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NOTICE–AND–TAKEDOWN PROCEDURES IN UKRAINE, SPAIN, CHINA, AND THE US

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Abstract. The purpose of the presented study is to consider the notice-and-takedown procedures presented in the legislation of Spain, China and the USA in the projection of the discussion of their application in Ukrainian realities. The analysis shows that many debatable issues of the procedures are still unresolved, although, for example, China has made a significant step, perhaps too abrupt, but allowing others to learn the practices of the country; Spain has chosen its own path, as prescribed, for example, by the EU Directive on electronic commerce, in many respects positive and revealing, but in some aspects unfinished; the USA got the privilege of being criticized like anyone who has given birth to a new important approach, but at the same time the decision has become truly breakthrough as evidenced by the scale of the procedures implementation beyond US borders; Ukraine is in the infancy of implementing the procedures, but the experience of other countries is definitely useful and applicable in the country to fight unfair competition and support small and medium-sized businesses in difficult economic times.

Keywords: DMCA, intellectual property, Internet, notice and takedown, unfair competition.

Author contributions

The authors made an equal contribution to the article. Together they selected literature, analyzed it and drew common conclusions.

Disclosure statement

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INTRODUCTION

The transition of human activity to the digital space predetermined the transformation of the regulation of such relations. Technologies define new participants in various processes on the Internet and laws describe their rights and obligations.

The globalization and simplification of access to the Internet allows more people to share content than ever before (Guzman, 2015). The Internet, on the one hand, has become a tool for the creation and use of many intellectual property (IP) objects (Shmatkov, 2021), and, on the other hand, it contributes to large-scale infringement of IP rights (Kreiken, 2017).

The first document that takes into account the specifics of the violation of IP rights on the Internet was the Digital Millennium Copyright Act (DMCA), a 1998 United States copyright law. Further, the United States began to "export" this document in other countries (Gibson, 2011), the provisions of the law began to "voluntarily" appear in various jurisdictions. One of the most common of such provisions in the world are the notice-and-takedown procedures – for example, the EU Directive on electronic commerce (Directive 2000/31/EC), published in 2000, mentions a notice-and-takedown procedure that were born in the DMCA.

In general, the idea of the notice-and-takedown is to create a toolkit to quickly remove infringing content and remove liability from intermediaries. Flexibility of the procedures reflects the rapid transformation of the Internet (Wang, 2021). The purpose of implementing the procedures is the formal acquisition of legal (Gibson, 2011) and psychological (Penney, 2017) liability of Internet service providers, as well as enhanced opportunities to protect rights holders on the Internet (Schonauer, 2011). The compromise stuck is that intermediaries will enjoy the immunity if they fulfill their duty to block or remove any illegal or harmful materials (Azmi, Ismail & Daud, 2017).

Over the past decades, the notice and takedown regime has become ubiquitous and is built into the system structure of all major intermediaries (Perel & Elkin-Koren, 2015). The DMCA created an important incentive for Internet service providers to comply with takedown requests submitted by IP rights owners (Loren, 2011). Stakeholders now benefit from the simplicity and low cost of the process (Urban & Quilter, 2006).

The intensity and scale of distribution of the procedures under consideration necessitate the study of criticism and best practices for their implementation, taking into account such criticism.

LITERATURE REVIEW

Sometimes the notice-and-takedown procedures are called balanced and fair (Feng, Wan & Fang, 2019), but much more often scholars tend to criticize this practice at a different scale. There are several areas of such criticism:

- Speed of decision-making to block access to infringing content (Dong, 2022; Kuczerawy & Ausloos, 2015)
- Excessive compliance with takedown requests (Guzman, 2015; Kuczerawy & Ausloos, 2015; Tarkiainen, 2021);
- Ignoring the rights of the party whose content is being blocked (Frosio, 2017; Gibson, 2011; Kreiken, 2017; Kuczerawy & Ausloos, 2015; Schonauer, 2011; Urban & Quilter, 2006)
- Problems with the use of automated enforcement tools and lack of fair use detection algorithms (Cobia, 2008; Guzman, 2015; Hazelwood, 2009; Neill, Karobonik & Balderas, 2014; Perel, M., & Elkin-Koren, 2015; Urban & Quilter, 2006)
- Use of the procedures as a means of unfair competition (Cobia, 2008; Ido, 2019; Schonauer, 2011; Wan, 2018)
- Insufficient liability for false notices (Bar-Ziv & Elkin-Koren; 2018; Cobia, 2008; Loren, 2011)

