Chapter 13
Disgorgement of Profits in Greece

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Abstract Disgorgement of profits, as a remedy, is not alien to Greek private law, but the relevant legal framework seems to be rather fragmented. Disgorgement damages are confronted with skepticism, since according to the (still) prevailing opinion in Greece the aim of damages is primarily compensatory. Pragmatic approaches, though, led to the enactment of special provisions in the late 1980s and early 1990s for the infringement of certain immaterial goods, following the German model of the so-called 'triple damage calculation' (*dreifache Schadensberechnung*). The protection of intellectual property rights has been further enhanced through substantive and procedural rules, enacted for the transposition of Directive 2004/48/EC into Greek law. Disgorgement of profits may be attained, at least in theory, through other private law institutions as well, namely agency without authorization (*negotiorum gestio*) and unjust enrichment, but in practice few claims are brought on these legal bases. When there is a contractual relation between the parties, the creditor may claim the gain that arises out of the impossibility of performance as a 'substitute', while special provisions regulate the disgorgement of profits in case of breach of fiduciary duties. Finally, further private law instruments, such as collective claims, may lead to results functionally comparable to disgorgement damages, even if this is not their main aim. The paper concludes that from a *de lege ferenda* perspective the adoption of disgorgement damages as a general remedy, following the pattern of Art. 6:104 of the new Dutch Civil Code, would serve better the practical needs.

Keywords Damages • Disgorgement of profits • Immaterial goods • Negotiorum gestio • Personality rights • Right of publicity • Tort remedies • Unjust enrichment

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Introduction

There can be little doubt that Lord Hatherly's famous quote "*This Court never allows a man to make profit by a wrong*",[1] reflects an imperative of justice and is thus in principle shared by all legal systems. The disgorgement of illegal gains is essential not only from a moral, but also from a deterrence perspective: If the wrongdoer anticipates that he will not be able to keep his profits, he will have no incentives to engage in such an activity in the first place. Nevertheless, this approach has been proven to be quite a challenge in its implementation, as it seems that in reality wrongful conduct often does pay at the end. This is especially so when the behavior of the wrongdoer does not lead to physical damage of a resource but rather to the infringement of immaterial goods (such as intellectual property rights, the right of publicity of a person or trade secrets) or to the breach of other statutory provisions which, among other objectives, aim at the protection of legal interests of private persons as well (such as regulations on competition law, unfair business practices or insider trading).

Under Greek law, an unlawful behavior may give rise to both criminal and administrative sanctions as well as to civil liability.[2] This notwithstanding, it is not seldom that the expected benefits from the unlawful act outweigh the expected costs of the wrongdoer either because the sanctions are themselves inadequate or because the probability that they will be imposed (and enforced) is low. This can be attributed to a number of factors, varying from informational asymmetry leading to difficulties regarding the identification of the wrongdoer, the proof of the conditions of liability or the assessment of the extent of the accrued profits, to the inertia as to the initiation of the relevant proceedings. Given that each of the instruments for the disgorgement of profits has different strengths and weaknesses a combination of all seems desirable.[3]

This paper focuses on disgorgement remedies in Greek private law. Such remedies are not based on a single legal ground, but are rather dispersed over the private law system. Special provisions on disgorgement damages exist as to certain types of infringements, especially to intellectual property rights (section "Disgorgement Damages"). The claim for disgorgement of profits may be also based on institutions of civil law other than damages, namely on false (or non-genuine) agency without authorization (*negotiorum gestio*),[4] on unjust enrichment or, if the

[1] See Jegon v. Vivian (1870–1871) Law Reports. Ch. 6, 742 et seq., at 761.

[2] See e.g. Arts. 65, 65A and 66 of Law 2121/1993 on civil, administrative and criminal sanctions for infringements of copyrights; Arts. 1 (in combination with Art. 914 GrCC), 25 and 44 of Law 3959/2011 on civil liability as well as on administrative and criminal sanctions in case of violation of the law on free competition through forming cartels.

[3] This issue has been examined in Greece especially within the framework of private enforcement of competition law. For an overview of the relevant discussions see Athanassiou (2013), § 24 no. 1 et seq., especially no. 37–50.

[4] In Greek 'μη γνήσια διοίκηση αλλοτρίων' (Art. 739 GrCC), which is the equivalent to the German term 'unechte Geschäftsführung ohne Auftrag' (§ 687 [2] BGB).

gains arose out of breach of contract, on the creditor's claim for the 'substitute' (section "Legal Grounds for the Disgorgement of Profits Beyond Damages"). In addition, further instruments may indirectly skim-off the wrongdoer from unlawful profits. The special collective redress mechanism established in consumer law provides such an example and may thus qualify as a functional equivalent to disgorgement damages (section "Functional Equivalents to Disgorgement Damages in Private Law"). Following this analysis, the paper concludes with a *de lege ferenda* proposal for the adoption of disgorgement damages as a general remedy, following the pattern of Art. 6:104 of the new Dutch Civil Code.

Disgorgement Damages

The Aim of the Law of Damages

According to the traditional approach, which is still the prevailing one in Greece, the main aim of damages is to compensate the victim.[5] Following the principle of *restitutio in integrum* the plaintiff is entitled to full compensation for his (pecuniary) losses, meaning that he should be placed in the position he would have been in, had the damage not occurred.[6] Compensation is thus in principle tailored to meet the exact needs of the specific victim, who is at the focal point of the whole procedure, while the circumstances under which the damage occurred or the degree of fault of the wrongdoer are in principle immaterial.[7] This rule, which is primarily meant to protect the victim, sets at the same time an upper limit on damages, in the sense that these shall not exceed the loss that the victim has actually incurred.[8]

The deterrence effect of compensation is widely acknowledged, but it is considered as a positive side-effect rather than as an aim in itself.[9] To the extent

[5]See Stathopoulos (2004), § 8 no. 7; Filios (2011a), § 168 B 1; Georgiades (2011), § 5 no. 4; Georgiades (1999), § 10 no. 3; Kerameus et al. (2000), 31 et seq. at 33; Valtoudis (2009), 203 et seq., at 204; Roussos (2013), 81 et seq. at 81. Cf. Kornilakis (2012), § 81 no. 2; Doris (2007), 673 et seq., at 679.

