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COMPARATIVE LEGAL ANALYSIS OF INTERNET BROADCASTING REGULATION IN KAZAKHSTAN AND THE USA

Abstract

The article discusses the regulation of broadcasting via the internet, comparing the experiences of Kazakhstan and the United States. It provides examples of foreign legislative practices and considers both Russian and US approaches to internet broadcasting regulation.

The internet system is not subject to legal regulation. This is due to the fact that the system has no owner and develops in accordance with its technological features. The article's authors draw objective conclusions about the direct impact of self-regulation on Internet broadcasting, which is crucial for its regulation. They also analyse the procedure of Internet broadcasting in the USA, providing a comparative legal analysis due to its extensive application in the country.

Keywords: Internet broadcasting, ISP, comparative broadcasting regulation, Internet self-regulation, media

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Сравнительно-правовой анализ регулирования интернет-вещания в Казахстане и США

Аннотация

В статье поднимаются вопросы касающиеся сравнительного регулирования вещания посредством сети Интернет на опыте Республики Казахстан и США. В работе приведены примеры опыта зарубежной законодательной практики по регулированию интернет-вещания, рассмотрена практика как российского опыта, так и передового в этой сфере США.

Интернет-система не подлежит правовому регулированию и это понятно – система не имеет владельца и развивается в соответствии со своими технологическими особенностями. Авторами статьи сделаны выводы о непосредственном влиянии саморегуляции сети Интернет, что имеет ключевое значение и для регулирования вещания посредством сети Интернет. Также авторы акцентируют внимание на процедуру интернет-вещания Интернет в США, так как она достаточно давно применяется в США, что позволяет сделать обширный сравнительно-правовой анализ.

Ключевые слова: Интернет-вещание, провайдер, сравнительного регулирования вещания, саморегулирование сети Интернет, медиа

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Қазақстан мен АҚШ-тағы интернет-хабар таратуды реттеудің салыстырмалы құқықтық талдауы

Аннотация

Мақалада Қазақстан Республикасы мен АҚШ тәжірибесі негізінде интернет арқылы хабар таратуды салыстырмалы реттеуге қатысты мәселелер көтеріледі. Жұмыста интернет-хабар таратуды реттеудегі шетелдік заңнама тәжірибесінің мысалдары келтірілген, оның ішінде ресейлік тәжірибемен қатар, Америка Құрама Штаттарының осы саладағы ең алдыңғы қатарлы тәжірибе іесі деп қарастырылған.

Интернет жүйесі құқықтық реттеуге жатпайды және бұл түсінікті - жүйенің иесі жоқ және ол технологиялық сипаттамаларына сәйкес дамиды. Мақала авторлары Интернет арқылы хабар таратуды реттеу үшін маңызды болып табылатын Интернеттің өзін-өзі реттеуінің тікелей әсері туралы қорытынды жасайды. Авторлар сонымен қатар

Америка Құрама Штаттарында Интернет-хабар тарату процедурасына назар аударады, өйткені ол Америка Құрама Штаттарында ұзақ уақыт бойы қолданыуда, сондықтан да бұл кең салыстырмалы құқықтық талдауға мүмкіндік береді.

Түйінді сөздер: Интернет-хабар тарату, провайдер, хабар таратуды салыстырмалы реттеу, интернеттің өзін-өзі реттеуі, БАҚ

When making information available to the public on the internet, it is important to consider the rights of third parties. Therefore, it is necessary to identify the copyright owners of the information before exercising this right. Regrettably, the current legal norms in the legislation of the Republic of Kazakhstan do not always consider the unique aspects of legal relations that arise in the online environment.

Internet distribution organizations can function as electronic carriers (media) or relayers in mutual communication, and these organizations also interact with Internet service operators. The Republic of Kazakhstan is only at the beginning of its path in terms of Internet distribution development. This has resulted in several legal issues regarding the interaction between Internet distribution organizations and information consumers.

The aim of this study is to analyse legislative and law enforcement practices regarding Internet broadcasting in Kazakhstan and the United States.

In order to achieve this goal, the authors set the following objectives

- to conduct a comparative legal analysis of the legislative and law enforcement practice of the USA and RK

- to identify problematic issues in the regulation of Internet broadcasting in the Republic of Kazakhstan and to provide the practice of applying the US experience.

The authors have used comparative legal and historical methods. They have also used the method of analysis.

The Internet system is not easily subject to legal regulation, which is understandable given that it has no owner and develops according to its own technological features. Moreover, there are various definitions of the system from both technological and legal perspectives. Legislatively, the Internet system is defined as a public information and telecommunications network. Legislation defines public communication networks, but does not provide a clear definition of public

information and telecommunication networks. Information and telecommunication interactions are based on technological and software foundations, which include communication as a fundamental aspect. Therefore, it is possible, to some extent, to equate information and telecommunication networks with communication networks.

