

Kristina Janušauskaitė

# Implementation of the EU Enforcement Directive in the Baltic Countries

Experience in View of the Development of Protection of  
Intellectual Property Rights



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**MIPLC**

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Volume 7

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*To my parents*



## Preface

This monograph was published on the basis of the dissertation which had been submitted to the Ludwig-Maximilians-Universität (Munich) in winter semester 2009/2010. The dissertation was devoted to comprehensive collection and examination of the legislation and practice of the Baltic countries regarding enforcement of intellectual property rights. As it can already be seen from the title of the monograph, the analysis of the implementation of the provisions of the EU Enforcement Directive in the Baltic countries was made considering relevant historical, social and economic aspects of the Baltic region. Therefore, such research can be interesting not only in terms of relevant legal issues, it also has practical dimension which can be useful for scholars as well as practitioners.

The author of the monograph first of all expresses her thanks to the supervisor of her dissertation Prof. Dr. Dres. h.c. Joseph Straus for his constructive guidance and his full support while doing the research on the topic and writing the dissertation. The author also thanks Prof. Dr. Michael Lehmann for his revision of the dissertation and positive evaluation as well as Prof. Dr. Vytautas Mizaras for his appreciable suggestions which enabled the dissertation to be more synchronised with the local actualities. Special thanks go to the MIPLC whose staff were extremely helpful during the author's doctoral studies in Munich, also to the MIPLC faculty members, especially to Chief Judge Rader R. Randall, Prof. Martin Adelman, Prof. Dr. Heinz Goddar, Prof. Dr. Thomas Dreier, all dear friends and colleagues from all over the world as well as the author's family whose help and full support was constantly felt.

Vilnius, August 2010

*Kristina Janušauskaitė*





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## § 1 Abbreviations

AB	akcinė bendrovė ( <i>lt.</i> ) (Public limited liability company)
AGATA	Lithuanian Neighbouring Rights Association
AKKA/LAA	Latvia's Copyright Collection Society
approx.	approximately
Art(s).	article(s)
AS	aktsiaseļts ( <i>est.</i> ) (Public limited liability company)
ATRIP	International Association for the Advancement of Teaching and Research in Intellectual Property
BioMed	biomedical
BSA	Business Software Alliance
BĶ	bendra ģimonė ( <i>lt.</i> ) (Joint venture)
BT	Bundestag
ca	circa
CCP(s)	Code(s) of Civil Procedure
CD(s)	compact disk(s)
COM	Commission (EU)
Corp.	Corporation
Cri	Computer Law Review International (former: Computer und Recht International)
Dir.	Directive
DRM	digital rights management
Drucks.	Drucksache
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
Ed(s).	edition(s)
ed.	editor(s)
E.I.P.R.	European Intellectual Property Review
<i>e.g.</i>	exempli gratia
EG	Europäische Gemeinschaften
EPC	European Patent Convention
EPLA	European Patent Litigation Agreement
EPO	European Patent Organisation
EST	Estonia
est.	Estonian
<i>etc.</i>	et cetera
<i>et al.</i>	et alii

et seq.	et sequens
EU	European Union
“EU” piracy	“end-user” piracy
EV	English version
ff	fortissimo
FDI	Foreign Direct Investment
FP6	Sixth Framework Programme (EU)
Ft(s).	footnote(s)
ftp (server)	File Transfer Protocol (server)
GATS	General Agreement on Trade in Services
GATT	General Agreement of Tariffs and Trade
GDP	Gross domestic product
GERD	Gross domestic expenditure on R&D
ger.	German
GESAC	European Grouping of Societies of Authors and Composers
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil
“HDL” piracy	“hard-disk loader“ piracy
Hrsg.	Herausgeber
<i>Ibid</i>	ibidem
ICT	information communication technologies
<i>Id.</i>	identical
IDC	International Data Corporation
<i>i.e.</i>	id est
IFPI	International Federation of the Phonographic Industry
IIC	International Review of Industrial Property and Copyright Law
IIPA	International Intellectual Property Association
Inc.	incorporated
IP	Intellectual Property
IPR(s)	intellectual property right(s)
IT	information technologies
ISP(s)	Internet Service Provider(s)
LATGA-A	Agency of Lithuanian Copyright Protection Association
L.J.	Legal Journal
LT	Lithuania
lt.	Lithuanian
Ltd.	limited (company)

LV	Latvia
lv.	Latvian
MLS	Minimum Living Standard
MPA	Motion Picture Association
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
No.	number
OHIM	Office of Harmonization for the Internal Market
OJ L	Official Journal Legislation (EU)
OV	original version
P./pp.	page, pages
Para	paragraph
PCT	Patent Cooperation Treaty
p.m.a.	post mortem auctoris
P2P	peer to peer
PHARE	Poland and Hungary; Aid for Economic Restructuring (EU Programme)
Ref(s).	reference(s)
rus.	Russian
R&D	Research and Development
TBP	Tartu Biotechnology Park
TM	trademark
TPM(s)	technical protection measure(s)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UAB	uzdaroji akcinē bendrovē ( <i>lt.</i> ) (Private limited liability company)
UCC	Universal Copyright Convention
UNO	United Nations Organization
UK	United Kingdom
USD	United States Dollar
USSR	Union of the Soviet Socialistic Republics
USTR	United States Trade Representative
Sec(s).	Section(s)
SSR	Soviet Socialistic Republic

VAAP	Vsesojuznaja Agentura Avtorskich Prav (Soviet Authors' Rights Agency ( <i>rus.</i> ))
VAT	value added tax
Vol.	volume
<i>vs.</i>	versus
WB	World Bank
WW	World War
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZUM	Zeitschrift für Urheber- und Medienrecht, früher Film und Recht

## § 2 Introduction

### A. *Subject-matter and objectives of the research*

Since the beginning of the last decade of the past century, when the three Baltic countries – Estonia, Latvia and Lithuania – joined the international community as sovereign states<sup>1</sup>, they have been facing not only rapid economic changes and demanding legal reforms, including those related to the creation of a full system of substantial intellectual property legislation and the establishment of a functioning legal enforcement infrastructure due to *acquis communautaire*, but have also experienced a continuous social and cultural transformation, which reflected the ‘inherited’ Soviet mentality through discrepancies in legislative processes and solutions which are related to the actual enforcement of intellectual property rights<sup>2</sup>, the development of innovation markets, and the spreading of creative incentives in the three countries.

It is believed that certain continuing national legislative improvements, namely, those concerning enforcement of intellectual property rights by implementing, *inter alia*, the EU Enforcement Directive<sup>3</sup>, cannot be pursued without considering historical, social, economic, and cultural aspects of the Baltic countries. This is due to the fact that the contemporary East-Baltic region<sup>4</sup>, which can be seen as a particular sub-region of the European Union, mirrors specific outcomes of complex historical processes which absorbed legal traditions of their neighbouring countries and other

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1 Lithuania proclaimed its renewed independence on 11 March, 1990, the first in the Soviet Union. Estonia regained its independence on 20 August, 1991, and Latvia on 21 August, 1991. All three countries joined the UNO on 17 September, 1991.

2 As a matter of methodology, a term ‘enforcement’ (*Rechtsdurchsetzung, Ausübung*, ger.), as used in the following text, covers means and procedures aimed to recognition of rights, prohibition of actions which infringe or may actually infringe or damage the rights, compensation for property damage as well as for non-pecuniary damage, etc.. However, it does not cover economic, political, organizational and other means which essentially condition enforcement of rights (in that case a term ‘protection’ could be used) and which are separately analysed in this study. The more elaborated discussion on the terminology to be used can be found in *Mizaras, Civil Remedies for Infringement of Copyright*, pp. 27-28, with a summary in English on pp. 369-370.

3 Directive 2004/48/EC of the European Parliament and of the Council of 29 April, 2004, on the Enforcement of Intellectual Property Rights, OJ L 195, 2.6.2004, pp. 16-25, to be implemented by 29 April, 2006 (Art. 20, Dir.) (hereinafter – the “*Enforcement Directive*”, or the “*Directive*”).

4 The term ‘*East-Baltic region*’, as used herein, has recourse to a comprehensive monograph on a geopolitical sketch of the Baltic countries, in which grand geopolitical schemes and theories are considered. See more in *Laurinavičius et al., Aspects of Geopolitics of the Baltic Countries*, p. 23 et seq., with the English summary available on pp. 405-410. The Baltic countries can be also so-called countries in transition under the TRIPS Agreement; following the term as used in, e.g., *Straus, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement*, p. 807.

western states, by showing rudiments of some unique aspects of their legal systems. The choice to deploy the analysis covering the Baltic countries is reasoned, *first*, by the fact that those countries are considered to be as a specific sub-region of the European Union which represents similar, if not sometimes the same, historical and contemporary lines in view of IP legislation and practice, and, *second*, they also expose themselves as an *ad hoc* coordinating group within the Central and Eastern European countries<sup>5</sup> in the process of adoption of the IP laws as well as in the process of integration and accession into the EU. Notably, Lithuania is taken as the core country of the further analysis, whereas Latvia and Estonia serve as example countries in certain areas which are the most relevant for comparison in order to explore the enforcement related issues due to the implementation of the Enforcement Directive<sup>6</sup>.

By virtue of historical circumstances, the Baltic countries constantly experience social tension, which is mainly influenced by their “cross-road” geographical position and certain dynamic integration processes into the European Community as well as into the so-called western community in general. Another influencing factor – the strained existence of intellectual property rights during the Soviet Union occupation<sup>7</sup> – should be distinguished as well. Despite the fact that the East-Baltic demonstrated the rapid growth of economics and a favourable business environment in the region<sup>8</sup>, one could still notice that some ingrained historical, social, and cultural factors did not allow the use of benefits of this growth in specific areas which were important for development of certain Baltic market fields, namely, IP and R&D markets, especially by utilizing intellectual products, revitalizing local forces in the field of science and innovation, and creating effective investment strategies.

The specific features of the market economy in the Baltic region have an impact on the enforcement of intellectual property rights in view of the success and failure of genuine intellectual property projects in the Baltic countries. Moreover, the enhancement of the protection of intellectual property rights is stipulated by the increasing significance of those rights in the Baltic region economic and cultural industry which results in the necessity to protect them in an effective and efficient manner<sup>9</sup>. Strategies of investment and IP application depend as much on effective enforcement<sup>10</sup> as on a coherent body of substantial law<sup>11</sup>, and, needless to say, en-

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5 This position is often undertaken by other IP scholars while exploring IPRs in the Central and Eastern Europe, see *von Lewinski*, Copyright in Central and Eastern Europe, p. 40.

6 *Note*: this is also due to differences among the national languages of the Baltic countries as well as limited access to the relevant sources of information in Latvia and Estonia.

7 The Baltic countries were occupied and annexed by the Soviet Union in 1940/1941.

8 *E.g.*, all three Baltic countries were listed among the top 30 economies in the world in terms of the report’s ease-of-doing-business index, according to World Bank information of 2008 (covering the period from April 2007 to June 2008), as indicated in *Doing Business 2009 Report*.

9 As indicated in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 369.

10 Art. 41(1) of the TRIPS Agreement provides that “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit *effective action* against any act of infringement of intellectual property rights covered by this Agreement,

enforcement of rights is generally bound with substantial rights, meaning that enforcement is essential to fully materialize one's rights<sup>12</sup>.

The national legislative provisions on IP rights enforcement have been improved due to the accession into the EU<sup>13</sup> and are being constantly revised after considering deficiencies dictated by the actual implementation of IP rights, national court practises, and the objectives of the Enforcement Directive, which was to stipulate a high, equivalent, and homogenous level of protection of IP rights<sup>14</sup>. The Enforcement Directive as a strong and comprehensive EU-wide legal instrument has been designed to eliminate inconsistencies and weaknesses in the national laws on intellectual property rights protection and measures, procedures, and remedies and ensuring the effective enforcement to avoid the disparities between the intellectual property enforcement systems of the Member States<sup>15</sup>.

The objectives embodied in the Directive are extremely relevant and of a high practical importance to the Baltic countries which, as previously mentioned, often faced the stepped-up processes related to the achievement of more effective protection of intellectual property rights, and which still suffer from actual suppressive pragmatic factors, e.g., piracy of IP products<sup>16</sup>, often reflected through their economic, legal, and political environment. Although many legal achievements in the field of IP anti-piracy campaigns were reported<sup>17</sup>, the changing forms of infringements of IP rights through the growth of internet piracy makes the enforcement provisions, both the legislative solutions and, especially, their practical application, particularly important for the Baltic region. The introduction of EU-wide legal measures that are supposed to contribute effectively to a reduction of intellectual property rights infringements and are aimed to ensure, *inter alia*, an equivalent level of IP enforcement in the Internal Market<sup>18</sup>, also raises the question of whether those objectives are achievable in the Baltic market.

On the other hand, one could also question whether an existing complex of factors in a certain EU region, for example, the East-Baltic region, encourages viewing

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including *expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements*. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse." 'Effective' meaning the legal instrument which should be instrumental to the pursued end, as interpreted in *Correa*, A Commentary on the TRIPS Agreement, p. 410.

11 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 875.

12 See *Mizaras*, Civil Remedies for Infringement of Copyright, p. 27.

13 The Baltic countries enjoy the status of EU Member States since 1 May, 2004 together with Slovenia, Slovakia, the Czech Republic, Poland, Malta, Cyprus, and Hungary.

14 See Recital 10, Dir.

15 See Recitals 8 and 9, Dir.

16 E.g., the software piracy rate in Estonia was 51 %, in Latvia and Lithuania 56 % in 2007, as indicated in *BSA/IDC 2007 Global Software Piracy Study*.

17 All three Baltic countries have been removed from the so-called "Watch List" in USTR Special 301 Report (Lithuania was removed in 2008 only, as observed in *2008 Special 301 Report*). However, some enforcement-related issues in the corresponding jurisdictions can be still observed..

18 See Recital 8, Dir.



the implementation of the very provisions not only through considering and analysing the relevant background and structure of the Directive<sup>19</sup>, its historical perspective<sup>20</sup>, its legal pertinence to other international standards set in the TRIPS Agreement<sup>21</sup> and other EU directives on IP protection, but also through contemplating on, *first*, the geopolitical and geo-strategical position of the East Baltic, which certainly helps to conceptualize certain social and economic processes important to the development of IP in the Baltic countries and their IP markets in general, and, *second*, on the virtual local IP “landscape” starting with an analysis of some important aspects of local IP research, teaching, industry, and innovation, as well as with genuine local innovative projects.

The framing of a more desirable and effective IP rights enforcement model, which can support local IP research, innovation, and competitiveness in the Baltic market, should certainly reflect an application of the common standards embodied in the TRIPS Agreement, in order to determine whether the Directive-created measures are in compliance with the international standards of IP protection and, moreover, should analyse a perspective of other legal instruments and issues, including, but not limited to, competitiveness in the European Community, the proper functioning of the Internal Market, and industry actions taken “in the fight against piracy and counterfeiting<sup>22</sup>”.

The assumption would follow, though, that such framing would be implemented by bringing special attention to the historical retrospectives of the Baltic countries, by responding to the question of which IP legal tradition, if any, the Eastern Baltic nations possess, and what circumstances influenced the contemporary IP enforcement systems which exist in Estonia, Latvia, and Lithuania, in order to measure the factors which are more difficult to determine than the corresponding quality of the existing legislation<sup>23</sup> on the issue.

Needless to say, an efficient enforcement system relies on the competence of the authorities involved (judges, patent attorneys, attorneys-at-law, specialists, experts, bailiffs, etc.), who are one of the primary sources in ensuring the quality of litigation

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19 It is to be noted that the Enforcement Directive is a *horizontal directive*, the scope of application of which covers *all* IP rights. The Enforcement Directive partially reflects what has already been embodied in the TRIPS Agreement, thus the question could also be raised whether there was a real necessity to have such an EU-wide legal instrument regarding an enforcement of intellectual property rights in general. See discussion in *Dreier*, TRIPS and Enforcement of Intellectual Property Rights, pp. 268-277; also *Straus*, TRIPs, TRIPs-plus oder TRIPs-minus, pp. 47-57.

20 The Commission’s Proposal for the Directive as well as the proceedings due to its adoption are meant here, see further discussion in *infra* § 5A.I.1.

21 Part III of the TRIPS Agreement specifically refers to enforcement of intellectual property rights, the reference to which is made by Recital 5 of the Enforcement Directive while directing to “<...> *common standards applicable at the international level* <...>”, on international implications and implications of TRIPS for national law. See also discussion in *Dreier*, TRIPS and Enforcement of Intellectual Property Rights, pp. 268-277.

22 See Recital 29, Dir.

23 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 875.

in cases of IP rights infringements<sup>24</sup>. Apart from the analysis of the actual situation regarding IP enforcement infrastructure in the Baltic countries, the analysis on a possible establishment of a common judiciary in the framework of Community rights system<sup>25</sup> could be undertaken from the view of the named sub-region.

By considering a dimension of a complex of the local cultural, social, and economic elements, the dynamic spread of new technologies, the growing usage of ‘knowledge-based’ products, the substantial rapid changes in the national IP enforcement infrastructure system of the Post-Soviet legal system<sup>26</sup>, the actual enforcement system of intellectual property rights in the Baltic countries could implicitly mirror the search for more efficient ways of complying with the western standards after the Soviet Union period, by reflecting the “IP mentality” issues as well as conflicts of local and foreign incentives to pursue certain enforcement processes. However, certain assumptions and improvements in relation to regional intellectual property rights enforcement issues are to be viewed in terms of mentioned innovation, by attempting to anticipate whether strengthening measures and procedures could have influence on low-level enforcement and whether more temperate enforcement provisions could have influence on high-level enforcement of rights in the Baltic countries in view of certain psychological aspects of the compliance with enforcement-related provisions. It is believed that such an approach could be discussed by pointing to various enforcement-related solutions in other countries, such as Germany, France, Italy, and the UK, and by tentatively drawing a specific historical line which covers adoption of national legislation processes reflecting some “*small vs. big*” processes in the Baltic region and in the EU as well.

## **B. Structure of this study**

With a consideration of further analysis of the very provisions of the Enforcement Directive and their actual implementation and application in the national court practice of the Baltic countries, § 3A of the thesis focuses on specificity of the geopolitical situation of the Baltic countries. Further, § 3B covers a history of IP legislation in the Baltic region by covering two main periods of such legislation, *i.e.*, before and after the Baltic countries’ accession into the European Union, by comprising the IP rights which are mainly practically relevant for the region, *i.e.* copyright, trademarks, designs and patents, and by taking the specificity of the geopolitical situation of the Baltic countries and its impact on national legislation, including IP legislation, into account. The historical overview, which mainly covers the then legislative pro-

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24 *Ibid*, pp. 884-923.

25 As established under Council Regulation 40/94/EC on Community Trade Marks, Council Regulation 6/2002/EC on Community Designs. Also see *Kur*, New Framework for IPR – Horizontal Issues, p. 3; *Drexler et al.*, Proposal for a Directive – A First Statement, p. 534.

26 *E.g.*, the courts competent to hear IPRs infringement cases and administrative institutions competent to enforce intellectual property rights, which are closely related to effectiveness of the implementation of the IP enforcement-related provisions, are meant herein.

visions and some unique empirical data, is followed by § 3C, which describes the current regulatory and institutional framework for enforcement in the Baltic countries which is deemed to be relevant to the further analysis of the IP enforcement related provisions.

It is believed that the analysis of an actual implementation of the provisions of the Enforcement Directive, especially those related to industrial property rights, cannot be fully accomplished without considering the economic development in the Baltic market, some social and economic factors, in particular, those related to the IP and R&D sector, important to the enforcement of IPRs in the Baltic states. Those considerations could provide a possibility of depicting some aspects of a local creative and innovative landscape as well as helping to better explore the national legislative solutions and court practice in question. Therefore, § 4 of the study describes some aspects of local research, industry and innovation in the light of a level of government regulation and support in the IP field, IP teaching, scientific research, and the creation of innovative products and their practical applications.

Furthermore, by considering the legal IP context of the Baltic countries as well as important R&D, IP industry and teaching factors which are described in the previous chapters of the study, § 5 *first briefly reviews* the objectives, the scope of application, and the substantial provisions of the Enforcement Directive in view of the TRIPS Agreement and, *second*, describes general procedural IP litigation principles under the national legislation, examines the specific and newly enacted IP enforcement legal institutions which are deemed to be important for the Baltic region.

As a result, the Enforcement Directive overview on its substantial provisions, the catalogue of the enforcement measures and remedies focusing on “grandfather” provisions and novelties, and procedural provisions is followed by an analysis of the national procedural, as well as substantive, laws of the Baltic countries, *i.e.* the provisions on persons having a right to claim their IP rights’ protection (*locus standi*), collection of evidence, actual applicability of the measures for preserving evidence in intellectual property rights infringement cases (in particular actualities on *civil (ex parte) searches* in the court practise of Lithuania in comparison with other European jurisdictions), provisional and precautionary measures, remedies, namely, damages, alternative measures, publication of judgments and their preventive role. Judicial tendencies and disparities concerning the listed subject-matters, also some aspects of correlation among civil, administrative, and criminal litigation are likewise examined in order to estimate various implementation of the Enforcement Directive outcomes, such as influence on substantive intellectual property laws of the Baltic

countries<sup>27</sup>, the creation of a favourable environment for local research and innovation, and the best enforcement model for the Baltic countries to follow<sup>28</sup>.

The analysis on the civil enforcement of IP rights in the Baltic countries regarding their historical, social, economic, and cultural factors, and economic and pragmatic reasons<sup>29</sup>, without which anticipation of future developments would be impossible, have an immediate connection with the intent to follow-up with certain conclusions, observations and suggestions. Considering the declared aim to implement stronger civil enforcement rules as pursued by the Directive, also further legislative ambitions in the field of harmonization of criminal enforcement measures within the EU<sup>30</sup> (which are not analysed in depth in this study, since they could be the subject-matter of a separate analysis), the conclusions and observations which are listed and described in the last part of the thesis, § 6, generally aim at the establishment of a more effective intellectual property rights enforcement model. Such model can be valued in terms of civil measures and remedies and its actual application by highlighting the specificity of the Baltic markets, their supplies and demands, their legal traditions of protection of IP rights, so that the idea and objectives of the TRIPS Agreement and the Enforcement Directive as well as local incentives to innovate and create grows not only in ambition, but also in reality<sup>31</sup>.

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- 27 As mentioned, the actual application of the measures and procedures could be even relevant to some future changes outside the intellectual property field, e.g., company and labour law, and contract and privacy law. Such issues, though, can be considered as the subject-matter of an additional study and analysis. See more in *Kur*, New Framework for IPR – Horizontal Issues, pp. 1-4.
- 28 E.g., on this point the question could be raised which society and legal traditions the Baltic countries resemble most – Scandinavian, German, or Russian, by considering which society type the Baltic countries represent – ‘industrial’ or ‘consumer’ in view of the economic and social landscape analyzed.
- 29 This view has been taken into consideration by some other scholars, by mentioning that the socio-economic analysis has an inherent value while analysing the context of enforcement of IPRs. The remarks on this view can be found in, e.g., *Kur*, New Framework for IPR – Horizontal Issues, pp. 13-14.
- 30 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission): COM (2006) 168 final, April 26, 2006 is meant here; see also references and discussion in IP Watch, *EU Seeks Stronger IP Enforcement at Every Level (2007)*.
- 31 As it is provided, “<...> without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished”, see Recital 3, Dir.



### § 3 Protection of IP rights in the Baltic countries: retrospective observations and the current infrastructure

#### A. *Specificity of the geopolitical situation of the Baltic countries: the general context*

It is hardly possible to conceptualize the legal intellectual property traditions of the Baltic countries and to conceive of their IP infrastructure and the realities of an actual IP enforcement without a brief reference to the geopolitical situation of the East-Baltic. It is believed that a brief overview of geopolitics with a further link to the analysis of IP infrastructure and certain aspects of IPR enforcement help to assess the current situation of the Baltic states in the IP international arena. Despite the fact that nowadays geographical barriers and the deployment of natural resources have less influence on the power of the states, the geography of the Baltic states remains important due to an uneven distribution of creative works and inventions, various capital flows which influence their living standards and types of industry.

As rightly pointed out by some local scholars analysing the aspects of the Baltic countries from the perspective of political science<sup>32</sup>, industrial, social, and intellectual capital, certain investments in innovations, along with a creation of an effectively functioning legal system to promote and protect those innovations form a favourable infrastructure in which business can develop.

The contemporary Baltic countries are the result of their complex historical development<sup>33</sup>, while at the same time being a particular challenge to Russia which, throughout the existence of the Baltic countries, has been involved in the politics of the western world and its democratic processes<sup>34</sup>. The East-Baltic lands constantly faced external unfavourable situations which did not allow them to form stable political institutions along with a coherent legal infrastructure, including an IP protection infrastructure. Moreover, due to lack of political traditions, in the Baltic countries politics was mainly based on ethnic and linguistic ties and the geopolitical research supports the statement that the Baltic countries were and are dependant on the great powers, which predisposed them to the traditional balance of power and interests in all fields<sup>35</sup>.

One may agree with the statement that the East-Baltic is a sub-region which formed through a constant circumvention of a collision of two main geopolitical powers – Russia (and during one historical period – the Soviet Union) and Germa-

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32 See *Laurinavičius et al.*, Aspects of Geopolitics of the Baltic Countries, p. 60.

33 More about formation and development of the Baltic countries see in *Meissner (Hrsg.)*, Die Baltischen Nationen, p. 11 et seq.

34 See *Laurinavičius et al.*, Aspects of Geopolitics of the Baltic Countries, pp. 24, 25.

35 See *Ibid.*, Aspects of Geopolitics of the Baltic Countries, p. 407.

ny<sup>36</sup>. The similarities of the historical circumstances (especially because of the experience of the pre-war independence<sup>37</sup>), the geographical characteristics, the existing problems and the present foreign policy objectives of the Baltic countries allow us to refer to the so-called “Baltic identity” or the “Baltic region”. However, such reference immediately faces criticism based on the fact that three countries are inherently different in a few aspects. Linguistically and geographically Estonia belongs to the group of Northern countries, whereas Lithuania belongs to the country group of Central Europe. Only Latvia’s characteristics can support the idea of the Baltic region with its specific identity<sup>38</sup>.

Importantly, in the last decade of the twentieth century, as a response to the political objectives of the aforementioned countries, the Baltic states tried to shape their political and military landscape into an institutionalized sub-region. However, such intentions did not succeed because of external forces as well as too many differences among the Baltic countries themselves in their geopolitical orientation. The Baltic countries are also sometimes referred to as being a region presenting one legal tradition, but such statements can be reasonably denied because of the mentioned language and religion differences as well as the different historical paths and political orientation aspects of the three countries<sup>39</sup>.

On the other hand, it is often argued that, mainly due to their accession into the EU and other international organizations and structures, also due to their “intricate geo-historical fate”<sup>40</sup> Estonia, Latvia, and Lithuania are considered to comprise a specific European sub-region<sup>41</sup>, and a special and unique geopolitical and geo-economic phenomenon<sup>42</sup>, which has been nowadays strongly influenced by its geographical situation as well as by external forces from superpowers and from its big neighbours, particularly Russia<sup>43</sup>. The geopolitical position of the East-Baltic and, as referred, its lack of political tradition and well-defined civilization potential<sup>44</sup> could

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36 Interestingly, in comparison with Lithuanians, both Latvians and Estonians absorbed more material and immaterial values from German culture as well as introduced a so-called ‘city culture’ and related intellectual and economic potential in their social elements. See more *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, p. 87.

37 As referred in *Elsuwege*, *State Continuity and its Consequences: The Case of the Baltic States*, p. 381.

38 See *Ahola et al.*, *Baltic Region. Conflicts and Cooperation*, pp. 59-60. *Note*: Lithuania and Latvia belongs to the Baltic language group, whereas Estonian belongs to the Finno-Ugric one. Lithuanian society is mostly a catholic one; Estonian and Latvian societies mainly follow Protestantism.

39 Additional historical discussion can be found in *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, pp. 3-18.

40 See *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, p. 407.

41 It is argued that the formation of the East-Baltic region was forced from outside, considering the fact that the Baltic countries had their specific geopolitical orientation and gravitation. See *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, p. 10.

42 See *Ibid*, p. 23; also *Elsuwege*, *State Continuity and its Consequences: The Case of the Baltic States*, p. 381.

43 See *Meissner (Hrsg.)*, *Die Baltischen Nationen*, pp. 11–44.

44 See *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, pp. 24-25.

be reflected in the processes related to the formation of a local IP system and, consequently, the tradition of IP rights protection and enforcement of such rights schemes as well. The geopolitical and geo-strategical position of the so-called East-Baltic is and often plays the role of gatekeeper to the Western countries.

While analysing the social and economic structure of the Baltic countries with the aim to understand the processes in relation to the IP legislation, environment and the enforcement of IP rights, it is to be considered that nowadays the Baltic countries are deemed to be more oriented to the so-called “maritime states”<sup>45</sup> with a strong “Nordic dimension”<sup>46</sup> with a tendency to export their own creations and innovations rather than to utilize them in the local markets. The orientation of their citizens, however, is ambivalent, especially taking the “heritage” of the Soviet era into account. Moreover, according to historical, cultural and political analyses, Lithuania, Latvia, and Estonia belong to the Western Latin civilization; though, from a geo-economic point of view, they belong to peripheral lands<sup>47</sup>. This is to be considered by analysing the processes of, *inter alia*, the implementation of certain legal models as far as IP rights and their enforcement in the Baltic region are concerned.

## **B. Historical overview of the protection of IP rights in the Baltic countries**

The current legal IP infrastructure in the Baltic countries reflects a unique period of IP development comprising legislative improvements regarding the enforcement of those rights as well as their actual application. It is sometimes argued that its past aspects have no need to be revised, although its historical overview is deemed to be important, as it allows scholars, practitioners, and local and foreign IP industry “players” to better understand the birth and growth of a regional IP protection system and to evaluate actual applications of the enforcement provisions related to IP rights.

In the Baltic countries the development of the national intellectual property systems started during the period of the so-called first independent republics (1918 – 1940), and later was strained during the Soviet occupation beginning in 1940/1941. Only 50 years later, when the Baltic countries regained their second independence in 1990/1991<sup>48</sup>, were those systems re-established. In the beginning of the twentieth century, the formation of intellectual property systems in the Baltic countries was mainly influenced by growing relationships with other foreign states as well as by

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45 It is more essential to Latvia and Estonia, though, as referred in *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, p. 71.

46 As argued by the monographers on the geo-strategic position of the Baltic and Scandinavian countries, the geo-strategic position of the Nordic countries, the cooperation with them is in general very important to all Baltic states, see, e.g., *Daniliauskas et al.*, *Geo-strategic Importance of the Nordic Countries to Lithuania*, pp. 113-115.

47 See *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, pp. 65-66.

48 Note: hereinafter the period from 1918 to 1940/1941 is called “the first independence” and the period after 1990/1991 “the second independence”.



the so-called global IP societies<sup>49</sup>. They were therefore influenced by international obligations<sup>50</sup>, and at the same time reflected the developing national economies in the Baltic region.

The brief historical overview of intellectual property legislation<sup>51</sup> may begin with the beginning of the 20th century for the following reasons: *first*, the historical, social, and political contexts of the Baltic countries at the end of the 18th century and, especially, in 1795, when most of the Baltic region became part of the Russian Empire after the third division of the Austrian-Hungarian Empire<sup>52</sup>, do not substantiate a discussion on national IP-related regulation before the so-called first independence in 1918/1919. *Second*, the twenty two-year period before World War II, when the Baltic States were developing as sovereign modern states with rudimentary modern IP laws (although the sources of the laws are quite modest), is the most important in terms of the formation of an intellectual property notion, its definition in national legal documents, and the creation of an IP protection system and an enforcement infrastructure.

Although the historical overview is mainly limited to the description of the existing national legislation and some data in relation to the rights registered during the analysed historical periods, it is considered to be quite illustrative for a depiction of an overall context, which is substantial for the further analysis of contemporary legislative provisions, namely, the provisions on the enforcement of IP rights.

## I. *Before World War II (1918 – 1940): the origins of modern national IP legislation*

### 1. Industrial property legislation

Before World War II, protection of intellectual property in the Baltic countries was established through contemporary civil laws which generally reflected czarist Russian civil tradition<sup>53</sup> and whose historical value provides the possibility to use past

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49 See *Pisuke*, Estonia: Copyright and Related Rights, p. 98.

50 Notably, the Baltic countries became members of the most important international treaties on IP rights valid at that time during their first independence period. See also the overview in *infra* § 3B.III.2 in relation to the adherence to the international treaties during the period 1918/1919-1940/1941.

51 The overview is mainly focused on the national IP legislation, since the sources of national court practice during the first independence are very modest.

52 *E.g.*, in 1795 the joint Lithuanian-Polish state was dissolved by the third division of the Commonwealth, which forfeited its lands to Russia, Prussia, and Austria. Over 90 % of Lithuania was incorporated into the Russian Empire and the remainder into Prussia. The territories of Latvia (from 1795) and Estonia (from 1710) also became parts of the Russian Empire after the long-term dominance of Poland and Sweden, and partially Russia, in their territories. See also more in *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, p. 7.

53 Although, *e.g.* Lithuania had old traditions of Civil Law codification, the national codified legal system, also comprising IPRs, was not created during the Interwar period in Lithuania. See *Mikelėnas*, *Reform of Civil Law in Lithuania*, p. 51. The 1864 codified civil laws which

experience in a perspective of implementation of new IP enforcement rules by understanding the context of legal IP traditions in the East-Baltic. Generally, during the entire first independence period, the Baltic states were creating and improving their legal systems. During the same period similar law creation and development processes could be also seen in other countries, such as Finland, Poland, or the Weimar Republic. However, unlike these countries, these processes in the Baltic states had been ended by the occupation by the Soviet Union in 1940/1941, which deleted them from the “map” of the Roman-German legal tradition<sup>54</sup>.

During the Russian occupation from 1795 to 1917, industrial property rights in Lithuania<sup>55</sup> were regulated according to the 1812 Manifest of Privileges to Inventions and Discoveries of Art and Handicraft, the law of 1870, and the 1913 Statute of Industry<sup>56</sup>. Even after the declaration of independence of Lithuania in 1918, the laws and codes of czarist Russia were still applicable for some time. Moreover, temporary documents for inventions began to be issued in 1924 according to czarist Russia’s Statute of Industry (Arts. 69-103)<sup>57</sup>. In Lithuania the first patent under this law was issued in 1929 to the British company Photomaton Patent Corporation Ltd., situated in London, with priority beginning 18 September, 1928<sup>58</sup>. The Statute of Industry was changed in 1928 by adopting the Law on Protection of Inventions and Improvements, which was valid until 21 July, 1940, and in which, important for the time, non-patentable subject-matter as well as the persons eligible to apply for a patent protection were for the first time listed in the laws<sup>59</sup>. Concerning the number of patents issued during the first independence period in Lithuania, it is important to note that in 1928 patents were mainly issued to foreign natural and legal persons. 34 patents were issued to Germans, 15 patents to French citizens, 10 patents to American applicants, and only one was issued to a Lithuanian citizen. The majority of the patents were issued in 1929. However, Lithuanian patentees comprised only 7,84 %

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reflected Roman-German civil legal tradition, however, were valid in Estonia and Latvia (in the latter with some later changes). See more in *Heiss (Hrsg.), Zivilrechtsreform im Baltikum*, p. 20.

54 As observed in *Heiss (Hrsg.), Zivilrechtsreform im Baltikum*, p. 9.

55 The term “*industrial property rights*“, as used in this sub-chapter, covers inventions and partially industrial designs.

56 See *Kasperavičius, Žilinskas, Intellectual Property*, pp. 220, 221.

57 The Statute of Industry (Arts. 69-103) of czarist Russia, however, did not provide for a definition of invention and for invention patentability criteria, except for novelty, which was a conditional worldwide novelty. See *Kasperavičius, Žilinskas, Intellectual Property*, p. 220.

58 See Lithuania, Patents before the 2nd WW, p. 3.

59 Under the Law on Protection of Inventions and Improvements, patents could be issued for 15 years from the application date. The Law also provided for an additional patent as well as for a dependent patent. After a period of 3 years from the publication of the patent, the possibility to submit a protest to the court was provided on the basis of which a criminal case could be initiated. The owner of the patent had an exclusive right to use an invention with an obligation to inform the national Ministry of Finance in case of a license to any third parties. Although the persons eligible to apply for a patent protection were not clearly listed in the law, it can be presumed that it was both national and foreign natural and legal persons as well as successors of natural persons, as referred in *Kasperavičius, Žilinskas, Intellectual Property*, p. 221.

of them. In comparison with 1930, when 107 patents were issued, only 37 patents were issued in 1940. During the period from 1928-1940, 1021 patents were issued, mainly to foreign natural and legal persons<sup>60</sup>.

In Latvia the formation of the national industrial property protection system started in 1919 with the drafting of laws on patents and trademarks. The czarist Russian 1913 Statute of Industry was also taken as a basis and contained the provisions pertaining to patents. Only in 1921 could actual granting of patents commence due to certain amendments to the Statute which, generally, had been amended several times until the national Law on the Protection of Inventions, Models, Factory Drawings and Trademarks in Exhibitions was adopted in 1925<sup>61</sup>. Approximately 4,500 patents were granted in Latvia during the first independence period<sup>62</sup>.

Similarly, the czarist Russian 1913 Statute of Industry was applicable in Estonia after the declaration of its first independence in 1919. The first patent act was enforced in 1921, and a completely new national Estonian Patent Act was adopted in 1937 and was enforced in 1938<sup>63</sup>; however, it was only valid for two years, up to the Soviet occupation in 1940. About 3,000 patents were granted during the first Estonian independence, approximately 143 patents a year, with a majority of patents granted to foreign applicants<sup>64</sup>. As far as industrial design was concerned, it should be mentioned that industrial design certificates were issued under the Law on Protection of Inventions and Improvements of 1928, and up to 1940 only 125 certificates were issued in Lithuania, mainly to foreign applicants<sup>65</sup>.

In the field of trademark protection the influence of the czarist Russian IP tradition was likewise obvious. In Lithuania the national Law on Trademarks was adopted in 1925, and was actually applied together with the Statute of Industry of the czarist Russia, and on the basis of which 5588 trademarks and 125 industrial design certificates were issued until 1940<sup>66</sup>. The Statute of Industry of czarist Russia was also applicable in Latvia and Estonia for trademark registration until the adoption of new amendments<sup>67</sup>. Similar numbers appear in Latvia, in which the Statute of Industry with certain Amendments to the Regulations on the Procedure of Granting Protection Certificates and Patents for Inventions, Models, and Trademarks was in force beginning in 1919: 4744 trademarks had been registered as of 1928, and in the

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60 All numbers are taken from *Kasperavičius, Žilinskas*, Intellectual Property, pp. 230, 231, as well as from Lithuania, Patents before the 2nd WW, p. 3.

61 As indicated in *Latvian Patent Office Information (2008)*.

62 The numbers are taken from the short summary of patent law and practice history in Latvia prepared by the Latvian Patent Office, see more in *Ibid*.

63 See *Pisuke*, Protection of IP in Estonia, pp. 10, 11.

64 More information about the patents registered during the first independence in Estonia as well as the work of the Patent Office can be found in the overview prepared by the Estonian Patent Office, see *Estonian Patent Office Information (2008)*.

65 See *Kasperavičius, Žilinskas*, Intellectual Property, p. 228. Note: there are no data provided for industrial design registered in Latvia and Estonia during the interwar period.

66 Mainly foreign citizens and foreign companies applied for national trademark and industrial design protection, as observed in *Ibid*, p. 231.

67 See *Pisuke*, Protection of IP in Estonia, p. 10. Also concerning Latvia see more information prepared by the Latvian Patent Office, see *Latvian Patent Office Information (2008)*.

last years of independence, there had been approximately 500 trademarks registered<sup>68</sup>. In Estonia, however, had the largest number of trademarks registered during 21 years of the first independence: 6,587 in total, with the number of foreign trademark registrations 1,5 times larger than the domestic one<sup>69</sup>. Importantly, the then Lithuanian Law on Trademarks established terms of signs which could be registered as trademarks, applicants for the trademark registration, and a term of protection<sup>70</sup>. As regards the enforcement of rights in the case of infringement of registered trademarks, the owner had a right to claim compensation for actual damages done<sup>71</sup>.

The adoption of the industrial property legislation could arguably reflect economic growth during this interwar period in the Baltic countries, especially when the bilateral patent agreements were signed, for instance, between Lithuania, Latvia, and Czechoslovakia<sup>72</sup>, which provided the incentive to protect industrial property rights. On the other hand, during the last decade of the first independence of the Baltic countries a certain innovative “stagnation” became evident. This recession could be explained by referring to the then political situation in Lithuania and also in the other two Baltic countries, which faced authoritarian regimes<sup>73</sup> as well as to the general world-wide economic depression.

## 2. Copyright legislation

Concerning the Baltic copyright legislation during the interwar period, it is to be noted that, for instance, national copyright legislation did not exist in Estonia. The Russian Empire’s 1911 Copyright Act<sup>74</sup> was in force until the Soviet occupation<sup>75</sup>, which could be considered a clear example of absorption of the Russian IP tradition and as a reflection on the contemporary public and political position in Estonia that “copyright was not regarded as an important economic or legal instrument in the society”<sup>76</sup> at that time. In comparison with Estonia, copyright protection in Lithuania reflected a differing position and was regulated under the Civil Laws Chapter 8 “Regulation of Copyright”<sup>77</sup>, which established the subject-matter of protection, author’s rights to written and oral literary works, musical works, artistic creations, and

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68 See *Ibid.*

69 See *Estonian Patent Office Information (2008)*.

70 The mark could be registered for a term from 1 to 10 years with a possibility of an extension, as reported in *Kasperavičius, Žilinskas, Intellectual Property*, p. 231.

71 *Ibid.*, p. 232.

72 *E.g.*, Estonia had bilateral agreements in the field of industrial property with Denmark, Luxembourg, Great Britain, the Soviet Union, and Lithuania. See more at *Pisuke, Protection of IP in Estonia*, p. 11.

73 The authoritarian regimes existed in Lithuania since 1928, and in Latvia and Estonia since 1934 until the Soviet occupation and annexation in 1940/1941.

74 The Copyright Act of the Russian Empire was treated as “one of the most modern acts in Europe at that time”, though; as referred in *Pisuke, Estonia: Copyright and Related Rights*, p. 99.

75 *Ibid.*, p. 98.

76 See *Pisuke, Estonia: Copyright and Related Rights*, p. 101.

77 See *Vansevičius, Copyright under Czarist Law*, pp. 120, 121.

photographic works, and also embodied a range of provisions reflecting international obligations<sup>78</sup>.

Moreover, Articles 695(21) – 695(26) of the Civil Laws embodied the provisions regarding damages to be adjudicated in case of infringement of copyright<sup>79</sup>. In the field of copyright in Latvia there were some attempts to amend the national legislation due to the harmonization with the IP legislation of the Western countries by starting to draft legislation on “Economic Authors’ Rights”; however, the legislative processes were discontinued in 1940<sup>80</sup>.

## II. *The Soviet occupation (1940 – 1990/1991): the strained existence of IP rights*

### 1. IP as a part of Soviet civil law

One can fully agree with the types of creation and innovation behaviours in a totalitarian society, listed by the Estonian scholar *Pisuke*<sup>81</sup>, as a reflection of the influence of a communist ideology in creative works which were mainly state-oriented, centrally planned, and centrally controlled, with the possibility of repression if a work did not fit into the frames of those established creative and innovative behaviours. The Soviet occupation and accession of the Baltic countries in 1940-1941 increased their cultural, social, and political ambivalence by forming a dual society and culture – the so-called “front” and the unofficial culture or “underground” – which was also reflected in the legal systems of Latvia, Lithuania, and Estonia. Regarding social structure, the Baltic people faced a wide-spread influx of the “front-society” because of the high rate of Russian emigrants and strong Soviet reprisal and control infrastructure<sup>82</sup>.

Formally, intellectual property was regarded as a part of Soviet civil law, which was incorporated into the Civil Codes and Civil Procedural Codes (definitely covering Soviet procedural norms) of the Soviet Republics of Estonia, Latvia, and Lithuania. The Codes changed the pre-existing concepts of general civil law of the Baltic countries by embodying the principles of abolishment of private law and private estate, and by limiting legal sources only to Soviet ones<sup>83</sup>. In 1940, when the Baltic

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78 See *Mizaras*, *Lithuanian Copyright: Historical and Modern Aspects and Trends of Development*, p. 833; also *Šalkauskis*, *Civil Laws*, pp. 192-206.

79 The actual applicability of the provisions in regard with civil remedies in copyright infringement cases illustrate a few cases in the Lithuanian court practice related to an adjudication of damages in which the court (*the Chief Tribunal*, at that time) made the conclusions that, e.g. damages in the copyright cases did not depend on the income received by the infringer who infringed those rights or stated that the courts had full discretion to decide on an amount of damages to be adjudged on a case-by-case basis without considering the opinion of the cassation instance, as referred in *Šalkauskis*, *Civil Laws*, pp. 196, 197.

80 As described in *Latvian Patent Office Information (2008)*.

81 See *Pisuke*, *Estonia: Copyright and Related Rights*, p. 101.

82 See *Laurinavičius et al.*, *Aspects of Geopolitics of the Baltic Countries*, p. 27.

83 See *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, p. 10.

countries were incorporated by force into the USSR, the 1922 Civil Code of the Russian Federation and other civil laws came into effect. Following the 1961 Fundamentals of Civil Laws of the USSR and the Soviet Union Republics, the Civil Codes, which basically resembled the Fundamentals, were adopted in 1964 in Lithuania, Latvia, and Estonia, coming into effect in 1965.

The Civil Codes regulated five legal intellectual property institutes, namely, copyright law, discovery and invention rights, and the rights of industrial models and obligations, which arise in regard to publication of contest (*i.e.*, competition in the fields of art, literature, science, etc., in which the best competitor is awarded by the state)<sup>84</sup>. Notably, Soviet legislation did not recognize the neighbouring rights of performers and producers of phonograms; however, broadcasting organizations enjoyed copyright of their broadcasts<sup>85</sup>.

Although the USSR Constitution and the Constitutions of the Soviet Republics of the Baltic countries provided for freedom of scientific, technical, and artistic creativity<sup>86</sup>, it is important to note that state control and non-recognition of the freedom of contracts were typical for intellectual property regulation in the Soviet Union<sup>87</sup>. The rights of right holders were strictly regulated by the State and treated as socialist subjective rights, for instance, according to the Soviet legislation which was fully applicable in the field of inventions, industrial designs, and trademarks. The so-called Author's Certificate (not a patent<sup>88</sup>) did not provide for exclusive rights; however, it was used as a protection document that could be centrally obtained only through the Soviet Union Committee for Inventions and Discoveries in Moscow<sup>89</sup>.

In the field of copyright, authors during the Soviet occupation either had to support the official communist ideology<sup>90</sup> or adapt to official requirements with an attempt at expressing oneself by allegory, either by giving up creative activities or by expressing one's own ideas in works in defiance of certain sanctions. Although the state advertised that it provided the best conditions to all creators and innovators by, *inter alia*, assessing remunerations (on the basis of benefits to the general public, however), by providing them with the best working conditions, and by awarding

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84 See Soviet Civil Law, p. 236 et seq.

85 See *Pisuke*, Estonia: Copyright and Related Rights, p. 103.

86 See Soviet Civil Law, pp. 236-238.

87 See *Sergejev*, IPRs in the Russian Federation, p. 40; there was, though, room for certain negotiations concerning remuneration, but only within the limits of the state-prescribed rates, as referred in *Pisuke*, Estonia: Copyright and Related Rights, p. 103.

88 There were two types of protection for an invention in the USSR: the Author's Certificate and a patent. An inventor had a right to choose either to claim or to recognize his/her authorship, by transferring exclusive rights to the invention to the state (an Author's Certificate), or to claim his/her exclusive rights to an invention (a patent). Similarly, the rights regarding an industrial model were regulated. The Soviet civil rules also protected rights to a discovery and to a rationally-based (rationalization) offer. Arts. 557-566, *Civil Code of the Lithuanian SSR*.

89 The subjective rights to the invention belonged to the state, which guaranteed the inventor a fixed remuneration and a very limited list of moral rights, as referred in *Pisuke*, Protection of IP in Estonia, p. 11.

90 See *Sergejev*, IPRs in the Russian Federation, p. 40.

them with state rewards, meaning also moral satisfaction of those persons<sup>91</sup>, in actuality, Soviet citizens had to participate in the creation of cultural products without authorization and without receiving a payment<sup>92</sup>. This condition during 50 years of Soviet occupation of the Baltic countries formed a certain attitude towards IPRs in general, whose rudiments are still being seen today.

The terms of protection also reflected the ideology of dominant state ownership of any type of intellectual property rights. The term of copyright in the Baltic countries was 15 years after the death of the author and was extended up to 25 years p.m.a.<sup>93</sup> only after the Soviet Union's accession to the UCC in 1974<sup>94</sup>, whereas a patent was granted for 15 years from an application date<sup>95</sup>.

## 2. Aspects of enforcement of IP rights under the Soviet regulation

Considering the provisions concerning the enforcement of intellectual property rights during the Soviet occupation<sup>96</sup>, it should be noted that even the Soviet Civil and Civil Procedural Codes provided for a right to submit a claim to the courts or other administrative institutions<sup>97</sup>, such claims were usually solved on the administrative-organizational level with so-called "means of mediation". Generally, disputes were solved according to administrative<sup>98</sup>, court, or so-called mixed (administrative-court) procedure. As far as copyright infringement cases were concerned, the plaintiffs who submitted complaints were exempted from an obligation to pay state fees, and copyright owners were exempted from court fees (a stamp duty and court expenses). The civil remedies in such cases covered adjudication of damages, amendments to works, publications about the infringement or prohibition of a publication, reproduction, or distribution of a work. The laconic Soviet civil rules provided that, in case of moral rights infringement, a copyright holder had a right to claim a restitution of rights (corrections or a publication to be made), a prohibition of a publication

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91 See Soviet Civil Law, p. 240.

92 The broad Soviet IP-related free-use provisions also demonstrate a "socialist IP thinking" which, along with other factors, such as a lack of technological innovations, contributed to an increasing gap between East and West countries. See *von Lewinski*, Copyright in Central and Eastern Europe, p. 42.

93 Art. 536, *Civil Code of the Lithuanian SSR*. Interestingly, the term of copyright belonging to legal persons was termless. After the reorganization of a legal person, such right was transferred to its successor, and, in case of its liquidation, to the state (Art. 538, *Civil Code of the Lithuanian SSR*).

94 Universal Copyright Convention of 1952, as revised at Paris on 24 July, 1971 (hereinafter – the "UCC").

95 Art. 562, *Civil Code of the Lithuanian SSR*.

96 Note: the civil cases from the Soviet time are currently contained in the national court archives without specific references to IP infringement cases, though. The described aspects of IP enforcement can be mainly featured by analysing the then legislative provisions and the corresponding commentaries only.

97 Arts. 539, 540, *Civil Code of the Lithuanian SSR*; also *Commentary of Civil Code of the Lithuanian SSR*, p. 367.

98 Art. 539, *Commentary of Civil Code of the Lithuanian SSR*, p. 353.

of a work, or a termination of a distribution of a work. Moreover, in case of economic rights infringement, a copyright holder had a right to claim damages.

As far as invention and rationalization rights were concerned, all disputes regarding acceptance of an offer for invention or rationalisation were solved according to the administrative provisions, except the disputes regarding a priority for a rationalization offer, an amount of remuneration, an assessment of such remuneration and its payment and an establishment of a fact of use of a rationalization offer. Such disputes could be solved in the courts as well. However, the administrative procedures were mainly used<sup>99</sup>. Disputes concerning industrial design were solved either in courts or by administrative or administrative-court procedure. It should also be mentioned that judges or a panel of judges in the administrative procedures were not always lawyers<sup>100</sup>. This fact also certainly could influence the lower legal quality of the decisions and judgements in the cases.

