

# How Could Copyright Infringement Be Made Commercially Meaningless? Proposal for a Novel Royalty Payment System

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Illegal copyright abuse affects a huge amount worldwide, while another similar amount is consumed by the operation of an often unsuccessful royalty system. The 2020 EU report on the protection of intellectual property estimates in the damage caused by “pirated products” to €121 billion. I am looking for a brief answer how to find a more effective legal protection system for right holders against the negative economic effects of the “pirated” products. To find an answer, I analyze historical, economic, and legal examples that ultimately give the impression of an international organization with a new or changing system of responsibilities and operations, the operation of which would make all known intellectual property right infringement practices commercially redundant or unprofitable. The title proposal concludes the analysis by saying that if, with the help of an international organization, the community buys intellectual property from public funds and allows anyone to produce it for a special tax for anyone, it would make business sense to spend money on “piracy” and defense against it.

*Keywords:* intellectual property, royalty, World Intellectual Property Organization (WIPO), piracy, right holder

## **Introduction—The Extent of Intellectual Property Infringements in the EU**

The Commission published its document on the protection of intellectual property in third countries outside the EU on 8 January 2020 under number SWD (2019) 452. The report divides the states affected by intellectual property infringement into three groups. Trade policy commissioner Phil Hogan says about 82 percent of total EU exports come from intellectual property-dependent sectors. Nowadays, as protected intellectual property is indispensably linked not only to industry but also to commerce and everyday civil life, it is essential in the long run to create and operate a global system that protects the interests of both right holders and communities. In this respect, it is unfortunate that the phenomenon only examines the value of exported and imported “pirated products”, and the value of pirated products circulating within the single internal market is not taken into consideration. Intellectual property infringements—including forced technology transfer, “theft” of intellectual property, forgery and piracy—threaten hundreds of thousands of workplaces in the EU every year. According to the report, on an annual basis, “pirated” products entering the EU through imports amounted to €121 billion. The value of “pirated” products entering the rest of the world can be estimated based on this. It is also important to note that this €121 billion is not only the value of pirated products made to the detriment of EU-resident right holders, but the aggregate value of all pirated products for which a right holder resident anywhere in the world has not received the royalties due to him/her.

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In the following, under “protection of intellectual property” I mean the protection of all works created by human creative activity in all areas of intellectual property law (e.g., copyright, patent law, trademark law) from copyrighted works through industrial designs and trademarks to know how formations protected as business secrets in other areas of law, with the exception of performance activities.

As a first step, I consider it important to see whether the €121 billion reported here is a significant amount at national economy level.

For most intellectual properties, the right holder is not a Member State or the EU, but is typically a for-profit private company. Thus, the Member State and the EU budget suffer a loss not in the absence of full royalty revenue, but in the non-payment of tax on that revenue (cf. Article 1 of 2016/943 {L157/1}). Leaving aside in-depth statistical and macroeconomic analyzes, I only examine the revenue data in the EU budget for 2019, as it is a “well-known fact” that budget revenue comes from taxpayers’ payments. The total revenue of the EU budget for 2019 is €144,680,980,690 (218/251 {L57/1}). A simple comparison of the figures shows that the total value of “pirated products” is not much lower than the amount of the EU’s annual budget revenue. The clear consequence is: There is an essential need to effectively prevent intellectual property infringements.

### Historical Examples

As a commercial lawyer, who also specializes in legal history, I approach the protection of rights holders at first glance from a perhaps novel, but fundamentally traditional perspective. Maybe the Roman saying “*historia est magistra vitae*”, i.e., “history is the teacher of life”, is still valid today. According to another old Roman saying, “*Scientia potential est*”, i.e., “knowledge is power”. Approached from the side of the economy, we can also translate the saying “*scientia est pecunia*”, “knowledge is money”.

In history, we often find cases where a community has been able to grow very much rapidly by somehow acquiring a copy of a “high-tech” device from another, technically more advanced community, they examined it, and based on this, their own production capacity was soon able to produce it, and thus they reduced the technical backwardness of their own community. Practical examples of this method have been found all over the world since the earliest societies in history. These activities very often took place through some kind of combat contact in history, where the technically underdeveloped community acquired an advanced technical tool in combat (“preyed” or “stolen”, the denomination depends on individual taste), took it to its professionals who disassembled it into elements and examined the possibility of its production. In our current terms<sup>1</sup> (Art 114/B of 32 Act of 1995), this can be interpreted as the issuance of a constraint license for the use of a “pending patent” or as a crime against an intellectual property right (Art 384-388/B of Criminal Code).

There are countless examples of this in world history; here I will mention just two historical examples out of many. In one case, the stolen invention was developed further, while in the other case, series production was carried out without any changes.

