

ufacturing and commercial secrets is concerned<sup>594</sup>. The same, however, cannot be said while referring to the Latvian provision on the reversal of burden of proof which does not fulfill the requirement to assure the legitimate interests of defendants' manufacturing and business secrets as set out in Article 34(3) of the TRIPS Agreement. The actual application of the reversal of burden of proof in the national IP litigation is difficult to examine due to the fact that no cases related to the practical application of the very rule were recorded<sup>595</sup>.

## V. *Legal standing in civil proceedings (locus standi)*

### 1. List of persons having a right to assert enforcement measures and remedies under Article 4 of the Directive

Article 4 of the Enforcement Directive lists four categories of persons who can assert the right to ask for an application of enforcement measures, procedures and remedies:

- a) the right holders of IP rights;
- b) all other persons who are authorized to use IP rights, in particular, licensees; also
- c) IP collective rights-management bodies; and
- d) professional defence bodies which are regularly recognised as having a right to represent IP right holders.

By virtue of the same article of the Directive, the recognition and scope of a legal standing of the listed persons, be they natural or legal, should be made in accordance with the provisions of applicable law, and, as far as collective societies and defence bodies are concerned, as permitted by applicable law.

The list provided in the Directive partially reflects a TRIPS formulation which is embodied in Article 42 and which relates to a legal standing in civil proceedings. The TRIPS wording, although indirectly, foresees the broader definition of the term "right holder" which includes federations and associations. The text of Article 42 of the TRIPS Agreement does not, however, refer to any licensees as persons having *locus standi*, thus by asking an appearance of a right holder in court proceedings subject to prohibition of overly burdensome personal appearances<sup>596</sup>.

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594 Similarly, in Germany the protection of manufacturing or business secrets of the defendants is specifically defined, as referred in *Straus*, Reversal of the Burden of Proof, the Principle of "Fair and Equitable Procedures" and Preliminary Injunctions under the TRIPS Agreement, p. 820.

595 This can be also seen in the whole context of the modest number of patent cases heard by the Baltic courts each year, see statistics in *supra* § 3C.IV.2. The case-law related to the reversal of burden of proof rule remained more than modest in the countries like Germany as well, as referred in *Ibid*.

596 See *Correa*, A Commentary on the TRIPS Agreement, pp. 418-419; also *Gervais*, The TRIPS Agreement: Drafting History and Analysis, pp. 290-291.

As observed, the Directive directly includes licensees in the list of persons who can assert their procedural rights in cases of IP infringements. It also generally refers to applicable law under which the scope of *locus standi* for licensees is to be defined. By virtue of Article 4(c) and (d) of the Directive, *locus standi* is similarly to define for collective rights-management bodies and professional defence bodies, by requiring that their legal standing should be permitted by applicable law<sup>597</sup>. Thus, the Directive, which contains a flexible formulation on legal standing in IP civil proceedings, leaves the national legislators a right to manoeuvre by amending the national provisions on legal standing in civil proceedings which can arguably lead to a weaker harmonization effect than expected. The national legislators are to observe, though, a principle of non-discrimination as far as rights or foreign collective rights-management bodies and professional bodies are concerned<sup>598</sup>.

## 2. *Locus standi* under the Baltic legislation

### a) IP right holders

As regards the Baltic national provisions on legal standing, it can be generally observed that the list of persons having a right to start civil proceedings against infringers of their rights generally reflects *locus standi* provisions, as set out in the Enforcement Directive.

In Lithuania patent, trademark, design owners, copyright and related rights owners, *sui generis* rights owners<sup>599</sup> and successors of their economic rights, with the aim of defending their rights, are eligible to seek for remedies in case of infringement of their rights. In Estonia an inventor, a proprietor of a trademark, an author of an industrial design as well as authors, related rights owners and makers of databases can similarly assert their rights to start civil proceedings against alleged infringers of their rights. In Latvia holders of copyright and neighbouring rights, an owner of a trademark (or successor in title) and a design owner, the author of an invention, as they are defined in applicable laws, are entitled to sue infringers of their rights. As follows from the *locus standi* provisions of the Lithuanian laws, a right holders or

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597 The formulation of the article was based on the prior-to-Directive provisions of the Belgian Law on Consumer Protection and French Consumer Protection Code, also French Intellectual Property Code, as referred in *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 18.

