

**D. Preserving evidence in IP infringement cases and right of information under the national legislation and court practice in view of the implementation of the Enforcement Directive**

**I. Evidence and measures to preserve evidence in IP rights infringement cases in view of Articles 6 and 7 of the Enforcement Directive**

**1. General remarks**

Timely and appropriate collection of evidence in IP infringement cases, *i.e.* collection of all available information about allegedly infringing copies of IP products or materials as well as technical equipment or devices used to reproduce infringing copies (for example, computer hard-disks, infringing audio and video media, also any information about infringing processes to produce patented products, etc.) plays a paramount role for preparation to hear any IP rights infringement case in the court.

Effective application of measures for preserving evidence serves to facilitate that role. It primarily allows IP right holders, who receive or collect information about alleged infringements of their rights, to assess the situation objectively and, if decided, to submit a warning letter (with a settlement agreement following it), or a substantiated, comprehensive and reasoned civil claim to the court. Furthermore, effective application of measures preserving evidence indirectly assures that the court has all possibly available evidence which is presented by the requesting party. It consequently can allow the court to render a reasoned decision on the merits of the case.

Articles 6 and 7 of the Enforcement Directive have been likewise drafted considering the importance of harmonization of certain aspects in relation to different national provisions regarding evidence and measures to preserve them<sup>621</sup>. Although the national legislation of the Baltic countries contained a number of provisions on evidence and measures preserving them before the implementation of the Directive, certain amendments were to be adopted in order to implement Articles 6 and 7 in view of the aims of the Directive.

The prior-to-implementation national measures for preserving evidence in the Baltic countries, the corresponding amendments which were adopted due to the implementation of the Directive, as well as the national court practice, namely the Lithuanian court practice of so-called *civil (ex parte) searches*<sup>622</sup> in IP infringement cases, are further examined.

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621 See examination of Arts. 6 and 7 of the Directive in supra § 5A.II.2.a) and in supra § 5A.II.2.b).

622 Although the term '*civil (ex parte) searches*' is not literary used in the national legislation of the Baltic countries, it is hereinafter used to refer to the pre-trial measures for preserving evidence which are applied on the basis of right holders' requests in the corresponding jurisdictions, following the well-established UK practice (the landmark decision in the case *Anton Piller K.G. v. Manufacturing Process Ltd.* [1976] Ch. 55 (C.A.)), also the French practise of

2. National measures for preserving evidence: before and after the implementation of the Enforcement Directive
  - (1) Prior-to-implementation regulation of measures preserving evidence

Before the implementation of the Enforcement Directive, collection and provision of evidence in IP infringement cases were already regulated in the legislation of the Baltic countries, namely, by general civil procedural rules. General provisions embodied in the national CCPs of Lithuania, Latvia and Estonia<sup>623</sup> on collection, presentation and assessment of evidence, as well as on provisional measures in civil proceedings were also applicable to evidence related to infringements of IP rights. The mentioned provisions however did not stipulate any specific rules regarding specificity of those cases.

IP right holders' requests for measures for preserving evidence could be submitted on the basis of the general rules on provisional measures set out in the mentioned CCPs. The codified provisions mainly referred to the procedure on application of provisional measures without any extensive references to, for instance, protection of the rights of the opposing party, as pursued by Article 7 of the Enforcement Directive. Notably, the provisional measures which were embodied in the CCPs could be applied in a complex manner with other measures listed in the then special IP laws, if they were listed at all.

In Lithuania, for example, the prior-to-implementation Copyright Law provided for application of provisional measures which could be also applied before starting civil proceedings, in case of a threat that irreparable harm could be done to evidence and interests of right holders. Article 81 of the 2003 Copyright Law, differently from the prior-to-implementation industrial property laws (which did not embody any provisions regarding preservation of evidence), contained provisions on provisional measures which, *inter alia*, included seizure of infringing copies of fixations of audiovisual works or phonograms as well as technical devices and equipment used for the reproduction, and appropriate documents, and other measures set out by the national CCP. Such seizures or description used to serve as measures for preserving evidence in copyright and related rights infringement cases. They were also applied without hearing the other party (*inaudita altera parte*), in cases where there was threat that evidence could be destroyed by the alleged infringer.

On the other hand, the legal confusion, *i.e.* clear separation between measures for preserving evidence from other provisional measures, had to be overcome. While drafting the corresponding amendments on the issue, it was observed that such regulation required more precise and specific reference to measures for preserving evidence in IP rights infringement cases, as it was formulated in Article 7 of the Direc-

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*saisie contrefaçon* where it is considered as a powerful enforcement tool, see more in *Véron*, “Saisie-Contrefaçon” an Overview: France, p. 135.

623 Arts. 176-224, the Lithuanian CCP; Part V, Chapter 24 of the Estonian CCP; Part A, Division Three, Chapters 15-17, the Latvian CCP.

tive<sup>624</sup> in the context of Article 6 of the Directive, instead of applying general provisions on provisional measures as set out in the Lithuanian CCP.

In Latvia and Estonia the possibility to ask for measures for preserving evidence, as it is formulated in Article 7 of the Enforcement Directive, was not provided before the implementation of the Directive. In other words, there were no clear provisions which allowed IP right holders to pursue their rights requesting civil searches. Similarly to Lithuania, the prior-to-implementation CCPs of Latvia and Estonia only generally established rules regarding evidence, also provisional measures. Such legislative default was very much stressed by reporting piracy and other practical issues related to IP enforcement<sup>625</sup>.

## b) Implementing amendments on measures preserving evidence

The implementing amendments to the national laws on IP rights as well as to the national CCPs<sup>626</sup> covered new provisions regarding measures for preserving evidence in view of the aims as pursued by Article 7 of the Enforcement Directive.

The implementing amendments in Lithuania as of 2006 covered provisions on measures necessary to preserve evidence in IP infringement cases. The provisions were specifically embodied in the national legislation on IP rights<sup>627</sup>. The corresponding measures are to be also applied by considering general rules which are set out in the Lithuanian CCP, namely its Articles 221 – 224. The CCPs of Estonia and Latvia have been also amended by taking into consideration the necessity to implement the harmonizing provisions on precautionary and provisional measures. The implementing amendments to the corresponding CCPs of Estonia and Latvia include new provisions on precautionary measures in civil proceedings which also cover rules regarding preservation of evidence in IP infringement cases which can be ordered as pre-trial measures or after the commencement of civil proceedings<sup>628</sup>.

