Ratings, rankings, reviews on the Internet. Where the freedom of speech ends and infringement of law begins?

Opublikowano: 2 July 2018 • Autor: Anna Porebska APR

Ratings, rankings, reviews on the Internet Where the freedom of speech ends and infringement of law begins? Nowadays we cannot imagine life without the Internet and modern technologies as they make our everyday functioning, both in private and professional life, easier. But almost unlimited access to the Internet and lack of embarrassment in expressing opinions […]

Ratings, rankings, reviews on the Internet

Where the freedom of speech ends and infringement of law begins?

Nowadays we cannot imagine life without the Internet and modern technologies as they make our everyday functioning, both in private and professional life, easier. But almost unlimited access to the Internet and lack of embarrassment in expressing opinions as an anonymous participant of the global network also have a second, darker side.

Reviews and ratings on various types of websites spread with the speed of a lightening notwithstanding the fact whether they are real or fake or whether they are written by persons who actually used the services of the entrepreneur they reviewed or whether they were inspired by the competition.

Pervasive rankings and illusory anonymity

While observing the influence of opinions expressed on the Internet on the reputation of enterprises and related to this problems of a legal nature, we are increasingly aware that the dystopian visions of the future straight from the series “Black mirror” are not as detached from reality as we would think just a few years ago.

It is enough to mention the Social Credit System introduced in China which evaluates Chinese citizens. Compliance with the law, punctual meeting of their financial obligations or cleaning up after dogs allows to earn positive points and make life easier on many levels. On the other hand, infringement of the law, stowaway or delay in payment for energy may lead to a situation in which we will

not be able to get a loan in a Chinese bank or get a dream job.

Just as in the “Black mirror” series, a bad rating may result in refusal to sell an airline ticket. The system evaluates both individuals and companies. Discount offers or privileged treatment of persons with high scores sound tempting but monitoring different activities and their automatic assessment may destroy someone’s life and lead to a tragedy.

Shouldn’t these black visions make us treat all types of online rankings with a greater distance?

Online reviews can provide valuable comments, warn or praise, encourage you to use the services of some facilities but also effectively deter clients. Reading online reviews has become our habit. We check on the Internet what reviews the hotel has before choosing a place for a holiday trip (e.g. booking.com, tripadvisor.com), how many stars internet users awarded a restaurant before deciding where to have dinner (e.g. zomato.com) or which doctor was ranked the best by other patients before we decide to make an appointment (znanylekarz.pl, dobrylekarz.pl).

Almost every Internet user uses Google Search or Google Maps. Maps are not only used for location, but contain a number of information about visited places, tourist attractions, restaurants, hotels and local businesses, including the average rating of Internet users (calculated on the basis of awarded stars) with their comments. Google Maps, basing on its own unspecified criteria, decides also which reviews are the ‘most relevant’, by placing them at the top of the list according to their arbitrary choice. Algorithms also decide when the reviews will be removed and that affects the overall rating of a business.

Expressing opinions about places or companies is within the

boundaries of constitutional freedom of speech. However, it is very easy, especially in a place as anonymous as the Internet, to violate the freedom of opinion and to enter, often violently, into the sphere of rights and freedoms of other people or companies.

We don’t always realise that a large part of reviews posted on different websites or on Google Maps are reviews written by hired marketing agencies (in the case of positive opinions) or are inspired by competitors (negative reviews, defamatory comments, hate). In many cases, you can see at first glance which reviews are true and which are part of the unfair competition. Is it possible to take seriously a review written by an anonymous user who does not use his name and who has just created an account to write that review and then disappear?

More and more often reviews are written by the so-called “Local guides” who “cooperate” with Google on developing Google Maps in exchange for the opportunity to climb the next levels of the prog

ram and use different benefits offered by Google. The more reviews written, the more points in the program. And if places or companies whose services the “Local guide” never used, but only passed nearby are reviewed by him? Who would care...

But how much evil can these false reviews cause we only find out when we experience their effects “on our own skin”. One of the

persons who recently learned about that personally, was a paediatrician from Tychy, as someone tried to destroy his reputation on ‘anti-vaccine’ forums, until he took legal steps with the help of the Prosecution.

The fight to remove negative reviews from the Internet is not easy and the function of ‘reporting violations’ offered by Google or other online platforms is not very effective. This does not mean that we are helpless in this situation. Taking legal steps requires more effort but it is quite often the only way to resolve the issue of false reviews or hate on the Internet and to recover the reputation questioned by other internet users.

When posting negative reviews may infringe the law?