598 A principle of non-discrimination has been stressed out by the Commission while drafting the provisions on legal standing in the Directive, as observed in *Ibid.*

599 This covers owners of copyright in literary, scientific and artistic works, performers, producers of phonograms, broadcasting organisations and producers of the first fixation of an audiovisual work (film), also holders of *sui generis* rights to databases; Arts. 1, 77(1), the Lithuanian Copyright Law. Notably, by virtue of the definition in Art. 2(5) of the Lithuanian Copyright Law, owner of copyright does not only mean an author, but also another natural or legal person, possessing the author's exclusive economic rights in the cases provided for in this Law, as well as a natural or legal person to whom the author's exclusive economic rights have been transferred (successor in title).

his (her) successor in title can assert civil procedural rights to sue infringers, whereas not all IP legislative acts clearly define such right in Latvia and Estonia.

Importantly, the national laws define the right owner (or right holder) of each IP right. According to Article 2(5) of the Lithuanian Copyright Law, for instance, it can be observed that an “owner of copyright”<sup>600</sup> means not only an author, but also another natural or legal person, possessing the author’s exclusive economic rights in the cases provided for in the mentioned law, as well as a natural or legal person to whom the author’s exclusive economic rights have been transferred (successor in title). Similarly, under Sections 1(4) and 10 of the Latvian Design Law, holders of the right to a design comprises the list of persons such as designer or his/her successor in title, also joint designers, also designer who created a design as a work task (employee), unless it is otherwise provided in the contract with an employer.

According to Article 12 of the Estonian Patent Law, the right to apply for a patent and to become the owner of a patent is vested in the author of the invention and a legal successor of the author. If an invention is created in the performance of contractual obligations or duties of employment, the right to apply for a patent and to become the owner of the patent is vested in the author or other person pursuant to the contract or employment contract, unless otherwise prescribed by the legislation of the country of the residence or seat of the applicant. The Estonian Patent Law accordingly defines that the author of an invention is a natural person (also joint authors as natural persons) who created an invention as a result of his/her inventing activities (Article 13(1)). The proprietor of a patent, however, is the person who has been lastly registered as a proprietor in the patent registry (Article 14(1) of the Estonian Patent Law).

## b) Licensees

### (1) Before the implementation of the Directive

Before the implementation of the Enforcement Directive *locus standi* of licensees has not been precisely regulated in many of the national IP laws. Before the implementing amendments in Lithuania, it was stated in the Patent Law<sup>601</sup> that, unless it was differently provided in the licence agreement, a licensee could ask the owner of the patent to take measures to protect his rights obtained under the licence agreement by specifying legal acts needed to protect his rights. Such licensee could, if he proved that the owner of the patent had received his request, but failed to institute proceedings against the infringer of patent rights, within three months from the receipt of request, institute proceedings against the infringer in his (her) own name,

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600 As suggested in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 42, the original terminology, i.e. “owner of copyright” (“*teisių subjektas*”, lt.) instead of “copyright holder” (“*teisių turėtojas*”, lt.) has been left in the amended Lithuanian Copyright Law in order to assure a consistency of the legal terminology in the national legislation.

601 Art. 41, the Lithuanian Patent Law as of 18 January 1994.

after notifying the owner of the patent of his (her) intention. The owner of the patent had also the right to join in the proceedings as a person concerned. Even before the expiration of the three month period, the court could, on the request of the licensee, grant an appropriate injunction to prevent infringement of the rights of the owner of the patent, if the licensee proved that immediate action was necessary to avoid substantial damage.

The prior-to-implementation wordings in the Lithuanian Design Law<sup>602</sup> and Lithuanian Trademark Law<sup>603</sup> also established a possibility of any licensee, be it exclusive or not, to submit a claim regarding an infringement of trademark or design rights, unless otherwise stated in a license agreement. An exclusive licensee could submit a claim, despite the fact it was stated otherwise in a license agreement, provided that a design owner does not submit his claim within a specified term after the notification about an infringement.

The previous Lithuanian Copyright Law<sup>604</sup>, however, did not constitute a right of any licensee to submit a claim to the court by asking for remedies in case of infringement of his rights. The necessity to define *locus standi* of, at least, exclusive licensees more precisely has been already emphasized before drafting the implementing amendments and referring to the then Lithuanian court practise<sup>605</sup>, also to the case practise and legal doctrine of other countries<sup>606</sup>.

## (2) The implementing provisions regarding *locus standi*

The amendments have been finally introduced into Article 77(1) of the implementing Lithuanian Copyright Law in 2006, by granting licensees of exclusive rights to apply to the court and demand protection of the rights assigned to them. The national laws on trademarks, patents and designs have been likewise amended by granting *locus standi* to exclusive licensees only.