In Estonia, Article 244 of the CCP stipulates that pre-trial taking of evidence may be organised by a court ruling during court proceedings at the request of a party or, if good reason exists, also before proceedings are initiated, provided that the opposing party agrees to this or evidence could be lost or using the evidence afterwards could involve difficulties. The court shall also initiate pre-trial taking of evidence in order to safeguard evidence, if a person substantiates that the copyright and related rights, or industrial property rights thereof have been infringed, or that a danger of

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624 As, for example, referred in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 47.

625 This has been especially pointed out in *2005 Special Report: Latvia, Estonia*, pp. 43, 60. Absence of legislative schemes to apply *civil (ex parte) searches* was considered as one of the issues in the enforcement of the IP rights, especially copyright enforcement.

626 See *refs.* to the implementing national laws in supra § 5B.I.1.c).

627 Art. 81(5) of the Copyright Law; Art. 41(3) of the Patent Law; Art. 50(3) of the Trademark Law, and Art. 47(3) of the Design Law of Lithuania.

628 Part V, Chapter 26 (“Pre-trial Taking of Evidence for Safeguarding Evidence and Pre-trial Establishment of Facts”) of the Estonian CCP, for Latvia see also in *Harenko et al.*, Expedited Remedies For the Protection of IP in Finland and the Baltic States, pp. 31-34.

infringement exists. Similarly, Article 100 of the Latvian CPL provides for such pre-trial measures to preserve evidence.

Nowadays IP right holders in Lithuania can, on the basis of the provisions embodied in the national IP laws, request the local courts to apply the following measures for preserving evidence:

- the detailed description and detention of the goods and copies of works, other objects of the protected rights, which infringe the protected rights or only the description thereof;
- the arrest and seizure of the goods and copies of works, other objects of the protected rights, which infringe the protected rights, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods, copies, and the documents relating thereto;
- other provisional measures covered by the CCP<sup>629</sup>.

The list of national measures for preserving evidence, which contains so-called *saisie descriptive* and *saisie réelle*<sup>630</sup> and which is still embraced by the provisions on provisional measures, is unlimited. In view of complexity of IP rights infringement cases, such solution is reasonable. Considering the circumstances of each case, also the aim of the measures in question (which is not limited to aims to preserve evidence that can be destroyed only, but also can pursue another aims), the national courts can alternatively choose which measure to apply on the basis of the request of the interested party<sup>631</sup>. For example, if applying measures such as taking computer hard-disks used for reproduction of infringing content that are also used in daily company's business, etc. could cause irreparable damage to the opposing party, the detailed description of software installed as well as information on hard-disks can only be applied<sup>632</sup>.

The special IP laws refer to the CCP, namely to provisional measures embodied therein. Provisional measures, which can be considered relevant to preserve evidence are, for instance, prohibition imposed on a defendant to enter into certain agreements or to be involved in certain activities, also obligation to take all meas-

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629 Notably, the list also reflects the provisions established in the CCPs of, for instance, France, Germany, Austria, Switzerland which follow Art. 41(1) and (2) and, especially, Art. 50(1) and (2) of the TRIPS Agreement.

630 These are so-called measures related to full description of allegedly infringing items with taking samples of them or not (*saisie descriptive*) or arrest of such items, or devices or equipment used to produce such items, also related documents (*saisie réelle*), as described in *Cottier, Véron*, Concise International and European IP Law, p. 471.

631 The discussion has been held, though, regarding such discretion. On one hand, it is argued that the court is restricted to the request of IP right holder in terms of requested measures, on the other, it is stated that the courts are to be provided with the possibility to decide, alternatively, which measures are most appropriate in a concrete case, as referred in *Mizaras*, Copyright Law (Vol. II), p. 190.

632 As observed in Ruling of Vilnius City 3rd Circuit Court as of 11 December 2007, Case No. 2-5921-391/07, *Microsoft Corporation, Adobe Systems Inc., Corel Corporation vs. UAB "DDB Vilnius"*.

ures which are to prevent any damage or its increase. Hence, measures for preserving evidence and provisional measures are closely intertwined. One of the highlighted issues, which follows from the Lithuanian implementing provisions, is the same evidence threshold applicable to measures preserving evidence and provisional measures, as further discussed<sup>633</sup>.

Last but not least, by virtue of Article 6(2) of the Enforcement Directive, the national IP laws in Lithuania establish that, in case of an infringement of rights committed on a *commercial scale*<sup>634</sup>, the court may, in accordance with the procedure laid down by the CCP, order the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information<sup>635</sup>. Importantly, if the requested party fails to provide such documents without valid reasons within the time limit set by the court or it refuses to permit to make use of them, the court is entitled to take a decision on the basis of the evidence which was submitted.

It is referred, however, in the national IP laws<sup>636</sup> that for the purpose of application of provisional measures, the court may, upon request of an interested person, order the competent authorities to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information. “*Commercial scale*” is not required to be proven in that case. Although the referred provisions differ in terms of the persons who are to provide such documents (the opposing party or the competent authorities), considering collision of measures for preserving evidence and other provisional measures (which can be also applied as measures preserving evidence), the issue whether the courts will need to establish “*commercial scale*” in allegedly infringing activities while applying those measures can still arise.

### 3. Lithuanian practice on civil (ex parte) searches

#### a) General aspects

Despite certain discrepancies regarding the legislative wording on measures for preserving evidence in Lithuanian laws before the implementation of the Enforcement Directive in 2006, IP right holders, in particular software copyright holders, started

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633 See discussion regarding threshold of evidence in *infra* § 5D.I.3.b)(2).

634 See examination of the term “*commercial scale*” (“*commercial purposes*”) in *supra* § 5C.II.2.

635 In Lithuania the provision is embodied in Art. 80(2) of the Copyright Law, Art. 41(2)(2) of the Patent Law, 50(2)(2) of the Trademark Law, Art. 47(2)(2) of the Design Law. It has been suggested to implement the provision of Article 6(2) of the Directive without limitation to infringements committed on a “*commercial scale*” with a reference to Art. 2(1) of the Directive which establishes the possibility to create more favourable means to right holders to protect their rights, as suggested in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 47. Such suggestion, however, has not been accepted by the *Seimas*.

636 *E.g.*, Art. 81(3), the Lithuanian Copyright Law.

to submit requests to the local courts to apply such measures<sup>637</sup>. Requests were mainly based on the then provisions on provisional measures, as it was established in the prior-to-implementation Copyright Law and the Lithuanian CCP<sup>638</sup>. Such provisional measures covered description and seizure (if ordered by the court) of allegedly infringing copies of software, related documents and materials such as licences, purchase documents, also equipment or devices which were used to reproduce them (e.g. computer hard-disks).

