May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

Compensation for Damage Caused by Crimes related to the use of the Objects of Intellectual Property Rights in the IT-Sphere: ECTHR Practice

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Abstract:
Ensuring effective protection of the rights and legitimate interests of participants in legal relations in the field of IT is an important task of legal regulation. The level of development of measures of influence on violators of intellectual property rights and development of the practice of application of such measures indicates the status of observance of these rights, the range of potential risks and possible ways of their elimination. On this background, it is important to review the case-law of the European Court of Human Rights for redress for damage caused by criminal offenses related to the use of the objects of intellectual property rights in the field of IT and its application by national judicial authorities. The purpose of this paper is to analyze the case-law of the ECtHR for redress for the damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT. The object of the study is the public relations arising from litigation by the ECtHR on compensation for damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT, and the subject of the study is the case-law of the ECtHR on this issue. The research methodology consists of such research methods as induction and deduction methods, analysis method, synthesis method, as well as historical method, system method, modeling and abstraction methods, and comparative-legal method. The study analyzes the ECtHR's practice of redressing the damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT, examines the key positions of the ECtHR's practice in the Ukrainian courts.

Keywords*: protection of rights, redress, intellectual property, crimes, exploitation of the use of the objects of intellectual property rights, IT sphere, case-law of the ECtHR.*

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I. INTRODUCTION

In today's society, most human and business activities are closely linked to the use of information technology, computer systems, and networks. Thus, computers have become an integral part of human life, they store information that underpins the work

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

of an entire enterprise or company, create intellectual property in the field of IT, conduct financial transactions, etc.

The requirement of «information security» means the need to protect «information» as an object of civil rights. In this case, it is about prevention and liquidation of the consequences of active illegal actions of persons who encroach on information, try to distort information, destroy it, etc. (Kharytonov, Kharytonova, Tolmachevska, Fasii, &Tkalych, 2019). Thus, IT activities require enhanced protection against possible cyberattacks and intellectual property attacks, as they are of particular value and interest to cybercriminals. Common types of such crimes related to the objects of intellectual property rights in the field of IT are, for example, Internet piracy, use (without the permission of the owner) of a trademark, company name, geographical indication, etc.

The Criminal Code of Ukraine (2001) (hereinafter referred to as the CC of Ukraine) provides for liability for several infringements of intellectual property rights. Thus, Article 176 of the CC of Ukraine provides for sanctions against copyright infringers, resulting in damage exceeding 100 times the tax-free minimum of citizens' incomes. The composition of this crime is formulated as material. The crime is considered to have been completed since the material damage occurred to a significant amount.

In general, as regards the damage caused by these types of crimes, such damage can be pecuniary and non-pecuniary. Damage to property can be manifested in the form of loss, deterioration or diminution of property value and expenses necessary for restoration, acquisition of lost property. Regarding the damage caused by crimes in the field of information technology, it should be noted that there are certain features related to the object of the criminal attack – in particular, information, property rights. Besides, damages to be recovered include loss of profit, that is, moves that were not received.

Non-pecuniary damage is usually associated with a loss of reputation and such damage must also be properly recorded and calculated in order to further redress in criminal proceedings. The Ukrainian courts have repeatedly considered the issue of damage compensation. However, there is no sufficient practice of redressing the damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT and the consideration of such cases by national courts.

On this background, it is necessary to analyze the case-law of the European Court of Human Rights (hereinafter referred to as ECtHR) on this issue and to highlight the features of the ECtHR's dispute settlement regarding the damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT.

II. METHODOLOGY

One of the methods of researching the issue of the article was the deduction method, which was used to study the general knowledge of the national law system and to determine in it the place of practice of the ECtHR. Also, the induction method was chosen to investigate the substance of ECtHR decisions on redress for offenses related to the use of intellectual property rights in the field of IT because they are a source of national law. The method of analysis helps to investigate the enforcement mechanism in the administration of justice and the use of ECtHR practices in its implementation.

