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CRIMINAL AND LEGAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS

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SUMMARY

The author explores criminal responsibility for copyright and related rights violation in the article. The author considers that an important feature of crimes against intellectual property rights is their criminal misconduct, which indicates the illegality of such acts and their foreseeability in the criminal law. The article analyzes the criminal misconduct of criminal acts, which are closely related to social danger and are a subjective manifestation of the real danger of an act for public relations that has developed in the field of intellectual property and its legal assessment. Some criminological aspects of the criminalization of these crimes are also considered.

Key words: copyrights, intellectual property, copyright objects, related rights, criminal liability.

КРИМІНАЛЬНО-ЮРИДИЧНИЙ ЗАХИСТ АВТОРСЬКИХ ПРАВ І ПОВ'ЯЗАНИХ З НИМИ ПРАВ

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АНОТАЦІЯ

У статті автором досліджено кримінальну відповідальність за порушення авторських і суміжних прав. Автор зазначає, що важливою ознакою злочинів проти інтелектуальної власності є їх кримінальна протиправність, яка вказує на протизаконність таких дій і передбачуваність їх у кримінальному законі. У статті проаналізовано кримінальну протиправність таких злочинних діянь, які тісно пов'язані із суспільною небезпекою і є суб'єктивним проявом реальної небезпеки діяння для суспільних відносин, що склалися в сфері інтелектуальної власності та її законодавчого оцінювання. Також досліджені окремі кримінологічні аспекти криміналізації зазначених злочинів.

Ключові слова: авторське право, інтелектуальна власність, об'єкти авторського права, суміжні права, кримінальна відповідальність.

Introductory part (introduction). Copyright is the personal non-property and proprietary rights of authors, their successors, as well as other natural and legal persons who acquired rights to works in accordance with a contract or law. The content of these rights is described in detail in Articles 423, 438, 440 of the Civil Code, articles 14, 15 of the Law "On Copyright and Related Rights".

According to Art. 433 of the Central Committee and Art. 8 of the Law of 23 December 1993 "On Copyright and Related Rights" objects of copyright are works, namely: 1) literary and artistic works, including written, oral, stage, musical, audiovisual, photographic works, and also works of painting, architecture, sculpture, graphic arts, applied art, etc.; 2) computer programmes; 3) compilation of data (databases), if they are the result of intellectual activity by selecting or streamlining their constituent parts; 4) other works. The works are subject to copyright without performing any formalities regarding them and regardless of their completeness, purpose, values, etc., as well as the manner or form of their expression.

The presentation of the main material. Copyright does not apply to ideas, processes, methods of activity or mathematical concepts as such. In addition, according to Art. 434 of the Central Committee, Art. 10 of the Law "On Copyright and Related Rights" the following objects *are not objects of copyright*: 1) acts of state authorities and local self-government bodies (laws, decrees, resolutions, decisions, etc.), as well as their official translations; 2) state symbols of Ukraine, banknotes, emblems, etc., approved by state authorities; 3) the announcement of news of the day or other facts having the nature of the usual press information; 4) works of folk art (folklore); 5) other works, established by law.

Related rights are the personal non-property and proprietary rights of performers, producers of phonograms, videogram producers, broadcasting organizations, as well as other persons who have acquired such rights in accordance with a contract or law. The content of these rights is described in detail in Art. 452 of the Central Committee, articles 38-41 of the Law "On Copyright and Related Rights".

According to Art. 449 of the Central Committee and Art. 35 of the Law "On Copyright and Related Rights" objects of related rights, regardless of purpose, content, evaluation, method and form of expression, are: a) the implementation of literary, dramatic, musical, musical and dramatic, choreographic, folklore and other works; b) phonograms, videograms; c) transmission (programs) of broadcasting organizations.

The subject of the offense may be the above-mentioned objects of copyright and related rights.