The first requests to apply measures for preserving evidence in copyright infringement cases were submitted in Lithuania in June 2004<sup>639</sup>. From legal point of view the first requests could be called as requests for application of *quasi civil searches* because they were based on the previously described prior-to-implementation general provisions on provisional measures, hence, by following a different legal scheme than set out in Article 7 of the Enforcement Directive and well-established in the practice of other countries such as France<sup>640</sup>. Despite this fact, the applied measures for preserving evidence seemed to achieve the same result, i.e. evidence about infringing activities, also infringing IP products used to be collected. Although not all initial requests to apply measures for preserving evidence in software copyright infringement cases have been met by the local courts<sup>641</sup>, there were further successful cases on the subject-matter followed by the civil cases<sup>642</sup>.

As previously mentioned, practice on *civil (ex parte) searches* has not been established in Latvia and Estonia before the implementation of the Directive, though<sup>643</sup>. Due to this fact as well as the fact that the early national court practice on civil searches in Lithuania (although covering copyright infringement cases only) can be considered as significant starting point for the formation of this important enforce-

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637 Notably, local courts (*apylinkių teismai*, lt.) have the competence to adopt rulings on preservation of evidence which can be appealed to district courts (*apygardų teismai*, lt.). About the court system and competence of the national courts of Lithuania see also in supra § 3C.IV.1.a).

638 See *refs.* to the national laws before the implementation of the Directive in supra § 5D.I.2(1).

639 The first successful *civil ex parte search* has been performed following Ruling of Kaunas City Circuit Court of 28 June 2004 on the request of *Microsoft Corporation, Adobe Systems, Inc. vs. UAB "Autosabina"*. Since then, approx. 4-5 civil searches on *ex parte* basis a year have been performed in software copyright infringement cases in Lithuania (*BSA unofficial information*).

640 In France, however, *saisie contrefaçon* is based on slightly different concept as embodied in Art. 7 of the Directive, i.e. instead of requesting an applicant to provide all reasonably available evidence which can prove alleged infringement, an order on *saisie contrefaçon* assures a possibility to collect evidence, as referred in *Cottier, Véron*, Concise International and European IP Law, p. 471, also *Mizaras*, Copyright Law (Vol. II), p. 428-429.

641 E.g., Ruling of Vilnius City 2nd Circuit Court as of 21 June 2004, *Microsoft Corporation, Adobe Systems Inc. vs. AB "Paneriu investicijos"*: the court rejected the request on the basis that *prima facie* evidence has been received as anonymous information.

642 E.g., Ruling of Panevėžys City Circuit Court as of 28 August 2006, *Microsoft Corporation vs. J. Skodžius Firm "Skominta"*, also Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB "Arginta"*.

643 See also *Harenko et al.*, Expedited Remedies For the Protection of IP in Finland and the Baltic States, pp. 31-32.

ment tool in the Baltic countries in general, the further examination is limited to the Lithuanian court practice on the subject-matter with the anticipation that the court practice in Latvian and Estonian jurisdictions can reflect issues and trends similar to the Lithuanian practice in the future<sup>644</sup>.

b) Requirements for civil (ex parte) searches requests

(1) Substantiated requests by interested parties

By virtue of Article 7 of the Enforcement Directive, the implementing national legislation on IP rights in Lithuania generally reflects the substantial requirements that are to be met while applying measures for preserving evidence in IP infringement cases. Pursuant to Article 81(5) of the Copyright Law<sup>645</sup>, in order the local court adopts a ruling on measures for preserving evidence, a request of an interested party, be it natural or legal person<sup>646</sup>, based on *reasonably available evidence to support claims* that protected rights have been infringed or are about to be infringed, is to be first submitted. Article 222 of the Lithuanian CCP does not provide any concrete reference to such evidence.

Requests to apply measures for preserving evidence can be submitted either before submitting a civil claim or after civil proceedings have commenced. In all cases a requesting party should indicate that any delay to apply measures preserving evidence is likely to cause irreparable harm to the requesting party or there is a demonstrable risk of evidence being destroyed. As it can be observed, aims of such measures are not limited to the threat that evidence could be destroyed. They, for instance, also stipulate abstract possibility of circumstances which can hinder submission of evidence in the future while hearing the case in the court<sup>647</sup>. There should be a reference that such evidence lies in the control of the opposing party. Moreover, the application for preservation of evidence is also subject to protection of confidential information under the implementing legislation, as required by Article 6(1) of the Enforcement Directive<sup>648</sup>.

Thus, a requesting party or, as a rule, his (her) attorney-at-law, prepares the documents, *first*, proving IP rights possessed by the requesting party and, *second*, all

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644 Such anticipation can be made analysing aspects of amended precautionary measures, as described in *Harenko et al.*, Expedited Remedies For the Protection of IP in Finland and the Baltic States, pp. 31-32. *Note*: the examination of civil searches is also limited to the practice of Lithuanian local courts and, in case of appeals, the appellate courts. Rulings on civil searches are rendered in Lithuanian and they are not translated.

645 The identical provisions are embodied in the industrial property legislation in Lithuania; see *refs.* to articles in *supra* Ft. 627 herein.

646 Importantly, see also list of persons having *locus standi* under the implementing national provisions in Lithuania in *supra* § 5C.V.2.

647 See *Mizaras*, Copyright Law (Vol. II), p. 430. Such interpretation of aims of measures preserving evidence can be likewise found in *Commentary of CCP of Lithuania*, p. 90, and it reflects the concept pursued in Article 7 of the Directive.

648 See also further discussion on measures to preserve interests of the opposing party (alleged infringers) in *infra* § 5D.I.3.e).

available *prima facie* information about allegedly infringing activities being exercised by the opposing party and evidence regarding risk of actual harm that can be caused by not applying the requested measures immediately. These implementing legislative requirements regarding requests for measures for preserving evidence are in compliance with Articles 6 and 7 of the Enforcement Directive. They also reflect the court practice of other European countries on the issue<sup>649</sup>.

As far as documents that are required to prove ownership are concerned, considering Lithuanian court practice on civil searches (which relates to copyright infringement cases), it is observed that at the stage of requesting for pre-trial measures preserving evidence a mere power-of-attorney of the right holders issued to their representatives, in which their ownership to certain IP products is stated, can suffice<sup>650</sup>. The courts do not examine the ownership issues on a pre-litigation stage. Therefore, if any questions regarding ownership are raised by applying measures for preserving evidence, they can be solved while hearing the case on its merits with a due application of the authorship presumption as well as, for instance, in case of patents related to process-patents, of the rule on reversal of burden of proof<sup>651</sup>. This, in fact, differs from the requirement to prove ownership while requesting provisional measures, which can also serve as measures preserving evidence. According to Article 81(4) of the Copyright Law, it can be assumed that the court requires establishing the ownership with the due certainty:

“the court shall be entitled to require the person, who requests application of provisional measures, to provide any reasonably available evidence in order to satisfy itself *with a sufficient degree of certainty* that he or a person, for whose interests application of provisional measures is requested, is the owner or user of the rights protected under this Law and that the applicant's right is being infringed, or that such infringement is imminent.”

