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THE LEGISLATION AND PRACTICE OF CRIMINAL COPYRIGHT INFRINGEMENT IN HUNGARY

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1. Introduction[1]

Two years has passed since the new Criminal Code[2] of Hungary came to force on the 1st of July, 2013. In addition to several other changes, the legislator also made modifications to the crimes regarding Intellectual Property. Within this, the legislator also modified the crime of Infringement of Copyright and Certain Rights Related to Copyright,[3] which modifications could bear serious consequences to infringers and right holders, also to the authorities, prosecutors and courts concerned is the related procedures.[4]

Based on these, this paper will shortly present the evolution of criminal copyright infringement in Hungary, what are the practical problems that have emerged during this, and what solutions did the legislator come up with to these problems. In connection with these topics, this paper will also examine if the current scale of protection – which is constantly increasing – is adequately tailored to the current needs of copyright, which is only slowly adapting to the digital environment. It is also important to see how financial loss mentioned in the criminal act could be appraised, calculated, or could be a subject of accurate calculations at all. Furthermore, what role does and should the more and more frequently appointed[5] experts have in these

1 Every link cited in this paper has been lastly accessed on the 6th of June, 2016.

2 Act C of 2013 on the Criminal Code (A Büntető Törvénykönyvről szóló 2013. évi C. törvény).

3 Hereinafter referred as Criminal Copyright Infringement, or Copyright Infringement.

4 S. Tattay, Levente: A szellemi tulajdonjogok védelme az Európai Unióban. *Magyar Jog*, 2012/7. 406–418.

5 Kármán, Gabriella – Nagy, László Tibor – Szabó, Imre – Windt, Szandra: A szellemitulajdon-jogokat sértő bűncselekmények kutatása. *Kriminológiai Tanulmányok,* 48. 2011. 37. Available at: http://goo.gl/meghnS. Regarding to this empirical research, experts are appointed in 90% of the examined criminal procedures in Hungary.

procedures, is the use of them justifiable in every case, and is it aligned with the purpose of criminal and copyright law?[6]

Including but not limited to, and with the intent of representing contrast, this paper will present some aspects of the United States' legislature and solutions, aspects that are emerging questions relevant to our research, solutions that can be constructive to the national or even international legislation, like the proper scale and justification of criminal protection, and the tools of protecting intellectual property.

While I present the history and characteristics of the crime, I mostly and maybe understandably use works of Hungarian scholars. The other parts of this paper cites authors from abroad and from Hungary, as well.

Finally, I must emphasize that the writer of the present lines mostly researches and writes about civil law, seeing the emerging criminal problems through a civil law lens, naturally keeping in mind the characteristics of criminal law, as well. Although the crime of copyright infringement in Hungary is filled[7] with the Copyright Act of 1999,[8] so this civil approach will hopefully be able to be constructive to criminal law.

2. The History of Criminal Copyright Infringement in Hungary

The predecessor of the current criminal act, named *Unauthorised Use of Copyrighted Works* could be found in the Governmental Regulation 17 of 1968 on Misdemeanours, and was enacted in it by the Ministers Council Regulation 19 of 1983.[9]

The curiosity of this misdemeanour is that it operates only with copying, marketing[10] and publicly performing copyrighted works, although copyright infringement could be realised in many other ways as well, in terms of civil law. This is a very interesting solution, because copyright infringement outside copying, marketing and publicly performing will only have consequences in civil law, but not criminal law. Copying should have been realised on an unauthorised image or sound recording – the directive is a little inaccurate at this point, because the carrier of the copyrighted material is neutral in term of copyright, the copying itself can be authorised or unauthorised –, and should have contained financial gains – as also the other criminalised acts –, which narrows down the liability for the misdemeanour even more. The scale of the liability seems relatively low compared to the later and actual criminal liability.

The first crime was enacted by the Act XVII of 1993[11] to the Criminal Code of 1978, to the chapter regarding crimes against property. After that the crime can be found under the name *Infringement of Copyright and Certain Neighbouring Rights*, but this is

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6 S. more: Ujhelyi, Dávid: A szerzői jog célja és emberképe a szellemi alkotásokat megalapozó elméletek tükrében. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2014/5. 34–52.

7 As the Court Decision BH2000.288.I. also implies.

8 Act LXXVI of 1999 on the Copyright Code (1999. évi LXXVI. törvény a szerzői jogról).

9 The original text of the directive is available at: http://goo.gl/g4Wunw.

10 Although the Copyright Act of 1969 did not describe the above mentioned uses, the Copyright Act in force mentions them under § 18. (Copying) and § 23. (Marketing).

11 The original text of the act is available at: http://goo.gl/oiQuHI.

not the only change that has been made. Potential victims of this crime has been defined a bit complicated, maybe with the purpose of precision, mixing up the definitions of copyrighted works and related rights. Although the definition of the criminal act alters from its predecessor, and instead of highlighting single uses, it operates with the broad phrase of copyright infringement, so after this, the crime can be committed with every use that inflicts copyright infringement. As an also significant modification, financial loss appears in the criminal act as result in the crime.[12] Regarding the sanctions, next to penalties known from the misdemeanour form, imprisonment and community service work also appear.[13] The qualifying circumstances of the crime are the amount of financial losses, and if it is committed in the pattern of business operation. It is also important to emphasize that at this time the crime committed in negligence is also criminalised. Therefore compared to the misdemeanour form, the crime enacted has a significantly wider spectrum, and it is much more serious than its predecessor.

The next notable modification was amended by Act CXXI of 2001,[14] which adjusted the Criminal Code to the Copyright Code that came into force two years earlier. After this, the new name of the § 329/A. is *Infringement of Copyright and Certain Rights Related to Copyright*. The definition of the potential victims is still overcomplicated, and is supplemented with film- and sound recording producers. The criminal act itself can be separated to two sections.[15] The first section deals with copyright infringement which is committed with the purpose of financial gains, but there is no actual result; the second section regulates infringement that has financial loss as result. Committing the crime negligently is still subject to criminal liability, and the act slightly modifies the qualifying circumstances, as well.

The Act XXVII of 2007 on modifying the Criminal Code largely simplifies the crime,[16] discarding the overcomplicated description of the victims and more elegantly, defines the object of the crime instead. Accordingly, the spectrum of criminal liability widens, because the types of copyrighted works are not described in the crime anymore, so the criminal protection covers all sorts of works in the future, not just the ones mentioned in the Criminal Code. It is also very important that according to this amendment committing the crime negligently – because of constitutional reasons – will not be subject to criminal liability anymore,[17] which narrows the scope of criminal law protection.

