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INTELLECTUAL PROPERTY RIGHTS IN WEBSITE

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List of abbreviations

EU – European Union

IPR – Intellectual Property Rights

CJEU - Court of Justice of the European Union

GUI – Graphic User Interface

HTML - Hypertext Markup Language

CSS – Cascading Style Sheets

FTP – File Transfer Protocol

SSH – Secure Shell

PHP – Personal Home Page Tools

DNS – Domain Names System

TLD – Top Level Domain

IP – Internet Protocol

ICANN – Internet Corporation for Assigned Names and Numbers

UDRP – Uniform Domain-Name Dispute-Resolution Policy

Introduction

The Internet nowadays became a universal space for marketplaces from all over the world which provide absolutely different types of goods and services. Almost each and every entrepreneur, from small business and to large international enterprises, must take into account opportunities of promotion and advertisement of his or her goods and services online. And for this extend Websites have become a virtual shops and offices of enterprises, which allow the potential consumer to get the first impression about company and to receive necessary information.

The economic value of websites in the realities of modern market relations hardly can be overrated. Except trading and representative function websites are used as instruments of advertisement, performance of this function directly correlates with originality of all elements of website and dynamic of its content.

Finally, websites may contain elements, which express the reputation of its owner, such as domain names, which may contain trademark.

The research is primarily based on the analysis of international legal acts, European Union legislation and CJEU judgments. Ukrainian national legislation and national legislation of member states of the European Union is represented in the research not with the purpose of direct comparison (except first chapter), but with the purpose of outlining the existence of approaches to determination of certain notions and their legal regulation. Thus, references to national legislation appear only in chapters and subchapters, where they help to determinate legal nature of the object from.

Also it should be mentioned that, despite the issues of infringement and enforcement of intellectual property rights in the elements of website do not constitute the problem of research, they may be taken into consideration and analyzed in cases, when it is necessary to determinate legal nature of an object.

The problem of research is absence of single, common and unified approach to determination of notion and legal nature of “website”, absence of complex determination of website elements, which would take into account both technical and legal aspects of certain object and, subsequently, absence of formalized legal regulation for contractual relations on development and maintenance of websites.

Also it should be mentioned that, despite the issues of infringement and enforcement of intellectual property rights in the elements of website do not constitute the problem of research, they may be taken into consideration and analyzed in cases, when it is necessary to determinate legal nature of an object.

Relevance of the master thesis lies in the fact that the Internet nowadays has become a territory for doing business all over the world, and websites in this process have a role of one of the main and the most powerful instruments. Since websites have such a huge influence on business and is complicated and multi-functional object, it is relevant to determinate legal mechanism of its transfer, to determine what exactly is transferred (e.g. which exactly material rights are transferred), since it has direct economical meaning and is significant for proper functioning of market.

Scientific novelty and overview of the research on the selected topic.

Taking into account relative novelty of website as an object of civil legal relations, it is still relevant object for research. Existing works mostly have partial character and don't research website in the relation with its elements, considering them as separate objects of intellectual property law and assessing them as such. Among the Ukrainian scholars, who researched website either generally or its separate elements, the following may be mentioned: Rudnytska Z. with her research "Legal protection of website as a type of the collection of works", Herasymchuk N. with his research "Website as an object of legal protection", Maidanyk N. with her research "Website in the Internet as specific object of copyright", Zerov K. with his research "Hyperlinks in the system of regulation and protection of copyrights on works, placed in the Internet", Filinivych V. with his research "Internal legislation of European countries in field of legal regulation of websites" and also collective research of Kharytonova O., Ulianova G., Kyryliuk A., Symonian U., Badzhi N., Pozova D., Grygorianz G., Burova L., Martyniuk I. "Topical issues of determination of the legal nature and structure of intellectual property legal relations, which appear in the Internet". Among the European the following scholars and their researches were taken into consideration: Adams T. and Wayne C. with their collective research "Copy Fights: The Future of Intellectual Property in the Information Age", Sanna Wolk with her research "EU Intellectual Property Law and Ownership in Employment Relationships" and collective research of Lionel Bently, Estelle Derclaye, Graeme B Dinwoodie, Thomas Dreier, Séverine Dusollier, Christophe Geiger, Jonathan Griffiths, Reto Hilty, P Bernt Hugenholtz, M-C Janssens, Martin Kretschmer, Axel Metzger, Alexander Peukert, Marco Ricolfi, Martin Senftleben, Alain Strowel,

Michel Vivant, Raquel Xalabarder “The Reference to the CJEU in Case C-466/12 Svensson”, dedicated to the legal nature of hyperlinks in the Internet, and others.

Significance of research lies in determination of website and its elements as objects of civil turnover, determination of scope of rights, which are transferred through the agreements on development of website and, subsequently, qualitative improvement of understanding and regulation of legal relations associated with websites and its elements.

The aim of research is determination of actually existing approaches to the notion “website” and to its elements; giving the legal assessment from legal point of view to elements of website separately and in complex, determination of intellectual property rights in website generally and in its elements separately; analysis of contractual practice in sphere of development and transfer of websites.

The objectives of research are:

- To assess existing approaches to notion “website” and to provide own definition of notion “website”;
- To identify the legal nature of different elements of website;
- To identify the scope of intellectual property rights in elements of the website;
- To present existing variants of conclusion of agreements on website development and/or maintenance;
- To identify the key features and elements of such agreements.

Research methodology is represented by following methods:

- Method of comparison, which is used for finding out similarities and differences between different approaches to the same notions;
- Method of analysis, which is used for exploring legal acts, judgments and doctrines;
- Method of classification, which is used for characterization of certain notions through their features and parameters;
- Method of analogies, which is used for determination of the identity of GUI of computer program and GUI of website;
- Method of generalization, which is used for determination of notion “website”.

Structure of research comprises three chapters.

First chapter comprises two subchapters, which provide the definition of notion of “website” in accordance to Ukrainian and European Union approach appropriately, using also national legislation European Union member states. It gives the foundation for further research.

Second chapter comprises five subchapters, each of which gives legal assessment and describes legal nature of website design, content, software, domain names and databases. Each of subchapters provide exhaustive analysis of appropriate object, gives an assessment to its legal nature.

Third chapter is not divided into subchapters. It provides the analysis of agreements on development and maintenance of website, its legal nature, the most important provisions and their legal regulation.

Defense statements of this master thesis are:

Website, for the purposes of this research and intellectual property law generally, is complex of software, information and media means, which can be expressed in appropriate forms, as well as structural solutions, all of which are united with single function through the computer language, consist of different objects (including objects of intellectual property law) and are/may be placed on the host. It is complicated object, which consists of other objects of intellectual property law (not only copyright and related rights).

Complicated character of website leads to conclusion, that each of its elements has its own legal value and may be a subject for qualification as an object of intellectual property law.

Agreements on development and maintenance of website, considering lack of legal regulation on websites and its elements, not always may be considered as exclusively agreements on creation by order, or on provision of services, or mixed ones. Despite this issue remains at the discretion of national legislation, it is still possible and important to define certain provisions, which are recommended to be agreed and provided in an agreement.

Notion of the website

Ukrainian approach

It's fair to say, that website even nowadays is still quite new object not only for legislative matter, but also for theoretical one, since the first open access to the public website took place on 30 April 1993.

For the long time in Ukrainian legislation the notion of the website was contained only in “Order of information content and technical support of the single web portal of executive bodies”, which is a subsidiary legislation act.

In accordance to abovementioned Order, website is a set of software and hardware with an address on the Internet along with information resources available to a specific subject and provides access of legal entities and individuals to these resources and other information services through the Internet¹.

As we can see, website, in accordance to provided notion, is defined from the standpoint of activities of executive bodies and information services provided by them, but it is not considered from the point of view of Intellectual property law.

23 March 2017 the Law “On copyright and related rights” was amended by the following notion: “The website is a set of data, electronic (digital) information, other objects of copyright and (or) related rights, etc., interconnected and structured within the address of website and / or owner account of this website, access to which is carried out through the Internet address that can consist of a domain name, records of directories or calls and (or) numeric address by Internet protocol”².

As can be seen, in this notion it is considered, that the website may contain in itself works protected under copyright and related rights, but still the website is not defined neither as the single object of intellectual property law, nor as complicated object, which may contain different types of copyright and related rights objects, design and domain name as its components. However it is worth adding, that despite the fact that notion of website was added

¹ Наказ “Про затвердження Порядку інформаційного наповнення та технічного забезпечення Єдиного веб-порталу органів виконавчої влади та Порядку функціонування веб-сайтів органів виконавчої влади” (Order of information content and technical support of the single web portal of executive bodies), Офіційний портал Верховної Ради України, <http://zakon2.rada.gov.ua/laws/show/z1021-02>

² Закон України “Про авторське право та суміжні права” (Law “On copyright and related rights”), Офіційний портал Верховної Ради України, <http://zakon3.rada.gov.ua/laws/show/3792-12>

to the abovementioned law, it was not added to the list of the objects of copyright, thus it is not directly considered as an object of copyright.

Despite existence of legal notion of website in legislation, in Ukrainian doctrine there are still few different points of view on the concept of website and its legal nature.

M. V. Hura approves, that website is a separate, logically completed element of the Internet, created on the basis of the hyperlink technology located on the server (host), has a unique URL, accessible to any user of the Internet, and contains Internet-pages that are graphical and can be viewed using special computer programs (browsers).

Meanwhile the scholar M. A. Khataeva understands it as a system's address information on the Internet about a specific person and his product (work, service), created with the help of electronic devices and accessible to an uncertain circle of users.

Instead, I. V. Moskalenko affirms that website is a collection of images, videos, audio tracks or other digital media hosted on the server and accessible to users through the Internet.

Scholar O. A. Mazur is convinced that the website is presented in an objective form of a set of results of intellectual activity, systematized into a single object in such a way that it can be placed on the Internet. According to this definition, the website is determined by the following features:

- Existence of results of intellectual activity;
- Objective form of expression of the results of intellectual activity;
- Provides systematic results of intellectual activity;
- Single object;
- Possibility of placing the results of intellectual activity on the Internet.

In the narrow sense, as a digital work and in the broad, as a property complex, it is proposed to consider the website by P.V. Babarikin, at the same time in this concept as a property complex include the material media of information (server, etc.), which excludes the possibility of considering the website as a complex of exclusive rights, that is, as an object, governed only by the laws of intellectual property. It is important to note that the scholar K. S. Basmanova in her dissertation proposes the following definition of the term “web site” - it is an object intended to be used for placing on the Internet the result of intellectual activity consisting of a static basis (the basic element of a site), which is a programmatic (object code) and generated visual representations (website design), and dynamic content, representing a set of

heterogeneous objects of exclusive rights and other materials systematically located within the base element of the site³.

N. I. Maidanyk expresses the position, that structurally website consists of certain amount of components, which together provide the fulfillment of its functional purpose. The minimum set of elements of website includes 5 types of it: design, structure solution, software, content, domain name⁴.

Regional administration of Ministry of Justice of Ukraine in its Methodical recommendations for legal services (legal advisers) of executive authorities, state enterprises, institutions and organizations consider website rather as a collection of works.

The website is created by diverse activities of certain individuals. The website design solution is related to the requirements for color, graphic and audiovisual display. The organization of internal search engine transitions requires a certain software solution. Selection and systematization of information components is directly related to the professional orientation of the website. Thus, the creation of a website may be characterized not only by the selection, location, streamlining of the components of the website, but also the versatility of the creative process. In this process, some individuals create elements that are then used at the second stage by other individuals to create a complex object in general. A website, as a collection of works, can combine literary and musical, photographic, audiovisual and other works and can consist of both heterogeneous and homogeneous things. “Web site” is a collection of web pages available on the Internet, which are united by content as well as by navigation.

There are three types of components that are inherent to websites:

- Software tools;
- Internet addresses;
- Information content.

Each of these components can be considered as a separate object in terms of intellectual property. In addition, owners of intellectual property rights on these components can be completely different persons.

³ Herasymchuk N.. 2017. “Веб-сайт як об’єкт правової охорони” (Website as an object of legal protection), Українське право, August 17, 2017, http://ukrainepravo.com/legal_publications/essay-on-it-law/it-law-harasymchuk-website-as-an-object-of-legal-protection/

⁴ Maidanyk Nataliya, “Веб-сайт в мережі інтернет як особливий об’єкт авторського права” (Website in the Internet as specific object of copyright), Юридична Україна: Правовий часопис, № 12, 2008, 73 – 80

Consideration of the website as a collection of work in Ukrainian doctrine is quite spread (but definitely not common). Rudnytska Z. mentions that each new site, created by a programmer or designer, is the result of intellectual creative activity and has signs of novelty, originality, uniqueness, which is the basis for attributing the latter to objects of copyright. Another reason for the dissemination of copyright protection on the work is its attachment in an objective form. This means that the content of the work is not protected, but only the form of its expression. Ability to reproduce the work proves its objective form of existence. The website can be reproduced by copying its files or printing pages. Thus, the website corresponds to all the features, stipulated by the current legislation, put forward to the object of copyright. On the one hand, the various objects of copyright in themselves - the elements of the website do not express the aim and purpose of the author, and only because of the creative intellectual selection, ordering, combination of the author make a separate work - a unique and completely new Internet site. Therefore, the author of the website must be recognized a person who, using a set of heterogeneous objects of copyright filled them with new content and value and created a unique website. A similar situation arises with the authors of the collection of works, which is the result of creative arrangement and combination of individual, previously created works⁵.

On my opinion such approach to determination of website is not correct, since, firstly, some elements of the website may exist independently (e.g. design, content, database) and be protectable by intellectual property law. Secondly, the collection of work presumes as its elements objects of copyright. But some elements of the website should be protected not under copyright, but under other institutes of intellectual property law (e.g. trademark law and patent law).

In the collective work of Kharytonova O., Ulianova G., Kyryliuk A. and others “Topical issues of determination of the legal nature and structure of intellectual property legal relations, which appear in the Internet”, the plurality of positions regarding legal nature of the website is provided.

Thus, the website is not considered by the legislation of Ukraine as an independent object of intellectual property law. In our opinion, the website should be considered as an independent object of intellectual property law, although not provided by current legislation, but deserves proper protection and protection against unlawful encroachment. In order to attract the attention of Internet users, site owners are trying to create them more vivid, original and easy to view information. However, site owners cannot be insured against unscrupulous actions related

⁵ Rudnytska Z., “Правова охорона інтернет-сайту як виду збірника творів” (Legal protection of website as a type of the collection of works), Часопис Академії адвокатури України, №18, 2013, 1-6

to copying both the information posted on the site and the design of the site and use them on other websites.

Firstly, based on the fact that the site has a certain set of textual and graphic information, databases, audio and video materials, it can be recognized as an independent database.

Secondly, the site page has its unique address on the Internet and is written using the HTML language commands a kind of program that controls the formation of page images when accessing the user, the navigation process itself and other tasks set before a particular web-resource. If the program developed for use of the site is original, in accordance with the law “On Copyright and Related Rights” may receive protection and be registered as a computer program.