After a court ruling on preservation of evidence is enforced, *i.e.* the measures have been applied by the court bailiff, and infringing copies or material, or implements, if any, is described and seized, the requesting party is required to start a civil action, *i.e.* to submit a civil claim based on the collected evidence. Therefore, already by filing a request, IP right holder can anticipate a possibility of a civil claim, depending on evidence collected.

According to Article 221 of the Lithuanian CCP, the court has 3 calendar days to decide on a requesting party's request to apply those measures on the basis of *rea-*

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649 Under Italian law, for instance, IP rights owners should prove existence of their rights and so-called *fumus boni iuris* (illegal conduct) and *periculum in mora* (risk of actual and irreparable harm), see more about Italian court practice in civil searches in *Bonadio*, Remedies and Sanctions for the Infringement of IPRs under EC Law, p. 323. Similar practice is established in France, as described in *Véron*, “Saisie-Contrefaçon” an Overview: France, pp. 136-137.

650 *E.g.*, Ruling of Vilnius City 2nd Circuit Court as of 4 September 2006, *Microsoft Corporation, Adobe Systems, Inc. vs. UAB “Šilo bitė”* (request denied); Ruling of Trakai District Circuit Court as of 17 May 2007, Civil Case No. 2-1056-764/2007, *Microsoft Corporation, Adobe Systems, Inc. vs. the company “Prepozicija”*; Ruling of Kaunas City Circuit Court as of 28 May 2007, Civil Case No. 2-10071-151/2007, *Microsoft Corporation vs. UAB “Alaista”*: in all cases the courts accepted such power-of-attorney.

651 See previous examination in *supra* § 5C.IV.



*sonably available evidence* submitted by a requesting party. In practice such short term means that the requesting party, IP right holder, needs to be ready to enforce the court ruling immediately after it is rendered, *i.e.* to know to which court bailiff he will submit the ruling, also whether experts' or specialists' help will be required<sup>652</sup>.

(2) Presentation of “*reasonably available evidence*” by the requesting party

Besides a substantiated written request by an interested party, which should confirm his (her) ownership regarding IP rights in question, in order the court adopts a ruling on civil search, another important requirement should be met. As already mentioned, it is required that *reasonably available evidence to support claims* that the protected rights in question has been infringed or is about to be infringed should be presented by the requesting party while submitting a request to apply measures for preserving evidence to the court<sup>653</sup>. Thus, a requesting party should indicate that there is a threat that the opposing party's active or passive conduct can infringe its rights and cause harm to its interests.

Formulating the provision on measures preserving evidence, the Lithuanian legislator literally followed the formulation of Article 7(1) Para 1 of the Enforcement Directive. Notably, such wording differs from the formulation regarding evidence to be submitted in cases of requests to apply provisional measures under Article 9(3) of the Directive. Article 82 of the Lithuanian Copyright Law as well as other national IP laws for both measures for preserving evidence and other provisional measures establish a lower threshold of evidence to be provided to the court<sup>654</sup>. It is required to establish *sufficient grounds to suspect* that there is an infringement of the protected rights, and not *sufficient degree of certainty*<sup>655</sup>.

Neither the Lithuanian CCP nor IP laws define the term “*reasonably available evidence*”. Article 177 of the CCP generally embodies that evidence is “*any factual information on circumstances which have an implication for the right judgment*”. Evidence should be collected and presented to the courts in the form of evidentiary means which can be explanations of third parties or their representatives, witness testimonies, other written evidence, material evidence, search protocols, also expert statements<sup>656</sup>. Similar definition of evidence, which can be collected and presented

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652 See further discussion on enforcement of such court rulings in *infra* § 5D.I.3.c).

653 Art. 81(5) of the Lithuanian Copyright Law; see also *refs.* to articles in the industrial property laws in *supra* Ft. 627 herein.

654 Such conclusion regarding the threshold of evidence is also provided in *Mizaras*, Copyright Law (Vol. II), pp. 432.

655 In Estonia, for instance, the law simply stipulates that to apply *civil ex parte search* the applicant must provide the court with a “good reason”, whereas in Latvia the applicant should identify evidence that is necessary to secure, provide facts for the proving of which this evidence is necessary, and provide reasons why the applicant is requesting preservation of evidence.

656 Art. 177(2), the Lithuanian CCP.

in infringement of rights cases, is embodied in the Estonian and Latvian legislation<sup>657</sup>, also in the legislation of other countries<sup>658</sup>.

According to the Lithuanian legal doctrine and practice, infringement of IP rights is considered to be *a question of fact* that can be proved with all legally available evidence presented as evidentiary means. Such evidence needs to be sufficient to support a requesting party's request regarding application of measures for preserving evidence, *i.e.* the court needs to be convinced that such measures should be applied, otherwise, irreparable harm can be done to a right holder's interests and it can be difficult to hear the case on its merits. Thus, the court is not required to be provided with all evidence regarding the merits of the case at this stage, for example, the requirement to provide all copies of allegedly infringing software, as expressed in a few rulings of the national courts<sup>659</sup>. Such request from the court can be considered unjustified in view of the aims of measures for preserving evidence.

To the contrary, evidence such as nature of business activities of the defendant, the defendant's denial about the infringing activities, repeated infringing activities, anonymous information, written evidence about the defendant's reaction towards the given notice about the infringing activities, etc. should suffice<sup>660</sup>. Besides, by examining both the provisions of the Directive and the implementing provisions, it can be agreed with the interpretation that requests regarding submission of relevant evidence can be also addressed to third parties, but not the alleged defendant, who does not own such evidence. Those requests are to be duly performed by considering principle of proportionality, confidentiality of information, protection of private life, etc.<sup>661</sup>.

Therefore, on the one hand, estimation of what can be considered by the term "*reasonably available evidence*" in particular case should be closely held by a requesting party or, as a rule, its attorney at law while preparing a request. On the other hand, it should be promptly assessed by the court which is rightly to interpret the character of the provisions on measures for preserving evidence and to distinguish them from provisional measures<sup>662</sup>.