### III. *The period of substantial changes of IP rights protection (1990/1991 – 1994)*

#### 1. Adoption of the new national IP legislation

Beginning in 1988-1989, the Baltic countries lived through one of the most important changes in their 20th century history, namely, the liberation from Soviet occupation. This led to the very difficult process of making changes to their national legislations, including those on intellectual property regulation, while facing a rapid transformation from a centralized economy into a free market. Certainly, after the declarations of independence of the Baltic countries in 1990-1991, the Russian core of the “front culture” had been clearly disposed of. While the influence of the Russian economy declined, the relationship between the Western European countries and the Baltic countries began to grow. Later the Western European/Baltic relationship developed to a high institutional level, *i.e.* in the form of membership in the EU or NATO. Even so, a sizable Russian minority in the Baltic States, especially in Latvia and Estonia<sup>101</sup>, and the inheritance of the Soviet mentality towards social,

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99 See Soviet Civil Law, p. 236 et seq.

100 With a reference to the commentaries regarding the articles on the disputes on, *e.g.* ownership of an invention and payment of a remuneration, it is observed that the cases could be heard by the representatives from the organizations in which an invention had been made and the trade-unions or the courts, Art. 566, *Commentary of Civil Code of the Lithuanian SSR*, p. 370.

101 The Russian-speaking population comprises approx. 29 % of the whole population in Latvia, approx. 26 % in Estonia and approx. 6 % in Lithuania, following the information provided by the national statistic departments, see in *Statistics Department of Estonia (2008)*, *Statistics Department of Latvia (2008)*, *Statistics Department of Lithuania (2008)*. As argued, the presence of large Russian-speaking minorities in Latvia and Estonia reflect the Soviet legacy; see more in *Elsuwege*, *State Continuity and its Consequences: The Case of the Baltic States*, pp. 381–384.



economic, and cultural issues still contribute to a substantial relationship between the Baltic countries and the Russian Federation to this day<sup>102</sup>.

As in many other legal fields, beginning in 1991-1992, the contemporary Parliaments of the newly-independent Baltic States had to make speedy and sometimes difficult decisions regarding the ambiguous economic situation and the unstable political system at that time, taking into account the existing legislation of the first independent republics (importantly, the legislation was re-established following the principle of *restitution in integrum*<sup>103</sup>). Generally, the Baltic countries were bound to Soviet legislation until their independence in 1990-1991; however, there were some exceptions which naturally reflected the contemporary political and legal situation. For instance, Soviet copyright legislation in Estonia was valid until the adoption of the national Copyright Act in 1992<sup>104</sup>, which was the first independently drafted and enacted copyright law in the history of Estonia, based on the principles of the Berne Convention<sup>105</sup>, the Rome Convention<sup>106</sup>, some ideas from the WIPO Model Copyright Act, and the copyright laws of the Nordic and continental legal tradition countries<sup>107</sup>. At that time, the Estonian Copyright Law was in compliance with all international obligations and major EU requirements. In Lithuania the 1990 Law on Provisional Basic Law established that all other laws, including the 1964 Civil Code, which were valid in Lithuania until 11 March, 1990, continue to be valid, if they do not contradict with the Provisional Basic Law. However, such a lasting application of Soviet legislation could not be tolerated, neither for economic nor for political reasons<sup>108</sup>.

The re-establishment of the legal systems in the Baltic countries began with the adoption of the Constitutions: the Estonian Constitution was adopted on 28 June, 1992<sup>109</sup>, by referendum, the Lithuanian Constitution on 25 November, 1992<sup>110</sup>, also

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102 See Laurinavičius et al., Aspects of Geopolitics of the Baltic Countries, p. 27.

103 See refs. to the national legislation during the Interwar period in supra § 3B.I; also in Pisuke, Estonia: Copyright and Related Rights, p. 103.

104 Copyright Act was adopted on 11 November 1992 and entered into force on 12 December 1992 (hereinafter – the “Estonian Copyright Law”).

105 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, and amended on September 28, 1979 (hereinafter – the “Berne Convention”).

106 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961 (hereinafter – the “Rome Convention”).

107 See Pisuke, Estonia: Copyright and Related Rights, p. 105.

108 As pointed out in Mikelėnas, Reform of Civil Law in Lithuania, p. 52.

109 Art. 32 of the Estonian Constitution provides that “*the property rights of everyone are inviolable and enjoy equal protection*”. This provision should be read together with Art. 39 which establishes that “*authors shall have the inalienable right to their work*” and that “*the state shall protect intellectual property rights*” as well as with Art. 25 which provides that “*everyone shall have the right to compensation for moral and material injuries caused by anyone’s unlawful action*”.

110 Under Art. 23 of the Lithuanian Constitution “*property shall be inviolable*” and “*the rights of ownership shall be protected by law*”. Art. 42 provides that “*the law shall protect and defend the spiritual and material interests of authors which are related to scientific, technical, cultural, and artistic work*”.

by referendum, and the Latvian Constitution on 15 February, 1922<sup>111</sup>, by resuming its validity. These constitutions provided the basis for the protection and enforcement of intellectual property rights, for the applications of the provisions of international treaties, including treaties related to intellectual property rights, as well as for the national court system.

The adoption of the new Constitution in Lithuania was followed by the work on the drafting of a new national Civil Code<sup>112</sup> which was supposed to embody the transition from a planned and completely centralized economy into market relations and to also establish new principles of property relations regulation. Considering the regulation of intellectual property rights, it should be noted that the Law on Amendments and Supplements of the 1964 Civil Code covered in full a new Chapter on Copyright which was based on the international intellectual property treaties. However, due to increasing conflicts between the provisions of the supplemented and amended Civil Code and other individual laws in Lithuania, the Civil Code lost its significance<sup>113</sup> which necessitated an adoption of a new comprehensive and systematic Civil Code, the concept of which had been already elaborated while amending the 1964 Civil Code. The concept reflected the civil codes of Italy, Holland, and the Quebec Province of Canada.

Estonia and Latvia followed instead a more German legal approach, while still considering the civil practice of the above mentioned countries<sup>114</sup>, and, as initially suggested, also covered the separate chapter (the Sixth Book) on Intellectual Property with an incorporation of all national intellectual property laws which were valid at that time. After a long and difficult process of the approximation and coordination of the suggested draft, the new Lithuanian Civil Code was adopted in 2000 and came into force on 1 July, 2001<sup>115</sup>. However, contrary to the original draft, it did not comprise intellectual property regulation, which was left to special IP laws.

Most of those individual laws were already existent in 2001 in Lithuania in the field of the protection of trademarks<sup>116</sup>, patents<sup>117</sup>, designs<sup>118</sup>, computer programs

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111 As established in Art. 105 of the Latvian Constitution, everyone has the right to own property which shall not be used contrary to the interests of the public, though property rights may be restricted only in accordance with law. Art. 113 additionally provides that “*the State shall recognise the freedom of scientific research, artistic and other creative activity, and shall protect copyright and patent rights*”.

112 In Lithuania the drafting process started in 1991. The supplements and amendments to the 1964 Civil Code were handed in 1992 to the Supreme Council. The Parliament finally adopted them on 17 May, 1994, as referred in *Mikelėnas*, Reform of Civil Law in Lithuania, p. 53.

113 As argued, the special individual laws regulated very different situations which were not coordinated. They even reflected the conflicts among the then state institutions and created “chaos and anarchy in the sphere of property regulations and in court practice as well”, as observed in *Mikelėnas*, Reform of Civil Law in Lithuania, p. 54.

114 See *Heiss (Hrsg.)*, Zivilrechtsreform im Baltikum, pp. 52, 56.

115 Hereinafter – the “*Lithuanian Civil Code*”.

116 Law on Trademarks, adopted on 10 October 2000, entered into force on 1 January 2001 (which changed the Law on Trade Marks and Service Marks, as of 1993), amended on 8 June 2006, entered into force on 28 June 2006 (hereinafter - the “*Lithuanian Trademark Law*”).

and databases<sup>119</sup>, copyright and neighbouring rights<sup>120</sup>. Additionally, the laws regarding the protection of firm names, layout-design (topographies) of semiconductor integrated circuits, plant varieties have been adopted.

As far as IP rights were concerned, a similar solution and legislative line has been undertaken in Estonia, which, slightly differently from Lithuania, adopted its new civil legislation on the basis of the 1940 civil code draft and in the form of five different codified laws<sup>121</sup>. While codifying its civil legislation, Latvia also resumed the validity of its 1937 Civil Code<sup>122</sup>. However, similarly to Lithuania both national legislating bodies did not include IP provisions in the codified legal acts. Since 1992, when the newly adopted Estonian Copyright Law came into force<sup>123</sup>, the Estonian Parliament has issued all main individual laws in the field of patents<sup>124</sup>, trademarks<sup>125</sup> and industrial designs<sup>126</sup> by complementing those laws with the ones on the protection of geographical indications, utility models, and layout-designs of integrated circuits. Similarly, in Latvia the IP laws have been also adopted during the first decade after the declaration of independence, starting with the national Patent Law<sup>127</sup>, the Law on Trademarks and the Law on Industrial Design Protection<sup>128</sup>, the

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117 Patent Law, adopted on 18 January 1994, entered into force on 1 February 1994, amended on 28 October 2008, entered into force on 11 November 2008 (hereinafter - the “*Lithuanian Patent Law*”).

118 Law on Designs, adopted on 7 November 2002, entered into force on 1 January 2003 (which changed the Law on Industrial Design, as of 1995), amended on 1 July 2008, entered into force on 17 July 2008 (hereinafter - the “*Lithuanian Design Law*”).

119 Law on the Legal Protection of Computer Programs and Databases, as of 1996 (invalid from 9 June 1999; changed by the 1999 Law on Copyright and Neighbouring Rights).

120 Law on Copyright and Related Rights, adopted on 18 May 1999, newly adopted on 5 March 2003, entered into force on 21 March 2003, amended on 13 March 2008, entered into force on 27 March 2008 (hereinafter – the “*Lithuanian Copyright Law*”).

121 See *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, p. 52.

122 See *Ibid.*, pp. 21, 22.

123 See supra Ft. 104 herein.

124 Patents Act, adopted on 16 March 1994, entered into force on 23 May 1994, amended on 15 March 2007 (hereinafter - the “*Estonian Patent Law*”).

125 Trademarks Act, adopted on 1 October 1992, newly adopted on 22 May 2002, entered into force on 1 May 2004, amended on 1 January 2007 (hereinafter - the “*Estonian Trademark Law*”).

126 Industrial Design Protection Act, adopted on 18 November 1997, entered into force on 11 January 1998, amended on 15 March 2007 (hereinafter - the “*Estonian Design Law*”).

127 Patent Law, adopted on 31 March 1993, newly adopted (except Chapter V) with an entry into force on 20 April 1995, the current version entered into force on 1 March, 2007 (hereinafter – the “*Latvian Patent Law*”).

128 Law on Trademarks and the Republic of Latvia Law on Industrial Design Protection, adopted on 7 April 1993, changed by the Law of the Republic of Latvia on Trademarks and Indications of Geographical Origin, as from 15 July, 1999, last amended on 8 February 2007 (hereinafter – the “*Latvian Trademark Law*”), and Law on Industrial Designs, adopted on 18 November 18 2004, substituted the previous “Rules on Industrial Design”, as of 15 April 2004, last amended on 8 February 2007 (hereinafter – the “*Latvian Design Law*”).

Copyright Law<sup>129</sup>. The listed laws have been also complemented by, *inter alia*, other important laws in the field of IP protection such as topographies of semiconductor chips, plant varieties and pharmaceuticals.

The adoption of those laws meant an explicit transposition of Soviet legal norms into modern IP laws which were to comply with international obligations as well as help to accommodate modern technologies, innovations, and creations in the Baltic market. Moreover, as far as IP rights were concerned, the newly-embodied provisions undoubtedly expressed the implementation, at least on the legislative level, of the legal traditions and experience of other countries<sup>130</sup> and they have been continuously amended due to the accession of the Baltic countries into the EU.

## 2. Adherence to the international treaties on IP protection

In the five to seven year period following the declaration of the second independence, the Baltic countries, as sovereign states, entered into all-important international multilateral treaties in the field of IP rights<sup>131</sup>. These complemented the bilateral treaties in the field of investment protection that had been signed with, for instance, the Russian Federation and the United States, and which, as a rule, directly listed IP rights as an investment. However, the bilateral agreements did not contain explicit provisions relating to the enforcement of IP rights. The general enforcement provisions were covered by other bilateral instruments, *i.e.* the treaties on trade relations and IP rights<sup>132</sup>.

In view of the time period, the relatively speedy adherence to the international treaties was explained by the fact that, *first*, many of the at that time valid international treaties had already been signed by the Baltic countries due to a formation of a

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129 Copyright Law, adopted on 11 May 1993, newly adopted on 10 May, 2000, amended on 6 December 2007 (hereinafter – the “*Latvian Copyright Law*”).

130 *E.g.*, while drafting the Lithuanian Copyright Law (its 1999 wording), the French traditions of copyright protection with a focus on a distinction of moral and economic rights, therefore, distinguishing, for instance, certain remedies, were considered. Moreover, the then wording of law also reflected the key provisions of the EU directives which had been previously adopted. See more in *Mizaras*, *Lithuanian Copyright: Historical and Modern Aspects and Trends of Development*, pp. 836, 837.

131 All international treaties in the field of industrial property rights to which the Baltic States acceded or re-accessed to after the second independence are listed by the national patent offices; see *Estonian Patent Office Information (2008)*, *Latvian Patent Office Information (2008)*, also *Lithuanian Patent Office Information (2008)*.

132 *E.g.*, Article XI of the Agreement between the United States of America and the Republic of Lithuania on Trade Relations and Intellectual Property Rights Protection as of 26 April 1994 provides not only general provisions on enforcement of IP rights, but also the specific procedural and remedial aspects of civil actions, provisional measures, including also the ones applied on *ex parte* basis and criminal procedures. The similar agreement with Latvia as of 6 July 1994 embodies the identical provisions. See *Garrison*, *Intellectual Property, Treaty II.17(B)-1*; also Agreement between the United States of America and the Republic of Latvia on the Relations and Intellectual Property Rights Protection. *Note*: the mentioned enforcement provisions in the bilateral treaties on trade relations actually reflected the provisions as set in Arts. 1714-1717 of NAFTA as well as Part III of the TRIPS Agreement.

modern IP legal system during the first independence (1918/1919–1940/1941)<sup>133</sup>, and, *second*, the adherence to those treaties was absolutely necessary for the substantial changes in the national laws regarding, *inter alia*, protectable subject-matter, mandatory minimal protection requirements, and effective and equal protection of IP rights<sup>134</sup> after the breakdown of the Soviet Union.

Formally, after the declarations of independence in 1990/1991, the general position of the newly formed governments of the Baltic States was that agreements to which the USSR or the Estonian, Latvian, or Lithuanian SSRs were parties were not automatically valid in the new independent Republics<sup>135</sup>, so formal ratification steps by the national legislators had to be made. Accession to the international treaties, signing bilateral treaties, and compliance, at least formally, to international standards during the Soviet occupation is to be considered a significant political step which allowed the Baltic countries, though not directly involved, to introduce and respect international obligations. Notably, some of the international treaties in field of patents, designs and trademarks are pending for ratification at the national parliaments<sup>136</sup>.

Alongside the formal reasons, factual circumstances relating to the signing of the international treaties cannot be omitted. A unilateral pressure by some countries already played an obvious and significant role<sup>137</sup> during the first independence period. Such pressure, of course, obliged the Baltic countries to provide adequate and efficient IP protection not only on a legal, but also on an economic basis. However, notwithstanding the formal intentions to become an equal member of the international community, the pressure from abroad was sometimes heavily criticized by local industry and the general public at that time, as the Estonian example shows. The Estonian legislative position at that time reflected the idea that, for instance, in the field of copyright, foreign works should be permitted to be used without any restrictions in order to advance the growth of IP in the developing country<sup>138</sup>.

As far as the enforcement of IP rights is concerned, the adherence to some international treaties should receive special attention. *First*, the Berne Convention<sup>139</sup>, namely its Preamble as well as Articles 5, 6bis (after the 1928 Rome revision), also Articles 16 and 15 indirectly embody enforcement-related provisions. The accession to the Berne Convention by the Baltic countries raised interesting constitutional and international law issues, not regarding the accession as such, but concerning the retroactive protection of foreign works. The Baltic countries, as legal subjects under the basis of international public law, had never lost their independence because of

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133 *E.g.*, the Berne Convention was valid in Latvia from 1938 until its occupation in 1940. Estonia joined the Paris Convention in 1924 and the Berne Convention in 1927.

134 See *Beržanskienė*, Berne Convention and Copyright in Lithuania, p. 10.

135 See *Elsuwege*, State Continuity and its Consequences: The Case of the Baltic States, p. 384.

136 *E.g.*, Patent Law Treaty, London Agreement, etc. are meant herein, as referred in *Lithuanian Patent Office Information* (2008).

137 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 45.

138 See *Pisuke*, Estonia: Copyright and Related Rights, p. 101.

139 Lithuania joined the Berne Convention on 14 December, 1994, and Estonia rejoined it on 26 October, 1994. The Berne Convention re-entered into force on 11 August, 1995, in Latvia.

their unlawful incorporation into the Soviet Union (*ex injuria non oritur jus*)<sup>140</sup>. Estonia and Latvia were therefore bound by the Berne Convention they had signed in 1927 and 1938, respectively, even though they were not *de facto* members during the Soviet occupation (the UCC to which the Soviet Union was a Contracting State, was in force at that time). When the question about retroactive protection of foreign works was raised, the national legislators had to find a solution. The Estonian decision was clear: foreign works, as well as national works created before the 1992 Estonian Copyright Law came into force were to be protected retroactively. The related rights for performance, phonograms, and radio and television broadcasts also enjoyed retroactive protection, more precisely: the right to use them for the cases of use of such subject-matters beginning from 12 December, 1992<sup>141</sup>. The Latvian legislators solved the question of retroactive protection similarly: in August 1995 Latvia rejoined the Berne Convention, thus guaranteeing copyright protection in Latvia both for national and international authors. In Lithuania the situation was different, since Lithuania did not join the Berne Convention before World War II.

*Second*, the adherence to the 1996 WIPO<sup>142</sup> Copyright Treaty<sup>143</sup> and the WIPO Phonograms and Performances Treaty<sup>144</sup> was also followed by national legislative changes in the field of IP rights. The preventive measures by virtue of Article 14(2) of the WIPO Copyright Treaty, as well as provisions regarding the protection of TPMs<sup>145</sup> can today be found in the national copyright legislation and the Criminal Codes of the Baltic countries<sup>146</sup>.

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140 See *Ahola et al.*, Baltic Region. Conflicts and Cooperation, p. 267.

141 More discussion on the issues of the validity of the Berne Convention in Estonia can be found in *Pisuke*, Estonia: Copyright and Related Rights, pp. 112, 113.

142 Convention Establishing the World Intellectual Property Organization (signed at Stockholm on July 14, 1967 and as amended on September 28, 1979) entered into force on April 30, 1992 in Lithuania, on January 21, 1993 in Latvia, and on February 5, 1994 in Estonia.

143 WIPO Copyright Treaty (hereinafter – the “WCT”) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty, Geneva, 20 December, 1996, in force 6 March, 2002. WCT came into force in Lithuania on March 6, 2002 and on March 6, 2002 in Latvia. In Estonia WCT entered into force on 14 March, 2010.

144 WIPO Performances and Phonograms Treaty (hereinafter – the “WPPT”) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) and the Rome Convention (1961) referred to in the Treaty, Geneva, 20 December, 1996, in force 6 March, 2002. WPPT came into force in May 20, 2002, in Latvia and Lithuania. After its signing in 1997, the ratification is pending in Estonia.

*Note*: as far as international treaties are concerned, the issue of the validity of the treaties should be mentioned. Under the constitutional laws of Estonia, Latvia, and Lithuania, signed international agreements come into force when they are accordingly ratified by the national Parliaments and have a valid direct effect. Even though the absence of ratification has no impact on the actual implementation of the provisions of the WIPO Treaties because of their implementation during the Estonian and EU law harmonization processes, this could be viewed as an unreasonable delay.

145 WPPT, namely its Arts. 18-19 and 23(2) set out almost identical provisions regarding TPMs and enforcement.

146 Arts. 193, 194 of the Lithuanian Criminal Code (wording as from 21 July 2007), Art. 225 of the Estonian Criminal Code (wording as from 15 March 2007), Sections 147, 148, 149 of the

Last, on 10 February, 1999, Latvia was the first to join the WTO, by adhering to one of its pillars, the TRIPS Agreement. In November, 1999, Estonia joined the WTO without recourse to any transition period<sup>147</sup>. Lithuania is a member of the WTO since 31 May, 2001. Since signing of the TRIPS Agreement, which Section III directly embodies the provisions concerning the enforcement of IP rights<sup>148</sup>, new tasks to revise and adopt the provisions in IP laws have fallen to the national legislators as well. From an IP rights enforcement perspective, the implementation of the provisions of the WIPO Treaties and the TRIPS Agreement was very much applauded by the local and foreign right-holders wishing to protect their rights more effectively. The implementation also coincided with the reforms relating to the accession into the EU processes after the 1998 EU Association Agreements with the Baltic countries had been signed<sup>149</sup>.

#### IV. *Substantial reforms in the field of enforcement of IP rights regarding the implementation of *acquis communautaire**

In the bilateral EU Association Agreements, the governments of the Baltic states stressed the importance of improvements in the field of adequate protection of IP rights<sup>150</sup>. Importantly, the mentioned agreements, also called the third generation agreements<sup>151</sup>, obliged the Baltic countries to adapt their IP legislation as a result of the harmonization directives and other legal measures which were already in force by that time.

Along with the formal objectives to improve IP protection in the Baltic countries, to amend the IP laws with obvious discrepancies and weaknesses and to speed up the presupposed integration into EU processes, some internal processes, which had

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Latvian Criminal Code (wording as from 17 October 2002), see *refs.* and overview regarding criminal liability for IP infringements in the Baltic countries in *infra* § 5G.I.

147 See *Pisuke*, Estonia: Copyright and Related Rights, p. 114.

148 The very provisions of the TRIPS Agreement (Section III), referred in view of the Enforcement Directive, are further explored in *infra* § 5A.I.2.a).

149 The EU Association Agreements entered into force on 1 February 1998 in all three Baltic countries. It should be mentioned that during the preparation for the accession into the EU the Baltic countries formulated their direction which, as believed, formed the position in regard with IP legislation and improvements as well. *E.g.*, the Estonian Government formulated the so-called ‘*Northern Dimension*’ by stressing IT networks and infrastructure as one of the most important development fields in the Baltic region; see more in *Estonian Government’s European Union Policy for 2004 -2006*, p. 37. The same political direction has been repeated in *Estonia’s European Union Policy for 2007 – 2011*, p. 41.

150 Art. 67 of the EU Association Agreements establishing an association between the European Communities, their Member States and the Republic of Estonia, also Latvia and Lithuania explicitly stated the obligations to create the level of IP protection which existed in the EU and stressed the need to improve efficient measures in the field of enforcement of the IP rights.

151 The mentioned agreements, “the most advanced and far-reaching“, envisaged the preparation of the Baltic countries to enter the EU, as referred in *von Lewinski*, Copyright in Central and Eastern Europe, pp. 47-48.

clearly influenced the IP-related situation, such as the growing IT industry<sup>152</sup> and, at the same time, a high level of piracy and counterfeiting products<sup>153</sup> in the Baltic markets, should have also been taken into consideration. All those factors and processes reflected a progressive approximation of the national IP laws by mainly focusing on a creation of new export markets rather than on an imposition of certain sanctions for not ensuring adequate IPR protection under the bilateral or multilateral international agreements in the Baltic region<sup>154</sup>. As referred to by some authors, for example, in Estonia the national legislative amendments were influenced not only by the desire for a speedy integration into the EU, but also by the internal development in the legal system, in particular, by the drafting and adoption of new General Principles of Civil Law, a Criminal Code, a Customs Act, etc. and, additionally, by some pressure from abroad, especially from countries like Finland and the USA<sup>155</sup>.

At the time the actual negotiations with the EU started, the Baltic countries already had a full range of national IP legislation<sup>156</sup> which, due to the accession process, had to be accordingly approximated. By the time the Enforcement Directive was to be implemented<sup>157</sup>, the Baltic countries had in general adopted the substantial amendments to the national copyright legislation on the basis of the provisions of previous EU directives and also the requirements of the TRIPS Agreement. Amendments also followed in the area of industrial property, *i.e.*, patents, trademarks, designs, layout designs of integrated circuits, and geographical indications<sup>158</sup>, however, many legislative discrepancies remained.

As far as the enforcement provisions were concerned, the Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society<sup>159</sup>, namely, its Articles 6, 7, and 8 should be mentioned. The provisions, as embodied in the aforementioned articles of the Directive, have been adopted in the national copyright legislation<sup>160</sup>. However, they have not yet been actually applied. Importantly, the provisions in regard with the liability of ISPs as embodied in Article 8 of the Di-

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152 See *Datamonitor, Growth of the Software Industry in Lithuania (2001)*.

153 *E.g.*, it has been reported in *Infobalt Press Releases (2000)* that the percentage of pirated goods (protected under copyright and neighbouring rights) used to reach approx. 85% in Lithuania in 2000.

154 See *von Lewinski, Copyright in Central and Eastern Europe*, p. 46.

155 See *Pisuke, Estonia: Copyright and Related Rights*, p. 106.

156 See *refs.* to the national laws in *supra* § 3B.III.1.

157 Until 29 April, 2006 (Art. 20, Dir.).

158 *Note*: as a rule, the national legislative act lists the directives which have been accordingly implemented by this very act.

159 Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001, L 167/10 (hereinafter – the “*Copyright Directive*”).

160 Arts. 74, 75 of the Lithuanian Copyright Law (as amended on 5 March, 2003, enforced as from 21 March, 2003); Art. 68(1)(3) and (4) of the Latvian Copyright Law (amended on 22 April, 2004); the provisions were not, however, explicitly implemented in the 1992 Estonian Copyright Act (amended on 16 October, 2002).



rective are to be highlighted due to growing internet piracy as well as a strong IT sector and its ongoing development in the Baltic countries<sup>161</sup>.

Further, the new amendments to the 2003 Law on Copyright and Related Rights, which came into force in Lithuania on 12 October 2006, implemented the provisions of the EU Enforcement Directive. In Estonia, the Enforcement Directive was implemented while adopting the extensive amendments to the Estonian Code of Civil Procedure and in Latvia by adopting new amendments to the Civil Procedure Law<sup>162</sup>.

While referring to the implementation of *acquis communautaire*, the Council Regulation (EC) No 1383/2003 of 22 July, 2003<sup>163</sup>, concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights should also be mentioned. The EC Regulation 1383/2003 is substantial in terms of effective actions as applied *ex officio* by the customs authorities or on the basis of applications by IP right holders due to a high number of piracy incidents at the borders of the Baltic countries. However, those actions (measures and procedures) are strictly regulated by the EC Regulation 1383/2003 and do not fall under the scope of the regulation of the Enforcement Directive<sup>164</sup>.

## V. Concluding remarks

Following the scheme of geopolitical functions that could be performed by the Baltic countries, a parallel could be drawn in terms of promoting and protecting IP rights: due to its “cross-road” position, the East-Baltic could be the outpost for the expansion or barrier of external innovations, and, moreover, they could actively contribute to the expansion of IP in this sub-region by involving the “Eurasian” core and become an arena of innovation exchange.

On the other hand, while exploring some rudiments of the creation of the modern IP systems during the interwar period in the Baltic countries, the IP “mentality” and related regulatory system during the Soviet occupation and, finally, referring to the rapid legal changes after the declarations of the independence of the three Baltic states in 1990/1991, it is evident that such discontinuous historical circumstances

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161 See further *refs. in infra* § 4A.II.

162 See *Harenko et al.*, Expedited Remedies for the Protection of IP in Finland and the Baltic States, pp. 31-32; also see the implementing amendments in the field of IP rights enforcement regulation in the Baltic countries in *infra* § 5B.I.1.c).

163 Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ 2003, L 196/7 (hereinafter – the “*EC Regulation 1383/2003*”). Since 1 May, 2004, when the latter regulation became directly applicable to the Baltic countries, the national legislation regarding the import and export of IP goods that was in force until the accession date is no longer applicable.

164 See more discussion about border measures and civil remedies in *infra* § 5G.II.

caused the specific and, frequently, uneven formation of the Baltic IP legal doctrine and practice.

Notwithstanding the fact that, from the current legislative point of view, the national IP system is duly regulated, especially due to the formal and actual integration into the EU processes, Baltic history still has a strong influence, which does not always allow a consistent implementation of EU-wide provisions in practice. Moreover, factors such as the extremely rapid transformation since the declarations of independence of the Baltic countries from centralized economies with weak protection of IP rights to market economies with strong protection of IP rights and the Soviet “IP-mentality” of the people adopting and applying the laws play an enormous role in the creation of an IP-friendly environment in the Baltic countries. The period immediately following the declarations of independence is considered to be only a short transformation period, one which obviously promises additional possible changes in the future.

### ***C. Overview of the current national regulatory and institutional framework for the enforcement of IP rights***

#### ***I. Adoption of national IP legislation: some procedural aspects***

Under the national Constitutions of the Baltic countries<sup>165</sup>, national laws are adopted by the national parliaments (the *Riigikogu* (est.) in Estonia, the *Seimas* (lt.) in Lithuania and the *Saeima* (lv.) in Latvia) and are only enforced after they are officially signed and proclaimed by the national presidents<sup>166</sup>. As the drafting of national laws in the national parliaments is mainly subject to discussions by the parliamentary committees<sup>167</sup>, the role of those committees in the process of the adoption of national legislation, as well as its approximation and implementation with EU legal provisions and international obligations is of the highest importance<sup>168</sup>.

In the area of drafting national substantive IP legislation and the procedural laws which are important for the IP enforcement, the Cultural Affairs and the Legal Af-

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165 *Refs.* to the 1992 Estonian Constitution, Articles 65(1) and 78(6); the 1922 (last amended in 2003) Latvian Constitution, Articles 64 and 70; the 1992 Lithuanian Constitution, Articles 67 (2) and 70. See also *supra* Fts. 109-111 herein.

166 All the national legislative acts, after they are signed and proclaimed, can be found in the official magazines (Engl. “State Gazette“): for Lithuania – “Valstybės žinios” (lt.); for Estonia – “Riigi Teatja” (est.), and for Latvia – “Latvijas Vēstnesis” (lv.).

167 *Refs.* to the 1992 Estonian Constitution, Article 71; the 1922 (last amended in 2003) Latvian Constitution, Articles 25; the 1994 Statute of the Lithuanian Parliament (last amended in 2006), Section III.

168 It should also not be forgotten that on the EU legislative level the Baltic members at the European Parliament have their own representatives (Estonia has 6, Latvia - 8, and Lithuanian – 12 representatives at the European Parliament (2010 data)) who can directly participate in law-adoption processes in the EU legislative institution.

fairs Committees in the Estonian Parliament, the Education, Science and Culture and the Legal Affairs Committees in the Lithuanian Parliament and in the Latvian Parliament, as well as the Development of Information Society Committee in the Lithuanian Parliament are mainly involved. According to the Statutes of the national parliaments<sup>169</sup>, experts from the IP field, who are not the members of the national parliaments, can provide their opinions and attend the meetings of the listed parliamentary committees while the amendments to the national laws are being drafted. It allows IP practitioners to directly participate in the legislative process which, considering the speedy transposition of laws and creation of the national IP systems, is to be seen as an important factor helping the national legislators to adopt or implement legal provisions by closely considering practical needs and actual problems.

In addition to the parliamentary committees and the national Ministries of Culture of the Baltic countries<sup>170</sup>, which are the essential links in the chain of drafting the national IP legislation<sup>171</sup>, other institutions which have played, and are playing, an important role in the law-adoption process should be mentioned. The provision of the opinions and expertise by the former European Committee to the Government<sup>172</sup> of Lithuania is considered very valuable for the preparation of the contemporary IP legislation. As far as the enforcement of IP rights were concerned, the qualitative legal conclusions provided by the European Committee were valuable in approximating the national legislation with the EU provisions. For example, along with other factors the Committee's independent conclusion regarding the term "*commercial purposes*" arguably impelled the Lithuanian legislators to improve the provisions in the Law on Copyright and Neighbouring Rights<sup>173</sup> that was in force at that time. Moreover, the opinions which are provided by foreign and local IP right hold-

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169 Art. 48(8) of the 1994 Statute of the Lithuanian Parliament provides for the possibility of forming working groups consisting, *inter alia*, of experts from the field to prepare the draft laws. Similarly, the possibility of third-person experts attending the committees' sessions is provided in Art. 22(3) of the 2003 Estonian Riigikogu Rules of Procedure Act and in Section VI of the 1994 Latvian Saeima Rules of Parliamentary Procedure (all documents as amended).

170 Their role is discussed in the subsequent section.

171 *E.g.*, the last amendments to the national copyright legislation in regard with the enforcement of IP rights have been made by the Ministries of Culture. More on the work of the national Ministries of Culture, the cultural strategies, and reports see *Estonian Ministry of Culture Information (2008)*, *Latvian Ministry of Culture Information (2008)* and *Lithuanian Ministry of Culture Information (2008)*.

172 The European Committee was reorganized beginning January 1, 2004, with the interception of its functions by the Department of the Coordination of the EU Policy Analysis and Positions at the Chancery of the Government of Lithuania.

173 *The European Committee at the Government of the Republic of Lithuania, 3 December 2002 Letter No. 2002-11-11, on Commercial Purposes Term*. In the explanatory letter, the experts of the European Committee broadly explained the term "commercial purposes". Such explanations were later reflected in the subsequent positions undertaken by the parliamentary groups which were drafting the amendments to the national IP legislation. For further analysis on the national court practice and the terms "*commercial purposes*" and "*commercial scale*" regarding Recital 14, Dir. see in *infra* § 5C.II.2.

ers<sup>174</sup> on one side and, for instance, consumers' associations on the other, allow the legislators to implement or adopt legal provisions which mirror the local IP situation and practice, while, at the same time, being in compliance with international obligations.

## II. Competence and functions of the main national IP institutions

As a rule, national laws are to be enforced by adopting the national secondary legislation, which concretizes the legislative provisions as embodied in the primary laws. According to the national Constitutions, the responsible institutions approved by the Governments in the field of copyright and neighbouring rights, namely, the national Governments and the national Ministries of Culture, adopt legal acts (regulations, decrees, or orders, respectively) in which concrete enforcement rules are embodied. IP institutions are established and they function under the secondary legislation which clearly list and define their aims, competencies, and functions.

The role and functions of the national Copyright Boards at the Ministries of Culture, the national patent and trademark offices, and the collective administration societies should be especially considered in a discussion on the enforcement of IP rights. Moreover, as follows from the actual practice of application of certain enforcement provisions, the quality and accuracy of the national secondary legislation plays a role. Hence, the effective work of these institutions in the field of drafting laws is highly valuable.

### 1. The Ministries of Culture: the Copyright Divisions and Boards

With regard to influencing their societies' views and attitude towards intellectual property as well as to their participation in the processes of adopting and amending IP laws, the role of the national Ministries of Culture cannot be underestimated<sup>175</sup>. Since their creation<sup>176</sup>, the Copyright and Neighbouring Rights Divisions and the Copyright Boards at the national Ministries of Culture of the Baltic countries played, and are playing, an important role in both the processes of the creation of the enforcement system of IP rights and the approximation of the EU legal provisions with the national ones.

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174 *E.g.*, the opinions provided by the foreign associations of IP right holders such as BSA, IFPI are meant herein.

175 This could be well illustrated by referring to the objects and activities planned by the national governments and the Ministries of Culture. *E.g.*, one of the priority questions in the program of the Lithuanian Government for the year 2007-2008 was educating the public on IP questions. Moreover, the Ministry is prepared to create an anti-piracy centre concept as well as draft amendments to the Criminal Code and Code of Administrative Offences, as listed in *Report (2007 Annual) by the Lithuanian Ministry of Culture*, pp. 10-11.

176 The Copyright Committee at the Ministry of Culture of Estonia was established in 1992, the Copyright Board in Lithuania in 2000. In Latvia the Copyright and Neighbouring Rights Division at the Ministry of Culture started to function at the beginning of 2000.

From an IP perspective, the main functions of the mentioned divisions and boards cover, *inter alia*: participation in the law adoption processes; participation in and organization of IP-related educational programs; attendance (mainly, as legal experts) at court hearings of IP rights infringement cases<sup>177</sup>. It should be noted that sometimes even very declarative provisions prospects approved by the Ministries of Culture concerning the establishment of a more effective legal system to fight against piracy find their way to actual application. For example, in Lithuania anti-piracy projects can now be partially financed from the state budget<sup>178</sup>, which is considered a big step towards the actual effective implementation of the enforcement provisions.

## 2. The collective administration societies

The national collective administration societies, whose functions were re-established after the independence of the Baltic States<sup>179</sup>, also play an important role in terms of the effective protection of IP rights. Although the national collective societies have their own history, as they existed before the Soviet occupation in 1940/1941 in the Baltic countries<sup>180</sup> (it should also be noted that the legal protection of neighbouring rights in the Baltic countries was introduced only after the Soviet period, meaning that the collective societies had to deal with a relatively new field of IP rights), their role and functions are sometimes falsely interpreted by the general public, which associates them with the institution that functioned during Soviet occupation times, *i.e.* the collective society (the Union Agency of Copyright (VAAP)), which enjoyed a state monopoly and was the sole licensing authority<sup>181</sup>, and which clearly disseminated the Soviet ideal that the state must control all sectors of the country's cultural life. Therefore, the national collective societies, by fulfilling their duties under the provided competence, are still sometimes criticized by Baltic society<sup>182</sup>.

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177 The competencies and functions of the Ministry of Culture and the Copyright Board of Lithuania are listed in Arts. 71, 72 of the Lithuanian Copyright Law. The competencies and functions of the Latvian Ministry of Culture can be found in Arts. 67, 67(1) of the Latvian Copyright Law. For more on the functions of the Estonia Copyright Committee see at *Pisuke*, Estonia: Copyright and Related Rights, pp. 107-108.

178 Under the Order of the Minister of Culture of the Republic of Lithuania on the Approval of the Forms of Rules, Application, Contract and Reports in regard to the Partial Financing of the Anti-Piracy Campaigns from the State Budget, 29 June 2007, No. IV – 421, Vilnius (OV).

179 The collective administration societies have functioned in Lithuania since 1990 (and since 1999 for holders of neighbouring rights), since 1991 in Estonia, and since 1992-1995 in Latvia. See *Baltic Collective Administration Societies' Information (2008)*.

180 For more about the history of the Baltic collective administration societies see at *Pisuke*, Estonia: Copyright and Related Rights, pp. 100, 107.

181 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 44.

182 *E.g.*, the recent dispute in Lithuania between LATGA-A and the company “Hesona” explicitly illustrates that there many remaining “soviet” points of view in regard with an adequate remuneration to be paid to authors on the basis of Art. 33 of the Lithuanian Copyright Law due to the well-established soviet notion that “art belongs to people”, as observed following Lithuanian Court of Appeal, Civil Case No. 2-564/2007, *LATGA-A et al. vs. AB “Hesona” et al.* According to LATGA-A information (July 2008), there were more than 250 cases in the

In discussing the collective administration societies concerning the enforcement of IP rights, one important tendency should be taken into consideration. Arguably, with reference to the Soviet Union period, when cultural life was also centrally planned and organized, right holders had less motivation to initiate court actions against infringers of their rights. This tendency is unfortunately obvious nowadays as well, *i.e.* individual right holders are not willing to start legal processes against infringers. This is surely related to the fact that the court proceedings are still relatively long, require an appropriate professional preparation and representation in the courts, and are costly.

### 3. The trademark and patent offices

The first national institutions dealing with IP rights that were re-established after the declarations of independence in 1990/1991 were the national patent and trademark offices<sup>183</sup>. Along with the first new legislation in the field of industrial property, which was adopted immediately after the declarations of independence<sup>184</sup> in the Baltic States, the national patent offices played an important role in recreating the national system of registration of IP rights and the work of the national patent offices that functioned during the first independence<sup>185</sup>. They also had to become an equal member of the European patent<sup>186</sup>, trademark, and design systems gradually, by ensuring the protection of community rights as well as the rights under European patents.

In terms of patent or trademark litigation, the pre-trial procedures which are held at the national patent offices, namely, the cases heard by the Board of Appeals, should be duly considered. As stated in the national industrial property laws, disputes regarding decisions related to industrial property rights taken by the national patent offices are to be firstly resolved by the Board of Appeals<sup>187</sup>. The decisions

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courts (in the period January 2000 to July 2008) against user-companies which did not pay royalties.

183 Under the Order of the Government of Lithuania, the State Patent Bureau was established and began functioning in 1991. In the same year the Patent Offices started their functions in Estonia and Latvia (hereinafter – the “*national patent offices*”).

184 Such as the 1991 Order of the Government of Lithuania on “Registration of Firm Names” or the 1992 Order on “The Legal Protection of the Industrial Property in the Republic of Lithuania” which provided the order under which the patent, trademark, and design registration documents were to be registered at the State Patent Bureau, etc., or in Estonia in which the national patent office started its work with a registration of trademarks and service marks under the 1992 Trademarks Act by the Supreme Council, or Latvia in which the first patent application after independence was filed in February, 1992.

185 During the first independence, the patent offices functioned from 1919/1920 until 1940 by registering industrial property rights.

186 Starting with Estonia, which joined the EPO on 1 July, 2002. Lithuania joined the organization on 1 December, 2004, and Latvia on 1 July, 2005.

187 *E.g.*, Art. 40(1), Lithuanian Patent Law; Art. 27(1), Latvian Patent Law

can be appealed to, respectively, the Tallinn Administrative Court<sup>188</sup>, the Riga Regional Court and the Vilnius District Court<sup>189</sup>. Based on statistical data on appealed decisions of the patent office in Lithuania, the tendency that the Board of Appeals is playing an evidently important role is observable<sup>190</sup>. Moreover, the specialization and work of the members of the Board of Appeals is likewise significant in the pre-trial procedures.

### III. The role of the government institutions responsible for IP rights enforcement

#### 1. The police authorities: a good start in IP rights infringement cases is crucial

Regarding prosecution of infringers of IP rights and as far as the administrative and criminal enforcement of IP rights is concerned, the police fulfil an important function in terms of initiating and leading criminal and administrative IP cases to the courts<sup>191</sup>. It is observed that during the last decade, the national Baltic police authorities mainly dealt with copyright and neighbouring rights infringements<sup>192</sup>. Considering such observations, the main aspects of police functions in the primary investigation process in such cases should be noted.

Primary prosecution in administrative and criminal IP cases is held by the police officers, meaning that they can initiate actions either based on an individual complaint submitted by the right holders or right holders associations, or *ex officio*. Generally, after a case against the IP infringer is initiated, the functions of the police authorities, most importantly, comprise, *inter alia*, evidence collection and the preparation of the procedural documents (a protocol, a document on a seizure of infringing

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188 Art. 30(1) of the Estonian Patent Law establishes that an appeal against the decision of the Patent Office can be filed either to the Board of Appeals or to an administrative court.

189 The number of cases regarding invalidation of registered trademarks is dominant among IP cases in Lithuania, also Latvia; as follows from *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)*, also *Latvian Ministry of Justice Information (2008) (unofficial information)*.

190 E.g., in 2007 the Board of Appeals of the Patent Office considered 197 protests and 10 appeals in LT. The number of the enlarged European patents increased 10 %, whereas the number of the registered trademarks 29 %; see more statistical information in *Lithuanian Patent Office Information (2008) (EV)*.

191 See more information about administrative and criminal liability for IP infringement cases in *infra* § 5G.I. *Note*: there were also special IP units established in the national (economic, tax, or finance) police departments in the Baltic countries.

192 As referred to in the Letter by the European Committee at the Government of the Republic of Lithuania No 10-488 as of 19 April 2002 (OV), the effective police activities in fighting against infringements of IP rights helped Lithuania to strengthen the protection of IP rights and to fulfil its international obligations, by making an example that the commonly-named finance police initiated only 81 administrative cases against the infringers of IP rights during 1998-1999, whereas there were 147 administrative cases already initiated in 2000.

goods, etc.) of the case to be submitted to the court<sup>193</sup>. The collection of evidence requires special knowledge and specific training for the police officers, as the process of collecting evidence mainly involves the collection of specific technical information. In the context of this process, it should be noted that the police authorities usually involve specialists and experts, who provide written statements, which comprise part of the main crucial evidence in IP rights infringement cases. The formed court practice regarding a specialist's statements in IP infringement cases are considered positive, especially due to the fact that specialists are mainly the representatives (legal and/or technical experts) of IP right holders' enforcement associations, but not direct employees of IP right holder companies<sup>194</sup>. This is also due to the fact that procedural errors in the primary prosecution process might negatively affect the result of the case, *i.e.* the case could be terminated, or an appropriate assessment of damages for the calculation of which the number of illegal products and their exact specification is required<sup>195</sup>, could be omitted, which is sometimes evident in the national IP enforcement practice.

The functions and the work of the police authorities, and the importance of the participation of specialists in this first step in the primary investigation, have been a regular focus in the various reports concerning certain improvements in the field of the enforcement of IP rights in the Baltic countries<sup>196</sup>. One can agree on this focus, because police competence, and proper training and appropriate equipment for the police authorities, which have lived through multiple re-organizations, are substantial factors directly influencing the effective application of the enforcement provisions and, at the end of the legal process, the procedural and substantial success of IP cases.

In this regard it should be emphasized that in Lithuania there were certain attempts from the police authorities, which should be applauded, to investigate administrative and criminal cases while investigating other offences in the range of police competence. Moreover, the state tax inspections can be also involved in the investi-

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193 See *Vileita*, Commentary of the Lithuanian Law of Copyright and Article 214(10) of the Administrative Code, pp. 197-200.

194 Throughout the national court practice this has been raised as a particular issue, however, the national courts considered specialists who were actually employees of the right holders' enforcement associations as the appropriate persons able to provide all accurate information about the rights which were allegedly infringed. *E.g.*, in Lithuania since 1998-2000, when the police authorities started actively initiating administrative and criminal cases, a provision of *specialist's statements* in the copyright infringement cases unburdened the process of proving the infringement and undoubtedly made the process quicker. Moreover, the IP right holders were to calculate the damages that occurred on the basis of such statements as well. The Lithuanian court practice shows that those specialist's statements are considered as one of the substantial pieces of evidence in IP civil cases, as observed in Decision 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB "Arginta"*; see also the further discussion on measures for preserving evidence in *infra* § 5D.I.

195 See further discussion on the assessment of damages in the civil IP cases in *infra* § 5F.I.

196 Improvements of the work of the national police authorities have always been a significant issue mentioned in, for instance, *USTR Special 301 Reports* for all three Baltic countries.



gation of infringements of IP rights, as long as their competence allows<sup>197</sup>, as such infringements can be related to an avoidance to pay or non-payment of taxes. It is believed that this combination can make the activities against infringements of IP rights more efficient. Moreover, while enforcing *civil searches*, which can be started by IP right holders on the basis of the implemented provisions, the attendance of police authorities can be also invoked (in cases when the alleged infringer interferes or hinders the collection of evidence)<sup>198</sup>.

## 2. Customs authorities: ensuring effective measures at the borders

Since the EC Regulation 1383/2003 was adopted<sup>199</sup>, the national customs authorities are to be considered as one more significant institutional structure for the effective application of the enforcement-related provisions, namely, the protection of IP rights at the borders. Considering the specificity of the geographical situation of the Baltic countries, as previously discussed<sup>200</sup>, as well as the high rate of IP piracy reported at the borders of the Baltic countries<sup>201</sup>, it can be agreed that an effective functioning of the system of seizure of illegal goods and deterring infringements of IP rights at the borders is crucial for an effective enforcement of IP rights.

As follows from the legislatively-embodied competence and functions of the national customs authorities, one of the most important functions is an *ex officio* action by the customs authorities, *i.e.* measures taken before an application for action by the customs authorities is lodged. By virtue of Article 4 of the EC Regulation 1383/2003, the customs authorities “may suspend the release of the goods or detain them for a period of three working days <...>”. Alternatively, the right holders can initiate the application of the customs measures in advance by submitting an application. By authority of the Article 11(1) of the EC Regulation 1383/2003, the deadlines provided for right holders or their representatives to submit an application for action in case suspected illegal products are detained at the borders are very tight. Therefore, the competence and preparation of the officers of the customs authorities, in addition to specific equipment and information to detect those illegal goods play a crucial role<sup>202</sup>. As follows from the provisions of the EC Regulation 1383/2003, the

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197 As follows from their competence, *e.g.*, in Lithuania, the state tax inspections have, *inter alia*, a right to make raids during which the financial documents of the companies are checked and they can also organize a confiscation, storage, realization, etc. of exhibits in IP infringement cases. It is regulated under the Order of the Head of State Tax Inspection at the Ministry of Finance of the Republic of Lithuania, No. VA-205, 23 December 2004, Arts. 10.33., 10.21 (OV). See also further discussion on the application of measures for preserving evidence in IP infringement cases under Arts. 6, 7 of the Enforcement Directive in *infra* § 5D.I.

198 See also discussion about *civil (ex parte) searches* practice in Lithuania in *infra* § 5D.I.3.

199 See *supra* Ft. 163 herein.

200 See the description on the geopolitical situation of the Baltic countries provided in *supra* § 3A.

201 *Refs. to the USTR Special 301 Reports*; see also information in *infra* § 4A.II.

202 In this regard it should be mentioned that constant updated training is held for the national Baltic customs officers, enabling them to improve their competence and qualification in such cases. Moreover, by virtue of the requirements as set in Art. 5(5) of the EC Regulation

right holders must also provide very detailed and specific information to the customs authorities. The statistics show that this legislative possibility especially in connection with actions based on the requests of IP right holders is growing in practice, and more cases may be expected in the future following the customs seizures of IP infringing products at the Baltic countries' borders<sup>203</sup>.

#### IV. *The national judicial systems in view of IP rights enforcement*

##### 1. Competence to hear IP rights infringement cases and jurisdiction

###### a) General structure of the court systems

Needless to say, one of the main challenges for an effective implementation of the IP legislation concerns the establishment and proper functioning of independent civil, administrative, and criminal courts<sup>204</sup>. Judges undoubtedly play one of the most important roles in making the implemented legal provisions effective, especially in the period when the state faces the transformation of its legal system, when the new legislation is to affirm the social and economic changes in the countries<sup>205</sup>.

In Article 111(1) of the Lithuanian Constitution, it is established that the courts shall be the Supreme Court of Lithuania (*Lietuvos Aukščiausiasis Teismas*, Lt.), the Court of Appeal of Lithuania (*Lietuvos Apeliacinis Teismas*, Lt.), regional courts (*apygardų teismai*, Lt.), and local courts (*apylinkių teismai*, Lt.). This four-level court system comprises the system of general jurisdiction which is to create preconditions for courts of higher instances to correct any mistakes of the fact (*i.e.* the establishment and assessment of legally significant facts) or of the law (*i.e.* of the application of law) and not to allow that injustice is executed in any civil, criminal, or other case. It is also to ensure the uniformity (regularity, consistency) of the practice of courts of general jurisdiction, so that the jurisprudence of the courts of general jurisdiction is predictable and the constitution principles of a state under the rule of law, justice, and equality of people before the court are not disregarded. Any deviation from the previous court precedents which had been binding on the courts by then must in all cases be properly (clearly and rationally) argued in the corresponding decisions of the courts of general jurisdiction, *i.e.* no creation or reasoning of a new court precedent may be determined by accidental legal factors. Constitutionally, no court of general jurisdiction of lower instance is subordinate, neither administratively nor organizationally, to any court of a higher instance. The courts of lower in-

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1383/2003, the precise information provided by the right holders regarding counterfeits and legal products and the provision of their samples are very helpful in terms of successful application of the border measures.

203 See *refs.* to statistical data, also to the recent cases in *infra* § 5G.II.

204 See *Heath, Dietz et al.*, *Enforcement of IPRs in Eastern Europe*, p. 879.

205 Many scholars and practitioners emphasize this importance while exploring the actual application of the implemented and transposed legal provisions; see more in *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, pp. 141-144.

stance are only bound by the higher instance precedents in the cases of the same categories and obey the law only, but not any obligatory or recommendatory instructions from the higher instance courts, which could be considered *ultra vires* activities.

