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ON THE FAIR DISTRIBUTION OF BENEFITS FROM WORKS FROM THE PERSPECTIVE OF LAW AND ECONOMICS

ABSTRACT

The subject of the article are considerations regarding the optimal limits of protection of creators from the perspective of law and economics. The purpose is to show the economic reasons for protecting creators, resulting from the nature of the goods they produce, as well as the adverse consequences of a too wide scope of protection. The article is also going to present economic instruments that allow finding a balance between opposing rations, which is intended to maximize the social benefits of creative activity. The final aim is to confront the conclusions of the article with the jurisprudence of the Polish Constitutional Tribunal, in order to answer the question of whether the Tribunal's decisions take into account the assumptions of law and economics.

The article is based on an economic approach to the analysis of law. The analysis uses rational choice theory, game theory, efficiency criteria and other instruments from the area of microeconomics.

The analysis showed that the need for legal protection of authors results from the nature of their works that are quasi-public goods. Lack of such protection, in accordance with the assumptions of the theory of rational choice, has a demotivating effect on creators, contributing to a reduction in the number of creative initiatives. On the other hand, introduction of economic copyrights in order to protect the authors turns out to be a solution that implies low availability of goods and their high price, which in turn leads to a decrease in social welfare. Ultimately, it is reasonable to say that the purpose of intellectual property rights is to strike a balance between guaranteeing legal protection to authors and ensuring that the

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public has adequate access to works. The article also presented economic instruments in the form of efficiency criteria to solve the presented dilemma. Interesting conclusions emerged from the juxtaposition of law and economics assumptions with the jurisprudence of the Constitutional Tribunal. It turns out that in its case-law the Court does not follow any of the reasons presented by the economic analysis, and its decisions in the light of this analysis may be unfavorable to society.

The article presents an original approach to copyright using economic instruments. This approach allows for interesting conclusions that may be significant *de lege ferenda* and for judicial decisions.

Keywords: law and economics, copyright, free-rider problem, deadweight loss, efficiency criteria, game theory, rational choice theory

1. INTRODUCTION

Intellectual property, especially in today's information-based societies, plays a huge and rapidly growing role. It would seem, therefore, that the question of its legal protection should not be discussed. Meanwhile, this problem is not so clear-cut. There are significant voices of criticism relating to the scope of protection or the duration of protection granted to the intellectual property in various legislations. Even the very existence of legal protection in certain situations (e.g. in the case of patents on life-saving medicines) is a subject of controversy. Moreover, the problem is not limited to national legislation, but has an international dimension as well. The arguments of both sides of the discussion seem important, and the role of the legislators of individual countries is to balance these arguments and find the right balance between them.

In such process, it is crucial to find tools that will allow for a good understanding of the problem and provide conclusive solutions, adequate to the specific problems occurring in specific societies. It seems that the achievements of law and economics, a research movement on the border of law and economics, which developed in the United States in the second half of the twentieth century, are perfectly suited to this (Stelmach & Soniewicka, 2007). The *law and economics* movement's instruments are universal and can be applied to any legislation. Importantly, contrary to the initial wrong impressions that tend to occur, *law and economics* does not reduce the discussion only to monetary and descriptive issues (Becker, 1978), but provide normative models based on the postulate of maximizing social wealth, which is one of the interpretations of the concept of distributive justice (Stelmach et al., 2007).

The analysis carried out in this article has been – for simplicity – limited to works protected under copyright. Its aim will be to try to capture the phenomenon of a work from an economic perspective, and to describe the consequences of the lack of protection of authors and the consequences of introducing such protection, as well as to indicate methods allowing to find an optimal/fair level of protection. Comments on the basis of *law and economics* will also be confronted with the jurisprudence of the Constitutional Tribunal, setting normative limits for the protection of subjective rights.

2. SYSTEMS OF COPYRIGHT LAW

The literature distinguishes between two basic systems of copyright law: the Roman – *droit d'auteur* – and the Anglo-Saxon – copyright (Barta & Markiewicz, 2021). The first one functions mainly in continental European countries, and the authors' interests are assumed as justification for granting legal protection to authors. The second system, appropriate for countries with a common law system (e.g. Great Britain, the United States, Australia) recognizes the interest of the creator, but is also designed to ensure the development of science and art. (Barta & Markiewicz, 2021) The *droit d'auteur* system distinguishes a dualistic model based on the separation of two independent copyrights, i.e. economic right and moral right (Barta & Markiewicz, 2021). In the monistic system, moral and economic rights are treated as components of the uniform, inalienable right serving the creator (Barta & Markiewicz, 2021). The dualistic system is typical for France, Italy, Spain and Poland, while the one-tier system is in force in Germany (Barta & Markiewicz, 2021).

