INSTITUTE OF LEGISLATION
OF THE VERKHOVNA RADA OF UKRAINE
VÝCHODOEURÓPSKA AGENTÚRA PRE ROZVOJ n.o
EASTERN EUROPEAN DEVELOPMENT AGENCY n.o.

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# COPYRIGHT PROTECTION ON THE INTERNET: THEORY AND PRACTICE

Monograph

Podhájska -2015

UDK 347.78:004.738.5(02)

Rekommended By
Východoeurópska agentúra pre rozvoj, n.o.
Eastern European Development agency n. o.
Considered and recommended for publication by the Academic Council
of Institute of Legislation of the Verkhovna Rada of Ukraine
(the minutes No. 11 of “08” 09. 2015)

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Copyright protection on the Internet: theory and practice [monograph]/ Iryna Sopilko. — Slovak Republic , Podhájska : Východoeurópska agentúra pre rozvoj, n.o. Eastern European Development agency n. o.— 2015. —138 c.

ISBN 978-80-809608-24-9

The monograph highlights the theoretical and practical issues of protection of objects of copyright, including objects that are located on the Internet. The main means of protection are analyzed, the special feature of usage of technical means to protect objects of copyright on the Internet, the mechanisms of mediation and self-defense are investigated.

This monograph is intended for scientists, practitioners, teachers, postgraduates and students of higher education establishments, for everybody who is interested in copyright protection on the Internet.

**UDK 347.78004.738.5(02)**

ISBN 978-80-809608-24-9
EAN 9788089608249

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# INTRODUCTION

Today, when the open information society is being formed, issues related to the meaning, turnover, types and protection of information are of high interest. The information society may be defined as human interest-oriented, open-to-all, innovative development model-focused, high-tech society, where each and every individual may create and accumulate information and knowledge, have free access thereto, use and share therewith to allow each and every individual to realise his/her potential in full to ensure personal and social development and increase the quality of the life.

Problems of legal regulation of copyright protection topically arose at the end of the 20th – in the beginning of the 21st century and escalated after new digital technologies, opportunities of fast duplication, reproduction and use of intellectual property had appeared. Changing a tangible medium of expression, i.e. copyright object carriers and key distribution means, resulting from the use of cable distribution, satellite broadcasting and etc., makes lawmakers and scholars seek for new models of copyright exercise and protection. In addition, the problem of the legal regulation of protection of intellectual property rights (and copyright in particular) is related to displacing the focus from industrial property to copyright, developing software tools for enforcement of rights and technological measures of protection, forming new objects of intellectual property.

In the context of the development of the information society in Ukraine, the problem of effective protection of objects of intellectual property, and copyright in particular, which are to a certain extent related to digital technologies, is a lot acute. Literary, audio-visual, music and photographic works, computer software and other objects of copyright in digital form are constantly being violated. Annually, Ukraine takes top positions in the world in computer piracy, circumvention of technological measures of protection and etc.

Taking into account global expansion of computer technologies and the Internet development, judicial, administrative or notarial civil remedies applied by the offended party cannot always achieve the desired results and cease infringements or cause losses to be reimbursed for. This shows that new scientific researches into technological measures of copyright protection on the Internet are required.

The information society raises acute concerns when attempting to connect information technologies and laws. It is almost impossible to completely remove an object of copyright that is available free on the Internet from the network as there is a technically simple opportunity of

copying, duplicating and distributing objects of copyright on digital networks in the form of computer files. Copying and distributing objects of copyright cause their authors or other property right holders significant material losses, which cannot be always reimbursed for due to the exterritoriality of the global network.

A distinguishing feature of the studies is the distinct confrontation between normativists and natural law supporters where the first relies on the effective international, foreign and national laws, and the latter focuses on the discrepancy between these laws and challenges of time. Trying to fight its own arguments, a national lawmaker does not often take into account the opinions of scientists who analyse – in their studies – the best of the world practices in the regulation of the Internet relationship and adapt them to the Ukrainian conditions. Such a situation negatively affects the quality of the Ukrainian laws that governs society relations related to the Internet and causes its scientific and technological backwardness.

Such a situation poses new challenges to legal science and practice – nowadays, the key task of copyright protections is not only to restore the infringed right or reimburse for losses but to avoid potential copyright infringement on the Internet.

# SECTION 1
# GENERAL CHARACTERISTICS OF COPYRIGHT PROTECTION ON THE INTERNET

## 1.1. System of Objects of Copyright and Related Rights and Legal Regulation Thereof

Objects of copyright and the related rights take a special place among all the intellectual property objects. These objects are regulated in accordance with the norms of the Constitution of Ukraine, the Civil Code of Ukraine, international acts, the Law of Ukraine "On Copyright and the Related Rights" and other legal acts.

The main objects of copyright are literary and artistic works. According to the definition of Serebrovskyi V.O., "a work is a set of ideas, thoughts and images expressed in accessible for a person form that may be reproduced".

In the opinion of Dzera O.V., a work is a result of author's creation, his ideas, images, thoughts, etc. A work should be suitable for reproduction and perception.

There is no general definition of "work" in the Law of Ukraine "On Copyright and the Related Rights", but Article 1 gives the definition of audio, derivative, architecture, artistic works.

The name "literary works" is derived from the Latin word "letter", that is, works that are written. Although literary works are not always based on the reliable facts, they are aimed to reflect reality, consciousness of the person creating the object of copyright. In such a way the author tries to create not only a new and original work, but also put into it his/her world outlook, personal viewing of the world, individual thoughts, ideas, impressions, etc. That is why it is very important to provide legal protection of property and non-proprietary rights of the author to his work.

According to the form of expression literary works may be written and oral.

Written literary works include such traditional works as novels, tales, poems, articles, scientific works, and non-traditional works of practical application: advertising texts, instructions on equipment use, technical tasks, regulations on reward of labour, manuals for users and other works recorded on material data medium with help of symbols and signs.

Oral works include lectures, speeches, sermons and others. The peculiarity of an oral work is that it has no such material object as a copy of

the work. Such a work may be recorded with help of audio or video tape, but the result of the recording is phonogram or videogram.

According to the types of creation literary works are divided into: works of scientific literature, artistic works and fiction.

Scientific works include reference, information and popular literature.

Artistic works are: pictures, drawings, painting works and others.

Fiction works are: books, magazines, brochures of different genre.

The Berne convention for protection of literary and artistic works and other international documents contain the list of works which are considered to be the objects of legal protection. The convention defines: the term "literary and artistic works" covers all works in the sphere of literature, science and art in any form of their expression. These are: books, brochures and other written works; lectures, allocutions, sermons and other similar works; dramatic and music works; choreographic works and pantomime; music works with or without text; cinematographic works expressed by the way analogous to cinematography; pictures, drawings, painting works, architectures, sculptures, graphics and lithography; photographic works expressed by means analogous to photography; applied art works; illustrations, geographical maps, schemes, sketches and plastic works connected with geography, topography, architecture or science (Clause 2 Article 2 of the Berne convention).

WIPO Copyright Treaty of September 6, 1952 revised in Paris on July 24, 1971 contains a brief list of copyright objects. Article 1 of this Treaty declares: the objects of legal protection are: literature, scientific works and fiction: written works, music, dramatic, cinematographic works, works of art, graphic and sculpture.

Accrual of copyright does not require registration of the work or any other formalities.

To be legally protected the work has to comply with requirements specified by legislation; only in this case the work may be recognized as a copyright object. Examining the effective legislation of Ukraine one should come to the conclusion that the essential features of the work are:

— creative character of the work, the result of author's creation;

— branch of science, literature, art;

— objective form of expression of the work;

— reproduction of the work.

"Creation" is an essential requirement set up by legislation in order to consider the work as an object of copyright. Moreover, the legislators agree that "objectivity of the form" and "reproduction" of the work are the obligatory features of the copyright object.

Pidiprygora O.O. has given the definition to the term "creation": "it is a purposeful investigative activity of a person the result of which is something new that may be distinguished by its originality, peculiarity and historical uniqueness". The result of creative character of the work is its novelty. But there is an opinion that the feature of work novelty is absorbed by the creative feature. The feature of novelty as independent one is necessary only in patent law because it is connected with priority; it is unnecessary in copyright because it protects the form of the work. So, the creation is considered to be an intellectual activity the result of which is something new, original, peculiar and unique.

While talking about such feature as "objective form" it is important to mention that "objective" means belonging to the object or to be defined by it. As to the real objects this concept defines that objects, characteristics or relations exist beyond the subject and independent of it. To be legally protected the creative result of the author's work must be expressed in objective form. This requirement is set up in Article 2 of the Law of Ukraine "On Copyright and the Related Rights".

Whereas the object of the copyright is the work, but not the activity, only the result, but not the creation can be the object of copyright. The work is a single possible result of person's creative activity and efforts.

According to the form of expression the works may be:

— written (books, brochures, articles, magazines, letters, etc.);

— oral (performances, reports, lectures, speeches, sermons, etc.);

— graphic (illustrations, pictures, schemes, drawings, sketches, plastic works, etc.);

— electronic (digital), optical or others.

The object of copyright is the work on the whole, but not its separate elements. In some cases essential elements of the work may be legally protected, for example, the plot which is the result of the creation.

A person possessing the copyright (the author of the work or any other person who has been assigned an author's proprietary right to this work) may use a special sign of copyright protection. This sign consists of the following elements: Latin encircled letter "C"; the name of the person – copyright owner; the year of the first publication of the work. The sign of the copyright protection is put on the original and every copy of the work. If the work has been published anonymously or under the pseudonym (except the case when the pseudonym identifies the author), the publisher of the work (his name must be mentioned on the work) is considered to be the representative of the author and has the right to protect the rights of the latter. This provision is in force until the author has divulged his name or his authorship.

The Civil Code of Ukraine has determined the following copyright objects:

— novels, poems, articles and other written works;

— lectures, speeches, sermons and other oral works;

— dramatic and music works, pantomimes, choreographic and other stage works;

— music works (with or without text);

— audiovisual works; architecture, sculpture, graphic and painting works;

— photographic works;

— illustrations, paintings, schemes, sketches and plastic works connected with geography, topography, architecture or science;

— translations, adaptations, arrangements and other revisions of literary and art works;

— collected works if they are the result of intellectual activity;

— computer programs; compilations of database if they are the result of intellectual activity; other works.

Computer programs are protected like literary works. Nowadays Ukraine should choose between two possible ways: (1) “end-user” applying copyright norms for the protection of computer programs or (2) “computer programs developer” using not only the norms of the mentioned law but also patent law. The latter system of legal protection is used by the states – leaders in the development of computer programs (the USA, Japan). The majority of European states do not use the norms of patent law concerning computer programs protection, but legal practice knows the facts of their indirect use.

According to the effective legislation, computer program is a set of instructions in the form of words, numbers, codes, schemes, symbols or in any other form applicable for read-out by computer in order to achieve particular purpose or result. This concept covers both operating system and application program expressed in source or object codes.

The succession of the operation fulfilment, logical organization of computer program may be objectively expressed in the technical tasks, program description, subsidiary material, source and objective codes. Any of these objects must correspond to the criterion “sufficient to fulfil the set of commands”.

The creator of the computer program may demand from other persons to recognize him as a true author, and other persons must admit this fact. The right of authorship is the most important right of the author. All other property and non-proprietary rights appear from the right of authorship.

According to Article 11 of the Law of Ukraine "On Copyright and the Related Rights", subjective copyright to the computer program belongs to the author of the program, i.e. to the person who created this program. Legal fact is the fact of computer program creation by this physical entity. This person has the primary right to the computer program. Secondary right to the computer program belongs to persons who have been assigned this right according to the agreement (civil or labour). Legal fact of accrual of secondary copyright to the computer program is an agreement of assignment of property author's rights or rights to use.

Another object of copyright is compilation of database or another material. According to the effective legislation these works are protected like literary works. This protection is not extended to data or material and does not affect copyright to data or materials which are components of compilation.

The Law of Ukraine "On Copyright and the Related Rights" do not contain exhaustive list of the copyright objects, so the legislator allows to recognize as copyright objects (including intellectual property objects) the results of creative activities not mentioned in the law.

Copyright objects are fixed in Article 8 of the Law of Ukraine "On Copyright and the Related Rights" and in Article 433 of the Civil Code of Ukraine.

In particular, the copyright objects are:

— written works of a literary, journalistic, scientific, technical or other nature (books, brochures, articles, etc.);

— speeches, lectures, addresses, sermons and other oral works;

— computer programs;

— databases;

— musical works with or without lyrics;

— dramatic, musical drama works, pantomimes, choreographic and other works created for stage presentation, and staging versions thereof;

— audiovisual works;

— works of fine art;

— works of architecture, urban engineering and garden and park landscaping;

— photographic works, including works made by methods similar to photography;

— works of applied art, including works of decorative weaving, ceramics, carving, casting, art glass, jewelry, etc.;

— illustrations, maps, plans, drawings, sketches and plastic works relating to geography, geology, topography, engineering, architecture and other spheres of activity;

— stage interpretations of literary, journalistic, scientific works, and folklore versions that can be presented on stage;

— derivative works;

— collections of works, collections of folklore versions, encyclopaedias and anthologies, collections of regular data, and other composite works, provided that they are the result of creative work involving the selection, co-ordination or arrangement of the content without prejudice to the copyright covering the integrated works;

— texts of translations for dubbing, sound-tracking of and adding Ukrainian and other language subtitles to foreign audiovisual works;

— other works.

The Law of Ukraine "On Copyright and the Related Rights" and in the Civil Code of Ukraine the list of copyright objects is completed with the words "other works". It means that the mentioned list is not comprehensive because our life generates the new forms of expression of person creative individuality and copyright legislation action has to extend on such new forms.

Copyright object can be only a work which is the result of creative activity. This work has to be expressed in any objective form.

The creator's conception, which was formed in his or her consciousness in complete form or image, can't be acknowledged as copyright object. The action of legal norms on copyright protection does not spread on any ideas, theories, methods, procedures, processes, openings, even if they are expressed, described, illustrated in work.

According to the legislation, the following objects are not considered to be copyright objects:

— news or current events' announcement which is a simple media information;

— folklore works; political, legal or administrative official documents (laws, decrees, regulations, court decisions, state standards, etc.) and their official translations issued by the state authorities;

— state symbols of Ukraine, state awards, symbols and signs of the state authorities, Armed Forces of Ukraine and other military bodies;

— symbols of territory communities; symbols and signs of enterprises, offices and organizations; currency notes; schedules of vehicles and broadcasting; telephone books and other similar database that do not correspond to the criteria of uniqueness and which are not extended the sui generis right (the right of a particular type).

According to the legislation the author has the right to demand the recognition of his authorship by indicating author's name on the work and its copies and every time while using the work in public if it is possible

(Clause 1, Article 14 of the Law of Ukraine "On Copyright and the Related Rights"), to forbid mentioning his/her name if he/she wants to be anonymous author while using the work in public (Clause 2, Article 14 of the Law of Ukraine "On Copyright and the Related Rights"), to choose the pseudonym, to indicate and demand to indicate the pseudonym instead of the real name of the author on the work and its copies every time while using the work in public (Clause 3, Article 14 of the Law of Ukraine "On Copyright and the Related Rights"). The set of these rights is the right to author's name. The right to author's name allows the author to publish the work under his/her real name, pseudonym or without designation of the name. He has also the right to demand designation of his/her name every time while using the work. The right to the name includes requirement not to misrepresent the author's name (pseudonym) when it is mentioned by the persons that use this work.

The author of the computer program may indicate his/her name (pseudonym) in the text of the initial code, audiovisual pictures, in the materials of accompanying documents and on the package of medium containing the copy of the program.

Article 24 of the Law of Ukraine "On Copyright and the Related Rights" grants the right to the person possessing a legally produced copy of the computer program to adapt it, i.e. to make modifications in order to provide operation of the computer program on the specific technical means (hardware) of the user.

Legal regime of related right objects is of great importance as they are closely related to copyright objects.

Related rights are a set of civil norms governing the relations which are the result of the copyright to use literary and artistic works belonging to other persons and to form a new result of creative activity on their basis.

Related rights objects are those created as a result of using copyright objects.

So, one should distinguish the following features of the related rights objects:

— firstly, they are derivative from copyright;

— secondly, related rights appear from creative activity of the subjects of the above mentioned rights;

— thirdly, related rights have common feature with copyright: creativity.

The related rights objects are: performance, phonogram, videogram, programs of the media broadcast.

Performance is related to art and is considered to be a creative activity. The peculiarity of performance is an original interpretation of the art work. However, the text itself, verbal work is also protected by copyright.

According to the Law of Ukraine "On Copyright and the Related Rights" public performance is a presentation agreed by the subjects of copyright and the related rights of the works, performances, phonogram, programs of the media broadcast by means of declamation, play, singing, dancing and by other means both in live performance and with the help of any devices (except broadcasting) in the places where persons who are not members or close friends of the family may be present regardless of the fact if they are in the same place and at the same time or in different places and at different time.

Phonogram is a sound recording on the relevant medium (magnetic tape or disk, gramophone record, compact disk, etc.) of the performance or any other sounds (except sounds in the form of records) included into audiovisual work. Phonogram is the initial material for producing copies. The essential peculiarity of the related rights is their dependence on the rights of authors whose works create a new result. So, phonogram is a result that is protected by the related rights and created on the basis of other results of the person's activity. While protecting the works included to phonograms, the rights of the phonogram producer is restricted by legislation within the agreement between the performer and the author of the phonogram recorded work. It should be take into consideration that a person who has proprietary right to the material object, including the copy or phonogram of the work in which it is fixed, may have no rights to the work protected by intellectual property right.

The concept of videogram is new in national legislation of Ukraine. The protection of rights of videogram producers is similar to the protection of phonogram producer's rights. According to French legislation, the term "videogram" means the first fixation of pictures with or without soundtrack. Videogram is a video recording on the relevant medium (magnetic tape or disk, gramophone record, compact disk, etc.) of the performance or any moving pictures (with or without soundtrack), except pictures in the form of recording which are parts of this audiovisual work. Videogram is the basic material for producing copies.

According to Boyarchuk O.M., the criterion of distinguishing videogram from phonogram is only the type of recording. Videogram means a video recording, that is recording of the pictures, phonogram – a sound recording. All other approaches concerning phonograms are similar to the process of producing videograms. The process of phonograms and videograms production is a typical feature of the related rights. Derivative

feature of videogram indicates that it is a new development created on the basis of the results of other activities.

Legal sphere of the related rights covers the activities of media broadcast which is protected by legislation of Ukraine. The result of broadcasting is an air or cable broadcasting. Intellectual proprietary right to the programs of the media broadcast appears from the moment of their first launching.

A person possessing related rights may use a special symbol established by legislation in order to inform about his/her rights.

Lawyers are constantly discussing the issues concerning the subject of creative activity, the protection of both creative activity and the rights of this subject.

The issues concerning the subjects of creative activity, their legal regime and protection attract interest of such well-known legal scholars in the field of intellectual property as R. Shyshka, O. Melnyk, L. Glukhivskyi, O. Pidoprygora and others.

According to R. Shyshka, the first aspect of the problem of the subject of creative activity is that in most cases his/her legal behaviour is connected with his/her active and passive capacities. However, it is not quite correct in relation to creative activity as the right to creation does not depend on active and passive capacities of the person.

The second aspect of the problem of the subject of creative activity consists in involving animals in this activity: monkeys, elephants, dolphins, etc. and evaluation of such activity. This problem would not deserve attention if it was just entertainment and the pictures painted by animals were not sold at a symbolic price.

The third aspect is the person's creative activity under the influence of his/her contacts with animals, especially with dolphins. The contacts with dolphins may improve person's health; excite aesthetic feelings and associations which influence the person.

The fourth aspect consists of using artificial intelligence. There is no doubt that a computer is able to reproduce all programmed functions. In future the role and significance of computer technologies in creative process will increase in geometric progression. According to R. Shyshka, the question of partnership with artificial intelligence will appear sooner or later.

The fifth aspect consists of evaluation of creative activity of other civilizations. Thus, some works can not be explained from the point of view of potentialities of those times. There may be other displays of such creative activity.

Nature itself is “a creator”. The shape and interior design of stones, natural panorama, etc. have become reality.

However, only people are able to create works, so human beings are decisive factors in creative process.

According to R. Shyshka, the problem of the subject of intellectual property is complicated because the result depends not only on the idea (even brilliant one), but on the ability to demonstrate this idea to the audience and to represent it in the best way by means of masterly performance. A considerable number of people are involved in this process; each of them makes contribution to the final result by their creative activity.

However, despite of the number of science-based approaches to the subjects of intellectual property the effective legislation considers the author of the work as a primary subject.

O. Sergeyev defines the right of authorship as a legally protected possibility of a person to be considered as an author of the work and to require recognition of his/her authorship by other persons.

O. Melnyk thinks that only real creator of the work is entitled to be considered as its author. In his opinion, the right of authorship indicates the fact of creation of the work by the particular person, and this is very important for social evaluation of both the work and the author.

Only people may be authors regardless of their legal, social, political status, etc. The person indicated as an author on the original or copy of the work is considered to be an author of the work (presumption of authorship).

In accordance with Article 435 of the Civil Code of Ukraine the subjects of copyright are other physical and legal entities who have obtained the rights to the works according to the agreement or the law. For example, the authors of audiovisual work are: the production director, the author of screen version and/or texts and dialogues; the author of music (with lyrics or without) composed for this audiovisual work; art director, director of photography.

The translators or authors of other derivative works acquire the copyright if they do not infringe the rights of the author whose work has been translated, adapted, arranged or remade.

Thus, the right of authorship is inalienable from the author’s personality. It belongs only to the creator and is not granted in any case, even under the agreement or by right of succession. Moreover, this right may not be waived. It results from the fact of creation and does not depend on its publication, use, etc.

The right of authorship appears since the moment of creation of the work and is valid during the life of the author, and is subject to perpetual protection after his death. The person indicated as an author on the original

or copy of the work is considered to be an author of the work (presumption of authorship) unless otherwise proved.

The effective legislation does not require legal capacity of the author to be recognized as the creator of the object of intellectual property. Juveniles, minors and legally incapable persons may be authors of the works.

During the period of copyright protection the author may register his/her copyright in relevant state organs in order to legalize the fact of authorship (copyright) to the published or not published work.

Co-authors have special legal status. According to the effective legislation co-authors are persons who jointly created the work. Co-authors possess copyright regardless of the fact whether the work is inseparable or it consists of independent parts. The relations of co-authors are specified by the concluded agreement. The right of publication or use of the work belongs to all co-authors. If the work is inseparable no co-author may refuse the others to publish, use or modify it without reasonable grounds. In the event of infringement of joint copyright each co-author may enforce his/her right in court. If the work consists of independent parts each co-author has the right to use his/her part at his/her discretion, unless otherwise agreed. The copyright to interview is also considered to be co-authorship. The co-authors of interview are an interviewee and interviewer. The publication of interview is allowed only by the interviewee. The fee for use of the work belongs equally to the co-authors, unless otherwise agreed.

Another subject of intellectual property is an employer. Nowadays the majority of intellectual property objects are created at work, so the proprietary right of authors and employers to the objects created under the labour agreement is a controversial question. According to Clause 2 of Article 429 of the Civil Code, the proprietary rights to the object created under the labour agreement belong both to the employee who created this object and to the physical or physical person-employer, unless otherwise agreed.

The work is considered to be a company's work if it is created by the author at work under the labour agreement concluded between the employer and the author. According to the Law of Ukraine "On Copyright and the Related Rights" non-proprietary right to the company's work belongs to its author.

The exclusive proprietary right to the company's work belongs to the employer, unless otherwise specified by the labour agreement and civil agreement between the author and employer. For the creation and use of company's work the author is supposed to get the fee the amount of which is determined by the labour agreement or the civil agreement between the author and employer.

While concluding the labour agreement the employer and employee may regulate the matter of division of the proprietary rights to the intellectual property objects. In particular, they may agree that the exclusive proprietary rights to the intellectual property objects created by the employee under the labour agreement belong completely to the employer.

However, the employer and employee do not always attain mutual agreement as they have a contrary opinion concerning the proprietary rights to the intellectual property objects created under the labour agreement. An employer is interested in possessing personally the proprietary rights to the object of intellectual property created by an employee, but an employee is interested in joint possession of rights to the created object of intellectual property and in obtaining profit or fee (besides the salary) according to economic cost of this object. Thus, if an employee does not agree to conclude the agreement of assignment (cession) of proprietary rights to the created object of intellectual property an employer does not have the right to insist on concluding the agreement which provides for waiving an employee's exclusive rights in favour of an employer. According to Article 21 of the Labour Code of Ukraine, the division of rights to the intellectual property objects is not specified by the labour agreement and therefore may not be the subject of such an agreement. It is necessary to conclude an agreement of assignment of exclusive proprietary rights (Article 1113 of the Civil Code of Ukraine), but the above mentioned agreement is concluded only by consent of an employee. So, the division of proprietary rights to the intellectual property objects created under the labour agreement is regulated by the agreement between an employer and an employee.

Objects of the related rights have been protected since recently. Until 1993 there was no legal regime of protection of the related rights in Ukraine. According to the effective legislation of Ukraine the related rights are the rights of performers, the rights of producers of new phonograms and videograms, the rights of media broadcasts to their programs.

The subjects of the related rights are performers, their heirs and persons who legally obtained the related rights.

According to the Law of Ukraine "On Copyright and the Related Rights" the performers are actors of theatre and cinema, singers, musicians, dancers, conductors of musical compositions and other persons who perform the role, sing, recite, advertise, play the musical instrument, dance or perform literary and artistic works, amateur and folk arts, circus, variety and puppet numbers, pantomimes. Performance is a presentation of literary and artistic work.

The subjects of the related rights are producers of phonograms and videograms.

The producer of phonogram is physical or legal entities who on his/her own initiative takes the responsibility for the first sound record of the performance or any other sounds. The producer of videogram is natural or legal people who on his/her own initiative takes the responsibility for the first video recording of the performance or any other moving pictures (with or without accompanying sound).

Any person that obtained the related rights under the agreement or law may be the subject of these rights.

The state becomes the subject of copyright or related rights in case of succession under the law or testament.

The subjects of the related rights are media broadcasts. Media broadcasts (television and radio) are National Television Company, National Radio Company – national television and radio organizations that broadcast on the national channels and accountable to the Verkhovna Rada and the President of Ukraine.

Performers exercise their rights provided that they do not infringe the rights of the authors of performed works and other subjects of copyright.

Producers of phonograms and videograms may not infringe the rights of subjects of copyright and performers.

Media broadcasts may not infringe the rights of subjects of copyright, performers and producers of phonograms and videograms. The related rights appear from the fact of performance, audio and video production, program broadcasting. In order to exercise related rights no formalities are required.