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657 Art. 229(2) of the Estonian CCP, for instance, defines that "*evidence may be the testimony of a witness, statements of participants in a proceeding given under oath, documentary evidence, physical evidence, observation or an expert opinion. The court may also deem other means of proof to be sufficient in order to prove the facts relating to a proceeding on petition*".

658 *E.g.*, see Art. L. 615-15 of French IP Code (as amended by the Law 2007-1544 of October 29, 2007).

659 *E.g.*, Ruling of 4 September 2006, Vilnius City 2nd Circuit Court, *Microsoft Corporation, Adobe Systems Inc. vs. UAB "Šilo bitė"*.

660 See *Mizaras*, Copyright Law (Vol. II), pp. 433-434.

661 In the commentary of Art. 50 of the TRIPS Agreement it is also interpreted that such measures can be addressed to so-called fair third parties, see more in *Gervais*, The TRIPS Agreement: Drafting History and Analysis, Art. 50, para 2.423; also *Mizaras*, Copyright Law (Vol. II), p. 435.

662 The courts also demonstrate a patchy practice on the issue. In one case, the ruling on civil ex parte measures was considered invalid due to the basis of it on provisional measures rather than measures for preserving evidence (see Decision of 21 June 2006, Lithuanian Supreme

### (3) Most frequent evidence in *civil search* cases in Lithuania

By examining the Lithuanian court practice on civil searches, there can be three main sources detected from which IP right holders usually receive information about infringements of their IP rights. *First*, right holders receive and collect information themselves by, for instance, maintaining their database on their IP products sold and purchased, by performing audit programs of their IP products, etc. *Second*, information is provided by any third persons in written or as material or hearsay evidence, and, *third*, information is submitted by police officers or prosecutors who *ex officio* perform raids, organize test-purchases, establish infringements of IP rights and are entitled to initiate administrative or criminal cases related to infringements of IP rights.

The special attention can be brought to *hearsay evidence*, the assessment of which very much depends on the judicial habits of Lithuanian courts. As far as the recent court practice is concerned, it is observed that the courts tend to accept hearsay evidence regarding infringements of copyright. At this point the courts mainly argue that evidence in copyright infringement cases can be easily destroyed (and this can be illustrated by some cases already<sup>663</sup>) which can cause irreparable harm to right holder, *i.e.* “*it can be impossible to substantiate a civil claim regarding adjudication of damage suffered due to the copyright infringement*”<sup>664</sup>.

It should be noted, however, that not all courts follow the same line of argumentation. It was argued in some cases that mere hearsay evidence, especially received as anonymous information without provision of any concrete evidence and reasons why such evidence is to be preserved without hearing another party, cannot be accepted as sufficient ground to apply measures for preserving evidence. It is also argued that such measures are strict procedural means, and the interests of the opposing party such as nature of business of the company, *e.g.* publishing company using computers with software installed, etc. should be considered<sup>665</sup>.

Although there is still no case practice regarding application of measures for preserving evidence in infringement of industrial property rights cases reported, it can be presumed that in those cases, when requests for application for pre-trial measures relate to patents, trademarks or designs, or more complex copyright or neighbouring

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Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*), in another similar case the ruling was based on the provisions on provisional measures (see Ruling of Vilnius City 3rd Circuit Court, Case No. 2-5921-391/07, *Microsoft Corporation, Adobe Systems Inc., Corel Corporation vs. UAB “DDB Vilnius”*).

663 For instance, obstacles made by the defendant to the IP right holder to collect evidence while performing a civil search were negatively emphasized by the Lithuanian Supreme Court in its Decision of 21 June 2006 in Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*, and was partly the basis to render the decision in favour of the copyright holders.

664 *E.g.*, as referred in Ruling of Panevėžys City Circuit Court as of 28 August 2006, *Microsoft Corporation vs. the company “Skominta”*.

665 *E.g.*, as argued in Ruling of Vilnius City 2nd Circuit Court as of 21 June 2004, Case No. 2-5652-5/2004, *Microsoft Corporation, Adobe Systems Inc. vs. AB “Panerių investicijos” (former AB “Vilniaus mėsos kombinatas”)*; also Vilnius City 2nd Circuit Court as of 4 September 2006, *Microsoft Corporation, Adobe Systems Inc. vs. UAB “Šilo bitė”*

rights cases, hearsay evidence will not suffice. In those cases, the national judges can presumably address the practice of other countries, for instance, France which has long traditions and practice of *saisie contrefaçon*. In cases of infringements of, for instance, patent rights, evidence regarding an allegedly infringing product, process<sup>666</sup>, devices used to reproduce the patented characteristics are to be collected and presented to the court<sup>667</sup>.

By adopting court rulings on application of measures to preserve evidence, differently from, for instance, French practice where courts tend to scrutinize *saisie contrefaçon* requests, Lithuanian judges demonstrate quite formal analysis on the submitted primary evidence, including hearsay evidence. As a rule, such evidence is presented by the plaintiffs, the copyright holders, who receive the information provided on anonymous basis from IP right holders' associations<sup>668</sup>. On the other hand, as already mentioned, the courts should not try to solve the cases on their merits on that stage. They are to be convinced, though, that without taking measures to preserve certain evidence, it can be difficult or even impossible to hear the case on its merits.

#### (4) Application of measures preserving evidence on *ex parte* basis

The tendency to apply measures to preserve evidence without hearing the other party (*inaudita altera parte*) can be also observed in the Lithuanian practice on civil searches. On the basis of Article 81(5) of the Copyright Law, measures for preserving evidence may be applied without the defendant having been informed and heard, in particular where any delay is likely to cause irreparable harm to the applicant or where there is a demonstrable risk of evidence being destroyed. Such provision is also embodied in the industrial property laws of Lithuania<sup>669</sup>, also in Article 223(3) of the Lithuanian CCP.

By asking to apply measures *inaudita altera parte*, the requesting parties usually refer to prompt assurance of evidence that, especially in copyright infringement cases, can be easily destroyed or hidied by the opposing party. The reasoning of the na-

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666 As regards proving process of infringements related to product-by-process rights and proving, the reference should be made to the reversal of burden of proof rule, as discussed in supra § 5C.IV.

667 See *Bouvet*, Pre-trial measures: ex-parte searches and discoveries in IP cases (France) (*conference material*). On the other hand, as French practice shows, equipment is precisely described and samples of the products at issue are taken in patent infringement cases, as referred in *Véron*, “Saisie-Contrefaçon” an Overview: France, p. 138. It should be also noted that in some other, but EU jurisdictions, it is difficult to obtain requested provisional measures especially when the issue refers to validity of the registered IP rights which is to be settled at a trial, as observed in *Correa*, A Commentary on the TRIPS Agreement, pp. 434-435.