A compulsory feature of the objective aspect of this crime is the illegality of actions envisaged in Part 1 of Art. 176 of the Criminal Code. The peculiarity of the disposition of this norm is its formality, so during the qualification of these actions it is necessary to find out whether they violated the current legislation. Currently, the regulatory framework on copyright and related rights is comprised of a number of international treaties of Ukraine, the Central Committee (chapters 35-37, articles 418-456), and the Laws of Ukraine of December 23, 1993 "On Copyright and Related Rights"; of January 13, 1998 "On Cinematography"; of December 21, 1993 "On Television and Radio Broadcasting"; of June 5, 1997 "On Publishing"; of March 23, 2000 "On the distribution of copies of audiovisual works, phonograms, videograms,

computer programs, databases”, other laws regulating relations in the field of legal protection of personal non-proprietary rights and property rights of copyright and related rights subjects. Some provisions of these legislative acts are explained in the resolution of the Plenum of the Supreme Court of Ukraine №5 of June 4, 2010 “On the application by courts of the norms of legislation in cases on the protection of copyright and related rights” [1].

An important feature of crimes against intellectual property rights is their criminal misconduct, which points to the illegality of such acts and their foreseeability in the criminal law. Criminal misconduct is closely linked to social danger and is a subjective manifestation of the real danger of an act for public relations that has developed in the field of intellectual property and its legal assessment. In addition, criminal wrongdoing is the legal feature of social danger, which is enshrined in the law, and its degree defines the objective boundaries of wrongdoing, which can not raise questions about criminalization. The exclusion of a criminal offense as a mandatory feature of a crime is a concrete expression of the principle of legality in criminal law: only a person who committed a socially dangerous act, which is provided for by the law on a crime, is subject to criminal liability and punishment. The criminal law contains an exhaustive list of crimes. Hence the most important provision – the impossibility of applying a criminal law by analogy with such an act, which is not directly foreseen in it. Part 4 of Art. 3 of the Criminal Code of Ukraine expressly states that the application of the law on criminal liability is prohibited by analogy. The urgent question arises the need to criminalize criminal acts against intellectual property rights, the subject of which are such results of intellectual creative activity as animal breeds and scientific researches (although the doubts about the possibility of criminalization of the last object of intellectual property in the scientific literature are expressed) [2, p. 196]. But so far these types of behavior are not criminalized, and therefore criminal responsibility for them is impossible. Another obligatory feature of crimes against the law and the intellectual property that manifests itself at the time of the commission of the crime and reflects their internal psychological content is guilty. In this sense, the most important principle of criminal law – the principle of subjective criminality, that is, responsibility only in the presence of the guilt arising from Article 62 of the Constitution of Ukraine, is embodied. Part 2 of Article 2 of the Criminal Code of Ukraine consolidated this principle, noting that a person is considered innocent in committing a crime and can not be subjected to criminal punishment until her guilt is proved in a lawful manner and established convicted by court judgment. Thus, the law on criminal liability excludes objective criminality, that is responsibility for the damage caused in the absence of guilt. The guilt according to Art. 23 of the Criminal Code of Ukraine is the mental attitude of a person to the action or inaction which is being committed by her and its consequences, expressed in cases of criminal violation of rights. Features and content of the concept of “crimes against the right of intellectual property” in the form of intent. An offense against intellectual property rights is a unity of objective and subjective: the act and the mental (conscious and willful) attitude towards him. As an act can not be disclosed outside the connection with the mental attitude of the person to him, and the content of mental attitude (guilt) can not be determined outside the context of the nature of the act: the result of intellectual creative activity, which the person infringes, the method of encroachment, consequences and other objective features. The guilt largely determines the nature of the act and the degree of its severity and is an important criterion for recognizing it as a crime. The guilt is sometimes called the second material feature of crime and is its obligatory subjective property. Without guilt there is no crime, and therefore, there