The performer, producer of phonograms and videograms may use the sign of protection of the related rights on the copies or packages of audio or video records in order to inform about their related rights. The above mentioned sign consists of the following elements: the Latin encircled letter “R”; names of the persons possessing the related rights; year of the first publication of phonogram or videogram.

In the absence of other evidence the persons whose names are specified on the copies or packages of audio or video records are considered to be performers, producers of phonogram or videogram.

So, the performers are: actors of theatre and cinema, singers, musicians, dancers, conductors of musical compositions and other persons who perform the role, sing, recite, advertise, play the musical instrument, dance or perform literary and artistic works, amateur and folk arts, circus, variety and puppet numbers, pantomimes.

The special subject in the sphere of protection of copyright and the related rights is the State Service of Intellectual Property. It implements national policy in the sphere of protection of copyright and the related

rights, exercises its authorities according to the law and carries out the following functions: monitoring of application and observance of national legislation and international treaties in the sphere of protection of copyright and the related rights; registration of organizations of collective management, control of their activities and assistance; mediation in negotiations and conflicts between the organizations of collective management; examination of applications for state registration of rights to scientific, literary and artistic works, registration of agreements, etc.

The peculiarity of intellectual property right is that the holder of intellectual proprietary right possesses both proprietary and personal non-proprietary rights. According to legislation the author of an intellectual property object possesses the following personal non-proprietary rights:

to demand the recognition of his/her authorship by indicating his name on the work and its copies and every time while using the work in public if it is possible;

to forbid mentioning his/her name if he/she wants to be an anonymous author while using the work in public;

to choose a pseudonym, to indicate and demand indicating a pseudonym instead of a real name of the author on the work and its copies every time while using the work in public;

to demand keeping integrity of the work and prevent any distortion, perversion and other modifications of the work and any other encroachment on the work that may harm the author's honour and good name.

Author's proprietary rights (or proprietary rights of another person – holder of copyright) include: the exclusive right to use this work; the exclusive right to allow or forbid using this work by other persons. Proprietary rights of the author or another person – holder of copyright may be granted to another person according to the agreement of disposal of proprietary rights under which this person becomes the subject of copyright, i.e. the holder of proprietary rights. The exclusive right to use this work by the author or another person – holder of copyright allows him to use this work in any form and by any means.

It is allowed without permission of the author or another person – holder of copyright, but with obligatory designation of the author's name and the source of information to use reasonable number of quotations (short extracts) from the published works, including magazine and newspaper quotation in the form of press reviews if it is caused by critical, polemic, scientific or informative nature of the work which contains these quotations; free use of quotations in the form of short extracts from the performances and works included to the phonogram (videogram) or programs of media broadcasts; to use reasonable number of literary and artistic works as

illustrations in the publications, programs of media broadcasts, sound and video recording; reproduction in the press, public performance or information of the articles on current economic, political, religious or social issues previously published in the newspapers and magazines or works of the same type in case when the right to the reproduction or any public information is not forbidden by the author; reproduction with the aim to report current events by means of photography or cinematography, public information of the works which were seen or heard during such events; reproduction in the catalogues of works exposed on the exhibitions, auctions, fairs or in the collections to report the above mentioned events without using these catalogues with commercial aim; publication of the published works by cameo and dot printing for blind people; reproduction of reasonable number of works for judicial and administrative proceedings; public performance of music compositions during formal and religious ceremonies; reproduction of public speeches, orations and reports or other public information in the newspapers and other periodicals, programs of media broadcasts. It is also allowed without permission of the author or another person to reproduce hard copy of the work by non-profit organizations, such as libraries or archives.

It is allowed without permission of the author or another person – holder of copyright to reproduce a reasonable number of fragments from published written works, audiovisual works as illustrations for studying; to copy published articles and other small works and fragments from written works with or without illustrations by educational institutions.

Without permission of the author or another person – holder of copyright and without paying author's royalty it is allowed to reproduce previously published works exclusively for personal or family needs, except architecture works in the form of erections and buildings, computer programs; hard copy of books, music compositions and artistic original works.

Special legal regime concerning intellectual property objects is the right of reward. Article 23 of the Law of Ukraine "On Copyright and the Related Rights" defines: "the author during his life and his heirs after his death within the term determined by Article 24 of the Law of Ukraine "On Copyright and the Related Rights" concerning original artistic works sold by the author have inalienable right to get five per cent from the price of every next sale through auction, gallery, shops, etc.". The author's fee obtained as a result of using the right of reward is paid by organizations that dispose of proprietary rights of the authors on collective basis.

The right of reward, i.e. the right of the authors of artistic works to the share from the sale of their artistic works on the art market was specified for

the first time in the French legal Act of May 20, 1920. In international conventions this right was specified after adoption of Article 14bis of the Berne Convention (June 26, 1948). Article 14b allows using the right of reward by the states-members. It means that the creators of artistic works, in contrast to other authors, may sell their artistic works, sculptures only once. So, if the right of reward was not protected they (authors) would be deprived of possibility to obtain the share from any auction sale of their works after the first sale. At the same time, according to the norms of copyright, creative workers of another sphere (composers, writers) while using their works by means of reproduction, public performance, mechanical copying with help of audiovisual means, telecast, broadcasting may allow such reproduction in individual case or by means of license agreements with the organizations that dispose of the proprietary rights of the authors on collective basis, and demand reward. Besides the right of reward, creators of artistic work have the right to allow reproduction, broadcast and telecast of their works and obtain the share from payment for private copying. In comparison with other authors they obtain small reward as the number of their works is limited.

The right of reward is not applied in all countries. There appears misbalance between markets that may influence negatively artistic works sold in the countries that recognize the right of reward. Nowadays the right of reward is recognized by legislation in 47 countries, in particular, by the Law of Ukraine "On Copyright and the Related Rights" (Article 23). But the right of reward is applied effectively only in a number of EU countries: Belgium, Denmark, Spain, Germany, Portugal, France, Sweden and Iceland. On March 13, 1965 European commission proposed to provide harmonization of this right in all countries-members.

Necessary condition of effective application of the right of reward is availability of the large market of artistic works with permanent infrastructure of art galleries and places for auctions.

For the objects of the related rights another regime of intellectual property rights is applied.

A performer of the work has the following personal non-proprietary rights: to demand his/her recognition as performer of the work; to demand indicating or announcing his/her name (pseudonym) in his/her every performance or recording (if possible); to demand high-quality recording of his/her performance and prevent any distortion, perversion or other modifications that may harm his/her honour and reputation.

The proprietary right of performers is their exclusive right to allow or forbid the other persons: public information of their unrecorded performances (live air); recording in the phonograms or videograms their

earlier unrecorded performances; direct or indirect reproduction of their performances recorded without agreement in the phonograms or videograms, or with the agreement, but reproduction was made with another aim; distribution of their performances recorded in the phonogram or videogram by means of the first sale or another granting of proprietary right if performers did not give permission to the producer of phonogram (videogram) of further reproduction while recoding the performance for the first time; commercial distribution of their performances recorded in the phonograms or videograms if they did not did not give permission for such distribution while recording even after distribution of performances by the producer of the phonogram (videogram) or by his permission; distribution of their performances recorded in the phonograms or videograms through any means of communication in such a way that any person may have access from any place and at any time if they did not give permission for such distribution while recoding the performance for the first time.

The proprietary rights of the performers may be granted, alienated to other persons according to the agreement which defines the way of using performance, the amount and procedure of paying reward, the term of validity of the agreement and use of performance, the territory where these granted rights are effective. Reward rates of defined in the agreement may not be less than minimum rates established by the Cabinet of Ministers of Ukraine.

In case of using performance in the audiovisual work it is considered that the performer transfers all proprietary rights to the organization that produces audiovisual work or to the producer of audiovisual work unless otherwise specified by the agreement. In case when the performer during the first recording of the performance gives permission to the producer of the phonogram or videogram for its further reproduction it is considered that the performer has granted to the producer of the phonogram or videogram the exclusive right to the distribution of phonograms, videograms and their copies by means of the first sale or another transfer. In addition, the performer has the right to obtain reward for using his/her performance through organizations of collective management or otherwise.

The producer of the phonogram or videogram has the right to indicate his/her name (title) on each medium of the recording or its package together with the name of the authors, performers and work titles, to demand to be mentioned while using phonogram (videogram).

According to the Rome Convention, a phonogram producer is entitled to allow or forbid direct or indirect reproduction of his/her phonogram. Indirect reproduction means that the right of the producer is infringed not only in case of immediate reproduction of the phonogram, but also while

reproducing the recording from the existing phonogram. A media broadcast has the right to demand to mention its name while recording, reproducing, distributing its program and its public retransmission by another media broadcast.

As to proprietary rights of the phonogram or videogram producers, they have exclusive right to use their phonogram, videogram, and exclusive right to allow or forbid other persons: reproduction (direct or indirect) of their phonogram and videogram in any form and way; public distribution of phonogram, videogram and their copies by means of the first sale or another granting of proprietary right; commercial distribution of phonogram, videogram and their copies even after their distribution by the producer of the phonogram and videogram or with permission; public transmission of phonogram, videogram and their copies through any means of communication in such a way that any person may have access from any place and at any time; any modifications of the phonogram, videogram; import of phonogram, videogram and their copies in the customs territory of Ukraine with the aim of their distribution.

Proprietary rights of the phonogram and videogram producers may be granted (alienated) to other persons according to the agreement which specifies the way of using phonogram (videogram), the amount and procedure of paying reward, the term of validity of the agreement, the term of using performances, the territory where these granted rights are effective, etc. The amount of the reward defined in the agreement may not be less than minimum amount established by the Cabinet of Ministers of Ukraine.

Proprietary rights of the phonogram or videogram producer – legal entity may also be granted (alienated) to another person according to the established procedure as a result of liquidation of the legal entity – the subject of the related rights.

If phonograms, videograms or their copies have been introduced by the producer into civil circulation by means of their first sale in Ukraine, their further sale or grant is allowed without permission of the phonogram (videogram) producer or his/her legal successor and without paying reward.

As to the proprietary rights of media broadcasts they have exclusive right to use their programs in any way, and exclusive right to allow or forbid other persons: public information of their programs by means of transmission and retransmission; recording of their programs on the material medium and their reproduction; public performance of their programs in the places with paid entrance.

A media broadcast has also the right to forbid distributing program carrying signals transmitted by satellite by the distributing body in or from the territory of Ukraine. Proprietary rights of the media broadcast may be

granted (alienated) to other persons according to the agreement which specifies the way and term of using the program, the amount and procedure of paying reward, the territory where the granted rights are effective.

Proprietary rights of the media broadcast may also be granted (alienated) to another person according to the established procedure as a result of liquidation of the legal entity – the subject of the related rights.

It is allowed to use performance, phonogram, videogram, programs of media broadcasts, their recording, reproduction and public information without agreement of the performers, phonogram and videogram producers and media broadcast in the following cases:

the mentioned objects are reproduced only with educational and researching purposes;

subjects of the related rights have the right to a fair reward taking into account a number of reproduced copies.

Home reproduction of compositions and performances recorded in the phonograms, videograms and their copies is allowed exclusively for personal needs, without author's (performers, phonogram and videogram producers) agreement; reward is paid according to effective legislation.

According to the general rule, copyright to the work appears as a result of its creation and is valid from the moment of its creation. The copyright is effective during the author's life and 70 years after his death except the cases specified by law (clauses 1, 2 of Article 28 of the Law "On Copyright and the Related Rights").

As to the works published anonymously or under pseudonym, Term of validity of copyright expires 70 years after publication of the work. If the author's pseudonym raises no doubts as to the personality of the author, or if the authorship of the work published anonymously or under pseudonym is disclosed not later than 70 years after publication of the work, the period of 70 years is applied.

Copyright to the work published for the first time within 30 years after the author's death is valid during 70 years from the moment of its legal publication. Any person who publishes the work which has not been published after the expiry of copyright protection term is entitled to protection of the author's proprietary rights.

The term of protection of these rights is 25 years from the moment of the first publication (clauses 3-8 of Article 28 of the Law "On Copyright and the Related Rights").

Proprietary rights of the performers are protected during 50 years from the moment of the first recording of the performance. The rights of phonogram and videogram producers are protected during 50 years from the moment of the first publication of the phonogram (videogram) or their first

recording (video recording) if phonogram (videogram) has not been published within the mentioned period.

Heirs of performers and legal successors of phonogram (videogram) producers and media broadcasts are granted the right to allow or forbid to use performances, phonograms, videograms, public information, and also the right to reward within an established period.

## 1.2. Methods of Research and Approach to Copyright Protection on the Internet

The progressive development of any sphere of human activities is not available without due scientific and technological support and spiritual advancement of the society. These processes are tightly interrelated and, in turn, interdependent. The greatest value of the modern civilized world is a human being, their rights and freedoms. The Constitution of Ukraine stipulates that citizens are guaranteed the freedom of literary, artistic, scientific and technical creativity, protection of intellectual property rights, moral and material interests that arise with regard to various types of intellectual activity [82, p.8]. Such intellectual and creative activities can be a part of any purpose-driven and reasonable activities of human beings. The legislative practice and educational and special literature stipulate for dividing all the variety of creative activity and its outcomes into two key groups. The outcomes related to the spiritual life of a human being belong to the group of literary and artistic activity, which includes scientific, literary and art works, performance, creation of phonograms, videograms or broadcasting organisation programmes. The outcomes of creative and intellectual activities related to the production of goods belong to the group of scientific and technological activity results. This group includes inventions, utility models, industrial models and etc. This group is deemed to be the industrial property.

A distinctive feature of the late 20$^{th}$ century was a new type of goods on the market in a massive scale, namely objects of intellectual property right, and the traded volumes of these goods are being increased significantly faster than the traded volumes of standard goods. Intellectual property is an official result of the intellectual creative activity that grants its author or a person defined by the effective legislation the right of ownership to this result that is acquired, protected and exercised as stipulated by legal standards and norms. The social relations with respect to possession, use and disposal of the results of intellectual creative property defined by the legislation are the institution of the intellectual property right [82, p. 8].

In their majority, people who have a gift of creative activity create various objects of intellectual property to ensure the adequate standard of welfare for themselves and their relatives. Therefore, a writer writes his/her wok to sell and receive the respective consideration. Meanwhile, creativity is a kind of socially useful activities, which results in valuable works of great benefit for the society. It is intellectual property that constitutes a significant part of general creative activity, and its level defines the welfare of the society at large. The experience of the countries with the developed market economy witnesses that the lines of creative activity defined as intellectual activity are becoming of crucial social importance, priority and significance [21, p. 16].

Let's consider in detail the group of literary and artistic creativity that is governed by the institution of copyright and related rights. This group consists, in its turn, of separate types of creative intellectual activity:

— the group of literary and artistic activity that incudes scientific literature and fiction in any form: monographs, scientific articles, speeches, reports, written and other presentations;

— music works with and without texts, computer software and databases, audio-visual works, stage works and staging thereof. The so-called related rights that is the performance of a phonogram, a videogram or a broadcasting programme;

— works of architecture, urban development, landscape and a lot of other works aiming at enriching the human inner world [104, p. 28].

Generally, the Ukrainian legislation provides no definition of copyright. But when you address international legal documents, the World Intellectual Property Organization (the WIPO) provides such a definition in its interpretations: copyright is an exclusive right granted by the legislation to the author of a work to announce that he/she is a creator, reproduce it, distribute and make it available to the public by any ways and means, as well as to allow other persons to use the work as defined [37, p. 59].

The emergence and development of the Internet sharply promoted information opportunities of the society as a whole and every individual in particular. Today, the Internet is the systematically ordered accumulation of different information that has no analogues by its volumes and technical potential. The quantity of the Internet users amounts to 2 bln and is constantly growing; the volume of the content that fills up the global network is also increasing.

From the perspective of the social benefit, it is evident that the more music and literary works, films, software and databases are posted on the Internet, the better it is – the Internet technologies and services allow providing quickly and prudently a certain object for review to as many users

as possible promoting the cultural, scientific and other individual development of a human being. We can talk a lot about social benefits of free access to the abovementioned objects on the Internet, but we should remember that your freedom ends where another begins. Therefore, we should not forget that nowadays, literary, audio-visual, music and photographical works, which overwhelm the Internet, are fixed in the international and national laws on intellectual property right protection as the objects of copyright. Thus, we may talk about the free distribution and use of such objects of copyright on the Internet based on the validity of such actions.

The category of right protection has always raised high interest in jurisprudence, and it is hotly discussed today. One of open issues is the distinction between protection and defence of rights. R.B. Shyshka considers that defence of subjective rights shows the statistics of relations and is a general guarantee of their stability, while protection of rights constitutes the dynamics of the methods and forms provided by the civil legislation to restore a legal position of an offended party [205, p. 201].

Based on the analysis of the scientific opinions of leading scientists in jurisprudence, I.M. Sopilko integrated the meanings of defence and protection of rights in Informational Legal Relations Involving Ukrainian State Authorities. The authors provide the respective analysis below, "A lot of scientists pay attention to the problems of the protection and safety of rights in general theory as well as in various spheres of jurisprudence". However, this problem remains a live issue today. Numerous opinions on the correlation of these meanings can be grouped as follows. Based on one of the approaches, the meanings of protection and defence of rights are equal and may be used as synonyms.

The second approach states that one studied meaning includes the other meaning. The problem of this approach is that even its supporters cannot agree on which meaning is generic, and which is specific. Thus, some scientists say that the defence is a wider meaning that covers the protection as its component, and others say that the defence is a part of the protection.

The third approach definitely and clearly distinguishes between protection and defence of rights. Some scientists include defence and protection of rights to a wider meaning of legal protection. Please note that including the protection of rights in the system of legal protection depends on what one understands under legal protection, because this approach makes evident that defence and protection of rights are entirely separate and independent legal phenomena. Other scientists include the protection and defence in a wider meaning of legal defence. There is also an opinion that the means of the protection and defence of rights are covered by one and the

same meaning – social guarantees of rights and freedoms of a human being and citizen.

As regards the correlation between the protection and defence of rights, the analysis of the effective legislation shows that these terms are related but have different meanings. The Constitution of Ukraine, for example, uses the term "defence" in the context of safety of labour, safety of public order, health safety, defence of the President title, defence of rights and freedoms; while the meaning of protection is used in the context of the protection of the Homeland, state symbols, rights, freedoms, professional interests, sovereignty, territorial integrity and etc.

Investigating the correlation of the categories studied within the mechanism of protection of human rights, V. Temchenko also analyses how the mentioned terms are used in the Constitution of Ukraine. The scientific research shows that the term "protection" is used in the Constitution with legal structures that, among others, denote: 1) a legal commitment of the state or other bound parties to legal relationship to protect human rights and freedoms; 2) opportunities of a person of exercising his/her own subjective procedural right to protection if his/her rights are infringed.

Therefore, the scientists consider that "the term "protection" in terminological structures that denote certain subjective procedural opportunities of (rights to) the protection of the infringed rights is related to any constitutional right or freedom notwithstanding the literal use of this term directly in the Constitution. This right is logically distinguished based on the theoretical meaning of a subjective right and its structure where the structure consists of the following elements generally defined by theoretical science: a human right to own physical or legal actions – the behaviour right; a right to require from other parties to fulfiltheir obligations – the right of requirement; an opportunity of requesting competent state authorities for protection – the right of request; an opportunity of using certain social benefits – the right of use" [174, p. 171].

In addition, in the terminological word phrases of the Constitution, the term "defence" is used to denote quite a wide range of the powers of state authorities that provide, among others, for right infringement prevention, avoidance and restoration of rights and freedoms when they are infringed as well as bringing offending parties to legal responsibility.

The key and special aspect of the use of this term in the Constitution is that it is used in the meaning similar to the term "protection" as a commitment of the state and other parties, which bound to act, to protect human rights and freedoms. Finally, having analysed international and national regulations, the researcher summarizes that "the terms "protection" and "defence" are used in the regulatory context as synonyms or words with

close meanings in the respect of purposes, tasks, methods and subjects of right assurance and, therefore, may be used as identical in practice" [174, p. 190].

Considering the distinction between protection and defence, V. Bryzhko, M. Hutsaliuk, V. Tsymbaliuk, and M. Shvets note that M.V. Latynskyi states that the key subject-matter of any right is the defence of political, economic and other leading social interests. And the term "defence" is interpreted and used by the supporters of such a position in the broad social sense that provides for "consolidation, and development promotion, and regulation".

A.M. Larinthinks that protection implies the suppression of illegal infringement and right and freedom restriction, prevention of such infringement as well as the reimbursement for any loss incurred. It is the synonym of defence, safety, legal assistance, and danger elimination.

Confusingdefence of right and protection of right has a logical sense taking into account the failure of dictionaries to clearly define these terms. Dahl's Explanatory Dictionary states that protection means intercession. S.I. Ozhogov defines the term "to protect" as "to protect against attempts, hostilities, and dangers by defending". Meanwhile, "to defend" means to take care, guard, protect, keep perfectly safe, rescue as well as to control to avoid any damage to something or somebody. S. Ya. Vavzhenchuk states that in a social and philosophic sense, protection means defence, and defence, in its turn, means protection. It is interesting to note the Dictionary of Synonyms shows these terms as synonyms, in other words, they can be used interchangeably depending on the context. However, some explanatory vocabularies say that protection takes place in the process of defence, while defence means keeping safe and addressing carefully. Thus, the interpretations of the terms also have discrepancies: some researchers of the Russian and Ukrainian languages consider that these terms are identical and can be defined by using each other, while some include the process of protection in defence and deem it to be its component. We may also see the same in the legal sphere.

We think that it is impossible to accept that protection and defence are identical and interchangeable in the legal sphere. The analysis of the abovementioned opinions and the effective legislation witnesses that defence has a broader meaning that can include protection to a reasonable extent. It is worth noting that the sematic meaning of defence is to protect against infringement, and meanwhile, defence can be realised in two ways: 1) by establishing the standards of good and required behaviour, and defining means, methods and measures to comply with these standards; 2) by protecting the infringed rights, renewing them if these standards are

violated. Thus, the broad sense of defence of rights can be interpreted as the set of legal measures aiming at preventing violations and protecting rights if they are infringed.

Some researches tend to think that the category of defence and the category of protection are correlated as the whole and the part, in other words, protection is a part of defence [194, p. 40]. The category of defence, meanwhile, applies to activities that ensure the normal exercise of subjective rights (preventative measures, precautionary measures, warning), and the category of protection is related to activities performed when subjective rights are violated. The author supports such interpretations of defence and protection, but wants to note that copyright protection on the Internet as the specific environment of the exercise of copyright has some peculiarities related to the objective characteristics of the global information network.

We rely on the fact that the defence of subjective rights is a legal form of the protection of subjective rights. Protection is more informative and dynamic meaning that includes defence with its respective functional legal and static purposes. It is supported by the principles and their realisation in the patent standards of the international law, which stipulate that defence means to ensure the respective rights in the framework of a legal document – a patent or certificate – to the results of a human intellectual activity. It is related to the protection of personal data rights to the highest extant [212].

Meanwhile, O.F. Skakun, the well-known state and law theoretician, states, “Guarantees of human rights and freedoms ensure their enforcement, in other words, create conditions for exercising them. The enforcement of human rights and freedoms consists of three elements (aspects) of the state activity:

— to create conditions for exercising human rights and freedoms by positively influencing the development of general social guarantees thereof;

— to defend human rights and freedoms by preventing infringements thereof;

— to protect human rights and freedoms by restoring the infringed legal status and holding infringers legally liable.

The literature has various opinions relating to the terms “protection” and “defence” of human rights. It is evident that these meanings may not be confused.

The defence of each right exists permanently and aims at ensuring the force of a right. It provides for prevention, in other words, avoidance of illegal actions. Thus, the defence of rights and freedoms implies the legal exercise of such rights and freedoms under the control of social institutes but excluding their interference.

The need in protecting rights arises when they are prevented to be exercised, infringed or threatened to be infringed. The protection of right may take place when state authorities interfere in exercising rights and freedoms as the protective reaction to an objective factor of the violation of the rule of law; cause sanctions, liability; and represent the guarantees of personal safety of police officers.

It is impossible to realise the defence of rights in full without their protection. Protection is the most effective defence, its second phase.

When we are talking about the system of copyright protection, we imply the methods of such protection defined by the effective legislation. For the purposes of the research into copyright protection on the Internet, the authors deem appropriate to use protection methods defined by M.I. Brahinskyi and V.V. Vitrianskyi. This definition says that protection methods are measures, which are stipulated by the legislation and may help cease, prevent, and liquidate infringements of rights, restore rights and/or reimburse for losses caused by such infringements [25, p. 118]. The distinctive characteristic of this definition is that it includes the liquidation and prevention of infringement of rights within the category of protection that plays an important role in the protection of rights on the Internet.

Taking into account the abovementioned, we think that it is appropriate to use such a meaning as the safety of personal data when governing the personal data processing relations and referring to the prevention and avoidance of illegal processing of personal data, and measures to be taken after personal data legislation is violated, while only the latter should be interpreted as the protection of personal data [174, p. 180].

Taking into account the term “Internet“, the authors note that the Ukrainian legislation has no single term to define this digital information environment, but nowadays, the term “Internet“ can be often found in the Ukrainian regulations and bylaws.

O.A. Prysiazhniuk considers that nowadays, the most adequate and complete definition is provided by the Parliamentary Hearing Recommendations entitled “Russia and the Internet: the Choice of a Futur”[160]:

*The Internet* is a unique set of local, regional and national computer networks and a universal data exchange technology;

*The Internet* is a mode of informational communication for millions of people;

*The Internet* is the global informational space with no state borders that converts this system into a new high-quality phenomenon within the global community;

*The Internet*is a unique product of access to information relating to any types of activities or human interests;

*The Internet* is one of the key instruments for understanding the world, learning and obtaining professional knowledge;

*The Internet* is an object of the development and application of innovative software and tool engineering that ensures its rapid development in future.

The Internet has no centralised management system. It only has the system coordinator, the ISoc – the Internet Society. This non-profit organisation is based on sponsorship. Meanwhile, every country triggers its own legal and organisational mechanisms of the Internet control [122].

For the purposes of this research, the Internet means the global system of the interconnected computer networks that is designed for keeping, transporting and otherwise processing information and allows accessing information notwithstanding its location. Therefore, copyright protection on the Internet constitutes actions aiming at copyright protection when posting, storing and transporting objects of copyright through the Internet resources. The authors stress that it is thus necessary to research into applying the copyright to protect the Internet content rather than the Internet as a physical object.

All various approaches to the problem of copyright protection on the Internet can be reduced to the following key tactics:

— copyright protection on the Internet makes no sense at all;

— it is impossible to protect copyright on the Internet by using traditional copyright protection methods;

— it is necessary and possible to protect copyright on the Internet by using traditional copyright protection method.

