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INTERNATIONAL EXPERIENCE IN THE PREVENTION OF COPYRIGHTS CRIMES ON THE INTERNET

Nowadays copyright crimes on the Internet require the particular attention of government authorities and non-government organizations as well as investigative authorities. These types of crimes are especially comprehensive in commission and crime-solving, but their prevention is much more difficult.

Regarding that, Internet crimes imply the latency of such crimes due to complicated mechanism of their committing; it becomes difficult to design useful and applicable ways in which such crimes can be prevented. Accordingly, Ukrainian legislation is average in comparison with the experience of international countries, and needs changes with the course on its development due to European rules of law. With the course of accession of Ukraine to the European Union, it is worth pointing out the fact that sphere of copyrights is also crucial, which is stated in the EU-Ukraine Association Agreement.

In this article, we will consider the most prevalent ways of prevention the copyrights crimes. Here European legislation and international approaches for the prevention of copyrights crimes are investigated and the main ways for reducing such types of crimes are highlighted.

The purpose of the article is to investigate the approaches of European countries' authorities and regulatory agencies in the prevention of crimes connected to copyrights, and to review their legislation to prevent copyright crimes on the Internet. Thus, when Ukraine implements prevention methods outlined below, to the Ukrainian legislation practice, it will fundamentally change the current situation of copyright crimes commission on the Internet in Ukraine, decreasing their rate and latency.

Among the scholars who deal with this issue, the following ones can be distinguished: Margot Kaminski, Eldar Haber , Ann Bartow, Michael Birnhack, Assaf Eckstein, Niva Elkin Koren, Olga Frishman, Maytal Gilboa, Ayelet Hochman, Assaf Jacob, Mark Lemley.

There are also Ukrainian scholars who investigated the prevention methods of copyrights crimes: Matviienko O.V., Zerov K.O., Turbovets A.S., Bohynia K.O. and others.

Keywords: copyright crimes; prevention of copyright crimes; crime on the Internet; Internet crime; criminal offence on the Internet; copyright crime on the Internet; methods of prevention of criminal copyright infrimgements.

Trotter Hardy in his article 'Criminal copyright infringement' says that 'copyright crime on the Internet' is becoming a new 'white-collar crime'. He underlines brilliantly the next: 'Much of the recent trend toward increased penalties and punishment has centered on infringements of electronic ("digital") materials, especially as they are transmitted over the Internet where the opportunities for infringement without detection are greatest today'[1].

[1] Criminal Copyright Infringement (2002). *William & Mary Bill of Rights Journal/Criminal Copyright Infringement* <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1320&context=wmborj>. (2020, November, 12).

His thought, in my humble opinion, reflects the easiness of committing copyright crime on the Internet. Sophistication of tracking of these types of crimes, identification of criminal and their location move into the preventing and investigation problems. There is even a problem to identify what country offender is in due to the newest apps for concealing a location of committing crime, e.g. Nord VPN, CyberGhost, Express VPN, that successfully make all information about approximate location hidden.

There is the fact that such process as digitisation of copyright crimes did result in pervasive, global and practically uncontrolled copyright crimes and infringements due to the easiness of replication on the Internet, and both the simplicity and rapidity of digital transmission and the affordability of digital manipulations.

There are two ways how authors can make their digital works protected – contractual stipulations and technological protection. Circumvention of technological protection is practically couldn't be done. The WIPO Copyright Treaty has been internationally signed in 1996. Under this treaty, each Contracting Party is obliged, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, regarding Article 11 of the WCT, every party to the treaty «shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law»[1].

For satisfying the purpose of this article, we consider that it is necessary to highlight the main laws of European countries to combat copyright crimes on the Internet.

Starting with Spain, it should be noted that on 31 December 2011, the Royal Decree 1889/2011 was promulgated, which in his turn, supplemented the functions of the Spanish Copyright Commission (an abbreviation – 'SCC') and set the notice and takedown procedure to protect copyright on the Internet that was adopted by the debatable Spanish 'Sinde Act'. This act has been adopted by Spanish government on 3 January, 2012 and is known as 'Sinde', as it was named after the last minister of culture Angeles González Sinde.

