to the comments on the Svensson decision, it should be stressed that its basic reasoning was confirmed in a subsequent decision of the Court of Justice in the BestWater case³². In that case, the dispute focused on the legal classification of embedding or a technique of "embedding" or "pasting" not links but specific works, actually placed on third-party servers,

onto one's own website. Such a way of communicating content gives the impression that a user uses content placed directly on the website they are visiting at a given time.

Considering the BestWater case, the court decided the problem constituting the subject of the proceedings should be approached in a manner analogous to the one in the previous case of Svensson related to linking. It decided that it is possible to consider a given act as communicating the work to the public under the InfoSoc directive only when the work is communicated to the public using technical means other than those originally used by the authorised entity and when it reaches new recipients in this way, i.e. recipients not considered when allowing to use the work in the past. The court decided that in this case there were no separate technical means (the Internet was considered a technical means). The material the dispute referred to was also available to the public on a popular portal offering video content, therefore, "embedding" it on another website did not extend its reach to any broader audience. Consequently, the court did not see any infringement of the law in this case. To sum up, embedding can be considered legal only when the material has been communicated to an unlimited audience on the Internet beforehand. Similarly, however, to the Svensson case, the question concerning the assessment of legality when "embedding" refers to a work already distributed without proper authorisation was not answered.



Decision in the GS Media case – illegality of linking in

the case of profit-earning activities or awareness of illegal work publication

Another decision concerning the legal classification of linking is the decision of the Court of Justice of the European Union of 2016 in the GS Media case³³. The decision broke the case law started in the Svensson decision and then confirmed in the BestWater case, which was disadvantageous for authors. According to the decision reasoning for GS Media, placing on a website a hyperlink (link) redirecting to works protected with copyright and published on another website without the author's permission is not "communicating the work to the public"; provided, however, that the person placing this hyperlink does not intend to earn from it and is not aware of the illegality of publishing those works. Importantly, according to the court, if hyperlinks are placed to earn profits, awareness of the illegality of publication on another website should be presumed.

The facts in this case referred to the photos of Dutch model Britt Geertruida Dekker, which were placed on an Australian server without the consent of the copyright holder, Sanoma. The defendant in the proceedings in domestic court, GS Media, publisher of a gossip Internet portal GeenStijl, placed links to the mentioned photos on their website. Importantly, it did it many times, ignoring recurring calls to remove the disputable links received from Sanoma.

In the light of the above circumstances, the court decided the linking party's awareness of the illegal nature of the content linked makes it possible to consider their actions as acts of communicating the work to the public. This means that once again the decisive factor was the purposeful nature of the wrong doer's actions.

Irrespective of the facts in this case, the court decided to adopt an important evidence presumption. According to the judges, the profit-earning nature of the linking party's activities enables one to presume that they were aware of the illegal nature of the linked materials. A commercial entity should make every reasonable effort to verify and determine whether the materials distributed infringe any third-party rights. Insofar as the defendant fails to prove they were not aware of the illegal nature of the materials they redirect to using the link, linking for commercial purposes should be considered an infringement of the exclusive rights of authors and other authorised entities.



Decision in the Filmspeler case – Sale of multimedia players with an illegal function as an act of communicating the work to the public

A highly interesting decision concerning another attempt at establishing the definition of communicating the work to the public was made on 26 April 2017 in the Filmspeler case faced by the Court of Justice of the European Union because of a question asked by a Dutch court. The proceedings referred to considering offering to sell multimedia players (devices "enriched" with illegal functions) as an act of communicating the work to the public under the InfoSoc directive.

The device offered for sale by Jack Frederik Wullems (defendant) is specific in that – when connected to a TV set and after establishing connection with the Internet – it can display illegal content communicated to the public on the Internet (through streaming) on one's TV screen.

In the decision, the court decided as follows:

"The concept of 'communication to the public', within the meaning of Article 3(1) of [the InfoSoc directive], must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons,

available on the Internet, containing hyperlinks to websites – that are freely accessible to the public – on which copyright-protected works have been made available to the public without the consent of the right holders."

The court agreed also with the opinion of the Advocate General, provided earlier, concerning the temporary multiplication of the works in memories of devices, like those sold by Jack Wullems, and decided this requires a permit from the authorised entity.



Opinion of the Advocate General in the Ziggo BV case – making the .torrent file search engine available as an act of communicating works to the public.

The interpretation of the notion of communicating works to the public



was also the subject of the opinion by Advocate General Maciej Szpunar of 8 February 2017 in case no. C-610/15, *Stichting Brein against Ziggo BV, XS4ALL Internet BV*.

The facts of the major proceedings in domestic court referred to the dispute between *Stichting Brein*, an association combating Internet piracy, and the largest Internet access providers in the Netherlands, i.e. *Ziggo BV* and *XS4ALL Internet BV*, concerning the issue of a court remedy vis-a-vis said access providers, requiring them to block access to *The Pirate Bay* portal. During the proceedings, the Supreme Court of the Netherlands had doubts whether providing website users access to a website which does not contain any protected works but offers a system enabling them to reach the works by downloading from other users' computers is an act of communicating the work to the public. A positive answer to the question asked in this manner would make it possible for the domestic court to order blocking the website.

In his opinion, the Advocate General suggested the court should issue a decision, under which the activities of the website operator, consisting in making it possible to find files "redirecting" to protected works offered for exchange in the P2P network, by indexing them and providing a search engine, i.e. a website like *The Pirate Bay*, are considered an act of communicating the work to the public under the *InfoSoc* directive, if the website operator was aware this was illegal content and they failed to do anything to prevent access to such content.

According to the Advocate General, such a decision is supported by the fact that *The Pirate Bay* website is clearly illegal, and its operator did not respond to calls to remove illegal content. All the same, the website operator was fully aware of

the illegal nature of the content made available via the website. Hence, the operator's action is both required to infringe copyright and purposeful, as the operator is fully aware of the purposes the website is used for. This means that the action of the operator of such a website meets the criteria required to assume that the operator communicated the works exchanged on the Internet to the public without the consent of the copyright holders.



Legal responsibility under Polish law

When analysing the remarks on the liability of content providers in the context of Polish law, it must be indicated that different rules of liability apply to direct and indirect infringement of copyright. In the first case, it is about initiating actual exploitation of the work. In order to assess whether there has been a direct violation of the copyright monopoly of the creator or other copyright holder, one might find helpful the catalogue of examples of fields of exploitation included in Article 50 of the Copyright Act. If this is an indirect infringement, this should be understood as actions aiming to facilitate or assist in the infringement. The examples mentioned in the literature include, among others, abetting the unlawful use of the work or providing technical means for such infringement.

Contrary to the case of direct infringements where there are usually no major doubts as to the possibility of claiming damages from the infringer, other doubts may arise in the case of indirect infringements – aiding and

abetting. In particular, it is possible to pursue claims for damages under Article 422 of the Civil Code, i.e. a provision which extends the liability to pay compensation also to persons who abetted to inflict damage or aided in this, as well as the persons who knowingly benefited from the damage inflicted by someone else. There are generally three views on this case in the literature. The first one allows for the direct application of Article 422 of the Civil Code in such situations, arguing that copyright is a part of civil law, and therefore there are no impediments to applying general rules of liability to pay compensation³⁴. The second view completely excludes the application of this provision in the context of copyright law, and that is because of the – according to some – autonomous nature of the provisions governing the liability for copyright infringement (cf. Article 79 of the Copyright Act, which provides for the payment of compensation calculated as a multiplication of the royalty due)³⁵. Third, there is also an indirect solution permitting the application of Article 422 of the Civil Code, only partially, i.e. only in respect of the claims for compensation (the Copyright Act also provides for other claims than the claim for compensation, as will be discussed below)³⁶.

In our opinion, this report is not the right place to decide which one of these views is correct, because this would require a thorough analysis and presentation of strictly juridical arguments, and this study does not allow a space for this, given its nature. One can only hope that the case will be settled by the judiciary through the formation of the line of case law or by the legislators through the amendment of copyright law.

Leaving aside the considerations about the applicability of the concept of "indirect perpetration" in the context of copyright law, the claims and demands to which the copyright holders are entitled

for infringement of their property rights should be generally presented. According to the Copyright Act, the copyright holder is entitled to the following claims and demands listed in Articles 79 and 80 of the act:

- 1) demand to bring the infringement to an end;
- 2) demand to remove the effects of the infringement;
- 3) claim for compensation for damages caused, pursuant to general provisions of the Civil Code;
- 4) claim for payment of a sum of money (at present³⁷ – twice the amount due to the copyright holder under the relevant licence);
- 5) demand to recover the profits earned;
- 6) demand to make a statement or announce the judgement;
- 7) demand for information;
- 8) supplementary demand (such as withdrawing or destroying illegal copies of the work); and
- 9) claims related to removal of technical or electronic security measures³⁸.

The liability for violation of the copyright monopoly arises independently of the damage caused, as it is sufficient to declare the unlawfulness of the infringement of the monopoly of the creator or other copyright holder. Most demands and claims are also independent of the fault of the perpetrator, which excludes, among others, the possibility of relying on defence of excusable error by the infringer. Finally, the claim for damages referred to in point 4 above is of a quasi-repressive nature, which means that the determination of compensation need not be equivalent to the damage suffered by the copyright holder. The assessment of the admissibility of laying down such a claim in Polish law in the

context of its compliance with European law was the subject of deliberations of the Court of Justice of the European Union in the judgement of 25 January 2017 in Case C-367/15, Oława Cable Television Association against the Polish Filmmakers' Association. In this judgement, the court held that the introduction of such a regulation into national law does not conflict with Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights³⁹.

