

Problems With Kosovo's Criminal Copyright Enforcement

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Globalization and the Internet have made the music, movies and books more accessible than ever before to users across the globe and therefore have made them more vulnerable to unauthorized use and commercial piracy and counterfeiting. The transitional society of Kosovo is no exception to what is taking place in other jurisdictions across the globe. The level of piracy and counterfeiting in Kosovo has exceeded the highest threshold of piracy known to Kosovo.[1] The extremely large number of fake DVDs and printed work in the market is evidence that copyright violation in Kosovo is of great concern.

In our opinion, the current widespread copyright problem in Kosovo was caused by (1) the lack of or inappropriate legal and institutional framework; coupled with (2) the fast transforming social and economic structures in this post-conflict society. Even though, with time, legislation has been crafted and institutional frameworks have been made operational, the poor economic and social conditions persist.[2]

The legal doctrine teaches that law is shaped by and dependent on the social and economic structures of the society.[3] Thus, any attempts to legislate contrary to these norms would be rather perilous. On a practical level, if the law prohibits behavior that economic conditions and other social factors — at a certain stage of development — have turned into “common” conduct or failure to enforce the enacted legislation it risks to lose credibility and legitimacy[4] before the individuals, businesses and international enterprises.

In this article, we will first describe the current legal framework available in Kosovo intended to protect the economic rights of the authors and interpreters by means of criminal law. We will then analyze the justification for imposing criminal sanctions in cases of copyright violations and whether these sanctions assist to achieve the goals of the copyright protection policy. Final remarks will conclude this article.

Criminal Provisions

Legal regulation of intellectual property rights started off in Kosovo with the Law on Patents in 2004,[5] followed by the adoption of the Law on Industrial Designs,[6] the Law on Trademarks,[7] the Law on Copyright and Related Rights,[8] and the Law on Customs Measures.[9] All these laws foresaw administrative and civil measures for IP rights infringements. The Law on Copyright and Related Rights also included criminal provisions. The first Criminal Code[10] criminalized trademark, patent and industrial design infringements. It excluded copyright infringement.

The last three years were significant for the protection and enforcement of IP rights, and the Kosovo government showed determination to improve the existing situation. It started off with the National IP Strategy 2010-2014 document,[11] followed by new IP laws introducing substantial changes[12] and the entry into force of a new Criminal Code.[13] Finally, a task force aimed at combating counterfeiting and piracy[14] was

established in accordance with the National Strategy to Combat Counterfeited and Pirated Goods for the 2012-2016 period.[15] Of relevance to this article are the Criminal Code and its provision concerning copyright infringement, specifically Article 296 of the code.

Article 296 covers the rights of the authors, including foreign authors[16] and interpreters. The Criminal Code imposes criminal sanctions in three different copyright-related situations: first, in case of infringement of moral rights[17]; second, in case of unauthorized use of a copyrighted work or subject matter of a related right; and third, in case of unauthorized use of a copyrighted work or subject matter of a related right with actual financial profit. Interestingly enough, the code lists as a separate “additional” criminal offense the act of circumvention of technological measures.

In principle, the legislators chose to impose no “commercial scale” for the intentional (direct or eventual) unauthorized uses of copyrighted work (Art. 296, Section 5). However, Sections 6 and 7 of Article 296 state that if an intentional act of a copyright infringement occurs with a profit of at least €10,000- €50,000 or €50,000 and more, the perpetrator can be punished up to five or eight years in prison, respectively. It can be interpreted that the requirement of “actual profit” of different scales relates to the “commercial scale” as used in the Agreement on Trade Related Aspects of Intellectual Property Right Article 61,[18] and therefore the code marks a distinction in terms of penalties between commercial and noncommercial acts.

The legislators failed to specify which activities constitute infringement of copyrighted work, using the broad wording “unauthorized use of a copyrighted work or subject matter of a related right” (Art. 296, Sections 5-7). Until a case law is established, we are of the opinion that the answer to this question is found in the Law on Copyright and Related Rights.[19]

We believe that, while in the cases discussed in Sections 6 and 7 criminal sanctions can be imposed only if intentional activities pertaining to businesses such as reproduction, distribution and rental of copies are committed with an actual generation of profit — which may vary depending on the type of product in the Kosovo market[20] — in the cases foreseen in Section 5 criminal sanctions may be imposed against each and every activity listed in the Law of Copyright.[21] Thus, the undefined maximum threshold of the actual profit set forth in Section 7 (€50,000 and more), in connection with Section 5 of Article 296, suffices to conclude that the Criminal Code criminalizes noncommercial and commercial scale activities in all circumstances.

Rational for Criminal Provisions

As stated, the new Criminal Code criminalizes all intentional IP right infringements, regardless of the commercial or noncommercial nature. In principle, criminal law punishes acts or conduct that are harmful to the society, conducts that a community considers to be immoral or morally wrongful acts.[22] Using the notions of “harm” and “wrongful act,” while at the same time taking into account the current economic and social situation in Kosovo, is it realistic to place these infringements in the criminal law spectrum and will this positively affect the work of the authors, be they nationals or foreigners?