In addition, issues of interpolation of the DMCA practices into laws outside the United States (European Commission, 2012; Commission of the European Communities, 2003; Lisovyi & Dmytruk, 2020; Wang, 2018) as well as the application of the provisions of the procedures beyond the scope of copyright (as it is established in the DMCA) (Dong, 2022; Feng, Wan & Fang, 2019; He, 2020; Wu, 2019) remain debatable.

To develop proposals for improving existing legal regimes, many of the above studies are based on a comparison of approaches described in the legislation of various countries. Scholars regard the DMCA as a parent law, the laws of European countries where the notice-and-takedown procedures are implemented, and China is often also mentioned as a country that has developed the procedures significantly in the context of the huge jump of the e-commerce market in the country. Ukraine is hardly mentioned in this context; single mentions (Lisovyi & Dmytruk, 2020) do not reveal the status and specific steps for the implementation of the procedures.

Thus, the objective of the presented study is to consider the notice-and-takedown procedures presented in the legislation of various countries in the projection of the discussion of their application in Ukrainian realities.

METHODOLOGY

To achieve the objective of this study, we have analyzed the following documents (as of June 2022):

- The Law of Ukraine "On Copyright and Related Rights" (Law of Ukraine) (Ukraine)

- The Royal Decree No. 1889/2011, of December 30, 2011, on the Operation of the Intellectual Property Commission (as Amended up to Royal Decree No. 1023/2015 of November 13, 2015) (Royal Decree) (Spain)
- The E-Commerce Law of the People's Republic of China (Adopted at the Fifth Session of the Standing Committee of the 13th National People's Congress on August 31, 2018) (E-Commerce Law) (China)
- The Regulations on the Protection of Right of Dissemination via Information Network (2013) (Regulations) (China)
- The DMCA (the USA)

The Law of Ukraine for analysis was chosen to achieve the objective of the study. The Royal Decree is considered here as the practice of an EU country that was one of the first to introduce the notice-and-takedown procedures (Commission of the European Communities, 2003). The practice of China is interesting from the point of view of the scale of the e-commerce markets in the country where the procedures are very widespread (Kwak, Zhang & Yu, 2019). The DMCA is the parent document and therefore could not be omitted from this analysis.

Based on the literature review, it was decided to focus on the content of the following points in the documents:

- IP objects
- Subjects of law enforcement
- Notice structure
- Measures within the Internet platform
- Representation of subjects
- Notice processing time
- Counter-notice processing time
- Term for automatic recovery of the content
- Liability for a false notice
- Liability of a platform operator

RESULTS

IP objects. While the DMCA considers only copyright, in the Royal Decree and the E-Commerce Law IP objects are defined as intellectual property. In Spain, the issue is in the area of responsibility of the Intellectual Property Commission. Article 52[1] of the Law of Ukraine, in turn, narrows objects to audiovisual works, musical works, computer programs, videograms, phonograms, transmissions (programs) of broadcasting organizations.

Subjects of law enforcement. The DMCA gives a wide range of such subjects, among which it is worth highlighting a service provider, a subscriber or account holder of a provider's system, a user of a system, a user of material that resides on a system or network controlled or operated by or for a service provider, a person authorized to act on behalf of the owner of an exclusive right, a copyright owner, a person authorized by the copyright owner, a person making the material available online, a person who knowingly materially misrepresents a person who provided the notification, a service provider's designated agent, etc.

