Zhovtiak L.E.
Student of LL.M. in Human Rights at the Faculty of Law,
Taras Shevchenko National University of Kyiv

COPYRIGHT VIOLATIONS IN THE INTERNET: INTERNATIONAL EXPERIENCE AND UKRAINIAN REALITY

Implementation of digital technology has changed the ways in which the objects of intellectual property rights are distributed. Digitalization, except the advantages, such as possibility to disseminate freely works within intervention of intermediaries, is also provides new possibilities to infringe authors' rights and increase unauthorized use of copyright works. The authors' proprietary intellectual property rights and moral rights, as well as their enforcement, could be easily violated by the Internet user, thus, in modern world, the need for effective protection over the unauthorized usage of intellectual property objects could not be exaggerated.

Taking into consideration great demand for legal protection of the copyright in the Internet, especially in Ukraine, lots of scientists raised in issue for scientific discussion. For instance, following scientists contributed into research: Y.M. Baturina, V.I. Zhukova, D.M. Boyko, O.V. Dzera, O.V. Kochanovska, U.V. Nosikov and so on. Among foreign scientists it is necessary to name E. Fleischmann, K. Koelman, T. Vinje, Gr. Smith, J.P. Barlow and lots of others. At the same time, lot of issues are remaining uncovered and needs further investigation.

The topic regarding the most effective protective measures are still quire disputable among the scientists. For instance, «some experts have argued that the answer to this problem is placing legal liability for copyright infringement on those who allow and enable Internet copyright pirates to exist, namely the Internet Service Providers (ISPs)»[2, p. 2]. This scientists base their considerations on the facts that ISPs make a profit from the pirates' usage of the Internet and are able to control how their subscribers use the Internet. Contrary, it shall be kept in mind that in many cases ISPs acts as passive carriers, thus some limitation from copyright liability shall be granted to them. The others experts convinced that technological measures (for instance, «digital watermarking») is more effective than legal norms. However, the most effective way is to protect the rights of the copyright holders by different means, among which legal norms play the vital role.

From the end of nineteen century the most important treaty in the field of copyright was the Berne Convention for the Protection of Literary and Artistic Works, which was adopted in 1886 (Ukraine has ratified it in 1995 year). Despite the fact that it was revised quite regularly in order to provide solutions to problems caused by developments of modern objects of intellectual property (such as phonography, photography, radio, cinematography, television), it do not include any specific provisions to regulate relations that occurred in the Internet.

Also, it is necessary to outline Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS), which purpose is «to ensure that measures

and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade» [1, p. 46].

Currently, the most specific international regulation regarding the means of protection of the intellectual property rights in the Internet (i.e. technological protection measures or rights management information) is the WIPO Copyright Treaty (hereinafter – the «WCT») and the WIPO Phonograms and Performances Treaty, which both were ratified by Ukraine in 2001 year.

Furthermore, in European Union several directives were introduced in order to regulate intellectual property relations. Among other, it is necessary to draw attention on Directive of the European Parliament and of the Council 2001/29/EC as of 22.05.2001 on the harmonisation of certain aspects of copyright and related rights in the information society and the Directive 2004/48/EC as of 29.04.2004 on the enforcement of intellectual property rights.

In the United States of America, the Digital Millennium Copyright Act (DMCA) was adopted in October 1998 in order to implement the obligations, which USA took after ratification of WCT and the WPPT in 1997.

According to doctrine, two forms of copyright infringement could be distinguished: direct copyright infringement and secondary copyright infringement, which is subdivided into two categories: contributory and vicarious copyright infringement [2, p. 4].

In case of direct copyright infringement, a copyright holder shall prove his ownership and the fact that the coping was made by the copyright violator (i.e. by direct evidence of copying or by showing that the copyright object are similar to the original object) and was used in a way that violated one of the copyright holder's exclusive rights. In such a case, the fact of knowledge or intent shall not be obligatory for conviction. In case if the person was not personally engage in the violating activity, but bears responsibility, the secondary copyright infringement has occurred (for instance, liability of ISPs). Contributory copyright infringement occurred if the violator know and contributes to the infringing conduct. Vicarious copyright infringement occurred if the violator was able and entitled to control the infringer's acts and receives a financial benefit.

Concerning the secondary liability, the DMCA exempt ISPs from copyright liability in case if certain conditions are met. These conditions address following issues: 1) service provider's knowledge of the infringing material; 2) the service provider’s control over the infringing material; 3) the financial benefit derived by the service provider from the infringing material; 4) the service provider's response on request to remove or disable access to infringing material [4, p. 3].

Thus, hosting providers have so-called «duty of care», that «requires that the hosting provider be aware of the copyright-infringing third-party content on the host’s server» [3, p. 40]. All hosting providers are obliged to prevent the infringement of the copyright in case if they are aware of it. This means, that host providers shall delete the harmful content and prevent the uploading of such content again.

