

SOCIAL HARMFULNESS OF OFFENCES COMMITTED AGAINST GOODS ACQUIRED THROUGH IMMORAL MEANS

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1. The inspiration for writing this text was a case (or rather multiple cases) we came across when performing our professional duties. The facts of these cases were all similar in that the perpetrators recorded, copied and then distributed on-line pornographic works (legally produced and distributed) to which wronged party X had exclusive property rights. The acts committed by the perpetrators met the statutory criteria of crimes under Article 116(3) in conjunction with Article 117(2) of the Act of 4 February 1994 on copyright and related rights¹ (hereinafter referred to as “ACRR”) in conjunction with Article 12 of the Polish Penal Code (hereinafter “PC”). The Public Prosecutor’s Office has consistently refused to initiate proceedings in these cases, or when initiated, the proceedings used to be terminated on the grounds of the negligible degree of social harmfulness.² However, without going into the details of the justification behind these decisions, it is worth quoting some

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¹ Journal of Laws of 2021, item 1062, consolidated text.

² One of the cases was as follows: the proceedings were discontinued by the Police under decision of 30 September 2016 – Police office in OS (file no. 866/16) due to failure to meet the criteria of a criminal offence. Pursuant to a decision issued by the District Court in W. (II Kp 1144/66) of 29 March 2017, the interlocutory appeal filed by the wronged party was accepted and the case was remanded to the District Prosecutor’s Office in T. The District Court, with the decision of 29 June 2017 (Ds. 433.2017) again discontinued the proceedings due to finding that the social harmfulness of the act in question was negligible. As a result, wronged party X filed a subsidiary indictment with the District Court in W. With a decision of 12 December 2017

of them in order to explain the reasoning adopted by the prosecutors. For instance, the substantiation of the decision of 29 June 2017 on discontinuation of the inquiry carried out by the District Prosecutor's Office in T.³ stated that

“the conduct of the wronged party ... is not socially beneficial, valuable or having any socially acceptable positive effect. On the other hand, the negative social effect of pornography is obvious when it comes to the impact on the psyche of young people, on the perception of sex by adults, on relationships between partners, on the condition of the family as a social unit, on demography, which also affects the state of the social security system etc. The hedonistic pleasure of a few members of society who use this kind of visually drastic pornography cannot be regarded as a value (social interest). Therefore, the question of whether such attitudes are protected by criminal law or, more precisely, whether actions that undermine the financial benefits from such practices can be regarded as socially harmful to a greater than negligible extent should be considered as crucial in these proceedings. In the view of the arguments put forward above, the answer to this question must be ‘no’. And, while the wronged party may subjectively feel affected by the loss of earnings, no apparent harm has been caused by the act under the inquiry to society and the values protected in society. Of course, the production of pornographic films is not an illegal, forbidden activity. These products are therefore protected under civil law and it is through civil law suit that X should seek redress for the losses claimed.”

The case was brought before the District Court in W. (as a result of the filing of a subsidiary indictment by X), and this court discontinued proceedings pursuant to Article 17 § 1(3) of the Criminal Procedure Code stating *inter alia* that

“acts detrimental to the attainment of financial benefit from production of pornographic content are difficult to find socially harmful in a greater degree than negligible. It is beyond dispute that a pornographic film producer may suffer loss as a result of the dissemination of his proprietary works owned by other unauthorised entities, but nevertheless the small degree of social harmfulness of such an act prevents considering it a criminal offence and, consequently, speaks against punishing for it. There is no doubt that, in the case in question, the property rights of the subsidiary accuser have been infringed, but it should be borne in mind that these rights concern pornographic films, which, as has already been pointed out on several occasions, are a socially harmful and undesirable phenomenon. Thus, assuming a view that the dissemination of such films without authorisation or against its conditions constitutes an act whose degree of social harm is higher than negligible would lead to an odd situation.”

2. According to Article 1 ACRR, a copyrightable work is considered to be any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and manner of expression. It is an intangible legal good, which should be distinguished from a tangible object (material carrier of the work – *corpus mechanicum*), on which it is usually recorded.⁴ To qualify as a work within the meaning of Article 1(1) ACRR, a specific intangible product should cumulatively meet the following conditions: (a) to be a result of human (author's)

(II K 665/16) the District Court in W. discontinued the proceedings pursuant to Article 17 § 1(3) of the Criminal Procedure Code.