More varied provisions on the legal standing of licensees can be nowadays found in the Estonian legislation on IP rights. In Estonia an exclusive licensee of a trademark can file an action only with the permission of the owner of trademark. The permission is not required in case the owner was duly informed and failed to file an action within a reasonable time<sup>607</sup>. A person who uses an invention as a licensee (not necessarily exclusive) may file an action to the court regarding a dispute related to the license<sup>608</sup>. A licensee of an industrial design with a registered license can file an

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602 Art. 47, the Lithuanian Design Law as of 1 January 2003.

603 Art. 50, the Lithuanian Trademark Law as of 1 January 2001.

604 Art. 77, the Lithuanian Copyright Law as of 21 March 2003.

605 As it can be observed from the following cases: Lithuanian Supreme Court, Civil Case No. 3K-351/1997, *UAB "Gėja" vs. Valstybinis leidybos centras*; also Lithuanian Supreme Court, Civil Case No. 3K-3-154/2000, *L. Vilčiauskas and UAB "Naujieji Birštono mineraliniai vandenys" vs. UAB "Birštono mineraliniai vandenys ir Ko"*.

606 As it was suggested in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 42.

607 Art. 57 (3), the Estonian Trademark Law.

608 Art. 54(3), the Estonian Patent Law.

action against the infringer, unless the license agreement established otherwise and by duly notifying the owner of the industrial design who does not file the action himself (herself)<sup>609</sup>. The provisions, therefore, are not limited to exclusive licensees only and cover a broader range of possible plaintiffs in civil proceedings.

The legal standing of licensees in copyright infringement cases is not defined in Estonia, though. The Estonian Copyright Law omits the provisions regarding other persons, but copyright or related rights owners or database makers, who are eligible to start a civil action against the infringers. The same can be observed while analysing the Latvian Copyright Law which contains no provisions regarding *locus standi* of licensees, be they exclusive or not. From the practical point of view, as far as copyright infringement cases are concerned, it affects the litigation possibilities, for instance for distributors, also many other ICT companies in Estonia and Latvia, which presumably possess a number of licences.

As far as licensees of industrial rights in Latvia are concerned, it is to be noted that an exclusive licensee of a patent has the same rights as the patent owner to start civil action against infringers<sup>610</sup>. Furthermore, any licensee of an industrial design or trademark can start an action against illegal use of a design with a consent of the owner of the design or the trademark which is not required when the rights to start such action are conferred in the licensing agreement or the owner of a design does not bring an action after he was duly informed<sup>611</sup>.

### c) Rights-management collective societies and professional defence bodies

By virtue of Article 4(c) of the Enforcement Directive, an eligibility to apply to the national courts by demanding remedies, as permitted by and in accordance with the applicable national law, is, *inter alia*, given to associations of collective administration of rights, with the aim of defending the rights which those societies administer<sup>612</sup>.

Already prior to the adoption of the Enforcement Directive, such a right has been introduced into the Lithuanian Copyright Law, namely its Article 67(4) which has not been changed while amending the law in 2006 and which provided that:

“<...>A collective administration association, on behalf of authors and owners of related rights whom or which it represents, and on the basis of the signed agreements concerning collective administration of rights, shall fulfil the following functions <...> defending the rights of owners of copyright and related rights it collectively administers, without any special authorisation in court and other institutions”<sup>613</sup>.

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609 Art. 85(2), the Estonian Industrial Design Law.

610 Art. 45(3), the Latvian Patent Law.

611 Art. 48(4), the Latvian Design Law; also Art. 28(2), the Latvian Trademark Law.

612 The list of the national collective societies which administer authors and neighbouring rights in Lithuania, Latvia and Estonia is provided in supra § 3C.II.2.

613 A similar wording can be found in the Estonian and Latvian legislative provisions on *locus standi* of collective societies, *i.e.* Art. 77(1)(5) of the Estonian Copyright Law and Art. 69(1) of the Latvian Copyright Law.

The national case practise shows that, for example, LATGA-A, the Lithuanian collective society administering rights of local and foreign authors, is active in the national courts to protect infringed interests and rights of the authors it represents. The cases mainly concern the legal issues regarding non-payment of royalty fees, also illegal public performance of musical works or copyright infringements of visual works<sup>614</sup>.