Thirdly, the website can be represented in a unique design, when no templates, forms, graphic objects which are available for free use on the Internet are used, but creative work is made for the development of special fonts, the creation and selection of color solution to the site, the implementation of inscriptions and other effects, create unique solutions to the elements of navigation on the site. In this case, the website may receive protection as a complicated copyright object. In addition, the original design of the site may receive protection as an industrial design that is the subject of industrial property⁶.

Regarding first approach, on my opinion, website cannot be considered as a database, since database (in meaning of copyright) has feature of arrangement in certain “creative” manner, which allows to provide search of materials (content) of such database. But website has elements, which are not visible for user (e.g. back end code). Thus, website cannot be considered as database.

Also, on my opinion, consideration of HTML code as a computer program and, subsequently, providing it legal protection under copyright, is incorrect, since the code, written on HTML is neither source code, nor object code, thus it is not protectable under copyright.

Taking into account plurality of points of view on the concept of website, there are also two main points of view in Ukrainian doctrine regarding mechanism of legal protection of website. In accordance to first one, despite website is not included into the list of copyright objects in the law “On copyright and related rights”, it should be considered as the non-

⁶ Kharytonova O. et al. “Проблемні питання визначення правової природи і структури правовідносин інтелектуальної власності, що виникають у мережі Інтернет” (Topical issues of determination of the legal nature and structure of intellectual property legal relations, which appear in the Internet), Наукові праці НУ ОЮА, 2015, pages 169-172

nominated object of copyright and, subsequently, that it should be protected in accordance to general provisions of copyright.

The opposite point of view is that websites is a complex object, different parts of which may be protected as various types of intellectual property objects, such as software, artistic content, design of the website, trademarks, graphical interfaces and so on.

- Software used on the website (such as HTML-code) may be protected by copyright or by patent law;
- The design of the website, obviously, must be protected by copyright;
- E-commerce systems, search engines, or other technical tools on the Internet may be protected by patents as utility models;
- The artistic content of the website, such as written material, photographs, graphics, music and video, could be protected by copyright;
- Databases may also be protected by copyright;
- Business names, logos, product names, domain names, and other designations placed on your website may be protected as trademarks;
- Graphics-based symbols, screen displays, graphical interfaces and even web pages can be protected by industrial design law;
- Hidden aspects of the website (such as confidential graphics, source code, object code, algorithms, programs and other technical descriptions, data charts, logic charts, user instructions, data structures, and database content) may be protected through legislation trade secrets until they are disclosed⁷.

Also as a separated object should be defined hyperlinks. In accordance to law “On copyright and related rights”, hyperlink is formalized in accordance with Internet standards the address of a website or its parts (web pages, data). In the event that the hyperlink addresses to a part of the website (web page), then, in addition to the domain and (or) numeric address of the Internet Protocol, it may contain additional records of directories or calls and terms of access to the web page that may be reproduced or stored on devices that can read and reproduce electronic (digital) information using the Internet⁸. Thus, despite the fact that all components and content of

⁷ Herasymchuk N., “Веб-сайт як об’єкт правової охорони” (Website as an object of legal protection). Українське право, August 17, 2017, http://ukrainepravo.com/legal_publications/essay-on-it-law/it-law-harasymchuk-website-as-an-object-of-legal-protection/

⁸ Закон України “Про авторське право та суміжні права” (Law “On copyright and related rights”), <http://zakon3.rada.gov.ua/laws/show/3792-12>

the website by itself may be lawfully used, the hyperlink, which is placed on this website, may refer to some element (on the other website, for example), access to which is prohibited by the right holder.

On the one hand it is obvious, that hyperlink by itself is not an object of copyright, since it consists of the access protocol, domain name and the name of the web page, and these elements doesn't meet the requirements of novelty or originality. On the other hand, the direct hyperlink allows user to access and download certain object, thereby infringing copyrights of the right holder. And since such direct hyperlink is placed on the website intentionally, it may be considered as an infringement⁹.

Thus, despite there is still no common scientific opinion regarding legal nature of website in Ukrainian legal doctrine and no clarity regarding this issue in legislation, obviously, this direction in Ukraine is developing, and new legal provisions, such as legal notion of the website in the law "On copyright and related rights" combined with new approaches in legal doctrine prove it.

⁹ Zerov Kostyantyn, "Гіперпосилання в системі регулювання та захисту авторських прав на твори, розміщені в мережі Інтернет" (Hyperlinks in the system of regulation and protection of copyrights on works, placed in the Internet), Теорія і практика інтелектуальної власності, № 4/2015, 2015, http://www.ndiiv.org.ua/Files2/2015_4/4.pdf

EU approach

Legislation of EU doesn't provide us any notion or direct concept of the website by itself. However, European Commission funds a project, which is called European IPR Helpdesk, which provides different kind of advices and explanations regarding intellectual property law in European Union. Thereby, any explanation and position of this Helpdesk must be considered as made on the officially EU behalf.

The European IPR Helpdesk issued a Fact sheet "Intellectual Property considerations for business websites". In accordance to this document, many parts of the website may be protected by different types of intellectual property rights in the European Union. "For example:

- Technical innovations related to e-commerce systems, search engines or other technical Internet tools may be protected by patents or utility models;
- Software, including the text-based HTML code used in websites, can be protected by copyright, trade secrets and, if having a technical character, by patent as well;
- Your website design can be protected by copyright and elements such as computer-generated graphic symbols, screen displays and graphic user interfaces (GUIs) may be protected by designs;
- Most creative website content, such as written material, images, graphics, data and any music, broadcasts and videos, will be protected by copyright;
- Databases can be protected by copyright or by *sui generis* database laws;
- Business names, product names, logos, domain names and other signs posted on your website are likely to be protected by registered trademarks, as well as the law of passing off or unfair competition law depending on the jurisdictions;
- Hidden aspects of your website (such as confidential graphics, source and object code, algorithms, programs or other technical descriptions, data flow charts, logic flow charts, user manuals, data structures, and database contents) can be protected as a trade secret, as long as they are valuable, have not been disclosed to the public and you have taken reasonable steps to keep them in secrecy"¹⁰.

Such approach to protection of websites leads to conclusion, that nowadays European Union considers website not as separate Intellectual property law object, but as complicated

¹⁰ "European IPR Helpdesk. Fact Sheet: Intellectual Property considerations for business websites", European Union, 2018, <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-Considerations-for-Business-Websites.pdf>

object, which also consists of different abovementioned objects of intellectual property law each of which should be protected separately and independently.

It is worth noting, that overwhelming majority of member-states of European Union don't have the notion of the website defined in terms of copyright in their legislation. Taking into account this fact may be made the conclusion, that, despite neither European Union in general, nor each of member states of European Union in particular don't have developed legislative position regarding websites and its elements as the objects of intellectual property law, they still rather consider each element of the website as separate one, than look at it as on a single holistic object.

Some of European Union member states try to ensure the legal protection not for website by itself, but for specific copyright content, which may become an object for piracy.

For example, Code of Intellectual Property of France has a provision about the establishment of the Authority for the dissemination of works and protection of rights on Internet. In accordance to provisions of this Code, High Authority for the dissemination of works and protection of rights on Internet is an independent public authority, which provides:

- Encouragement to the development of legal offers and observation of the legal and illegal use of works and objects to which is attached a copyright or related rights over networks electronic communications used for the provision of online public communication services;
- Protection of these works and objects in relation to human rights violations committed on electronic communications networks used for the provision of online public communication services;
- Control and monitoring in the field of technical protection measures and identification of works and objects protected by copyright or related right¹¹.

Basically, abovementioned authority performs the function of internet police.

Also deserves attention an approach of Great Britain to regulation of relations, which arise regarding websites. The main legal act in this area is Copyrights, Designs and Patents Act 1988. In accordance to article 56, "if a copy of a work in electronic form has been purchased on

¹¹ Code de la propriété intellectuelle (Code of the intellectual property), WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=435162

terms which, expressly or impliedly or by virtue of any rule of law, allow the purchaser to copy the work, or to adapt it or make copies of an adaptation, in connection with his use of it”¹² [8].

Together with abovementioned act there is also Copyrights and Related Rights Regulation 2003. In article 8 of it is mentioned, that “copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable:

- a transmission of the work in a network between third parties by an intermediary;

or

- a lawful use of the work;

and which has no independent economic significance”¹³.

Abovementioned article concretizes the article 56 of the Copyrights, Designs and Patents Act indicating, that transfer of the information from one person to another does not make an infringement of the author’s rights (except certain cases).

Also worth attention is Digital Economy Bill, which applies on the territory of all country. Its severe provisions made all internet-providers to oppose against it, but still the Bill came into force. The main feature of this act is a special obligation, held by internet-providers, to disconnect their users, if they will be considered guilty in unlawful file exchange.

In Germany was created Society for protection of copyright in sphere of music called GEMA for struggling with people, who unlawfully download or copy from the Internet works of others for their personal use or for its spread¹⁴.

Basically, GEMA is the Collective management organization, which is specialized on protection of rights on musical works. Thus it provides the protection of right holder’s rights on works, which are unlawfully placed in the Internet.

¹² Copyright, Designs and Patents Act, legislation.gov.uk, <https://www.legislation.gov.uk/ukpga/1988/48/contents>

¹³ Copyrights and Related Rights Regulation, legislation.gov.uk, <https://www.legislation.gov.uk/uksi/2003/2498/contents/made>

¹⁴ Filinovich V., “Внутрішнє законодавство країн Європи у сфері правового регулювання веб-сайтів” (Internal legislation of European countries in field of legal regulation of websites), Науковий вісник Міжнародного гуманітарного університету, № 10-2, 2014, 12

Also interesting is a question about watching of movies online. Thus, movies, placed on the websites, are provided for watching to undefined amount of persons. But still in German jurisprudence and doctrine there is no certain answer, if such watching of a movie violates any copyrights. In accordance to German legislation distribution of media products is punishable by law only in case, if it was recorded on the external (long-term) memory of the computer. But computer programs are considered to be distributed even if they are recorded on operative (short-term) memory of the computer.

Spain also take actions to resist violations of intellectual property rights in the internet. Thus in 2013 was adopted so called “Sinde Law”, named after the minister of culture Angeles Gonzales-Sinde. This law was directed on the owners of websites, which link on piracy content. The main features of this law are:

- Directed opposite websites, which unlawfully contain links on copyrightable content with purpose of making profits;
- Establishes governmental commission, authorized to force internet-providers to block websites;
- Not used against individual internet-users, even if they download pirated content;
- Initiates changes in criminal legislation – punishment for piracy in Internet up to 6 years of imprisonment¹⁵.

One more of relevant topics related to websites in European Union is electronic commerce. The main legal act on electronic commerce in European Union is Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Despite it doesn't provide neither definition of website in general, nor of its specific elements in particular, this Directive outlines some requirements for websites, created for providing electronic commerce services. These requirements are particularly related to design and existence of different notifications, cookies policy, existence of links to data protection policy and so on. Thus, abovementioned Directive indirectly defines website as a sort of an instrument of electronic commerce and, since the website, as any other asset, may be transferred (and since it is especially relevant in field of electronic commerce), this Directive also highlights an importance of legal regulation of websites as an object of civil turnover.

¹⁵ Filinovyuch V., “Внутрішнє законодавство країн Європи у сфері правового регулювання веб-сайтів” (Internal legislation of European countries in field of legal regulation of websites), Науковий вісник Міжнародного гуманітарного університету, № 10-2, 2014, 13

Regarding hyperlinks, unlike Ukrainian practice, Court of Justice of the European Union (CJEU) not so long ago clarified main and fundamental issues related to legal nature of hyperlinks, their use and its correlation with copyright and related rights infringement.

In accordance to Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, “member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”¹⁶.

In Case C-466/12 (Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB) the court ruled, that abovementioned article of InfoSoc Directive “must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an “act of communication to the public”, as referred to in that provision”¹⁷.

A bit more than two and a half years later, in case C-160/15 (GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker) the court ruled, that abovementioned article of InfoSoc Directive “must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed”¹⁸.

In first case the court ruled that hyperlinks to freely available on other websites works generally cannot be considered as communication to the public. In second case the court

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

¹⁷ Judgment of the CJEU in Case C-466/12, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200038>

¹⁸ Judgment of the CJEU in Case C-160/15, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200421>

specified that hyperlinks to freely available on other websites protected by copyright works must be considered as communication to the public, if they are placed on the website with pursuit of financial gain.

The above explanations of CJEU show gradual foundation and refinement of the EU position regarding hyperlinks and their correlation and relation to copyright and related rights.

Still, despite the existence of clarified and multiple court practice on the issue of hyperlinks, there are opposite opinions about them. For example, Advocate General, regarding the abovementioned case C-160/15 suggested, that hyperlinks should not be considered in any relation to the copyright and, subsequently, the notion of “communication to the public”.

Summarizing first chapter dedicated to notion of website, it is reasonable to provide definition of notion “website” from the intellectual property law standpoint, which will underlie this master thesis and express actual legal nature of website.

Thus, website is complex of software, information and media means, which can be expressed in appropriate forms, as well as structural solutions, all of which are united with single function through the computer language, consist of different objects (including objects of intellectual property law) and are/may be placed on the host. Website is complicated object, which consists of other objects of intellectual property law (not only copyright and related rights).

Intellectual property rights for components of the website

Website design

With the purpose of assessment of legal nature of website design the following legal acts will be analyzed in this subchapter: Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Berne Convention for the Protection of Literary and Artistic Works, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, EU-Ukraine Association Agreement and national legislation, represented by Ukrainian laws “On the protection of rights on the inventions and utility models” and “On copyright and related rights”, French Code of the intellectual property, German Law “On copyright and related rights” and Lithuanian “Law on copyright and related rights”. The complicity of providing of legal assessment of website design lies in the fact that it is not legally determined taking into account its actual technical and functional nature. Thus, a large number of legal acts, related to different institutes of Intellectual property law, must be analyzed.

Talking about design of the website first that should be mentioned is fact, that the design by itself consists of other objects and features, most of which may be considered as an independent object of intellectual property law. Those are:

- Icons, which may be considered as objects of copyright. There are plenty of online-platforms, which provide for web-designers or their clients wide range of different icons, which may be used in their website design, and right of use of those icons may be purchased on such platforms.
- Logotypes, which may be considered as trademarks and, subsequently, should be used with fulfillment of all requirements for use of the trademarks according to trademark law of appropriate territory.
- The font and its design, which also may be considered as object of copyright. And just as in the case with icons there are also lots of online-platforms, which provide services of purchasing of rights on different font designs.
- Animations, images, photographs, videos and audiovisual works. Despite these objects may be just a part of the content of the website, on my opinion if they are used with the purpose of external visual expression and decoration of the website (e.g. as background) they should be considered as part of website design.
- Micro animations of transitions between webpages or of different bars (e.g. menu bars) should be considered as object of copyright and, in some specific cases, they also may be

protected as utility models, depending on prerequisites of consideration as utility model in certain country, since there is no any European Union legal act on this issue.

- Small functional elements (e.g. buttons of menu bar, scroll bar, cursor etc.), design of which may be considered as object of copyright.
- Color solution of website, which, in specific cases, may be protected under trademark law (if appropriate combination of colors is a trademark).
- Distance between different elements. Despite this characteristic cannot be an independent object of intellectual property law, it is worth to mention, that this parameter highly impacts on distinguishing feature of website design.

