

АКТУАЛЬНІ ПРОБЛЕМИ ПРАВА ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ: ЗАХИСТ АВТОРСЬКИХ ТА СУМІЖНИХ ПРАВ ВІД КОНТРАФАКЦІЇ, ПІРАТСТВА ТА ПЛАГІАТУ

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TO THE PROBLEM OF BOOTLEGGING

Especially with the rise of digital technologies and Internet file sharing networks intellectual piracy, including counterfeiting, has become a growing threat for the globe. On the one hand, cutting-edge devices offer new opportunities for performers providing ready access to wider audiences. But on the other hand, they also bring new challenges. Unlimited numbers of virtually identical high quality copies can be cheaply made and quickly distributed throughout the world in tangible form in either CDs or in electronic form, via the Internet. The increased ease of dissemination, copying and accessibility offered by the digital environment impacts on the ability of performers to control and benefit from their creative endeavours. According to the study of Counterfeiting Intelligence Bureau (CIB) of the International Chamber of Commerce (ICC) counterfeit goods make up 5 to 7% of the world trade. The music industry loses about \$ 5 billion every year to piracy worldwide, including only physical product, – \$ 1 million a day in the United States alone. Distribution of counterfeit and pirated goods in world markets cause damages to copyright owners as well as reduce both job opportunities and tax revenues at state and local levels.

In order to success in combating counterfeiting and piracy it is necessary to link the considerable resources and efforts of the private sector with law enforcement partners on local, state and international levels. At the same time an appropriate theoretical basis should be established. This demonstrates the relevance and timeliness of research on strengthening intellectual property rights protection and the fight against their infringements.

Many publications of Ukrainian and Russian lawyers have dealt with both theoretical and practical aspects of the struggle against piracy and counterfeiting, among them works of O. Chumachenko, O. Dvoryankina, A. Galchenko, K. Guryanova, A. Kovalya, A. Nersesyan, S. Panova and others. However, the problem of bootlegging as a form of piracy in its wider sense hasn't been taken up properly.

The aim of this article is to provide a general overview of bootlegging problem.

To achieve this goal the following tasks are stated:

- to make a distinction between bootlegging and other forms of piracy;
- to analyze international anti-bootlegging law.

Taking into consideration the international law enforcement practice, the concept of piracy should be treated as any illegal use of copyright and related rights. As it is noted in the study, prepared by Darrell Panethiere for the 13th Session of the Intergovernmental Copyright Committee, in its wider sense, and as often spoken of in the popular press, "piracy" may also refer to acts of «bootlegging» (the making of an unauthorised recording of a live performance) and of «counterfeiting» (selling works made to resemble a genuine copy, as by replicating the label, the packaging, or the recording itself) [1]. Although «bootlegging» is sometimes used as a generic term to refer to the combination of the three categories: counterfeiting, pirating, and classic bootlegging [2, p. 4]. It is rather difficult to agree on this point of view. Interestingly enough, in the domestic legal doctrine the term «bootlegging» is rarely used.

First of all, it is necessary to define the terms «bootleg» and «bootlegging» that are often used to refer to a wide range of things. Most of the less informed people within the intellectual property rights consider the terms «piracy», «counterfeiting», «bootlegging» and their derivatives as interchangeable words, which is incorrect. As it was noted, record companies often lump all together under the generic category of «piracy» but this is to blur rather than clarify. Indeed, bootleggers often have the indignity of having all pirate recordings referred to as «bootlegs», a misconception regularly reinforced by the media [3, p. 160].

Historically the word «bootleg» originates from the practice of smuggling illicit items (particularly alcohol in the legs of tall boots during the U.S. Prohibition era). Over time, people started to use it to refer to anything that is illegal, unauthorized, illicit or unregulated.

In 1985 the U.S. Supreme Court gave such a definition of bootlegging: «A bootleg phonorecord is one which contains an unauthorized copy of a commercially unreleased performance» [4]. According to the title 17, United States Code, section 101 «phonorecords» is a term of art in copyright law, which not only includes records, but also any «material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device». The term «phonorecords» includes the material object in which the sounds are first fixed [5].

