

INTERPRETATIVE DECISION

№ 1

Sofia, May 31, 2013

Supreme Cassation Court of the Republic of Bulgaria, GENERAL ASSEMBLY OF THE CRIMINAL DIVISIONS, in a court hearing on 21 of February, 2013 with members:

CHAIRMAN: LAZAR GRUEV

VICE CHAIRMAN: PAVLINA PAVLOVA

HEADS OF DIVISIONS:

ELIANA KARAGYOZOVA, IVAN NEDEV, TATIANA KANCHEVA

MEMBERS:

PLAMEN TOMOV

ELENA AVDEVA

ELENA VELICHKOVA

KAPKA KOSTOVA

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KRASIMIR HARALAMPIEV

BISSER TROYANOV

ROUJENA KERANOVA

KRASIMIR SHEKERDZHIEV

FIDANKA PENEVA

PLAMEN PETKOV

with the participation of the Secretary Romyana Videnova

put on review interpretative case № 1 on the inventory for 2013

reported by Judge ELENA AVDEVA

The Chairman of the Supreme Cassation Court of the Republic of Bulgaria pursuant to Art. 125 of the Law on judiciary has made a request the General Assembly of the Criminal Divisions of the Supreme Cassation Court (GACD) to issue an interpretative decision because of contradictory court practice (case law – my note) on the application of Art. 172b of the Penal Code (PC) in relation to the protection of right over trademark.

The following questions are raised:

I. Regarding the objective elements of the criminal composition of art. 172b

1. Is there an objective element part of the composition of the Art.172b "Use in commercial activity" when goods are passing transit through the territory of the Republic of Bulgaria?
2. Whether the use of signs similar to foreign trademarks constitutes a crime under the Art.172b of Penal Code?
3. Is the principle of Community exhaustion of right over a trademark is applicable when establishing the unlawful use of trademark under Art. 172b of Penal Code?
4. When there is an element "commercial activity" of the composition of art. 172b of Penal Code?

II. Regarding the elements that outline the subject of the criminal composition of art. 172b of Penal Code

1. Who is the subject of the crime under art.172b of Criminal Code, when a user of illegally identified goods is a legal entity?
2. Is it mandatory the subject of the crime under art. 172b of Penal Code to be a trader within the meaning of the Commercial Law?

III. Regarding the occurrence of damages/harmful consequences and the procedural role of the injured person/injured legal entity by the crime under art. 172b of Penal Code?

1. Whether damages, subject to compensation, occur from the crime under art. 172b of Penal Code?
2. Is there an injured person/injured legal entity from the crime of Art. 172b of Penal Code and is it possible it to be constituted as a civil claimant in the criminal process?

GACD, in pursuance of its powers under Article 124 of the Constitution of the Republic of Bulgaria and art. 124, par. 1, it. 1 of the Law on judiciary, in order to pronounce took in consideration the following:

Public relations arising in connection to the exclusive right over a trademark have criminal protection under art. 172b of the Penal Code.

The provision has blanket structure, and therefore its interpretation is bound to its supplementing provisions of the special Law on marks and geographical indications (Prom. SG 81 of 14.09.1999, in force since 15.12.1999 latest revision SG 54 of 15.07.2011). It is a product of Bulgarian legal tradition (first law on trade and industrial brands is adopted by the National Assembly on 11.18.1892, and is published in the State Gazette, issue 16 of 01.22.1893) (LMGI) and the introduced by the legislator international and EU Community law of intellectual property.