The supporters of the first approach defend social utility principles and ground their opinion on unlimited opportunities of developing an individuality through resources of the global network; however, this point of view does not take into account the interests of an author and, thus, it is illegal from the perspective of law, and it affects the interests of n author by promoting the interest of a user from the perspective of formal logics. The supporters of the so-called cyberlibertarianism that appeared as a system of social and legal views on legal control of the Internet space after D. P. Ballou made his Declaration of the Independence of Cyberspace in 1996, demonstrate such arguments: a lawmakervaguely understands a sphere he wants to regulate; no state authority can control cyberspace; cyberspace has its own common law, which ensures its development and functioning.

The authors think that the refusal of the supporters of the independency of cyberspace theory to compromise goes beyond the legal scope and can be

considered in the context of multiple research into views relating to copyright protection on the Internet rather than in the context of seeking a rational way out that recently meets numerous infringements of copyright within the global network.

The supporters of the second approach stress on the uniqueness of the Internet. Thus, O.A. Orlova states that problems relating to copyright protection on the Internet are caused by the qualities of this network such as globalism, exterritoriality, general availability, interactivity, anonymity [102, p. 71].

The Internet globalism means that it covers all countries of the world and is ambitiously growing. The development of wireless technologies, satellite communication and other achievements of modern science and technology allows distributing quickly objects of intellectual property through the Internet in digital form and for long distances. Some time ago, a hard copy of a book could be transported from one place of the world to another in several days or weeks if a region was difficult to access, and nowadays, a text file can be sent to any place of our planet by e-mail or other computer instant messaging systems on the Internet in a few seconds.

Exterritoriality as a characteristic of the Internet network is related to multiple current locations of its providers, users, hosters and etc. Let's consider an example: a certain Internet forum user (an Internet forum is a type of websites that is specially adapted for comfortable communication and sharing of views) can quite easy publish a literary, graphic or any other work making its copying and reading available to an unlimited number of people. Though the effective legislation wants to abstract away from recognising that the work disclosed on the Internet is published – when correlated with printing, the consequences of such actions correlate with traditional publishing of works.

The problem is that every book, newspaper or magazine in a hard copy has its concrete publisher that can be found by an exact address to bring claims against it. On the Internet, a user can live in one country and the Internet forum can be located in the domain area of another country and the website holder can represent the third country. In addition, the web servers can be located in the fourth country. Any judicial or administrative protection of the infringed copyrights seems to be unlikely.

Here is the case with www.demonoid.me, the globally known torrent tracker owned by natives to Serbia – as generally known data says – who constantly support the lifespan of the website. The torrent tracker is special as it contains only links to specific objects of copyright located on users' personal computers worldwide (the website has millions of users), while the web servers located in Ukraine today have no pirated content. But the

access to this website for the Ukrainian users (the users with IP addresses located in the so-called UA area) is blocked to officially avoid any potential breaches within the hosting country. Such an instance of exterritoriality of the Internet resulted in the situation when in 2007, the website was suspended under the pressure of a Canadianrecord company with its further restart in a short period of time. Today, traditional legal methods of control are unfortunately helpless before the Internet exterritoriality.

General availability is an actual potential access of enormous number of users to the resources on the Internet. Various statistical data witnessing several billions of the Internet users are constantly being updated and demonstrating the permanent increase in the Internet audience and speeding up of the dynamics of its increase. To use the Internet in the majority of countries of the world, you need no administrative formalities. Any potential user should only realise a technical possibility of connection. An enormous number of the Internet users promotes fast distribution of any content, including the context that can infringe copyrights of certain persons.

Interactivity as an integral characteristic of the Internet relates to the so-called real-time mode when certain events, including those of legal significance, can take place online. The example of the Internet interactivity is making a certain work available to the public whereupon the author makes some changes and amendments to this work. If the object of copyright is made available through a physical carrier, it requires a lot of resources and efforts to make changes to it. Digital form used on the Internet allows changing works quickly and simply, however authors cannot avoid the distribution of the reproductions of original copies. The information on an author also can be changed on the Internet.

Anonymity as a characteristic of the Internet means that the Internet users can act anonymously, in other words, they cannot provide any personal data. Anonymity also allows liquidating any traces of activities of users on the Internet. Dynamic IP addresses and special software designed to hide users' IP addresses or specify fake addresses have – along with anonymity – raised the concern of the use of the Internet incognito.

Anonymity is one of the key and most dangerous obstacles to copyright protection on the Internet through traditional methods. Lack of even potential opportunities of identifying infringers results in inability to bring them to responsibility. A person whose copyright has been infringed cannot actually identify a party whom it may address the reimbursement claim and etc.

Some researchers rely on special qualities of objects of copyright in digital form and the interaction mechanism between such objects and the

Internet space. Thus, O.V. Iienin [64, p. 345] thins that key characteristics of digital technologies, which can impact the peculiarities of copyright protection on the Internet, include:

— relative speed and ease of distribution through the Internet;

— ease of reproduction and distribution of phonogram reproduction means in digital form;

— no significant financial expenses for fast distribution of objects of copyright;

— high information recording density;

— high quality characteristics of digit recording.

The Internet specificity and causes of legal nihilism of its users determined by S.P. Kudriavtseva, the Russian researcher, are of high interest from the scientific [83, p. 226]. She conventionally divides such causes into three categories:

— technical;

— legal;

— social and psychological.

The first category includes the nature of information, its publication on electronic digital carriers and on the global information network that causes the technically simple opportunity of copying, reproducing, quickly distributing, duplicating such information and etc. Legal causes include the lack of detailed legal control, imperfect legislation as well as conceptual complexity to ensure evidence on the Internet. Social and psychological causes include the ephemeral status of the human autonomy, the opportunity of acting anonymously or incognito without providing any personal information and verifying its reliability.

The majority of the supporters of the second approach to problems of copyright protection on the Internet based on the above-mentioned classification offers to use technological measures of protection, the network self-regulation tools and other combinations of law and technologies. The peculiarities of copyright protection on the Internet through modern legal and technological measures will be described in detail in the second and third sections of this research.

The supporters of copyright protection on the Internet through traditional means stress on positive changes in this area. The arguments of those who support applying traditional judicial protection means intended for civil rights to infringement of copyright on the Internet usually aim at demonstrating successful transformations of national and international legislation. Judges, for example, often face a problem of how to identify the respective defendant, but the Resolution of the Plenary Session of Supreme Court No. 5 on Application by Court of Law Standards for Cases on

Copyright and Related Rights Protection dated 4 June 2010 initiated evident changes to this situation [136].

Paragraph 31 of this Resolution includes a directive that requires judicial protection of copyright if any property rights of a copyright holder are infringed when his/her work has beenposted on the Internet. When settling the respective disputes, the court should determine whether the website and information posted on it belong to a person against whom the claim is brought, and what proves the fact of the infringement of copyright. The administrator of the system of the registration and accounting of domain names and addresses in the Ukrainian Internet segment may be required to provide the data on the website holder as stipulated by the provisions of the Civil Procedural Code [136]. This resolution also answers the question relating to illegal storage of a software copy within the memory of electronic means (a computer and etc.) – such storage is recognised as the infringement of a property copyright.

Coming back to the problem of defining copyright protection on the Internet and differentiating between protection and defence, the authors want to stress that the differentiating problem also relates to an ambiguous approach of a lawmaker to this issues. Thus, Article 2 of the Ukrainian Law on Copyright and Related Rights [126] provides for that the Ukrainian legislation on copyright and related rights is based on the Constitution of Ukraine and consist of the relevant rules of the Civil Code of Ukraine, this Law, the Laws of Ukraine on Ownership, Cinematography, Television and Radio Broadcasting, Publishing, and Distribution of Copies of Audio-Visual Works and Phonograms, as well as other laws of Ukraine protecting personal non-property rights and the property rights of copyright and related rights holders. But we know that separate articles of this law aims at regulating copyright protection, particularly Article 50 (Infringement of Copyright and Related Rights), Article 51 (Procedure for Protecting Copyright and Related Rights), and Article 52 (Civil Law Remedies for protection of Copyright and Related Rights). In addition, this law uses the term “technological measures of protection“ of copyright rather than “technological measures of defence“.

Information and communication technologies have hardly changed the general principles of copyright protection. Meanwhile, their impact on the meaning and content of copyright as well as the mechanism of their exercise has indirectly influenced the defence of copyright – the period of the defence of copyright has been prolonged, the scope of the subjective copyrights has been increased through the new environment of their exercise, the system of the personal property and non-property rights of an author has been improved, new copyrights has appeared.

The system of copyright protection defined by the effective legislation of Ukraine is characterised by combining only legal civil law remedies for infringement of copyright deprived of a technological component that includes absolutely new technological measures of protection that are non-relevant to copyright but meet the challenges of the information environment.

Technological measures of protection are absolutely new phenomenon in the sphere of copyright as well as civil law. Technological protection allowed ensuring the due level of the defence of copyright in the information environment. It was possible by applying traditional civil law remedies. However, some researchers seriously doubt that the use of technological tools to ensure the safety of the transfer and distribution of digital works is legal.

Authors think that the close interrelation between the components of civil law remedies for infringement of copyright is a peculiarity of the modern system of copyright protectionwhich has been generated under the influence of information technologies. Meanwhile, civil law remedies for infringement of copyright are the only institution of copyright, which should be researched based on the close relationship between its components.

It is important to understand the jurisdiction of the Internet network. Views on the jurisdiction of the Internet are absolutely different. Especially, the interests of the state relating to protection of people in the information space oppose the developed processes of the information society self-regulation. The information society persists in its opinion that it has created the Internet, while states try to liquidate their lack of attention to the global network, which they have omitted at the beginning of its emergence and development. In Ukraine, this process takes place by approving and effecting legislative instruments relating to information relationship regulation. Based on judicial precedents, the court takes the supremacy of national legislation over information relations as the basis in the majority of cases. O.P. Radkevych thinks that this is the best way out of such a situation as it witnesses the rational development of national legislation in respect of the Internet based on special laws that derive from international legislation. The definite legislative instrument should define the legal status of the Internet and determine the key principles of its activities [151, p. 436].

### 1.3. Peculiarities of Disposal of Copyright on the Internet

The general rule allows that every author has a right to economic exploitation of object of copyright created thereby as he/she may deem reasonable. The exclusive right of an author to use the work as well as to allow or prohibit the use ofthe work by other persons is defined by Section 1, Article 15 of the Ukrainian Law on Copyright and Related Rights [126]. For the purposes of this research, the disposal of copyright on the Internet implies realisingthe complex of copyright powers in whole or in part within the global network.

Within the research, the authors stress that the category of disposal is not one of the components of the triad of the powers of a right of ownership – in parallel with possession and use. The disposal of copyright implies the complex of the powers in respect to objects of copyright defined by national legislation of various countries and international legal acts as follows:

— reproduction of objects of copyright;

— creation of a derivative work based on such an object;

— sale, alienation or distribution by another method of an object of copyright;

— public display;

— importation of copies;

— versions, adaptations, arrangements and other similar alterations to works;

— distribution by first sale and etc.

The effective copyright legislation of Ukraine includes the list of eleven powers of an author, and the lawmaker stresses on the inexhaustibility of the list offered. The Internet environment and the digital form of copies of works, which are being used therein nowadays, significantly change the traditional ways of how to exercise the abovementioned powers.

The Ukrainian copyright legislation and the majority of the copyright-relating acts of foreign countries do not include the list of physical forms of objects of copyright. This relates to the fact that such forms are constantly being changed and improved under the influence of scientific and technological progress. However, scientific works of the Ukrainian and foreign scientists recognise that the digital forms of objects of copyright are specific. This is represented in the scientific works of O.M. Pastukhov [106, p. 113], V.S. Drobiazko, R.V. Drobiazko [53, p. 189], O.P. Serheieva [164, p. 302], E.P. Havrylova [35, p. 177] and other scientists.

The procedure for converting a work to the digital form is of high significance from the perspective of its qualification and based on the positions of copyright. A. Kerever, the French researcher, states that digitisation is translating – with electronic means – any massage in the form

of text, sound, static or movable image into the binary language, which uses bits 1 and 0 [73, p.135]. Therefore, the question of to which power (reproduction or reprocessing) digitisation belongs arises.

D. Lipszyk, the French scientist, considers the conversion of an object of copyright to digital form as reproduction [86, p. 158]. V.O. Kaliatin, the Russian copyright researches, even formulates a new category called "digital reproduction" as a separate type of the power of reproduction. V.O. Kaliatin states that digital reproduction – in contrast to analogue reproduction – significantly increase the potential of copying a work, and the conversion of a work to digital form should be considered as an individual action [68, p. 96].

The EU lawmaker supports this opinion. Thus, the Green Paper approved by the European Commission on 19 July 1995 says that "the concept of reproduction shall be duly revised to define whether the right to reproduction must be applied to ordinary use (digital form, transitory copy, storage in the memory of computers and other equipment) that is natural for the information society" [13, p. 178]. Therefore, all regulatory acts based on the Green Paper referred digitisation to the power of reproduction.

Referring the digital form of objects of copyright to the power of reproduction is quite essential as the contents of the object remains to be untouched while its form is changed. In addition, if digitisation were referred to the reprocessing, it would require defining the creative nature of reprocessing, as the reprocessing of a work – provided that the author's rights are not infringed – may result in a new object of copyright as a derivative work as well as a new copyright holder, which receives all the author's powers relating to a derivative work created thereby.

Analysing judicial practice, we can note that defining the creative nature of reprocessing will unavoidably require the respective examination that significantly complicates legal proceedings, increases expenses of both parties and results in long-lasting litigation. O.A. Pidopryhora states that a derivative work is inextricably associated with two features: the creative nature of a work and its physical form [108, p. 130]. Reprocessing a work by digitating its physical form does not result in a derivative work as it has technical nature rather than creative one.

The opinion of P.A. Kalenychenkois interesting as he states that the change of form results in significant changes in the characteristics of a work (the reproduction and distribution are considerably simplified, posting works on computer networks, including the Internet, becomes possible, importing works without any additional customs inspection of copyright is easier). Thus, the digitisation of objects of copyright is included into the power of reproduction as well as the power of reprocessing [66, p. 192]. Based on such an opinion, the researcher concludes that a user may not

practically convert a work or the object of related rights to digital form without any permission (or right alienation) to reproduce or process such an object of copyright. It is difficult to agree with such a conclusion as a work may be converted to digital form to satisfy personal needs. For example, a fair user may transfer the data of a music compact disc, which he/she has purchased on legal basis, to MP3 format to use them with the digital MP3 Player. It would be beyond the purpose and law to ban such conversion in the days of the massive distribution of high technologies as persons could be actually deprived of their rights to use the benefits of an item, which belongs thereto on legal basis, or such rights could be significantly limited.

Researching into the peculiarities of the disposal of copyright on the Internet, it is worth mentioning the copyright qualification of posting a work on the global network and correlation of the powers of reproduction and making available to the public to the extent that its representatives may access such an object from any place and at any time as they may deem appropriate (the so-called power of access).

The latter appeared in the Ukrainian copyright legislation when the norms of the WIPO (World Intellectual Property Organization) Performance and Phonogram Treaties had been implemented. The wording of such a power word by word repeats the norms of the treaties being modified into the definition stipulated by Article 442 of the Civil Code of Ukraine as "the use by representing inpublic electronic information systems"[201]. Thus, we may consider certain competition of powers. The power of access aimed at regulating legal relations of the use of objects of copyright and related right on the Internet.

The Ukrainian law remained passive to such a power for a prolonged period of time. Thus, the Presidium of the Supreme Economic Court of Ukraine issued the Recommendations on Practice of Settlement of Disputes Related to Protection of Intellectual Property Rights where it stated that "posting works on the Internet means reproducing them within the meaning of Article 1 of the Law on Copyright and Related Rights" [211] and in no way referred to the representation in public electronic information systems. It is difficult to agree with such a conclusion, as the mentioned power has been implemented prior to the Ukrainian copyright legislation, and it is fair enough to use it to protect the rights and interests of the respective right holders.

V.H. Rohan correctly admits that "the extensive and restrictive interpretation of civil acts in the national legal system is impossible as it is stipulated by the Constitution and legislation of Ukraine. The court should literary interpret and apply civil acts" [148, p. 13]. Therefore, all norms of the law, including definitive norms, which define author's powers, must be applied within the limits, which are clearly established by the legislation.

Various civil acts (the Civil Code of Ukraine and the Law of Ukraine on Copyright and Related Rights) provide for various versions of the mentioned power, and it is worth analysing both definitions. The Law of Ukraine on Copyright and Related Rights, Article 15, Part 3, Par. 9 defines that posting a work by its author on the Internet means "making his/her works available to the public in such a way that its representatives may access the works in any place and at any time as they may deem appropriate" [126].

The Civil Code of Ukraine does not define such distribution as a separate power of the use of a work, but its Article 442, Part 1 considers it as one of the varieties of publishing defining it as "the communication to the indefinite range of persons by representing in public electronic information systems" [201].

Having analysed both definitions, we can conclude that posting an object of copyright on the Internet as required by the Law on Copyright and Related Rights should meet two conditions:

— availability to the public at any time;

— availability to the public from any place.

However, the Civil Code of Ukraine states that the conditions for defining certain actions as posting objects of copyright on the Internet are:

— availability to the indefinite range of persons;

— representation in public electronic information systems.

The failure to meet any of these conditions disables the protection of a work with the mentioned power and makes the protection available only by exercising the power of reproduction. However, the practice shows that evading these conditions raises no challenges. General availability may be easily restricted by implementing the so-called user registration system on websites. Such a system can, for example, require that its user provides certain data and enter permanent username and login. Implementing such a system allows the website holders to consider the users of their websites as defined and exclude the website from the category of websites open to general use.

In addition, the user access to the website may be limited through certain software actions. Usually, these limits are established for official purposes only for an hour per day not to create nuisances to users. General availability from any place may be easily restricted by implementing a user access system for a certain country, region and etc. Recently, restrictions to refer users to the so-called UA area, RU area and others have become popular. Such restrictions are usually related to the location of the servers of the Internet-provider that delivers the Internet services for a subscriber.

Therefore, we may state that the power of the Internet access is not able to ensure the protection of rights to objects of copyright posted on the

global network. This relates to the fact that its contentis restricted by conditions, which can be easily evaded by a user as well as a website holder. In addition, the mentioned power does not include any digital transfer, in other words, any transfer by e-mail or through specially designed software, which allows sending files (ICQ, Skype and etc.) in addition to communication functions.

We would like to consider the power of reproduction and peculiarities of its exercise on the Internet in detail. The Internet functions so that its users – viewing objects of copyright consciously or unconsciously, without their consent (if they appear in pop-up windows of browsers, banners of webpages and etc.) – create the range of electronic copies of such an object in their or sending computers:

— the modem of a sending computer;
— the router of a of a sending computer (if available);
— the modem of a receiving computer;
— the router of a of a receiving computer (if available);
— the Internet browser;
— the operative memory of a receiving computer;
— the video chip of a sending computer;
— the video chip of a receiving computer and etc.

In addition to temporary copies, it is also possible to create a permanent copy on a hard disc drive or other information carrier of a receiving computer. Temporary electronic copies meet the definitions of the power of reproduction provide by the Ukrainian and other national copyright legislations. As creating such temporary copies of an object of copyright is inevitable and almost all users of the Internet create them every day, each and every case of creating the temporary copy of an object of copyright without permission is deemed as the infringement of copyright from an official perspective. The transboundary Internet raises the need in accumulating the efforts of all international society as the only possible way out.

Nowadays, the legislations of a lot of countries offer an opinion that the transfer of information through the Internet is not deemed as goods. The European Union and the highly developed countries of North America, inter alia, fairly consider such a process as a service. Such a position of the European and American lawmakers is not unexpectedand relates to the use of the so-called “exhaustion doctrine”.

The exhaustion doctrine (or better known as the “first sale doctrine” based on the civil law doctrine of the USA and some other countries) is inherently a limitation of the author’s power of distribution. The author’s subjective right to distribute an object of copyright created thereby is exhausted after the author has started selling the copies of such an object.

Meanwhile, they may be sold by an author or any other person authorised by the author. In other words, when the copy of a work is first sold or otherwise alienated by the author or other authorised person, this copy may in future be distributed without any additional consent of the copyright holder and, consequently, without any additional fee to be paid thereto.

In the world of physical copies of objects of copyright, applying the exhaustion doctrine raises no problems. It is related to the fact that a person who uses an object of copyright in the form of a certain copy of a work actually loses is/her opportunity of using it after it is transferred (sold or otherwise alienated) to another person. Applying the exhaustion doctrine on the Internet is almost impossible.

When the electronic (digital) copy of an object of copyright is posted on the Internet, the opportunities of duplicating and further transferring such an object in the dorm as a file from one user of the Internet to another cannot be limited. Every new customer can receive a full copy of a work while a previous user also can continue using it. It is evident that in such situation, the author or another person who has legal copyright to the work bears significant losses. In addition, this situation results in the conflict between the power of reproduction and the power of distribution, as each transfer of a work creates its full copy while its original remains in the transferring party.

Taking into account the mentioned above, the Ukrainian lawmaker may choose between two key ways of how to avoid the exhaustion doctrine on the Internet. These ways are as follows:

— to transfer information through the Internet as a service that allows not applying the right to distribution to works posted on the global network (such a way is pragmatic for the countries of the European Union);

— to exclude the Internet from the scope of the exhaustion doctrine (this way is typical of the American civil law doctrine).

It is possible to solve the problems relating to the exercise of the majority of the author's powers having been considered by this scientific work when the legal regulation of the relationship associated with the use of objects of copyright on the Internet is enhanced. Thus, the authors of this scientific work stress on the necessity to include two new powers in the Civil Code of Ukraine and the Law of Ukraine on Copyright and Related Rights:

— "electronic recording" that Article 1 of the Law of Ukraine on Copyright and Related Rights defines as recording a work, a performance, a phonogram, a videogram or their copies to be temporarily or permanently stored in computer-readable electronic, including digital, form;

— "electronic distribution" aiming at replacing the power of the disclosure of the works to the public for the purposes of the Internet to the

extent that may access the object of copyright from any place and at any time and the communication to the indefinite range of persons by representing them in public electronic systems. The authors think that the power of electronic distribution should be defined as enabling through the means of communication the access to a work, a recorded performance, a phonogram, a videogram or their copies by using telecommunication networks (save for TV networks).

The authors suppose that the reproduction in digital form as one of the ways of use of a work should be left beyond the copyright regulation. It is possible to realise by making changes to the effective laws that would specify the impossibility of exercising the power of reproduction in the cases, which the authors have listed herein. Such a statement is based on the objective differences between the reproduction of a work in digital and physical forms. These differences demonstrate as follows:

— there is no a real opportunity of controlling electronic digital reproduction today;

— such reproduction can be carried out by a computer without any direct instruction of a user (e.g., in cash memory) or beyond their will;

— a user actually requires no special efforts and financial expenses to carry out such reproduction;

— duplication and copying resulting from such reproduction are almost unlimited, it is impossible to establish any quantity restrictions in the majority of cases.

It is worth noting that the authors' offers may not constitute a part of the national legislation system unless changes are made to the World Intellectual Property Organization treaties taking into account that Ukraine has ratified them. It is related to the fact that they directly involve the norms implemented by Ukraine. Therefore, the author stresses that it is necessary to initiate changes to such treaties by submitting the respective offer to the World Intellectual Property Organization.

Understanding that the process of making such changes is complex and long-lasting, the authors emphasise the importance of accepting such changes at the international level. Zero changes to the international approaches to legal regulation of author's powers slow down the potential development of the national copyright system, adequate to the time requirements. Furthermore, the active participation of Ukraine in the process of international law-making will promote the international image of Ukraine as well as its integration into the European society.

# SECTION 2
# TOPICAL ISSUES OF TECHNOLOGICAL MEASURES OF COPYRIGHT PROTECTION ON THE INTERNET

## 2.1. Concept and Place of Technological Measures of Copyright Protection

The world practice of intellectual property protection, including copyright protection, shows that there are two main forms of such protection - jurisdictional and non-jurisdictional. The jurisdictional form of copyright protection is usually provided by judicial authorities. In addition to judicial remedies for in fringement of rights, the jurisdictional form of protection includes the protection by other authorised bodies. The essence of this protection is that the copyright holder whose rights have been infringed applies to a competent authority. This authority provides (caries out) protection if appropriate.

O.A. Prysiazhniukin his thesis research Fundamental Concept of Legal Regulation of Internet Relations in Ukraine (General Theoretical Aspects) notes that ”It is clear that the e-environment has changed the idea of possibilities and quality of copying and changing the works. The technology of combining them on electronic carriers has reached such a level that the line between creativity and interpretation of the existing data, between the work and its copy becomes increasingly blurred. Without necessary tools of intellectual property protection, the development of the information society will be retarded. Easy and free copying and almost instantaneous distribution of creative products make them cost – inefficient for authors of information products. Therefore, key concepts of copyright, such as the right to reproduction, public performance, public broadcasting, communication, display, quotation, reproduction of the work for personal purposes, by libraries and archives, reproduction of copies of a work for training are to be given a new interpretation for computer and information technologies and telecommunication networks that [122].

The jurisdictional form of copyright protection covers the actions of individuals and organisations regarding copyright protection taken by them, but on the basis of and within the law. Such forms of protection are usually used less often than jurisdictional protection, but the right to self-protection is one of the most important institutions of the constitutional status of a person. Thus, Part 5, Art.55 of the Constitution of Ukraine says that everyone has the right to protect their rights and freedoms from infringements and illegal encroachments by any means permitted by law. Therefore, the Ukrainian lawmaker acknowledged at the level of the Basic

Law a personal right to self-protection of rights. In terms of legal consequences, it was equivalent to jurisdictional legal protection, but now any person may protect the rights at his/her discretion using his/her own resources.

Modern realities of public life consider effectiveness as one of the main criteria of civil protection efficiency. Jurisdictional copyright protection provides for the recourse for protection to the authorised bodies, which adversely affects the effectiveness of protective actions and significantly reduces their efficiency in future. Instead, the use of non-jurisdictional copyright protection allows protecting efficiently the infringed rights as well as preventing such infringement in future.

Today, technological measures of copyright protection on the Internetare an outstanding example of the implementation of copyright protection in non-jurisdictional form. We agree with T.Koskinen-Olsson that technological measures of copyright protection are the most effective means for protecting digital forms of objects of copyright on the global network [80, p. 55]. Being essentially a preventive measure of protection, technological measures of protection considerably complicate or even make an unauthorised access to objects of copyright, their illegal copying, distribution and other similar illegal actions impossible for infringers.

The emergence and existence of technological measures of protection date back to the time when objects of copyright were given a duplicated tangible form of expression, i.e. with the advent of the printing industry. Technological development enhances the emergence of new forms of objects of copyright and motivates copyright holders to search for new effective ways to protect their intellectual products from unauthorised use.

In the early days of copyright, technological capabilities of infringers were limited, and technological protection was automatic, but with the advent of copy and duplication machines, and later – with the invention of digital forms of storage and distribution of works – authors and other legitimate copyright holders required the use of technological protection on their own.