Piracy and infringement of copyrighted works is present in Kosovo at a very large scale, although no official statistics as to the quantity have ever been published. A few complaints, however, have been raised in civil and criminal proceedings before the Kosovo courts so far. Coming out of an armed conflict and with the need to establish the most basic institutions to make the state functional, the Kosovo Parliament, together with much international assistance, formulated the IP legal framework and the structures to hear IP rights cases. However, these instances have yet to be explored by parties, as only a few civil and criminal cases have been filed so far.

The new Criminal Code has echoed the strong stance the Kosovo government has toward copyright infringement. The government appears to have recognized the negative effects that copyright infringement has, not only on copyright holders, but on the copyright policy as well. Thus, it decided to criminalize infringement of copyrights, and it decided not to employ the term "piracy" or provide a clear definition of what acts may constitute piracy. Instead, it used the general term "unauthorized uses of a copyrighted work." By doing so, they left room for the possibility for any type of activity to be considered a piracy offense[23], and therefore be subject to criminal sanctions.

A criterion that could help draw the difference between the rationales of criminalizing commercial- and noncommercial-scale copyright infringements is the level of harm caused by the unauthorized use of protected material by consumers or market competitors. The violation of copyrights for noncommercial use causes really small, insignificant damage compared with violation of copyrights for commercial use. True, the government aims to foster creativity and acquire foreign direct investments[24]. However, because the level of harm caused with noncommercial use is of a lower scale and taking into account the current social-economic situation, the government must have considered embracing a more balanced approach.

The only distinction that the legislators made between commercial and noncommercial unauthorized uses of copyrighted works is the level of the criminal sanction foreseen. However, this may not be considered sufficient to conclude that a balanced approach has been taken. Not being able to afford genuine goods, an average Kosovo person violates copyright rights not for commercial purposes or financial gain but due to economic factors. They too face the threat of criminal sanctions. Protection against noncommercial uses and damage repair in such cases could well be achieved through the means of civil law. After all, criminal sanctions are prescribed only for those acts threatening or violating certain rights in such a manner that their protection could not be realized without the interference of criminal law.[25]

In addition to this, the strict sentencing foreseen for copyright infringements is intended to use criminal law as a tool to alert Kosovo's public to respect others' property. One of the four rationales for strict sentencing is to raise awareness and educate society, increase morality and strengthen the obligation to respect the law (Article 41, Criminal Code). However, in a number of jurisdictions, surveys have shown that public generally does not consider unauthorized use of a copyrighted material a wrongful act.[26]

Every unauthorized use of copyrighted work may not necessarily be considered an immoral or wrongful act in Kosovo either. This perception refers to noncommercial uses of copyrighted works. Before using the threat of criminal sanctions against all potential copyright infringers, the government should have conducted a survey to determine how the society "feels" about this. Until then, the government could have used other means of

increasing the general public's understanding to respect personal property, rather than harsh criminal punishments.

In the end, a criminal sanction foreseen in cases of noncommercial unauthorized use of a copyrighted work will not have any effect on crime prevention and raising awareness, if that certain act is not deemed unacceptable in that particular society.

Final Remarks

It is common knowledge in Kosovo that the level of piracy and counterfeiting of products protected by copyright in Kosovo is very high, with extremely large numbers of fake DVDs and printed work in the market. While the Parliament intervened with several legislative changes over the last few years, the courts and other enforcing bodies have been less influential. We find it very unfortunate that, at the time this article was drafted, we could not find a single precedent to start shaping Kosovo's case law on the subject. If there were a case law established, the answer to the question posed with this article would have been easier to elaborate.

In any case, taking a balanced approach is always the most difficult task for the decision maker. In light of the above analysis, we may conclude that:

1. Kosovo's legislation needs to provide a full and clear definition of the copyright offense. Every unauthorized use of a copyrighted work may easily be considered "piracy," as there is no definition of a "piracy" offense and no delineation between commercial and noncommercial or personal use (causing different levels of harm). At this point, it is advisable to also take into account that the inappropriate extension of the reach of the criminal law may also threaten the public's right to use copyrighted material lawfully, as well as violate the right to freedom of expression.

2. It is true that the Criminal Law may be used as a tool to educate the public through punishment. This aim may not be achieved, however, if a certain act is not considered "wrong" or "immoral" in a given society. Taking into account the economic factors, there is a risk that noncommercial unauthorized use of a copyrighted work, such as downloading music, is not considered unacceptable in Kosovo

Having said that, we are afraid that proper enforcement of Section 5 of Article 296, which lacks the commercial scale element, will be low. Considering the level of harm caused to copyright holders and the copyright policy by "unauthorized use taken not for commercial purpose" and taking into account the fact that these acts are rarely, if ever, considered indictable by Kosovo citizens — all this combined with the huge economic problems Kosovo is facing — criminalization of all copyright infringements may end up having little effect in practice.