The E-Commerce Law establishes the subjects such as e-commerce platform operators and IP rights holders; the Regulations mention Web service provider. The Royal Decree defines the following subjects: IP rights holders, representatives of rights holders, persons who consider that their IP rights or those of their representatives have been violated, persons responsible for information society services, providers of intermediation services of the information society, and Secciyn Segunda de Comisiyn de Propiedad Intelectual. The Law of Ukraine establishes the subjects such as a rights holder, a lawyer, an owner of the website, an owner of web page, a hosting provider, a copyright infringer.

Notice structure. The DMCA describes the following structure of a copyright infringement notice:

- A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed

- Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site
- Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material
- Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted
- A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law
- A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

The notification according to the E-Commerce Law includes prima facie evidence on the constitution of infringement, and the Regulations reveal the structure by such components:

- The right owner's name, contact information, and address
- The title and Web address of the infringing work, performance, or sound or visual recording that is required to be deleted or to which the link is required to be disabled
- Preliminary evidentiary materials proving the existence of infringement
- The Royal Decree governs the drafting of the following notice:
- Identification of the work or service object of the request
- Accreditation, by any means of proof admissible in law, of the ownership of the alleged IP right and, where appropriate, of the entrustment of its management or of the representation of the owner. In the case of rights with more than one owner, the identification data of the other owners will be included, if known
- Proof, by any means of proof admissible by law, that the alleged work or provision is being exploited, lucrative or not, through the service of the information society object of the request, identifying, describing and locating said activity
- Declaration that authorization has not been granted for the exploitation carried out in the service of the information society object of the request
- Justification of the concurrence, direct or indirect, in each of the services to which the request refers, for profit or for damage caused or that could be caused to the holders and that they do not have the legal obligation to support
- The data available to the applicant that allow or help to identify the person in charge by locating the services of the information society against which the procedure is directed, and that allow communication with the web pages that provide the services, including, where appropriate, the data of the corresponding intermediation service provider of the information society
- Any other relevant circumstance in the procedure the start of which is requested, including the proposition of those tests or verifications that the applicant deems appropriate in defense of his right
- The Law of Ukraine requires the provision of the following information:
- Information about the complainant, necessary for the identification: name (title); place of residence (stay) or location, e-mail address or postal address where the website owner or other persons in the cases provided by this Law shall send information; for complainants – legal entities – the registration data of a legal entity in the country of location, in particular in the commercial, banking, judicial or state register, including details of the register, registration number
- The type and name of the object (objects) of copyright and/or related rights, the infringement of which is referred to in the complaint
- A reasoned statement that the complainant has IP rights to the object of copyright and/or related rights specified in the relevant complainant, with reference to the grounds for such rights and their validity
- Hyperlinks to electronic (digital) information posted or otherwise used on the website

- The demand to prevent access to electronic (digital) information on the website
- Information about the hosting service provider that provides services and/or resources for hosting the relevant website, namely: name; e-mail address or postal address to where the website owner or other persons shall send information in the cases provided for by this Law
- The complainant's statement that the information provided in the complaint is reliable, and the complainant's rights, the violation of which is alleged, have been verified by a lawyer, through whose representation (mediation) the complaint is submitted.
- The complaint is supplemented with a copy of one of the documents that, in accordance with the legislation on advocacy and advocacy practice, certifies the authority of the lawyer to provide legal assistance to the complainant

Measures within the Internet platform. The DMCA mentions disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent; the E-Commerce Law – deletion, blocking, disabling the link, termination of transaction and service, ceasing the infringement, eliminating the impact, making an apology, compensating for the losses; the Royal Decree – interruption of service or withdrawal of content; according to the Law of Ukraine it is allowed to prevent access only to electronic (digital) information specified in the compliant on termination of violation; if the access to electronic (digital) information cannot be prevented for technical reasons, the website owner or hosting provider may prevent access to the web page that contains the relevant electronic (digital) information.

Representation of subjects. According to the DMCA, to prevent service providers from being held liable for copyright infringement for content hosted or stored by third parties, a service provider must designate an agent. Chinese laws do not require representation for any of the parties to the process.