1. The Roman Republic had no naval forces, and even merely some merchant ships until the First Punic War (264-241 BC). At the beginning of the war, the naval power of Carthage clearly ruled the waters. According to legend, the Roman fleet began to be built on the basis of a ship from Carthage that drifted ashore (Polybios, 2002). This type of Carthage ship was further developed by the Romans with the fitting of the *corvus* (leaf bridge), which was a pending patent in our present terms. It allowed the Romans to apply their land

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<sup>1</sup> In the rest of the article, I refer to Hungarian legislation matching the content of the standards proposed by WIPO, but we can find similar legislation in the legal system of all WIPO member states.

tactics in naval battles by fighting in hand-to-hand combats on the enemy ship. The “stolen” patent and the pending patent developed through it already brought victory to Rome in the battle of Mylae in 260 BC. The galleys of the Roman fleet looked similar in the following centuries and applied the tactics learned here. In this example, we saw that Rome utilized the most potential of the “stolen” technology and developed it further corresponding to its own technological needs.

2. The other example is from many hundreds of years later and from an opposite point on Earth. Japan became acquainted with firearms when a Portuguese ship shipwrecked at the coast of one of the Japanese islands in 1543. Firearms were quickly introduced to Japanese warlords and they soon set up their own arms manufacturing industries and musketeers. However, since the use of firearms was not considered high in their moral order, the technique was only used, not developed. Thus, when, in 1853, after centuries of secession, Japan regained contact with the rest of the world; the Americans found firearms in the Japanese army that were used in Europe in the 16th century.

The above two examples also show that people have been trying to explore the discoveries of others since ancient times (meaning new results based on human activity, regardless of which area of science and intellectual property law they belong to), inventions, that they will use further either without modification or upgraded. This need, which is perhaps the most basic human curiosity, is still present today, and in many cases, it is confronted with another basic need, the protection of secrecy. To meet the two conflicting demands, entire industries have been built, called industrial espionage and data protection. We consider industrial espionage to be fundamentally illegal in our current concepts and culture, regardless of the fact that most states and several companies pursue such covert, “scanning” activities while developing their privacy capabilities so that their secrets cannot be obtained by others. Nowadays, the issue is complicated also by the fact that new discoveries are often presented and published by scientists/researchers at scientific symposia before legal protection and industrial application. This greatly alleviates the risk of royalty-free use of the new “discovery”—not only because the “discovery” cannot be legally protected *in itself*, but also because the “customer’s” professionals can transform the known “discovery” to make the connection between them abolished. Patent law worldwide requires that the inventor “discloses” the novelty of the patent in a way that is understandable to professionals in front of the patent authority, which publishes the patent in its official gazette at the same time as granting the protection, in a way that is understandable and feasible for an expert (Art 60 of 32 Act of 1995).

### **Illegal Forms of Knowledge Transfer**

The line between scientific research and industrial espionage is sometimes blurred, as organizations pursuing industrial espionage typically use the analysis of the published scientific publications in addition to their own diverse covert activities. Thus, in the rare proceedings that examine such cases, the most important issue from a professional—and not political or business—point of view is to distinguish between “data theft” (which is a criminal offense in most countries), plagiarism convicted in science and proper source designation. As a textbook, these can be easily separated by individual definitions, but in practical cases we typically face much more complex examples, which even bear certain features of all three forms (Erdösi, 2005).

Even if industrial espionage, intellectual property “theft” is determined by a criminal judgment, and a legal judgment is made, we face another problem. The spy later prepares the product with his own equipment, from his own raw material, with the violation of the rights of the right holder. Let me bring an analogy from the field of criminal law to the relationship between the infringement and the judgment: A basic constitutional rule in

criminal proceedings is that evidence obtained unlawfully may not be used by a court. But, if the investigator obtains the evidence illegally, thus uselessly in court proceedings, it is easier to obtain the same data from that known data—now legally—because he/she already knows exactly what he/she is looking for. So if you have obtained the necessary information by “data theft”, it will be easier for you to create a new procedure to obtain the same result with your own expertise. In such a case, however, the court cannot find an infringement, since the new product achieves the same or a similar result in a completely different way than the protected earlier patent.