It should be noted that despite the differences between the *droit d'auteur* and copyright systems manifested primarily in the roles played by these branches of law, these systems are significantly converge to each other. This happens, among others, due to the application of Art. 6bis of the Berne Convention for the Protection of Literary and Artistic Works of September 9th, 1886, which introduces the protection of moral copyrights, thus obliging the signatory states from the Anglo-Saxon circle to respect these rights (Barta & Markiewicz, 2021). Similarly, the separation of property and moral rights within the *droit d'auteur* system and the dualistic model is, in a certain sense, conventional in nature, which results from the fact that economic rights are often used to protect personal interests, and moral rights are sometimes used to pursue property interests (Barta & Markiewicz, 2021).

Therefore, despite the existence of juridical dissimilarities between different systems and models of protection under copyright law (e.g. different catalogs of protected works, rules for determining the rightsholder, different moment of protection, duration of rights, admissibility and rules of trading, legal protection) (Barta & Markiewicz, 2021), in the further part of the article its authors will refer to the remarks made on the ground of economic analysis to all systems and models of the copyright protection, and treat the conclusions obtained as valid and universal for all of them.

3. COPYRIGHT FROM THE PERSPECTIVE OF *LAW AND ECONOMICS*

3.1. WORKS AS QUASI-PUBLIC GOODS

Conducting an economic analysis of copyright law requires reflection on the nature of copyrightable works as economic goods. Such works belong to the category of non-material goods, i.e. goods comprehensible by means of the intellect. Although the use of works requires their materialization, the material media of the work should not be equated with the work itself. The material medium serves only as a way to express intellectual content. Hence, the work itself, unlike its carrier, should be regarded as an intangible asset. The opposite of intangible goods are material goods, i.e. those that have a tangible character and which we discover and comprehend with the help of the senses.

The works should also be referred to the classical classification of goods in economics, carried out based on two features: excludability from consumption and competitiveness in consumption (competition in consumption). The excludability from consumption means that a person can be prevented from enjoying a good relatively easily. This ease should be understood not so much as the possibility of using effective techniques to stop consumption, but above all as the possibility of exclusion from consumption without incurring (high) prohibitionary costs. Rivalrousness in consumption means that the consumption of a given good by one person reduces the amount of good that will remain for others. The above features allow to distinguish four categories of goods:

1) private goods characterized by both excludability from consumption and competitiveness in consumption (e.g. bread);
2) club goods characterized by non-competition in consumption and exclusion from consumption (e.g. cable TV);
3) public goods that are non-excludable from consumption and non-competitive in consumption (e.g. fresh air, national defense);
4) common-pool resources, i.e. those non-excludable from consumption, but competitive in consumption (e.g. the possibility of fishing in a body of water).

Club and common-pool goods are sometimes classified as public goods. The above breakdown is presented in the table.

	Excludable	**non-excludable**
Rivalrous	Private goods	Common-pool resources
Non-rivalrous	Club goods	Public goods

Copyrightable works as intangible goods are characterized by a lack of competition in consumption. Using a computer program, listening to a piece of music or reading a book by one person does not mean that other people will not be able to use these intellectual contents. However, some problems are related to the second of the abovementioned features. It can be argued that intangible goods are non-excludable from consumption because the author has little ability to prevent copying of his work. On the other hand, there are certain instruments that make it possible to exclude others from the consumption of works at least partially. Such instruments include, for example, legal measures or technical safeguards relating to computer programs. Accepting the latter argument means locating the intangible goods in the presented division somewhere in the middle, between the public goods and the club goods. In this case, these goods can be called quasi-public goods (Gordon & Bone, 2000).

3.2. THE FREE-RIDER PROBLEM

The presence of goods such as copyrightable works on the market, as a result of the behaviour of rational market players, leads to distortions of the market mechanism known as the free-rider problem. The producer of a public good will not be able to enforce payment for the product by using the sanction of eliminating the people who do not pay for the good from consumption. In the case of public goods, it is therefore possible for people who do not pay for the good to use it. It is not difficult to guess that there will be a large group of consumers

interested in such an option. We will call such people "free-riders" and the described problem the "*Free-rider problem*"(Bednarski & Wilkin, 2003).

