

## STAGES OF LEGAL REGULATION OF INFORMATION

### INTERMEDIARIES IN THE USA

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**Abstract.** The study of the formation of legal regulation of information intermediaries should begin with the United States. Firstly, it was in the United States that the Internet information and telecommunications network was developed. Accordingly, it was in the United States that the first information intermediaries began to appear, and subsequently the first legal disputes with their participation. Secondly, it was in this country that legal regulation of information intermediaries first arose. Subsequently, the US experience served as the basis for the introduction of this institution in other countries (for example, in the legislation of the EU countries). In turn, the study of the process of introducing the institution of information intermediaries into US legislation will provide an opportunity to better understand the reasons for the emergence of this regulation, as well as the need to improve it at present. The study of the stages of development of legal regulation of information intermediaries in the United States has significant theoretical and practical value. Based on the above, the relevance of this study is obvious.

**Keywords:** information intermediary, Internet provider, Internet service provider, intellectual property in the USA, Internet.

Since about 1991, the Internet has been rapidly popularizing due to the introduction of the World Wide Web, the spread of personal computers, browsers, and the emergence of Internet providers. The emergence of Internet sites has become a new milestone in the history of Internet development. Firstly, the site itself was an object of legal regulation. Secondly, sites launched the era of the commercial Internet, as each company tried to have its own representation on the global network (the site provided new opportunities for advertising, concluding deals, and other interactions with partners and clients). For a certain period of time, sites with mainly introductory material ("business card sites") dominated the Internet. Basically, these were relatively simple in content and structure one-page sites, without the ability for users to upload any material to them. Consequently, sites were created and edited only by site owners. The specified period of time from approximately 1991 to 2005 is often



referred to in literature as the era of "Web 1.0" or, alternatively, "Internet 1.0". However, already within the framework of the "Internet 1.0" period, the problem of determining the liability of information intermediaries or Internet providers (this name is used in the USA) emerged. Thus, questions of determining the liability of Internet providers in the USA arose long before legislative regulation. Thus, the case of "Stratton Oakmont Inc. vs. Prodigy Services Co."<sup>1</sup> is significant. The company Prodigy Services provided an Internet bulletin board service (Prodigy's). An anonymous user posted information on the bulletin board that was allegedly defamatory in relation to the company's top manager. The US Supreme Court in New York issued a decision stating that online service providers (information intermediaries) can be held liable for the speech of their users if they exercise editorial control over the posted material. This decision contradicted the aforementioned decision in the *Cubby Inc. Vs CompuServe Inc.* However, the court held that Prodigy Services was engaged in the selection of content and exercised editorial control over it, and therefore should be held liable. The results of this case are central to the justification for the adoption of Section 230 of the US Communications Decency Act<sup>2</sup> of 1996, which is aimed at allowing Internet service providers to avoid liability for user content, but at the same time provide the means to remove it. It is worth noting that in the United States, lawsuits for copyright infringement on the global network began to be considered almost simultaneously with the spread of the Internet. This is due to the fact that the Internet itself originated in the United States, and the specifics of the lawsuits corresponded to the level of development of the Internet itself. For example, as already noted, the first court cases were related to the posting of content on forums and message boards. This is due to the fact that forums and message boards were the most popular among users. For example, in 1993, in the case of *Playboy Enterprises v. Frena*<sup>3</sup> the district court held that posting a copyrighted image publicly on a bulletin board without the permission of the copyright holder infringes the copyright holder's right to distribute the work. In total, 170 images were at issue in this case. Interestingly, the court made extensive use of the term "piracy" in this situation, which soon became commonplace in the

<sup>1</sup> Stratton Oakmont Inc. vs. Prodigy Services Co. [Электронный ресурс]: URL: <https://h2o.law.harvard.edu/cases/4540> (дата обращения: 14.03.2020).