In Spain, a special division (Secciyn Segunda) of the Spanish Intellectual Property Commission was created through which it ensures the functioning of procedures and communication between the parties. In Ukraine, the complainant applies for termination of the violation only through the representation (mediation) of a lawyer.

Notice processing time. The DMCA establishes that a service provider upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. The Regulations prescribe that a Web service provider shall take measures immediately upon its receipt of the right owner's notice. Ukrainian and Spanish documents allocate 48 hours to this stage. At the same time, the Royal Decree states that timing starts once the order on the request for judicial authorization for the location has been issued. If the judicial order denies the requested authorization, it will also be transferred to the provider of the intermediation service of the information society.

Counter-notice processing time. According to the DMCA, a service provider replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

The Chinese documents do not regulate these issues in detail. For example, Article 16 of the Regulations states that a service receiver may submit a written statement to the Web service provider to request the restoration of the deleted work; Article 17 states that a Web service provider shall restore the deleted work, performance, or sound or visual recording or the disabled link thereto immediately upon its receipt of a written statement from a service receiver.

The provisions of the Royal Decree imply that within the previously mentioned 48 hours the provider of the intermediation service of the information society can make the allegations and propose the evidence it deems appropriate on the existence of an authorization for exploitation or the applicability of a limit to IP rights or any other circumstance in its defense.

Article 52[1] of the Law of Ukraine shows several options for the development of events, so the counter-notice processing time can take 48–72 hours from the receipt by the website owner of the complaint on termination of the violation.

Term for automatic recovery of the content. The term for automatic recovery of the content of an alleged infringer, according to the DMCA, is described in the previous subsection and does not exceed 14 days. The E-Commerce Law establishes that if the e-commerce platform operator has not received any notice within fifteen days as of the arrival of the forwarded statement (statement from operators on platform shall include prima facie evidence on no act of infringement) at the IPR holder that the right holder has filed a complaint or lawsuit, it shall immediately stop the measures it has taken. The Spanish rules provide for several cases of content recovery, the maximum term in which the resolution must be notified by the Secciyn Segunda is three months. The lack of notification within that period will have dismissal effects on the application.

The Law of Ukraine establishes that the owner of the website has the right to refer to the hosting service provider, from which the owner received information about the measures taken, with a notice of refusal on the grounds, demanding the restoration of access to electronic (digital) information. If such a request meets the requirements for a notice of a refusal, the hosting provider shall immediately, no later than 48 hours after receipt, send a copy to the complainant. If the notice does not meet the requirements for a notice of a refusal, the hosting provider shall inform the website owner. The hosting service provider shall restore access to electronic (digital) information on the tenth working day from the date of sending the complainant a copy of the notice, if during this time the complainant has not provided confirmation on the opening of court proceedings on the protection of his rights to the object (objects) of copyright and/or related rights (electronic (digital) information), with respect of which the complaint on termination of the infringement was filed.

Liability for a false notice. The Royal Decree doesn't establish any liability for sending a false notice. The DMCA prescribes that any person who knowingly materially misrepresents that material or activity is infringing, or that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

The documents implemented in China establish that anyone who causes loss of operators on platform due to its maliciously wrong notice shall assume double liability for compensation (the E-Commerce Law); the right owner shall be responsible for the truthfulness of the content in the notice (the Regulations); if a Web service provider deletes, or disables the link to, a work, performance, or sound or visual recording by mistake due to the right owner's notice, thereby causing losses to those who receive services from the Web service provider, the right owner shall bear liability for compensation (the Regulations).

The Law of Ukraine sets an abstract standard – the complainant (the complainant's official) is responsible for providing knowingly inaccurate information about the existence of IP rights, the violation of which is referred to in the complaint.

Liability of a platform operator. The DMCA establishes that a service provider shall not be liable for monetary relief, or, except as provided in other section of the document, for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case a case in which (A) the material is made available online by a person other than the service provider; (B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and (C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the certain conditions are met.

