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Responsibility of Internet intermediaries for violations of intellectual property rights

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The content on the Internet can instantly reach an unlimited number of users with minimal cost and without time and territory restrictions. However, freedom of information exchange has not only positive aspects. Over the past decades, the Internet has become a broad arena for "intellectual piracy". In this regard, the question arise: how can the copyright holder today protect his content from Internet pirates and who is responsible for the violations of copyrights?

Responsibility of Internet intermediaries is expressed in two main forms: secondary liability and injunction. According to the first, Internet intermediaries can be held liable for violations of their users, while an injunction guarantees that intermediaries will stop network violations, even if the basis for their own responsibility cannot be established.

The specificity of the activities of Internet intermediaries is that, on the one hand, their services are of a technical nature, and the intermediary is usually not aware of what content is uploaded to the website. But, on the other hand, the intermediary creates the conditions for posting such information and has the ability to block it.

The Digital Millennium Copyright Act of the United States 1998 (DMCA) contains provisions that are in practice referred to as safe harbor [8]. The essence of these provisions is to establish special grounds for exemption from liability for copyright infringement. These include the following conditions: lack of financial gain, lack of actual knowledge about the illegal content, expedient removal of such content upon receipt of a notification (so-called notice-and-take-down procedure). This mechanism is especially effective against anonymous offenders, and also does not impose significant organizational or financial burdens.

A similar mechanism is also enshrined in EU law and is regulated in detail by Directive 2000/31/EC (art. 14). Under the EU law online intermediaries have a duty to provide a safe online environment to users by sanitizing it from illegal content promptly and proactively [1]. However, the E-Commerce Directive does not exclude the possibility of blocking (art. 15).

States are gradually incorporating injunctions into the structure of legal remedies.

On January 1, 2018, the Law on Measures for Social Networks (NetzDG) entered into force in Germany. It requires large network platforms (e.g. Facebook, Instagram, Twitter) to quickly remove illegal content within 24 hours. In fact, the law shifts the functions of censors to social network administrators. The law does not provide for judicial protection in the event that the administration of a social network violates a person's right to access information. Because of this, the German media called NetzDG one of the most repressive laws against the Internet [5].

In Russia, according to Federal Law No. 187 (the "Law on the Suppression of Piracy") entire sites may be blocked as a preliminary interim measure. The Law also allows copyright holders to achieve permanent blocking of pirated sites in the event that the court twice decides that the information resource has violated intellectual rights. In practice, there are still problems associated with the use of the locking mechanism. For example, blocking a site not by name, but by IP address, will terminate access to all sites located on the server with this IP address [4].

Over the past few years, European courts have paid increased attention to freedom of expression and information as a mechanism of external restrictions on intellectual property rights.

In one of the first such cases, *Scarlet Extended v. SABAM*, the court ruled that the adoption of such an injunction would amount to a violation of Art. 11 of the EU Charter (freedom of expression). Such blocking is not able to distinguish legal and illegal materials. However, compatibility with EU law of injunctions providing for specific measures is not excluded [6].

The co-founders of "*The Pirate Bay*" internet service have been convicted in Sweden for contributing to subsequent copyright infringement. The ECtHR was of the opinion that national copyright regulation is contrary to Art. 10 of the European Convention on Human Rights. In the Court's view, since "The Pirate Bay" provided the means to disseminate information, the use of this platform for file sharing was protected by Art. 10 ECHR [3].

In *Akdeniz v. Turkey* 2014 the ECHR faced the problem of blocking access to the sites "myspace.com" and "last.fm" in Turkey because they distributed copyrighted music. The court affirmed that "any measure blocking access to the website should be specific" [2].

However, some national courts have not stopped issuing "massive" injunctions.The Paris Civil Court of First Instance ruled that French providers had to block 16 specific copyright infringing video websites. And the major search engines used in France (including Google and Yahoo!) should exclude these 16 websites from search results [10]. A number of film studios forced British Telecommunications plc ("BT") to ban its users from access to the Newzbin2 website, which made downloading materials easier. The court ordered BT to block access to any web address that provided access to the NewzBin2 website [9].

Is such security measure as blocking websites effective? This is an extremely controversial issue. Many resources continue to work successfully, generating income for their owners, even after blocking. For example, in 2016, by the decision of the Moscow City Court, the well-known information exchange service "Rutracker.org" was blocked. However, the final blocking did not lead to the liquidation of the resource itself. During the year of blocking, the number of file distributions on Rutracker.org was reduced by only 5% [7].

However, these regimes pose a risk that censorship by private individuals "chills" the freedom of expression on the Internet. In addition, there are disputes over ensuring freedom of access for users. In fact, even the mild notice-and-take-down procedure can break them. For example, this procedure caused 37% of unsubstantiated claims in the USA, and access to thousands of videos on YouTube was blocked by mistake [11].

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