[6]Pecuniary losses are assessed on the basis of the 'theory of difference', as formulated by Mommsen (1855). On the application of this theory in Greece see, among many others, Stathopoulos (2004), § 8 no. 47 et seq.; Spyridakis (2004), no. 63.3; Georgiades (2011), § 5 no. 10; Georgiades (1999), § 10 no. 6. From case law see the following decisions of the Greek Supreme Court (Areios Pagos – hereinafter: AP): 416/2012, available at the databank, Intrasoft-Nomos; 1054/2011, Intrasoft-Nomos, 1432/2009, ChrID 2010, 440.

[7]Damage is in principle assessed on the basis of the 'concrete calculation method'. Deviations to this rule are foreseen by special provisions. On this issue see, among many others, Stathopoulos (2004), § 8 no. 7-8 and 93 et seq.; Georgiades (2011), § 5 no. 72; Georgiades (1999), § 5 no. 5 and § 10 no. 3.

[8]See especially Stathopoulos (2004), § 8 fn. 4; Filios (2011a), § 171 A; Valtoudis (2009), 204; Roussos (2013), 81. See also AP 839/2012, Intrasoft-Nomos.

[9]See Stathopoulos (2004), § 8 no. 13; Filios (2011a), § 168 B 1; Georgiades (2011), § 5 no. 7; Panagopoulos (2000), 195 et seq., at 225 and 228; Valtoudis (2009), 205. Cf. however Kornilakis

that full compensation of the victim serves both purposes, as it is usually the case in negligently inflicted damage to property assets, no difficulties arise. This is no longer the case when deterrence considerations advocate for the imposition of damages, which exceed the victim's actual loss. Based on the primacy of the compensatory aim of damages, the prevailing opinion objects to this possibility, unless an exception to this rule is explicitly provided by the law.[10] Hence remedies such as punitive damages are considered alien to the Greek legal system, though not per se contrary to the Greek *ordre public*.[11]

The Particularities of Immaterial Goods and the Shortcomings of the Traditional Approach

The application of the traditional approach to damages does not lead to satisfactory results in case of infringement of rights on immaterial goods, such as copyrights, patents, trademarks, trade secrets, or even aspects of a person's identity. Such goods are non rival in their use, in the sense that the use by one person does not prevent the simultaneous use by another person, which comes at zero marginal cost.[12] Moreover, their enforcement, i.e. the exclusion of third parties from making use of them, comes at high cost. It is for this reason that, when it comes to such goods, the free-riding problem is acute.[13]

On this premises, and especially because the consumption of immaterial goods is non-rival, their infringement does not lead to the reduction of the rightholder's assets, but rather to lost profits, like e.g. the decrease of the sales of the original

(2012), § 81 no. 4; Doris (2007), 679; Spyridakis (2004), no. 62.3; Zervogianni (2006), 9 stressing the importance of both aims. Cf. also Marinos (2009a), 2029 et seq. at 2035 and 2042 et seq., referring to the aim of compensation for infringement of immaterial goods in particular.

[10] Art. 65 Law 2121/1993 provides an example of such a provision. See in more detail infra section "Before the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights". On the possibility of the legislator to deviate from the compensatory aim of damages and proceed to the enactment of such provisions see especially Stathopoulos (2004), § 9 no. 9; Doris (2007), 678. Contra Papanikolaou (2007), 289, especially at 290 et seq. and Roussos (2013), 82 who claim that the legislator should provide special justification when enacting such provisions.

[11] See the landmark decision AP (full bench) 17/1999, published in DEE 2000, 181. This decision regarded the enforcement in Greece of a punitive damages award of the court of Houston, Texas. Areios Pagos ruled that punitive damages are not *per se* contrary to the Greek *ordre public*, unless they are excessive. This decision has been in principle well-received in the literature. See Nikolaidis (2000), 319 et seq., especially at 321 and 332; Panagopoulos (2000), especially 231-232; Doris (2007), 679; Stathopoulos (2010b), 609 et seq., especially at 621; Themeli (2011), 1399 et seq., especially at 1416; cf. Dellios (2013), no. 75. Contra Valtoudis (2009), 205; cf. Kerameus et al (2000), especially at 35. Cf. also Roussos (2013), 82.

[12] On the notion of non-rival use see, among many others, Hall and Lieberman (2009), 477; Besanko and Braeutigam (2010), 719; Cooter and Ulen (2012), 40.

[13] See, among many others, Hall and Lieberman (2009), 477; Besanko and Braeutigam (2010), 723.

product due to the availability of counterfeit products or the loss of royalties that the rightholder would earn in order to provide his consent for the use of his right by another person.[14] Setting evidentiary difficulties aside and assuming that these lost profits are indeed refunded to the rightholder, he will then be indeed placed in the position he would have been in, had the infringement not occurred. Nevertheless, only by coincidence will his loss match the profits of the wrongdoer. Often the wrongdoer's profits are higher than the lost profits of the rightholder, especially if the former had greater skills regarding the exploitation of the right, as compared to the latter.[15] The issue is even thornier in cases in which the holder of the right did not wish to exploit it commercially. Typical such cases arise when it comes to the violation of the right of publicity of a person. Namely, according to Greek case-law, if the person whose image has been unlawfully published in the press claims that he would not have consented to its commercial use, he is not entitled to compensation for pecuniary harm, on the grounds that, had he not given his consent, he wouldn't have derived any profit from the use of his image anyway.[16] In such cases the victims may be only granted damages for their non pecuniary losses.[17]

In all preceding cases, the specific damage inflicted to the rightholder, more often than not, does not correspond to the benefit of the wrongdoer and thus the unlawful behavior of the wrongdoer pays. As a result compensation for lost profits it is not a suitable remedy to confront violations of immaterial rights.