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12 Kovács, Gyula: *Szerzői vagy szerzői joghoz kapcsolódó bűncselekmények nyomozása*. Thesis. Eötvös Loránd University, 2008. 29. Available at: http://goo.gl/sD2wtb.

13 S. Kiss, Tibor: Szerzői jogi szankciórendszerünk fejlődése a XIX. és a XX. században. *Magyar Jog*, 2011/8. 459–470.

14 The original text of the act is available at: http://goo.gl/O4bPCk.

15 Kardos, Andrea – Szilágyi, Dorottya: Szellemi alkotások büntetőjogi védelme – I. rész. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2011/6. 14.

16 The original text of the act is available at: http://goo.gl/0rh41O.

17 Ott, István: *A szerzői jogok hazai büntetőjogi védelme a fájlcserélő rendszerek körében*. Doctoral Thesis, Pazmany Peter Catholic University, Budapest, 2012. 79–81. Available at: https://goo.gl/WNaC0d.

The Act XCII of 2008 leaves the above mentioned, basic form of the crime untouched, but adds a supplementary paragraphs,[18] which criminalises everyone who fails to pay blank media- or reproduction fees.[19] The necessity of this amendment could be questioned, because the original crime could be interpreted as it already contained failing to pay these fees, so it is most likely that the legislator's goal was to clarify uncertainties that emerged in the practice of criminal procedures.

The last relevant modification regarding the previous Criminal Code is the Act LXXX of 2009,[20] which discarded community service work and penalties from the named sanctions,[21] but this adjustment was mere technical in nature.

3. Analysis of the Current Crime Regarding Copyright Infringement

The current Criminal Code in force made several modifications to the crime regarding copyright infringement, some of that were highly anticipated, but some of them must be subjected to some constructive criticism.

One of the most marked changes is that the crime itself has been removed from the chapter regarding property, and has been moved to a new chapter – along with the other similar crimes –, made specifically for crimes regarding intellectual property. According to the ministerial reasoning of the Criminal Code, the reason of this modification is that these criminal acts are special, regarding the underlying goals – "*to protect the interests and incentives of the creators, and fostering creativity and innovation*" –,[22] legally protected values, and the ways of protection and legislation in intellectual property law. It is a much appreciated change that the legislator finally noticed and acknowledged that these crimes are special in nature and function, as well.

The crime in § 385. (1) contains two seemingly minor but in fact very important changes. Firstly, the previous versions of the crime counted the criminal acts by the number of victims, therefore if the infringement affected two right holders, the crime was twofold, if it affected three right holders, it was threefold and so on. But the new text makes the crime a so called *summarized crime*,[23] so regardless of the affected right holders, the crime is always counted one, if the acts are judged in one criminal procedure.[24] This necessarily means that the qualification of the crime is not aligned to

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18 The original text of the act is available at: http://goo.gl/pGUHxk.

19 S. also: Mezei, Péter: Az új büntetőtörvénykönyv koncepciója és a szerzői jog, II. paragraph. *Szerzői jog a XXI. században (Copyright in the XXI. Century Blog)*, blog post, 2012. Available at: http://goo.gl/FxqSUI.

20 The original text of the act is available at: http://goo.gl/leyDpE.

21 Kármán, Gabriella – Mészáros, Ádám – Nagy, László Tibor – Szabó, Imre: *A szellemi tulajdonjogokat sértő bűncselekmények vizsgálata – Empirikus elemzés*. National Institute of Criminology, Working Paper, 2010. 41. Available at: http://goo.gl/M27Bea.

22 The reasoning of the Act C of 2012 on the Criminal Code. 150. Available at: http://goo.gl/v2bvl1.

23 Belovics, Ervin – Molnár, Gábor – Sinku, Pál: *Büntetőjog II. Különös rész*. Budapest, HVG-Orac, 2013. 683.

24 Mezei, Péter: Elfogadták az új Btk.-t. *Szerzői jog a XXI. században*, blog post, 2012. Available at: http://goo.gl/dd0hhl.

the number of victims, but only to the sum of the financial losses caused by the infringer. This sum also contains the injuries caused by acts that are only misdemeanours.[25] Secondly, the new crime does not have two sections of the crime: it discards the section which is committed with the purpose of financial gains, and only leaves the one causing financial loss as result, easing a little on the criminal liability.

It is beyond dispute that the crime itself is a so called *frame disposition*,[26] meaning that the crime is completed or filled not by the Criminal Code itself, but an external act, in this case the Copyright Code. The Supreme Court's decision on criminal principle no. 9/2013.[27] says that because of this – and the territorial nature of copyright –[28] courts and acting authorities cannot presume that every work is actually protected by copyright law, therefore it must be examined in every criminal procedure if copyright protection is actually covering the work or not.[29]

One of the most controversial changes can be found in § 385. (5). This paragraph contains a complete defence against prosecution, by stating that it is not punishable if someone commits the crime regulated in the (1) paragraph, if it is committed by "copying or making available to the public on-demand, if it is not with the purpose of financial gain.". The reasoning of the Criminal Code justifies this with the following: "From the view of criminal law as last resort, it seems unjustified […] to massively criminalize personal uses."[30]

It is important to emphasize that this decriminalizing paragraph is only applicable, if the infringer's use is the same as the uses specified in the § 18. and § 26. (8) of the Copyright Code of 1999, and the caused amount of financial losses does not exceed 500.000 HUF (approx. 1.600 EUR). Although the goal of the legislator seems clear, the text of the paragraph is not completely in accordance with this goal, or the definitions of the Copyright Code.[31] The (1) paragraph of the crime criminalizes every unauthorised use of copyrighted material, because the Copyright Code states that every use of the work shall be authorised by the right holder. So for example, if someone downloads (copies), and uploads (makes available to the public, on-demand) a software with a p2p-filesharing client, the act cannot be punished. However if this software was installed, simply stored on the hard drive or have run[32] – so it has been used outside the

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25 See more in the Supreme Court's no. 7/2014. decision of criminal principle.

26 To be precise, it is more or less beyond dispute, because the National Institute of Criminology has a different opinion on the matter. S. Kármán–Mészáros–Nagy–Szabó (2010) op. cit. 42. Cf. BH 2000.288.I.

27 The decision is available at: http://goo.gl/3k56R2.

28 Forgács, Tünde: A szellemi tulajdon területén szabályozó nemzetközi szerződések a magyar jogban, különös tekintettel az e szerződéseket kihirdető nemzetközi jogforrásokra és a soft law problematikára. *Publicationes Universitatis Miskolcinensis – Sectio Juridica et Politica*, XXX/1., 2012. 271.