can be no punishment for one or the other act against intellectual property rights. The mark of crimes against intellectual property rights is their punishment, which is understood as the threat of use for the crime of punishment contained in penal sanctions. Punishment, in essence, stems from social danger and a criminal offense: it therefore becomes criminalized because it is socially dangerous and foreseen by a criminal law as a crime. Although the wording of the crime in Part 1 of Art. 11 of the Criminal Code does not contain an indication of punishment as a sign of a crime, it certainly follows from the sign of criminal wrongdoing. Without the imposition of a punishment for a crime that was recognized as a crime, such a confession would have lost any sense. Pointing to Part 2 of Art. 1 of the Criminal Code on the way of carrying out the task before the Criminal Code, the law emphasizes that for its implementation, the Criminal Code determines which socially dangerous acts are crimes and which punishments are applied to the persons who committed them. Without a criminal sanction, it is impossible to fight any crime. However, this does not mean that the penalty provided for in the sanction must necessarily be applied to the person who committed the act, formulated in the disposition of a particular article. A person recognized as a criminal may be released from criminal liability or punishment by a court, as well as by amnesty or pardon. It should be noted that the current Criminal Code of Ukraine is not establishes a relatively small amount of punishment for crimes against intellectual property rights. However, it is enough to compare the most severe sanction for violation of copyright and related rights – imprisonment – in the legislation of Ukraine and the countries that successfully eliminate piracy. So, Art. 176 of the Criminal Code of Ukraine provides for deprivation of liberty to commit the said crime for a maximum up to 2 years, in the United States – up to 10 years, in Poland – up to 5 years, and in Malaysia – up to 20 years [3, p. 45]. According to international experience, it is possible to succeed in combating criminal infringements of intellectual property rights when citizens realize that the state does not allow such violations. In countries where such measures have been applied and backed up by effective punitive sanctions, the violation of intellectual property rights is put under control without noticeable political unrest and the cost of huge government resources [4].

According to official data, the encroachment on intellectual property is about 1% in the structure of economic crime. At the same time, according to experts, the latency of these crimes is 80–90% of the total.

Among the crimes against intellectual property, the most widespread violation of copyright and related rights (77.5%). In the second place – the illegal use of the trademark (15.2%), followed by violations of patent and inventive rights and illegal receipt and disclosure of information constituting commercial secrets (about 4%). Violation of the rights to the results of creative activity in the field of culture and arts is the most massive, requiring taking measures to protect the rights and legitimate interests of creative workers [5].

In modern literature, under the social danger the objective character of acts that entail negative changes in social reality and cause significant damage to social relations is understood. The specificity of social danger lies in its nature and degree. Public danger on certain grounds and conditions is the sole basis for the criminalization of acts. Analyzing theoretical studies, one can notice the different views of criminologists regarding the public danger of crimes in the field of intellectual property. Thus, there is a need to study the criminological aspects of the criminalization of these crimes. First of all, we find out the essence of direct damage caused by the commission of crimes against intellectual property, which has a certain specificity, due to the features of the object to which these crimes are directed. It must

be agreed with V. Kharchenko that the very onset of socially dangerous consequences turns the encroachments in the sphere of intellectual property into a crime, their size and gravity are also a criterion for assessing the accomplished, which allows for delineation of offenses and acts as the most important criterion for the criminalization of these acts. The analysis of 179 archival criminal cases gives grounds to talk about the considerable losses incurred by owners of exclusive intellectual property rights. The aggregate amount of pecuniary damage caused by investigated crimes in the field of intellectual property reached 36,657,007 UAH of which, according to Art. 176 of the Criminal Code of Ukraine (154 criminal cases) – 29 365 097 UAH, and under Art. 229 of the Criminal Code of Ukraine (25 criminal cases) – 7 291 910 UAH. Such damages are confirmed by an examination on each criminal case. In fact, this is a missed benefit to the owners of intellectual property rights, if under normal circumstances their right was not violated. Among the victims are such well-known American companies, as Microsoft, Adobe System, Corel, Adidas Group, Nike International LTD, Kraft Foods Inc. Given the size of direct damage, given the high latency and significant prevalence of crimes against intellectual property, are impressive. Only Microsoft estimates its losses from counterfeit software sales in our state at \$ 200 million. In this regard, it is not surprising that the International Intellectual Property Alliance (IIPA) in its report recognized Ukraine as the number 1 pirate country in the world. But material damage does not cover all the consequences of criminal violations of intellectual property rights.

Conclusions. The existence of this kind of crime leads to significant negative changes in public life and social consciousness that are not measurable. The accumulated negative impact on society of such crime is the state of insecurity of intellectual property rights, which impedes the normal development of social relations regarding the commercialization of intellectual

property rights, and thus leads to the impossibility of the transition of Ukraine's economy from industrial to post-industrial. Consequently, on the basis of the foregoing, it can be argued that the degree of public danger of crimes against intellectual property in the modern world is rather high [6].

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