The legislation of the Republic of Kazakhstan does not provide a definition for the concept of Internet distribution. Therefore, the meaning of this concept should be inferred from the explanation of the terms that encompass it, such as the Internet and the radio broadcasting system.

The Internet system is not subject to legal regulation, which is understandable given that it has no owner and develops according to its technological characteristics. Although there are many definitions of the system from both technological and legal perspectives, there is no legal definition of the Internet in the legislation of the Republic of Kazakhstan. In contrast, the Russian Federation defines the Internet system as a publicly available information and telecommunication network [1].

In his works, Petrovsky S.V. argues against the notion that the Internet cannot be owned, stating that it can act as an object of civil circulation. However, it is important to recognise that the Internet is not owned by any one individual or entity [2].

It is important to clarify that we are not discussing the recognition of a new object in civil law, but rather the possibility of considering the Internet as a technical complex with legal characteristics.

According to researcher V.P. Talimonchik, the most accurate definition of the Internet can be given. Considering the important characteristics for legal regulation, the author defines the Internet as a complex subject of legal regulation. It is the integration of various social relations into a single socio-technical system, created during the development of the global

computer network. Its purpose is to implement mass information and communication [3].

Internet distribution procedures have been used in the United States for some time. The legislation of this state broadly covers various aspects of relations arising in the process of online use of objects of copyright and related rights by Internet broadcasting organizations. The US has a mandatory music licensing procedure, which is a statutory royalty payment scheme for the use of copyrighted musical material. According to Section 115 of the Copyright Act of 1976, once a song is recorded and distributed to the public, the publisher must license the song to anyone who wishes to record and distribute it, in exchange for a fee. These fixed license fees are administered by various organizations and trade associations and are paid to music publishers. In addition, the US Digital Millennium Copyright Act (DMCA) of 1998 supplements US copyright law with guidelines that consider modern technological advances in information copying and distribution. This law permits the creation of copies of works solely for the purpose of broadcasting. It recognises digital broadcasting as a distinct form and permits the creation of copies for this new digital form of broadcasting. Additionally, it allows non-commercial libraries and archives to create digital copies of broadcasting works for storage and use within the library only.

The US Satellite Home Improvement Act of 1999 defines three types of licenses for broadcasting aeronautical radio signals. One license applies to cable television systems, and two apply to satellite airlines. A cable license permits a cable system to retransmit local and other radio and television stations to subscribers.

Regrettably, current domestic legislation does not allow for such possibilities as there are no existing norms. Furthermore, the presence of such norms would enable not only the digitisation of copyright and related rights objects of broadcasting organisations, but also libraries. It would also permit broadcasting organisations to freely distribute information over the internet.

For instance, any work created in the United States since January 1, 1978, is

automatically protected from the moment of creation and generally remains protected for the lifetime of the author plus an additional 70 years after their death. The protection applies to the author's works. Avoid subjective evaluations unless clearly marked as such. The confirmation cannot be transmitted by any machine or device.

In terms of legal protection for such objects, our legislation is similar to that of the US. However, when it comes to regulating the transfer of intellectual property through network methods, Kazakhstani legislation lags behind.

However, even though there are no specific laws governing Internet broadcasting in the Republic of Kazakhstan, certain norms may still apply to the relationships that arise during such broadcasts.

These norms are based on the main principles of information dissemination as established in Article 4 of the Law of the Republic of Kazakhstan 'On Access to Information', which require the consideration of the rights of other subjects [4].

When applying the norms of the Republic of Kazakhstan, it is important to consider the unique characteristics of broadcasting in both the 'real' and 'virtual' environments. In the 'virtual' environment, the process is directly influenced by other subjects such as operators of various internet services, including communication operators, access operators, content operators, and host operators, without whom information cannot be transferred. Unfortunately, the term 'operator' is only legally defined in a few Kazakhstani legislative acts, such as the Law of the Republic of Kazakhstan N 567 of July 5, 2004, which defines the operator of the centralized database of subscriber numbers, and the definition of the communication operator in 'On approval of the rules for the provision of communication services' by the Ministry of Development and Investment of the Republic of Kazakhstan (Order No. 171, February 24, 2015). The absence of operator types in Kazakhstan, unlike international legislative practice, poses a significant problem. This is because the responsibility imposed on these entities depends on the type of service operator. In contrast, the USA and EU countries have established distinct types of responsibility for each operator type.

For instance, the European Union directive on electronic commerce (Directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market, Jul 17, 2000, 2000/31/EC) [5] identifies three categories of providers: content providers, host providers, and access providers. These categories are determined by the functions they perform. Therefore, a service provider that performs several functions, such as providing access to data on the Internet and offering content from its own server, can be classified into multiple categories.