³ PR Ds 433.2017.

⁴ Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa, 2011, p. 18.

work; (b) to be a manifestation of creative activity; (c) to be of an individual character; (d) to be established.⁵ Pursuant to the wording of Article 1, the following circumstances are of no importance: the manner in which the work is expressed, the completion of any formalities concerning the work, its scientific or artistic value, its suitability to satisfy a particular need (thus, subject to protection are not only high quality works, but also works of very low artistic level, as well as those which are denied any artistic value); the purpose of the work (aiming at satisfying aesthetic or practical needs connected with the development of science). As rightly pointed out by Barta and Markiewicz “also bad and ‘cheesy’ novels, trashy paintings, obviously false scientific treatises are all protected”.⁶ The same authors, in another work, explicitly indicate that “pornographic works are also subject to copyright”.⁷ Therefore, there can be no doubt that a pornographic film (even if it shows drastic scenes and is negatively assessed by the audience) is a work within the meaning of Article 1(1) of the Act on copyright and related rights and as such is subject to both civil-law and criminal-law protection. This is so because the protection in question is not limited by any moral judgements, but by objectively verifiable properties of the work as indicated above. It is therefore irrelevant what the nature of the work is, and thus whether it presents content perceived as acceptable or morally positive from the point of view of judgement of the public. Even in cases where it presents features which are downright unacceptable, it remains a work within the meaning of the ACRR.

It is therefore beyond doubt that the conduct involving the unlawful distribution of others’ copyrightable works in order to earn a financial benefit constitutes a prohibited act even where that distribution relates to pornographic material, regardless of how pornography as such can be assessed. The content of the work is irrelevant for establishing that an act constitutes an infringement of copyright. Doubts may arise as to whether, and if so in what circumstances, an act consisting in an infringement of property and non-property rights by unlawful distribution of a work for the purpose of earning a financial benefit may be regarded as having a negligible degree of social harmfulness (possibly deprived of the characteristics of social harmfulness at all) due to its pornographic content.

3. Article 115 § 2 PC lists a number of elements to be taken into account when assessing the degree of social harmfulness, and therefore reprehensibility, of an act that formally meets the statutory criteria of an act prohibited under penalty. It should be pointed out that not all of the factors listed in that provision which influence the

⁵ Cf. in more detail Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, op. cit., p. 19 et seq.; Poźniak-Niedzielska, M., in: Poźniak-Niedzielska, M., Szczotka, J., Mozgawa, M., *Prawo autorskie i prawa pokrewne. Zarys wykładu*, Bydgoszcz–Warszawa–Lublin, 2007, p. 16 et seq.; Barta, J., Markiewicz, R., *Prawo autorskie*, Warszawa, 2013, p. 29 et seq.; Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, Warszawa, 2011, p. 21 et seq.

⁶ Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Komentarz*, p. 19; cf. also the judgment of the Polish Supreme Court of 30 May 1972, II CR 137/72, not published: “The protection of copyright is enjoyed by a product of individual human thought, which is established in any form, regardless of the value it objectively represents”.

⁷ Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, Warszawa, 2011, p. 22.

assessment of the degree of social harmfulness must occur in every case assessed, since this depends on the specific facts of the case. In the case under analysis, the conditions of the type and nature of the goods infringed, as well as the amount of damage caused and threatened, are first and foremost taken into account.

In the first place, it is necessary to refer to the protected good and define what it is in the event of an infringement of the author's rights to pornographic creations. At first glance, two views would be possible here. First of all, it could be considered that the object of protection includes only the rights of the author, both moral rights and property rights. Secondly, it could be considered that this object includes, apart from the rights of the author, some considerations of a more general nature, goods of a supra-individual nature related to the values that a given work presents for the general public. It should be added that in the analysed case it is impossible to completely exclude the author's rights.