Let's analyze the discussed issue using game theory. The following analysis will answer the question of why rationally acting entities take actions that lead to adverse effects. Game theory is a branch of mathematics dealing with the search for optimal solutions in the event of a conflict of interest. It examines the specific type of situation in which the decisions of one entity depend on the expectations of the conduct of another entity (Stelmach et al., 2007). Before we start modeling the problem we are interested in, let us introduce three elementary concepts in the field of game theory. These are the terms:

1) the dominant strategy;
2) Nash equilibrium;
3) Pareto-optimal situation.

We distinguish the concept of a weakly dominant strategy and a strictly dominant strategy. Strategy s_1 poorly dominates s_2 if for a given player it is a better response to at least one of the opponent's strategies and at the same time is no worse than s_2 to any opponent's strategy (Stelmach et al., 2007). Strategy s_1 strictly dominates s_2 if for a given player it is a better answer to each opponent's strategy than s_2 (Stelmach et al., 2007).

Nash equilibrium is a combination of players' strategies in which each player's strategy is optimal for him (maximizes his utility). Nash's equilibrium is stable, as none of the players has reasons to deviate from the previously adopted strategy. The choice of weakly dominant strategies (and also of strictly dominant strategies) always generates Nash equilibrium (Stelmach et al., 2007). We say that the result of a game is Pareto-optimal if there is no score that is better for at least one player, and for each of the other players it is not worse (Stelmach et al., 2007).

To discuss the issue we are interested in, we will use the "prisoner's dilemma", i.e. a model in game theory that is used to describe non-zero-sum conflicts. Suppose that in our model society consists of two persons: A and B. This society sets itself the task of producing a good Z. The cost of producing the good Z is 10 units, while the benefit of consuming this good for each person is 7 units. Each player has a choice of two strategies:

1) cooperate in the production of the good (K);
2) not to cooperate in the production of the good (N).

The possible outcomes of the game resulting from the combination of both strategies, from the point of view of player A, are as follows:

1) a score marked as *T (Temptation*) occurs when player A chooses strategy N and player B chooses strategy K;
2) a score marked as *R (Reward*) occurs if both players choose strategy K;
3) a score marked as *P (Punishment*) occurs if both players choose strategy N;
4) a score marked as S (*Sucker*) occurs if player A chooses strategy K and player B chooses strategy N (Stelmach et al., 2007).

If both players act rationally, then each of them will have the following order of preference: T>R>P>S, which will cause both players to choose their strictly dominant strategy N. This choice will lead to Nash equilibrium and consequently the best result of the game R in which the Pareto optimum occurs will not be achieved (Stelmach et al., 2007). The result of this behavior of the players will be that the good Z will not be created. The payout matrix for our game is as follows:

A/B	K^A	N^A
K^B	2/2	7/-3
N^B	-3/7	0/0

The above considerations explain where the word "dilemma" was found in the name of the analyzed game. Rational actors seeking to maximize their utility will be inclined to choose strategy N, because it is a better answer than K to all opponent's strategies (Stelmach et al., 2007). As a result, the outcome of the game, although it is a consequence of the rational choices of players, will not be an optimal solution in the sense of Pareto.

The prisoner's dilemma can also be used to model the conflict of interest between the creator and the illegal sellers of his works (Gordon & Bone, 2000). In this case, players have two strategies to choose from. The cooperative strategy (K) is about creating songs, while the non-cooperative strategy (N) is about using the fruits of someone else's work. Since both players will choose the non-cooperative strategy N, no player will make a creative effort and as a result, the Z track will not be created.

In conclusion, due to the problem of the "free-rider" there are too few songs on the market. This results in inefficiencies in resource allocation and, as a result, social welfare will not be maximized. The problem of the "free-rider" is, paradoxically, the result of the rationality of consumers of intangible goods. Those consumers, faced with the choice between a cooperative activity consisting in financial support for the creation of intangible goods by simply buying them from authors and a non-cooperative activity consisting in copying works, will opt for a non-cooperative activity, since such behaviour brings them closer to the result that occupies the highest place in their order of preferences. This result occurs when other entities pay for the work, thanks to which the work will be created, and they will not pay for the work, but will copy and consume it.

