

COUNTERFEITING AND INFRINGEMENTS UPON INTELLECTUAL PROPERTY RIGHTS

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Abstract: The scientific paper aims to present the ways in which intellectual property rights are infringed and the description of the most used forms of fraud. In order to protect and encourage innovation, it is necessary that criminal law rules provide for situations of non-compliance with intellectual property rights, such as: counterfeiting, piracy and plagiarism, criminal rules including applicable sanctions. The code of conduct in case of violations of the legal norms regarding the intellectual property right presupposes a more sophisticated action that must be well documented, and for the eradication of the phenomenon the causes that favor these illegal activities must be established, including the customer motivation encouraging these practices. Experts have found that the increasing use of new IT technologies and applications in many areas, as well as the use of the Internet on a global scale, have given rise to a new phenomenon and a particularly complex way of fraud, namely online piracy in various fields such as music, film industry, but also forms of online counterfeiting.

Keywords: intellectual property, counterfeiting, piracy, peer-to-peer file sharing, organized crime, computer system

1 INTRODUCTION

Infringement of intellectual property rights is a widespread phenomenon in the European Union. Cheap counterfeit copies of popular goods remain very popular with consumers.

Criminals are able to produce counterfeit goods in large quantities, at minimal cost, and

use online platforms to market their products easily and efficiently internationally. Counterfeiting and piracy are terms used to describe a range of illegal activities related to infringements of intellectual property rights.

Most counterfeit goods infringe a trademark, which means that a good is produced without the authorization of the holder of his rights.

Counterfeit goods and below standards pose significant risks to the health and safety of consumers.

Online markets are the key channel for the distribution of counterfeit goods. The volume of sales of counterfeit goods online has increased significantly in recent years.

Counterfeiters use social media platforms to promote their products and to direct potential consumers to online sales platforms. The online sale of counterfeit products is closely linked to the increasing use of parcels and postal services for the distribution of counterfeit products, which is difficult to detect among a growing flow of licit goods sold online and sent through postal goods.

In a series of sector studies, the European Union Intellectual Property Office estimated sales losses in 11 sectors in the EU (directly in the sectors analyzed and in the related supply chain) as a result of counterfeiting.

In the 2013-2017 period, these losses amounted to 83 billion euros per year. In addition, more than 671,000 jobs have been lost to legitimate businesses, and Member States have lost € 15 billion in tax revenue per year (2020 Synthesis Report) [7].

It should be noted that cybercrime under copyright and related rights is the most topical field in criminal matters, due to the technological dynamics and diversification of antisocial activities in the virtual environment.

Computer systems now offer new, even sophisticated, law-breaking opportunities and create a high potential for committing other types of crime than in known, traditional ways.

The place of such crimes in the criminal legal landscape has become as important as that of particularly serious traditional crimes, due to the ease of their commission and camouflage, their predominantly cross-border nature due to the Internet, and the devastating potential of their effects.

2 THE CONCEPT OF INTELLECTUAL PROPERTY AND METHODS OF COMPUTER FRAUD

The totality of the legal norms that refer to the capacity of human innovation, to the way of commercialization of this activity as well as to the patrimonial and non-patrimonial rights of the holder make up the intellectual property right.

Domestic and international bodies, whose field of activity is the protection of intellectual property rights.

National bodies - State Office for Inventions and Trademarks (OSIM) and the Romanian Copyright Office (ORDA).

International bodies - World Intellectual Property Organization (WIPO), World Trade Organization (WTO), European Patent Organization, etc.

The legal norms referring to the protection of copyright were based, on the one hand, on the idea that the person who created it should have the possibility to decide on the way in which his creation is capitalized, in this sense having the right to impose a benefit of a pecuniary nature, and on the other hand for community members to benefit from its innovation.

In our country, the legal framework governing copyright is provided in Law No. 8 of 1996, which is harmonized with the strategy in the field adopted at European level.

In the same normative act, the facts that are considered crimes are also mentioned.

The legal protection of trademarks and geographical indications is ensured as a result of the adoption of Law no. 84/1998.