Moreover, in order to identify the specificities of ECtHR decisions on redress for damage caused by offenses related to the use of intellectual property rights in the field of IT, as well as to solve the existing difficulties in applying ECtHR dispute resolution, the synthesis method was applied. In addition, the historical method was used in the analysis of patterns of practice in resolving such disputes.

Furthermore, the systematic method was applied in the analysis of the application of ECtHR

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

practice by national courts to operate a union and sustainable case law. Also, modeling and abstraction methods were used in the process of formulating proposals to the current legislation of Ukraine. The comparative method was used to compare the rules of national law and practice of the ECtHR.

In addition, the following normative-legal acts were analyzed for the study.

1. Constitution of Ukraine (1996).
2. European Convention on Human Rights (1950).
3. Criminal Code of Ukraine (2001).
4. Criminal Procedure Code of Ukraine (2012).
5. Civil Code of Ukraine (2003).
6. Copyright and Related Rights: Law of Ukraine (1993).
7. On the Enforcement of Judgments and the Practice of the European Court of Human Rights (2006).
8. On the Protection of Rights to Marks for Goods and Services: Law of Ukraine (1993).
9. Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No 2, 4, 7 and 11 to the Convention: Law of Ukraine (1997).
10. Judgment of the European Court of Human Rights in the case of Megatad.com SRL v. Moldova, dated 8 April 2008.
11. Judgment of the European Court of Human Rights in the case of Anheuser-Busch Inc. v. Portugal of 11 July 2007.
12. Judgment of the European Court of Human Rights in the case of Smith Kline and French Laboratories Ltd v The Netherlands of 10 July 1991.
13. Judgment of the European Court of Human Rights in the case of Paeffgen GmbH v. Germany of 18 September 2007.
14. Judgment of the European Court of Human Rights in the case of IC EdituraOrizonturi SRL v. Romania, 13 May 2008.
15. Judgment of the European Court of Human Rights in the case of Ashby Donald and Others v. France of 10 January 2013.
16. Judgment of the European Court of Human Rights in the Akdeniz v. Turkey case of 11 March 2014.

III. ANALYSIS OF RECENT RESEARCH

Issues of redress, problems of realization of intellectual property rights, including the ECtHR practice on the compensation of damage caused by crimes related to the use of intellectual property rights in the field of IT, were analyzed by such scientists as Avramova and Razina (2013), Antonyuk (2004), Barbashin (2016), Bezzub (2015), Bocharova (2006), Voloshchenko (2015), Gorkusha (2014), Gurova (n.d.), Demidovich and Prokhorov-Lukin (2012), Ennan (2012), Kalenichenko (2009), Ketrar (2012), Kononenko (2008), Lavrovska (2013), Malkov (2019), Michalsky (2017), Orlyuk (2019), Paliyuk (2003), Selivanov (2017), Tomarov (2018), Fesenko (2016), Khalota (2001), Shishkina (2005), Stefan (2019), and Yakubovsky (2013).

Problems of copyright protection on the Internet are the subject of research in the works of Avramova and Razina (2013). Thus, in their work, the researchers analyzed the problems that arise with copyright protection, identified key points, and suggested solutions. Besides, Antonyuk (2004) analyzed the right of participants of legal relationships to self-defense. Barbashin (2016) drew attention to the protection of the trade name. Moreover, Bezzub (2015) analyzed the measures taken to combat internet piracy in Ukraine, as well as experts' assessments of the effectiveness of such measures. Bocharova (2006) explored the EU intellectual property right and its harmonization with national legislation. Voloshchenko (2015) has analyzed novelties of the intellectual property law of

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

Ukraine in the context of the processes of European integration.

The subject of Gorkusha's (2014) study was the protection of copyright and related rights infringed on the Internet. Gurova (n.d.) developed an algorithm for actions in a cyberattack on business and analyzed peculiarities of recovering property damage.

In addition, Demidovich and Prokhorov-Lukin (2012) analyzed the international experience of copyright and related rights protection in the criminal legislation of some European countries. Ennan (2012) researched the legal protection of intellectual property in the EU, namely the background of formation, current state and trends of development. Kalenichenko (2009) investigated the problems of copyright and related rights protection on the Internet. Ketrar (2012) it also paid sufficient attention to the legal issues of copyright and related rights against piracy on the Internet and explored the practice of the ECtHR in this regard.

