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LIABILITY OF INTERNET INTERMEDIARIES FOR COPYRIGHT INFRINGEMENT

The article researches the concept and types of Internet intermediaries. The peculiarities of the responsibility of these subjects in accordance with national and international legislation are determined.

Key words: *copyright, Internet, Internet intermediary, protection.*

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Відповідальність інтернет-посередників за порушення авторських прав

У статті досліджуються поняття та типи інтернет-посередників. Визначено особливості відповідальності цих суб'єктів відповідно до національного та міжнародного законодавства.

Ключові слова: *авторське право, Інтернет, інтернет-посередник, захист.*

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Ответственность интернет-посредников за нарушение авторских прав

В статье исследуются понятие и типы интернет-посредников. Определены особенности ответственности этих субъектов в соответствии с национальным и международным законодательством.

Ключевые слова: *авторское право, Интернет, интернет-посредник, защита.*

Problem statement and its relevance. Alongside the development of the information society and the use of modern technologies that allow any user to create and distribute content in a digital format, the nature of information relations has changed, transforming the consumer of the content into its creator and distributor. These opportunities for the individual to exercise their informational, creative freedom lead to numerous significant violations of intellectual property rights, including on the Internet, and raise relevant problems over determining the range of subjects, liable for counterfeiting in this network. This is because after placing a work on the Internet, access to the respective intellectual property object opens simultaneously for a large number of users.

To date, Ukraine has already taken some steps to improve the legal framework for copyright protection by ratifying the Association Agreement between Ukraine, on the one hand, and the European

Union, the European Atomic Energy Community and their Member States, on the other hand [1]. It has undertaken to take certain measures to protect intellectual property rights in a digital environment. Thus, in accordance with Article 244 of the Association Agreement, both parties acknowledge that intermediary services may be used by third parties for unlawful activities. To ensure the free circulation of information services and, at the same time, to protect intellectual property rights in the digital environment, each party shall ensure that the measures specified by this Division for the providers of intermediary services are in place. This Division applies only to liability, which may be the result of violations in the field of intellectual property rights, copyright in particular. In addition, on April 20, 2017, the President of Ukraine P. Poroshenko signed a draft law «On State Support to Cinematography in Ukraine» [2], which came into effect on May 6, 2017. The main purpose of the legal act is to regulate and maintain financing and production of Ukrainian films, to introduce subsidiary liability

for infringement of copyright and related rights by third parties, as well as to establish certain rules aimed at facilitating the protection of rights on the Internet. By passing this law, Ukraine has confirmed its intentions to strengthen the liability for violating intellectual property rights, including such entities as an Internet intermediary.

Analysis of research and publications. The research of certain aspects of the liability of Internet intermediaries for copyright infringement was carried out by such scholars as I. Zhilinkova, K. Zerov, O. Kokhanovskaya, O. Karpenko, O. Matskevich, V. Naumov, I. Sopilko, O. Pastukhov, R. Shishka and others. Among foreign scholars, L. Edwards, D. Seng, I. Garrote Fernandez-Diez, in their writings, studied the issues of responsibility of Internet intermediaries.

The purpose of this article is to study the peculiarities of liability of Internet intermediaries for copyright infringement on the basis of analysis of the legal provisions of national and international law.

Presenting main material. One of the main factors in the formation of a modern global network and the spread of creative content within it is a growing share of Internet intermediaries. The term «Internet intermediary» includes the notion of a service provider in the information society in accordance with Article 2 (b) of Directive 2000/31/EU of the European Parliament and of the Council «On certain legal aspects of information society services, in particular electronic commerce in the Internal Market» [3]. This includes all individuals who create, maintain, and benefit from electronic platforms or networks adapted to Web 2.0 (information technology that allows users to create and distribute their own content on the World Wide Web), for example, search engines, social networks, data services, etc. However, in the context of copyright protection on the Internet, Internet-based mediation should be considered as a place on the server to download data users.

According to Art. 245-247 Association Agreements between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, the following types of intermediaries can be singled out [1]:

1) «Mere conduit» - provides access to the network, including end-user Internet connection.

