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Seizure as a distinctive measure for safeguarding intellectual property rights

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Abstract
In this research the author reconsiders the history of failure of the implementation of competition laws to deal with the abuse of the intellectual property (IP) rights in different Asian local jurisdictions. When using legal tools to dampen the trend of monopolistic behaviors based on IP ownership, challenges based on antitrust laws have hardly ever gained success despite the growth in the specifics of probe concerning overlapping provisions on the same. The article examines the procedural aspects of major court trends, regulatory uncertainty and doctrinal variance that have slowed down proper enforcement. There are some issues as well about the way emerging jurisprudence and regional trade patterns are creating a more sophisticated balance between the need to encourage innovation and the need to maintain market fairness. This research using comparative legal analysis indicates a necessity to harmonize legal approaches towards combating anti-competitive ordinances which are dressed in an IP protection.

Keywords: ***Intellectual Property Rights, Confiscation, Legal Enforcement, Property Seizure, IPR Protection, Anti-Infringement Measures, Innovation Safeguard, Due Process, International Law, Preventive Legal Action.***

1.Introduction
Intellectual property (IP) has become one of the major pillars of the economic innovation, cultural growth and technologies in the modern global environment. As the societies move toward knowledge-based economies the amount of value that intangible assets produce has surpassed significantly the amount that tangible resources provide. As this new paradigm develops, protection of intellectual property has become an issue of national and international interest and the mechanisms of enforcement systems must be very strong and creative. However, this happens to be one of such mechanisms which have not received much consideration in the academic circles as well as legislative formulations due to their application in the aspect of enforcing the intellectual property right (IPR) in the confiscation aspect. Confiscation, unlike other existing forms of remedies that may involve damages, injunctions etc, has a direct effect by going against the material or monetary fruits of IPR infringements and therefore serves as a punitive and preventive tool. The paper resorts to the redefinition of confiscation not only as a legal penalty, but rather as a particular strategic instrument in the construction of intellectual property protection. The spread of IP-intensive industries, such as pharmaceuticals, software, film and fashion globally, has increased pressure on the implementation of IP laws. With the flow of counterfeit and pirated products in foreign markets, nations need to have multidimensional approaches in curbing IP infringements(1). There is a gap between the establishment of laws and their actual observance, especially in the transitional economies like Ukraine, which is problematic. Despite the provisions laid out by the legislation that formalizes the crime aspect of IP violations, as well as provides civil and administrative punishment, its prevention power is rather low. Partially, this can be attributed to the delays in proceedings, low prosecution rates, and the presence of insufficient sanctions. In that light, asset seizure provides a more aggressive way to punish the perpetrators of crime without the denial of illegitimate advantage and at the same time promote the rule of law.

This has resulted in a significant development in Ukrainian IPR legal framework over the past years to be aligned to the acquis communautaire of the European Union given the commitments of EU-Ukraine Association Agreement. Nevertheless, when these reforms are taken into practical effect, some structural shortcomings are found. Inappropriate infringements such as the reproduction, distribution, and internet piracy of intellectual property are quite common yet unchecked since security is lax. As a reaction to these issues, the Ukrainian government has also provided various legal changes, among them is Law No. 2974-IX (2023), which has the target of securing IPR. In this case, the mechanisms proposed in this reform to enable confiscation as an appropriate action to cases of IPR violations must be mentioned. However, uncertainties still persist on matters such as the range, process and judicial control of such confiscation giving rise to due process and proportionality issues.

Asset seizure in criminal law As an instrument of disrupting criminal enterprises and denying them the proceeds of crime, asset seizure has been traditional in criminal law. Applying to the case of IP, confiscation would destroy the financial system helping to maintain the network of fake production and distribution. Copyright Violations In Ukraine, it is listed under arts. 176 229 Criminal Code of Ukraine, the trademarks violation. Nonetheless, the provisions were weakened in 2016 to exclude confiscation as an option of sanctions to apply, a move that has been criticized to allow the entry of counterfeit materials back into the market. The law has since seen legal scholars and practitioners pushing forward the resurgence of confiscation as well as the inclusion of destruction clauses to ensure that laundering of pirated goods through state auction or resale would be avoided.