In our opinion, in practice, pursuing claims against an individual infringer may be ineffective because of the need to spend both time and money to do so. The compensation thus obtained may in some cases be insufficient even to cover the costs incurred in initiating and conducting legal proceedings. On the other hand, as to the issue of time spent, it must be borne in mind that court proceedings concerning the infringement of copyrights via the Internet are, by their nature, very complicated. According to us, this is because of the need to demonstrate the infringement, which due to the involvement of the mass communication means, which the Internet certainly is, and the technical equipment (usually computers), will most likely give rise to the need for expert witness evidence. Making such an opinion in its final shape (that is with respect to the objections raised by the parties and additional court inquiries) may take up to several months. Finally, the inefficiency can also result from the dubious practical effectiveness of the judgement itself – it must be borne in mind that blocking access to pirated content on one server will most likely result in its being made available again elsewhere on the network.

The effectiveness of pursuing claims by copyright holders should also be

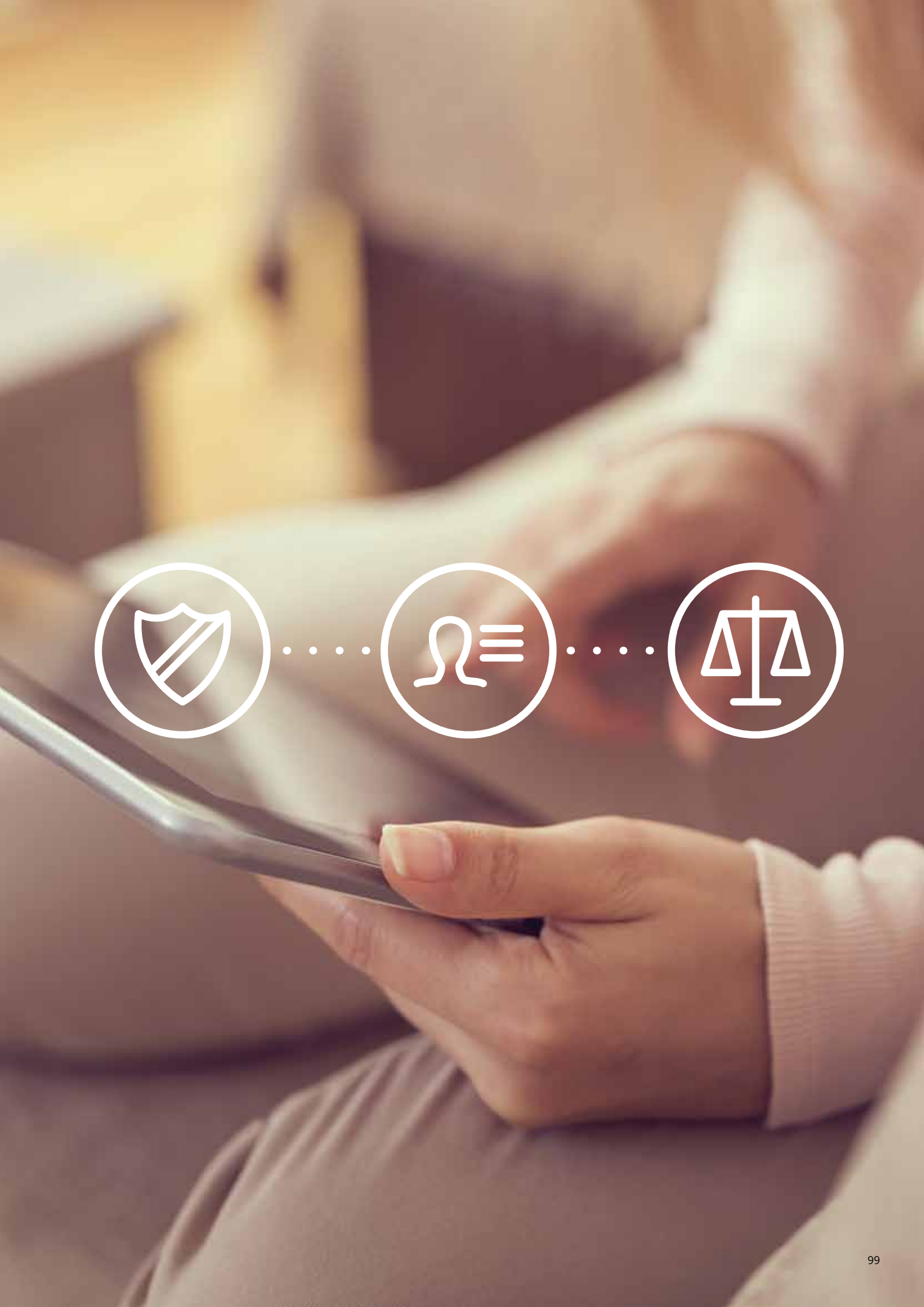
assessed through the prism of the organisational structure of the Polish courts. In this context, it is necessary to mention the concept of establishing separate organisational units within the common courts specialised in hearing intellectual property cases. The supporters of such a solution believe that this would contribute to improving the quality of case law in intellectual property protection cases. Such a system of specialised courts is in place, in Portugal, Sweden, Russia, France and Italy, among others. More importantly, in December 2016, the Ministry of Justice announced that it was considering the implementation of such a model in Poland, and the first meeting of the expert panel appointed by the Minister of Justice was held on 25 January 2017⁴⁰. At present, the specific shape of the planned changes is not known, including the competence of such specialised courts or departments established in existing courts⁴¹.



The issue of acquiring infringers' details

A significant practical difficulty when pursuing claims in relation to illegal sharing of copyright-protected content is **the lack of clear legal grounds for acquiring the personal data of the infringer (obviously, if the infringer is a natural person)**. While the penal procedure provides for arrangements allowing the competent authorities to obtain the data necessary to conduct the proceedings (cf. Articles 218 and 236a of the Code of Penal Procedure), this issue poses important practical problems in civil proceedings. **In our opinion, the Code of Civil Procedure does not contain legal grounds which would undoubtedly give the civil court the authority to request that such data are disclosed for the purposes of the proceeding.**

However, Article 80(1) (3) of the Copyright Act could provide legal grounds for this. This provision, as part of the so-called demand for information, entitles the court to request information from the access provider, among other things about "origin, distribution networks, volume and price of goods or services which infringe the author's economic rights". On the other hand, as a result of the decision of Bialystok Court of Appeal of 7 February 2013 (I ACz 114/13), the "information on distribution networks" should be also understood as the personal data of users sharing the content protected by copyright illegally. In the opinion of the Court of Appeal, the disclosure of personal data will be permitted on these grounds provided that the right to privacy of such person and the extent of the infringement of the copyright by such person are balanced.





Responsibility of the hosting service provider

General remarks

The next link in the chain of content circulation on the Internet is the hosting service provider. These services consist in providing storage space on servers connected to the network.

Storage space is provided in order to store data from the customers – content providers. Hosting providers are entities rendering services by electronic means, the responsibility of which is governed primarily by Article 14 of the Act of 18 July 2002 on Providing Services by Electronic Means⁴² and Article 14 of 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 **(Directive on electronic commerce)**.

In practice, the provision of hosting services is connected with the ability to store and sometimes also share the infringing content with third parties. It is not clear whether the hosting service also includes the sharing of stored content. This opinion is supported, among others, by J. Barta with R. Markiewicz⁴³, W. Chomiczewski⁴⁴ and D.K. Gęsicka⁴⁵, while P. Sadowski disagrees with such a view⁴⁶. Due to technical conditions of the provision of such a service (consisting essentially in making it possible for the recipient to disseminate the content by means of technical equipment and the resources of the service provider), the question arises as to whether and on what basis the hosting provider should be liable if the stored content violates the rights of third parties.

When evaluating the possibility of infringement of a third-party copyright by the hosting service provider in relation to the stored content, it should be

considered whether the provision of data storage services can in itself constitute such an infringement, i.e. whether in the case of storing the data received from an entity other than the hosting provider, the hosting service provider will violate the exclusive rights of the copyright holder.

As noted in the body of literature, it is not clear whether in such a situation the hosting provider should be held responsible for direct infringement of third-party rights or only for indirect infringement (e.g. for aiding)⁴⁷. It seems that the answer to this question depends mainly on the technical conditions and the actual role of the hosting provider in the content dissemination process. This can be a passive role only, in which the hosting provider is not involved in content sharing – this is decided only by the customer that provides the content. In such a situation, the hosting provider does not reproduce the work or make it accessible to anyone who may have access to it at a place and time of their choosing. These actions are done directly by the content provider. However, it is also possible that the role of the hosting provider is larger and it performs tasks other than just providing storage space on the servers. In such case, the basis and scope of liability of such entity may be different, because it cannot be excluded that in the course of doing so, the work will be, for example, reproduced and, consequently, the rights of the copyright holder of the content will be directly violated.



Safe havens

Regardless of the nature of the liability of the hosting provider, the situation in which it arose and its possible exclusion remain a key issue. The conditions for liability of the hosting provider are set out in Article 14 of the Act on Providing Services by Electronic Means, constituting the implementation of Article 14 of e-Commerce Directive.

