



DIGITAL REVOLUTION & LEGAL EVOLUTION – COPYRIGHT AND RELATED IP RIGHTS IN THE DIGITAL DOMESTIC MARKET

Cryptocurrency, big data, artificial intelligence, data theft, cloud, virtual, augmented, or mixed reality, cyber warfare, telemedicine, social media, autonomous driving, Industry 4.0, Criminal Law 4.0, NFTs – these are not the only issues that are bringing about the era of the fourth so-called digital revolution, which perhaps represents the most global societal change in history.

Each of these digital changes is bringing new challenges to all facets of society – the link between law and technology is one of the biggest. **Adapting the law to the modern digital world** is inherently complex, as it concerns disparate systems and, above all, the rigidity of the legal system is colliding with dynamic technological progress.

An example that illustrates the special relationship between legal and digital technologies very well are **NFTs (non-fungible tokens)**. The legal nature of this blockchain-based technology, which contains unique digital assets (essentially electronic property), is still widely debated by legal professionals, not only with respect to **potential government regulation**, but also with respect to its relevant **use in the private sector**. The use of this technology is already widespread. A well-known example is the successful edition of perhaps the most famous work by painter Gustav Klimt – the painting “The Kiss” – in the form of 10,000 NFTs.

Among other things, the European Union has attempted to address the new challenges with **Directive 2019/790 of the European Parliament and of the Council** on copyright and related intellectual property rights in the digital domestic market and with the amendment of Directives

96/9/EC and 2001/29/EC. However, this Directive has been vigorously criticised in several Member States and its implementation is lagging behind in many respects. However, the recent CJEU ruling in Case C-401/19 Poland/Parliament and Council, in which even the most criticised provisions were given binding interpretations by **precedent**, has made clear that this legislation continues to be enforced in its original form under EU law. Specifically, the Court addressed that part of the policy that requires **online service providers** to prevent unauthorized uploads of **copyrighted content**.

Nevertheless, the content of the policy raises many further interpretation questions, and it will undoubtedly be interesting to see what further decisions will result in their practical application. In addition, individual Member States also protect copyright by criminal or other legal provisions. These national regulations will be examined in more detail in the following pages of this article.

AUSTRIA

Status quo of the implementation of Directive (EU) 2019/790

The implementation of Directive (EU) 2019/790 on copyright and related rights in the digital single market took place in Austria as part of the 2021 copyright amendment. The *Urh-Nov (Urheberrechts-Novelle* [copyright amendment]) 2021 (BGBl (*Bundesgesetzblatt* [Federal Law Gazette]) I 2021/244) was published on 31 December 2021 in the Federal Law Gazette and came largely into force on 1 Janu-



ary 2022. The Austrian legislator has thus completed the most comprehensive and complex amendment of the Austrian Copyright Act, which has led to a profound amendment of the Copyright Act. In addition to numerous topics such as the right to protect performance for press publishing as well as requirements for online platforms, among other things, exceptions to text and data mining, distance learning, the preservation of items from cultural heritage institutions and for out-of-print works, the standards under copyright contract law (reasonable remuneration, contract adjustment, revocation obligation, transparency obligation) are of broad practical importance.

National legal framework against computer piracy

Austrian legislation does not provide for a specific legal framework against computer piracy. For the protection of computer programs, the copyright (special) provisions of §§ 40a to 40e UrhG apply, according to which the Austrian legislator considers computer programs as works explicitly worthy of protection that enjoy copyright protection.

Copyright & NFT (non-fungible tokens)

In Austria, the legal disputes with non-fungible tokens have only taken place in specialist groups so far and have (yet) not emerged from any general national legislation. The theory is based on the assumption that NFT can be understood as a kind of securitisation of the protected work, a similarity between tokens and securities is affirmed, and an analogous application of the property law provisions is also advocated. In the area of national copyright, the legal issues and effects of NFT are still largely unclear. In principle, the question of whether copyright can be established for an NFT will depend on whether an NFT can be qualified as a work worthy of protection within the meaning of the UrhG. In Austria, it remains to be seen how the case law and national legislation will position itself with regard to the copyright status of NFT.