Special Provisions on Damages for the Infringement of Intellectual Property Rights

Before the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights

In view of the particularities of immaterial goods, special provisions regarding their protection were gradually enacted in Greece in the late 1980s-early 1990s, following the German model of the so-called 'triple damage calculation' (*dreifache Schadensberechnung*).

[14] See Art. 298 GrCC which defines lost profits as the profits that would be expected with a high degree of probability in the usual course of events, taking into account the special circumstances, and particularly the preparatory measures taken.

[15] See Marinos (2009a), 2042; Karagounidis (2011), 93 et seq., at 95.

[16] See AP 940/1995, NoV 1997, 1109; decision 4661/2004 of the Multi member Court of First Instance of Athens, NoV 2005, 114. On this issue see Synodinou (2007), 295; Fountedaki (2012), 417 et seq. Cf. Karakostas (2011), 335, who confronts this approach of case law with skepticism and Karagiannis (2007), 83 et seq., especially at 86 who heavily criticizes it.

[17] On the function of such damages, especially in cases of infringement of the right of publicity by the mass media, see infra section "Monetary 'Satisfaction' for Non-pecuniary Loss for Infringement of the Right of Publicity".

Law 1733/1987 on patents grants to the patent holder whose right has been culpably infringed the choice to claim, alternatively, damages based on his actual loss (in the form of lost profits), the license fees he would have been entitled to, or the profits of the wrongdoer.[18] Similar provisions have been enacted for the protection of topographies of semiconductor products,[19] as well as for industrial designs.[20]

Law 2121/1993 on copyrights went even a step further as compared to the aforementioned provisions. Namely, it provides that when a copyright is infringed the rightholder shall claim both pecuniary and non pecuniary damages for his loss, while it also stipulates that compensation for pecuniary damages shall not be less than double the license fees that are due in such cases. Hence the legislator opted for the assessment of damages on the basis of the abstract calculation method, in order to facilitate the victim to ground his claim.[21] It further stipulates that instead of compensation, the copyright holder can claim the enrichment of the wrongdoer or the profits the latter derived from his unlawful activity, even if he did not act culpably.[22]

From a legal-dogmatic point of view it has been debated whether the plaintiff's claims for the license fees and for the profits of the wrongdoer qualify as compensation claims, assessed according to the abstract calculation method, or whether they rather constitute special claims based on unjust enrichment or false agency without authorization.[23] Given that the conditions of these claims are explicitly stated in the law, their legal categorization is of rather limited practical significance.[24] In any

[18] See Art. 17 para. 2 of Law 1733/1987.

[19] See Art. 17 para. 2 of Presidential Decree 45/1991.

[20] See Art. 28 of Presidential Decree 259/1997.

[21] In Art. 65 para. 2.

[22] Art. 65 para. 3.

[23] This debate refers mainly to the provisions of Art. 17 para. 2 of Law 1733/1987 on patents. According to the prevailing opinion the options provided in this article constitute alternative ways of assessment of damages. See Rokas (2011), § 12 no. 8; Antonopoulos (2005), no. 1013–1015; Panou (1999), 1109 et seq. who refers to three ways of assessing damages. See also decisions 478/2008 of the Piraeus Court of Appeals, DEE 2008, 1371; 454/1990 of the Athens Court of Appeals, EllDni 1991, 198; Multi member Court of First Instance of Athens 1808/2010 Intrasoft-Nomos. Contra (rightly, in my opinion) Valtoudis (2009), 206–207. Cf. also Karagounidis (2011), 100. The wording of Art. 65 of Law 2121/1993 on copyrights is clearer, as it states that the wrongdoer's enrichment or his profits may be claimed instead of compensation. It is therefore accepted that the law provides special claims of unjust enrichment and false agency without authorization respectively. See Stamatoudi (2011), 21 et seq. at 21-22; Garoufalia (2003), 102 et seq.; Kallinikou (2008), no. 269; Kotsiris (2010), no. 419. Cf. also Valtoudis (2009), especially 211, according to whom both claims should be rather based on unjust enrichment.

[24] The most important issue where the practical significance persists pertains to the prescription of the rightholder's claims. The claim for damages in tort is prescribed in 5 years (Art. 937 GrCC), the claim for unjust enrichment in 20 years (Art. 249 GrCC), while, according to the prevailing opinion claims deriving from false agency without authorization are prescribed in 20 years. See Sakketas (1952–1987), Art. 739 GrCC no. 6; Papanikolaou (1980), Art. 739 GrCC no. 11; Georgiades (2007), § 36 no. 70; Tasikas (2010), Art. 739 GrCC no. 13. Contra Kallimopoulos (1978), 206,

case, these provisions are well justified from a policy perspective, have a strong deterrence effect and, despite evidentiary difficulties especially regarding the proof of the wrongdoer's profits, they have considerably enhanced the protection of the rights they apply to. Where no such provisions exists, like e.g. in trademarks (until 2012), the right of publicity or even trade secrets, it has been maintained in the legal literature that the existing provisions should apply by analogy.[25] Nevertheless, courts have been rather reluctant to do so.[26]

Changes Brought About by the Transposition of Directive 2004/48/EC into Greek Law

Directive 2004/48/EC 'on the protection of intellectual property rights' has further enhanced the protection of these rights through both substantive and procedural rules, the most significant of which, for the aims of this analysis, are the following:

Damages According to Art. 13 of the Directive

Art. 13 of the Directive grants to the holder of the right that has been infringed a claim for damages and provides that:

> When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement or (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

In order to comply with the Directive, the Greek legislator repeated the provision of Art. 13 of the Directive (with the exact same wording) in the special law on

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according to whom the claim prescribes in 5 years. Differences may also arise as to the extent of the profits which the plaintiff can claim. On this point see and infra sections "False Agency Without Authorization" and "Unjust Enrichment".