Similar constitutional principles of judicial power are to be applied for the functioning of the national courts in Estonia and Latvia. Article 148(1) of the Estonian Constitution establishes a three-level court system (city, county, and administrative courts as the first instance, circuit courts (*Tallinn, Tartu* and *Viru*) as the appeal instance, and the Supreme Court (*Riigikohus*, est.) as the third instance). In Latvia, the court system of general jurisdiction is comprised of local courts, regional courts, and the Supreme Court (*Augstākā Tiesa*, lv.). Thus, the three-level system is established under Article 82 of the Latvian Constitution as well<sup>206</sup>.

In the context of the establishment of the four-level general jurisdiction, the constitutional principles, the scope of competence, and judicial power, which are thoroughly explored in the Ruling of the Constitutional Court of Lithuania and mentioned in the set-forth paragraph, respectively<sup>207</sup>, and also in the context of the three-level general jurisdictions in Estonia and Latvia, the competence of the national courts of general jurisdiction to hear IP cases should be addressed.

In Lithuania all civil IP cases are to be heard by the local courts (there are 54 local courts), except the cases relating to trademarks and patents, which are to be considered by the district courts situated in Vilnius, Kaunas, Klaipėda, Šiauliai, and Panevėžys (there are 5 of them) as the first instance<sup>208</sup>, one of which – the Vilnius District Court (*Vilniaus Apygardos Teismas*, lt.) – has an exclusive jurisdiction over the appeals from the decisions of the Patent Office<sup>209</sup>.

The appealed first instance cases are to be considered by the Court of Appeals of Lithuania, situated in Vilnius, or by the district courts, when the local court's case is appealed (when the facts that are important to the decision of the case are, *inter alia*, investigated and assessed anew) and, in case the cassation appeal is submitted, the case is exclusively considered by the Supreme Court of Lithuania (when the issues of law are decided anew), also situated in Vilnius. As far as IP criminal and adminis-

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206 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, pp. 885, 900.

207 See Ruling of the Constitutional Court of the Republic of Lithuania (Case No. 33/03) on the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania, 28 March 2006 (hereinafter – the “*Constitutional Court of Lithuania, Case No. 33/03, 2006*”).

208 Before the amendments to the 1999 Lithuanian Law on Copyright and Related Rights had been adopted in 2003, the courts that heard copyright and related rights cases were the district courts. Considering the fact that the judges at the district courts are more experienced ones, and hear relatively less cases than the judges at the local courts per year, it could be also argued that it had an implicit influence on the IP cases and the quality of their decisions.

209 See also *refs.* in *supra* § 3C.II.3.

trative cases are concerned, they are firstly heard by the local courts and can be appealed to the district courts and the Supreme Court of Lithuania respectively<sup>210</sup>.

In Latvia, the IP cases are to be considered by the local courts (there are 34 of them), except when they are exclusively heard by the regional courts (cases concerning patents and trademarks)<sup>211</sup>. Those regional courts (there are 5 of them) are also assigned to hear the appealed cases from the local courts, whereas their own decisions are to be considered by the Supreme Court of Latvia, situated in Riga, as the appellation instance. The Senate of the Supreme Court (consisting of 25 Justices) considers the matters on law on the basis of errors of procedural or substantive law, or the lower instance court acting *ultra vires* as the cassation instance<sup>212</sup>. The administrative and criminal cases against the infringers of IP rights are considered by the local courts as the first instance courts and can also be appealed to the regional courts and the Supreme Court of Latvia<sup>213</sup>.

Similarly, in Estonia civil, criminal and administrative IP cases are heard by the city and county courts (there are 18 of them), the decisions of which can be appealed to the circuit courts (there are 3 of them) and, in case the cassation appeal is submitted, to the Supreme Court of Estonia (17 Justices) in Tartu as the cassation instance<sup>214</sup>. As a rule, the cases in the first instance court are considered by one judge, in the appeal and cassation proceedings by three judges or justices, respectively, and in cases of the enlarged boards in the Supreme Courts of Lithuania and Latvia by seven justices. Moreover, supplementary steps to be taken prior to the civil procedure have been established in Estonia and Lithuania (such steps, however, are not applied in Latvia)<sup>215</sup>.

## b) Role of the national Supreme Courts

The national Supreme Courts are to be specifically mentioned, as far as the continuity of the jurisprudence of the national courts of general jurisdiction and the predictability of the court decisions is concerned. The national Supreme Courts function not only as the cassation instances in the Baltic countries<sup>216</sup>, but also play an important

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210 It should be additionally noted that in the end of 2007, according to the information provided in the *Report on the Activities of the Courts of the Republic of Lithuania (2007)*, p. 6, there were 745 judges in Lithuania in total. 464 of them worked in the local courts, 152 in the district courts, 30 in the Court of Appeals and 33 in the Supreme Court of Lithuania.

211 As reported, in practice it basically means the Riga Regional Court which also has an exclusive jurisdiction over any counterclaim requesting the invalidation of industrial property rights, also for cases filed by foreigners. See *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, p. 903.

212 See *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, pp. 900-901.

213 According to the Latvian Ministry of Justice Information as of 2001, there were 423 judges in Latvia, see *Latvian Ministry of Justice Information (2008)*.

214 See *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, p. 886. According to *Estonian Supreme Court Information (2008)*, there were 245 judges in Estonia in total.

215 See *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, p. 887 et seq.

216 Notably, the national Supreme Courts hear the cases on the issues of law within the limits of the cassation appeals, except when public interests are concerned, as repeatedly described in,

role in the formation of the consequent and consistent national court practice in the form of preparing *the legal reviews* and issuing *the consultations* to the courts of general jurisdiction<sup>217</sup>. In this respect, it should be mentioned that some consultations of the Supreme Court of Lithuania, for example, the consultation in regard to an adjudication of compensation (by submitting a civil claim) in criminal IP rights infringements cases, created a barrier to the effective protection of the rights of right holders as a result of the excessive time and costs involved, since the possibility of submitting a civil claim by asking for an adjudication of compensation in the IP criminal case was denied<sup>218</sup>.

On the other hand, a few comprehensive elucidations regarding the national court practice prepared by the Supreme Court of Lithuania can be considered a very positive step in forming a constituent and consistent practice relating to IP infringement cases. The significant elucidation concerning the term of ‘a price of a legal sale of a copyright subject-matter’ as a basis for calculating compensation in civil IP cases should be mentioned in this regard<sup>219</sup>. When deciding on the mentioned issue, the Supreme Court of Lithuania solved the inconsistent practice of calculating damages in the form of compensation, thus enabling the right holders to predict the established principles of adjudicating remedies in the civil cases of the IP rights category.

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*e.g.*, Decision 21 June 2006 of Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

217 Judgments of the Estonian Supreme Court are published in Part III of the Official Gazette (“*Riigi Teataja*”) in Estonian, and they are also available on the website of the Supreme Court, see *Estonian Supreme Court Information (2008)*. Only the judgments of the Constitutional Review Chamber are available in English. In Lithuania the legal reviews and consultations by the Supreme Courts are not, however, available in English. They are regularly published in the Supreme Court publications (“*Teismų praktika*”) and they can be found at the court website, see *Lithuanian Supreme Court Information (2008)*. The court practice of Latvian Supreme Court is published in resumptive books for certain period of time (*e.g.*, one or couple of years), on website of the court, see *Latvian Supreme Court Information (2008)*, as well as collected by public fee-paying database as Lursoft. All publications are available in Latvian only.

218 See *Supreme Court of Lithuania, Consultation No. B3-25, 27 September 2001*; for the analysis on the national court practice in regard to the compensation institute and the relevant court practice see more in *infra* § 5F.I.1.

219 The Supreme Court of Lithuania interpreted that ‘*a price of a legal sale*’ of a copyright subject-matter is the basis to calculating compensation as provided in the 1999 Law on Copyright and Related Rights. Such criteria has been confirmed in a row of subsequent civil cases, in one of the last of which the Supreme Court also referred to ‘a legal sale price’ as a criteria in calculating this compensation under the current Law on Copyright and Related Rights as amended on 12 October, 2006. See Lithuanian Supreme Court, Consultation No. A3-64 on aspects of the application of some provisions of the Law on Copyright and Related Rights, 22 February 2002 (hereinafter – the “*Supreme Court of Lithuania, Consultation No. A3-64/2002*”).

## 2. Establishment of specialized courts: a solution for the Baltic countries?

In Article 111(2) of the Constitution of Lithuania, it is established that for the consideration of administrative, labour, family, and cases of other categories, specialized courts *may be* established according to the law. The systematic application of the constitutional principles of judicial power also implies that the instance system which ensures a right to appeal, a formation of a uniform court practice, a binding the courts by existing precedents, and an organisational and other insubordination of the courts should be established for the specialized courts as well. However, as noted in the Ruling of the Constitutional Court of Lithuania<sup>220</sup>, the specialized courts might have certain particularities which are not listed in the Ruling.

As regards the competence of such specialized courts, the division of legal matters to be heard by the specialized courts and/or courts of general jurisdiction could be solved, *inter alia*, by the clear specification of matters to be considered by a specialized court or a court of general jurisdiction, or by clear assignments of the categories of the cases to be considered by the mentioned courts. In Lithuania only the specialized administrative courts have been established so far. Similarly as in Estonia, they consider administrative matters<sup>221</sup>.

As follows from the analysis of the national constitutional provisions regarding the establishment of the specialized courts, the national legislators have broad discretion in establishing the courts assigned for consideration of each category of cases which, as might follow from the wording of such provisions, could cover the IP cases as well. The question would be if such specialized courts, which would only consider IP cases, are actually needed. In this context, some empirical data concerning IP cases heard by the national courts could help provide a reasonable answer.

In 1997 – 1999, the Lithuanian Supreme Court heard 6 IP-related cases; in 2000, 10 cases. There were 9 trademark cases that reached the Supreme Court of Lithuania in 2003, and 10 trademark cases in 2004 and 2005<sup>222</sup>. In 2000, 39 IP cases were brought before the national courts in Lithuania, 30 of which concerned trademarks. During 2004 – 2007 there were in total 29 of IP cases heard by the Supreme Court, 77 cases by the Court of Appeal, and 146 cases by Vilnius District court in Lithuania. Many cases were related to invalidation of the Lithuanian Patent Bureau decisions regarding the registration of trademarks, also copyright and trademark infringement cases, and very minor number of patent cases<sup>223</sup>. In comparison, during 1994 – 2001, 5 civil IP cases, 3 criminal cases, and 4 administrative cases (all in regard to copyright and related rights) were decided, whereas there were only a few

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220 See *Constitutional Court of Lithuania, Case No. 33/03, 2006*.

221 The administrative courts, which function since 2001, also consider the appeals against the decisions of the Patent Office, as referred in *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, p. 886.

222 See *Ibid*, p. 914; also *Klimkevičiūtė, Trademark Protection (Lectures, 2006)*.

223 The numbers are taken from *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)*.

cases relating to industrial property rights in the Supreme Court of Estonia<sup>224</sup>. In Latvia, in 2007 – 2008 there were in total 25 copyright cases and 34 trademark cases, and only 1 case regarding patents and 1 industrial design received by all courts as first instance<sup>225</sup>.

Thus, in this empirical context, the efficacy of establishing IP specialized courts is considered questionable, as the establishment of such specialized courts would bring a higher than necessary cost to the states. Instead, creating a corps of judges specialized in hearing IP cases, especially, civil ones, should be considered. This would also support the view of the specialized IP courts being unnecessary for the time being.

Some practical observations with regard to an actual focus on hearing IP cases in one court, for example, in the Riga Regional Court<sup>226</sup> with its specific exclusive jurisdiction, in the Vilnius District Court<sup>227</sup>, or the Tallinn Administrative Court<sup>228</sup>, supports the assumption that the specialization of a few judges is a positive factor in IP cases, even though this view has also faced some criticism<sup>229</sup>. Such consistent practical specialization has not been observed in the Supreme Courts. However, there are a few specialized judges who are often appointed by the Chief Justices to hear IP cases. It is believed that such practical specialization helps to educate and train judges in IP-related legal matters<sup>230</sup> by making a positive impact on the quality of decisions, judgments, or orders in IPR infringement cases. In this area of educating and training judges in IP-related legal issues, many positive steps have already been made<sup>231</sup>. This progress has always been considered a core factor in the improvement of the application of intellectual property laws<sup>232</sup>. One may agree that such education has positively influenced the decisions and judgments adopted by the national courts, in the form of higher quality and speedier legal processes. The demand for a larger number of judges competent to consider IP cases is still evident, though.

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224 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 891.

225 Following the information provided in *Latvian Ministry of Justice Information (2008) (unofficial information)*.

226 See *supra* Ft. 211 herein.

227 Importantly, the appeals of the decisions taken by the Appeal Divisions of the State Patent Bureau of Lithuania can be appealed to the Vilnius District Court. Such exclusive competence allows the mentioned court and some of its judges actually to specialize in patent-related cases.

228 See *Heath, Dietz et al.*, Enforcement of IPR in Eastern Europe, p. 892.

229 *Ibid*, p. 903.

230 As an example, the District Court of Ljubljana, Slovenia, is often mentioned. This court has an exclusive jurisdiction for IP cases, as referred in *von Lewinski*, Copyright in Central and Eastern Europe, p. 60.

231 The seminars for the Baltic judges who deal with IP cases are to be particularly mentioned.

232 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 61.

### 3. Common judiciary in the framework of community rights: Baltic perspective

The possibility of a common regional jurisdiction in the Baltic countries is to be addressed, especially when discussing the adjudication of cases regarding community rights<sup>233</sup> as well as European patents. After some recent discussions on this point, the concerns expressed concerning, *first*, a requirement that judges of such a court have a technical education, and, *second*, a language issue that could impose the need to change the national constitution, which currently clearly states that all legal processes must be held in the national language, could be reasonable.

It should be pointed out, however, that the main reason for not establishing a regional specialized court in the Baltic countries is a lack of cases in regard to European patents<sup>234</sup> and, moreover, a modest number of patent cases in Lithuania in general. A modest number of patent cases has been also reported in Latvia and Estonia<sup>235</sup> with a reference to the non-specialization of judges or a lack of qualified judges. This could also be supported by the currently observable fact that the so-called innovation performance in the Baltic countries is still either “catching up” (for Lithuania and Latvia) or “trailing” (for Estonia)<sup>236</sup>.

## V. IP practitioners and their role in IP enforcement-related processes: professionalism as the key factor

### 1. Legal representation

A number of local specialists and scholars have correctly stated that professional preparation, experience, and passion for IP cases by IP professionals – patent and trademark attorneys and attorneys-at-law – is an important ‘human’ factor which plays a significant role in the quality and success of IP cases. The professional qualifications<sup>237</sup>, competence and relevant experiences of local patent attorneys and attor-

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233 Community Trade Marks (Council Regulation 40/94/EC); Community Designs (Council Regulation 6/2002/EC).

234 Such concerns and arguments have been expressed in the public discussion held on 11 July, 2007, in Vilnius with regard to an official position of Lithuania related to the patent system in Europe, see more in the *Report of the Council of the European Union Work Group on Intellectual Property (Patents) (2007)*, due to the Commission of the European Communities Communication from the Commission to the European Parliament and the Council on Enhancing the Patent System in Europe, Brussels, 3.4.2007 COM(2007) 165 final. *Note*: see also *refs.* to statistical data in previous section.

235 See *Ibid.*

236 See Annex III, Commission of the European Communities Communication from the Commission to the European Parliament and the Council on Enhancing the Patent System in Europe, Brussels, 3.4.2007 COM(2007) 165 final.

237 See more on the requirements to become a patent and trademark attorney as well as an attorney-at-law in the Baltic countries in *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, pp. 888-890 (for Estonia), pp. 901-902 (for Latvia), pp. 915-916 (for Lithuania).



neys-at-law allow them to provide appropriate legal services in IP infringement cases not only in the national courts, but also worldwide.

As far as *locus standi* of the right holders in judicial practice is concerned<sup>238</sup>, it is observed that in the national courts IP right holders are usually represented by legal representatives, *i.e.* attorneys-at-law or patent attorneys, as defined in the national civil procedural codes. It is mainly due to the fact that, for instance, the Lithuanian CCP requires a party, which wants to be represented in the court, to hire a professional representative<sup>239</sup>. In IP civil proceedings those professional representatives are attorneys-at-law and (or) assistant attorneys-at-law. The Estonian and Latvian civil procedure codes provide more extensive list of representatives in court proceedings who are not necessarily advocates or assistant advocates<sup>240</sup>. On the one hand, such requirement means higher litigation costs; on the other hand, it assures a professional collection of evidence, a preparation of all necessary procedural documents to be submitted to the courts, especially considering the fact that nowadays the national civil procedures are intended to be mainly written, as well as a due presentation of a party during the court hearings.

## 2. Patent and trademark attorneys

During the last decade, along with an increase of IP cases in general and due to the specific educational and training programs organized, *inter alia*, by the national patent offices and other state institutions, the competence and qualification of IP professionals has noticeably increased. However, as may be illustrated by the present numbers of patent attorneys<sup>241</sup> and attorneys specializing in IP in the Baltic countries, this field of legal expertise is not widespread. Although the relatively small Baltic IP market and the modest number of IP cases brought to courts within recent years, especially the ones related to industrial property rights such as patents or designs<sup>242</sup>, do not illustrate a need to have more IP practitioners in the future, some main factors which are deemed to be important for the enforcement of IP rights should be noted.

As far as the formal requirements to become a patent and trademark attorney are concerned, common features in regard to this professional activity for all three Baltic countries can be observed: the candidates must pass an examination and be regis-

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238 See further examination on the implementing legislation regarding *locus standi* in *infra* § 5C.V.

239 Art. 56, the Lithuanian CCP.

240 *E.g.*, pursuant to Art. 218(1)(6) of the Estonian CCP it can be “other persons whose right to act as a contractual representative is provided by law”.

241 There were 57 patent attorneys in Lithuania, 64 patent and trademark attorneys in Latvia, and 54 patent attorneys in Estonia registered in 2008. The list of the currently registered patent and trademark attorneys in the Baltic countries can be found at *Estonian Patent Office Information (2008)*, *Latvian Patent Information (2008)* and *Lithuanian Patent Information (2008)*.

242 See *supra* Fts. from 223 to 225 herein.

tered as patent attorneys in the state registrar<sup>243</sup>. The examination of persons willing to become a patent attorney is considered to be an important legal requirement which ensures an adequate legal representation of clients at the national patent offices and at the national courts. In Estonia and Latvia, patent attorneys are solely eligible to represent clients before the courts, whereas in Lithuania a patent attorney can represent a client before the courts only with the attendance of a lawyer. This is due to the fact that there is no requirement for a patent attorney to have a legal education (*i.e.* a patent attorney is required to have an university diploma of technical, natural or computer sciences, mathematics *or* legal studies), which is required for legal representation<sup>244</sup>, particularly considering the complexity of patent and trademark infringement cases.

In the current context of national enforcement of IP rights and because of the role of the national patent offices, another underlying practical factor should be presented – the activities of patent attorneys as far as the registration of inventions is concerned. According to the national patent laws, the granting of patents in Latvia and Lithuania is based on a simple registration procedure without an examination of the patentability requirements by the patent offices<sup>245</sup>, whereas in Estonia patent applications are subject to the examination of the patentability requirements<sup>246</sup>. This arguably leads to a situation where the Estonian patent attorneys play a more active role while a patent application is being examined at the national patent office, whereas the activities of the Lithuanian and Latvian attorneys are clearly shifted to the opposition procedures and proceedings in patent infringement cases.

## VI. Concluding remarks

The national IP enforcement regulatory framework in the Baltic countries is established on the legislative level and it functions in coordination with the international (such as WIPO, EPO) and European-wide (such as OHIM), institutions working in the field of IP rights. As far as actual enforcement of IP rights is concerned, the effective work of the established (or re-established) national IP enforcement institutions and authorities is crucial. The implementation of the EU Enforcement Directive into the national legislation and the application of the enforcement provisions in practice are tightly linked to the following factors:

*First*, the efficient work of the national bodies which have a legislative power, *i.e.* the national parliaments and governments, namely, the special Copyright Divisions

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243 See in Heath, Dietz *et al.*, Enforcement of IPRs in Eastern Europe, pp. 888-890 (for Estonia), pp. 901-902 (for Latvia), pp. 915-916 (for Lithuania).

244 As a matter of fact, there is a number of attorneys at law specializing in the IP field in the Baltic countries. The information about them can be found on the official websites of the national law offices, the references to which can be found via the websites of the national bar associations.

245 Art. 10(1), the Latvian Patent Law; Art. 19, the Lithuanian Patent Law.

246 Art. 23(1) of the Estonian Patent Law provides that the Patent Office verifies the compliance of the invention with the patentability requirements.

at the national Ministries of Culture, in view of the processes related to the adoption of the laws which implement the Directive;

*Second*, the national IP enforcement institutions, such as the police authorities and customs; and

*Third*, the judicial institutions (currently, the national courts with a general jurisdiction) which actually consider the IP infringement cases. Although having specialized courts or special court divisions to consider IP cases could support the idea of improving the quality of the decisions in the IP infringement cases, considering the number of IP cases which are heard by the national courts of the Baltic countries each year, it is evident that this proposal would be too cost-consuming.

While discussing the effective work of the IP institutions, the existent human factor should also be considered. This human factor refers to the persons adopting the laws and implementing them who, in many cases, demonstrate some remnants of the Soviet mentality and education, especially where IP rights are concerned. This factor often causes a slow consideration of the draft laws processes as well as a delayed preparation of the cases to be submitted to the courts and court proceedings. Attention should be paid to offering more frequent and qualitative trainings with regard to IP-related education and knowledge for the national judges, the officers from the national IP enforcement authorities, such as the police and customs officials, as well as for the IP practitioners. According to the strategies prepared by the Ministries of Culture of the Baltic countries covering IP enforcement, these trainings are planned as an important focus for the coming terms. It is to be noted that the involvement of foreign specialists and experts in the field, as well as generally promoting IP in the schools, universities, and other educational institutions could also clearly be helpful.

It is also important to see the law-adoption process not only through the formal regulation of the work of the national Parliaments and the Governments, but also by considering who can attend this process and have an actual influence, if any, by allowing the laws to be more closely-related to the practice. It is very important in terms of the transposition of laws in the Baltic countries and also in terms of better analysing the local provisions by which the European provisions are implemented.

## § 4 Considerations of the relevant social and economic factors which are important to the implementation of the Enforcement Directive

### A. General considerations

#### I. Social changes in the Baltic countries in view of the accession into the European Union

Along with the examination of the legislative IP history, the recent developments and changes in this legal field as well as the corresponding IP regulatory infrastructure, it is important to consider social and economic changes in the Baltic countries which are in a close correlation with an actual implementation of the provisions on enforcement of IP rights. It can be observed that certain legislative changes together with other economic factors such as, for instance, the growth of IT industry, improvements of a local R&D sector<sup>247</sup> and the spread of awareness of, especially, local right holders about the protection of IP rights, had an immediate effect on a reduction of the number of counterfeits and pirated products in the Baltic IP market and at the same time increasing local innovation and creation activities.

These IP-relevant economic factors as well as IP teaching which plays an enormous role for improvements in the local R&D sector cannot be considered without taking general social processes in the Baltic states after the declaration of their independence in 1990/1991 into account. The general social processes mainly mean the progressive social transformation (which is generally specific to the “post-soviet” world) substantially affected by the rapid approach of the Baltic states with the EU and other western countries which also was followed by the accession of the Baltic countries into the EU.

From the social point of view, although the discussion of whether Baltic identity is European or post-Soviet is still ongoing<sup>248</sup>, the EU integration processes led to very affirmative results, meaning the expeditious changes from the so-called “soviet mentality” to the western viewpoints in many fields, including intellectual property. From the economic point of view, it was presumed that the accession into the EU would positively affect the local markets<sup>249</sup>. However, notwithstanding the fact that

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247 See overview in *infra* § 4B.III.

248 As observed in *Elsuwege*, State Continuity and its Consequences: The Case of the Baltic States, pp. 381-382.

249 Notably, before the accession to the EU it was presumed that the GDP in Lithuania would grow about ten (10) percent in 2009 due to the accession (comparing with the estimated numbers presuming non-accession), as observed in *Vilpišauskas*, Internal Market and Lithuania, p. 80. The growth rate of GDP, however, was generally declining at the end of 2008 due to other economic reasons, as provided by *Statistics Department of Lithuania (2008)*.

the Baltic people constantly demonstrate their approval for the accession in the EU<sup>250</sup>, which also indirectly means gradual acceptance and acheless implementation of the EU legal provisions, some other opinions pointing to negative impacts because of the accession into the EU have been also expressed<sup>251</sup>. This illustrates how difficult and variegated “westernization” processes in the Baltic states are and how divergent positions regarding interception and application of the European legal provisions can actually be.

In terms of intellectual property rights protection and enforcement in the Baltics, features of the rapid and at the same time ambiguous social transformation covering changes of “IP mentality” can be seen on various levels.

*First*, due to the geopolitical position of the Baltic countries<sup>252</sup> as well as their role in the EU as its sub-region, IP rights started to be gradually considered as an important innovative factor which can induce a competitive ability of their local markets in the Internal Market and in a trade with and also investment in other EU Member States and non-European countries, for instance, the big neighbouring markets such as Russia, Ukraine, Poland, or UK<sup>253</sup>, etc.;

*Second*, the changing “IP mentality” can be observed in public opinions and official positions of the Baltic national legislators as well as government institutions which emphasize that IP is to be considered as an immaterial property that should be adequately protected applying the European as well as worldwide standards of such protection and referring to the well-established legal notion that an infringement of IP rights is a theft, and that IP piracy is to be tackled using effective enforcement measures<sup>254</sup>,

*Third*, in context of the listed changes, the progressive views of consumers’ of IP products are also evident. The high standard of protection of IP rights and their effective enforcement can help to economically benefit from such property from both – IP right holders and consumers – perspective. Moreover, consumers started to be

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250 *E.g.*, in 2006, 69 % of the Lithuanian population was in favour to the EU membership, and only 17 % expressed its disapproval. In comparison with 1999, the assent to the EU membership grew 31 % in Lithuania, as referred in *Development of Public Opinion Regarding EU Membership (2006)*.

251 The negative impacts of the accession into the EU mainly concerned local small enterprises, consumers as well as the state institutions which were obliged to work in an effective, responsible and transparent manner, as observed in *Vilpišauskas*, Internal Market and Lithuania, p. 78.

252 See overview in *supra* § 3A.

253 As of 1 January 2008, Lithuanian enterprises’ FDI abroad made by 34,7 % more than on 1 January 2007. Most of all (29,4 %) was invested in Latvia, in Russia (12,7 %), then in Poland, Ukraine, Estonia, and UK. In 2007, the most obvious growth of Lithuanian enterprises’ FDI was observed in Latvia and UK, as provided by *Statistics Department of Lithuania (2008)*. From 2003 until 2006 the number of Lithuanian FDI increased 18 % in Ukraine, and 26 % in Russia; see *Statistics, FDI in LT (2006)*, p. 46.

254 Such attitudes and positions were explicitly embodied in the IP strategies prepared by the national Ministries of Culture, *e.g.*, the Decision of the Government of the Republic of Lithuania No 1176 as of 29 September 2000 on “*Strategy of Protection of Copyright and Neighbouring Rights and Measures of its Implementation in 2000 – 2003*” (OV).

aware about healthy and safety risks that might occur while using counterfeit products, small and medium size companies were informed about the positive effects of using legal products<sup>255</sup>, etc.

The transformation of local “IP mentality” on business and state institutions level, progressive consumers’ views have an immediate connection to changing public standpoints regarding IP piracy and counterfeiting which rates can be reasonably considered as a signal indicator of an actual success of the local IP enforcement systems.

## II. *IP piracy in the Baltics: prevailing tendencies and impact on the national IP rights enforcement legislation*

In view of the overall IP products piracy rate in the EU in general and in each of the EU member states, the piracy rate in the Baltic countries is still relatively high<sup>256</sup>. As the indicator to depict and to illustrate the actual IP enforcement situation in each and every country, the information regarding piracy level in the Baltic states can also demonstrate those legal issues due to which the fight against counterfeits and piracy in the local markets does not achieve expected results, although the EU-level legislation in those countries is in place<sup>257</sup>.

The piracy phenomenon in the Baltic countries has an immediate connection with the following factors:

*First*, piracy is highly influenced by the geographical position of the Baltic countries, meaning that in most cases they are so-called “cross-road” countries for the counterfeits which are imported from the neighbouring countries. The Baltic countries have a comparatively low level of domestic piracy; however, they suffer from the import of pirated goods from other, mainly Central European countries<sup>258</sup>, also transshipment of pirated and counterfeited goods from Asia, in particularly China<sup>259</sup>;

*Second*, local “IP mentality” and consumers’ attitude towards the use of IP products is very much influenced by the long-history of the suppressed protection of intellectual property rights during the Soviet occupation when such protection was on generally low level<sup>260</sup>;

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255 As referred in *Datamonitor, Growth of the Software Industry in Lithuania (2001)*, pp. 11, 12.

256 See *refs.* to software piracy rates in supra Ft. 16 herein. As reported in *BSA/IDC 2007 Global Software Piracy Study*, in 2007 the software piracy rate in the Baltic countries is higher than the overall rate in the EU (35 %) and in other countries, for example, in Slovenia 48 %, Finland 25 %, Germany 27 %. According to *2008 Special 301 Report IIPA Special Mention: Lithuania*, pirated products of sound recordings and musical compositions amount to 80 % in Lithuania (it reduced only 5 % since 2003).

257 *Note*: the piracy rates, though, should be examined considering certain methodology used to estimate them, *i.e.* not all business sectors are covered by estimating illegal software used, as follows from *BSA/IDC 2007 Global Software Piracy Study*.

258 See *von Lewinski, Copyright in Central and Eastern Europe*, p. 59.

259 See also additional data and *refs.* in *infra* § 5G.II.

260 See overview in *supra* § 3B.II.

Third, piracy is also linked to the fact that “consumers are still swayed by the enormous price differential between legal and illegal goods”<sup>261</sup>. Although local consumers’ attitude very much changed in the recent decade (mainly as a result of many educational programs carried throughout the Baltic countries that helped to increase awareness about a threat of illegal use of IP products), some examples illustrate that the use of illegal copies of IP products is still widespread<sup>262</sup>. Moreover, the theft of IP is still not equated in the public mind with other offences against property such as fraud, theft, etc. in other countries<sup>263</sup>, and this is also true for the Baltic societies.

By virtue of the reports regarding the piracy levels and the main IP enforcement issues in the Baltic countries, one may see that piracy has recently been changing its forms. It can be explained by pointing out the changing economic situation in the Baltic countries, the wide-spread awareness regarding illegal use of pirated products and also proclaimed benefits from the use of legal products. The growth of internet piracy, the spread of piracy at the borders, still very high level of music and recording piracy as well as optical media piracy<sup>264</sup> are indicated as the highlighted issues which should be tackled by applying effective and adequate enforcement measures.

The effective application of enforcement measures, for instance, civil remedies, can be already observed in the national court practice which dealt with the cases regarding illegal use of IP products. As an example, software copyright cases, namely the so-called “end-user” piracy or “hard-disk loader” piracy<sup>265</sup> cases can be highlighted in this regard. During 1998 – 2000 many of them have been initiated, following the police raids carried on in Lithuania<sup>266</sup>. Many of the administrative, criminal and civil cases which were initiated on the basis of illegal use of software products found during the raids ended successfully in the courts which adopted the decisions to impose administrative or criminal sanctions to the infringers of IP rights, and/or to adjudicate civil remedies, namely, the compensation for damages occurred

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261 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 59.

262 *E.g.*, as follows from the sociological study performed in Lithuania, 44,1 % respondents answered that the prohibition to make private copies at home will not stop from making them, and 38,7 % answered that the prohibition to make copies on the internet will not stop such activities, as observed in *Kiškis, Mizaras*, Research on Outcomes of the Mechanism of Compensation for Reproduction of Works for Personal Purposes, p. 4.

263 See *Blakeney*, Counterfeiting and Piracy in the EU: Overview, p. 5.

264 *E.g.*, Lithuania is indicated as a transshipment of pirated optical media point in the Baltic region in 2007 with a reference to the ineffective border measures and, *inter alia*, *ex officio* actions that the customs authorities are to take. The reference is also made to the known blank infringing optic disc plant in Lithuania with huge revenues and a widespread market covering other two Baltic countries, as indicated in *2008 Special 301 Report IIPA Special Mention: Lithuania*. The case regarding optic disc plant in Lithuania has been already initiated (case is pending): see Lithuanian Court of Appeal, Civil Case No. 2A-123/2008, *Prosecutor of Vilnius City District, La Face Records, LLC., Virgin Records America, Inc. et al. vs. UAB “Baltic optical disk”*.

265 See *Balcevič et al.*, Protection of Copyright and Neighbouring Rights: Is it Easy to be a Creator in Lithuania, pp. 54, 55.

266 In most of the cases the public opinion regarding police actions against infringers was negative, as observed in *Infobalt Press Releases (2000)*, however, they were necessary to begin certain processes to fight piracy and counterfeiting.

because of those infringements have been applied<sup>267</sup>. Such successful court practice in IP infringement cases played an enormous role in reducing software IP piracy in the Baltic markets.

## ***B. Aspects of the Baltic IP research, innovation and industry***

### *I. General remarks*

As rightly referred, “the enforcement of intellectual property rights thus protects local commercial and industrial innovation, as well as encourages technology transfer and foreign investment” and has an immediate effect on the countries’ economic, social, cultural growth<sup>268</sup>. It is also to contribute to technical innovation<sup>269</sup>.

This is noticeable for the Baltic countries which are building their economies, improving their IP legislation and fighting against IP piracy which, needless to discuss, has negative economic impacts on their economies<sup>270</sup>. It is believed that the success of local commercial and industrial innovation also starts with IP teaching and research at the level of local universities, other educational as well as scientific institutions. It should be noted likewise that before the World War II intellectual property-orientated research and teaching in the Baltic countries played a very modest role. It could be conditioned by the fact that the Baltic states as well as their legal systems, including IP legislation and related infrastructure, were developing during the period of the first independent republics (1918/1919 – 1940/1941), and only, for instance, in Estonia regular scientific research and teaching began at the beginning of the nineties at the University of Tartu where it has been introduced as an independent field of research and education<sup>271</sup>.

The described aspects of such local teaching and research arguably helps to depict the features of local innovative and creative context of the Baltic countries which legislative provisions on enforcement of IP rights are further analysed.

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267 See more about “the compensation instead of damages” provision and its application in Lithuanian court practice with *refs.* to landmark court decisions on the subject-matter in *infra* § 5F.1.1.

268 See *Blakeney*, Counterfeiting and Piracy in the EU: Overview, p. 3.

269 See more in *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, p. 808.

270 According to *BSA/IDC 2007 Global Software Piracy Study*, in 2007 the losses from using illegal software in the Baltic countries amounted (\$ Million): 20 \$ in Estonia, 29 \$ in Latvia, and 37 \$ in Lithuania; and in comparison with 2006 those losses increased.

271 See *Pisuke*, Estonia: Copyright and Related Rights, p. 103.



## II. *IP teaching: a role of the national educational institutions and a level of the scientific research*

One may agree that research as well as knowledge which is materialized in technologies and peoples' creation is a substantial impulse for the economic development which is, of course, influenced by all other internal and external factors and creation of intellectual potentials starting from the school and university levels. Therefore, it is extremely important to understand and to control the processes which are related not only to the creation of specific knowledge and distribution of them, however, also the processes in relation with the use of such knowledge.

Such view is reflected in the so-called "European Paradox"<sup>272</sup> which foresees a very important IP education, research and industry interconnection and formulates the important message for the Baltic countries as well. It is essential to stimulate the applied technological research in order to create the end-consumer products which are used as means and processes to develop other better-quality products and services and to compete in the Internal Market as well as in the worldwide market more effectively<sup>273</sup>.

Such views and intentions to analyse the actual status of applied sciences and possibilities of their practical implementation were the basis for the report on actual potentials of applied sciences at the Vilnius University in Lithuania with the main aim to clarify how the scientific products could be applied in practice and could be spread in a circle of further innovative activities taking the intellectual property aspects into account<sup>274</sup>. The report is to be considered as one of the most important sources while analysing the actual status in the field of local applied sciences and the conditions of patenting of creative innovations as well as intellectual property protection in this particular field<sup>275</sup>.

As specifically described in the Report 2006, the primary source of scientific research in IP field is nowadays found in the biggest universities of the Baltic countries<sup>276</sup>. Let us take the example of the Vilnius University which is one of the leading

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272 "European Paradox" mainly reflects the view that there exists a strong fundamental science, however, a weak innovative activity. *Note*: this view could be well applied to the Baltic countries as well; see also *Innovation in FP6 European Commission, Community Research, 2005*, p. 3.

273 As also stressed in *Mizaras, Current Key Aspects of Intellectual Property in Lithuania (ATRIP Congress (2008))*, p. 2.

274 Report of the Workgroup established by the Order No. R-121 as of 10 May 2006 of the Rector of the Vilnius University on the topic "*Science at the University of Vilnius: Applied Sciences and Intellectual Property*" (*unofficial publication*) (hereinafter – the "*Report (2006)*"), or the "*Vilnius University Report on Applied Sciences and IP (2006)*"). The Report 2006 covers the information in the field of applied sciences in 2004-2005 and is based on the self-analytical material on scientific research at Vilnius University and the findings as of 2004 of the competent experts of the European University Association in this particular field.

275 The numbers (local scientific research level, etc.) as provided in the following text are based on the information from the *Report 2006*.

276 Vilnius University (Lithuania), Riga University (Latvia) and Tartu University (Estonia).

universities in Lithuania in the field of creation of scientific products<sup>277</sup> and in the participation at the international projects (it makes 40 % of all in Lithuania implemented projects) as well as in the scientific publications<sup>278</sup>.

Despite the leading positions of the Vilnius University and its incentives to induce innovative as well as R&D activities, references to certain impediments have been reported. The work forces, for example, in the area of technological research in the Vilnius University are still modest. Almost 50 % of the scientists of the highest qualification are older than 50 years, the means and programmes on the education of young generation are well-timed, though, too sporadic. Moreover, the attribution of scientific activities to technological or physics sciences is not strictly regulated which is often reflected in the financing processes of such activities.

The separation of applied sciences from experimental and research in fundamental sciences is likewise not clear. Although, the latter separation can be considered relative, the analysis shows that 80 % of the funds for the scientific projects administered by the Vilnius University are used for applied scientific works; moreover, the international science programs coordinated by the EU and also NATO science programs support objective-applied research and applied innovative activity<sup>279</sup>. The status of applied technological research is well presented by the number of inventions and patents: it is reported that in the period of 2004–2006 twenty (20) inventions made by the Vilnius University employees were patented and three (3) further patent applications submitted<sup>280</sup>.

In this context, it is important to mention the percentage of the contracted research and services. Although the commissions provided by local and foreign companies make a substantial part of the scientific research, the local – Lithuanian – commissions amount to around 25 % only<sup>281</sup>. By virtue of the Report 2006, there are particular incentives to innovative activities of the local companies, however, the

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277 *E.g.*, in the field of physical sciences the scientific products created at the Vilnius University made 2/3 of all scientific products created in Lithuanian Universities; the scientific products in the area of, for instance, biomedicine increased from 25 to 36 % in 2004–2005, as referred in *Vilnius University Report on Applied Sciences and IP (2006)*, p. 2.

278 In 2005 there were 300 scientific publications published by the Vilnius University (in comparison with 2001 there were 600 publications) among 918 scientific publications published by other Lithuanian universities in the editions of the Institute of Scientific Information, as reported in *Ibid.*, p. 2.

279 As reported in *Ibid.*, p. 3, Vilnius University exercises about 50 various international scientific programs per year (more than 20 are FP6 projects, and around 30 projects were in 2006).

280 As indicated in *Ibid.*, p. 4. These numbers could be compared with the numbers of patented inventions in that period. In comparison, according to *Lithuanian Patent Office Information (2008)*, there were 543 valid patents on the basis on national applications (44, 38 % of Lithuanian applicants) on 31 December 2004, and, similarly, 504 valid patents on the basis on national applications on 31 December 2007.

281 According to the Report, the foreign companies provide funds which are three times bigger than the funds provided by the local partners in the fields such as a research on technologies of industry of materials, a research on medicaments together with Finland and Italy, a production of unique technological equipment under order by Spanish universities, etc. See *Vilnius University Report on Applied Sciences and IP (2006)*, p. 3.

Report 2006 emphasizes that the price of creation of invention and its patenting are extremely high<sup>282</sup>. The Report 2006 also reveals the continuing active discussions that local educational institutions are able to initiate neither new research activities nor favourable conditions for innovative activities mostly because of the lack of financial resources that could be given for such activities<sup>283</sup>.

Last but not least aspect to be mentioned are IP studies at the national universities in general. Taking Lithuania as an example, it can be agreed with the opinions that, although, IP courses and seminars (covering all IP rights) are contained in the curriculum of the local universities, shortage of IP studies within non-legal curriculum is considered as one of the weak points in IP studies in Lithuania. Such drawback can be solved by incorporating relevant IP courses within technical orientated subjects at the universities<sup>284</sup>.

### III. Local research and innovation

#### 1. Research and development areas

On the basis of data on expenditure on R&D structure by field of science and types of research, it is obvious that, for example, in Lithuania technological, agricultural, medical and physical sciences receive much of attention. The same tendency is seen in both the institutions of higher education and universities as well as the Government sectors<sup>285</sup>. In the business sector the expenditure on R&D in the fields of manufacture of chemicals and chemical products as well as machinery and equipment comprises a relatively high percentage<sup>286</sup>. According to the Report 2006, the local and foreign industries involved in the research projects are basically focused on research on substances, electronic and laser technologies, information technologies as well as on database of geophysical research. Contemporarily, the foreign companies are more focused on the fields of innovations which, as rightly pointed out in the Report 2006, have an actual applicability abroad. This is also the case for both Latvia<sup>287</sup> and Estonia<sup>288</sup>.

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282 *E.g.*, the patenting of one biochemical product was financed by one local company and amounted to 50,000 Euro. See *Ibid.*, p. 4.

283 Due to this, it should be also mentioned that under the Order of the Minister of Economics of Lithuania as of 15 March 2005 the most parts of the costs related to patenting could be compensated, however, there were no guarantees that such compensation could be actually provided. In 2008 a possibility to deduct the expenditures invested into R&D for 3 times instead of one was additionally enacted, as reported in *Mizaras*, Current Key Aspects of Intellectual Property in Lithuania (ATRIP Congress (2008)), p. 2.

284 Such information and opinions were expressed by *Ibid.*, pp. 6-8.

285 *Note*: business sector is not covered here. Statistics, *Research Activities in LT (2006)*, p. 25.

286 *E.g.*, as referred in *Statistics Department of Lithuania (2008)*.

287 See more at *Latvian Research Landscape (2008)* which also contains the National Concept of R&D in Latvia for 2002-2010 (EV).

288 See *Statistics Department of Estonia (2008)*.

The innovative activities in the Baltic countries can also be reflected in the means by which the companies protect their IP rights. For this purpose, the numbers related to the registered IP rights could be used as the comparable statistical data. The figures from the corresponding registers of the State Patent Offices in Estonia, Lithuania and Latvia in the years of 2007, also 2008 demonstrate quite even and similar figures for registered IP rights for all three Baltic countries. Namely, according to the Lithuanian statistics, at the end of 2007 there were in total 729 patents, 33, 939 trademarks and 507 designs in force in Lithuania<sup>289</sup>. It is reported, accordingly, that in Estonia (data as of 30 June 2008) there were in total 1,415 patents, 30,738 trademarks, and 986 designs in force<sup>290</sup>. Such total numbers are not provided for Latvia, but it is indicated that in 2007 there were 4,891 trademarks registered, 803 patents and 97 designs in total<sup>291</sup>.

Additionally, as reported for Lithuania, in the period 1994 – April 2007, 3,090 national patents have been issued, and 737 patents and 3,325 European patents (since 1 December 2004) were valid<sup>292</sup>. Those numbers could be also compared with the ones in the field of trademarks and designs, as referred above, and also with the number of, for instance, patent cases that were actually considered. As far as patent rights are concerned, it should be emphasized that generally there is a modest number of patent cases that reached the Supreme Court of Lithuania after 1994, since the time the Lithuanian Patent Law came into force. It is partially reasoned by the fact that the Lithuanian patent system exists for 14 years only and that the Lithuanian inventors apply for a few patents in Europe and Lithuania<sup>293</sup>. Similarly, during 15 years of the national patent system in Latvia, 18 patent cases have been solved; and there is no relevant statistics provided for Estonia<sup>294</sup>.

## 2. Foreign and local investments in local IP industries

With a reference to the mentioned need of foreign investments in the field of promoting local innovations and in consideration of the fact that the survey on the section of FDI in the Baltic countries is directly related to the analysis of certain legal provision on IP enforcement, it is to be mentioned that general FDI in all Baltic

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289 The numbers are taken from *Lithuanian Patent Office Information (2008)*.

290 The numbers are taken from *Estonian Patent Office Information (2008)*.

291 The numbers are taken from *Latvian Patent Office Information (2008)*. Note: for all three countries information regarding patents covers the patents granted on the basis of national filings and PCT national phase entries by the state of domicile or establishment of the first applicant or assignee; regarding TMs and designs it includes national and foreign applicants.

292 See *Report of the Council of the European Union Work Group on Intellectual Property (Patents) (2007)*.

293 There were only 5 patent cases considered at the Supreme Court of Lithuania and 10 patent cases in the appellation instance since 1994. There is no statistics about the patent cases at the first instance courts provided, as can be observed in the *Report of the Council of the European Union Work Group on Intellectual Property (Patents) (2007)*, pp. 2, 3.

294 See *Report of the Council of the European Union Work Group on Intellectual Property (Patents) (2007)*, pp. 3, 5.

countries is constantly growing<sup>295</sup>. This statement could be supported by the rates given on the percentage of GERD financed from abroad in the Baltic countries as well<sup>296</sup>.

Although Denmark, Sweden, and Germany<sup>297</sup> usually lead among the investing countries in Lithuania, the bulk of investments flow from Russia as well<sup>298</sup> by confirming the above discussed “geopolitical code” of Russia towards the East-Baltic<sup>299</sup>. Since 2002 Germany is one of the leading investing sources in Latvia as well. The leading positions of investors are usually taken by Estonian, Sweden and Denmark companies, though<sup>300</sup>. The landscape of foreign trade in Estonia seems to be different: in the last years the main partner in export and import remained Finland<sup>301</sup>. The part of the industry of the Baltic countries which finance R&D sector has been constantly growing in Estonia and Latvia, whereas it has been slightly decreasing in Lithuania<sup>302</sup>.

What concerns the investment areas, it is important to overview the disposition of FDI by economic activities in the Baltic countries in order to assess how much of the foreign investments flow into IP-related fields. The statistical data of Lithuania shows that the foreign countries mostly invest in the areas of manufacturing industry, including manufacture of chemical products, financial intermediation, transport, storage and communication<sup>303</sup>, whereas, Lithuanian companies mainly invest into wholesale and retail trade abroad and manufacturing by focusing on the markets of neighbouring countries such as Latvia or Russia<sup>304</sup>. The investments in the area of

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295 From 1997 to 2006, FDI in LT was approx. seven times more; it also grew 19,6 % since the beginning of 2007 until beginning of 2008, as reported in *Statistics Department of Lithuania (2008)*. In EST, FDI increased 7 % comparing 2006 with 2007, as provided in *FDI Information (WB Group) (2008)*. In LV, the number concerning FDI inflows reached 1,6 Billion USD in the past years, as indicated in *FDI Information (WB Group) (2008)*.

296 See more in *Eurostat Information (2008)*.

297 According to the statistical data, investments from Denmark made 15-17 % of all investments in year 2003-2006, whereas investment from Sweden amounted to 13-15 % thereof in the same period. The part of investments by German companies made 9-11 % in 2003-2006, as referred in *Statistics, FDI in LT (2006)*, pp. 12, 13. In 2007, the mostly invested were Latvia, Sweden, Russia in Lithuania; see in *Statistics Department of Lithuania (2008)*.

298 E.g., in 2007 investments from Russia made 9,6 % of total FDI in LT, see *Statistics Department of Lithuania (2008)*.

299 See overview in supra § 3A.

300 See *FDI Information (WB Group) (2008)*.

301 Finland, Sweden, Russia are leading investors in Estonia in 2006-2007, *FDI Information (WB Group) (2008)*, also *Statistics Department of Estonia (2008)*.

302 See *Eurostat Information (2008)*. Notably, in R&D intensity growth ranking table of the EU 27 countries Cyprus was leading with 10% and Estonia was followed by Latvia with 7%, as indicated in *Statistics Department of Estonia (2008)*.

303 Within manufacturing (34,5 % of all investments), most of investment in LT fall per oil refinery products and manufacture of chemical products – 48,6 % in 2006, see *Statistics Department of Lithuania (2008)*.

304 Interestingly, although Estonian investments made only 7 % of all investments in LT in 2006 and Latvian investments are not indicated statistically, Lithuanian enterprises invested 34,1 % in Latvian market in 2006. As statistically referred, Latvia, Ukraine and Russia were the main targets of Lithuanian investors in 2003-2006; see *Statistics Department of Lithuania (2008)*.

raw materials and products of chemical industry as well as life sciences are in the scope of foreign investors in Estonia as well<sup>305</sup>. The similar distribution of FDI is observable in Latvia; however, foreign projects are quite modest in the fields of chemicals, electronics or life sciences<sup>306</sup>.

Notably, the tendency of growing of FDI into the R&D sector of the Baltic countries is clearly visible; however, the numbers of such investment in view of general FDI made are still modest<sup>307</sup>. Moreover, it should be mentioned that general FDI in the local regions of the Baltic countries is much less than in the capitals<sup>308</sup> which allows forming a view that the regional politics in relation with promoting innovations and research should be better implemented.

#### IV. Factors promoting the local research and innovation

##### 1. Promoting activities in the Baltic universities

As rightly pointed out in the *Vilnius University Report on Applied Sciences and IP*, the most important factors inducing activities on innovative research on the level of educational institutions would be:

- (1) strategic management in the field of technological science<sup>309</sup>;
- (2) reorganization of scientific forces;
- (3) guaranties of priorities of applied research;
- (4) country-wide coordination of innovative activities.

Such factors can be likewise applicable to the educational research institutions of other two Baltic countries. It is also important to have a frequent co-operation among the Baltic universities and research institutes and private enterprises<sup>310</sup>. The

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305 See *Statistics Department of Estonia (2008)*.

306 Since 2002 the part of investments in the chemicals sectors in LV amount to 5 % and in life sciences sector – to 1 % only, see *FDI Information (WB Group) (2008)*.

307 For instance, FDI in the field of R&D, computers and related activities grew 175 % from 2003 until 2006 in LT, see *Statistics Department of Lithuania (2008)*.

308 E.g., the investments in Vilnius County are almost five times and bigger than in other regions of LT, see *Ibid*. Comparably, the highest number of registered IP rights in 2007 in Lithuania (patents, trademarks, etc.) also refers to Vilnius County, as provided in *Lithuanian Patent Office Information (2008)*.

309 One of the main reasons of the weak management is the fact that universities are not holders, but trustees of their IP rights in Lithuania. Main part of university inventions are sold to foreign partners or published without patenting, as referred by *Mizaras, Current Key Aspects of Intellectual Property in Lithuania (ATRIP Congress (2008))*, p. 2.

310 One of the highest innovation cooperation levels within the EU in 2002-2004 was found in LT (56 % of all innovative enterprises), however, one of the lowest – in LV (18 % only). Private-public co-operation on innovation was most frequent in, *inter alia*, LV and LT as well, see *Eurostat Information (2008)*.

activities of the Lithuanian company “Fermentas” can serve as the example of such cooperation in the field of biotechnology<sup>311</sup>.

As far as IP rights are concerned, certain legislative improvements in the field of innovative research on the level of educational institutions have been suggested as well. It is worth while mentioning the incentives pursued by the Vilnius University to adopt more precise rules by changing the substantive provisions in the national IP laws regarding, for instance, the transfer of economic rights of employees of the university to the university with the consideration of work functions of the employees<sup>312</sup>.