It is therefore of importance for the appropriate application of art.172b Penal Code the principles enshrined in First Council Directive EC 89/104/EEC of 21.12.1988 for approximation the laws of Member States relating to trademarks repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22.10.2008 on the approximation of the laws of the Member States relating to trade marks (codified version), Directive 2004/48/EO of the European Parliament and of the Council of 29.04.2004 on enforcement of intellectual property rights and Agreement on Trade Related Aspects of intellectual property Rights constituting Annex 1B of Marrakesh Agreement Establishing the World Trade organization (TRIPS) as well the case law of the Court of EU (ECJ) on preliminary requests. Important objective sources of law on the subject are Regulation № 207/2009 of Council of 26.02.2009 on the Community trade mark (codified version) and Regulation № 1383/2003 by the Council of 22.07.2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

In this legal framework GACD has reached the following answers on the raised questions:

On point I.1

The objective element of the crime under art. 172b of Penal Code "Use in Commercial activity" finds its legal definition in the supplementing provision of Art. 13, par. 2 of LMGI. In the provision are exhaustively listed the actions, in the course of which it can be assumed infringement of the right of the trademark owner through use without his consent of identical or similar to the registered signs.

These are:

1. affixing the sign to the goods or to the packaging thereof;
2. offering the goods, placing them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;
3. importing or exporting the goods under that sign;

4. using the sign on business papers and in advertising.

Paragraph 1, Item 12 of the Additional Provisions of LMGI defines the activity of import or export as the actual carrying across the border of the Republic of Bulgaria of goods, regardless of whether the customs regime has been operated with respect to such goods. Transit according to Art. 97, par. 1 of Law on Customs (Prom. SG. 15 of 6.02.1998, in force since 1.01.1999, the latest revision SG 15 of 15.02.2013, in force from 1.02.2013 (LC) is a type of custom regime which allows movement from one place to another one the customs territory of the Republic of Bulgaria

1. foreign goods without being charged with import customs duties and without being subject to trade policy measures;
2. local goods in cases and under terms specified in the Regulations for which restrictive or promotional export measures have been provided for with the aim that these measures should not be avoided or used illegally.

The comparison between Art. 97, par. 1 of LC and 13, par. 2 item 3 of LMGI shows that the custom regime *transit* is supposed actual carrying of goods across the border of the country by putting them in its customs space, making it possible to be conducted a crime under the art.172b of Penal Code. This hypothesis, however, is conceivable when transit only non-original products aimed at the european consumer.

The arguments on this are as follows: Bulgarian jurisprudence has established mandatory definition which clearly differentiated from the original goods from the non-originals, counterfeited, imitated goods. In p.4 of Interpretative Decision № 1 from 15.06.2009 to SCC on interpretative case № 1/2008 of GATD states that "the original goods bear the graphic image of the sign of the registered trademark with the consent of the right holder." Per argumentum a contrario, the absence of consent for the use of the sign of the registered mark places the goods in the category of non-originals, counterfeited, imitated goods.

According to the definition of par.1, it.12 of the Additional Provisions of LMGI in the meaning of this law the terms *import* and *export* are related to goods, bearing a sign identical or similar to the registered mark, but not uniform with it, i.e. these are goods, marked with non-original sign, which is not authorized by the titular.

In the objective composition of the executive act of the crime art.172b Penal Code is included the important element the use of the mark to be concluded without the consent of the holder of the exclusive right and without legal basis, by which the legislator clearly points to the cases of operation with non-original, counterfeit goods.

Support of the view that in the transit passing of goods in the context of the crime of art. 172b Penal Code of importance is their non-original character can be found in art. 2, par. 1, (a) and art. 3, par.1 of Regulation № 1383/2003 by the Council of 22.07.2003. The Regulation as a whole is

dedicated to the activities of customs authorities in respect to goods suspected to or infringing certain rights of intellectual property. For its purposes goods, infringing intellectual property are the imitated goods (Art. 2, par. 1 /a/) and vice versa, its provisions do not apply to goods on which is placed a trademark with the consent of proprietor of that mark (Art. 3, par. 1).

Next, GACD notes that the pointed normative sources build legal protection within the frames of European Union and are aimed against infringements of the right over a trade mark, applicable under the Community law or the domestic law of the Member State. Therefore the custom regime *transit* itself does not establish infringement of the exclusive right over a mark, if the goods are not subject to commercial transaction, aimed at consumers in European Union. This understanding of the law¹ impose in each particular case to be clarified whether the transit passing to a third country goods are intended for the European market. When there is no data in this regard, there is no ground for criminal liability for violation of industrial property rights under art. 172b of the Penal Code. Furthermore, in accordance to art. 81, par. 6 of LMGI the legislator has excluded also the administrative liability for transit passing goods, which complements the arguments of the above interpretation of art.172b of Penal Code.

