

# DEFINITION OF MATERIAL DAMAGE IN CRIMINAL PROCEEDINGS IN THE INVESTIGATION OF CRIMINAL OFFENCES IN THE AREA OF INTELLECTUAL PROPERTY

**Tarasenko Oleh, National Academy of Internal Affairs**

**Momotenko Tamara, National Academy of the Security Service of Ukraine**

**Chaplynskiy Kostyantyn, Dnipropetrovsk State University of Internal Affairs**

**Barash Yevgen, National Academy of Internal Affairs**

**Patyk Andrii, National Academy of Internal Affairs**

## ABSTRACT

*Description: The purpose of the article is to consider the peculiarities of definition of material damage in the course of investigation of criminal offenses in the area of intellectual property related to copyright infringement.*

*Research methodology. The study used general scientific and special methods, namely: analysis and synthesis method, logical method, dialectical method, monographic method, logical and semantic method, normative and dogmatic method and legal modeling method.*

*Results of the Study. Based on the study of court decisions, scientific and methodological developments, it is concluded that the monetary amounts (e.g., loss of profits) cannot be recognized as the amount of the tangible damage. The possible components of material damage caused by copyright infringement, its content and the methods of its calculation are established.*

*Practical implication. The possibility of using the price of copyright and / or related rights, at which the owner sells his (her) rights on the market for the definition of the amount of damage caused in case of violation of such right, is considered.*

*Value /originality. It is noted that the amount of direct material damage caused by infringement of intellectual property rights in criminal proceedings should be determined as the amount of funds that the subject would have received from a person who unlawfully used the object if used in the manner prescribed by law, i.e. as the amount of unpaid remuneration received for the use of an intellectual property right.*

**Keywords:** Criminal Offense, Intellectual Property, Copyright, Pre-Trial Investigation, Material Damage.

## INTRODUCTION

Nowadays, intellectual property is a highly liquid commodity, which actively participates in economic circulation, as the value of the vast majority of goods includes the value of intellectual property used in their manufacture. As the share of intellectual property in the

country's economy grows, so does the number of criminal encroachments on these objects. Criminal offenses committed in the area of intellectual property are one of the most dangerous forms of encroachment on the private property of individuals and are committed through illegal reproduction, distribution of copies of audiovisual works, unlicensed software, music and phonograms, etc. Ensuring security in the area of intellectual property, the implementation of measures to protect the interests of persons (right holders) is primarily the prerogative of the State, as it acts as the complex system of management agents, each of which has its role in achieving the main goal – ensuring the interests of persons, who are the owners of intellectual property. Protection of the rights and legitimate interests of individuals and legal entities is one of the main tasks of criminal proceedings, so the nature and amount of damage caused by criminal offenses in the area of intellectual property are subject to fixation in criminal proceedings. However, one of the problems in solving this task is to establish the amount of material damage caused by copyright infringement, to apply certain methods of its calculation depending on the methods of infringement of copyright and / or related rights, etc. These and a number of other derivative problems in ensuring reliable protection of intellectual property rights in Ukraine have recently become significantly relevant. Preservation and increase of intellectual potential, international authority of the country depends on their effective decision.

## MATERIALS AND METHODS

It should be noted that a number of publications are devoted to the issue under consideration. For example, Ketrar (2014) investigated the features of compensation for property and non-property (moral) damage in copyright. Korystin et al. (2007) developed the method for determining the amount of damage (loss) caused by the offenses committed in the area of intellectual property. Lavrovska (2013) considered the peculiarities of determining the amount of loss of profits in the context of material damage caused by the offenses in the area of intellectual property. Liubenok (2012) identified the features of the assessment of intellectual property rights in national and international practice. However, these issues were considered separately from the requirements of modern legislation governing the compensation of material damage caused by criminal offenses of copyright in the area of intellectual property. So the purpose of the article is to determine the features of the establishment of pecuniary damage in criminal proceedings during the investigation of criminal offenses in the area of intellectual property.