The second of those views does not seem justifiable. In the case of protection of copyright against distribution of a work for the purposes of earning a financial benefit, no general value is protected, but only the private property belonging to the wronged party. It should be noted that in the event of conduct taken by an offender who unlawfully distributes a someone else's work to the public in order to earn a financial benefit, the work reaches the audience, is presented to them. If it were to protect that audience from any socially unacceptable content contained in this work, the criminal prohibition thus structured would not be able to achieve such an objective. Since the provision does not prohibit the distribution of the given content in general but merely the distribution which infringes the rights of the wronged party, the structure of the provision shows that it is primarily about property rights, it cannot be assumed that considerations such as public morality constitute at least a secondary object of protection.

If so, it must be assumed that, where appropriate, only property rights and moral rights to the work are protected. However, this statement does not exhaust the subject. It must be considered whether, in the case of a pornographic work, the protection of the author's rights may be limited due to the very nature of the work being distributed. It must therefore be considered whether the attack on the author's property rights and moral rights to a pornographic work will not be characterised by a lower degree of social harmfulness than the attack on the rights of authors of works which are perceived as socially beneficial.

It is necessary to determine whether the protection of a good such as non-property rights and, above all, property rights to a work, may be limited by the very content of that work, which may be more or less acceptable from the point of view of social assessments. First of all, it should be noted that it does not appear that any legal protection may be granted to income from a work which contains criminal content, i.e. from a film involving child pornography, presentation of violence or the use of an animal. In such a case, anyone who distributes such content for any purpose commits a crime and any proceeds derived from it shall be forfeited, either directly or indirectly, as a consequence of the offence. The question of the liability of those who further distribute such a work without the author's consent in order to obtain a financial benefit will be largely reduced to the penal code provisions on the dissemination of pornography.

Another example are pornographic, though legal creations. These are indeed works of a more or less morally acceptable or unacceptable nature, but still permitted by law. The proceeds derived from the rights to them are not a benefit derived from an offence but a legal income. The assets accumulated from those proceeds are subject to legal protection in the same way as any other.

There is no doubt that a copyright infringement committed for earning a financial benefit constitutes an attack on property. In this case, the infringed good is among those whose protection appears to be obvious. The question arises whether, in a situation where the property originates from a legitimate but morally controversial activity, something changes as regards the protection granted to that property, in particular whether such origin of the property leads to the conclusion that an attack on it can be regarded as having a negligible degree of social harmfulness.

To answer this question, it is necessary to start with the reason for which property rights in a work of art are protected – is it because of the interest of the injured party or is it directly related to the interest of the state expressed in the promotion by these works of art of certain values accepted by the state.

One should start with the statement that in the legal sense, a good is anything that people consider valuable and would like to possess. A good is given the status of a legal good if the legislature covers it with legal protection.⁸ In view of the above, a so-called social good is not a legal good until the legislature decides that it must be legally protected. On the other hand, social goods themselves exist independently of the legislature's decision and depend on the social assessment of certain values as valuable for the public or not.⁹ There is no doubt that author's rights, both property and non-property ones, are legal goods, also in the situation when they include content that is controversial from the point of view of social assessments.

The literature on the subject points out that legal goods include, on the one hand, goods protected to secure their use by their holders and, on the other hand, goods protected due to general interest. These are individual and supra-individual goods.¹⁰ A given good is classified as one of these categories depending on whether it belongs to the individual interest or to the public interest. The fact that a given good is protected due to individual interest does not mean that its value is lower than goods of the community. On the contrary, an attack on a good of a personal nature may be characterised by a significant degree of social harmfulness.¹¹

4. There should be no doubt that property rights and non-property rights in a work, regardless of its content, are rights protected by reasons of individual interest. Protection is granted to them regardless of its supra-individual value they have, if

⁸ Gizbert-Studnicki, T., 'Konflikt dóbr i kolizja norm', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 1989, No. 1, p. 1 et seq.; Plebanek, E., *Materiałne określenie przestępstwa*, Warszawa, 2009, p. 100.

⁹ Buchała, K., Zoll, A., *Polskie prawo karne*, Warszawa, 1994, p. 124.