2) «Hosting provider» - provides information belonging to a third party and ensures its availability. A special kind of the hosting provider is a content provider (content provider), which provides services for storing the information provided by the recipient of the service, including the objects of copyright and related rights, and ensures their availability. O. Matskevich attributes the content provider to a substantive form of Internet intermediaries [4, p. 54];

3) «Caching» is a provider that provides automatic interim storage of material on a system or the Internet, which is controlled or managed by the provider.

The same classification is presented in his works by K. Zerov [5], Enrique García García - Judge of the Court of Appeal of Madrid [6].

To date, one of the problems of legal regulation of social relations arising from the use of the Internet is the problem of liability of Internet intermediaries (providers of services in the information society) [7, p. 19]. The urgency of the issue is determined by the emergence of such emerging phenomena as Web 2.0, the rapid spread of sites with custom content, online transmissions and free hosting.

World practice provides many examples of cases concerning «indirect violation» of copyright and related rights. This breach implies the indirect involvement of the Internet intermediary in infringing the copyright by providing resources and services that facilitate the violation. The model of lawsuits against Internet intermediaries regarding indirect violation is more effective as compared with the persecution of offending individuals, since, usually, user-generated content appears to be a significant factor in monetization of a web site that facilitates the receipt of profits by an intermediary. This model involves filing a claim to an intermediary for non-compliance and non-enforcement of control measures related to the violation of copyright, which is carried out through the services of an intermediary. Article 59 of the European Parliament and Council Directive 2001/29/EU «On the harmonization of certain aspects of copyright and related rights in the information society» [8] states that in the digital environment, third parties are likely to use each time with a greater frequency of intermediary services for committing unlawful activities. In many cases, these intermediaries have the best conditions to put an end to the unlawful activity. Thus,

without prejudice to any other sanctions envisaged or methods of appeal, the intellectual property rightholders should be able to request an injunction on an intermediary who transmits to the network a violation by a third party against a protected work or another protected object. This opportunity should be available, even if the actions of an intermediary are subject to an exception in accordance with Article 5 of this Directive. The conditions and characteristics of such injunctions must be specified by the national laws of the Member States.

Within the framework of national law-making processes, under the influence of international regulations and recommendations, there is a tendency to increase the liability of intermediaries. However, under the pressure of the Internet industry, many countries legally limit the indirect liability of intermediaries (American DMCA Regulations 1998 [9], Directive 2000/31/EU of the European Parliament and of the Council [3]). These rules were called «safe harbor», which in general implies a provision that specifies that certain behavior will not be regarded as a violation of the established rule.

The world is also developing the practice of applying «Graduated response» systems, the meaning of which is the response of service providers in the information society (Internet Service Providers) to illegal activities related to copyright infringement in their networks. In case of detection of such an activity, an offender shall be sent a warning indicating the violation and informing about possible sanctions against him. In case of repeated violations, a certain number of warnings are still sent, and after the limit is over, a practical sanction is imposed (usually it includes: blocking traffic in certain protocols, restricting or cancelling access to the network or applications, the use of certain filters). The system is currently operational and legally secured in a number of developed countries such as France, New Zealand, South Korea, the United Kingdom, and is effectively pursuing its educational function, as evidenced by the statistics on the reduction of copyright infringement in France [10].

This system, according to the general concept, includes the following stages:

- 1) monitoring of the networks for the infringements of copyright (usually by the right holders);
- 2) providing to service providers sufficient evidence of a violation committed by the individual at a particular IP address;
- 3) informing the offender;

4) imposition of sanctions. Sanctions are determined in accordance with disciplinary or administrative liability within the competence of a certain provider or authorized regulatory body. Civil and criminal sanctions may be imposed, but through the courts. However, taking into account national peculiarities, the system can be implemented in different ways in different countries. In practice, the means of securing the system are, usually, legal and administrative measures, rather than direct imperative intervention of the provider as it is stated in the concept.

This approach to copyright protection on the Internet is not ideal and is constantly criticized as unlawfully restricting fundamental human rights and freedoms. In Ukraine, the introduction of such a system in the near future is not considered. This is due to factors such as: lack of specialized copyright protection mechanisms on the Internet in the legislation; The absence of a specialized body and the general ineffectiveness of the existing government bodies in the relevant sub-sector; Undeveloped practice of considering such cases by courts; The physical incapability of the material and technical base of state bodies and private enterprises to introduce such technologies and bear the costs associated with it. However, in the context of European integration and stable economic and political development, this way of protecting copyright on the Internet can be introduced and effectively operate in our country.