The study used general scientific and special methods. Thus, the analysis and synthesis method as well as the logical method were used to develop a holistic view on the institution of material damage in criminal proceedings. The dialectical method, as well as monographic method made it possible to consider the state of scientific researches concerning this issue. The logical and semantic method was used to establish the meaning of the concepts of “material damage”, “loss of profits”. With the help of the normative and dogmatic method, the content of the normative-legal acts of domestic legislation governing the issue under consideration was analyzed. The use of the legal modeling method made it possible to develop the relevant conclusions and propositions.

The materials studied are the legislation of Ukraine, as well as the scientific works of Ukrainian and foreign scientists on this subject.

## RESULTS AND DISCUSSION

Material damage may arise in the presence of: damage; illegal behavior; causation (Hrynko, 2010). However, Art. 22 of the Civil Code of Ukraine (Law of Ukraine, 2003) does not use the concept of "damage", but provides a definition of "loss", which is an income that a person could actually receive under normal circumstances, if his (her) right had not been violated (loss of profits). In accordance with Art. 225 of the Civil Code of Ukraine, the damages to be reimbursed by the person who committed an economic offense include: the value of lost, damaged or destroyed property, determined in accordance with the requirements of the law; additional costs (penalties paid to other entities, the cost of additional work, additional materials, etc.) incurred by the party who suffered losses as a result of breach of obligation by the other party; unearned profit (loss of profits), to which the party that suffered the loss was entitled, was entitled to expect in the case of due performance of the obligation by the other party.

When committing criminal offense under Art. 176 of the Criminal Code of Ukraine (Law of Ukraine, 2001) a person simultaneously infringes copyright and causes damage, which should be expressed in a specific monetary equivalent – that is, clearly defined amount. Moreover, the offender cannot be prosecuted without establishing the amount of such damage. Formally, damage is understood as reduction or destruction of property or non-property (personal) goods protected by law. Speaking as a diminution of existing property, personal goods, property damage is considered to be of certain economic value and is expressed in monetary form. Damage to property may result, for example, in the author being deprived of royalties because of usurpation of another person's rights in regard to authorship. The term "material damage", not "losses" is used in the disposition of Art. 176 of the Criminal Code of Ukraine, as damages include loss of profits, which cannot be the object of pecuniary damage in criminal law.

To resolve the issue of whether the not received profit or income of a person who is the right holder of the relevant object of copyright can be considered material damage within the meaning of Art. 176 of the Criminal Code of Ukraine, it is necessary to distinguish such terms as "profit", "loss of profit", "income".

These terms are used depending on the person who uses the object of copyright and / or related rights (legal entity, individual, individual), the relationship involving such persons (civil, commercial), the legality of such relations, etc. Besides, in our opinion, the method of committing criminal offense is of some importance – i.e. the types of infringement of copyright and / or related rights listed in Article 176 of the Criminal Code of Ukraine, namely: illegal reproduction, distribution of works of science, literature and art, computer programs and databases; illegal reproduction, distribution of performances, phonograms, videograms and broadcasting programs; their illegal reproduction and distribution in audio and video works, diskettes, other media; camcording; card sharing; other intentional infringement of copyright and related rights.

The peculiarity of the components of material damage in case of copyright infringement is that it does not actually include direct damage, since, in the case of copyright infringement, the object of the copyright does not actually disappear, unlike material objects that can be destroyed or damaged (Lavrovska, 2013). The loss of profit is calculated as a component of material damage under such circumstances (Ketrar, 2014).

In determining the amount of loss of profits, the amount of profit (or royalties) that the owner of the copyright could have obtained but did not obtain due to the introduction of a counterfeit copy of the work on the market, or the amount of the licence fee that the owner of the copyright could have received if a person used the object on legal grounds, namely on the basis of a license (license agreement) are taken into account (Buzovska 2014). The amount of direct material damage caused by infringement of intellectual property rights in criminal proceedings should be determined as the amount of funds that the actor of intellectual property rights would receive from a person who illegally used the object of intellectual property rights (if used in the manner prescribed by law, i.e. as the amount of not received remuneration for the use of the object of intellectual property rights). It is appropriate to appoint an independent forensic examination when determining the amount of material damage in the form of loss of profits (Korystin et al., 2007).