In the context of the above, **it is generally noted that the Act on Providing Services by Electronic Means modifies the conditions for liability of the hosting provider in a way that is more favourable to the hosting provider in relation to what is permitted by the e-Commerce Directive⁴⁸**. Namely, Article 14 of the Act on Providing Services by Electronic Means provides for less strict conditions for exemption from civil liability than is expressly derived from the wording of the directive. To exclude liability under Polish law, the "lack of knowledge" about the illegal nature of the stored data is sufficient, and in relation to claims for compensation, the directive requires – in addition to lack of knowledge – lack of awareness of the facts and circumstances, which clearly imply the unlawfulness.

In view of the above, it must be recognised that Polish regulations implement EU regulations at least partially, which in turn may affect the imbalance between protecting the economic interests of the hosting providers and the copyright holders. We therefore consider it reasonable and expedient for the legislators to take steps to bring the Polish legislation in this regard in full compliance with European Union law.

Objections to the correctness of implementation to the Polish legal order are also raised in relation to Article 14(3) of the e-Commerce Directive. According to this provision, the rules for relieving the hosting provider from liability mentioned above do not preclude the courts or administrations of the member states from requiring the hosting provider to bring the confirmed infringements to an end or to prevent them. The Polish act, by defining exclusions of liability in a rather general way, may give the impression that these exemptions also preclude from raising demands towards hosting providers to bring infringement to an end or demands to take specific actions, even though the

e-Commerce Directive clearly determines their admissibility.

This results in far-reaching uncertainty about the law in force and should prompt the legislators to take appropriate legislative action.

Under the Act on Providing Services by Electronic Means, the hosting provider may become aware of the unlawful nature of the data as a result of receiving a "reliable information" or "official notification". In turn, the exemption from liability is conditional upon taking immediate actions to prevent access to illegal content. It is, however, problematic that the formalities of the proceedings after receiving the notice (notice and take-down procedure) are not regulated. In addition, the act does not clarify what information can be considered reliable and provide grounds for hosting provider liability (subject to the conditions discussed above). In particular, it should be decided whether the evaluation of such information should be limited to formal aspects (i.e. evaluation including issues such as the notifier's designation, indication of the content in question and its location) or whether it should include the assessment of information

reliability. It is also unclear what scope of information should be indicated in such a notice.

In practice, the national courts and doctrine representatives also consider the issue of maintaining the hosting provider status (and, consequently, using the safe havens) when the hosting provider also performs additional activities such as sorting or formatting content. As provided by the e-Commerce Directive, the entity that "stores the data" can benefit from safe haven. This concept is to be understood under recital 42 of the directive, which states:

"(...) the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored"¹⁴⁹.



It seems that such actions as indicated above (i.e. sorting, formatting, etc.) will not be considered in advance as extending beyond the area defined in the above-mentioned recital in the preamble to the e-Commerce Directive⁵⁰. The subject of discussion is also the ability to store "own" data by the hosting provider in addition to those stored on the customer's behalf. In addition, in practice, there are situations where the hosting provider receives remuneration not only from the customer but also from other sources for the provision of content storage services – for example, by publishing advertisements on its website. The possibility of treating an entity conducting such or similar activities as a hosting provider rather than an active content provider may lead to more extensive exemption from liability than envisaged by the European legislators. At the same time, the adoption of a narrow interpretation of the provisions could restrict the activities of entities on the Internet and slow down the development of this market segment. These issues have been the subject of deliberations of the national courts of the member states for several years.



General and specific monitoring obligation

The lack of an obligation to perform general monitoring of the legality of stored content resulting from EU law is to some extent a natural consequence of assuming the passive role of the hosting provider, as referred to above. More

importantly, it is often forgotten that this rule refers only to the general obligation to monitor the content and thus, in essence, to routinely verify the legality of stored data, even though there are no reasons for suspecting them to be illegal. This solution was dictated by practical considerations because, in view of the large amounts of data stored, it would be most likely impossible to fulfil the general monitoring obligation. However, most importantly, the provisions of the e-Commerce Directive do not make it impossible to oblige the network service providers (including hosting service providers) to monitor specific types of data, and such an obligation is imposed both by law and the decision of the authorised body⁵¹.

When the above remarks are considered in the context of Polish law, **again, it must be concluded that the legislators failed to implement the provisions of the e-Commerce Directive in the Polish legal system.** When reading Article 15 of the Act on Providing Services by Electronic Means literally, one could get an impression that this provision prohibits imposing any obligations on hosting providers relating to monitoring of stored data. This understanding is obviously contrary to the wording and purpose of the e-Commerce Directive. In view of the above, Article 15 of the act should be interpreted in a manner consistent with the provisions of the above-mentioned directive, that is as prohibiting that only a general – not a special – obligation to monitor the legality of content is imposed. **We obviously agree with the need to interpret Article 15 of the act in support of the EU, but in our opinion we should not stop at interpretation endeavours. In order to ensure clarity of regulations relating to hosting activity, according**

to us, it is necessary to rewrite the provision in question in line with the European original.



Control of the hosting provider over the content provider

Please note that the exemption from liability of the hosting provider will not take place if the customer – the content provider – operates under the authority or under the control of the hosting provider. This rule stems from Article 14(2) of the e-Commerce Directive.

For a long time, the doctrine has been pointing out a faulty implementation of Article 14(2) of the e-Commerce Directive by the Polish legislators⁵². The regulation contained in the directive states that the exemption from liability within safe havens does not apply "if the recipient of the service is acting under the authority or the control of the provider". In turn, according to Article 14(4) of the Act on Providing Services by Electronic Means, the exemption from liability does not apply if "the service provider has taken control over the service recipient in the meaning of provisions of the Act on Competition and Consumer Protection". The essence of a provision of the directive consists in referring to the relationship which is broadly understood as the ability of the hosting provider to influence the content provider⁵³. Meanwhile, the Polish provision only refers to strictly defined cases of taking over control, which does not cover all cases falling within the scope of the

e-Commerce Directive. We agree with the opinion that, in this case, it is necessary to apply the interpretation favouring EU law.⁵⁴ However, in order to avoid legal uncertainty, it would be advisable to amend Article 14(4) of the act in accordance with Article 14(2) of the e-Commerce Directive.



Draft of Copyright Directive in the Digital Single Market

Draft regulation relating to the cooperation of right holders, the hosting providers and the Internet service providers is particularly important from the point of view of the copyright holders. As explained in recital 37 of the draft Copyright Directive in the⁵⁵ Digital Single Market, the need for the implementation of new regulations is due to the fact that in recent years there has been a significant development of services providing access to copyright-protected content posted by the users of these services. As such, they have become the main source of access to online content.

According to the draft Article 13 of the new directive, the hosting service providers that store and share the works, posted by the users, would be required to conclude licensing agreements with copyright holders and implement measures aimed primarily at ensuring effective protection of those rights. The use of effective content recognition technology is among the examples of measures aimed at this purpose.

The meaning of this provision is clarified

in recital 38 of the preamble to the draft directive and in particular its first two subparagraphs, according to which:

"Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council".

"In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefore".

The entry into force of the above-mentioned solution would mean a significant strengthening of the position of copyright holders. Due to the increasing importance of the services in question and the practical extension of the activities undertaken within or alongside the hosting services offered, the member states and the national courts have been struggling for several years with balancing the interests of service providers (in the form of the possibility of providing such services without fear of liability, where the content comes from an entity other than the service provider) and the holders of copyright of the content that is the subject of illicit circulation on the network.





Liability of network access providers

Initial remarks

Article 12 of the Act of 18 July 2002 on providing services by electronic means regulates the conditions for the provision of mere conduit services. On the subject-matter side, this provision applies to the service provider that provides the services by electronic means, including the transmission of data provided by the customer through the telecommunications network or the provision of access to a telecommunications network. Therefore, it is mainly about the entities providing Internet access services. For the purpose of this study, such service providers will be referred to as the access providers.

Regarding the scope of liability of such entities for the content being transmitted, the act provides for the exemption from liability, provided that:

- 1) they are not the initiators of data transfer;
- 2) they do not select the recipient of the data transfer; and
- 3) they do not choose nor modify the information contained in the transmission.

The foregoing exemption from liability also includes automatic and short-term indirect storage of transmitted data, if this activity is for the sole purpose of carrying out the transmission and the data are not stored longer than is

normally required for the transmission (Article 12(2) of the above-mentioned act – so-called packet switching transmission).

The above-mentioned rules for exemption from liability are the implementation of Article 12(1) and (2) of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce).

Nevertheless, it should be noted that Article 12 of the e-Commerce Directive also includes paragraph (3), according to which the provisions relating to the exclusion of liability of access providers do not affect the possibility for a court or administrative authority, in accordance with the national law, of requiring the service provider to terminate or prevent an infringement. This regulation was not reflected in the Polish act implementing the above-mentioned directive. This creates a state of uncertainty about the legal situation of both the copyright holders and access providers, especially in the context of lack of implementation of Article 8(3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive), according to which:

"Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right".

This is particularly important for the recognition of access providers as intermediaries within the meaning of the above provision, as is determined in the case law of the Court of Justice of the European Union.



Judgement in the Tele2 case – Internet provider as an "intermediary" within the meaning of the InfoSoc Directive

The role of access providers in the process of illegal sharing and using the protected content on the Internet is one of the most controversial issues related to the functioning of copyright law on the Internet. This is because of the need each time to balance contradictory values: first – copyright protection, second – freedom of business activity of access providers, and third – freedom of expression and access to end-user information.

The judgement which attempted for the first time to confront the interests of access providers with the interests of copyright holders, was the decision of the European Court of Justice (now Court of Justice of the European Union) of 19 February 2009 in the Tele2 case⁵⁶. This ruling is crucial for determining the scope of liability of service providers in providing technical means used for infringements committed by third parties.