CHINA

National legal framework against computer piracy

Pursuant to Article 24 of the Computer Software Protection Regulations, a person is liable who violates the legitimate rights and interests of the computer software copyright owner. If the violation also damages the public interest, the copyright authority orders the removal of the violation, confiscates the illegal proceeds, confiscates and destroys the infringing copies, and may impose a fine. In addition, Article 23 of the Computer Software Protection Regulations provides for extensive civil liability of the infringer to the copyright owner. Pursuant to Article 217 of the Criminal Code, a person who infringes copyrights or related property rights for the purpose of achieving profits will be sentenced to a maximum of three years imprisonment and a fine or one-off financial penalty. In the presence of particularly serious circumstances, imprisonment could be up to ten years

Copyright & NFT (non-fungible tokens)

The Supreme Court in China has taken a clear position against crypto trading in its recent legal interpretation of criminal law. This means that trading in cryptocurrencies is classified as a means of illegally raising money. A judicial interpretation is the official interpretation of the Supreme Court on how to enforce a law in China. To consider cryptocurrency trading illegal, four conditions must be met. These are public fundraising, unspecified fundraising objectives, promised capital and interest income, and violation of laws and regulatory requirements. As a result, cryptocurrencies cannot play a usual role in NFT trading. China calls its own NFTs “Distributed Digital Certificates”, or DDC. The NFT infrastructure is currently under construction, meaning corresponding changes in the law can be expected in a timely manner.

CZECH REPUBLIC

Status quo of the implementation of Directive (EU) 2019/790



The amendment of the Copyright Act implementing the EU Directive on Copyright in the Digital Single Market has reached the Chamber of Representatives of the Czech Parliament. This is currently being discussed in the responsible committees and the plenary of the Chamber of Representatives. After it is passed, the law will continue to go through the legislative process. The President's final signature is expected for Autumn 2022. The proposal discussed by legislators still does not fully consider the European Commission's recommendations or the recent decision of the Court of Justice of the European Union (ECJ) in relation to Poland's action against the European Commission on this Directive. It remains to be seen now whether the parliamentary debate will bring changes to the legal text and what these will be.

National legal framework against computer piracy

The basic protection of copyright (and thus the protection of authors of works against computer piracy) in criminal law is guaranteed by Act No. 40/2009 Coll., the Criminal Code. Specifically, this is included in § 270 of the Act, under the offence of infringement of copyright, related rights, and database rights. The perpetrator can be punished with a prison sentence of up to 8 years if the benefit gained or the damage caused is of great magnitude. It should be noted that there have already been several unconditional convictions without parole on the basis of this paragraph in the past, mainly for the illegal distribution of films and computer games via online platforms.

Copyright & NFT (non-fungible tokens)

Since this is a new technology, there is no general legislation in the NFT sector to date. Most legal professionals agree that NFTs are not securities. Their trading is not regulated in any way, and there is no legislation specifically governing how NFTs should be dealt with. On the other hand, NFTs may be subject to a number of regulations. It will primarily depend on what rights are actually transferred with NFT. These may be copyright licenses, but also various rights arising from contracts between the transferors. NFTs can also encroach on personal

rights if they are associated with portrait photos, for example.

GERMANY

Status quo of the implementation of Directive (EU) 2019/790

In Germany, the DSM Directive has already been implemented into national law. The law to adapt copyright to the requirements of the digital domestic market was announced on 4 June 2021 and came into force on 7 June 2021. The provisions on the copyright responsibility of upload platforms were defined in the so-called copyright service provider law, which came into effect on 1 August 2021. It also regulates user rights and compensation claims of the authors on platforms as well as a right of information for researchers for scientific research into platform economics (Art. 3 Copyright Service Provider Act (UrhRDaG, *Urheberrechts-Diensteanbieter-Gesetz*).