That modern law enhances the concept of intellectual property and establishes a new Official Committee that has the authority to prosecute Internet sites that offer copyright content without the rights to do so. The SCC was created under the Ministry of Culture as a national authority designed to defence copyright. This national body is entrusted with arbitration and mediation functions. Though, such functions were strengthened by the mentioned above anti-Internet piracy 'Sinde Act' in March 2011, which established the procedure of notice and takedown for the deletion of content which infringes copyright and made a new division of the SCC ('Section Two') concerned with such procedure. Regarding the law, those individuals who download objects illegally should not be punished[2].

In regard of new anti-Internet piracy law, any content and service provider may be a subject of the new notice and takedown procedure. This applies to providers of communication infrastructure and services (for example, operators providing Internet access or those who provides housing services), and also to those who enable third parties to upload content, e.g. social networks, blogs and marketplaces, and other providers of services as those who provide links to illegal content.

By the way, 'Sinde Act' entails that any company or individual taking part in providing of Internet services may be required to stop the connection to illegal content or take down content uploaded by third parties. As intermediaries are not the main target of the notice and takedown procedure, broadly speaking, they are not responsible for copyright crimes, – they can be engaged in investigation activity of SCC through providing data about the alleged violator or suspending access to the society services and sites with information which infringe copyright.

The law stipulates that a judge must order the shutdown of a suspicious website upon receipt of the recommendation of the Committee and gives a maximum of 10 days to have it shut down. The owners of illegal websites have got two days after the requirement to close infringing sites without any fine or consequences.

This law allows the application of the notice and takedown procedure against perceived copyright infringing actions which suit the following two general requirements:

1) they are carried out with a profit-making motive, or cause (or are capable of causing) a patrimonial damage (i.e. financial loss);

[1] WIPO (1996). *Copyright Treaty (adopted in Geneva on December 20* <https://www.wipo.int/treaties/en/text.jsp?file_id=295166#P87_12240> (2020, October, 26).

[2] BBC (2012). *Anti-internet piracy law adopted by Spanish government* <https://www.bbc.com/news/technology-16391727> (2020, October, 26).

2) they constitute "information society services", as this concept is used by the Spanish E-commerce Act implementing the E-commerce Directive[1].

According to the procedure, for alerting about the copyright violation, the copyright owner is obliged to fill out an application and send it to the SCC. The application must contain the information on the identification of the infringed copyrighted works, a description of the alleged breach and evidence confirming actual copyright infringement and the damage that is caused or potential damage might be caused.

Besides that, the copyright owner must submit details regarding the relevant Internet service provider and the intermediary service providers that are used. After that, the SCC inform designated intermediary services providers about the beginning of the procedure pursuant to their condition as an interested party, and to assist in future cooperation regarding identification of the alleged violator and the removal of the unlawful content. The SCC will then work to reveal the individual or company is liable for the relevant infringement. In case when the SCC has not such instruments to identify the responsible party (for example, this authority has few information at its disposal about the ISP), it will communicate with the national Courts (in this situation, the Administrative Courts) and request a Court order which asked for the relevant intermediary services provider to give the SCC any data that can be useful in the identification of the appropriate ISP. Then, this ISP must carry out the order within 48 hours.