29 Mezei, Péter: Büntető elvi határozat az Szjt. hatályáról és a szerzői jogsértés vétségének elévüléséről. *Szerzői jog a XXI. században*, blog post, 2013. Available at: http://goo.gl/nwZ2j3.

30 The reasoning of the Act C of 2012 on the Criminal Code. 151.

31 Ujhelyi, Dávid: A magáncélú fájlmegosztás dekriminalizálásának margójára. *Szerzői jog a XXI. században*, blog post, 2013. Available at: http://goo.gl/LF9uFi.

32 S. Gyertyánfy, Péter (ed.): *Nagykommentár a szerzői jogról szóló 1999.* évi *LXXVI. törvényhez*. CompLex, 2014. Online-version, Chapter III, Point I, Paragraph c). The Prosecutor General's Prosecution

decriminalised uses, even if it is in connection with a decriminalised use –, the action can be punished. We can witness the collision of authentic and logical interpretation in this case, which may look like a minor dogmatic defect, but criminal procedures can depend on it, and this defect is undoubtedly the fault of the legislator.

Financial losses seem also problematic in connection with the decriminalising paragraph, because the decriminalization is only applicable if these injuries are between 100.000 and 500.000 HUF (approx. 320 and 1.600 EUR). The ways of calculating foregone earnings, the appointed experts and also their opinions are playing an important role in criminal procedures, practically it is the only base of the sanctions imposed on the infringers, may it be three or even more years of imprisonment. The statements of the National Tax and Customs Administration – the authority investigating this kind of crimes –, which were made before the new Criminal Code came to force, and were in connection with financial losses in case of cinematographic works are especially worrying in this context.[33]

The phrase "not with the purpose of financial gain" in the decriminalization clause seems quite interesting and less worrying. For the first look it may seem that mentioning financial gain is unnecessary, because the Copyright Code mentions it by the requirements of free uses,[34] as a part of the three-step-test.[35] Therefore uses without the purpose of financial gain may be in fact free uses, and because of this they are not criminalized by the Criminal Code. In view of this, the legislator probably wanted to decriminalise uses that are without the purpose of financial gains, but fail to meet the other requirements of free uses: uses that conflict with the normal exploitation of the work, unreasonably prejudice the legitimate interests of the author, are unfair, or are incompatible with the intended purposes of free use.[36] Although it would be very interesting to see a case in practice, where the use would not be free use because of the unfair behaviour of the infringer, and because of the amount of the financial losses, the court could not use the decriminalizing paragraph, as well.

Finally, a much awaited modification must be highlighted. Listening to the proposals of the representatives of the jurisprudence,[37] at the same time the Criminal Code came in force, the legislator brought the misdemeanour form of copyright infringement

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Surveillance and Accusation-Preparation Department is on the same position in its Nf. 6625/2007. directions.

33 Regarding to the Administration's statement, it will calculate with 800 USD per cinematographic work, so the decriminalizing paragraph will be unusable after downloading three films. S. Barna, József: Három film megosztását engedi az új Btk. *ITCafé,* 2012. Available at: http://goo.gl/53V5Y, and Mezei, Péter: A NAV válaszol: nem eszik olyan forrón… *Szerzői jog a XXI. században,* blog post, 2012. Available at: http://goo.gl/tCDI9M.

34 § 35. (1) of the Copyright Code.

35 S. more: Gyenge, Anikó: *Szerzői jogi korlátozások* és *a szerzői jog emberi jogi háttere*. Budapest, HVG-Orac, 2010.

36 The Hungarian Copyright Code adds two requirements – the last two in the list – to the requirements of the three-step-test. § 33. (2) of the Copyright Code.

37 S. Kármán–Mészáros–Nagy–Szabó (2010) op. cit. 172. and Kardos–Szilágyi (2011) op. cit. 16.

back.[38] From now on, criminal acts that does not exceed the amount of 100.000 HUF (approx. 320 EUR) in financial loss, are misdemeanours. This misdemeanour also contains a decriminalizing regulation – basically the same as the one in the Criminal Code –, in its (3) paragraph.

Although in the transition period there was a problem regarding the applicability of the criminal and misdemeanour form of copyright infringement. Regarding the infringements which were committed under the jurisdiction of the old Criminal Code, but were judged after the new Criminal Code came into force, and did not exceed the amount of financial loss mentioned above, the acting criminal authorities and courts – correctly –[39] terminated the procedures and remitted the cases to the authorities competent in misdemeanours. But these authorities – regarding to the § 2. (5) of the Misdemeanour Act –[40] also terminated the procedures. Therefore acts causing financial losses under the specified amount, and were committed before the new Criminal Code came to force, are in a peculiar legal paradox, because it seems clear that the legislator didn't want these acts to be unpunished. In my opinion this interpretation of the Misdemeanour Act is *contra legem* despite its relative simplicity, because these acts in fact were not misdemeanours at the time they were committed, but they were crimes – more seriously punishable acts – regarding the old Criminal Code. Therefore the cited paragraph of the Misdemeanour Act should be interpreted[41] – or even reviewed – as follows: If the act was not subject to misdemeanour liability by the time it was committed, and it was not subject to any law that punished the same act even more seriously, than misdemeanour liability cannot be declared.

As we could see above, the criminal act of Infringement of Copyright and Certain Rights Related to Copyright has taken on step forward, but several ones backward. The legislator's intent to decriminalise certain uses can be seen as an advancement, but nor the paragraph itself or its practise is in harmony with this intent. The same can be said on the fact that despite the implemented adjustments, the crime means an even more serious[42] criminal liability than the previous versions – in line with the previous modifications.[43] We must add that reinstating the misdemeanour form to the system was very much on the agenda, but because of the temporally problems of applicability, and the interpretation problems of the decriminalizing paragraph, it is not certain that the modifications can achieve substantial changes in the procedures.

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38 Act II of 2012 on Misdemeanours, § 192/A. (hereinafter mentioned as Misdemeanour Act).

39 The § 2. of the Criminal Code states that „If, in accordance with the new penal laws in force at the time an act is adjudicated, the act is no longer treated as an act of crime or if it draws a more lenient penalty, then the new law shall apply; otherwise, new penal laws have no retroactive application.".

40 The paragraph states that misdemeanour liability cannot be based on acts that were not criminalised as misdemeanours at the time of committing.

41 S. more: Bisztriczki, László – Kántás, Péter (ed.): *A szabálysértési törvény magyarázata*. Budapest, HVG-Orac, 2014. 43–44.