On p.I.2.

Some court panels find that the crime under art.172b of Penal Code has as its object goods bearing the trademark in its original state as in the registration, therefore in the use of identical or similar sign lack object of crime.

Other court panels share the understanding, that object of the crime are goods with placed without the consent of trademark owner sign which may be identical or similar to the registered trademark.

GACD considers as right for the second opinion.

The terms "a sign similar to a registered mark" and "sign identical to the registered trade mark" are included in the composition of crime under art. 172b of Penal Code by way of reference to the LMGI. Pursuant to art. 13, par. 1 LMGI the owner of exclusive right over mark is entitled to prevent a third party without his consent from using in the commercial activity any sign which

1. is identical with the mark in relation to goods or services which are identical with those for which the mark is registered;
2. because of its identity with or similarity to the mark and the identity or similarity of the goods or services covered by the mark and the sign, there exists a likelihood of confusion on the part of the consumers; the likelihood of confusion includes the likelihood of association between the sign and the mark;

¹ See Decisions on Case Class International C-405/03, Joined Cases C-446/09 and C-495/09 and Case L'Oreal - C-324/09 of ECJ

3. is identical with or similar to the mark in relation to goods or services which are not identical with or similar to those for which the mark is registered, where the earlier mark has a reputation in the territory of the Republic of Bulgaria and where use of that sign without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark.

In each of these three hypotheses is referred to the use of sign, different from the registered trademark. The lack of consent of its proprietor for commercial use by third parties excludes the possibility of its occurrence in the original form on goods under their control. The originality of the trademark is in correlation with consent of its titular on its inclusion in commercial activity under the meaning of LMGI. It (originality – my note) always fell in his absence (consent – my note). Therefore goods with original sign could not be object of crime under art. 172 b of Penal Code.

Within its scope fall the cases, where identical signs are used in the option of art. 13, par. 1, it. 1 of LMGI and identical or similar signs in the option of art. 13, par. 1, it. 1 of LMGI.

The first option is relevant to counterfeit goods, as to them is demonstrated the combination identical sign - identical goods, where the likelihood of confusion is always assumed.

The controversial case causes additional explanations. Too often, under the influence of expert assessment, for minor differences between incriminated and registered sign (different color shade, larger or smaller scale of image etc.) it is assumed that the affixed sign is similar to the trademark and therefore is relevant the hypothesis of art. 13, par. 1, it. 2 of LMGI. Indeed in this case it is concerned an identical sign - imitation of the original one, and when it is used for identical goods there is the hypothesis of art. 13, par. 1, it. 1 of LMGI. Goods with counterfeit trademark under p. 14 /a/ of TRIPS Agreement states that "any goods, including packaging, bearing without authorization a trademark identical to a validly registered trademark in relation to those goods or where it cannot be distinguish in its essential characteristics of such trademark, and which therefore infringes the rights of holder of the trademark in question. " Art. 16, par. 1 of the same Agreement presumed that " In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. "

Quoted provisions assume that the goods with counterfeited trademarks are possible options of the identity of the sign, which can be manifested as strong similarity or indistinguishable or hardly distinguishable similarity with the main characteristics of the original. In the same line of reasoning is the view expressed in p. 3 of Interpretative Decision № 1 of 15.06.2009 on Interpretative case № 1/2008 of a GATD, according to which "the affixed by a third party graphics sign on the goods is a copy or imitation of the trademark irrespectively whether the image is identical or similar to the sign, acquired the capacity of trademark by virtue of registration under art. 10 of LMGI. "

The distinction between original and counterfeit goods is in line on the consent of trademark owner for the use of the trademark for identical goods, and not in line to sameness of the illegally used indication of the registered sign. On the counterfeits is infringed the main function of the mark - to indicate origin. The affixed on them sign does not allow for the relatively well informed and reasonably observant consumer to understand whether goods originate from the proprietor or a related ²business or originate from another party. He is devoid of opportunity to compare directly and immediately the perceived sign and the mark. Insubstantial differences between them are not able to trigger an assessment potential to counteract on the imitative suggestion of the counterfeit, and therefore should be neglected. Therefore, when the sign is copy or imitation of a registered mark and is placed on identical goods, the likelihood of confusion of the consumer is assumed without its proving to be necessary. In this case the violation of the right on a mark is under art. 13, par. 1, it. 1 of LMGI.