¹⁰ See Czerwiński, S., 'Zgoda pokrzywdzonego jako czynnik wyłączający karalność czynu przestępnego', *Głos Sądownictwa*, 1935, No. 7–8, p. 537 et seq.

¹¹ Zawłocki, R., *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa, 2007, p. 143.

any. The fact that legal protection is granted to such specific goods was decided by the legislature constructing the types of acts prohibited by Articles 116 and 117 of the Copyright Law. This circumstance means that the assessment of the degree of social harmfulness of a prohibited act, made pursuant to Article 115 § 2 PC, should not refer to the assessment of the degree of violation or exposure of legal assets other than the object of protection, but to the degree of exposure or violation of this legal property, which is the object of protection in the case of a criminal act committed by the perpetrator.

The fact that the provision refers to the type and nature of the infringed good means that in the case of certain legal goods, such as, for example, human life and health, even a small degree of infringement makes it impossible to consider the act as socially harmful to a negligible extent, and in the case of others the degree of infringement may be lower, because there are more valuable and less valuable goods.¹² However, this does not change the fact that the object of protection may be valued in criminal law using another good. This occurs primarily at an earlier stage – when considering the issue of illegality. At this stage, however, it is necessary and possible only to determine whether the infringement or exposure of the good was of a minor nature, justifying the conclusion that the social harmfulness of the act is either negligible or more serious.

If the perpetrator had violated another legal interest alongside the object of protection, his/her conduct would have been more socially harmful. On the other hand, if the perpetrator were to act in order to protect a protected good, other than the object of protection of the type of offence concerned, this should also be taken into account. If, therefore, the offender had committed, for example, an offence under Article 119 ACRR in order to prevent the demoralization of minors, the possibility of applying Article 26 PC (state of necessity) should be considered. In such a case, a legal good other than the object of protection would appear and the need to protect it could prove to be more important than the object of protection. However, this would be a case of a legal excuse, and thus a situation that is beyond the area of this analysis. In the cases which gave rise to this analysis, the case in question is that the statutory elements of the act under Article 116 (3) in conjunction with Article 117 (2) ACRR, which does not involve a legal excuse, but the lack of punishability is under consideration because of the negligible social harmfulness of the offence. It is not therefore a case of protection of a protected good other than the object of protection. The conflict of goods is a characteristic arrangement for a legal excuse, and therefore of a circumstance excluding unlawfulness of an act committed. It consists in the occurrence of a collision between two legally protected goods.¹³

As indicated, the situation in question arises at the stage of establishing whether the offender's conduct is unlawful. In the case when it is so established, it is necessary to refer to the object of protection of the offence committed.¹⁴ It is also

¹² See Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 404.

¹³ Cieślak, M., *Polskie prawo karne*, Warszawa, 1990, p. 232; Zoll, A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982, p. 101 et seq.

¹⁴ Zawłocki, R., *Pojęcie i funkcje...*, op. cit., pp. 198–199.

explicitly stated in the literature on the subject that the degree of social harmfulness is negligible when there is no probability of causing consequences of a certain significance for the interests safeguarded by criminal law; this applies to the social relations conveyed by the offence whose criteria are met by the offender's conduct.¹⁵ This is so because Article 115 § 2 PC refers to the type and nature of the infringed good, i.e. the good attacked by the perpetrator. In view of the fact that the prevailing view among scholars in the field and judicature is that Article 115 § 2 PC contains a closed-ended list of circumstances affecting the degree of social harmfulness of the act,¹⁶ it should be noted that when assessing the social harmfulness of perpetrator's conduct, elements not contained in the above-mentioned provision should not be introduced. The provision refers to a good infringed by the perpetrator, and not by the good anticipated by the perpetrator through his/her conduct. The latter may appear in the assessment of social harmfulness in a secondary way – through the motivation of the perpetrator. The issue of motivation may be discussed later, but first it should be noted that the only goods that can be identified as affecting the level of social harmfulness of perpetrator's conduct are non-property and property rights to a work. This is because they are indicated by the provisions describing the behaviour, the criteria of which have been met by the perpetrator.