42 The Supreme Court is on the same opinion in its 7/2014. decision of criminal principle [38-39].

43 S. also: Jávorszki, Tamás – Rongáné Srakta, Ibolya: A szerzői vagy szerzői joghoz kapcsolódó jogok megsértése bűncselekményének jogalkalmazási kérdései. Ügyészek *Lapja*, 2008/5. 35–56.

4. Other Related Issues of Criminal Copyright Infringement

After presenting the nature and history of the crime, there are two related issues that has to be discussed: On the one hand, the justifiability of the criminal liability, and on other hand, the problems of determining and calculating the amount of financial losses, and in connection with this, the role of appointed experts in the procedures. The examination, understanding and successful reconsidering is essential to the Criminal Code be able to serve its purpose correctly.

4.1. Justifiability and Necessity of Criminal Protection in the 21th Century

It is undisputable and trivial that the 21th century posed challenges on copyright law in more than one aspect. Because of this, copyright law is subject to constant changes and modifications, therefore the appropriate scale of protection sits on the fence, and the legislator is not capable by all means to keep on with this wavering.[44] After all this, we must ask ourselves if the current scale of criminal copyright protection – which is one of the most important elements of copyright protection – is if fact in harmony with the ideal or necessary scale of protection regarding works of authorship. To answer this question, we must first take a look at the international sources of criminal copyright law, because these sources are definitive regarding the actual scale of protection. We also must specify the purpose of criminal copyright protection, and see if the current system is able to serve this purpose.

1. The TRIPS agreement[45] – which was enacted to the Hungarian legal system by the Act IX of 1998 – is not particularly strictly drafted talking about criminal sanctions of copyright infringement, it only lays down minimum requirements[46] that are acceptable and feasible for every state party. Article 61 states that state parties are only obligated to criminalise copyright "piracy",[47] when it is wilful and it is on a commercial scale, although the agreement does not define which uses are considered as piracy.[48] State parties are also obligated – according to the Hungarian translation – to have fines and imprisonment as applicable sanctions, but is must be highlighted, that the original English text uses the "and/or" not the "and" conjunction, therefore fines alone

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44 See more: Ujhelyi, Dávid: Válságjelek és megoldásaik a digitális szerzői jogban. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2013/6. 69–107.

45 The examined text of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement is available at: https://goo.gl/GqE4KN.

46 Gregor Urbas: Copyright, Crime and Computers – New Legislative Framework for Intellectual Property Rights Enforcement. *Journal of International Commercial Law and Technology*, Vol. 7. Iss. 1, 2012. 12.

47 The use of term pirate or piracy is absolutely unusable in copyright law, s. Peter K. Yu: Digital Copyright and Confuzzling Rhetoric. *Vanderbilt J. of Ent. Tech. Law*, 2011/13:4:881. 31, also s. Mezei, Péter: A fájlcsere retorika – gondolatok egy álvita margójára. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2012/2. 49. and Ujhelyi (2013) op. cit. 76.

48 Actually the agreement defines pirated products (or as it should stand: infringing products, it can be found in the footnote marked with *), but nevertheless it fails to define piracy as a criminal act.

are enough sanctions, the legislator is not actually obliged by the agreement to put incarceration into the system.

Harmonizing criminal law is a hard nut to crack in the European Union, it actually brings up the question of the scope of authority.[49] Before the Treaty of Lisbon came to force, the cooperation in justice and home affairs was the third of the three pillars of the European Union.[50] This meant that the Union only had jurisdiction if the criminal protection was necessary to protect – for example – the common commercial policy.[51] The three pillars system has been replaced in 2009 with Article 83 of the Treaty on the Functioning of the European Union (hereinafter mentioned as TFEU). This article constitutes a general power of harmonization, which means that if a crime affects more state parties – has a cross-border dimension –, or taking effective actions against a crime needs the participation of more state parties – so they have a special need to combat them on a common basis –, than the Union has the power to establish minimum requirements or rules with directive-legislation.[52] Interestingly, the article's first paragraph – which contains the criminal acts in which the general power of harmonization is applicable, the areas of crime – fails to enlist at least one crime that concerns intellectual property, although because of the territorial nature of intellectual property it would be understandable if it would do so. But the second paragraph[53] of the article states that "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy […], directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.", which provision could serves as a basis of possible harmonization in the future.

The IP Rights Enforcement Directive[54] has to be mentioned, as well. Article 2. (3) point b) and c) states – maybe because of the three pillar system, which bounded the legislator when the directive was made – that the directive does not affect the rules established in the TRIPS agreement, or the legal system of the state parties. Furthermore, the directive has relevant parts regarding financial loss, which will be dealt with in the later parts of this paper.

The Anti-Counterfeiting Trade Agreement[55] is also interesting on this subject. It could have focused on raising the level of minimum requirements in criminal law

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[49] Fazekas, Judit – Gyenge, Anikó: Büntetőjogi jogérvényesítés a szellemitulajdon-jogok területén európai és nemzeti szinten. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2006/6. 7–8.

[50] Spránitz, Gergely: Digitális tartalmak szerzői jogi védelme online környezetben – II. rész. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2007/4. 79.

[51] Horváthy, Balázs: A szellemitulajdon-jogok védelme és az EU közös kereskedelempolitikája. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2013/1. 6.

[52] Békés, Ádám: *Az Európai Büntetőjog – Luxemburgi* és *Strasbourgi büntető* ítélkezés. Doctoral thesis. Pazmany Peter Catholic University, 2010. 35. Available at: https://goo.gl/DukZYu.

[53] Udvarhelyi, Bence: Büntető anyagi jogi jogharmonizáció az Európai Unióban. *Publicationes Universitatis Miskolcinensis – Sectio Juridica et Politica*, XXX/1., 2012. 306–307.

[54] Directive 2004/48/EC of the European Parliament and of the Council.