Article 20 of the Regulations prescribes that a Web service provider shall be exempted from the liability for compensation when offering automatic access service according to the instructions of those who receive its services or offering automatic transmission service in respect to works, performances,

or sound or visual recordings provided by those service receivers, provided that the following conditions are met: (1) Neither selection nor alteration is made to the transmitted works, performances, or sound or visual recordings; and (2) the works, performances, or sound or visual recordings are made available to the designated service receivers, and others' access thereto is prevented.

Article 21 of the Regulations prescribes that a Web service provider shall be exempted from liability for compensation when automatically storing works, performances, or sound or visual recordings obtained from any other Web service provider and automatically making them available to those who receive services according to a technical arrangement, in order to improve the network transmission efficiency, provided that the following conditions are met: (1) no alteration is made to the automatically stored works, performances, or sound or visual recordings; (2) no impact is caused to the original Web service provider that has made the works, performances, or sound or visual recordings available in its understanding of the service receivers' access to the works, performances, or sound or visual recordings; and (3) automatic modification, deletion, or screening is made to the works, performances, or sound or visual recordings according to a technical arrangement when the original Web service provider has modified, deleted, or screened them.

Article 22 of the Regulations prescribes that a Web service provider shall be exempted from liability for compensation when providing those who receive its services with information storage space so as to enable them to make works, performances, or sounds or visual recordings available to the public via information network, provided that the following conditions are met: (1) the information storage space is clearly indicated as having been provided for use by those who receive its services, accompanied by an announcement on the name, contact person, and Web address of the Web service provider; (2) it has not altered the works, performances, or sound or visual recordings provided by those who receive its services; (3) it is unaware of, and has no justified reason to be aware of, the infringement of a work, performance, or sound or visual recording provided by anyone who receives its services; (4) it has gained no economic benefits directly from works, performances, or sound or visual recordings provided by those who receive its services; and (5) it has, pursuant to these Regulations, deleted the work, performance, or sound or visual recording regarded by the right owner as involving infringement after receiving the right owner's written notice.

Article 45 of the E-Commerce Law indicates that e-commerce platform operator shall assume joint and several liability with the infringer if it fails to take necessary measures.

The Royal Decree establishes that in any case, the suspension of the intermediation service will be subsidiary with respect to the voluntary compliance with the measures contained in the notified resolution, and will cease when accredited before the Secciyn Segunda the reestablishment of legality by the service of the information society or, in any case, once one year has elapsed since the execution of the measure.

The Law of Ukraine describes the issue as follows. The owner of the website, web page is not responsible for the infringement of copyright and/or related rights committed using the Internet if the owner timely committed the actions provided for in the law. The provisions of the previous statement shall not apply if: a) the owner of the website within three months, despite the received and satisfied complaints on termination of violations, committed at least two cases of use on one or more web pages, which he owns, the same copyright object, and/or related rights on the same website; b) the owner of the web page, who is not the owner of the website, within three months, despite the received and satisfied complaints on termination of violations, committed at least two cases of use of the same object of copyright and/or related rights on the same website.

DISCUSSION

IP objects. While the DMCA only covers the scope of copyright, according to the definitions, the Chinese and Spanish documents cover all intellectual property. The notice-and-takedown procedures of the E-Commerce Law are applicable to all infringements of all categories of IP in selling all kinds of goods on e-platforms, even to those which cannot be determined with a sufficient degree of certainty on available evidence by the e-platform (Feng, Wan & Fang, 2019). Copyright

really covers many different areas (Shmatkov, 2020; Shmatkov et al., 2021), but many objects previously protected by copyright are now moving into the area of other types of IP (for example, implementation of the program code) (Shmatkov, Hlibko & Georgiievskyi, 2021). Critics say the notice-and-takedown procedures can't simply be transplanted to other IP objects (Feng, Wan & Fang, 2019; Wu, 2019) without creating an unnecessary burden on internet service providers (Zhang & Zhu, 2018), but in a less labor-intensive process like trademark comparison, there are clear opportunities for transferring those practices (Dong, 2020).