Of course, the above models are simplified, and a number of detailed arguments can be raised against individual assumptions. However, they seem to illustrate well the main problem with goods such as copyrightable works.

3.3. THE ECONOMIC FUNCTION OF COPYRIGHT

The above considerations lead to the conclusion that the public nature of works means that the market mechanism does not guarantee the achievement of an effective level of creativity. This, in turn, leads to social welfare not being maximised. *Law and economics* treat the growth of social welfare as one of the main goals of the law. Hence, it postulates its solution using legal instruments such as copyright (in the objective sense).

The economic copyright gives the author the exclusive right to use and dispose of the work. This law is confirmed by the authority of the state, which means that anyone who violates it must take into account the institutionalized reaction of state bodies. The author, having such an exclusive, legally enforceable right, has the power to deprive others of the possibility of using his work if this use takes place without his consent. Thanks to this, he can completely or significantly reduce the number of "free-riders" and secure remuneration for creative work, guaranteeing reimbursement of creation costs. Therefore, economic copyrights solve the problem of underinvestment in creative activity. They allow the author to internalize

most of the benefits of his work. It is precisely the facilitation of the creator's internalization of the positive effects of his work that is the essence of the function performed by copyright (Sag, 2005).

The mere establishment of standards granting protection to the author does not mean that they will effectively fulfil their function. The effectiveness of the protection system is manifested in the number of potential "free-riders" eliminated from consumption. However, this elimination can be carried out both:

1) ex-ante (before the rights of the author are infringed);
2) as well as ex-post (when the copyright infringement has already occurred).

If protection aims at *ex-ante* elimination, we talk about preventive protection, and if it is aimed at *ex-post* elimination, we talk about repressive protection. Repressive protection takes place with the participation of the court or out of court (e.g. through settlements or mediation). Due to the fact that this type of protection is relatively burdensome for the author (due to the need to incur court or transaction costs), preventive protection is of particular importance (Leveque & Meniere, 2004). The main instrument of this protection is a system of ailments that will have to be endured by the person infringing the rights of the author. This system includes both civil law obligations of the infringer (e.g. the obligation to redress damage) and penalties. For the sake of simplicity, we will call all these ailments a system of punishments, and a single ailment a punishment.

Law and economics speaks about how to shape the system of penalties so that the number of copyright infringements (and thus the number of "free-riders") is as small as possible. On the basis *of law and economics*, the penalty is treated as a kind of price incentive. Rationally acting entities, in accordance with the assumptions of *law and economics*, will calculate the impact of the potential penalty on their utility account. If the penalty properly serves a deterrent function, the subjects will cease to infringe the rights of the creator, and the behaviour that reduces social welfare will be eliminated. Let us examine on what assumption the economic theory of effective punishment is based. According to the views of law *and economics*, rational actors do not violate the law as long as the benefits derived from the violation of the law are less than the amount of penalties for the violation multiplied by the probability of being caught in the violation (Leveque & Meniere, 2004). This simple relationship can be written using the formula:

$$K < P * S$$

where:
K – advantage derived from the infringement
P – probability of being caught violating
S – the amount of the penalty

If, in relation to the potential violator, this inequality is no longer met, a violation of the law will occur. The P value depends primarily on the effectiveness of the law enforcement apparatus. In the case of copyright, the ability of the creator himself to detect infringements will also be important. The value of S, on the other hand, depends on the amount of penalties. The decision-maker (legislator) should shape the system of preventive protection in such a way that, for a given type of copyright infringement, the value of P multiplied by S is greater than the value of K. Such a system of penalties will ensure the effectiveness of the

author's protection. To achieve this goal, the decision-maker can proceed in two ways. First, it can affect the detection of violations by directing funds to law enforcement agencies. Such actions modify the value of the variable P. The second solution is to influence the amount of penalties, which in turn modifies the value of the variable S. It is worth noting that due to the nature of copyright infringements, their detection is very difficult. Even with a large financial outlay, increasing the detection of infringements faces major obstacles. The possibility of operating the variable P is therefore very limited. This means that the formation of the preventive protection system will take place mainly through the appropriate determination of the amount of penalties. Due to the low P-value, *law and economics* suggest that these penalties should be very high.