[25] See Liakopoulos (1974), 596 et seq.; Panou (2000), 1254 et seq.; Antonopoulos (2005), no. 778; Marinos (2009b), no. 819 who are all in favor of the application of Art. 17 para. 2 in all cases of violations of immaterial goods. See also Marinos (2007), 577 et seq.; Karagiannis (2007) 123 et seq., especially 140 et seq. pleading for the application by analogy of the provisions of Law 2121/1993 on copyrights in cases referring to the right of publicity. Contra Fountedaki (2012), 424.

[26] See decisions Piraeus Court of Appeals 478/2008, DEE 2008, 1371; Athens Court of Appeals 454/1990, EllDni 1991, 198; Multi member Court of First Instance of Athens 1808/2010, Intrasoft-Nomos. Cf. however decision 1726/2013 of the Single member Court of First Instance of Athens, available at Isokratis databank, which seems to accept the application (by analogy) of the provisions of Law 1733/1987 for the protection of trademarks as well.

patents,[27] which applies also for industrial designs and semiconductor products.[28] Similar provisions, have been included in the new law on trademarks which entered into force in 2012.[29] As regards copyrights, no amendment to Law 2121/1993 was deemed necessary, since it already granted greater protection to the holder of the copyright, as compared to Art. 13 of the Directive.[30] This enhanced protection of copyrights under Greek law is considered compatible with Directive 2004/48/EC, since this Directive is of minimum harmonization.[31]

The provisions of Directive 2004/48/EC leave no doubt that for the European legislator the primary aim of damages, at least in cases of infringements of intellectual property rights, is deterrence. Art. 13 of the Directive, as well as the provisions which incorporated it in Greek law, move past the traditional approach, according to which in the assessment of damages it is the victim who stands at the focal point, and turn their attention to the wrongdoer. As Professor Marinos aptly put it *"(. . .) the European legislator is neither interested in legal-dogmatic, national categories nor thinks in this way, but he is almost exclusively orientated to the efficient realization of his aims in each national legal system (. . .)"*.[32]

Measures Addressing the Informational Asymmetry Between the Parties

In intellectual property rights' infringements, the plaintiff faces considerable problems as to the proof of his damage and/or the profits of the wrongdoer. In order to achieve its goal, Directive 2004/48/EC includes procedural rules regarding the

[27] See Art. 53 of Law 3966/2011 which amended Law 1733/1987 on patents. This reform has been criticized as hasty, since it introduced in Law 1733/1987 a new article (namely Art. 17Δ), which repeats the wording of Art. 13 of the Directive, without nevertheless repealing the already existing provisions of the same law (Art. 17 para. 2), which contains very similar rules. On this point see Karagounidis, in Association of Greek Commercialists (2011) 97–98.

[28] See Art. 17 para. 3 of Presidential Decree 45/1991 on semiconductor products and Art. 28 para. 2 of Presidential Decree on industrial designs, that were also amended by Art. 53 of Law 3966/2011.

[29] See Art. 150 of Law 4072/2012 and especially para. 7 that reads: "When assessing damages the court takes into consideration, among other factors, the negative financial consequences and the loss of profits of the rightholder, as well as the profits derived by the person who infringed the trademark" and para. 8 according to which "If the wrongdoer did not act culpably, the rightholder has a claim for the amount by which the wrongdoer has profited from the exploitation of the trademark without his consent, or for the gains that the wrongdoer derived from this exploitation".

[30] See Art. 65 of Law 2121/1993.

[31] See Marinos (2009b), 2048; Marinos (2010), 601 et seq., at 603; Karagounidis (2011), 102. Nevertheless, both claim that a restrictive interpretation of Art. 65 of Law 2121/1993 is necessary, in the sense that only if the wrongdoer acted with gross negligence or intent should compensation amount to double the license fees. Cf. also Kallinikou (2008), no. 269; Valtoudis (2009), 205, however, expresses his reservations as to the compatibility of Art. 65 of Law 2121/1993 with the Directive.

[32] See Marinos (2009b), at 2029.

presentation to the court of evidence which lies in the control of the wrongdoer,[33] while it also grants to the plaintiff the right to information on the origin and distribution networks of the goods or services which infringe his intellectual property right.[34]

The Greek law on copyrights has been amended in order to comply with the Directive already in 2007,[35] while the reform of the laws regarding other intellectual property rights followed in 2011–2012.[36] It is worth noting that the relevant Greek provisions go a step further than the Directive, stating that if the party who has been ordered to present evidence to the other party refrains from doing so, without due reason, the allegations of the latter are considered admitted. After the incorporation of these provisions in Greek law, the overall level of protection of intellectual property rights has indeed increased.[37]

Legal Grounds for the Disgorgement of Profits Beyond Damages

In the absence of a special provision on disgorgement of profits, the civil law instruments which are better fit for this aim are false agency without authorization and unjust enrichment. Notwithstanding the difficulties as to the proof of the wrongdoer's profits, both possibilities have been thoroughly examined in the context of the right of publicity and it is therefore on these cases that lays the focus of the analysis. Contract law remedies may be also of interest if there is a contractual relation between the parties.

False Agency Without Authorization

Agency without authorization (*negotiorum gestio*) is a legal institution that deals with cases in which a person manages another's affairs without being instructed by the latter, or otherwise entitled, to do so. In such a case the intervenor (*gestor*) shall act in the benefit of the principal and according to his actual or presumptive will.[38] If,

[33] See Art. 6 of Directive 2004/48/EC.

[34] See Art. 8 of Directive 2004/48/EC.

[35] Art. 2 para. 3 of Law 3524/1997 introduced a new article in Law 2121/1993, namely Art. 63A.

[36] Art. 53 of Law 3966/2011 introduced a new article in Law 1733/1987 (namely Art. 17 Α), which applies also in industrial designs and semiconductor products (see supra note 28). In addition, the new law on trademarks (Law 4072/2012) includes these rules in Art. 151.

[37] On this issue see in detail Apostolopoulos (2008), 179 et seq.

