Вісник Національного університету "Львівська політехніка". Серія: "Юридичні науки"
№ 3 (43), 2024

UDC 341:347.77

Marta MALETS
Lviv Polytechnic National University,
Educatinoal and Rasearch Institute of Law,
Psychology and Innovative Education,
Associate Professor of the Administrative
and Informational Law Department,
Ph.D. in Law
marta.r.malets@lpnu.ua
ORCID: 0000-0002-9129-3608

INTERNATIONAL LEGAL STANDARDS FOR THE LEGAL REGULATION OF INTELLECTUAL PROPERTY: FOREIGN EXPERIENCE

http://doi.org/10.23939/law2024.43.137

Before the twentieth century, obtaining intellectual property protection in different countries was considered a difficult task since the legislative regulations of this process were quite different. That is why more and more states wanted to systematise and develop a unified approach to the legal regulation of intellectual property at the international level.

The emergence of international legislation on intellectual property is explained by the fact that the rights to the results of intellectual activity have the quality of a 'territorial limitation', i.e. in the absence of international treaties, they are recognised and protected only in the territory of the state where they originally appeared.

The international system of legal regulation of social relations related to the creation and use of intellectual property results is based on the desire to overcome this contradiction. It interacts with national systems of intellectual property protection, ensuring the rights of creators outside their countries.

The article emphasises that, given the intensification of international economic and cultural relations, the unification of intellectual property legislation is essential. The adoption of international treaties solves this problem only partially. The analysis shows that the development of international legal instruments does not contribute to, and sometimes even hinders, the development of intellectual property law since it is based on the prevailing paradigm, according to which ensuring a high level of legal protection of intellectual rights is the main criterion for assessing legislation.

The author examines the current state of social relations in intellectual property law, the dynamics of international legal regulation, and the peculiarities of legislative adaptation to the current priorities of developed countries in this area.

Keywords: international intellectual property law, US experience, intellectual property protection, legal regulation, intellectual property.

Problem statement. The analysis of scientific sources gives grounds to assert that intellectual property is a system of legal relations between the author and third parties regarding the appropriation and

alienation of intangible results of intellectual work. Such legal relations should be involved in producing, exchanging, distributing and consuming results. Relations in the field of intellectual property are a form of alienation of results of intellectual work by society for their further use. The results of intellectual activity are, primarily, the ideal content of knowledge embodied in various media (literary, scientific and artistic works, industrial designs, trademarks, etc.), as well as ideas that do not have a tangible embodiment (hypotheses, ideas, concepts, theories).

With the development of information legal relations and information and communication technologies, legal protection of intellectual property has also been significantly modernised as legal liability has changed. New legal relations and new objects of legal protection have emerged. International legal regulation of intellectual property has become one of the most pressing issues in this context.

Analysis of the problem study. Law scholars studied the problems of international legal regulation of intellectual property. They are H. Androshchuk, Yu. Boshytskyi, M. Haliantych, D. Hetmakov, I. Dakhno, O. Dzera, V. Drobiazko, Yu. Kapitsa, A. Kolodii, O. Orliuk, O. Pidopryhora, O. Rokhitnytskyi, O. Sviatotskyi, R. Stefanchuk, R. Shyshka and others. These scholars contributed significantly to developing the problems of legal regulation of intellectual property in administrative law.

The article aims to analyse the international legal standards for legal regulation of intellectual property based on the experience of developed countries.

Presentation of the main material. The experience of developed countries and international legal standards for legal regulation of intellectual property (IP) allows us to note the following trends in developing the legal principles of intellectual property law. They include the transition from consideration of intellectual rights in the context of cultural rights and freedoms to the consolidation and interpretation of intellectual rights in the context of economic rights and freedoms and recognition of the interrelation of intellectual rights with information rights and freedoms.

While the interest in the problem of the correlation between intellectual and cultural rights is declining, the idea of a stable relationship between intellectual and information rights is being formed in international legal policy and practice. Comparison of the value of creative work, which is reflected in the regulation of intellectual rights, with the value of free access to information (the right to freedom to express, receive and disseminate information) indicates a gradual rejection of a purely economic assessment in favour of an approach that provides for a balance between intellectual and information rights [1].