In the case under analysis, the good in the form of rules of morality and decency could appear at the stage of deciding on unlawfulness. It would be so, if the perpetrator acted in order to protect some legal good. Then it would be necessary to consider the need to use the institution of state of necessity. However, the perpetrator did not act to protect any legal good. Irrespective of the fact that the materials in question were controversial and their dissemination could be perceived as behaviour against the widely adopted principles of morality, it should be noted that the conduct of the perpetrator, who disseminates the materials without authorisation or contrary to authorisation, must be assessed from the point of view of moral principles in the sphere of morality in the same way as the behaviour of the wronged party. The perpetrator does not act to protect any moral good that is or may be violated by the dissemination of pornographic material, because the perpetrator himself/herself disseminates the material. He therefore violates the same social good that is violated by the wronged party, who legally distributes the materials in question. Therefore, it is difficult to say that the act of the perpetrator, involving dissemination of pornographic materials with infringing the rights of the entitled person, is characterized by a negligible degree of social harmfulness only due to the fact that the materials are of such character. After all, any accusations that could be made against the wronged party because of what materials he disseminates can also be made against the perpetrator. He is not acting for any positively assessable purpose. He does not wish to exclude the availability of material which he judges

¹⁵ Kaczmarek, T., *Spoleczne niebezpieczeństwo czynu i jego bezprawność jako dwie cechy przestępstwa*, Wrocław, 1966, p. 34; Zawłocki, R., *Pojęcie i funkcje...*, op. cit., p. 283.

¹⁶ See Majewski, J., in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny. Część ogólna. Tom I*, Warszawa, 2016, p. 949; Judgment of the Supreme Court of 01.04.2009, V KK 378/08, Lex No. 507961, Judgment of the Supreme Court of 04.03.2009, V KK 22/09, Lex No. 495325, Judgment of the Supreme Court of 09.09.2008, WZ 53/08, Lex No. 458865.

to be controversial, but wishes to gain a pecuniary advantage from its continued dissemination in violation of the wronged party's rights. If it were otherwise, this should of course be taken into account when assessing the degree of social harmfulness of perpetrator's conduct. It is rightly believed that the original essence of social harmfulness should be sought in the violation of values that form the foundations of criminal law prohibitions.¹⁷ However, in the case under analysis, there is only one legal good at stake – property and non-property copyrights. The perpetrator assaults these rights, and in doing so does not act to protect any legal good, nor does he protect such good. While it is true that the perpetrator attacks the work whose content must be regarded as unacceptable from the point of view of social assessment, the perpetrator does not reduce or remove the negative features of the work by committing the attack. On the contrary, the perpetrator distributes the work.

It is worth noting at this point that also in the situation in question this perpetrator's motivation is significant for the assessment of the degree of social harmfulness of the perpetrator's act. It should be noted that the perpetrator of the offence in question acts in order to obtain an unlawful financial gain. The striving for profits, on the other hand, is traditionally and rightly considered in the scholarly opinion and jurisprudence as a circumstance that increases the degree of social harmfulness of an act.¹⁸ At the same time, the motivation of the perpetrator is not to seek to eliminate a content that he/she considers immoral and actually controversial, which could actually be assessed as a circumstance that reduces the level of social harmfulness.¹⁹ On the contrary, the perpetrator distributes the same content, doing in this sense exactly what the wronged party did.

Moreover, it should be stressed that the conduct of the wronged party does not fulfil the statutory elements of any criminal act. In a situation in which pornographic content is distributed non-publicly and in such a way that it cannot impose its reception on a person who is not willing to view it, and is not prohibited because of the unlawful content, the person who distributes it does not commit any criminal offence. Thus, in the present case, there is no conflict of legal rights, because the perpetrator does not act in order to avert any danger threatening the protected good.

5. To sum up the findings made so far, it should be emphasised that the legal good attacked by the perpetrator is not the very content of the work, but the author's property and non-property rights to the work. By attacking them, the offender does not do so in order to eliminate the threat to any protected good, nor does he/she act for any other socially acceptable purpose, but in order to obtain benefits which can be assessed as being as controversial in terms of the principles of morality as

¹⁷ Kaczmarek, T., *Spoleczne...*, op. cit., p. 26; Zoll, A., 'Aksjologiczne podstawy prawa karnego', in: Czech, B. (ed.), *Filozofia prawa a tworzenie i stosowanie praw*, Katowice, 1992, p. 306; Zawłocki, R., *Pojęcie i funkcje...*, op. cit., p. 225.