Some important aspects are to be mentioned regarding *locus standi* of professional defence bodies, *i.e.* professional organizations or associations which, among their other objectives and aims, are permitted to protect legal interests and rights of their members. As set forth in Article 4(d) of the Directive, such bodies have a right to ask for an application of enforcement measures, procedures and remedies, as permitted by and in compliance with applicable law.

Neither the Lithuanian nor the Estonian or Latvian legislation embodies a legal standing of the professional defence bodies to start civil proceedings. It is argued that professional defence bodies can be represented in the courts on the basis of general representation rules as set out in the national procedural codes<sup>615</sup>. As the current court practice in Lithuania shows, local or foreign defence organizations such as the associations “Infobalt”<sup>616</sup> or FGPA<sup>617</sup>, BSA or IFPI are not permitted to sue infringers of their members’ rights in the courts. Although the associations are very much involved into initiating enforcement campaigns against infringements of their members’ rights and participating in the pretrial proceedings, especially by providing specialists’ and experts’ statements, collecting evidence, etc., civil claims regarding adjudication of damages and (or) imposition of other civil remedies are submitted by the right holders to the national courts<sup>618</sup>.

By virtue of the wording of Article 4(d) of the Directive, which refers to *locus standi* of professional defence bodies “as permitted by applicable law”, such national practice cannot be deemed as contradicting to the very provision of the Directive. Although it does not impose a duty on the national legislators to additionally amend

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614 In 2007 there were 113 civil cases reported which had been initiated by LATGA-A for infringements of contracts, also for illegal public performance of musical works, copyright infringements of visual works. In the same year ca 250,000 Lit (72,464 Euro) have been adjudged for LATGA-A by the courts, as referred in the *Report on LATGA-A Activities (2007)*, pp. 64-67.

615 See *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 45.

616 The association “Infobalt” unifies Lithuanian IT, communications and electronics companies, as well as scientific institutions, seeking to represent the national ICT sector locally and worldwide.

617 “Fonogramų gamintojų ir platintojų asociacija“ (*lt.*) (“Association of Phonogram Producers and Distributors”).

618 *E.g.*, foreign companies such as Autodesk, Inc., Microsoft Corporation, Adobe Systems Inc., although being the members of BSA, are to be plaintiffs in the national civil proceedings, as referred, *e.g.*, in Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

the laws<sup>619</sup>, it can be also argued that the eligibility given to IP right holders associations to sue infringers can be considered as efficient tool to fight against piracy and counterfeiting cases.

#### d) Foreign natural and legal persons

By virtue of Article 5(2) of the Berne Convention<sup>620</sup> and on the basis of the national codes of civil procedure, foreign natural and legal persons are eligible to protect their infringed rights in the Baltic national courts.

Before the adoption of the Enforcement Directive, the requirement of the “national treatment” of foreign natural and legal persons, who or which seek the protection of their rights, has been introduced into the Lithuanian CCP as well as in the CCPs of Estonia and Latvia. Articles 793(1), 38(1), 5(1) of the Lithuanian CCP constitute that any person is eligible, according to the procedure provided in the Civil Procedural Code, to apply to the court with the aim to defend his (her) rights or legally protect interests that were infringed or disputed.

The same principle was established in the CCPs of Estonia and Latvia and has been regularly applied in the judicial practice of the corresponding countries. Regarding *locus standi* of foreign legal persons in IP infringement cases, one procedural aspect is to be mentioned, though. The foreign legal persons can stand in the courts only by providing duly signed and authorized representation documents. The power-of-attorneys which contain the right to stand in the courts, duly signed, notarized and apostilled, are recognized as appropriate documents allowing the foreign company to start a civil action in the courts of Lithuania.

## VI. Concluding remarks

Given that legal traditions, legal particularities and actual IP enforcement status in each Member State should have been taken into account before implementing the Enforcement Directive, it is observed that a legislative (formal) implementation by the Baltic countries omitted those considerations. The relatively speedy implementation of the Directive process by the corresponding jurisdictions was accomplished without considering the specificity of the Baltic region, collecting actual data which would have allowed evaluating the prior-to-implementation national enforcement rules, mechanisms and court practice.

On the other hand, the adoption of implementing amendments to the national legislation was influenced by rapidly changing landscape of IP protection, necessity for

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619 The same suggestion to exclude from the implementing amendments to the Lithuanian Copyright Law separate provisions regarding *locus standi* of professional defence bodies can be found in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 45.

620 Also referring to the scope of Art. 5(2) of the Berne Convention, as examined in *Ricketson, Ginsburg*, *International Copyright and Neighbouring Rights*, pp. 319-320.