As for the method of definition of damage for various types of infringement of copyright and / or related rights listed in Article 176 of the Criminal Code of Ukraine, the basic principle of calculation does not differ, as in all cases it is necessary to calculate which amount of loss of profit the owner of the copyright object has suffered as the result of certain actions. It all depends on the specific situation and the availability of documents that could indicate the income of the owner from the possession, use and disposal of property rights to the object of copyright. Some complications are that formal methodologies for the calculation of material damage (copyright and / or related rights), which would have to be approved by the Ministry of Justice of Ukraine according to the expert specialty 13.9 "*Economic examination in the field of intellectual property*", are not available.

The peculiarity of intellectual property is their intangible form, methods of identification and documentation, etc. (Liubenok 2012).

The intangible nature of these objects implies the peculiarity of the definition of material damage, namely one of its elements – loss of profits. Thus, Item 2, Art. 52 of the Law of Ukraine "On Copyright and Related Rights" (Law of Ukraine, 1993) states that: "In determining the amount of damages to be compensated to the person whose rights have been violated, as well as to compensate for moral (non-pecuniary) damage, the court should proceed from the essence of the violation, property and moral damage caused to a person who owns copyright and (or) related rights, as well as from possible income that this person could have received".

The approaches to the calculation / determination of loss of profits (material damage) as an element of material damage differ; they depend not just on the object of copyright and / or related rights, but also on other factors, in particular, on the method of use, licensing conditions, receiving income from illegally used copyright and / or related rights.

Therefore, the material damage is calculated in accordance with the Art. 22 of the Civil Code of Ukraine and other regulations of Ukraine, which are listed below.

In accordance with Art. 22 of the Civil Code of Ukraine, the component of losses is: loss of income that a person could actually have received under normal circumstances, if his (has) right had not been violated (loss of profit) (Par. 2); losses are reimbursed in full, unless the contract or law provides for compensation in a smaller or larger amount (Par. 3). If the person who has violated the right has received the proceeds therefrom, the amount of the loss of profit to be paid

to the person whose right has been violated cannot be less than the income received by the infringer.

The main methods of calculation are the calculation of loss of royalties, which were not received by the owner of the object of copyright (Benedesiuk, Humeha, Domanska and others, 2018). The main methodological document used by experts in Ukraine in this regard is the National Standard № 4 "Valuation of intellectual property rights" (Resolution of the Cabinet of Ministers of Ukraine, 2007). Par. 26 of this Standard states that the amount of damages for the misuse of intellectual property is determined as of the date of valuation application of the valuation procedure of accumulation of profit (income), which was not received by the subject of intellectual property rights and / or the licensee due to illegal use of the object of intellectual property rights, based on the production and / or sale of counterfeit products".

Certain issues regarding the definition of damage due to infringement of intellectual property rights are also determined by the Methodology for assessing intellectual property rights (Order of Fund of State Property of Ukraine, 2008).

The price at which the owner of copyright and / or related right sells its objects on the market is also an important assessment factor, as it partially reflects the amount of damage caused in case of violation of such a right, because there's always a share in the price of the original product (including calculation) that belongs to the copyright object. The peculiarity is that the copyright object can be embodied in material things (goods) an infinite number of times, but it is a certain quantity of such goods themselves (as a rule), as defined the demand for them (Veremko, 2017). According to paragraph 15 of Article 1 of the Law of Ukraine "On Prices and Pricing" (Law of Ukraine, 2012) "*price is a monetary equivalent of unit of goods*". That is, fixing the fact of sale of a certain number of units of goods (the value of which includes the price of intellectual property) will make it possible to calculate the amount of damage caused to the right holder.

It should also be borne in mind that there is a significant difference in damage to the right holder, distinguishing between such business transactions / civil relations as transfer (alienation) of property rights and transfer of the right to the use of the work (Articles 31 – 32 of the Law of Ukraine "On Copyright and Related Rights"). In the second case, when, for example, the offender has acquired the rights to use the object a certain number of times, but used more than provided by the terms of the agreement, then the price of the licensed copy of the work can be used in the calculation of damages (Decision of the Plenum of the Supreme Economic Court of Ukraine, 2012).

