INFORMATION INTERMEDIARIES IN THE LAW OF FOREIGN COUNTRIES

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Abstract. Regulation of the activities of information intermediaries is undoubtedly an important feature necessary for resolving problems in the field of intellectual property and copyright infringement. At the same time, a comparison of the norms regulating the grounds for the onset of liability of information intermediaries is carried out. The article examines the grounds for the onset of liability of information intermediaries, enshrined in the law of foreign countries

Keywords: information intermediary, liability of information intermediaries, USA, EU, Internet

Information intermediaries play an increasingly important role in modern society. Their actions influence the choices we make, how we exercise our rights, and how we interact. The market dominance of some of them allows them to control key modes of public communication. The term “information intermediaries” generally refers to a wide, diverse, and rapidly growing range of service providers that facilitate online interactions between individuals and businesses. Some connect users to the Internet, enable data processing, and host web services, including for user comments. Others collect information, assist with searches, facilitate the sale of goods and services, or enable other commercial transactions. Importantly, they may perform several functions in parallel, including those that are not simply intermediaries. Information intermediaries also moderate and rank content, largely through algorithmic processing, and they may perform other functions similar to those of publishers.

Because of their significant influence over the products and services offered by companies or organizations, they are potentially at legal risk due to the dissemination of the content they produce. In particular, they may be held either directly liable for their actions or indirectly or secondarily liable for the actions of their users. While this may be seen as an inevitable consequence of the services these intermediaries have chosen to provide, it is important to recognize that such liability may have a significant chilling effect on their willingness and ability to provide services, and may therefore ultimately hinder the development of the Internet itself.

In the law of foreign countries, persons providing services during the operation of the Internet are called differently: in the European Union the term “intermediary service providers” is used, in the USA – Internet Service Provider, on-line service provider, provider of access, provider of the informational content, in this article the term “information intermediaries” will be used to name the specified list of persons[1].

Historically, the first and leading reference for identifying the various types of information intermediaries has been the US Digital Millennium Copyright Act of 1998 (DMCA)[2] and in particular Section 512, which contains detailed rules limiting the liability of intermediaries in the context of copyright.

As can be seen from the main provision of this section and other international references, there are generally 5 types of information intermediaries covered:

1. Temporary digital communications providers.
2. Caching providers.
3. Hosting providers.
4. Search engines and application service providers.
5. Non-profit educational institutions.

[1] . Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). – [Электронный ресурс]. – Режим доступа: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:En:HTML

[2] Digital Millennium Copyright Act, December 1998.). – [Электронный ресурс]. – Режим доступа: http://www.copyright.gov/legislation/dmca.pdf

Directive 2000/31/EC [3] distinguishes three categories of providers:

1) content providers (provide their own content and ensure its availability);

2) access providers (provide access to information without storing it);

3) hosting providers (provide third-party content and ensure its availability).

The EU's ISP liability regulations are modelled on the US copyright safe havens, but unlike US law, Directive 2000/31/EC of 17 July 2000 on electronic commerce is not limited to copyright law, so ISP liability can be excluded in a wider range of situations.

The European Directive on Electronic Commerce 2000/31 (ECD) devotes four Articles (12-15) to the liability regime of "information society service providers", under which an "information society service" is defined as: ... any service normally supplied for consideration, at a distance, by means of electronic data processing (including digital compression) and storage equipment, and at the individual request of the recipient of the service.

This definition is broad enough to cover many services, including simple access providers, but it also differs in several important ways from the DMCA model. First, it requires in all such cases (and others) that the service be provided at the individual request of the recipient, thereby excluding radio and television broadcasting. Second, it excludes those services that cannot be provided entirely at a distance. It should be added that paragraph 18 of the ECD makes it clear that the concept of "remuneration" does not mean that the services must necessarily be provided in exchange for remuneration, so long as they qualify as part of an "economic activity".