Unfortunately, the Law of Ukraine reflects a very limited application even in the field of copyright, namely, audiovisual works, musical works, computer programs, videograms, phonograms, transmissions (programs) of broadcasting organizations. The main reason for that limitation is obviously that the whole procedure migrated from the Law of Ukraine On State Support of Cinematography in Ukraine. But the reasons are not important, the result is – Ukrainian sellers on marketplaces who continue to work in the conditions of war cannot use the procedure, for example, if someone stole a photo taken by them or their product description. The minimum necessary improvement for today is to expand the scope of the Law of Ukraine to all objects of copyright.

Subjects of law enforcement. While the DMCA describes the all possible types of subjects concentrating on Internet service providers and copyright owners, while the Chinese documents mention e-commerce platform operators (or Web service providers) and IP rights holders, drafters of the Law of Ukraine, in addition to the already known IP rights holder and IP infringer, invented subjects such as a web page owner next to a website owner and also highlighted a hosting service provider:

- hosting service provider – a person who provides website owners with services and/or resources for hosting websites or parts of them on the Internet and providing access to them via the Internet. A website owner who hosts the website or part of it on the Internet on his or her own resources and/or independently provides access to it using the Internet is also considered a hosting service provider;
- website owner – a person who is the owner of an account and sets the procedure and terms of use of the website. In the absence of evidence otherwise, the owner of the website is considered to be the registrant of the corresponding domain name used to access the website, and/or the recipient of hosting services;
- web page owner – a person who is the owner of an account used to host a web page on a website, and who manages and/or places electronic (digital) information within such a web page. The website owner is not the owner of a web page if the latter owns an account that allows, independently of the website owner, post and manage information on the web page.

In general, the above explanations are quite intelligible, but one can hardly agree with the widespreadness of the division between the owner of the page and the website in the digital world. Moreover, the DMCA states that once the material is uploaded, each hosting service provider becomes a service provider (17 U.S.C. § 512(c)(1)). We assume that objects should be described either flexibly (the DMCA) or in a general way (Spanish or Chinese format), but the creation of concepts that are difficult to explain at first glance in general procedures is debatable.

Notice structure. The largest number of requirements for the notice drafting may be found in the Law of Ukraine, the smallest – in the DMCA and the E-Commerce Law. What the DMCA gives as an example, the Law of Ukraine makes mandatory. To enjoy the benefits of self-regulation, such notice-and-takedown procedures should be quick and easy (Kuczerawy & Ausloos, 2015).

Measures within the Internet platform. According to the analysis, the Chinese measures within the Internet platform the broadest and most appropriate. These provisions may be useful for the legislations of all countries under consideration.

Representation of subjects. According to the DMCA to keep their safe harbor status an Internet service provider shall be represented by a designated agent; all service providers with designated agents assigned prior to December 1, 2016, must appoint or reappoint a designated agent through electronic submission to the US Copyright Office, or they will lose eligibility (Beck, 2018). The E-Commerce Law and the Regulations do not prescribe any representation requirements. In Spain, any interaction on the procedures is carried out through the Secciyn Segunda.

Another innovation proposed in Ukraine is – the complainant applies for termination of the violation only through the representation (mediation) of a lawyer – the motivation for this innovation is inexplicable, such a procedure completely contradicts the idea of creating a simple, cheap and fast process (Dong, 2022; Kuczerawy & Ausloos, 2015).

Taking into account the analyzed proposals and our opinion, the ideal model lies between the Spanish (but involvement of the state delays the procedures) and the American (but there are no qualification and/or experience requirements for a designated agent of an Internet service provider) approach in order to reduce the influence of correct opinion for today that the law is more effective than self-regulation (Floridi, 2021). This approach also reinforces the requirement of good faith in determining whether the use was fair (Bleech, 2009).

Despite the dominance of algorithmic solutions (Perel & Elkin-Koren, 2015), such duty should not be transferred to machines (Neill, Karobonik & Balderas, 2014).