The development of information technology greatly facilitated access to objects of intellectual property and simplified the commission of offences in this area. At the same time, society's attitude to copyright infringement on the Internet is tolerant: most citizens do not consider such actions theft or other morally unacceptable behaviour [2].

Despite introducing new criminal law prohibitions and increased sanctions for intellectual property violations, the need for alternative solutions is becoming increasingly urgent. Many researchers argue that the current approach is not socially relevant or effective in the rapidly changing world. They point to the high costs of excessive criminalization, the challenges in identifying perpetrators, jurisdictional conflicts, and the existence of alternative ways to protect copyright. Moreover, they stress the importance of ensuring free access to information in the modern world.

Ch. Buccafusco and J. Masur [3] emphasise that criminal penalties may be more effective in preventing IP infringements than civil and self-defence measures in some situations. However, such penalties are associated with significant costs.

For example, suppose a rock star infringes the copyright of another singer. In that case, there is no need to impose criminal penalties, as the infringer is likely to be able to compensate for the damage caused. Suppose a private individual downloads hundreds of copyrighted files from the Internet, on the one hand. In that case, there is minimal possibility of detecting such an offence, and on the other hand, the amount of

damages exceeds all of the person's property and future income. In such a case, civil sanctions lose their deterrent effect of unlawful behaviour, and the threat of criminal liability or alternative sanctions, including a temporary ban on computers, mobile phones, tablets and other electronic devices, are required.

From an economic point of view, alternative sanctions are preferable, as they are most effective against file-sharing sites and pirated software sellers. An example of the application of such sanctions is demonstrated by the Copyright Alert System (from now on – the System), a private mechanism for notifying, educating and punishing subscribers of certain Internet providers in the United States, which was launched in February 2013. Users found guilty of illegal file sharing by the System receive notifications and warnings about the inadmissibility of repeated violations. After five or six warnings, restrictions on Internet use may be imposed. Despite the criticism expressed by some scholars and the non-profit organisation Electronic Frontier Foundation defending civil liberties in the digital world, these measures can be considered less controversial and more effective than criminal punishment or civil sanctions [4, p. 311].

There are analogous systems in Europe and Asia. A similar mechanism is provided for by the French Law No. 2009669 of June 12, 2009, on the promotion and protection of works on the Internet (Loi favorisant la diffusion et la protection de la création sur Internet), commonly known as the HADOPI law. One of the empirical studies shows that it significantly affects the legitimate purchase of online music recordings. Consumer awareness of this Law led to a 22.5 % increase in sales of songs on the iTunes media player, while the company's annual revenues increased by approximately $6.3 million [5, pp. 311,312]. It does not prove the effectiveness of these measures compared to civil and criminal liability. Still, it indicates the possibility of using other means that entail relatively low costs.

At the same time, public tracking and prosecution of infringers can be more effective than private tracking and prosecution due to economies of scale. However, right-holders are well organised in various associations to achieve the same effect. In the USA, in particular, there are the Recording Industry Association of America and the Motion Picture Association of America [6, p. 312].

The most obvious costs of criminal liability are the costs of detection, investigation, prosecution and sentencing. These costs are usually shared between state authorities and associations representing victims. They are very high. The enforcement of custodial sentences is also highly costly.

However, using civil or criminal liability can reduce the cost of software or hardware that restricts or complicates various actions with electronic data or allows for tracking such actions (digital rights management – DRM). Finally, the purchase of the latter, given their high efficiency, depends only on the preferences of the right-holders [7].

It should be noted that such means can harm society if used excessively and do not allow for legitimate copies of socially essential materials. To prevent their use, the US Congress may restrict the distribution of protected works in the media that use these costs. It would increase the economic benefits of criminal and civil liability.

Another category of costs of criminal liability is that because some citizens believe that copyright infringement on the Internet does not cause significant harm, such prohibitions may reduce respect for the criminal law and, as a result, the desire to comply with it. However, criminal law prohibitions can help raise awareness of such behaviour's unacceptability. It is difficult to predict their exact impact on people.

