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Athens court rules on moral damages in software infringement case

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Introduction

The Single-Member First-Instance Court of Athens recently dealt with three important legal issues:[1]

- the principle of exhaustion of rights;
- the amount and calculation of damages in copyright infringement cases; and
- moral damages suffered by legal entities or persons as a result of the infringement of software and other "products" that enjoy copyright protection according to Greek law.

The Court's decision arose in the context of injunction proceedings relating to the defendants' unauthorised use of software programs. The plaintiff, a leading multinational software manufacturer, owned the rights to exploit the programs.

Decision

Exhaustion of rights over software programs

Article 41 of the Greek Copyright Law[2] reads as follows:

> *The first sale in the European Community of a copy of a program by the author or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or of a copy thereof.*

Accordingly, the Court held that the holder of the IP right to a computer program cannot object to the resale of a copy thereof where such a copy is accompanied by a licence for unlimited use, whether material or immaterial. The Court held that this applies regardless of the existence of contractual clauses that prohibit further transfer. The Court made specific reference to certain European Court of Justice decisions in this respect.[(3)]

According to the Court, the term "sale" used in article 41 of the Copyright Law must be interpreted in a broad sense. The term includes, according to the decision, all forms of marketing of the copy of the computer program that include a right of time-limited use for a price. Such usage aims to provide to the rights holder the possibility of receiving remuneration corresponding to the economic value of the copy in question.[(4)] The second buyer of the specific copy, like any subsequent buyer, is a "person who legally acquired it" within the meaning of article 42(1) of the Copyright Law, which reads as follows:

> *In the absence of an agreement to the contrary, the reproduction, translation, adaptation, arrangement or any other alteration of a computer program shall not require authorization by the author or necessitate payment of a fee, where the said acts are necessary for the use of the program by the lawful acquirer in accordance with its intended purpose, including correction of errors.*

Of course, the original purchaser of a computer program who resells either the hardware or the immaterial copy of their program – in relation to which the distribution right that the beneficiary had has been exhausted pursuant to article 41 of the Copyright Law – must ensure that it is impossible to use their own copy, at the time of its resale. This prevents the possible

infringement of the exclusive right to reproduce a computer program provided for in article 42(2) of the Copyright Law, which belongs to the creator or author of the relevant program.

Damages in cases of copyright infringement

Article 65(2) of the Copyright Law provides as follows:

> *A person who by intent or negligence infringes copyright or a related right of another person shall be liable for compensation of damages and for restitution of moral damages. The compensation for damages cannot be less than twice the fee that is usually or by law paid for the type of exploitation that the infringer did without license.*

Interpreting this provision, the Court held that article 65(2)(2) of the Copyright Law was introduced to address the difficulty of calculating the property damage in case of infringement of rights to intangible goods according to article 298 of the Civil Code. Article 65(2)(2) of the Copyright Law provides: "The compensation for damages cannot be less than twice the fee that is usually or by law paid for the type of exploitation that the infringer did without license."

Article 65(2)(2) introduces the abstract calculation of damages based on the statutory or usually paid remuneration – that is, exclusively on the basis of objective criteria.[(5)] Thus, the usual fee is defined as that which a prudent licensor would demand and a prudent licensee would accept to pay if they had entered into a licence agreement knowing all the relevant circumstances. In other words, it is the usual price requested in the specific industry for granting the right to use the specific intangible good.[(6)]

Any previous contracts with third parties that granted a licence to exploit the intangible asset and that the beneficiary may have concluded in the past – before the act of infringement – are crucial for this calculation. Thus, the consideration that the beneficiary claims indiscriminately from the end user is the fee

usually paid to license a computer program (ie, including reproduction, storage, installation, loading, display and execution) that is addressed to:

- the general public (eg, an operating system); or
- a specific professional public (eg, a design program or a sound and/or image-editing program).

In other words, it is the price of a program that has not been designed to cover the needs of a specific natural or legal person.

Moral damages suffered by legal entities

The Court considered the monetary restitution of moral damages suffered by a legal entity due to an infringement of its IP rights (including those to a software program). The Court rejected the plaintiff's requests for the award of monetary restitution due to moral damage. It held that they were inadmissible because they were too vague.

According to the Court, the plaintiff had provided only a general and abstract invocation of its damage. It had failed to reference specific, materially significant incidents that, due to the infringement of its disputed IP rights, had:

- disrupted its business operation and activity;
- caused the loss of existing or new clients;
- suspended its preparatory business actions; or
- led to its financial loss or a reduction in its income.[7]

Comment

The Court's restrictive approach with respect to assessing the moral damages of a legal person is in line with the case law in most decisions (on the merits) of the Greek appeals courts. Such decisions usually assimilate the moral damages of legal persons to actual financial loss. This differs from cases involving natural persons, where financial damages are totally

distinct from moral damages. The latter aim to redress only the psychological harm suffered by a natural person as a result of the infringing behaviour and not their financial losses.

Case law is not unanimous on this matter. The Greek Supreme Court recently held that the moral damages of legal persons need not correspond to specific financial damages suffered.[(8)] It may be argued that the decision discussed in this article was wrong in this respect as it required the plaintiff to prove the incurrence of specific financial damages. This is against the basic principle of civil law, which is to compensate not only the direct financial damages of the injured person but also:

- their direct distress (in the case of natural persons); or
- the indirect adverse financial impact of the infringing act (in the case of legal persons).

In the latter case, there should be no need to prove specific financial damages as those are covered by the compensation due for damages and not by the amount of moral damages to be awarded by the court.

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Endnotes

(1) Decision No. 2916/2022.

(2) L 2121/93.

(3) See:

- C-166/15, *Ranks and Vasiļevičs*, EU:C:2016:762, paragraph 30 (12 October 2016); and
- C-128/11, *UsedSoft*, EU:C:2012:407, paragraph 77 (3 July 2012).

(4) See *Ranks and Vasiļevičs*, paragraph 28 and *UsedSoft*, paragraph 49.

(5) See Supreme Court decision No. 438/2018.

(6) Id:

> *the above-mentioned provisions for the calculation of the compensation payable . . . impose objective comparison criteria (among which are the market conditions prevailing at the time of the damage) for the use of the program in question, in in view of a specific business activity).*

(7) See:

- Supreme Court decision No. 382/2011;
- Court of Appeals of Athens decision No. 2790/2021; and
- Court of Appeals of Thessaloniki decision No. 626/2014.

(8) See Greek Supreme Court decisions:

- No. 766/2021;
- No. 1483/2021; and
- No. 193/2018.