3.4. ECONOMIC CONSEQUENCES OF THE CREATOR'S MONOPOLY

Establishing authors' protection has certain consequences. This leads to an improvement in their market position, but at the same time gives them something like *monopoly power* (Gordon & Bone, 2000). In order to explain this phenomenon, it is necessary to refer to the concept of competition. Competition is the process by which market participants compete with each other in an attempt to present market offers that are more advantageous than others (Marciniak, 2002). Due to the strength of competition, four basic market models are distinguished in the economic literature:

1) excellent competition;
2) pure monopoly;
3) oligopoly;
4) monopolistic competition (Marciniak, 2002).

Using the above models, we can describe the economic consequences of granting the author economic copyrights. The starting point is that, apart from rare cases of parallel works, it is not possible for two identical works to exist (Barta et al., 2005). Originality or uniqueness result from the very nature of the work (these are its defining features). Even if similar works from different authors exist on the market, they can only be considered as substitutes to a limited extent (e.g. books on similar topics, videos dealing with the same problem, computer programs with similar functions, etc.). This means that when those who copy works and create competition to the author are eliminated from the market, other creators will not be able to offer homogeneous works to consumers. As a result, there will be non-price competition between authors (also based on other characteristics of the work than just the price), and individual authors will have some control over the price of their works. Since the works market will not be characterised by homogeneity of products, lack of price competition and lack of the authors' influence on prices then, since these market characteristics are conditions of perfect competition, the 'works market' will not be perfectly competitive. Whether a monopoly, oligopoly or monopolistic competition is created on the market will depend on how many creators offer works that are in a "limited substitution" relationship.

The "monopolistic power" of the author in economic terms should therefore be understood as the market position of the author, in which his competitors copying and selling his works "illegally" (without his consent) are eliminated from the market, and there are no substitute works on the market. Other creators are only able to offer substitution works to a certain extent. This means that the creator becomes the only seller of a unique good, which gives him influence on its market price. And this influence on the price of his work will be

called the "monopolistic power" of the creator. The creator will have the greatest "monopoly power" if the market takes the form of a monopoly, and the smallest within monopolistic competition.

The distortion of competition resulting from the introduction of copyright has its consequences. The creator – guided by the principle of profit maximization in conditions of imperfect competition – will be motivated to release fewer copies on the market in relation to the needs of society, and the price of copies on the market will be high. The works will be consumed by a few consumers who will pay a high price for their copy. The use of copyrights to solve the problem of the "free-rider" contributes to the creation of unnecessary social loss (*deadweight loss*). The unnecessary social loss in the present case results from the fact that society does not receive goods further production of which is profitable from the point of view of the ratio of social benefits to social losses.

The problem outlined here was described by Michael Heller as *"Tragedy of the anticommons".* This phrase refers to Garrett Hardin's essay "*The Tragedy of the Commons*". In his essay, Hardin described the dilemma of eighteenth-century English farmers who, through overexploitation, led to a significant reduction in pasture productivity: almost every shepherd, knowing that the grass was free, added another sheep to his flock in the belief that if he did not do it, others would do it anyway; As a result, the common good – the pasture – fell into disrepair (Stelmach et al., 2007). Heller used the phrase "Tragedy of the *anticommons"* to mean the opposite situation, when a few people, due to the fact that they have exclusive rights to public goods, limit access to these goods, thus wasting their potential in terms of creating social welfare (Leveque & Meniere, 2004).

It is worth pointing out that granting the author economic copyrights to his works entails not only the costs associated with the emergence of imperfect competition on the market. This way of stimulating creativity also generates other categories of costs. In the first place, it should be pointed out that creative activity is cumulative, which means that works created in the present are based on the works created in the past (Gordon & Bone, 2000). New creators very often create their works in such a way that they borrow certain elements from old works and add new content to them. The existence of economic copyrights requires that new authors obtain the consent of the author of the original work to dispose of and use their work (e.g. Article 2 of the Polish Act on Copyright and Related Rights). As it is well known, such consent will often require appropriate remuneration, which increases the cost of creating new works. This category of costs can be called the costs of reducing future creativity. A certain paradox of copyrights is visible here. On the one hand, these rights are established to increase the number of creative initiatives. On the other hand, imposing additional development costs on future authors weakens these initiatives (Gordon & Bone, 2000).

The second important category of costs are the costs associated with the enforcement of the rights of the author. These costs can be divided into costs borne by the author himself and those borne by society. The author bears, i.a. the costs related to monitoring the market in order to detect violations of his rights, costs of legal assistance during the trial or costs of mediation if the parties want to avoid a trial. Society, on the other hand, is burdened with financing the law enforcement apparatus and the judiciary. The costs of lawsuits can be particularly high, which means that copyright protection cases are often very complicated.