The first need to use technological protection emerged in the early XX century in the United States where a mechanical piano-player became very popular. That piano-player reproduced music by means of a special punched tape, which contained a set of tracks. Manufacturers of the punched tapes paid fees to composers for using their works, but having purchased one tape, the purchaser could easily create a copy and start its illegal distribution.

Later, the problem of technological copyright protection arose again in the framework of the global spread of tape and videotape recorders. In the

United States, the so-called Betamax case sparked public outcry where Universal Studio filed a law suit against Sony demanding to ban the production of video tape recorders. It was then that legal precedent was established. Such a precedent recognised legitimacy of the production of those technical systems that enabled to commit both legal and illegal actions.

In that, case the use of such video tape recorders for personal needs (for example, recording a certain part of a television programme with the purpose of viewing it at time the user may deem appropriate) was recognised as legal actions, and the use of such video tape recorders with the purpose of making illegal copies of films for subsequent duplication was recognised as illegal actions. That situation required inventing technologies that would limit copying (duplicating) of videotapes by users, and that was done by Macrovision.

The technological design of the company added impulses in each empty interval of vertical scanning that did not affect the quality of reproduction, but complicated a process of copying and led to loss of quality. That design was one of the first patented technological measures of protection, and the manufacturer immediately developed and patented circumvention techniques.

The global network of the Internet has significantly complicated an author's chance to renounce technological measures of protection due to technically simple option of free and instant duplication and distribution of his/her work among the Internet users. Therefore, today copyright holders are seeking to protect their objects of copyright against unauthorised use not relying on efficiency of legal systems [190, p. 47].

The importance and effectiveness of such remedies are established by law. Thus, in accordance with Part 1(e), Art.50 of the Law of Ukraine on Copyright and Related Rights, "any deliberate action to circumvent technological protection of copyright and /or related rights, including manufacturing, distribution, importation for distribution and any other means for such circumvention, are considered to be infringement of copyright and/or related rights that give grounds for legal remedy" [126].

So, the use of technological measures of protection forms, in its essence, the two-level system of copyright protection on the Internet where:

— at the first level, technology protects rights of an individual;

— at the second level, specifically-defined provisions of the Law of Ukraine on Copyright and Related Rights protect technology against potential circumvention.

In the Ukrainian jurisprudence, the concept of technological measures of copyright protection has traditionally been defined by the legislation that

is used, in particular, by such researchers as O. M. Pastukhov [106] and I.I.Vashchynets [31] in their research papers. According to Article 1 of the Law of Ukraine on Copyright and Related Right "technological measures of protection shall be technical devices and/or technological developments designed to create technical obstacle to infringement of copyright and /or related rights in the process of reception and/or copying of the protected (encrypted) recordings in phonograms (videograms) and broadcasting organisation programmes or to control access to objects of copyright and related rights"[126].

The definitions of technological measures of protection in different countries are not identical. For example, according to the intellectual property rights experts of the US State Department, technological measures of protection in the context of the Internet are computer software that regulate access to works posted on the Internet. This may be software that protects certain information from site visitors who have not obtained prior authorisation, or cryptographic codes that restrict access to information, its storage in the users' computer memory or printing without appropriate authorisation [212]. It is difficult to accept this opinion because this definition reflects only a certain part of technological measures of protection, in other words, it explains the term "technological measures of protection" in its narrow sense.

O.A.Orlova, the Russian researcher, does not use the term «technological measures of protection», but considers a possibility of placing on electronic documents a special product that can prevent a process of copying or make this process subject to payment [102, p. 72].

In addition, the author mentions apossibility of assigning to the document a programme code that can partially disrupt the integrity of the document if the latter is received or used illegally. The situations referred to above essentially conform to technological measures of protection. Recently, Russian scholars have also useda new legal definition, according to which technological measures of copyright protection are any technologies, technical devices or their components that control access to a work, prevent or limit actions prohibited by an author or another holder of copyright to the work.

Technological measures of protection are provided for by the legislation of the European Union. According to Part 1, Article 6 of the Directive of the European Parliament and of the Council No. 2001-29 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society dated 22 May 2001, "Member States shall provide adequate legal protection against the circumvention of any effective technological measure by a person if it is known that he/she commits such acts intentionally or if

there are reasonable grounds to believe that a person who committed such acts purported to do so" [129].

On the basis of the detailed analysis of the definitions given by scholars and legislation of different countries, we can come to the conclusion that technological measures of copyright protection are technological mechanisms (in the formof devices or products), designed to protect access and transfer of objects of copyright and to supplement legal defence provided for by law and/or agreement with effective technological protection.

Some researchers note that the Ukrainian legislation on copyright lack any detailed regulation of the use of technological measures of protection in the sphere of copyright, the limits of such use, exceptions, etc., and therefore, reference to international practices in terms of legal regulation of relations regarding the use of technological measures of copyright protection is fully justified [29, p. 33].

The authors agree with this opinion, but emphasise that excessive specification of legal regulation of technological measures of protection is not an essential drawback of the legislation. This is connected with dynamic scientific and technological progress, constant invention of new technical devices and products that can help protect copyright. Therefore, without a possibility of predicting the development of technological measures of protection even for a short period, lawmakers should limit themselves to the regulation of such protection measures within key points.

As for international experience in legal regulation of technological measures of copyright protection, it should be noted that the World Intellectual Property Organization (WIPO) adopted the Copyright Treaty in 1996 and, in 2001, Ukraine joined it. According to Article 18 of the Treaty, the Contracting Parties undertake to provide for adequate legal protection and effective legal remedies against "the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights under the Treaty and that restrict the acts, in respect of their works, performances or phonograms which are not authorised by authors, performers or producers of phonograms or permitted by law" [12]. However, this provision is of declaratory nature and effects only the obligation of the Contracting Party to the Treaty to introduce in to its legislation the category of technological measures of copyright protection, and this has been implemented in Ukraine.

The WIPO Copyright Treaty was not the first international document declaring the need for technological measures of protection. In the middle of the 1990s, the so-called American White Book and European Green

Paper were created with the purpose to streamline the functioning of copyright in cyberspace. The European Green Paper, known as the European Commission Green Paper, contains provisions, under which digital technology and new opportunities of database to better protect works and other protected objects, promote the development of systems adopted for copyrighters, producers of equipment, distributors of works and other authors of protected works [13, p. 64].

The legal nature of technological measures of copyright protection is understudied in the legal literature. Classifying technological measures of copyright protection on the Internet as one of the means of civil protection is indisputable. The provisions of Chapter 3 of the Civil Code of Ukraine on Protection of Civil Rights and Interests [200] specify these types of civil rights protection, depending on the protection procedure:

— judicial protection;
— administrative protection;
— civil rights protection by a notary;
— self- protection.

The constitutional provision on self-protection of rights contained in Article 55 ofthe Constitution of Ukraine was further implemented in the Civil Code of Ukraine, where the right to self- protection was enshrined as a legal category at the legislative level for the first time. The above legislative actions opened the way to further use the category of self-protection both in the regulatory acts and in the academic literature, court decisions and everyday legal practice.

Some researchers believe that the establishment of technological measures of copyright protection may be considered as one of the means of self-protection [28, p. 23]. We agree with this opinion because according to Article 19 of the Civil Code of Ukraine, self-protection is the use by an individual of counter measures permitted by law and not contradicting moral standards of society. The means of self-protection should conform to the content of the infringed rights, nature of actions, which have infringed this right, and consequences resulted from such an infringement.The means of self-protection may be chosen by a person or established by an agreement or civil acts [200].

Pursuant to Article 19 of the Civil Code of Ukraine, self-protection is the use by an individual of counter measures permitted by a law and not contradicting moral standards of society. The means of self-protection should conform to the content of the infringed rights, nature of actions, which have infringed this right, and consequences resulted from such an infringement. A copyright or related right holder whose rights have been infringed may choose the means of self-protection or these means may be

established by an agreement. Certainly, these means have to comply with the law [215, p. 790].

For example, an important way to protect rights is to hold negotiations between a copyright or related right holder and an alleged infringer of these rights, during which an offending party may be convinced to abate the infringement of rights and execute the agreement of legal use of copyright or related rights. The negotiations and compromise are, in many cases, more productive than the proceedings in the court or other competent authorities.

The legal literature considers self-protection as actual actions of an authorised person permitted by law and aiming at the defence of personal or property rights or interests [46, p. 413]. Classic examples of self-protection in the domestic civil law are statutory self-defence, infliction of harm in a state of emergency, retention of property by a lender.Modern copyright which has faced the challenges of new information technologies often uses such methods of self-protection as the notification of an infringer on copyright, requirement to eliminate the causes of such infringement and technological copyright protection on the Internet.

In terms of legislative definition, technological measures of copyright protection matchthe categoryof self-protection, as:

a) they are not prohibited by law and even directly stipulated there by (Article 1 of the Law of Ukraine on Copyright and Related Rights defines technological protection, and Part1 (e), Article50 of the Law of Ukraine on Copyright and Related Rights recognises any action of deliberate circumvention of technological measures of copyright protection as infringement of copyright);

b) they do not contradict moral principles of society as they aim at protecting property rights of an author or another legal right holder;

c) they match the nature of actions that infringe the right (establishment of technological measures of copyright protection, as well as they are circumvented by means of digital technology).

It is possible to ground that technological measures of copyright protection refer to the self-protection of civil rights in the light of self-protection conditions. Self-protection is available under the following conditions:

a) infringement of civil rights or threat (risk) of infringement there of;

b) need to cease or prevent the infringement;

c) protection measures match the level of danger of an offense permitted by law and within the limits of legislation.

In this case, if there is a risk of copyright infringement on the Internet, an author or another legal copyright holder must prevent the offense and use special technological measures of protection, which are directly specified in

the Ukrainian legislation. Thus, all necessary requirements to the means of self-protection when determining technological measures of copyright protection on the Internet and using them in future are complied with.

The practical use of technological measures of copyright protection is of great interest among software producers, distributors of musical, audio-visual and other works who often become victims of crime on the Internet. Civil legislation requires optimal decisions in order to include technological measures of protection in contracts.

The contracting practice of recent years shows the active use of technological measures of copyright protection as a mechanism of protection of copyright holders against illegal actions of counter party. In particular, since recently, an integral attribute of software use (distribution) licence agreements is the early termination of license in case of hacking codes / passwords of computer software, circumvention of technical protection with purpose of unauthorised copying of software, and so on. This practice clearly illustrates that legislation provides for legal mechanisms of self-protection under the agreements in the form of liability for the circumvention of technological measures of copyright protection.

Technological measures of copyright protection may be specified by agreements in two ways:

— direct specification of the legally defined category of technological measures of protection and prohibition of actions of a counter party to circumvent such measures of protection;

— specification of particular actions that may lead to circumvention of the technical protection of objects of copyright the rights to which are assigned by the agreement.

Annex 2 on Non-Exclusive Computer Software Use Licensing Agreement describes another way of establishing technological measures of protection. Thus, Paragraph 2.8 of the Agreement contains a list of actions that are prohibited for a licensee in case of distributing computer software on the Internet. The paragraph states as follows, “2.8. The licence may be early terminated it the Licensee (his representatives, officials and other persons related to the Licensee) intends to perform or performs at least one of the following actions:

— Copying of software;

— Hacking of passwords and /or code of computer software;

— Distribution of the copy (copies) of computer software;

— Decompilation of computer software;

— Modification of computer software;

— Other actions, which are not specified in this Agreement, but infringe or may infringe in future the Licensor’s copyright to computer software”.

This approach, according to the author, is more efficient because it allows an author or another legal copyright holder (in this case an object of copyright is computer software) to specify in the agreement actions leading to the circumvention of technological measures of protection in detail. This is related to the fact that an author or another legal copyright holder is aware of strong and weak aspects of using specifically-defined technological measures of protection and may foresee possible ways of their circumvention by counter party and consequences of such circumvention. Therefore, the agreement should provide for liability for specific actions which result in circumvention rather than for abstract technological measures of protection.

An important objective is to prevent infringement actions and confiscate of counterfeit copies, reproduction equipment, which constitute important evidence and may be destroyed without judicial control.

Any actions aiming at deliberate circumvention of technological measures of copyright and related right protection, including production, distribution, importation for the purposes of distribution, and use of means for such circumvention.

The provisions specifying deliberate circumvention of technological measures of copyright and related right protection were included in the WIPO Copyright Treaty (Article11) andthe WIPO Performances and Phonograms Treaty (Article18) for the first time at the international level.

According to the articles referred to above, the contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures of protection that are used by authors, performers or producers of phonograms in connection with the exercise of their rights under the Treaty and that restrict the acts, in respect of their works, performances or phonograms which are not authorised by authors, performers or producers of phonograms or permitted by law.

Importation, production or distribution of anti-protection devices, or any offer and delivery of services with a similar effect are considered to be illegal.

Anti-protection device means any device, productor component in corporated into a device ora product, the main purpose or the main effect of which is circumvention of any method, mode, mechanism or system preventing or impeding any legal actions.

The condition of prohibition is the fact that a person who has committed the mentioned actions knows or has sufficient grounds to know that such a device or service is used or will be used for the purpose of unauthorised

exercise of any rights. The requirement of knowledge is focused on the purpose, for which such a device or service is used.

Forgery, alteration or removal of right management information, including this in electronic form, without permission of a copyright and/or related right holder or any person who carries out such management.

Distribution, importation into the customs territory of Ukraine for the purpose of distribution, public broadcasting of an object of copyright and/or related right, from which right management information, including this in electronic form, has been removed or altered without permission of the holder of copyright and/or related rights [216, p.171].

Right management information is an information that identifies the work or another protected material of an author, a performer, a phonogram producer or another right holder, or information on the conditions of the use of a work, a performance or a phonogram, and any number or code representing such information, when any of the referred to above is attached to the copy of the work, the phonogram (videogram), the fixed performance or appears in connection with a broadcasting programme, public broadcasting of or making available the work, the phonogram or the fixed performance to the public.

Forgery, alteration, removal, distribution of the right management information without any permission of authors, performers, producers of phonograms defined as infringement of their rights by the WIPO Copyright Treaty (Article 12) and the WIPO Performances and Phonograms Treaty (Article19).

Any other actions of any person infringing moral rights and property rights of copyright and related right holders.

Use of objects of intellectual property without the consent of the copyright and related right holder as well asthe failure to comply with the conditions of use of these objects, infringement of moral and property rights.

## 2.2. Types of Technological Measures of Copyright Protection and Peculiarities of Their Use

A great number of technological measures of protection are successfully used to protect copyright on the Internet. In addition, lawyers and programmers are constantly developing new technological measures of protection. Therefore, legal science requires examining the main types of technological measures of protection, their detailed classification.

For the first time in domestic science, O.M.Pastukhov classified measures of copyright protection prior to infringement [106]. His

classification contained both technological measures of protection and legal remedies as well as marketing techniques allowing copyright holders to control the use of their works on the Internet. They included:

1) reduced functionality;
2) “ticking bomb”;
3) protection against copying;
4) cryptographic envelopes;
5) contracts;
6) preventative measures.

The authors agree with the fundamental nature of this classification for further research into national civil law, but emphasise that the classification referred to above deals with technological as well as other means of copyright protection. For example, such an element of classification as a contract is an exclusively legal remedy.

Preventative measures also refer to protection by involving judicial, customs authorities and etc. rather than protection by taking technological measures as one of the types of civil self-protection. Part 3, Article 53 of the Law of Ukraine on Copyright and Related Rights says if the defendant in the case of copyright infringement fails to provide access to necessary information or fails to provide it within a reasonable period of time, prevents court procedures, or, with the purpose to preserve relevant evidence on an alleged offense, especially in the event where any delay may cause irreparable harm to a copyright holder or where there is an obvious risk that evidence can be destroyed, the court or a judge is entitled at their sole discretion or upon the applicant’s request to apply temporary measures prior to a claim or a case hearing involving the other party (defendant) [126].

Another example of using preventative measures is described in Part 5 of Article 256 of the Customs Code of Ukraine, according to which after an object of intellectual property in recorded in the customs register, the customs authorities take measures to prevent the movement across the customs border of Ukraine of counterfeit products that may contain objects of copyright and related rights, rights to trademarks, industrial designs and geographical indications protected by the Ukrainian legislation [93].

The examples of preventative measures of protection referred to above and stipulated by the national legislation given reason to include them to the category of technological measures of protection. Therefore, we should not unconditionally and fully use the classification given by O.M.Pastukhov specifically for the classification of technological measures of copyright protection on the Internet as some researchers do today.

It should be noted that certain technological measures of copyright protection under this classification are rarely found in the works of other scholars, but they are commonly used on the Internet, so they are worth paying special attention. Such technological measures of protection include the so-called «ticking bomb» and reduced functionality mode.

The reduced functionality mode stipulates that copyright holders provide users with the copies of works, which have certain functional restrictions. A common example of the reduced functionality mode is distributing by software developers their beta versions (i.e., versions, which are not final for this type of product and may contain a number of errors and defects that should be corrected in the final version), "crippled versions"(i.e., versions, which lack one or more key software options: printing text with word processor application, or saving the edited image with a graphic editor and etc.). These beta versions and "crippled versions" mainly aim at allowing user to get used to a particular software, its advantages in contrast to the other software, and to purchase in future a full version of the software that will function consistently and in full .

The so-called "ticking bomb" is a modified version of the reduced functionality mode. In this case, a user has, in fact, the full computer software with all options functioning, but such software or another object of copyright is significantly limited in time.The most common time limitation methods are as follows:

— providing a certain, pre-set number of computer software uses;

— establishing a specific time or period upon which the further free use of the software is impossible.

The national civil law provides for other classifications of technological measures of copyright protection on the Internet. Thus, according to the classification drawn by I.I. Vashchynets, technological measures of protection can be divided into four groups:

1) technological measures of protection aiming at protecting actions falling within an exclusive author's right;

2) cryptographic copyright protection;

3) encoding and marking;

4) electronic copyright control system on digital networks [32, p. 15].

The first group aims at protecting authors against any alterations of their works, creation of digital copies there of, making available to the public without authors' consent and other infringements of their rights. According to all indications, it combines an anti-copying system and a conditional access system. An anti-copying system is mentioned by E. Barbryin his research including serial copying control measures and others there in [17, p. 38].The leading French researchers in the sphere of intellectual property

law, a conditional access system is designed to provide secure access to the protected information, ensure payments and defence of copyright to the blocked work[56, p. 43].

Cryptographic protection that is classified as the second group referred to above includes such methods and means of information conversion, which disguise the content of an object of copyright. In this case, disguising means placing objects of copyright in the so-called cryptographic envelope, which allows further retrieval only by using a special code or encryption [15, p. 258].

The cryptographic protection restricts or completely excludes copying of works. The most striking example of such protection is the so-called IBM's Cryptolopes and the SCMS (the Serial Copy Management System), which allows making only one copy of a document and prevents further copying this copy. The cryptographic protection is primarily designed to encourage users to buy the so-called "keys" in order to retrieve the object of copyright from the cryptographic envelope.

According to I.I. Vashchynets' classification, the third group of technological measures of copyright protection – the so-called encoding and marking means– includes digital signatures, digital envelopes, a package protection system, and encoding means.

It should be noted that the package protection system and encoding means are not related to technological measures of copyright protection on the Internetas they refer to physical copies of a work rather than to its digital copies. With the package protection system, copies of an object of copyright are put in a special wrapper or package that contains information (including the encoded one) relating to the objects that are produced and distributed observing copyright.

Encoding means are presented by ISBN code forbook publishing, by ISSN code for periodicals, ISMN code for music scores [27, p. 235]. Digital envelopes as one of the technological measures of copyright protection on the Internet are used to enclose a work into such an envelope by using special encryption. This envelope contains information on the work and the conditions of its use, and can be opened by a user only after a certain password provided to the user by the right holder is entered.

Considering the technological measures of copyright protection of the third group classified as above, the author believes that special attention should be paid to a digital signature. Article 1 of the Law of Ukraine on Electronic Digital Signature states that ‘‘a digital signature is a type of an electronic signature obtained by cryptographically transforming the set of electronic data, which is attached to or logically combined with this set, and allows confirming its integrity and to identify a signing party. An electronic

digital signature is applied with a private key and checked with a public key’’[134].

In addition to the definition, the Law of Ukraine on Electronic Digital Signature expressly specifies the intended purpose of digital signature. In accordance with Article 4 of the Law of Ukraine on Electronic Digital Signature, the digital signature is intended to ensure the activities of individuals and legal entities that are carried out using electronic documents. It is used by individuals and legal entities– users of electronic document circulation– to identify a signing person and to confirm the integrity of the data in electronic form. Using the digital signature does not change the procedure of signing contracts and other documents established by legislation for deeds in writing [134].

Thus, the author cannot agree to unconditionally qualify the digital signature as a technological measure of protection because it does not meet the concept of the technological measures of protection within the meaning of the Law of Ukraine on Copyright and Related Rights, and it is used for other purposes relating to electronic document circulation rather than copyright protection.

Similar to the digitalsignature, the authors cannot consider the fourth group of technological measures of protection, i.e., electronic copyright management systems in digital networks, as technological measures of protection. This position is explained by the contradictory nature of the term “electronic management system” in the Ukrainian civil law.

The fact is that the American legal doctrine has no concept of technological measures of protection, but, instead, uses the term “digital rights management” or DRM. According to I.I. Vashchynets, the term “electronic management systems”essentially corresponds to the digital rights management within the meaning of the American legal doctrine and includes technological as well as contractual protection.

The functions of electronic management systems include:

— distribution of remuneration among copyright holders;

— opportunities of obtaining permits for the use of object of copyright online;

— receipt of payment from users and etc.

Distribution of remuneration among copyright holders and receipt of payment from users are not the purposes of technological measures of protection within the meaning of Article 1 of the Law of Ukraine on Copyright and Related Rights. Therefore, the concept of electronic management systems is beyond the scope of one of the types of technological measures of copyright protection.

The classification of S.V.Reznichenko and T.O. Novak includes five main types of technological measures of copyright protection:

1) digital signatures;
2) “watermarks”;
3) cryptographic envelopes;
4) digital envelopes;
5) “secret block”, “black boxes”, etc. [153, p. 112].

In this case, the researchers specify technological measures of protection, which are the most popular today, but such a classification may not be called as complete. Digital signatures, digital and cryptographic envelopes were mentioned above.

Watermarks as a kind of technological measures of copyright protection on the Internet, constitute an inclusion of a software code that partially violates the integrity of an object of copyright. Digital watermarks being an achievement of modern computer steganography (the science of transferring secret information) are defined as information that is attached to a digital object and maybe detected or retrieved for claiming the right to this object [197, p. 78].

Such protection measure is largely used for graphic works (both in digital and in paper forms): images, photos, animations and etc. – and contains information on the author of the work, a source of distribution and etc. Since the purpose of steganographic methods is to hide certain information, they are similar to cryptographic methods, but while the purpose of cryptography is to disguise the content of the text, steganography aims at hiding the existence of the text or making it unavailable for alterations or retrieval (in the latter case, the text refers to information on the author of the work, a source of its distribution and etc.).

The modern methods that partially or completely solve the problem of copyright protection by applying digital watermarks are divided into two groups: a group of methods that hide information in a space domain, and a group of methods that apply digital measures of protection to a frequency domain [79, p.154].

The first group is more likely to be distorted and destructed, but the second group is relatively resistant to external impacts. The legal value of such division of digital watermarks into two groups consists in establishing ways of circumvention of technological measures of protection when producing evidence of the infringed copyright in court: the circumvention of digital watermarks of the first group may result in complete loss of digital watermarks, and hence, in actual lack of evidence.

The author thinks that secret blocks and black boxes as the measures of protection are rarely used nowadays as they protect objects of copyright

when they are created rather than when they circulate in the market, and only the author (creator) and a few people, usually known personally to the author, may access them. These measures of protection are primarily developed to protect uncompleted potential objects of copyright in digital form, and are not used after the work, such as computer software, is completed.

Some researchers identify such measures of protection as firewall and brandmauer [22, p. 200]. Firewall controls all information flows between the internal information system and external information space as the information membrane. The firewall is essentially a set of filters analysing the information that passes through it based on certain algorithms. These algorithms decide whether such information should be blocked or allowed for further transmission. In addition, the system can register events associated with information access and alarm on situations requiring immediate response.

Brandmauer is used by many organisations to exchange data with the Internet; it is often a separate device (router), but may have the form of software. This often implies the false impression of security. Since recently, personal brandmauer shave been used – this allows monitoring the data transmitted to the Internet. When working with brandmauers, it is, first of all, required to block all ports on the computer and to open, afterwards, only those that are really required to continue working. Alarm protocols are also required.

I.L.Borysenko [22] considers that firewall and brandmauerare information security means that sometimes may serve as technological measures of copyright protection. Article 14 of the Law of Ukraine on Information states that "information protection is a complex of legal, organisational, and telecommunication means and measures that prevent illegal acts in respect of information" [140].

The category of information is defined by this Law as the documented or publicly disclosed data on events and phenomena in the society, state and environment. The author says that firewalls and brandmauers are neither measures of information security on the Internet, nor technological measures of copyright protection in their pure form, firewalls only involve the interaction with information, while brandmauers are designed to protect access to and transfer of objects of copyright only. In this case, firewalls and brandmauers interact with computer Internet traffic in general rather than with information or objects of copyright, which may, but must not, include both categories referred to above.

The classifications that were clear in certain periods became less clear in other periods. The classifications referred to above show that there

searchers have tried to approach closer to specific technological measures of protection, but continuous development of scientific and technical progress requires more general classifications. Technological measures of copyright protection being effectiveseveral years ago become outdated and are replaced by new measures today. This fact must be considered in determining classification criteria and details.

According to the author, technological measures of copyright protection should be classified by the following criteria:

a) according to their purpose:

— technical protection measures intended to create a technological obstacle to the infringement of copyright while receiving and copying protected (encoded) recordings in copyright objects;

— technical protection measures intended to control access to the use of copyright objects;

b) according to the source of fixation:

— established in the agreement between the holder of property rights to the work and another interested person;

— established by legislation act.

The legal value of this classification by purpose derives from the legislative definition of technological measures of protection and distinguishes the grounds for establishing such measures.

The legal value of this classification by the source of fixation is important in the event of circumvention of technological measures of protection: if technological measures of protection applicable as required by an agreement are circumvented, such actions should be considered both as the breach of the agreement, and the violation of applicable legislation. The violation of legislational ways means the breach of an agreement, but the breach of an agreement does not always mean the violation of applicable legislation. Therefore, when an offending party circumvents technological measures of copyright protection specified only in the agreement, he/she should be held civilly liable in accordance with the agreement.

In addition, technological measures of copyright protection may be classified by methods of implementation:

— hardware;

— software;

— mixed.