[38] See Art. 730 of the GrCC.

on the contrary, the *gestor* knowingly[39] treats the affairs of another person as his own and in his own benefit, the agency without authorization is characterized as 'false' (or non-genuine). The *gestor* is then liable in tort,[40] but he also bears all obligations that stem from the law in cases of agency without authorization, i.e. he is obliged to restitute to the principal whatever he acquired by reason of the management of the latter's affairs as well as render account for the affair he managed.[41]

On these premises, false agency without authorization can be used as a legal basis for the disgorgement of unlawful profits. According to the prevailing opinion, every infringement of an absolute (*erga omnes*) right of another (e.g. intellectual property rights or, more importantly given the lack of special provisions, the right of publicity) constitutes an intervention in another's (i.e. the rightholder's) affair.[42] However, the field of application of this provision is constrained by the fact that the *gestor* must have acted intentionally.[43] Hence, unlike the special claims for disgorgement of profits in case of violation of intellectual property rights, the provisions on false agency without authorization do not apply if the infringement has been negligent (even grossly negligent).[44]

Case-law on disgorgement of profits on the legal basis of the general provisions on false agency without authorization is rather poor. It seems that in practice

[39] According to the rather prevailing opinion, false agency without authorization exists when the gestor acted with intension (no matter if this intention had been immediate or eventual). See Papanikolaou (1980), Art. 739 GrCC no. 4; Oikonomopoulou (2008), Art. 739 GrCC no. 3; Tasikas (2010), Art. 739 GrCC no. 3. Contra Kallimopoulos (1978), 61, who restricts the application of this provision only in cases of immediate intention.

[40] On the tort liability of the gestor in case of false agency without authorization see Kallimopoulos (1978), 81-82; Sakketas (1952–1987), Art. 739 GrCC no. 1; Papanikolaou (1980), Art. 739 GrCC no. 12; Oikonomopoulou (2008), Art. 739 GrCC no. 3; Tasikas (2010), Art. 739 GrCC no. 9. See also decision 3488/2004 of the Multi member Court of First Instance of Piraeus, ChrID 2005, 30.

[41] See Arts. 739, 734 and 719 GrCC. According to the prevailing opinion the gestor has to return to the principal all profits, even if these are partially due to the former's special capabilities. See Filios (2011b), § 101; Georgiades (2007), § 37 no. 66-67; Tasikas (2010), Art. 739 GrCC no. 7. Contra Kallimopoulos (1978), 189 et seq.; Papanikolaou (1980), Art. 739 GrCC no. 10; Karagiannis (2007), 102, who claim that the profit should be distributed between the gestor and the principal, depending on the circumstances. Cf. also Karakostas (2011), 333, who claims that the provisions on false agency without authorization are stricter for the gestor compared to the provisions of unjust enrichment and torts.

[42] See Kallimopoulos (1978), 52; Papanikolaou (1980), Art. 739 GrCC no. 3; Georgiades (2007), § 37 no. 63; Tasikas (2010), Art. 739 GrCC no. 1; Karakostas (2011), 332. Cf. also Christodoulou (2007), 180 et seq. at 196, with specific reference to the application of Art. 739 in case of infringement in immaterial goods.

[43] If the gestor did not knowingly manage the affairs of another, the provisions on false agency without authorization do not apply and he is therefore only liable on unjust enrichment, or probably also on torts. See Art. 740 GrCC as well as Papanikolaou (1980), Art. 740 GrCC no. 4; Tasikas (2010), Art. 740 GrCC no. 4-5.

[44] See also Art. 740 GrCC, as well as supra note 39. On the comparison of the provisions of Art. 739 GrCC with Art. 65 of Law 2121/1993 on copyrights see in detail Garoufalia (2003), 102 et seq.

few claims are brought on this basis. Even if such a claim is brought, the courts acknowledge the possibility of disgorgement of profits on this legal basis, but they then seem rather reluctant to proceed to its application.[45] This is evident in the decision 4661/2004 of the Multi member Court of First Instance of Athens. In this case the plaintiff, who was a model, brought a claim against the owner of a magazine for the unauthorized publication of (half-naked) photos of hers and demanded damages for her non pecuniary harm, as well as 60 % of the profits from the circulation of the issue of the magazine in which her photos were included. The court ascertained that in acting so the magazine had infringed the plaintiff's right on her own personality, and in particular it had violated her right on her own image. It thus granted the plaintiff damages for her non pecuniary harm. It nevertheless rejected her claim for the disgorgements of the magazine's profits, on the ground that the magazine did not manage the plaintiff's affairs, but rather the affairs of the photographer, who had the copyright over the photos. This line of argumentation is hard to follow and has been thus heavily criticized in the literature.[46]

Unjust Enrichment

An alternative legal basis for the disgorgement of profits is unjust enrichment. According to Art. 938 of the Greek Civil Code, whoever is liable in tort shall grant to the victim whatever he acquired from his tortious activity on the basis of the provisions on unjust enrichment. Following Art. 904 of the Greek Civil Code "*whoever has become richer without legal cause from the property or at the cost of another person shall return the benefit*". It is generally accepted that enrichment from the property of another does not occur only when a person has used a property asset of another, but also when he has employed means which fall within another's legal sphere, like e.g. the unauthorized use of the name or the image of another for advertising purposes.[47] Disgorgement of profits on the basis of unjust enrichment is possible even if the beneficiary did not act culpably.

Nevertheless it will often not be possible to disgorge the full profits of the beneficiary on the basis of unjust enrichment. According to the prevailing opinion the beneficiary shall retain the part of the profits which he acquired due to his

[45] See Athens Court of Appeals 3346/1996, EllDni 1998, 667; Multi member Court of First Instance of Athens 1912/2010, Intrasoft-Nomos; Multi member Court of First Instance of Athens 4661/2004, NoV 2005, 114. See also Karagiannis (2007), 77 and 107-108. Cf. also Karakostas (2006), 193 et seq. at 196.

[46] See especially Karagiannis (2007), 78; Karakostas (2011), 332-333.