In accordance with Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, “design is the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation”.

The term “product” used in above notion of design, in accordance to same Regulation, means “any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs”¹⁹.

Thus, despite IPR Helpdesk Fact sheet “Intellectual Property considerations for business websites” contains thesis “Your website design can be protected by copyright and elements such as computer-generated graphic symbols, screen displays and graphic user interfaces (GUIs) may be protected by designs”, I suppose, that since website cannot be considered as an item, the provisions of Council Regulation on Community designs, at least formally, are not applicable to the website design. But I agree with such position of the IPR Helpdesk and suppose, that appropriate adoptions to the Regulation on Community design should be done.

Talking about international copyright perspective, in accordance to Berne Convention, “the expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are

¹⁹ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, EUR-Lex, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/cdr_legal_basis/62002_cv_en.pdf

assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”²⁰.

Despite above notion of literary and artistic works doesn't constitute direct mentioning to artistic design, it still may be referred to “production in the artistic domain”.

Ukrainian legislation, for instance, in the law “On copyright and related rights” says that works of fine art constitute an object of copyright. In accordance to this law, the work of fine art is sculpture, painting, drawing, engraving, lithography, work of artistic (including scenic) design, etc.²¹.

Code of intellectual property of France mentions, among others, graphic works in the list of objects of copyright²².

In accordance to German law “On copyright and related rights”, copyrightable objects are also works of fine arts including works of architecture and applied arts and designs of such works²³.

Law on Copyright and Related Rights of the Republic of Lithuania mentions, that the subject matter of copyright shall include original literary, scientific and artistic works which are the result of creative activities of an author, whatever may be the objective form of their expression. The subject matter of copyright shall comprise the works of sculpture, painting and graphic art, monumental decorative art, other works of fine art and works of scenery²⁴.

Thus, despite the artistic design is not directly prescribed as an object of copyright neither in European Union legislation, nor in Berne Convention, it is still protected under national legislation of the European countries. It may be called differently (e.g. fine art, graphic work, work of artistic design), but still, differently from notion of design under Regulation on Community design, all these categories serve to determinate visual graphic works, created as the

²⁰ Berne Convention for the Protection of Literary and Artistic Works, WIPO, http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661

²¹ Закон України “Про авторське право та суміжні права” (Law “On copyright and related rights”), Офіційний портал Верховної Ради України, <http://zakon3.rada.gov.ua/laws/show/3792-12>

²² Code de la propriété intellectuelle (Code of the intellectual property), WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=435162

²³ Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights), WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=423012

²⁴ Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas (Law on copyright and related rights), WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=191200

result of creative activity of the human and which have purpose of external decoration of an object. Thus I suggest to determinate the external decorative aspect of website design as an object of copyright with all subsequences such as moment of creation, moment of appearance of rights, term of its protection, etc.

Thus, in accordance to Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, rights of an author of a website design “shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public. In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author”²⁵.

But the point is, that except abovementioned exclusively visual and decorative aspect of website design, which has graphical user interface (GUI) as its part, there is also so called user experience design, which serves to enhance usability and accessibility of interaction with website, create every possible route of the user on website (prototyping), optimize these routes and to increase the ability of website to realization of its function (in context of its interaction with user). The issue in this case is the fact that user experience design cannot be considered as an object of copyright, since the key feature of it is not an external form of expression, but the functional logic of website construction.

Thus, on my opinion, the website design may be considered in broad and narrow sense. In broad sense website design includes in itself both visual decorative aspect of design (with graphical user interface) and user experience design (functional logic of website construction). Nowadays there are no legal provisions neither in national, nor in international legal acts which define website design as a single object in above broad sense.

In narrow sense website design should be considered only like complex visual expression of the website, including design of all web pages of the website (with graphical user interface) and, subsequently, should be protected under copyright. In this case user experience design should be considered as an independent object and, in certain cases, it may be protected as utility model.

No international treaty obliges Member States to implement a utility model system under their national laws. No reference to utility models is found in the Agreement of Trade-

²⁵ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>

Related Aspects of Intellectual Property Rights (TRIPS Agreement). Nevertheless, a number of countries have implemented utility model systems to protect minor and incremental innovations and to complement the patent system in a flexible manner.

In countries where utility model protection is available, since utility models are listed as one category of industrial property in the Convention for the Protection of Industrial Property (Paris Convention), the general principles of the Paris Convention, such as the national treatment and the right of priority, are also applicable on utility models. Further, if an international patent application under the Patent Cooperation Treaty (PCT) is filed, utility models are one type of protection available at the national level in designated countries that have a utility model system.

In some countries, utility models can be applied for in the same fields of technologies as patents. In other countries, utility model protection is eligible only for the shape or structure of products in certain fields of technology, such as mechanical devices and apparatus, but not for technical, chemical and biological processes. Eligible subject matter for utility models varies significantly from one country to another.

In general, the requirements for acquiring a utility model are less stringent than for patents. In some countries, the requirements for protecting utility models are basically the same as for patents, such as they must be within the eligible subject matter; they must be novel; they must involve an inventive step (non-obvious); they must have industrial applicability (utility); and they must be described in an application in a sufficient and complete manner.

In some countries, the standards for an “inventive step” or “non-obviousness” may be lower than patents or absent altogether, and the requirement of “novelty” might be applied only at a local level.

Spanish patent law, for example, does not make a terminological distinction between resolutions that receive legal protection as inventions and utility models. In this or that case we are talking about an inventive solution. If instruments, tools, apparatus and appliances or parts thereof meet these requirements, then they can first obtain legal protection as utility models. This means that a utility model is not a form of legal protection, suitable for any small invention. A utility model can only be recognized as a new form of product, which determines its practical suitability. Accordingly, the difference between a utility model and an industrial design consists in the fact that the industrial design is only a new form of the product to meet the aesthetic needs.

As we are talking about solutions that have a spatial structure, it is clear that neither methods nor breeding achievements can obtain legal protection as utility models. The same applies to chemical or microbiological products. The essence of these decisions is contained in their internal structure, and not in the external form, therefore they are excluded from legal protection as a useful model.

Further, some countries require that the inventions are related to products, such as devices or apparatus (three-dimensional regime), thereby excluding processes or chemical substances. However, some countries allow utility models on processes, chemical compounds, pharmaceuticals or software.

An owner of a utility model obtains the exclusive right to prevent or stop others from commercially exploiting the utility model for a limited period, often 6 to 10 years from the filing date. In other words, in general, utility model protection means that the invention cannot be commercially made, used, distributed, imported or sold by others without the utility model owner's consent. The above right is territorial, i.e. the right can be enforced only within the country in which a utility model is granted.

The lack of international framework and, subsequently, national territorial limitation of legal protection of utility models compares unfavorably with copyright, which may be used for the protection of external visual part of website design.

In accordance to Ukrainian law “On the protection of rights on inventions and utility models”, invention (utility model) is a result of intellectual activity of human in any sphere of technology. An object of utility model may be product, process (method) as well as the new use of a known product or process. A utility model meets the requirements of patentability, if it is new and industrially applicable²⁶.

Thus, the user experience design may be considered and protected as the utility model in accordance to Ukrainian legislation, since it is a process, and in that case, if it meets the requirements of novelty and industrial applicability. The term of the protection of utility model is 10 years from the date of filing of application.

Worth mentioning, that in abovementioned law directly indicated, that legal protection in accordance with this law does not apply to results of artistic design.

²⁶ Закон України “Про охорону прав на винаходи і корисні моделі” (Law “On the protection of rights on the inventions and utility models”), Офіційний портал Верховної Ради України, <http://zakon2.rada.gov.ua/laws/show/3687-12/para0120#o120>

Since user experience design doesn't have an artistic feature, it is still protectable as utility model.

Also important is to draw attention on distinguishing between website design (both in broad and in narrow sense) and code, which is used for the expression (description) of the design. The function of code in this case is just interpretation of its elements and their parameters through the special programs (browsers) into the design by itself.

The CJEU in its judgment in case C-393/09 (22 December 2010, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*) also outlines the position regarding distinguishing between design (partially the graphical user interface, which is the element of design) and computer program. In accordance to this judgment, a “graphic user interface is not a form of expression of a computer program within the meaning of Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and cannot be protected by copyright as a computer program under that directive”²⁷.

In accordance to opinion of Advocate General in abovementioned CJEU case, “graphic user interface, as I will see, is used to establish an interactive link between that program and the user. It makes a more intuitive and user-friendly use of that program possible, for example, by displaying icons or symbols on the screen”²⁸. Thus, graphic user interface has the link between computer program and the user as its purpose, which is expressed in visual expression of all interactive elements of the program. This definition is highly important, since there is no legal act, which provides it.

“In particular, the graphic user interface is an interaction interface which enables communication between the computer program and the user. In those circumstances, the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.

Any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task. In those circumstances, the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that

²⁷ Judgment of the CJEU in Case C-393/09, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83458&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=280104>

²⁸ Opinion of Advocate General in Case C-393/09, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83832&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=280104>

program by means of which users make use of the features of that program. In accordance with the 10th and 11th recitals in the preamble to Directive 91/250, interfaces are parts of a computer program which provide for interconnection and interaction of elements of software and hardware with other software and hardware and with users in all the ways in which they are intended to function. In particular, the graphic user interface is an interaction interface which enables communication between the computer program and the user. In those circumstances, the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.

Nevertheless, such an interface can be protected by copyright as a work by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society if that interface is its author's own intellectual creation"²⁹.

Also in accordance to EU-Ukraine Association Agreement, "ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Agreement"³⁰.

Taking into account everything mentioned above in this subchapter, it may be concluded that, despite the website design is, in fact, complicated object which has (may have) in its constitution a lot of other objects of intellectual property law, there is the position of CJEU on this issue. Despite CJEU case was held regarding a design (graphical user interface) of the computer program, on my opinion it must be mentioned, that all those conclusions should be also applicable to the graphical user interface of the website, since graphic user interface of both computer program and website serves the same purpose, which is creation of user-friendly expressed link between the computer program (or website) and user.

Thus, taking into account everything abovementioned it should be concluded, that website design is, as the website by itself, quite complicated object, which consists of external visual design of the website (which includes graphic user interface) and user experience design (functional logic of website construction). Since nowadays there are no legal acts, which consider website design (in broad sense) as a single object, and since those parts of website design have totally different legal nature, both parts of it should be determined and legally

²⁹ Judgment of the CJEU in Case C-393/09, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83458&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=280104>

³⁰ EU-Ukraine Association Agreement <http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900>

regulated separately. Also such separation is reasonable, since in practice both of these parts of website design is usually created by different specialist, using absolutely different knowledge and skills.

Of course there are lots of other elements of design, which may be considered as separated objects of intellectual property law (such as icons, logotypes, fonts etc.). But the website design (in narrow sense) comprises not just all that elements by themselves, but mainly the way expression, arrangement and location on the display.

Website content

With the purpose of assessment of legal nature of website content the following legal acts will be analyzed in this subchapter: Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

The development of modern technologies and the information society expands the possibilities of free access to virtually any objects of intellectual property rights. Most often, such use occurs in violation of the rights of owners of such objects. That is why the most pressing issues are the protection of objects on the Internet. Particular attention is paid to the objects of copyright in connection with the ease of violation of rights to them.

Content of the website is, probably, the most dynamic element of it. Basically, the content by itself makes each and every website information resource, since only content of website may contain information, which may be perceived by user and which is an actual reason for any user to visit certain website.

Talking about content of website, there is an approach, in accordance to which content is described as every expressed material, displayed on the website. Thus, according to this approach, design of the website should be considered as one of the elements of its content. On my opinion such approach to determination of content of website is incorrect, since, firstly, content is the information and experiences that are directed towards an end-user or audience³¹. Thus, since design by itself is not an information or experience, it shouldn't be considered as a part of content of the website. Secondly, from the legal standpoint, as it was written in previous subchapters, design of website constitutes separate object, which has its own features (e.g. design of the website is more static, than the content of the website).

Thus, on my opinion the following objects should be considered as parts of content of the website:

- Texts (books, pamphlets, addresses, lectures etc.);

³¹ Wikipedia – the free encyclopedia, <https://en.wikipedia.org/>

- Musical compositions;
- Audiovisual works;
- Works of drawing and painting;
- Photographs;
- Other objects, provided for user on the website, which contain any information or experience.

Thereby, since all abovementioned objects are included into the list of objects, which are copyrightable under Berne Convention, in case, if such object meets requirements for copyright protection, it shall be protected under Berne Convention, European Union legislation on copyright and national legislation of certain countries.

Thus, according to Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, generally material rights on an object of copyright (in accordance to article 2 of Berne Convention) “shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.

The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work”³².

Usually the person, who owns and uses website, doesn’t create all content by him/herself. Thereby it would be reasonable to determine legal regulation of transfer of material rights on the content of website.

According to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, “member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including

³² Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>

the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting”³³.

Thus, placement of any object of copyright on the website can be considered as communication to the public.

According to Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, “ ‘rental’ means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage; “lending” means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

The rights to authorize or prohibit rental and lending may be transferred, assigned or subject to the granting of contractual licenses”³⁴.

Rights on content may be either transferred, or assigned or licensed to the owner of website in following ways:

- If the author of work has labor relations with the owner of website;
- If the author of work has civil agreement with the owner of website on creation of appropriate work;
- If owner of websites acquires rights on already existing work (e.g. licensing).

“Talking about labor legal relations (between employer and employee) in field of copyright, in the late 1980s the European Commission published its proposals for copyright within the EU. The Commission’s efforts led among other to the adoption of Directive 91/250/EEC on the Legal Protection of Computer Programs. Article 2(3) of the Directive

³³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

³⁴ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115>

contains a mandatory requirement on employees' programs. The employer shall exclusively be entitled to exercise all economic rights in an employee's computer program, where a program is created in the execution of the employee's duties or where the employee is following instructions given by the employer.⁸It is an automatic legal transfer of the copyright in computer programs. However, if the parties agree, the employed author of the computer program can recover the rights through a specific clause in the employment contract or a separate agreement on the exploitation of the computer program made by the employee (waiving the legal automatic transfer of rights).

Summing up, today only employee's computer programs are harmonized at European level and the question of employees' copyrighted works in general is left to different national solutions. In some countries, such as in the Netherlands and the United Kingdom, national copyright acts regulated employees' copyright. In other countries, such as Germany, France and the Nordic countries, a transfer from the employee to the employer follows from general principles of law³⁵.

Thus, despite harmonization on European Union level on the issue of transfer of copyrights in labor relations is absent (except computer programs), the general principle of labor law on this issue in most cases lets to conclude, that economic rights in work, created in accordance to labor obligations of employee, should belong to employer.

Differently from copyright on work, which is created under labor obligations of the author, copyright on work, created under civil contract, usually doesn't have any "default" specified in law rule of ownership. Since there is no international legal regulation on this issue, usually it should be regulated by contract itself. Thus, if transfer of some economic copyright is not prescribed by the contract, customer usually will not have an opportunity to claim and receive it, since this right will stay with author.

Also, despite this topic was slightly touched in first chapter, talking about content of website it seems to be reasonable to analyze hyperlinks: their legal nature and significance for copyright.

