

INTELLECTUAL PIRACY IS VARIETY OF CRIMINAL PUNISHABLE ACT IN FIELD OF COPYRIGHT AND ALLIED RIGHTS INFRINGEMENT

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The questions of intellectual piracy are investigated as one of the varieties of criminal punishable act in the field of copyright and allied rights infringement. The author's definition of «intellectual piracy» and its classification are offered.

Intellectual piracy, copyright, allied rights, criminal responsibility, classification.

Problems of intellectual piracy are the most dangerous forms of copyright and allied rights infringement. Infringement of intellectual property rights in Ukraine creates serious barriers for technological and economic development of the country and affects adversely its investment attractiveness. As well as it was expected that International Intellectual Property Alliance (IIPA) added Ukraine to the list of the special attention of «list of 30» for 2012 [1].

The mentioned problem was the subject of research of V. Gulkevych, A. Koval, Y. Logviniv, V. Kharchenko and others. However some aspects of criminal legal protection of copyright and allied rights related to intellectual piracy were not enough examined.

The aim of this article is an analysis of intellectual piracy as one of the varieties of criminal punishable act in the field of copyright and allied rights infringement and determination of ways of improvement of criminal legal protection of copyright and allied rights.

The problems of protection of items of intellectual property right and fight against intellectual piracy today came to the fore in the world and became not just legal and commercial questions. As a result of the universal intellectualization of the up-date world economy they are going to be a political problem related to economic security and they require strategic approaches in order to be decided. Let us distinguish a few prime factors that in any case influence on the level of intellectual piracy in the field of violation of intellectual property rights: economic; scientific and technical; human rights factor.

M. I. Oreshkin associates «intellectual piracy» with «intellectual criminality». He marks that there is the widest extension of «intellectual piracy» in the field of copyright and allied rights infringement for audiovisual works. The share of the counterfeit products in relation to the legal products at the audiovisual market presents from 65 to 95%. None of the sectors of the economy of Russia exceeds the above-mentioned numbers of commodity and money turnovers which are not under the state control [2, p. 4].

Thus, one of the factors that influences directly on criminal acts in the field of intellectual piracy is a high degree of criminalization of items of copyright and allied rights which produce considerable profits to the violators of intellectual property rights. About the special public danger of such phenomenon Y. V. Truntsevskiy writes: «Intellectual piracy, being connected with other components, is more publicly dangerous, that testifies about the special egocentric orientation of a personality of a criminal, maximum criminal irregularity of guilty persons» [3, p.372].

Unlike a concept of «piracy», a concept of «intellectual piracy» is new enough for the criminal legislation and is not investigated enough in the national science of the criminal law. A term of «piracy» found application in the field of intellectual property right, in particular in copyright and allied rights. It originates from English; a word «piracy» means a violation of rights [4, p. 337].

In opinion of O. G. Morozov, piracy – it is a term that became usual and means illegal use of items of copyright and allied rights for the commercial purposes [5, p. 21]. Later on the scientist remarked that the determination of the phenomenon, related to the illegal use of copyright and allied rights, requires necessary terminology and offers, if the concept of such illegal acts is established and exactly determined, not to give complete definition of the concept in every case of referring to it, it is necessary to give a special name to it, to delineate, especially when it has already got such one in ordinary life – intellectual piracy [5, c.157]. Y. V. Truntsevskiy determines intellectual piracy in an audiovisual sphere, as the whole complex of criminal trespasses, prejudicing the protected by law economic interests of citizens, society and the state as a result of the illegal use of items of copyright and allied rights, and which are accomplished for the commercial purposes in large [3, c.117]. I. S. Volkov makes a connection between intellectual piracy and the items of copyright and allied rights and distinguishes the following types of intellectual piracy: video piracy, piracy in the area of interactive rights, audio piracy, and television piracy. According to his opinion, the social nature of all these forms is identical – to endeavour to obtain commercial benefit, the difference is only in the method of the use of copies of works (phonograms) [6, c.118]. In opinion of A. Koval, in the overwhelming majority of cases the copyright and allied rights infringement is objectively associated with commitment by «intellectual» criminals of a number of other crimes, prescribed by the corresponding articles of the Criminal Code of Ukraine, which, at long last, assist for their commitment [7]. It is necessary to agree with an idea, that piracy is a method of existence at the expense of other persons [8, p. 72].