Other way of promoting local research, science and innovations is a creation of science and technology parks and incubators which development is important for both private companies, universities and public institutions. “Sunrise Valley” project in Lithuania, which started in 2002, can be seen as an example of a rapidly developing public company which stimulates the local forces working in technological, physical and biomedical sciences<sup>313</sup>. The project also promotes the networking between the universities and business, by encouraging technology transfer and the commercialisation of publicly funded research, by creating new employment and wealth creation opportunities and by attracting new FDI in high value added activity areas.

Similar examples can be also found in Estonia in which, amongst a few others, the Tartu Biotechnology Park provides services to biotechnology, medicine, etc. and R&D institutions, develops new service packages to start-up companies, coordinates various national and international projects<sup>314</sup>. Business incubators, specialized consultations and information for technology orientated business and provision of advisory services are also key functions of the Latvian Technology Centre<sup>315</sup>. Along with the objectives to promote innovative research, science and technologies, the establishment and activities of such technology parks play an important role in promoting the protection of IP rights as the special activities regarding IP rights development are foreseen.

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311 More about the company and its produced products see in *Fermentas: Life Sciences (2008)*.

312 See *Vilnius University Report on Applied Sciences and IP (2006)*, pp. 10, 11. This is also due to the fact that Art. 8 of the Lithuanian Patent Law embodies the protection of so-called *service inventions*, i.e. inventions made by an employee during the execution of a commission or an employment contract.

313 The first Science and Technology Park was established in 1993 in Vilnius, other 5 parks were established in July-October 2002 throughout Lithuania; more information see in *Sunrise Valley: Key Facts and Figures (2008)*.

314 Since September 2005 TBP runs the BioMed incubator for biotechnology, medical and veterinary businesses; more information on the projects run by the park, also other Estonian biotechnology projects such as Estonian Genome Project see in *Tartu Biotechnology Park Information (2008)*.

315 See more information in *Latvian Research Landscape (2008)*.

## 2. IP strategy in the local business sector

In view of the general growth of R&D sector<sup>316</sup>, the need and utility of IP strategy<sup>317</sup> within the IT companies is obvious. It partially depends on the fact that it is not always possible to enforce certain IP enforcement provisions, in particular, when “on-line infringements”<sup>318</sup> are concerned, and to prevent consumers from infringing IP rights.

Some of the local IT industries, considering their liability as internet service providers, as foreseen in the national copyright legislation<sup>319</sup>, forced the processes in relation with the protection of intellectual property rights in order to tackle infringements of IP rights in the internet, for instance, by signing the agreements on administration of the infringing content on the ftp servers<sup>320</sup> which are considered to be one of the most popular contemporary sources of the pirated products<sup>321</sup>. Such model of IP strategy inside the companies requires, though, more effective practical application<sup>322</sup>.

## 3. Level of the national governments’ regulation and their support in the field of research and development

The percentage of the Government support for R&D sector and its funding could indicate actual state-level attitude to innovations and the continuity of the politics on their constant promotion. In a view of general European tendencies, the national Governments of the Baltic countries tend to fund innovative activities<sup>323</sup>.

In comparison with the business enterprises or external funds in R&D sector, the Lithuanian Government seems not being very lavish towards this sector. However,

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316 *E.g.*, from 2003 to 2006 the investments in R&D sector grew 175 % in LT, as referred in *Statistics, FDI in LT (2006)*, p. 21.

317 “IP strategy” is meant as inner company rules and requirements in regard with protection of company’s IP assets as well as compliance with IP laws herein.

318 P2P services (*e.g.* local ftp servers) are particularly meant on this point.

319 *E.g.*, by virtue of Art. 11 of the Enforcement Directive, it should be mentioned that Art. 77(3) of the Lithuanian Copyright Law provides a civil liability of ISPs. See examination regarding the implementing provisions on injunctions against intermediaries in *infra* § 5E.I.3.

320 *E.g.*, the Memorandum of Understanding signed in 2003 among the leading national IT companies and right holder associations in Lithuania embodied important measures and procedures that were to be applied by the companies in order to control infringing content, mainly protected by copyright laws, in ftp servers (BSA information).

321 As referred in *2008 Special 301 Report*, also *2008 Special 301 Report IIPA Special Mention: Lithuania*.

322 eBay practices on the issue can be followed as an example, see more in *Osthaus, Fighting Piracy and Counterfeiting in the Light of European Principles of eCommerce*, pp. 645-646.

323 As indicated, the percentage of GERD financed by the Government in 2000 – 2005 grew in LT (from 61,7 % to 62,7 %). In LV this percentage in 1995 – 2005 decreased from 53 % to 46 %, and in EST in 1998 – 2004 it reduced from 63,3 % to 44,1 %. In comparison with the estimated GERD financed by the national Governments in the EU (27), (the rate decreased from 39 % to 34,8 % in 1995 – 2005), the mentioned percentages from the East-Baltic are relatively high, see more in *Eurostat Information (2008)*.



those funds are basically committed to the sectors of the institutions of higher education, universities and the Government itself<sup>324</sup>. As follows from the statistical data, from the total expenditure on R&D<sup>325</sup> the main percentage is spent for applied research and basic research, whereas experimental development receives less foundation<sup>326</sup>. In Latvia the Government funds spent for financing R&D make the biggest part among other sources of finance<sup>327</sup>. Additionally, the Governments also support projects which are related to increasing better conditions to innovative activities<sup>328</sup>.

While talking about the national governments' support in the field of R&D in the Baltic countries, it should be noted that by virtue of the procedure set out in the national legislations, interested parties have a right to participate in the preparation of the national IP laws<sup>329</sup>. Such participation is deemed to be important in terms of a possibility to make a better link between the legislators and "IP players" in practice, in terms that the local as well as foreign companies can express their views, actual needs important for legislative improvements and also provide constructive proposals to amend the laws. "Sunrise Valley" project in Lithuania is again a good example of certain cooperation between the national "IP players", the leading IT companies, and the national Government.

## V. Concluding remarks

In the recent years the social transformation of "IP mentality" from Soviet "IP-thinking" to "think-western" in the Baltic countries is observed. The national legislators and government institutions strongly advocate for the adequate and effective protection of IP rights by applying the European as well as worldwide standards of such protection. The changing attitude of local businesses, consumers and general public towards the use of legal IP products also plays an enormous role in the process of bringing the application of the provisions of such protection into practice.

Alongside with changing social factors, the ideas and concrete local projects related to innovative and creative activities such as technology parks and centres, for instance, deemed to promote local research, innovation, technology transfer and industry are being implemented. This is also supported by the data regarding the

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324 In 2007 the biggest share of expenditure on R&D was comprised of the government sector funds (47,9 %), whereas business enterprise sector funds made up 24,5 %, and foreign funds 19,6 %, as indicated in *Statistics Department of Lithuania (2008)*.

325 In 2007 distribution of expenditure on R&D mostly belonged to high education sector (50,6 %), business enterprise sector (28,5 %) and government sector (20,9 %). The percentages remained similar since 2004, as observed in information provided by *Statistics Department of Lithuania (2008)*.

326 Statistically, the percentages of basic, applied research and experimental development in 2002 – 2005 did not change, see also more in *Research Activities in LT (2006)*, p. 22.

327 See *Latvian Research Landscape (2008)*.

328 E.g., the project supported by the Ministry of Economy of Lithuania to identify main drawbacks of innovation system in Lithuania, as indicated in *Mizaras, Current Key Aspects of Intellectual Property in Lithuania (ATRIP Congress (2008))*, p. 2.

329 See overview about adoption of national IP legislation in *supra* § 3C.I.

growth of investments into the R&D sector, increase of FDI in the local, especially, IT companies, active financial support of the national Governments of the Baltic countries to the local or local with a foreign investment companies working in the field of science, technology and innovations that are actually applied in practice, also the Governments' funding of certain projects which are focused on improving local conditions to innovations. On the other hand, the discrepancies in the field of local technology transfer regulations, management of IP rights, effective finance of R&D projects, etc. are to be still tackled.

Considering the fact that in the Baltic countries many innovations are based on the contractual basis with the foreign partners, it is significant to develop the projects which have the actual applicability in foreign countries and for foreign partners. On the other hand, it is also significant to bring certain incentives to local researchers and, moreover, to induce FDI in the regions of the Baltic countries which, along with educational programs, will allow to promote innovations and research on the regional basis.

The social factors as well as factors in relation to the local research and innovation are important for the further analysis of the implementation and actual application of the provisions on enforcement of IP rights, especially, considering that fact that, despite the positive social and economic changes in the Baltic countries, the piracy level is still high. This fact allows arriving at a conclusion that there should be more efforts to strengthen the actual system of enforcement of IP rights made. It is also believed that the strong, adequate and effective IP rights protection has an immediate effect on encouraging local innovation and successful investments in R&D sector.



## § 5 Aspects of enforcement of IP rights in the Baltic countries in view of the implementation of the EU Enforcement Directive

### A. EU Enforcement Directive: idea, objectives and scope of application

#### I. Brief review on the adoption of the Directive

Overview of the genesis of the Enforcement Directive, its objectives in view of other international standards in the field of the enforcement of IP rights, its scope and content of its provisions are necessitated by the aim to comprehensively examine the implementing provisions set out in the Baltic legislation. Therefore, before starting to analyse the implementation of the Directive in the corresponding jurisdictions – Lithuania, Latvia and Estonia – it is first focused on the aim and the content of the Enforcement Directive.

1. Commission's Proposal for a Draft Enforcement Directive: between support and critique
  - a) Supportive positions

The final text of the Enforcement Directive was adopted by the European Parliament and the Council on 29 April 2004<sup>330</sup> after the expressed active support, but also strong criticism regarding the Commission's Proposal for a Draft Enforcement Directive in 2003<sup>331</sup>.

The active support for adopting a directive on enforcement of IP rights mainly came from various groups of interested circles such as IP right holders and their associations<sup>332</sup>, also the European Economic and Social Committee which in general

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330 OJ L 195, 2.6.2004, pp. 16-25.

331 Proposal for a Directive of the European Parliament and of the Council on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights: COM (2003) 46 final, January 30, 2003 (hereinafter – the “*Commission's Proposal for a Draft Enforcement Directive (2003)*”).

332 E.g., BSA, the association consolidating the leading software manufacturers, welcomed the adoption of the Directive, but remained concerned that it felt short of introducing measures that would reduce software piracy in the EU, by pointing out, especially, the two-tier enforcement system (distinction between serious and not serious IP rights infringements) that had been introduced in the draft Enforcement Directive. The initial BSA's position was also supported by other IPRs associations such as IFPI, GESAC, MPA and others. The associations such as BSA, IFPI have their representatives in the Baltic countries. See *BSA Comments on a EU Draft Enforcement Directive (May 2003)*. It was, however, criticised that statistics and information provided by such associations to the Commission, while lobbying for an adoption for such directive were tendentious and quite unilateral, as also observed in *Hye-*

welcomed such EU-wide instrument in the field of IP enforcement<sup>333</sup>. The supportive voices reasonably referred to the high piracy and counterfeiting rate in Europe<sup>334</sup> and other issues that were increasingly evident due to pirated products in the Internal Market such as decrease of employment rate in IP-related sector, tax losses, impediments to development of innovation, business, cultural sector, threats to consumer protection and health considerations. It has been supportably expressed that, in view of the EU expansion, it was necessary to create an adequate level of enforcement of IP rights by harmonizing enforcement measures within the EU by extending to all Member States the best practices of one another<sup>335</sup> and with the special focus on the countries in which enforcement was the weakest.

The European Parliament's support was initially expressed by adopting a resolution on the subject<sup>336</sup> and later providing certain amendments to the Commission's Proposal in which it has been especially pointed out that, *inter alia*, procedures, measures and penalties should be applied in gradual and proportionate way considering the circumstances of each case of IP infringement<sup>337</sup>.

Last but not least, the advocacy for the Proposal for an Enforcement Directive was also expressed by the Governments of the then EU Member States<sup>338</sup> as well as newly EU acceding countries<sup>339</sup> which considered an adoption of a directive on enforcement of IP rights being a very important tool to strengthen the protection of those rights in their jurisdictions.

#### b) Criticised aspects

On the other hand, the Commission's Proposal for a Draft Enforcement Directive was strongly criticised<sup>340</sup> by pointing out the issues such as, *first*, a constitutional basis for a directive in general by referring to the principles of subsidiarity and pro-

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*Knudsen*, Marken-, Patent- und Urheberrechtsverletzungen im europäischen Internationalen Zivilprozessrecht, pp. 227-229.

333 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 4.

334 In 2003 the piracy rate in the EU (e.g., in software sector) was 37 %, as indicated in *BSA/IDC 2007 Global Software Piracy Study*.

335 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 245.

336 OJ C 41, 7.2.2001, p. 56.

337 The amendments were actually prepared by the Committee on Legal Affairs and the Internal Market of the European Parliament. See *Fourtou Report (2003)*, p. 6.

338 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 3.

339 E.g., as seen from the Explanatory Letter of the Amendments to the Lithuanian Copyright Law in 2006 which can be found in the legal database of the *Seimas* (OV), the Government of Lithuania, namely, the Ministry of Culture, very much welcomed the implementation of the Directive by pointing out the issues that could be solved by having such EU-wide legal instrument in the field of enforcement of IP rights in Lithuania. The support has been generally expressed by Latvian and Estonian Governments as well.

340 The critical position was supported by a number of prominent academics as listed following the opinion in *Cornish et al.*, Procedures and Remedies for Enforcing IPRs: The European Commission's Proposed Directive, p. 449.

portionality by virtue of Article 95(1) of the EC Treaty and already existing provisions of the signed TRIPS Agreement on enforcement of IP rights<sup>341</sup>. *Second*, the scope of application of the proposed Directive, which since its first draft brought a certain confusion, if not “an awkward division”, as argued<sup>342</sup>, regarding a separation between so-called “serious” infringements (committed wilfully and/or fraudulent for *commercial purposes* or those having a *significant harm*<sup>343</sup>) and other infringements carried out on negligent or harmless basis, received a lot of critique as well.

Moreover, the Commission’s Proposal for a Draft Enforcement Directive, containing many vague and abstract provisions, covered all IP rights. As can be observed, the Commission did not actually consider the special nature of some of IP rights and related issues which had been addressed by the European Parliament while providing the amendments to the Commission’s Proposal<sup>344</sup>. By referring to the unique technical subject-matter of patent law or distinct procedural rules regarding them, it was noted that patents or Community rights such as plant varieties, trade marks, registered and unregistered designs were to be examined with more scrutiny while drafting the Directive. The possible establishment of a common system of adjudication, unitary catalogue of procedural measures, sanctions and remedies had to be duly discussed as far as Community rights were concerned.

The critical attention was also brought to the fact that the Draft Enforcement Directive could induce a possibly painful intervention into the national civil, administrative and especially criminal procedural systems of the Member States (as the initial Draft Directive covered criminal means as well), considering the fact that a precise scrutiny of the characteristics of those systems, a comprehensive revision of their legal traditions, and analysis of actual data in various European markets had not been done prior to the Commission’s Proposal, although such necessity had been mentioned by the Commission itself<sup>345</sup>. Local resources of IP protection which were available or not available to IP right holders or competent authorities have not been likewise addressed in a complex manner. The Commission actually referred to the legal situation in the Member States in its Explanatory Memorandum<sup>346</sup>; however, references were sporadically focused on some civil enforcement institutes which varied from country to country, but not on the legal traditions and IP enforcement situation in each of them<sup>347</sup>.

Most importantly, taking the planned expansion of the EU at that time into account, no references have been made regarding, at least, general characteristics of

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341 See further discussion in *infra* § 5A.I.2.

342 See *Cornish et al.*, *Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive*, p. 447.

343 See further discussion in *infra* § 5C.II.2.

344 See *Fourtoun Report (2003)*, pp. 6, 25.

345 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 15.

346 See *Ibid.*, pp. 12-15.

347 See also *refs.* regarding necessity to evaluate empirical data at issue in *Straus*, *The Impact of the New World Order on Economic Development: The Role of the IPRs System*, pp. 48 et seq.

the legal systems and legal traditions of the newly acceding Member States, also the Baltic countries, especially considering the fact that those states were mainly part of the Soviet law tradition and were still facing many relicts of it, especially when local enforcement infrastructure had to be taken into consideration.

Furthermore, since the Commission's Proposal, in which the aim to combat counterfeiting and piracy by "harmonizing national legislation on the enforcement of intellectual property rights" was actively advocated on the basis of the Commission's Green Paper of October 15, 1998 on "Combating Counterfeiting and Piracy in the Single Market"<sup>348</sup> and its Action Plan of November 30, 2000<sup>349</sup>, the proposal for an Enforcement Directive immediately faced a conceptual tension between its two actual objectives<sup>350</sup>: *first*, being an instrument to combat piracy and counterfeiting (however, omitting to provide any definitions of those phenomenon<sup>351</sup>) and, *second*, being a harmonisation tool for IP measures and remedies (as it was primarily planned, covering civil remedies and criminal measures, also administrative means) in IP infringement cases as far as all IP rights were concerned<sup>352</sup>.

c) Adopted EU Enforcement Directive: tension remained?

The tension, unfortunately, has not been escaped even after the adoption of the final text of the Enforcement Directive for the following aspects. After the deletion of the initially drafted criminal provisions and technical protection measures (which was a logical legal decision, indeed) and focus on civil proceedings only, the Directive seemed to lose its primary idea to fight against piracy and counterfeiting, if not its significance and necessity at all. This argument can be supported with the frequently expressed position that criminal measures and sanctions are in many cases more effective to stop and prevent piracy and counterfeiting, especially those being organized crimes<sup>353</sup>, than the civil substantive and material means<sup>354</sup>. The efficiently working regulatory and administrative enforcement infrastructures also play a big role in the fight against piracy and counterfeiting. The Directive does not harmonize any aspects of those infrastructures (it is assumed that such harmonization would be overambitious, though)<sup>355</sup>.

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348 COM (98) 569 final.

349 COM (2000) 789 final.

350 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, pp. 244–246.

351 See discussion in *Ibid*, p. 245.

352 See Recital 13 of the *Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 28.

353 The link between counterfeiting and piracy and the criminal economy is broadly discussed in *Blakeney*, Counterfeiting and Piracy in the EU: Overview, pp. 10–14.

354 See also *WIPO*, the Enforcement of Intellectual Property Rights by Means of Criminal Sanctions: An Assessment; also IP Watch, *EU Seeks Stronger IP Enforcement at Every Level*; as well as *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 327; and *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 245.

355 Chapter IV of the Enforcement Directive only refers to codes of conduct and administrative cooperation between Member States and the Commission.

In general, the Enforcement Directive, as finally adopted, contains many broad and vague, also a number of optional provisions which can arguably weaken its desired harmonizing objectives and effect. Importantly, special attention has not been finally paid to different types and characteristics of IP rights or expressed critical points as far as Community rights were concerned. Hence, certain confusion has been left which, on the other hand, opened possibilities for different interpretations of the provisions of the Directive by the national legislators and the national courts<sup>356</sup>.

2. Relation between the Enforcement Directive, other international standards on IP enforcement and EU directives

a) Part III of TRIPS Agreement: was the Enforcement Directive necessary?

(1) Community's competence to legislate on enforcement of IP rights

On 15 April, 1994 the Community, within its attributed competence (Article 5 of the EC Treaty), signed the WTO Agreement, also one of its pillars – TRIPS Agreement – and became a member of the WTO. The EU Member States, however, maintained their competence to sign agreements and/or legislate in the specific areas of the WTO Agreement, in particular GATS and TRIPS due to the notion of the “shared competence” between them and the Community<sup>357</sup>. As far as TRIPS was concerned, this meant that Member States were eligible to execute relevant documents as separate WTO members and independent contracting parties<sup>358</sup> by assuming obligations under the said agreement, *inter alia*, to ensure an effective enforcement system in their national legislations within the enforcement framework as provided in Part III of TRIPS and by being responsible for their own measures.

The said part of TRIPS provided minimum requirements for enforcement of IP rights<sup>359</sup>, being one of the major achievement of the negotiation<sup>360</sup>, by embodying

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356 Any interpretation of the provisions of the Enforcement Directive is to be concluded by referring to the general aims and objectives set out by the Directive and its Recitals.

357 The exclusive competence by the Community to conclude the TRIPS Agreement was based on Article 113 of the EC Treaty regarding the border measures contained in Section 4, Part III, of TRIPS only. See *Macrory et al. (ed.)*, WTO: Legal, Economic and Political Analysis, p. 1463; also *Dreier*, TRIPS and Enforcement of Intellectual Property Rights, p. 269; and *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 7.

358 See *Macrory et al. (ed.)*, WTO: Legal, Economic and Political Analysis, p. 1469. Latvia and Estonia joined the WTO in 1999 and Lithuania in 2000, thus by signing the TRIPS Agreement before the accession into the EU on 1 May, 2004. The accession to the WTO followed with certain changes in the field of enforcement of IP rights in the national legislations of the Baltic countries which mainly coincided with the accession into EU process starting in 1998. See also *refs. in supra* § 3B.III.2.

359 As noticed, the content of the TRIPS provisions, including the ones on enforcement of IP rights, mainly reflected the positions of the industrialized countries whose experience could contribute to necessary understanding of procedural rights, measures, remedies and their even



general obligations (Article 41), civil and administrative procedures and remedies (Articles 42 – 49), provisional measures (Article 50), special requirements related to border measures (Articles 51 – 60), and criminal procedures (Article 61) which had to be or could be (depending on their optional or mandatory character) implemented in the national legislation. Contrary to the substantive IP rights, procedural principles and rights on IP enforcement which are constituted in TRIPS can be asserted only when they are embodied in the national legislations (no direct effect or direct applicability<sup>361</sup>). The Community, however, maintained the right, as interpreted by the ECJ<sup>362</sup>, to further harmonize the national laws in the field of IP enforcement, provided that such harmonization was necessary for the proper functioning of the Internal Market. On the other hand, as rightly observed<sup>363</sup>, such harmonization could also mean the “back door” harmonization, *i.e.* that the Community was able to return to the areas which were not harmonized prior to TRIPS and which actually did not directly fall under the scope of its competence.

Considering the described observations regarding the Community’s competence to enter the TRIPS Agreement, also the nature of measures and principles, as embodied in Part III thereof, which were addressed to the national legislators of the Member States, the question can still remain if there was a justified actual need to adopt an EU-wide legal instrument harmonizing provisions on enforcement of IP rights.

## (2) Necessity to adopt a directive on enforcement of IP rights

It was argued by the European Commission that, by virtue of its general goals to combat counterfeiting and piracy by harmonizing IP enforcement provisions of the Member States, the Enforcement Directive was basically aimed to improve on TRIPS standards or, in other words, to supplement those standards (TRIPS-plus harmonization) in order to avoid disparities that existed among the national legislations on IP enforcement prior to the Commission’s Proposal for a Draft Enforcement

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interpretation. See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, p. 808; also *Dreier*, TRIPS and Enforcement of Intellectual Property Rights, p. 258; as well as *Correa*, A Commentary on the TRIPS Agreement, pp. 409-410. On the other hand, the interests of the developing countries have been considered, as referred in *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 287.

360 See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, p. 807; also *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 287.

361 See *Correa*, A Commentary on the TRIPS Agreement, p. 409; also *Dreier*, TRIPS and Enforcement of Intellectual Property Rights, pp. 269-270.

362 Opinion 1/94, 27 IIC 503 (1996).

363 According to the ECJ, “<...> external competence cannot be conferred if an internal power has not been exercised”, as pointed out in *Macrory et al. (ed.)*, in WTO: Legal, Economic and Political Analysis, pp. 1473, 1475.

Directive<sup>364</sup>. The improvements on the TRIPS standards under the Enforcement Directive meant either:

*First*, an introduction of the so-called super-TRIPS requirements (by adding certain provisions of TRIPS) such as (i) as far as damages were concerned, 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 as a form of damages (Article 3(1)(b)<sup>365</sup>); (ii) a third party information about the participation in infringing activities (Article 8<sup>366</sup>); (iii) a seizure of infringing products from everyone possessing them, including private parties (Article 7<sup>367</sup>); or

*Second*, an introduction of fully new measures which were not set out in the TRIPS such as asset-freezing injunction, market recall and publication of judicial decisions (Articles 7, 10, 15<sup>368</sup>). The introduction of new measures was based on the best practices of some countries such as United Kingdom, France, the Benelux countries, Germany, the Netherlands which have had old legal traditions in the field of IP enforcement or particular institutes thereof and “which have proved their effectiveness”, as referred by the Commission in its Explanatory Memorandum<sup>369</sup>.

By claiming a necessity to improve on TRIPS standards, the Commission, however, did not provide any data, evaluation or assessment in relation to this very statement<sup>370</sup> by just expressing its general argumentation regarding the need of such EU-wide legal instrument. To the contrary, instead of revising how the EU Member States implemented the TRIPS provisions on IP enforcement and, on the basis of such revision, moving ahead with a proposal on what can be done from the Community’s side to reinforce the TRIPS standards, the finally adopted Enforcement Directive set basically the so-called low-platform *acquis* by leaving a possibility to various manoeuvres by the Member States (this is due to a number of broad provisions contained in the Directive<sup>371</sup>) and also a chance to regulate other IP-enforcement re-

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364 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 7.

365 Or even more, alternatively, as “<...>damages set at double the royalties or fees <...>”, as provided in Article 17 of the *Commission’s Proposal for a Draft Enforcement Directive (2003)*; see also *Fourtjou Report (2003)*, pp. 18-19.

366 Art. 9 of the *Commission’s Proposal for a Draft Enforcement Directive (2003)*.

367 Art. 8, *Ibid.*

368 Arts. 11, 12, and 19, respectively, of the *Commission’s Proposal for a Draft Enforcement Directive (2003)*.

369 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 17.

370 It has been arrived at the same opinion in *Cornish et al.*, *Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive*, see Ft. 2, p. 449.

371 See further discussion on the list of enforcement measures, procedures and remedies set out in the Directive in *infra* § 5A.II.

lated areas later<sup>372</sup>, especially those in relation to administrative and/or criminal measures<sup>373</sup>.

Despite the goal to improve on TRIPS standards, the Enforcement Directive, however, is silent on certain provisions that can be found in the TRIPS Agreement, e.g. the form of judicial decisions (Article 41(3)), revision of judicial decisions (Article 41(4)), declaratory judgements (Article 44(2)), thus confirming the statement that the Directive could be also seen as TRIPS-minus<sup>374</sup>. The TRIPS-minus standard can be also seen in a distinction between wilful and negligent IP infringements, also infringements carried out for commercial scale for which some civil remedies are to be differently applied according to the Directive<sup>375</sup>. By virtue of Article 41(1) of the TRIPS Agreement, an effective civil enforcement action is to be made permissible to any act of infringement of IP rights by making no distinction that arise from an application of the concept that “an infringement was carried out on a commercial scale”<sup>376</sup>.

Thus, considering various aspects regarding the provisions of the finally adopted Directive, it is difficult to provide unambiguous answer whether such EU-wide tool was necessary. Focus, on one hand, can be turned to the aspect on what outcomes and goals the Directive perceived. On the other hand, the speedy adoption of the Directive seems to reflect ‘aims justify means’ method which cannot be always acceptable.

- b) Enforcement Directive as the first extensive horizontal instrument on enforcement of the substantive IP rights
- (1) Prior EU-wide provisions on enforcement of IP rights

Although, as follows from the discussion on the necessity to adopt the EU Enforcement Directive, it can be questioned if such necessity was justified, the Directive is still to be considered as the first attempt to comprehensively harmonize certain as-

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372 See Ft. 8 in *Cornish et al.*, Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive, p. 449.

373 Ref. to the Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission). The critical position has been already expressed in *Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive on Criminal Enforcement Measures (2006)*.

374 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 246; see more comprehensive discussion regarding the bases for TRIPS-plus and TRIPS-minus in *Straus*, The Impact of the New World Order on Economic Development: The Role of the IPRs System, pp. 53 et seq.

375 See further discussion in *infra* § 5C.II.

376 The distinction, however, is made with the reference to the criminal measures the application of which is limited to wilful trademark counterfeiting or copyright piracy on a commercial scale under Art. 61 of the TRIPS Agreement. See *Correa*, A Commentary on the TRIPS Agreement, p. 411; also *Gervais*, The TRIPS Agreement: Drafting History and Analysis, pp. 326-327.

pects of civil enforcement of IP rights on the so-called “horizontal” basis in the EU. The EU directives harmonizing substantive intellectual property rights or some aspects of them, which had been adopted prior to the Commission’s Proposal<sup>377</sup>, did not provide an extensive enforcement mechanisms, be they civil, administrative or criminal. Only episodic provisions could be found in some of the directives dealing with certain procedures or remedies in cases of infringements of IP rights. While adopting the Enforcement Directive, they have been reasonably taken out of the scope of its regulation<sup>378</sup>. The EC Regulation 1383/2003<sup>379</sup> can be seen as a “horizontal attempt” prior to the Directive, however, covering only the sectoral instruments such as measures which should be taken by or procedures applicable to national customs authorities.

Already in its Explanatory Memorandum the Commission pointed out the priority of the intervention of the Community into the field of enforcement of substantive intellectual property rights<sup>380</sup> by covering the rights which had been harmonized on the basis of the EU-wide instruments in order to ensure the proper functioning of the Internal Market, to create a homogenous, high and equal level of IP enforcement in the national legislations by virtue of the standards embodied in the TRIPS Agreement. The Commission clearly based its position on *ubi ius, ibi remedium* principle, aiming that *acquis communautaire* relating to the substantive IP rights was to be effective only having an instrument on enforcement of those rights.

Referring to the critics expressed towards the Enforcement Directive, such aim alongside with the more expressed goal of the Directive to combat piracy and counterfeiting did not sound promising from the beginning, though. It was due to the general complexity of the provisions on enforcement of IP rights as embodied in the Directive, also to a different nature of those IP rights<sup>381</sup>, for example, some enforcement measures or remedies applicable in cases of copyright infringements might not be effectively applicable to infringements of trademarks or patents rights. It is also due to a different nature of IP rights infringements themselves, *i.e.* those committed on large-scale and so-called ordinary small-scale infringements<sup>382</sup>.

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377 The Annex to the initial Commission’s Proposal for the Draft Enforcement Directive listed the directives on substantive IP rights. The list has been later introduced into the Statement by the Commission on the scope of Article 2 of the Enforcement Directive, see Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual property rights. OJ L 94, 13.4.2005, p. 37.

378 See *refs.* to the EU directives which partly dealt with the provisions on enforcement of IP rights in *infra* § 5C.II.1.

379 See *supra* Ft. 163 herein.

380 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 5.

381 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 252; also *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 829.

382 As pointed out in *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 826, measures like destruction of goods and removal from the channels of commerce should be proportionally differentiated in terms of large-scale and small-scale infringements of IP rights.

## (2) Character of the provisions of the Enforcement Directive

By partially eliminating the distinction between infringements of IP rights carried out on a commercial scale and other infringements, the Directive strengthened its positions in terms of full-scale harmonization as far as civil enforcement measures were concerned. It left, however, the possibility for the national legislators to implement the Directive by choosing either “umbrella law” solution (by enacting one law which would cover all civil enforcement measures and procedures) or so-called “distributive” method of implementation (by enacting implementing amendments to each individual IP law)<sup>383</sup> and actually created a basis for various outcomes from the implementation process.

As follows from the character of some provisions embodied in the Enforcement Directive, the Member States, by implementing them, should consider the existing national legislation on the subject<sup>384</sup>. Moreover, there are also provisions which have an optional nature<sup>385</sup> and are to be implemented with the consideration of the general aim and objectives of the Directive which are embodied in its Recitals. Although it was clearly expressed by the Commission in its Explanatory Memorandum that the enforcement rules provided under TRIPS could vary, thus there was an actual need to harmonize them within the EU<sup>386</sup> by enacting an EU-wide legal instrument, the fact that the Directive contains many broad provisions can foster to make a reverse conclusion. The Directive can surely lead to the undesired situation when instead of the harmonization of certain enforcement measures, procedures and remedies, the outcome of having different enforcement means could be faced.

In view of the enforcement provisions embodied in the TRIPS Agreement, the following sub-chapter generally focuses on the list of the substantive and procedural enforcement measures, procedures and remedies under the Directive, their character and background, also their optional or mandatory nature and certain issues regarding their wording and interpretation which are important for their implementation into the selected national legislation of the examined jurisdictions – the Baltic countries.

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383 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 252.

384 Arts. 2(1), 4, 8(3), Dir.

385 Arts. 12, 13(2), 16, Dir.

386 See *Explanatory Memorandum of the Commission's Proposal for the Draft Enforcement Directive (2003)*, p. 12.

## II. *Review of the catalogue of enforcement measures, procedures and remedies under the Enforcement Directive: “grandfather” provisions and novelties*

### 1. Substantive provisions under the Directive

Six groups of substantive enforcement measures and remedies have been harmonized under the Enforcement Directive. The Directive constitutes:

- (1) Right of information (Article 8);
- (2) Corrective measures (Article 10);
- (3) Injunctions (Articles 11);
- (4) Alternative measures (Article 12);
- (5) Damages (Article 13), and
- (6) Publication of judicial decisions (Article 15).

All listed measures and remedies can be applied while adopting a court decision on the merits of the case. The right of information can be also asserted while considering an IP infringement case. The listed provisions on substantive enforcement measures can be furthermore divided to:

- (1) Measures that are not directly used to compensate damages suffered due to IP rights infringement (measures without compensatory nature), and
- (2) Measures that are related to adjudication of damages (measures with compensatory nature).

In practice, both groups of the listed measures can be applied in a complex manner. Notably, the provisions of the Enforcement Directive, which shall be implemented by the Member States, regarding the right of information by third parties, corrective measures, and injunctions are broadly formulated in terms of the list of natural or legal persons to whom those measures can be applied by the national judicial authorities. It can be agreed with an explanation that any widening of the circle of those persons should be critically considered in practice<sup>387</sup>.

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387 *E.g.*, the term “*intermediaries*” is not defined in the Directive, therefore, it can be interpreted as comprising any kind of intermediaries in one or other way involved in IP infringement cases. Such interpretation should be carefully considered by actually applying the listed civil enforcement measures, as argued in *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 829. It conveys the meaning that serious infringements from those committed on “accidental” basis should be separated.

## a) Right of information (Article 8)

By supplementing Article 47 of the TRIPS Agreement and transposing the relevant provisions in certain national legislations such as Germany and Benelux countries<sup>388</sup>, Article 8 of the Enforcement Directive lists persons (infringers and/or (importantly!) any other persons) who, under the request of the competent judicial authorities, are to provide the information on the origin and distribution networks of the goods or services which infringe IP rights; defines the content of such information and regulates the relation between the provisions as set out in Article 8(1) and (2) and the national legislation. By virtue of Article 8(2), the requested information can comprise:

“The names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; (b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.”<sup>389</sup>

As follows from Article 8(3), the Directive provides only minimal standards regarding the provision of information<sup>390</sup>, thus, the national legislators, who are to implement Article 8, can broaden the list of persons who are to provide information<sup>391</sup> as well as the content of required information. The importance should be given to the fact that, differently from Article 47 of TRIPS, the Directive stresses “*commercial scale*” of activities committed by infringers and/or any other persons from whom information is required<sup>392</sup>. Moreover, although it is not directly provided in the Directive, the wording and context of Article 8 implicates that requirement to provide such information in practice would mean either a provision of accounting or financial documents which allow to calculate damages caused by the infringement and/or information which allows to identify infringers, third persons involved in the infringement and an infringement which was or is being committed<sup>393</sup>.

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388 See *Explanatory Memorandum of the Commission's Proposal for the Draft Enforcement Directive (2003)*, p. 19; also *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 822. *E.g.*, a right of information could be found in the prior-to-implementation German Copyright Law, also in the copyright laws of Switzerland and Austria, as referred in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 212. Importantly, the amendments to the implementing German legislation was focused on regulation of provision of such information by third persons (it being a TRIPS-plus provision), as discussed in details in *Peukert/Kur*, Stellungnahme des Max-Planck-Instituts der Richtlinie 2004/48/EG in Deutsches Recht, pp. 296-299.

389 Thus, the Directive expands the provision embodied in Art. 47 of TRIPS.

390 See *Mizaras et al.*, Implementation of EU Legislation in the Civil Laws of Lithuania, pp. 151-152.

391 Importantly, any broadening of the list of persons who can be asked to provide information should be carefully considered, as mentioned in *supra* Ft. 387 herein.

392 On the term “*commercial scale*”, as used in the Enforcement Directive, see further discussion in *infra* § 5C.II.2.

393 Such distinction has been made in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 213-215, referring to the Lithuanian Copyright Law as well as German, Austrian and Swiss copyright legislation, particularly provisions on the right of information.

The harmonized provisions are without prejudice to other national statutory provisions which govern use of information in civil or criminal proceedings or responsibility for misuse of the right of information. Moreover, the Directive does not obstruct an application of the national provisions that constitute a right to refuse to provide certain information, for instance, information concerning family members, or regulate the provision of confidential information or personal data<sup>394</sup>.

b) Corrective measures (Article 10)

By virtue of Article 10 of the Enforcement Directive, the Member States shall ensure that the competent judicial authorities, at the request of the applicant, may order to recall or definitively remove infringing goods or, in appropriate cases, materials or implements principally used in the creation or manufacture of those goods from the channels of commerce, or to destruct them. An order to apply such measures shall be without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort.

The listed measures are so-called corrective measures which have been developed in the national court practices in the Netherlands, also Belgium<sup>395</sup>. They are embodied in the Directive with a reference to a principle of proportionality between the seriousness of the infringement, the remedies ordered and the interests of third parties<sup>396</sup> (Article 10(3) of the Directive) while applying them. The reference should be likewise made to Article 46 of the TRIPS Agreement on disposal of goods outside the channels of commerce or destruction of goods, unless it is contrary to existing constitutional requirements<sup>397</sup>. TRIPS, therefore, stipulates two types of corrective measures, and the Directive also adds recall as another alternative corrective measure.

It is however unclear from the wording of the Directive if the national legislator, by implementing the Directive, or the national court, by applying corrective measures, are free to decide which measure (recall, definitive removal or destruction) is to be applied in IP infringement cases, as the Directive lists them alternatively<sup>398</sup>. It can be presumed that the implementing legislation and court practice on the subject-matter will show actual application of the provision on corrective measures; howev-

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394 See further discussion on the right of information in the Baltic legislation in *infra* § 5D.II.

395 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 19; also *Mizaras et al.*, *Implementation of EU Legislation in the Civil Laws of Lithuania*, pp. 146.

396 The Directive does not, however, make any difference if infringing goods or materials or implements used in the creation or manufacture of those goods belong to the infringer or third persons, as observed in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 69.

397 Such measures are considered to be effective deterrents against pirates and counterfeiters whose the only significant expense is often acquiring infringing implements and/or materials, as commented in *Correa*, *A Commentary on the TRIPS Agreement*, p. 411; also *Gervais*, *The TRIPS Agreement: Drafting History and Analysis*, p. 300.

398 As argued in *Peukert/Kur*, *Stellungnahme des Max-Planck-Instituts der Richtlinie 2004/48/EG in deutsches Recht*, p. 295.



er, it can also lead to different implementation outcomes in different EU countries<sup>399</sup>.

Furthermore, corrective measures, as follows from the title and the wording of Article 10 of the Directive, are aimed at restoring the status before infringing activities occurred and they are to be carried out at the expense of the infringer, unless there are reasons for not doing so (Article 10(2) of the Directive). It is also argued that such measures can play a preventive, punitive, and even compensatory role in practice<sup>400</sup>. Corrective measures which are harmonized by the Directive and also embodied in the national IP legislation, as further examined, can be derived from criminal type of confiscation of infringing good and (or) materials as well. The harmonized provisions were, however, criticised as being applicable to all infringements of IP rights, instead of limiting the application of corrective measures to obvious cases of counterfeiting and piracy only<sup>401</sup>.

### c) Injunction (Article 11)

Referring to Article 44 of the TRIPS Agreement, the measure aimed to prevent infringing activities from being continued is embodied in Article 11 of the Enforcement Directive under which:

“<...>where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement.”<sup>402</sup>

Article 11 additionally constitutes a right to ask the national courts to issue such injunction against the intermediaries whose services are used by third parties infringing IP rights, *e.g.*, internet service providers, hence, adding to Article 44 of the TRIPS Agreement. It is considered to be a very important provision due to a number of infringements of IP rights committed in digital environment nowadays. It continues the harmonization practice in this field within the EU. The provision is to be applicable without prejudice to a right to ask for such injunction which is constituted

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399 It is also argued in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 68, that the Member States should list *all* alternative corrective measures. It is due to the fact that some of the countries have not had a measure on recall from the channels of commerce, but definitive removal and destructions, which, accordingly, can not be considered new for them. On the implementing legislation regarding corrective measures and application of them in the Baltic court practice see further discussion in *infra* § 5F.III.1.

400 See *Mizaras*, *Copyright Law (Vol. II)*, pp. 277-280.

401 See *Kur*, *Enforcement Directive – Rough Start, Happy Landing?* P. 826.

402 Injunctions, as embodied in Article 11 of the Directive, do not cover preliminary injunctions (or interlocutory injunctions as they are called in the Enforcement Directive) which are intended to prevent any imminent infringement before deciding on the merits of the case and regulated under Article 9 of the Directive on provisional and precautionary measures which is further discussed in *infra* § 5A.II.2.c).

in Article 8(3) of the Copyright Directive<sup>403</sup>. Moreover, by virtue of Article 11, with a view to ensuring compliance with the injunction issued, the Member States can, but must not, adopt the provisions on application of penalty payments in cases of non-compliance with the injunction<sup>404</sup>.

An application of an injunction, as formulated in Article 11 of the Directive, is a preventive measure as far as prohibition of infringing activities, which already occurred, are concerned<sup>405</sup>. Notably, following the wording of Article 11, the courts can, but must not issue an injunction<sup>406</sup>. The formulation is not clear, though, as regards actual threat of infringing activities in the future which can necessitate a so-called preventive claim<sup>407</sup>. On the other hand, by referring to Article 15 of the Explanatory Memorandum by the Commission, also Recital 24 of the final text of the Enforcement Directive, it can be interpreted that such injunction is also aimed at preventing new IP rights infringements when there is a real threat that they can be committed in the future<sup>408</sup>.

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403 According to the referred Article 8(3) of the Copyright Directive, the Member States shall ensure that the right holders can ask for an injunction against intermediaries whose services are used by third persons infringing copyright or related rights.

404 Such penalty is provided in the Lithuanian Civil Code. Although such possibility to impose a penalty can be applauded in terms of more effective implementation of the ordered injunction, however, it can be also seen as a punitive element which is not in compliance with the concept of civil remedies for IP rights infringements, as argued in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 62. See also discussion in *infra* § 5E.I.4.

405 It is also sometimes called a *quasi-preventive remedy* which not only stops the continuation of the infringement, but deters from the commitment of such infringement in the future, as referred in *Ibid*, p. 62.

406 Although it was argued that, even the Directive is obscure regarding the mandatory nature of injunctions, it is anticipated that ECJ will interpret Art. 11 of the Directive broadly, as referred in *von Mühlendahl*, *Enforcement of IPRs – Is Injunctive Relief Mandatory?* P. 380.

407 Already before the adoption of the Directive a possibility to submit a so-called preventive claim has been provided in the Lithuanian Civil Code, also the Lithuanian Copyright Law as of 2003. The provisions on the preventive action against IP rights infringements that are about to be committed, provided that evidence on such threat are to be provided, could be found in German (in case of repeated infringements only), also Austrian and Swiss copyright laws, as analysed in *Mizaras*, *Civil Remedies for Infringement of Copyright*, pp. 243-257.

408 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 21. Such interpretation can be also seen in view of Art. 41(1) of TRIPS which sets out “<...> expeditious remedies to prevent infringements <...>”, and not only a suspension of them once they have started. See *Correa*, *A Commentary on the TRIPS Agreement*, p. 411; also *Gervais*, *The TRIPS Agreement: Drafting History and Analysis*, p. 287, *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 67; also further discussion on the national court practice regarding adoption of injunctions (preliminary and permanent) in IP rights infringement cases in *infra* § 5E.I.

d) Alternative measures (Article 12)

Importantly, at the request of the liable person to whom either corrective measures (Article 10 of the Directive) or an injunction (Article 11 of the Directive) can be applied, in case there is neither intent nor negligence involved in the infringing activities of that person, the courts instead of corrective measures or an injunction can order a pecuniary compensation, provided that an application of corrective measures or an injunction would cause a liable person disproportionate harm and such compensation appears to be reasonably satisfactory for an injured party.

The optional provision set out in Article 12 of the Enforcement Directive on alternative measures is a TRIPS-plus provision which was modelled on Article 101(1) of the German copyright law<sup>409</sup>. Alternative measures are considered to be as a certain balancing mechanism among the enforcement measures applicable in case of deliberate or negligent IP infringements.

e) Damages (Article 13)

Supplementing Article 45 of the TRIPS Agreement which constitutes a common rule on damages to compensate the right holder for the injury suffered<sup>410</sup>, Article 13 of the Enforcement Directive embodies an adjudication of damages, one of the key provisions in the field of enforcement of IP rights, which shall be implemented by the Member States. Referring to the different legal regulation on damages in the EU Member States, especially the provisions on calculation of loss of profits by the right holder or gain of profits by the infringer<sup>411</sup>, the Directive seeks to harmonize the regulation on pecuniary damages with the aim they are *appropriate* for the suffered harm due to an IP infringement<sup>412</sup>. An adjudication of moral damages is not harmonized by the Directive<sup>413</sup>, though, moral prejudice caused by the infringement must be, *inter alia*, considered by the courts as an element other than economic factor under Article 13(1)(a) of the Directive.

Article 13 of the Enforcement Directive first refers to a general obligation for the Member States to regulate civil liability by compensating for actual damages that were suffered as a result of an IP infringement which was committed knowingly or with reasonable grounds to know it. It constitutes fundamental principles applicable

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409 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 21.

410 See *Correa*, A Commentary on the TRIPS Agreement, p. 426; also *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 298.

411 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 14. The recourse, though, can be made to Art. 44(1) of TRIPS, which refers to *bona fide* acquirers in view of application of injunctions, as observed in *Correa*, A Commentary on the TRIPS Agreement, p. 424.

412 Notably, the term “adequate” is used in Art. 45 of TRIPS. See also explanations regarding the term in *Correa*, A Commentary on the TRIPS Agreement, p. 426.

413 Such solution was due to diverging concepts of protection of moral rights in continental and Anglo-American (also followed in the UK) legal systems.

for any civil liability case by form of adjudicating damages, *i.e.* illegal activities, actual prejudice, causative relation between illegal activities and prejudice occurred, and fault<sup>414</sup>.

The methods of calculation of damages harmonized by the Directive are either actual damages (compensatory damages) or damages which can be adjudicated as a lump sum (license analogy)<sup>415</sup>. While adopting a decision on actual damages, the courts should consider various factors:

“<...> 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 right holder by the infringement.”

It can be noted that lost profits and unfair profits made by the infringer are listed as aspects that should be considered in order to calculate actual damages. Therefore, it has been reasonably discussed by some scholars if those aspects qualify as criterion to calculate actual damages or as a separate type of compensatory damages<sup>416</sup>. Both positions can be accepted. Additionally, by considering the implementing provisions on the issue as well as the aims of the Directive, it can be agreed that lost profits and unfair profits by the infringer fall under the rules of civil liability which are applied to adjudicate actual damages<sup>417</sup>.

Alternatively, as previously referred, the courts may set damages as a lump sum which is calculated:

“<...> 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.”

Such alternative provided in the Directive is considered to be a very important method to calculate damages in IP infringement cases which goes beyond the traditional civil methods to calculate damages due to specificity of IP rights, *i.e.* due to the fact that in some IP rights infringement cases it is very difficult to assess pecuniary damages suffered.

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414 See on civil liability conditions under the national legislation in *infra* § 5F.I.1.; also in *Mizaras et al.*, Implementation of EU Legislation in the Civil Laws of Lithuania, p. 148.

415 The final harmonizing provisions on damages set out in the Directive are different from the initial Commission’s proposal. Damages set at double the royalties or fees which would have been due if the infringer had requested the authorisation to use IP right in question, or compensatory damages corresponding to the actual prejudice suffered with a possibility to recover all profits made by the infringer have been initially proposed by the Commission, as can be seen in *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 22, also Art. 17 of the Commission’s Proposed Draft Directive.

416 See *Dreier*, Ausgleich, Abschreckung und andere Rechtsfolgen von Urheberrechtsverletzungen – Erste Gedanken zur EU-Richtlinie, pp. 706, 710, 712; also *Peukert/Kur*, Stellungnahme des Max-Planck-Instituts der Richtlinie 2004/48/EG in deutsches Recht), pp. 292-294.

417 See further discussion on the implementing provisions on loss of profit, an infringer’s gained profit in *infra* § 5F.I.1.

The provision on a lump sum damages was embodied in the Directive using the practice of other countries, namely Germany, which in their prior-to-Directive national legislation already contained a licence analogy method<sup>418</sup>. Article 13 does not refer to any concrete amount of damages as lump sum, by leaving for the Member States to regulate it (e.g., double or even triple amount of royalties<sup>419</sup>). Although the Commission claimed that such alternative calculation of damages did not constitute punitive damages<sup>420</sup> and was aimed at compensating actual damages suffered, the actual application of such method and its deterrent effect could confirm the contrary<sup>421</sup>.

The Enforcement Directive (in particular, its provisions on damages which open the possibility for the courts to compute higher damages than under the previous national legislations<sup>422</sup> and which can also implicate adjudication of higher damages than necessary to compensate the actually done harm) furthermore makes a difference between wilful and negligent infringements. In case an infringement was committed not knowingly or with reasonable grounds to know, as pursued by Article 13(2) of the Directive, the Member States may constitute in their national legislations that the courts can order the recovery of profits gained by the infringer or the payment of so-called *pre-established damages*. The Directive does not concretize any of the methods of calculation of such damages leaving it to national legislators' discretion. Pursuing the Commission's initially expressed position on the gained

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418 The licence analogy method has been used to calculate damages on the basis of the objective calculation of a royalty amount which should have been paid by the user in case a licence agreement between such user and a right holder had been made. While assessing such amounts, the tariffs of royalties to be paid by the users which are established by, for instance, GEMA in Germany, are taken into consideration. See more in *Dreier, Ausgleich, Abschreckung und andere Rechtsfolgen von Urheberrechtsverletzungen – Erste Gedanken zur EU-Richtlinie*, pp. 709-710; also in *Mizaras, Civil Remedies for Infringement of Copyright*, pp. 192-193.

419 Notably, license analogy method differs from the legal institute of compensation instead of actual damages. Such compensation was embodied in the Lithuanian copyright legislation prior to the adoption of the Directive already in 1994. None of the Western European countries provided for such possibility to adjudicate damages in the form of compensation which was actually assessed on the basis of a resale price of legal IP products (double or triple royalties) and reflected the concept of “statutory damages” known in the US legal system. Besides the Lithuanian copyright legislation, the “compensation” provision could be likewise found in Russian, Ukrainian, Kirgizian, also Poland, Slovenia copyright laws, as referred to in *Mizaras, Civil Remedies for Infringement of Copyright*, pp. 139-140. See also further discussion on the implementing legislation on damages in *infra* § 5F.I.1.c).

420 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 22; *ref.* also to Recital (26), *Dir.* *Note*: the discussion regarding double or triple amount of royalties or license fees took place while drafting the Directive.

421 See *Metzger/Wurmnest, Auf dem Weg zu einem Europäischen Sanktionenrecht des geistigen Eigentums?* P. 931. Following the explanation in *Correa, A Commentary on the TRIPS Agreement*, p. 411, TRIPS Part III does not encompass punitive sanctions. See further discussion on national court practice on adjudication of damages in IP cases in *infra* § 5F.I.1.

422 As argued in *Kur, Enforcement Directive – Rough Start, Happy Landing?* P. 828.

profits<sup>423</sup>, it can be interpreted that gained profits cover the gross income gained by the infringer who is bound to provide evidence of his deductible expenses and profits attributable to factors not related to the infringement.

f) Publication of judicial decisions (Article 15)

Another substantive provision on enforcement measures harmonized by the Enforcement Directive concerns publicity measures, as constituted in its Article 15, which obligates the Member States to ensure that:

“<...> in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part.”