Continuing the theme of the notice and takedown procedure in Spain, after receiving a Court order the service provider must willingly remove the infringing content or stop doing activity is assumed to be unlawful within 48 hours or provide defence evidence regarging the content or activity that is deemed to be infringing. When the service provider voluntarily deletes the content, the SCC will stop carrying out the procedure and inform the interested parties (as a rule, the copyright holder and the intermediary services providers). If not, when service provider doesn't willingly shut down the infringing content or unlawful activity, the SSC will have two days to investigate all obtained evidence and report the interested parties about the results of considering, together with a proposal to resolve. Then, all parties involved will have five days to provide their conclusions in relation to the resolution of the SSC. When period for making conclusions has finished, the SSC must adopt the resolution, which confirm or refute the existence of copyright infringement. The SSC will order the service provider and the online content to remove illegal content within maximum 24 hours in case of copyright infringement is confirmed. When the order of the SSC is executed, but infringing content isn't deleted during that time, the SSC will promptly request to the relevant Administrative Court with application to issue a Court decision where implementation of the measures suggested by the SSC in the mentioned resolution are confirmed or rejected.

In case when the Court agrees with measures, proposed by the SSC, the Court decision shall be addressed to all interested parties. Also the intermediary services provider is obliged to fulfill the suspension measures within 72 hours, since the receipt of the notice of the Court decision, where stated that the service provider and the online content have not deleted the infringing content or stopped unlawful activity[2].

We gradually come to considering UK legislation in preventing the copyright crimes in the Internet. First of all, it must be noted that existing legislation for 2006, namely s97A of the UK Copyright, Designs and Patents Act 1988, was not effective enough to provide right holders with appropriate level of protection against online copyright infringement (OCI), especially illegal file-sharing). Pursuant to s97A, the High Court is empowered to grant a decision against a service provider, where it has actual knowledge about a person who use their service to infringe copyright.

Secondly, regarding Gowers Review of Intellectual Property (known as Government's Review of IP in the UK in December, 2006), right holders and Internet Service providers expressed their disagreement on the interpretation and effect of s97A and about it has remained totally untested since 2003. Accordingly, the government declared in February 2008 that it would conduct consultations on legislation that would entail Internet service providers and copyright holders to be involved into taking actions on online copyright infringement, in order to implement legislation by April, 2009. In addition, in July 2008 six largest UK's Internet Service providers together with government and industry representatives signed the agreement of understanding according to which they agreed working for a meaningful reduction in unlawful file-sharing. But unfortunately, the fulfillment of 'the memorandum of understanding' was unsuccessful because copyright holders and these six ISPs didn't come to common decision on how any measures to reduce online copyright infringements would be funded.

[1] Lovells, H. (2012). *Measures to limit online copyright infringement* <https://www.lexology.com/library/detail.aspx?g=b3591f12-9d56-4618-8ca3-985312a6fc28> (2020, October, 26).
[2] Ibid.

Following this failure, the government was obliged to legislate in this area and the appropriate provisions were enacted and then integrated in the 'DEA' (UK Digital Economy Act 2010). During the discussion of the 'DEA' in Parliament of the United Kingdom, mentioned provisions related to OCI evoked active discussion and ultimately were seriously amended at each stage. In the overall, the Digital Economy Act 2010 (DEA) was enacted by the UK Labour Government during the 'clean-up' phase when legislation is passed by Parliament in the last days of a standing government (UK Government, 2010)[1].

For combating Internet-crime, two phases of regulations were set out in the 'DEA'. The first phase implies a mechanism regarding which copyright holders would identify the IP addresses of people being suspected of infringing copyright law and relay these IP addresses to the certain ISPs. After that, this particular Internet Service provider would then send warning notices to the suspected infringers. The ISPs might also be associated to give copyright holders an anonymous list with subscribers in respect of which the Internet service provider had previously received a big number of infringement notices from the copyright holders. With this anonymous list copyright holders are able to go to a court with a view to receive the names of the relevant subscribers with the aim of bringing individual copyright infringement actions.

The second phase of regulation is comprised of technical measures that ISPs may undertake with the aim to limit online copyright infringements. These technical measures may involve restriction to Internet access for specified subscribers, which is similar to the French step-by-step response regime[2].