In turn, intermediary liability refers to cases where information intermediaries involved in the transmission, processing or storage of electronic data over the Internet are liable for illegal content transmitted or stored on their networks. Sometimes intermediaries may be legally liable for content on their networks created by third parties, including content that they did not even know was on their networks.

Depending on the relevant national law, liability for third-party online content "may arise in a number of situations, both legal and political, including for defamation,

obscenity, invasion of privacy, violation of intellectual property rights, or because the content is critical of the government."

The initial approach to internet regulation by many governments was to shield information intermediaries from liability – an approach that may now seem counterintuitive. Given the importance of intermediaries to online information exchange, governments recognized early on that holding intermediaries liable for the illegal activities of third parties could significantly impede the free flow of information. They feared that online platforms might block content to avoid liability. In response, key jurisdictions – the United States and the European Union – adopted so-called safe harbor rules that have become a cornerstone of the modern platform economy.

In the European Union, safe harbors are enshrined in the E-Commerce Directive, which protects intermediaries from liability for third-party content. The definition of a "safe harbor" in the E-Commerce Directive was motivated not so much by the protection of free speech, but by the desire to allow the European IT sector to grow without fear of incalculable liability risks. Platforms such as Facebook or YouTube are granted immunity under Article 14 of the E-Commerce Directive if they meet certain conditions. To benefit from the safe harbor, they must promptly remove or block access to illegal content as soon as they become aware of it. Article 14 of the E-Commerce Directive has led to the development of notification and takedown procedures, but it does not regulate these procedures in detail.

The EU Directive establishes three types of information intermediary function, the performance of which entails special grounds for liability:

1. simple transfer of material, in accordance with Article 12, Section 4, Chapter II of the EU Directive;

2. temporary placement of material, in accordance with Article 13, Section 4, Chapter II of the EU Directive;

3. permanent placement of material, in accordance with Article 14, Section 4, Chapter II of the EU Directive.

Compared with its American equivalent, Section 230 of the Communications Decency Act (CDA), the immunity provided by the e-Commerce Directive is more limited, as the former protectors exempt intermediaries from liability even if they have positive knowledge that information is illegally located on their platforms. Unlike Section 230 of the CDA, the e-Commerce Directive also only insulates platforms from monetary liability; it does not affect court orders to take down content. Many countries have adopted similar regimes, although they vary in their scope of application and in the immunity they provide to information intermediaries.

US legislation contains special provisions that establish grounds for exempting information intermediaries from liability depending on the following four types of functions they perform[3]:

1. in connection with the transfer of materials, in accordance with paragraph a of Section II of the DMCA;

2. in connection with the temporary placement of materials (caching), in accordance with paragraph b of Section II of the DMCA;

3. in connection with the permanent placement of materials in systems or networks on the instructions of the user (hosting), in accordance with paragraph c of Section II of the DMCA;

4. when using the tools on the location of materials, in accordance with paragraph d of Section II of the DMCA.

The North American model of legal regulation of the activities of Internet providers is precedent-setting in nature, based on the First Amendment to the US Constitution on freedom of speech and freedom of exchange of information. The American experience is used by some Russian Internet providers in forming their corporate policies regarding illegal content and the procedure for its removal.

[3] . Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). – [Электронный ресурс]. – Режим доступа: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:En:HTML

In the context of the conducted research, it was established that there are three legal models for limiting the liability of information intermediaries when using their services to disseminate information that violates the right to honor, dignity and business reputation: unconditional limitation of liability of information intermediaries (a model typical of the USA); limitation of liability subject to non-interference in the process of posting information and removal or restriction of access to such information after receiving notification from the interested party (a model typical of Great Britain, other EU countries, and also the Russian Federation); limitation of liability subject to an active search for and removal of such information (a model proposed by the European Court of Human Rights)[4].

Thus, it can be concluded that the norms in the law of foreign countries in the field of intellectual property are formulated similarly. However, even this is not a basis for further improvement of legislation.

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