One of the conditions provided by the criminal law is that the trademark is registered, and it can be demonstrated only in the case of holding the international, community or national certificate.

The most common situations of non-compliance with intellectual property rights are those related to activities related to plagiarism, piracy and counterfeiting of products.

2.1 Fighting counterfeiting and piracy

The member states of the European Union, like all other countries, face a strong threat to the economy: counterfeiting and piracy that infringe intellectual property rights, namely industrial property and artistic and literary property.

Counterfeiting and piracy affect virtually all sectors of the European economy, from luxury goods (cosmetics, footwear, textiles, leather goods, accessories), audiovisual and computer media, toys, electrical and household appliances, detergents, etc.

The literature has highlighted several multiple consequences of counterfeiting for the authentic goods market with implications for businesses, consumers and economic well-being.

The fundamental theoretical works of Grossman and Shapiro (1988a and 1988b) studied the demand-price curves on counterfeit and authentic products markets and provided the starting point for the discussion on the effects of counterfeit trade. The authors describe counterfeiting as a phenomenon that undermines the functionality of the property rights system, allowing the original producers' competitors to appropriate a part of the value of a company's intangible assets and impose losses of value upon those consumers who bought without wanting copies.

In order to reduce the phenomenon, with regard to piracy and counterfeiting, the circumstances in which consumers buy such products as well as the documentation of the criminal activity of the perpetrators must be taken into account.

The specialized journal which has as object of activity the jurisprudence in this field and publishes articles, syntheses and opinions so a reasoned point of view can be formulated regarding the improvement of the national legislation in accordance with the European legislation, is the Journal of Intellectual Property Law.

In this way, the specialists established that the use of new technologies and IT applications in as many areas as possible, as well as the widespread use of the Internet have created a new phenomenon and a new way of fraud, namely online piracy in more areas.

Among the most used methods of fraud in the online environment are:



Figure 1. Guide for investigating intellectual property crimes committed in the digital environment (Bucharest 2015) pag.18

File-sharing piracy:

- consists in peer-to-peer (P2P) technology and has had the greatest success among users;
- the exchange of data between computers is done freely so the documents are not stored in a central server;
- the computer acts as both the server and the buyer;
- the principle is that the authors provide their own calculation technique through which the documents are transited of everything that is stored individually;
- file sharing activity occurs as a result of transferring and copying documents;
- is not conditioned by the supervision of the network by a dedicated person;
- file sharing is done through specialized programs.

In this category we will exemplify the systems used as follows:

2.1.1 The so-called DC++ system

- it is useful because it accepts the introduction of own documents in the network, at the same time there is the option of transferring files from the formed network;
- in the event that a file is stored in the user's computer, it can be downloaded by the other participants who are part of the network, the user being practically forced to accept access to the computer;
- with the help of a hub that monitors the connections between the network members, the documents are transferred.

2.1.2 The so-called BitTorrent system

In this category the most popular system used is bittorrent which uses peer-to-peer file transfer technique.

How this system works is as follow:

Using a program, the person who intends to share the file creates a .torrent file that has meta data that defines the files provided.

Usually using a web-based interface, the torrent file is uploaded to a tracker. In this case, this data is not found on the tracker server, because the files are stored on the computer of the person who created the torrent.

In order to be able to connect to other users, the torrent consumer of the person who set up the .torrent file puts this torrent in the "seed" position. Seeders are those people who have downloaded the entire file and give it to other people for download. The user informs the tracker, the aspect according to which he intends to give the file, and this will communicate to any user who wants to download the connection data.

Through an interface, you can see the files stored on servers called trackers, download it and open it in a Bit.Torrent client. The beneficiary bit.torrent accesses the file and obtains all the necessary information in order to continue the download.

2.1.3 Download type piracy

A computer, which has only the role of server without being used as a client, is a dedicated computer and forms those networks that use this server. These servers are called dedicated because they provide file protection and are designed to respond efficiently to the needs of network beneficiaries.

Within these networks, the files are stored in a central server with the possibility of accessing both the files containing data and existing applications, their management being done centrally.