In the second option of using an identical or similar sign – the one under art. 13, par. 1, it. 2 of LMGI, the similarity is different from the copy or the imitation of the mark on the counterfeited goods. Under p. 8 of the Preamble of Regulation № 207/2009, from 26.02.2009 on Community trademark (codified version) the concept of similarity should be interpreted in relation to the likelihood of confusion. The latter is a function of the existence of a variety of factors, in particular of the recognition of the mark on the market, of the link which can be made with used and registered sign, the degree of similarity between the mark and the sign and between the marked goods or services. A crime under art.172b of the Penal Code is also possible under the conditions of art. 13, par. 1, it.2 of LMGI, but when reaching a conclusion about the likelihood of confusion of the consumer, since in this case it is not assumed, and it is a particular objective condition for the provision of criminal law protection for the right on the mark.

The similar sign is present in the hypothesis of art. 13, par. 1, it. 3 of the LMGI. This provision protects trademarks holders from actions described as “dilution”, "blurring" or "received ready". It is typical for them, unlike the cases under art. 13, par. 1, it. 1 and 2 of LMGI, likelihood of consumer confusion is not provided. So formulated infringement of right over a mark is not covered by art. 172b of Penal Code as it relates to the additional objective element - establishing of the reputation of the earlier trade mark within the territory of Republic of Bulgaria, for which LMGI provides for a special order.

On p.I.3

The principle of community exhaustion is regulated in art. 15, par. 1 of LMGI and is a restriction on the right of the owner of exclusive right over a mark to prohibit its use for goods, which are released on the market on the territory of the Member States of the European Union, respectively European Economic Area, by him or with his consent.

²See Decision C-323/09 of ECJ

The lexical and logical interpretation of art. 15, par. 1 of LMGI reveals his irrelevance to the scope of the objective elements of the crime under art. 172b Penal Code.

Community exhaustion of right over a trade mark occurs only in respect of goods, released on the market by the trademark owner or with its consent, i.e. the original goods. Therefore the introduced by art. 15, par. 1 of LMGI principle *priori* excludes use without consent of sign within the meaning of art. 13, par. 1, it. 1 and 2 in activities under art. 13, par. 2 of LMGI that fill the blanket rule of art. 172b Penal Code.

For these reasons GACD accept that the principle of Community exhaustion of right over trademarks is not applicable in case of establishing unlawful use of a trademark under art. 172b Penal Code.

On p.I.4

The term "commercial activity" within the meaning of art. 172b Penal Code specifies the way, on which could be infringed the right of a proprietor of mark. It is open to interpretation only in the context of art. 13, par. 1 and 2 of LMGI. The commercial activity, as it was mentioned in point I.1 is limited to performance of the listed in art. 13, p. 2 of LMGI actions, by which in the commercial cycle are introduced goods for profit, namely:

1. affixing the sign to the goods or to the packaging thereof;
2. offering the goods, placing them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;
3. importing or exporting the goods under that sign;
4. using the sign on business papers and in advertising.

GACD disagrees to the opinion that the objective content of art. 172b Penal Code is supplemented by the provisions of the Commercial Law (Prom., SG, issue 48 from 18.06.1991, in force from 1.07.1991, the latest revision No. 15 .02.2013, in force from 15.02.2013, amend. and supplemented. No. 20 of 28.02.2013 (CL). Such reference is unacceptable for several reasons.