Unlike counterfeit CDs, which are copied from officially released albums or soundtracks, bootleg ones are made from commercially unavailable material (unrecorded songs, live concerts, gigs, private or professional recording sessions etc.). Outtakes, which mean unreleased alternative versions of songs that were officially released, or songs that have not been officially released by the artist or record label, can also be bootlegs. As a more common term for both counterfeit and bootlegged products can be used «illegal copies». A big amount of bootlegged recordings, record albums are produced and then distributed among fans of the artist without any financial gain. In this case we shouldn't talk about piracy which involves only commercial infringement of intellectual property rights. But sometimes bootleggers are aimed at selling their products trying to add professional-quality sound engineering and package them to the raw material. Just this kind of bootlegging being done for profit is harmful for artists or record companies when they happen to be the holders of an exclusive recording contract.

The term «counterfeiting» may be used in a broad and narrow sense. In the first case, the counterfeiting should be understood as manufacturing of products and/or introducing into civil turnover goods with violation of copyright and related rights as well as industrial property rights and rights on the means of individualization of merchandise turnover subjects, goods and services. In the second – only a violation of copyright and related rights while reproducing, publishing or distributing of the relevant intellectual property objects. Counterfeit products imitate as closely as possible appearance of the original product with the use of trade marks and logos of the record label so that consumers are misled to believe that they are purchasing original product.

In its turn bootlegging can be defined as the commercial recording, reproduction and distribution of live or broadcast performances, which have never been released officially, without the consent of either performers or record companies. Bootleg is a result of the entire activity. Specifically, bootlegging may

be broken down into four elements: the (1) unauthorized, i.e. by someone other than the artist, (2) fixation, i.e. recording, (3) of a live musical performance (4) for the purpose of commercial gain [6, p. 374].

Unauthorized recording of live performances either directly at a concert or indirectly from a live broadcast is frequently regarded as «classic» bootlegging; it is also called live bootlegging, or audience recording. Since portable technology became available to the masses this kind of bootlegging has expanded easily. There are two types of bootleg recordings, Digital Audio Tapes (DATs) and Soundboards. DATs though similar to cassette tapes in appearance are more expensive and do not record «air noise». Still one gets more of the crowd than the music on tape, so only concertgoers tend to use this method. Soundboards are the alternative. Bootleg companies purchase these, because of the superior near-studio quality sound. Basically, a soundboard is the audio that enters the microphones on stage, and is stored digitally on a special recording device called soundboard. This method tends to pick up more of the music and less of the audience [7, p. 428].

Besides, it is stated that recordings of live concerts come from two possible sources: audience recordings and line recordings. A line recording is one which has been recorded directly from a feed from the concert so there is no background noise on the recording. Line recordings are often incorrectly referred to as «soundboard» recordings. Indeed, «soundboard» has come to refer to all recordings which are not audience recordings. Literally, a soundboard recording would be one that has been made directly from the output of the mixing desk at

a concert. Soundboard tapes are made either by the mixing engineer or his assistant, either for the artist or for their own amusement [3, p. 166].

As it is stated in the literature, development of legislative support for the rights in performance was caused by the problem of bootlegging and the necessity to combat it. Sound recordings have been protected by copyright in the UK since 1911, whereas in the USA there wasn't any protection of sound recordings until 1972 because of constitutional provisions under which the phonogram (the technical copyright expression for record or CD) was discounted from being considered a «writing». This was affirmed in the 1909 Copyright Act that did not grant protection to sound recordings because records are not literary or artistic creations, but mere uses or applications of creative works in the form of physical objects [3, p. 158]. In the 1980s there was a great increase in the distribution of bootleg recordings because of the audio cassette and videotapes. Therefore, the US anti-bootlegging law has significantly strengthened during the 1990s.

Apart from the national legislative, there has been the formation of international anti-bootlegging law including multilateral treaties which seek protection of related rights (also called neighbouring rights) of performers, producers of phonograms and broadcasting organizations.