We usually do not leave useful, effective solutions until we find another, significantly better solution. Today, both public and private intelligence services are mobilizing significant forces to “industrial espionage” and to the defense against industrial espionage by other states, and now in some cases already by private companies. The community receiving the new technology paid royalties for the production and use of the adopted technology in the rarest cases—according to our current concepts. In fact, this infringing activity has helped the technical development of all mankind. Intellectual property rights, which protect the material interests of the right holder, only began to develop in the second half of the 19th century, until then only the secrecy of know-how (in our current terms) provided protection, but nothing gave protected against the case if another person deciphered the secret by examining his/her product copy. Until production capacities were limited and production lines were slow, the current state of science and technology provided effective protection for the right holder, as production capacity would have had to be created to produce a “pirated product”, which in any case required significant expenditure that could have been born in industrial level. This has led to the current situation when, with the exception of performing arts, the infringement is typically not committed by individuals who are traditional subjects of criminal law, but by various companies that cannot be forced to pay royalties to the right holder even after long, evidence-based litigation, thank to their transnational company structure or maybe thank to the “disregarding” in the legislation and jurisdiction of a state.

According to the analysis, most of the damage caused comes from design and trademark infringements, as in these cases during the preparation of the product the raw material costs are usually negligible compared to the content covered by copyright protection. By their nature, these are areas of intellectual property where “pirated” products can be easily produced on cheaper production lines at a much lower operating cost than by the manufacturer of the original product. The breakdown of damages by industry shows that most damages occur in cosmetics, insecticides, and fertilizers, as well as in the clothing industry.

Approaching the situation from business and savings point of view, it may be worth considering a solution whereby the revenue from the infringing product is shared between the right holder and the producer of the (infringing) product in a proportion agreed in an international agreement, because during the infringing production material and production costs inevitably arise. If the quality of the product prepared this way does not meet the quality of the “copied” original product, it can also be stated in the international agreement that in this case the producer owes the customer compensation (Chapter 72 of the Civil Code) or price difference of the original and the counterfeit product can be regarded as compensation.

### **Theoretical and Practical Problems With the Current System**

Since the development of intellectual property law, the legal system has placed legal protection on an ex post basis, which requires the active participation of the right holder. The legal protection of intellectual works appeared in the 19th century and became an independent field of law by the first half of the 20th century.

Nowadays, in addition to international conventions on this subject, the national legislation of each country typically approaches the issue from the point of view of the protection of business secrets, in which Hungary also continuously adopts and develops foreign solutions (54 Act of 2018 Protection of Business Secrets).

All the legal systems of the Earth agree that disputes over infringements of intellectual property rights fall within the scope of private law, although these acts are also sanctioned by criminal law (Chapter 37 of Criminal Code). It is also fully agreed that in a private dispute, the court will only start proceedings upon the action of law of the right holder, in which there is no formality; the court will make a decision only on the basis of the evidence presented to it and will not go beyond the claim. The costs of initiating the proceedings, with the exception of the forms of tax-exemption, which vary from country to country, typically for social policy reasons, must be borne by the person initiating the proceedings and except for the case of post-financing, the lawyer's fees have to be paid by the initiator, too. This is independent of the fact that according to the legal system of most states, the court obliges the losing party to pay, in addition to the principal claim, also the procedural fee and the winner's attorney's fees. If the losing party does not pay the awarded amount by the deadline, the legal system of most states helps to get it with some state assistance, typically for another separate request and fee. That is to say, in the course of judicial enforcement, in addition to the infringement suffered by the right holder, there are additional costs for enforcement that vary from country to country, which he or she receives only at the end of the proceedings.

In addition to the procedural processes just outlined, the current system of international law has inevitably led to a situation where the vast majority of intellectual property right holders that can enforce their rights are capital-intensive companies who can go through these legal procedures without liquidity problems, which vary from country to country but typically take several years until the right holder "gets his/her money".

We know that with today's advanced level in science and technology, technical innovations, i.e., the subject matter of intellectual property rights, can be explored also for us—with a few exceptions—if we have a tool that uses the technique legally which is legally acquired by us. For this we need various research techniques from which quite a few are taught by universities in BA curricula (but not to facilitate infringement). So we do not have to flip through the official journals that publish the mandatory disclosure required by patent law in old or recent issues, but with this we can also learn/decipher techniques that have not been officially explored (cf. know how).

The EU report also declares the long-standing practice as a fact that in several countries intellectual property rights infringements are taking place on a quasi "large-scale".

Criminal lawyers had already said at the turn of the previous century that perfect law enforcement and the sanctioning of all violations were only in Hell, but no one wanted to get there. So we can write any legally perfect law or contract; we can be absolutely sure that despite of them there will still be infringing content on the market, after which the right holder will not receive the royalty. This philosophical sentence, the truth of which we often see as proven in both case law and legislative practice, raises the idea of seeking a more effective protection to secure the royalties of right holders from another point of view.

Thinking of copyrights, practice—and the right holders—are most interested in property rights (whether they receive royalties). The author's personal right, the right to a name, is more relevant in science, where they typically refer to the first instrument on a given subject, which these scientific materials indicate almost without exception.