<sup>2</sup> Telecommunications Act of 1996 [Электронный ресурс]: URL: <https://www.gpo.gov/fdsys/pkg/PLAW104publ104/pdf/PLAW-104publ104.pdf> (дата обращения: 14.03.2020).

<sup>3</sup> Playboy Enterprises v. Frena [Электронный ресурс]: URL: <https://www.copyright.gov/title17/92chap1.html#102> (дата обращения: 14.01.2020).



Internet industry. In this case, the administrator of the bulletin board, George Frena, was held liable. George Frena himself claimed that the images were uploaded by users of the site, and that he promptly removed the images upon receiving a subpoena. However, despite George Frena's alleged lack of knowledge regarding the copyright infringements occurring on his bulletin board, the court ruled that he had infringed the copyright in the images taken from Playboy magazine. In "Sega Enterprises Ltd. V. Maphia"<sup>4</sup> in 1994, another federal district court held that uploading a copyrighted work to a bulletin board constitutes the creation of unauthorized copies of the work. In addition, this case is interesting because it already reflects the problem of liability of information intermediaries - this is emphasized by the court's attention to the fact that users also violated copyright, and the information intermediary knew about this and facilitated this infringing activity. Consequently, already at the early stage of the Internet development ("Web 1.0"), questions related to the liability of the information intermediary arise. In turn, the technological breakthrough in connection with the spread of information and telecommunications networks was so rapid that proper legal regulation had not yet been developed and implemented. Questions of the liability of information intermediaries arise in defamation disputes and disputes related to intellectual property. In turn, the first court cases in the United States are not characterized by uniformity, as well as the establishment of clear grounds for exempting the information intermediary from liability. However, certain prerequisites for legislative regulation had already been formulated. Thus, the immunity of information intermediaries from liability for the actions of users, subject to certain conditions, had already been applied by the courts. Thus, this stage in the history of the development of the institution of information intermediaries can be designated as "the stage of the emergence of prerequisites for the legal regulation of the institution of information intermediaries." This stage has a time frame from approximately 1990 (the first court cases) to 1996 (the adoption of special legislation).

Centralized legislative regulation of relations on the Internet began with the adoption of the already mentioned Communications Decency Act (CDA) within the

<sup>4</sup> Sega Enterprises Ltd. V. Maphia [Электронный ресурс]: URL: <https://www.gpo.gov/fdsys/pkg/PLAW-104publ104/pdf/PLAW-104publ104.pdf> (дата обращения: 14.03.2020).



framework of the Telecommunications Act of 1996<sup>5</sup>. This law was primarily aimed at regulating pornographic materials on the network. The said regulatory act, signed by US President Bill Clinton in February 1996, provides for criminal liability for the transmission of "obscene" materials to persons under 18 years of age and the demonstration of "patently offensive" materials and messages to minors. This Law affects not only the authors of "obscene" material, but also Internet providers, if they have not introduced technical barriers to access for minors. It is worth noting that this law was a landmark in the USA. First, it caused a stir in society, as the provisions of the law were perceived as open censorship of the Internet. The provisions of the law were considered negative and directed against freedom of speech on the Internet. The reason was the vague wording of the law "obscene" and "patently offensive". Nevertheless, the well-known Section 230 of the said law was left in force. Section 230 provides immunity from liability for providers and users of "interactive computer services" that publish information provided by third-party users: "no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider"<sup>6</sup>. Section 230 was created in response to a pair of lawsuits against Internet service providers in the early 1990s (such as the aforementioned Stratton Oakmont Inc. vs. Prodigy Services Co.), which had different interpretations of whether service providers should be considered publishers or distributors of content created by their users. It is worth noting that the provisions of the law are mainly applied in defamation disputes and do not extend to intellectual property relations. In addition, in the future, US law will be supplemented by a law regulating intellectual property issues on the Internet and the liability of service providers.