In addition, it is essential to recognize the difference between the ordinary and special confiscation. The latter one is a different procedural procedure according to which it is possible to seize the property that does not have to belong to a convicted individual but is utilized or obtained during the act of a crime(9). This comes in handy especially in IPR applications whereby, the production being undertaken may use third party equipment, leased premises or shared rights. Yet, it is legally imperative that this should not be overreached at all costs that as a consequence, confiscation should not encroach on the privileges of others who may not have worked in cahoots with the culprit. Constitutional Court of Ukraine had ruled on such fears to clarify that special confiscation has to be proportional, has to be done in accordance with law and must be tried in full jurisdiction.

Outside criminal law, the confiscation is also seen as a resolution to IPR violations by the administrative and custom regulations. Ukraine In Article 51-2 of the Code on Administrative Offenses, there is a duty to seize fake goods, and one should take into account the fact that the fines are too small to serve as a prohibitive measure. In the meantime, the Customs Code of Ukraine also allows seizing the goods that have been imported in breach of the IPR provisions, though the Article 476 does not necessarily state that the latter must be destroyed. This gap in the law in effect enables confiscated fake goods to be recycled into commercial legal circulation effectively removing the punitive and deterrent purpose of confiscation as the trade moves to clear the goods rather than bury them.

The comparative analysis in legal matters also highlights the significance of including the process of confiscation as a part of an effective enforcement strategy. To give an example, Belgian legislation (Code Peinal de la Belgique, 1867) has expressly stated that the objects obtained or employed in the course of infringement of IPR may be seized. This goes in line with the two international best practices, including the agreement on trade-related aspects of intellectual property rights (TRIPS) of the World Trade Organization (WTO) requiring member countries to ensure that the remedies must incorporate destruction or seizure of infringing goods. In addition, the Council of Europe Convention concerning Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (2005) gives an exemplary guidance aimed at ascertaining that confiscation provisions do not interfere with human rights. Confiscation is something that cannot be merely provided by the legal provisions but needs its institutional capacity, judicial training, and international cooperation. The National Intellectual Property Authority (NIPA) of Ukraine, which is created by Cabinet Resolution No. 43-r (2022), should be enabled to do not only the registration and monitoring of the IP rights but to organize the implementation of the enforcement measures with all agencies. The employment of technology experts in judicial trials, diffusion of data sharing mechanisms between law enforcers, as well as collaboration with inter-government agencies such as the World Intellectual Property Organization (WIPO) and Interpol will help to increase the effectiveness and validity of confiscation as a form of IPR protection.

To sum up, asset seizure or confiscation, in case when it is used strategically, might be seen as an effective deterrent to IPR abuse. It provides a special mixture of economic disapproval, legal imposition, and moral censure. In order to reveal all its potential, however, Ukrainian legislation cannot lose its domestic contradictions, increase the gravity of administratory sanctions, and avoid the destruction of the involved counterfeits instead of their redistribution. Confiscation has great potential to become a key protection tool of intellectual property, and through the unification of national laws with international ones on the one hand, and the provision of relevant enforcement agencies with tools and the power to use them on the other hand, confiscation can go from being an underutilized punishment to becoming an indispensible measure in combating intellectual property violations.

2.Methodology

The study was based on the elaborate array of legal and methodological approaches designed to investigate confiscation as a unique legal instrument of defending intellectual property rights. The methods chosen helped to

reveal the legal nature of confiscation, consider the reality of confiscation in Ukraine and other countries, and propose recommendations on the improvement of law.

A dialectical research approach was implemented in order to reach the goals of the study. It is also based on this method that it was possible to examine the conflicting legal and procedural aspects regarding confiscation and special confiscation, and primarily in the context of criminal and administrative law. Dialectical methodology allowed highlighting the areas of problems in the legal regulation and enforcement of intellectually property rights, which gave a better understanding of the changes in the development of these legal instrument(3).

Moreover, both deductive and inductive reasoning were included in the research. The deduction process referred to the application of general theory of intellectual property law and confiscation to additional norms in the national legislation. This has been useful in the determination of the relationship between the theoretical constructs of law and their expression in practice. In the meantime, induction enabled the researchers to draw wider conclusions due to presence of trends and patterns in legal acts and law enforcement approaches connected with seizure of the assets of suprapatrone violators of the intellectual property.