Some scholars are of the opinion, that "use of hyperlinks doesn't violate copyright, since technically creation of new copy of work doesn't take place. Thereby, creation of map

³⁵ Sanna Wolk, "EU Intellectual Property Law and Ownership in Employment Relationships", (Scandinavian Studies in Law, 2010)
<http://arbetsratt.juridicum.su.se/Filer/PDF/sanna2003/EU%20Intellectual%20Property%20Law%20and%20ownersh ip%20in%20employment%20relations.pdf>

which shows, where an object may be found or placing of the link on an object, is not interfering the sphere, where the right holder has opportunity to protection, even despite an object is obviously “pirate”. Placing of such hyperlink shouldn’t be different from creation of such map”³⁶.

“Hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3 of Directive 2001/29. We offer three reasons for this conclusion:

- Hyperlinks are not communications because establishing a hyperlink does not amount to “transmission” of a work, and such transmission is a prerequisite for “communication”;
- Even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication to the public “of the work”, and whatever a hyperlink provides, it is not “of a work”;
- Even if a hyperlink is regarded as a communication of a work, it is not to a “new public.”

This does not mean that creating hyperlinks in no circumstances involves liability. In fact, as is clear from national case-law, different forms of hyperlinking may indeed give rise to the following forms of liability:

- (a) Accessory liability (particularly in respect of knowingly facilitating the making of illegal copies);
- (b) Unfair competition;
- (c) Infringement of moral rights;
- (d) Circumvention of technological measures.

Only the last of these has been the subject of harmonization at a European level, and thus falls within the competence of the Court of Justice”³⁷.

CJEU in its judgment in Joined Cases C-403/08 and C-429/08 mentioned, that “it should be noted at the outset that Article 3(1) of the Copyright Directive does not define the

³⁶ Adams T., “Copy Fights: The Future of Intellectual Property in the Information Age” 2002, 295

³⁷ Lionel Bently et al., “The Reference to the CJEU in Case C-466/12 Svensson”, (University of Cambridge Faculty of Law Research Paper No. 6/2013, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326

concept of “communication to the public”. Since the European Union legislature has not expressed a different intention as regards the interpretation of that concept in the Copyright Directive, in particular in Article 3 thereof (see paragraph 188 of the present judgment), the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used”³⁸.

“Communication” thus occurs irrespective of whether the means of communication is by wire or wireless, but in all cases a communication presupposes an act of “transmission”, a technical act of emission (giving rise to potential reception of the work by “the public”)³⁹.

Until recently national courts of European countries resolved cases regarding hyperlinks differently and considered placing of hyperlinks as the use of work, but not as work itself.

For example in Netherlands in case 139609/ KGZA 00-84622 (Algemeen Dagblad BV&orsv. Eureka Internetdiensten) in 2000 the court mentioned, that placing of hyperlink doesn't infringe copyrights. Thus, placing the works in the internet right holder provided implicit permission for using the name as hyperlink.

The Supreme court of Germany in 2003 in case Paperboy I ZR 259/00 ruled that placing of hyperlinks is not the violation of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. The person, who places hyperlink to the website, which contain copyrightable object, which was already made accessible for the public, doesn't use this work in the meaning of copyright law, but only make access to it easier. The access to the work becomes possible via hyperlink, thereby it becomes accessible to the user, who didn't know URL address as the exact name of the webpage in the internet. It, basically, is not different from the references in printed sources⁴⁰ [5].

Finally the CJEU clarified this issue in 2015 in its judgment in case C-466/12 (Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB). The court ruled, that abovementioned article of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related

³⁸ Judgment of the CJEU in Joined Cases C-403/08 and C-429/08, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=667588>

³⁹ Lionel Bently et al., “The Reference to the CJEU in Case C-466/12 Svensson”, (University of Cambridge Faculty of Law Research Paper No. 6/2013, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326

⁴⁰ Zerov Kostyantyn, “Гіперпосилання в системі регулювання та захисту авторських прав на твори, розміщені в мережі Інтернет” (Hyperlinks in the system of regulation and protection of copyrights on works, placed in the Internet), Теорія і практика інтелектуальної власності, № 4/2015, 2015, 5 http://www.ndiiv.org.ua/Files2/2015_4/4.pdf

rights in the information society “must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an “act of communication to the public”, as referred to in that provision”⁴¹.

A bit more than two and a half years later, in case C-160/15 (GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker) the court ruled, that abovementioned article of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society “must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed”⁴².

In first case the court ruled that hyperlinks to freely available on other websites works generally cannot be considered as communication to the public. In second case the court specified that hyperlinks to freely available on other websites protected by copyright works must be considered as communication to the public, if they are placed on the website with pursuit of financial gain.

Summarizing it should be concluded, that both European Union legislation and national legislation of EU member states on copyright, which constitutes the main legal instrument of regulation of website content, may be considered as developed enough to cover almost all issues related to existence and operation with rights on website content. Also it is worth to mention well-formed and applicable legal approach to use of hyperlinks on websites and resolution of disputes around them.

Among the other things I would like to draw attention, that, despite there exists and approach, in accordance to which website design is included into the notion of website content, on my opinion it should be considered as separate object, which has different features and

⁴¹ Judgment of the CJEU in Case C-466/12, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200038>

⁴² Judgment of the CJEU in Case C-160/15, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200421>

functions (e.g. dynamic or static character, decorative or informational function, etc.). Thus, for example, if some image is used with purpose of decoration of website, it should be considered as an element of its design, but if it has exclusively informational character (e.g. image of good on the online store) it should be considered as piece of content of the website.

Website software

With the purpose of assessment of legal nature of website software the following legal acts will be analyzed in this subchapter: TRIPS Agreement, The European Patent Convention, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, EU-Ukraine Association Agreement, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights and Ukrainian Law “On copyright and related rights”.

Software of the website constitutes one of the main elements, which, according to international legislation, should be considered as an object of copyright.

Thus, in accordance to Agreement on Trade-Related Aspects of Intellectual Property Rights, “computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention”⁴³.

In accordance to Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, “the term “computer programs” shall include their preparatory design material.

The term ‘computer program’ shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

Only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. In accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. In accordance with the legislation and case-law of the Member States and the

⁴³ TRIPS Agreement, IPR Helpdesk,
<https://www.iprhelphdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Domain-Names.pdf>

international copyright conventions, the expression of those ideas and principles is to be protected by copyright”⁴⁴.

In national legislation of member states of European Union notion “computer program” is also usually not provided in proper manner.

In accordance to Ukrainian law “On copyright and related rights”, a computer program is a set of instructions in the form of words, numbers, codes, charts, symbols, or in any other form, expressed in a form suitable for reading by the computer, which triggers it to achieve a certain purpose or result (this the concept covers both the operating system and the application program, expressed in the source or object codes)⁴⁵.

In accordance to EU-Ukraine Association Agreement, “the Parties (Member States) shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention. For the purposes of this provision, the term "computer programs" shall include their preparatory design material”⁴⁶.

Taking into account the fact, that international legal acts don't provide direct definition of notion “computer program” (it is only mentioned, that protectable under copyright are programs in any form, which are expressed in object code or source code, and their preparatory design material), it seems to be reasonable to provide not legislative, but scientific definition of the computer program, source code and object code.

A computer program is a general structured collection of instruction sequences that perform a specific task when executed by a computer. A computer requires programs to function.

Source code is any collection of computer instructions, possibly with comments, written using a human-readable programming language, usually as plain text.

Object code is a sequence of statements or instructions in a computer language, usually a machine code language (i.e., binary) or an intermediate language such as register transfer

⁴⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, EUR-Lex,

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0024>

⁴⁵ Закон України “Про авторське право та суміжні права” (Law “On copyright and related rights”), Офіційний портал Верховної Ради України, <http://zakon3.rada.gov.ua/laws/show/3792-12>

⁴⁶ EU-Ukraine Association Agreement

<http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900>

language (RTL). The term indicates that the code is the goal or result of the compiling process, with some early sources referring to source code as a “subject program”⁴⁷.

Talking about code, used in the website, should be made few remarks regarding their technical and, subsequently, legal nature.

In European IPR Helpdesk Fact Sheet “Intellectual Property considerations for business websites”, in the list of parts of the website mentioned software, including the text-based HTML code used in websites, which can be protected by copyright, trade secrets and, if having a technical character, by patent as well⁴⁸.

Here it should be mentioned, that HTML is a markup language (a system for annotating a document in a way that is syntactically distinguishable from the text). It means, that HTML (as well as CSS) code doesn’t contain any instruction sequences, which may perform any task while executing by computer. Such code doesn’t contain any “logic”, which could be realized and provided by computer, it is created using the prescribed tags and their properties, and all potential variety of such code very limited because of these features.

Since HTML and CSS are not programming languages, their code cannot be considered neither as source code, nor as object code, thus, it does not constitute a copyrightable object.

Also, since HTML and CSS are strictly standardized markup languages (CSS – style sheet language), which have strictly determined static syntactical structure, variety of expression of which is also very limited by total amount of possible tags and their properties, on my opinion there is no even potential reason to consider such code as an object of copyright.

Thus, the position of European IPR Helpdesk, concerning the HTML code and its determination as software and its possibility to be copyrightable, on my opinion, contradicts the actual nature of abovementioned objects and, subsequently, is incorrect.

Generally, talking about software of the website, important is to determine the terms “front end” and “back end”.

Front end is interaction interface between the user and the main software and hardware. It is usually made on HTML, CSS and JavaScript languages. Basically, talking about code, the

⁴⁷ Wikipedia – the free encyclopedia, <https://en.wikipedia.org/>

⁴⁸ “European IPR Helpdesk. Fact Sheet: Intellectual Property considerations for business websites”, European Union, 2018, <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-Considerations-for-Business-Websites.pdf>

front end code is that part of it, which is executed directly on the user's device. Thus the back end part of code is the one, which is executed on the server. The back end code is usually written on PHP language. Important to mention, that differently from HTML and CSS, JavaScript and PHP are programming languages, thus the code, written on them, may be considered copyrightable.

The function of such division of front end and back end is optimization and distribution of load between the servers, which hold the websites, and user's devices. Earlier front end part of website code kept only visual external graphic design of website and didn't contain any source code (e.g. JavaScript), which would execute any logical tasks. Thus, all "logical" part of website code was kept in back end and was executed by server. The reason for it was comparatively low computing power of user's devices.

Nowadays, because of increasing of quantity of users and qualitative improvement of computing power of user's devices, the front end starts to play an important role in execution of overall logic of website code.

Good example of such optimization is online store, where user, for example, makes the request to display some selected under certain criteria (e.g. price) list of twenty goods. In this moment the back end code request database, and after making of appropriate selection sends it to the front end. After that, when user wants to make some changes in selected list of goods (only within this twenty goods), he may request the front end code, which now contains information about this twenty goods, to select ten of them under other criteria (e.g. color). In this example is shown, how the load back end may be reduced through providing some "logic" via front end.

The JavaScript code, used for front end, and PHP code used for back end, since PHP and JavaScript are programming languages, may be considered as the source code. Thus, it should be protected under Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs as the expression of the computer program. Also, it should be protected as an artistic work under Berne Convention. TRIPS Agreement also contains provision, in accordance to which "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention"⁴⁹. Taking it into account, all provisions regarding terms of protection and scope of material and moral rights, mentioned in Berne Convention, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and

⁴⁹ TRIPS Agreement, IPR Helpdesk, <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Domain-Names.pdf>

certain related rights, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, TRIPS Agreement and national legislation of member states of TRIPS Agreement and European Union.

Thus, in accordance to t Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, “the rights of an author of a computer program shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public. In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author”⁵⁰.

One more important issue is possibility to protect in complex way both back end code and front end code. The reason of such protection lies in the nature and the method of actual use of them. As it could be seen in the example with website of online store, the back end and front end code may be tightly interrelated and connected to each other by their functions and even they may contain references on the pieces of others’ code. However it should be mentioned, that both back end and front end code are separate files, which are, furthermore, usually created by different specialists and, despite their tight interrelation, have different purposes.

Moreover, in accordance to Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, “ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive”⁵¹.

Also in CJEU judgment in case C-406/10 the court mentioned, that “Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive”⁵².

⁵⁰ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>

⁵¹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0024>

⁵² Judgment of the CJEU in Case C-406/10, CURIA, <http://curia.europa.eu/juris/document/document.jsf?docid=122362&doclang=EN>

CJEU judgment in case C-406/10 (SAS Institute Inc. v World Programming Ltd) outlines, that it “is not an infringement of the copyright in the source code of a computer program for a competitor of the copyright owner to study how the program functions and then to write its own program to emulate that functionality. Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive”⁵³.

Taking into account the fact, that such interrelation between pieces of code is rather principle, which do not constitute an expression of the computer program, thus it should be concluded, that it cannot be protected under copyright.

System of patent protection may be an alternative to copyright in such case. But, in accordance to European Patent Convention, “European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application. Programs for computers shall not be regarded as inventions”⁵⁴. Thereby, programs for computers and its components cannot be protected as invention under European Patent Convention.

Except protection of inventions national legislation of lots of countries define utility model as an object of patent law. In the European Union, there are no unified international acts regulating the protection of utility models, so each of the member states has its own national legislation in this area.

Currently, the legal protection of utility models is provided only in 17 EU states. The rights of hand-held models in Belgium, Great Britain, Luxembourg, the Netherlands, Sweden, etc. are not protected.

Analysis of the actual systems of legal protection of utility models in Europe shows that each country uses a system that is most rational and advantageous for national applicants. Main condition - not to violate the basic principles of the Paris Convention for the Protection of

⁵³ Judgment of the CJEU in Case C-406/10, CURIA, <http://curia.europa.eu/juris/document/document.jsf?docid=122362&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=296886>

⁵⁴ The European Patent Convention, European Patent Office, <http://www.epo.org/law-practice/legal-texts/html/epc/2016/e/index.html>

Industrial Property: equal rights for foreign and national applicants, the right to priority, the criteria for security, one invention - one security document, etc. That is, each member state of the Paris Convention has the opportunity, in accordance with its national needs, to identify certain features of its patent system⁵⁵.

Obvious disadvantage of utility model protection, comparing to protection of inventions, is absence of any international legal framework for its regulation. Thus, the only possibility to provide protection in two or more countries is to claim for it separately. But still it is important to compare prerequisites for patentability of utility models in different countries.

For example, in accordance to Law of Germany “On utility models” inventions can be protected as a utility model if they meet requirements of novelty, have inventive step and suitable for industrial use (have industrial applicability). Thus, utility models are considered to be not a special type of technical solutions, but so-called “small inventions”, which are distinguished by a special (simplified) regime of registration of rights and their implementation⁵⁶.

When software emerged there was a general misunderstanding of what software actually is and it raised the question under which type of legal protection it falls. Copyright and patents are complimentary in some regards: patents protect fundamental and functional features, while a copyright protects the way a program is written and its data structure. However, this does not exclude an overlap.

The distinction between copyright and patent is best explained by the following analogy:

A document setting out a novel chemical process would attract copyright protection, but the protection would protect the document against copying, not the process from being carried out. A patent for the process would prevent it from being carried out but not being written about or broadcast. This is to say that in appropriate circumstances, both copyright and patent protect different aspects of a piece of software.