According to the Copyright Law of the United States of America (1976), US § 512 exempts service providers from liability if they perform intermediate or temporary storage of material during transmission, provided that:

- 1) the transfer of material is initiated by the service provider;
- 2) the transfer or storage is carried out by an automatic technical process without material selection by the service provider;
- 3) the service provider did not select the recipients of the material.
- 4) The service provider does not store any copies of the material created during interim or transitory storage on their server for longer than necessary for transmission.
- 5) The material is transferred through the system or network without any alterations to its content.

When comparing the legislation of the Republic of Kazakhstan with that of the USA, it is important to note that Article 16 of the Law 'On Information' specifies two key points.

Firstly, the operator must be aware of the illegality of the information being disseminated when storing and providing access to it.

Secondly, if the operator provides information that was originally provided by another person, any changes or corrections made to the information must also be done by the operator.

Furthermore, according to the Copyright Law of the United States of America of 1976, if an infringing copy of a work is found and a notice is sent to the provider, they must promptly terminate access to the material. The mechanism for implementing this rule is initiated by the Online Copyright Infringement

Liability Limitation Act, a US legislative act that outlines the guidelines for applying to an internet service provider. Under this act, a copyright owner may hold the internet service provider responsible for copyright infringement. The act also specifies the procedure for submitting an application to block the site in such cases.

Regrettably, Kazakhstani legislation does not include such a provision. This prevents internet service providers from engaging in illegal activities. Therefore, the development of internet broadcasting currently requires close attention to the legislation of the Republic of Kazakhstan.

Therefore, it is essential to establish and implement standards that enable the elimination of the consequences of contradictions and gaps in the normative legal acts concerning the regulation of relations that arise during the distribution of the current legislation on the Internet. This will enable us to participate in international discussions on legal issues related to the Internet with a more well-prepared approach.

Thus, the development of Internet broadcasting requires close attention to the legislation of the Republic of Kazakhstan. The existing provisions of the Civil Code of the Republic of Kazakhstan, which determine the legal specifics of ensuring the protection of rights to objects of copyright and related rights, do not always adequately regulate relations in the online environment. For example, from the point of view of the law, any music performed "in a place open to the public or in a place where a significant number of persons not belonging to the usual family circle are present" is a public performance.

The right of public performance is an exclusive right that can only be exercised by the rightholder. This type of use of a work is common in all public places - in hotels, cinemas, on the Internet. Where music is played and a licence agreement is required, in most cases it is not.

The consent of the author or right holder and payment of remuneration to him for placing a musical work on the network is required on the basis of Article 964 of the Civil Code of the Republic of Kazakhstan, which stipulates that

the author (his legal successor) has the right to make the work available to the public in such a way that a person can access the phonogram from any place and at any time at his own choice (making it available to the public). The consent of these persons must be expressed in a simple written form (contract).

Thus, legality in the case of network distribution can only be established if there is a licence agreement, which must be concluded in simple written form. Failure to comply with the simple written form requirement renders the agreement invalid (Article 32 of the Law of the Republic of Kazakhstan "On Copyright and Related Rights"). At the same time, the law does not specify whether a licence concluded via the Internet is considered to be in simple written form.

At the same time, it is only possible to speak of the legality of a transaction carried out over the Internet if the parties have electronic digital signatures that are used by agreement between them.

In addition, it should be noted that the Law of the Republic of Kazakhstan "On Copyright and Related Rights" establishes the rule of public performance of a phonogram published for commercial purposes. Thus, according to Article 39, the public performance of a phonogram published for commercial purposes is allowed without the consent of the phonogram producer, but with the obligatory payment of remuneration.

However, the legislation does not answer the question of what rights the user of a phonogram published on the Internet for non-commercial purposes has, whether he can reproduce it publicly, receive remuneration, transfer it to other persons, use it in the ways specified in Article 964 of the Civil Code of the Republic of Kazakhstan. Such relations arise, for example, when a phonogram is placed on a website by the right holder.

Therefore, it is necessary to develop and adopt the Information Code, which would allow to solve the problem of consolidation of the existing legislation in this area and to eliminate the existing contradictions, gaps and consequences of different methodological approaches to the development of draft normative legal acts in this area of relations.

Ultimately, this would make it possible to enter the platform of international discussion of legal problems of the Internet with a better prepared concept.

It is also necessary to adopt the following laws "On Types of Operators of Internet Services" (Providers), with separate provisions to establish the responsibility of operators of transmission of information that can be attributed to the objects of copyright and neighbouring rights; "On Regulation of Relations in the Internet", which should include the concept of the Internet, Internet broadcasting, to disclose the emerging legal relations in the Internet environment, to define a set of procedures for placement and use of information in the Internet.

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