National legal framework against computer piracy

Measures against computer piracy are regulated at two levels, a civil and a criminal level. However, the regulations are in the same law: the German Copyright Act. On the one hand, the unauthorised exploitation of copyrighted works, e.g., by copying or making available for download, constitutes a copyright infringement, which can be given a formal warning in accordance with § 97 para. 1 UrhG (*Urhebergesetz* [Copyright Act]). There is a claim for damages, which is calculated on the basis of different models, such as a license analogy. On the other hand, there may be a criminal imprisonment of up to three years or a fine if works are distributed or publicly reproduced without the consent of the beneficiary. Anyone who bypasses or removes technical protective measures can be punished with imprisonment for up to one year or a fine. Both crimes are only prosecuted upon request.

Copyright & NFT (non-fungible tokens)

So far, there has been no express legal regulation on NFTs. They are thus subject to the ex-



isting copyright regulations. An NFT is protected by copyright only if the underlying work is protected by copyright. If, for example, a citation no longer falls under the so-called small coin and is therefore not protectable; this also applies to the associated NFT. In addition, NFTs are predominantly considered an unknown type of use until 2021. In this respect, subsequent claims to remuneration by the originator of the original work can arise when using NFTs.

POLAND

Status quo of the implementation of Directive (EU) 2019/790

To date, this policy has not yet been implemented into Polish law. At the end of July 2021, a total of 23 countries (including Poland) were asked to comment due to non-implementation of the policy. According to Art. 29 para. 1 of the Directive, the Member States were obliged to put the necessary legal and administrative provisions into effect by 7 June 2021 in order to comply with the provisions of the Directive.

The Prime Minister's Office website includes an announcement dated 8 October 2021, according to which the planned date for the adoption of the Implementation Act is the second quarter of 2022.

National legal framework against computer piracy

Regulations concerning computer piracy (CP) are included in criminal law, among other things. According to Art. 278 § 2 of the Act of 6 June 1997 (StGB (*Strafgesetzbuch* [German Criminal Code])), anyone who appropriates someone else's computer program in order to gain a financial advantage is also punished with a term of imprisonment intended for theft. At the civil law level, regulations for combating CP are described in the law of 4 Feb. 1994 on copyright and related property rights, which provides that a rights holder whose copyright rights have been infringed may require a person who has infringed these rights to:

- Refrain from infringing the law;
- Eliminate the consequences of the infringement;
- Provide compensation for the damage incurred;
- Disclose the benefits obtained.

These provisions apply *mutatis mutandis* to the elimination or circumvention of technical protective measures against access to, reproduction of, or distribution of a work.

Copyright & NFT (non-fungible tokens)

In Polish law, there are no separate regulations that directly relate to NFTs. Unfortunately, it is often the case that the legislation (not only at the national level) does not keep up with the dynamic technological change and that corresponding regulations are usually only implemented after a longer period of time. Until then, the currently applicable regulations of the law on intellectual property must be used, the correct application of which is not entirely trivial in this case due to the digital nature.

ROMANIA

Status quo of the implementation of Directive (EU) 2019/790

As of 1 April 2022, the implementation of Directive (EU) 2019/790 of the European Parliament and of the Council has been transposed into Romanian national law and is therefore in force. This has been converted into national law as an addition to Law No. 8/1996 on copyright and related rights. The provisions of Directive (EU) 2019/790 of the European Parliament and of the Council were therefore supplemented or taken into account within the framework of the Act 8/1996.

National legal framework against computer piracy

Computer piracy or illegal access to a computer system is a criminal offence in Romania under Section 380 of the Criminal Code. Accordingly, unauthorised access to a computer system is punishable by imprisonment from three months to three years or a fine.