Notice processing time. In general, notice processing time is balanced in all countries to take into account the opportunities and workload of the party that considers such a notice. Only the DMCA does not indicate specific dates – this issue has not been covered enough in the literature, but obviously it has prospects for further research.

Counter-notice processing time. All the documents except DMCA offer adequate time frames for the counter-notice processing time – it is clear that these time frames if they are too long would have a negative impact on the business of the alleged infringer (or a bona fide user) of IP. It is still important that the procedures should take into account the rights of the alleged infringer and provide an incentive to consider his arguments (Frosio, 2017; Gibson, 2011; Kreiken, 2017; Kuczerawy & Ausloos, 2015; Schonauer, 2011; Urban & Quilter, 2006). Internet service providers have motivation to rule in favor of the applicant because otherwise they may lose their safe harbor (Kreiken, 2017). As well as increased responsibility placed on intermediaries leads to excessive blocking of content (Tarkiainen, 2021). All these arguments mediate the need to develop effective mechanisms for the protection of the accused party.

Term for automatic recovery of the content. This issue requires further research as the search for the balance between cost, speed, ease of the procedure (Dong, 2022; Kuczerawy & Ausloos, 2015), and the prevalence of law over self-regulation requires finding the right solutions. It is unlikely that an owner of one or more photos that were illegally copied by his competitor on the marketplace will go to court. It is likely that regulation of the inclusion of competent persons (as described in the subsection "Representation of subjects") and the cancellation of automatic recovery of the content in case of failure to file a complaint with the court would help to resolve the issue.

Liability for a false notice. The notice-and-takedown procedures tend to result in erroneous deletion (Wan, 2018). The developed protections lead some to abuse these mechanisms (Schonauer, 2011). In the absence of sufficient legal oversight, the notice-and-takedown regime is vulnerable to misuse (Bar-Ziv & Elkin-Koren, 2018). Although the importance of this issue is emphasized in the scientific literature (Bar-Ziv & Elkin-Koren; 2018; Cobia, 2008; Ido, 2019; Loren, 2011; Schonauer, 2011; Wan, 2018), it is surprising that the Royal Decree does not provide any liability for sending a false notice. The Law of Ukraine establishes a rather abstract liability without specifying real consequences. It may be appropriate for the legislators of these countries to consider the experience of China and the United States in the context of the provision under consideration.

One notable suggestion is to delay takedown of disputed material until opportunity for counternotice has been offered (Urban & Quilter, 2006) – this suggestion could fit quite harmoniously into existing regimes.

Liability of a platform operator. All countries, except Spain, in the documents under consideration quite clearly formulate the conditions for exclusion of liability from the service provider. In the EU, the notice-and-takedown procedures are mainly based on the fact that notification may result in a service provider becoming aware of the infringement (Wang, 2018).

It's pretty obvious that the purpose of creating the procedures is to remove liability from the service provider along with other benefits. But we believe that the service provider is still not doing enough to remove liability from himself and we continue to insist on the importance of involving

competent persons in the review of the notices for this party's money, and on the more transparent and obligatory taking into consideration the opinion of the alleged infringer.

CONCLUSIONS

The presented analysis shows that many debatable issues on the notice-and-takedown procedures are still unresolved, although, for example, China has made a significant step, perhaps too abrupt, but allowing others to learn the practices of the country; Spain has chosen its own path, as prescribed, for example, by the EU Directive on electronic commerce, in many respects positive and revealing, but in some aspects unfinished; the USA got the privilege of being criticized like anyone who has given birth to a new important approach, but at the same time the decision has become a real breakthrough as evidenced by the scale of the procedures implementation beyond US borders; Ukraine is in the infancy of implementing the procedures, but the experience of other countries is definitely useful and applicable in the country to fight unfair competition and support small and medium-sized businesses in difficult economic times.

Improving the algorithmic application of the statutory regimes is not sufficiently disclosed in this study and requires further research.