Such measure has not been constituted in the TRIPS Agreement and, in view of the goals of the Directive, was viewed as another effective mean to inform the public about infringements of IP rights, hence, playing a preventive role against infringements of IP rights<sup>424</sup>.

Article 15 of the Directive does not concretize in which media means the decision or its part should be published or how the dissemination of information is to be done (the newspapers were mentioned only in the Explanatory Memorandum by the Commission<sup>425</sup>). It does provide, though, that Member States may provide for additional publicity measures, which in certain circumstances, include also prominent advertising which can be interpreted as, for instance, informing the infringer's customers by mail. The provision on publicity measures is especially important for the jurisdictions of the new EU Member States such as the Baltic countries in which IP mentality, awareness and knowledge about IP rights and respect towards them is still under formation<sup>426</sup>.

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423 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 22.

424 See *Ibid.*

425 See *Ibid.*

426 On implementing legislation regarding publicity measures and application of them in the Baltic court practice see further discussion in *infra* § 5F.IV.

## 2. Procedural provisions under the Directive

Along with the substantive civil enforcement measures and remedies, the Enforcement Directive establishes three groups of the procedural enforcement measures:

- (1) Evidence<sup>427</sup> and measures for preserving evidence (Articles 6 and 7, respectively);
- (2) Provisional and precautionary measures (Article 9)<sup>428</sup>; and
- (3) Legal costs (Article 14).

The listed procedural measures are generally aimed to ensure enforcement of the final court decision on the merits of IP infringement case, also to ensure a collection and preservation of collected evidence in IP infringement cases or to prevent from infringing IP rights and/or deter from infringing them<sup>429</sup>. The implementation of all those provisions is mandatory to the Member States.

### a) Evidence (Article 6)

Evidence has an undoubtedly paramount importance in IP infringement cases<sup>430</sup>. The Enforcement Directive therefore focuses on the harmonization of the national provisions in the field of collection and presentation of evidence to the courts, which very much differed prior to the Directive, as far was IP infringement cases are concerned. By virtue of Article 6(1) which is modelled on Article 43(1) of the TRIPS Agreement, the Directive first constitutes a general obligation of the Member States to ensure that:

“<...> on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information.”

It is additionally provided that, in order to implement the obligation as set out in Article 6(1), the Member States may establish in their national legislation that *samples* of a substantial number of copies of a work or any other protected object should

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427 The question remains, however, if the provision on evidence, which is harmonized by the Directive, can be generally considered as a procedural, rather than the substantive one, as argued in *Knaak*, Die EG-Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums und ihr Umsetzungsbedarf im deutschen Recht, pp. 747-748.

428 By virtue of Art. 50 of TRIPS, both measures for preserving evidence and provisional and precautionary measures can be called “preliminary measures”, as indicated in *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, pp. 812-814, *ref.* also to ECJ, Judgement of 26 March 1992, Case C-261/90, OJ 1989, L 317/48.

429 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 19; Recital 20, Dir.; also *Mizaras et al.*, Implementation of EU Legislation in the Civil Laws of Lithuania, p. 158.

430 See Recital 20, Dir.

be considered by the competent judicial authorities to constitute reasonable evidence. Thus, the Directive leaves broad terms such as “a substantial number of copies” or “reasonably available evidence” for discretion of the national legislators and/or for an interpretation and assessment by the national courts in each individual IP infringement case. On the other hand, such broad terms constituted in the Enforcement Directive can weaken its actual harmonization effect which is generally pursued by the Directive, because different solutions by the national legislators or different argumentation by the national courts can lead to different outcomes regarding evidence that should be presented and estimated in IP infringement cases<sup>431</sup>.

By supplementing Article 43 of the TRIPS Agreement and referring to Recital 20 of the Enforcement Directive, Article 6(2) of the Directive importantly refers to a sufficiency of evidence in cases where infringement of IP rights was committed on a commercial scale<sup>432</sup>. The provision obliges the Member States to enable the national courts to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information<sup>433</sup>.

#### b) Measures for preserving evidence (Article 7)

By further supplementing Article 43 as well as Article 50 of the TRIPS Agreement and by incorporating the well-established legal institutes from some European jurisdictions such as *Anton Piller* order or *Doorstep* order (UK) and *saisie-contrefaçon* (France)<sup>434</sup>, Article 7 of the Directive focuses on preservation of evidence in IP rights infringement cases and incorporates such legal concepts as *saisie descriptive* and *saisie réelle* taken from the well-established French court practice on the issue<sup>435</sup>. It seeks to harmonize measures for preserving evidence, particularly measures that can be applied before the commencement of proceedings on the merits of the case, *i.e.* so-called *civil (ex parte) searches*. By virtue of Article 7(1) of the Directive, the Member States shall ensure that:

“<...> even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to

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431 On this point it is frequently argued that evidence should be enough to convince the judge that infringement occurred or can occur, as also referred in *Correa*, A Commentary on the TRIPS Agreement, p. 420.

432 On the term “commercial scale” see further discussion in *infra* § 5C.II.2.

433 On the implementing national legislation of the Baltic countries regarding evidence in IP rights infringements cases as well as sufficiency of evidence in cases committed on a commercial scale under the national court practice see further discussion in *infra* § 5D.I.

434 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, pp. 13, 19. It can be argued, though, that Art. 7 of the Directive only partly reflects the French *saisie contrefaçon* concept because in France a right holder is not obliged to provide any reasonably available evidence. See also *Correa*, A Commentary on the TRIPS Agreement, p. 420.

435 See *Cottier, Véron*, Concise International and European IP Law, p. 471.



be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information.”

Article 7(1) again refers to broad term “*reasonably available evidence*” regarding the committed infringement of IP rights or IP rights which are about to be infringed. Such provision does not explain to the national judicial authorities how to determine which evidence is sufficient to decide that a measure to preserve evidence, for example, a detailed description, with or without the taking of samples, or a physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents, can and should be applicable<sup>436</sup>.

Moreover, differently from the wording of Article 9(3) of the Directive regarding submission of reasonably available evidence in cases of application of provisional measures, Article 7(1) does not refer to evidence which can allow the sufficient degree of certainty about the ownership of IP rights and current or imminent infringement<sup>437</sup>. It is rightly interpreted, though, that the Directive pursues lower threshold of evidence to be provided in order to adopt measures preserving evidence. This is especially due to the fact that the wording of Article 7(1) was, *inter alia*, based on the French concept of *saisie-contrefaçon*.

It is also argued that reasonably available evidence such as expert testimony and test data are considered to be relevant for the establishment of the facts and the determination of validity and infringement of IP rights at hand and are to be respected in all enforcement procedures by both parties and the third persons involved<sup>438</sup>. It is left for the discretion of the national courts and it can reflect different outcomes in such cases due to different levels of general preparation and experience of national judges in the different jurisdictions<sup>439</sup>.

The possibility pursued by the Directive to order measures to preserve evidence without the other party being heard (*inaudita altera parte*) is likewise modelled on Article 50 of the TRIPS Agreement from which the Directive literally transposes that it should be particularly applicable in cases “where any delay is likely to cause

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436 *E.g.*, as stated in *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, p. 813, in cases of infringements of process-patents, “the identity of product at hand alone will not suffice”. See also *Correa*, A Commentary on the TRIPS Agreement, p. 420.

437 Such omission has been debated in the legal literature, see more in *Knaak*, Die EG-Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums und ihr Umsetzungsbedarf im deutschen Recht, pp. 745, 748; also *Tilmann*, Beweissicherung nach Art. 7 der Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums, pp. 737, 739.

438 See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, pp. 811-812.

439 The Baltic national court practice also illustrates difficulties faced by the national judges while ordering measures to preserve evidence due to lack of instructions or court practice regarding the definition of “reasonably available evidence”. It especially concerns “hearsay evidence” which is not directly mentioned in Art. 7 of the Directive. Art. 7(5) indirectly implicates that information about an infringement can be based on witness testimony. On the Baltic national court practice regarding the preservation of evidence in IP rights infringement cases, also application of *civil (ex parte) searches* see further discussion in *infra* § 5D.I.

irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed”<sup>440</sup>.

On the other hand, the Directive explicitly requires enabling the national courts to ask for a certain security measures for a defendant in order to avoid any abuse from the side of IP right holders, by employing the principle of “fair and equitable procedures” as set out in Article 3(1) of the Directive, also Article 41(2) and 42 of the TRIPS Agreement<sup>441</sup>. Those measures cover a lodging of an adequate security or an equivalent assurance by the applicant and also an appropriate compensation for any injury caused to the defendant. It moreover provides that the applicant must institute proceedings, *i.e.* submit a claim, to the court within its indicated time which cannot exceed 20 working days or 31 calendar days whichever is the longer. In the opposite case the measures to preserve evidence are to be revoked or ceased to have effect with a possibility for a defendant to ask for the appropriate compensation for any injury caused due to those measures<sup>442</sup>.

c) Provisional and precautionary measures (Article 9)

On the basis of Article 50 of the TRIPS Agreement<sup>443</sup>, Article 9 of the Enforcement Directive seeks to harmonize provisional and precautionary measures which can be applied by the national courts before deciding on the merits of the case. Similarly to the measures on preserving evidence in IP rights infringement cases, provisional and precautionary measures are especially relevant in practice due to the fact that in most cases the right holders seek to take a rapid action to stop the continuation of IP rights infringement or to prevent any imminent infringement<sup>444</sup>. The provisional and precautionary measures are also to assure claims brought by the right holders regarding the adjudication of damages which were suffered because of IP infringements.

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440 As argued, evidence of risk that evidence can be destroyed should be “*demonstrable*”, as stressed out in *Correa*, A Commentary on the TRIPS Agreement, p. 436.

441 See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, p. 813.

442 The requirements constituting the mechanism to protect defendants’ rights while applying measures on preserving evidence are embodied in Art. 7(3), also Art. 7(4) of the Directive which almost literally transpose Art. 50(6) and Art. 50(7) of TRIPS; see more in *Correa*, A Commentary on the TRIPS Agreement, pp. 437-438.

443 Art. 50 was also drafted on the basis of proposals submitted by the European Communities, the United States and Switzerland, 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. 812.

444 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 20.

Provisional measures harmonized under the Directive comprise:

- a) An interlocutory injunction (Article 9(1)(a)) which can be also issued against an intermediary whose services are being used by a third party to infringe an IP right<sup>445</sup>, and
- b) The seizure or delivery up of the allegedly infringing goods so as to prevent their entry into or movement within the channels of commerce (Article 9(1)(b)).

Besides the provisions which *mutatis mutandis* are applicable to measures on preserving evidence (a submission of reasonably available evidence on an imminent infringement in order to have “a sufficient degree of certainty” which would depend on the specific circumstances of the individual case at hand), orders on provisional and precautionary measures can be applied *inaudita altera parte* following the same legal requirements and facing the same legal consequences as provided for orders on preserving evidence<sup>446</sup>. Article 9(2) likewise obliges the Member States to enable the national courts to order:

“<...> the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.”

Such practically important precautionary measure can be ordered only in case of an infringement of IP rights on a commercial scale<sup>447</sup> and if the injured party demonstrates circumstances which can endanger the recovery of damages. This measure has been modelled on the British law concept known as the *freezing injunction* or *Mareva injunction*<sup>448</sup>. Considering the judicial practice in other EU countries, interlocutory injunctions or precautionary seizures are to be ordered with a scrutiny performed by the national judges considering all factual circumstances of an individual case as well as complex technical facts presented by the parties and with an assistant of independent specialists or experts<sup>449</sup>.

#### d) Legal costs (Article 14)

By supplementing Article 45(2) of the TRIPS Agreement, Article 14 of the Directive embodies the obligation for Member States to ensure reasonable and proportionate legal costs and other expenses (meaning investigation costs, costs for experts’

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445 Ref. also to the Copyright Directive.

446 See discussion in supra § 5A.II.2.b).

447 On the term “commercial scale” see further discussion in infra § 5C.II.2.

448 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 21.

449 See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, pp. 822, 823.

and/or specialists' opinions, etc.<sup>450</sup>) incurred by the successful party which, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.

Although the harmonizing provision in the Directive on the legal costs is laconic and comprises broad terms such as "reasonable and proportionate legal costs" without explaining how it should be estimated<sup>451</sup>, it has an extreme practical importance in IP litigation process, especially in the jurisdictions where litigation is generally expensive<sup>452</sup>.

### III. Concluding remarks

Despite the initial positive legal and anti-piracy policy intentions for which the Enforcement Directive was welcomed, the legal context and the final wording of it left many doubts in terms of its actual harmonizing effect in different jurisdictions, including the Baltic countries. Such conclusion follows from the following observations.

*First*, the Directive, which goal was mainly to fight against piracy and counterfeiting by harmonizing the enforcement rules within the EU, did not indeed accumulate all methods and forms of IP enforcement, be they civil, administrative and criminal. The focus on civil enforcement alone was logically based on impossibility to cover all IP enforcement means, especially combining civil and criminal measures. It was due to the different legal nature and characteristics of civil and criminal measures. Moreover, harmonization of criminal measures on that stage would have been a quite demanding and legally doubtful exercise due to the fact that criminal law and criminal procedural law exceptionally falls under the scope of the national regulation of the Member States.

*Second*, a legal uncertainty remains due to the scope of the Enforcement Directive. The Directive is applicable to *all* IP rights, including industrial property rights, by not addressing essence and nature of the latter rights due to their specific subject-matter. The same applies to the specificity of the systems of Community rights to which the Directive does not give any special attention and also other rights which are not IP rights from their essence (so-called "grey area" rights), however, which can indirectly fall under the scope of the Directive.

*Third*, although the best legal practices in some countries regarding the application of some enforcement institutes had been duly considered, the Enforcement Directive has been drafted without actual assessment of certain characteristics of legal traditions of the EU Member States. The consideration of the accession fact of new

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450 The list of sample expenses has been initially provided by the Commission, as referred in *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 22.

451 The same can be said about the provision on legal costs, embodied in Article 45(2) of TRIPS, which, interestingly, covers appropriate attorney's fees as an optional part of the expenses; see also *Correa*, A Commentary on the TRIPS Agreement, p. 427.

452 On the legal costs in the Baltic legislation and IP litigation practice see further discussion in *infra* § 5F.II.

Member States and their relatively young IP traditions and a legal heritage from the Soviet legal tradition was not taken into account.

Last, but not least, the obligations of the Member States to enforce the TRIPS standards regarding enforcement of IP rights prior to the Enforcement Directive have been not addressed as well. As rightly argued, instead of the possible revision on how the EU Member States implemented the TRIPS standards, the Enforcement Directive has been adopted by demonstrating the low-level *acquis* which can actually reduce its harmonizing effect. Such effect can be also reduced by leaving discretion for the national legislators to determine a scope of application of some provisions of the Directive on the basis of the applicable law. On the other hand, the national legislators of the Member States – also the national legislators of the Baltic countries – were obliged to adopt new enforcement provisions related to collection of evidence, damages, the right of information, etc., in view of the aims pursued by the Enforcement Directive. It deemed to be positive improvement in terms of comprehensive IP rights enforcement scheme in the Baltic region.

## ***B. Implementing legislation of the Baltic countries***

### *I. Legislative (formal) implementation*

#### 1. Prior-to-implementation provisions on IP enforcement, duration of the implementation and the implementing provisions

Already before the adoption of the Enforcement Directive on 29 April 2004, the Baltic IP legislation contained a number of provisions regarding enforcement of IP rights. The provisions were mainly embodied in the national special laws on IP rights as well as in the Civil Codes<sup>453</sup> and Codes of Civil Procedure. The key provisions on civil enforcement remedies in both copyright and related rights as well as industrial property legislation, which were constituted before the adoption of the implementing amendments, are further examined.

#### a) Prior-to-implementation national IP enforcement provisions: key aspects

##### (1) Copyright legislation

The extensive list of provisions on enforcement measures and remedies regarding infringements of copyright, related and *sui generis* rights could be found in the Lithuanian Copyright Law. Importantly, since its initial adoption in 1999 and its later amendments in 2003<sup>454</sup>, Chapter VI of the mentioned law embodied the provisions

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453 See also *refs.* regarding the national Civil Codes in supra § 3B.III.1.

454 The amendments to the Lithuanian Copyright Law in 2003 mainly covered the implementation of the provisions set out in the Copyright Directive. See also further *refs.* to the legislative acts in this section.

on compensation as an alternative method for reimbursement of actual losses suffered because of infringement of rights<sup>455</sup>. Compensation institute was one of the remedies listed together with a recognition of rights, an injunction, a redress of infringed moral rights, an exaction of unpaid remuneration, a reimbursement of losses or damage (material and (or) moral), including the lost income<sup>456</sup> and other expenses.

Compensation instead of actual damages is to be considered as a key provision in terms of remedies for copyright infringements prior to the implementation of the Enforcement Directive. This is especially due to the fact that it was frequently applied in the Lithuanian judicial practice and, although it faced a lot of critique, the institute played an important role to assure the compliance with the protection of IP rights because of its evident deterrent effect<sup>457</sup>. As far as a computation of the compensation was concerned, it had to be determined according to the price of legal sale of an appropriate work or object of related rights, by increasing it up to 200 percent, or up to 300 percent, if the infringer has committed the infringement deliberately<sup>458</sup>. The latter provision of compensation was transposed from the similar provision embodied in the 1994 Law on Legal Protection of Computer Programs and Databases. The mentioned law along with the then valid Lithuanian Civil Code was applicable to infringements against author's rights to computer programs and database authors' rights<sup>459</sup>.

Besides compensation, the 1999 Lithuanian Copyright Law established a right to ask the court to order a seizure or destruction of infringing copies of copyrightable works and the devices or equipment used for their manufacture, as well as other devices and equipment used in connection with the infringement of rights and other provisional measures such as prohibition of the release into circulation of infringing copies of copyrightable works (corrective measures).

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455 Arts. 77(1)(7) and 79 of the Lithuanian Copyright Law as of 2003.

456 By virtue of Art. 79(4) of the Lithuanian Copyright Law, also Art. 6.249 of the Lithuanian Civil Code the lost income covered the profits gained by the infringer from the infringing activities which could be reimbursed even if there was no culpability in the infringer's activities, as argued in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 39.

457 See examination of the court practice on the adjudication of compensation in copyright infringement cases in Lithuania in *infra* § 5F.I.1.c).

458 The concept of "*a price of legal sale of an appropriate work or object of related rights*" has been examined in the judiciary practice and interpreted by the *Supreme Court of Lithuania, Consultation No. A3-64/2002*, see also further discussion in *infra* § 5F.I.1.c).

459 Art. 20 of the 1994 Law on Legal Protection of Computer Programs and Databases (not enforced as from 9 June 1999) provided that in cases when the plaintiff could not compute precisely the amount of losses suffered as a result of the infringement, the court, taking into account the complexity and significance of the program or the database, could award to the plaintiff from 500 to 10,000 Lit (ca from 145 to 2,898 Euro) for the use of each illegal copy, and in cases the rights have been infringed for enrichment, the court could order to increase the damages up to 50,000 Lit (ca 14,493 Euro).

*Note:* 1 Euro is 3.4528 Lit (fixed rate).

Moreover, at that time the Copyright Law already embodied the possibility to apply provisional measures, including those to preserve evidence, without informing the other party and without calling it to the court hearing (*inaudita altera parte*). The practical application of such provisional measures started before the adoption of the Directive in Lithuania<sup>460</sup>.

Along with new amendments in 2003, the list of enforcement measures and remedies was furthermore complemented in the Lithuanian Copyright Law. Civil liability for circumvention of TPMs and rights management information, also injunctions against intermediaries due to the implementation of the Copyright Directive was introduced. A list of the legal remedies has been also extended by: (1) adding a preventive claim (to stop infringing activities which might occur in the future), (2) elaborating on a seizure provision, and (3) introducing a right of information.

The provision on compensation was also amended and changed in 2003. A new wording of a compensation referred to an amount from 10 to 1,000 MLS<sup>461</sup> that could be computed by the courts. As regulated by the law, the courts had to determine the amount of compensation considering culpability of the infringer, his or her property status, causes of unlawful actions and other circumstances which were significant to the case, as well as the criteria of good faith, fairness and reasonableness. Such formulation provided the national courts with more discretion to assess the amount of compensation. The courts, however, tended to apply the legal interpretation and standards which had been already elaborated by the national court practice on the adjudication of damages and (or) compensation by virtue of the 1999 Lithuanian Copyright Law<sup>462</sup>.

The Estonian Copyright Law which was adopted in 1992 and subsequently amended in 2000, 2001 and 2002, did not contain the provisions on compensation as an alternative computation of damages. According to the mentioned law, a compensation for moral and (or) economic damages which occurred due to illegal activities was to be calculated on the basis of the provisions of the Law of Obligations Act<sup>463</sup>. Brief provision on compensation could be found in the Latvian Copyright Law which was adopted in 1993, then newly revised in 2000 (last amended in December 2007), and which referred to a compensation of losses, including lost profits, or also a compensation which could be adjudicated based on the discretion of the court<sup>464</sup>. The law did not provide any guidelines how such compensation had to be adjudicated.

Similarly to the prior-to-implementation of the Directive Lithuanian legislation, both Estonian and Latvian Copyright Laws constituted the rights of the right holders to ask the national courts to recognize their rights, to discontinue the illegal activi-

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460 The national court practice on measures preserving evidence is discussed in *infra* § 5D.I.

461 In 2003, also in 2004 MLS was 125 Lit (ca 36 Euro) in Lithuania.

462 See discussion regarding the national court practice on adjudication of damages in *infra* § 5F.I.

463 Art. 81(2)(1) of the Estonian Copyright Law which refers to Art. 1043 of the Law of the Obligations Act.

464 Art. 69(1)(4), the Latvian Copyright Law.

ties, to prohibit the use of the work, to pay damages, including moral damages, to confiscate and destruct the infringing copies, to terminate the contract, to delivery the assets acquired through an infringement<sup>465</sup>.

## (2) Industrial property legislation

Enforcement provisions, which were embodied in the national industrial property legislation before the adoption of the Enforcement Directive, differed in the Baltic countries.

Contrary to the copyright legislation, the laws on industrial property rights, namely, the laws on patents, trademarks and designs, did not contain extensive enforcement provisions since their initial adoption in Lithuania<sup>466</sup>. The list of civil remedies for infringements of patent rights was rather limited to injunctions and adjudication of pecuniary damages in the prior-to-implementation Lithuanian Patent Law. More detailed provisions covered a legal standing (*locus standi*) in IP infringement proceedings<sup>467</sup>. The prior-to-implementation industrial property laws generally covered remedies such as declaratory judgments and preventive claims (in case of patent rights). However, the practical application of such remedies was very modest which is illustrated by the modest court practice regarding infringements of industrial property rights, especially patents or industrial designs<sup>468</sup>.

As far as damage adjudication was concerned, the provision on alternatively possible compensation was enacted in the Lithuanian Trademark Law, namely in its wording as of 2000. Similarly to the then Lithuanian Copyright Law, a compensation had to be determined according to the price of legal sale of a relevant good or service by increasing it up to 200 percent or up to 300 percent if the infringer has committed the infringement deliberately. Neither the previous wording of the Trademark Law as of 1993 nor the Design Law as of 2002 which changed the Law on Industrial Law contained such provision.

The provision on alternatively possible compensation was not embodied in the Estonian and Latvian laws on patents which were adopted prior to the adoption of the Enforcement Directive<sup>469</sup>. The Estonian Patent Law established, however, that a compensation for damage is to be assessed pursuant the Law of Obligations Act<sup>470</sup>.

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465 The lists of civil enforcement remedies were embodied in Sections 69 and 70 of the Latvian Copyright Law and in Section 81 of the Estonian Copyright Law. See also the overview of the Estonian copyright legislation before the adoption of the Enforcement Directive in *Koitel*, Gewerblicher Rechtsschutz und Urheberrecht in Estland, pp. 1013-1015.

466 See *refs.* to the prior-to-implementation legislative acts on industrial property in *supra* § 3B.III.1.

467 *Locus standi* in IP infringement cases is further discussed in *infra* § 5C.V.2.

468 See statistics in *supra* § 3C.IV.3.

469 The Estonian Patent Law was adopted in 1994 (last amended in 2007), whereas the Latvian Patent Law was initially adopted in 1993, then newly adopted (except Chapter V) with an entry into force from April 1995. The enforcement measures and remedies were set forth in Chapter XI of the Estonian Patent Law and Chapter X of the Latvian Patent Law.

470 Art. 53(1)(1) of the Estonian Patent Law which refers to Art. 1043 of the Law of the Obligations Act.



Moreover, it provided that if a patented invention was used in good faith, a court could order compensation not exceeding damage caused within five years before the filling of the civil action<sup>471</sup>. The latter laws additionally provided for other civil enforcement remedies which, *inter alia*, covered termination of illegal activities, seizure of the infringing material, and reimbursement of damage, including lost of profits and profits gained by the infringer as a result of the illegal use of the invention.

By virtue of the Estonian and Latvian legislation on trademarks and industrial designs, which had been adopted before the Enforcement Directive came into force<sup>472</sup>, it can be observed that quite general enforcement provisions which were embodied in the mentioned laws provided for such remedies as a termination of illegal activities, reimbursement of damage and seizure of infringing items.

#### b) Duration of the implementation of the Directive

The Baltic countries adopted the implementing national laws by the end of 2006 and the beginning of 2007<sup>473</sup>. In the context of almost all other EU Member States, which adopted their implementing legislation later than the required implementation term under the Directive<sup>474</sup>, it can be observed that the Baltic countries did not fall far behind schedule.

Other new EU Member States, for instance, Hungary, Slovenia or Rumania implemented the Directive prior to the required deadline, as reported<sup>475</sup>. Some other countries such as Czech Republic, Cyprus or Malta adopted the implementing laws

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471 Art. 53(2), the Estonian Patent Law (as amended in 2002); see also in *Koitel*, Gewerblicher Rechtsschutz und Urheberrecht in Estland, p. 1011.

472 The Estonian Trademarks Law was passed in October 1992, and then newly adopted in May 2002, whereas the Industrial Design Law was passed in November 1997 (entered into force in January 1998). The Latvian Law on Trademarks and on Industrial Design Protection was adopted in April 1993. It was changed in July 1999 by adopting the new Law on Trademarks and Indications of Geographical Origin.

473 See *refs.* to the implementing national legislation in the subsequent section. The national implementing legislation is also listed in the National Provisions Communicated by the Member States concerning the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (hereinafter – the “*National Execution Measures concerning the Implementation of the Enforcement Directive (2008)*”).

474 *Note*: even if the implementing legislation has been adopted prior to the deadline to implement the Directive (29 April, 2006 (Art. 20, Dir.)), in many EU countries it came into force later, see also *National Execution Measures concerning the Implementation of the Enforcement Directive (2008)*.

475 Hungary adopted the implementing legislation in 2005 which came into force on 15 April, 2006. Slovenia implemented the Directive by adopting amendments to Industrial Property Act and the Copyright and Related Rights Act in March, 2006, whereas the implementing legislation regarding industrial property rights came into force on 20 July 2005 in Rumania (prior to its accession into the EU from 1 January 2007), see *National Execution Measures concerning the Implementation of the Enforcement Directive (2008)*.

in 2006<sup>476</sup>. This also applies, for example, to Spain, Italy or Finland where the national legislators passed the implementing laws in 2006<sup>477</sup>.

However, not all EU Member States were diligent to draft the implementing amendments within the required implementation term under the Directive and to communicate the national implementation measures to the Commission. Countries such as France or Germany were especially late to implement the harmonized enforcement measures under the Directive. France, for instance, implemented the Directive by adopting the amendments to its national legislation on 29 October 2007<sup>478</sup>. In Germany drafted amendments had to overcome lengthy discussions at the Parliament and were finally adopted on 11 April 2008<sup>479</sup>. Such omission to implement the Directive within the required deadline could have turned into imposition of certain sanctions by the Commission to Germany and even the direct application of some of the provisions under the Directive which were deemed to be directly applicable<sup>480</sup>.

Considering the duration of the implementation of the Enforcement Directive in other countries (both new and old EU Member States), it can be pointed out that a relatively rapid incorporation of the harmonized provisions on enforcement of IP rights in the IP legislation was, *inter alia*, influenced by the following factors.

*First*, the necessary amendments were promptly drafted considering the accession of the Baltic countries into the EU on 1 May 2004. It followed the requirement to generally approximate all national IP legislation with the EU legislation in this field, which has been generally duly accomplished by the Baltic countries.

*Second*, the newly amended list on enforcement remedies and procedures<sup>481</sup> was to establish an exhaustive legislative framework aimed to assure the compliance with the protection of *all* IP rights<sup>482</sup> and to unify IP enforcement provisions which had already existed on the national level prior to the implementing provisions, but were different as far as copyright and industrial rights were concerned.

*Third*, many of the harmonized enforcement provisions under the Directive were almost literally transposed into the Baltic national legislation, in particular in Lithuania. This can be well observed while examining the Lithuanian implementing legis-

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476 The implementing legislation came into force in May and June, 2006 in Czech Republic. Similarly, it came into force in July 2006 in Cyprus and in December, 2006 in Malta, see also *National Execution Measures concerning the Implementation of the Enforcement Directive (2008)*.

477 The implementing laws came into force on 7 June 2006 in Spain. Italy implemented the Directive by incorporating the amendments under the Decree enforced from 22 April 2006. Finland implemented the Directive by adopting the laws which came into force in September, 2006, see also *Ibid*.

478 The French law implementing the Directive came into force on 31 October 2007, see *Ibid*.

479 BT – Drucks. 16/8783; also GRUR Int. 2008, pp. 490, 629.

480 See more comprehensive discussion regarding the direct applicability (or direct effect) of the provisions of the Enforcement Directive in view of the German legislation in *Eisenkolb, Die Enforcement-Richtlinie und ihre Wirkung*, p. 387 et seq.

481 See overview in the subsequent section.

482 This has been especially due to high piracy and counterfeiting rate in the Baltic countries, as referred in *supra* § 4A.II.

lation. Prior to the draft implementing amendments there were in fact some studies accomplished, for instance, in Lithuania<sup>483</sup>, in relation to the assessment of the national copyright law provisions containing enforcement measures and remedies. They were focused on one specific group of IP rights (copyright), though. No comprehensive analysis has been made in the field of patents, trademarks or designs in order to implement enforcement provisions with more scrutiny. Social and economic factors that could be relevant while preparing the implementing amendments have not been taken into account as well.

c) Adoption of the implementing amendments on IP enforcement

(1) General remarks

Lithuanian legislator has chosen the “distributive” method of the implementation of enforcement provisions set out in the Directive<sup>484</sup>. Corresponding amendments have been adopted with regard to each national law on IP rights due to the fact that these laws, as it was examined in the previous sub-chapter, had already contained certain provisions on enforcement prior to the adoption of the Enforcement Directive.

Drafting new amendments to the then existing national legislation on copyright and related rights as well as industrial property rights generally coincided with the accession processes into the EU. Since the submission of the initial Draft Enforcement Directive in 2003, the Baltic national institutions responsible for drafting the laws started to revise the national legislation in order to assess the possible changes in IP enforcement area. Once the Directive has been adopted on 29 April 2004, such revision was shaped up to the constructive drafting of the necessary amendments.

While drafting the implementing amendments, it has been considered if each provision embodied in the Directive was mandatory or optional and if it required the implementation into the national legislation. Lithuanian legislator also followed the terminology which had been used in the Lithuanian laws prior to the implementation of the Directive, for instance, “*commercial purposes*” instead of “*commercial scale*”, provided that it did not contradict to the objectives pursued by the Directive and its general content<sup>485</sup>.

Some of the implementing amendments to the Latvian and Estonian IP legislation have already occurred before the accession into the EU on 1 May 2004 and were followed with the amendments to the national CCP. Notably, in Estonia the amendments, although not related to enforcement, to the Trademark, Industrial Design, also Patent and Utility Models Laws coincided with the accession date (1 May 2004).

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483 The comprehensive analysis of the national copyright provisions in view of the provisions under the Directive can be found in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, pp. 4-64.

484 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 252, also *supra* Ft. 383 herein.

485 Consideration regarding the legal terminology used in the Lithuanian laws and the Directive has been accordingly noted in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 41.

Further, as far as Latvia and Estonia were concerned, the implementing amendments were subsequently introduced to the national CCP<sup>486</sup> and they stipulated new provisions regarding evidence, collection of evidence, precautionary and provisional measures (pre-trial measures) pursuant to the implementation of the Enforcement Directive.

## (2) Copyright legislation

In 2005 the initial drafts to the Copyright Law and industrial property laws were submitted by the national Ministry of Culture and the Ministry of Justice in Lithuania<sup>487</sup>. The package of new amendments to the Lithuanian Copyright Law was subsequently adopted and enforced from 31 October 2006<sup>488</sup>. The implementing amendments to the Lithuanian Copyright Law were accomplished later than to the industrial property legislation. It was mainly related to the lengthy disputes at the *Seimas* on other amendments that came along with the newly drafted enforcement provisions set out in the Copyright Law. The last wording of amendments actually reflected the initially drafted texts by the mentioned ministries<sup>489</sup>.

The implementing provisions in the Lithuanian Copyright Law newly formulated and exposed the enforcement measures:

- (1) a right of information;
- (2) evidence and measures for preserving them;
- (3) corrective measures;
- (4) a publication of judicial decisions.

The new amendments also incorporated alternative measures and new wording on damages, in particular on a compensation institute. As far as the latter is concerned, a copyright, related or *sui generis* right holder, instead of requesting compensation of damage (losses), can nowadays ask the court to adjudicate a compensation in the amount of up to 1,000 MLS, which is ultimately set by the court, taking into consideration the same factors as established in the previous wording of the said law. Alternatively, a right holder can ask for royalties or fees which would have been due if

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486 In Estonia the amendments to the Civil Procedural Code came into force on 1 January 2006, whereas in Latvia on 1 March 2007. The amendments mainly included new provisions on precautionary measures, as referred and discussed in *Harenko et al.*, Expedited Remedies For the Protection of IP in Finland and the Baltic States, pp. 31-34.

487 The amendments to the 2003 Copyright Law have been initially drafted by the Lithuanian Ministry of Culture in 2005 (published on 13 December 2005), later, in 2006, discussed at the Law Department and the Law and Legal Affairs Committee of the *Seimas*. Similarly, the amendments to the then industrial property laws have been drafted by the Lithuanian Ministry of Justice on 29 December 2005 and after the consideration in the *Seimas*, adopted on 8 June 2006.

488 Law No X-855 Amending Articles of the Lithuanian Copyright Law as from 12 October 2006, State Gazette, 31 October 2006 No. 116-4400.

489 This can be observed in the comments and opinions provided by the interested parties and listed in the official *Seimas* website on the draft amendments to the 2003 Copyright Law.

the infringer had requested authorisation to use the works or other objects of the rights protected under this Law, and where the infringer acted intentionally or with negligence – in the amount of up to two such royalties and fees. Although the amended Copyright Law included the provisions regarding the recovery of profits in cases when the infringer acted not knowingly or without reasonable grounds to know, it did not provide for pre-established damages in such cases.

Furthermore, under the amended Lithuanian Copyright Law, namely its Article 77, the list of remedies additionally includes a redress of the infringed moral rights (injunction to make appropriate amendments, to announce the infringement in the press, or any other way); an exaction of unpaid remuneration for unlawful use of a work, objects of related rights or *sui generis* rights; a payment of compensation by referring to other enforcement means such as a right of information, corrective measures, etc.

Importantly, due to the implementation of the Enforcement Directive, the amendments to the Lithuanian Copyright Law likewise covered: (a) an introduction of a definition of “*commercial purposes*”<sup>490</sup> (Article 2(17) of the amended law); (b) a new provision regarding proof on the presumption of authorship (Article 12 of the amended law)<sup>491</sup>.

The IP enforcement-related amendments have not been additionally introduced to the Estonian and Latvian copyright legislation after the adoption of the Enforcement Directive<sup>492</sup>.

### (3) Industrial property legislation

The implementing amendments to the Lithuanian Patent<sup>493</sup>, Design<sup>494</sup> and Trademark Laws<sup>495</sup>, also the Law on the Legal Protection of Topographies of Semiconductor Products<sup>496</sup> were finally adopted by the national Parliaments and enforced as from 28 June 2006. In 2006 the new amendments concerning enforcement provisions have been adopted in the Law on the Protection of Plant Varieties<sup>497</sup> which

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490 See further discussion in *infra* § 5C.II.

491 See further discussion in *infra* § 5C.IV.

492 As referred in previous sub-chapter, the amendments have been introduced into the Estonian and Latvian CCPs due to the Directive-based provisions on precautionary and preliminary measures.

493 Law No X-649 Amending Section VII of the Patent Law and its Annex as of 8 June 2006, State Gazette, 28 June 2006, No. 72-2668.

494 Law No X-650 Amending Section VIII of the Design Law and its Annex as of 8 June 2006, State Gazette, 28 June 2006, No. 72-2669.

495 Law No X-651 Amending Section X of the Trademark Law, its Article 56 and its Annex as of 8 June 2006, State Gazette, 28 June 2006, No. 72-2670.

496 Law No X-652 Amending Articles 1, 10, Section VI and Annex of the Law on Legal Protection of Topographies of Semiconductor Products as of 8 June 2006, State Gazette, 28 June 2006, No. 72-2671.

497 Law No X-862 Amending Articles 1, 2, 4, 5, 18, 19, 24, 26, 29, 37, X Section and Annex of the Law on the Protection of Plant Varieties as from 19 October 2006, State Gazette, 4 November 2006 No. 118-4453.

provided for more extensive enforcement means than those enacted before due to the implementation of the Directive.

The implementing amendments mostly changed the previous provisions on enforcement related to patent, trademark and design rights which were embodied in the prior-to-implementation legislation on industrial property in Lithuania. Since the amendments in June 2006, the industrial property laws in Lithuania contain the more extensive list of civil enforcement provisions<sup>498</sup>. The amended laws cover new enforcement institutes such as a right of information, evidence, measures for preserving evidence and provisional measures, corrective measures, publication of judicial decisions. Importantly, the provisions on adjudication of pecuniary damages, including the lost income and other expenses, have been specified in the Lithuanian industrial property laws as well.

In Lithuania each law on industrial property rights identically comprises the remedies such as a recognition of rights, an injunction with the aim of prohibiting the continuation of illegal activities, a prevention from carrying out acts because of which the rights may be actually infringed or damage may be actually caused, an application of other measures for defence of the rights, in case they are embodied in other national laws.

The adjudication of damage under the Lithuanian industrial property legislation can take more sophisticated form nowadays. It clearly established loss of profit, infringers' profits, other expenses occurred due to the infringement of industrial property rights in question. Similarly to the amended Lithuanian Copyright Law, instead of actual damage, the right holders can ask for a compensation which has been due in case an infringer would have used a patent, a trademark or a design with an authorization given by the owner, and where the infringer acted intentionally or with big negligence – in the amount of up to two such compensation. The amended industrial property laws likewise embody the provisions regarding the recovery of profits in cases the infringer acted not knowingly or without reasonable grounds to know, however, they do not provide for pre-established damages in such cases as pursuant in Article 13(2) of the Directive<sup>499</sup>.

As far as Estonian and Latvian legislation on industrial property rights is concerned, the reference is to be made to the amendments adopted in the Latvian Design Law which came into force on 7 February 2007<sup>500</sup>. The latter amendments specifically concerned the enforcement provisions in the previous wording of the Latvian Design Law<sup>501</sup> which, differently from other laws on industrial property rights in Estonia and Latvia, contained the new provisions regarding remedies for in-

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498 The general lists on civil remedies are embodied in Art. 41 of the Lithuanian Patent Law, Art. 50 of the Lithuanian Trademark Law, and Art. 47 of the Lithuanian Design Law.

499 See examination of Art. 13(2) of the Directive in supra § 5A.II.1.

500 It is to be repeatedly noted that other industrial property laws have not been additionally amended in Estonia and Latvia after the adoption of the Directive, see also *refs.* to the mentioned laws in previous section.

501 Law on Industrial Designs, as from November 18, 2004, substituted the previous “Rules on Industrial Design”, as of 15 April, 2004.

fringements of design rights. This particularly refers to the newly amended provision on compensation for losses and moral injury. Section 48(1)(3) of the amended Latvian Design Law establishes that if the amount of actual compensation for losses may not be specified in accordance with the law, the amount of compensation shall be in conformity with such an amount as may have been received by the owner of the design in respect of a transfer of the right to use the design to a licensee.

## II. Concluding remarks

Considering the duration of the implementation of the Enforcement Directive by the Baltic countries as well as the new amendments on civil IP enforcement measures, procedures and remedies in view of the prior-to-implementation provisions in the same field, the following remarks and observations can be made.

*First*, the rapid implementation of the Directive in the Baltic countries, especially in comparison with other EU Member States such as France or Germany, depended on, *inter alia*, the fact that the national legislators almost literally transposed the harmonizing provisions in their national IP laws, also the national procedural laws as far as Latvia and Estonia were concerned. Some of the national laws, *e.g.* the Lithuanian Copyright Law, already contained the extensive list of provisions on civil remedies before the implementation of the Directive. However, the transposition of certain harmonizing norms, especially those related to preservation of evidence or provisional measures, also a right of information were newly formulated.

It can be particularly observed that, by implementing the provisions as embodied in the Directive, the Lithuanian legislator sought to unify the list of civil enforcement measures, procedures and remedies as far as *all* IP rights were concerned. This was especially due to the fact that before the implementation of the Directive national industrial property laws did not contain a similar list of civil enforcement means as they had been regulated under the Copyright Law. The unification of the civil enforcement measures, procedures and remedies has been achieved by the formal (legislative) implementation of the Directive.

*Second*, by implementing the Directive, the Lithuanian legislator amended and specified provisions on damages, especially what concerns the alternative computation of them. For example, in Lithuania it has been opted to leave the alternative method of computation of damages, *i.e.* compensation, together with “license analogy method”, which had been embodied in the national IP laws by virtue of Article 13(1)(b) of the Directive.

*Third*, by implementing almost a complete list of the civil enforcement measures, procedures and remedies as embodied in the Enforcement Directive, the Baltic national legislators were also to create more favourable position for IP right holders to protect their rights in the national courts. Almost full-scale enactment of civil enforcement measures and remedies, as set out in the Directive, especially in Lithuanian IP legislation, can be treated as positive in terms of the early formation of the IP legislation tradition in the Baltic countries, also the assurance of the compliance

with protection of IP rights and the “IP mentality” in the respective jurisdictions. It should be noted, however, that in practice the national courts are to apply those legislatively established civil enforcement means in proportionate, fair and reasonable manner, so that interests and rights of third parties are adequately considered in order to avoid any abuse of IP rights enforcement system.

### **C. General provisions of the Enforcement Directive in view of the implementing Baltic legislation and other Baltic national laws**

#### **I. Interpretation of the “subject-matter” under Article 1 of the Directive**

By virtue of the final wording on the subject matter as set out in Article 1 of the Enforcement Directive, the term “*intellectual property rights*” also comprises industrial property rights<sup>502</sup>. However, a certain uncertainty or, at least, a possibility for a wide interpretation has been still left in view of the list of rights regarding which the harmonized enforcement measures and procedures are to be implemented.

Article 1, which is to be read together with Article 2(1) and Recital 13 of the Enforcement Directive, does not make any distinction in terms of any substantive intellectual property rights, be they national IP rights or IP rights deriving from the Community legislation, including also acts of unfair competition, parasitic copies or similar activities. The Commission’s position is therefore further examined in order to assess the initial ideas regarding the scope of the subject-matter covered by the Directive. The subject-matter regulated under the implementing legislation and other national legal acts is subsequently discussed.

#### **1. The Commission’s position**

In order to define the term “subject-matter”, as set out in Article 1 of the Directive, a reference to the initial Commission’s position is to be first made. In its Explanatory Memorandum<sup>503</sup>, the Commission expressed the view that the Directive had to be focused to at least the rights such as copyright, related rights, *sui generis* rights and rights regarding topographies of semiconductor products, trademarks, designs, patents, utility models, rights regarding geographical indications, plant varieties, rights to other trade (commercial) indications, provided such rights are protected under the

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502 Although it was suggested to exclude patents from the scope of the Directive, as referred in *Fourtou Report (2003)*, p. 6, the decision to comprise them under that scope has been finally taken.

503 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, pp. 4-5.



national laws. Such position was repeated in the Statement made by the Commission on the scope of Article 2 of the Enforcement Directive in 2005<sup>504</sup>.

The final wording of the “subject-matter” was adopted without considering a proposal expressed in *Fourtoun Report* regarding the elimination of patents from the scope of the Directive<sup>505</sup>. Another criticism referred to terms such as acts carried out on “commercial scale” which could be treated as being inherent for industrial property<sup>506</sup>, but not for all IP rights, though. This implicated a broad final formulation regarding IP rights covered by the Directive and could be further considered as being far more reaching harmonization goal in comparison with the one initially pointed out in the Explanatory Memorandum by the Commission<sup>507</sup>.

Furthermore, the broad “subject-matter” under the Directive left possibilities for *de facto* expansion of the harmonized regulation area into so-called “grey areas” such as personality rights, trade secrets<sup>508</sup>, also firm names, provided they are protected under the national legislation. Assumably, it also provides for an opportunity, or, one may say, an advantage, to the national legislators to have wider discretion rights to include enforcement measures and procedures applicable to “grey area” rights as well as moral rights in the implementing national laws<sup>509</sup>, although it was not explicitly mentioned in the Directive.

## 2. The protected “subject-matter” under the Baltic national legislation

### a) The definition of “IP rights” under the Baltic legislative acts

#### (1) IP right holders and their economic rights

By virtue of the implementing legislation in Lithuania, *i.e.* the Copyright Law, Patent Law, Trademark Law, Design Law and the Law on Legal Protection of Topographies of Semiconductor Products<sup>510</sup>, enforcement measures, procedures and remedies are those applicable in case of infringement of the following rights which are listed in the respective implementing laws: copyright and related rights (rights of performers, producers of phonograms, broadcasting organisations and producers of

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504 Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights. OJ L 94, 13.4.2005, p. 37.

505 See *Fourtoun Report (2003)*, pp. 6, 25.

506 See *Cornish et al.*, Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive, p. 447.

507 As stated by the Commission in *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 5: “It is thus a logical extension that the Community should take an interest in the effective enforcement of the intellectual property rights which it has harmonized or created at Community level.”

508 See *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 824.

509 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 248.

510 See *refs.* to the legislative acts in *supra* § 5B.I.1.c).

the first fixation of an audiovisual work (film)), also *sui generis* rights to databases; industrial property rights such as patents, trademarks, designs, also rights related to topographies of semiconductor products. Rights to the listed objects comprise an exclusive right of the owners to manufacture, use, import, export, offer for sale, etc. (as far as industrial property rights are concerned); also reproduce, publish, distribute, adapt, broadcast, make available to the public, etc. (as far as copyright and related rights are concerned).

Moreover, according to Article 56(3) of the implementing Lithuanian Trademark Law, the remedies which are provided in this law are *mutatis mutandis* applicable to rights related to geographical indications<sup>511</sup>. The amended Law on the Protection of Plant Varieties<sup>512</sup> also provides the Directive-based enforcement means which can be applicable in case of infringement of rights on plant varieties.

A similar list of IP rights can be made while examining the subject-matter defined in both Latvian and Estonian IP legislation on copyright and neighbouring rights, which also cover the rights of database makers (*sui generis* rights), as well as legislation on patent, trademark and industrial design rights, also rights related to topographies of semiconductor products, geographical indications and plant varieties<sup>513</sup>. It can be additionally noted that, differently from Lithuania and Latvia, utility models are protected in Estonia<sup>514</sup>.

## (2) Moral rights

As far as copyright and neighbouring rights are concerned, besides the listed economic rights, the copyright laws of the Baltic countries embody moral rights of authors and performers<sup>515</sup>. The provisions regarding the redress of damage for infringement of moral rights of authors and performers are listed in the sections on enforcement of rights embodied in the national copyright laws<sup>516</sup>. The latter laws generally provide for a possibility to claim moral damage which is assessed by the

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511 The registration and protection of geographical indications is regulated under the EU Council Regulation 1791/2006/EC, OJ 2006 L 363, 20.11.2006, p. 1; also under the Order of the Minister of Agriculture of the Republic of Lithuania No. 499 as of 26 February 2007. Neither the Regulation nor the Order establishes specific enforcement remedies, measures or procedures.

512 Chapter X, the Lithuanian Law on Plant Varieties, see also *ref.* to the legislative act in *supra* § 5B.I.1.

513 See *refs.* to the legislative acts in *supra* § 5B.I.

514 Utility Models Act, passed on 16 March 1994 (entered into force 23 May 1994), last amended 10 March 2004 (entered into force on 1 May 2004) (hereinafter – the “*Estonian Law on Utility Models*”).

515 Art. 14(1) of the Lithuanian Copyright Law embodies non-transferable moral rights of authors: (i) the right of authorship, (ii) the right to the author’s name, (iii) the right to the inviolability of a work. Performers also enjoy their moral rights in their direct (live) performance or the fixation of his performance, as set out in Art. 52 of the Law. In Latvia moral rights of authors are protected under Sec. 14 of the Copyright Law, and in Estonia under Art. 12 of the Copyright Law.

516 Art. 84 of the Lithuanian Copyright Law, Art. 81(2)(1)(1) of the Estonian Copyright Law, and Sec. 69 of the Latvian Copyright Law

courts while applying other civil enforcement remedies, including an economic damage<sup>517</sup>. Although the Enforcement Directive does not regulate civil enforcement measures, procedures and remedies related to infringements of moral rights, the Baltic national legislation contains such provisions which are to be considered being more favourable for right holders pursuant to Article 2(1) of the Directive.

b) “Grey areas” under the national legislation

(1) Non-property rights, firm names, commercial (industrial) secrets

By virtue of Recital 13 of the Enforcement Directive, the list of IP rights which are protected under the national IP legislation and to which the harmonized enforcement measures are to be applied directly, can be also complemented with other rights that are protected under the Lithuanian Civil Code, Estonian Law of Obligations Act<sup>518</sup> and Latvian national legislation<sup>519</sup>. Although those rights are not, as a rule, considered IP rights as such, they either embody moral non-property related interests and values or they can be treated as results of certain intellectual activity or an identification of commercial (trade) activities which is similar to the notion of trademarks such as firm names<sup>520</sup>.

Amongst the list of the subject-matter regulated under the Lithuanian Civil Code<sup>521</sup>, special personal non-property rights and values, also rights to a business name of a legal person<sup>522</sup> and to a commercial (industrial) and professional secret can be also analysed in the perspective of enforcement means as set out in the Direc-

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517 Notably, Art. 68 of the Lithuanian Copyright Law as of 1999 provided for moral damage not less than 5,000 and not more than 25,000 Litas (ca not less than 1,449 Euro, not more than 7,246 Euro). In assessing the amount of moral damage, the court should take into account the degree of the culpability of the infringer, his (her) financial position, the consequences of moral damage, as well as other circumstances that were significant to the case, which the courts actually considered. *E.g.*, Decision of 19 February 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-273/2003, *J. Jakštas et al. and LATGA-A vs. UAB “Mūsų gairės”*. See also further discussion in *infra* § 5F.I.1.d).

518 Law of Obligations Act, as of 26 September 2001 (entered into force on 1 July 2002), last amended as from 1 May 2004.

519 In Latvia the provisions on moral non-property related interests and values or on identification of commercial (trade) activities, which are not IP rights, for instance, trade secrets can be found in the national Civil Code, the Labour law, the Criminal law, the Law on Competition, the Civil law, the Freedom of Information law, the Commercial law, etc.

520 Notably, Lithuanian Supreme Court also heard the dispute regarding the firm name infringing the well-known trademark which was followed by the landmark decision on the issue, *i.e.* Decision of 27 March 2006, Lithuanian Supreme Court, *Danish Company “Kirkli A/S” (“Lego Juris A/S”) vs. UAB “Legosta”*.

521 The list of civil subject-matter regulated by the Lithuanian Civil Code, which, *inter alia*, covers intellectual property, personal non-property rights, commercial (industrial) secret, is embodied in I Book, III Part, V Chapter of the mentioned Civil Code.