Under the Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886, only works that are fixed in a tangible form are protected. Also, any sound or visual recording shall be considered as a reproduction of literary and artistic works for the purposes of this Convention. Authors are enabled to authorize the reproduction of their works, in any manner or form. Besides, authors of dramatic, dramatico-musical and musical works were given the exclusive right of authorizing the public performance of their works, including such public performance by any means or process and any communication to the public of the performance of their works as well. Any special protection for the performer's rights wasn't provided.

A minimum guaranteed protection for performers, producers of phonograms and broadcasting organizations was established in the International Convention for the protection of performers, producers of phonograms and broadcasting organizations (hereinafter the Rome Convention), entered into force on 18 May 1964. Under its Article 7, performers are granted the possibility of preventing the carrying out of certain acts with their performances undertaken without their consent – broadcasting and communication to the public except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is

made from a fixation; fixation of their unfixed performance and reproduction of such fixation. It should be noted that according to the Rome Convention, a phonogram is any exclusively aural fixation of sounds of a performance or of other sounds.

The same provisions were reproduced in the Agreement on Trade-Related Aspects of Intellectual Property Rights («TRIPS»), entered into force on 1 January 1995. But the term of the protection available under this Agreement to performers was extended up to 50 years in comparison with a term of 20 years provided by the Rome Convention. Besides, disputes relating to copyright and related right appeared to be under the jurisdiction of the World Trade Organization.

The international protection of the rights of performers and phonogram producers in the wake of global developments in digital technology was further ensured by the WIPO Performances and Phonograms Treaty (WPPT), adopted on 20 December 1996 and entered into force on 20 May 2002. The WPPT updated the protections of “neighbouring rights” owners with the intention of harmonizing them with the conflicting copyright protection systems that have developed around the globe [8]. Under the Article 6 performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances. A term of 50 years is also stipulated for the protection of these rights. “Communication to the public” is defined in the Article 2 as the transmission to the public by any medium otherwise than by broadcasting, of the sounds of a performance, or the sounds fixed in a sound recording. No distinction is made in this Article between audio or audiovisual means of broadcasting, transmission by cable or by making the first recording of the performance.

In order to strengthen the economic rights of film actors and other performers and as a result of 12-year negotiations held under WIPO auspices, the Beijing Treaty on Audiovisual Performances was adopted on 26 June 2012. This document provides audiovisual performers with the same rights in their unfixed performances as provided to phonogram performers in Article 6 of the WPPT: the authorization of performers to the audio or audiovisual broadcast and wired transmission of their live performances is required. It should be noted that the draft of the Treaty on Audiovisual Performances originally restricted the exclusive right to authorize the first fixation of a performance to audiovisual fixations. An agreement to include the first fixation of performanc-

es in both audio and audiovisual media was made at the Diplomatic Conference on the Protection of Audiovisual Performances.

To sum up, it should be noted that bootlegging remains a persistent problem throughout the world. Sometimes bootlegging, however, is not viewed as a major problem for the entertainment industry because of minimal economic significance of bootlegs. In this case the rise in volume bootlegging, involving classic bootlegging, on an international scale should

be considered. Changing technologies have had a great impact on the recording, distribution, and varying profitability of the bootlegging industry. Bootleg recordings should be understood as the unauthorized recording of a musical broadcast on radio or television or of a live concert.

In the subsequent research it seems to be prospective to analyze how bootlegging is addressed in specific countries in relation to their domestic intellectual property law.