⁵⁵ Romanyuk Taras, “Правова охорона корисних моделей у деяких країнах Європи: досвід для України” (Legal protection of utility models in some countries of Europe: experience for Ukraine), Часопис Київського університету права, 2014/4, 2014, 210-213

⁵⁶ Romanyuk Taras, “Правова охорона корисних моделей у деяких країнах Європи: досвід для України” (Legal protection of utility models in some countries of Europe: experience for Ukraine), Часопис Київського університету права, 2014/4, 2014, 210-213

The possibility of having more than one instrument of software protection gave rise to the ongoing software protection vagueness that escalated into the question of why the EU needs a software patent when it already has software copyright.

Thus, in The Supreme Court of Judicature, Court of Appeal (civil division), judgment in case No: A3/2006/0205, during the reasoning was mentioned, “if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own. The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff’s work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author’s skill and labor as to attract copyright protection.

First I think the fact that we are considering a computer program copyright does not in any way preclude a mere “idea” as to what the program should do from being excluded as having nothing to do with the nature of the work. The nature of the work is a computer program having all the necessary coding to function. The general idea is only faintly related to that – no different from the relationship of the general idea of a plastic letter-box draught excluder to the artistic works consisting of the drawings for a particular excluder in the Kleeneze case. Indeed I have to say that, as Mr Howe waxed lyrical about the combination of features in the animation, he sounded more like counsel in a patent case than one in a copyright case. Not all of the skill which goes into a copyright work is protected – the obvious example being the skill involved in creating an invention which is then described in a literary work. An idea consisting of a combination of ideas is still just an idea. That is as true for ideas in a computer program as for any other copyright work⁵⁷.

⁵⁷ The Supreme Court of Judicature, Court of Appeal (civil division), judgment in case No: A3/2006/0205, British and Irish Legal Information Institute, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html>

The primary concern with copyrighting software is that it is not a literary work as such and it is better suited under the definition of a mathematical formula or algorithm, which ordinarily cannot be copyrighted. Software is based on source code which means that once you have it on your computer the algorithm can easily be rewritten. Since the copyright only protects original, it is a weak legal defense against people that rewrite an already existing computer program with slight modifications.

The advantages of copyright in the case of software is that it is automatically applicable in the EU: once a program has been created on one's computer and afterwards recorded (disk, hard disk, USB flash, etc.), according to Article 2(2) of the Berne Convention³², it is already covered by copyright. Second, the copyright is relatively cheap and almost universally recognized.

“Despite sincere attempts to explain abstractions and vague words included in the text of the EPO convention, there is still a great deal of uncertainty as to what kind of software is patentable. Software ‘as such’ is excluded from patenting and “computer programs” are not patentable according to article 52(2) of the European Patent Convention; nonetheless, the latest changes dictate that even though “software” cannot be patented, Computer Implemented Inventions (CII) is patentable material in some exceptional cases.

In 2003, there was a proposal for an EU Directive on the patentability of computer implemented inventions that would provide a broad interpretation and a clear scope for CII. The proposal failed and in July 2005 it was rejected by a majority of 648 MEPs (18 in favor and 11 abstentions out of total of 680 MEPs). The aim of the Directive was to harmonize national patent laws and patent application practices in the EU. The debate was rather intense and there were a number of companies such as Microsoft, Hewlett-Packard and IBM that supported the motion and certain EU politicians, as well as Linux International and other open-source software supporters that were against the motion”⁵⁸.

Ukrainian law “On the protection of rights on the inventions and utility models” doesn't contain requirement of inventive step for utility model. Instead it only requires novelty and industrial applicability.

Ukraine largely incorporated into its legislation the rules of law of the former USSR, a formal obstacle to the protection of computer software by the rules of patent law was the Explanation No. 4 of the State Committee for Inventions and Discoveries, November 13, 1975

⁵⁸ Mihai Avram, “Software Legal Protection: Shaping the EU Software Patent”, (Amsterdam Law forum, 2014, Vol. 6:2), 20-36

“On the recognition of the invention of objects of computing equipment that is characterized by mathematical support of the computer”, which assumed that there are not accepted for consideration of the application for the issuance of an author's certificate and a patent for an invention, if the claimed object is a mathematical solution of problems, including algorithms, computer program.

Today not only Ukraine, but the whole world is facing the problem of imperfect computer software protection. Elected by a large part of the world, the protection of computer software by copyright has its advantages: simplicity and availability of protection; the effect of the protection extends to all computer programs without restrictions; copyright and, accordingly, the ability to protect the program arise from the moment it was created.

The advantage of using copyright mechanisms is determined by the fact that in a context of rapid development of the software sector, the mechanism of protection that does not require significant formalities and time for examination is more attractive. Enforcement of protection using copyright mechanisms can be provided relatively quickly, easily and inexpensively. The very fact of their creation in an objective form is the basis of the origin of copyright for these objects. Term of existence of the copyright is significant and, as a rule, exceeds the economic and technical terms of the use of software. Copyright protects the program itself in the form of source code or object code, and content (as an idea, process, medium) is not protected by copyright. That is, the author's expression of ideas in a particular material form is protected.

Nowadays, the protection of computer programs as objects of copyright is not carried out in full and proper way. This fact subsequently leads to the violations of their use and creates a serious obstacle to the development of a civilized information technology market in Ukraine, constrains international cooperation, causes economic losses to the state, is unlawful from the copyright perspective and affects enormous harm to computer software producers.

According to V. Antonov, computer programs, as specific objects of intellectual property, should have a special mode of legal protection. Except copyright, they must be directly protected by the patent contract law, the law on unfair competition, the protection of commercial secrets

A patent allows to protect the content of the software, patent protection extends to the essence, which is the main idea of the program embodied in the algorithm. In addition, the patent

gives the exclusive right to ownership of the very idea (if it is reflected in the essential features of the claims) and prevents it from being used unauthorizedly.

Taking into account everything abovementioned, the protection of website software (code, written on PHP, JavaScript and other programming languages) is granted by copyright law. Since different pieces of code may constitute different files and may be created by different specialists it is important to be determined and taken into account, while giving any evaluation to website as a complicated object.

Since nature of website code is different from other computer programs, there may be not so many cases, when such piece of website software could have been protected under patent law (as utility model or invention). Anyway, European and international legal framework for regulation of computer programs and their patentability must be created and developed in accordance to actual nature and necessities of software (including website software) development market.

Domain names

With the purpose of assessment of legal nature of domain names the following legal acts are analyzed in this subchapter: Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain, Ukrainian Laws “On Telecommunications”, “On protection of rights on signs for goods and services” and Resolution of the Cabinet of Ministers on the procedure for connecting to the global data transmission networks. The reason to plurality of Ukrainian legal acts, which are analyzed in this subchapter, is the necessity to outline the evolution and genesis of the notion “domain name” in Ukrainian legislation, which is important for the disclosure and assessment of its legal nature.

It is important to mention in the very beginning of this subchapter, that domain names are not recognized protectable under any scope of intellectual property nor in the EU, neither in Ukraine, nevertheless they are often used as a sufficient and significant part of a website. But, despite such legislative definiteness, different scholars still provide different points of view regarding legal nature and legal value of domain names. For that reason the analysis of such subject matter is necessary.

The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address – just like a telephone number – which is a rather complicated string of numbers. It is called its “IP address” (IP stands for “Internet Protocol”). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the “domain name”) to be used instead of the arcane IP address⁵⁹.

Company domain names may be registered in any number of “top level domains” called “TLDs”. It is possible to choose from the “generic top level domains” (“gTLDs”), such as .com, .net, .org and .info. Or the one can choose from the specialized and restricted top level domains if you qualify (e.g. .aero for air travel and transport businesses, or .biz for commercial enterprises). It is possible also to register your domain name under a “country code top level domain” (“ccTLD”), for example, .bg for Bulgaria, .cn for China, .ch for Switzerland.

⁵⁹ ICANN Glossary, Internet Corporation For Assigned Names and Numbers, <https://www.icann.org/resources/pages/glossary-2014-02-03-en>

The technical management of the domain name system is in the hands of the Internet Corporation for Assigned Names and Numbers (“ICANN”). However, in the gTLDs, the registrations themselves are handled by a number of Internet registrars accredited by ICANN, that can be found at ICANN's website⁶⁰.

In accordance to Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain, “the .eu TLD was implemented and also there were set out the conditions for such implementation, including the designation of a Registry, and established the general policy framework within which the Registry will function. “Registry” means the entity entrusted with the organization, administration and management of the.eu TLD including maintenance of the corresponding databases and the associated public query services, registration of domain names, operation of the Registry of domain names, operation of the Registry TLD name servers and dissemination of TLD zone files”⁶¹.

Further, Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration. It set out the public policy rules concerning the implementation and functions of the .eu Top Level Domain (TLD) and the public policy principles on registration referred to previously mentioned Regulation.

“A registered domain name shall be subject to revocation, using an appropriate extra-judicial or judicial procedure, where that name is identical or confusingly similar to a name in respect of which a right is recognized or established by national and/or Community law, such as the registered national and community trademarks, geographical indications or designations of origin, and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works, and where it has been registered by its holder without rights or legitimate interest in the name; or has been registered or is being used in bad faith.

Bad faith, mentioned in above paragraph, should be considered in cases, where:

⁶⁰ World intellectual property organization website, http://www.wipo.int/sme/en/e_commerce/domain_names.htm

⁶¹ Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002R0733>

- Circumstances indicate that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to the holder of a name in respect of which a right is recognized or established by national and/or Community law or to a public body; or
- The domain name has been registered in order to prevent the holder of such a name in respect of which a right is recognized or established by national and/or Community law, or a public body, from reflecting this name in a corresponding domain name, provided that:
 - A pattern of such conduct by the registrant can be demonstrated; or
 - The domain name has not been used in a relevant way for at least two years from the date of registration; or
 - In circumstances where, at the time the ADR procedure was initiated, the holder of a domain name in respect of which a right is recognized or established by national and/or Community law or the holder of a domain name of a public body has declared his/its intention to use the domain name in a relevant way but fails to do so within six months of the day on which the ADR procedure was initiated;
- The domain name was registered primarily for the purpose of disrupting the professional activities of a competitor; or
- The domain name was intentionally used to attract Internet users, for commercial gain, to the holder of a domain name website or other on-line location, by creating a likelihood of confusion with a name on which a right is recognized or established by national and/or Community law or a name of a public body, such likelihood arising as to the source, sponsorship, affiliation or endorsement of the website or location or of a product or service on the website or location of the holder of a domain name; or
- The domain name registered is a personal name for which no demonstrable link exists between the domain name holder and the domain name registered”⁶².

The deeper description of a bad faith notion and also interrelation between domain names registered in bad faith and trademarks is outlined in Judgment of EUCJ in case C-569/08, 3 June 2010 (Internetportal und Marketing GmbH v Richard Schlicht). In accordance to judgment, “the claimant had the registered national trademark in Sweden &R&E&I&F&E&N& within Class 9 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, corresponding to the description “safety belts”. After this, claimant registered the

⁶² Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0874>

domain name www.reifen.eu, removing all symbols “&” in accordance to the transcription requirements, mentioned in the Regulation No 874/2004.

Nevertheless, taking into account the fact, that the claimant has Austria as the country of its registered office, the fact, that the word “Reifen” means “tires” in German language, the court concluded, that the claimant hadn’t got an intention to use the trademark in class it was registered (safety belts). Thus, since the trademark was registered in the bad faith, so the domain name, registered subsequently to so called “sunrise period” after trademark registration (using prior right in accordance to it) should be also considered as registered in bad faith.

The court also concluded, that Article 21(3) of Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration must be interpreted as meaning that bad faith can be established by circumstances other than those listed in Article 21(3)(a) to (e) of that regulation, which makes that list of grounds for bad faith consideration non-exhaustive”⁶³.

Also in accordance to CJEU judgment in Case-376/11 (Pie Optiek SPRL v Bureau Gevers SA, European Registry for Internet Domains ASBL), the notion “licensees of prior rights” was clarified. Thus, with purpose of avoidance of abusing of this term (in case of its literal interpretation), CJEU ruled, that “the third subparagraph of Article 12(2) of Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration must be interpreted as meaning that, in a situation where the prior right concerned is a trade mark right, the words “licensees of prior rights” do not refer to a person who has been authorized by the proprietor of the trade mark concerned solely to register, in his own name but on behalf of that proprietor, a domain name identical or similar to that trade mark, but without that person being authorized to use the trade mark commercially in a manner consistent with its functions”⁶⁴.

Thus, despite in accordance to European Union legislation rights to TLD .eu are not intellectual property rights by nature, they are closely interrelated with intellectual property rights on trademarks and company names. Basically, despite the domain name is not an object to

⁶³ Judgment of the CJEU in Case C-569/08, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81083&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=183109>

⁶⁴ Judgment of the CJEU in Case C-376/11, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=125214&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=418442>

intellectual property rights, it still can consist of trademarks, company names, names of artistic works, which would be, subsequently, the objects of the protection under appropriate sphere of intellectual property law. Subsequently, the mechanism of protection of domain names is also closely interrelated and based on the mechanism of protection of rights on abovementioned objects.

Talking about Ukrainian legislation, domain name notions are provided in three different legal acts.

Thus, in accordance to the Law “On telecommunications” domain is part of the hierarchical address space of the Internet, which has a unique name that identifies it, is serviced by a group of domain names servers, and is centrally administered⁶⁵.

The Law “On protection of rights on signs for goods and services” provides the notion of domain as the name used to address computers and resources on the Internet⁶⁶.

In the Resolution of the Cabinet of Ministers on the procedure for connecting to the global data transmission networks domain is defined as the part of the address space on the Internet, designed to identify a computer or group of computers⁶⁷.

Despite existence of legally determined notion of domain name in Ukrainian legislation, there is still no single position in Ukrainian legal doctrine regarding legal nature of domain names: either it is or it is not an object of intellectual property law. On the one hand, domain names are not included into the exhaustive list of intellectual property objects mentioned in the Civil code of Ukraine and also it is not mentioned as an intellectual property law object in any of international legal acts, which are adopted by Ukraine.

On the other hand, domain names can express object of intellectual property law. Nowadays in domain names usually is used verbal notation, which may be the part of company name or trademark, name of geographical indication of the good, names or surnames of people or their pseudonyms.

⁶⁵ Закон України “Про телекомунікації” (Law “On Telecommunications”), Офіційний портал Верховної Ради України, <http://zakon5.rada.gov.ua/laws/show/1280-15>

⁶⁶ Закон України “Про охорону прав на знаки для товарів і послуг” (Law “On protection of rights on signs for goods and services”), Офіційний портал Верховної Ради України, <http://zakon5.rada.gov.ua/laws/show/3689-12>

⁶⁷ Постанова Кабінету Міністрів Про затвердження Порядку підключення до глобальних мереж передачі даних (Resolution of the Cabinet of Ministers on the procedure for connecting to the global data transmission networks), Офіційний портал Верховної Ради України, <http://zakon5.rada.gov.ua/laws/show/522-2002-%D0%BF>

Worth to mention, that domain name and company name or trademark obviously have similar function, namely providing of identification of goods, services, legal entities and information about them. Nevertheless, since the main purpose of the trademark is distinguishing of goods and services (and, subsequently, their manufacturer/the one, who provides the services) among others, trademark seems to be a reference point, which allows the consumer to look through alternatives and to make choice among competitors on the market. But the domain name doesn't serve this purpose, since it only allows user to navigate in the Internet.