Moreover, Kononenko (2008) analyzed the customary legal nature of the precedent character of ECtHR decisions. Lavrovska (2013) drew attention to the pecuniary damage and lost profit in the case law on intellectual property crimes. In addition, Malkov (2019) has conducted research into forms and methods of international control and has identified among them the most common ones in the enforcement of ECtHR judgments on compensation for damage caused by crimes in the field of IT objects of intellectual property rights. Michalsky (2017) structured and identified a system of subjects for counteracting intellectual property offenses in Ukraine. Besides, Orlyuk (2019) conducted a comprehensive study of intellectual property policy, in particular, analyzed the development of intellectual property policy for universities and scientific institutions.

Furthermore, Paliyuk's (2003) research helped to determine the place of the Convention on the Protection of Human Rights and Fundamental Freedoms in the legal system of Ukraine.Besides, Selivanov (2017) investigated harm as a necessary basis for the use of compensation in the protection of copyright and related rights. Tomarov (2018) drew attention to the new rules of compensation for copyright infringement. In his writings, Fesenko (2016) investigated the experience of foreign countries in providing the state with the protection of intellectual property, including compensation for damage caused as a result of crimes related to the use of the objects of intellectual property rights in the IT-sphere. In the study of Khalota (2001), the methods of activity of law enforcement agencies for ensuring the realization of human rights were analyzed. Shishkina (2005) explored the legal nature of the European Court of Human Rights judgments and their impact on enforcement.

In addition, Stefan A. has comprehensively investigated the issue of compensation for copyright and related rights violations. Thus, in her work, the researcher analyzed the rules of national legislation on the subject, the foreign experience of regulation, as well as the jurisprudence of both the ECtHR and its application by national courts.

Moreover, Stefan (2019) analyzed the problematic issues and conflicts of law, namely the lack of a proper mechanism for compensation for crimes in the sphere of IT objects of intellectual property rights, and made proposals to change such regulation.Also, Yakubovsky (2013) paid considerable attention to the research of problems of protection of property rights of intellectual property and the ways of their solution.

Thus, the work analyzed above makes it possible to conclude that, although sufficient work has been done to investigate the protection of intellectual property rights, the study of redress for damage caused by crimes related to the use of the objects of intellectual property rights in the field of IT has received insufficient attention, which requires further scientific research.

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

IV. RESULTS

The laws of Ukraine set out the rules on the grounds and conditions for the protection of intellectual property.

Frequently asked questions are the identification of the damage caused by the crimes committed in the sphere of IT objects of intellectual property rights. Thus, differently understand such damage and differently calculate its size, and therefore when committing similar illegal actions in the same circumstances in similar legal relationships, different approaches and methods of calculation of material damage caused by illegal use of the object of intellectual property rights are applied, which leads to the unequal qualification of illegal actions, the imposition of different punishment, wrong decision of a civil claim in a criminal case in the part intended to recover the amount of damage.

For example, when used without permission or in breach of contract, the party to the contract does not receive (or receive, but to a lesser extent) any remuneration (profits, benefits), and therefore any use of the intellectual property right without the permission of the subject or with violation of the terms of the license agreement is considered illegal except in cases provided by the Law of Ukraine "On Copyright and Related Rights" (1993). The amount of the undisclosed fee needs to be established to verify the existence (absence) of a mandatory indication of the underlying and qualified crime, such as material damage caused to a considerable, large, and especially large extent.

According to Part 1 of Art. 91 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) is subject to proof of the amount of damage caused by a criminal offense, whereby the court decides the issue of the admissibility of evidence (2012).

To determine pecuniary damage as unaccounted compensation (lost benefit) in the case of unlawful use of a copyright object (related rights) in each case, the pre-trial investigation agency should analyze the licensing agreements and, to check the amount of pecuniary damage, order an expert examination.

It should be borne in mind that, to apply such a special method of protection as compensation for damages through the payment of compensation, there is no proper legal support.