Firstly, the CL itself does not create a legal definition of commercial activity, but rather built on the concept of trader, indicating which persons are traders (art. 1 of CL)/ and which are not (art. 2 of CL). The legislative approach focuses on the capacity of the individuals and not on the performed activities. In contrast of it, art. 13, par. 2 LMGI creates a comprehensive list of activities in the course which performing is possible infringement of right over a mark. Obviously the legislator did not refer the CL, but has distanced from it, avoiding inclusion in the elements of the criminal composition of the special capacity *trader*, unlike other provisions of the Penal Code (as art. 227b, par. 1, Art. 227c, art.227d Penal Code etc.).

Secondly, the linking of the executive act of art. 172b Penal Code with the outlined in CL perimeter of the civil circle finds excluded from the interpreted provision possibility persons without status of traders to avoid criminal liability, despite of the existence of all other prerequisites of the discussed legal text. Such result would limit unnecessarily the scope of art. 172b Penal Code and would reduce in diversion to its purpose, its beneficial effect of criminal legal regulator.

On p.II.1

The controversial practice of the courts in cases where user of goods with a sign under art. 13, par. 1 LMGI is a legal entity should be resolved in accordance with the principle of Bulgarian criminal law that the subject of crime can only be a physical person.

Participation of legal entities in different legal relations is performed by the behavior of the physical persons who form and express willingness on its behalf.

Relevant for determining the subject of the crime of art. 172b Penal Code, when the presence of an entity in a civil-legal circle is related to an infringement of the exclusive right to a mark, is the question of who committed specific actions led to its unauthorized use. In each case it is necessary to investigate the orientation of the behavior of the physical person, actually engaged in the act, by ordering and production of goods, actions of import and export, advertising, warehousing, brokerage, offering for sales, sales etc. Intentional nature of the crime impose the determination of all the elements, objectifying conscious perceptions for the antisocial character of the act, providing of socially dangerous consequences and the willing these to occur.

On p.II.2

The legislator did not set a requirement of special capacity of the subject of the crime under art. 172b of Penal Code.

In the formulation of the provision is used use relative pronoun "who", indicating, in criminal aspect that subject could be any mentally responsible physical person, that has reached determined by the law age, which has committed the executive act of art. 172b Penal Code.

The special way of its realization – use in the commercial activity, does not correlate with the capacity trader under CL as, the activity itself is not covered by its provisions, as explained in p.I.4.

Criminal law protection is put in dependence on the nature of the performed activity, rather than particular capacity of the perpetrator.

On p.III.1

CACD, following established in the court practice³ tradition maintains that the basis of a civil claim in the criminal process is the act in its delict appearance. On a compensation are subject the damages which are a direct consequence, irrespective whether they are element of the criminal composition.

The crime under art.172b, par. 1 of Penal Code is on a simple performing, without providing of criminal result. The aggravated composition of art.172b, par. 2 Penal Code includes the occurrence of significant harmful consequences. In all cases, however, the crime leads to a negative change the conditions for normal existence and the possibility of exercising the exclusive right on mark. The achieved commercial status and reputation of the owner of an exclusive right are affected. In his legally protected sphere l occur adverse changes that have property dimension. For the proper qualification of the act including for its discussion in the context of art. 9, par. 2 Penal Code or the preconditions for the administrative liability, it is important to be determined the amount of damages and the amount of the significant harmful consequences.

Recognition of the damages of the crime under art. 172b Penal Code is consistent with applicable international law and Community law.

According to Article 45, par. 1, of the TRIPS Agreement, the judicial authorities should be authorized to order the infringer to pay to the right holder the damages in an amount adequate to compensate him for damage suffered by him due to violation of the right of intellectual property. In the same line is art. 13 of Directive 2004/48/EC of European Parliament and the Council of 29.04.2004 on enforcement of intellectual property rights, requiring Member - States to guarantee that at the request of the injured party, judicial authorities will stipulate the offender to pay to the right holder compensation in accordance to the actual damages. These commitments are reflected in art. 76, par. 1, p. 3 LMGI governing a claim for compensation of damages for breach of right over a mark.