As there are no legal definitions of a technical device and technological development, which are used to determine technological measures of copyright protection by a lawmaker, the legal value of this classification is to technologically distinguish such measures of protection. Technological hardware measures of protection use hardware to carry out their functions.

They are relatively labour-consuming, technically complicated, and require personnel experienced in the sphere of information security and considerable financial costs. Technological software measures of protection are easier and simpler for non-experts in the sphere of information security to implement; and the mixed type combines both categories referred to above respectively. Thus, hardware measures of protection matches the legal category of technical devices with software measures of protection matching technological development.

## 2.3. Problems of Legal Regulation of Circumvention of Technological Measures of Protection

From the perspective of civil law, while considering technological measures of copyright protection as a legal category, the issue on circumvention there of and liability for such actions raise great interest. The effective legislation does not define the circumvention of technological measures of protection. The provision defining the circumvention of technological measures of protection as infringement of copyright only specifies a number of actions, which may lead to adverse results for an offending party. Such actions for technologica lmeasures of protection are:

— Use;

— Production;

— Distribution;

— Importation into the territory of Ukraine for distribution.

As we can see from this list, the national lawmaker does not distinguish between production and distribution of instruments of circumvention and use thereof. All the actions referred to above are types of circumvention of technological measures of protection. This approach is somewhat different from the European one stipulating that circumvention of technological measures of protection means direct neutralisation thereof by using special software, devices and etc. According to A.Kerevera, circumventing technological measures of protection, in fact, means unlocking by a copyright holder [72, p. 33].

The USA legislation also distinguishes between actions relating to circumvention of technological measures of protection and production or distributionof such instruments of circumvention. This is not accidental and is associated with the differentiation of legal consequences for committing such actions.The USA legislation on copyright, being one of the strictest in the world, banns any actions relating to circumvention of only those

technological measures of protection that restrictor prevent unauthorised access to works.

Actions relating to circumvention of technological measures of protection aiming at copying objects of copyright are not banned. Instead, production, distribution and importation into the customs territory are banned for those technological measures of protection that restrictor prevent unauthorised access to works and for those measures that protect against unauthorised copying [72, p. 34].

Therefore, we can state that lawyers of the developed countries use two different categories:

a) circumvention of technological measures of protection;

b) production and distribution of devices designed to circumvent technological measures of protection.

Such differentiation of the categories can solve a number of official legal and practical problems arising when the regulations that ban circumvention of technological measures of protection are practically applied. One of these problems is the Ukrainian legislation lacks restrictions or exceptions to ban circumvention. Articles 21-25 of the Law of Ukraine on Copyright and Related Rights [126] contain a number of cases of free use of works:

— free use of a work specifying the author's name (with the purpose of quotation, showing current events by means of photography or cinematography, public performance of musical works during official or religious ceremonies, etc.);

— free reproduction of copies of a work for training (such as educational illustrations during classroom studies if such actions are not regular and justify learning objectives, and etc.);

— free copying, alteration, decompilation of computer software by a legal owner of such computer software (in order to ensure that it functions on the owner's technical means, to make a copy for archival purposes, or to replace a legally acquired copy if the original is lost, to observe, study, research the functioning of the computer software for determining its fundamental ideas and principles;

— free reproduction of works for personal or family use (in addition to computer software, except for the case referred to above), and others.

Taking into account the long-term positivist traditions of interpreting the legislation by the Ukrainian enforcement authorities, the author assumes that circumvention of technological measures of protection in the cases referred to above will be considered by the mentioned authorities as infringement of copyright and an infringing party will bear liability define by the legislation.

It is evident that liability for circumvention of technological measures of protection in these cases is inappropriate and does not meet the logic of the Law of Ukraine on Copyright and Related Rights. This situation results in the violation of one of the basic principles of modern copyright law–the principle of balance of interests of users of works and authors or other legal copyright holders.

The author says that the German copyright legislation may solve this problem. Thus, the German Law on Copyright does not consider the production and distribution of circumvention devices as an offense if such actions are carried out for personal purposes [152, p. 15].

In addition, the provisions of the Law of Ukraine on Copyright and Related Rights binds the author using technological measures of protection to provide users with necessary means to use the work in the manner as determined by the legislation or agreement. Objects of copyright protected by technological measures should include labels with information on such technological measures of protection, and the name and contact details of a person who use such technological measures to enable the interested parties to bring a claim.

At first glance, it may seem that indicating the name and contact details of a person who has established technological measures to enable an end user to bring a claim is an unnecessary requirement of the legislation as technological measures provided by the law are legal after they are incorporated into an object of copyright. However, the practice shows that a number of problems may arise due to the use of technological measures of protection by a fair end user:

— technological measures of protection may limitactions of legal acquirers of works who do not intend to infringe copyright but cannot use the purchased copy of a work, computer software and etc. in full as copying for the purposes of their own use or storage to avoid loss of the software or the work through damage of a tangible carrier (CD, flash cards), which contain this work, or software and etc., is restricted.

— some technological measures may be incompatible with each other, which prevents or complicates to simultaneously use several legally acquired objects of copyright by a fair end user;

— technological measures of protection designed to prevent unauthorised copying by using potential of the PC or another electronic computing machine can significantly slow down their operation, make unstable, threat information storage on hard disks or other storage elements of personal computers and etc.

— some technological measures of protection may require a permanent Internet connection to the controlling system, and, when it is temporarily

absent, block the operation of a personal computer or another electronic computing machine;

— some technological measures of protection block possibility of using an object of copyright on another PC and etc. on the legal basis.

For the purpose of copyright protection on the Internet the detailed regulation of technological measures of protection in the national legislation is not required, it is sufficient to legitimise the use thereof. However, all examples mentioned above show that technological measures of copyright protection on the Internet influences ongoing operation of personal computers or other technologies used, so the lawmaker must provide for feedback between an end user and a person who applies instruments of protection to the object of copyright.

Coming back to the lack of dual liability for two different categories of circumvention of copyright protection, I.I. Vashchynetsbelieves that the best way to solve this problem within the national legislation is to distinguish between actions relating to circumvention of technological measures of copyright protection and production, distribution and importation for distribution [31, p. 97].

Such distinction would be justified in terms of harm caused by these actions to copyright holders: circumvention of technological measures of protection measures and access to awork brings more harm to the author than, for example, production of instruments of such circumvention that only makes copyright infringement available. Supporting the first argument, the author only partially agrees with the second one, as production of instruments of circumvention of technological protection is an initial stage of further use or distribution thereof, and temporarily results in less adverse consequences for authors, but may expose to the same social danger in future.

The existence of a wide range of applications, devices and equipment that may be used to circumvent technological measures of protection is still an open issue today. In Ukraine, the legal status of such software and hardware tools is not legally defined, so the author considers that it is appropriate to adopt the best legal practices of the European Union.

Part 2, Article 6 of the Directive of European Parliamentand of the Council No. 2001-29 on Harmonisation of Certain Aspects of Copyrightand Related Rights in the Information Society dated 22 May 2001[129] states that the products, devices or their components as well as provision of services threatening infringement of copyright are banned for production, importation, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes which:

a) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention;

b) their producers or other owners aim to profit by the use of such devices (products and services) for circumvention of technological measures of protection;

c) are promoted, advertised or marketed for the purpose of circumvention of technological measures of protection.

Another vital problem of modern copyright legislation is to determine the grounds of liability for circumvention of technological measures of copyright protection in the case of the unauthorised copying of a work in digital form. Today, these actions are often mistakenly classified as either actual infringement of copyright, or circumvention of technological measures of copyright protection. The lack in the practice of judicial protection against infringement of copyright by using circumvention of technological measures of protection leads to a situation where in some cases, it is mistakenly considered that technological measures of protection rather than a work as an object of copyright is protected.

In other words, the parties to the dispute artificially distance themselves from adirect object of copyright and pay more attention to technological measures of copyright protection. This situation is unacceptable, and the national legal science should develop an approach according to which technological measures of copyright protection are not a goal that is generated by modern information requirements, including the Internet space, but the means of satisfying such requirements.

Although using and securing technological measures of copyright protection by instruments of copyright cause hot debates among academics, lawmakers and legal practitioners, it should be noted that the basic principles of the legal regulation thereof are quite clear and concise. Certain rules regulating technological measures of copyright protection in legislation of the most developed countries of the world, the WIPO Treaties on Copyright, and legislative acts of the European Union show the fundamental positions of lawmakers from different countries in respect to the normative consolidation and the gradual transformation of technological category into the formal legal category.

Today, technological measures of protection are the most effective means of copyright protection on the Internet. Technological measures of protectionare efficient, meet the requirements of the digital Internet environment, are focused on preventing offenses and etc.

The analysis of civil protection of infringed rights has allowed the authors to include technological measures of copyright protection on the Internet in the non-jurisdictional form of protection that applies self-

protection. The specific aspects of technological measures of protection create the two-level system of copyright protection on the Internet, where the technology protects rights of the individual at the first level, and the law protects the technology against its potential circumvention at the second level.

Looking for optimal models of including technological measures of protection in civil contracts, two main ways have been represented with the efficiency of the second way being proven: the contract should provide for liability for specific actions of a counter party, which can lead to circumvention of technological measures rather than for abstract technological protection measures.

The authors have provided the examples of the most popular classifications of technological measures of protection used by the leading Ukrainian civil law scholars and considered strong and weak aspects thereof offering their own classification according by purpose, source of fixation and method of implementation and justifying the legal value of classification by each criterion.

Having determined the list of actions, which the effective national legislation consider as circumventions of technological measures of copyright protection, the authors have compared this list with similar lists established by the legislations of other countries and international legal acts revealing weak aspects in the legal regulation of circumvention of technological measures of copyright protection under the Ukrainian legislation.

Having concluded that it is necessary to improve the national legislation, the authors have stressed the need to adopt the best practices of foreign law-making relating to liability for circumvention of technological measures of copyright protection and legal regulation of technological measures in general, and have provided the examples of standards, to which the Ukrainian lawmakers should pay attention.

# SECTION 3
# PECULIARITIES OF COPYRIGHT PROTECTION ON THE INTERNET WITH LEGAL MEASURES: THEORY AND PRACTICE

## 3.1. Peculiarities of Judicial Protection of Copyright on the Internet

Applying technological measures ensures a person with essential means of copyright self-protection and in no way deprives of an opportunity of protecting his/her copyright with traditional official legal measures. The state legal treatment of infringers will always play an important role in the mechanism of the protection of subjective rights not with standing the sphere of the social and legal life where infringements take place. Judicial protection is the most popular type of the legal protection of rights infringed.

Analysing regulatory basis for the judicial protection of copyright on the Internet, the authors think that the following legal provisions should be primarily noted.

— Part 2, Article 27 of the Universal Declaration of Human Rights states that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author [59];

— Part 1, Article 16 of the Civil Code of Ukraine states that each person shall be entitled to apply to the court for the protection of his/her/its private non-property or property rights and interests [200];

Copyright may be protected by applying the general civil law principles and special standards defined by the Law of Ukraine on Copyright and Related Rights. General civil remedies are stipulated by Part 2, Article 16 of the Civil Code of Ukraine. They include right recognition, recognition of a legal action as invalid; cessation of the action infringing the right; restoration of pre-infringement position; enforcement of fulfilment of borrower's obligation in kind; change of legal relationship; termination of legal relationship; reimbursement for losses; reimbursement for moral (non-material) damages; recognition of acts of state authorities and local government as invalid. The majority of the remedies listed above may be applied to the copyright protection on the Internet.

We would like to consider the provisions of the basic national copyright law in detail. Thus, Part 1, Article 52 of the Law of Ukraine on Copyright and Relate Rights says that "Persons holding copyright and related rights shall have the right to seek protection of their copyright and/or related rights

by lodging claims in compliance with the established procedure with a court of law and other bodies pursuant to their powers" [126].

Seeking for basis for judicial protection of copyright, we again address the provisions of the Law of Ukraine on Copyright and Relate Rights, Article 50 of which provides for the list of actions, which are deemed as infringements of copyright providing the grounds for applying to the court for the protection:

— actions by any person that infringe the personal non-property rights of copyright and/or related rights holders stipulated by the law;

— piracy in the sphere of copyright and/or related rights that is publication, reproduction, importation into the customs territory of Ukraine, exportation from the customs territory of Ukraine, and distribution of counterfeit copies of works (including computer software and databases), phonograms, videograms and broadcasting organisation programmes;

— plagiarism that is promulgation (publication), in full or in part, of awork of another person under the name of a person who is not its author;

— importation into the customs territory of Ukraine of copies of works (including computer software and databases), phonograms, videograms and broadcasting programmes without permission of persons holding the copyright and/or related rights;

— actions, which pose a threat of infringement of copyright and/or related rights;

— any actions to intentionally evade technological measures of copyright and/or related rights protection, in particular the production, distribution, importation for distribution and the use of such technological measure;

— forging, altering or removing rights-management information, in particular rights-management information in electronic form, without the permission of the copyright and/or related rights holders or persons who carry out such management;

— the distribution, importation into the customs territory of Ukraine for the purposes of distribution, and public broadcasting of objects of copyright and/or related rights, from which rights-management information, especially that in electronic form, has been removed or altered without the permission of the copyright and/or related rights holders [126].

Piracy also appears in copying works of fine art. Copying works of fine art has recently expanded. If the work is copied by its author or with his/her permission, no illegal actions take place as these works are duplicated and distributed for commercial purposes. The copying may be failed distorting the original of the work. In such cases, the infringement of the personal non-property right of the author who is entitle to require the integrity of the

work and react against the misrepresentation, distortion of or other changes to the work or other attack on the work that may forfeit the author's honour and reputation raises a concern (Article 14 of the Law of Ukraine on Copyright and related Rights) [217, p.14].

Such variety of types of creativity in the sphere of scientific and literary activities requires multiple examinations. The modern trends in cultural, scientific and artistic development witness the increase in infringements of rights in this sphere resulting in the qualified examination at the highest level. Meanwhile, there is no legal basis for such examinations; highly qualified experts who are able to carry out them are in lack. Therefore, one of the priorities for improving the legal defence of intellectual property rights as whole, and copyright and related rights in particular, is to improve the examinations of objects of copyright.

Experts divide modern piracy relating to phonograms, videograms and computer software into three types:

— ordinary piracy;

— piracy that uses materials and devices, which complicate identifying pirate products;

— counterfeiting, in other words, the full reproduction of the licensed original products.

Counterfeit audio- and video-products come to Ukraine in two ways: they are exported from abroad, or they are produced in Ukraine by national producers who are also engaged in designing legal products.

To reveal counterfeit phonograms or videograms, the respective examination should be carried out as neither investigator nor court cannot identify counterfeit copies by themselves. Special knowledge, skills and experience are required [216, p. 56].

The Law of Ukraine on Copyright and Related Rights has also recognised that actions aiming at counterfeiting, altering or removing rights-management information, especially that in digital form, without the permission of copyright and/or related rights holders are illegal.

The list of these actions (which the effective laws of Ukraine recognise as illegal, i.e. infringements of rights that cause certain legal liability) witnesses that proving that any of these actions are illegal may require the respective examination of the object of copyright and/or related rights.

It is worth noting that the infringement of copyright on the Internet is a relatively new type of infringements, therefore there is the range of material and procedural issues, which claimants meet when preparing their claims. These include, inter alia, as follows: 1) searching an infringer and, respectively, identifying a defendant; 2) establishing the fact of

infringement and preparing the evidence base. We would like to focus on the abovementioned issues.

Modern civil law discusses the issue of identifying a person who is liable for counterfeiting on the Internet. In addition to a person who directly posts a work on the Internet, persons who host the websites or web-portals of the infringers as well as providers who ensure the Internet access may also be held liable. However, it is difficult to identify an infringer who has uploaded work to the Internet.

Modern technologies allowing any user to create and distribute digital information have also revolutionised the nature of information relationship and converted the information consumer to its creator and distributor. And this, in its turn, contradicts to the copyright doctrine. New information potential allowing a person to exercise their informational and creative freedoms results in the escalated legal problems arising from delay in regulatory copyright control [71, p. 13].

When a work has been posted on the Internet, the respective object of copyright may be simultaneously accessed by an enormous amount of users. Afterwards, it is almost impossible to prevent other people from using this object. Thus, the matter of current interest is whom you may address to require liquidating the infringement of copyright.

The majority of the abovementioned actions can be taken on the Internet. The law of Ukraine on Copyright and Related Rights provides for the following types of claims a copyright holder may submit:

1) claims requiring the restoration of the infringed rights and/or the cessation of actions infringing copyright and/or related rights or posing a threat of such infringement;

2) claims requiring the reimbursement for losses (material damage), including lost profit, or collection of the income derived by the infringer from the infringement of copyright and/or related rights, or the compensation to be paid by the infringer;

3) claims requiring reimbursement of moral (non-property) losses [126].

Paragraph 11 of the Resolution of the Plenary Session of the Supreme Court of Ukraine No. 5 on Application by Courts of Law Standards for Cases on Copyright and Related Rights Protection dated 05 June 2010 states that a proper defendant in cases on copyright and/or related rights protection shall be a person who has infringed by his/her actions non-property or property rights of copyright and/or related rights holders [136].

Having analysed the Law of Ukraine on Telecommunications dated 18 November 2003, potential defendants within these cases should include: operators, providers, website holders (domain name registrars), the Internet service clients.

However, defining a defendant in these cases correctly tightly depends on qualifying his/her actions related to posting an object of copyright on the Internet correctly. It is worth noting that the theory and practice offer no understanding of how to define the posting of a work on the Internet – as reproduction, public broadcasting or distribution. The mentioned meanings are defined by Article 1 of the Law of Ukraine on Copyright and Related Rights dated 14 July 2001.

*Public broadcasting* means the air transmission – with the consent of copyright and/or related rights holders - through radio waves (as well as laser beams, gamma rays, etc.) including satellite, or remote transmission by wires or any type of surface or underground (underwater) (conductor, fiber optic or other) cable of works, performances, any sounds and/or images, their phonograms and videograms, broadcasting organisation programmes when an unlimited number of persons can receive the mentioned transmission in various places located at the distance from the place of transmission where the images or sounds cannot be received without the mentioned transmission;

*Reproduction* means the production of one or more copies of a work, videogram, phonogram in any physical form, as well as recording thereof to temporarily or permanently store in electronic (including digital), optical or other computer-readable form. The Draft Law of Ukraine on Copyright and Related Rights No. 4451 offered a broader definition of reproduction: the direct or indirect, temporary or permanent production of one or more copies of a work that is in hard copy or any similar form or recorded, phonogram, videogram, performance recorded in any way and in any physical form, in full or in part, as well as recording thereof to temporarily or permanently store in electronic (including digital), optical or other computer-readable form [125].

*Distribution* of objects of copyright and/or related rights means any action whereby objects of copyright and/or related rights are offered to the public directly or indirectly, including informing the public of these objects in such a way that its representatives may access these objects from any place and at any time as they may deem appropriate.

I.I. Vashchynets states that the legislative definition of distribution establishes its traditionally typical relationship with physical carriers of works, and includes actions that refer to other ways of use, e.g., public broadcasting. He thinks that the definitions of publishing and distribution should be clearly differentiated, and offers to definedistribution as follows: “Distribution means any action whereby originals of works and their copies are put into circulation” [32].

The EU Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society 2001/29/EC dated 22 May 2001 relates distribution to the transfer of material rights to an original of a work and its copies [50]. The international practice within understanding the meaning of distribution was used when making the Draft Law of Ukraine on Copyright and Related Rights No. 4451 where distribution was defined as ‘‘any action whereby the copy of a work, a recorded artistic performance, a phonogram and a videogram is directly or indirectly offered to the public by selling or otherwise transferring the ownership of such copy’’ [125].

The court practice also shows no unity when qualifying the posting of information on the Internet.

Thus, the oversight letter of the Supreme Economic Court of Ukraine No. 01-8/31 on Some Issues of Practice of Settling Disputes Related to Application of Intellectual Property Law dated 14 January 2002 says that posting on the Internet a work in form available to the public means *reproducing* such a work and requires the permission of a copyright holder [132].

Paragraph 29 of the Recommendation of the Presidium of the Supreme Economic Court of Ukraine on Practice of Settling Disputes Related to the Protection of Intellectual Property Rights states that posting on the Internet works in form available to public means the *reproducing* such works within the meaning of Article 1 of the Law on Copyright and Related Rights, and, thus, Article 15 of this Law applies to such posting [211].

Paragraph 46 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to the Protection of Intellectual Property Rights dated 17 November 2012 says that posting on the Internet works in form available to public means *reproducing* such works within the meaning of Article 1 of the Law on Copyright and Related Rights, and, thus, Article 15 of this Law applies to such posting. If such posting infringes the property rights of a copyright holder defined by Article 15 of the Law, this provides the basis for judicial protection of copyright (Article 50(a) of the Law of Ukraine on Copyright and Related Rights).

In addition to the mentioned above, recording a work or object of related rights in the computer memory means using the work if the a recording party initiates the access to this object of copyright or related rights for an indefinite range of persons. If the requirements of the Law of Ukraine on Copyright and Related Rights are violated, the copies of the work created or resulted from such use are deemed to be counterfeit. Infringing persons (especially the holders of websites where works or

objects of related rights have been posted without any permission required by the Law) are recognised as the infringers of copyright and/or related rights.

The fact of posting on the defendant's website the work or object of related rights equalling to the object of intellectual property, the property rights to which belongs to the claimant, witnesses that such rights are infringed by the defendant provided that the latter does not provide the court with any proofs justifying the posting of the controversial object of intellectual property on his/her website. Reproducing such an object from another website without any proofs justifying the use of the object of intellectual property may not be the basis for releasing the defendant from liability [131].

The Supreme Court of Ukraine takes absolutely different position. Paragraph 31 of the Resolution of the Plenary Session of the Supreme Court of Ukraine No. 5 on Application by Courts of Law Standards for Cases on Copyright and Related Rights Protection dated 05 June 2010 states that posting on the Internet works in form available to the public means *making the works available to the public* in such a way that its representatives may access these works from any place and at any time as they may deem appropriate and as stipulated by Article 9 of the Law of Ukraine on Copyright and Related Rights; in other words, such posting is deemed as legal only when permitted by the author or other copyright holder. Article 1 of the Law of Ukraine on Copyright and Related Rights says that reproduction means the production of one or more copies of a work, a videogram, a phonogram in any physical form, as well as recording thereof to temporarily or permanently store in electronic (including digital), optical or other computer-readable form. If such posting on the Internet infringes the property rights of a copyright holder defined by Article 15 of the Law of Ukraine on Copyright and Related Rights, this provides the basis for judicial protection of copyright. When settling the respective disputes, the court should determine whether the website and information posted on it belongs to a person against whom the claim is brought, and what proves the fact of the infringement of copyright. The data on the website holder may be required from the administrator of the system of the registration and accounting of domain names and addresses in the Ukrainian Internet segment based on the Civil Procedural Code of Ukraine [136].

Analysing the position of the Supreme Court of Ukraine, we can conclude as follows. First, posting works on the Internet means making the works available to the public rather than reproducing them as defined by the Supreme Economic Court of Ukraine.

Second, if such posting does not mean reproduction, free reproduction of the copies of works – from the perspective of Ye. Danylenko – for training or personal purposes as defined by Article 23 (Free Reproduction of the Copies of a Work for Training) and Article 25 (Free Reproduction of Works for Personal Purposes) of the Law of Ukraine on Copyright and Related Rights do not include the cases of making the works available on the Internet [50].

Third, the Plenary Session used a new meaning "public", which is not defined by the effective legislation of Ukraine. This may raise a question whether ensuring the member of a family or close friend with the opportunity of reviewing the work in the closed interest group created on the Internet (e.g., social networks) infringes the copyright. Taking into account the general definition of the public, we can consider it as an infringement.

I.I Vashchynets offers that the effectives legislation includes the right to public communication as a separate exclusive right that could ensure all methods of making works available to the public on the information networks in electronic (including digital), optical or other computer-readable form. For this purpose, he offers to include in Article 1 of the Law of Ukraine on Copyright and Related Rights the following definition of public communication: "Public communication means making works available to the public so that its representatives may access the works from any place and at any time as they may deem appropriate" [32, p. 14].

Taking into account the fact that users of the Internet make works available to the public, they actually infringe the copyright. But searching for such infringers takes a lot of money and time. Therefore, judicial practice – similar to identifying a defendant in cases on forfeiture of honour, dignity and goodwill – has selected the way of bringing the website holder to liability.

Therefore, it is reasonable to address the practice of identifying a defendant in cases on the protection of honour, dignity and goodwill if information is distributed on the Internet. Notwithstanding that the Resolution of the Plenary Session of the Supreme Court of Ukraine on Judicial Practice in Cases on the Protection of the Dignity and Honour of Individual as well as Goodwill of Individual and Legal Entity dated 27 February 2009 explains the practical problems of the protection of honour, dignity and goodwill, it is successfully being applied when identifying a defendant and protecting copyright on the Internet.

Paragraph 12 of the Resolution states that a proper defendant in the case of the distribution of the disputed information on the Internet is an author of the respective material and a website holder who must be identified and

specified in the claim by the claimant (Part 2 (2), Article 119of the Civil Procedural Code of Ukraine). If the author of the distributed information is unknown or unidentified or his/her place of residence (location) cannot be defined, and the information is anonymous, and the access to the website is free, a proper defendant is a holder of the website where the mentioned information material is posted as this is the very website holder who has created technological possibilities and conditions of distributing misleading information. The data on the website holder may be required from the administrator of the system of the registration and accounting of domain names and addresses in the Ukrainian Internet segment based on the Civil Procedural Code of Ukraine. If any misleading information that forfeits dignity, honour and goodwill and is posted on the Internet information resource registered as a mass medium in accordance with the law, courts should be governed by standards regulating the activity of mass media when considering the respective claims [146, p. 7].

The resolutions of the Plenary Session of the Supreme Court of Ukraine referred to above refute the opinion that social networks and file-sharing sites are not liable for the information posted on their websites. It is worth noting that not all Internet users (including lawyers) support such an opinion.

Discrepancies between the defence of authors' rights and the right to information appear with increasing frequency. The USA, for example, shut down its famous Mega upload file-sharing site and held its holders liable for the distribution of pirate content. Ukraine also set such a precedent – EX.UA was shut down in 2012.

Taking into account that it is difficult to find and hold a copyright infringer liable, such an approach is quite convenient. In addition, a website holder may – beyond the court – cease the infringement of copyright as it has technical capabilities of deleting illegal content. In other words, the claim requiring ceasing copyright-infringing actions may be satisfied in full.

However, if the website holder is recognised guilty of the infringed copyright, it should also reimburse the author for the losses caused (if any).

The legal basis for non-contractual liability is the elements of a civil offence. An actual basis is the fact of an offence. This form implies the formula of a general delict: a person who has through his/her guilt caused loss to another person must reimburse for the loss.