The decision was made in response

to the legal question of the national court regarding the possibility of recognising an access provider as an intermediary within the meaning of the InfoSoc Directive. Please remember that according to Article 8(3) of this directive, the member states shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. There were doubts in this regard relating to whether or not an entity the role of which is limited to only enabling the user to gain access to the network via a dynamic IP address, without offering other services such as email, downloading or sharing files, and exercising legal or effective control over the services the user is using, could be considered an intermediary.

The question about the possibility of treating Internet providers as "intermediaries" within the meaning of Article 8(3) of the InfoSoc Directive was answered affirmatively by the court, which referred to the purposes of that directive in the statement of reasons for the decision. This purpose is to ensure the effective protection of the interests of copyright and related rights holders in the common market. In the court's view, the exclusion of access providers from the concept of an intermediary would mean a significant reduction in the protection provided by the InfoSoc Directive.



Judgement in the UPC Telekabel Wien case – continuation of the dispute over the recognition of the Internet provider as an "intermediary"

Further questions, regarding the scope of liability of access providers, have arisen as a result of a dispute between UPC Telekabel Wien GmbH and the Association of Filmmakers. The following issue was the axis of conflict: Is the national court authorised to order the access provider to block access to a website infringing copyright, if there is no legal link between the addressee of an injunction and the infringer (i.e. access provider does not provide, for example, hosting service to the infringer)?

The question asked in such a way was answered affirmatively by the court in the judgement of 27 March 2014, thereby authorising the injunctions issued by national courts against access providers to block access to specific content and the websites which make them available⁵⁷. More importantly, it was not considered necessary for the injunctions to specify what specific measures the addressee should take. However, in the interest of access providers, they are guaranteed the ability to being exempt from liability (for example fines) if they show that they have taken "all reasonable steps". Verification of this condition is left to the national courts.

The significance of this judgement is enormous. Due to small effectiveness of actions against end-users (for example, because they are difficult to identify) and hosting service providers (here the problem is to pursue the claims against entities located outside Poland or even the European Union), the judgement in the UPC Telekabel Wien case means opening a new front to the fight against online piracy. Obviously, pursuing of claims against access providers will not be a weapon in this fight (such as claims for damages), and instead, it will be based on the possibility to require that the access to certain content, shared in violation of copyright, is blocked.

However, the inconsistent way of implementing the Directive in EU countries may be problematic in this situation, including the complete lack of implementation of Article 8(3) of this directive in Polish law (which is discussed in more detail below).



Judgement in the case known as UPC Telekabel Wien vs. Polish law

There is no uniform position among the doctrine representatives whether the constructs used in the judgement in the UPC Telekabel Wien case could be directly applicable under Polish law⁵⁸.

There is no doubt that in Polish law it is not easy to find a provision explicitly giving jurisdiction to the court to issue relevant injunctions against access providers. This is due to lack of implementation of Article 8(3) of the InfoSoc Directive. Let us not forget that under this provision, the member states are required to ensure that copyright holders can request an injunction against intermediaries, the services of which are used by a third party to infringe copyright or related rights.

The particular importance of this mechanism to combat copyright infringements on the Internet is indicated by the fact that it is "copied" in Article 11 of Directive

2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights adopted on 29 April 2004.

Despite the lack of implementation of Article 8(3) of the InfoSoc Directive to the Polish law, according to the case law of the court, the national courts should interpret domestic (national) law in the light of the wording and purpose of the directive. In addition, "such an obligation is imposed on the court in so far as, in a given case, it is possible to make the interpretation in compliance with EU law and it does not mean that the court may go beyond the express wording of a provision of domestic law or not to apply such provision"⁵⁹.

According to the above rule, some authors try to find legal grounds for such an order in the text of Article 439 of the Civil Code. This provision states that "anyone who, as a result of another person's behaviour [...] is directly threatened by damage may demand that this person undertake the measures necessary to avert the imminent danger and, if needed, also provide adequate protection". However, there are doubts about the possibility of considering the actions of access provider as objectively unlawful, which is a prerequisite for the application of Article 439 of the Civil Code⁶⁰. In the literature, it is argued that such qualification would only be possible with respect to deliberate actions of the Internet provider, and these deliberate actions should refer to its knowledge that specific websites, used by its customers thanks to the services it provides, serve to share pirated content⁶¹. As can be seen, the state of Polish legislation in this area is unsatisfactory, and consequently,

one can not refrain from searching for a kind of prosthesis that would enable the copy right holders to demand protection of their rights. **However, this path seems to be ineffective and cumbersome, so, in our opinion, the above-mentioned practical problems should be eliminated by carrying out legislative changes aimed to implement into the Polish legal system Article 8(3) of the InfoSoc Directive.**



Responsibility of payment service providers and advertisers

The concept that the most effective means to combat piracy is to cut off the providers of pirated content from the sources of funding is mentioned more frequently in the public debate on this phenomenon.

It is referred to in English as the 'follow the money approach'. Depriving the operators of pirated websites of income would obviously make this activity unprofitable. This includes, in particular, two main sources of income, i.e. advertising revenue and revenue from the sale of temporary access to the content provided. As a consequence, the fight against online piracy would focus on developing mechanisms that would restrict the ability of advertisers to place ads on the websites providing

pirated content or would limit the ability of payment service providers to act as a middleman in payment transfers between the end-user and the website operator (for example, SMS or fast Internet payments).

From the very beginning, it must be stated that neither Polish law nor European law provides for specific arrangements regarding the liability of providers of electronic payment services in connection with intermediating the payments to entities illegally distributing copyrighted content.

In fact, the only official document dealing with the issue of implementation of the "follow the money" concept is the "Digital Single Market Strategy for Europe" published on 6 May 2015.⁶²

In this paper, the European Commission outlined the strategy for building a digital single market with a timetable for actions to be implemented between 2015-2016. As a part of planned activities, the European Commission has undertaken to submit in 2016 legislative proposals concerning, inter alia, more modern enforcement of intellectual property rights, with particular emphasis on commercial-scale infringements, including the "follow the money" concept. This declaration was then repeated in the Communication of 9 December 2015 "Towards a modern, more European copyright framework"⁶³. This communication announces the implementation of the "follow the

money" concept based on a self-regulatory approach, without precluding that it will be backed by appropriate legislation. This would involve broadly understood Internet intermediaries, including advertisers and electronic payment operators.

Official actions to implement the European Commission's declaration have been made in the advertising industry. On 21 October 2015, a stakeholder meeting took place with potential participants of the agreement. It resulted in the adoption of a document describing the underlying assumptions of the future self-regulation agreement⁶⁴. This document includes announcements of implementation of unspecified safety precautions and content monitoring. More importantly, the agreement will not involve the creation of the EU list (or database or repository) of websites, through which mass copyright infringement occurs. However, it allowed the creation of such lists (databases) at national level.

There are currently no reports of similar arrangements or work on similar self-regulation in the electronic payment service industry.

In conclusion, it must be stated that the actions taken so far by the European Union bodies to implement the "follow the money" approach have not been satisfactory. In particular, the very general nature of the declaration could be unsettling, as well as the idea that specific mechanisms should be developed through intra-industry self-regulation. The official positions of other community bodies also show concern. The European Economic and Social Committee, in its opinion on the communication from the European Commission, stated that it fully supports the "follow the money" approach, "whilst wondering how effective it really is, beyond the exemplary voluntary steps taken by the key intermediaries on the Internet economy value chain"⁶⁵.





Responsibility of the search engine provider

A separate type of service from those already mentioned is the service consisting in providing search engines, which allow the user to obtain a list of links matching his/her query.



Due to the specific nature of such a service, the question arises whether and to what extent the provisions of the e-Commerce Directive apply to search engine providers. It seems that at present there is a prevailing view that there is no basis for applying the exemption from liability referred to in Article 14 of this act to search engine providers. It is also acknowledged that the directive in question does not contain any regulation directly relating to such services. This issue is subject to separate regulations in several member states of the European Union (for example, in Spain or Austria).

The lack of uniform regulation at the European level has led to a discussion about the scope of the obligations of search engine providers, for example, in the context of facilitated access to illegal content through the use of such services. Based on these discussions, J. Barta and R. Markiewicz point out that it is not realistic for a search engine provider to verify the legitimacy of the content the search provides a link to. Consequently, the authors challenge the liability of such service providers regardless of their fault. This, in turn, leads to a

conclusion that, in order to be free of liability, the search engine provider should prevent the search results from including the links to content that are illegally distributed (i.e. these links should be deleted) after obtaining information about the unlawfulness of the content. Failure to do so would result in responsibility for aiding⁶⁶.

In the above context, it is worth noting the opinion of Advocate General Maciej Szpunar of 8 February 2017 in case C-610/15 (*Stichting Brein vs Ziggo BV, XS4ALL Internet BV*). The Advocate General argued that the provision of a search system which gives access to copyrighted works (i.e. .torrent files) may, under certain conditions, be treated as communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. This opinion was further discussed in point 96.



End-user
responsibility



Permitted private use

From the point of view of the end-user's responsibility, the institution of permitted private use is of utmost importance. As stems from Article 23 of the Copyright Act, it is permitted to use free of charge the work having been already disseminated for purposes of personal use without the permission of the author. This does not mean, however, that such use is unlimited and its scope can be freely expanded.

