

Improvement of Copyright Protection Mechanism on the Internet



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Abstract *The article investigates separate problems of intellectual property protection on the Internet based on the analysis of the Ukrainian acts of legislation provisions as well as defines the remedies. Methods of investigation: both general-scientific and specific-legal methods of theoretical knowledge became the basis of the research. The essence of the Internet as a global net is defined through the methods of comparison and analysis in relation to the technical method. By their means, the author has also found out the peculiarities of intellectual property*

rights security and protection within the sphere of the Internet. The use of technical method enabled to determine the main types of copyright infringement on the Internet. Through the use of expectation method, the author analyses the questions of copyright infringement recording on the Internet and offers the ways of improvement of intellectual property rights legal protection within this Net. Results: problem-solving ways in the sphere of copyright protection and neighboring rights on the Internet are outlined. Discussion: ensuring proper and effective level of intellectual property rights protection on the Internet as one of the strategic directions of national legislation reforming and law enforcement practice within the sphere of copyright and neighboring rights.

Key words: *Internet, intellectual property right, protection, security, copyright infringement, copyright.*

Problem statement

The problem of copyright protection and neighboring rights on the Internet is a thorny question nowadays due to the lack of single position for all the countries. The use of foreign countries experience while developing the system of intellectual property rights protection, including the Internet, is of great importance for Ukraine. Since our country set a task to reform the national system of intellectual property legal protection, to increase sufficiently the level intellectual property rights protection, to fulfill all the existing international obligations and leave the List of 301, to ensure the proper level of intellectual property rights protection on the Internet, to safeguard the strategy vector of national development "Ukraine – 2020", as well as to achieve gain in the international ranking of environment of innovation and investment opportunities.

Society informatization and development of global information networks created unlimited possibilities for the use of Internet in different life spheres. However, fast development together with the use of Internet poses a set of threats and challenges, especially concerning copyright and neighboring rights infringement in the information space, in particular: preview of webpages, saving their content in the computer memory, copying texts, pictures, sound signals, their acquaintance with

unrestricted circle of users – all these actions incur significant losses for copyright and neighboring rites proprietors of both substantive and intangible nature. The above-mentioned infringements have always increased because of imperfection of legal regulation of relations in the sphere of copyright protection on the Internet that lead to the situation when Ukraine was referred to be "the biggest intellectual property rights infringer" due to the data of the United States

Trade Representative (USTR). However, with the assistance of international organizations the changes to the legislation were developed that improve copyright protection mechanisms from infringement, notably: The Law of Ukraine was passed "On the State Support of Cinematography in Ukraine" [1] that makes a set of changes in the regulatory legal acts that settle relations between intellectual property rights proprietors. In particular, with the amendment to the Law of Ukraine "On the Copyright and Neighboring Rights" [2] the new article 52-1 the partial regulation of non-jurisdictional form of copyright and neighboring rights protection on the Internet objects was made. The new article of this legislation assumes the commitments of hosting service providers on the copyright and/or neighboring rights protection using the Internet and specifies the peculiarities of their responsibility for copyright and/or neighboring rights infringement; the activity of several known unauthorized websites (ex.ua, torrent.net.ua, extratorrent.cc, fs.ua, hdclub.org) was stopped; the Department of Cyber policy as a part of National policy was created and started to cooperate with Interpol in the sphere of intellectual property; The Superior Intellectual Property Court was created; the reform on the collective management of copyright and neighboring rights proprietors' property rights was started; the takedown notice with partial responsibility of website hosting-providers was introduced.

However, Ukraine still remains to be favourable for the activity of Internet pirates and takes the third place in the world for the number of peer-to-peer connections for illegal videogames filesharing.

Therefore, all the mentioned above testifies to the fact that a series of questions on the procedure of termination and fixing infringements of copyright and/or neighboring rights on the Internet was left behind, inclusion of electronic evidences by the courts, prevention of infringements through the proper use of copyright self-help mechanisms etc.