522 Business (firm) names of legal persons are not specifically regulated in Latvia and Estonia. The protection of such names can be asserted by application of the national trademark legislation of the corresponding countries.

tive. The protection of personality rights, including a disclosure of incorrect information, as established in the Estonian Law of Obligations Acts<sup>523</sup> can be similarly examined.

By further focusing on the listed rights in the mentioned jurisdictions, the question can be raised if the harmonized remedies, also procedures embodied in the Directive can be in any way applicable to cases of infringements of the mentioned rights on the national level. This is especially due considering novelties of civil enforcement such as the right of information, also *civil (ex parte) searches* as pre-trial measures.

## (2) Civil enforcement remedies in cases of infringements of “grey area” rights

In Lithuania in case of infringement of special personal non-property rights and values such as a right to a name, right to an image, privacy and secrecy as well as a personal honour and dignity right, also a right to the inviolability and integrity of the person<sup>524</sup>, besides an order to discontinue the infringing activities (injunction), non-pecuniary and pecuniary damage can be ordered. Damage is accordingly assessed under the norms of the Lithuanian Civil Code and other national laws, e.g. the law on provision of information to the public as far as right to an image and its commercial exploitation is concerned<sup>525</sup>.

Regarding personal honour and dignity, a person has a right to demand refutation in judicial proceedings of the publicised data, which abase his honour and dignity and which are erroneous as well as redress of the property and non-pecuniary damage incurred by the public announcement of the said data. Where erroneous data were publicised by a mass medium (press, television, radio etc.), the person about whom the data was publicised has a right to file a refutation and demand the given mass medium to publish the said refutation free of charge or make it public in some other way. Such publication of information is similar to publication measures embodied in Article 15 of the Directive and in the implementing national legislation<sup>526</sup>.

In Estonia, if personality rights are violated by defamation of a person, *inter alia*, by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right, a person can ask the court to adjudicate damages. The obligated person should compensate the aggrieved person for the expenses caused to the person and for damage arising from a decrease in income or deterioration of the future economic potential

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523 Arts. 131, 134(2), 1045(1)(4), 1046, 1047 of the Estonian Law of Obligations Act.

524 Art. 1.114, the Lithuanian Civil Code (I Book, III Part, V Chapter), also Arts. 2.20-2.25, the Lithuanian Civil Code (II Book, II Part).

525 Law on Provision of Information to the Public, revised version as from 11 July 2006. The remedies for infringements of, for instance, a right to an image and commercial exploitation thereof, are assessed on the basis of the Lithuanian Civil Code as the mentioned law, as observed in the landmark Decision of 15 March 2004, Lithuanian Supreme Court, Civil Case No. 3K-3-197/2004, *Linas Karalius vs. UAB “Ieva”*.

526 See more discussion on judicial practice regarding publication of the decisions in IP infringement cases in *infra* § 5F.IV.

of the aggrieved person, but only if this is justified by the gravity of the violation, in particular by physical or emotional distress. The law also provides a civil liability for a disclosure of incorrect information (publication measures). In that case, similarly to the Lithuanian practice, the person who disclosed such information should refute the information or publish a correction at the person's expense regardless of whether the disclosure of the information was illegal or not<sup>527</sup>.

The provision regarding a right to commercial (industrial) and professional secret<sup>528</sup> directly refers that, in case of an infringement of this right, remedies, including also adjudication of actual damage, which are listed in the Lithuanian Civil Code are applicable. The rules regulating rights to business names of legal persons (firm names)<sup>529</sup> contain an explicit reference to remedies which are embodied in the articles on business names. The remedies, which are similar to the ones constituted in the national IP laws, contain a right of a legal person to request the court to oblige another legal person to discontinue unlawful acts (injunctions) or alter the business name and to redress the property and non-pecuniary damage incurred by the infringing acts. In case another legal person gained rights and assumed obligations by using other legal person's business name as a cover or used it without the latter's consent, remedies likewise would comprise a right of the legal person to request another legal person (infringer) to return everything he has acquired by using other person's name as a cover or using the said name without the latter's consent.

Additionally to those civil remedies which are directly embodied in the provisions on protection of special personal non-property rights and values, rights to a business name of a legal person and to a commercial (industrial) and professional secret, the plaintiff can also ask the court for other civil remedies constituted in the Lithuanian Civil Code<sup>530</sup>. The list of these other civil remedies comprises:

- (1) an acknowledgement of rights;
- (2) a restoration of the situation that existed before the right was violated;
- (3) a prevention of unlawful actions or prohibition to perform actions that pose reasonable threat of the occurrence of damage (preventive action)<sup>531</sup>;

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527 Arts. 131, 134(2), 1045(1)(4), 1046, 1047 of the Estonian Law of Obligations Act.

528 Art. 1.116, Lithuanian Civil Code (I Book, III Part, V Chapter). Commercial (industrial) and professional secret is defined as information having a real or potential commercial value, not known to third persons and not freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality (Art. 1.116(1), Lithuanian Civil Code).

529 Arts. 2.39-2.42 Lithuanian Civil Code (II Book, II Part, IV Chapter). A business name of a legal person is understood as a composition of words or word-combinations used in their figurative or direct meaning, following the legal requirements for making such composition, which enables to distinguish that legal person from other legal persons. Until 1 January 2004, the business names of legal persons were regulated under the Law on Firm Names as of 1 July 1999 in Lithuania.

530 Art. 1.138, Lithuanian Civil Code (I Book, V Part, VIII Chapter).

531 *E.g.*, in case of violation of a right to a firm name, the right holder can ask the court for an injunction to discontinue an infringement on the basis of Art. 1.138 of the Lithuanian Civil

- (4) an ad judgement to perform an obligation in kind;
- (5) an interruption or modification of a legal relationship;
- (6) a recovery of pecuniary or non-pecuniary damage from the person who infringes the law and, in cases established by the law or contract, a recovery of a penalty (fine, interest);
- (7) a declaration as voidable of unlawful acts of the state or those of the institutions of local governments or the officials thereof in the cases established in the Civil Code;
- (8) other ways provided by laws.

Thus, the general civil remedies under the Lithuanian Civil Code, as listed above, which are applicable in cases of infringements of special personal non-property rights and values, rights to a business name of a legal person and to a commercial (industrial) and professional secrets, are similar to the remedies which are set out in the national IP laws for infringements of IP rights. Other enforcement remedies such as a right of information (Article 8 of the Directive), corrective measures (Article 10 of the Directive), alternative measures (Article 12 of the Directive), and alternative adjudication of compensation instead of actual damages (as constituted in the implementing Lithuanian Copyright Law only<sup>532</sup>) or pre-established damages (Article 13(2) of the Directive) which are embodied in the Directive and the national implementing legislation are not constituted in the Lithuanian Civil Code.

This allows observing that, according to the national legislation, the civil enforcement remedies, as harmonized by the Directive, are still specific for IP rights and they are not additionally applicable in case of infringements of personality rights, also rights to a name of a legal person or to a trade (commercial) and professional secret in Lithuania. Notably, civil enforcement procedures such as *civil (ex parte) searches*, provisional measures (on pre-trial stage, for instance) regarding “grey area” rights can be ordered under the general rules of the national CCPs. The same approach can be observed while examining Estonian and Latvian provisions on personal non-property rights and values. In comparison, in Germany, for instance, the personality rights are similarly protected under the German Civil Code which provisions specifically embody the liability for infringements of those rights as well as civil remedies<sup>533</sup>.

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Code which reflects the provision on injunctions harmonized by Art. 11 of the Enforcement Directive on permanent injunctions.

532 See further discussion on compensation instead of damages as alternative computation of damages in the Lithuanian Copyright Law in *infra* § 5F.I.1.c).

533 Art. 12, Bürgerliches Gesetzbuch (BGB); also Arts. 22, 23, Kunsturheberrechtsgesetz (KUG).

## II. *The scope of the application of the Enforcement Directive*

### 1. Covered and excluded legal areas under Article 2 of the Directive

#### a) Areas to which the Directive has no prejudice

Following the examined provisions on the subject-matter of the Enforcement Directive under its Article 1 and the Baltic legislation on the issue, while observing civil remedies in “grey area” rights, the references to the legal fields and regulations, which are not covered or in any other way concerned by the Enforcement Directive, are further discussed. Article 2 on the scope of the Directive, in particular its Paragraphs 1 and 2, begins with the list of the legal areas to which the Directive has no prejudice.

*First*, the Directive is not applicable to any enforcement means which exist in the Community or national legislation, in so far as those means may be more favourable for right holders (for instance, compensation instead of damages, known in the Lithuanian copyright doctrine, can be considered as more favourable to right holders).

*Second*, by virtue of Recital 16 of the Directive, the specific provisions on the enforcement of rights and exceptions contained in the Community legislation on copyright and related rights, namely, the rights in relation to the legal protection of computer programs<sup>534</sup>, *i.e.* the special measures of protection of them embodied in Article 7 of the Computer Programs Directive, or the rights as they are harmonized in the Copyright Directive, *i.e.* Articles 2 to 6 and Article 8 thereof, are not covered by the Directive as well. This is due to the fact that the mentioned directives already concretized some specific enforcement remedies. The enforcement-related provisions embodied in the Computer Programs Directive and the Copyright Directive were actually the most extensive ones in comparison with other EU-wide legal instruments prior to the adoption of the Enforcement Directive<sup>535</sup>.

*Third*, according to its Article 2(3)(a), the Enforcement Directive has no effect on the Community provisions regarding the substantive law on intellectual property, namely, the rights on processing of personal data and free movement of such data<sup>536</sup>, on electronic signatures<sup>537</sup>, and on e-commerce, by particularly referring to the lia-

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534 Council Directive 91/250/EEC on the legal protection of computer programs. OJ L 122, 17.5.1991, p. 42 (hereinafter – the “*Computer Programs Directive*”).

535 The list of other directives in trademark, patent, designs, etc. fields, which were adopted before the adoption of the Enforcement Directive, and their brief content in view of the Enforcement Directive is comprehensively examined in *Amschewitz, Die Durchsetzungsrichtlinie und ihre Umsetzung im deutschen Recht*, pp. 31-73.

536 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.95, p. 31.

537 Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures was published in the Official Journal of the European Communities. OJ L 13, 19.01.2000, p. 12.

bility of internet service providers<sup>538</sup>. Importantly, the provisions which are excluded from the scope of the Directive and which are embodied in the Computer Programs Directive on special measures of protection regarding computer programs, also in the Copyright Directive on protection of TPMs have been already implemented in the Baltic national copyright legislation prior to the adoption of the Directive<sup>539</sup>.

Civil liability of internet service providers (intermediaries) in case of IP infringements, as provided in Article 8(3) of the Copyright Directive, is implemented in Lithuania<sup>540</sup>. In Latvia, a possibility of injunctions against ISPs is established in the laws<sup>541</sup>, whereas in Estonia the law does not *expressis verbis* contain such provision, but the court may take any measures considered necessary by the court to secure an action.

Furthermore, as provided in Article 2(3)(b) and (c), the Enforcement Directive does not effect the international obligations assumed by the Member States under the international treaties in the field of IP rights, including Berne Convention, Paris Convention<sup>542</sup>, Rome Convention and the TRIPS Agreement<sup>543</sup>, and any criminal procedures or penalties that either are set out in the national legislation or in the TRIPS Agreement<sup>544</sup>.

Pursuing also Recitals 11, 12 and 32 of the Enforcement Directive, its scope is even more narrowed by way of not regulating anything in relation to, respectively, judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, applicable law, the anti-trust rules as provided in Articles 81 and 82 of the EC Treaty, or fundamental human rights and principles. The Directive is only aimed at the procedural rules by not affecting any of the above listed rights as well as national enforcement infrastructure, *i.e.* police, prosecution, other enforcement agencies or institutions. The Directive does not likewise refer to

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538 Arts. 12-15, Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. OJ L 178, 17.7.2000, p. 1 (hereinafter – the “*E-Commerce Directive*”).

539 Art. 80(3) of the Estonian Copyright Law (amended in October 2004); Arts. 74-76 of the Lithuanian Copyright Law (amended in March 2003); Art. 68(1)(4) of the Latvian Copyright Law (amended in April 2004).

540 Art. 77(3), the Lithuanian Copyright Law.

541 Article 250(10)(3)(3), the Latvian CCP (provisional injunction); Article 250(17)(3)(3), the Latvian CCP (permanent injunction); also Art. 69(1)(7), Latvian Copyright Law.

542 Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised and amended (hereinafter – the “*Paris Convention*”).

543 See also *refs.* to Recitals 5 and 6, Dir. The Baltic countries are Contracting States to the listed international agreements, as referred in *supra* § 3B.III.2.

544 Art. 61 of TRIPS, Art. 16 of the Directive; notably, all three countries provide for criminal and administrative (Latvia and Lithuania) liability for IP criminal offences. On criminal and administrative liability and *refs.* to national legislation on the issue as well as national court practice see in *infra* § 5G.I.



any choice of law rules, although some aspects regarding them have been discussed after its adoption<sup>545</sup>.

Finally, the implementation of the Directive cannot lead to anything that might create a conflict between the procedural enforcement rules and the substantive laws on the issue, as primarily interpreted by the Commission<sup>546</sup>.

## b) Applicability of the Directive to any infringement of IP rights

The important aspect regarding the scope of the application of the Enforcement Directive is to be mentioned by referring to the provision constituted in its Article 2(1) which establishes that the Directive shall be applicable to *any infringement* of intellectual property rights.

Due to the suggested amendments by the European Parliament<sup>547</sup>, the final wording on the scope of the Directive omitted a reference to acts “*when the infringement is committed for commercial purposes or causes significant harm to the right holder*”, as initially provided in the Commission’s Proposal<sup>548</sup>. Such omission was to avoid the treatment of the Directive being a TRIPS-minus instrument in the field of enforcement of IP rights in a unjustified sense and also to circumvent other legal discrepancies that might occur by making such distinction between infringements carried out on a commercial scale (for commercial purposes) or causing a significant harm or not<sup>549</sup>.

Although, as follows from the current wording of Article 2(1) of the Directive, the harmonized civil enforcement means are applicable to *any* infringement of IP rights, the Directive still contains some provisions which are applicable in cases of infringements of IP rights which are carried out on a commercial scale only. Due to the enforcement provisions applicable to infringements carried out on a commercial scale which are embodied in the Enforcement Directive, namely in its Articles 6(2), 8(1) and 9(2), the definition of “*commercial scale*” along with some retrospective remarks on *travaux préparatoires* of the Directive and the prior-to-implementation national legislation and court practice on the issue is further examined.

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545 Notably, the objectives pursued by the Directive to harmonized civil enforcement aspects of IP rights can also help to avoid *forum shopping*. See more in Hellstadius, Meier-Ewert, Jurisdiction and Choice of Law in Intellectual Property Matters, p. 328.

546 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 18.

547 See *Fourtoun Report (2003)*, pp. 5-6.

548 See Art. 2 of the *Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 31.

549 See further discussion in *infra* § 5C.II.2.

2. The term “*commercial scale*” (“*commercial purposes*”) under the Directive
  - a) Embodiment of the term in the Draft Enforcement Directive

Since the first Commission’s Proposal in 2003, the term “*commercial scale*” (or a term “*commercial purposes*”, as it was embodied in the Draft Enforcement Directive), received a lot of, especially critical, attention. By defining the scope of the Directive, the Commission drafted that the means enforcing IP rights should be applied when the infringement is carried out for commercial purposes or causes significant harm<sup>550</sup>. The idea was mainly based on the goal pursued by the Directive to combat counterfeiting and piracy, to fight against serious, deliberate, organized illegal activities which involve a commercial element or cause significant harm to IP right holders. The incorporation of such term into the draft text of the Directive immediately divided the list of IP rights infringing activities into two parts, hence, by leaving all other infringements of IP rights, which were not carried out for commercial purposes or did not cause any significant harm, out of the scope of the Directive.

Such division was strongly criticised<sup>551</sup> by pointing out, *inter alia*, the relatively objective nature of the term “commercial purposes”, rather than subjective intent of an infringer, a confusion between industrial property and copyright, an unjustified shift of burden on the right holders to prove “commercial purposes” in infringer’s activities and also the vagueness of the term itself which, as argued, could have brought various outcomes and interpretations. The term “significant harm” which was also incorporated into the draft Directive was similarly judged.

It was likewise stated in *Fourtoun Report* on the Commission’s Proposal that measures and procedures under the Directive should be applied to all IP rights infringement cases by taking due account to each specific case individually<sup>552</sup> instead of embodying the vague terms “commercial purposes” and “significant harm”. The references were also made to the TRIPS Agreement in which the only Article 61 contained the term “commercial scale” as far as criminal procedures were concerned<sup>553</sup>. The distinction has not been made under the TRIPS Agreement whether infringement of IP rights was carried out on a commercial scale or not.

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550 See *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 17.

551 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, pp. 248-251; also *Cornish et al.*, Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive, pp. 447-448.

552 See *Fourtoun Report (2003)*, p. 5.

553 See *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 327. Following the argumentation in *Correa*, A Commentary on the TRIPS Agreement, p. 449, isolated acts of infringement, even if made for profits, will not be subject of Art. 61 TRIPS as lacking “*commercial scale*”.

b) Relevance of the definition of “commercial scale” in IP enforcement practice

The expressed critique regarding the term “commercial purposes”, as proposed in the Draft Enforcement Directive, was finally considered. The final wording of the Directive avoided the distinction between infringements of IP rights based on such term<sup>554</sup>. Recital 14 of the Enforcement Directive defines “*acts carried out on a commercial scale*” as:

“<...> those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.”<sup>555</sup>

The consideration, however, did not lead to the complete elimination of the term from the text of the Enforcement Directive. Additional enforcement measures, which are applicable in case of infringements carried out on a “commercial scale”, are set out in Articles 6(2), 8(1) and 9(2) of the Directive, as subsequently described.

By virtue of Article 6(2) of the Enforcement Directive, given that infringements are carried out on a commercial scale, the national courts are to be enabled to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

The courts may also order to get information on the origin and distribution networks of the goods or services which infringe IP rights from the infringer and (or) any other person who was found in possession of the infringing good or using the infringing services on a commercial scale as well as was found to be providing on a commercial scale services used in infringing activities or was indicated by the person, as listed, as being involved in the production, manufacture or distribution of the goods or the provision of the services (Article 8(1) of the Directive).

In case the infringement is committed on a commercial scale and the injured party demonstrates circumstances that can endanger the recovery of damages, the courts may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets (Article 9(2) of the Directive).

In view of the above listed provisions and Recital 17 of the Enforcement Directive, it can be interpreted that the Enforcement Directive indirectly incorporates a criminal law notion of “commercial scale” into the concept of civil enforcement measures and procedures applicable to all IP infringement cases, not only to piracy and counterfeiting ones. Recital 17 does not simply add “commercial scale” into the

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554 The term “*significant harm*” has been eliminated from the text of the Directive as well, thus, by also avoiding the confusion between unfair competition and IP which was accordingly pointed out in *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, pp. 250-251.

555 Notably, the term “*commercial scope*” instead of “*commercial purposes*” has been incorporated into the Directive, following the TRIPS wording. Prior to the Enforcement Directive, none of the EU legislative acts on IP rights defined the terms “*commercial purposes*” or “*non-commercial purposes*”, although, some of the directives, e.g., Art. 7 of the Computer Programs Directive, also Recital 42 of the Copyright Directive contained such terms.

list of factors that can be duly considered while applying certain enforcement measures in each and every case of infringement of IP rights<sup>556</sup>. On the other hand, following the definition of “commercial scale” of acts as provided in Recital 14 of the Directive, it can be presumed that in practice only a minor list of IP infringement cases are not carried out for direct or indirect economic or commercial advantage, except, of course, those cases which fall into the list of limitations and restrictions regarding IP rights.

c) Judicial interpretation of the term “commercial purposes”: the Lithuanian court practice

(1) Before the implementation of the Directive

As referred, already during the process of the adoption of the Enforcement Directive, the introduction of the vague term “commercial scale” into its text could implicate various legal outcomes while applying it in IP enforcement practice. On this point the reference to the Lithuanian court practice can be made. Even prior to the adoption of the Directive and the implementing legislation, the Lithuanian judges had to deal with a judicial interpretation of “commercial purposes”. The retrospective observations regarding this interpretation of the very term and its application in practice can be useful for the future IP litigation in Lithuania as well as other Baltic states – Latvia and Estonia – which did not face the same legal issue, however, embody such term in their legislation<sup>557</sup>.

Since 1998, when the number of IP infringement cases, especially cases related to software copyright infringements, started to increase in the national courts of Lithuania<sup>558</sup>, among various legal issues and factors relevant to those cases, the courts had to tackle with an issue of an interpretation of the terms “commercial purposes” or “direct or indirect commercial advantage” regarding infringers’ activities. The source of the issue was the fact that the mentioned terms were embodied in the previous wordings of the Lithuanian Copyright Law<sup>559</sup>, they were also constituted as a subjective element of the crime compositions in the national Criminal Code and the Code Administrative Offences which provided for liability and sanctions for IP criminal offences and infringements of IP rights<sup>560</sup>, though, not defined therein. Article 73(1) and (2) of the 2003 Lithuanian Copyright Law, by defining an infringe-

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556 See the suggestion for the draft Recital 10 in *Fourtou Report (2003)*, p. 6.

557 In Estonia and Latvia the prior-to-implementation IP legislation did not contain the term “*commercial purposes*”, as it was used in the Lithuanian legislation. Therefore, the issues on legal interpretation of the very term did not emerge in the IP litigation practice of those countries.

558 *E.g.*, in 2002 there were 4 criminal, 25 administrative, and 8 civil cases against software copyright infringements initiated, as reported by BSA (*unofficial information*).

559 *Ref.* to the wording of the Lithuanian Copyright Law as of 1999 and 2003.

560 Arts. 192-194 of the Lithuanian Criminal Code, Art. 214(10) of the Code of Administrative Offences; see more on criminal and administrative liability in *infra* § 5G.I.

ment of copyright, related rights and *sui generis* rights, made a distinction, *i.e.* the infringement of copyright, related rights or *sui generis* rights was deemed to be:

Either, “use of a work or an object of related rights or *sui generis* rights (including the publication, reproduction, public performance, broadcasting and retransmission or other communication to the public), and distribution thereof without the licence of the owner of such rights (without the conclusion of an agreement, or upon violation of its terms and conditions)”,

Or, “import, export, distribution, transportation or keeping for *commercial advantage* of infringing copies of works, objects of related rights or *sui generis* rights”.

The lack of the definitions of “commercial purposes” or “direct or indirect commercial advantage” in the national laws brought certain confusion and various interpretations by the national courts<sup>561</sup>. This was especially evident in administrative and criminal cases on IP infringements as far as illegal use, in particular illegal reproduction of copyrightable works by the legal persons was concerned. For example, the Lithuanian Supreme Court explicitly stated in a few criminal cases regarding the illegal reproduction and use of the copyrightable software that the mere reproduction of copyrightable material by the end-user company, even if the company’s activities were related, for instance, to production of advertisements, did not automatically constitute “commercial purposes” in the activities of the alleged infringer<sup>562</sup>. However, in another criminal case against the illegal reproduction and use of illegal software, the Supreme Court rejected the arguments raised by the defendant that the use of copyrightable content in the company did not constitute the commercial activities<sup>563</sup>.

Considering such patchy court practice, which was being formed by the Lithuanian Supreme Court, the lower courts were reluctant to interpret the term “commercial purposes” broadly and started to refer to them as to acts of distribution or sale of copyrightable works, excluding infringing end-user activities in criminal and administrative cases. The prosecutors were also reluctant to initiate or consider IP infringement cases referring to an absence of any commercial purposes in infringer’s activities, *i.e.* in the cases where infringements of IP rights were committed by end-

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561 The interpretation of the very term could be found in the commentaries drafted by the prominent Lithuanian IP scholars at that time. The term “*commercial purposes*” could not be limited to direct profit, *e.g.* sale, but also to the commercial activities of the user, even if there was no direct profit from the use of the copyrightable content, see *Vileita*, Commentary of the Lithuanian Law of Copyright and Article 214(10) of the Administrative Code, pp. 194-195.

562 Such conclusions were made in the following criminal cases which had negative response in IP enforcement practice in general: Lithuanian Supreme Court, Decision of 1 October 2002, Criminal Case No. 2K-467/2002, *V. Zaura under Article 142(1) of the Criminal Code*; also Lithuanian Supreme Court, Decision of 16 December 2003, Criminal Case No. 2K-723/2003, *A. Ivoškus under Article 142(1) of the Criminal Code*.

563 See Lithuanian Supreme Court, Decision of 8 October 2002, Criminal Case No. 2K-656/2002, *G. Astrauskas under Article 142(1) of the Criminal Code*.

users of illegal products. Such interpretation, prosecution and court practice were not compatible with the intention of the national legislator either<sup>564</sup>.

The divergent practice was tried to be solved by the Supreme Court of Lithuania adopting a consultation on the term “commercial purposes” in 2004<sup>565</sup>. The consultation was, *inter alia*, drafted on the basis of the expressed positions by other state institutions which did not have a constitutional right to interpret the laws, however, played an important role by helping to bring certainty into IP litigation practice on this specific issue<sup>566</sup>.

Despite the uneven interpretation of the term “commercial purposes” in criminal and administrative IP infringement cases, the legal issue on the interpretation of the “commercial purposes” in the civil cases has been overcome. This depended on the fact that, although the criminal and administrative cases were suspended due to the lack of “commercial purposes” in infringers’ activities in 2001 and 2002 due to the mentioned divergent decisions by the Lithuanian Supreme Court, the aggrieved IP right holders could assert their rights to claim damage and (or) ask the courts to apply other civil enforcement measures and remedies.

(2) Implementing amendments: finally solving the issue of the “*commercial purposes*”?

The implementing amendments to the Lithuanian Copyright Law in 2006, namely, the introduction of Article 2(17) therein, literally embodied the term of “acts carried out on a commercial scale” as it is defined in Recital 14 of the Enforcement Directive. It also solved the question on the interpretation of the very term on the legislative level. Importantly, Article 73 of the amended Copyright Law does not link an infringement of copyright, related rights and *sui generis* rights to the commercial purposes, by leaving the broad reference: “the acts which infringe any copyright, related rights and *sui generis* rights, protected by this Law and other laws, shall be deemed to be the infringement of copyright, related rights and *sui generis* rights”.

The issue of committing infringements of IP rights for “commercial purposes”, however, has been repeatedly pointed out in the following decisions of the Supreme Court. In one of the latest decisions on illegal reproduction and use of copyrightable software it has been stressed out that the mere fact of reproduction of software in the company did not automatically constitute commercial advantage or gained profits<sup>567</sup>.

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564 The Letter of the Law Department at the Chancellery of Seimas of the Republic of Lithuania as of January 2003 on “*Definition of the Term Commercial Purposes*” (OV) (*unofficial publication*).

565 See *ref.* regarding the legal effect of consultations adopted by the Supreme Court of Lithuania as well as the role of this court in the national IP enforcement practice in *supra* § 3C.IV.1.b).

566 *E.g.*, the Letter as of 3 December 2002 of the then European Law Department at the Government of Lithuania No 2002-11-31, also the Letter as of January 2003 of the Legal Department at the Chancellery of Seimas on the Definition of the Term of Commercial Purposes, see also information about the mentioned institutions in *supra* § 3C.I.

567 See Lithuanian Supreme Court, Criminal Case No. 2K-7-201/2008, *T.K., UAB “Tadetas”*, also *refs.* to the case and the corresponding decision see more in *Janušauskaitė*, Litauen –

According to the very decision, the national courts should consider all relevant factors such as the type of software products in use in order to establish commercial activities of the accused person, *i.e.* for example, if the company's main activities focus on reproduction of foodstuff, and there is illegal graphical software application found installed in the company's computers, it can be considered by the courts that such software was not used for commercial purposes. The mentioned decision can again change enforcement practice in IP rights infringement cases, namely in administrative and criminal cases. It can also mean that the police and prosecutors will need to clearly examine and state in the procedural documents only those works which are used in direct commercial activities by the company which is not always easy to prove.

### III. *The principle of "Fair and Equitable Measures, Procedures and Remedies" under Article 3 of the Directive*

#### 1. Essence of the principle

Another important provision which is embodied in Article 3 of the Enforcement Directive concerns a general civil procedural principle on "fair and equitable procedures" applicable to all civil enforcement measures, procedures and remedies. The implementation of the principle in the national legislation and its due application by the national courts as well as other enforcement institutions and agencies assures effectiveness of the application of all enforcement means in general.

Despite the initial Commission's Proposal which contemporized the enforcement procedures and measures on, *inter alia*, the principle of proportionality<sup>568</sup>, Article 3(1) of the Enforcement Directive finally set forth that:

"procedures <...> shall be fair and equitable, they shall not be unnecessarily costly, or entail unreasonable time-limits or unwarranted delays".

Article 3(2) of the Enforcement Directive additionally provides that measures, procedures and remedies should be "*effective, proportionate and dissuasive*". These general enforcement principles are almost a literal transposition of civil procedural axioms constituted in Article 41 of the TRIPS Agreement, leaving it as broad as in the latter international document. Such broadness arguably opens a possibility for divergent interpretations of the terms by the national legislators courts which apply the principle in IP litigation practice<sup>569</sup>.

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Oberinstanzliche Gerichtsentscheidungen zur Durchsetzung von Urheberrechten und verwandten Rechten, pp. 974-975.

568 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, pp. 18, 31; also *Fourtou Report (2003)*, p. 9.

569 It also represents certain flexibility for the national legislators to implement them, as observed in *Correa*, A Commentary on the TRIPS Agreement, p. 418; see also *Gervais*, The TRIPS Agreement: Drafting History and Analysis, p. 289.

As far as “*fair and equitable procedures*” are concerned, the TRIPS Agreement, namely its Article 42, explores more on this civil procedural principle which also can help to interpret the general provisions of the Directive in a systematic way. The TRIPS Agreement refers, *first*, to the availability of IP right holders to request for all civil enforcement procedures, which are covered by TRIPS, *second*, to the eligibility of defendants to provide timely and sufficiently detailed written notice, also on the basis of claims, *third*, to the possibility of the parties to be represented by independent legal counsels, to substantiate their claims and provide evidence on the aspects they want to prove<sup>570</sup>, by not imposing overly burdensome requirements concerning mandatory personal appearances and by considering protection of confidential information, unless it is otherwise provided under the applicable constitutional requirements<sup>571</sup>. The same line of interpretation can be held while examining and applying the principle “*fair and equitable procedures*”, as set out in the Directive.

The nature of the provision of Article 3 of the Enforcement Directive practically presupposes an obligation to a national legislator to adopt the provisions which are in compliance with the general enforcement principles as well as a duty of national judges, who apply the concrete enforcement provisions in each IP infringement case, to consider whether an enforcement mean is in conformity with the general principles of the civil procedure. The literal embodiment of the principle of “*fair and equitable procedures*” is not required, though. It is important that the whole system of civil enforcement measures, procedures and remedies as implemented in the national legislation due to the Enforcement Directive and their application in practice, reflects the idea of the principle of “*fair and equitable procedures*” and the goals of the Directive<sup>572</sup>. Moreover, the principle is to be respected by the parties in IP infringement cases as well as by any third parties involved in the court proceedings, so that no abuse of enforcement measures, procedures and remedies occurs<sup>573</sup>.

## 2. Embodiment of the principal in the Baltic legislation and practice

The general principles of the national civil procedures reflect the provisions set out in Article 3 of the Enforcement Directive and they are, accordingly, in compliance with Article 42 of the TRIPS Agreement. The principles have been already adopted in the national civil procedural legislation, *i.e.* the national CCPs of the Baltic countries<sup>574</sup>, before the adoption of the Directive.

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570 See also *refs.* regarding specific cases of burden of proof as far as authorship presumption or reversal of burden of proof in process-patents infringement cases in *infra* § 5C.IV.2.

571 See *Correa*, A Commentary on the TRIPS Agreement, pp. 418-419.

572 The same arguments can be found in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 41.

573 See *Straus*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, pp. 811-812.

574 Law on Enactment, Effect and Implementation of Civil Procedure Code as of 28 February 2002, enforced as from 1 January 2003 (as amended), State Gazette, 6 April 2002, No. 36-1340; 24 April 2002 No. 42 (amendment). The principle was respectively embodied in Chapter 1 of the Estonian CCP, as of 20 April 2005 (entered into force 1 January 2006); and Part



By constituting a right to any person, be it natural or legal, to apply to a court in order to defend his right or legally protected interest which is being infringed or disputed<sup>575</sup>, Article 7 of the Lithuanian CCP establishes a *principle of concentration and economy* in civil proceedings:

“<...> the courts should apply all means established in the Civil Procedure Code to ensure that a process is not delayed, that a case is solved during one court hearing, if it does not undermine hearing a case in an appropriate manner, also that the court decision is enforced promptly in a shortest period and in the most economic way possible. The parties to the civil proceedings should implement their rights in good faith and do not abuse their procedural rights, also they should take care of a prompt hearing of the case, to provide their evidence and arguments on which they base their claims or replications diligently and timely.”

Similar principle is established in Article 2 of the Estonian CCP as well. Such formulation is considered as one of the most important ones in view of the provision of Article 3(1) of the Directive which establishes that proceedings shall not be unnecessarily costly or entail unreasonable time-limits or unwarranted delays. The principle is applicable together with other general principles of civil procedure such as, *inter alia*, equity of the parties in the proceedings, public consideration of cases, except in cases provided by laws, independence and equity of judges, as laid down in the national CCPs.

By amending the Lithuanian CCP in 2003, which introduced a *principle of concentration and economy* in Lithuanian judicial practice, the prior issues regarding quite lengthy civil procedures in the national courts were intended to be solved. The concept of the newly amended Lithuanian CCP was, in general, to establish a civil procedure system based on written procedural documents and evidence rather than on adversarial civil proceedings which was substantiated on oral arguments presented by the parties<sup>576</sup>. Such idea was, *inter alia*, grounded by introducing new civil procedure principles such as a *principle of concentration and economy*. The introduction of the very principle and its practical application changed the form of the civil proceedings, including proceedings regarding infringements of IP rights, *i.e.* made them shorter, hence, less costly, and based on written arguments.

The national court practice shows that the judges tend to be bound by such principle<sup>577</sup> which is also reflected in shorter duration of the civil proceedings in general. According to Lithuanian statistics, not even one percent of all civil cases heard in

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A, Division 1, Chapter 1 of Latvian CCP, as of 14 October 1998 (entered into force as from 1 March 1999), amended on 17 June 2004.

575 Art. 5(1), the Lithuanian CCP.

576 The same concept has been introduced in the Estonian and Latvian CCPs when amending them in 2005 and 2006. Notably, adversarial civil proceedings were partly a relict of the Soviet concept of civil procedure in general.

577 *Ref.* can be made to the landmark civil cases on IP rights infringements in Lithuania such as Lithuanian Court of Appeal, Civil Case No. 2A-352/2001, *Microsoft Corporation, Adobe Systems Incorporated, Symantec Corporation and BĮ UAB “VTeX” vs. UAB “Sagra”*; Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB “VTeX” vs. UAB “Fima”*, also Lithuanian Supreme Court, Civil Case No. 3K-3-311/2006, *Microsoft Corp., Symantec Corp., BĮ UAB “VTeX” vs. UAB “Vilpostus”*, in which the courts solved complex IP legal disputes relatively speedy.

2007 by the national courts in Lithuania were considered more than 1 year<sup>578</sup>. The recent lengthy civil cases related to IP rights infringements have also occurred in the corresponding judicial practice, where the issues were mostly related to the prolonged collection of evidence and substantiation procedure<sup>579</sup>.

As far as costs related to civil proceedings are concerned, the reference should be made to the provision on harmonisation of legal costs as set out in Article 14 of the Enforcement Directive. The legislative implementation and actual practice on the issue of legal costs is further discussed<sup>580</sup>.

#### IV. *Presumption of authorship and ownership*

##### 1. Debatable aspects of the “presumption” provision set out in Article 5 of the Directive

By incorporating Article 15 of the Berne Convention, which sets out the presumption of authorship, and by adding *mutatis mutandis* provision regarding the presumption of rights related to copyright<sup>581</sup>, the Enforcement Directive, namely its Article 5 by virtue of Recital 19 thereof, left a few debatable issues regarding the presumption of authorship that can emerge in IP litigation practice. Article 5(a) of the Directive defines the presumption of authorship and ownership, which is accordingly applied to related rights under Article 5(b) of the Directive as follows:

<...> for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner.”

*First*, the presumption regarding rights related to copyright is new to the international and EU legislation. In terms of collection of evidence in IP infringement cases, such presumption is to be treated as making the proving process easier. However, as noticed<sup>582</sup>, the presumption, as far as the proof regarding possession of rights is concerned, can unjustifiably put related rights owners into more privileged position comparing to the one of copyright holders. Such argument refers to the conceptual

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578 In 2007 there were 1,385 civil cases among 153,436 which were heard in the national courts more than one year, as reported in the *Report on the Activities of the Courts of the Republic of Lithuania (2007)*, p. 44. The category of IP cases has not been distinguished; however, it can be presumed that the length of civil proceedings in IP infringement cases approximates from 6 months to 1 year.

579 *E.g.*, Lithuanian Supreme Court, Civil Case No. 3K-3-270/2006, *Microsoft Corp., Symantec Corp., Adobe Systems, Inc., Autodesk, Inc. vs. UAB “Kompiuterių mokymo centras”*. The referred case took six years since establishment of the infringement of copyright by the police authorities till the final court decision.

580 See further discussion in *infra* § 5F.II.

581 Or “neighbouring rights”, as more often used in English translations of the Baltic national legislation.

582 See *Mizaras et al.*, *Implementation of EU Legislation in the Civil Laws of Lithuania*, pp. 143-144.

aspect of the authors' rights presumption which is based on a presumption of moral rights, instead of economic rights<sup>583</sup>. In view of related rights, except the rights of performers, this presumption could mean an automatic presumption of economic rights which in practice should be carefully considered.

*Second*, Article 5 of the Directive does not regulate a presumption of rights as far as legal entities are concerned. The lack of such regulation can be also negatively reflected in IP enforcement practice as far as the proving process is concerned. The attempt to include some explanatory provisions on a presumption of authorship such as "the author or the copyright holder of the work shall be presumed to be the person or entity whose name is featured on copies of the work or any other protected object, or on packaging connected with it, or appears in relation with the work or the protected object, in particular by way of written or electronic statement, label or any other indication"<sup>584</sup> did not find its way to the final wording of the Directive. This, on the other hand, can be explained by referring to the same logics applicable to the presumption of rights related to copyright which, except the rights of performers, do not conceptually cover moral rights.

The further discussed national court practice regarding the presumption of authorship in cases of infringement of related rights as well as rights of legal persons demonstrates how the debatable issues are solved by the national legislators and the courts of the Baltic countries.

## 2. Authorship presumption and reversal of burden of proof under the Baltic legislation and practice

### a) Authorship presumption

The copyright presumption is constituted in Article 6 of the implementing Lithuanian Copyright Law by referring to an author as a natural person who has created a work. The law additionally provides that a natural person, whose name is indicated on a work in the usual manner, is in the absence of proof to the contrary, to be regarded as the author of the work. This is also applicable even if the work is disclosed under a pseudonym:

"<...> where it leaves no doubt as to the identity of the author. When the pseudonym of an author appears on the work, which rises doubt as to the identity of the author, or the name of an author does not appear on a work, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights until the author of such work reveals his identity and establishes his claim to authorship of the work."

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583 On the other hand, due to technological developments, the concept of presumption can be exposed to economic rights which would not contradict to the essence of the presumption of authorship, as argued in *Ricketson, Ginsburg*, *International Copyright and Neighbouring Rights*, pp. 369-372.

584 Such suggestion was expressed in *Fourtou Report (2003)*, p. 11.

Almost identical provisions can be found in Section 8 of the Latvian Copyright Law as well as in Article 29 of the Estonian Copyright Law. The national provisions define the presumption of authorship more specific and, as argued<sup>585</sup>, are in favour for right holders of copyright.

In national IP litigation practice the issue on presumption of authorship, in particular regarding a burden of proof of this *prima facie* presumption, was soundly raised by the Lithuanian courts and finally solved by the Lithuanian Supreme Court in 2000. In the trademark and copyright infringement case the Supreme Court concluded that a party who questions an authorship should submit evidence proving that the author is not the person who created that specific work:

“<...> Copyright originates upon a creation of a work. It is proved by the fact that a work was created and it originally exists. The laws do not require proving circumstances regarding origination of the work. The civil procedure embodies rules and order which do not require from the party to prove circumstances because the existence of them is being presumed (Lithuanian Civil Code, Arts. 483, 7 et seq.)”<sup>586</sup>.

This Supreme Court landmark decision sought to define the concept of the presumption of authorship and it actually unburdened the substantiation process for copyright holders, as observed from the prior-to-implementation Lithuanian court practice in copyright infringement cases.

As far as related rights are concerned, the Lithuanian Copyright Law, namely its Article 51 sets out that the presumption of authorship applies *mutatis mutandis* to owners of the related rights. In comparison with the prior-to-implementation wording of the Copyright Law which established the presumption for phonogram producers only, the list of related rights holders, to whom a presumption of rights is currently applied, has been extended<sup>587</sup>.

Moreover, the presumption of authorship, in particular the presumption of existing exclusive economic rights, has been correspondingly applied in cases regarding software copyright infringements (or infringements of rights to computer programs). The national courts of Lithuania considered the specificity of computer programs as a subject-matter of copyright<sup>588</sup> in those cases and, despite the fact that the plaintiffs

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

586 Note: unofficial translation of an excerpt from the court decision, see Decision 10 March 2000, 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”*. The concept has been affirmed in the following practice in copyright infringement cases, see, e.g., Decision of 3 May 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-311/2006, *Microsoft Corp., Symantec Corp., BĮ UAB “VTeX” vs. UAB “Vilpostus”*.

587 By virtue of Art. 2 (12) of the Lithuanian Copyright Law, the “the owner of related rights” means a performer, producer of a phonogram, broadcasting organisation, producer of the first fixation of an audiovisual work (film), another natural or legal person possessing exclusive related rights in the cases provided for in this Law, as well as a natural or legal person to whom the exclusive related rights have been transferred (successor in title).

588 Art. 10(2) of the Lithuanian Copyright Law establishes that “the owner of an author’s economic rights in a computer programme created by an employee in the execution of his duties

were the legal persons (the manufacturers of software programs), applied the authorship presumption similarly to the cases where the author is a natural person considering the whole context of the Lithuanian Copyright Law. In 2001 the Lithuanian Court of Appeal in the case of software copyright infringement concluded that:

“The Board of Judges agrees with the argument of the appellant that Article 6 of the Lithuanian Copyright Law consolidates the presumption of authorship, *i.e.* the presumption is applied to the author of the work himself, but not to the holder of the economic rights. However, this provision must be applied in the context of the whole Lithuanian Copyright Law. Unlike rights to other subject matters of copyright, rights to a computer programme created by an employee belong to an employer. <...> Taking into consideration the particularity of computer programmes as subject matter of copyright, this circumstance is considered sufficient to certify exclusive economic rights of the plaintiffs. The defendant has not provided any data concerning the fact that exclusive economic rights to the programmes listed herein belong to other persons. Thus, it is considered that proper plaintiffs brought the action in the case.”<sup>589</sup>

Similarly to Lithuanian practice, in Latvia if a computer program has been created by an employee while performing a work assignment, the economic rights to that program will belong to the employer, unless it is otherwise stated in the employment contract<sup>590</sup>. Thus, in practice a presumption of existing economic rights and a burden of proof imposed on the defendants (if authorship or related rights ownership is questioned) can be likewise applied.

#### b) Reversal of burden of proof under the national patent legislation

Although the Enforcement Directive does not embody any other specific provisions regarding aspects of burden of proof, except for authors and related rights owners, the significant point regarding the rights of the process-patent owners and the reversal of burden of proof rule in case of an infringement of their rights as constituted in, respectively, Article 28(1) and 34 of the TRIPS Agreement, is worth to be mentioned.

It can be observed that the Baltic national legislators differently adopted the special reversal of burden of proof rule as embodied in Article 34 of the TRIPS which generally means that the national judicial authorities, in civil cases for infringement of a process patent for obtaining a product, are “to order the defendant to prove that the process to obtain an identical product is different from the patented process”. As referred, such reversal of burden of proof is applicable in at least one of the circum-

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or fulfilment of work functions shall be the employer, unless otherwise provided by an agreement“.

589 *E.g., note:* unofficial translation of an excerpt from the court decision, see Decision of 10 December, 2001, Lithuanian Court of Appeal, Civil Case No. 2A-352/2001, *Microsoft Corporation, Adobe Systems Incorporated, Symantec Corporation and BĮ UAB “VteX” vs. UAB “Sagra”*. The case is to be considered as one of the leading civil cases in the national IP court practice in Lithuania before the implementation of the Directive. The court, *inter alia*, interpreted the concept of burden of proof regarding economic rights of copyright holders, but also discussed very important issues such as the applicable law and adjudication of compensation in copyright infringement cases; see also *refs. in infra* § 5F.I.1.c).

590 Sec. 12 of the Latvian Copyright Law.

tances: (a) if the product obtained by the patented process is new; or (b) if there is a likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used<sup>591</sup>.

The novelty of the products obtained by means of the process requirement is introduced in the Latvian Patent Law as far as the reversal of burden of proof in cases of infringement of process-patents is concerned. Article 41(3) and (4) of the mentioned Law constitutes the obligation for the patent (or the exclusive license) owner to prove the fact of the infringement and the guilt of the infringer, except “cases when patents are granted for a process of making a new product“. Any identical product is considered as manufactured on the basis of the patented process, unless it is proved otherwise.

Lithuanian legislator followed the US approach in terms of the reversal of burden of proof rule, *i.e.* in civil proceedings the rule is applied without requiring novelty of the product obtained by the patented process<sup>592</sup>. Article 41(5) of the Lithuanian Patent Law, therefore, provides that:

“If the subject-matter of a patent is a process for obtaining a product and the product obtained by the defendant is identical to the product obtained by the patented process, or if there is a reason to believe that the product is produced by infringing the patent, but the plaintiff is unable through reasonable efforts to determine the process actually used, the defendant must prove that the process to obtain the identical product is different from the patented process.”

In the course of implementing the TRIPS Agreement, the Estonian legislator shifted the burden of proof on the defendant to prove that the defendant used a process different from the patented process for manufacturing a similar product, in case an action is filed on the basis of products manufactured according to a patented process (Article 55(1), the Estonian Patent Law<sup>593</sup>). By virtue of Article 55(1)(2) of the Estonian Patent Law, though, in case the use of a different process cannot be proved, the product is deemed to have been manufactured according to the patented process provided that, despite reasonable efforts, the proprietor of the patent has not succeeded in determining the process actually used for manufacturing the product and the use of the patented process is likely or if the product manufactured according to the patented process is new. Thus, the Estonian Patent Law alternatively refers to the novelty of the product obtained by the means of the process requirement in order to apply the reversal of the burden of proof rule.

In Estonia and Lithuania application of the reversal of a burden of proof rule is subject to the confidentiality requirements as far as protection of a defendant's man-

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591 Notably, the Member is in compliance with Article 34 of TRIPS if it provides the reversal of burden of proof in one of the alternatives listed, see more comprehensive discussion in *Straus*, *Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement*, pp. 808-810.

592 France also followed the US approach, 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. 817.

593 The same applies to utility models, as regulated by Art. 52(1) of the Estonian Law on Utility Models.

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” (“*teisijų subjektas*”, lt.) instead of “copyright holder” (“*teisijų 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.

a more effective protection against IP rights, especially copyright infringement cases. It also depended on the general obligations assumed by the Baltic states to approximate the national legislation with the Community legal requirements due to the accession into the EU.

Some important remarks should be made regarding the implementing amendments in the Baltic legislation which concerned the substantive legal norms that existed before the implementation. The implementation of the Directive does not reveal substantial changes regarding the list of IP rights, also the principle of “fair and equitable remedies, procedures and measures”. Although not much influence on substantive legal rules can be observed, the analysis of the implementing legislation shows that the implementation influenced the regulation of some important substantive provisions in the national IP laws. This particularly relates to (1) *legal standing of licensees* and (2) *presumption of rights related to copyright* which have been amended in Lithuania pursuant the corresponding provisions of the Enforcement Directive. There can be no substantive changes observed regarding *locus standi* regulation in Latvia and Estonia. By giving the right to exclusive licensees to stand in the court to defend their rights under the assumed licenses, which is generally to assure more effective protection of IP rights, can arguably bring new colours into the national IP litigation practice, which before the implementation of the Directive was undistinguished.

By exposing the presumption of rights to rights related to copyright, the proving process in the cases of infringements of related rights can be more simplified. On the other hand, such changes in Lithuanian legislation can bring certain conceptual confusion regarding the essence of the presumption of authorship which, as a rule, is to presume moral rights. Upcoming Baltic national court practice can also illustrate how those amended provisions will be actually applied.

By incorporating the definition of the term “commercial purposes” into the implementing Lithuanian Copyright Law, which can solve an issue regarding varying judicial interpretation of the very term, the practice regarding copyright and related rights infringements is deemed to be more consistent. The national courts in criminal and administrative IP infringements cases, though, will presumably require solving issues regarding application of the term “commercial purposes” in the upcoming practice.

**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 "Panerių 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 “Silo 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.1.3.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) (*conferene 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).

more precise wording in view of the formulation of Article 8 of the Directive<sup>702</sup>, *i.e.* the content and providers of such information were to be specifically defined.

By virtue of the implementing amendments in the special IP laws in Lithuania, also the CCPs in Latvia and Estonia, IP right holders can exercise their right of information by submitting a proportionate request to the court *during the proceedings* concerning the infringement, hence, the institute is not covered by pre-trial measures. Such request can be submitted with other requests, for instance, regarding application of provisional measures (injunctions), corrective measures or submission of financial or commercial documents which can contain case-relevant information. As far as the content of information is concerned, by implementing the Enforcement Directive in 2006 and amending the national IP laws in Lithuania, the *Seimas* went beyond the minimal set of the information that could be requested according to the Directive. Besides information which is listed in Article 8(2) of the Directive<sup>703</sup>, Article 79 of the implementing Lithuanian Copyright Laws additionally provides for:

“3) information on the exploited works and objects of related rights or *sui generis* rights, the scope and duration of their exploitation, income received by the users and other information necessary for calculation of remuneration.”

The more extensive content of information that can be requested according to the Lithuanian IP laws can be considered as more favourable for right holders in view of Article 2(1) of the Directive, however, exercise of such right of information should fall under due scrutiny of particular circumstances of each case and of rights and interests of other persons in order there is no misuse of such right. An application of right of information serves as important procedural tool for IP right holders not only to receive information regarding alleged infringers of their rights, nature and location of the infringing activities, etc., but also to collect all relevant data and information, which are not in their possession, that can be helpful to assess damages, including profit gained by infringers. Notably, however, that the national laws on industrial property in Lithuania do not provide such additional clause which can be considered as legal inconsistency. Copyright, related rights and *sui generis* rights holders can be held in more favourable position in cases of calculation of remuneration.

Considering complexity of calculation of remuneration of damages in IP infringement cases in general, the provision on third party information can be effective for IP litigation practice, especially in cases of information that can be requested from intermediaries who provide services or access to telecommunication networks to other persons who can be infringing IP rights (for instance, ftp-related services, P2P services, etc.). Moreover, provision of information is also relevant in terms of

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702 Such suggestion was expressed in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 52.

703 Art. 8(2) of the Directive lists: (i) the names and addresses of the manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; (ii) the quantities of manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question. Such list of requested information is reflected in Art. 250(16) of the Latvian CCP. Art. 280 of the Estonian CCP stipulates the obligation to provide information in action related to intellectual property.

discontinuing infringing activities, preventing from infringements in the future and application of corrective measures<sup>704</sup>.

## 2. Providers of requested information

The implementing amendments introduced one of the most important changes in terms of the institute of right of information in the national legislation of the Baltic countries, *i.e.* that information can be requested not only from direct infringers, but also from third persons who are not infringers<sup>705</sup>: (i) persons who possess for commercial purposes the goods and copies of works, other objects of the protected rights, which infringe the protected rights, (ii) who were found to be using on a commercial scale the services infringing the protected rights or (iii) who were found to be providing on a commercial scale services used by third persons in activities infringing the protected rights, as well as (iv) those indicated by the above mentioned persons as being involved in the manufacture or distribution of the goods or copies of works, other objects of the protected rights, which infringe the protected rights, or the provision of the services, infringing the rights defined under the IP laws<sup>706</sup>.