[47] See Stathopoulos (2004), § 16 no. 40, 42 and 84; Kornilakis (2012), § 64 no. 3; Georgiades (1999), § 55 no. 10; Karagiannis (2007), 111; Fountedaki (2012), 422.

own efforts and capabilities (e.g. using of his networking and know-how).[48] The distinction between the profits that should be returned on the basis of unjust enrichment and the profits that the beneficiary is entitled to keep is particularly difficult and is, ultimately, decided on the basis of experience-based knowledge. In addition, unless the defendant acted in bad faith, he shall return the enrichment only to the extent he was still richer at the time he was served the claim.[49] He shall thus subtract the expenses that he incurred before he had been served, provided that they are directly related to the object of his enrichment (e.g. hiring of specialized staff for the commercial exploitation of the infringed right).[50]

In practice the significance of unjust enrichment in the disgorgement of profits is rather limited. This is mainly due to the fact that according to the prevailing opinion in case-law, the claim of unjust enrichment is subsidiary to other claims,[51] meaning that it can be brought only if no other claim is available. This opinion has been heavily, and rightly, criticized in the legal literature for lack of legal foundations.[52]

The Claim for the 'Substitute' as a Contract Law Remedy

The 'Substitute' in Case of Impossibility of Performance

If the performance of a contract is impossible through no fault of the debtor, the latter is released from his obligation.[53] Even so, the debtor shall grant to the creditor any eventual 'substitute' (*surrogatum*), i.e. everything that has devolved upon him as a result of the impossibility of performance.[54] If the impossibility of performance is due to the fault of the debtor, as it is presumed, the creditor is entitled to damages instead.[55] Nevertheless, according to the prevailing opinion, if the creditor 'waives' his right to compensation, he can still claim the substitute.[56]

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[48] See Stathopoulos (2004), § 16 no. 103; Kornilakis (2012), § 69 no. 7; Georgiades (1999), § 57 no. 12; Valtoudis (2010), Art. 908 no. 17 and Valtoudis (2009), 209.

[49] See Art. 909 GrCC.

[50] See *ad hoc* Valtoudis (2009), 210 and in detail Stathopoulos (2004), § 16 no. 109; Valtoudis (2010), Art. 909 no. 9 et seq.

[51] See among many others AP 1326/2011 Intrasoft-Nomos; AP 1468/2010, EfAD 2011, 100; AP 493/2010, ChrID 2011, 338.

[52] See Stathopoulos (2004), § 23 no. 25; Kornilakis (2012), § 62 no. 17; Valtoudis (2009), 211.

[53] See Art. 336 GrCC. See also Art. 363 GrCC on the initial impossibility of performance, i.e. the impossibility which existed already at the time of the conclusion of the contract. See also Art. 380 GrCC on reciprocal contracts.

[54] See Art. 338 GrCC.

[55] See Arts. 335 and 362 GrCC on the subsequent and on the initial impossibility of performance respectively. Cf. Art. 382 GrCC on reciprocal contracts.

[56] See Stathopoulos (2004), § 19 no. 44. See also A. Gazis, Art. 338 GrCC no 2; Spyridakis (2004), no. 120.5; Koumanis (2010), Art. 338 GrCC no. 3.

Given that this 'substitute' may arise out of a subsequent contract that the debtor has concluded, which eventually led to the impossibility of performance of the initial contract, e.g. when the debtor transfers the object of the sale to a third person (*lucrum ex negotiatione*),[57] it can serve for the disgorgement of the debtor's profits that arise out of breach of contract.[58] It is immaterial whether the debtor is still in possession of the gains at the time he is served the claim.[59] It is debated, though, whether the creditor is entitled to the whole substitute, even if he could not have acquired such gains himself, e.g. because the debtor acquired this profit due to his own special skills or due to extraordinary circumstances.[60]

The Right of Subrogation in Case of Breach of Fiduciary Duties in Particular

In case of breach of fiduciary duties the law often provides special remedies for the disgorgement of the wrongdoer's profits. A characteristic such example can be retrieved from the legislation on limited companies and on public limited companies. Namely, the relevant laws include special provisions according to which the directors or/and managers of such companies shall refrain from any activity which is competing with the company's business, unless the general assembly of the company has consented to this activity. If the directors or/and managers fail to get this consent, but they nevertheless enter into a transaction in their own name or in the name of a third party, the company can claim either compensation or the benefits they derived from this activity.[61]

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[57] See Stathopoulos (2004), § 19 no. 38; Georgiades (2011), § 20 no. 30; Georgiades (1999), § 24 no. 32; Kornilakis (2009), 426; Koumanis (2010), Art. 338 GrCC no. 8.

[58] On the function of the claim for the substitute see in detail Kornilakis (2009), 428 et seq., and especially at 430, referring the significance of this claim as a means for the disgorgement of the debtor's profits.

[59] See Stathopoulos (2004), § 19 no. 39; Georgiades (1999), § 24 no. 33; Georgiades (2011), § 20 no. 31; Koumanis (2010), Art. 388 GrCC no. 4.

[60] See Stathopoulos (2004), § 19 no. 46; Georgiades (2011), § 20 no. 30; Spyridakis (2004), no. 120.5; Koumanis (2010), Art. 338 GrCC no. 9, according to whom in such cases the creditor shall receive only part of the substitute, similarly as in cases of unjust enrichment (see supra section "Unjust Enrichment"). Contra Filios (2011b), § 125 B, according to whom the creditor is entitled to the whole substitute. Cf. also Kornilakis (2009), 427-428, who concludes that the claim for the substitute differs functionally from the claim of unjust enrichment.

[61] See Art. 23 para. 2 of Law 2190/1920 on companies limited by shares and Art. 20 para. 3 of Law 3190/1955 on limited liability companies. This is equivalent to the German *'Eintrittsrecht'*, provided in Art. 113 HGB. In is worth noting that in case of limited liability company, the company has a claim for the profits only if the director entered into a transaction in the name of a third party. If he did so in his own name, he is only liable to pay damages to the company. See also Marinos (2009a), 2044 noting the deterrence effect of these provisions.