The scope of permitted personal (private) use includes the use of single copies of the work by a circle of people having a personal relationship, in particular, any consanguinity, affinity or social relationship. Permitted private use is a universal copyright construct in the sense that it refers equally to the use of the work both on the Internet and in the "traditional" fields of exploitation. It should be borne in mind that Polish legislation, including the Copyright Act, does not provide for a different (and limited or weakened) protection of content used on the Internet. This means that the right to exploit such content is vested exclusively to the creator or other rights owners. Substantial restrictions on this specific monopoly are provided for by the permitted use provisions. However, due to their unique character (i.e. they are an exception from the creator rights) the relevant provisions should be interpreted more narrowly. It should be remembered that permitted use is subject to restrictions of the so-called three-step test, regulated in Article 35 of the Copyright Act. According to this provision, the use without consent of the right holder is permitted only in

exceptional circumstances provided for in the act and provided that such use does not conflict with a normal exploitation of the work and does not harm the legitimate interests of the author. As indicated by E. Traple, "normal exploitation of the work is affected by the actions which prevent further exploitation of the work or limit the extent of such exploitation which would be normally expected"⁶⁷. Despite the general character of the above-mentioned provision, its practical significance has turned out to be extremely important, as will be discussed later in this study (see the remarks relating to the judgement in the ACI Adam case in the section titled "Downloading in the context of judgement in the ACI Adam case").

There is currently no doubt that the permitted private-use construct – also called personal use – also includes the relationship between Internet users. Of course, it is not about incidental contact between these users or participation in an open discussion group (including Internet forums), because it is needed that a real personal and social relationship exists, limited to a closed circle of persons, who contact with each other only via the Internet⁶⁸. This condition is often not met by "friends" from social networking sites, because contact with them usually does not have a "personal" character. In order to apply the private-use institution, it is necessary to have a real personal relationship, and the mere fact of adding someone to a group of friends on this type of website does not yet indicate the existence of such a relationship. For this reason, sharing copyrighted content with a broad group of "friends" through social media goes beyond the scope of private use and thus constitutes an infringement of rights of the creator or other copyright holder.

This report does not cover specific

issues regarding the scope of permitted private use of works, as this matter is so extensive that it would require a separate publication.

Further comments on the responsibility of the end-user for use of works on the Internet will refer to the assessment of legality of the most common forms of such exploitation. We are referring to the downloading of content and its storage on devices (including the specific characteristics of peer-to-peer networks), the streaming of content together with its specific derivative forms, and the so-called stream ripping (downloading content which is streamed online to computer's hard drive).



Peer-to-peer (P2P) networks

One of the most perceptible issues for copyright holders are the so-called P2P file sharing systems. They are characterised by the fact that the content is exchanged between the users directly, without an intermediary in the form of a central data storage server (including a lot of content protected by copyright). The nature of this solution consists also in the fact that the user who downloads the data most often simultaneously shares them in real time with other P2P network users.

According to the dominant view, content sharing in P2P networks cannot fall within the scope of the concept of permitted private use⁶⁹. It should be assumed that when copying (downloading) protected content is combined with further dissemination (sharing), such activity is significantly outside the scope of permitted private use. Sharing may be categorised

as dissemination of work without the author's consent to an unlimited circle of persons, which violates the author's economic rights. As a consequence, sharing protected content without the consent of copyright holders puts the end-user in a position of content provider with all the legal consequences.



Downloading in the context of judgement in the ACI Adam case

In turn, when referring only to the issue of end-users downloading protected content posted illegally on the Internet, one should pay attention to the groundbreaking judgement of the CJEU of 2014 in the ACI Adam case⁷⁰.

Before presenting the key arguments of this judgement, we will briefly present our views on the issue of downloading protected content by Internet users. Until this judgement has been issued, in the context of Polish law, part of the doctrine has assumed that the only condition for benefiting from the permitted private use is the fact that the work has the status of disseminated work (i.e. a piece of work which has been made available to the public in any way by its author's permission)⁷¹. Moreover, it was not considered important that the work has been made available by the copyright holder's permission, for example, only for distribution in cinemas, and so the copyright holder's permission did not include the publication on the Internet. In conclusion, according to this view, when referring to the provisions on permitted private use, the end-user would not be liable for infringement of the copyright monopoly of the author

if downloading a copy of the work from the Internet, unless it is the so-called leak (i.e. has been published without the consent of its creator)⁷². Please note that in relation to works made available on the Internet before their official premiere, not knowing this fact by the person downloading such work does not exempt him/her from the liability for such infringement⁷³.

In the context of the above, the importance of the above-mentioned ACI Adam judgement cannot be overestimated. In fact, the Court of Justice of the European Union has clearly taken the position that a user downloading work from the Internet, such as films or recordings for personal use only, where such work has been posted there without the consent of the copyright holder, acts unlawfully in the light of European Union law. Copying of pirated discs, films and books for personal use is also not allowed. The court has justified its view, above all, by the need to restrict (narrow) the interpretation of the provisions on permitted private use.

However, the impact of this judgement on the Polish legal order is not clear. There is no consensus among the representatives of copyright law doctrine on whether downloading pirated copies from the Internet has become unlawful as a result of the judgement⁷⁴ itself (that is whether Polish law can be interpreted in accordance with this judgement and thus may constitute the grounds for punishing users), or if it is necessary to amend the copyright act⁷⁵. It should be noted that the requirement of legality of the source copy has not been expressly provided for in the provisions of this act as a condition for reproduction of the work in the framework of permitted private use.

None of the above-mentioned interpretations seems to be clearly dominant among the doctrine

representatives. The first one is justified, in particular, by the existence in the Polish Copyright Act of Article 35 (cf. above), which is the equivalent of Article 5(5) of the InfoSoc Directive, and the court relayed, among others, on this provision when issuing the judgement in question. Opponents of such an approach emphasise that "exceptional restrictive copyright protection, both under civil and criminal law, (...) requires particular caution in restricting the scope of permitted use by means of case law 'guided' by the CJEU interpretations. Because this may expose the persons, using in good faith (here: based on trust in previously accepted rules) the works distributed on the Internet, to unexpectedly harsh liability regime"⁷⁶. In our opinion, clarification of Polish law on permitted private use in accordance with the spirit of judgement in the ACI Adam case would be the most appropriate course of action. Nevertheless, we also consider that the provisions of Polish law, and in particular the aforementioned Article 35 of the Copyright Act, already in its present form, give rise to the interpretation of these provisions in accordance with the judgement in the ACI Adam case.



Streaming and similar content sharing techniques

In recent years, streaming has become a very popular form of using cultural goods made available on the Internet. It consists in sending works in real-time to a user-operated device in the form of a continuous stream of data, which allows them to be presented simultaneously, without having to store the entire work in the device memory (i.e. permanent memory).

The legitimization of the use of protected content by Internet users via streaming technology can be seen – in accordance with the dominant position – in the CJEU judgement in the Newspaper Licensing Agency Ltd case (judgement of 5 June 2014 in case C-360/13, Public Relations Consultants Association Ltd vs. Newspaper Licensing Agency Ltd, et al.).

The argument in the judgement in question states that: "Article 5 of [InfoSoc] Directive (...) must be interpreted as meaning that the on-screen copies and the cached copies made by an end-user in the course of viewing a website satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the conditions laid down in Article 5(5) of that directive, and that they may therefore be made without the authorisation of the copyright holders".

This argument can bring one to a conclusion that when an Internet user browses through online resources – which leads to the creation of transient copies of the content viewed in the device memory – the user operates within the limits of the law. As stated above, according to some authors this principle can be applied also to streaming.

There is, however, a dispute over how to assess the situation when an Internet user gets familiar with the works that are made available by streaming, without permission from the copyright holder. So it is about whether or not it is possible to apply the principle expressed in the judgement in the ACI Adam case to streaming, according to which it is permissible to make a copy of work for personal use only if a legitimate source has been used for that purpose.

This doubt arises from the perception that, in the case of streaming, we are not dealing with permanent reproduction

("copying") of the work, which would require relying on the provisions of permitted private use and taking into account the requirements of the judgement in the ACI Adam case. The specific way of using works through streaming consists in the fact that the work is not entirely saved on a device, but that only temporary copies of small pieces of files are stored in RAM or on the hard drive. Such temporary reproduction is legalised on the basis of other legal grounds, i.e. Article 5(1) of the InfoSoc Directive (in Polish law: Article 231 of the Copyright Act), further strengthened by the judgement in the Newspaper Licensing Agency Ltd case.

In addition, in the case of recipients of works made available by streaming, the recipients are only getting "familiar" with its content, in the same way you can become acquainted with the contents of a book in a bookstore or when watching a film on TV. According to the dominant view, such activities are not covered by the copyright monopoly⁷⁷, so there is no need to legalise them by referring to the provisions on permitted use.

As a result, the judgement in the Newspaper Licensing Agency Ltd case, referred to above, can therefore be of great importance in assessing the legitimacy of use of streamed content and content made available using related techniques (broadcasting, simulcasting, etc.) by Internet users. It should be kept in mind, however, that it does not refer strictly to the so-called streaming services⁷⁸ and does not take into account the specific characteristics of their activities. It is also not entirely clear how it should be understood in light of other important CJEU judgements, such as ACI Adam. In the context of the growing popularity of pirate streaming platforms, some authors expect that if CJEU were to rule on a case strictly related to streaming, the judgement issued could be far from such a liberal approach as presented by some authors today (cf. above)⁷⁹.