## CONCLUSION

It is possible to establish whether the received profit or income of a person who is the right owner of the respective copyright object can be considered as material damage only in the course of studying the object and the subject. A priori, monetary amounts (e.g., loss of profits) cannot be recognized as the amount of the tangible damage as this fact is «laid down» in the indictment under art. 176 of the Criminal Code of Ukraine. The inclusion of the amount of possible receivable in the amount of real damage in criminal proceedings is contrary to the requirements of criminal procedure law, which provides for mandatory specification of both the

actions that caused the damage and the actual consequences that have already occurred. Moreover, in contrast to civil and commercial law, subjunctive inclination «what would be if ...» is unknown to criminal law. Art. 62 of the Constitution of Ukraine (Law of Ukraine, 1996) forbids to base an accusation on assumptions; Part 4, Art. 3 of the Criminal Code of Ukraine prohibits the application of criminal law by analogy. Besides, according to the Constitution of Ukraine all doubts in regard to the proof of guilt of a person are interpreted in his or her favour. In addition, if it is not established that actual damage was caused by the actions of the accused (for example, copies of audio-visual works were sold for a certain fixed amount), then the existence of an offence under Article 176 of the Criminal Code may not be invoked.

## REFERENCES

- Benedesiuk, I., Humeha, O., & Domanska, M. (2018). *Handbook for judges in the area of intellectual property*. Kyiv: KIS.
- Buzovska, N. (2014). Current issues of protection of rights to photographic works. *Legal Bulletin*, 6(1), 348–355.
- Decision of the Plenum of the Supreme Economic Court of Ukraine. (2012). *On some issues of the practice of resolving disputes related to the protection of intellectual property rights of October 17, 2012 no. 12*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/v0012600-12#Text>
- Hrynko, S. (2010). Causation as an objective condition for the emergence of tort obligations in Ukraine. *University scientific notes*, 2(34), 66 – 78.
- Ketrar, A. (2014). Features of compensation of property and non-property (moral) damage in copyright. *Current Issues of State and Law*, 72(1), 205 – 212.
- Korystin, O., Herasymenko, L., & Tomma, R. (2007). *Definition of damage (losses) caused by offenses committed in the area of intellectual property: A handbook*. Kyiv: KNUVS.
- Lavrovska, I. (2013). Material damage and loss of profits in judicial practice on crimes in the area of intellectual property. *Bulletin of the Supreme Court of Ukraine*, 7(155), 35 – 47.
- Law of Ukraine. (1993). *On copyright and related rights of December 23, 1993 no. 3792-XII*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/3792-12#Text>
- Law of Ukraine. (1996). *The Constitution of Ukraine of June 28, 1996 no. 254к/96-VR*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
- Law of Ukraine. (2001). *Criminal Code of Ukraine of April 5, 2001 no. 2341-III*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>
- Law of Ukraine. (2003). *Civil Code of Ukraine of January 16, 2003 no. 435-IV*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/435-15#Text>
- Law of Ukraine. (2012). *On prices and pricing of June 21, 2012 no. 5007-VI*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/5007-17#Text>
- Liubenok, N. (2012). Features of assessment and recognition of intellectual property rights in national and international accounting practice. *Bulletin of socio-economic research*, 2(45), 138 – 143.
- Order of Fund of State Property of Ukraine. (2008). *On the Approval of the Intellectual Property Rights Valuation Methodology of June 25, 2008 no. 740*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/z0726-08#Text>
- Resolution of the Cabinet of Ministers of Ukraine (2007). *On approval of the National Standard № 4 “Valuation of intellectual property rights” of October 3, 2007, no. 1185*. Retrieved April 15, 2021 from <https://zakon.rada.gov.ua/laws/show/1185-2007-%D0%BF#Text>
- Veremko, V. (2017). *Whether, how and when to use the names of works without infringing copyrights? Law and Business*, 30 (1328). Retrieved April 15, 2021 from [https://zib.com.ua/en/129686-chi\\_mozhna\\_ta\\_yak\\_vikoristovuvati\\_nazvi\\_tvoriv\\_ne\\_porushuyuc.html](https://zib.com.ua/en/129686-chi_mozhna_ta_yak_vikoristovuvati_nazvi_tvoriv_ne_porushuyuc.html).