¹⁸ Budyn-Kulik, M., *Umysłność w prawie karnym i psychologii*, Warszawa, 2015, p. 276 et seq.

¹⁹ See Konarska-Wrzosek, V., *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, p. 90; Zawłocki, R., *Pojęcie i funkcje...*, op. cit., p. 207; Plebanek, E., *Materialne...*, op. cit., p. 268.

in relation to the wronged party. The degree of social harmfulness of a criminal act is assessed once it has been established that the act committed meets the statutory criteria of the criminal act and is unlawful and, therefore, there is no circumstance excluding criminality (consisting in the collision between the good protected by the formally infringed provision and any other property protected by law), it must be considered that the influence of the nature and character of the infringed good on the degree of social harmfulness must be considered in reference to the good protected under the provision breached. The assessment of the degree of social harmfulness of an offence must therefore depend not on the content of the work, the rights to which they were infringed, but on the degree of infringement of those rights. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights.

Therefore, if such a perspective were to be adopted, it would be considered as hardly socially harmful not only to disseminate such content, but, for example, to steal the media containing them, the equipment used to produce them or the money obtained from their sale. Moreover, the theft of money earned by prostitution could be treated similarly, since prostitution must be assessed negatively, as the legislature itself indirectly states, since it does not tax the income from prostitution. Indeed, it could be argued that, since the conduct by which the victim receives a given income is immoral or indecent, the attack on the good belonging to the victim is not socially harmful. However, there is no doubt that the conduct in question constitutes criminal offences.

The examples presented above are *reductio ad absurdum* of the assumption that attacks on property comprising rights to goods containing controversial content from the point of view of the principles of morality, or attacks on property resulting from lawful but indecent behaviour, are characterised by a lesser degree of social harmfulness than attacks on property otherwise created.

It should be noted that it does not matter whether a given right was created in a morally acceptable way, provided that it was created legally. If it is created lawfully, such property shall be protected like any other property. This means that in order to determine whether the nature and character of the infringed good allows recognising whether the act is socially harmful to a greater degree than negligible or is negligible, the moral assessment of the manner in which that right arises or the related phenomena is irrelevant when they are legally permitted, even if they are socially disadvantageous.

It should be added that interpreting the analysed prohibition as a restriction due to the content of a work would be in fact nothing else than introducing into the provisions of Article 116(3) in conjunction with Article 117(2) ACRR the content which is not there. In fact, the court would introduce to the statutory description of conduct a negative criterion that does not exist therein: it would exclude protection in the situation where the work contains morally dubious content. Meanwhile, there is no doubt that social harmfulness of an act does not determine the content of the prohibition, i.e. does not constitute a criterion of the prohibited act, but only

allows for an assessment of the gravity of the committed act according to its social harmfulness, which in each type of act may occur to a different extent.²⁰ However, the very content of the prohibition is determined solely on the basis of those provisions that describe the statutory criteria of the prohibited act.

The foregoing considerations relate to the type and nature of the good infringed as a condition for assessing the degree of social harmfulness. It is of a qualitative nature. Its assessment shows that the object of protection in the present case is not the content of the work. If that were the case, account should be taken of the fact that the content, although permitted by law, is highly controversial in moral terms, and as such probably does not deserve a high assessment, and therefore its protection would have to be of low intensity. However, in the case at issue, the rights to the work are concerned, including both non-property and property rights. The latter are considered a relatively valuable object of protection. What's more, they are quantifiable and can be defined in money. The act committed by the perpetrator causes a certain financial damage, which is quite easy to assess. In itself, the amount of the actual and potential damage is a separate condition for assessing the degree of social harmfulness caused. In the present case, it plays a dual role in some sense, since it is not only self-contained but is closely linked to the object of protection, it enables it to be specified and the extent of its infringement to be assessed. As a general rule, it must be assumed that the greater the actual and potential damage, the greater the degree of social harmfulness caused by the offence committed. It should be emphasized that in a situation in which property rights, i.e. rights measurable in money, are protected, the value of actual and potential damage is an important factor in assessing the degree of social harmfulness caused by the offence.