3.5. TRYING TO SOLVE THE DILEMMA

Copyright seemed to be an ideal instrument to reduce the problem of the "free-rider" and the problem of insufficient number of creative initiatives. However, it turned out that this solution is not without flaws, as it leads to distortions of competition. In addition, this solution burdens society with additional costs, which further aggravates the adverse effects of the creator's "monopolistic power". The question then becomes, is *law and economics* surrendering to the problem posed?

The role of *law and economics* should be redefined in response to this question. If copyright is to be economically effective, it should resolve this contradiction, which means that it should provide economic tools to weigh up the reasons for and against the protection of the author (Landes & Posner, 1989).

Two elements are needed to determine the optimal (effective) level of protection for creators. The first are the variables that make up the concept of security level, which include the duration of protection and the scope of protection. The time variable contains information about the duration of the author's economic rights. The scope variable concerns the 'depth' of copyright (e.g. the range of rights from ideas to expression, from original works to derivative works, from total protection to fair use, etc.).

The second element is the criteria for answering the question of what value of the above variables is optimal from the point of view of balancing the conflicting economic reasons behind strengthening and weakening protection. Those criteria therefore determine the economically effective level of protection for authors. The traditional criteria used in *law and economics* are Pareto efficiency, Kaldor-Hicks efficiency and social welfare maximization. The Pareto-improvement criterion allows changes to be made if the proposed change is better for at least one person and no worse for others. The Kaldor-Hicks criterion and the similar Posner criterion, on the other hand, allow for a change if, after making a change, people who have benefited from the change are able to hypothetically compensate for the decrease in utility (social wealth) to those who have lost on the change and still have a higher utility (social wealth) than before the change (Kaldor, 1939; Hicks, 1939).

Based on the above criteria, it is possible to build economic arguments to shape the optimal level of protection for authors. By way of example, under Article 36 of the Copyright Act, the duration of author's economic rights is 70 years from the death of the author. If we assume that copyright is primarily intended to motivate the creator to undertake creative initiatives with the prospect of profits achieved in the future, it is difficult to accept justification for the continuation of copyright after the death of the creator. Moreover, it can also be pointed out that extending the protection by one year from 2 to 3 years from the date of the first dissemination will be of great importance to the author. On the other hand, extending protection also by one year from 20 to 21 years from the time of initial dissemination will be of lesser importance. This is due to the fact that the time perspective makes the profit from creative activity more illusory and thus less taken into account by the creator in his economic calculation. In addition, profits obtained from the sale of works are subject to the law of decreasing marginal utility, so each additional zloty from the sale of the work obtained in subsequent years will have less and less utility for the author (Gordon & Bone,2000). Using the Pareto criterion, it would be possible to justify the abolition of protection after the death of the creator, because the author does not lose on such a change, or using the Kaldor-Hicks criterion to justify shortening the protection, e.g. to 15 years, i.e. to a more tangible perspective from the perspective of the average person.

4. OBSERVATIONS FROM THE PERSPECTIVE OF THE CASE-LAW OF THE CONSTITUTIONAL TRIBUNAL

Comments on legal protection made on the basis of *law and economics* should be confronted with the jurisprudence of the Constitutional Tribunal. The Constitutional Court has often sought the limits of protection of authors (Judgment of the Constitutional Tribunal of 21.11.2005, P 10/03, OTK-A 2005, No. 10, item 116; judgment of the Constitutional Tribunal of 24.01.2006, SK 40/04, OTK-A 2006, No. 1, item 5; judgment of the Constitutional Tribunal of 24.05.2006, K 5/05, OTK-A 2006, No. 5, item 59; judgment of the Constitutional Tribunal of 11.10.2011, P 18/09, OTK-A 2011, No. 8, item 81; judgment of the Constitutional Tribunal of 17.02.2015, K 15/13, OTK-A 2015, No. 2, item 16; judgment of the Constitutional Tribunal of 23.06.2015, SK 32/14, OTK-A 2015, No. 6, item 84; judgment of the Constitutional Tribunal of 5.11.2019, P 14/19, OTK-A 2020, No. 7.), and thus has commented on a topic which, according to point 2.5, is also a central problem in the light of *law and economics*.