It is done by providing illegally uploaded / downloaded content by using Internet sites (paid or free) that host this content.



Figure 2. Guide for investigating intellectual property crimes committed in the digital environment (Bucharest 2015) pag.21

2.1.4 Streaming

Unauthorized streaming is a relatively new form of illegal distribution / making available to the public of content protected by copyright and/or related rights, which tends to become common, as long as, in recent times, the streaming of music, movies , TV programs and broadcasts of sports programs through mobile communication tools has become increasingly popular.

EUIPO Executive Director Christian Archambeau said:

"Europe is based on industrial sectors such as the 11 targeted by our study for growth and jobs. Our research shows, however, how counterfeiting and piracy endanger growth and jobs.

The reason for this analysis, as well as our wider research, is to support decision-makers in developing solutions to this problem and to help European consumers become more aware of the economic consequences of counterfeiting and piracy on a larger scale.

There has been evidence for many years that intellectual property offenses are not victimless offenses, and these are supported by the latest Synthesis Report, which highlights some of the main research carried out by the European Union Intellectual Property Office through the Observatory.

The Organization for Economic Cooperation and Development, in one of its studies on infringement of intellectual property rights, concluded that the field of pharmaceuticals is one of the most unscrupulous areas of counterfeit products.

Counterfeits include not only lifestyle drugs but also drugs for the treatment of cancer or heart disease, including antibiotics with potentially fatal consequences for patients taking these drugs. Following the COVID 19 pandemic at the end of 2019 and its subsequent spread around the world, counterfeiters turned their attention to the production of counterfeit test kits, counterfeit personal protective equipment and, even before treatments were approved by the authorities, of counterfeit drugs, which they claim to cure the disease.

Counterfeit medicines, children's toys and counterfeit cosmetics are just some of the areas of concern, but there are hidden dangers that apply to all intellectual property offenses, beyond the elimination of jobs in legitimate industries and damage to public revenues.

Intellectual property offenses appear to be a low risk for offenders, these being used to support other organized crime offenses.

A report by the European Union Intellectual Property Office jointly with EUROPOL mentions case studies, which show the link between money laundering, document fraud, cybercrime, financial fraud, drug production, and trafficking.

The European Union Intellectual Property Office conducted a study in partnership with the European Patent Office in 2019, estimating the total contribution to the EU economy of industries that intensively use intellectual property rights to about 45% of gross domestic product and 29% of the labor force (another 10% found in areas that provide products and services in industries that use intensive intellectual property rights). These sectors account for most of the EU's trade with the rest of the world, accounting for 96% of EU exports of goods.

According to the Report of the European Union Intellectual Property Office for 2020, it was concluded that the attitude of EU citizens towards intellectual property rights and their willingness to consume products and services that infringe intellectual property rights is strengthened by lower prices, accessibility and a low degree of social stigma associated with such activities.

Online markets have gradually become important distribution channels for counterfeit goods, with criminals trying to copy with remarkable success the legal online business models.

Experts at Europol have identified another threat, namely the increasing use of rail transport between China and the EU and how infringers of intellectual property rights could exploit this practice.

Another vulnerability identified by experts is the online dissemination of protected content, with illegal television broadcasts and digital piracy being an additional challenge for law enforcement authorities.

Piracy and counterfeiting in the EU are an ongoing challenge and organized criminal groups often "pull the strings" and reap financial benefits.

China remains the main country of origin for counterfeit goods, and Hong Kong acts as a transit point for products originally made in China, but other countries also have trade

characteristics such as Turkey, which is associated with Bulgaria and Belgium through trade in counterfeit labels and stickers, which facilitate domestic production.

From the Europol Report for 2017, it was established that the perpetrators of crimes in the EU rely mainly on foreign producers, but then organize the import, transport, storage and distribution of counterfeit goods within the EU.

Counterfeit products are increasingly being distributed through online markets, which are usually distributed in small parcels through courier services, often to customers, highlighting the growing role of technologies in intellectual property crime.