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[1] Anti-Counterfeiting and Anti-Piracy Strategy 2012-2016, pg. 7. Also, Investment Climate Statement Kosovo, from the [U.S. Department of State Bureau](#) of Economic and Business Affairs, 2012. Available at: www.state.gov. Last time accessed on 3 June 2013.

[2] 'Economic Report Kosovo 2012', the Embassy of Switzerland in Kosovo; 'Kosovo Country Report' (2012) Transformation Index BTI.

[3] Drobak, John N. (2006) 'Normal and the Law', Cambridge: Cambridge University Press; Eliickson, Robert C. (1998) Law and Economics Discovers Social Norms, The Journal of Legal Studies 27: 537-552; Morales, Alfonso (2003), 'Renascent Pragmatism: Studies in Law and Social Science. Aldershot: Ashgate.

[4] Feldman, Y. and J. Nadler (2006), The Law and Norms of File Sharing, The San Diego Law Review 43: 577-618.

[5] Law on Patents no. 2004/49, adopted on September 27, 2004, promulgated by SRSG on December 21, 2004 as amended by Law on Amendments and Additions to Law 2004/49 for Patenting no. 02/L-100, adopted on December 18, 2006 and promulgated by SRSG on February 6, 2007 (now repealed).

[6] Law on Industrial Design no. 02/L-45, adopted on November 21, 2005 and promulgated by SRSG on April 21, 2006 (now repealed).

[7] Law on Trade Marks no. 02/L-54, adopted on February 23, 2006 and promulgated by SRSG on June 28, 2006 (now repealed).

[8] Law on Copyright and Related Rights no. 2004/45 adopted on June 29, 2006 and promulgated by SRSG on August 24, 2006 (now repealed).

[9] Law on Customs Measures for Protection of Intellectual Property Rights no. 03/L-170 adopted on December 29, 2009 and promulgated by Decree No. DL-004-2010 on January 8, 2010, available at <http://gazetazyrtare.rks-gov.net/Default.aspx>

[10] Provisional Criminal Code (UNMIK Regulation 2003/25) (now repealed)

[11] The National Intellectual Property Strategy for Kosovo 2010-2014, adopted by the Kosovo Government on 16 June 2010.

[12] Law on Trademarks No. 04/L-026 (2011); Law on Industrial Designs No. 04/L-028 (2011); Law on Patents No. 04/L-029 (2011); Law on Copyright and Related Rights No. 04/L-065 (2011).

[13] Code no. 04/L-082 Criminal Code of the Republic of Kosovo as amended by law no. 04/L-129 on Amending and Supplementing the Criminal Code of the republic of Kosovo no. 04/L-082 adopted on July 13, 2012 and entered into force on January 1, 2013

(hereinafter criminal Code).

[14] On January 30, 2013, the Kosovo government approved the decision to establish a task force against counterfeiting and piracy.

[15] On October 4, 2012, the Kosovo Government adopted the National Strategy to Combat Counterfeited and Pirated products for the 2012-2016 period, drafted by the Office of Copyright and Related Rights in cooperation with other enforcement institutions.

[16] Law on Copyright and Related Rights, Article 196 provides that foreign natural or legal persons enjoy the same protection of copyright and related rights as nationals, if international agreements or this law so provides, or in case that factual reciprocity exists.

[17] Article 296, sections 1-4 criminalizes plagiarism of a copyrighted material, non-recognition of authorship, distortion, mutilation or harm of a copyrighted work.

[18] TRIPS agreement, Art 61, obliges member states to provide criminal measures at least in cases of 'wilful piracy committed on a commercial scale

[19] Law on Copyright and Related rights, Art. 22 lists the number of rights granted to copyright holders and Chapter IX of the Law explains the neighboring rights.

[20] See the 2009 WTO panel decision in China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights defined the threshold for criminal prosecution in case of a "commercial scale activity" as: an act carried on at "the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market...The magnitude or extent of typical or usual commercial activity relates, in the longer term, to profitability."

[21] Article 22 of the Copyright Law grants the following rights to the copyright holders: reproduction, distribution, rental of copies, public performance, public transmission, public presentation, broadcasting, disclosure, transformation and audio-visual adaptation.

[22] See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 149 (2d ed. 1960) (defining the moral component of a crime as the "intentional or reckless doing of a morally wrong act").

[23] Differently, in the TRIPS agreement, Art 61, obliges member states to provide criminal measures in cases of 'wilful piracy committed on a commercial scale'

[24] Anti-Counterfeiting and Anti-Piracy Strategy, Objectives, pg. 25

[25] Criminal code, Article 1, para.1

[26] See G.S. Moohr, "The Crime of Copyright Infringement: An Inquiry Based on Morality, harm and Criminal Theory" (2003) 83 Bost