Stream ripping

The solution consisting in "ripping" online content made available by streaming to computer hard disk (so-called stream ripping) is increasingly popular among Internet users. Most often, this is done by converting video (for example, music videos) into audio files, usually in MP3 format. It is necessary to use software (either a standalone program or a plug-in to the Web browser) or online service provided via various websites to make the conversion possible.

From a practical point of view, stream ripping can be compared to recording a TV program on a VHS tape or other similar data carrier, or to recording a radio broadcast on a CD, a cassette, or even by means of a voice recorder. Such actions are generally considered to fall within the scope of permitted private use⁸⁰, of course, as long as one does not continue to make such copies available to a wide circle of users. In our opinion, in view of the similarities described above, stream ripping⁸¹, as well as the above-described activities, should be assessed in the same way, provided that the source copy undergoing a conversion is produced or made available with the consent of the copyright holder, or provided that the user was aware of its unlawful origin (cf. previous comments on the judgement in the ACI Adams case – p. 116). It is also doubtful whether such action will not harm the normal exploitation of the work or impair the legitimate interests of the creator. This would mean that the reproduction of the work based on stream ripping would not be covered by the scope of permitted use. Each case should be evaluated individually; therefore, we can not give a clear answer to the above questions.



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Solutions used in selected EU countries

Introduction

European Union legislation creates a framework for determining the legal status of individual entities operating on the digital content market, but the practices of individual member states show that some of them, apart from the implementation of directives, also seek their own solutions for the effective protection of copyright on the Internet. Selected solutions that are in place in

Great Britain, Germany, Austria, Portugal, France and Denmark are presented below. The proposed choice is not comprehensive but may be the starting point for discussing the solutions that would best suit the needs of the Polish market.



Copyrights, Designs and Patents Act – CDPA

In British law, the basic legal grounds for dealing with content providers infringing intellectual property rights (and therefore to be used against online piracy) are provided by the Copyright, Designs and Patents Act 1988 (hereinafter referred to as the: CDPA). Article 2A of this act foresees that intentional copyright infringement (piracy) by communicating the work of the public is an offence subject to criminal liability where such activity occurs in the course of business or otherwise than in the course of business – to such an extent as to affect prejudicially the owner of the copyright – if the infringer believes or has reason to believe that, by doing so, he/she is infringing the copyright in that work. This widely formulated provision applies to the use of works on the Internet, although, of course, it is not restricted to it. Based on the CDPA, owners of the websites, through which the copyright is infringed, may be sentenced to a fine or imprisonment.

CDPA regulations work in conjunction with the provisions of British law implementing the Directive 2000/31/EC,

which provides a way for the access providers and other network service providers to avoid liability, by providing that the hosting or caching service provider⁸² is not liable for the infringement of copyright; provided that after being informed of copyright infringing content, it will take effective action to remove such content or block access to it (under the notice and take-down procedure). These regulations⁸³ are intended to encourage a rapid response to requests from copyright holders and remove/block access to unlawful content to be exempted from any liability for infringement of rights of the creators and other copyright holders and therefore they are an equivalent of Article 14(3) of the Polish act on providing services by electronic means.

In addition, copyright holders may apply for an injunction addressed to access providers pursuant to Article 97A CDPA (introduced for the purpose of transposition of the InfoSoc Directive in 2003, including Article 8(3)) to block access to the material infringing their rights. This regulation is particularly important in cases where content is hosted outside the territory of the

United Kingdom, where it would be difficult to carry out the notice and take-down request procedure discussed above.

Digital Economy Act

The Digital Economy Act 2010 (DEA) was adopted in 2010 – this act is designed to facilitate combat against online piracy by requiring Internet service providers⁸⁴⁾ to notify the infringers of unlawfulness of their actions and to collect information about the persons who have repeatedly committed the infringement, and then forward such information to the copyright owners, but without providing data identifying individual users. In turn, the copyright holder has the opportunity to request the court to issue an order for disclosure of the identity of the infringer and subsequently to initiate legal proceedings against that person. Eventually, however, this act has not come into force in its entirety – some of the solutions have required the issuance of relevant implementing regulations to become effective, which has not been done so far.

Digital Economy Bill

Currently the UK Parliament is working on a bill amending the CDPA, referred to as the Digital Economy Bill. Within the scope of interest of this paper, this act aims to introduce tougher criminal sanctions for infringements of intellectual property rights through illegal communication of protected content to the public on the Internet. In this regard, the currently applicable term of imprisonment of two years would be replaced by 10 years of imprisonment. As a result of the change, Internet piracy would be penalised just as severely as "physical" infringements of the exclusive rights of the creators (i.e. relating to data carriers).

Creative Content UK

Individual users who make the content available illegally are identified using a special "voluntary" procedure agreed between the British Phonographic Industry (BPI), the Motion Picture Association (MPA) and the largest access providers. Under this procedure, copyright owners identify users who use illegal P2P file sharing networks and inform access providers who in turn send a violation notification to the link owner. This system is primarily a soft measure of responding to online piracy and will not give grounds for legal sanctions, but it will help reduce online piracy and raise awareness among users. The initiative is also linked to the social and educational campaign "Get It Right From a Genuine Site".

Follow the money approach

When discussing new trends in tackling Internet piracy in the United Kingdom, the "follow the money approach" must be mentioned, which seeks to eliminate online piracy by cutting off infringers from sources of financing. The following assumption serves as justification for this approach: If the flow of funds to the owners of pirated websites is reduced (mainly by cutting them off from advertising revenue and payment processing services), such websites will cease to be profitable, and consequently, the scale of the phenomenon will diminish considerably. A number of initiatives, some of which are briefly outlined below, prove that the "follow the money approach" is used in the United Kingdom:

- **Digital Trading Standards Group** – is an organisation of the representatives of the broadly understood advertising ecosystem, such as advertising agencies, publishers and intermediaries, which published

Good Practice Principles at the end of 2013 to raise standards for online advertising. Since 2014, the entity responsible for verifying whether individual entities are in compliance with the requirements of Good Practice Principles has been ABC – Audit Bureau of Circulation, a non-profit unit established by the media industry. The promising fact is that most of the major online advertising agencies, such as Microsoft Advertising, Yahoo.com and Advertising.com, have recently declared full support for the above-mentioned principles;

- **Police Intellectual Property Crime Unit – PIPCU** – is an independent organisational unit within the London police organisation set up in 2013, specialising in the fight against intellectual property infringements, including counterfeit products and online piracy. It concentrates, in particular, on the process of interrupting the flow of funds to the operators of websites that infringe copyright. By June 2016, PIPCU managed to block access to more than 10,000 websites of this kind. PIPCU is also responsible for posting warnings (in places where ads usually appear) on the pirate websites: "This website has been reported to the police. Please close the browser page containing this website. Police Intellectual Property Crime Unit (PIPCU)". This slogan is intended to deter users of the websites illegally providing protected content from using their resources;
- **Operation Creative** – an initiative intended to track the influx of revenue to pirate websites by creating a list of such websites (Infringing Website List). This initiative is run by PIPCU. Currently, this list includes over 1,000 websites. Based on this list, the Intellectual Property Office (IPO) contacted 37 advertisers in March 2015, informing them that their ads appear on copyright-infringing websites.

IP Enforcement Strategy

In May 2016, the UK government published the IP Enforcement Strategy, which proposes actions to be implemented by 2020. One of the goals of the strategy is to harmonise the penalties for online piracy with penalties for infringing intellectual property offline (i.e. by extending the maximum penalty of imprisonment from two years to 10 years).

"Self-cleaning" of Google and Bing search engines

Another interesting initiative in the United Kingdom is the agreement concluded in February 2017 between the British entertainment industry and the government on one side and the operators of the most popular search engines – Google and Microsoft – on the other. This agreement assumes that the links to illegal content will be significantly less visible in the search results. The effects of the agreement will be visible from 1 June 2017.



The institution of Raubkopie – limiting the scope of permitted private use

German law, like most European copyright laws, provides for significant exceptions to the copyright monopoly in the form of the institution of permitted (private as well as public) use. However, what distinguishes Polish legislation from German legislature in this regard is the more precise definition of the limits of private use in the German Act on Copyright and Related Rights. (Ger. Urheberrechtsgesetz – UrhG). Particular attention should be paid to the institution provided for in UrhG, commonly known as Raubkopie. This is an illegally obtained model copy of the work which is used to make a copy for the purpose of permitted private use. For example, this could be a pirated DVD with a copy of a film, which is then reproduced – with the intention of applying the institution of permitted use – by a person close to the user.

According to § 53 (1) UrhG, "It shall be permissible for a natural person to make single copies of a work for private use on any medium, insofar as they neither directly nor indirectly serve commercial

purposes, as long as no obviously unlawfully produced model or a model which has been unlawfully made available to the public is used for copying". This provision therefore lays down the condition of the "legality of the source copy", which determines the possibility of benefiting from the permitted private use construct. This condition is of great importance in P2P networks, as in their case, one should definitely presume that the works made available for reproduction (download) are of illegal nature. As a result, both downloading and sharing copyrighted content through P2P networks will, in principle, be considered unlawful. Thus, the German copyright law provides for a requirement of legality of the source copy referred to in the judgement of the Court of Justice of the European Union in the ACI Adam case (cf. above in chapter 10 – s. 116 and following).

Störerhaftung – responsibility for contributing to the violation

In German law, similarly as in Polish law, the liability for indirect infringement of copyright has not been regulated

independently of the general principles of liability for damages. Based on the general civil law provisions, the German judiciary derives the obligation to take adequate security measures by the persons who allow others to access the Internet over wireless networks. This applies to hot spots, i.e. public Internet access points, most often offered by restaurants, cultural institutions and shopping centres. The potential liability of such entities has been and is the subject of intense discussions in Germany.