Functional Equivalents to Disgorgement Damages in Private Law

Apart from the remedies that aim specifically at the disgorgement of unlawful profits, further mechanisms may lead to comparable outcomes. The most significant ones in Greek law are the following:

Monetary 'Satisfaction' for Non-pecuniary Loss for Infringement of the Right of Publicity

In all cases of infringement of the right to one's personality, as well as in all torts, the law provides that the victim shall seek monetary 'satisfaction' for his non pecuniary loss.[62] According to the prevailing opinion, the function of this remedy is compensatory.[63] The reason that it is named 'satisfaction' rather than compensation relates to the difficulties as to its assessment. Indeed, it lies upon the judge to decide on the amount that will be granted to the victim, after taking into consideration all relevant circumstances.[64]

Despite the fact that the punitive aim of such damages is in principle rejected, a closer look into the criteria on the basis of which judges assess these damages may lead to a different conclusion. More concretely, the judges do not only look at the victim, but also at the wrongdoer. Factors such as the degree of fault of the wrongdoer, his motives, the nature of his activity as profit or non-profit, as well as his financial situation in general, are often taken into account.[65] This assumption regarding the latent punitive aim of monetary satisfaction for non pecuniary losses seems to be reinforced by special laws which set minimum amounts of damages for such losses, sometimes exceedingly high, for certain types of violations, such as e.g. in case of libel by the mass media.[66]

[62] See Arts. 59 and 932 GrCC.

[63] See Stathopoulos (2004), § 8 no. 63; Georgiades (2011), § 5 no. 7; Filios (2011a), § 168 B 2; Kornilakis (2012), § 106 no. 4; Karakostas (2005), 107 et seq., at 109, (2011), 381.

[64] In Greece there exist no tables regarding damages for non pecuniary losses, and thus the amounts granted to the victim may diverge significantly from one case to the other.

[65] See, among many others, AP 109/2012; Intrasoft-Nomos; AP 284/2012, Intrasoft-Nomos; AP 1007/2011, ChrID 2012, 256; AP 654/2009, Intrasoft-Nomos. For a detailed analysis of these criteria see Paterakis (2001), 314 et seq., especially 320-321 and 340.

[66] See Art. 4 para. 10 of the only Art. of Law 2328/1995 on infringements by Radio and TV. See also para. 2 of the only Art. of Law 1178/1981, as amended by para. 1 of the only Art. of Law 2243/1994 referring to minimum compensation of the non pecuniary loss of the victim in case of libel by the press. It has been debated in case law whether these minimums amounts may be reduced by the courts, if in a specific case, considering all the relevant facts, the prescribed amount of minimum compensation is inconsistent with the constitutional principle of proportionality (see Art. 25 para. 1

On these premises, and out of equity considerations, judges seem sometimes to employ monetary satisfaction for non pecuniary losses in order to remedy legal deficiencies, especially in cases in which the legal framework is not comprehensive.[67] Thus the high amounts that are granted to the victims as non pecuniary damages for the infringement of their right to publicity may factually lead to the disgorgement of the profits of the wrongdoer. In the aforementioned case of the model whose photos have been published by the magazine without her consent,[68] the court rejected the plaintiff's claim for the profits of the magazine, but granted her 40.000 Euros for her non pecuniary loss. Even though this approach can be applauded as to the result, it is flawed from a methodological perspective, while it also lacks in transparency.

Collective Redress Mechanisms

Collective redress mechanisms do not technically qualify as remedies but rather as means to facilitate the enforcement of the rights of individuals. These instruments are particularly useful when the loss is dispersed over many persons, each one of whom has suffered a minimal loss. Such instances may arise especially in cases of violation of competition law, unfair business practices or insider trading regulations to the detriment of consumers or investors, respectively. In such cases it is highly unlikely that each individual separately will bring a claim for damages, since his costs for doing so exceed his expected benefit. Collective redress mechanisms can function as a counter-balance for the rational apathy of the victims, ensuring that the gains will not stay with the wrongdoer. Their aim seems thus to be deterrent rather than compensatory.[69]

Collective Action in Consumer Law

Law 2251/1994 on consumer protection grants consumer associations the right to file actions for the protection of consumer interests. Such actions can take two forms: First, consumer associations are entitled to pursue the legal protection of

of the Greek Constitution). Decision 6/2009 of the full bench of Areios Pagos, published in Arm 2009, 1162, decided in the negative, on the ground that the principle of proportionality is primarily addressed to the legislator and not to the judge. This decision has been (rightly, in my opinion) heavily criticised. See among many others, Stathopoulos (2010a), 833 et seq.; Fountedaki (2012), 379 et seq.

[67] See also Karagiannis (2007), 120 fn. 250.

[68] See supra section "False Agency Without Authorization".

[69] Cf. however Athanassiou (2013), § 24 no. 84 who discusses the aims of private enforcement of competition law to conclude that they are primarily compensatory.

the rights of the member of the association.[70] Second, consumer associations with at least 500 active members may bring a suit in their own name for the protection of the interests of consumers in general.[71] In this last suit, the consumer organization may, along with other claims, demand monetary 'satisfaction' for the non pecuniary losses suffered because of the wrongful behavior of the supplier. The law explicitly stipulates that in assessing these damages the court shall take into consideration the intensity of the violation, the size of the supplier's business, and its annual turnover in particular, as well as the need of general and special deterrence.[72] In order to avoid inequitable results the law provides that such monetary satisfaction for non pecuniary harm shall be granted only once for each violation.[73] Such collective claims can be also filed by the chambers of commerce, manufacturing and industry as well as by professional chambers.[74]

While all forms of collective redress address the issue of rational apathy of the consumers, it is this last possibility, namely the collective actions claiming 'satisfaction' for non pecuniary losses, that is of utmost interest for the disgorgement of profits of the wrongdoer. Consumer associations have made widely use of collective claims and courts have granted to them considerable damages.[75] Given the traditional approach that damages aim at the protection of the victim, the aforementioned provision seems to have initially puzzled both the courts and the legal literature. Almost 20 years after the enactment of this provision it is no longer debated that monetary satisfaction for non pecuniary loss functions as a 'civil sanction',[76] aiming primarily at deterrence. This conclusion is reinforced by the fact that consumer associations are not free to dispose of this amount in any way they wish. Namely, according to the law, damages shall be spent for the education, information and in general for the protection of consumers.[77] In addition special legal provisions regulate the distribution of this amount: 35 % shall stay with the consumer association which brought the claim, another 35 %

[70] Art. 10 para. 15 of Law 2251/1994.