Slandering and defamation on the Internet more and more often end up in the courtroom.

The basis of civil law claims may be the provisions of the Civil Code concerning the infringement of personal rights, i.e. art. 23 and 24. Negative, false reviews may violate honour, good name, privacy as well as reputation and credibility of the entrepreneur. In such a case, a subject whose personal rights have been threatened by someone else’s actions, may demand the actions to be ceased unless it is not unlawful. However, in the event of the infringement already committed, it may also demand the person who committed the infringement to remedy its consequences, in particular to make a relevant statement (of right content and form). Additionally, it can demand financial compensation or payment of an appropriate sum for a specific social purpose and compensation for financial damage suffered.

In the relations between entrepreneurs, writing defamatory posts

may constitute an act of unfair competition. The Act of 16 April 1993 on combating unfair competition states that it is such an act that disseminates false or misleading information about his or other entrepreneur or enterprise in order to yield benefits or cause damage. The information may be about persons managing the enterprise, manufactured goods or services provided, prices charged, economic or legal situation.

In the event of committing an act of unfair competition, an entrepreneur whose interest has been threatened or infringed may demand cessation of the unlawful actions, removal of the effects of prohibited activities, making one or repeated statement of appropriate content and form, repair of the damage pursuant to general rules, handing over unjustified benefit, adjudication of an adequate amount of money to the determined social goal connected to support for the Polish culture or related to the protection of national heritage – where the act of unfair competition has been deliberate.

Writing untrue, defamatory information may also have criminal consequences.

Imputing to another person or enterprise through the means of mass communication such conduct or characteristics that may discredit in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity (art. 212 of the Criminal Code) is an offence which is prosecuted by private indictment and is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

Dissemination of false or misleading information about the enterprise, in particular about the persons managing the enterprise, manufactured goods, provided services or prices charged, about the

economic or legal situation of the enterprise, in order to bring detriment to the entrepreneur is subject to a fine or arrest.

How to identify an infringer?

Establishing the identity of an anonymous infringer is the biggest obstacle to the effective pursuit of claims concerning infringement of personal rights on the Internet. Theoretically, it is possible to request the network operator to provide the IP number of the specific user, however the request can often be refused due to the protection of the confidentiality of correspondence and personal data.

It results from the wording of art. 18(6) of the Act of 2002 on the provision of electronic services that there is an obligation to provide information on data only to state authorities for the purposes of their investigations. However, this does not mean that disclosure of these data whose rights have been infringed is prohibited. Therefore, prosecuting bodies in the event of initiation of preparatory proceedings have a greater chance of finding infringer. However, not every infringement of personal rights or principles of fair competition will result in criminal liability.

Therefore, provisions on the protection of personal data apply in this respect. Administrative courts have previously held the view that "*the secret of communication in the telecommunications networks reaches only to the borders of the collision with the applicable legal order, and where there is a suspicion of contradiction with that order, this rule must be surrendered before a higher good*" (judgment of the Supreme Administrative Court of 21 February , file no I OSK 2324/12).

Therefore, it is assumed that there is no basis, pursuant to the provisions on the protection of personal data, for the provision

regarding the obligation to disclose operational data to state authorities for the purpose of specific proceedings to be treated as excluding the possibility of disclosing such data to other persons.

In order to obtain data in the form of the computer’s IP, it is necessary therefore to refer to the necessary interest in the form of pursuing claims for infringement of personal rights or committing an act of unfair competition.

What is important, the Supreme Administrative Court accepts that it is not necessary to file a lawsuit or to direct a private indictment

(judgment of the Supreme Administrative Court of 4 December 2014, file no I OSK 978/13). it is obvious that in any case –in the case of filing a lawsuit as well as in the case of a non-judicial claim, it is necessary to identify the addressee of the claim.

In practice, obtaitment (judgment of the Supreme Administrative Court of 4 December 2014, file no I OSK 978/13). it is obvious that in any case –in the case of filing a lawsuit as well as in the case of a non-judicial claim, it is necessary to identify the addressee of the claim.

In practice, obtaining data necessary to identify the case is still

significantly impeded, and since the general regulation on data protection (GDPR) is in effect, it should be observed how the practice of sharing these data and the intervention of the President of the Office for Personal Data Protection in case of refusal to disclose them will form.

Who to sue if the author of the post cannot be identified?

If it is impossible to identify the direct infringer, there is no other way then to contact the administrator of a website on which the infringement occurred to remove the infringing content. Once the administrator is aware of the infringement, he is obliged to react, and in the case of refusal to delete the post, he also becomes liable for the infringement.