The Civil Code of Ukraine includes no meaning of guilt. D.V. Bobrovasays that "according to the function it carries out in the construction of an offence, guilt is defined by the civil literature as the psychological attitude of a person to his/her illegal action or inactivity and consequences thereof. The category "psychological attitude" that is used

within the meaning of guilt shows the assessment (possible assessment) of behaviour, estimate (or possible estimate) of harmful consequences. Guilt is tightly related to illegality and its consequences. The issue of guilt arises only when illegal behaviour takes place. Though guilt has common characteristics with illegality, the first differs from the latter as illegal or socially significant nature of actions (inactivity) is or can be understood, and harmful consequences are or can be estimated" [199, p. 515].

Taking into account the definition referred to above, it is quite difficult to prove the website holder's guilt of illegal content being posted on its website by the Internet users.

However, as today copyright infringement claims are brought against website holders, let's consider the procedure for their identification. The easiest option is when the website includes the information required. Otherwise, it is possible to realise by using websites, which have the information on the registered domain names and their holders. The most popular is WHOIS (the WHOIS service is a source of the public information on domain names. Such information is available to any person through the Internet by WHOIS or HTTP). Referring to domain names in UA area, the information on a domain name registrar can be provided by Hostmaster LLC (http://hostmaster.ua/) that administers and technically supports .ua domains and public domains within it.

However, it is necessary to take into account the Law of Ukraine on Protection of Personal Data dated 01.06.2010 that came into force on 01 January 2011 [138]. This Law states that the information on an individual website holder constitutes personal data and may not be open to the public. Thus, Hostmaster LLC is not entitled to provide such information. In such a case, copyright holders should use their rights to perpetuation of evidence granted by Part 4, Article 133 of the Civil Procedural Code of Ukraine and bring to the court a claim requiring Hostmaster LLC to provide the information on a website holder to perpetuate evidence. This opinion is proven by Paragraph 46 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012: it shall also be noted that the public access to confidential data on individuals included in the records of the domain name holder identifier is closed. Thus, if claimants require such data, they may submit the requiring claim to the court as defined by Article 38 (4) of the Economic Procedural Code of Ukraine [131].

Another unpleasant moment a copyright holder may meet is when a website holder is located in another country. Part 1 Article 109 of the Civil Procedural Code of Ukraine provides that claims against individuals shall

be filed with the court at the place of his/her residence or location that is legally registered.

In addition, it is worth noting that having approved to the Law of Ukraine on Changes to Some Legislative Acts of Ukraine on Legal Defence of Intellectual Property on 22 May 2003, Article 16 of the Economic Code of Ukraine was amended with as follows: "Cases on the infringement of property rights of intellectual property are considered by economic courts at the place of the infringement".

Paragraph 1.4 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012 states that cases on disputes related to the infringement of property rights of intellectual property are considered by economic courts at the place of the infringement (Article 16, Part 4 of the Economic Procedural Code of Ukraine). If the respective infringement takes place beyond Ukraine, the jurisdiction of economic courts of Ukraine does not govern the relationship of parties related to such infringements (notwithstanding whether a defendant is a resident of Ukraine or has its representative in Ukraine) [131].

The provision referred to above expressly illustrates another problem of the use of the objects of copyright on the Internet, the exterritoriality of the infringement. S. Berus says that opening the Internet access to the object enables its availability almost in the entire world, and within the territory where the respective right is not effective in particular. But this circumstance also has another aspect. Availability of works in the entire world creates an opportunity of filing the use-related claims almost in any country of the world [26].

The lawmaker does not say whom one may address when it is impossible to define a copyright infringer on the Internet. The Plenary Session of the Supreme Court of Ukraine offers the way of solving this issue in cases on protection of dignity and good will: the judicial protection of dignity, honour and good will in the case of misleading information on a person is not excluded if a person who has distributed such information is unknown (anonymous or pseudonymous letters or appeals, death of an individual or liquidation of a legal entity, distribution of the information on the Internet by a person who cannot be identified and etc.). In such a case, the court is entitled to establish the fact of the misleading information upon the claim of an interested party and refute it within a separate proceeding. Such a claim should be considered as defined by the rules of Section IV of the Civil Procedural Code of Ukraine. If the circumstance referred to by the claimant is proven, the court only ascertains the fact that the distributed

information is not true and refutes it. Therewith, the burden of proof of the inaccuracy of the distributed information is imposed on the claimant who bears expenses related thereto. It is possible to establish such a fact only when a person who has distributed the misleading information is unknown. If a person who has distributed the misleading information becomes known within a separate proceeding of this case, Part 6, Article 235of the Civil Procedural Code of Ukraine requires that the court does not consider such a case and explains the interested parties that they are entitled to file a claim on general basis (Paragraph 13 of the Resolution of the Supreme Court of Ukraine on Practice of Judicial Protection of Dignity and Honour of Individual and Goodwill of Individual and Legal Entity dated 27 February 2009).

The lawmaker's position as regards operators and providers is clear. Part 4, Article 40 of the Law of Ukraine on Telecommunications dated 18 November 2003 says that telecommunication operators and providers shall not bear any liability for the contents of the information transmitted through their networks [147]. International practice provides two new approaches to defining the liability of providers. The first approach is the horizontal approach when the provider bears liability only when there is a technical opportunity of preventing the transmission of right-infringing materials, the provider knows of such materials and understands or could understand that it infringes the rights. The second approach is the alternative approach that requires adopting special copyright-related laws to define the liability of providers [61].

As an example of the second approach, we can represent Digital Millennium Copyright Act adopted in the USA in 1998. This act increases the liability for the infringement of copyright on the Internet and, in the meantime, protects providers from the liability for actions of users. The most popular provision of the act is a provision, which ensures the Internet service providers, hosting companies and other interactive services with almost absolute immunity against the infringement of intellectual property rights by their clients. Moreover, one of the principles of the act – the deletion of materials based on a notice – played its crucial role in the Internet development. This principle guarantees the protection against legal prosecution to all the so-called intermediaries, e.g., the Internet service providers if their clients infringe copyright [71]. Therefore, such a popular video service as YouTube should delete the material upon the receipt of the respective author's notice not to become a defendant in the copyright infringement case.

Besides, in October 2011, the Stop Online Piracy Act (SOPA) was submitted to the United States House of Representatives offering the other

way of solving the problem of the liability of providers and website holders. That Act focused the attention of the public of the USA as well as other countries. It says that any person or entity on the Internet (including a provider) shall - upon the receipt of the author's notice on the use of the pirate content on the Internet site - stop any interaction therewith (including block the access to the site for users), otherwise it shall be considered as an associate.

The Draft Law on Changes to Some Legislative Acts on Settling Issues on Copyright and Related Rights No. 6253 dated 15 June 2010 includes provisions similar to those in the SOPA [23]. Notwithstanding the fact that the consideration of this draft law is slowed down as the world society has negatively reacted to the SOPA, we think appropriate to consider its key provisions in detail. This draft law provides for a new four-phase mechanism of copyright protection on the Internet consecutively requiring taking such action:

— revealing a violation on the Internet;

— requiring by a copyright holder that the Internet service provider (the Internet operator) ceases the infringement of copyright;

— within two weeks upon the receipt of the requirement referred to above, the provider (the Internet operator) shall warn the infringer named by the copyright holder that it must stop infringing the right;

— if the infringement is not ceased within two weeks upon the receipt of the warning, a person who assists therein shall stop providing the Internet access services to the named copyright infringer or stop posting the Internet site of the user on the provider's equipment [23].

If the provider (the Internet operator) refuses to take actions stipulated by the third and fourth phases of the protection mechanism referred to above, this enables to bring it to joint liability for the infringement of copyright with a person who has directly infringed copyright.

In addition, the mentioned provision of the Law provides an opportunity of abusing the right as the Internet provider does not verify whether a requiring party holds the copyright when taking a decision on deleting the material. There is also an opinion that such increase in the number of liability bearers expressly opposes to the principle of equity of liability as neither a hoster, nor a provider and an operator can control all the information posted (distributed) through them in order to ensure intellectual property rights, including copyright.

Therefore, to solve the problem of copyright protection on the Internet, it necessary to define a reasonable balance between regulatory base and self-regulation instruments directly on the Internet. The Internet Watch, the British system of the internet self-regulation, shows that the mechanism of

self-regulation is quite effective, the Internet Watch Foundation, which receives claims on illegal use of materials on the Internet, considers the accusations and requires that the Internet service provider takes certain measures in respect of the infringer. The Foundation also tracks any potential further use of this material on the Internet. Nowadays, Ukraine has no effective Internet self-regulation mechanisms.

The analysis of the court judgements in cases on copyright protection on the Internet witnesses that these cases usually involve several defendants who have infringed copyrights independently of each other; but as the practice shows their number is significantly higher. A model of such a situation is a case involving the claim of Maximum Publishing House against Alliance Capital Management LLC and the Ministry of Agriculture Policy of Ukraine that have posted on their websites the article, the exclusive property right to which belongs to the claimant [159].

When applying to the court, a claimant should confirm his/her/its status of a copyright holder. However, it is necessary to take into account the fact that the copyright to a work results from creating the work. Therefore, no registration of the right to the work, no other special filing of the work and no other formalities relating thereto are required to create and exercise the copyright to the work. The State Service of Intellectual Property of Ukraine may register copyright to a work as stipulated by the Resolution of the Cabinet of Ministers of Ukraine No. 1756 on State Registration of Copyright and Contracts Related to Copyright to Work dated 27 December 2001. Such registration is based on the application of the copyright holder and establishes no right. Moreover, the State Service of Intellectual Property of Ukraine has no authority to verify the copyright of the applicant and the fact whether the copyright to this work is registered by another person or entity. However, registering copyrights brings significant advantages: the claimant is released of the obligation to prove his/her authorship of the work taking into account the provisions of Article 33 of the Economic Procedural Code of Ukraine on the obligation to prove and provide the economic court with the proofs to decide which party should prove the copyright or related right protection case-related circumstances, and the fact of the use of the object of these rights by the defendant, and the amount of loss, and the cause and effect link between the loss and defendant's actions if any loss arises. If the author's rights are approved by the authorised body in a certificate issued, the holder of material intellectual property rights to the work, which have been granted to the work specified in the certificate, is released from the liability for proving that the respective rights belong thereto. In such cases, the burden of proof of the fact that these rights belong to a person other than that specified in the certificate is imposed on

the defendant (Paragraph 26 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to the Protection of Intellectual Property Rights dated 17 November 2012).

It is also worth noting that the author of a work brings before the court the loss reimbursement or compensation claim only when the property rights are not transferred to another party. Paragraph 10 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012 states that personal non-property rights of the author may not be transferred (alienated) to other parties as they are defended perpetually. Based on the facts referred to above, courts should take into account that the author of a work is a proper claimant within the claim requiring banning the use of the work that infringes his/her personal non-property rights notwithstanding whether the property rights are transferred (alienated) (Article 31 of the Law of Ukraine on Copyright and Related Rights) or the right to use the work is transferred to other parties (Article 32 of the Law of Ukraine on Copyright and Related Rights) if this party does not protect this right. At the same time, the right to loss (material damage) reimbursement, or collection of income obtained by an infringer from the infringement of copyright, or compensation is reserved for a person, to whom the property rights are transferred (aligned) or the exclusive rights to use the work are transferred. The author is entitled to require that moral damage is reimbursed for [136].

The other problem, which copyright holders may meet when applying to the court, is the problem of recording and preparing an evidence basis. As mentioned above, the court should – when settling the respective disputes – establish whether the website and the information posted thereon are disposed by a party, against which the claim is brought, and what proves the fact that it has infringed the copyright [136].

Part 1, Article 57of the Civil Procedural Code says that evidence is any actual data, which are basis for the court to establish circumstances grounding the requirements and objections of the parties, and other circumstances, which are significant for resolving cases. The data are based on the explanations of the parties, third parties, their representatives examined as witnesses, written evidence, real evidence, including audio and video recordings, and expert opinions.

The economic procedure offers very similar regulation for such an issue. Thus, Article 32 of the Economic Procedural Code of Ukraine says that evidence in a case is any actual data, which are basis for the court to legally establish circumstances grounding the requirements and objections of the

parties, and other circumstances, which are significant for resolving cases correctly. These data are defined by such means: written and real evidence, forensic expert opinions; explanations of the representatives of the parties and other persons engaged in the legal proceeding.

Testimonies of witnesses, which may be used as evidence in civil processes, are unlikely to be used as evidence of the infringement of copyright on the Internet. Therefore, written evidence, real evidence and expert opinions are the key evidence basis. The practice in considering cases on copyright infringement on the Internet shows that the information obtained from the Internet does not meet the classic representation of written and real evidence, and the claimant puzzles how to convert such information to written and real evidence.

One of the criteria of evidence provided to the court is reliability. Reliability or authenticity of evidence is a theoretic term certifying that the information included in the evidence is true. Making sure of the authenticity of evidence means clarifying whether a witness tells the truth or the data that are specified in the document or are important for the case are true, or the copy of the document is true to its original if this document is important for the case. For this purpose, it is necessary to learn the characteristics of a source of evidence, circumstances of its generation, and circumstance that may affect its authenticity or completeness [202, p. 332]. The characteristics of the reliability of evidence referred to above are urgent for converting the information obtained on the Internet to evidence.

Article 59 of the Civil Procedural Code of Ukraine includes the rule of admissibility of evidence: the court does not take into account evidence obtained by violating a legal process. Based thereon, the following question arises: Does the effective legislation define the procedure for obtaining evidence on the Internet? Unfortunately, no, it does not. The judicial practice has adopted certain approaches to resolving this problem [202, p. 333].

The printed web-page with the information infringing the author's right is often used as evidence of the infringement of copyright on the Internet in practice. Thus, Paragraph 9 of the Instructions of the State Arbitration of the USSR No. И(I)-1-4 on Use of Documents Prepared with Computers as Evidence dated 29 June 1979, which are effective nowadays, says that the data on a technical carrier (a punched tape, a punched card, a magnetic tape, a magnetic disc and etc.) may be used as evidence in the case only when they are converted to the form available for ordinary perception and storage within the case [127]. And this is the simplest way to obtain evidence. Meanwhile, such a printed web-page is not always considered as evidence.

O. Horban states that in accordance to Article 36 of the Economic Procedural Code a document should be submitted to the court in original or as duly certified copy to be used as evidence. The original evidence (the Internet page in the form of computer files) is stored on the website, in other words, submitting it to the court directly requires submitting the server that is hardly technically possible. At the same time, the effective legislation of Ukraine does not exclude the possibility of submitting to the court the copies of a document instead of its original providing that such copies are duly certified. Within the meaning of the Ukrainian legislation, the duly certified copy of a document is a copy certified by a notary or – when defined by the legislation – officials who are authorised thereto. O. Horban deems that the copy of written evidence is the image of the Internet page on the display screen of an end user. It is evident that the due certification of the image of the Internet page requires converting it to a document in a hard copy, i.e., a document printed by a printer [208].

If the copy of written evidence is submitted, the Civil Procedural Code entitles the court to require its original upon the request of the persons involved in the case (Article 64 of the Civil Procedural Code).

The Plenary Session of the Supreme Economic Court does not consider an ordinary printed web-page without any due certification as evidence: the printed Internet-pages (web-pages) by themselves may not be used as evidence in the case. However, if the respective documents are duly issued or certified by an institution or specially authorised person within their competence and fixed with the official seal in one of the member states of the Commonwealth of Independent Countries, Article 6 of the Agreement on Procedure of Settling Disputes Arising out of Commercial Activities dated 20 March 1992 says that they have the evidentiary force of official documents in Ukraine (Paragraph 46 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012).

But the Resolution of the Plenary Session on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012 approved by the Supreme Economic Court of Ukraine radically changed the approach to resolving such an issue, at least for the economic processes.

The Supreme Economic Court stated that the video and audio recordings of the process of investigating by the interested party a web-site, which is informed to be used infringing copyright and related rights, may be used as the instruments of proof; such a recording on an electronic or any other carrier (a hard disk of computer, a floppy disk, laser reading disks,

other information carriers) should be submitted to the court specifying a recording person, date and conditions of the recording, and may be used as real evidence in the case (Paragraph 46 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012).

The authors think that this opinion is quite controversial. It is not a secret that modern technologies allow making any recordings with any content. The positive fact is that judicial practice tries to solve the problem with evidence of copyright infringement on the Internet, but it is impossible to guarantee that the evidence referred to above may always prove the fact of right infringement and does not provide any possibilities for abuse.

In the USA, for example, instruments of proof are divided into material (written and real evidence) and oral (testimonies of parties, witnesses and experts). Written evidence is documents or their copies, which are provided by the parties to be investigated by the court and include the information on circumstances that are significant for the case. In addition to hard copies, evidence may be submitter in electronic form [161, p. 11]. The interesting fact is that the legislative and judicial practices of the United States of America refer the printed computer software and computer pages (the latter includes the images of the Internet page) to originals of documents rather than their copies provided that they accurately reproduce such a software or page. Thus, Rule 1001.3 of the Federal Rules of Evidence says that if such data are saved on the computer or similar device, any print or other output of the data that can be read and can accurately reproduce such data is an original [208].

The English Civil Evidence Act says that any computer-generated document is considered as evidence. A computer-generated record is considered as hearsay evidence [166].

The original of the Internet page, which includes copyright-infringing information, is on the web server. The Civil Procedural Code of Ukraine refers physical objects, which include information on circumstance that are significant for the case, to real evidence (Part 10, Article 65 and Article 37 of the Economic Procedural Code of Ukraine says that real evidence is items with characteristics witnessing circumstances that are significant for settling the dispute correctly. Based on the fact that real evidence is a carrier rather than information on it, a web server may be considered as real evidence. Taking into account the abovementioned and Articles 137 and 140 of the Civil Procedural Code and Articles 38 and 39 of the Economic Procedural Code, a web server may be required and examined as real

evidence. But it is unlikely that a civil or economic process will take such radical measures.

In addition to written and real evidence, the claimant also has such an instrument of proof as forensic expert's opinions. Forensic examination is scheduled by the court when considering a case to answer questions arising from an economic dispute and requiring special knowledge. Paragraph 2 of the Resolution No. 4 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues on Forensic Examination dated 13 March 2012 says that an expert's opinion provided to the claimant (an individual or legal entity) upon the request may not be considered as the certificate of forensic examination even if the respective document is titled as a forensic expert's opinion or similar, as a person obtains the rights and bears the liability of a forensic expert after he/she receives an examination resolution [133]. Therefore, there is no reason for the claimant to address a forensic expert before a claim is filed as such an opinion is not an expert's opinion and may not be considered. Paragraph 24 of the Resolution states that the economic court should take into account the respective Resolution No. 5 of the Plenary Session of the Supreme Economic Court of Ukraine dated 23 March 2012 when solving issues on forensic examination for disputes related to the protection of intellectual property rights.

According to Subparagraph 2.3 of the Resolution No. 5 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues on Forensic Examination dated 23 March 2012, to solve an issue whether a work is used without the consent of its author (or another copyright holder), including in the form of plagiarism or piracy in the sphere of copyright and/or related rights, the court must schedule forensic examination involving literature or art experts or others depending on an object of copyright and/or related rights.

Within cases on copyright and related right infringements, a forensic expert may be requested to answer the following questions:

Is the text material (or its fragment) used in the monography, article, booklet or other edition or on a website the full or partial reproduction of a literary work…, copyright to which belongs to…?

Is the image used in the newspaper, magazine, or other edition or on a website the reproduction of a photographic work…, copyright to which belongs to…?

Does the programme of the broadcasting organisation aired …, show a literary, music, audio-visual… work or its fragment, copyright to which belongs to…?

Does the programme of the broadcasting organisation aired …, show a performance, phonogram, videogram, related rights to which belongs to…? [133].

As the previous Recommendations No. 04-5/76 of the Supreme Economic Court of Ukraine on Some Issues on Forensic Examination in Disputes Relating to Protection of Copyright and Related Rights dated 29 March 2005 (ineffective), the Resolution No. 5 of the Plenary Session of the Supreme Economic Court of Ukraine dated 23 March 2012 provides no opportunity of asking the expert questions whether certain material is on the website, but this fact will be verified when preparing the expert's opinion on copyright infringement.

O.F. Doroshenko states that typical questions stipulated by the methodological recommendations facilitates the task, but sometimes the wording of the questions raises a serious challenge, especially when they concern complex objects of machinery and technology. And sometimes it makes no sense to definitely accept the questions offered by the parties as they often aim at muddling the expert (and the court respectively) rather than identifying actual data that are significant for the case. The way out is evident: the appointed exert should be engaged in making the list of questions. The procedural legislation does not ban such actions, and allows avoiding excess questions, including those of legal nature, and reducing the period of the examination [213].

The next problem that may arise when collecting evidence within this category of cases is that information posted on the Internet can technologically be removed from an information resource that considerably complicates (and sometimes makes impossible) proving the fact of copyright infringement.

Taking into account that to find the truth in the case, the Civil Procedural Code and Economic Procedural Code entitle and bind the parties and other participants of the case submit or inform of their evidence the court or the economic court prior to the judicial proceedings within the case (Article 131, and Part 1 (6), Article 119 of the Civil Procedural Code, and Part 2 (5), Article 54 of the Economic Procedural Code), the author must ensure the evidence. Both, the Civil Procedural Code and Economic Procedural Code, allows ensuring evidence before the respective claim is filed. As the procedural laws do not restrict the procedure for ensuring evidence when protecting the infringed copyright, the author may use this right.

We would like to stress that based on the specific aspects of the object of protection, the lawmaker entitled the court to resolve on taking immediate measures to prevent infringement of intellectual property rights

and save the respective evidence as and when defined by the legislation (Part 2, Article 432 of the Civil Code of Ukraine). In other words, both the material and procedural laws allow a copyright holder to perpetuate evidence.

Perpetuation of evidence means that the court procedurally records the evidence to use it as evidence if it becomes impossible or difficult to submit it in future [202, p. 129].

According to Part 1, Article 133of the Civil Procedural Code, the participants of the case who considers that it is impossible or difficult to submit the required evidence are entitled to claim the perpetuation of evidence. Part 3, Article 133 of the Civil Procedural Code stipulates that the court may perpetuate evidence upon the request of the interested party before it brings a suit.

The positive fact is that the lawmaker does not restrict the range of evidence, which the court may perpetuate, and procedural perpetuation actions: the court methods of the perpetuation of evidence are interrogation of witnesses, examination, requirement and/or inspection of evidence, including at the place of their location. In the respective cases, the court may apply other methods of the perpetuation of evidence (Part 2, Article 133 of the Civil Procedural Code, Paragraph 15 of the Resolution No. 5 of the Plenary Session of the Supreme Court of Ukraine on Application of Civil Procedural Law Provisions Governing Proceedings in Case before Trial dated 12 June 2009 [135]).

According to Part 4, Article 135 of the Civil Procedural Code, the issues on the perpetuation of evidence is settled by making a resolution. And Articles 292 (2) and 293 of the Civil Procedural Code state that this resolution may not be appealed against. Considering the categories of copyright protection cases, we can conclude that a judge may directly inspect the image of the Internet page on the Internet and record the results in the protocol to perpetuate evidence (Article 140 of the Civil Procedural Code). But unfortunately, the practice shows that persons whose copyrights have been infringedface the fact that judges do not want to carry out such inspection. Therefore, the procedure referred to above is rather an exception that an option of perpetuating evidence of the infringement of rights on the Internet.

The Economic Procedural Code provides for a similar institution called “a preventative measure”. Section V-1 on Preventative Measures was added to the Economic Procedural Code as the Law of Ukraine on Changes to Certain Legislative Acts of Ukraine on Legal Protection of Intellectual Property had been adopted on 22 May 2005 [128].

But taking into account the types of preventative measures stipulated by Article 43 (2) of the Economic Procedural Code –including requirement of evidence; inspection of premises where actions related to right infringement and arrest of property belonging to a person against whom the preventative measure are taken, and being held by such a person or other parties, take place – it is unlikely that such measures can perpetuate evidence of copyright infringement on the Internet.

Instruments of proof of copyright infringement on the Internet include inspecting written evidence within pre-trial proceedings.

If any difficulties in submitting written evidence arise, the civil and economic procedural laws of Ukraine allow inspecting and investigating evidence at the place of their location. Part 1, Article 140 of the Civil Procedural Code states that real and written evidence, which cannot be delivered to the court, shall be inspected at the place of their location within judicial proceedings. An evidence location inspection protocol is filed and signed by the participants of the inspection. The protocol includes the description, all filed or certified plans, drawings, copies of documents, photographs of written and real evidence, videos and others made during the inspection (Part 4, Article 140 of the Civil Procedural Code).

Such an inspection is carried out within the judicial proceedings in the case and as defined by Article 39 of the Economic Procedural Code of Ukraine. The inspection is carried out upon the request of the interested party. The results of the inspection are recorded in the protocol signed by a judge and enclosed to the materials of the case. The opinion of the Supreme Economic Court of Ukraine on the interpretation of certain problems of copyright protection on the Interesting is quite interesting.

Paragraph 46 of the Resolution No. 12 of the Plenary Session of the Supreme Economic Court of Ukraine on Some Issues of Practice of Settling Disputes Related to Protection of Intellectual Property Rights dated 17 November 2012 says that within the meaning of Article 5 (1) of the Law of Ukraine on Electronic Documents and Electronic Circulation, a web page constitutes an electronic document, which cannot be delivered to the court; however, they can include information on circumstances that are significant for the case (e.g., if they are the objects of copyright or related rights).Thus, taking into account Article 32 (1), Article 36 (1) and the instruction of Article 39 (1) of the Economic Procedural Code of Ukraine, the court is – under specific circumstances – entitled to inspect and investigate evidence at the place of its location recording the respective procedural actions in the protocol stipulated by Article 81 (1) of the Economic Procedural Code.

The Resolution referred to above proves that evidence of copyright infringement may be inspected by the court directly on the Internet. The practice also supports such a position.

Thus, in FUJIKURA Ltd. vs. Tekhnolohii Merezh (Networks Technologies) LLC, Nostmaster LLC and Allied Standard Limited LLC case No. 20/29604.10.11 on Recognition of Rights to Goods and Service Mark, "the court has inspected and investigated evidence on the Internet filing the Evidence Inspection and Investigation Protocol and opening in the web browser http://imena.ua page by entering the name and .ua domain in the address bar. The information posted on this page of the website is printed and added to the materials of the case" [158]. And the Economic Court in Kyiv City specified in its judgement in the case on the cessation of the infringement of intellectual property right that "the court has inspected and investigated evidence at the place of its location – on the Internet – recording it in the evidence inspection and investigation protocol".

The authors think that such a position of the Supreme Economic Court of Ukraine positively influences the process of resolving the infringed copyright protection cases. But nowadays, it faces certain difficulties, including the lack of due material and technical facilities in the court. Not all courts of Ukraine have the respective computer platform or the Internet access. The lack of special knowledge, which judges need to inspect and correctly record information on the Internet, also plays its role in this situation [209].