It is known in practice since the first copyright treaties that intellectual property law is increasingly applying that the author can sell his/her intellectual property rights. The sale of property rights is known in practice both in part and in full. Thus, property rights can be sold permanently or for a definite period of time (actually leasing the use of an intellectual property for a specified period of time) or from territorial point for use in a specific geographical area or worldwide. It is also important to note the fact that in Roman-Germanic and Anglo-Saxon legal culture, the rule of “*nemo plus juris ad alium transfere potest quam ipse habet*” (no one can transfer more rights than he/she has) that has been known since the Romans exists in other legal cultures with the same content. If the unrestricted, full ownership of an intellectual property is transferred to a capital-intensive organization, it can assert its interests more effectively in the typically lengthy and costly litigation and enforcement process than an individual or non-capital-intensive organization.

In most countries, there are so-called “Collective rights management” organizations, using the Hungarian terminology which protects the property rights of authors and performers, since at the current level of science and technology, a work can be played countless times in the framework of non-private, i.e., fee-based use. These national organizations have an international relationship with each other, enabling them to act in their own country for royalties from an author or performer from another country. In many countries, legislators and government agencies provide specific solutions to support authors through these collective rights management organizations. The legal system of most countries is familiar with the “blank cassette fee” where a fee is payable to the collective rights management organization for the sale of a blank media device, as the buyer can copy any royalty-based work on it. This fee is distributed by the collective rights management organization to all authors registered by it, in the manner specified by the organization.

There are an International Intellectual Property Convention and a World Intellectual Property Organization (WIPO) that currently has 193 member states. Collective rights management organizations working in the different Member States of WIPO are mainly concerned with the protection of property rights related to works of performance. Nowadays these organizations usually operate with good and increasing efficiency in the field of legal protection and enforcement of property rights (WIPO, 2019). In the Internet-based consumer culture that can be experienced nowadays all over the world, collective rights management organizations can measure where and how many times the individual work has been played, so they can take action against specific consumers. From the same data, the distribution of the “empty cartridge fee” can also be made more realistic.

An organization with international legal personality can acquire intellectual property rights. If this new international organization or an already existing one for which new rights are granted, is provided with sufficient resources through the payment of a membership fee by the member states, this organization (either through a pre-payment or post-payment scheme or a system linked to the actual frequency of use) can purchase property rights from the authors. In this way, the certain member state becomes legally and financially interested in collecting from producers of “pirated” products a higher amount (e.g., as a kind of special tax), from which the membership fee is financed. The reason is that the authors sold the property rights to the state, which is also a member of the organization, and the calculation of the membership fee payable depends on the amount of damage caused by an intellectual property offense in that state. The formula for calculating the membership fee shall take into account the amount of damage caused by the legal entities of the state concerned in the previous year by the infringing activities of the country’s industry through the use (primarily production) of the protected products. The statistical offices of each state collect data on the copyrighted products produced by them and also calculate the extent of the damage caused by the intellectual property infringement by indirect

calculation. Collective rights management organizations around the world use mathematical formulas set up with such logic to determine the amount of royalties they pay to each author.

Countries severely affected by intellectual property infringements are reported to have more efficient methods of collecting taxes than those known in EU countries. Maybe the voluntary willingness of the companies concerned to pay taxes can also be increased by the fact that, through such a system, the purchaser can be sure that he/she has bought a copyrighted intellectual work. It is up to the states to decide whether to introduce a trademark, the use of which certifies that the company has paid the copyright fee of intellectual property in the country of production, i.e., the fee set for the membership fee of the competent international organization, which may increase the marketing value of the product as well.

### Conclusion

Based on the above, two things can be said with complete certainty: (1) The use of intellectual creations without the payment of royalty, and the further development of intellectual creations can be dated back to the beginning of humanity, and we know historical examples since ancient times; and (2) this infringement nowadays amounts to huge sums on the one hand at the right holders, and on the other hand through the loss of tax revenues: It hits several percent holes in the state budget.

Looking at the experiences so far, setting up a UN organization that acquires the rights to all types of intellectual property and ensures “fair use” for legal entities in the member states seems to be a practical solution. The operation of the organization could be financed by a membership fee payable by the member states, which could be determined for each member state according to the formula that takes into consideration the infringing activities in that state in the previous year and the value of the intellectual property produced in this way. Such a system, with proper settings, could make the current practice of intellectual property infringements commercially redundant, which could also make the maintenance of the law enforcement system useless. All this would open up huge resources for the economy from both sides and would also help to increase the speed of scientific and technological innovation by directing here the resources that become free. There will be no need for the legal protection system and for the systems for scanning and reproducing protected contents. The costs of maintaining and operating them can be transferred to any other purposes.

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