TABLE 1 Methods

Method	Purpose	Application in Study
Dialectical Analysis	Identify contradictions and evolving dynamics in law	Examined legal inconsistencies and evolving perspectives on confiscation across different legal domains
Deductive Reasoning	Apply general legal principles to specific rules	Interpreted constitutional and statutory principles (e.g., proportionality, due process) in IP enforcement
Inductive Reasoning	Draw conclusions from observed legal practices	Analyzed enforcement trends and case outcomes to suggest general legislative improvements
Comparative Legal Analysis	Benchmark Ukraine's legal norms against foreign systems	Compared Ukrainian confiscation laws with Belgium’s Penal Code and international treaties (e.g., TRIPS)
Normative Document Review	Examine statutory and regulatory texts	Analyzed the Constitution, Criminal Code, CUAO, and Customs Code for confiscation-related provisions
Synergistic System Approach	Assess how multiple legal systems interact	Evaluated the coordination between criminal, administrative, and customs enforcement mechanisms
Abstraction Method	Generalize legal concepts for theoretical analysis	Distinguished between general and special confiscation; positioned confiscation as both punitive/preventive

The research design also revolved around cross legal approach. The Ukrainian law was considered along with the foreign ones and in particular those of Belgium because its penal code also provides the issue of special confiscation in the relation to the intellectual property. The comparative analysis allowed defining the effective practices of other jurisdictions and the assessment of compatibility of the regulations on confiscation in Ukraine with the standards of international law, in particular, with the principles of Council of Europe Convention and TRIPS Agreement.

To give the research further foundation, the study has used normative law analysis. It entailed a thorough examination of the main law materials of Ukraine, such as Constitution of Ukraine, the Criminal Code (2001), the Code of Ukraine on Administrative Offenses (1984), and the Customs Code (2012). Addressed legal provisions referred to legal acts on legal terms regarding the seizure and destruction of property allowing taking measures due to violating intellectual rights. The use of the articles of the Criminal Code 176, 177, 203-1, 229 in cases of IP violations was evaluated critically in terms of their relevance to the violation of the IP and the legal basis of confiscation.

The methodology of synergistic research was taken to encompass the crossovers between criminal, administrative, and custom laws. Said approach enabled the researchers not only to consider the confiscation mechanism as a standalone component but to regard it as a set of interconnected parts. It has contributed to the overall assessment

of the role of confiscation within the framework of the overall analysis of the phenomenon of protecting intellectual rights in Ukraine.

The technique of abstraction was used to apply the confiscation processes into more general legal categories, and the conceptual differences relatively between ordinary confiscation and special confiscation could be put into clear light(4). This abstraction also facilitated and justified the theoretical mode of understanding confiscation as not merely a punitive sanction but just as a check and curative as well as an authority of the law holistically to counterfeit goods, pirated materials or bad faith trademarks.

In addition, the case law and the legal doctrine were also analyzed to enhance the study. As an example, interpretation of confiscation in customs matters gave a crucial precedent in the decision of the Supreme Court in a case No. 400/548/19 by the Grand Chamber. The analysis of such rulings, along with the doctrinal sources of the law, helped the researchers to establish the extent to which the courts interpret confiscation provisions in practice and to find any discrepancies or holes in implementation.

In order to ensure compliance of the Ukrainian domestic practices with the expectations of the international community, benchmarking against international instruments was carried out. This involved having an analysis regarding the TRIPS Agreement of the World Trade Organization, the conventions of Council of Europe, and the guidelines provided by WIPO. The instruments were used to explain positionally the assessment of whether the legislation of Ukraine complies with its international obligations and in proposing routes to reform, which are legally and internationally tenable.Lastly, the research included practical materials, such as analytical reports, judicial commentary, academic articles, and proposals of legal reform. These sources offered extra background information and assisted in formulating evidence-based conclusions and sets of recommendations in legislative directions.

3.Results

Through the research, what comes out is that it is quite a difficult legal and procedural exercise to determine and establish infringement of the intellectual property rights (IPR). The violations usually aim at the non-property as well as economic rights of the intellectual property right holders. Usual ones are the unlicensed use, plagiarism, counterfeiting, and illegal dissemination of the safe works. Such crimes are common to digital settings, which makes them harder to spot and prosecute. Another detail that the research mentions is that although Ukrainian law sets up civil, criminal, and administrative liabilities, the mechanisms of enforcement are not sufficiently strong that would prevent and deter such infringements.