Also should be mentioned the differences between mechanisms of legal protection of domain names and trademarks. So, the legal protection of trademarks (except well known) is based on principles of territoriality and specialization, thus it is spread only on certain territory of registration and on certain class of goods and services. Differently from trademarks, the domain name must be unique in certain domain zone, regardless of character and specialization of information resource. Thus, taking into account the fact, that each and every domain name must be unique, but trademarks may have similar spelling and may be registered in different classes, the possible is situation, when one domain name will be lawfully claimed by two or even more persons.

Thus, the issue of determination or non-determination of domain name as mean of individualization on legislative level is still not totally resolved. Despite the domain name serves the purpose of individualization, now, it can only be considered as an analogy to mean of individualization.

The popularity of famous trademarks may become a matter for so called cybersquatting – registering, trafficking in, or using an Internet domain name with bad faith intent to profit from the goodwill of a trademark belonging to someone else. The cybersquatter then offers to sell the domain to the person or company who owns a trademark contained within the name at an inflated price.

The following types of cybersquatting are defined:

- Sectoral (names of goods, services, sectors of economics);
- Brand (trademark names);
- Geographical (names of geographical objects, e.g. cities);
- Nominal (domain names, that are consonant to names of famous people);
- Protective (when the lawful owner of the trademark registers also domain names, which are consonant or similar to his/her trademark);

- Typosquatting (registration of domain names, which have similar spelling to popular websites domain names, aimed at the possible mistake of the user)⁶⁸ [30].

As regards the relationship between the domain names and the names of individuals, these restrictions should be taken into account for their use in favor of another object. Violation of the right of an individual to the name is considered to be the use of this name in the domain name along with elements that defame the honor and dignity of an individual. One can consider infringement of the right of an individual on behalf of such use in the domain name, which addresses to a resource on the Internet, which hosts materials that reproach the honor and dignity of an individual - the bearer of such a name. Certain authors consider the violation of the rights of the author or the performer the registration of the domain name by a third party, which coincides with the name of such author or performer in the event that such a domain name addresses an Internet resource that hosts the works of such author or performer.

Differently, the literature evaluates the nature of the rights to the disputed domain name, which the owner does not use at all, or does not apply to homogeneous goods. Certain authors assume the possibility of recognizing such actions unfair and extending to them the provisions of civil law regarded to abusing of rights. Other authors suggest applying the provisions of civil law regarded to abusing of rights in situations, where the homonym of some famous public person registers appropriate domain name with the purpose of further reselling of it to that famous public person.

There are also so called Request for comments (RFCs), which, in the context of Internet governance, is a type of publication from the Internet Engineering Task Force (IETF) and the Internet Society (ISOC), the principal technical development and standards-setting bodies for the Internet⁶⁹.

In accordance to RFC 1034 On Domain Concepts and Facilities, “when some organization wants to control its own domain, the first step is to identify the proper parent zone, and get the parent zone's owners to agree to the delegation of control. While there are no particular technical constraints dealing with where in the tree this can be done, there are some administrative groupings discussed in [RFC-1032] which deal with top level organization, and middle level zones are free to create their own rules. For example, one university might choose to use a single zone, while another might choose to organize by subzones dedicated to individual

⁶⁸ Doroshenko Oleksandr, “Причини виникнення конфліктів торгівельних марок та доменних імен” (Reasons of appearance of the conflicts between trademarks and domain names), Теорія і практика інтелектуальної власності, 2013, 4/2013, 16-21

⁶⁹ Wikipedia – the free encyclopedia, <https://en.wikipedia.org/>

departments or schools. [RFC-1033] catalogs available DNS software and discusses administration procedures.

Once the proper name for the new subzone is selected, the new owners should be required to demonstrate redundant name server support. Note that there is no requirement that the servers for a zone reside in a host which has a name in that domain. In many cases, a zone will be more accessible to the internet at large if its servers are widely distributed rather than being within the physical facilities controlled by the same organization that manages the zone. For example, in the current DNS, one of the name servers for the United Kingdom, or UK domain, is found in the US. This allows US hosts to get UK data without using limited transatlantic bandwidth.

As the last installation step, the delegation NS RRs and glue RRs necessary to make the delegation effective should be added to the parent zone. The administrators of both zones should insure that the NS and glue RRs which mark both sides of the cut are consistent and remain so⁷⁰.

Thus, the domain can be either non-delegated (registered but not used), and delegated (which is used to indicate a certain information resource).

European IPR Helpdesk also draws attention on domain names, its correlation with trademarks and cybersquatting.

The Internet provides a scenario, where creating and disseminating content has become easier than ever. Furthermore, as explained above, registering domain names is simple, affordable and fast. Lastly, the proliferation of the new gTLDs has substantially increased the possibilities for new domain name variations. While this can boost business dynamics and therefore is appreciated by businesses, it can also be a potentially harmful threat. There are two main different ways under which trade mark owners can see their rights infringed on the Internet:

- By having their trademarks replicated on third party sites, creating confusion among consumers about the origin of the goods or services advertised on those sites (e.g. a trader sells counterfeited products online), or
- By having their trademarks registered as domain names by unauthorized third parties, a practice known as cybersquatting (e.g. an individual registers a third party trade mark as a domain name in, for example, the .com extension without any right to do so).

⁷⁰ Request for Comments: 1034, Domain Names - Concepts and Facilities, November 1987, 20, <https://www.ietf.org/rfc/rfc1034.txt>

Cybersquatting is a practice of making abusive registrations of domain names that are already registered either as domain names in one or more top-level extensions or as trademarks or trade names. Cybersquatters register such domain names and later offer them for sale – often to the owner of the previous domain name or trade mark - at a much higher price than the original registration fee. While the first-come, first-served rule applies in domain name registration, the actions of cybersquatters do not remain unpunished.

Domain name disputes usually take place between a trade mark owner and a domain name registrant who has registered a domain name that infringes the rights of a trade mark owner. In this scenario, a trade mark owner, known as the complainant in this type of disputes, will try to either gain control of the infringing domain or see it suspended so the counterparty is not allowed to use it. These disputes can be solved by a court. However, in order to avoid the costs and delays usually associated with court proceedings, it is advisable to resort to the domain name dispute resolution proceedings available, managed by ICANN.

The Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) is a system established by ICANN for the resolution of disputes regarding the abusive registration and use of domain names. It is applied by all accredited registrars in their agreements with all their customers (the domain name holders or registrants). During the domain name registration procedure, registrants declare not to infringe the rights of third parties and accept to submit themselves to the UDRP. This means that, in the case where a domain name registration is considered abusive by a third party trade mark owner – the complainant - and the complainant decides to bring a UDRP case against the allegedly infringer, the latter – who by registering the allegedly abusive domain name before an accredited registrar has accepted to submit to the UDRP - will be obliged to submit to the said proceedings. This does not mean that the complainant does not have other options, such as court proceedings, to solve the dispute. The choice of forum remains the complainant’s decision and the registrant, as a defendant in this scenario, has no say on it. The complainant in a UDRP case must prove that:

- The domain name is identical or confusingly similar to a trade mark or a service mark in which the complainant has rights;
 - The registrant has no rights or legitimate interests in respect of the domain name;
- and
- The domain name has been registered and is being used in bad faith⁷¹.

⁷¹ “European IPR Helpdesk. Fact Sheet: Domain names and cybersquatting”, European Union, 2017, <https://www.iprhelphdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Domain-Names.pdf>

Taking into account everything abovementioned it may be concluded, that European Union has developed system of legislation regarding TLD .eu, actual and applicable judicial practice, which resolves issues and uncertainties, which are not resolved in required way in EU legislation. All that material makes good foundation for further resolution and understanding of any issues, which may arise regarding use of domain names.

The existence of UDRP procedure, administrated by ICANN, gives claimant the opportunity of choice: either to resolve dispute in court, or in accordance to UDRP procedure.

Talking about Ukrainian regulation of domain names, taking into account existence of non-regulated problem issues which arise on the collision of trademark rights and rights on domain name, it seems to be reasonable to adopt special legal act (similar to European Union), which would straightly provide correlation between rights on domain names and other rights (including intellectual property rights), the procedure of receiving, use and termination of rights on domain name.

Databases

With the purpose of assessment of legal nature of databases, used in websites, the following legal acts will be analyzed in this subchapter: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. The reason to the fact, that only one legal act is directly analyzed in this subchapter, is an absence of other international legal regulation of *sui generis* database protection, which constitutes the main instrument for legal protection of databases, used in websites.

It is hard to imagine existence and functioning of most of modern websites without databases. Every action of user of the website related to search query field or sorting out information on the website (e.g. sorting of goods in online store) anyway entails the request to database.

It is worth saying, that databases, used on websites (on their back end part), are made through the special programs, but the database protection is not applicable to these programs.

In accordance to Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, “database” is a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means⁷².

Nowadays legal protection of databases is provided in two modes: protection of database under copyright and under *sui generis*.

“Copyright protection is provided to that databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection. The copyright protection of databases shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves”⁷³.

Thus, the key features, which describe the database as an object of copyright protection, are:

- A set of information (data) brought into the system, which components are combined with a particular subject field and are arranged in an appropriate manner;

⁷² Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0009>

⁷³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0009>

- Information constituting the contents of a database may, by its very nature, constitute works protected by copyright or other information that are not themselves objects of intellectual property;

- The organization of the aggregate of information may have different objective forms - electronic, written, card file format, etc.;

- Information in the database is organized according to a certain scheme: according to the given criteria, it is selected and arranged, which provides it with accumulation, conservation, rapid search of the necessary elements, access and use of it;

Some scholars in the context of copyright protection consider the databases as works that, by their regime, are equated with composited works, namely collections⁷⁴.

In accordance to Berne Convention, collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

In accordance to TRIPS Agreement, compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

On this basis, it is possible to determine the common criteria for the legal protection of the DB and other collections:

- Existence of creative work in selecting, coordinating or arrangement of the content;
- Absence of copyright infringement on the works included in them as components.

The legal protection under *sui generis* right is provided to databases, “where has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or

⁷⁴ Yarkina N., “Правова охорона баз даних: режими авторсько-правовий і *sui generis*” (Legal protection of databases: copyright and *sui generis* regimes), 2008, 81-84
<http://dspace.nlu.edu.ua/bitstream/123456789/8580/1/Yarkina.pdf>

presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database”⁷⁵.

In CJEU Judgment in case C-203/02 (*The British Horseracing Board Ltd and Others v William Hill Organization Ltd*) the terms “verification” and “obtaining” in the context of database content are clarified. Thereby, “the expression “investment in ... the obtaining ... of the contents” of a database in Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.

The expression “investment in ... the ... verification ... of the contents” of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition”⁷⁶.

In CJEU Judgment in case C-338/02 (*Fixtures Marketing Ltd v Svenska Spel AB*) the term “presentation” in the context of database content are clarified. Thereby, “the expression ‘investment in ... the ... presentation of the contents’ of the database concerns, for its part, the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organization of their individual accessibility.

Investment in the creation of a database may consist in the deployment of human, financial or technical resources but it must be substantial in quantitative or qualitative terms. The quantitative assessment refers to quantifiable resources and the qualitative assessment to efforts which cannot be quantified, such as intellectual effort or energy”⁷⁷.

⁷⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, EUR-Lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0009>

⁷⁶ Judgment of the CJEU in Case C-203/02, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49633&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=815555>

⁷⁷ Judgment of the CJEU in Case C-338/02, CURIA, http://curia.europa.eu/juris/document/document_print.jsf?sessionId=9ea7d2dc30db8e6154e671f84708b128816cef63c58d.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=49634&occ=first&dir=&cid=38026

For *sui generis* protection of databases, differently from copyright, creative manner of arrangement of the content is not required. Instead of it for *sui generis* protection the substantial investment in either obtaining, verification or presentation is required.

Unlike copyright, *sui generis* protection is provided, albeit with a contribution to the collection of material, its selection, verification and arrangement, but extends not only to the result of the latter, but also to the entire database in the whole, including its content. Thus, all of the database and its substantial parts are protected from the illegal appropriation from the user or competitor.

Thus, *sui generis* right protection is provided to databases, where:

- Either the information (content of database) is obtained and/or verified using substantial human (including intellectual), financial and technical resources; or
- The architecture (structure) and the way of indexation of information of database is optimized using substantial human (including intellectual), financial and technical resources, subsequently, faster presentation of content of database (its part) becomes possible.

In accordance to CJEU Judgment in case C-173/11 (Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v Sportradar GmbH, Sportradar AG), “the objective of Directive 96/9 is, by approximating national laws, to remove the differences which existed between them in relation to the legal protection of databases, and which adversely affected the functioning of the internal market, the free movement of goods and services within the European Union and the development of an information market within the European Union. To that end, the directive requires all the Member States to make provision in their national law for the protection of databases by a *sui generis* right. In that context, the protection by the *sui generis* right provided for in the legislation of a Member State is limited in principle to the territory of that Member State, so that the person enjoying that protection can rely on it only against unauthorized acts of re-utilization which take place in that territory.

Thus, the mere fact that a website containing a database protected by a *sui generis* right under Directive 96/9 on the legal protection of databases is accessible in a particular national territory is not a sufficient basis for concluding that the operator of that website is performing an act of re-utilization caught by the national law applicable in that territory. If the mere fact of being accessible were sufficient for it to be concluded that there was an act of re-utilization, websites and data which, although obviously targeted at persons outside the territory of the

Member State concerned, were nevertheless technically accessible in that State would wrongly be subject to the application of the relevant law of that State”⁷⁸.

Databases, used on websites, are rarely copyrightable (only in case, if the database is the part of website content), since all arrangement of information in database is made by special computer programs. Nevertheless, since databases used in website may have all of abovementioned features, subsequently they may be protected under *sui generis* right.

Also the difference between copyright and *sui generis* protection of databases is absence of moral rights in latter.

“The repeated and systematic extraction (permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form) of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted”⁷⁹.

Talking about above provision parsing programs (parsers) should be mentioned. On of functional purposes of such programs is collecting data from other open databases for their further compilation into new database. One of example of using such parsing program is website, which provides services of comparison of prices on goods. Parser periodically makes preset queries (e.g. once per day it queries names of certain determined goods) to databases of online stores, list of which is preset. The collected data about name and price of goods is arranged into database of this website and, when its client makes query, it shows collected data in the form of comparison of prices on certain good.

It is obvious, that parser in this case makes systematic (e.g. once per day about one good) extraction of insubstantial part of the content of database (part is insubstantial, since it collects information only about one good per one query). Thus, if the online stores databases right holders’ interests are prejudiced (if those databases are *sui generis* protectable on the basis of substantial investment in presentation of its content), such action should be considered as a violation of his *sui generis* right and are not permitted.