Registered companies are required to pay the fees and taxes required by law, which provides an opportunity to increase unfair competition from counterfeiters, who do not have this obligation and who produce counterfeit or pirated goods or products. The most important aspect to consider is that this counterfeiting activity is found in products such as toys, medicines, food, beverages and electronic devices for which there is a danger to consumer safety, including a danger to his health.

The mode of action of criminal groups in counterfeiting must be understood by taking into account three motivations: consolidation, vertical, and horizontal expansion. Organized crime is involved in this activity, in order to defend itself from amateur competitors. A criminal group is expanding into piracy to profit from its experience. For example, the methods used in human smuggling, forgery of documents, money laundering, etc. The most important motivation of a criminal group to get involved in piracy is that the illicit income streams of the criminal group can be diversified.

The definition of organized crime is given by the FBI: "Any group that has a certain form of formalized structure and whose main objective is to obtain money through illegal activities."

This definition and others proposed by the United Nations and Interpol refer to people working in a structured organization, engaged in criminal activities.

The size of organized crime groups varies from a few people to a few thousand.

What differentiates organized crime from legal enterprises is that the "product" itself is illegal (drugs, prostitution), goods are stolen (counterfeit stolen goods consist of intellectual property) or market protection methods are illegal (protection through intimidation, threats or actual violence).

The trade in smuggled products required a move away from the hierarchy to alliances with other groups around the world. Crime has thus become transnational.

Moreover, with the advent of the digital age, information technology allows operations to reduce what IT experts call the "minimum sustainable scale of operations." This is especially true for virtual trading on the internet market. It is also valid for illicit trade, perhaps especially for crimes in which barriers to entry are low.

3 COPYRIGHT AND RELATED RIGHTS INFRINGEMENTS

The legal rules that protect copyright provide that all acts of infringement of these rights are committed in the manner of direct or indirect intent, without providing for the retention of the act committed in the manner of fault.

The national legislation differentiates these infringements regarding the intellectual property right, classifying them in deeds of contravention, civil or criminal deeds, the criteria of separation being represented by the damages produced, the way of violation, the means used as well as the degree of social danger. In the online environment, the following methods are generally used as a method of action: offering for sale counterfeit goods, offering for use goods for

a fee, promoting and excessive advertising of goods protected by intellectual property rights.

In the text of the law provided by art. 193 of the normative act, which refers to copyright, several ways of committing the respective crime are mentioned: placing on the market, import-export activities and making pirated goods.

They are also provided by criminal law and the manufacture for the sale of pirated goods such as: possession, rental, storage or promotion of pirated goods.

In order to be retained as criminal offenses, it is necessary for people who commit such acts to physically make pirated goods, to place them on the competitive market for goods, regardless of whether the person who places the goods on the market is different from the person who made the goods or transited the border with this category of goods, an activity which is subject to customs checks.

In order to consume the deed, it is necessary that the action of creating pirated goods materialize in the one of distribution.

The legal norms, which are provided in the content of art.194 refer to the violations of the rights related to the copyright or the sui-generis rights of those who manufacture databases.

Related rights are the rights of performers, the rights of television and radio institutions, the rights of producers of audio-video recordings, and the sui generis rights of the database producer ensure the protection of holders who design a collection of works, data or other independent information in a certain form and algorithm, and which is accessed by electronic means or in another configuration.

The offense is committed by giving free access to any person, regardless of the access procedure, of these creations, both online and physically on a device that has the capacity to store information.

As a rule, the commission of this act is retained in competition with that mentioned in Article 140 of the same normative act and consists in the use of specialized programs,

which have the role of granting free access to other users to works copied to the computer hard disk without the consent of the rights holders.

The crime is outlined in the way of storing works on servers, to which any user who meets certain criteria or file-sharing facts has the right to access, with the help of which their own computer is directly accessed by network members, for the benefit of each member who has access to the products protected by copyright, related rights or sui generis rights they represent.

Another way of committing crimes under criminal law, refers to computer programs that are copied to computer systems so the legal framework provides protection of intellectual property rights, which refers to software developers.