Similarly, in Latvia the information can be requested from a third party, which is in possession of counterfeit goods on commercial scale, or which has on commercial scale provided or used services in connection with the illegal use of IP object, or which has been indicated by the person noted in the above two examples to be involved in the manufacturing, distribution or supply of the counterfeit goods (or provision of services in connection with the illegal use of IP objects)<sup>707</sup>.

The important aspect is that, the same as formulated in Article 8(1) of the Directive, direct infringers are to provide information irrespective whether an infringement is committed for commercial purposes or not, whereas third persons are required to provide information only in case of commercial purposes involved in their activities<sup>708</sup>.

Noticeably, provision of such information should be performed by observing *proportionality* requirement, *i.e.* by observing if such measure reflects nature of the infringement in question, if it does not affect infringer's rights in unjustified manner, etc. Other legal limitations such as provisions which afford an opportunity for refusing to provide information which would force the person to admit to his own participation or that of his close relatives in an infringement of the protected rights and govern the protection of confidentiality of information sources or the processing of

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704 See *Mizaras*, Copyright Law (Vol. II), pp. 397. Also further examination of the implementing legislation on corrective measures in *infra* § 5F.III.1.

705 This is an important novelty which has been introduced by the Directive by taking the examples of practice of other countries; see more in *Knaak*, Die EG-Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums und ihr Umsetzungsbedarf im deutschen Recht, p. 749.

706 Art. 79(2) of the Copyright Law, also Art. 41(1)(2) of the Patent Law, Art. 50(1)(2) of the Trademark Law, Art. 47(1)(2) of the Design Law of Lithuania.

707 Art. 250(16), the Latvian CCP.

708 On the term “commercial purposes” (“commercial scale”) see discussion in *supra* § 5C.II.2.

personal data are to be considered. The observation of requirements regarding confidential information as well as provision of personal data is especially due in cases when the requested information is possessed by the intermediaries, *i.e.* operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services (ISPs), etc. Considering the growth of internet piracy which is a common phenomenon not only in the whole world, but also in the Baltic countries<sup>709</sup>, provision of the requested information can be also seen in view of legal liability of internet service providers which is embodied in the national IP laws, *i.e.* ordering an injunction against the intermediary with the aim of prohibiting him from rendering services in a network to third parties who make use of these services infringing a copyright, related right or *sui generis* right, also patent, trademark or design rights<sup>710</sup>.

In absence of national court practise on the application of the right of information in IP infringement cases so far<sup>711</sup>, it is difficult to assess how the national courts are to practically solve the issues regarding requests by right holders to apply such measure in view of legal protection of other rights and interests protected by the national laws. It is assumed, however, that the courts are to follow other national provisions on definition of family or close relative relations in order to define certain limitation for application of right of information<sup>712</sup>, also on protection of confidential information and processing of personal data<sup>713</sup>.

As far as the balance between the protection and enforcement of IP rights and other fundamental rights and interests is concerned, the courts of the Baltic countries should likewise take into consideration the court practice on application of the right of information of other countries, also interpretations and conclusions made by the ECJ on the issue. For instance, as far as requirement for the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings is concerned, the ECJ concluded<sup>714</sup> that by transposing the provisions embodied in the E-Commerce Directive, the Copyright Directive, the Directive on Privacy and E-Communications, also the Enforcement Directive, namely its Article 8(1), a fair balance should be found be-

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709 See also overview on IP piracy in the Baltic countries in *supra* § 4A.II.

710 See further discussion regarding injunctions against intermediaries in *infra* § 5E.I.3.

711 Only a few cases in which such request was submitted by the plaintiffs have been reported 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)*; and no cases reported in *Latvian Ministry of Justice Information (2008) (unofficial information)*.

712 The corresponding national provisions can be found in the Constitution of the Republic of Lithuania (Art. 31), also the Civil Code and CCP.

713 Law Amending the Lithuanian Law on Legal Protection of Personal Data of 11 June 1996 No. I-1374 (new version of 1 February 2008, No. X-1444, to be entered into force since 1 January 2009); Estonian Personal Data Protection Act of 1 October 2003, amended 14 April 2004 (entered into force from 1 May 2004); Latvian Personal Data Protection Law of 23 March 2000, last on 19 December 2006.

714 See *ECJ*, Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) vs. Telefónica de España S.A.U. (2008)*, paras 50-71.

tween the various fundamental rights protected by the Community legal order, the principle of proportionality and protection of IP rights. Neither Article 8 and Article 9 of the Enforcement Directive nor Article 8 of the Copyright Directive provide an obligation for ISPs to report to IP right holders about the infringements of their rights. On the other hand, following the argumentation by the ECJ, it is not prohibited to embody such obligation in the national laws by virtue of protection of other rights, interests and freedoms of other persons.

### III. Concluding remarks

Measures for preserving evidence in the form of so-called *civil (ex parte) searches* can be considered as essential tools for the relatively young and still forming practice regarding enforcement of IP rights in the Baltic countries, based on the implementing provisions in the special IP laws (Lithuania) and the CCPs (Latvia and Estonia) nowadays. The national court practice on preservation of evidence was quite modest before the implementation of the Directive in 2006 and it still is. More defined court practice on *civil (ex parte) searches* can be observed in the past years in Lithuania only. The examined Lithuanian court practice on the basis of the recent court rulings on this subject-matter and their enforcement can allow depicting features of actual implementation of this very important legislative novelty in the field of civil IP enforcement. Thus, the following observations can be made.

*First*, application of *civil (ex parte) searches* assures rapid and independent from police officers or prosecutors actions taken by IP right holders against activities which allegedly infringe their IP rights. By virtue of the examined wording of the Lithuanian implementing legislation on the subject-matter, it can be presupposed that IP right holders should be careful, though, to substantiate their requests, provide reasonably available evidence which will be further assessed by the courts. As the national practice on copyright infringement cases shows, the courts still face certain issues which mostly concern the definition of “*reasonably available evidence*” in those cases. It should be stressed that the implementing provisions embody low threshold of *prima facie* evidence while requesting a civil search, which should be followed by the national courts.

*Second*, the courts are also reluctant to apply “samples” provision in cases where there are many infringing items involved. It can be advocated that more frequent application of “samples” provision can contribute to effective preservation of evidence in the mentioned cases and foster speedier and less costly litigation scheme by also preventing against illegal use of protected IP subject-matter. The practice, which confirms the application of civil searches on *inaudita altera parte* basis, seems to turn to the direction where it is required from requesting parties to present at least sorted *prima facie* evidence to the court. In turn, IP right holders are required to substantiate their claims better, in order to assure more efficient and speedier civil proceedings in the court as well as to avoid any unsubstantiated or roughly substantiated claims.

*Third*, the Lithuanian practice on civil searches is limited to copyright infringement cases. It does not allow making the whole picture of the actual implementation of this institute, considering also other IP rights. The reasons for such practice can be found in the facts that only foreign companies, mainly software IP right holders, tried to request for civil searches considering that evidence in their rights infringement cases is a very delicate matter, *i.e.* it can be easily destroyed or hid by the opposing party.

*Fourth*, it is also observed that the competence of court bailiffs, experts or specialists who are able to promptly evaluate evidence, to measure which evidence is to be taken as samples, etc. as well as the competence of attorneys who prepare necessary procedural documents to be submitted to the court for application of measures preserving evidence is essential for application of *civil (ex parte) searches*. The appropriate competence and knowledge in the field allows the listed persons to avoid inappropriate application of measures, as provided in Article 7(4) of the Enforcement Directive, and to achieve the aims of civil searches in general.

*Fifth*, an application of *civil (ex parte) searches* can have a deterrent effect. It can be anticipated that, by being aware of successful application of such searches which are held independently by IP right holders, companies will intend to assure that only legal IP products and (or) material are used in their businesses, by maintaining their IP assets, respectively. Companies, which use IP products in their commercial activities, are to take a due care and maintain all documents related to purchase and use of those IP products in their premises, by considering a possibility of surprise searches that can be performed by right holders on the basis of the court rulings. As a matter of fact, the opposing party is usually informed about the court ruling upon performance of a civil search and has a right to appeal it, in case its legal interests such as confidential information, etc. are infringed or unduly affected.

As far as the harmonizing provisions regarding the right of information are concerned, it should be mentioned that the implementing national legislation almost literally transposed the corresponding provisions on the content of requested information, also list of persons who can be requested to provide information. As the latter is concerned, it should be highlighted that the implementing national legislation provides for a possibility to request third parties to provide such information. The Lithuanian legislator even broadened the scope of the requested information under the Copyright Law, which is considered as more favourable solution for copyright and related right holders. Court practice on the issue is, however, modest which does not allow discussing actual implementation aspects on the subject-matter so far. On the other hand, considering the transposition of the provisions regarding provision of information by third parties, especially intermediaries, *i.e.*, the cases regarding IP infringements online and submission of the relevant information, can be expected in the near future.

**E. Provisional measures and injunctions under the implementing national legislation and court practice**

**I. Provisional measures under the national legislation in view of Article 9 of the Enforcement Directive**

**1. Application of provisional measures as procedural civil remedies**

**a) Objectives and nature**

Article 9 of the Enforcement Directive is generally aimed to harmonize provisional and precautionary measures that can be ordered by the courts during the civil proceedings before finally deciding on the merits of the case as well as before commencing civil proceedings. Such measures include: (1) interlocutory injunctions, also interlocutory injunctions to intermediaries, (2) orders regarding seizures or deliveries up of the allegedly infringing goods and (3) precautionary seizures of movable and immovable property, in case of commercial scale is established in the infringing activities<sup>715</sup>.

Article 9(1)(a) of the Directive explicitly refers to *interlocutory injunctions* by pointing out that they are to prevent imminent infringements, or to forbid the continuation of the alleged infringements, or to make such continuation subject to the lodging of guarantees which are intended to ensure compensation to right holder, whereas seizures of infringing goods are to prevent them from entering the market and seizures of movable and immovable property – from danger to recover the adjudicated damages. The requirements, which are applicable to measures for preserving evidence, are *mutatis mutandis* applicable to provisional measures<sup>716</sup>.

By examining the wording of the implementing provisions on provisional measures in Lithuanian legislation on IP rights<sup>717</sup>, it can be observed that they stipulate the measures which are (i) to ensure enforcement of final courts decisions, (ii) to prevent from imminent infringement, also (iii) to forbid a discontinuation of infringement. This, in turn, reflects the Lithuanian legal doctrine on provisional measures which also refers to them as measures to ensure enforcement of the final court decision, preventive measures and measures for preserving evidence:

“Where there are sufficient grounds to suspect that an infringement of protected rights in question has been committed, the court may, in accordance with the procedure laid down by the CCP, apply provisional measures necessary to prevent any imminent infringement, to forbid the continuation of the infringements and to enforce the final decision of the court.”<sup>718</sup>

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715 See examination of Art. 9 of the Directive in supra § 5A.II.2.c).

716 See examination of requirements for application of measures for preserving evidence in supra § 5D.I.3.b).

717 Art. 81(1) of the Copyright Law, Art. 41(3)(2) of the Patent Law, Art. 50(3)(2) of the Trademark Law, and Art. 47(3) (2) of the Design Law of Lithuania.

718 As described in *Commentary of Civil Code of Lithuania*, p. 333.

Thus, on the basis of the substantiated request by the interested party, the court can adopt an order: (1) to forbid persons to commit any imminent infringement of the protected rights, (2) to discontinue, on a provisional basis, any infringement of the protected rights, also 3) to forbid an intermediary to provide services to a third party who uses these services by infringing the protected rights. Moreover, Article 145 of the Lithuanian CCP stipulates an unlimited list of provisional measures which can be chosen by the interested party. They are mainly aimed to ensure enforcement of final court decisions which can be interpreted as narrowing the objectives of provisional measures in general<sup>719</sup>. For instance, a prohibition imposed on the defendant to enter to any agreements or take certain actions, which is established in the CCP, but aimed to ensure final court decisions, can be also seen as reasonable measure that can be imposed on a provisional basis during the civil proceedings and applied in IP infringement cases.

Similarly to measures for preserving evidence, national courts may also order the alleged infringers to lodge adequate security intended to ensure damage compensation to the person who requested injunction and (or), 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. Differently from the provision of Article 9(2) of the Enforcement Directive which is constructed on the British concept of so-called *Mareva injunction* or *freezing injunction*<sup>720</sup>, under the Lithuanian IP laws<sup>721</sup> it is not required to prove “commercial scale” (“commercial purposes”) in the activities of the opposing party in order to apply orders to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information. In view of the aims of the Directive, such provision can be considered more favourable for right holders. It is, however, presumed that, while applying such provision, the principle of proportionality is to be duly observed by the national courts<sup>722</sup>.

The legal nature of provisional measures, including interlocutory injunctions or, as they are formulated in the Lithuanian national doctrine and general case practice, “orders on discontinuation of illegal activities”, are based on the general legal doctrine of *actio negatoria* and should be distinguished from substantive preventive civil remedies in IP infringement cases such as permanent injunctions. The differentiation is due to distinct objectives of application of those civil remedies, their nature and application requirements (procedural or substantive), different standard for evi-

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719 Such only aim, which actually reflects the formulation set out in the 1964 CCP of Lithuania, has been also criticised as narrowing the objectives of provisional measures, see *Mizaras*, Copyright Law (Vol. II), p. 416.

720 See *refs.* in supra § 5A.II.2.c).

721 See *refs.* to the implementing provisions on the provisional measures in Lithuania in supra Ft. 717 herein.

722 The extended scope of application of Art. 9(2) of the Directive is in compliance with Article 2 (1) of the Directive; see also in *Mizaras*, Copyright Law (Vol. II), p. 418.



dence that should be provided in order to apply them, also consequences of their application<sup>723</sup>.

Such differences have a practical relevance which can be illustrated with the example from the Lithuanian court practice on the issue. For instance, it cannot be agreed with the argumentation expressed by the Lithuanian Court of Appeal<sup>724</sup> that, in case requested provisional measures coincide with the claims by the plaintiff, such measures are to be considered as going beyond the scope of the request to apply provisional measures and they are to be examined as the part of that claim. The Court of Appeal confirmed the conclusion of the first instance court in the mentioned case that, although the dispute regarding subjective IP rights in question did not take place, by prohibiting the defendant to use infringing software in his activities, the goals of further substantive requests by the plaintiff, which actually covered the same requests, are achieved. Such case practice can be considered as faulty. It is also to be noted that requests for discontinuation of infringing activities are, as a rule, asked by the plaintiffs, IP right holders, while submitting civil claims to the courts.

The main characteristic of procedural provisional measures is preventive. Such characteristic can be also detected by analysing the provisions embodied in the Latvian and Estonian CCPs on provisional measures<sup>725</sup>. They are aimed to secure *status quo*, to ensure enforcement of the final court decision and to prevent from damage that can occur during the civil proceedings. Both provisional and permanent preventive civil remedies, however, do not compete and they are to be applied in a complex manner. Even more, once the final court decision on the merits of the case is rendered, provisional measures of procedural nature can be transformed to the substantive preventive civil measures which are aimed to, for instance, discontinue the infringing activities or prevent from them in the future.

#### b) Requirements for application of interlocutory injunctions

In Lithuania the courts order application of provisional measures on the basis of a request by an interested party (a plaintiff). The court can order such measures on its

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723 The same legal doctrine is followed in the practice of other EU countries such as Germany or Switzerland, as referred in *Mizaras*, *Civil Remedies for Infringement of Copyright*, pp. 245-247, also *Mizaras*, *Copyright Law (Vol. II)*, pp. 436. See also further discussion regarding requirements for interlocutory injunctions in *infra* § 5E.I.1.b).

724 Such argumentation has been provided in other, but IP infringements, civil cases, *e.g.*, in Decision as of 8 November 2007, Lithuanian Court of Appeal, Civil Case No. 2-707/2007, "*Ashburn International*" vs. *AB "Lukoil Baltija" et al.*; also in similar case, Decision as of 26 January 2006, the Lithuanian Court of Appeal, Civil Case No. 2-49/2006, *AB "Krašto projektai" vs. UAB "Vilniaus kapitalinė statyba" et al.*

725 Art. 250(10) of the Latvian CCP; Art. 378(2) of the Estonian CCP stipulates that in order to secure an action based on infringement of copyright or related rights, or industrial property rights, the court may, among other, seize the goods concerning alleged infringement of IP rights or impose an obligation to hand over such goods to prevent the putting on the market or distribution of such goods.

own motion only in cases of public interest<sup>726</sup>. Similarly to requests to apply measures for preserving evidence, the requesting party should provide evidence regarding its *locus standi*<sup>727</sup>, facts about the infringing activities or danger that such activities can occur, also *prima facie* evidence that the defendant allegedly committed or is committing such activities. These are the factors which are, as a rule, assessed by the Lithuanian courts while ordering preliminary injunctions.

By virtue of the legal doctrine of the Baltic countries, it is to be noted that, besides the mainly preventive nature of provisional measures and their procedural character, one of the most important differences lies on the fact that there is no requirement to prove fault in infringer's activities or inaction in order to impose an interlocutory injunction or other provisional measure (so-called "*objective infringement of rights*")<sup>728</sup>. The fact of illegal activities suffices in order to apply provisional measures, whereas general conditions for civil legal liability, including fault (intent or negligence), are required in order to ask for substantive preventive civil remedies in IP infringement cases.

It is required, though, to provide *reasonably available evidence* to convince the court that the right holder has a right to apply for such remedies, that the rights are being infringed or that the infringement is imminent. The requirement is set forth in the provisions on provisional measures in the national IP laws of Lithuania<sup>729</sup>. Notably, it is laid down that provisional measure can be applied by the court where there are *sufficient grounds to suspect* that an infringement of IP rights in question has been committed, whereas Article 9(3) of the Enforcement Directive uses another formulation. It is established in the Directive that the applicant is required to provide any reasonably available evidence in order to satisfy themselves *with a sufficient degree of certainty* that the applicant is the right holder (his *locus standi*) and that the applicant's right is being infringed, or that such infringement is imminent. Thus, it can be agreed with the arguments that the requirements on evidence standard for preliminary injunctions embodied in the Directive are higher than the one established in the national legislation<sup>730</sup>. On the other hand, such lowering of the standard can be interpreted as more favourable to right holders which can be considered as being in compliance with Article 2(1) and general aims of the Directive, as long as the principle of proportionality is observed.

Following such interpretation, the Lithuanian courts are not required to examine all circumstances of the case, especially considering the fact that provisional measures (injunctions) are to be applied promptly. Additionally, a reasonable sample of a substantial number of products shall be considered by the court to constitute reason-

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726 Art. 144(1), the Lithuanian CCP.

727 As referred in e.g., Lithuanian Court of Appeal, Civil Case No. 2-564/2007, *LATGA-A et al. vs. AB "Hesona" et al.*

728 It follows from the concept of *actio negatoria* which had been developed in Germany, Austria and Switzerland, as discussed in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 246-247.

729 See *refs.* to the implementing provisions on the provisional measures in Lithuania in *supra* Ft. 717 herein.

730 As also concluded in *Mizaras*, Copyright Law (Vol. II), pp. 437-438.

able evidence of an infringement of the rights to order interlocutory injunctions or apply other provisional measures. Moreover, provisional measures can be applied *inaudita altera parte*, in particular where any delay is likely to cause irreparable harm to the applicant. Identically to application for measures for preserving evidence, the same balancing schemes to ensure rights and interests of the opposing party are *mutatis mutandis* applicable under the national legislation<sup>731</sup>.

## 2. Permanent injunctions under the national legislation in view of Article 11 of the Directive

### a) Injunctions against the continuation of IP infringements

Injunctions, as a preventive or quasi-preventive civil remedy against infringements of IP rights, are known in the court practice of many EU member states and their legal doctrine<sup>732</sup>. Similarly, such substantive civil remedy, which is nowadays harmonized under Article 11 of the Enforcement Directive, is aimed at prohibiting the continuation of the infringement<sup>733</sup>. Injunctions can be imposed by rendering a court decision on the merits of the case, finding an infringement of IP right in question<sup>734</sup>.

Injunctions, as the substantive civil enforcement measure, have been already constituted in the prior-to-implementation national legislation of the Baltic countries. In Lithuania they have been embodied in Article 1.138 of the Lithuanian Civil Code, also in the national IP legislation before the adoption of the Enforcement Directive<sup>735</sup>. In view of implementation of the Directive, the provisions did not require additional legislative improvements in Lithuania<sup>736</sup>. The national provisions on provisional measures, including injunctions, were established in the implementing pro-

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731 See *refs.* to legislative balancing schemes to ensure rights and interests of the opposing party in supra § 5D.I.3.e). Also, notably, *e.g.*, Art. 391 of the Estonian CCP does contain the obligation to compensate the damage caused to the other party by the securing of the action if, *inter alia*, court judgment for refusal to satisfy or hear the secured action enters into force, or the proceeding in the matter is terminated on any other grounds except approval of the compromise of parties.

732 *Injunctions* have been embodied in the copyright laws of Germany, Switzerland and Austria, as referred and examined in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 244-245.

733 See examination of Art. 11 of the Directive in supra § 5A.II.1.c).

734 There was no national case practice observed, which would illustrate cases when the IP infringement was found, however, the courts did not order a permanent injunction due to certain specific factors of the case (which could be considered as a similar outcome following the US Supreme Court Decision of 15 May 2006, *Ebay Inc. et al vs. Mercexchange LLC*); see also explanations in *Correa*, A Commentary on the TRIPS Agreement, pp. 423-424.

735 Art. 77(1)(2) of the Lithuanian Copyright Law, Art. 41(1) of the Lithuanian Patent Law, Art. 50(1) (2) of the Lithuanian Trademark Law, Art. 47(1) (2) of the Lithuanian Design Law and Art. 21(1) of the Lithuanian Semiconductors Law (before their implementing amendments in 2006).

736 As similarly argued in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, pp. 62-63.

visions set out in Latvian and Estonian CCPs<sup>737</sup>. The court practice to order permanent injunctions in IP infringement cases has been, however, modest in the Baltic jurisdictions<sup>738</sup>.

## b) Possibilities of preventive claims

Although they are not directly mentioned in Article 11 of the Enforcement Directive, but anticipated in view of its Article 9(1)(a), also Recital 24, as well as in view of Article 41 of the TRIPS Agreement<sup>739</sup>, injunctions to prevent from carrying out acts because of which the rights may be actually infringed or damage may be actually caused in the future can be ordered by the courts. A so-called *preventive claim* refers to infringing activities that, in case of a real threat, can occur in the future. Hence, it has to be distinguished from an injunction regarding discontinuation of infringing activities that actually occurred<sup>740</sup>.

Before the implementation of the Directive in Lithuania the national legislation on IP rights already established a right to ask the court to adopt a decision to prevent from carrying out acts because of which the rights may be actually infringed or damage may be actually caused<sup>741</sup>. Such substantive civil remedy was not specifically provided before the amendments to the Copyright Law in 2003, also in the laws on industrial property. Preventive claim could be, on the other hand, submitted on the basis of Articles 1.138 and 6.255 of the Civil Code. The same provisions of the Civil Code and the amended specific provisions in the national IP laws can be currently applied in case of submission of preventive claims to the courts<sup>742</sup>. According

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737 Art. 250(17) of the Latvian CCP covers permanent injunctions in IP cases.

738 E.g., there were 12 requests submitted to apply injunctions in IP cases (9 requests were met), whereas in 2005 there were 6 of such requests (5 were met), as reported by Vilnius District Court 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)*. Note: it is not indicated if the requests concerned preliminary or permanent injunctions.

739 See also interpretation of the content of Art. 41 of TRIPS in *Correa*, A Commentary on the TRIPS Agreement, p. 411.

740 In Estonia, for instance, the Supreme Court in its Decision No. 3-2-1-167-04 concluded that it was not possible to claim to stop abstract copyright infringement in the future, the claim to stop future actions had to be concrete, as pursued by the Law of Obligations Act, Art. 1055. However, the lower instance courts used to argue that a preventive injunction could derive from the content of the claim, considering that the plaintiff sought for a continuous protection of his registered rights, as follows from Tartu Circuit Court, Civil Case No. 2-2-188/2003, Decision of 10 December 2003, *AS Flora Liit vs. AS Flora*. In Latvia, following the formulation of Art. 250(17) of the CCP (on permanent injunctions), a preventive claim can be submitted.

741 Art. 77(1)(3), the 2003 Lithuanian Copyright Law.

742 Notably, the statute of limitations is not applicable while submitting a preventive claim because they are based on still continuing activities. The general 3-years statute of limitations is applicable to claims regarding damage incurred due to infringements of IP rights, except claims regarding infringements of personal non-pecuniary rights, as follows from Arts. 1.125(8), 1.134(1) of the Lithuanian Civil Code.

to the general formulation embodied in Article 6.255 of the Lithuanian Civil Code, the aim of a preventive claim is to prevent from any potential damages that may occur in the future. Considering such aim, preventive claims are based on the following conditions.

*First*, there should be a real threat of infringing activities. Importantly, a threat of possible infringing activities cannot be presumed and should be substantially proved by the plaintiff. The national legislation does not provide any guidance what a real threat specifically means and what evidentiary means can be provided to prove it. Thus, it is left for the court's discretion to decide. The references can be made, though, to the court practice of other countries. In Germany a threat which is a basis to submit a preventive claim can be proved by referring to the infringement which has been already committed by the same defendant, also to the nature of activities of the defendant, e.g. publishing activities by using software, pharmaceutical-related activities using patented products. In Austria, for instance, the defendant's involvement in other infringing activities, which can be related to IP infringements counts as well, e.g. the defendant is involved in illegal distribution of certain movies, thus there is a threat that such activities can cover distribution of other copyrightable material as well<sup>743</sup>, etc.

*Second*, similarly to application of measures for preserving evidence and procedural provisional measures the fact of infringing activities matters. The obligation to prove a defendant's fault is not required by the applicable laws<sup>744</sup>. However, as argued<sup>745</sup>, the defendant's rights, also public order are to be carefully considered by applying a principle of proportionality, i.e. by considering the nature of defendant's activities and other circumstances of the case.

### 3. Injunctions against intermediaries

Articles 9(1)(a) and 11 of the Enforcement Directive contain one more very important provision. Both embody a possibility for the national courts to order interlocutory injunctions as well as permanent injunctions against intermediaries<sup>746</sup>. Importantly, permanent injunctions against intermediaries are to be applied without prejudice to Article 8(3) of the Copyright Directive<sup>747</sup>. In view of widespread use of internet services, the growth of IT services and, at the same time, the increasing number of IP rights infringing content on the Internet, which is not an exception for the Baltic countries as well<sup>748</sup>, the implementation of the provision on injunctions against in-

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743 As provided in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 254-256.

744 See *Commentary of Civil Code of Lithuania*, pp. 355-356.

745 See *Mizaras*, Civil Remedies for Infringement of Copyright, p. 256.

746 The term "intermediaries" can be described as operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services (ISPs), etc., as follows from *ECJ*, Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U. (2008)*, para 34.

747 See also *refs. in supra* § 5C.II.1.a).

748 See overview on IP piracy level and forms in the Baltic countries in *supra* § 4A.II.

intermediaries is important. Considering a preventive role of injunctions, intermediaries, be they local or foreign companies, are to be aware of such regulation and to take all precautionary measures to control, to the most possible extent and technical and (or) administrative possibilities, the content of services which are being provided by them and used by third parties.

Injunctions against intermediaries have been already embodied in the prior-to-implementation Lithuanian Copyright Law by transposing the provisions set out in the Copyright Directive in 2003. The national provisions on injunctions were, however, omitted in Lithuanian laws on industrial property which were respectively amended in 2006<sup>749</sup>. Article 78(1) of the current Lithuanian Copyright Law sets out that owners of copyright, related rights and *sui generis* rights shall have the right to apply for an injunction against an intermediary, with the aim of prohibiting him from rendering services in a network to third parties who make use of these services infringing their rights. The same provisions are embodied in Lithuanian industrial property laws<sup>750</sup>. The implementing Latvian and Estonian legislation also constitutes a right to request an injunction against intermediaries<sup>751</sup>.

In Lithuania the courts can order three types of injunctions against intermediaries which provide services to third parties who infringe IP rights: (1) suspension of a transmission of information related to the infringement of the rights, (2) elimination of such information, if an intermediary has technical means to carry this out, or (3) removal of the access to information infringing the rights, as provided in the national IP laws.

Injunctions can be ordered on the basis of a request of an interested party which, by applying to the court, is required to provide any information that an intermediary's networks, websites, servers contains infringing content. By analysing the national legislation on injunctions against intermediaries, it can be observed that practical application of such injunctions can be complicated for a couple of reasons, though. *First*, difficulties to collect *reasonably available evidence* about the alleged infringing content online can be anticipated. As the information in intermediaries' networks, websites or servers can be very temporary, the right holders are to maintain certain system to regularly control it and collect evidence which for many right holders can be time-consuming exercise that is not directly related to their primary activities. It is presumed that applications to order injunctions to intermediaries can mainly follow the fact when IP right holders detect a substantial amount of evidence about infringing content online, collect (actually, print in hard copies) evidence re-

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749 See *refs.* to the implementing legislative acts in supra § 5B.I.1.c).

750 Art. 41(4) of the Patent Law, Art. 50(4) of the Trademark Law, and Art. 47(4) of the Design Law of Lithuania.

751 Art. 250(10)(3)(3) of the Latvian CCP (provisional injunction) and Art. 250(17)(3)(3) of the CCP (permanent injunction); also Art. 69(1)(7) of the Latvian Copyright Law provides for the right to request intermediaries to cease providing services to third parties who infringe the relevant IP rights. If such request is not complied with, the claimant may bring an action against the intermediary. In Estonia, however, the law does not *expressis verbis* contain such provision, but the court may take any measure considered necessary by the court to secure an action, as provided in the Estonian CCP.

garding such content and promptly submit a request for an injunction, be it interlocutory or permanent. *Second*, as the national court practice on the issue is more than modest, it is difficult to anticipate how the local courts would examine the information about the alleged infringements which is provided in a form of, for instance, printed emails or lists regarding P2P files, or any other infringing content downloaded on ftp servers. The issue regarding solidity of such evidence can be yet raised by the courts.

Last but not least, injunctions are to be generally seen in the concept of liability of intermediaries in cases of infringing content online downloaded by third parties. By virtue of the Directive on E-Commerce<sup>752</sup>, intermediaries are not generally liable for IP infringements online, except the cases when they: (a) initiate the transmission; (b) select the receiver of the transmission; (c) select or modify the information contained in the transmission; or (d) they are aware about the infringing content on their websites, networks or servers, including infringing copies or references. Thus, intermediaries' liability is based on their fault (intent or gross negligence) which is required to be proved in order that damages can be awarded. On the other hand, although the general obligation to monitor the content online is not established<sup>753</sup>, intermediaries can be requested to control the content by the interested parties (IP right holders) and inform them accordingly<sup>754</sup>. Although there are no specific provisions which establish such duty in the national legislation as well, the requests from IP right holders may be considered while assessing the evidence regarding IP rights infringements and ordering injunctions against intermediaries by the courts in view of requirements to observe personal data protection and confidentiality of information<sup>755</sup>.

#### 4. Assurance of compliance with permanent injunctions

Another aspect which is to be mentioned in view of the implementation of Article 11 of the Enforcement Directive is imposition of penalty payments for non-compliance with an injunction ordered by the court. Considered as an effective security mean, such requirement can, but must not be embodied in the national legislation. By virtue of Article 77(2) of the Lithuanian Copyright Law:

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752 Namely, Articles 12-15 of the E-Commerce Directive.

753 See *ECJ*, Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) vs. Telefónica de España S.A.U. (2008)*, paras 50-71; also previous discussion regarding provision of information by the intermediaries in supra § 5D.II.2.

754 Such mutual cooperation, for instance, was established in the Memorandum of Understanding signed by the IT companies and IP right holder associations in Lithuania in 2003, see also corresponding *refs.* in supra § 4A.II. It can be also agreed with the opinion that notice and take-down procedures should be taken as a ground to release host providers from liability, except cases of intent or gross negligence, as expressed in *Osthaus*, *Fighting Piracy and Counterfeiting in the Light of European Principles of eCommerce*, pp. 646-647.

755 See also observations regarding consideration of personal data protection and protection of confidential information in supra § 5D.II.1.

“Seeking to ensure the enforcement of an injunction to continue the unlawful acts, as well as an injunction to prevent any acts because of which the rights may be actually infringed or damage may be actually caused <...>, the court may, at the request of the persons who are entitled to make such demands, obligate an infringer to lodge adequate assurance intended to ensure compensation for any possible damage.”<sup>756</sup>

Thus, instead of requirement to pay penalty in case of non-compliance with the court’s injunction, as formulated in Article 11 of the Enforcement Directive, the lodging of assurance for damage compensation to right holders is provided in the Lithuanian laws. It can be agreed with the opinion<sup>757</sup> that such assurance for compensation is more effective in view of the aims of the Directive for the following reasons. *First*, it allows having more forms of the adequate assurance to compensate possible damages (e.g., it can be mortgage, real estate bonds, bank deposit instead of lump-sum payment). *Second*, it provides for more security for right holders and it is more preventive because infringers’ economic interests can be more tightened by such requirement than by a just lump-sum payment. It should be also noted that practically payment of penalty is not eliminated. As follows from Article 771(5) of the Lithuanian CCP, which establishes general liability rules for debtors for their non-compliant activities or inaction, it is likewise possible to impose penalty. It means, in turn, that by ordering injunctions the courts can alternatively choose which form of assurance to request in order the interests of right holders are secured in the case at hand.

## II. Concluding remarks

The implementing national legislation of the Baltic countries demonstrates a full scale legislative implementation regarding provisional and precautionary measures in view of Article 9 of the Directive and injunctions in view of Article 11 of the Directive, especially, concerning injunction against intermediaries. Although the case practice on application of the listed measures in IP infringement cases is still under development, some important aspects for the upcoming practice are to be mentioned.

It can be observed, *first*, that the national legislators, namely, the Lithuanian legislator went beyond the minimal standard which is established in the Enforcement Directive in some cases. This namely refers to: (i) non-requirement to establish “commercial scale” in allegedly infringing activities in order to apply orders (as far as provisional measures are concerned) to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information from alleged infringers, also (ii) lower standard for evidence to be provided to the court while asking to order an interlocutory injunction, i.e. *sufficient grounds to suspect* that an infringement of IP rights in question has been committed, instead of *suffi-*

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756 The identical provisions are embodied in the Lithuanian industrial property laws.

757 As explained in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, p. 64.



*cient degree of certainty*, as set out in Article 9 of the Directive. Moreover, more favourable solutions are provided by the Lithuanian legislator in terms of assurance of compliance with permanent injunctions, *i.e.* such assurance also covers also other forms, except of penalty payment.

Such implementing solutions can be considered as more favourable for IP right holders in view of Article 2(1) and aims and objectives of the Enforcement Directive, as long as the principle of proportionality is observed. Notably, the national courts are to carefully examine individual circumstances of each case, *i.e.* the nature of an infringement, its character, which can also mean examining if commercial purposes were involved in the infringing activities. It is very important to stress that by imposing injunctions, also ordering other procedural provisional measures, the courts are able to distinguish between infringements committed on commercial scale and other infringements, as application of injunctions can have a serious effect on, for instance, business of the alleged infringer, etc. It is especially relevant while talking about injunctions against intermediaries which can be anticipated in the upcoming judicial practice in the Baltic countries.

## ***F. Damages, legal costs and other enforcement measures***

### ***I. Adjudication of damages in IP rights infringement cases in view of Article 13 of the Directive***

#### **1. Actual damages and alternative methods to calculate damages: dilemma in the national IP infringement cases**

Before starting to examine the current implementing provisions on reimbursement of actual damages as well as alternative methods to calculate them and national court practice, especially focusing on the Lithuanian practice on the issue, it can be generally mentioned that in the Soviet legal doctrine the general rule regarding reimbursement of damages existed: damages were to be reimbursed either by paying in kind or by recovering losses in full<sup>758</sup>. No alternative methods to compute damages, which would be specific to copyright or industrial property rights cases, were established.

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758 Such principle has been established in Art. 496 (as amended in 1994) of the Soviet Civil Code of 7 July 1964 (valid until 1 January 2001 in Lithuania). The same was applicable to Latvia and Estonia; see also *Dietz et al.*, *Urheberrecht in Mittel- und Osteuropa*. Teil II, pp. 18, 76, see also *refs.* to the legislative acts applicable to IPRs during the Soviet Union in *supra* § 3B.II.1.

a) General remarks regarding compensation of damages

Harmonizing provisions regarding calculation of damages, as embodied in Article 13 of the Enforcement Directive by supplementing Article 45 of the TRIPS Agreement, are considered as one of the key aspects in the field of harmonization of enforcement of IP rights. The formulation of the very article<sup>759</sup> refers to the well-established notion that the aim of reimbursement of damages is to compensate harm suffered by a right holder due to his rights infringement which is frequently difficult to assess due to immaterial character of the subject-matter of IP rights. It also stipulates that in order to adjudicate damages in IP infringement cases, the cumulative conditions for civil legal liability are to be fulfilled.

The named article specifically points out the fault of infringer (“*knowingly, or with reasonable grounds to know*”) and covers two methods to calculate damages in IP infringement cases: (i) *compensatory damages* and (ii) so-called “*licence analogy*”. As follows from the formulation of Article 13 of the Enforcement Directive, both alternative methods should be implemented in the national laws.

The prior-to-implementation national provisions regarding methods to calculate damages which were suffered due to IP rights infringements generally differed in the European countries. While drafting provisions on damages in the Directive, it was intended to compile arguably best practices on calculation of damages which existed in some countries<sup>760</sup>. Following comments regarding the initial draft proposal<sup>761</sup>, the final formulation of Article 13 reflects the possibility for the national courts to choose between two alternatives: either to set actual damages (including lost profits, unfair profits gained by the infringer, also moral prejudice caused to right holders) or to set damages as a lump sum (on the basis of *at least* the amount of royalties to be paid for an authorization to use IP right in question).

Article 13 of the Enforcement Directive has been fully implemented in the Lithuanian legislation. The implementing national IP laws in Lithuania provide for three methods to compensate damage in IP infringement cases:

- Reimbursement of actual damages, including the possibility to request for infringer’s gained profits which can be considered as losses<sup>762</sup>; or
- Compensation instead of damages (losses)<sup>763</sup>; or

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759 See previous discussion on Art. 13 of the Directive in supra § 5A.II.1.e).

760 Before the adoption of the Directive, the calculation of damages was based on either actual losses suffered, or infringer’s profits, or payment of royalties which would have been due if the infringer had requested authorization to use the right, as listed in *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 14; also referred in *Mizaras, Compensation as a Civil Remedy for Protection of Authors’ Rights*, p. 138.

761 See *Fourtoun Report (2003)*, pp. 18-19.

762 Arts. 77(1)(6), 83(2) and (3) of the Lithuanian Copyright Law; also Arts. 41(1)(4), 41(5)(2) and (3) of the Patent Law; Arts. 50(1)(4), 51(2) and (3) of the Trademark Law; and Arts. 47(1)(4), 48(2) and (3) of the Design Law of Lithuania.

763 Arts. 77(1)(7), 83(4)(1), the Lithuanian Copyright Law.

- Royalties or fees which would have been due if the infringer had requested authorisation to use the works or other objects of the protected rights under national IP rights (license analogy)<sup>764</sup>.

Thus, Lithuanian Copyright Law provides for ternary mechanism to compensate damages: compensation for actual damages as well as two alternative methods to compute damages<sup>765</sup>. The Lithuanian laws on industrial property, however, omit provisions regarding compensation instead of damages as alternative method. The method of calculation of damages in a specific IP infringement case can be alternatively chosen by a right holder, *i.e.* a plaintiff cannot use a combination of the assessment methods, but rather choose one way of calculating damages<sup>766</sup>. Notably, actual damages and compensation instead of damages have been already embodied prior to the implementation of the Directive<sup>767</sup>. License analogy, however, is a new institute in the national IP laws of Lithuania.

The national legislation of other two Baltic countries – Latvia and Estonia – establishes compensation for damage (actual damage) to be paid by the infringers. Following the Estonian Copyright Law, also laws on industrial property, the courts could impose a compensation for economic and moral damage caused through the infringements of IP rights which is, *inter alia*, to be assessed to the rules as established in the Law of Obligations Act<sup>768</sup>. The Estonian Trade Marks Law, for example, namely provides for compensation for economic damage caused intentionally or due to negligence, including loss of profit and moral damage. The almost identical provisions are constituted in the Latvian Copyright Law which provides that compensation of losses, including lost profits, or compensation pursuant to the discretion of the courts could be adjudicated. And, similarly to Estonian provisions, the Latvian laws on industrial property rights embody the reimbursement of damages<sup>769</sup>.

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764 Art. 83(4)(2), the Lithuanian Copyright Law; also Art. 41(5)(4) of the Patent Law, Art. 51(4) of the Trademark Law, and Art. 48(4) of the Design Law.

765 The alternative methods to compensate damages are provided in the laws of other countries such as Germany, Austria, Switzerland, US, France, as referred in *Mizaras*, Copyright Law (Vol. II), p. 328.

766 Right holders' discretion to choose, alternatively, adjudication of actual damage or compensation for damages has been applied by the national courts before the implementation of the Directive, see, *e.g.* Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB "VTeX" vs. UAB "Fima"*. Such practice also reflects German practice on the issue, as observed in *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15.

767 See *refs.* to prior-to-implementation of the Directive national provisions on damages and the implementing amendments in supra § 5B.I.1.

768 Art. 81 of the Copyright Law; Art. 53(1)(1) of the Patent Law; Art. 84(1) of the Industrial Design Law; and Art. 57(1)(2) of the Trade Marks Law; also Art. 1043 of the Law of Obligations Act of Estonia.

769 Art. 69(1)(4) of the Copyright Law; Art. 45(4)(3) of the Latvian Patent Law, Art. 28(4)(2) of the Latvian Trademark Law, and Art. 48(1)(1) of the Latvian Industrial Design Law.

Similarly to the Lithuanian legislation, actual damage includes loss of profit under Estonian and Latvian legislation<sup>770</sup>.

b) Actual damages (losses)

(1) Civil legal liability conditions

As previously referred, the prior-to-implementation national provisions on compensatory damages in Lithuania already covered specific regulation regarding computation of actual damages. The implementing provisions on the issue did not stipulate any new distinctive changes in terms of the elements that are to be considered while estimating economic negative consequences faced by the right holders due to their IP rights infringement in order to adjudicate actual damages. The current provisions on damages in the national IP laws which are to be applied together with the corresponding provisions set out in the Lithuanian Civil Code<sup>771</sup> identically provide that:

“When appraising the amount of damage (losses) actually caused by the infringement of the rights <...>, the court shall take into account the substance of the infringement, the amount of the inflicted damage, lost profits as well as other expenses suffered by the right holders, other circumstances.”

Thus, material damage is to be calculated by applying general civil principles to prove damage which was suffered by a right holder<sup>772</sup>. All general conditions of civil liability against civil delicts<sup>773</sup> which are embodied in Articles 6.246 – 6.249 of the Lithuanian Civil Code are to be fulfilled: (1) illegal activities or inaction, (2) fault (intentional illegal activities or inaction or negligence), (3) damage (negative consequences that occurred due to illegal activities or inaction), (4) causality between illegal activities or inaction and damage suffered<sup>774</sup>.

As follows from the national court practice regarding IP rights infringements cases in Lithuania, the cumulative conditions for civil legal liability are usually examined in each case. The issue regarding fault (intent or negligence) is assessed on the basis of objective criteria, *i.e.* on the assessment of a person’s activities who acts according to objective reasonable standard of certain behaviour (*bonus pater familias*). By referring to illegal activities and inaction of a person, it is important to con-

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770 *E.g.*, Art. 57 of the Estonia Trademark Law stipulates that the proprietor of a trade mark may file an action against a person infringing the exclusive right for compensation for pecuniary damage caused intentionally or due to negligence, including loss of profit and moral damage (the same established in Art. 817 of the Copyright Law, Art. 53 of the Patent Law, Art. 50 of the Utility Models Law, Art. 84 of Industrial Design Law of Estonia).

771 Arts. 6.245-6.255 of the Lithuanian Civil Code which provides the definition of civil liability, its forms, conditions for civil liability, the definition of non-pecuniary damage, cases of exemption from civil liability, preventive claim, etc.

772 The same applies to alternative methods to calculate damages, *i.e.* compensation instead of damages (losses) and license analogy under the Lithuanian legislation.

773 Lithuania followed the French concept regarding civil delicts, as referred in *Mizaras*, Copyright Law (Vol. II), p. 302.

774 As also referred in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 84.

firm causality between them and damage suffered. As far as IP rights are concerned, such confirmation is not an easy task<sup>775</sup>. Given the national court practice on the issue, the important role has been additionally played by the Lithuanian Supreme Court which in 2002 adopted a landmark consultation by stating that:

“Infringement of copyright or related rights practically always means damage suffered *ex facto* because, due to every illegal use of a work, a right holder loses profits, his (her) reputation, also his (her) name can be diminished, and the infringer gains the profits due to the fact that he (she) does not pay an approved royalty fee to the right holders for using his (her) rights.”<sup>776</sup>

In the referred consultation the Supreme Court, *inter alia*, interpreted the issue of a price of a legal sale on the basis of which the compensation instead damages had to be assessed<sup>777</sup>. The consultation which, as a matter of fact, was to be followed by the lower national courts<sup>778</sup>, helped the right holders as well as the national courts to overcome certain substantiation issues which were related to material damage suffered due to infringement of IP rights. The consultation also stressed a causality aspect between illegal activities (or inaction) and damage in the civil proceedings<sup>779</sup>.

Last but not least important aspect related to calculation of actual material damage is fault of the infringer: *intent or negligence*. Similarly to the formulation set out in Article 13 of the Enforcement Directive, also in view of Recital 29 thereof, which stresses out the difference between intentional and negligent infringements, the implementing national legislation as well as the prior-to-implementation legislation on IP rights of the Baltic countries made the same differentiation. Article 83(2) of the Lithuanian Copyright Law briefly refers to “*substance of the infringement*” as the element that should be estimated and is very important while calculating material damage in copyright infringement cases. The identical provisions are embodied in the Lithuanian industrial property laws. In order to estimate this ‘substance’, a reference to Article 6.248(2) of the Lithuanian Civil Code should be made which stipulates specific provisions regarding fault of an infringer.

Importantly, according to Article 6.248(1) of the Lithuanian Civil Code, despite its type (intent or negligence), *an infringer’s fault is presumed, i.e.* an infringer is obliged to prove his innocence. Such presumption is well-established in the Lithuanian legal doctrine and court practice regarding infringements of IP rights. Moreover, following the doctrine of general delict, a presumption of an infringer’s fault covers a presumption of illegal activities<sup>780</sup>. In comparison, there is no such pre-

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775 See *Mizaras*, Copyright Law (Vol. II), pp. 306-307.

776 See *Supreme Court of Lithuania, Consultation No. A3-64/2002*.

777 See further discussion in *infra* § 5F.I.1.c)(2).

778 See overview regarding the role of the Lithuanian Supreme Court and effect of its consultations in *supra* § 3C.IV.1.b).

779 Although the Supreme Court consultation was related to the application of the provisions of the Lithuanian Copyright Law (wording as of 2003), it could be presumably considered in cases of trademark and design infringements, as the compensation institute has been embodied in the prior-to-implementation Lithuanian Trademark Law and Design Law.

780 See *Mizaras*, Copyright Law (Vol. II), p. 304. This had been explicitly confirmed in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

sumption in Germany or Switzerland, also France where fault of the infringer (a defendant) should be proved by the plaintiff<sup>781</sup>. As referred by some scholars, the presumption of the infringer's fault, which notion was intercepted from the French legal doctrine, especially when intentional activities are concerned, can also be valued critically and can be renounced in delict cases in Lithuania<sup>782</sup>. On the other hand, from the practical point of view, the presumption is significant and helpful for IP right holders (plaintiffs) in the civil proceedings as it facilitates a substantiation process.

The national court practice in Lithuania shows that almost in all cases the right holders argue for intentional activities or inaction of the infringers. As far as software copyright infringements are concerned, it is frequently argued that software cannot be reproduced without knowing, *i.e.* reproduction activities involve conscious understanding about activities being committed<sup>783</sup>. On the other hand, national courts intend to consider other circumstances, for instance, such as types of works which have been reproduced that can show unintentional character of illegal activities of the infringer. It is also argued that, as a matter of fact, in most of the cases of copyright infringements the infringers act negligently (on the basis of mere or big negligence). At the same time, it is referred that in those cases there should be more requirements for negligence to be stated in copyright infringement cases, for instance, a mistake or ignorance of the protection of IP rights, or wrong legal advice do not justify illegal activities or inaction of an infringer<sup>784</sup>.

## (2) Reimbursement of direct material damages

As argued, in view of the Baltic case practise reimbursement of direct material damages plays a quite modest role in the field of IP rights<sup>785</sup>. It is due to, *inter alia*, specificity and character of IP rights, various ways to distribute and use products with IP rights involved, hence, difficulties to estimate a concrete amount of damages suffered because of infringements of IP rights. Such factors can be well illustrated by analysing the current Lithuanian legislative formulation on the issue.

According to Article 6.249(1) of the Lithuanian Civil Code, direct damages mean loss of or injury made to property and expenses related to infringement of rights. Thus, in order to calculate damages, a value of property, namely a value of IP rights should be established, due to the notion that IP rights are a valuable asset. Although it can be difficult to assess the value of the infringed IP rights, certain criteria to calculate damages based on such value can be defined. It can be either (i) an objective value of IP rights or (ii) value of the material object in which IP rights are embodied.

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781 As referred in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 90, such presumption can be applied in cases of mere negligence in Austria, though.

782 See *Mizaras*, Copyright Law (Vol. II), p. 304.

783 As referred in Decision of 3 May 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-311/2006, *Microsoft Corp., Symantec Corp., BĮ UAB "VTeX" vs. UAB "Vilpostus"*.

784 See *Schricker (Hrsg.)*, Urheberrecht. Kommentar (2006), § 97 para 51; also *Mizaras*, Copyright Law (Vol. II), p. 305.

785 See *Mizaras*, Copyright Law (Vol. II), p. 307.

IP rights can be evaluated and, for instance, expressed in terms of money and accounted in account-books of companies. They are a taxable subject-matter and can be defined as an investment<sup>786</sup>, etc. Notably, a balance value of IP rights is usually their purchase value (*i.e.* price a user pays for an authorization to use an IP right in question).

Thus, while calculating damages in IP infringement cases, it is important to estimate the value which was prior to the infringement and after it, but, as it can be rightly assumed, such estimation is not easy to make. It is especially due to the fact that many of the infringements occur not by directly harming IP subject-matter, but when IP rights are used without authorization (license) from right holders which means that their possibilities to use their own works or other IP subject-matters are reduced. Reduction of such possibilities can be mostly assessed as loss of profits. The same estimation can be made when the subject-matter of IP rights is not yet in use as well, etc.<sup>787</sup>

Moreover, direct material damage can also occur when injury or loss is made to the material object in which IP right is embodied, for instance, when an original work of art, photography, an audiovisual work, design work or a patented invention is directly destroyed or harm is done thereto.

According to Article 6.249(1) of the Lithuanian Civil Code, direct material damage also covers expenses related to IP rights infringement. Such expenses can encompass expenses regarding establishment of an infringement (for collecting information, providing some control measures, etc.), especially when an infringement concerns rights administrated by the collecting societies. They can also involve pre-procedural expenses regarding elimination of negative consequences, for instance, those regarding reimbursement of damages without civil proceedings, as well as all other expenses regarding an infringement, for instance, expenses related to preventive measures taken by an IP right holder, collection of evidence, phone conversations, written communication, etc.<sup>788</sup>

It has been also provided in the national laws that infringing copies of works or other objects of the protected rights may be handed over to the respective right holders, if so requested. It is presumed, therefore, that if the court applies the latter provision, this fact can be taken into account as “other important circumstance” while assessing an amount of material damage<sup>789</sup>.