That is why, it is worth getting acquainted with the regulations of a website and the procedure of reporting infringements. In Google, this procedure consists in filling out previously prepared forms relating to specific violations. If the post contains hateful, violent or inappropriate content, advertising or spam, it is not relevant or there is a conflict of interest in that post then it can be reported in Google maps. However, those reports are often left unanswered or Google’s response is negative.

Google does not verify whether the person who wrote a review actually used the services of the company reviewed, but only examines whether the review meets Google’s rules concerning only the form of the review, relying on the freedom of speech and equal weight of positive and negative reviews. Often the entrepreneur is therefore not able to enforce from Google the removal of the review, despite the certainty that the person has never been his client or that the review is a form of harassment from the

competitor.

In such situation the only solution is to take the case to court.

If the website is maintained by an entity established in Poland or in territory of the European Union, it is possible to bring a claim to the Polish court competent for the place of registered office of the defendant or to the court in whose district the harmful event occurred (art. 35 of the Polish Code of Civil Procedure).

The issue of the jurisdiction in cases concerning infringements committed via the Internet (the so-called Internet torts) has been clarified in the Supreme Court resolution of 15 December 2017 in case III CZP 82/17, which states that: "*An entrepreneur, pursuing claims resulting from an act of unfair competition, consisting in publishing on a website may, pursuant to art. 35 of the Code of Civil Procedure, bring an action before the court in whose district the publication was posted on the website or before the court in whose jurisdiction the availability of the website caused a threat or violation to his interest*s".

The jurisprudence of the EU Court of Justice also leaves no doubt as to the possibility of suing an entity from another Member States in their own country. The CJEU stated that in the case of infringement of personal rights by means of content placed online, one can bring an action in the courts of the Member State in which the publisher of that contents is established or before the courts of the Member State in which the centre of his interests is based (judgment of the CJEU of 25 October 2011, case C- 509/09)

The problem arises when the website administrator is not based in the European Union.

Can you sue Google in Poland?

Most of the popular websites on which Internet users infringe third parties' rights are headquartered in the territory of the United States where Polish courts do not have jurisdiction. Does this mean that we cannot sue Google or Facebook in Poland?

The above rules on the territorial jurisdiction of the courts apply when the domestic jurisdiction of Polish courts is determined. Lack of domestic jurisdiction may be the basis for rejecting the suit.

It results from the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters that if the defendant is not domiciled in a Member State, the jurisdiction of each Member State is determined by law of that Member State.

In Polish law, the general rule of determining national jurisdiction is stated in art. 1109 of the Code of Civil Procedure and is based on the defendant's domicile or place of his usual residence or seat in the Republic of Poland. The rule does not apply however to Google, because economic activities of its branches in Europe are limited to advertising. Therefore, art. 1103^{7} of the Code of Civil Procedure applies, according to which cases heard in the process other than those mentioned in art. 1103^{1}-1103^{6} are within domestic jurisdiction also when they concern an

obligation not resulting from a legal act in the Republic of Poland. Therefore, while the effects of violation of the rights of a entity through the content posted on the Internet took place on the territory of Poland, protection before the Polish court and on the basis of Polish law may be demanded.

The possibility of suing Google and other global giants in Poland was confirmed in a precedent judgment of the Court of Appeal in Warsaw of 3 April 2017 in a case with reference number I ACa 2462/15.

In this case, Google lodged a cassation appeal and the case is currently awaiting a decision of the Supreme Court, whose position in this case will undoubtedly influence further rulings of the Polish courts in cases involving enterprises from overseas.

Conclusions

Polish jurisprudence concerning Internet torts is not yet as developed as for instance in Germany, where specific rules for responding by websites to reports on violations committed by users are established and also obligations to verify not only the content of reviews but also their validity and real use of services of the reviewed entrepreneur have been developed.

It should be expected, that due to the policy of ignoring and not responding to user reports and the scale of possible violations, that there will be more and more lawsuits against global giants, concerning not only the right to be forgotten, as in the case of Google’s lost cases in Poland but also the protection of personal rights and acts of unfair competition.

The possibility to use the legal remedies gives hope that in the

future the culture of using internet tools will change for the better. In the end, they were invented to serve users, make life easier and not to limit us because of unethical behaviour of other people.

Anna Porębska, LL.M., Adwokat

Piotr R. Graczyk, Adwokat

[/vc_column_text]

Anna Porebska APR
2 July 2018