Analysis of research and publications.

The problems of intellectual property rights protection from infringement on the Internet have often attracted the attention of academic circles. Separate problems of intellectual property rights protection on the Internet were discussed in scientific works of such native theorists and practitioners as: Yu. Ye.

Atamanov, S. V. Bondarenko, G. I. Grigor'iants, K. O. Zerov, Ye. V. Kovalenko, P. Kalenychnenko, A. V. Kyrlyuk, Ye. P. Lytvynov, M. O. Melnychuk, O. A. Pidopygora, O. M. Pastukhov, Yu. S. Shemshuchenko, R. B. Shyshka, A. O. Shtefan and others. However, new and fast technical development constantly issues new challenges concerning the improvement of copyright protection mechanisms on the Internet.

The purpose of the article is the analysis of current legislation concerning form and substance of copyright infringement on the Internet, ways of its prevention and elimination.

Statement of basic materials. The change of the Internet into the leading means of communication, information exchange and business operations creates new phenomena in the system of intellectual property relations, determined by virtual content, transboundariness, and dynamic nature of this global net. What does the notion "Internet" stand for? It is worth noting, that the first definition of this concept was given by the the United States Council for Networks in 1995: "Internet" – is the part of global information system, that is logically connected with it by the unitary address, established on IP-protocol or its perspective extensions; can support communications using Transmission Control Protocol / Internet Protocol (TCP/IP) or its gradual extensions and/or common protocols; provides, uses and/or makes available (for everybody or confidentially) services of high level, based on the communications and is connected with them by infrastructure" [3, p. 198].

On the legislative level the concept of "Internet" is defined in the Law of Ukraine "On Telecommunications". In accordance with article 1 of regulatory legal act, the Internet – is the global information system of public access, that is logically connected by the global address space and is based on the Internet-protocol, defined by international standards [4].

Although the Internet contributes to technical progress in the world, the large-scale use of it causes the possibility of distribution of unreliable information, plagiarism, unauthorized use of unique content, protected by copyright and other violations, the number of which increases. The ability of infringers to act anonymously on the Internet as well as

lack of education of the majority of global Net users with respect to the existing system of copyright and neighboring rights protection – all these resulted in the persistent requirements of international community concerning activation of Ukraine in struggling against Internet pirates.

In accordance with part 1 art. art. 52-1 of the Law of Ukraine “On the Copyright and Neighboring Rights”, during the infringement of copyright and/or neighboring rights by any person, done with the use of Internet, the copyright and/or neighboring rights proprietor has the right to make an application to stop infringement to the website and/or webpage owner, where electronic (digital) information is posted or otherwise used [2].

However, this procedure of copyright and neighboring rights protection is applied only to relations connected with the use of audiovisual, musical works, computer programmes, visible records, soundtracks, broadcasting programmes.

Generally, any direct or indirect actions of the person headed towards infringement of rights and interests of copyright proprietors that are given them by the law or assumed by the treaty, carried out with the help of Internet are referred to be copyright infringement.

In this regard, one of the problems to be solved is the procedure of proving the existence and ownership of copyright on the intellectual property right Internet object to the copyrighter as well as establishment of copyright infringer identity. According to O. Riabets, posting reliable information about website owner is rather exception than norm, and copyrighters remain to be unsecured further, hence it is impossible to find out to whom to issue a claim [5]. The application about infringement termination has to contain reliable information as to the existence in applicant the title in intellectual property on the item subject to copyright and/or neighboring rights, indicated in the corresponding application. This clause neutralizes one of the main copyright provisions, in particular: “copyright exists from the moment of corresponding object creation and its registration is not obligatory” and provides the area for abuse, manipulation and refusal on the part of website owners. In accordance with the part 4 article 11 of The Law of Ukraine “On Copyright and Neighboring Rights” [2], the person owing a copyright (the

author of the work or any other person to whom the title on this work was legally passed), can use copyright reserved sign to inform about his/her rights. This sign comprises the following elements:

- circled Latin letter “c”, - (there is no image of the sign);
- the name of the person holding a copyright;
- the year of the first publication of work.