The concept of "indirect copyright infringement" derives primarily from the wording of § 97 of UrhG, introducing the responsibility of anyone who infringes copyright in an unlawful way. The German authors draw the following conclusion from this provision: This standard covers both direct and indirect violation of author's economic rights made without the required authorisation of the rights holder. It is clear, however, that different degrees of interference in these rights justify a different formulation of the conditions of liability. The case law of the Federal Supreme Court has developed the general principle that in the event of

infringement of an author's economic right, also the person, who has created the possibility of direct infringement of these rights by third parties and has not taken the necessary steps to prevent such infringements, bears the liability for such infringements. However, it has not been easy to assess whether the steps taken by the link owner have been sufficient to exempt them from liability. The differences between individual German courts have been clearly marked. The argument included in the judgement of the Federal Supreme Court of 12 May 2010 (I ZR 121/08) could be cited as an example. According to this argument, the link owner, already at the time of the first installation of the router, is obliged to enable all available security measures and select a password which is composed of at least 10 characters, including special characters and numbers⁸⁵.

In May 2016, the German media learned about the initiation of legislative work aiming to rationalise the principles of such liability and clearly define its limits. These changes are related to the opinion of the Advocate General of the Court of Justice of the European Union Maciej Szpunar in the *McFadden* case⁸⁶. The argument presented in this opinion comes down to a statement that an entity, which makes available a non-secure Wi-Fi network not for profit, cannot be found guilty of copyright infringement committed by a user of such network. However, in the opinion of the Advocate General, under certain conditions, it should be permissible to direct injunctions to hotspot operators, which oblige them, for example, to adequately protect the provided network against the access of persons committing infringements. Most importantly, this view was confirmed by the court's subsequent judgement in this case⁸⁷.

The draft law amending the German counterpart of the Polish Act on

providing services by electronic means – *Telemediengesetz* (TMG) – was made public on 27 February 2017. According to the judgement in the *McFadden* case, it provides for rationalisation of the liability of hotspot operators (exemption from obligation to pay compensation for damages) and allows the courts to issue injunctions to secure wireless networks against access by the infringers. Interestingly, the costs of issuance of such an injunction would be borne by the owners of rights in such works.

Injunctions to block access to pirated content

The provisions of the German law establishing the institution of *Störerhaftung*, referred to above, also provide grounds for issuing injunctions against access providers. The final confirmation of this position was included in the Federal Supreme Court judgements of 26 November 2015 in two cases regarding the portals making available the copyrighted content illegally (by providing links to content available on hosting websites). Thus, the German legal order provides the creators and other copyright holders with the possibility of exercising the power specified in Article 8(3) of the *InfoSoc Directive*.



Limitation of the scope of permitted private use – effect of the judgement in the ACI Adam case

As in the German regulations, Austrian law restricts the scope of permitted private use by requiring that the source copy is legal, as provided for in § 42 (5) of the Austrian Copyright Act⁸⁸. This provision was introduced into this act in August 2015, with effect from 1 October of the same year. This amendment was the Austrian authorities' response to the judgement of the Court of Justice of the European Union in the ACI Adam case of 10 April 2014, which stated that EU law precludes national legislation which allows for reproduction of works for private purposes, regardless of the legality of the source copy. The Austrian legislators, by introducing the regulation in question, relied on the standards present in the German law (§ 53 (1) of UrhG), so the observations included in the preceding chapter generally remain valid in relation to the Austrian legislation.

Injunctions to block access to pirated content

Austria is the cradle of one of the most significant legal disputes over the liability of access providers. This is a dispute over the ability to order access providers to block their own customers' access to pirated Internet services (primarily the so-called torrents and streaming services).

It was in Austria that a court proceeding against UPC Telekabel Wien was initiated, which involved blocking access to the www.kino.to website through which illegal copies of films were made available by streaming, and it was also possible to download films from this website. The dispute was finally resolved by the Court of Justice of the European Union in the judgement in case *UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH et al.*⁸⁹. This judgement allowed for obliging access providers that have been recognised as "intermediaries", within the meaning of the InfoSoc Directive, to block access to pirated content on the network. For more on this subject – see chapter 108.

Despite the fact that the local legislator implemented Article 8(3) of the InfoSoc Directive allowing for issuing relevant injunctions, the Austrian fight for anti-piracy blockades is a sort of never-ending story. Every few months, at regular intervals, there are new reports on either a court order against access providers obliged to block yet another website or a revocation of such an order by the higher courts.



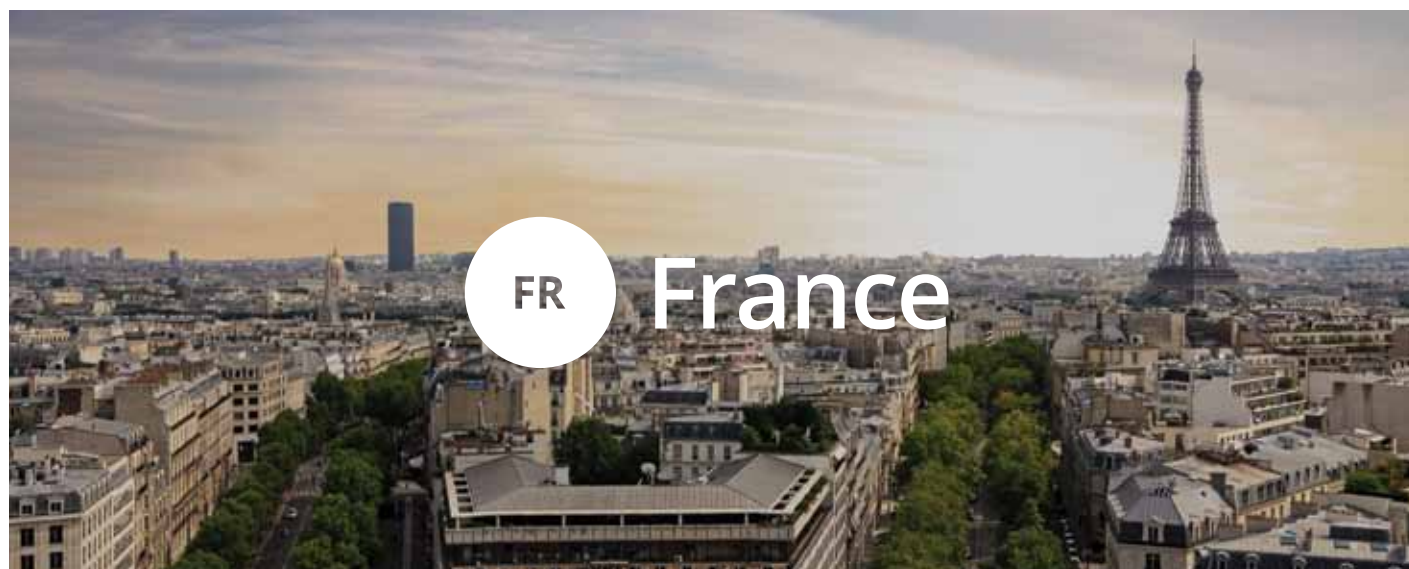
Self-regulatory actions

As in the United Kingdom, part of the Portuguese system of combat against piracy on the Internet is based on a voluntary agreement between certain entities. In July 2015, the organisations bringing together copyright holders, IGAC (General Inspectorate for Cultural Activities), the Portuguese Directorate-General for Consumer Affairs as well as the Portuguese Association of Telecommunications Operators and other organisations (for example, the MAPINET anti-piracy group) signed a Memorandum of Understanding to protect copyright and related rights on the Internet. This self-regulatory agreement, supported by the government of Portugal, is to allow the signatory organisations to inform MAPINET about domains containing at least 500 works potentially infringing copyright. On this basis, MAPINET collects the evidence provided by the notifiers, transmits it to IGAC, which in turn contacts the access providers, obliging them to block access to the domains within 15 days. These websites will also be excluded from advertising.

According to media reports from about one year ago,⁹⁰ more than 300 websites providing access to pirated content were blocked.

Injunctions to block access to pirated content

Portuguese legislation, in keeping with the requirements of Article 8(3) of the InfoSoc Directive, expressly provides for the possibility of issuing an injunction against an access provider to block access to pirated content on the network. Additionally, the jurisdiction of the court is not limited to cases of culpable acts of such an "intermediary". A court battle ordering a local access provider to block access to the biggest torrent service (The Pirate Bay) was one of the bigger cases. It ended with blocking the main domain address registered in Sweden and dozens of its variations.



Doubts about the definition of a hosting provider – on the example of an eBay auction site operator

In French legislation, it is also worth paying attention to the solutions relating to hosting service providers. France has implemented the e-Commerce Directive into the national law system. On the other hand, the deliberations of French courts are interesting as to which entities can benefit from the safe havens provided for this type of service provider. Contradictory views on this issue were presented, among others, in the following judgements relating to eBay.

The eBay case

Judgement of the Commercial Court in Paris of 30 June 2008 provided that the dominant activity of eBay consists in operating online auctions, and its hosting business cannot be separated from the dominant activity. For this reason, the court found that eBay may not rely on the exemption from liability envisaged for hosting providers.

This judgement is also important in the context of Article 15 of the e-Commerce Directive (i.e. a provision that states that the hosting provider is not obliged to monitor the content). It seems that the court went beyond the scope of this provision and considered that monitoring of content may be required when it can be assumed that the hosting provider ensures the technical means for posting copyright infringing content on the Web.