All hardware and software components in an assembly that provide services to the user, in order to coordinate and control the execution of operations with the help of programs make up a computing system that can be represented graphically as follows:

A computer program consists of "sets of instructions designed to enable functions to be performed by an information processing system called a computer" (Directive 91/250 / EEC).

A mathematical system in which user input data is entered, which it processes, after which the user uses the data obtained in a language established by the programmer is the definition of the computer program. It can only be protected if it falls under the conditions of any work as provided for in the relevant legislation. A work benefits from protection from the moment it is created. For the existence of the crime, it is necessary to execute one of the actions of unauthorized reproduction provided by law, such as: installation, storage, running or execution, display or transmission in the internal network.

The difference between other works protected by specific legislation and the

computer program is the fact that private copying is not accepted, and if the installation, running, storage or execution of the program on a computer unit for which a valid license is not held is an offense.

Offenses provided by art.196 of Law 8/1996 on copyright and related rights.

Incidental legal norms also include alternative variants of non-compliance with protected values, as a result of distribution, reproduction, import, public disclosure, broadcasting, production of derivative works, fixing of works bearing related rights for commercial purposes and non-compliance with the legal provisions to the collective management mentioned in art.145 of the same normative act.

Usually, these acts are committed in a formal competition and are represented by download actions on the hard disk of the private computer, by using a specialized computer program, protected works and accepting that other internet users access these works, without having the consent of the rights holder. In this context, the phrase "making available" means setting up partitions in the online environment such as (forming new sites, uploading sites, indicating links) or computer networks such as file-sharing.

Regulations provided by the Code of Criminal Procedure

In accordance with the provisions of art.35 par. 1 of the Code of Criminal Procedure, the competence to investigate cases having as object offenses under the intellectual property rights regime belongs to the criminal investigation bodies within the prosecutor's offices attached to the judges.

As ways of notifying the commission of the crime, we can mention those provided by art. 288 of the Code of Criminal Procedure, respectively the complaint, the denunciation, the ex officio notification or the acts of finding concluded by the finding bodies. The category of finding bodies includes, among others, "bodies of state inspections, other state bodies, as well as public authorities, public institutions or other legal persons under public law, for offenses that constitute violations of the provisions and obligations whose observance they control, according to the law."

With regard to these bodies, we can mention that in this field of copyright and related rights, these institutions can be, for example, the Romanian Copyright Office and the National Audiovisual Council.

When submitting the notification or finding the crime, the judicial police investigation bodies must identify the violated legal norms, the manner of committing the deed, the determination of the injured person and the civil party, these aspects being important to determine the manner of investigation.

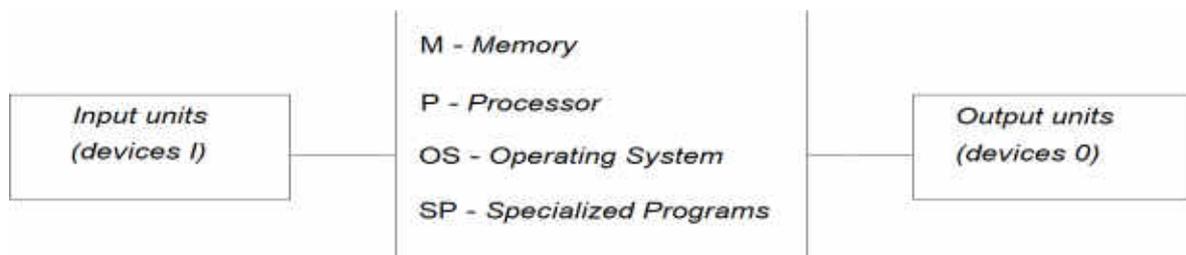


Figure 3. Guide for investigating intellectual property crimes committed in the digital environment (Bucharest 2015) pag.13

In order to carry out the criminal investigation activity within a process according to the provisions of the Code of Criminal Procedure (art. 305 para. 1), the criminal investigation bodies order the beginning of the criminal investigation "in rem" (regarding the deed). This procedural stage of the criminal investigation involves the administration of evidence establishing the existence or non-existence of a crime, in identifying the perpetrator (s) and establishing all the circumstances committed, including establishing the damage caused.