As mentioned above, The Plenary Session of the Supreme Economic Court [131] does not consider an ordinary printed web-page without any due certification as evidence unless it is duly issued or certified by an institution or specially authorised person within its competence and fixed with the official seal in one of the member states of the Commonwealth of Independent Countries.

Based on the said above, the issue on certifying the copy of a web-page is urgent. Such copies must be certified by a specially authorised person or a notary.

The Ukrainian legislation does not give a clear answer to a question what these persons should be. In the majority of cases, such pages are certified by the officials of the claimant. The question whether such certification is due arises. The powers of officials are defined by such documents as: a charter, employment contracts, job descriptions, or legislative acts for the separate categories of officials. Doubts that any of these documents entitles officials to certify documents of third parties, especially the Internet pages, arise. Thus, it is hardly possible to recognise that the printed Internet-page certified by the official of the claimant is duly

certified. The court has all and each reason to refuse accepting the printed Internet-page certified in such a way as evidence [209].

As an alternative to the civil and procedural institution of the perpetuation of evidence, scholars and practitioners consider an opportunity of perpetuating evidence in the notarial process. Such practice is popular in the Russian Federation and has positive outcomes within this category of cases.

In addition, it is worth noting that Article 53 of the Law of Ukraine on Copyright and Related Rights on Claim Preservation Measures in Cases on Infringements of Copyright and Related Rights includes an independent procedural process for perpetuating claims in copyright and related right infringement cases, that is, in its essence, the hybrid the process for perpetuating evidence and the process for perpetuating claims. Thus, Paragraph 2 of this Article says that if a defendant in a copyright and/or related right infringement case denies access to the necessary information or does not ensure it within the reasonable period, prevents court procedures, or if aiming at preserving the appropriate evidence of the alleged infringement, especially when any delay can result in irreparable damage to a copyright and/or related right holder, or when there is an evident risk of destroying the evidence, the court or a judge shall have the right to impose *sua sponte* and upon the claimant's application interim measures before a claim is filed or proceedings are initiated with the participation of the other party (defendant) by:

a) making a resolution authorising the inspection of the premises, in which the events relating to an infringement of copyright and/or related rights are allegedly occurring;

b) arresting and removing all copies of works (including computer software and databases), recorded performances, phonograms, videograms and broadcasting programmes believed to be counterfeit, means of circumvention, as well as materials and equipment used for the production and reproduction thereof;

c) arresting and removing invoices and other documents that can serve as evidence of actions infringing or creating a threat of infringement of (or certifying an intention to infringe) copyright and/or related rights.

The author thinks that the peculiarities of the procedure for perpetuating evidence in copyright protection cases should be stipulated by the Civil Procedural Code and Economic Procedural Code of Ukraine. The fact that this issue is not resolved causes the loss by claimants of an opportunity of grounding their requirements and supporting them with the respective evidence.

The Law of Ukraine on Copyright and Related Rights provides for the other way of how to protect the infringed copyright – to submit a loss (material damage) reimbursement claim, including the lost profit or collection of the income derived by the infringer as a result of the infringement of copyright.

Part 2 (2), Article 22 of the Civil Code defines that lost profit shall be profit, which a person could actually obtain under ordinary circumstances if his/her right were not infringed.

Defining the amount of the lost profit, the Resolution of the Plenary Session of the Supreme Economic Court on Some Issues on Settling Disputes related to Protection of Intellectual Property Rights (Paragraph 50) offers economic courts to rely on indices, which usually characterise income of a copyright and/or related rights holder. Such indices may include the retail market price for the originals of products/licensed copies of works and objects of related rights; a fee for the respective types of the use of works and objects of related rights that is usually applied; other similar indices. Meanwhile, the system of discounts and privileges, which is applied by copyright and/or related right holders depending on the quantity of the purchased copies of works and objects of related rights, the value of the contract for disposal of property intellectual property rights to a work and/or an object of related rights, and other criteria, should not be taken into account. Documents proving the retail price for the originals of products/licensed copy of a work may include any duly generated documents (a letter, a certificate, a price list, a price catalogue and etc.) of a copyright and/or related right holder or its official representative in Ukraine. When settling the respective disputes where the term "lost profit" is used, the courts should rely on the fact that one counterfeit product/copy of a work ousts from the marker one original product/licensed copy of a work within an offense. When considering the respective cases, it is worth taking into account the instructions of Part 3 (2), Article 22 of the Civil Code stipulating that if an infringing party derives any income therefrom, the amount of the lost profit to be reimbursed for to the offended party may not be less than the income derived by the infringing party [131].

Paragraph 41 of the Resolution No. 5 of the Plenary Session of the Supreme Court on Application by Courts of Law Provisions in Copyright and Related Right Protection Cases dated 5 June 2010 states that when settling the respective disputes, it is worth keeping in mind the provisions of Part 3 (2), Article 22 of the Civil Code stipulating that if an infringing party derives any income therefrom, the amount of the lost profit to be reimbursed for to the offended party may not be less than the income derived by the infringing party [136].

T.S. Kivalova notes that “the question relating to an amount of material damage caused to intellectual property right is quite complicated as neither the effective legislation of Ukraine, nor the Plenary Session of the Supreme Court of Ukraine determine the way of how the material damage should be calculated. Thus, the modern law-enforcement practice provides for a creative approach to determining the amount of the material damage caused by infringing an intellectual property right” [74, p. 46]. Taking into account the mentioned above, A. Koval states that it is reasonable to carry out forensic examination to determine the amount of the material damage caused by infringing an intellectual property right [75].

Based on the analysis of forensic examination, when copyright is infringed, the claimant requires compensation as stipulated by Part 1 (d), Article 52 of the Law of Ukraine on Copyright and Related Rights. Such a remedy is popular as, first and foremost, it is quite difficult to determine the amount of losses caused by infringing the copyright.

If the authorised person files the compensation claim, the court is entitled to award compensation equalling to 10 to 50, 000 minimal salaries instead of the reimbursement of loss or collection of income. This provision states and the judicial practice confirms that in such cases, compensation should be paid if the fact of – rather than the amount of the loss caused by – the infringement of property rights of a copyright holder is proven.

The institution of compensation for infringement of copyright is relatively new in civil law science. However, despite its innovative nature, this copyright remedy has become very popular as the claimant should prove neither any losses nor the alleged amount to be compensated – this is the competence of the court [81, p. 33]. Thus, collecting compensation for infringement of copyright refers to civil liability (similar to the literature-grounded statement that a penalty is a method to ensure an obligation while collecting a penalty refers to liability) [40, p. 59].

The concept of civil protection developed by the soviet civil law doctrine stresses that the key function of civil remedies is a recovery function [33, p. 17]. Civil liability also is of recovering compensatory nature [210, p. 126]. It means that civil remedies as well as civil liability are designed first and foremost to ensure that the property status of the offended party is recovered as it has been before the infringement. Such recovery includes, among others, the compensation of material and non-material damage caused to the offended party.

Damage is an essential element of civil liability. G.F. Shershenevych wrote that violation is a forbidden action that infringes a subjective right of another person by causing material damage [204, p. 611]. Today, some researchers rely on the fact that civil violation always causes at least non-

material damage [91, p. 47]. In such a case, the person may require compensation for the moral (non-material) damage.

Meanwhile, analysing actions banned by copyright legislation, we may conclude that some infringements of copyright do not cause by themselves any material damage to the author or copyright holder. Especially, it refers to the cases when a work is translated to another language and an enormous amount of its copies, which infringers fails to distribute, is produced without the author's consent.

The institution of compensation for infringement of copyright is borrowed from the English and American law systems where it is known as statutory damages. Especially in the USA, collecting statutory damages is one of civil remedies used by the court to protect copyright stipulated by § 504(c) of Copyright Act dated 19 October 1976 [92, p. 53].

However, this institution is unknown to civil law of countries of continental law system. The Supreme Court of the Federal Republic of Germany, in particular refusing on the basis of the clause on the public order of recognition of American court judgement on collecting penalty damages, stated that the German private law provided for loss reimbursement and no enrichment of the offended party as a legal consequence of an illegal action

Granting an individual the right to require from another individual to pay penalty is not compatible with the fact that a state has monopoly to make such requirements as well as with the fact which procedural guarantees should be applied when considering penalty cases. Though the meaning of penalty is familiar to civil contract law, it is not used in delict relationship. In addition, the procedure for calculating statutory damages in general form contradicts the principle of proportion, one of the key principles in a law-governed state. In civil law, it is based on the nature of calculation of damage to be reimbursed for; a proper aim of civil process with its typical rules is only the recovery of the infringed property right [189, p. 28].

Such a position of Germany as well as some other states of the continental law system represents the position of the European Court of Human Rights, which, within the range of its landmark judgements, determined the criteria of civil disputes and cases that should be considered based on the rules of a criminal process. Thus, any sanctions with such peculiarities as punitive orientation and severity of punishment will be considered as criminal notwithstanding their official qualification in the national law system. Statutory damages, though they are not officially an institution of criminal law, includes the typical peculiarities referred to above giving the grounds for deeming them as criminal sanctions.

In addition, taking into account the position of the European Court of Human Rights, cases on compensation for infringement of copyright should be considered as criminal complying with all the rules of criminal procedural proceedings (presumption of innocence, interpretation of all doubts in favour of a defendant and etc.). The failure to comply with these rules may be the basis for appealing against the respective judgement of the European Court of Human Rights based on the breach of the European Convention on Human Rights [189, p. 29]. The latter, within the obligations undertaken by Ukraine, is the part of the national legislation. Judgements of the European Court of Human Rights are to be complied with by Ukraine.

Taking into account such a position of the European Court of Human Rights as well as penalty nature of the institution of compensation, some researchers state that filing a claim on compensation defined by the court within the legal limits instead of a claim loss reimbursement are not referred to civil remedies for copyright protection. The position of the European Court of Human Rights requires certain changes to approaches to such civil copyright remedy [165, p. 29].

Based on the arguments referred to above, we can suppose that the copyright remedy specified in Part 1 (d), Article 52of the Law of Ukraine on Copyright and Related Rights is of civil nature and complies with the general principles of the national civil law. It is possible to apply compensation as liability within an author contract if the parties determine an accurate amount of such compensation that makes the compensation equal to penalty.

Meanwhile, such civil remedy for copyright raises a negative attitude of the states of the continental law system and, what is the main, contradicts the European standards of human rights. It is worth noting that all member states of the European Union whose national legislations had an analogous institution, made the respective changes thereto.

Based on the mentioned above, I.I. Vashchynets offers that compensation for infringement of copyright equalling to 10 to 50, 000 minimal salaries instead of loss reimbursement or collection of income may be deemed as such that contradicts the European Convention on Human Rights, and the respective judgements of compensation may be appealed against in the European Court of Human Rights. To avoid such a situation, the said scientist offers to amend Part 2 (d), Article 52 of the Law entitling the court to award “compensation that is determined by the court in the amount of double income, which is derived or could be derived as a result of the infringement, or, if the infringer has acted wilfully, in the amount of triple income instead of loss reimbursement of collection of income” [32, p. 14].

Thus, Article 67 of the Law of Lithuania on Copyright and Related Rights provides for the right of a copyright holder to require, instead of loss reimbursement, compensation, an amount of which is based on the price for the legally sold work or object of related rights being increased to 200% or 300% if the infringer has acted wilfully [69, p. 135]. Such a provision should be taken into account as it complies with the European standards of human rights, and carries out a penalty function in respect of copyright infringers.

The authors think that a similar provision should be included in the Ukrainian copyright legislation considering the national realities as, e.g., provisions on the obligation of a contract-breaching person to repay the advance payment at double rate that also has penalty nature.

Paragraph 45 of the Resolution of the Plenary Session of Supreme Court No. 5 on Application by Court of Law Standards for Cases on Copyright and Related Rights Protection dated 5 June 2010, a copyright holder is entitled to require compensation instead of loss reimbursement or collection of income. When settling the respective disputes, courts should take into account that compensation is to be paid if the fact of the infringement of property rights of a copyright and /or related right holder rather than the amount of loss is proven. Therefore, evidence of actions, which are recognised as the infringement of copyright and/or related right, is enough to satisfy the requirement of compensation. To determine an amount of compensation that is adequate to the infringement, the court should investigate the fact of the infringement of property rights and the type of the infringement; objective criteria, which can witness an approximate amount of damage caused by each and separate illegal use of the object of copyright and/or related rights; duration and volume of the infringements (single or multiple use of disputable objects); an amount of income derived from the infringement; the quantity of persons whose rights have been infringed; intentions of a defendant; possibility of recovery of previous status and efforts required therefor and etc. Meanwhile, the general principles of civil law stipulated by Article 3 of the Civil Code, including justice, honesty and reasonableness, should be taken into account. The respective basis for determining the amount of compensation should be specified in a court judgement. An amount of compensation is determined by the court based on claims but it may not be less than 10 minimal salaries and may not exceed 50, 000 minimal salaries stipulated by the law upon the approval of a judgement [136].

When determining the amount of such compensation, the economic court should rely on specific circumstances of a case and the general principles of civil law stipulated by Article 3 of the Civil Code, including

justice, honesty and reasonableness. The amount of the compensation is determined by the court within the alleged requirements depending of the nature of violation, the level of defendant's guilt and other circumstances. The court also takes into account duration and volume of the infringements (single or multiple use of disputable objects); the estimated amount of loss cause to the offended party; an amount of income derived from the infringement; the quantity of persons whose rights have been infringed; intentions of a defendant; any infringements of the exclusive rights of this claimant caused by the defendant; possibility of recovery of previous status and efforts required therefor and etc.

When determining the amount of such compensation, the court should rely on the amount of a minimal salary that is effective upon the approval of judgements [131].

Considering the civil remedy applied by courts, civil liability, which the court may apply to a copyright infringer if the authorised person addresses the court when the remedies referred to above are exercised, should be learned. This liability is defined by Part 2, Article 52 of the Law of Ukraine of Copyright and Related Rights by enlisting the powers of the court concerning the respective judgements on infringers. We think that the provision specified in Part 2 (g (2)) of the said Article requires high attention. This provision defines the rules for determining amounts of losses and compensation for moral damage caused by copyright infringements. It, in particular, says that the amount of loss caused to a person whose rights have been infringed may additionally include court expenses born by this person and expenses relating to lawyer fees. Some national researchers, including O.A. Pidopryhora, also include the expenses referred to above to real losses [108, p. 371].

Such a way of determining an amount of losses has its minuses. Court expenses as well as lawyer fees are not referred, based on their legal nature, to real losses within the meaning of Article 22 of the Civil Code of Ukraine. The basis for covering such expenses is not the fact of the infringement of civil rights but a claim brought by a person to the court. Thus, such expenses are covered on the basis of other regulatory acts (the Civil Procedural Code, the Law of Ukraine on Court Fees [145] and etc.)

S. Mirzoian states that the difference between losses and court expenses and lawyer fees may be proven by the fact that these expenses are paid by a losing party to the proceedings rather than an exclusive right infringer [92, p. 67].

Therefore, having analysed the provisions of Article 52 of the Law of Ukraine on Copyright and Related Rights, we can ascertain the fact that civil remedies for copyright are stipulated only by Part 1of this Article. And

such a remedy as a claim on compensation equalling to 10 to 50, 000 minimal salaries instead of loss reimbursement or collection of income cannot be deemed as a civil remedy for infringement of right. In addition, the powers of the court listed in Parts 2, 3 and 4 of Article 52 of the Law of Ukraine on Copyright and Related Rights are not remedies for infringement of copyright when considering claims of copyright holders. The mentioned powers peculiarly fix liability as Part 2 (a-e) and Parts 3 and 4 of this Article show, or represent the context of the court judgement or resolution when satisfying the claims of the authorised person brought to exercise civil remedies for infringement of copyright stipulated by the Law of Ukraine on Copyright and Related Rights as Part 2 (f and g) of Article 52 shows.

D.D. Luspenyk indicates the complexity and ambiguity of the enforcement of new Civil, Family, Economic and Civil Procedural Codes of Ukraine and other laws as there are express discrepancies and misunderstandings in these regulatory acts, which are recognised by a lot of lawyers, scientists and practitioners. We can agree with this author who thinks that law-enforcement authorities should show their skills in applying new laws to various specific cases and interpreting them based on scientific recommendations and their own understanding of the mechanism of laws and law logics [87, p. 7].

Strengthening, at the legislative level, legal liability of judges for violation of the Civil Procedural Code and the standards of professional conduct defined by the Code of Judicial Professional Ethics approved by the Fifth Meeting of Judges of Ukraine on 2 October 2002 is topical and necessary [87, p. 15].

Speaking about the complexity of litigation, the authors mean the application of traditional approaches to judicial protection of copyright to works posted on the Internet. According to the effective legislation, the protection of copyrights to ordinary works (works embodied in physical objects) does not differ from the protection of copyrights to works posted on the Internet in electronic form. In the first section of this research, the author analysed the characteristics of the global network (globalism, exterritoriality, anonymity and etc.) which significantly complicates traditional remedies for subjective rights. Therefore, such an approach of a lawmaker is unacceptable nowadays.

We can illustrate such a thesis in the context of defining the place of copyright protection if they are infringed on the global information network, and defining a bearer of legal liability for such infringement.

Thus, Article 5 of the Berne Convention states the scope of defence as well as remedies provided to the author to defend his/her rights are governed exclusively by the legislation of a country where such actions are

required [19]. Modern researchers interpret this rule as an opportunity of a right holder to protect his/her rights in any country where a work is illegally used, and if it is used on the Internet, protection is ensured almost in every country where access to the work is available [85, p. 148].

We should remember that the Internet is the international information network, and it is necessary to continue finalising regulatory acts at the international level. Moreover, there is the range of questions, which may be resolved by signing treaties: separation of jurisdiction on the network, areas of Internet addresses and etc. In other scientific researches, the author has already noted that since the adoption of the Berne Convention, conferences aiming at the substantial revision thereof relating to the technological process-caused need in updating it were called twice. However, the 1967 Stockholm Revision and the 1971 Paris Revision could not concern legal governance on the Internet as at that time, the Internet stated its modern development and was not massively distributed [99, p. 74].

Nevertheless, Article 37 of the Law of Ukraine on International Private Law states that the law of a country, where protection of intellectual property rights is required, is applied to legal relationship relating to protection of these rights [141]. It is worth noting that the recognised fact of the reproduction of an object of copyright on the Internet raises to the court a problem of defining a proper liability bearer as the reproduction is actually carried out by an ordinary user rather than a person who has posted such an object on the Internet. And such an object can be reproduced without the direct consent or the knowledge of a user. Holding an ordinary user liable in such a case contradicts the principles of justice, expediency and inevitability of legal liability.

Real copyright protection on the Internet is problematic relating to the international nature of infringements. Thus, P.A. Kalenychenko thinks that neither the Law of Ukraine on International Private Law nor other regulatory acts relating to the problem concerned gives a definite answer to a question whether courts of Ukraine may consider disputes on protection of rights of the Ukrainian copyright and/or related right holders, which have been infringed by posting works or objects of related rights by foreign citizens or legal entities on the Internet illegally. This author notes that “an opportunity of considering such cases in future raises doubts as procedural provisions require evidence of the notification of a defendant on the initiation of proceedings in the case, time and place of court hearings and etc.; and it is not always practically possible to provide such evidence as the court requires accurate proofs of location of the defendant, registration thereof in commercial registers and etc.” [66, p. 196].

Searching for ways of enhancement of the national copyright legislation, the author thinks that positive experience of neighbouring countries, including Poland, should be taken into account. We know that according to Part 1, Article 52of the Law of Ukraine on Copyright and Related Rights [126], the list of ways of liquidating the consequences of infringements is stipulated by the Ukrainian legislation, and they include:

— banning illegal publication of works, their performances, staging and etc.

— banning producing copies of phonograms, videograms and etc. and broadcasting them;

— ceasing illegal distribution of works;

— removing and even destroying copies of works, phonograms, videograms and etc.;

— removing items, materials, equipment, which are involved in infringements.

In contrast to the Ukrainian legislation enabling the offended party to use only law-stipulated methods to protect rights, the Polish copyright legislation does not limit methods of protection, which may be selected by the offended party – the list of available methods is open. The Polish lawmaker considers that the main thing is that methods of protection are expedient and can liquidate the consequences of infringements, but they must not contradict the law and the principles of the social life. According to the Polish legislation, the court may bind a defendant to take actions, which meet the scope of protection and are recognised as necessary for liquidating the consequence of the infringement of personal copyright [34, p. 5]. Thus, the Polish lawmaker entitles the offended party to select actions for protecting his/her infringed rights, and the court only determines whether they are reasonable and adequate for the scope of protection. The author thinks that the elements of such an approach should be included in the national copyright legislation.

Completing the research into the peculiarities of judicial copyright protection on the Internet, we would like to raise the problem of theoretical legal training of judges. In her scientific works, I.E. Berestova notes that "judges often do not know specific terminology that leads to mistakes in court transcripts, misinterpretation of circumstances of cases, testimonies of witnesses, the court does not always have technical capabilities to fully and comprehensively consider circumstances of cases relating to copyright infringement on the Internet" [18, p. 103].

The Russian researchers L.N. Borokhovych, A.A. Monastyrska and M.V. Trokhova even raised a question on the establishment of special intellectual property courts as in Great Britain, the USA, Germany, and

Sweden [24, p. 108]. As in 2001 the Decree of the President on Measures to Protect Intellectual Property in Ukraine [139] delegated to the Cabinet of Ministers of Ukraine to explore the issue of the establishment of special patent courts, the authors think that the establishment of special intellectual property courts or, at least, field training of judges in this area is a matter of time and financial resources as the basis for such actions have already appeared.

## 3.2. Other Methods of Protection andAlternative Regulationof Copyrighton the Internet

The use of specific legal mechanisms of copyright protection even in the event of improvement of the effective copyright legislation will not be able to completely solve the problem of wide-spread Internet piracy. Under such conditions, alternative approaches to the regulation of copyright on the Internet should be sought by using well-established mechanism of copyright protection. Such approaches, according to the author, should relate to:

— development and adoption of a totally new mechanism of copyright protection on the Internet;

— use of self-regulation mechanisms on the Internet;

— introduction of mediation mechanisms relating to copyright infringement on the Internet;

— cross-subsidisation of models by the example of subsidisation of other information networks (TV, radio).

Mediation is one of the non-jurisdictional methods of copyright protection.The term “mediation”comes from the Latin “mediare”, i.e. to be an intermediary. The term “mediation” is widely used in the world and is equivalent to Ukrainian term “poserednytstvo (посередництво)”. Mediation is a process of negotiations when the settlement of a controversial issue involves a neutral third party – the mediator (intermediary) who holds negotiations, listens to the arguments of the parties on the merits of the dispute and actively helps the parties understand their interests, evaluate the possibility of compromise and make an independent decision satisfying all participants in the negotiations. In other works, mediation is one of the highly efficient so-called alternative (extrajudicial) methods of dispute settlement [193, p. 180].

The difference between mediation and court or court of arbitration is that the parties to the conflict select at their own discretion an intermediary who does not take a final decision for the parties, but helps resolve the

conflict by arranging and holding negotiations, through which the parties to the conflict can approve their mutual decisions on controversial issues.

In the court, the parties do not select a judge, and a judgement binds the parties to the dispute as well as all public authorities and local governments, enterprises, institutions, organisations, officials and officers. In the court of arbitration, the parties select arbitrators, but the judgement of the court of arbitration binds the parties to the dispute. Mediation has no specific procedural rules as opposed to the state court or permanent court of arbitration, there are only general rules, with which each intermediary must comply [58].

HostmasterLLC is called to settle the conflict through mediation [150]

Advantages of mediation:

On 1 November 2011, the Law of Ukraine on Court Fee came into force providing for the court fee for filinga property claim: 1% of the amount but not less than 0.2 of a minimal salary for the courts of general jurisdiction, and 2% of the amount but not less than 1.5 of a minimal salary for economic courts. A claimant in disputes relating to intellectual property had previously been released from paying a state duty on the basis of Article 4(2) of the Decree of the Cabinet of Ministers No. 7-93 of 21.01.1993 on State Duty.

One of the reasons of the absence of demand for mediation is the lack of information that mediation is beneficial from any perspective: it saves money for court expenses and lawyer fees and time for dispute settlement. In addition, the prejudice is reduced to a minimum when making decisions, since they are made by the parties themselves. The great advantage is the fact that the percentage of voluntary implementation of decisions made by mutual agreement is rather significant. The failure to involve mediation as a way of copyright protection in Ukraine results from the absence of proper legal regulation of mediation procedure as opposed to foreign countries where mediation is regulated by special legislation. For example, Austria adopted the Federal Law on Mediation, and the USA adopted the Uniform Mediation Act. In Ukraine, there is no special regulatory act on mediation, and measures aiming at promulgating and promoting mediation are mostly related to involving psychologist intermediaries to resolve conflicts between the parties to criminal cases [193, p. 181].

Using copyright-based methods in conjunction with economic factors seems to be very efficient, in particular, cross-subsidisation on the Internet similar to the model used on radio and TV, where the audience of programmes pays nothing, while broadcasting organisations pay for the use of the protected copyrighted materials at the expense of advertisers [97, p. 164]. The need for technological and legal measures of copyright

protection on the Internet automatically disappears when a copyright holder decides to distribute the works free of charge for the Internet users. This is possible if they use one or more models of cross-subsidisation, such as:

— Advertising;
— Sponsorship;
— Pre-purchase;
— Saleof improvements;
— Sale ofcomplementarytechnology;
— Collection of personal information.

Advertising is one of the most profitable business models on the Internet. According to this model, the company provides free information to users in order to attract visitors to its site, and then sells advertising space to others. As practice shows, multibillion industries may initially be based on advertising. For example, the television industry, in fact, provides its intellectual property to the audience for free, and exists largely due to advertising. Using the TV model as an example, we can assume that the Internet users will not be required to pay for the use of works, and the creation of intellectual property may be fully financed by advertising. In fact, many copyright holders combine the advertising model with other forms of non-operating revenues. However, advertising is an important component in business models of cross-subsidisation.

Another option of the advertising model is sponsorship – the distribution of products under the sponsor's trademark. In the early stages of television, various companies bought the programme advertising time and were mentioned as its sponsors. On the Internet, sponsorship can take different forms, but the basic idea is stronger integration of the sponsor and webpage content rather than just placing of its banner at the top of the page. For example, a lot of companies hold online contests which award participants who give their answers to questions that can be answered only after visiting the websites of sponsors.

Sponsorship is a strong alternative to banner advertisement, especially since advertisers are increasingly being dissatisfied with the results thereof. However, the sponsored content also raises complicated issues regarding independence of publishers, because the line between advertisement and editorial information becomes blurred.