[71] Art. 10 para. 16 of Law 2251/1994.

[72] Art. 10 para. 16 (β) of Law 2251/1994.

[73] Art. 10 para. 22 of Law 2251/1994.

[74] Art. 10 para. 24 of Law 2251/1994.

[75] See among many others AP 652/2010, DEE 2010, 943; AP 430/2005, DEE 2005, 460; AP 1219/2001, DEE 2001, 2001.

[76] See Nikolaidis (2000), 326; Panagopoulos (2000), 226; Doris (2007), 677; Georgiades (2005), 145 et seq., at 156; Dellios (2013), no. 74; Apalagaki (2008), Art. 10 of Law 2251/1994 no. 70; Stathopoulos (2010b), 616; Athanassiou (2013), § 24 no. 176. See also Papanikolaou (2007), especially at 292 with heavy criticism of this provision. On case law see supra note 75; contra Karakostas (2008), especially no. 1013-1018, who insists on the compensatory aim of this claim, claiming further (at no. 1026) that deterrence is just a positive side effect. Nevertheless Karakostas seems in the meanwhile to have adopted a more moderate approach. See Karakostas (2011), 381 fn. 1147, accepting the punitive aim of such damages.

[77] Art. 10 para. 22 of Law 2251/1994.

is granted to consumer associations of second degree (i.e. associations of consumer associations), while the rest 30 % ends up in the state budget.[78]

Collective Action for Violations of Competition Law?

Similarly to consumer law violations, the consequences of competition law, may spread over a large number of persons, leading to considerable profits for the wrongdoer. Nowadays there is no longer much doubt on the importance of private enforcement of competition law.[79] Nevertheless, when it comes to compensation claims, the opinion in favor of disgorgement damages does not seem to have prevailed. This can be mainly attributed to the practical difficulties as to the assessment of the profits of the wrongdoer as well as to concerns regarding over-deterrence.[80] Even under a regime of compensation for the concrete damages suffered by the plaintiffs in each specific case, collective redress mechanism could significantly contribute to the enforcement of competition law.

The introduction of collective redress mechanism has been thoroughly discussed on a European level. However, the final draft of the proposal of a Directive "on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union" refrained from including any relevant provision.[81] In addition, no such provisions have been adopted in the new Greek competition law of 2011.[82]

This notwithstanding, when competition law violations lead to damage to the consumers, the collective redress mechanism which is provided in consumer law can apply. Namely it is accepted that consumer associations, as well as other professional organizations, are entitled to both pursue the claims of their members and file collective claims in their own name, even when these pertain to violation of competition law.[83] Nevertheless, the legal framework of the collective action for

[78] Ibid.

[79] See in detail Athanassiou (2013), § 24 no. 1 et seq., especially 37 et seq.

[80] See Athanassiou (2013), § 24 no. 84-87.

[81] See para. 11 of the preamble of the proposal. On such provisions in the White Paper and previous drafts of the Directive see Papadelli (2010), 662 et seq.

[82] See Law 3959/2011.

[83] See Athanassiou (2013), § 24 no. 177-178. Cf. Karakostas (2008), no. 978 who also claims that collective claims of consumer associations are not restricted in cases where the provisions of consumer law are violated, but they can be filed in case of violations of other legal provisions as well, provided that the relation between the parties is a consumer-supplier relation. Cf. also Athens Court of Appeals 147/2004, NoV 2005, 289 and Koumanis (2005), 502 et seq.

consumer law violations does not fit well the needs of cases on competition law violations.[84] It is thus doubtful whether such a claim has been filed to date.[85]

Concluding Remarks

Disgorgement damages are confronted with skepticism in Greece. They are often rejected as a matter of principle, since according to the (still) prevailing opinion in Greece the aim of damages is primarily compensatory. Pragmatic approaches in the literature, though, led to the enactment of special provisions on disgorgement damages for infringements of intellectual property rights. In cases which do not fall within the field of application of these provisions disgorgement of profits is in theory possible through other institutions, namely false agency without authorization and unjust enrichment, provided that their respective conditions are met. In practice, however, few claims are brought on these legal bases. The issue seems less thorny when there is a contractual relation between the parties. The creditor can then claim the gain that arises out of the impossibility of performance as 'substitute', while special provisions regulate the disgorgement of profits in case of breach of fiduciary duties. Finally, further private law instruments, such as collective claims, may lead to results which are functionally comparable to disgorgement damages, even if this is not their main aim.

Although disgorgement of profits, as a remedy, is not alien to Greek private law, the relevant legal framework seems to be rather fragmented. The adoption of disgorgement damages as a general remedy would considerably enhance the deterrent effect of damages, which is logically prior to its compensatory aim. From a *de lege ferenda* perspective a flexible provision on the pattern of Art. 6:104 of the new Dutch Civil Code, which enables the judge to take into account the profits of the wrongdoer in the assessment of damages, depending on the circumstances of each case, would serve practical needs. In order to avoid inequitable results, which would also lead to over-deterrence, the judge should consider eventual administrative or criminal sanctions which have been imposed on the same wrongdoer for the same violation.[86] Finally, the enactment of such a provision should come with special rules to facilitate the proof of the wrongdoer's profits, as this would greatly enhance its applicability.

[84] See in more detail Athanassiou (2013), § 24 no. 179 et seq., referring especially to the very short prescription time for this claim.

[85] See Athanassiou (2013), § 24 no. 184.

[86] See especially Stathopoulos (2010b), 621.

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