It should be noted that in Ukraine the responsibility of Internet providers (intermediaries) is regulated by the Law of Ukraine «On Telecommunications» [11]. Article 38 of this Law establishes the legal principles of the operator's influence on the infringing consumer. According to Article 1 of the Law of Ukraine «On Telecommunications», the operator is different from the provider in the right for maintenance and operation of telecommunication networks. In cases of violation of the rules for the provision and receipt of telecommunication services by the consumer, the operator has the right to reduce the list or terminate the provision of services. Also, in cases of the use of end-user equipment by the consumer for illegal conduct or actions that threaten the state security, the operator may disconnect the end-user equipment by a court decision.

Substantial changes in the responsibility of Internet intermediaries were also introduced by the

Law of Ukraine «On State Support to Cinematography in Ukraine» [2], which additionally amends such acts as the Law of Ukraine «On Copyright and Related Rights», the Code of Ukraine on Administrative Offenses, the Criminal Code and a number of other laws. From now on, according to Art. 52-1 of the Law of Ukraine «On Copyright and Related Rights» [12], Internet intermediaries such as the owner of a website, web pages and a hosting service provider may be held liable for civil liability under a copyright claim by a copyright holder Procedure established by law. In addition, Articles 16417 to 16418 of the Code of Ukraine on Administrative Offenses [13] provide for the administrative liability of website owners and hosting providers for violating the terms and conditions governing the termination of copyright infringement through the use of the Internet.

From the above, it should be noted that the legal framework for the introduction of the «Graduated response» system has already been laid down in Ukrainian legislation, however, Article 40.4 of the Law of Ukraine «On Telecommunications» [11] contains a provision that discharges a liability of operators, telecommunications providers for content transmitted by their networks. This rule is in part consistent with the substance of the «safe harbor» concept, the essence of which is explained above.

Considering the responsibility of Internet intermediaries in France, New Zealand, South Korea, Ukraine, it should be mentioned that digital libraries and educational pages have a special position in the field of copyright protection on the Internet. In general, they are divided into commercial (where the user is required to pay a fee in a certain way) and free access (the user either does not have to pay at all, or generates revenue by viewing an advertisement, which is then directed exclusively to the needs of the web site without getting profits by owners). Commercial libraries operate in the legal field, since they are often formed by the right holders themselves or with their permission (for example, the work of international publishing corporations «Elsevier», «Springer»). Copyright protection issues are also rarely encountered by libraries that publish free articles.

A more complicated situation is the situation with libraries that illegally place copyrighted works. To date, the right to the existence and functioning of such open access electronic libraries as

Library Genesis, Twirpx, and Sci Hub is actively being defended. The basic principle of the work of such libraries is the free exchange of scientific and educational content through the user's filling of the site's database. The method of publishing material on them can range from hyperlinks to download and torrent files to direct download to the web site server.

In Ukraine, for the creation of an electronic library, there is a rather complicated procedure, which involves the creation of the Register of subjects of copyright for the works planned to be placed, the conclusion of contracts with the respective owners of copyright, the use of works statistics gathering, the remuneration [14]. The very resource-intensiveness of the procedure provides reasonable grounds for believing that most of the working electronic libraries in Ukraine are distributing copyrighted data illegally.

Thus, it can be argued that in Ukraine there was a legally established mechanism for the protection of copyright in the Internet with the appropriate diversification of Internet intermediaries and specialized regulations of their activities, however, in a limited number of issues. The next step in the development of this issue will be the practice of the authorities and the judicial branch of reviewing these cases, during which it will be possible to identify the shortcomings of innovations in the law enforcement aspect.

Conclusions. In Ukraine, copyright protection on the Internet is under development. Taking into account the positive experience of some countries and the international community in general, our country has excellent examples to follow and every chance of establishing effective mechanisms for ensuring the legality in the field of intellectual property on the Internet. Implementation of the achievements of world jurisprudence taking into account the peculiarities of national law will create a powerful regulatory framework, effectively working mechanisms for copyright protection on the Internet and regulate the activities of participants in these relationships, including Internet intermediaries.

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