Thus, a particularly significant event was the adoption of the famous Digital Millennium Copyright Act (DMCA) in the United States in 1998<sup>7</sup>. Firstly, it was the Digital Millennium Copyright Act (DMCA) that established the concept of an information intermediary or Internet service provider. Thus, an Internet service provider is "an entity that transmits, routes, or provides connections for the digital transmission of material without changing the material. In turn, the material and the

<sup>5</sup> omunications Decency Act of 1996 [Электронный ресурс]: URL: <https://www.fcc.gov/general/telecommunications-act-1996> (дата обращения: 14.01.2020).

<sup>6</sup> Telecommunications Act of 1996 [Электронный ресурс]: URL: <https://www.gpo.gov/fdsys/pkg/PLAW104publ104/pdf/PLAW-104publ104.pdf> (дата обращения: 14.03.2020).

<sup>7</sup> igital Millenium Copyright Act [Электронный ресурс]: URL: <https://www.copyright.gov/title17/92appb.html> (дата обращения: 14.01.2020).



points of departure and delivery are determined by the user. An Internet service provider will also be a person providing digital services for the provision of access to the network, as well as an operator of the relevant equipment”<sup>8</sup>. In addition, the law identified certain categories of Internet providers: persons engaged in data transmission activities; persons engaged in caching activities; persons engaged in material placement activities; persons engaged in information retrieval activities (search engines, hyperlinked sites). Secondly, the Digital Millennium Copyright Act (DMCA) established the so-called "safe harbor clauses". Thus, an Internet service provider will not be liable for infringement of intellectual property rights if certain conditions are met. In turn, the law establishes its own conditions of exemption from liability for each category of information intermediaries. For example, "a provider placing material on the network will not be liable for infringement of intellectual property rights if the following conditions are met: he does not have actual knowledge that the material infringes a person's rights; in the absence of such actual knowledge, is not aware of the facts or circumstances from which the infringement of rights appears; or after receiving such knowledge or awareness, promptly takes steps to remove or disable access to the materials; does not receive a financial benefit directly related to the infringing activity, if the service provider has the right and ability to control such activity; and, upon notification of a claimed violation as described in paragraph (3), promptly responds by removing or blocking access to materials that are alleged to be infringing or the subject of infringing activity” [8]. It is worth noting separately that the Digital Millennium Copyright Act (DMCA) has influenced the legislation of other countries.

The DMCA model has become the basis for international practice of legal regulation of relations involving information intermediaries. For example, based on the analysis of the norms of American legislation, it can be noted that it is similar to the domestic legal regulation of information intermediaries.

Based on the above, several stages can be distinguished in the history of the development of legal regulation of information intermediaries in the United States. Thus, issues of determining the liability of Internet providers in the United States arose long before legislative regulation and were considered in court cases. Therefore, the first stage in the history of the development of the institution of

<sup>8</sup> U.S. Code § 512 [Электронный ресурс]: URL: <https://www.law.cornell.edu/uscode/text/17/512> (дата обращения: 14.03.2020).



information intermediaries is the "stage of the emergence of prerequisites for the legal regulation of the institution of information intermediaries." This stage has a time frame from approximately 1991 (the first court cases) to 1996 (the adoption of special legislation). The second stage is the "stage of the emergence of legal regulation of the institution of information intermediaries." This stage has a time frame from approximately 1996 (the adoption of special legislation) to the present. This stage began with the adoption of Section 230 of the Communications Decency Act (CDA), which is applied mainly in defamation disputes and does not regulate issues of liability for violation of intellectual property rights. However, the most important event in this phase was the adoption of the famous Digital Millennium Copyright Act (DMCA) in the United States in 1998. Firstly, this law established the first legal definition of an information intermediary in the world, and also established the classification of information intermediaries. Secondly, the law established provisions on a "safe harbor" that limited the liability of an information intermediary. In short, these provisions can be described as providing "immunity to Internet providers." In addition, the DMCA served as a kind of prototype for provisions on information intermediaries in other countries.

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