The determination of the amount of damages poses in front of the court practice serious challenges. They are associated with the essential characteristics of the right over a mark as a specific intangible asset, part of the intellectual property. The application of the mark in the stock circle is a result of costs and time to create trade reputation of its. The negative economic consequences of its involvement are real and distinct, but difficult to quantify under the known mechanisms of the delict. The national legislator, adjusting with the existing international standards⁴ has created in art. 76b, par. 1, it. 2 LMGI presume mechanism for assessment of damages for infringement of right on the mark. According to it, if the claim is established on its ground, but there is not enough information about its amount, the claimant may ask as compensation sum equivalent to the retail prices of lawfully manufactured goods identical or

3 See PP No 1 of 07.02.1955, amended with PP No 7/87 and PP No 9 of 25.12.1961

4 See Motives on the Draft Law for amendment of LMGI, 17.05.2006, 40 GA

similar to the goods subject to the infringement. This algorithm is in line with the rule in criminal proceedings to be searched only the suffered damages, and not the loss of earnings, as well to the postulate that the legal persons do not suffer moral damage. Designed on the specifics of the infringed right under art.172b Penal Code this view reflects presumed economic consequences of the affected of one in its essence intangible asset. The absolute amount of determined thus damages is practical guide for proper qualification of the crime under art. 172b Penal Code and its differentiation from the administrative infringements.

On p. III.2

The figure of the injured party occurs after a positive response to questions whether a person has suffered damages (property or moral) or whether these are direct and immediate result of the crime.

Taken by GACD understanding that the crime under art. 172b Penal Code causes real damages naturally leads to the recognition of procedural opportunity based on art. 74, par. 1 - 2 of the Penal Procedure Code and art. 84 of Penal Procedure Code, the injured physical person and the injured legal entity to be constituted as civil claimants. Under certain contractual terms and conditions this right may occurs and for a licensee on the argument from art. 75, par. 1 and par. 3 LMGI.

Based on the above, the General Assembly of the Criminal Divisions of the Supreme Cassation Court of the Republic of Bulgaria

HAS DECIDED

On p. I.1.

The objective element of the composition of art. 172b Penal Code "use in commercial activity" when goods are passing transit through territory of the Republic of Bulgaria is present if the goods are subject of a commercial transaction aimed at consumers in European Union.

On p.I.2

Use of signs, similar to foreign trademarks, is an intrinsic element of the crime under Art. 172b Penal Code.

On p.I.3

The principle of Community exhaustion of the right on trademark is not applicable for establishing of illegal use of trademark under art.172b Penal Code.

On p.I.4

The element “commercial activity” of the composition of the crime under art. 172b Penal Code is present in the hypotheses of art. 13, par. 2 LMGI, when the activities are being carried out for the realization of economic benefits; it is not depending on the performed by the subject activity as trader under the Commercial Law.

On p.II.1

The subject of the crime under art. 172b Penal Code when a user of the unlawfully identified goods is a legal entity is the physical person, on the behavior of which the legal entity has acquired the capacity of the user.

On p.II.2

The subject of the crime under art.172b Penal Code can be any criminally responsible person.

On p. III.1

From the crime under art.172b Penal Code may occur damages, subject to compensation.

On p.III.2

Injured physical/legal person is the holder of the right over a mark, who could be constituted as a civil claimant.

CHAIRMAN:

(Professor LAZAR GRUEV)

VICE. CHAIRMAN OF SCC:

(PAVLINA PANOVA)

HEADS OF DIVISIONS:

ELIANA KARAGYOZOVA IVAN NEDEV

TATIANA KANCHEVA

MEMBERS:

PLAMEN TOMOV

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(Special opinion on p, I.3.)

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(Special opinion on p. I.5.)

SPECIAL OPINION

of the judge Plamen Tomov

I think that on the the question of Is the principle of Community exhaustion of right over a trademark is applicable when establishing the unlawful use of trademark under Art. 172b of Penal Code? "(I.3) was incorrectly answered categorically negative, that this principle is not applicable.

For the explicitness of the response has a place only in substantive legal aspect: the principle of the Community exhaustion relates to original goods, and these really could not be object of the crime under art.172b Penal Code.