Thus, the system of ways of protection of intellectual property rights enshrined in the Civil Code of Ukraine enshrines such methods of protection as compensation for damages and other ways of compensation for property damage, as well as compensation for moral (non-property) damage [5]. Special remedies include damages and one-time monetary penalties.

For the national legislator, the application of protection of intellectual property rights began with the adoption of the Law of Ukraine "On Copyright and Related Rights" (1993) and the imposition of sanctions for violation of intellectual property rights in the CC of Ukraine, but in the legal environment has not yet formed a clear vision of its legal nature and conditions of application.

This leads to the unequal application by the courts of rules on the protection of intellectual property rights. Against this background, difficulties arise and the need to apply to supranational courts, namely the ECtHR. Therefore, it is important to analyze the ECtHR's practice of redressing the damage caused by IT offenses in the area of intellectual property rights.

The application of the Convention on the Protection of Human Rights and Fundamental Freedoms by the courts of Ukraine is envisaged by Article 17 of the Law of Ukraine “On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights” (2006).

Thus, according to Art. 9 of the Constitution of Ukraine (1996) The Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Ukraine (hereinafter – the Convention), is a part of national legislation.

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

Article 6 § 1 of the Convention (1950) establishes the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide the dispute over its civil rights and obligations or establish the merits of any criminal charges against it. Article 19 of the Convention (1950) provides that a European Court of Human Rights is established to ensure compliance by States parties to the Convention, one of which is Ukraine, with their obligations under the Convention and its Protocols. The Contracting Parties undertake to comply with the final decisions of the Court in any case to which they are parties.

ECtHR practices in the areas of intellectual property and the Internet, including for damages, are relatively minor. However, it should be analyzed.

Thus, the intellectual property falls within the scope of Article 1 of Protocol 1 to the Convention, and ownership of the physical medium is the relevant right.

The Court has recognized that Article 1 of Protocol No. 1 to the Convention applies to patents. This is reflected in the ECtHR's decision on inadmissibility in the case of Smith Kline and French Laboratories Ltd v The Netherlands (1991). The court thus found that the control of the use of property established a fair correlation between the applicant's interests and the general interests, so the complaint was found to be manifestly ill-founded.

In Anheuser-Busch Inc. v. Portugal (2007), the Court stated that Article 1 of Protocol No. 1 applies to intellectual property.

The decision in the case of Megadat.com SRL v. Moldova (2008) concerns the company which was the largest Internet service provider in Moldova, the applicant company complained of invalidation of its telecommunication licenses on the ground that it did not inform the competent supervisory authority of the change of address. She further claimed that she was the only one in 91 companies to receive such severe punishment. As a result, the company had to cease operations. The European Court of Justice noted that the trial by the Moldovan courts was very formal. No attempt was made to establish a relation between the general problem at issue and the sanction applied to the applicant company. The Court thus found that the proceedings were arbitrary and that the company was subjected to too severe a penalty. In addition, given the discriminatory treatment suffered by the company, the Court concluded that the authorities did not use any consistent considerations in invalidating the Megadat.com SRL licenses. Therefore, there has been a violation of Article 1 of Protocol No. 1.

The assertion of the exclusive right to use and own the registered domain names on the Internet is being followed in the case of Paeffgen GmbH v. Germany (2007). In the present case, the Court considered the issue of domain name registration and the potential interference with the exercise of third party rights. The injunction prohibiting the use and requiring the revocation of domain names registered in the applicant's name but interfering with the rights of third parties was intended to achieve a legitimate general interest in maintaining a functioning trademark and/or name protection system. The national authorities had wide discretion. However, their decision had to establish a fair balance between the protection that the owner of the exclusive right to use domain names should receive and the requirements of the common interest. The owner of such "property" should not have had an individual or excessive burden. Concerning non-property rights, it should be noted that case law only partially covers this component of intellectual property rights.