⁷⁸ Judgment of the CJEU in Case C-173/11, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128651&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=390271>

⁷⁹ Judgment of the CJEU in Case C-203/02, CURIA, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49633&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=815555>

Sui generis databases are protectable from the moment of the end of the process of their creation. The maker of database (right holder) is the person, that take the initiative and bears the risks (in broad meaning) while making the substantial investments in its creation. Thus, the issue of distribution of rights between employer and employee or between customer and performer of civil agreement of creation of database is not resolved by the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, but is left at the discretion of national legislation of member states.

Summarizing it should be concluded, that databases in modern websites play significant role. Technical development of database architecture, its optimization and formation of its content are independent fields of knowledge with their own specialists. Taking into account economic importance and amount of resources, required for development and creation of some databases, legal regulation of them becomes vital.

Thus, *sui generis* protection becomes the main instrument to enforce economic and legal safety operating with databases.

Agreements on development and maintenance of website

Most organizations and companies now recognize the importance of both a web site and an effective e-commerce strategy as part of their overall marketing plans. Web site development is an integral part of the “gold rush” approach amongst many companies to get on the web.

Unless an organization has its own resources to develop a website, the commissioning of a website will involve procuring the services of a specialist website development company. However, in the whirl of technological and marketing activity, it is easy to lose sight of the need to negotiate and sign a website development agreement that properly sets out the rights and obligations of both customer and developer.

Website development projects essentially involve a partnership between customer and developer, where tensions can easily arise and where both sides need to work with each other in order to achieve successful completion of the project. Such projects can range from the very minor (e.g. small websites that act as no more than a product brochure) to complex websites that undertake direct selling of products and services and represent the core “clicks and mortar” business of the customer. Projects need to be properly managed by both customer and developer - a well drafted website development agreement provides a useful management tool in achieving this.

IT service market has international feature and Internet allows counterparties to hold negotiations and to contract physically being in different countries. Taking into account existence of big scope intellectual property law objects in websites and their value and significance, necessity of contractual regulation of relations on development and maintenance of website seems to be obvious.

An important issue is also correct qualification of contracts on website development. Since this issue is not regulated by international legal acts, it should be regulated by national legislations. The problem of situation is, firstly, novelty of websites as objects of civil turnover and, secondly and subsequently, lack of legal determination of website as such objects. Thus, depending of specificity and differences between legislations of different countries, contracts on website development may be qualified as either contract on creation by order, or contract on provision of services. Since different types of contracts may involve different types of remedies and requirements for their formation, such determination has high degree of importance.

On my opinion, depending on the essence of subject matter and actual purpose of certain contract, it may be considered as mixed contract (e.g. the development of website by

itself, which is regulated by contract on creation by order, and some period of maintenance of website after its development, which should be considered as a subject matter of contract on provision of services).

Since a lot of website developers and web-designers work as freelancers now, quite spread are the following types of agreements:

- Customer contracts directly with performer (private individual), who provides all services alone;
- Customer contracts directly with group of performers (private individuals), each of whom performs his/her own part of agreement (software development, design creation, etc.);
- Customer contracts legal entity, which provides all services through its employees;
- Customer contracts legal entity, which provides all services through subcontracts.

The contract may be concluded in consequence of email correspondence, where each email may be considered as an offer, counter-offer, accept (in case of compliance with requirements, set for consideration as an offer or an accept) or just as part of negotiations, or it may be concluded through signing the unified document – agreement – where all terms are prescribed.

In many ways a web site development agreement is similar to a software development agreement and many of the issues raised in this booklet will be familiar to anyone who has previously been involved in negotiating that type of agreement. This booklet examines the most important aspects of web site development agreements and the key legal issues that arise⁸⁰.

Developers should not be permitted to get away with presenting terms and conditions with very little reference to their own obligations and the services they are to provide. These services may not only include the design and development of the site but also associated services such as maintenance of the site, modifications, assistance in obtaining a domain name and web hosting services

A key issue for the client will be to ensure that the services are provided on-time and that the site is developed in accordance with a project schedule. A client should therefore seek to tie the designer into a timetable that is appended to the agreement and should be careful to avoid

⁸⁰ Jennifer O'Brien, "Website Development Projects: Avoiding The Pitfalls", 2014, 7-10

“estimated” target dates. However, there must be some recognition on the client’s part that the developer cannot work in isolation - the developer relies on input from the client, such as the client’s employees responding to questions raised by the developer and providing materials and graphics in a timely manner. The most a developer will ever give is likely to be a best endeavors obligation to complete the project on schedule.

Regardless of how the contract is concluded, it should contain certain provisions, which assure legal certainty and definiteness of parties will and intention.

The first, main and obligatory (essential) term of any agreement is its subject matter. Depending if the agreement is on development of software, or creation of website design, or other object, or combined, subject matter should be expressed differently. Thus, the development of software requires determination of its functions and set of use cases that describe user interactions that the software must provide. All this information should be provided in so called “software requirements specification”, which, subsequently, should be considered as the part of the agreement.

Similar recommendations should be followed, if the subject matter of the agreement is creation of website design. In this case, instead of software requirement specification, so called “statement of work” should be made. Statement of work includes in itself specification of scope of work, such as creation of visual design and information architecture (site structure/organization, navigation etc.), performance of concept testing, observing and measuring user interaction on functional prototypes and existing products, implementation of the user interface etc.. Also statement of work may include in itself guidelines, which provide requirements for color palette, icons etc..

Similarly to abovementioned, if subject matter of the agreement is creation of website content (e.g. text articles), it should be specified by requirements of amount of symbols and topic of article.

Next important provision in this kind of agreements concerns terms of completion of subject matter of the contract. Importance of it lies in the actual nature of functioning of the website. Since website is complicated and, usually, multi-optional object it is difficult to define if it works properly in short perspective. Thereby, especially regarding software part, it is recommended to set a provision, in accordance to which the performer must cure and remedy any unforeseen glitches, bugs and/or errors during certain period after completion of subject matter by itself.

Provision of agreement regarding transfer of material intellectual property rights should contain scope of rights, which are transferred, and moment of their transfer. In this context the important is issue of actual ownership of transferred rights. In cases, if the performer is legal entity, whose employees actually make the subject matter, it should be prescribed in their labor contracts provision that they don't remain themselves any material rights on created objects (depending on national legislation). The same issue arises, if the performer involves subcontractors for performance of whole or part of the subject matter of the contract.

Thus, for example, in accordance to EU-Ukraine Association Agreement, where a computer program is created by an employee in the execution of his/her duties or following the instructions given by his/her employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract [49].

The moment of transfer of rights is usually set after full payment under the contract.

Talking about rights, should be regulated the provision either on guarantee or on liability for unlawful use of other intellectual property law objects in performance of the agreement. Since it is not regulated by international law and usually is neither regulated by national laws, description of such provision remains at the discretion of the parties. On the one hand, it is reasonable for the performer to be liable for unlawful use of intellectual property law objects during performance of his contractual obligations. On the other hand, the customer may, for example, include some object into guidelines for design creation without notification about absence of material rights on it. Thus, recommended form of such provision should contain description of cases, when the performer is liable for unlawful use of intellectual property law objects in his performing, and description of cases, when the customer is liable for such actions.

Subsequently to international character of website developing there are plenty of internet services, which provide opportunity for performers to leave their adverts and for customers to find and contract them. The most part of such internet-services perform the function of guarantors between parties. Terms of use of such portals are legally binding agreements, which settle certain rules of use and operation on them and every user, using the website is agreed to be bound by these Terms. These Terms of use often contain provisions about intellectual property rights and their distribution between the performer and customer.

Thus, for example, "Fiverr" internet-service states in terms of use: "unless clearly stated otherwise on the seller's service page/description, when the work is delivered, and subject to payment, the buyer is granted all intellectual property rights, including but not limited to,

copyrights for the work delivered from the seller. All transfer and assignment of intellectual property to buyer shall be subject to full payment for the service and the delivery may not be used if payment is cancelled for any reason

By purchasing a “Commercial Use License” with your order, the Seller grants you a perpetual, exclusive, non-transferable, worldwide license to use the purchased delivery for Permitted Commercial Purposes. All intellectual property rights of the purchased delivery are hereby assigned to you”⁸¹.

“Upwork” internet-service in its Legal user agreement (another name for Terms of use) states: “upon Performer’s receipt of full payment from Customer, the subject matter of agreement, including without limitation all intellectual property rights in it, will be the sole and exclusive property of Customer. If Performer has any intellectual property rights to the subject matter that are not owned by Customer upon Performer’s receipt of payment from Customer, Performer hereby automatically irrevocably assigns to Customer all right, title and interest worldwide in and to such intellectual property rights⁸²”.

Thus such Terms of use settle a general order of performance, payment and transfer of rights; nevertheless, parties still may specify them, but not to contradict.

Issues regarding payment are also an important to agree about. Modern practice of agreements on development of website has two methods of payment: fixed rate payment and hourly payment.

If parties agree on fixed rate payment, it is reasonable for parties also to agree on total amount of edits (or amount of edits in each part of performance) and the conditions for making edits to completed and accepted part of performance (if it is divided on parts). These provisions are designed to make the customer more thoughtful and rational in suggesting edits and, subsequently, to protect performer from inadequate and inconsistent conduct of consumer. Thus, should be agreed amount of payment for violation of rules for making edits.

Differently, talking about hourly payment, working time per day and total estimated term of performance (calculated without taking into account possible edits) should be agreed, instead of terms, recommended to be agreed in case of fixed rate payment.

The development of a web site is quite likely to be subject to modification during the course of the project. To avoid delays, unnecessary extra cost and tension between the parties, it

⁸¹ Fiverr – Freelance services, <https://www.fiverr.com/>

⁸² Upwork – Freelance services, <https://www.upwork.com/>

is therefore essential that the agreement includes a change control provision which clearly sets out a process for agreeing edits. This should not only specify the process for requesting changes (e.g. the submission of a written request setting out the proposed modification) but also the scope of the changes that are to be permitted so as to avoid a fundamental change in the project as a whole. Changes must be clearly specified, accurately costed and formally authorized by the appropriate persons of both the client and the developer who are responsible for managing the project. The project plan or schedule should subsequently be amended to take into account any impact on timing.

“During the course of a web site project both client and developer are likely to learn a great deal about each other’s business. Standard confidentiality provisions should therefore be included in the agreement preventing unauthorized disclosure or use of the other party’s information. These should continue for a defined period following termination. In addition, the acquisition of knowledge about each other’s business may enable a party to enter the other’s industry. The more likely scenario is that the client will be concerned to prevent the developer from designing similar sites for the client’s competitors. However, the developer may also be concerned to prevent the client from using the expertise it acquires from the developer to itself design web sites for third parties. In either case, appropriate protection should be built into the agreement by way of an exclusivity or non-compete clause. This should obviously be drafted in a manner which ensures that it complies with relevant competition laws”⁸³.

If the client is unable to store the website on its own servers, it will need to engage the services of a third party who stores web sites on its Internet servers, receives or stores commands or data transmitted by Internet users, transmits web page data to users’ Internet addresses and performs related maintenance. Particular issues to consider include the following:

- The rates to be charged by the developer for such web hosting, usually a monthly fee linked to the amount of data transmitted from the customer’s website or linked to a level of bandwidth, with additional bandwidth subject to an additional fee;
- The allocation of a specific amount of hard disk space that may be used on the developer’s server to store the customer’s web pages - additional fees will be payable for further blocks of space;
- The assistance of the developer to obtain a domain name for the customer - this is likely to result in the developer requiring a warranty and indemnity from the customer as to the

⁸³ Jennifer O’Brien, “Website Development Projects: Avoiding The Pitfalls”, 2014, 7-10

customer's ownership of any trademark or name which it requests to be included in its domain name. A key issue for the customer is to ensure that if the domain name is registered in the name of the developer, that domain name is transferred into the name of the customer;

- An obligation on the developer to provide reports of hit statistics;
- Warranties from the developer as regards the amount of bandwidth it will provide, the user-to-modem ratio it will maintain, the processor capacity it will operate and the obligations it will have as regards back up, maintenance, security and privacy.

Approval involves approval by the client of material that is to be made available on the site - this should generally be subject to an agreed procedure. If the client's brand or trade names are to be included on the site, the client should consider imposing an obligation on the developer that it will only include them in accordance with the instructions of the client. Acceptance of a web site involves more than testing it to ensure that it conforms its functional specification. It also involves the more subjective test of acceptance of the "look and feel" of the site. Acceptance is likely to involve a number of stages. These will commonly comprise delivery of an Alpha version that is tested by the client at the developer's facilities, following which the client will indicate acceptance or suggest modifications. This should be subject to key delivery dates to review various elements of the build, following which a Beta version is then produced, again for testing by the client. This is usually accessible to the client by means of a username and password which enables remote testing by the client. Once this is finally accepted, the developer should be under an obligation to deliver the completed web site to the client ("the deliverable")⁸⁴.

Next important issue is security assurance of the website and restriction of access to administration of website for third parties and developer after the completion of the contract. Basically, the access to moderation of website may be available in three ways.

First one – is direct access to the host, on which the website is set. Such access is granted after input of the login and password. But, since hosting organizations usually don't provide advanced capabilities of file transfer directly on host, this way of access to website moderation is rarely used alone.

Second one – is access to FTP (File Transfer Protocol) or SSH (Secure Shell) servers, which is also granted with its own login and password. Servers, which use these protocols, are made with purpose to allow the owner of the website more convenient, fast and advanced

⁸⁴ Jennifer O'Brien, "Website Development Projects: Avoiding The Pitfalls", 2014, 7-10

capabilities for file transfer. Also these protocols use special encryption and decryption keys, which provide additional security.

Third and the last one is access via special Web Content Management System, which provides website authoring, collaboration, and administration tools that help users with little knowledge of web programming languages or markup languages create and manage website content. Basically, such way of access to website moderation is the most user-friendly, but it gives much less capabilities, than others.

Taking into account the capabilities, provided by each of abovementioned ways of access to website moderation, it can be concluded, that they may have great influence on website and performance of its functions. Thus, developers' obligation on transfer of logins, passwords, encrypting and decrypting keys to the customer after completion of full payment should be provided in contract on website development. On the one hand, it allows customer to ensure himself from unscrupulous and dishonest actions of developer and third parties after contract performance. On the other hand, the developer has an effective lever of influence on the customer, who doesn't perform his contractual obligations (e.g. doesn't pay on time).

Taking into account everything abovementioned it should be concluded, that since websites, as objects of civil turnover, appeared quite recently, the legal nature of agreements on development and maintenance of websites is still not regulated on international level and is poorly determined in national legislation. Nevertheless, taking into account a significance of websites in business and its direct influence on commercial results, contractual regulation of website development and maintenance is necessary. Also, taking into account plurality of specific provisions of such agreements, developed contractual practice and appropriate doctrine in this direction has high value and should be developed in the near future.

Conclusions

1. Analysis of existing approaches to notion “website” leads to conclusion about ambiguity of understanding of it both by scholars and by legislators. Novel character of website as an object of civil relations and imperfect understanding of program-technical aspect of website don’t allow scholars to come to a common point of view in its determination.

2. Website is a complex of software, information and media means, which can be expressed in appropriate forms, as well as structural solutions, all of which are united with single function through the computer language, consist of different objects (including objects of intellectual property law) and are/may be placed on the host. Website is complicated object, which consists of other objects of intellectual property law (not only copyright and related rights).