The discussed question has though - and this is reflected in its formulation (in establishing") - a certain procedural aspect: the original goods could not be, but they become object of the crime in a particular case (it is clear that this would happen as a result of error), how could it be established that?

The answer is, I think, obvious: being proved that the incriminated goods are actually original and that the principle of Community exhaustion of right over a trademark rights is active, but unfortunately, this response do not follow directly from the above interpretation.

(PLAMEN TOMOV)

Special Opinion of Judge Krasimir Shekerdjiev on Interpretative Decision № 1/2013

I could not agree with the opinion of the majority in relation to points III.1 and III.2 of the interpretative decision. From the wording of the provision of art.172b Penal Code could be made the conclusion that the legislator has outline the main composition of the crime in the provision of art.172b, paragraph 1 and in paragraph 2 of the same text has provided two aggravated compositions of the same crime. The analysis of the main composition gives grounds to assess whether it is on simple performing (as adopted and the majority) and for its performing is not required the occurrence of any damages. They are incriminated as a separate qualifying circumstance and exactly its appearance is a ground for increased criminal liability. The structure of the legal provision is similar to that of art.282 Penal Code, for which there is no doubt that it does not provide occurrence of damages in its main composition (that of art.282, par. 1 Penal Code) of damage. I find that the figure of the injured party in criminal proceedings is always associated with this he to endure damages incurred as a result of a crime. I think that these damages are always part of the crime composition and namely its occurrence is a ground to be provided the procedural opportunity the injured party (on the pre-court phase) to take participation in the criminal proceedings, respectively civil claimant in the court phase. In the luck of provided by the legislator damages (part of the crime composition) I do not find as possible to be accepted that the participation of injured party in any of the criminal proceedings is possible.

Therefore I assume that when the legislator has not provided as an element of the composition of the crime of art.172b, par, 1 CCP occurrence of damages on these proceedings do not exist the figure of injured party or civil claimant, respectively it is not acceptable the consideration of civil claim with subject caused damages for joint consideration in criminal proceedings. This is only possible in the hypothesis of art.172b, par. 2 Penal Code and only in the existence of aggravating circumstances, "significant adverse consequences."

I can not agree with the majority opinion that provisions of Art. 45, par.1 of the TRIPS Agreement support the thesis of the majority. Indeed, there is a requirement for the judicial authorities to order the infringer to pay to the right holder damages in an amount, compensating the damage suffered as a result of infringement of intellectual property rights. This requirement contains an obligation for national authorities to ensure judicial protection of any affected rights, but does not require it to be in the criminal proceedings. There is no dispute that in the national legislation exists a possibility a claim with subject affected intellectual property rights to be brought under the general order, respectively the lack of opportunity damages to be sought within the criminal proceedings is not a violation of the Agreement.

In conclusion, it should be noted also that with the decision for the existence of damage in cases concerning art.172b, par. 1 Penal Code SCC (with respect to the constant practice) requires the authorities of pre-court phase to meet all their obligations under Chapter VIII, Section I of Penal Procedural Code as always to search the person, who has endured damages from the incriminated action, to clarify to that person its rights under art. 75 PPC, provide the ability to participate in criminal proceedings and these obligations must be met no matter where is the residence of this

person. This requirement must be met in relation to each injured party, in the case of affected rights of more than one object of a criminal defense under the discussed legal text. Similar obligation exists in the court proceedings with a view to the possibility of clarified the rights of the injured party to lodge a civil claim.

Along with the requirement to meet the mandatory procedural provisions guaranteeing the rights of the person who suffered damages by the crime for the authorities of the pre-court phase will always be a requirement to include in its procedural acts information about the amount of damages and to identify it on specific method known in advance.

Implementation of these commitments cases concerning crimes on art.172b Penal Code (other than those under art.172b, par. 2 Penal Code) may prevent proper development of criminal proceedings and actually to compromise the proper criminal proceedings in order to protect the interest of the injured party in the developing alternative proceedings for repair of damages. I find that as unacceptable, especially when it is with regard to criminal composition, on which the legislator does not provide even the occurrence of damages.

Krasimir Shekerdjiev