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**THE PROTECTION OF COPYRIGHT BY NATIONAL
CRIMINAL LAW, IN THE OPERATION OF FILE
SHARING SYSTEMS**

Theses of Doctoral Dissertation

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I.

Subject of the essay, premises

The topic is very timely, as downloading copyrighted materials from the internet and using file sharing systems have nowadays become mass phenomena of our society. The main reason for this lays in the consumers' demand to acquire these materials for free. Downloading certain works may constitute fair use (in cases defined by copyright laws) and therefore not require obtaining permissions and paying royalties. But the currently operating file sharing systems require sharing the files simultaneously with downloading. Upon examining file sharing in its complexity, we shall emphasize that the activity constitutes a criminal act in almost all cases, as it breaches copyright and causes pecuniary losses (as no royalties are paid, with exceptional cases being very rare).

It is necessary to criticise the current criminal regulations and to seek proposals for their improvement, especially because tolerating the previously mentioned mass phenomena would mean an antagonistic conflict with the state's duty to execute the regulations of criminal law. In other words: an activity that breaches the regulations of the criminal code may not be considered legal, only because it is so common that a prosecution would cause social crises. It is extremely important to remember: file sharing is not only a mass phenomenon, but a mass phenomenon that almost completely lacks society's disapproval. It is considered a fashionable mischief rather than an act that shall be condemned ethically and criminally.

We must also accept that technical and social evolution both point towards a significant rise in internet usage. Therefore the cases and problems related to the subject of the present essay increasingly require solutions.

We must admit that there is no way to prosecute all members of the Hungarian file sharing systems. This would be impossible to execute and would also cause a vast public uproar. In the current practice, consequently enforcing their rights is neither the goal of the judiciary nor the aggrieved parties. It looks as though the solution lies in the amendment of the current criminal regulations. During this course we must always

consider the conflict between interests of the copyright holders and the users. This does not mean however that the present essay would neglect a 'criminal law viewpoint' of the topic. Our task is to find practical legal solutions that may find the proper balance between needs of the society and the requirement of consequent enforcement of regulations. With the current regulations, it seems inevitable that a long habit of non-enforcement will cause the regulations to become unenforceable.

II.

Research methodology

The present essay does not focus on international regulators. The reason is that our aim has specifically and exclusively been to examine national legislation, and that inspecting the problems of the Hungarian regulations does not require listing foreign legal codes.

The theoretical starting point is that the examination shall not focus only on criminal regulations, but it shall also include provisions of the copyright law.

Therefore the essay lists and examines property rights and inherent rights of persons, as listed in the copyright law. It lays special emphasis on property rights, as causing pecuniary losses is always an element of the criminal charge of the examined offences, and pecuniary losses may be caused by damaging property rights. Of all the property rights, the rights to multiplication and providing on demand access shall be highlighted, as these are mostly affected by downloading (multiplications) and uploading (providing on demand access).

Fair use is a major limitation to the exclusive right granted by copyright law, as it permits use of copyrighted material without acquiring permission from the rights holders or paying royalties to them.

With consideration to the previously mentioned case, the present essay thoroughly examines the rules of fair use, considering that Section 329/A of the Criminal Code only provides a framework to necessary elements of the criminal act, and also that criminal responsibility requires a damage of copyright. The examination also considers the current practices of fair use in European continental legal systems and the US.

The essay provides a general insight to consequences in civil and criminal law in case of breaching one's copyright. During the presentation of the current regulations, the typical judicial and interpretational doubts will arise, with the present essay seeking for the possible explanations.

To criticise criminal regulations, we must first get to know the technical properties of file sharing. Listing the different generations of the technology enables us to raise and discuss questions related to each development stage. One of the main motivations to the development of these systems was to move the dubious activity outside the sphere of criminal culpability. Development has turned in the direction of decentralisation that does not only involve an increase of effectiveness, but also with a rise in latency. Claiming that file sharing is legal had different reasons in each of the generations, but none of them are acceptable.

It is absolutely necessary to examine the different acts constituting file sharing. The reason for this is that partial offence elements may occur individually. Downloading may be considered multiplication, while uploading shall be providing on demand access.

It is extremely important to note that multiplication does not necessarily include the whole of the work, it may also cover only an identifiable part of the work. Therefore the defence claiming that 'usage did not concern the whole work, only a part of it' is unacceptable. Identifying such a part is not a problem. If certain parts of the work were not identifiable, then the users would not be able to get the parts, and therefore the whole of the work.

Downloads are very important (as opposed to uploads), because this act may be considered fair use. If so, it causes no damage of pecuniary rights and constitutes no criminal act. The primary obstacle of recognizing fair use is the theory of ‘illegal source’, developed by the Council of Copyright Experts. This says that copying from an illegal source – based on the principle of *nemo plus iuris* – may not be considered legal, based only on the fact that the source was illegal, even if it otherwise fulfils the requirements of fair use. The essay promotes the opinion that this principle’s major fault is assuming the existence of a collective mindset. The essence of the criticism is that the requirement to act in the manner required by good faith and fairness does not include examining if the work accessible on the internet was shared with or without the author’s permission. Since the legality of the source is not impossible, an error in this belief is also possible.