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ПРОЦЕДУРИ ПОВІДОМЛЕННЯ ТА ВИДАЛЕННЯ В УКРАЇНІ, ІСПАНІЇ, КИТАЇ ТА США

Анотація. Метою представленого дослідження є розгляд процедур повідомлення та видалення, представлених у законодавстві Іспанії, Китаю та США в проекції обговорення їх застосування в українських реаліях. Для досягнення мети цього дослідження ми проаналізували наступні документи (станом на червень 2022 р.): Закон України «Про авторське право і суміжні права» (Україна); Королівський указ № 1889/2011 від 30 грудня 2011 року Про діяльність Комісії інтелектуальної власності (зі змінами, внесеними до Королівського указу № 1023/2015 від 13 листопада 2015 року) (Іспанія); Закон Китайської Народної Республіки Про електронну комерцію (прийнятий на п'ятій сесії Постійного комітету 13-го Всекитайського збору народних представників 31 серпня 2018 р.) (Китай); Положення Про захист права розповсюдження через інформаційну мережу (2013) (Китай); Закон про авторське право в цифрову епоху (США).

Аналіз проведено у проєкції наступних аспектів: об'єкти інтелектуальної власності; суб'єкти правозастосування; структура повідомлення; заходи в межах Інтернет-платформи; представництво суб'єктів; час обробки повідомлення; час обробки зустрічного повідомлення; термін автоматичного відновлення контенту; відповідальність за надання недостовірної інформації; відповідальність оператора платформи. Аналіз показує, що багато дискусійних питань процедур досі не вирішено, хоча, наприклад, Китай зробив значний крок, можливо, занадто різкий, але цей крок дозволяє іншим вивчати практики країни; Іспанія обрала власний шлях, як це передбачено, наприклад, Директивою ЄС про електронну комерцію, багато в чому позитивний і показовий, але в деяких аспектах незавершений; США отримали привілей критики, як і всі, хто народив новий важливий підхід, але водночас це рішення стало справді проривним, про що свідчить масштаб впровадження процедур за межами США; Україна перебуває на початковому етапі впровадження процедур, але досвід інших країн, безумовно, є корисним і таким, що може застосовуватись у країні для боротьби з недобросовісною конкуренцією та підтримки малого та середнього бізнесу у складні економічні часи.

Ключові слова: DMCA, інтелектуальна власність, Інтернет, повідомлення та видалення, недобросовісна конкуренція.

NOTICE–AND–TAKEDOWN PROCEDURES IN UKRAINE, SPAIN, CHINA, AND THE US

Abstract. The purpose of the presented study is to consider the notice-and-takedown procedures presented in the legislation of Spain, China and the USA in the projection of the discussion of their application in Ukrainian realities. To achieve the objective of this study, we have analysed the following documents (as of June 2022): the Law of Ukraine "On Copyright and Related Rights" (Ukraine); the Royal Decree No. 1889/2011, of December 30, 2011, on the Operation of the Intellectual Property Commission (as Amended up to Royal Decree No. 1023/2015 of November 13, 2015) (Spain); the E-Commerce Law of the People's Republic of China (Adopted at the Fifth Session of the Standing Committee of the 13th National People's Congress on August 31, 2018) (China); the Regulations on the Protection of Right of Dissemination via Information Network (2013) (China); the Digital Millennium Copyright Act (the USA).

The analysis shows that many debatable issues of the procedures are still unresolved, although, for example, China has made a significant step, perhaps too abrupt, but allowing others to learn the practices of the country; Spain has chosen its own path, as prescribed, for example, by the EU Directive on electronic commerce, in many respects positive and revealing, but in some aspects unfinished; the USA got the privilege of being criticized like anyone who has given birth to a new important approach, but at the same time the decision has become truly breakthrough as evidenced by the scale of the procedures implementation beyond US borders; Ukraine is in the infancy of implementing the procedures, but the experience of other countries is definitely useful and applicable in the country to fight unfair competition and support small and medium-sized businesses in difficult economic times.

Keywords: DMCA, intellectual property, Internet, notice and takedown, unfair competition.

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