[55] The examined and final text of the Anti-Counterfeiting Trade Agreement (hereinafter mentioned as ACTA is available at: http://goo.gl/rvZCQ5.

in developed countries, but instead ACTA aimed to raise the level of protection of developing countries, to serve the interests of the developed ones.[56] This is proven by the fact that the final, fairly hollowed out[57] text did not require any significant changes in the legal system of the developed countries.[58] Specifically, Article 23 of ACTA, similarly to the TRIPS agreement, criminalizes infringements, or more specifically "piracy", that have a commercial value, which is widely interpretable.[59] Pirating is not defined in this agreement, it only contains the definition of pirated goods. The agreement highlights uses that should be criminalized by all means, like unauthorized copying of cinematographic works, and subjects of great importance, like criminal liability for aiding and abetting, liability of legal persons.[60] Hungarian law – and every state party of the European Union, as well as the United States – satisfies these requirements. Like the TRIPS agreement, Article 24. mentions only fines and imprisonment on obligatory implemented sanctions, Article 26. highlights the importance of *ex officio* criminal enforcement. It is interesting, that ACTA emphasizes in a footnote – no. 1, under the applicable sanctions – that state parties are not obliged at any means "*to provide for the possibility of imprisonment and monetary fines to be imposed in parallel*."

In the end, ACTA was not able to accomplish its goals, and because of the civil pressure and the legal concerns arisen even the European Parliament rejected it,[61] and the developing countries did not accept it as well.

Altogether the relevant international sources of law,[62] and the sources of law in the European Union does not bind the hand of the national legislator strictly, regarding criminal copyright infringement, nor the applicable sanctions, and the liability system established by the Hungarian Criminal Code is much more strict. Furthermore, it is concerning that the firstly determinative TRIPS agreement, and recently drafted ACTA are both operating with the phrase "piracy". Use of such an uncertain concept or definition in criminal law harmonization is unacceptable.

2. According to § 79. of the Criminal Code, the purpose of the punishment is to prevent the actual offender and others from committing crimes, to protect society, so technically special and general prevention.[63] According to Serge Subach, the purpose

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[56] Miriam Bitton: Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures. *The Journal of Criminal Law & Criminology*, Vol. 102. No. 1, 2012. 102.

[57] Christophe Geiger: The Anti-Counterfeiting Trade Agreement and Criminal Enforcement of Intellectual Property – What Consequences for the European Union? *Max Planck Institute for Intellectual Property and Competition Law*, Research Paper, No. 12-04, 2012. 2.

[58] Kőhidi, Ákos: A Hamisítás Elleni Kereskedelmi Megállapodás egyes polgári jogi kérdései. *Jogi Iránytű*, 2012/1. 3. S. also the prospect of the European Commission. Available at: http://goo.gl/ORrMLW.

[59] Irina D. Manta: The Puzzle of Criminal Sanctions for Intellectual Property Infringement. *Case Research Paper Series in Legal Studies*, Working Paper, 2010-30. 489.

[60] S. ACTA Article 23, paragraph (3), (4) and (5).

[61] S. the announcement of the European Parliament. 2012. Available at: http://goo.gl/mHw8WQ.

[62] The Bern Convention and WIPO-WCT does not contain criminal regulations.

[63] Görgényi, Ilona – Gula, József – Horváth, Tibor – Jacsó, Judit – Lévay, Miklós – Sántha, Ferenc – Váradi, Erika: *Magyar büntetőjog* – Általános *rész*. Budapest, CompLex, 2014. 469. and Belovics,

of punishment besides of prevention could be isolation, rehabilitation or retribution;[64] Joe Donnini includes compensation to this list.[65] Although Subach adds that these purposes fail in certain aspects if intellectual property is concerned. Accordingly, the mechanism of deterrence when the infringement is realized online is not quite clear to jurisprudence, so it cannot be applied appropriately; imprisonment or isolation not just punishes the offender for the committed crimes, but for the crimes hypothetically will be committed in the future. Imprisonment cannot serve the purpose of rehabilitation in this special type of offenders; and instead of retribution, education of the offenders, or community service work – perhaps by copyright aiding organizations – should be used.[66] Ferenc Nagy adds the following thoughts to imprisonment: "[…] it only suits modern criminal law policy if courts only use executory imprisonment, if the purpose of punishment only can be achieved this way."[67]

Furthermore, it is very important to highlight that like in every other criminal act, in the case of criminal copyright infringement as well, criminal law can only be the last resort, *ultima ratio*.[68] In addition we must mind if punishments and criminal acts are grounded on stable moral – how society thinks about acts, and the legal consequences of them – and social – does crimes prevents damages or injuries at all – foundations.[69]

3. These thoughts leads us to the questioning ourselves: what purpose does the criminal act regarding copyright infringement serve in criminal law, and can it properly fill its role, does it meet the above examined requirements? Our base concept here is that while civil lawsuits serve private interests, criminal procedures serve common or public interests.[70] In Hungarian criminal law, the public interest protected by the criminal act is called the protected legal subject. According to the reasoning of the Criminal Code – as it was mentioned in Chapter III – criminal acts protecting intellectual property have special legal subjects, in our case it is the economic rights of the right holder.[71] But this situation is complicated, because the rights of the right

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Ervin – Busch, Béla – Nagy, Ferenc – Tóth, Mihály: *Büntetőjog I.* – Általános *rész*. Budapest, HVG-Orac, 2014. 458–461.

64 Serge Subach: Criminal Copyright Infringement – Improper Punishments from an Improper Analogy to Theft. *Criminal and Civil Confinement*, Vol. 40:255, 2014. 262.

65 Joe Donnini: Downloading, Distributing, and Damages in the Digital Domain: The Need for Copyright Remedy Reform. *Santa Clara Computer & High Tech. L. J*, Vol. 29, 2013. 415–415.

66 Subach (2014) op.cit. 267–269.

67 Nagy, Ferenc: A büntetőjogi szankciórendszer reformja. Büntetések és intézkedések az új Büntető Törvénykönyvben. *Büntetőjogi Kodifikáció*, 2001/2. 9. Available at: http://goo.gl/LuMZqF.

68 Spránitz, Gergely: Digitális tartalmak szerzői jogi védelme online környezetben – I. rész. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2007/3. 37.

69 Geraldine Szott Moohr: The Crime of Copyright Infringement – An Inquiry Based on Morality, Harm, and Criminal Theory. *Boston University Law Review*, Vol. 83:731, 2003. 749.

70 Benton Martin – Jeremiah Newhall: Criminal Copyright Enforcement Against Filesharing Services. *North Carolina Journal of Law and Technology*, Vol. 15, Iss. 1, 2013. 125.