Criminal liability in this area is economically justified in two categories of subjects: 1) the financially insecure and 2) offenders whose actions are difficult to detect. Since it is unfair to prosecute the poor and refuse to punish the rich, it is advisable to focus law enforcement attention only on those offences that cause severe harm and are challenging to investigate. They include large-scale sales of counterfeit copies of music, films, and software [8, p. 315–316].

At the same time, it should be established that criminal liability becomes due to intentional actions to exclude the imposition of penalties on users acting in good faith. By law, it is also necessary to establish that intentional circumvention of software protection for fair use of works or access to non-copyrighted objects is not a crime.

S. Morhan [9] emphasises that the current versions of the Stop Online Piracy Act of 2011 (SOPA) and the Protect Intellectual Property Act of 2011 (PIPA) contain provisions that will take more work to apply in practice.

For example, the Stop Online Piracy Bill states that a case can be heard in a US court if the website is used in the US. The IP Bill also targets any website that infringes copyright, giving the US universal jurisdiction over such crimes.

The bills should clarify that at least one part of the criminal action must be under US jurisdiction. For example, The Pirate Bay is the world's most extensive catalogue of torrent files. It is located in Sweden, and the people who use it to download files are worldwide. A French citizen from a computer in France can illegally download an American film stored on a British website after finding a link to it on The Pirate Bay [10, p. 583, 584].

Determining the territorial jurisdiction of a criminal case (the right to 'one's judge') is vital for ensuring a fair trial. It is enshrined in the US Declaration of Independence and the US Constitution. In the decision in *United States vs. Cores* (1958), the US Supreme Court also explained that the trial of a criminal case at the crime scene is a guarantee against injustice and difficulties arising from a trial in a remote location [11].

The criminalisation of copyright infringement is questionable in principle, as intellectual property, despite its name, is not property in the traditional sense. The US Supreme Court in *Dowling vs. United States* (1985) expressed this position. The defendant illegally made copies of Elvis Presley's songs and sold them. The court stated that the right-holder did not have ordinary movable property. Intellectual property is a set of interests that are protected by law. Therefore, such a violation cannot be equated with theft under the National Stolen Property Act of 1948 [12, p. 589].

It is absurd to punish all these people criminally. Moreover, the punishment does not correspond to the gravity of the offence. Thus, according to § 2319 of Title 18 of the US Code, the first-time downloading of a single song is punishable by imprisonment for up to five years and/or a fine of up to USD 250,000. At the same time, the penalty for stealing a CD from a store is much less severe – about one year in prison and a fine of $5,000. Even violent crimes do not carry such severe penalties. For example, aggravated assault is punishable by up to three years and ten months in prison and a fine of up to USD 75,000. Of course, it should be borne in mind that penalties may vary from state to state, while copyright infringement is a federal offence [13, p. 591].

Copyright infringement is enough to bring administrative or civil liability, which, in this case, is strict liability. Large copyright holders have the resources and the capacity to bring such claims. In addition, the issue of jurisdiction in this case is not as acute as in criminal prosecution.

Arguments that civil liability does not have an intimidating effect should be rejected. Even the threat of long prison terms cannot deter primary copyright infringers from continuing their activities.

The American legislator should entrust the right to prosecute transnational copyright infringers to other countries, including at the offender's location, decriminalise the actions of ordinary users who download pirated files and prosecute only large-scale and direct copyright infringements.

S. Lawson discusses copyright infringement in the scientific field. The author emphasises that intellectual property is a relatively new concept, dating back to the mid-nineteenth century. In the twentieth century, it was widely used by corporations for profit. Copyright infringements, previously considered mainly civil offences, have been subject to excessive criminalisation since the late 1980s [14, pp. 25–26].

Information technologies have facilitated the practice of pirating objects and created new forms of lawful distribution of information. Right-holders should not rely on criminal law but look for new ways to adapt to this situation.

Piracy often drives innovation and stimulates the development of science. For example, after gaining independence, the United States deliberately refused to recognise the rights of British book publishers to promote the development of discussion of socially important issues and transfer knowledge to different social

groups and regions. Information companies also have the opportunity to benefit from copyright infringement. For example, the music industry has made huge profits from hip-hop, partly based on illegal borrowing.