In the event that the crime is committed for the purpose of obtaining computer data, imprisonment of six months to five years is considered.

If the act has been committed with regard to a computer system to which access is restricted or prohibited by special methods, devices or programs for certain user groups, a prison term of two to seven years is provided for.

Copyright & NFT (non-fungible tokens)

There are no specific copyright laws in Romania (yet) relating to NFTs. However, from a fiscal point of view, there is a duty to declare and pay tax on income from corresponding transactions. The tax authority treats income from relevant transactions, such as sources of income, as a result of the transaction of intellectual property rights.

SLOVAKIA

Status quo of the implementation of Directive (EU) 2019/790

On 16 February 2022, the National Council of Slovakia adopted Law No. 71/2022 Coll. amending Law No. 185/2015 Coll. on Copyright as amended (the “Copyright Act”). The objective of the amendment is to implement Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright into Slovak law. Within the implemented provisions, the new law largely meets the requirements of the Directive, but a concrete interpretation from the practice remains to be seen. The law only came into force on 25/03/2022.

National legal framework against computer piracy

The basic protection of copyright (and thus the protection of authors of works against computer piracy) in criminal law is regulated by Act No. 300/2005 Coll., the Criminal Code. Specifically, this is contained in § 283 of the Act under the offence of infringement of copyright law. The perpetrator can be punished with a prison term of up to eight years, depending on the scope of the damage.

Copyright & NFT (non-fungible tokens)

There is no general NFT legislation in Slovakia yet. Slovakian legislation only defines the term “virtual currency”. However, legal experts agree that NFTs are not equivalent to virtual currencies (cryptocurrencies). Based on this interpretation, one tends to conclude that NFTs should not fall within the scope of AML, the Income Tax Act, and the Methodological Guideline of the Ministry of Finance of the Slovak Republic since NFT does not fully coincide with the definition of virtual currency. In this regard, however, further practice, case law and possible changes in law must be awaited.

SPAIN

Status quo of the implementation of Directive (EU) 2019/790

Spain has transposed Directive (EU) 2019/790 into national law by Royal Legislative Decree 24/2021, which came into force on 4 November 2021. This missed the implementation deadline by a few months. As part of the implementation, the current text of the Copyright Act was changed on a point-by-point basis. The goal is to adapt the applicable copyright to the development of new technologies. In particular, the use of protected content is now regulated by providers of online content exchange services. In addition, a right of revocation for the benefit of authors has been introduced, which allows the author to revoke an authorisation in whole or in part if the rights to a work that is not exploited have been transferred. The law also provides that authors must be entitled to appropriate remuneration if they transfer their rights for the exploitation of their works.

National legal framework against computer piracy

A specific legal framework against computer piracy does not exist in Spain. Works affected by computer piracy are protected by the General Copyright Act.

**Copyright & NFT (non-fungible tokens)**

There is no specific regulation of copyright in relation to NFTs in Spain. However, the general mechanisms for the protection of non-digital artistic and intellectual works, which the General Copyright Act provides, also apply to NFTs.

NFTs are covered by the laws that apply to logos, paintings, books, or songs. If a product leads to the creation of a token, it should be effectively registered in the Intellectual Property Register for appropriate protection.

CONTACT**China:**

Marcel Brinkmann

Marcel.Brinkmann@schindhelm.com

Germany:

Karolin Nelles

Karolin.Nelles@schindhelm.com

Sarah Schlösser

Sarah-Schloesser@schindhelm.com

Austria:

Julia Spitzbart

J.Spitzbart@scwp.com

Poland:

Piotr Wyszumirski

Piotr.Wyszumirski@sdzlegal.pl

Romania:

Helge Schirkonyer

Helge.Schirkonyer@schindhelm.com

Spain:

Axel Roth

A.Roth@schindhelm.com

Czech Republic/Slovakia:

Monika Wetzlerova

Wetzlerova@scwp.cz