

Kluwer Copyright Blog

Ukraine: updated Statutory Damages for Copyright Infringement

Iharion Tomarov (Counsel, Vasil Kisil and Partners) · Saturday, September 29th, 2018

Since July 22, 2018, a new mechanism for calculation of the amount of statutory damages has become effective in Ukraine. From now on a court should determine damages based on the license fee the infringer would have paid to obtain the rightsholder's permission.



The old method for calculating statutory damages, namely “choosing” from the range of 18,410 hryvnias (approximately EUR 560) to 92,050,000 hryvnias (approximately EUR 2,785,180), was the most popular of the available remedies for two reasons: (1) the claimant didn't have to prove the amount of damages suffered; and (2) the defendant had to overcome the presumption of guilt for the damage done.

The law contained no criteria for the application of statutory damages i.e. defining a sum which would correspond fairly to the scope of infringement, and the minimal effort required for the complainant to recover the minimum amount of statutory damages led to the situation where complainants frequently abused this remedy. Complainants would request the minimum figure (or more) in damages in respect of a single (usually cheap) infringing item, resulting in a damages award of 100 or even 200 times more than the loss suffered by the plaintiff. On a side note, the courts usually pointed out the disproportion between the amount of statutory damages claimed (even the minimal sum as prescribed by the Copyright Law) and the income received by the infringer, or even mentioned abuse of right to statutory damages. Nonetheless, most complainants recovered the minimum amount of statutory damages if the plaintiff proved that the violation had occurred.

The new statutory damages are defined as a lump sum, which is either double or, if the violation is willful, triple the amount of the license fees that would have been paid had the infringer applied for permission to use the copyrighted work in question.

The new approach raises at least two important questions: (1) are courts able to make use of

established experience to calculate a fair amount for the license fee? (2) how will the plaintiff prove the amount of the license fee?

The Higher Commercial Court of Ukraine has developed its position on evaluation of copyright infringement as follows: **each separate occurrence of unlawful use** of a work, including repeated use of the same work, **constitutes a single violation and may serve as the basis for awarding statutory damages** (the resolution of the Plenum of the Higher Commercial Court of Ukraine no 12 dd. 17.10.2012 “On some issues related to consideration of disputes concerning protection of intellectual property”).

There are at least three approaches to what must be considered as a single violation:

- (1) each work brings about a single violation;
- (2) each copy of a work brings about a single violation;
- (3) each separate manner of using a work brings about a single violation.

The amount of a license fee usually depends on the number of works and the number of copies which the licensee is allowed to produce or sell, as well as on the particular manners of use granted to a licensee. So, any and all approaches may be taken into consideration.

A figure for the hypothetical fee that may be payable will be affected by the number of works and, perhaps, the number of copies of the work; the manners in which the infringer used the work and the duration of such use; and the guilt of the infringer who has to actively rebut the presumption of guilt.

Courts have to continue applying the criterion of statutory damages being proportionate to the circumstances of the infringement, since this is, perhaps, the only argument to maintain a balance between the abuse and the figurative amount.

If the copyright holder has never issued a paid license, then, in our opinion, due account should be taken of other factors, such as expenses incurred by the plaintiff to create and promote the works; and whether there was any income from using the work in another manner, such as advertising under a partner program on the YouTube video hosting service (though the work as such was accessible for free).

Now the Ukrainian courts face new challenges:

- how to calculate the license fee fairly, considering that different kinds of copyrighted works may be licensed at very different prices, and even within one category of work the amount of the license fee may be enormously different.
- civil courts must define precisely the form of guilt that must be shown by the infringer.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please

subscribe here.

Kluwer IP Law

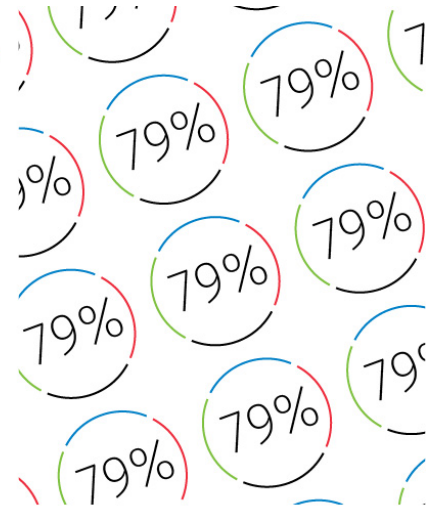
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Saturday, September 29th, 2018 at 10:50 am and is filed under [Damages](#), [Remedies](#), [Ukraine](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.