It is worth noting that the degree of social harmfulness of a prohibited act may be regarded as negligible, when a specific act has an unusually low degree of social harmfulness, as compared to other acts that meet the statutory criteria of prohibited acts specified in the same provision or provisions.²¹ It does not seem that in the situation where the perpetrator's behaviour concerned pornographic works, the harmfulness would be significantly lower than in the case of other typical infringements of property and non-property rights. Since the infringement consisted in unauthorised dissemination of works and making profits from it, there is no difference between this and other infringements of this kind, not concerning pornographic works, which, taking into account the purpose of the provisions, would justify the statement that this is an atypical situation. From the point of view of the ACRR, in this case an unlawful distribution of works in order to achieve financial gain took place. The assessment whether the social harmfulness of such dissemination is or is not negligible depends not on what content was disseminated, but on the intensity of the infringement of copyright. This means that the fact that the act consisted in dissemination of somebody else's pornographic work does

²⁰ Zawłocki, R., *Pojęcie i funkcje...*, op. cit., p. 225.

²¹ See Zoll, A., 'Materiałne określenie przestępstwa', *Prokuratura i Prawo*, 1997, No. 2, p. 12.

not constitute grounds for determining that the social harmfulness of the act is negligible. What matters is only the degree of copyright infringement.

6. The discussion presented above leads to the following conclusions:
 - A. Films, whatever their nature, are works within the meaning of the Copyright Law. This also applies to pornographic films. The protection of their rights is not limited by any moral assessments, but by objectively verifiable features of the work.
 - B. For legal pornographic works, while their content itself may be regarded as controversial or even unacceptable from the point of view of social norms, the assessment of the social harmfulness of the act is determined not by the content but by the degree of the infringement of the object of protection. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights.
 - C. Protected goods other than those provided for in the provision describing the offence attributed to the offender may be relevant on the basis of possible state of necessity. However, to find that this state of necessity occurs, it would be necessary to establish that the perpetrator acted towards eliminating a threat posing to a certain good protected by law. Where the perpetrator disseminates a someone else's pornographic work, it is not the case of such a good. The conduct of the perpetrator must be assessed from the point of view of the principles of morality in the same way as the conduct of the wronged party. The perpetrator does not act to protect any moral good that is or may be violated by the dissemination of pornographic material, because the perpetrator himself/herself disseminates the material. He/she therefore violates the same social good that is violated by the wronged party, who legally distributes the materials in question.
 - D. The perpetrator strives to earn an unlawful financial benefit. The striving for profits, on the other hand, is traditionally and rightly considered in the scholarly opinion and jurisprudence as a circumstance that increases the degree of social harmfulness of an act.
 - E. The degree of social harmfulness of a prohibited act may be regarded as insignificant, when a specific act has an unusually low degree of social harmfulness, as compared to other acts that meet the statutory criteria of prohibited acts specified in the same provision or provisions. Between the infringement of the rights to a pornographic work and those relating to other works there is no difference, which in the light to the purpose of the provisions infringed would justify the finding that it is an unusual situation.
 - F. The fact that the act consisted in dissemination of somebody else's pornographic work does not constitute grounds for determining that the social harmfulness of the act is negligible. What matters is only the degree of copyright infringement.