668 Such information has been received as anonymous information on the hotline maintained by BSA, as seen from the recent cases, e.g., Vilnius City 2nd Circuit Court as of 4 September 2006, *Microsoft Corporation, Adobe Systems Inc. vs. UAB “Šilo bitė”* (request denied), also Ruling of Kaunas City Circuit Court as of 28 May 2007, Civil Case No. 2-10071-151/2007, *Microsoft Corporation vs. UAB “Alaista”*.

669 See *refs.* to the Lithuanian industrial property legislation in supra Ft. 627 herein.

tional courts is mainly limited to the laconic references which support the requesting parties' arguments such as:

“<...> measures should be applied as there can be irreparable harm done to the right holders or the defendant, if notified, can take unfair means and hide the relevant evidence, therefore, evidence should be applied promptly without hearing the other party”<sup>670</sup>.

Where measures to preserve evidence are applied *inaudita altera parte*, the defendant must be so informed without delay after the application of the measures at the latest. Practically it means, as observed from the Lithuanian practice, that the alleged infringer is informed about the court ruling upon the enforcement of such ruling by the bailiff. A so-called “surprise motive” which is essential to *civil ex parte searches* allows preserving certain evidence, especially if they are expressed in immaterial form such as computer programs, from being destroyed.

Such practice can be compared with the practice in other jurisdictions, for example, France, Italy or Finland. In France, where *ex parte* procedure is the standard, defendants are informed upon performance of *saisie* only, “in order to maximize effect of surprise”<sup>671</sup>. In Italy, where measures to preserve evidence can be also applied on *ex parte* basis, the opposing party must be given a notice about a ruling without delay after the execution of the measures at the latest<sup>672</sup>. Although it is referred that *ex parte* measures are to be applied to professional infringers<sup>673</sup>, in Finland such measures are applied in most of IP infringement cases<sup>674</sup>.

According to Article of 81(6) of the Lithuanian Copyright Law, upon request of the defendant, including his request to be heard, the court may revoke the applied measures for preserving evidence. Moreover, the defendant is entitled to claim compensation for any injury caused by those measures, where the applied measures are revoked by the court, or where they lapse due to any act or omission by the person who applied for the application of such measures, or where a court's decision comes into force stipulating that there has been no infringement or threat of infringement of the protected rights<sup>675</sup>.

##### (5) Sufficiency of evidence and application of “samples” provision

By virtue of the provision embodied in Article 6(1) of the Enforcement Directive on “a reasonable sample of a substantial number of copies” of the protected subject-

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670 See, e.g., Ruling of Kaunas City Circuit Court as of 28 May 2007, Civil Case No. 2-10071-151/2007, *Microsoft Corporation vs. UAB “Alaista”*.

671 See *Véron*, “Saisie-Contrefaçon” an Overview: France, p. 136.

672 See more in *Bonadio*, Remedies and Sanctions for the Infringement of IPRs under EC Law, p. 323.

673 See *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 308.

674 See more information on application of precautionary measures in Finland in *Harenko et al.*, Expedited Remedies for the Protection of IP in Finland and the Baltic States, p. 31.

675 Note: no practice on revocation of measures preserving evidence or compensation regarding invalid *civil ex parte searches* in IP infringement cases have been reported in Lithuania so far.

matter<sup>676</sup>, the Lithuanian legislator established that a reasonable sample of a substantial number of products shall be considered by the court to constitute reasonable evidence of an infringement of IP rights in question. The provisions, which were newly adopted due to the implementation of the Directive, can be nowadays found in the national IP legislation of Lithuania<sup>677</sup>.

By referring to the aims of substantiation process in civil proceedings, also a principle of economy of civil proceedings<sup>678</sup>, Article 176(1) of the Lithuanian CCP leaves the legal procedural matter on sufficiency of evidence to discretion of the national courts. Therefore, how much evidence suffices during civil searches will depend on the specific circumstances of each case. Although no practice on application of “samples” provision in Lithuania has been reported<sup>679</sup>, it is presumed that in practice there should be as many samples taken as to form the certainty on the scope of infringing activities and their character (samples of infringing products, samples on description of process, devices, etc.), the defendant’s involvement into the infringing activities, the place, date and extent of the infringement. There can be also evidence, which is sorted on the basis of, for instance, its nature (e.g. nature of computer programs in use), provided to the court<sup>680</sup>.

Presumably, the local courts are still reluctant to apply “samples” provision because of judicial habits, i.e. that a substantiation process is usually to cover all IP rights allegedly infringing items. On the other hand, the reference to the conclusion, to which the Lithuanian Supreme Court arrived, can be made on this point. The court referred that:

“<...> in civil proceedings an issue regarding sufficiency of evidence is solved by the principle of balance of probabilities which means that there is no requirement to demonstrate absolute confidence by the court. In order to conclude about existence of certain facts, evidence is considered to be sufficient if it allows more to confirm such facts than deny them.”<sup>681</sup>

Such conclusion can be considered as the good basis not only for the application of “samples” provision, but also the institute on civil searches in general.

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676 Hereinafter – the “samples” provision; see also examination of the provision embodied in Art. 6 of the Directive in supra § 5A.II.2.a).

677 Art. 80(1) of the Copyright Law; Art. 41(2)(1) of the Patent Law; Art. 50(2)(1) of the Trademark Law, and Art. 47(2)(1) of the Design Law in Lithuania.

678 See also discussion on “fair and equitable procedures” in supra § 5C.III.

679 In 2005-2007 there were no requests regarding submission of “samples” of infringing IP products, as indicated by Vilnius District Court and the Court of Appeal in *Questionnaire Regarding Implementation of the Enforcement Directive in Lithuania in 2005-2008. Answers by Lithuanian Supreme Court, the Court of Appeal and the Vilnius District Court (unofficial publication)*.

680 Such court’s request was, for example, expressed, in Ruling of Vilnius City 2nd Circuit Court as of 4 September 2006, *Microsoft Corporation, Adobe Systems Inc. vs. UAB “Šilo bitė”*, under which it was refused to apply civil search due to the lack of at least sorted description of computer programs in use.