It is worth noting, that it is the absence of knowledge of subjects of legal relations in the system of Internet copyright protection and security that leads to their infringement.

The most common copyright infringements are the offences connected with illegal use of exclusive property rights of authors as well as illegal distribution of works. The following can serve as the examples of copyright infringements mentioned above: posting on the Internet sites for free (paid or unpaid) access without the consent of the author (or authors) or other copyrighters, publication of works in public establishments whether on a paid basis or free of charge (without paying royalty by the establishment), loading the work or a part of it into mobile phone or tablet computer memory whether on a paid basis or free of charge etc. The most of the Internet copyright infringements are revealed through illegal reproduction and copying musical, art, literary works, or computer programmes without the prior consent by the author or copyrighter. Taking into account the technical means available today, there also exists authors non-property rights infringement, in particular, plagiarism that can be considered as unmotivated reproduction.

Having analysed judicial practice on settlement of disputes related to copyright on the Internet, one has to emphasize the problem of recording offence. Hence, its individual recording in the court will not be regarded as an evidence, consequently, it has to be certified by the relevant authority or expert, providing that the evidence is not withdrawn.

In accordance with article 76 of the Ukraine Code of Civil Procedure [6], the evidence is any data based on which the court establishes the presence or absence of circumstances (facts), that prove claims and objections of parties to a case and other conditions, important for solving the case. These data are

established by the following means: 1) written, material, electronic evidence; 2) experts' conclusions; 3) witnesses' evidence.

The main aim of copyright infringement recording is getting appropriate and reasonable evidence that can further be used in the court. As of today, there is no legally established ways of recording the webpages content on the Internet. The analysis of statutory provisions and academic views makes it reasonable to offer classification of ways of recording of webpage content on the Internet that can be of use in the law enforcement process. Therefore, according to the person doing the Internet page content recording, the following recording can be differentiated: recording that is conducted individually by the copyrighter (or his agent); recording, carried out by the third party (notaries, surveyors, patent attorneys, intermediary service providers); recording, carried out by the court [7].

In accordance with the character of recording, the following ways of recording can be used: visual (they assume only visual overlook of the image, shown on the screen of output device) and technological.

The clause 46 of the resolution of the Plenum of the High Economic Court of Ukraine "On Some Issues of Disputes Settlement, Connected with Intellectual Property Rights Protection" from 17.10.2012 №12 provides for the use as an instrument of evidence a video-, an audio record of the process of investigation of the site, according to which there is some information of its usage with the violation of copyright and neighboring rights by any interested person. This record, saved on the electronic or other media (hard disc, floppy disc, laser sensing system disk, other medium) is brought to court, providing the information about who, when and on which conditions created it and can serve as a material evidence in the case [8].

Proceeding from the above, it is worth noting, that there is a series of practical ways to record facts as an instrument of evidence on the Internet, among which are the following: 1) printing of website page on the Internet; 2) evidentiary hearing as a part of proceedings; 3) submission the expert's conclusion to the court; 4) report of website survey with the supplement of site photo, taken by the lawyer; 5) electronic evidence, certified by electronic signature, in accordance with article 1 of the Law of Ukraine "On Electronic Signature" and

part 2 of the article 96 of the Code of Commercial Procedure of Ukraine.

Under the electronic evidence one should understand information in electronic (digital) form, containing data about circumstances having relation to the case, in particular, electronic documents (including text documents, graphics, schemes, photographs, video- and audio records etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. This data can be saved, in particular, on unattached devices (memory cards, mobile phones etc.), servers, backup systems, other places of saving data in electronic form (including the Internet).

The question about getting notarial certification of webpages on the Internet remains controversial, since the notaries of Ukraine provide for the only procedure such as certification of a copy to a document or its extract to be true.