For the purposes of this study, it is worth paying special attention to the judgment of the Constitutional Tribunal of 23/06/2015 (SK 32/14, OTK-A 2015, No. 6, item 84), in which the Tribunal ruled that Article 79(1)(3)(b) of the Act of 4 February 1994 on Copyright and Related Rights "*to the extent that the rightholder whose economic copyrights have been infringed may demand from a person who has infringed those rights, to redress the damage caused by paying a sum of money in the amount corresponding – if the infringement is culpable – to three times the appropriate remuneration which, at the time of its assertion, would be due for the rightholder's consent to use the work, is inconsistent with Article 64(1) and (2) in conjunction with Article 31(3) in conjunction with Article 2* of the Constitution ". In the grounds of that ruling, the Court pointed to several interesting arguments.

First, the Court rightly drew attention to the complex subject matter of copyright protection and their diverse normative content. Hence, when assessing – from a constitutional perspective – "*it is not so much the qualification of author's economic rights that matters*" due to the scope of Article 64(1)-(2) of the Constitution (right to property), but "*the degree of intensity of protection of these rights*" (SK 32/14, OTK-A 2015, No. 6, item 84). The Tribunal assumed that author's economic rights, taking into account their content and functions, are covered by the guarantees referred to in Article 64(1) and (2) of the Constitution. However, it is worth emphasizing that "*the intensity of this protection, depending on the type of problem analysed, may be identical or similar to the right to protection of property or to protection of other property rights*" (SK 32/14, OTK-A 2015, No. 6, item 84).

Article 64(1) and (2) of the Constitution guarantees to the holder of author's economic rights the freedom to dispose of them, as well as the protection against infringements by third parties. However, this protection is not absolute, because it is limited by the constitutional requirements for the protection of the financial situation of the person committing the infringement of property rights. Adopting a different assumption would be incompatible with Article 64 and Article 31(3) of the Constitution, and consequently would mean full freedom of the legislator to interfere in the area of economic rights of the entity infringing copyright.

Secondly, the legislator, seeking to protect the holders of economic copyrights, cannot completely lose sight of the position of the perpetrator of the damage. A rightholder whose property rights have been infringed may be granted various legal protective instruments, but

should not have solutions "*that would indicate that the legislator itself guarantees excessive interference with the property rights of the person responsible ex delicto*". The basic protective instrument is compensation within the limits of an adequate causal link. However, it must not lead to a complete loss of proportion between the amount of damage suffered and compensation.

These observations of the Court are extremely interesting. The Constitutional Tribunal assumed that the protection resulting from author's economic rights may be analogous or similar to the protection of property or other economic rights. It therefore failed to take account of the specific subject-matter of those rights, that is to say, works constituting quasi-public goods which differ substantially from movable or immovable property. Next, in seeking limits on protection, the Court above all raised arguments relating to the protection of the legal position of the person committing the infringement. Such arguments are not taken into account at all in the light of *law and economics*. Interestingly, the Court also saw only an *ex post* perspective, i.e. the effects after committing the infringement. This is fundamentally different from the *ex ante* perspective taken by the economic analysis. Finally, the conclusion reached by the Court assumes a limitation of the liability of the perpetrator, which also does not correspond to the conclusions of the economic analysis, which suggest tightening of liability. In summary, it could be stated that the Court's judgment does not take into account the assumptions of *law and economics* in any way, and its expected effect may be a reduction in the number of creative initiatives and a decrease in social wealth.

5. FINAL REMARKS

The analysis showed that the need for legal protection of authors results from the nature of works as quasi-public goods. The lack of such protection, in accordance with the assumptions of the theory of rational choice, has a demotivating effect on creators, contributing to a reduction in the number of creative initiatives. On the other hand, introduction of economic copyrights in order to protect the authors turns out to be a solution that implies low availability of goods and their high price, which in turn leads to a decrease in social welfare. Ultimately, it is reasonable to say that the purpose of intellectual property rights is to strike a balance between guaranteeing legal protection to authors and ensuring that the public has adequate access to works. We also presented economic instruments in the form of efficiency criteria to solve the presented dilemma. Interesting conclusions can be drawn from the juxtaposition of *law and economics* assumptions with the jurisprudence of the Constitutional Tribunal. It turns out that in its case-law the Court does not follow any of the reasons presented by the economic analysis, and its decisions in the light of this analysis may be unfavourable to society.

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