Talking about element of the website, in this work legal nature of the following was researched: website design, website content, website software, domain name and databases.

3. Thus, website design consists of two parts:

- The external decorative aspect of website design, including graphical user interface (GUI), which is copyrightable;
- User experience design, which serves to enhance usability and accessibility of interaction with website, create every possible route of the user on website (prototyping), optimize these routes and to increase the ability of website to realization of its function (in context of its interaction with user), which is not copyrightable, but in some countries may be protected as utility model.

4. Website content, which is the dynamic element of the website, brings information and experiences that are directed towards an end-user or audience. The content may consist of texts (books, pamphlets, addresses, lectures etc.), musical compositions, audiovisual works, works of drawing and painting, photographs and other objects, provided for user on the website, which contain any information or experience. Thus, the content of website is copyrightable.

5. Website software is expressed in back end and front end pieces of code, which provide logical operations, run scripts, gives the website an interactive feature and is copyrightable in accordance to European Union and international legislation. However it is worth to mention, that the HTML and CSS codes cannot be considered as the part of website software, since they are not programming languages and their code doesn’t constitute neither source code, nor object code. Thus, HTML and CSS codes are not copyrightable.

6. Domain names (TLD .eu) in accordance to European Union are not an object of intellectual property law by nature. Nevertheless, they are closely interrelated with intellectual property rights and they can consist of trademarks, company names, names of artistic works, which would be, subsequently, the objects of the protection under appropriate sphere of intellectual property law. Subsequently, the mechanism of protection of domain names is also closely interrelated and based on the mechanism of protection of rights on abovementioned objects. European Union has developed system of legislation regarding TLD .eu, actual and applicable judicial practice, which resolves issues and uncertainties, which are not resolved in required way in EU legislation.

7. Databases, used in websites (if they are used not as a part of the content) may have only under *sui generis* protection and, moreover, this protection becomes more important, since the significance of databases in website and their value (expressed in human, financial and technical resources) increase.

8. The agreements on website development and maintenance can be divided on the following types:

- Customer contracts directly with performer (private individual), who provides all services alone;
- Customer contracts directly with group of performers (private individuals), each of whom performs his/her own part of agreement (software development, design creation, etc.);
- Customer contracts legal entity, which provides all services through its employees;
- Customer contracts legal entity, which provides all services through subcontracts.

Criteria for such division is a legal mechanism of transfer of material intellectual property rights (depending if employees or subcontractors have certain provision about transfer of material intellectual property rights on created object of intellectual property law in their contracts).

9. The main elements of agreements on website development and maintenance are: subject matter, which may be specified in software requirement specification or statement of work; term of completion of subject matter of the contract and term of further maintenance; scope and conditions of transfer of material intellectual property rights (e.g. after full payment); method of payment and subsequent conditions of making edits; transfer of all logins, passwords, encrypting and decrypting keys for security purposes.

Recommendations

1. Consider the following notion of website as the one, which objectively express its legal nature, in respect of its program-technical aspect:

Website is a complex of software, information and media means, which can be expressed in appropriate forms, as well as structural solutions, all of which are united with single function through the computer language, consist of different objects (including objects of intellectual property law) and are/may be placed on the host. Website is complicated object, which consists of other objects of intellectual property law (not only copyright and related rights).

2. Add to the Article 2 (1) of the Berne Convention for the Protection of Literary and Artistic Works, to the list of “literary and artistic works” and appropriate acts of national legislation design of the websites and computer programs.

3. The Article 1 (2) of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs state as follows:

“Protection in accordance with this Directive shall apply to the expression *of a computer program in either source code, or object code*. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive”.

Also complete the 1 Article of abovementioned Directive with provision, which clarifies, that code, written on HTML and CSS (and other similar computer languages), which constitute neither source code, nor object code, is not protected under this Directive.

4. Consider the contracts on development and maintenance of website as mixed contracts, which have provisions, regular for contract on creation by order and for contract on provision of services. These contracts have specific set of terms and, despite not all of them are essential, the uniqueness of this set allows in perspective to distinguish this type of contracts among others in separate group.

List of bibliography

1. Наказ від 25.11.2002 № 327/225 “Про затвердження Порядку інформаційного наповнення та технічного забезпечення Єдиного веб-порталу органів виконавчої влади та Порядку функціонування веб-сайтів органів виконавчої влади” (Order of information content and technical support of the single web portal of executive bodies)

<http://zakon2.rada.gov.ua/laws/show/z1021-02>

2. Закон України від 23.12.1993 № 3792-XII “Про авторське право та суміжні права” (Law “On copyright and related rights”)

<http://zakon3.rada.gov.ua/laws/show/3792-12>

3. Herasymchuk N.. “Веб-сайт як об’єкт правової охорони” (Website as an object of legal protection). Українське право, August 17, 2017

http://ukrainepravo.com/legal_publications/essay-on-it-law/it-law-harasymchuk-website-as-an-object-of-legal-protection/

4. Nataliya, Maidanyk. “Веб-сайт в мережі інтернет як особливий об’єкт авторського права” (Website in the Internet as specific object of copyright), Юридична Україна: Правовий часопис, 2008, № 12. Pages 73 – 80.

5. Kostyantyn, Zerov. “Гіперпосилання в системі регулювання та захисту авторських прав на твори, розміщені в мережі Інтернет” (Hyperlinks in the system of regulation and protection of copyrights on works, placed in the Internet). Теорія і практика інтелектуальної власності, 2015, № 4/2015, 26-32

http://www.ndiiv.org.ua/Files2/2015_4/4.pdf

6. “European IPR Helpdesk. Fact Sheet: Intellectual Property considerations for business websites”, European Union, 2018.

<https://www.iprhelphdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-Considerations-for-Business-Websites.pdf>

7. Code de la propriété intellectuelle (Code of the intellectual property), March 17, 2017

http://www.wipo.int/wipolex/en/text.jsp?file_id=435162

8. Copyright, Designs and Patents Act, 1988

<https://www.legislation.gov.uk/ukpga/1988/48/contents>

9. Copyrights and Related Rights Regulation, 2003

<https://www.legislation.gov.uk/uksi/2003/2498/contents/made>

10. Filinovich V., “Внутрішнє законодавство країн Європи у сфері правового регулювання веб-сайтів” (Internal legislation of European countries in field of legal regulation of websites), Науковий вісник Міжнародного гуманітарного університету, 2014, № 10-2

11. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

12. Judgment of the CJEU, Case C-466/12, 13 February 2014

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200038>

13. Judgment of the CJEU, Case C-160/15, 8 September 2016

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200421>

14. Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/cdr_legal_basis/62002_cv_en.pdf

15. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886

http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661

16. Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights), September 09, 1965

http://www.wipo.int/wipolex/en/text.jsp?file_id=423012

17. Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas (Law on copyright and related rights), No. VIII-1185 of May 18, 1999

http://www.wipo.int/wipolex/en/text.jsp?file_id=191200

18. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>

19. Закон України від 15.12.1993 № 3687-XII “Про охорону прав на винаходи і корисні моделі” (Law “On the protection of rights on the inventions and utility models”)

<http://zakon2.rada.gov.ua/laws/show/3687-12/para0120#o120>

20. Judgment of the CJEU, Case C-393/09, 22 December 2010

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=83458&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=280104>

21. Opinion of Advocate General, Case C-393/09, 14 October 2010

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=83832&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=280104>

22. ICANN Glossary, Internet Corporation For Assigned Names and Numbers

<https://www.icann.org/resources/pages/glossary-2014-02-03-en>

23. World intellectual property organization website

http://www.wipo.int/sme/en/e_commerce/domain_names.htm

24. Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002R0733>

25. Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0874>

26. Judgment of the CJEU, Case C-569/08, 3 June 2010

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=81083&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=183109>

27. Закон України від від 18.11.2003 № 1280-IV “Про телекомунікації” (Law “On Telecommunications”)

<http://zakon5.rada.gov.ua/laws/show/1280-15>

28. Закон України від 15.12.1993 № 3689-XII “Про охорону прав на знаки для товарів і послуг” (Law “On protection of rights on signs for goods and services”)

<http://zakon5.rada.gov.ua/laws/show/3689-12>

29. Постанова Кабінету Міністрів від 12 квітня 2002 р. N 522 Про затвердження Порядку підключення до глобальних мереж передачі даних (Resolution of the Cabinet of Ministers on the procedure for connecting to the global data transmission networks)

<http://zakon5.rada.gov.ua/laws/show/522-2002-%D0%BF>

30. Doroshenko Oleksandr, Minchenko Nataliya, Berestiuk Olena, “Причини виникнення конфліктів торгівельних марок та доменних імен” (Reasons of appearance of the conflicts between trademarks and domain names), Теорія і практика інтелектуальної власності, 2013, 4/2013, 16-21.

31. Wikipedia – the free encyclopedia

<https://en.wikipedia.org/>

32. Request for Comments: 1034, Domain Names - Concepts and Facilities, November 1987, 20

<https://www.ietf.org/rfc/rfc1034.txt>

33. “European IPR Helpdesk. Fact Sheet: Domain names and cybersquatting”, European Union, 2017

<https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Domain-Names.pdf>

34. TRIPS Agreement

<https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Domain-Names.pdf>

35. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0024>

36. Judgment of the CJEU, Case C-406/10, 2 May 2012

<http://curia.europa.eu/juris/document/document.jsf?docid=122362&doclang=EN>

37. The European Patent Convention

<http://www.epo.org/law-practice/legal-texts/html/epc/2016/e/index.html>

38. Taras, Romanуuk. “Правова охорона корисних моделей у деяких країнах Європи: досвід для України” (Legal protection of utility models in some countries of Europe: experience for Ukraine), Часопис Київського університету права, 2014, 2014/4, 210-213

39. Avram, Mihai. “Software Legal Protection: Shaping the EU Software Patent”, Amsterdam Law forum, 2014, Vol. 6:2, 20-36.

40. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115>

41. Wolk, Sanna. “EU Intellectual Property Law and Ownership in Employment Relationships”, Scandinavian Studies in Law, 2010, 420-426.

<http://arbetsratt.juridicum.su.se/Filer/PDF/sanna2003/EU%20Intellectual%20Property%20Law%20and%20ownership%20in%20employment%20relations.pdf>

42. Adams T., Wayne C., “Copy Fights: The Future of Intellectual Property in the Information Age” 2002, 295

43. Bently, Lionel A. F. and Derclaye, Estelle and Dinwoodie, Graeme B. and Dreier, Thomas and Dusollier, Severine and Geiger, Christophe and Griffiths, Jonathan and Hilty, Reto

and Hugenholtz, P. Bernt and Janssens, Marie-Christine and Kretschmer, Martin and Metzger, Axel and Peukert, Alexander and Ricolfi, Marco and Senftleben, Martin and Strowel, Alain M. and Xalabarder, Raquel, The Reference to the CJEU in Case C-466/12 Svensson (February 15, 2013). University of Cambridge Faculty of Law Research Paper No. 6/2013, 2-3.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326

44. Judgment of the CJEU, Joined Cases C-403/08 and C-429/08, 4 October 2011

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=667588>

45. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0009>

46. Judgment of the CJEU, Case C-203/02, 9 November 2004

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49633&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=815555>

47. Judgment of the CJEU, Case C-338/02, 9 November 2004

http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30db8e6154e671f84708b128816cef63c58d.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=49634&occ=first&dir=&cid=38026

48. Judgment of the CJEU, Case C-173/11, 18 October 2012

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=128651&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=390271>

49. EU-Ukraine Association Agreement

<http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900>

50. Judgment of the CJEU, Case C-406/10, 2 May 2012

<http://curia.europa.eu/juris/document/document.jsf?docid=122362&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=296886>

51. The Supreme Court of Judicature, Court of Appeal (civil division), judgment in case No: A3/2006/0205, 14 March 2007

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html>

52. Rudnytska Z., “Правова охорона інтернет-сайту як виду збірника творів” (Legal protection of website as a type of the collection of works), Часопис Академії адвокатури України, 2013, №18, 1-6

53. Kharytonova O., Ulianova G., Kyryliuk A., Symonian U., Badzhi N., Pozova D., Grygorianz G., Burova L., Martyniuk I., “Проблемні питання визначення правової природи і структури правовідносин інтелектуальної власності, що виникають у мережі Інтернет” (Topical issues of determination of the legal nature and structure of intellectual property legal relations, which appear in the Internet), Наукові праці НУ ОЮА, 2015, 169-172

54. Yarkina N., “Правова охорона баз даних: режими авторсько-правовий і *sui generis*” (Legal protection of databases: copyright and *sui generis* regimes), 2008, 81-84

<http://dspace.nlu.edu.ua/bitstream/123456789/8580/1/Yarkina.pdf>

55. Website Fiverr – Freelance services, <https://www.fiverr.com/>

56. Website Upwork – Freelance services, <https://www.upwork.com/>

57. Jennifer O’Brien, “Website Development Projects: Avoiding The Pitfalls”, 2014, 7-

Abstract

In this research it is provided an analysis of existing approaches to notion “website” and to its elements. The main and the most valuable elements of the website, such as design, software, content, domain name and database are subjected to analysis and their legal nature is determined.

Also in this research it is provided presentation of existing practice of contracts on development and maintenance of website, as well as recommendations to formation of their provision and content, which are based on the analysis of actual nature of relations and actual necessities of the parties.

Notion of website, website design, agreement on development, databases, website software.

Summary

Master thesis “Intellectual property rights in website” is dedicated to determination of actually existing approaches to the notion “website” and to its elements; giving the legal assessment from legal point of view to elements of website separately and in complex; determination of intellectual property rights in website generally and in its elements separately; analysis of contractual practice in sphere of development and transfer of websites.

Thus, the first chapter of this master thesis is dedicated directly to research and assessment of existing approaches to notion oaches rc both in Ukraine and in European Union. In the end of first chapter presentation of authors own definition of notion “website” is provided.

In second chapter of this master thesis the legal nature of elements of website is researched and determined, basing on actual nature and features (including technical). Subsequently to determination of legal nature of website elements, they are qualified as certain objects of intellectual property law (e.g. website design, which, in broad meaning, is determined as visual decorative expression of website, which is copyrightable, and as user experience design, which can be protected as utility model depending on national legislation), or, on the contrary, some of them are qualified as such, which cannot be protected under intellectual property law (e.g. HTML and CSS codes, which, despite statements of scholars, cannot be considered as computer program neither by its nature, nor according to legislative requirements).

Third chapter of this master thesis is dedicated to determination of existing variants of conclusion of agreements on website development and maintenance, which is made basing on analysis of actual relations between customers and developers, taking into account prevalence of freelance in this sphere. On the basis of analysis of such relations and actual necessities of parties, the key features, elements and provisions of these agreements are determined.

HONESTY DECLARATION

09/05/2018

Vilnius/Kyiv

I, Roman Zavhorodnii, student of
(*name, surname*)

Mykolas Romeris University and Taras Shevchenko National University of Kyiv (hereinafter referred to University), Faculty of Law, Private Law Institute, Double degree master programme “Intellectual Property law”

confirm that the Master thesis titled

“Intellectual Property Rights in Website”:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(*signature*)

(*name, surname*)