When it comes to the pre-purchase model, this is a method where companies provide to consumers a free copy of a work with certain restrictions (of duration or specific functions) hoping that consumers will purchase a full copy. For example, a seller may provide a free software hoping that consumers will be back to buy its copy. Moreover, in a lot of cases, consumers may use works illegally, and then decide to buy a legal

copy, even if the seller has not intended to provide copies on the terms of pre-purchase.

On the Internet the pre-purchase model became very popular because the production or distribution of trials does not require significant financial direct costs. Thus, software, information and prepaid services are usually provided on the pre-purchase basis.

According to the model of the improved version sales, consumers receive an object of copyright free of charge with the hope that someone will buy its improved version. To some extent, this model is an analogue of the pre-purchase model. For example, Version 1.0 may be the best way to sell Version 2.0. However, the use of this model is not limited to software. An author, for example, may provide free access to the initial fragment of a literary or audio-visual work in order to trigger the demand for full versions of intellectual property object.

Sales of complementary technologies generally mean that companies dealing with both software and hardware may provide users with free software to encourage them to use their patented complementary hardware.

As for the collection of personal information, websites can easily collect significant volume of information on their users – and often without their consent.

Websites, for example, can find out IP addresses of their users, and the last website that they have visited. In addition, placing a personal identifier in special file on the user's hard drive called "cookie", website can track actions of their uses on the site and get information what sites and how long they browse. In addition, a lot of sites require or may require that users fill in the registration form and give personal information.

Later, companies will be able to use this information for commercial benefits in different ways. Though the commercial use of personal information may cause significant problems in the terms of privacy, such use is not legally restricted in most cases.

The list of alternative business models on the Internet referred to above is incomplete. Businessmen are prone to develop new methods to get profit from free distribution of works online. The variety of alternatives enhances the basic idea: creators of intellectual property may cross-subsidise their works in various ways.

The complex use of the alternative approaches to the regulation of copyright on the Internet referred to above along with the use of technological and legal measures of protection, web-depositories, extensive information government campaigns to support the author's property and moral rights on the Internet will significantly reduce the number of offenses

relating to objects of copyright on the Internet and protect authors from any adverse consequences.

### 3.3. Problems in Determining Websiteas Special Objectof Copyright Protection

The Internet has influenced not only traditional functioning of objects of copyright in the everyday social life. Under the influence of information technology, a website will eventually become a separate object of copyright. Nowadays, a lot of companies, institutions and organisations have their own webpages on the Internet, or branch websites, orat least business card websites.

Computer software, which a few decades ago was recognised as a new object of copyright legislation in a lot of countries, may give its place to the most recent object of copyright – a website. According to certain opinions widely spread in the academic circles, a website shouldbe recognised as an object of copyright, along with literary, musical, and other works, and a person who has created it should be recognised as its author.

In most cases, the website is made by an order by persons having certain professional skills in web design and computer programming. So, the website becomes an object of copyright that will be recognised as a work made for hire (if a person has created the website according to the employment agreement) or an object of copyright made by an order (if the website has been created under the works (services) agreement).

However, taking into account general availability of domain names and numerous popular manuals on web building and web design, any person can create their own small websites for individual, business or other purposes. The originality of websites will push lawmakers to provide to their creators with a legal status of an author including all legal consequences arising from such a status.

The first definition of the Internet site (website) in Ukraine was stipulated by the Joint Order No. 327/ 225 of the State Committee for Informative Policy, Television and Radio Broadcasting of Ukraine and the State Committee for Communication and Informatisation of Ukraine on Approval of Procedure for Website Content and Engineering Support of Single Web Portal of Executive Authorities and Operation Procedure of Websites of Executive Authorities dated 25 November 2002, which specifies that “a website is a set of software and hardware with a unique address on the Internet with information resources possessed by a certain person providing access for legal entities and individuals to these

information resources and other information services through the Internet" [137].

However, it should be noted that the category was used before the publication of the order referred to above when there was no definition. The first official reference to a website as a category used at the state level within the official paperwork dates back to May 2001 – when the process of creating the website of the Verkhovna Rada was started by the Order of the Speaker of the Verkhovna Rada of Ukraine.

In academic circles of Ukraine, the range of problems relating to a website came up for discussions at the beginning of the XXI century. For example, M.V. Hura offered his own definition of a website as "a separate logically complete web element created on the basis of hyperlinks and located on a server (host) has a unique address (URL) with the access for any Internet user, and basically consists of Internet pages in graphical format and can be viewed by using special software (browsers)"[48, p. 34].

In contrast to this definition, V.B. Naumov, the Russian legal scholar, offered the description of a website, according to which a site is a systematically ordered set of webpages connected by hyperlinks, where each website page has a unique address on the Internet and is the kind of an application written with HTML commands designed to control a page display while accessing by a user [101, p. 201].

According to Z.I. Rudnytska, only a creative work may result in something new, original and unique. Therefore, there are sufficient grounds to consider a website as an object of copyright, because every new website is a result of creative and intellectual activity of a programmer or a designer and has signs of novelty, originality and uniqueness [162, p. 1].

The analysis of these definitions leads to the conclusion that none of the researchers directly states that a website is an object of copyright. The Ukrainian legislation as well as legislation of a lot of other European countries do not consider a website as a separate object of copyright that allows researchers to express different and sometimes diametrically opposite opinions relating thereto.

Y.Kobieliev, the Russian researcher, says that every website representing a system of objects of copyright bears signs by which it may be distinguished from other websites on the Internet. However, these objects of copyright being the components of the website are works in the legal sense. Therefore, a website should not be considered as a whole object of copyright taking into consideration the requirement to respect the copyright of persons whose works result in the originality of every individual website [76, p.66].

Some researchers support the autonomy of a website as an object of copyright. Thus, O. Moiseievainsists on that the list of objects of copyright specified by the Russian legislation is not exhaustive suggesting that not only works expressly specified by the legislation may be considered as objects of copyright [96, p. 72].

This suggestion may be applied to the Ukrainian legal realities as a national lawmaker also defines the so-called "other works" as a group of copyright that may appear in circulation after the copyright legislation is formulated, and a website ideally matches the category of other works.

S.I. Semilietov offers the definition that may be an argument justifying a website as a separate object of copyright, according to which "a website is a set of electronic documents in the form of software files located systematically and placed at a specific domain address on a specific host server, the display of which with the help of browser application on the user's screen represents the completed audio-visual work of an author consisting of one or more pages available to any user on the Internet by the reference" [163, p. 54].

It should be mentioned that some Russian researchers have tried to specify a websiteas an audio-visual work or database, but in our opinion, a website is as inglespecific object of copyright. In the technical sense, objects of intellectual property rights used on the website may be the following:

— website design;

— website architecture;

— animation component;

— audio and video works;

— photographs, drawings and other graphic images;

— unique computer software used for the site operation;

— unique applications that influence interconnection of individual site elements;

— literary works and other textual content (information content of the website);

— trademarks;

— commercial names and others.

As we can see from the list referred to above, objects of copyright as well as intellectual property in general may be the elements of the Internet site. This means that it is possible to place a company logo and etc. on the website.

The first holder of the rights to any content element is a person who has created such an element (a programmer, a designer, a writer, etc.).However, there can be exceptions – when the work is created to fulfil the order

agreement or employment duties.The website content includes a lot of objects of intellectual property that are usually created by different persons. However, it is commonly known that the website is, in most cases, used by one person (an individual or a legal entity) who is called as the owner of the website. Thus, as the Ukrainian legislation provides no legal regulation of websites, the owner of the websitehas to sign agreements with allentities whose creative products are used as the website content. This situation causes considerable inconvenience for the owners of the Internet sites that maybe solved by recognising the website as a specific object of copyright by the Ukrainian lawmaker.

Analysing Appendix 1 to the Information System (Website) Development Agreement, we can see how the parties in their contractual relationship solve copyright issues related to the creation of websites. Paragraph 2.3.5 of the Agreement stipulates as follows, "Upon the completion of the works relating to the creation of a website, the Contractor shall transfer all rights to the website to the Customer (including the copyright to certain parts of the website)". As evidenced by the contracting practice, copyright to individual elements of the website content rather than to the website as a whole is protected.

As evidenced by the national legislation, a particular object of the material world must meet four key characteristics to be recognised as a work:

— creating such an object is a creative process;

— it belongs to science, literature, art;

— each and every work has its own objective form of expression;

— each and every work must be reproducible.

The doctrinal interpretation of a creative process may be defined as "the purposeful human intellectual activity resulting in something totally new, unique, original, and creativity may be manifested in human technical, artistic, literary, scientific, and industrial activities"[63, p.4]. From perspective of this approach to creativity, a website may be expressly recognised as an object of copyright.

The process of creation as an essential condition to recognise a website as an object of copyright is connected with the purpose fulintellectual activity of a person. Every website is unique and original; it may be created by using various software tools, different programming languages, interface components, hardware and etc. Selecting all the components, methods and principles referred to above as well as applying them refers exclusively to the intellectual activity of a person creating a website. Specific knowledge in the form of computer skills at the competent level proves the intellectual component in the process of creating a website.

Belonging to science, literature or art may be illustrated by being compared with another object of copyright - computer software. It is well known that computer software is protected by the copyright legislation as a literary work as the so-called body of software is textually expressed. Every webpage in the HTML format is essentially a file containing certain text information in the strict logical sequence. Since a website is a system of the ordered webpages, it may be easily recognised as a literary work. In addition, due to the strong graphics potential of the website, it may be partially considered as a work of art. The site architecture, its design and others may represent certain artistic value.

The objectivity of the form of the Internet site expression is also obvious. M.V.Hurahas noted that "in order to actually become an Internet site a website has to be spread on the Internet that would be impossible if the website were only on the author mind"[47, p. 453]. The author entirely agrees with this opinion.

A website by virtue of its nature is not simple but complex object of copyright. The definition mentioned above allows identifying the following components of the website:

a) software;

b) hardware;

c) unique address on the Internet;

d) information resources [89].

The elements of a website may include: video, audio, graphics, text, databases – which are deemed as objects of copyright under Paragraph 1, Article 8 of the Law of Ukraine on Copyright and Related Rights [126]. If such elements of the website meet the required criteria, they maybe recognised as separate objects of copyright and hence, special legal protection regime is provided for each of them. The author of a website claims copyright to the entire website composed of different elements; these elements do not express the purpose and intention of the author by themselves and represent a particular work only as a result of the creative intellectual welfare, arrangement and combination. In other words, as Z.I. Rudnytska says, the author of a website is a person who can give a new meaning and value to different types of objects of copyright and create a unique website [162, p.2].

Due to the form (internal and external), a website should be considered as an object of copyright, its legal protection should be ensured because it is the only work (an object of copyright) that combines different works (audio-visual works, literary publication, scientific and musical works, databases and other works that are not objects of copyright – train schedules

or laws on the website of the Verkhovna Rada of Ukraine), and their harmonious coexistence should be ensured.

The information resources of the website include text, graphics, video recordings and others. However, selecting, posting and arranging website information resources always have creative nature. When determining the creative nature of the author pf the website, his/her thinking may be divided into productive (creative) and reproductive (uncreative). Therefore, it is logically to suggest that the absence of criteria of information selection and arrangement that are invented by the author may not be seen as productive thinking and does not provide any grounds for copyright [162, p. 3].

If a website is created by an order and with using the created objects of copyright (photos, graphics, text and etc.) through creative selection and arrangement of the latter, then it seems possible to draw a parallel between a collection of works and a website. However, if a person providing services has created a unique website with a completely new content that has no analogues, there is no sense to protect each element of the website as a separate object of copyright, prove its authorship as well as to separately protect "the selection and posting of works and/or other data that can be the result of creative activity (arrangement)".

A web siteis a work, a complex and complicated result of a diverse creative process, and therefore, the author of the website is entitled to the entire website and each of its elements, which is an integral part thereof, where the author is involved in the creation of an entirely new site with unique information content. The author's copyright is protected to the site as a copyright object; and particular objects of copyright are structural elements ofthe inner and outer composition of the website, elements of the form. If the author creates an original and unique website using various objects of copyright that already have an author, legal protection is applied to the website in the form in which it was created as a result of creative selection, publication, arrangement and combination of structural parts, by reason of which a website is implemented in this and not another objective form (only in this case legal regime of protection for collection of works may be used, and copyright objects that already have an author are used in accordance with the provisions that regulate creation and use of collection of works) [162, p. 4].

Based on the mentioned above, Z.I. Rudnytska concludes that a website is a separate integral complex object of copyright resulting from the creative intellectual activity of an author representing the linked elements of the Internet site organically and logically (works that are separate objects of copyright and works that are not separate objects of copyright according to Article 434 of the Civil Code of Ukraine) and resulting from original

selection and arrangement where each element meets a general purpose of the created website [162, p. 4].

Nowadays, websites can be created in two ways. The first way is to create the website by an order and by a professional group of web designers; and the second way is to create the website by the Internet users. When the website is created by one person, all its elements are created by this person and constitute the result of his/her creative activity. In the second case, the separate elements of a website are created by various designers, so the problem of legal defence of the work transferred to the customer is greater as different elements of the website belong to different authors. [162, p. 5].

It seems appropriate to use the terms "contractor" and "author" taking into account not the status – an individual, an individual entrepreneur or a legal entity – but the subject matter of the agreement signed by the parties: the provision of services by a person who specialises in creating websites by implementing the idea of the design of the website offered by the customer if its objective idea is expressed in the form of a layout or another visual display of the future Internet site. Thus, when making the agreement between a customer who has a clear idea of the future website and provides a layout or other visual display of the website, and a person who has agreed to carry out the order, i.e. to provide a service using special knowledge, the customer will be an author of the future website, and the person who carries out the order will be a contractor [162, p. 5].

Every website has its own address on the Internet. It is known that every website on the Internet has its domain name. Paragraph 15, Part 1, Article 1 of the Law of Ukraine on Protection of Rights to Marks for Goods and Services states that "a domain name is a name used for addressing computers and online resources" [143]. Since every website is located on a server of a specific hosting provider, the wording relating to addressing computers and resources rather than the Internet site directly may be considered sufficient.

One of the most common and effective ways to protect the Internet site is associated with its domain name. Thus, intellectual property experts, patent at tourneys and private legal practitioners state that "the protection of rights to domain name by registering a trademark is the most common and the only possible way today" [5]. The authors agree with the first part of this statement, but the single possibility is evidently hyperbolised taking into account the effective legal framework.

The last condition (the condition of reproducibility) is as follows: every website can be stored in computer memory by storing all its webpages consecutively. If a special technical obstacle to ensure the content of certain

webpages is applied by the owner of the website, they are still reproduced in random access memory, video chip and etc. So, any website – notwithstanding whether specific technical storage obstacles are present – is reproducible by the computer of a user either on the hard drive, or in the memory cache.

The analysis of the effective legislation, contracting practice, leading scholar's opinions and other sources allows defining key Internet site provisions:

— according to the effective legislation, an Internet site is not directly defined as an object of copyright to be protected;

— separate parts of website, i.e. its content, can be separate object of copyright;

— copyright to a website should be protected by protecting copyrights to its separate parts, components (content).

Having demonstrated that the Internet site complies with all requirements to a work, the author believes that a website should be recognised as a new object of copyright in the national legislation.

In general, we can summarize that copyright protection on the Internet is a relatively new and ambiguous process.This ambiguity involves dividing legal experts into different groups in respect of this process, which include conservative supporters of heavy legislative regulation of copyright protection on the Internet and creative reformers and even supporters of the so-called free Internet space. By classifying key legal theoretical approaches to copyright protection on the Internet, essential arguments of supporters of such approaches, strong and weak aspects of each approach were analysed.

Having compared the category of defence and the category of protection of copyright on the Internet and the category of defence and the category of protection of copyright, which are not related to digital networks, some differences were found. The reasons for this shift in emphasis have been also explained having analysed objectively existing features of the Internet. Every defined characteristic of the Internet has been explained in detail. The authors conclude that protection that is traditionally applied to the rights infringed on the Internet also takes preventative (precautionary) form.

Analysing the key author's powers, significant attention has been paid to the exercise of such powers within a new epoch of information. Considering the impact of digital objects of copyright on the process of their use, distribution and etc., the author has provided the definitions of digitisation process that are known to civil law science, and has described this process from legal perspective.

Having determined key weak aspects of exercising traditional powers of an author on the Internet, the author has offered the following solutions:

— including a new author's power "electronic recording" into the national copyright legislation;

— including a new author's power "electronic distribution" into the national copyright legislation;

— making changes to the national copyright legislation on significant restriction of interpretation of a power to reproduce on the Internet.

Considering the conflict of laws relating the power to reproduce and distribute, the authors have explored the problem of so-called exhaustion doctrine on digital networks and suggested two possible ways to solve it relying on the American and European copyright legislation. The first way is to consider information transfer through the Internet as a service rather than a product. The second way is to make changes to the effective Ukrainian copyright legislation relating to excluding the Internet from the scope of the exhaustion doctrine directly providing detailed arguments of its basic principles.

The final issue in this section concerns the definition of the legal nature of the Internet site in Ukraine and its possible inclusion into the list of objects of copyright. The detailed analysis of modern legislation, research papers of Ukrainian scholars, and opinions of legal practitioners allows concluding that a website meets the requirements to works not with standing the fact that the effective national legislation fails to recognise it as an object of copyright. The author has also paid attention to key elements of the website content that are protected by copyright law as well as intellectual property law in general – this allows concluding on the complexity of this category as an object of copyright and its specificity.

# SUMMARY

Results of the scientific research into legal theoretical and practical principles of copyright protection on the Internet allow summarizing as follows:

1. Crucial tasks that are completed and related to copyright protection on the Internet are the implementation of the Ukraine – European Union Association Agreement, including the Intellectual Property section, and the harmonisation of the national legislation with the European standards. The State Service of Intellectual Property in association with Ukrpatent State Enterprise has already adopted the package of respective changes to the national legislation. A draft law, which provides for changes to seven key legislative acts (five law, the Civil Code and the Economic Code) governing the activities in the sphere of intellectual property, has been designed. The draft law will be analysed by international experts who work within the Twinning Project on Strengthening the Protection and Enforcement of Intellectual Property Rights in Ukraine. The end date for designing the draft law is determined by the order of the Cabinet of Ministers of Ukraine as July 2015.

2. The key features of the global information network – the Internet – which influence the peculiarities of protection of objects of copyright there on are globalism, exterritoriality, general availability, interactivity, and anonymity. Such objective characteristics of the Internet – in the midst of the classical confrontation arisen in legal science between positivist scientists and supporters of natural law theory – have resulted in the polarised opinions relating to copyright protection on the Internet. In this research paper, the author has expressed three key approaches to solving the problem of copyright protection on the Internet:

— copyright protection on the Internet is not reasonable at all (D. P. Ballou and supporters of the so-called free cyberspace theory);

— copyright protection on the Internet is not possible through traditional methods of copyright protection (V.B. Naumov, O.M. Pastukhov);

— copyright protection on the Internet is necessary and possible through traditional methods of copyright protection (I.I. Vashchynets).

Meanwhile, all researchers of the functioning of copyright on the Internet – notwithstanding which approach they support – agree that the boundary between the category of copyright protection and the category of copyright defence on the Internet is not as clear as the boundary between protection and defence of rights to objects in the material world.

Copyright protection on the Internet is a relatively new and ambiguous process. This ambiguity involves dividing legal experts into different groups in respect of this process, which include conservative supporters of heavy legislative regulation of copyright protection on the Internet and creative reformers and even supporters of the so-called free Internet space. By classifying key legal theoretical approaches to copyright protection on the Internet, essential arguments of supporters of such approaches, strong and weak aspects of each approach were analysed.

Having compared the category of defence and the category of protection of copyright on the Internet and the category of defence and the category of protection of copyright that is not related to digital networks, some differences were found. Each feature of the Internet was grounded in detail. The authors conclude that protection that is traditionally applied to the rights infringed on the Internet also takes preventative (precautionary) form.

3. Exercising traditional author's powers on the Internet face significant difficulties. Thus, the digital form of a work prevents the power of reproduction from functioning in a normal way, successful exercising of power of distribution comes to nothing as the exhaustion doctrine is not effective on the Internet.

Analysing the experience of foreign countries an international regulation of copyright protection on the Internet, the author have offered the range of innovations that could significantly improve the situation with copyright powers on the global information network, including:

— overcoming the exhaustion doctrine by directly refusing, at the legislative level, to spread it on the Internet or accepting the concept that providers ensure the Internet as a service rather than as a work;

— accepting by the Ukrainian legislation and scientific doctrine of two new author's powers – electronic recording and electronic distribution.

The authors have defined the power of electronic recording as "recording a work, a performance, a phonogram, a videogram or their copies to temporarily or permanently store in electronic (including digital), optical or other computer-readable form".

The authors have defined the power of electronic distribution as "enabling through the means of communication the access to a work, a recorded performance, a phonogram, a videogram or their copies by using telecommunication networks (save for TV networks)".

4. The research into legal regulation of Internet sites in Ukraine and legal theoretic approaches of leading national scientists allows the authors to express such an opinion on the legal nature of Internet sites as specific objects of copyright:

— the effective legislation of Ukraine does not directly recognise an Internet site as a type of an object of copyright as it is not included into the list of objects of copyright defined by the Civil Code of Ukraine and the Law of Ukraine on Copyright and Related Rights;

— it is possible to recognise an Internet site as a separate special object of copyright as the lists referred to above are inexhaustive – as specified by the lawmaker – and the national civil law doctrine grounds that an Internet site complies with all official requirements to a work as a legal category;

— at this phase, the most rational way of protecting copyrights to Internet sites is protecting copyright by its separate parts, components (content), which can be separate objects of copyright.

The analysis of the effective legislation, contracting practice, leading scholar's opinions and other sources allows defining key Internet site provisions:

— according to the effective legislation, an Internet site is not directly defined as an object of copyright to be protected;

— separate parts of website, i.e. its content, can be separate object of copyright;

— copyright to a website should be protected by protecting copyrights to its separate parts, components (content).

Under such circumstances, having grounded the compliance of an Internet site with all the requirements to a work, the authors think that a website should be included in the national legislation as a new object of copyright.

Effective copyright protection on the Internet by using only official legal measures is impossible and unreasonable today. The fact that the Ukrainian copyright legislation provides for technological measures of protection is a great leap forward aiming at combating an actual inability of a person to protect his/her copyright through exterritoriality, transboundedness and globalism of the Internet.

Researching the essence of technological measures of protection, the authors have provided their own definition of this legal category: technological measures of protection are technological mechanisms (in the form of devices or products), designed to protect access and transfer of objects of copyright and to supplement legal defence provided for by law and/or agreement with effective technological protection.

In addition, the authors have analysed strong and weak aspects of classifications of technological measures of protection carried out by different scholars and have offered to classify the measures by the criteria as follows:

a) according to their purpose:

— technological protection measures intended to create a technological obstacle to the infringement of copyright while receiving and copying protected (encoded) recordings in objects of copyright;

— technological protection measures intended to control access to the use of objects of copyright;

b) according to the source of fixation

— determined by the agreement between the holder of property rights to a work and another interested person;

— determined by legislation act.

c) according to a method of implementation:

— hardware;

— software;

— mixed.

Having analysed the meaning of technological measures of protection defined by the national and foreign scholars and stipulated by the national legislations of Ukraine and other countries, the authors conclude that *technological measures of copyright protection* are technological mechanisms (in the form of devices or products), designed to protect access and transfer of objects of copyright and to supplement legal defence provided for by law and/oragreement with effective technological protection.

5. Despite its evident imperfection, the judicial protection has always been the most popular type of the jurisdictional form of protection of copyright infringed on the Internet. The main obstacle to the effectiveness of such a remedy is ineffective protection of copyright if it is infringed well beyond a country where an object of copyright has been created, that is related to infringers' attempts to illegally post objects of copyright on the servers of countries with a complicated and non-transparent judicial system. This problem has not been solved in Ukraine as well as in the rest of the world yet. The authors note that ways of solving this problem should be searched for by enhancing the Berne Convention.

However, the authors think that it is necessary to take into account potential positive changes in the judicial protection of copyright on the Internet at the national level. Besides, high opportunity of reforming the national system of copyright protection on the Internet by applying a new four-phase mechanism of protection referred to above allows drawing other positive conclusions on prospects of protection of copyrights to objects posted on the Internet in Ukraine.

6. Challenges of a new epoch of information make seek for ways of protecting copyright on the Internet not only within jurisdictional and non-jurisdictional forms, which are traditional for legal science. Neither perfect

functioning of technological measures, nor reforms in judicial system of copyright protection allow – by themselves – expecting the problem of copyright protection on the Internet is solved in full. It is evident that we should seek among achievements of related branches of knowledge (law and technology, law and sociology, law and psychology, law and marketing).

7. Legalising instruments of the Internet self-regulation allows creating the system of mutual respect of copyrights of other persons gradually. The creation of web-depositaries in different countries of the world and successful functioning of the Internet Watch, the mechanism of the Internet self-regulation, once again stress that such assumptions are lawful.

Mediation that covers more and more countries of the world is very effective in the area of family, employment and copyright law. It requires taking into account the specific character of psychology of official legal relationship between members of family, an employer and an employee, an author and a user of objects of copyright.

Advertising, sponsorship, pre-purchase, saleof improvements, sale of complementary technology as the best representatives of models of cross-subsidisationare a way that allows determining fair balance between protection of the author's copyright to an object of copyright created thereby (this mostly concerns property rights) satisfaction of users' rights adequate for modern technological conditions.

It would be worth specifying in Article 44 of the Civil Code of Ukraine such a method of use of a work as making available to the public. Making a work available to the public (disclosure to the public) means taking, with the consent of an author or other copyright holder, an action that makes, for the first time, the work available to the public by publication, public performance, public exhibition, public display, public broadcasting and etc. (Article 1 of the Law of Ukraine on Copyright and Related Rights). Until recently, the most popular ways of making a work available have been the publication of a work, public exhibition, public performance, broadcasting and etc.

In the context of copyright protection on the Internet, only applying judicial, technological and alternative measures of protection and estimated models of intellectual property management in complex can combat the problem of right infringements.

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|---|---|
| Vydavateľ (názov): | Východoeurópska agentúra pre rozvoj n.o. |
| Ulica, číslo: | Za humanmi č.<br>508/28 |
| Mesto, PSČ: | Podhájska<br>941 48 |
| Autor: | Sopilko Iryna<br>Mykolaivna |
| Názov: | Copyright<br>Protection on the Internet: Theory and Practice - Ochrana autorských práv na internete - Teória a prax |
| Podnázov: | |
| Poradie vydania: | 1 |
| Rok vydania: | 2015 |
| Typ väzby a dokumentu: | viazaný |
| URL adresa (pre online dok.): | |
| Náklad: | 500 |
| Dátum požiadavky: | 7.9.2015 |
| Telefón: | 0905450765 |
| Posledné pridelené ISBN: | 978-80-89608-23-2 |
| E-mail vydavateľa: | zatko.eeda@gmail.com |
| Poznámka: | |