71 Grad-Gyenge, Anikó (ed.): *Kézikönyv a szerzői jogi jogérvényesítéshez* – Útmutató *a gyakorlat számára*. ProArt, 2014. 322. and Belovics–Molnár–Sinku (2013) op. cit. 680.

holder are products of an imaginary bargain between the creators and society, and the legislator is obliged[72] to strike an appropriate balance between these interests.[73] This may cause a paradox situation, where the too strictly tailored regulation – which is supposed to serve the interests of the society – has an opposite effect, and can harm the interests of society against the right holders, and can represent a disfigured balance. Therefore the legislator has to be clear on the dogmatic foundations of copyright, and its framework and driving forces,[74] and has to make and enforce regulations accordingly. So the criminal act will not harm its own protected subject, if it criminalizes only those uses, and applies only those sanctions, that are – respecting the *ultima ratio* nature of criminal law – absolutely necessary to criminalize.[75]

But there is another surprising dogmatic problem that emerges in connection with criminal copyright infringement. The first Copyright Code of the United States came to force in 1790,[76] but criminal protection was only established in 1879,[77] so the right holders had to wait for it for more than a hundred years. The finally enacted crime has been modified on several occasions, it can be find currently in the Copyright Code of 1976,[78] and it was also subject to several modifications[79] and additions,[80] the scope of criminal liability was typically broadened.[81] The structure of the crime is quite unique, but it is more interesting that because of the Anglo-Saxon legal systems are tend to see intellectual property rights as a true or real form of property,[82] the § 506. is commonly tried to be interpreted in analogy with theft,[83] fraud or even forcible entry.[84] There

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72 Moohr (2003) op. cit. 761.

73 John Lindenberg-Woods: The Smoking Revolver – Criminal Copyright Infringement. *27th Bulletin – Copyright Society of the U.S.A*, 1979. 63.

74 James Lincoln Young: Criminal Copyright Infringement and a Step Beyond. *Copyright Law Symposium*, No. 30, Columbia University Press, 1980. 183.

75 Christopher Buccafusco – Jonathan S. Masur: Innovation and Incarceration – An Economic Analysis of Criminal Intellectual Property Law. *University of Chicago Coase-Sandor Institute for Law & Economics Research Paper*, No. 649, 2014. 34.

76 Lydia Pallas Loren: Digitization, Commodification, Criminalization – The Evolution of Criminal Copyright Infringement and the Importance of the Wilfulness requirement, *Washington University Law Quarterly*, Vol. 77:835, 1999. 840.

77 Moohr (2003) op. cit. 736.

78 17 U.S. C. § 506.

79 The most important modification are the followings: No Electronic Theft Act (1997, NET Act; Public Law 105–147; H.R. 2265), and the Digital Millennium Copyright Act (1998, DMCA; Public Law 105–304; H.R. 2281).

80 Martin–Newhall (2013) op. cit. 107–121.

81 Stuart P. Green: Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights. *Hastings Law Journal*, Vol. 54, 2002. 170.

82 This originates most likely in Locke's theory of property, see: Alfred C. Yen: Restoring the Natural Law: Copyright as Labour and Possession. *Ohio State Law Journal*, Vol. 51:517, 1990. 523.

83 Stuart P. Green: Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights. *Hastings Law Journal*, Vol. 54, 2002. 170.

84 Eric Goldman: Warez Trading and Criminal Copyright Infringement. *Copyright Society of the U.S.A. Journal*, Vol. 51, 2003. 395–396.

are authors who say that based on the property-metaphor[85] it is necessary to create – *horribile dictu* – a new, *sui generis* copyright theft crime, as an independent form of theft.[86] But the theft analogy can not only be found in jurisprudence, it also played a role in the Tenenbaum case,[87] where the plaintiff and the defendant systematically referred to copyright infringement as theft.[88] I think that it is not necessary to further explain how deep and important dogmatic issues are presented by this practice, and what kind of problems may arise from it, regarding copyright- or criminal law, as well.

Moreover, the question of proceeding abroad and jurisdiction[89] has emerged in the relevant jurisprudence of the United States, which can be a tough nut to crack regarding the territorial nature of copyright law, when a country wants to take action against infringements that have been committed abroad, but have effect inland, as well.[90]

There are scholars abroad[91] and also in Hungary[92] who are aware that society does not disapprove every criminalized use of copyrighted works. Naturally, it would be surreal to say that if a part of society approves a behaviour, than criminal law cannot criminalize it, but the Hungarian Copyright Code's earlier mentioned decriminalizing paragraph actually tries to react to this same problem, so we cannot say either that society's opinion on criminally relevant matter are weightless, and cannot be taken into consideration. This could be very important regarding copyright law, where the rights provided are results of a bargain or compromise with society.

It is also debated regarding the analysis of the crime if the implied wilfulness of the infringer should cover only the infringing act or use, or should it cover the intent to specifically infringe someone's rights?[93] According to the most accepted opinion, it is enough if the infringers will covers the criminalized use, but there were cases[94] where the defendant's lawyer said that the defendants act lacked wilfulness, because the defendant believed that the use in question was not illegal, and thus the defendant should be relieved from criminal liability.[95] This argument looks parallel to the Hungarian Criminal Code's error in dangerousness to society, and although there was

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85 William T. Gallagher: Trademark and Copyright Enforcement in the Shadow of IP Law. *Santa Clara Computer & High Tech. L. J.*, Vol. 28, 2012. 491.

86 Jeff Vinall: The criminal law's treatment of twenty-first century copyright pirates – A treacherous new frontier for property offences. *Oxford University Undergraduate Law Journal*, Issue 2, 2013. 70–71.

87 Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487, 490 (1st Cir, 2011).

88 Peter J. Karol: Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case. *New England Law Review*, Vol. 47, 2013. 900.

89 Crystal Yi: Keeping up with the Times – Integrating Innovations in Criminal Copyright Infringement into the Federal Rules of Criminal Procedure. *Journal of Law, Economics & Policy*, Vol. 10:2, 2014. 496.

90 One of the most famous procedures is the Kim Dotcom case, see United States v Dotcom, No. 1:12-cr-3, 2012.

91 Green (2002) op. cit. 238.

92 Varga, Balázs: Informatikai bűncselekmények. *Jogi Fórum*, 2013. 2. Available at: http://goo.gl/wSx0iy.

93 Trotter Hardy: Criminal Copyright Infringement. *William & Mary Bill of Rights Journal*, Vol. 11:305, 2002. 319.

94 United States v. Moran, 757 F. Supp. 1046 (D. Neb. 1991).

95 Martin–Newhall (2013) op. cit. 129. This argument humorously got the name Tinker Bell exception.

actually a case where the procedure got terminated on the grounds of this argument,[96] this seem merely a special case, not a generally applicable solution for infringers.

4.2. The Questions of Calculating Financial Losses

Finally, we must take a look at the issues of calculating financial loss, because – as it was presented in Chapter III – aggravation of the crime – and so the punishment, which can be up to ten years is imprisonment –[97] is determined by it, and civil claims[98] in the criminal procedure are also aligned to it, but calculating it provokes a lot of unanswered questions.