BIBLIOGRAPHY

- Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa, 2011.
- Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, Warszawa, 2011.
- Barta, J., Markiewicz, R., *Prawo autorskie*, Warszawa, 2013.
- Buchała, K., Zoll, A., *Polskie prawo karne*, Warszawa, 1994.
- Budyn-Kulik, M., *Umyślność w prawie karnym i psychologii*, Warszawa, 2015.
- Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021.
- Cieślak, M., *Polskie prawo karne*, Warszawa, 1990.
- Czerwiński, S., 'Zgoda pokrzywdzonego jako czynnik wyłączający karalność czynu przestępnego', *Głos Sądownictwa*, 1935, No. 7–8.
- Gizbert-Studnicki, T., 'Konflikt dóbr i kolizja norm', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 1989, No. 1.
- Kaczmarek, T., *Spoleczne niebezpieczeństwo czynu i jego bezprawność jako dwie cechy przestępstwa*, Wrocław, 1966.
- Konarska-Wrzosek, V., *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń, 2002.
- Majewski, J., in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny. Część ogólna. Tom I*, Warszawa, 2016.
- Plebanek, E., *Materialne określenie przestępstwa*, Warszawa, 2009.
- Poźniak-Niedzielska, M., in: Poźniak-Niedzielska, M., Szczotka, J., Mozgawa, M., *Prawo autorskie i prawa pokrewne. Zarys wykładu*, Bydgoszcz–Warszawa–Lublin, 2007.
- Zawłocki, R., *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa, 2007.
- Zoll, A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982.
- Zoll, A., 'Aksjologiczne podstawy prawa karnego', in: Czech, B. (ed.), *Filozofia prawa a tworzenie i stosowanie praw*, Katowice, 1992.
- Zoll, A., 'Materialne określenie przestępstwa', *Prokuratura i Prawo*, 1997, No. 2.

SOCIAL HARMFULNESS OF OFFENCES COMMITTED
AGAINST GOODS ACQUIRED THROUGH IMMORAL MEANS

Summary

The article discusses the issue of the degree of social harmfulness of acts detrimental to goods obtained through immoral means (specifically, infringement of copyright to legally produced pornographic films). All film productions (also those of a pornographic nature) are works within the meaning of the Polish Act of 4 February 1994 on Copyright and Related Rights. The protection of rights to them is not limited by any moral assessments, but by objectively verifiable features of the work. For legal pornographic works, while their content itself may be regarded as controversial or even unacceptable from the point of view of social norms, the assessment of the social harmfulness of the act is determined not by their content but by the degree of the infringement of the object of protection. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property rights and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights. The finding that the act involved the dissemination of a someone else's pornographic work cannot serve as a basis for considering the degree of social harmfulness of the offence as negligible. It is only the degree of copyright infringement that matters in the specific case.

Keywords: social harmfulness, pornographic works, moral assessment, copyright infringement

O SPOŁECZNEJ SZKODLIWOŚCI CZYNÓW GODZĄCYCH W DOBRA UZYSKANE NA DRODZE NIEMORALNEJ

Streszczenie

Artykuł dotyczy kwestii stopnia społecznej szkodliwości czynów godzących w dobra uzyskane na drodze niemoralnej (a konkretnie naruszenia praw autorskich do legalnie produkowanych filmów pornograficznych). Wszelkie produkcje filmowe (także o charakterze pornograficznym) są utworami w rozumieniu ustawy z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych. Ochrona praw do nich nie jest bowiem ograniczona żadnymi ocenami moralnymi, lecz obiektywnie sprawdzalnymi cechami dzieła. W wypadku legalnych utworów o charakterze pornograficznym, mimo że sama treść może być postrzegana jako kontrowersyjna, a wręcz nieakceptowalna z punktu widzenia norm obyczajowych, o ocenie społecznej szkodliwości czynu decyduje nie treść, ale poziom naruszenia przedmiotu ochrony. Nie ma znaczenia moralna ocena treści zawartych w utworze, jeżeli tylko treści te są same w sobie legalne i rozpowszechniane są w legalny sposób. W wypadku ochrony niemajątkowych, a zwłaszcza majątkowych praw do utworu nie chodzi bowiem o ochronę treści zawartych w tych utworach, lecz praw twórcy. Ustalenie, że czyn polegał na rozpowszechnianiu cudzego utworu o charakterze pornograficznym nie może być podstawą do stwierdzenia znikomego stopnia społecznej szkodliwości czynu ustalenie, Znaczenie ma tylko to, jaki był w konkretnej sprawie poziom naruszenia praw autorskich.

Słowa kluczowe: społeczna szkodliwość, utwory o charakterze pornograficznym, ocena moralna, naruszenie praw autorskich

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