While talking about secondary liability for copyright infringement, the peer-to-peer file sharing services are usually observes primarily. The Napster and Grokster cases, is a illustrative examples of effective sues by record companies for

encouraging users of peer-to-peer services to violate copyrights. However, the social network sites (i.e. MySpace, Facebook, Vkontakte) gives a broad opportunities for copyright infringements (as the users' pages often contain copyrighted content uploaded without the owner's consent).

One other interesting issue is the peculiarities of treatment of hyperlinks as copyright infringement. In USA, where the copyright protection is on higher level than in Ukraine, a number of lawsuits were submitted in this regards. However, some judges rules that «hyperlinks do not constitute copyright infringement because no copy is actually created in the process of linking (Ticketmaster Corp v. Tickets.com, Inc)» [4, p. 5]. However, linking to the unauthorized copies of the intellectual property objects constituted contributory copyright infringement (i.e. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc. case).

The important peculiarity of the copyright infringement in the Internet that influence on the liability for such actions, is it global nature. For instance, the some of the actions that are not legally binding in one country could violates the copyright laws in other countries where material may be accessed.

Unfortunately, Ukrainian legislation do not contain special legal norm for protection of copyright in the Internet. Relations regarding copyright in Ukraine is regulated by the Civil Code of Ukraine as of 16.01.2003 № 435-IV, Law of Ukraine «On Copyright and Related Rights» as of 23.12.1993 № 3792-XII and by Commercial Code of Ukraine as of 16.01.2003 № 436-IV regarding the software.

Despite the fact, that the main international treaties aimed on copyright protection were successfully ratified by Ukraine and became the part of Ukrainian legislation (thus, should be taking into consideration by the Internet users, state bodies (especially courts), it is not enough in order to protect copyright effectively. It worth to say that Ukrainian legislator has made several attempts in order to regulate the Internet sphere in Ukraine, however, as of now no final decision is introduced. One of the examples of such attempts is the draft law № 3353 «On amendments to some legislative acts of Ukraine on protection of copyright and related rights in the Internet» that was registered in Verkhovna Rada of Ukraine on 23.10.2015.

The first step in order to find the solution to the problems of protection of intellectual property on the Internet shall be implementation of the specialized legal regulation in Ukraine. While there was several legislative initiatives, none of them was effective. Thus, the problem of protection of copyright in the Internet nowadays will remain the greater interest until the full legislative clarification and unification.

References:

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Кузьмич І.І.
аспірант,
Науковий керівник: **Бошицький Ю.Л.**
кандидат юридичних наук, професор,
Київський університет права
Національної академії наук України

ПРАВОВЕ УРЕГУЛЮВАННЯ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ В ОБЛАСТІ БІОМЕДТЕХНОЛОГІЙ

Визначальна роль у процесі стрімкого зростання біоекономічної індустрії належить біотехнологіям, продукція з яких застосовується у медичній, фармацевтичній, сільскогосподарській, харчовій, енергетичній сферах і охороні навколишнього природного середовища, що є запорукою соціально–корисного розвитку держави. Відомо, що біотехнологія – це система методів і способів застосування живих організмів та біологічних процесів у виробництві, що передбачає виготовлення продуктів, які містять речовини біологічного походження, отримані з біологічного джерела (клітин мікроорганізмів, тварин і рослин, продуктів їхньої життєдіяльності), з використанням технічних пристроїв на основі використання генно – інженерних та гібридомних технологій [4, с. 15].

Безперечно, така продукція, яка є результатом інтелектуальної діяльності людини, потребує захисту і охорони. Зміст специфіки правової охорони біотехнологій в тому, що патентна охорона не є обов'язковим елементом біотехнології, у своєму складі біотехнології можуть містити один або декілька об'єктів інтелектуальної власності, які можуть мати матеріалізовану й нематеріальну форми (біологічний матеріал, виділений з власного середовища за допомогою технічного способу; виріб, що складається з біологічного матеріалу або містить його; біологічні процеси створення, оборобки такого матеріалу, ізолювання його з природного середовища й аналізу, тощо [3, с. 12]. Зрозуміло, що вищезазначений інтелектуальний продукт вимагає ретельного дослідження критеріїв визнання його об'єктом інтелектуальної власності, специфіки реєстрації, стимулювання патентоздатності, відсутності системної законодавчої бази, причиною низького попиту завдяки капіталомісткості й довготривалій окупності, застарілої матеріально-технічної бази для впроваджень та низького рівня державного фінансування, тощо.

Безумовно, у вітчизняному законодавстві відображена цивільно-правова охорона об'єктів та суб'єктів інтелектуальної власності у галузі біомедтехнологій, удосконалення якої повинно встигати за біомедтехнологічною еволюцією [2, с. 14]. Необхідна й інноваційна модель