Also, in the case of IC EdituraOrizonturi SRL v. Romania (2008), the court found that deprivation of property could only be justified by reference to the public interest, subject to the conditions and proportionality of the objective pursued by the law. In the case of Neij and SundeKolmisöppi v. Sweden (2013), the court held that the copyright holders were protected by the

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

safeguards enshrined in Article 1 of Protocol No. 1 to the Convention. The applicants, in this case, contributed in many ways to the creation of an Internet site, one of the world's largest file-sharing services on the Internet. With this service, users can reach each other through torrent files. After communication, users could share electronic materials outside of computers through file-sharing. The applicants were found guilty of complicity in a crime against copyright law for assisting a site user in infringing their copyrights in music, movies, and computer games. The Court emphasized the importance of protecting copyright holders and the fact that, to facilitate the transmission of information, websites could provide the ability to exchange copyright-infringing music, movies, and computer games. In the Court's view, the respondent State must "maintain a balance between the two competing interests protected by the Convention". On the one hand, there is an interest on the Internet in ensuring that information is exchanged following Article 10 of the Convention and, on the other, that the rights of the authors of the protected works covered by Article 1 of Protocol No. 1 are respected. The Court held that the existence of copyright to be protected limits the freedom of expression. The Court held that the obligation of the national authorities to protect the property rights of the claimants under copyright laws and the Convention was a valid reason for restricting freedom of expression. Furthermore, in this case, the applicants did not take any measures to remove the offending files, even though they insisted on it.

The case of Ashby Donald (2013) and others against France is important. This case involved the criminal conviction of photographers for posting online fashion photos without the permission of the copyright holders. Publishing photos online for commercial purposes without the permission of the copyright holders – Fashion Houses, whose creations have appeared in the photographs, is the violation of copyright law. Therefore, the courts are justified in placing designers' rights above the rights of photographers to freedom of expression.

In the Akdeniz v. Turkey (2014) case, the ECtHR confirmed that "when it comes to striking a balance between arguably conflicting interests under consideration, such as the "right to freedom of information" and "copyright protection" (...) public authorities have an especially wide margin of discretion".

It has also been repeatedly stated in ECtHR decisions that the conditions of compensation are essential for estimating a fair balance and that the seizure of property without payment of an amount related to its value is usually a disproportionate interference and the complete absence of compensation can be justified under Article 1 only in exceptional cases.

Because of the above, it should be said that, despite the importance of using the Internet today, the number of disputes examined by the ECtHR regarding redress for damage caused by IT offenses is not high.

Concerning international experience in dealing with these issues, it should be noted that, by international standards, criminal liability can occur, at least, in cases of deliberate use of the trademark in the commission of counterfeiting and piracy on a commercial basis. In developing countries, criminal penalties are more commonly used than in developed countries, because criminal justice systems and procedures in developed countries are fully formed. For example, the United States has imposed severe penalties for counterfeiting and piracy. The thresholds for bringing a criminal case for piracy under the laws of the United States of America are low and are based on the retail price of pirated products. It is also worth analyzing the legal protection of IT in the European Union. Thus, protection applies to any form of expression of a computer program, except for the ideas and principles that underpin any element of the program, including its interfaces. So, foreign law also pays sufficient attention to the protection of intellectual property and compensation to the author for the illegal use of copyright objects.

May-June 2020
ISSN: 0193-4120 Page No. 976 - 986

CONCLUSIONS

The study examines the ECtHR's dispute resolution practice for damages caused by crimes related to the use of the objects of intellectual property rights in the IT-sphere. The following conclusions can be drawn.

In the domestic legal system, there are various forms of compensation for property damage for infringement of copyright and related rights. Nevertheless, the ECtHR's practice has particularities in dealing with such cases. Thus, the ECtHR case study analyzed may answer whether the compensation criterion is several thousand times greater than the amount of copyright infringement and / or related rights violated?

Nevertheless, questions remain 1. How can copyright be protected without proper evidence? 2. How to prove the fair amount of damage?

Thus, an analysis of the ECtHR's dispute resolution practices for the damage caused by crimes related to the use of the objects of intellectual property rights in the IT-sphere showed that the ECtHR's decisions on this matter are few, but that does not mean that the state should not ensure the proper enforcement of the decisions ECtHR and the implementation of the Convention's provisions in the IT field.

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