SARL Maceo vs. eBay, Inc., SARL eBay Europe and SA eBay France

The argument included in the judgement of the Civil Court of 25 October 2010 is very interesting when compared with the decision about eBay. This is because, in this case, the court found that despite eBay's efforts aiming at organising the website, indexing and correcting the entries and concluding agreements, the website could be considered a hosting provider rather than a news site.

Blocking access to pirated Web portals

French legislation provides for legal solutions that enable copyright holders to request a court to issue an injunction against an access provider to block access to the services violating their rights. Thus French law fully complies with the requirements set out in Article 8(3) of the InfoSoc Directive. In 2014, a Paris court ordered leading French service providers to prevent Internet users from accessing the PirateBay.se website and dozens of other sites to which the users could be redirected, including "mirrors" and proxy servers.



Limited scope of permitted use of digital content

The Danish legal system is characterised by a relatively narrow definition of the scope of permitted use of digital content included in the Danish⁹¹ copyright act. The Danish legislation recognises and admits this institution, but at the same time it clearly outlines its boundaries with regard to digital content.

First of all, benefiting from the institution of permitted use by reproducing a work is only permissible if the reproduction involves a legal copy of the work. Downloading a file from the Internet will only be possible if the file has been made available legally, with the permission of the rights holder. Denmark is therefore another EU country that has set the requirement for legality of a source copy (cf. part of the report on Germany and Austria). This approach is in line with the position of the Court of Justice of the European Union in the ACI Adam case, which has already been mentioned many times in the legal part of this study.

Secondly, the scope of use of a copy made in the framework of permitted use is restricted – it can only be used by

members of the same household, but not by acquaintances or neighbours.

While such clear delimitation of the use of work in the framework of permitted use could be an attempt to organise and control the digital content market, in practice, it may turn out that the law prohibiting the use of a work even in a circle of friends is simply dead – in particular, in the situation where the legislators would not decide to introduce and enforce sanctions against users.

Shaping the responsibility of access providers

Danish law contains provisions implementing Article 8(3) of the InfoSoc Directive and therefore provides the rights holders with the opportunity to request issuance of an injunction against the access provider to block access to websites infringing the author's economic rights or the right of other copyright holders. The jurisdiction of the court in this respect is independent of the alleged fault of an intermediary or even a violation of any of its legal obligations. Failure to comply with the injunction is, under Danish law, an

offence punishable by a fine or even imprisonment. The biggest torrent site – The Pirate Bay – has been blocked in Denmark continuously since 2008, despite many attempts by service providers to repeal court decisions ordering that the blockades are maintained.

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 58. Cf. in this regard, the positions of R. Barta and R. Markiewicz (R. Barta, R. Markiewicz, Prawo autorskie (Copyright Law), Warsaw 2016, p. 542) and the opposing position of J. Szczodrowski (J. Szczodrowski, Pośrednicy internetowi jako adresaci nakazów sądowych w kontekście naruszenia autorskich praw majątkowych i praw pokrewnych w Internecie – kilka uwag o dostępności oraz zakresie podmiotowym nakazów na tle najnowszego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej oraz prawa wybranych państw członkowskich (Internet intermediaries as addressees of injunctions in the context of infringement of author's economic rights and related rights on the Internet – several remarks on the availability and relevant scope of injunctions in the light of the recent case law of the Court of Justice of the European Union and the provisions of law of selected Member States) [in:] Zarys prawa własności intelektualnej (Outline of Intellectual Property Rights), ed. M. Kepiński, t. V, Własność intelektualna w obrocie elektronicznym (Intellectual Property in Electronic Commerce), ed. J. Kepiński, K. Klafkowska-Waśniowska, R. Sikorski, Warsaw 2015, p. 59–60).
 59. Cf. Judgement of the Supreme Court of 21 October 2011, IV CSK 133/11, OSNC 2012, no. 5, item 62.
 60. Cf. J. Barta, R. Markiewicz, op. cit., p. 542.
 61. Cf. J. Szczodrowski, op. cit., p. 59–60.
 62. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Single Market Strategy for Europe, COM(2015) 192 final.
 63. 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) 626 final.
 64. The Follow the Money Approach to IPR Enforcement. Stakeholders' Voluntary Agreement on Online Advertising and IPR – Guiding Principles [Ref. Ares(2016)6107273 – 25/10/2016].
 65. Opinion of the European Economic and Social Committee on the Strategy for the Protection and Enforcement of Intellectual Property Rights in Third Countries (Communication) COM(2014) 389 final.
 66. Cf. J. Barta, R. Markiewicz, op. cit., p. 534–536.
 67. E. Traple, [in:] Prawo autorskie i prawa pokrewne (Copyright and Related Rights). Commentary, ed. J. Barta, R. Markiewicz, LEX 2011.
 68. J. Barta, R. Markiewicz, op. cit., p. 231.
 69. K. Gienas [in:] Copyright and Related Rights Act. Commentary, ed. E. Ferenc-Szydełko, Legalis 2016.
 70. Judgement of the CJEU of 10 April 2014 in case C-435/12, ACI Adam BV at al. vs. Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding.
 71. K. Gienas [in:] Copyright and Related Rights Act. Commentary, ed. E. Ferenc-Szydełko, Legalis 2011, as well as J. Barta, R. Markiewicz, op. cit., p. 235.
 72. J. Chwaliba, Korzystanie z programów peer-to-peer a dozwolony użytek prywatny w prawie autorskim (Use of peer-to-peer software and permitted private use in copyright law), Zeszyty Naukowe Uniwersytetu Jagiellońskiego (Jagiellonian University Scientific Journal) 2008, no. 2, p. 18–53.
 73. Ibidem.
 74. Cf. among others R. Sikorski, Much ado about nothing? Uwagi o dozwolonym użytku prywatnym na tle orzeczenia TSUE w sprawie ACI Adam (Comments on permitted private use on the background of the CJEU judgement in the ACI Adam case) [in:] Zarys prawa własności intelektualnej (Outline of Intellectual Property Rights), ed. M. Kepiński, t. V, Własność intelektualna w obrocie elektronicznym (Intellectual Property in Electronic Commerce), ed. J. Kepiński, K. Klafkowska-Waśniowska, R. Sikorski, Warsaw 2015, and O. Tułodziecki, Prywatne kopiowanie utworów – tylko gdy źródło jest legalne (Private copying of works – only if the source is legal), "Rzeczpospolita" of 3 July 2014, p. 6.
 75. Cf., among others, K. Gienas, op. cit., and J. Barta, R. Markiewicz, op. cit., p. 232–233.
 76. R. Markiewicz, Dozwolony użytek dedykowany sieciom komputerowym (Permitted use dedicated to computer networks) [in:] Aktualne wyzwania prawa własności intelektualnej i prawa konkurencji (Current challenges of intellectual property law and competition law). Księga pamiątkowa dedykowana Profesorowi Michałowi du Vallowi (Commemorative Book dedicated to Professor Michał du Vall), ed. D. Kasprzycki, J. Ożegalska-Trybalska, Warsaw 2015 (el.).
 77. For example (with reference to doctrine and jurisprudence) I. Matusiak [in:] Copyright and Related Rights Act. Commentary, ed. E. Ferenc-Szydełko, Legalis 2017.
 78. Let's remember that the judgement concerned displaying fragments of press articles displayed by users while browsing a particular website on the monitor screen and temporarily saving these fragments in computer's memory.

79. J. Barta, R. Markiewicz, op. cit., p. 476.
80. Cf. P. Ślęzak, [in:] Copyright and Related Rights Act. Commentary, ed. P. Ślęzak, Legalis 2017; E. Traple, op. cit.
81. Cf. M. Siwicki, Media strumieniowe w Internecie (Streaming media on the Internet), PiP 2012, v. 8, p. 90–99.
82. Automatic and short-term indirect storage of transmitted data to speed up the process of getting access to them again.
83. Sections 19 and 22 of the regulation implementing the European Directive 2000/31/EC (The Electronic Commerce [EC Directive] Regulations 2002).
84. Network access service providers, referred to in this document as access providers, are one type of service providers referred to as the Internet Service Providers.
85. It should be noted here that in Germany there is a presumption that a copyright infringement made from a particular IP address is attributable to the person to whom the Internet access service is registered (as in the case of offences committed while driving a car, for which the owner of the vehicle is responsible or the driver indicated by the owner at the time of the violation). In addition, as the provisions implementing the Directive on the enforcement of intellectual property rights (2004/48/EC) allow for the possibility of collecting user data for a particular IP address almost automatically (cf. §101 UrhG), Germany has managed to significantly influence the reduction of copyright infringements made via P2P systems.
86. Opinion of the Advocate General Maciej Szpunar presented on 16 March 2016 in case C-484/14, Tobias McFadden vs. Sony Music Entertainment Germany GmbH.
87. Judgement of the CJEU of 15 September 2016 in case C-484/14, Tobias McFadden vs. Sony Music Entertainment Germany GmbH.
88. Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz) (niem. Ustawa o prawie autorskim i prawach pokrewnych), publ. BGBl. Nr. 111/1936 z późn. zm.
89. Judgement of the CJEU of 27 March 2014 in case C-314/12, UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH et al.
90. See <http://www.jn.pt/justica/interior/mais-de-300-sites-de-partilha-de-conteudos-bloqueados-5147965.html>.
91. Ophavsretsloven (Danish Copyright Act), pub. LBK no. 1144 of 23/10/2014 as amended.

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