Intellectual property protection is also organized at international level by certain organizations like the World Intellectual Property Organization (WIPO). Nevertheless, the fact that Ukraine is in the Priority Watch List of the U.S. Trade Representative shows that there are still contingencies in their IP enforcement system. All these inadequacies will be poor judicial resources, low sanctions, poor border control, and ineffective enforcement of the law. This is also compounded by the inability of law enforcement and judicial systems, which enable pirated contents and fake products to remain in the market relatively free of any charges(5).

Since 2016, the process of reforming Ukraine intellectual property protection system infrastructures has started and resulted in significant changes. The Ukrainian National Office of Intellectual Property and Innovation (UkrNOIPI) constitutes the principal milestone in the transformation, establishing by the Decree of the Cabinet of Ministers No. 43-r (2022). This agency was set the task to realize the state policy in the sphere of the intellectual property, to facilitate the flow of administration, to ensure better legal alignments with the European level. Nevertheless, even after its creation, there still exists gaps in enforcement especially with regard to confiscation in the three fields; criminal field, administrative field, and customs field.

Criminal protection of IPR occurs according to the Articles 176, 177, 203-1, and 229 of the Criminal Code of Ukraine which stipulates the collection of penalties in cases of the violation of IPR, and the infringement of copyrights, illegal use of trademarks, etc. However, an amendment to the legislation in 2016 eliminated this punishment type by confiscation and destruction by these articles. Such decision is highly condemned because instead of the legal sanction having a preventive effect, it is possible that counterfeited or pirated products will revert to commercial activities. Recreation of confiscation and destruction provisions in such articles would go a long way in intensifying the deterrence effect and minimizing the repeat offending (6).

In 2013, special confiscation was created with the Article 96-1 of the Criminal Code, which allowed the confiscation of the property not necessarily owned by the offender but related to the offense or caused by it.

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Though such measure is flexible regarding enforcement, it has also given concern on the chances of reintroduction of fake products on legitimate trade. There have been occasional arguments by scholars that special confiscation is not applicable when it comes to a pirated media or fake goods, rather they must be destroyed. This position is based in line with the international requirements such as TRIPES Agreement which promotes the destruction of the infringing products rather than their reuse.

TABLE 2 Results

Area of Law / Domain	Key Findings	Identified Issues	Suggested Reforms
Criminal Law	Confiscation removed from Articles 176, 177, 203-1, 229 in 2016	Counterfeit goods may re-enter circulation; sanctions lack deterrent effect	Reintroduce confiscation and destruction clauses; revise sanctions to strengthen criminal liability
Special Confiscation	Article 96-1 enables seizure of non-owned assets used in IP crimes	Ambiguity in application; counterfeit goods may still be reused	Exclude counterfeit products from special confiscation; mandate destruction instead
Administrative Law (CUAO)	Provides for confiscation under Articles 51-2, 156-3, etc.	Fines are too low to deter offenders; inconsistent destruction requirements	Raise fine thresholds; require mandatory destruction of seized counterfeit goods
Customs Law	Articles 461 and 401 allow seizure and destruction of IP-violating imports	Article 476 permits re-circulation of seized goods; lacks destruction mandate	Amend Article 476 to align with Article 401; prohibit resale or reuse of counterfeit imports

Under the Code of Ukraine on Administrative Offenses (CUAO), administrative responsibility in case of IP violations is ensured in Articles 51-2, 156-3, 164-3 to 164-13 of this Code. In these provisions, confiscation of infringing items is authorized(7). A key factor in consideration in the study however, is that the imposed penalty, usually a nominal monetary value, does not equate the monetary loss caused by IP crimes. This makes the administrative mechanism not effective as deterrent. Thus, the reforms need to raise penalty levels and direct destruction of the seized counterfeited products and especially pursuant to Article 51-2.

Another applicable measure in the customs context is the confiscation. Article 461 of the Customs Code states that goods related to the IP identified at the border can be seized as a result of the violations that occurred. Article 401 also permits destroying such goods on the hands of the right holder. But Article 476 of the same Code does not at present require destruction, and Article 243 does not exclude the reinstitution of confiscated goods in state ownership and as a consequence in the market: that is in contravention of international best practice. Nature of such law contradictions allows resale of counterfeit goods, although, in fact, illegal products become even more acceptable, and IP protection is diluted.