Regarding the criminal activity carried out in the online environment, through a website it is estimated that it can constitute as evidence, for example, screenshots, documents submitted by the injured person etc.

Our legislation defines evidence as "any element of fact which serves to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for a fair settlement of the case and which contribute to finding out the truth in criminal proceedings" (art.97 of the Code of Criminal Procedure).

In other words, computer systems commit crimes by infringing copyright and related rights, thus processing data and information that may constitute evidence in criminal proceedings. In order to obtain this evidence in order to materialize, the computer search is carried out as provided in the Code of Criminal Procedure. The computer search may be ordered "when the discovery and gathering of evidence requires the search for a computer system or a computer data storage medium." The computer search can be carried out only on the basis of obtaining a computer search warrant which from a procedural point of view can be obtained either in the criminal investigation stage, which implies only the beginning of the criminal investigation regarding the deed, or in the trial stage. In the first stage, the warrant of computer search is issued by the judge of rights and freedoms

within the competent court to judge the case in the first instance at the motivated request of the prosecutor. The search in the computer system or of a computer data storage medium is carried out by a specialist from the judicial bodies or from outside them or by a specialized police officer. The suspect or defendant and the prosecutor or investigative body of the judicial police must be involved in the computer search.

It should be noted that, in practice, the computer search is performed to discover evidence consisting of computer data stored on either a computer system, when the means of storing computer data is an integral part of the computer system (eg, telephone / television / clock). smart or tablet that has an internal memory), or on a means of storage autonomous from the computer system (memory card, memory stick, SIM card, CD, DVD, external hard drive). In this regard, it has been shown that the logical interaction with a computer data storage medium (medium) is the only one that can result in the gathering of digital evidence relevant to the case.

4 CONCLUSIONS

Counterfeiting activities have a negative effect on the economy in the first place, including leading to job losses and thus to the bankruptcy of companies.

Market surveillance authorities across the European Union draw attention to the dangers to the safety and health of consumers posed by counterfeit products, such as toys, clothing, electrical appliances and other consumer goods. The hazards are exposure to hazardous chemicals and toxins that can cause acute or long-term adverse health effects, suffocation, electric shock, fire and various types of injuries. Certain types of counterfeit products, such as pesticides, can cause harmful effects both to farmers who use them for their crops and to consumers of the resulting products.

In order to combat intellectual property rights, it is necessary to work with Europol on broader responses to intellectual property offenses, as well as to set up a specialized unit within that authority to fight against the prevention of intellectual property offenses.

Another important element in reducing counterfeiting is the effort of the European Union Intellectual Property Office in collaboration with Member States and with private and civil society partners to raise public awareness of the importance of intellectual property and the need to respect it. .

Another conclusion is that small penalties for infringements of property rights increase criminal activity and the very pursuit of such acts from the outset may not be of interest to certain authorities in some Member States.

Terrorism, cybercrime, illegal smuggling, drug trafficking and other areas of criminal activity have become the focus of international law enforcement, and intellectual property rights crimes have become less of a priority, favoring organized crime networks.

Developing and protecting the potential of intellectual property is an important factor for all countries because this field promotes economic development and socio-cultural progress. This link between the promotion and protection of the legitimate interests of the innovator and the interest of society creates a balanced system that aims to develop an environment conducive to creativity and invention, for the benefit of all.

Each state should promote cooperation between law enforcement authorities and national bodies responsible for ensuring the protection of intellectual property, as well as promote and implement programs on public education and training on the importance of protecting intellectual property rights.

This update reveals how intellectual property law crime continues to be one of the most profitable criminal practices and is closely linked to other criminal activities.

In order to contribute to confidence in the single market and promote innovation and competitiveness in business, the effectiveness of punishing counterfeiting and piracy must be increased.

Counterfeiting and piracy are also reflected in the number of jobs offered by companies, taking into account the damage suffered by the company, due to the above.

Hundreds of consumers are deliberately misled every day about the quality of the products they buy and which do not comply with the quality standards imposed by the competent authorities, endangering both their health and safety.

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