In the scientific sphere, the right to production often belongs to publishers rather than authors, even though the author's ideas and new knowledge represent the principal value. Currently, most books and journal articles are available only for a fee.

Now, there are many pirated websites with scientific materials. The most famous is Sci-Hub, created by A. Elbakyan in 2011. Such websites are popular because they solve many problems, including in developing countries with limited free access to scientific information. In addition, pirated websites make it faster and easier to obtain information than publishers' websites, even for those with the right to access the latter's resources.

The difference between theft and copyright infringement is worth noting: the latter does not aim to deprive the authors of their work. Piracy, on the other hand, deprives copyright holders of part of their income. Although publishers do not create scientific works on their own and do not increase their social significance creatively, they certainly invest labour and other resources in them, increasing their value. Piracy can lead to the collapse of the publishing industry, which is currently essential for all researchers.

At the same time, pirated access is the only way for many scientists to obtain scientific articles, as the cost of legal access to them is too high. Pirated copies of scientific articles do not pose any risks, unlike, for example, medicines produced in violation of exclusive rights. Pirated copies of articles are not different from legitimately created ones.

Piracy in the scientific field does not solve the problem of access to scientific information. This signal indicates the need to change the current approach to copyright protection. Today, the scientific community's efforts should be directed at creating a system of free and open communication between researchers [15, p. 28]. The work of publishers can be financed in other ways, mainly by charging for the preparation of an article for publication.

Conclusions. The constitutional regulation of intellectual property rights in foreign countries can be found in the works of comparative and constitutional law scholars. They provide examples from a large number of constitutions, determine the impact of the concepts of intellectual property prevailing in civil law on the constitutional regulation of the respective countries, analyse specific provisions of foreign constitutions, and attempt to identify the main stages of evolution of the constitutional regulation of intellectual property rights. However, it is only the initial stage of studying this vast and diverse issue.

The experience of developed countries and international legal standards on legal regulation of intellectual property allows us to note the following trends in developing the legal framework of intellectual property rights. They include the transition from consideration of intellectual rights in the context of cultural rights and freedoms to the consolidation and interpretation of intellectual rights in the context of economic rights and freedoms and recognition of the interconnection of intellectual rights with information rights and freedoms.

The development of information technology has significantly facilitated access to intellectual property and simplified the commission of offences in this area.

In recent decades, various countries have introduced new criminal law prohibitions to protect intellectual property and increased sanctions for their violation. Nevertheless, many researchers argue that the current approach is not socially relevant or practical, believing that the changed world requires other solutions. They point to the high costs of excessive criminalisation, difficulties in identifying perpetrators, conflict of jurisdictions, the existence of alternative ways of copyright protection, and the need to ensure free access to information in the modern world.

REFERENCES

1. Malets, M. R. (2016). ***The concept and content of the innovative component in intellectual activity.*** *Administrative law and process: Problems and prospects for development:* proceedings of the round-table, pp. 40–43. [In Ukrainian];

2. Shkarupa, V., & Tsymbaliuk, V. (2006). ***Application of legal provisions to forming the foundations of the theory of information law.*** *Legal Informatics*, *3*(11), 46–53. [In Ukrainian];

3. Geist, M. (2001). ***Old copyright law and new technologies: Canadian copyright reform in the digital age.*** *Michael Geist's Blog*. Retrieved from http://www.michaelgeist.ca/content/view/791/139// [In English]

4. Federal Trade Commission. (2003). ***To promote innovation: The proper balance of competition and patent law and policy.*** Washington, DC: Government Printing Office. [In English]

5. Derieux, E., & Granchet, A. (2010). ***Lutte contre le téléchargement illégal: Loi Dadvsi et Hadop***. Sa Lamy, p. 266. [In English]

6. Harhoff, D., & Wagner, S. (2005). ***Modelling the duration of patent examination at the European Patent Office*** (CEPR Discussion Paper No. 5283). Centre for Economic Policy Research. [In English]

7. The Editors of Encyclopedia Britannica. (2020). ***Digital rights management. Encyclopedia Britannica.*** Retrieved from https://www.britannica.com/topic/digital-rights-management. [In English]