The law of Ukraine «On copyright and allied rights» gives a definition of a concept of «piracy», under which a legislator understands a publication, recreation, import on the customs territory of Ukraine, export from the customs territory of Ukraine and distribution of counterfeit copies of works (including computer programs and database), phonograms, video grams and programs of broadcasting (clause b) of article 50).

So, the varieties of piracy except a publication and recreation, the legislator acknowledges an import on the customs territory of Ukraine of counterfeit copies of items of copyright and allied rights and (or) their export. In opinion of V. D. Gulkevych, the attempt of the legislator to define a concept of «piracy» within the confines of the Law «On copyright and allied rights» was unsuccessful, in fact, usually, this phenomenon in the criminal-legal doctrine, international legal acts is understood as an infringement of property rights of subjects of copyrights and allied

rights, a turnover of copies of counterfeit works, executions, phonograms, video grams and broadcasting programs. In any case, similar legislative definition of piracy in the field of copyright and allied rights is not of importance for criminal-legal description of crime, prescribed by article 176 of the Criminal Code of Ukraine. The verity of this statement is also founded on the judicial practice, as the actions of persons, who illegally recreated and distributed the items of copyright and allied rights were not qualified as piracy in any case.

The mentioned gives reason to mark that scientists in most cases associate intellectual piracy with the items of copyright and allied rights. Such an approach is firstly related to the history of criminal infringements of these items of intellectual property right, secondly, these items by quantitative characteristics are the most criminal punishable among other items, but it does not mean that to other items of intellectual property right an intellectual piracy cannot be applied, as one of the varieties of criminal punishable act. For example, at producing or realization of counterfeit products with counterfeited hologram, the counterfeited stamps of excise duties were used, the committed should be characterized not only under part 1 of article 176 of the Criminal Code of Ukraine, but also under corresponding part of article 216 of the Criminal Code of Ukraine «Illegal production, counterfeiting, use or sale of illegally produced, got or counterfeited stamps of excise duties or control marks».

As A. Koval marks, in particular cases the acts of a guilty person under article 176 can be characterized after totality of crimes and according to article 203-1 «Breach of legislation, that regulates a production, export, import of disks for the laser systems of reading, export, import of the equipment or raw materials for their manufacture» of the Criminal Code of Ukraine in the presence of all the necessary component elements of a crime which are stated in them in the case if the breach of legislation that regulates the production of disks for the laser systems of reading was made with a record on them the information that is the item of copyright and/or allied rights, without permission of the persons who have copyright or allied rights on it, in particular, the realization by the person, who produced them illegally. If, for example, a guilty person used illegally not only the items of copyright and/or allied rights but also other items of intellectual property right (invention, utility model, product and services mark), such acts must be characterized in the presence of all the necessary elements of the corresponding component elements of crimes after totality of crimes at once under three articles of the Criminal Code of Ukraine, namely, under article 176 and article 177 «Infringement of rights on an invention, utility model, pre-production prototype, topography of integral microcircuit, sort of plants, rationalization proposal», and also under article 229 «Illegal use of product and services mark, brand name, registered designation of origin» of the Criminal Code of Ukraine [7].

The obtainment of excess profits and high latency of uncovering of crimes make the items of copyright and allied rights attractive for the organized criminal groups which have transnational character. Not only the subjects of intellectual property rights bear considerable losses but also the state in the form of non-derived incomes due to tax payment, and it brings into disrepute all public organs.

The public danger of crimes only in an audiovisual sphere is increasing due to their transnational character of commitment. According to the classifications of the UNO the intellectual piracy enters to 17 types of the organized transnational

crimes. In the field of «piratical» business there is an increase of criminal structures with law enforcement authorities [3, p. 6–7].

The analysis of the special literature shows that intellectual piracy is «large-scale infringements of copyright and allied rights, committed with a view to obtain an illicit gain» [10, p. 66].

Thus, the Law of Ukraine «On copyright and allied rights» qualifies the following as counterfeit: a copy of work, phonograms, video grams which are imported to the customs territory of Ukraine without a permission of an author or other subject of copyright and (or) allied rights. However such an approach of the legislator not in full measure comprises the list of infringements and must include not only an import but also an export from the customs territory of Ukraine of counterfeit copies listed in article 1 of this Law [1].