LITERATURE

1. Panethiere D. The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development [Electronic source] / D. Panethiere // UNESCO e-Copyright Bulletin. — July–September 2005. — 19 p. — Access mode : http://portal.unesco.org/culture/en/files/28696/11513329261panethiere_en.pdf/panethiere_en.pdf.
2. Jerry D. Brown. U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy to Bootleggers [Electronic source] / Jerry D. Brown // Loyola of Los Angeles Entertainment Law Review. — 1995. — Vol. 16. — 67 p. — Access mode : <http://digitalcommons.lmu.edu/>.
3. Marshall Lee Keith Richard. Loosing One's Mind: Bootlegging and the Sociology of Copyright [Electronic source] / Lee Keith Richard Marshall // — University of Warwick, Department of Sociology, 2001. — 269 p. — Access mode : http://wrap.warwick.ac.uk/3068/1/WRAP_THESIS_Marshall_2001.pdf.
4. Dowling v. United States, 473 U.S. 207, 209 n.2 (1985) [Electronic source]. — Access mode : <http://supreme.justia.com/cases/federal/us/473/207/case.html>.
5. The Code of Laws of the United States of America [Electronic source]. — Access mode : <http://www.law.cornell.edu/uscode/text>.
6. Giuliano A. Steal this Concert? The Federal Anti-bootlegging Statue Gets Struck Down, but not Out [Electronic source] / A. Giuliano // Vanderbilt Journal of Entertainment & Practice. — 2005. — Vol. 7, Issue 3. — P. 373 — 379. — Access mode : http://www.jetlaw.org/?page_id=8558.
7. Lawrence H. Bootlegging — Its Impact on Sound Recording Industry and Legal Responses [Electronic source] / H. Lawrence // Journal of Intellectual Property Rights. — 2006. — Vol. 11. — P. 424 — 429. — Access mode : [http://nopr.niscair.res.in/bitstream/123456789/3607/1/JIPR%2011%20\(6\)%20424-429.pdf](http://nopr.niscair.res.in/bitstream/123456789/3607/1/JIPR%2011%20(6)%20424-429.pdf).
8. Carol M. Morrissey. WIPO Legislative Update [Electronic source] / Carol M. Morrissey // CongressLine. — 22 May 1997. — Access mode : <http://www.llrx.com/congress/052297.htm>.

SUMMARY

Pozova D.D. To the problem of bootlegging. — Article.

In the article the issue of bootlegging as a form of piracy taken in its wider sense is discussed. The focus of this study is upon the international aspects of this problem. The distinction between bootlegging and other forms of piracy is examined. Bootlegging is defined as the commercial recording, reproduction and distribution of live or broadcast performances, which have never been released officially, without the consent of either performers or record companies. The article will discuss provisions of the international agreements which have been drafted and signed in response to the problem.

Keywords: intellectual property rights protection, bootlegging, bootleg, intellectual piracy, counterfeiting, performer's rights, international anti-bootlegging law.

АННОТАЦИЯ

Позова Д.Д. К проблеме бутлегерства. — Статья.

В статье рассматривается вопрос бутлегерства как одной из форм пиратства, рассматриваемого в его широком смысле. Данное исследование сфокусировано на международных аспектах этой проблемы. Изучается различие между бутлегерством и другими формами пиратства. Бутлегерство определяется как коммерческая запись, воспроизведение и распространение незафиксированных исполнений, которые никогда официально не выпускались, совершенные без согласия исполнителей или звукозаписывающих компаний. В статье рассматриваются положения международных соглашений, разработанных и подписанных в ответ на данную проблему.

Ключевые слова: защита прав интеллектуальной собственности, бутлегерство, бутлег, интеллектуальное пиратство, контрафакция, права исполнителя, международное анти-бутлегерское право.

АНОТАЦІЯ

Позова Д.Д. Щодо проблеми бутлегерства. — Стаття.

У статті розглядається питання бутлегерства як однієї з форм піратства, взятого у його широкому розумінні. Дане дослідження сфокусовано на міжнародних аспектах цієї проблеми. Вивчається відмінність між бутлегерством та іншими формами піратства. Бутлегерство визначається як комерційний запис, відтворення і поширення незафіксованих виконань, які ніколи офіційно не випускалися, здійснені без згоди виконавців або звукозаписних компаній. У статті розглядаються положення міжнародних угод, які були розроблені та підписані у відповідь на дану проблему.

Ключові слова: захист прав інтелектуальної власності, бутлегерство, бутлег, інтелектуальне піратство, контрафакція, права виконавця, міжнародне анти-бутлегерське право.