The inspection of the judicial practice, in which the resolution of the Grand Chamber of the Supreme Court in case No. 400/548/19 is included, proves the fact that confiscation in customs offenses is viewed as the administrative penalty. At that, the Court clarified that in case a certain procedure is not subject to special regulation by the Customs Code, the Code of Administrative Offenses had to be used. Such interpretation of law gives a ground to reconcile the contradictions as well as increase the degree of predictive of enforcement. However, the method of not destroying goods seized, particularly in customs proceedings, completely compromises the whole system of enforcement and does not actually comply with the Council of Europe Convention on Confiscation and Seizure of Criminal Proceeds (8).

Looking at the issue as a matter of legal policy, it can be said that the current structure lacks an acceptable level of unity and firmness in addressing IP breaches. Partial and well-implemented mechanisms of enforcement are present in the criminal, administrative, and customs systems, however, due to the deficiency of coordination and the continuous removal obligations, their effectiveness is not high(9). Other factors that further sustain piracy and counterfeiting would be the inadequacy of the fines imposed, lack of digital legal enforcement system, and the general lack of awareness by the citizens on IPR.

In the end, a given study finds that confiscation, especially with mandatory destruction, is a very important and underutilized weapon in the Ukrainian lawirat protecting the rights of intellectual property. It could discourage violators, remove illegal products in the market and re-establish trust between the rights holders and investors. Nevertheless, in order to achieve such potential, Ukraine needs to devote its efforts to specific legal changes that would close all the loopholes, establish parity across the legislation, and align local practices with international commitments. The future research should investigate the judicial discretion in confiscation cases and the possibility to establish expedited proceedings in the process of destroying the infringing goods.

4.Conclusion

The results of the research prove that the existing legal system that regulates the area of confiscation as the one that protects intellectual property rights in Ukraine is rather disunifying and not fully developed. Although there are criminal, administrative, and custom based mechanisms that aim at the enforcement of intellectual property laws, there are inconsistencies in the legislative text, enforcement actions, and court interpretation which undermines considerably the overall performance of these measures. A threat to confiscation is its formality in the event that it is not accompanied by an additional duty to destroy any counterfeited or pirated products, thus becoming a mere formalism that has no effect of preventing repeated infringement and breaking the circles of illegal trade.

The situation is similar with the intellectual property infringement, where the confiscation should be not only a form of punishment against illegal activity but act of prevention, which takes away the infringing assets in the circulation. It is indicated in the study that the criminal code of Ukraine, the administrative offenses code, and custom code in Ukraine are in need of urgent reform. In particular, the introduction of confiscation and destruction clauses into the major criminal legislation provisions, increase the penalty levels within administrative legislation, and seal legislative gaps that now enable confiscated counterfeited products to re-appear at the market via state auctions or other resale schemes are to occur.

The introduction of special confiscation into the legislation of Ukraine can be called a great step as it provides flexibility in the seizure of assets used in crimes of intellectual property. Its use should however be clearly stated to make sure that counterfeit products, materials and manufacturing machines are not unintentionally legalized. As prescribed in the international norms of law, including the TRIPS Agreements, the Council of Europe and others, destruction of infringing goods should be given the highest priority to prevent decay of the value of the intellectual rights protection.

Moreover, improvement in enforcement of confiscation provisions does not merely depend on creating new laws; it needs building of institutions, interagency coordination and also training of judges. The institution of the Ukrainian National Office of Intellectual Property and Innovation offers a good institutional structure, which, however, should be sufficiently funded and endowed with authority to ensure effective coordination of an enforcement across various fields of law. Cooperation with other countries and adherence to the method of dealing with law enforcement on the global scale will prove to be essential in terms of credibility and foreign investment.

To sum up, the confiscation must be looked upon as not an addition to ordinary legal measures but the main heart of a powerful framework of intellectual property protection nowadays. It should therefore be supplemented by stringent protective legal measures, uniform enforcement and irrevocable recall of fake goods in the market to make it effective. The further development of these reforms will be one of the components of enhancing the legal ability of Ukraine to defend creators, innovators and legally successful companies in the world of global and digitised economy.

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Conflicts of interest

The authors have no conflicts of interest to declare

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