One more issue that is of importance as of today is a formation of specialized court in the sphere of intellectual property. It seems reasonable to us that it is the Supreme court for intellectual property that will give the opportunity not only to form professional judicial practice on intellectual property issues but will provide appropriate professional consideration of this category of cases, since nowadays the protection by courts of copyright and neighboring rights is regarded to be one of the most effective. Therefore, current national experts in intellectual property (V. Tatsiia, O. Petrushuna, R. Stefanchuk) consider that creation of separate Supreme court for intellectual property will contribute to solving the problem of differentiation of courts' jurisdictions during trials of intellectual property cases and correspondingly will provide the use of equal and correct judicial practice of settlement of relevant disputes. The creation of such a court will also be aimed at developing effective system of intellectual property rights protection with account of international standards and furthermore will improve investment attractiveness of our state.

Despite the fact that idea of extension of courts' specialization in intellectual property disputes was embodied in Ukraine, according to D. Grygorov [9], a series of questions of present-day conception of the Supreme court for intellectual property remained unsolved, in particular:

– *Territorial remoteness.* Since the court for intellectual property will be situated exceptionally in Kyiv, it will naturally cause the problem of access to the court for the majority of common Ukrainian citizens.

– *The absence of ex parte proceeding in the Code of Commercial Procedure of Ukraine.* The issue about procedural mechanism of recognition of brand name to be well known, that in all the circumstances cannot be actionable, is not solved today.

– *The problem of professionalism of future judges.* Specialized court for intellectual property would have to consolidate people who are experienced in this sphere and have appropriate special education (special knowledge). However, the legislator decided that in the Supreme specialized court those people can work that have neither experience in this sphere nor relevant knowledge. This refers to judges, first of all, those who are required to have only three years of experience in a position of judge. However, it is of no importance whether these years are in the sphere of intellectual property or during these years other disputes were settled. The state judicial administration with the approval of High Judicial Council has defined the number of judges in the court to the extent of 21 posts.

– *The absence of the expert (adviser) during proceedings that has special knowledge*

in administration of legislation practice in the sphere of intellectual property. According to new version of the Economic Procedure Code of Ukraine, the participation of an expert in the proceedings is restricted to giving assistance to the court in the use of technical means. In this regard, some scientists argue that it is reasonable to introduce such an expert that could be engaged by the court to make a finding, provide oral pleadings or explanations.

Therefore, it may safely be said that as of today the forming and beginning to work of the Supreme specialized court for intellectual property is connected with lots of unsolved issues of both procedural and organizational character that exacerbates not easy task of this judicial branch functioning in the Ukrainian court system.

An appropriate and effective level of intellectual property rights protection is to be understood as one of the strategic directions of national legislation and law-enforcement practice reforming on the whole in the direction of European integration. In accordance with the Strategy of sustainable development “Ukraine – 2020”, approved by the Decree of the President from January, 12-th 2015, intellectual property rights protection is defined as the reforming vector towards national security that is able to provide Ukrainian integration into international community.

Conclusion

In our opinion, the ways of problem solving in the sphere of copyright and neighboring rights protection on the Internet should be defined as follows: 1) strengthening responsibility for copyright infringement on the Internet; 2) providing a legislative framework for the list of webpages content recording ways on the Internet; 3) adoption of special laws that would increase the responsibility of providers; 4) charging the Internet-providers with control functions over the users' activity, giving information about clients (given only by decision of the court) and granting authorities concerning participation in the process of copyright objects' and neighboring rights protection from the Internet piracy; 5) building cooperation that would provide the participation of Ukraine in the international law-enforcement operations on closing websites that offer counterfeit and pirate products; 6) close cooperation with the National police in terms of crime detection in the intellectual property sphere; 7) creation of bodies which activity would be oriented to struggle against intellectual property rights infringement as well as the protection of these rights and raising legal consciousness and culture of Ukrainian citizens.

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