France was one of the first countries implemented into national law the European E-Commerce Directive in 2006. The e-Commerce Directive is the legal framework for online services in the Internal Market. The purpose of the Directive is to remove obstacles to cross-border online services in the EU and provide legal certainty to business and citizens[3]. This law was enacted in 2000 and incorporated 'the notice and take down' procedure at EU level, the same was inserted along with enacting of US DMCA (Digital Millennium Copyright Act, 1998). This procedure gives Internet Service providers immunity from liability, except when they were notified of infringement and didn't urgently delete the content. The French law, called the 'DADVSI' in French, has raised discussion concerning the relevant measures that should be undertaken to reduce online copyright infringements.

It should be noted, that private lawsuits against Internet users who infringe copyright through file-sharing in France were in particular cases unsuccessful because judges resist applying strict infringement sanctions to teenagers who download music for personal usage. Though, it became obvious that French copyright law was poorly adapted to the OCI, due to the fact that penalties for copyright infringement in this country were so tough.

The law DADVSI set a new duty of care for Internet subscribers to pursue relevant measures to assure their Internet access is not used for copyright infringement. However, such duty of care was not accompanied by any penalty and remained on paper.

Hence, the DADVSI didn't establish mandatory licencing for private downloading, this law included a provision implying that peer-to-peer downloads made by individuals wouldn't further be considered as a crime pursuant French copyright law, but would be considered only a misconduct (misdemeanor) due to a low-level fine the same as a parking ticket. France's Constitutional Court found that this lightened sanction regime violated the constitutional principle of equality of punishment for the same crime, in relation to the DADVSI set two different kinds of punishment for the same copyright infringement act, depending only on the technology used to commit infringement.

The DADVSI established a new regulatory authority, which called the "ARMT", which became responsible for issues related with compatibility of technical protection measures. The ARMT was designed to rebalance copyright and freedom of expression and ensuring that technical protection measures do not impede legitimate uses of the protected work, or hamper interoperability. The ARMT eventually became the French regulatory administrative agency today known as the "HADOPI".

Then French Council of Ministers initiated the enacting process of the controversial HADOPI law, which would introduce the three-strikes gradual response system, the regime that could finally sanction repeat infringers with the temporal suspension of Internet access. The first version of the law had authorized The

[1] UK Government (2010). *Digital Economy Act*. London: The Stationery Office Ltd, 24.

[2] Hlmediacomms (2012). *Europe: Measures to Limit Online Copyright Infringement* <https://www.hlmediacomms.com/files/2012/11/Europe_-_Copyright_Infringement.pdf> (2020, October, 26).

[3] Ec.Europa (2020). E-Commerce Directive. Available at: https://ec.europa.eu/digital-single-market/en/e-commerce-directive#:~:text=The%20e%2DCommerce%20Directive%20is,certainty%20to%20business%20and%20citizens> (2020, October, 26).

French Copyright Authority to take decisions on the suspension of Internet access for repeat infringers after a procedure in which the alleged infringer could provide his or her defence. The Constitutional Court decided that the suspension of Internet access caused a serious restriction regarding freedom of expression and decreed that only judicial authority has a right to order such a substantial measure, not an administrative agency. After revocation of the HADOPI law in this particular part, the government presented the amended document that established an expedited procedure under which a court could make the final decision whether or not to suspend Internet access for repeat infringers. This amended act of HADOPI law remains in force until today[1].

Applying such measure as web-blocking for copyright protection generally is applicable in the practice of **The European Court of Human Rights** (ECtHR). However, court's prohibitions for web-blocking should not be used as the methods of general blocking of information on the Internet: as stated by investigators of the use of Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users[2], blocking and filtration are the methods of limitation of online access to information, its publishing on the Internet, thus, they shall comply with the clauses stated in the Part 2 of Article 10 of European Convention on Human Rights and practice of European Court of Human Rights .[3]

When using web-blocking it is mandatory to weigh all the interests and estimate the importance of full blocking to a web-site. Thus, the Court announced as unacceptable the individual application in the ***Akdeniz v. Turkey (dec.) case*** *(application number* 20877/10) about the breach of Article 10 of European Convention on Human Rights, because the applicant was not a victim due to Article 34 of abovementioned Convention. Since the court prohibition on web-blocking just partly concerned the applicant as a normal user of blocked sited 'myspace.com' and 'Yeit'; the applicant was not allowed using the only one from all possible ways of listening to music; the applicant did not allege that these websites shared the information of specific interest for him or web-blocking deprived him of a source of important communication; the applicant's interests should have been balanced regarding copyright subjects as stated in the First Protocol to the European Convention on Human rights[4].