681 Such conclusion was made in Decision of 21 June 2006 by Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”* (unofficial translation of an excerpt from the ruling).

c) Enforcing court rulings on civil searches

Similarly to other jurisdictions like France or UK, where orders on *saisie contrefaçon* or *search orders* are enforced with the participation of the bailiff<sup>682</sup>, in Lithuania, once a court ruling on measures preserving evidence is adopted, the requesting party submits it to the chosen bailiff, who under the CPP is eligible to enforce it<sup>683</sup>. As a rule, a bailiff is not appointed by the court and is left to the discretion of the requesting party to choose. Besides general legal requirements that are to be borne in mind before asking the court to adopt a ruling on preservation of evidence, especially *inaudita altera parte*, a right holder is required to consider that the enforcement of such ruling generally involves a participation not only of a court bailiff, but also of a specialist or an expert who will be required to provide all necessary information about allegedly infringing goods and (or) materials, or implements, or samples that could be taken as sufficient evidence. A court bailiff selects a specialist or an expert with the help of the requesting party, accordingly.

The Lithuanian court practice shows that, as a rule, bailiffs invite specialists who help to check and describe items which allegedly infringe IP rights<sup>684</sup>. According to Article 177(2) of the Lithuanian CPP, written specialists' explanations are included in civil search protocols signed by the bailiff. Such explanations are considered as written evidentiary means accepted by the courts<sup>685</sup>. Although the current national civil search practice shows more frequent participation of specialists than experts, they can be also invited by the bailiffs. Expert opinions are likewise considered as evidentiary means under Article 177(2) of the Lithuanian CPP as well.

As a rule, court bailiffs invite specialists to participate in the process of identifying allegedly infringing products, e.g. checking and describing software products used by the end-user, relevant documents and equipment, e.g. license agreements, purchase documents, computer hard-disks, as well as seizing them, if necessary. Independence of specialists attending the performance of civil search should be noted on this point as well. In France, for instance, an expert who is an employee of the right holder (the plaintiff) is not considered being independent in copyright in-

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682 See Véron, “Saisie-Contrefaçon” an Overview: France, p. 137; also Mizaras, Copyright Law (Vol. II), p. 429.

683 According to Art. 585 of the Lithuanian CCP, a bailiff's requests to enforce court decisions, to provide the requested information and documents or to refrain from certain activities which can interfere into enforcement of court decisions are mandatory and are to be fulfilled within the term indicated by a bailiff. In cases of non-compliance with the bailiff's requests, a fine can be imposed. In cases of impediments to enforce courts decisions, a bailiff can request police assistance which attendance is required. On the other hand, a bailiff enforces court decisions within its given commission.

684 Notably, the provisions regarding “a specialist” is not directly embodied in the CPP, however, his or her written or oral explanations can be considered as evidence. The provisions regarding “a specialist” are laid down in the Criminal Code and the Code of Administrative Offences of Lithuania.

685 They are accepted even in cases when the ruling on civil search rendered by the first instance court is later overruled by the appellate court, as argued in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

fringement cases, however, such practice varies as far as trademark or patent infringement cases are concerned<sup>686</sup>. As follows from the civil search cases in Lithuania, specialists are employees of the right holder associations, the professional defence bodies, and the courts tend to accept evidence identified and described by such specialists. Such practice can be positively interpreted as, *first*, specialists are not employees of IP right holders and, *second*, they “have special knowledge in the particular protected subject-matter”<sup>687</sup>.

d) Requirement to submit a civil claim

The term to submit a civil claim on the merits of the case is to be determined by the court and, pursuant to Article 223 of the CCP, it cannot be longer than 14 days (from the submission of the copy of the court ruling to the requesting party). The recent court practice demonstrates that the local courts intend to apply maximum 14 days term which is in compliance with the term required by the Directive<sup>688</sup>. The requirement to submit a civil claim within the required term by the courts is significant in terms of necessitation of a certain scrutiny of any actions before applying civil searches as well as safeguards against unsubstantiated requests for application of them and assurance of the interests of the opposing party.

It should be furthermore added that, before the Directive has been legislatively implemented in Lithuania, following the requirements as set out in Article 148 (2) of the CCP, an obligation to pay an established stamp-duty was to be fulfilled while applying for measures for preserving evidence. Although the provisions on measures preserving evidence did not stipulate any stamp-duty, the requirement originated from the provisions on provisional measures, as they were actually applied in that time. It was established in the practice that the estimation of such amount could be approximate (which actually meant its fictitious nature): along with bank guarantees for reimbursement of possible damages to the opposing party an amount of stamp-duty was calculated on the basis of the lowest compensation for damages (losses) amount which could be adjudicated according to the then Copyright Law, *i.e.* 10 MLS<sup>689</sup>.

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686 As follows from the court practice in France, an employee of the plaintiff is not independent and is not allowed to assist the bailiff as well as an employee of the patent agent cannot attend the *saisie* because he is not subject to obligation of professional secrecy, whereas the trademark attorney is considered as independent from his client and can therefore assist the bailiff, as referred by *Bouvet*, Pre-trial measures: ex-parte searches and discoveries in IP cases (France) (*conference material*).

687 As argued in Ruling of 14 November 2007, Vilnius District Court, , Civil Case No. 2SA-140-492/2007, *Microsoft Corporation, Adobe Systems Inc., Corel Corporation vs. the individual company “Prepozicija”*.

688 Art. 7(3) of the Directive refers to “<...> the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer”.

689 See further discussion on this alternative method on calculation of damages under the national IP legislation in Lithuania in *infra* § 5F.I.1.c).



In case of submitting a civil claim after an application of measures to preserve evidence and enforcement of the court ruling on civil search, a plaintiff was obliged to pay the rest of the stamp-duty which was, as a general rule, calculated on the basis of the amount of the claim. Such practice has been changed together with the implementing amendments in the national IP laws which nowadays stipulate concrete provision on measures for preserving evidence the application of which is not imposed by any stamp duties<sup>690</sup>.

e) Protection of interests of the opposing party (alleged infringers)

By harmonizing national measures for preserving evidence, Article 7 of the Enforcement Directive was drafted in order to harmonize certain mechanisms or schemes which are relevant to balance the interests of right holders, on one hand, and the interests of the opposing party (alleged defendants), on the other. Considering that measures for preserving evidence as well as provisional measures are preventive remedies which can be applied by the courts even before starting to hear a civil case on its merits, it is important to note that aim of them is to secure certain *status quo*. On the other hand, it can happen that circumstances which were the basis to apply such measures disappear or it is proved that measures were overdue, invalid, etc.

Therefore, along with preventive enforcement remedies for IP right holder, certain safeguards for (alleged) defendants are provided in the Directive as well. They namely refer to adequate security and equivalent assurance intended to ensure compensation for damage suffered by the defendant because of invalid application of measures preserving evidence.