The definition of financial loss can be found in the § 459. point 17. of the Criminal Code, which is the sum of the caused damages and the losses of financial gains. Because the right holders do not, or rarely suffer actual damages, the losses of financial gains suffered by the right holder in connection with the crime shall be examined at first place.[99] Although calculating these losses is by no means an easy task.[100]

It is quite worrying, that the Prosecutor General gave out guidelines – in connection with the previous versions of the crime – that states, that in procedures of criminal copyright infringement it is not an essential task of the acting authorities to precisely calculate the caused financial loss.[101] In my opinion the precise calculation of financial losses is not just necessary and important in the criminal procedure, but it is the foundation-stone of the legitimacy of any judgement passed in this kind of crimes, and should have high importance.

In practice there are a lot of methods of valuating intellectual property[102] and calculating financial losses, although these are used without any particular consistence. Gross and net retail and wholesale prices, potentially applicable license fees, dealer's prices and average prices, price tables of collection societies and affidavits of the right holders can be found amongst the applicable calculation methods. These methods are examined by scholars,[103] and by the Council of Copyright Experts (shortly CCE, or SzJSzT in Hungarian) on several occasions, as well.[104]

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96 See the judgement of Nyíregyháza City Court, no. 32.B.1836/2008/24. Available at: http://goo.gl/3sxTJw.

97 § 385 (4) point c) of the Criminal Code.

98 Kardos, Andrea – Szilágyi, Dorottya: Szellemi alkotások büntetőjogi védelme – II. rész. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2012/1. 17–18.

99 Vida József: A szerzői jog büntetőjogi védelmének néhány gyakorlati kérdése, különös tekintettel a zeneművekre. Ügyészek *Lapja*, 2005/5. 15.

100 Christina Bohannan: Copyright Harm and Injunctions. *Cardozo Art & Entertainment L. J.*, Vol. 30:11, 2012. 20.

101 Vida (2005) op. cit. 15. and Grad-Gyenge (2014) op. cit. 353.

102 See Káldos, Péter: A szellemivagyon-értékelés elméleti és gyakorlati módszerei. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2006/4. 5–26.

103 Subach (2014) op. cit. 269.; Vida (2005) op. cit. 17.; Grad-Gyenge (2014) op. cit. 351–352.

104 S. the expert opinions of the Council SzJSzT (CCE) 5/1995, 27/1995, 01/2000, 15/2000, 19/2000, 29/2000, 10/2001, 31/2003.

The most inapplicable of the above mentioned calculation methods is the affidavits of the right holders,[105] because in fact the judge or the acting authority in this case calls the plaintiff to make statement on what punishment should be used on the defendant. But inquiring statements from the right holders is not just unreliable because of this: profits and expenses are managed confidentially[106] by the right holders, and if inquired, they will most probably give approximate values in their affidavits, but the punishment cannot be based on fictional mounts.

Saying that the financial losses are equal with the unpaid license fees also seems problematic.[107] Imagine if an unauthorised product was seized from the infringer, which was labelled with a cartoon figure which is protected by copyright law. If the right holder of this cartoon figure signs only contracts that are applying a minimum license fee system, then if this right holder is inquired, financial loss will be equal to this minimum license fee, which can be even thousands of euros, which would mean three to eight years of imprisonment to the infringer – only for one unauthorised product.

The most widely used base of calculating financial losses in Hungary is the net – without the general sales tax – retail price,[108] although it causes more questions than it answers. For instance, what happens if the appointed expert or the authority cannot find comparative prices? What should be done if the specific product was not distributed in the country of question at all, or it was distributed, but it is not available for years, and the last sale price is way too high compared to the value in time of the infringement, or it is on sale, and the price is too low?[109] It also seem unjustified to use net retail prices, because they contain a lot of expenses that does not emerge as income by the right holders, like the production costs of the goods, distribution expenses on the whole chain of distribution, advertising costs, although only the right holders losses can be added to the financial loss. Wholesale prices and retailers price tables also suffer from these defects. For example if a book is only distributed in physical form, but the infringer uploaded a self-made eBook to the internet, than we are lacking comparative prices – license fees – for this online use, and the distribution license fee or net retail price of the physical work cannot be the base of calculating the financial loss, because the distribution costs of eBooks are significantly under of physical works.[110] It is also important to clarify if we are going to use the price of the infringing or the authorised product, because the price of the original naturally exceeds – even several times – the price of the infringing one.[111]

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105 Ott (2012) op. cit. 128.

106 Kármán–Mészáros–Nagy–Szabó (2010) op. cit. 142.

107 See the (26) preamble paragraph of the IP Rights Enforcement Directive.

108 This most likely originates in the expert opinion no. 15/2000 of the CCE/SzJSzT.

109 Máté, István Zsolt: Az igazságügyi informatikai szakértő tapasztalatai – szerzői joggal kapcsolatos ügyek. *Infokommunikáció és Jog*, 2014/1. 28.

110 Szabó, M. István: Az e-könyv ára miért nem nulla forint? *HVG.hu*, 2014. Available at: http://goo.gl/YytzW9.

111 See more: Szathmáry, Zoltán: A szerzői vagy szerzői joghoz kapcsolódó jogok megsértése nyomozásának jogalkalmazási anomáliái. *Magyar Jog*, 2010/3. 153–157.

One of the most acceptable ways of calculating financial losses is to clarify how much is the pure profit of the right holder.[112] Pure profits are free from additional costs and expenses, and are calculable if the products is not in distribution at the time. Additionally, if the product is not in distribution, the amount financial loss could be zero,[113] and this would be a reason to terminate the criminal procedure, but naturally this would leave the doors open before civil litigation. The only problem is that this calculation method does not seem feasible in practice,[114] because – as it was mentioned above – right holders are not really willing to give statements about their precise profits.

It also came up that financial loss should be calculated separately by the types of works,[115] because specific calculation methods are not applicable by all types of works in criminal procedures. This idea is only acceptable with exceptions, because in practice it would be much more practical to use one, generally applicable calculation method, which only could be discarded in certain special types of works. For example, by songs the easiest, most justifiable and practical way is to use the price tables of collecting societies.