Council Regulation № 3295/94 of the European Communities from December 22, 1994 determine "piratical goods" as goods which are copies or contain the copies, are manufactured without a permission of the owner of copyright and allied rights, or the owner of rights in relation to a picture or a model, registered in the corresponding national law [12].

Concerning the legislative recognition of this, it is accepted by Cabinet of ministers of the Council of Europe in Recommendation R 95 «About measures against sound and audiovisual piracy», where the question is that there is no allowance for recreations, distributions or broadcasting of works, phonograms and executions protected by a copyright and allied rights for general notice with the commercial purpose, that on the whole is considered as «piracy» and an illegal activity [13, p. 72].

The main forms of piracy are video piracy, piracy in the field of the public use and camcording. Camcording means an unauthorized filming of a movie in the hall of the cinema on video [14].

The brought list extends considerably the list of infringements of counterfeit goods within the meaning of the international approaches to «counterfeiting» unlike the Law of Ukraine «On copyright and allied rights», that does not take into account the brought list of counterfeit goods, the definition of the concept of «counterfeiting» given in article 1 of this Law does not correspond to the European understanding of counterfeiting. In addition, such counterfeit goods can appear at the market before the official exit, for example, the exit of a movie for release. Thus in many cases the quality of the record can be inferior enough to the licensed. There are many sources, from where the copies of piratical movies come. These are the most important among them: CAM Rip; TS, TeleSync; TV – rip; WP, Work Print; TC, TeleCine, DVD – Screener; DVD – rip [15, p. 29]. Except them there are other support programs for the facilitation of process of crack – «setting up», "disassemblers», resource editors, «decompressers», etc. Sometimes piracy is secretly encouraged by an owner of copyrights that results in an unfair competition.

The Russian experts mark that intellectual piracy took the persistent organizational forms. The basic features of intellectual piracy are: Connection of hierarchical and linear principles of construction (co-ordination of the incorporated organized groups); occupation of piracy, as a profession that gives an only or main source of income; co-ordination of «piratical» activity on the local, regional, interregional, national and international levels; Shadow turnovers, it is comparatively with the budget of social branch; Use approximately 20-25% of income from intellectual piracy for subornation of public servants (in the first turn,

supervisory and law-enforcement authorities); Excess profits (to 400-500%); Possession of the developed system of the corrupted connections in law enforcement authorities, which provide high degree of invincibility against criminal prosecution; Tendency of piratical enterprises towards the police and prosecutor's backing; Use of lobby in the legislative, executive and judicial bodies of power for «movement» of advantageous decisions; Intensive laundering of piratical money through the international system of banks and other credit organizations [16, p.68–69].

The stated grounds to draw conclusion that intellectual piracy related to infringement of items of copyright and allied rights can be committed in the spheres of cinema industry, industry of audio recording, radio industry, cable television and Internet. Among the most widespread types of piracy is an activity related to audio piracy, video piracy, software, computer games, piracy of literary works.

Under intellectual piracy it is necessary to understand one of the varieties of criminal-punishable act that encroaches on the separate items of intellectual property right and is evident as intentional acts of a person, by means of a recreation, distribution, copying, appropriation, storage, transportation, selling and other illegal use of items of copyright and allied rights, with the aim of income generation.

Intellectual piracy in the field of copyright and allied rights infringement is subject to certain classification and is performed by means of: illegal recreation, copying, distribution, appropriation, storage, transportation, selling, production of phonograms and video grams, broadcasting programs; illegal public show, public execution, phonograms, video grams, broadcasting programs; falsifications of executions, phonograms, video grams, broadcasting programs; illegal acts related to disks for the laser systems of reading with the records of subjects of copyright and allied rights and which can be combined with an illegal recreation; illegal acts related to the unauthorized record, video recording at a public show, public execution, etc; illegal acts related to computer piracy; demonstration of pirated products in public places, and also through a cable net.

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Досліджено інтелектуальне піратствояк один із різновидів кримінально-караного діяння у сфері авторського права і суміжних прав. Надано авторське визначення поняття «інтелектуального піратства» і його класифікація.

Інтелектуальне піратство, авторське право, суміжні права, кримінальна відповідальність, класифікація.