Meanwhile, in the ***Yildirim v. Turkey case*** *(the application 3111/10)* the Court found the fact of violation of Article 10 of Convention in case, when national courts totally block an access to the abovementioned services for a victim as an owner and a user of GoogleSites services (inclusively the access to own account) , while the offence listed in the national legislation occurred only at one page of that service.[5]

The above examples from the practice of the ECHR indicate restrictions for the average user to access to information posted on the network. It is important to remember the fair use of the content is arranged on the Internet, that is, according to the article 10 of European Convention on Human Rights *"freedom to receive and impact information"*which also applicable for the information placed on the Internet, but only within the framework of which copyright is not violated.

As the result of the fundamental analysis of different worldwide approaches of copyright protection on the Internet, we can see that there are various mechanisms for such protection of violated rights as well as a large number of preventive measures. The research shows that the usage of the above analysed approaches depends on the political ideology of the country. For example, the liberal USA uses more loyal means of copyright protection at a time when socialist China uses stricter methods of controlling network content and user's digital activity.

It is also important to remember that internet piracy negatively affects the economy. For example, in the USA a study showed that in 2017 the U.S. economy lost $ 29.2 billion and up to 560.000 workplaces per year.[6]

There is no direct one hundred percent effective rule for the full protection of copyright on the Internet.

[1] Hoganlovells (2015). *Is 2015 the year of the website-blocking injunction?* <https://www.hoganlovells.com/files/upload/Is%202015%20the%20year%20of%20the%20website-blocking%20injunction.%20pdf.pdf> (2020, October, 26).

[2] Recommendation CM/Rec (2015). *6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum.* Київ: Інжиніринг <https://rm.coe.int/16802e3e96> (2020, October, 26).

[3] WIPO-Administered Treaties (1883). *Paris Convention for the Protection of Industrial Property* <https://www.wipo.int/treaties/en/ip/paris/> (2020, October, 26).

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[6] NCTA – The Internet & Television Association (2019). *"How Digital Piracy is Harming America's Economy"* <https://www.ncta.com/whats-new/how-digital-piracy-is-harming-americas-economy> (2020, October, 26).

Most of the discovered approaches that can be implemented depend on the citizents' level of awareness with respect to copyright. The statistics after the implementation Anti-Piracy laws in different countries shows that the most effective systems to provide strong copyright protection on the different stage of commiting the infringement. There are several useful preventive methods which start from the rise in awareness to respect copyright on the Internet and to provide and open licenses where users can get acquainted with term of use of the content. Also, there were effective methods to deal with violators on the Internet when committing infringements and it is about 'limited functionality', 'time bomb' and 'clearing houses'. Upon the commission of a piracy crime such methods as: suing the violator and the claiming of damages are traditional but still very effective methods because of the significant fines and payments of compensation.

Apart from that, some countries delegate obligations regarding monitoring and provide protection for infringed copyright on the Internet to the private sector, thus, private law firms are authorized to define infringements on the Internet and punish the violators.

Taking into account that the network is worldwide and there are many ways to commit copyright infringement it is important to construct the most effective methods of combating piracy at an international level by creating a global system of protection, new international anti-piracy organizations, which will help and support less developed countries, to share experiences and try to provide worldwide protection systems on the Internet for rights holders.

We should always keep in mind that piracy infringements will mainly take place on the Internet, but experience of the above mentioned examples in this research show that it is possible to fight against such infringements, punish the violators and raise the awareness of copyright rules and principles.

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