Based on the above, firstly we must accept that there are financial losses caused[116] in every case of infringement – because as a general rule the right holder may authorise every use of the copyrighted work –, but in certain cases it is so close to nothing, that – *de minimis* – ignoring these infringements is much closer to criminal laws nature and purpose.[117] The base of the calculation should be the pure profit of the right holder (the license fee per work, minus the dues and additional costs). There could be no additional damages added to this amount,[118] especially if they are not suffered by the right holder, like damages in reputation, or infringements derived from the original infringements, so it must be interpreted narrowly as possible. This value must be corrected in certain types of works. For example, if the offender infringed copyright on a software that is clearly outdated, was not distributed for a long time, then the calculated amount of financial loss should be reduced, or in extreme cases discarded in whole. This would help to avoid excessive sanctions.

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112 Magyar, Csaba: Mennyit ér a szoftver? *Infokommunikáció* és *Jog*, 2004/1. 35.

113 Of course the financial loss is never zero, but there are scholars who say if the infringer would never bought the product – because of financial problems, or attitude –, then there is no financial loss, at all. See Moohr (2003) op. cit. 754. Others say that financial loss only should have criminal effects if they cumulate. See Hardy (2002) op. cit. 341.

114 Kármán–Mészáros–Nagy–Szabó (2010) op. cit. 44.

115 Kiss, Zoltán: A vagyoni hátrány megállapítása szerzői és szomszédos jogok megsértése miatt indított eljárásokban. *Iparjogvédelmi* és *Szerzői Jogi Szemle*, 2001/3. Available at: http://goo.gl/k1Fb3V.

116 Vinall (2013) op. cit. 59.

117 This naturally does not prevent the right holders to start civil lawsuits. Financial losses are so minimal in these cases, that pursuing with the criminal procedures does not serve the interests of society.

118 Timothy L. Warnock: One Work, Three Infringers: Calculating the Correct Number of Separate Awards of Statutory Damages in a Copyright Infringement Action. *Vanderbilt J. of Ent. and Tech. Law*, Vol. 14:2:343, 2012. 350.

Finally we have to examine the role played by appointed experts, and expert opinions as measures of inquiry[119] in the criminal procedure. This is because in the case of criminal copyright infringement, experts are very frequently appointed – independently of it was necessary or not. The appointed expert is usually an IT-expert.[120] The biggest problem is that experts are asked to answer issues of law – for example is the use if the defendant infringing, or is the work under copyright protection? –,[121] despite experts are only empowered to give opinions in issues of facts, and not to give opinions in issues of law.[122] Therefore after the expert unlawfully gives an opinion – on for example that the software found on a data carrier are infringing copyright – the burden of proof now binds the defendant,[123] and the defendant has to prove the innocence, that there was no copyright infringement, but this burden of proof is unrealistic and unlawful.[124] It also seems problematic that experts do not often clarify in the opinions which calculation methods did they use when calculating the financial loss, and why did they used for example net retail prices as the base of the calculation.[125] These problems should be corrected as soon as possible, keeping in mind the legitimacy of the criminal procedures and judgements.

5. Conclusion

This paper has presented shortly the history of the crime regarding criminal copyright infringement, and examined the most important dogmatic and practical problems of these crimes.

We can conclude from the previous chapters that the intervention of the legislator is necessary. It is necessary to rethink the crime itself, to – differently from the previous tendencies – narrow down the scope of criminal liability in respect of the *ultima ratio* nature[126] of criminal law, and to specify and clarify the decriminalizing paragraph in respect of the dogmatic characteristics of copyright law,[127] and to lighten the applicable sanctions.[128] This is especially justifiable in light of these crimes are very hard to track

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119 Gyaraki, Réka: Az on-line elkövetett szerzői vagy szerzői joghoz kapcsolódó jogok megsértésének bűncselekménye. *Infokommunikáció* és *Jog*, 2010/6. 218.

120 Kardos–Szilágyi op. cit. (2005) 11. This is usual not only in Hungary, but abroad, as well, see: Donnini (2013) op. cit. 425.

121 Grad-Gyenge (2014) op. cit. 350.

122 See Court Decision (BH) 2007.397. There are scholars who says that courts are *de facto* transferring their powers in these cases. See: Máté (2014) op. cit. 24.

123 Ott (2012) op. cit. 146.

124 If the use is the one regulated in § 59. (2) of the Copyright Code (backup copy of software), than it's logical, but unrealistic to ask or even oblige the defendant to provide the original invoice, or the original copy of the software.

125 Kármán–Mészáros–Nagy–Szabó (2010) op. cit. 139.

126 30/1992 ABH (Decision of the Supreme Court).

127 EBH 2000.188 (Decision in principle of Courts).

128 For example, the maximum length of imprisonment in Romania is five years, see: Violeta Slavu: Protection of Copyright by Criminal Law Means. *Law Annals Titu Maiorescu University*, Vol. 8, 2009. 141.

down,[129] but the procedures are explicitly expensive,[130] so in the current system we can also question their usefulness to society. Because TRIPS agreement and the European Union does not have stricter requirements, it is enough to criminalize unauthorised uses that are committed with financial gain, and imprisonment must be reserved only to the most serious crimes. As a potential applicable model we can take a look at the crime enacted in Singapore,[131] where – similarly to the previous Hungarian misdemeanour form – the crime is structured by the uses, criminal acts.[132]

We also must clarify how we could correctly react to the special connection between copyright law and society in criminal law, the prevailing statutes shall respect this by all means, and it must be specified what role did the legislator meant to financial loss in the procedure, and regarding this how, and with what calculation methods, and under what principles can experts aid courts and authorities in their duties. The function of the criminal act should be harmonized with the functions of civil litigation, meaning criminal procedure should not be the tool of enforce private interest.[133]

And although there are opinions that say the possibility of a supranational regulation is only an illusion,[134] because of the territorial nature of copyright, international cooperation[135] must play an important role in criminal law, so copyright could be protected on an appropriate level.

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129 Andrea Wechsler: Criminal Enforcement of Intellectual Property Law – An Economic Approach. *Max Planck Institute for Intellectual Property and Competition Law*, Research Paper, No. 11-05, 2010. 10.

130 Margot Kaminski: Copyright Crime and Punishment – The First Amendment's Proportionality Problem. *Maryland Law Review*, Vol. 73:587, 2014. 611.

131 Mark Lim Fung Chian: Criminal Offences under the Singapore Copyright Act – Legal and Procedural Issues. *Singapore Academy of Law Journal*, Vol. 11, 1999. 126.

132 But one could argue that this structure makes the crime much more complicated.

133 Martin–Newhall (2014) op. cit. 125.

134 Bércesi, Zoltán: Szerzői jogi normaalkotás az Európai Közösségben. Ügyészek *Lapja*, 2011/6. 22.

135 Urbas (2012) op. cit. 19.