The implementing provisions almost literally transpose the provision embodied in Article 7(4) of the Directive, which was newly introduced into the Lithuanian IP legislation:

“Where the applied provisional measures or measures to preserve evidence are revoked by the court, or where they lapse due to any act or omission by the person who applied for the application of such measures, or where a court’s decision comes into force stipulating that there has been no infringement or threat of infringement of the rights protected under this Law, or the person who applied for the application of provisional measures or measures for preservation of evidence, does not institute, within the period determined by the court, proceedings, the defendant shall be entitled to claim compensation for any injury caused by those measures.”<sup>691</sup>

As previously mentioned, the prior-to-implementation Lithuanian IP legislation regulated application of provisional measures, however, omitted any provision regarding safeguards to the defence side. It was, though, briefly regulated by the Lithua-

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690 Such practice can be compared with the French *saisie contrefaçon* the application of which is not taxed by any stamp duties, see *Véron*, “Saisie-Contrefaçon” an Overview: France, p. 136.

691 Such provision can be found in Art. 81(7) of the Copyright Law, also in Art. 41(3)(7) of the Patent Law, Art. 50(3)(7) of the Trademark Law, and Art. 47(3)(7) of the Design Law of Lithuania.

nian CCP<sup>692</sup>. Despite that fact, it was considered as an important drawback in the procedure related to preservation of evidence<sup>693</sup>.

Nowadays, in order to assure that compensation for the defendant can be actually reimbursed, the courts, by virtue of Article 147(1) and (2), Articles 150(2) and 223(2) of the Lithuanian CCP, ask the requesting party to provide an adequate security or an equivalent assurance for compensation of damages that can be suffered by the defendant because of the application of measures preserving evidence. As a rule, a bank guarantee which can be provided together with a request to apply the measures suffices<sup>694</sup>. The courts, however, do not ask for an exact estimation of the amount of such bank guarantees, but rather accept the rough presumption of material damage that can be suffered. The law does not provide any recommendable amount either. In fact, it depends on the merits of the case, and it is not to be considered as an obstacle to enforcement. Such practice can be comparable with the well-established court practice on *saisie contrefaçon* in France where the courts can request of guarantees to ensure compensation<sup>695</sup>.

Besides the adequate security or bank guarantee which can be requested by the court, the defendant has a right to submit an appeal against the court ruling on *civil ex parte searches*, as embodied in both the CCP and the national IP legislation<sup>696</sup>. Such appeal can refer to (1) a court ruling, e.g. if it was rendered by infringing the law, especially when a ruling was adopted *inaudita altera parte*; also to the facts that (2) no civil claim was submitted within the indicated period by IP right holder who requested such measures, (3) the measures were revoked or became invalid due to activities or inaction of the requesting party, (4) there was no threat of infringement, etc. The opposing party can request for reimbursement of damage, if such appeal is met by the court. Such possibility is embodied in all IP legislation and implements the provision as set out in Article 7(4) of the Enforcement Directive.

Although not directly listed among the provisions, which are to secure the opposing party's interests, embodied in the CCP and the national IP legislation, for actual enforcement practice it is important to note that application of *civil (ex parte) searches* are to be performed considering: (i) a right to respect for his (her) home, by virtue of Article 8(1) of the ECHR, (ii) also protection of confidential information (trade secrets, know-how, etc.) that can be found in the companies while performing a civil search. What concerns a right to respect for his (her) home, it can be argued

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692 Art. 147 of the Lithuanian CCP (enforced as from 1 January 2003).

693 As also pointed out in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 48.

694 As observed in, e.g., Ruling of Kaunas City Circuit Court as of 28 June 2004, *Microsoft Corporation, Adobe Systems, Inc. vs. UAB "Autosabina"*.

695 Art. L.615-5 of the French Intellectual Property Code (amended by the Law 2007-1544 of 29 October 2007). The judge can ask for posting a bond, the specified amount of money, to guarantee possible damages to the defendant, as referred in *Véron*, "Saisie-Contrefaçon" an Overview: France, p. 137.

696 Provisions regarding the listed means of protection of interests of the opposing party are embodied in Arts. 147, 148, 150, 223, 224 of the CCP; see also *refs.* to articles in the national IP laws of Lithuania in *supra* Ft. 627 herein.

that measures for preserving evidence are in compliance with the ECHR, provided that those measures are effectively used to prevent other persons from using evidence which is to be preserved under the court order<sup>697</sup>.

The protection of confidential information can be accordingly secured by requiring an attending expert or specialist to sign an obligation regarding non-disclosure of confidential information which is detected during the performance of civil search and assured by the bailiff<sup>698</sup>. It should be however noted that, interpreting the implementing provisions in the national legislation, confidential information covers the attorney-client privilege as well<sup>699</sup>.

## II. *Right of information under the national legislation in view of Article 8 of the Directive*

### 1. Scope and content of requested information

Measures for preserving evidence serve to collect evidence which can support or deny existence of certain circumstances which are relevant to IP infringement cases in question. Right of information, as harmonized by Article 8(1) of the Enforcement Directive<sup>700</sup>, similarly pertains to such aims. This harmonized legal institute was relatively new to many EU countries, including the Baltic countries, especially as far as information to be provided by third persons was concerned.

Differently from the industrial property laws which did not embody the provisions on right of information before the implementation of the Enforcement Directive, the Lithuanian 2003 Copyright Law already stipulated such provision<sup>701</sup>. The information, which could be requested from infringers at that time, covered the origin of infringing copies, especially the identity (names and surnames) and addresses of producers, suppliers (distributors), clients, channels of distribution of infringing copies of works, amount of produced, submitted, received or ordered infringing copies only. Similar information could be requested according to the prior-to-implementation provisions of the Latvian and Estonian CCPs. Generally, the prior-to-implementation national provisions on right of information obviously required

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697 Such practice of proportionality between the interference of the applicant's right and other legitimate aims has been also established by, e.g., ECtHR, *Chappel vs. United Kingdom*, 30 March 1989, Case No. 17/1987/140/194. ECtHR has interpreted that the term "private home", in view of Art. 8 of the ECHR, also covers business premises.

698 In the French practice the issue of confidentiality is solved by asking the bailiff to put confidential documents, etc. in the sealed envelope which can be further submitted to the court, as referred in *Véron*, "Saisie-Contrefaçon" an Overview: France, p. 138.

699 It can be also compared with the German practice on the issue, as referred in *Schuster*, The Patent Law Wilfulness Game and Damage Awards, pp. 129-130.

700 See examination of Art. 8 of the Enforcement Directive in supra § 5A.II.1.a).

701 The right of information, however, was not established in the Lithuanian 1999 Copyright Law. See also *refs.* to prior-to-implementation of the Directive national legislation in supra § 5B.I.1.a)(1).