The essay notes that the national legal literature shares contradictory views on questions of downloading and uploading. Therefore during copying, the knowledge whether a source is illegal may not be considered obvious.

The legal categorization of uploading is much easier. This type of use always requires a permission and paying royalties. If the act lacks permission and royalties, it constitutes a criminal act. The essay takes into account that a work’s complete or partial use belongs to the same category.

We shall note that providing on demand access in a legal manner would solve the problems related to file sharing. If the upload was legal, then all multiplications would come from a legal source and therefore constitute fair use.

The essay points out that file sharing must be examined in its complexity. The reason is that a work’s upload and download happens simultaneously, based on the ‘tit-for-tat’ principle. This complexity is guaranteed, as attempts at a different use result in a ban from the system.

The essay examines opinions 07/08/1 and 17/2006 issued by the Council of Copyright Experts, noting that these hold no legally binding force for criminal jurisdiction.

The essay notes that the national legal literature is divided whether file sharing is harmful to social order or may be considered legal. It is very unlikely to presume that not legally qualified users may clearly understand the legality of their acts, if legal professionals deny the illegality.

The essay contains a separate chapter devoted to the different types of computer programs and the evaluation of their use in a file sharing system.

The essay thoroughly examines theoretical and practical aspects of determining pecuniary damages. It is very important to note that pecuniary damages are of high importance for the consideration of file sharing. This is the factor that draws a civil claim of copyright breach into the dimension of criminal law. It is very important to note that the current law does not define a minimum limit to pecuniary damage, and therefore very petty pecuniary damages may also constitute a criminal act. In this relation, the essay also touches the topic of the act being harmful to social order.

The special matters related to assigning an expert are mostly related to the dogmatic speciality of the criminal act, that is closely related to civil law relations. It is of elementary importance that the assigned expert shall only provide statements that fall under his/her own professional expertise. What is more – taking into account the related opinions of the Council of Copyright Experts – important to remember is that according to the basic principle of the Criminal Procedure Law, during deciding whether the plaintiff has committed an offence, the judge, the prosecutor and the investigating officials are not bound to a ruling or criminal offence determined in a different (e.g. civil, penal or disciplinary) process.

The questions related to the remuneration paid for blank media are discussed in the essay, as this concept was introduced to reduce or eliminate pecuniary damages that are the result of private copying of works. The essay supports the claim that expanding this remuneration for all media that is used for the storage of digital data – without the necessary elements of pecuniary damage – would greatly simplify the criminal classification of file sharing systems.

III.

Summary of the research outcome

The essay utilises and processes to statistical data to provide an insight to the high ratios of latency and the social acceptance of the acts in question. It pays special attention to the fact that illegal downloading of copyright protected materials is currently considered acceptable and frequent, and therefore invokes no disapproval of the society. Still however, we should not forget that the current criminal law imposes legal consequences on these low-profile acts. The high level of latency is a direct consequence of the antagonism between the social and criminal judgements of the act. Under the present practice, the investigating and prosecuting authorities do not seek to intensively pursue perpetrator of this type of crimes, since that would very likely cause serious social disorders.

The essay examines current views in the national legal literature and drafts proposals to solve the judicial problems occurring increasingly often. During this, it emphasises to note that decriminalization for cases below a minimum value limit may not be the only solution, although it seems inevitable. It seems unacceptable that a theft that falls under the minimum value limit of 50 000 HUF is only considered a minor offence, while a breach of copyright resulting in any petty pecuniary damage constitutes a criminal offence. The essay highlights the proposal to amend the Criminal Code in this matter, listing the possible positive and negative effects of such a change. We may fairly share the opinion that the current legislation needs a change of methods; otherwise coherent judiciary and effective protection by criminal law are merely illusions.

We shall not forget to mention the proposal to extend the scope of remuneration of blank media, that may not guarantee complete legality in the current legal environment, but by annulling pecuniary damage, it would greatly simplify the merely civil law classification of breach of copyright acts.

IV.

Publications on the subject of this essay

A büntetőjogi felelősség önálló elbírálása és a bizonyítási teher kérdésköre a szerzői vagy szerzői joghoz kapcsolódó jogok megsértésének egyes eseteiben – Ügyészek Lapja 2008. évi 6. szám

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A szerzői jog büntetőjogi védelmének egyes kérdései – Rendészeti Szemle 2009. évi 12. szám

Szakértői bizonyítás a szerzői vagy szerzői joghoz kapcsolódó jogok megsértése miatt indult büntetőeljárásokban - Ügyészségi Intranet 2010. április

Társadalomra veszélyesség és látencia a szerzői vagy szerzői joghoz kapcsolódó jogok sérelme kapcsán - Ügyészségi Intranet 2011. január