8. Romaniuk, I. M. (2010). ***Domestic legislation in the field of criminal legal protection of intellectual property.*** *Customs Affairs*, *4*(2), 73–77. [In Ukrainian];

9. ***Opinion on the Draft Constitution of Ukraine***. (1996). Retrieved from http://www.venice.coe.int/ webforms/documents/?pdf=CDL-INF%281996%29006-e. [In Ukrainian];

10. Androshchuk, H. O. (2022). ***Intellectual property as a factor in ensuring China's national economic security***. *Chinese Civilization: Traditions and Modernity*: proceedings of the XVI International Scientific Conference, vol. 1, pp. 81–101. [In Ukrainian];

11. ***Constitution of the United States of 1787.*** Retrieved from https://uk.wikisource.org/wiki/; Bill of Rights of the United States 1791. Retrieved from https://constituante.livejournal.com/11694.html. [In English]

12. ***Dowling vs. United States***, 473 US 207. (1985). Retrieved from https://caselaw.findlaw.com/us-supreme-court/473/207.html. [In English]

13. Tatsii, V. Ya. (2008). ***Current issues in developing domestic constitutionalism at the present stage of state building.*** *Bulletin of the Academy of Legal Sciences of Ukraine*, *3*(54), 35–42. [In English]

14. Zabokrytskyi, I. I. (2018). ***On the main characteristics of modern constitutions***. *Comparative and Analytical Law: Electronic Scientific Edition*, *1*, 50–54. [In Ukrainian];

15. Butnik-Siverskyi, O. (2005). ***Heuristics in the intellectual economy or the formation of an innovation entrepreneurship system.*** *Intellectual Property*, *8*, 29–34; *9*, 27–32. [In Ukrainian];

Дата надходження статті: 02.08.2024

Marta MALETS
Національний університет "Львівська політехніка",
доцент кафедри адміністративного та інформаційного права
Навчально-наукового інституту права,
психології та інноваційної освіти,
кандидат юридичних наук
marta.r.malets@lpnu.ua
ORCID: 0000-0002-9129-3608

МІЖНАРОДНО-ПРАВОВІ СТАНДАРТИ ЩОДО ПРАВОВОГО РЕГУЛЮВАННЯ СФЕРИ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ: ЗАРУБІЖНИЙ ДОСВІД

Одержання охорони інтелектуальної власності, у різних країнах світу до XX століття вважалося не легким завданням, оскільки, законодавче регламентування даного процесу досить відрізнялося одне від одного. Саме тому все більше держав бажало систематизувати та виробити

єдиний підхід до правового регулювання об'єктів інтелектуальної власності саме на міжнародному рівні.

Поява міжнародного законодавства з інтелектуальної власності пояснюється тим, що права на результати інтелектуальної діяльності мають властивість "територіальної обмеженості", тобто за відсутності міжнародних угод вони визнаються та охороняються лише на території держави, де вони первинно з'явилися.

Саме на прагненні подолати вказану суперечність заснована міжнародна система нормативно-правового регулювання суспільних відносин, пов'язаних зі створенням і використанням результатів інтелектуальної діяльності. Вона взаємодіє з національними системами охорони інтелектуальної власності, забезпечуючи права творчих осіб за межами їх держав.

У стаття підкреслено, що з урахуванням інтенсифікації міжнаціональних економічних і культурних зв'язків, особливого значення набуває уніфікація законодавства в сфері інтелектуальної власності. Ухвалення міжнародних угод вирішує цю проблему тільки частково. Аналіз показує, що розвиток міжнародно-правового інструментарію не сприяє, а іноді й стримує розвиток права інтелектуальної власності, оскільки його основою слугує панівна парадигма, згідно з якою забезпечення високого рівня правового захисту інтелектуальних прав є основним критерієм оцінки законодавства.

У статті досліджено сучасний стан суспільних відносин у сфері права інтелектуальної власності, динаміку міжнародно-правового регулювання, а також особливості законодавчого пристосування до сучасних пріоритетів розвинутих країн світу в даній галузі.

Ключові слова: міжнародне право інтелектуальної власності; досвід США; захист інтелектуальної власності; правове регулювання; інтелектуальна власність.