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786 *E.g.*, Art. 2(1) of the Lithuanian Law on Investment of 7 July 1999 (last amended as from 2 November 2004).

787 See *Mizaras*, Copyright Law (Vol. II), pp. 322-323.

788 The practice to adjudicate such infringement-related expenses is also known in other countries, *e.g.* Germany, as referred in *Ibid*, p. 324.

789 See *Vileita*, Commentary of the Lithuanian Law of Copyright and Article 214(10) of the Administrative Code, p. 183.

### (3) Loss of profit

Loss of profit is generally considered as pecuniary profits which could have been gained if there were no infringing activities<sup>790</sup>. It is stipulated in Article 6.249(1) of the Lithuanian Civil Code that loss of income is income which a person would have gained if there were no illegal activities<sup>791</sup>. The Lithuanian Civil Code does not provide any specific criteria how loss of profit is to be estimated; though, such provision is embodied in the implementing Lithuanian Copyright Law, namely its Article 83(3) which covers objective and subjective factors that are to be examined while adjudicating loss of profit in IP infringement cases. The identical provisions are embodied in the industrial property legislation in Lithuania as well<sup>792</sup>.

The mentioned Article 83(3) of the Copyright Law stipulates that the amount of loss of profit shall be set taking into account the profits that would have been received when legally using works or other objects (taking into consideration royalties and fees which are normally paid for lawful use of such works or other objects, or royalties and fees which are paid for lawful use of similar works or other objects, or royalties and fees most suitable for the modes of use of a work or any other object), as well as taking into account concrete circumstances which might have created conditions to receive profits (works performed by owners of rights, used materials and implements, negotiations on conclusion of agreements pertaining to the use of a work, etc.). According to the Estonian legislation, it is possible to claim loss of profit, which, as practice shows, is calculated by taking into account loss of license fees that should have been paid<sup>793</sup>. Notably, loss of profit is considered a profit which is gained through legal activities only, *i.e.* if profit has been gained through activities that were not in compliance with, for instance, fair competition rules or public order, etc., they cannot be adjudicated.

Thus, the law stipulates that royalties and fees which are normally paid for lawful use of such works or other objects can be considered as *objective factor* to assess loss of profit. It can be proved on the basis of tariffs that are established for use of such works<sup>794</sup>, previous license agreements which have been signed between plaintiff and other third persons, or defendant and other third persons, also on the basis of royalty fees and any other written evidence regarding payment for an authorization

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790 Such description is established in the Lithuanian Civil Code, Art. 6.249(1). Loss of profit, as it is formulated in the Lithuanian IP legislation, is established in other jurisdictions such as Germany, Austria, as referred in *Mizaras*, Copyright Law (Vol. II), p. 317.

791 Note: the term “loss of income” instead of “loss of profit” is used in the Lithuanian legislation. Due to more common terminology in English on the subject-matter, the term “*loss of profit*” is used hereinafter.

792 See *refs.* to the provisions in the Lithuanian IP legislation on the subject-matter in *supra* Ft. 762 herein.

793 The Estonian courts have taken into account the plaintiff’s testimony regarding the ordinary licence fees in order to assess pecuniary damage (as loss of profit) caused to the plaintiff, as follows from, *e.g.*, Estonian Supreme Court Decision No 3-2-1-84-98 of 25 June 1998 regarding copyright infringement, *J.Einard vs. P.Laurits, H-E.Merila & AS Iguan*.

794 Such tariffs are established by the national collective administration societies; see *refs.* in *supra* § 3C.II.2.



to use the protectable subject-matter. It is also referred that circumstances of each individual case, *i.e.* any discounts that could have been offered by the right holder, profit only as a percentage from the royalty fee, should be considered (*subjective factor*). Most importantly, as follows from the legislative formulation regarding loss of profit, causality between infringing activities and IP right holder's loss of profit should be proved.

Loss of profit proving process, however, can be ineffective and, as the case practise regarding adjudication of right holders' loss of profit in IP infringement cases in Lithuania shows, it is rarely used<sup>795</sup>. The reference can be made, though, to some cases regarding infringements of other "grey area" rights such as personality rights<sup>796</sup> and a few cases regarding infringements of copyright<sup>797</sup>. The court decision in the latter case regarding copyright infringement did not, however, demonstrate a profound examination and calculation of loss of profit. It rather referred to the rule regarding burden of proof related to loss of profit, *i.e.* the defendant had to provide all relevant evidence in order to calculate its illegally gained profit<sup>798</sup>. The aspect of causality between the infringing activities and loss of profit (in particular case, the infringer's gained profits) has been briefly discussed.

Moreover, while formulating the provisions on pecuniary damage, the Lithuanian legislator also embodied that *profits made by the infringer* may, at the request of the right holders or their representatives, be recognised as losses. It can be argued that such formulation is not clear in terms of definition if an infringer's gained profit is a separate type of damages or one of the factors that should be considered in order to estimate loss of profits by the right holder. The similar confusion can be noticed by referring to the formulation of Article 13(1)(a) of the Enforcement Directive<sup>799</sup>. It can be agreed, though, that in order to adjudicate an infringer's gained profits all civil legal liability conditions are to be accordingly proved<sup>800</sup>. An infringer's gained profits can be likewise the basis to calculate loss of profit by the infringer by considering the compensatory aim of adjudication of damages, *i.e.* an infringer's gained profits deemed to be corresponding loss of profits by the right holder. In case an in-

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795 Different practice, for instance, has been established by the German court practice where account of profits is a frequent way of calculating damages, as observed in *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15. As it will be further examined, instead of calculation of loss of profit, alternative methods to calculate pecuniary damage such as compensation instead of damages has been used by the right holders in cases of infringements of IP rights in Lithuania.

796 The plaintiff's loss of profit, or, as referred by the court, the profit which was gained or could be gained by the defendant, was adjudicated for the infringement of the right to one's image, as seen in Decision of 15 March 2004, Lithuanian Supreme Court, Civil Case No.3K-3-197/2004, *L. Karalius vs. UAB "Ieva" et al.*

797 *E.g.*, Lithuanian Court of Appeal, Civil Case No. 2A-98/2007, *B.V.-F. vs. National M. K. Čiurlionis Art Museum, UAB "Fodio" and the Ministry of Culture of the Republic of Lithuania.*

798 Such procedural rule of burden proof was embodied in Art. 79(5) of the prior-to-implementation of the Directive Lithuanian Copyright Law (wording as of 2003).

799 See examination in *supra* § 5A.II.1.e).

800 About general civil legal liability conditions see more in *supra* § 5F.I.1.b)(1).

fringer's gained profits are higher than can be proved by the right holder, the rest of the gained profits can be proved on the basis of *unjustified enrichment*<sup>801</sup>.

(4) An infringer's gained profit; unjustified enrichment

By virtue of Article 83(5) of the implementing Lithuanian Copyright Law, as far as cases of negligence are concerned (where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity), the court may, at the request of the right holder in question order the recovery of profits. The laws also embody references how those profits can be calculated. Such references can be also taken into consideration while calculating profits gained by the infringer in general. It is said that:

“The profits of the infringer shall be considered to be all that the infringer saved and (or) received by infringing the protected rights <...>. The profits of the infringer shall be determined and recovered regardless of the fact whether or not the owner of the rights himself would have gained the similar profits. When determining the profits of the infringer, the owner of the rights must present only the evidence, which would confirm the gross earnings received by the infringer; the amount of the net earnings (earning after the deduction of expenses) must be proved by the infringer himself.”<sup>802</sup>

Therefore, as far as the Lithuanian legislation is concerned, a claim for infringer's gained profits can be based on either (i) civil legal liability rules (which are in compliance with the provision embodied in Article 13(1)(a) of the Enforcement Directive), or (ii) *unjustified enrichment* rules (which reflect the provision set out in Article 13(2) of the Enforcement Directive). By virtue of the implementing legislation in Lithuania, in both cases (civil legal liability or unjustified enrichment), the following principles to adjudicate an infringer's gained profit are to be observed<sup>803</sup>: (i) only actual (not hypothetical) profit, (ii) net profit (after deduction of non-infringement related expenses), (iii) profit gained only because of infringing activities or inaction (profit gained due to other activities which are not related to IP rights infringing activities are to be deducted) can be adjudicated. As it can be observed, the right holder is to prove gross earnings; net earnings are to be proved by the infringer which allows facilitating a substantiation process in civil proceedings.

Provisions regarding unjustified enrichment were embodied prior to the implementing amendments in 2006 in Lithuania, *i.e.* an infringer's gained profits could be adjudicated even if there was no infringer's fault involved in the infringing activities by calculating the gained profit despite the fact that such profit could have been gained by the right holder or not. These two aspects separated unjustified enrich-

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801 As it is laid down in Art. 6.242 of the Lithuanian Civil Code.

802 The provision is established in Art. 83(5) of the Lithuanian Copyright Law; also Art. 41(5)(5) of the Patent Law; Art. 51(5) of the Trademark Law; and Art. 48(5) of the Design Law.

803 Such principles are, *inter alia*, formulated by considering and comparing the practice of other countries such as Germany, Switzerland, Austria, as referred in *Mizaras*, Copyright Law (Vol. II), pp. 376-378.

ment from civil legal liability<sup>804</sup>. Instead, the conditions to claim an infringer's gained profit on the basis of unjustified enrichment are to be fulfilled: (i) enrichment should occur without any legal ground, (ii) a fact of enrichment is to be established, (iii) enrichment should occur at the expense of other person, (iv) enrichment can be only a subsidiary form of adjudicating loss of profit or infringer's gained profits when it is not possible to prove infringer's fault and causality between infringing activities and an infringer's gained profits<sup>805</sup>.

#### (5) Pre-established damages

The Lithuanian legislator, however, did not opt for pre-established damages, as it is alternatively formulated in Article 13(2) of the Directive<sup>806</sup>. Such decision was mainly due to the fact that the prior-to-implementation IP laws already provided for alternative methods to compute damages such as compensation<sup>807</sup>. By assessing the amount of this compensation, the courts had to consider if the infringer acted intentionally or not knowing or without reasonable grounds to know, thus, such alternative has been already stipulated in the provisions. It can be further interpreted that the implementing provisions on computation of damages, also license analogy (as they are formulated in the current Lithuanian IP legislation) are sufficient in order to estimate infringer's fault and, according to such estimation, to adjudicate appropriate damages in IP infringement case in question.

c) Alternative methods to compute damages: is fair and adequate estimation possible?

#### (1) General grounds for alternative methods to compensate damages

In view of Article 45(1) and (2) of the TRIPS Agreement<sup>808</sup>, the necessity to have alternative methods for damage calculation in IP infringement cases can be already depicted by examining the harmonized provisions on damages in the Enforcement Directive and by analysing the implementing legislation on IP rights in the Baltic

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804 From the procedural point of view, 3 years of statute of limitations is applied for claims regarding civil liability and damages, whereas 10 years of statute of limitations is applied to claim regarding unjustified enrichment (Art. 1.125, the Lithuanian Civil Code).

805 See *Mizaras*, Copyright Law (Vol. II), pp. 355-360.

806 See previous discussion in *supra* § 5A.II.1.e).

807 See *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, pp. 55-56.

808 As stipulated in TRIPS, Art. 45(1) and (2), the national courts shall order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity. They can also order the infringer to pay the right holder expenses, which may include appropriate attorney's fees, and, in appropriate cases, they can order, as provided in the national laws, recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

countries<sup>809</sup>. The origin of alternative methods to calculate damages is generally based on the following reasons.

*First*, it is frequently argued that traditional ways to calculate pecuniary damages are ineffective in cases of IP rights infringements mainly due to difficult assessment of the amount of damages and its substantiation process, as it has been referred by analysing the implementing national legislation on adjudication of actual damages<sup>810</sup>. Alternative methods to calculate damages are only methods to which all civil legal liability conditions are applied, *i.e.* the legal basis is the same as for actual damages (losses).

*Second*, alternative methods to compensate damages can be applied only when actual damage occurred, by referring that it is difficult to assess exact amount of such damage.

*Third*, requesting for alternative methods to calculate damage is a right holder's right, not an obligation. Importantly, as follows from the further analysed Lithuanian court practise, right holders are not obliged to justify why they have chosen to request compensation instead of reimbursement of actual damages. It is to be noted, however, that such choice is deemed to be alternative, *i.e.* in case a right holder has chosen compensation or license analogy, request for actual damage could not be met. This rule is also observed in other countries, for instance, Germany<sup>811</sup>.

*Fourth*, alternative methods to calculate damages play a preventive role, *i.e.* they are aimed not only to compensate damage, but also to eliminate all negative consequences which occurred due to IP rights infringements and prevent from them in the future. Although such role can be criticised as reflecting the notion of punitive damages, the preventive aspect is relevant for the Baltic countries where IP mentality is still under formation and IP piracy level is relatively high<sup>812</sup>.

As follows from the formulation of Article 13(1) of the Enforcement Directive, the Member States had to implement alternative method to compensate damages as a lump sum which should be at least as amount of royalties or fees which the infringer would have paid for authorization to use the IP right in question. As already mentioned, Lithuania has fully implemented Article 13(1). The national IP legislation and CCPs of Latvia and Estonia do not contain license analogy method, at least not *expressis verbis*. Pursuant to Art. 69<sup>1</sup> of the Latvian Copyright Law, for instance, if it is impossible to determine the damages caused by the copyright infringement, the relevant compensation to the claimant shall be equal to the sum that the claimant would have received as royalties for granting permission to use the work. According

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809 The grounds for alternative methods to compensate damages have been duly formulated in *Mizaras*, Copyright Law (Vol. II), pp. 325-327, by also considering the practice of other European countries, especially Germany, Austria, which legislation embodies such alternatives.

810 See previous discussion on adjudication of actual damages in supra § 5F.I.1.b).

811 See *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15.

812 See overview in supra § 4A.II.

to the Estonian IP laws, it is possible to claim loss of profit which, in practice, is calculated on the basis of loss of license fees that should have been paid.

The Lithuanian legislation, however, went further: license analogy as set out in Article 13(1)(b) has been implemented in 2006, but also a legal institute of prior-to-Directive compensation instead of actual damages (losses) has been left. Compensation instead of actual damages (losses) has been widely applied in the Lithuanian case practise (namely, case practise regarding copyright infringement cases) prior to implementation of the Enforcement Directive. In Lithuania the compensation institute, as in other very minor number of European countries<sup>813</sup>, has been transposed from the US copyright concept of *statutory damages*. However, as further analysed, it did not exactly reflect this concept<sup>814</sup>. The Lithuanian case practise regarding the mentioned institute of compensation instead of actual damages and the new implementing provisions regarding license analogy are further examined.

## (2) Compensation instead of actual damages (losses)

As previously referred, the institute of compensation instead of actual damages (losses)<sup>815</sup> was embodied in the Lithuanian Copyright Law on the basis of the US copyright law concept of *statutory damages*<sup>816</sup>. It has been applied in the national court practice regarding infringements of IP rights before the adoption of the Enforcement Directive. Compensation has been first embodied in the 1996 Law on Computer Programs and Databases, then in the 1999 Copyright Law, also in the prior-to-implementation Trademark and Design Laws<sup>817</sup>. According to the primary legislative formulation in the Copyright Law, namely its Article 67(3), which was identical to the provisions in the prior-to-implementation Trademark and Design Laws (with the implementing amendments the provisions regarding compensation in the latter laws were removed), compensation was to be calculated on the basis of *a price of a legal sale* of the product (item) or service:

“Instead of the reimbursement of losses, the owner of copyright or related rights may claim compensation, the amount of which shall be determined according to the price of legal sale of

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813 Although strongly criticised for being an alien concept to the continental legal doctrine, as seen in *Starzeneckij*, About Nature of Compensation for Infringements of Exclusive Rights, pp. 138-139, compensation for damages (losses) institute is also established, for instance, in the Civil Code of the Russian Federation, Art. 1301. It is set forth that a compensation in the amount of from 10,000 to 5 Million Rouble can be adjudicated upon the discretion of the court, or it can be computed as a double amount of the price to be paid, in similar circumstances of legal use, for legal item of a work or a double amount of value of rights to use a work, see *Kastalskij*, Main Novelties in Chapter Four of the Civil Code of the Russian Federation. See additional *refs.* in *supra* Ft. 419 herein.

814 As described in *Mizaras*, Compensation as a Civil Remedy for Protection of Authors' Rights, pp. 138-139.

815 Hereinafter – “*compensation*”.

816 See US Copyright Act, Art. 504(c) on statutory damages.

817 See *refs.* to the prior-to-implementation of the Directive national provisions on damages in supra § 5B.I.1.a)(1).

an appropriate work or object of related rights, by increasing it up to 200 per cent, or up to 300 per cent if the infringer has committed the infringement deliberately.”

Before the adoption of the Directive and further amendments to the national laws the case practise in IP infringement cases illustrated that the national courts tended to adjudicate compensation by calculating a price of a legal sale of each product (item) or service<sup>818</sup> as claimed by IP right holders<sup>819</sup>. The main discussion on the judicial level, though, was focused on the definition of “a price of a legal sale”.

In 2002 the Lithuanian Supreme Court rendered a consultation and concluded that “a price of a legal sale is a retail price of a product, i.e. a final price of a product, including all taxes”<sup>820</sup>. Such interpretation was very much criticized by the local scholars, also the practitioners. The critics not only referred to the US concept of statutory damages which was interpreted and applied differently there (notably, statutory damages are calculated on the basis of a number of infringing activities instead of a number of infringing items in the US), but also to the over-preventive aspect of the Lithuanian model of compensation which seemed to go beyond its compensatory aim<sup>821</sup>.

As far as the court practise regarding compensation based on a price of a legal sale was concerned, it could be observed that the most frequent plaintiffs who had claimed compensation were rich foreign companies which requested double or triple compensation amounts. On the one hand, the provision allowed such plaintiffs to pursue their rights and protect them in a speedier way without a substantiation of actual damage caused. Such practise tends to demonstrate a possible enrichment by the plaintiffs, as frequently argued by the defendants, because a retail price of the IP product in question (e.g. computer program) did not necessarily reflect an actual price of the product and covered also a fee fixed by distributors, also VAT which is paid to the state, and not to the right holder<sup>822</sup>.

Despite the fact that the national courts sought to apply all civil legal liability conditions in IP rights infringement cases in order not to limit the calculation of compensation to the brief estimation of a price of a legal sale only, and the fact that the 2003 and 2006 amendments to the Copyright Law eliminated a price of a legal sale as a basis to calculate compensation and linked it with MLS instead, the discussion regarding such price has been recently elevated to the level of the Lithuanian Constitutional Court<sup>823</sup> which is to examine if the provision on compensation instead

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818 E.g., Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB “VTeX” vs. UAB “Fima”*.

819 See Mizaras, Compensation as a Civil Remedy for Protection of Authors’ Rights, p. 143.

820 See *Supreme Court of Lithuania, Consultation No. A3-64/2002*.

821 See Mizaras, Copyright Law (Vol. II), pp. 345-346.

822 Notably, in later case practise VAT started to be excluded while assessing the amount of compensation, as referred in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

823 See also overview about the role of the Lithuanian Constitutional Court in the national judicial system in supra § 3C.IV.1.a).

of actual damages based on legal sales price was in compliance with the constitutional principles and constitutional order of Lithuania<sup>824</sup>.

On 10 June 2008 the Court of Appeals of Lithuania rendered a decision in a civil case regarding infringement of related rights and adjudication of compensation. The Court of Appeal decided to refer to the Constitutional Court of Lithuania with a request to examine if Article 67(3) of the Copyright Law<sup>825</sup> was in compliance with the Constitution of the Republic of Lithuania (namely, principles of justice and legal state, as embodied therein). By virtue of Article 67(3), compensation as an alternative method to compensate pecuniary damages in copyright and related rights cases, was to be calculated on the basis of *a price of a legal sale* of the protected objects (*i.e.* retail price of products, including all taxes, as mentioned) which could be doubled or tripled, depending on an infringer's fault. The Court of Appeal considered such method of compensating damages being punitive and going beyond its compensatory aim<sup>826</sup>. The case, which is relevant to civil enforcement of IP rights in view of the implementation of Article 13(1) the Enforcement Directive on compensating pecuniary damages, is pending in the Constitutional Court of Lithuania together with the similar request in regard with adjudication of compensation under the previous wording of the Trademark Law of Lithuania<sup>827</sup>.

The legislative formulation regarding compensation has been introduced before the implementation of the Directive, *i.e.* in 2003 by amending the then Lithuanian Copyright Law. Article 83(4)(1) of the current Lithuanian Copyright Law establishes that, instead of claiming actual damages (losses), the right holders can claim:

“<...> compensation in the amount of up to 1,000 minimum living standards (MLS), which is set by the court, taking into account the culpability of the infringer, his property status, causes

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824 On 10 June 2008, the Lithuanian Court of Appeal suspended the *Civil Case No. 2A-123/2008* regarding the infringement of related rights and adjudication of compensation and requested the Constitutional Court of Lithuania to examine if Article 67(3) of the 2003 Lithuanian Copyright Law is constitutional. The similar request has been submitted to the Constitutional Court regarding the previous formulation on compensation in Trademark Law (identical to the one in the Copyright Law) in 2006 (*the case is pending*); see Lithuanian Court of Appeal, Civil Case No. 2A-123/2008, *Prosecutor of Vilnius City District, La Face Records, LLC., Virgin Records America, Inc. et al. vs. UAB “Baltic optical disk”*. Similar considerations were also discussed in *Brockmeier*, Punitive damages, multiple damages und deutscher ordre public, p. 88 et seq., as far as German legal practice on the issue was concerned.

825 The wording as of 18 May 1999, valid till 1 January 2004 of the Lithuanian Copyright Law is referred herein.

826 It should be repeatedly noted that punitive damages were not recognised in the European legal doctrine, for instance, Germany uphold the principle of the lack of punitive elements in compensation for damages, as observed in *Schuster*, The Patent Law Wilfulness Game and Damage Awards, pp. 130-131.

827 See also *refs.* to the corresponding cases in the Constitutional Court of Lithuania and the corresponding description in *Janušauskaitė*, Litauen – Oberinstanzliche Gerichtsentscheidungen zur Durchsetzung von Urheberrechten und verwandten Rechten, p. 974.

of unlawful actions and other circumstances relevant to the case, as well as the criteria of good faith, reasonableness and justice <...>.<sup>828</sup>

As previously pointed out, compensation is only an alternative method to calculate damages in case of civil liability and, as referred by the Lithuanian Supreme Court, the assessment of the amount of which is a question of fact<sup>829</sup>. Therefore, all conditions for civil legal liability are to be fulfilled in order to adjudicate it. As follows from the above legislative formulation, compensation is to be assessed on the basis of abstract criteria, including also a price of a legal sale of IP products in question<sup>830</sup>, which are to be examined by the court in each individual case. However, it can be presumed that compensation will not always reflect actual damage done to economic rights of the right holders. Even more, it can be higher than actual damages in some cases. This confirms the statement that compensation for damages (losses) can be considered as *quasi civil liability*<sup>831</sup>.

### (3) License analogy method

By implementing Article 13(1)(b) of the Enforcement Directive in the Lithuanian IP legislation in 2006<sup>832</sup>, it was formulated that instead of requesting actual damages (losses) the right holder can alternatively ask for:

“<...> royalties or fees which would have been due if the infringer had requested authorisation to use the works or other objects of the protected rights, and where the infringer acted intentionally or with negligence – in the amount of up to two such royalties and fees”<sup>833</sup>.

Both the implementing national provision and the harmonizing provision regarding license analogy in the Enforcement Directive, which was borrowed from the well-established German legislation and case practice on the issue<sup>834</sup>, are based on the following factors.

*First*, license analogy as an alternative method to compensate damages is focused on the preventive aspect regarding IP rights infringements. It is argued, however,

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828 Notably, the compensation instead of damages has not been established in the industrial property legislation in Lithuania while implementing the Directive.

829 The argument that the assessment of a compensation amount is a question of fact rather than the question of law (the latter can be heard by the Supreme Court as the cassation instance) was recently expressed in Ruling of 27 November 2007, Lithuanian Supreme Court, No. 3P-3621/2007.

830 Although not directly mentioned in the Copyright Law, a price of a legal sale is to be again considered as relevant criteria while assessing the amount of compensation within the limits established by the law, as referred by Lithuanian Supreme Court in its Decision of 21 June 2006, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

831 See *Mizaras*, Copyright Law (Vol. II), p. 348.

832 See *refs.* to the implementing legislation in *supra* § 5B.I.1.c).

833 Almost identical provisions are embodied in Art. 83(4)(2) of the Copyright Law; Art. 41(5)(4) of the Patent Law; Art. 51(4) of the Trademark Law; and Art. 48(4) of the Design Law of Lithuania.

834 See *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, pp. 16-17; also *Peukert/Kur*, Stellungnahme des Max-Planck-Instituts der Richtlinie 2004/48/EG in deutsches Recht, p. 294.



that application of the method (the same as for compensation) cannot go beyond its compensatory aim which could mean the transposition of punitive damages concept into the European law. *Second*, it contains economic aspect as well, *i.e.* consideration that by infringing IP rights usually infringers save certain expenses which cannot be necessarily calculated as loss profits or gained profits, for instance, expenses related to production, development, distribution, entering the market, etc.<sup>835</sup> *Third*, the embodiment of license analogy as alternative method to compensate damages is relevant to legal policy of the states by considering IP mentality, scale of IP rights infringements, etc.<sup>836</sup>

The implementing provision on license analogy in the Lithuanian IP laws reflects all the above listed factors. As it can be observed, the Lithuanian legislator did not limit the amount of royalties or fees that can be adjudicated from the infringer. In case of fault, such amount can reach two times of such royalties and fees which is in compliance with the harmonizing provision set out in Article 13(1)(b) of the Directive. Such provision, which means that the courts can, but must not adjudicate up to two times royalties or licence fees in case of an infringer's fault, plays a preventive role, *i.e.* infringers are to be aware of possible adjudication of double royalties or license fees.

The legislative provisions also confirm the notion of license analogy method being a certain abstract method for calculating damages, *i.e.* by fictionally covering actual damages and also infringement-related expenses in order to compensate damages suffered due to IP rights infringement to full-extent. Similarly to compensation institute, license analogy is applied by considering all civil legal liability conditions and is applicable to economic rights of IP right holders' only. Moreover, similarly to compensation, it can lead to overreaching amounts, which do not necessarily cover actual damages done.

#### d) Moral prejudice (non-pecuniary damages)

Moral prejudice caused to the right holders because of IP rights infringements is stipulated in Article 13(1)(a) of the Enforcement Directive as one of the factors that is to be considered while estimating material damages suffered. Notably, the Directive does not harmonize moral rights of IP right holders. Moral rights which are protected under the national legislation can be the legal basis to assess moral prejudice as such<sup>837</sup>.

In Lithuania so-called non-pecuniary damages which were suffered due to infringement of moral rights of authors or performers have been established in the national legislation and applied in court practice since the adoption of first Copyright

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835 See *Dreier*, *Kompensation und Prävention*, p. 139.

836 It can be agreed with the opinion expressed in *Mizaras*, *Copyright Law* (Vol. II), pp. 334-335, that it is especially due for Lithuania (also other two Baltic countries).

837 See also discussion on the subject-matter covered by Art. 1 of the Directive in *supra* § 5C.I.

Law in 1999<sup>838</sup>. Similarly to Germany and Austria, where regulation of adjudication of non-pecuniary damage is established in both national Civil Codes and the corresponding IP laws, Article 84 of the current Lithuanian Copyright Law provides that:

“A person who has infringed personal moral rights of the author or performer, referred to in Article 14 and Article 52 of this Law, must redress non-pecuniary damage. The amount of such damage expressed in money shall be set by the court, in compliance with the norms of the Civil Code, which regulate redress of non-pecuniary damage.”

Notably, the cited provision refers to the list of personal moral rights of authors which are protected under the Lithuanian Copyright Law such as the right to authorship, the right to the author’s name and to the inviolability of a work<sup>839</sup>. A performer, accordingly, shall retain his moral rights in his direct (live) performance or the fixation of his performance, also the right to claim to be identified as the performer in connection with any use of his performance or the fixation thereof, and to object to any distortion or other modification of his performance or the fixation thereof, as well as other derogatory action in relation thereto, which would be prejudicial to his honour or reputation<sup>840</sup>. Importantly, Article 1.114 of the Lithuanian Civil Code<sup>841</sup> covers personal moral rights of authors and performers as general personal moral rights. Therefore, the case practice related to infringements of general personal moral rights is also relevant to infringements of moral rights of authors and performers<sup>842</sup>.

According to the current national legislation, there can be no adjudication of non-pecuniary damages in cases of infringements of authors’ or performers’ economic rights. Such possibility, however, was provided in Articles 539 and 540 of the 1964 Civil Code<sup>843</sup> before the adoption of the special copyright law in Lithuania<sup>844</sup>. Non-pecuniary damage, to which all civil legal liability conditions are applied, can be adjudicated by applying other remedies, including pecuniary damage in the form of actual damages or compensation, or license analogy. Differently from the 1999 Li-

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838 In Lithuania the regulation regarding moral rights of authors and performers follows the European continental tradition, as described in *Personal Non-Economic Rights and their Protection* (Articles from Scientific Conference, Vilnius (2001), p. 27.

839 Art. 14, the Lithuanian Copyright Law.

840 Art. 52, the Lithuanian Copyright Law.

841 See also *refs.* regarding so-called “grey area” rights in *supra* § 5C.I.2.b).

842 The court practice has been summarized in Resolution of the Senate of Judges of the Supreme Court of Lithuania No. 1 on “Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases”, *Gazette of the Supreme Court of Lithuania “Teismų praktika”*, 1998, No. 9. Similar practice is also observed in Estonia, as follows from, *e.g.*, Decision of 17 June 1996, Tartu Circuit Court, Civil Case No. II-2-95/96, *V. Jürisson vs. AS Postimees*.

843 See *ref.* to the 1964 Lithuanian Civil Code (with certain amendments valid until 1 January 2003; the Code was also valid for Estonia and Latvia) in *supra* § 3B.II.1. *Note*: the 1964 Soviet Civil Code was also valid in Latvia and Estonia.

844 In Germany, for example, it is possible to claim non-pecuniary damage occurred due to infringements of economic rights as well, if personal moral interests of right holders are infringed, as referred in *Mizaras*, Copyright Law (Vol. II), p. 377.

thuanian Copyright Law which established the amount of non-pecuniary damage from 5,000 to 25,000 Litas<sup>845</sup>, the current formulation does not refer to any exact amount of non-pecuniary damage to be adjudicated. The current provision is to be applauded because it provides for a flexible room for the courts to establish individual circumstances and harm suffered by the right holders in each individual case considering compensatory aim of such non-pecuniary damage, also its preventive aspect.

As it can be observed from the Lithuanian court practice regarding adjudication of non-pecuniary damage suffered due to infringements of general personal moral rights, the national courts usually consider nature of an infringement, its degree, an infringer's fault and other circumstances, for instance, an infringer's activities after the infringement, etc.<sup>846</sup> "*Commercial purposes*" involved in infringing activities can be also held as important factor to determine the amount of non-pecuniary damages<sup>847</sup>. As far as cases regarding moral rights of authors are concerned, it is criticized that the court decisions lack of argumentation related to the adjudged amount of non-pecuniary compensation, *i.e.* the brief estimation of how many infringing copies of a work were used and their multiplication by the fixed amount of damage are frequently unsubstantiated<sup>848</sup>.

In Estonia, according to its Copyright Law, it is possible to adjudicate moral damages in copyright cases for authors and performers. Moral damages can be requested for copyright infringements under Article 69(1)(5) and Article 69<sup>1</sup> of the Latvian Copyright Law. Similarly to the Lithuanian practise, both Latvian and Estonian legislation does not establish the amount, however, it can be calculated based on the Civil Code rules at the discretion of the court<sup>849</sup>.

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845 From ca 1,448 and to ca 7,241 Euro.

846 See Resolution of the Senate of Judges of the Supreme Court of Lithuania No. 1 on "Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases", Gazette of the Supreme Court of Lithuania "Teismų praktika", 1998, No. 9, p. 59.

847 The reference can be especially made to the German court practice on the issue, as argued in *Mizaras*, Copyright Law (Vol. II), p. 378.

848 See in *Mizaras*, Copyright Law (Vol. II), p. 378.

849 The Estonian Supreme Court ruled in Civil Case No 3-2-1-60-98, *Tiit Räs vs. AS Laks & Ko*, that moral damage must also be adjudicated in copyright infringement cases together with pecuniary damage, as also observed in Decision of 23 May 2003, Estonian Supreme Court, Civil Case No. 3-2-1-39-03, *Leonhard Lapin vs. Kihnu county*.

## II. *Legal costs as an important procedural factor in view of Article 14 of the Directive*

### 1. National procedural rules on legal costs

Legal costs in civil proceedings (as a rule, covering costs and other civil proceedings-relevant expenses) are an aspect which cannot be omitted while referring to civil IP litigation. Practical relevance of this aspect for civil enforcement of IP rights is unquestioned. Before starting any legal action against an infringer of IP rights, be it pre-trial measures or civil procedural or substantive measures, the aggrieved party should project expenses which can be presumably incurred in order to achieve the desired legal result. Such estimation should cover payments that can occur during civil proceedings and, importantly, honorary fees that will need to be paid to the attorneys who would be able to assess any of the above listed actions.

Needless to say, costs and expenses are not, as a rule, limited to the ones which are incurred during civil proceedings. They can similarly cover relevant payments for actions before submitting a civil claim to the court, for example, expenses regarding pre-trial collection of evidence (for an expert's opinion, etc.), communication with the infringer (phone conversations, letters, etc.), preparation of a warning letter, drafting a settlement agreement. Given that a civil case is submitted to the court, costs and expenses can increase due to unexpectedly lengthy civil proceedings, necessity to provide additional expertise or repeatedly examine certain factual aspects of the case.

Article 14 of the Enforcement Directive is namely designed to harmonize prior-to-Directive practice regarding legal costs which, as it can be presumed, differed from country to country. It is not, however, indicated in Article 14 of the Directive how exactly such legal costs are to be estimated nowadays, what "*legal costs and other expenses*" mean. Hence, it is left for the national legislators to define. The requirement that needs to be borne in mind is that legal costs and expenses are to be *reasonable* and *proportionate*. They should, as a general rule, be borne by the unsuccessful party, unless equity does not allow this<sup>850</sup>. Thus, the Directive leaves quite vague terms for the national legislators to follow. Practical application of such terms, especially of the term "*equity*", can be very complex and based on very different reasoning by the national courts.

As far as the national legislation on civil procedure of the Baltic countries is concerned, the legislative regulation on allocation of so-called litigation costs, which are to be paid by the parties in the civil proceedings, generally reflects the provision set out in Article 14 of the Directive<sup>851</sup>. As a general rule, the national rules on allocation of litigation costs, which cover a stamp duty and other case-related costs and which were incurred by the winning party, should be reimbursed by the losing par-

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850 See examination of Art. 14 of the Directive in supra § 5A.II.2.d).

851 The allocation of legal costs and other expenses related to the civil case is regulated by Art. 93 of the Lithuanian CCP, also Art. 41 of the Latvian CCP and Arts. 162, 163 of the Estonian CCP.

ty. Other case-related costs cover payments to specialists, experts, witnesses, translators, also payments regarding provisional measures, etc. In Lithuania the losing party is obliged to cover litigation costs incurred by the winning party, even if the losing party was exempted from paying the legal costs to the state budget<sup>852</sup>. They also establish that such litigation costs should be estimated due to reasonable and proportionate factors, by referring to a proportionate part of the adjudicated or denied amount of the claim. Such procedural provisions on litigation costs were already embodied before the adoption of the Enforcement Directive; therefore, they did not require any additional legislative amendment due to the implementation of the Directive.

## 2. Practical aspects regarding covering of legal costs

Taken practical application of the rules on litigation costs in IP infringement cases into account, it should be noted that the parties in the civil proceedings usually provide all documents proving their expenses due to the civil case in question, including honorary fees that have been paid to the attorneys-at-law or other representatives. Requests to cover those expenses also include a request to reimburse the stamp duty which has been paid for the submission of the civil claim<sup>853</sup>. The parties are, as a rule, requested to provide the corresponding documents before starting to hear the case on its substance, and not later than the decision on the merits takes place<sup>854</sup>. On the other hand, the parties can still apply to the court with after-trial request to recover certain expenses, but this should be accomplished by the strict time requirements as established in the CCPs.

While referring to litigation costs, fees for legal services that can be adjudicated to attorneys-at-law or assistant attorneys-at-law (honorary fees) in civil cases for providing legal services are to be especially noted<sup>855</sup>. By virtue, for example, to Article 98 of the Lithuanian CCP, the adjudicated party's expenses related to legal services provided by attorneys-at-law or assistant attorneys-at-law in civil proceedings should not exceed the maximum amounts which are listed in the recommendations prepared by the Ministry of Justice together with the Chairman of the Lithuanian Bar<sup>856</sup>. Following the recommendations, for instance, a maximum amount for a preparation of the claim or an appeal is 2,400 Litass, for a cassation appeal to the Su-

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852 *E.g.*, these can be the cases, *inter alia*, when the party is exempted to pay a stamp duty in cases regarding pecuniary damage suffered due to the criminal activities established by the court in a criminal case, according to Art. 83(1)(4) of the Lithuanian CCP.

853 Amounts of stamp duties to be paid are regulated under the provisions of the national CCPs.

854 This has been especially noted in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB "Arginta"*.

855 See also discussion on the role of the practitioners in IP infringement cases in *supra* § 3C.V.

856 Order No 1R-85 of the Ministry of Justice of the Republic of Lithuania regarding "*Recommendations on Maximum Amount of Fees Adjudged in Civil Cases to Attorneys-at-Law and Assistant Attorneys-at-Law for Provision of Legal Services*" (hereinafter – the "*Recommendations*"), as of 2 April 2004. Maximum amounts for specifically listed legal services provided in civil cases are based on minimal monthly salary which is 800 Litass (232 Euro).

preme Court is 2,800 Litās, for a representation in the court 120 Litās<sup>857</sup>. The issue is differently regulated in Estonia, where legal costs are partly regulated under the national secondary legislation, and in Latvia, where there are no specific regulations or recommendations<sup>858</sup>.

The recommendations and their actual application in practice<sup>859</sup> seemed to reflect *equity* requirement which is pursued by Article 14 of the Directive, as the recommendations refer to many circumstances that are to be considered by the courts such as complexity of the case, necessity of specific knowledge, economic status of the parties, the amount of the claim, character and consistency of legal services, etc. The listed criteria are considered by the national courts<sup>860</sup>. However, given that the aims of the Directive focus on ensuring protection of IP rights with a due balance of rights and interests of other persons, it should be stressed that recommended maximum amounts are much less than the actual honorary fees that can be paid by the parties to their lawyers<sup>861</sup>. An actual litigation cost sometimes equal to the amount of the claims or even exceeds them, which makes enforcement of IP rights practice in some cases paradoxical.

### III. Application of corrective and alternative measures

#### 1. Corrective measures in view of Article 10 of the Directive

The implementing legislation of Lithuania, both national copyright law and laws on industrial property rights, embody provisions regarding corrective measures<sup>862</sup>, as set out in Article 10 of the Enforcement Directive pursuant to Article 46 of the

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857 Respectively, ca 695 Euro, ca 811 Euro and ca 35 Euro.

858 The Estonian Government adopted Regulation with respect of limits of legal costs that can be claimed from the other party in court proceedings (Regulation No 137 of the Government of 4 September 2008), whereas in Latvia, under Art. 44 of the CCP, the losing party in civil proceedings may be adjudicated by the court to reimburse the costs for the assistance of an advocate – the actual amount thereof, but not exceeding 5 % of that part of the claim which has been allowed and in claims which are not financial in nature, not exceeding the normal rate for advocates.

859 Notably, the courts actually refer to the Recommendations, as observed in Lithuanian Supreme Court, Civil Case No. 3K-3-200/2005, *Microsoft Corp., Autodesk, Inc., Electronic Arts Inc. et al. vs. UAB “Tūris”*.

860 The criteria are listed in, e.g., Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

861 E.g., hourly rates at the leading Baltic law firm Lideika, Petrauskas, Valiunas ir partneriai LAWIN, which also represent their clients in a number of IP infringement cases as well, are: 160 Euro for lawyers, 180 Euro for associate lawyers and associate advisors, 220 Euro for associate partners and 240 Euro for partners and advisors (note: data of the year 2008).

862 Art. 82(1) and (2) of the Copyright Law; Art. 41(4) of the Patent Law; Art. 50(4) of the Trademark Law; also Art. 47(4) of the Design Law of Lithuania.

TRIPS Agreement<sup>863</sup>. Both Latvia and Estonia provide for corrective measures as well<sup>864</sup>.

Corrective measures were not new to the national IP legislation. Prior to the implementation of the Directive, such measures have been already stipulated in the Lithuanian Copyright Law<sup>865</sup>. Moreover, the list of such measures reflected the provisions set out in Article 10 of the Directive, *i.e.* all three methods of corrective measures could have been applied to infringers of IP rights when deciding on the merits of the case in Lithuania: (i) recall or (ii) removal from the channels of commerce, or (iii) destruction of infringing copies of the protected objects as well as, in appropriate cases, the materials and implements principally used in the creation or manufacture of the specified objects. Thus, the implementation mainly meant a literal transposition of the formulation of Article 10 of the Directive into the national legislation of Lithuania. The measures, though, had to be implemented in the industrial property laws which assured the establishment of comprehensive list of civil enforcement measures and remedies in view of the Directive<sup>866</sup>.

As follows from the implemented provisions on corrective measures, they can be applied either with regard to (i) infringing copies of goods, or (ii) materials and implements principally used in the creation or manufacture of those goods. In order to define a term “*infringing copy*”, a reference to Article 2(22) of the Lithuanian Copyright Law can be made which provides that:

“Infringing copy” means a copy of a work, an object of related rights or *sui generis* rights produced or imported into the Republic of Lithuania without the permission of the owner of the rights or a person duly authorised by them (without concluding an agreement or upon violating the terms and conditions set in it, except for the cases specified by this Law when a work, an object of related rights or *sui generis* rights may be reproduced without permission), as well as a copy of a work, an object of related rights or *sui generis* rights in which rights-management information has been removed or altered without the permission of the owner of the rights.”<sup>867</sup>

Notably, corrective measures refer to copies, and not to originals of the protected works or other IP projects. In practice material types of infringing copies of IP products vary from, for instance, products with infringing trademarks, products manufactured by infringing patent rights, etc. to temporary or permanent copies of computer

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863 See also examination of Art. 10 of the Directive in supra § 5A.II.1.b).

864 Pursuant to Art. 250(17)(2) of the Latvian CCP, and based on the request of the applicant, the court is entitled to order recall or definitive removal of infringing items from the channels of commerce, or destruction of infringing IP products. Such possibility is foreseen in Estonian IP legislation as well, for instance, Art. 58 of the Trademark Law.

865 Art. 77(1)(8), the 2003 Lithuanian Copyright Law.

866 See *Mizaras et al.*, Implementation of EU Legislation in the Civil Laws of Lithuania, p. 160.

867 Art. 801(1) and (2) of the Estonian Copyright Law defines “*pirated copy*” as “a copy, in any form and whether or not with a corresponding packaging, of a work or object of related rights which has been reproduced in any country without the authorisation of the author of the work, holder of copyright or holder of related rights” as well as “a copy of a work or object of related rights which has been reproduced in a foreign state with the authorisation of the author of the work, holder of copyright or holder of related rights but which is distributed or is going to be distributed in Estonia without the authorisation of the author, holder of copyright or holder of related rights”.

programs which are reproduced on hard-disks of computers. In any case, before applying corrective measures, evidence, *e.g.* specialists' or experts' statement, regarding illegal nature of such copies should be provided to the court.

As far as infringing materials or implements are concerned, it should be noted that the implementing provisions refer to those of them which are "*principally*" used in the creation or manufacture of infringing copies of goods, as it is also established in Article 10 of the Directive<sup>868</sup>. Thus, in practice the courts are to determine if certain devices such as scanners, copy machines, etc. are principally used to make infringing copies before applying corrective measures<sup>869</sup>. It is justified, therefore, to order to apply corrective measures with regard to hard disks of computers, and not computers as such, for example<sup>870</sup>. The courts are to list and describe corrective measures which are ordered in the individual case carefully.

Corrective measures are separate civil enforcement remedy which can be applied together with other measures and remedies, be they preventive or compensatory. It can be also agreed with the opinions that recall or definitive removal of infringing copies from the channels of commerce or destruction of them are to finally eliminate the infringing activities<sup>871</sup>, whereas recall or definitive removal of materials and implements are to prevent from further infringing activities<sup>872</sup>.

As follows from the implementing provisions in the national laws, in order to apply any listed corrective measure, it is not required to prove an infringer's fault. This is due to the aim of such measures which is to eliminate all negative consequences of illegal activities<sup>873</sup>. The fact of infringing activities and infringing copies and/or materials or implements to create or manufacture them suffice. However, fault as well as degree of infringing activities, *i.e.* number of infringing copies, scope of infringing activities, commercial or non-commercial purposes involved, play a role by determining which corrective measure is to be applied in a concrete case by the court.

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868 The term "principally used" reflects the provision set out in Art. 46 of TRIPS which refers to "<...> materials and implements the predominant use of which has been in the creation of the infringing goods <...>"; see also *Correa*, A Commentary on the TRIPS Agreement, p. 428.

869 The practice is well-established in Germany, where the courts examine if a particular device, for instance, video recorder, was principally used to reproduce infringing copies, as referred in *Mizaras*, Copyright Law (Vol. II), p. 282.

870 Such practice can be observed in Lithuania, as seen from 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 individual 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"*.

871 As also stated in Decision of 24 November 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-1069/2003, *Italian Company "Diesel S.p.A." vs. UAB "Mita", Klaipėda Territorial Customs as third party*.

872 Such opinions are examined in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 276-280.

873 As also argued in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, p. 69.



Importantly, as regulated by the implementing national laws, corrective measures shall be carried out unrequitedly, at the expense of the infringer, taking into account the *proportionality* between the seriousness of the infringement and the remedies ordered as well as the lawful interests of third parties. Notably, a burden of proof regarding disproportionality of application of corrective measures shall fall on an infringer. The principle of proportionality, as it is defined in Article 1.2 of the Lithuanian Civil Code, for instance, should be followed in each individual case by taking into consideration that, for instance, destruction of infringing copies as *ultima ratio* can be disproportional to interests of the defendant or any third party<sup>874</sup>, infringing copies were used by their manufacturer himself or a distributor, a type of infringing copy of the protected object, *e.g.* an infringing copy of an architectural work, etc. It can be also considered if an IP right holder seeks to retain infringing copies and/or material or implements, as it is possible according to the provisions on damages set out in the national IP laws<sup>875</sup>. Considering the essence of Article 10 of the Directive, also Article 46 of the TRIPS Agreement, any possibility (even formally established in the national legislation<sup>876</sup>) of putting infringing copies and/or infringing materials or implements repeatedly on the market is reasonably criticised<sup>877</sup>.

## 2. Alternative measures in view of Article 12 of the Directive

In view of the optional provision set out in Article 12 of the Enforcement Directive regarding application of alternative measures instead of corrective measures and permanent injunctions<sup>878</sup>, the Lithuanian legislator opted to implement such provision in the Copyright Law. The provision is not embodied in the national industrial legislation, though. In order alternative measures, *i.e.* pecuniary compensation, are applied, the following cumulative conditions are to be met, as follows from Articles 77(3) and 82(3) of the Lithuanian Copyright Law. Alternative measures have not been embodied in the national legislation of Latvia and Estonia, though.

*First*, pecuniary compensation as alternative measures can be applied by the courts instead of corrective measures and preliminary injunctions only. *Second*, there should be no fault (neither intent nor negligence), in actions or inactivity of an infringer<sup>879</sup>. In case of mere negligence, it is not possible to apply pecuniary com-

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874 Notably, neither Art. 10 of the Directive nor the implementing national provisions make a difference between infringing copies and/or materials or implements to create or manufacture them which are possessed by the defendant or any third party, also see *Mizaras*, Copyright Law (Vol. II), p. 279.

875 See *refs.* in supra § 5F.I.1.b)(2).

876 According to Para 15 of the Decree No 72 as of 6 August 1996 of the Ministry of Finance of the Republic of Lithuania regarding the realization and restitution of, *inter alia*, confiscated property, it is possible to transfer free of charge a confiscated property to state and municipal institutions, also sell it in public auction, etc.

877 Such criticism was expressed in *Mizaras*, Copyright Law (Vol. II), p. 279.

878 See also examination of Art. 12 of the Directive in supra § 5A.II.1.d).

879 *Ref.* can be also made to, for instance, *bona fide* acquirers of IP products, as they are described in *Correa*, A Commentary on the TRIPS Agreement, p. 423.

pensation as alternative measure as well<sup>880</sup>. *Third*, if execution of corrective measures or injunctions would cause the opposing party disproportionate harm, and, *fourth*, if pecuniary compensation to the injured party appears reasonably satisfactory. These are so-called substantive requirements to apply alternative measures which are all embodied in the national implementing legislation on IP rights. The procedural requirement, *i.e.* a request of an interested party to apply alternative measures, has been implemented as well. The court cannot apply such measure upon its initiative.

By considering the listed requirements that are to be met to apply alternative measures, the national courts, which do not have any national court practice on the question to consult so far<sup>881</sup>, presumably will have to tackle another legal issue, *i.e.* an amount of pecuniary compensation. On this point the sample reference can be made to the German practice on the issue. By virtue of the German Copyright Law, namely its Article 101(1), on which the wording of Article 12 of the Enforcement Directive is actually based, an amount of pecuniary compensation as alternative measure should reflect the amount which had to be paid if the person would have used a work or another IP product legally, *i.e.* so-called compulsory licence<sup>882</sup>. Hence, pecuniary compensation needs to be the same as licence payment for use of a work or another IP product in question. Moreover, it should be also considered if, in case of non-infringement of his (her) rights, the injured party would have given the license to use those rights which were injured.

The provision on alternative measures in the prior-to-implementation Lithuanian Copyright Law, namely its Article 77(1)(8), provided for a possibility of transferring illegal copies to right holders in cases of unintentional or negligent activities instead of imposing injunctions or applying corrective measures. Although such provision is not longer embodied in the implementing legislation, a transfer of illegal copies can be still applied in practice in view of the principle of proportionality, and an amount of pecuniary compensation in that case should be estimated accordingly<sup>883</sup>.

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880 Copyright infringements, for instance, are frequently committed on negligent basis, as referred in in *Mizaras*, Copyright Law (Vol. II), p. 326. It should be also pointed out that some local companies which are engaged in, for example, advertising, publishing, etc. activities, are expected to take more of due care in order not to infringe IP rights, as follows from the Decision of 3 May 2006 of Lithuanian Supreme Court, Civil Case No. 3K-3-311/2006, *Microsoft Corp., Symantec Corp., BI UAB "VTeX" vs. UAB "Vilpostus"*.

881 As follows from *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)*.

882 See commentary in *Schricker (Hrsg.)*, Urheberrecht. Kommentar (2006), § 101 para 6.

883 As also argued in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, p. 71.

#### IV. Publication of judicial decisions in view of Article 15 of the Directive

The provision regarding publication of judicial decisions, as set out in Article 15 of the Enforcement Directive<sup>884</sup>, has been implemented in all national IP laws in Lithuania. The publicity measures are also established in Latvian and Estonian CCPs.

By implementing Article 15 of the Directive, Lithuania has opted for publication of judicial decisions, in full or in part, on the infringements of IP rights only. Other forms of disseminating the information about the infringement, including prominent advertising, are not provided in the implementing laws. Article 85 of the Lithuanian Copyright Law provides that a decision on the infringement of the rights can be announced in full or in part in the mass media or in any other way, *i.e.* the forms of publication of judicial decisions are not limited<sup>885</sup>. The conditions to apply publicity measures, which are established in the national IP laws and should be followed by the courts in concrete IP infringement cases, are to be mentioned as follows.

*First*, a plaintiff's request to apply such measure should be initially submitted. The court cannot order to publish its decision on its own motion.

*Second*, the dissemination of information is performed at infringer's expense. The infringer can be ordered to pay in advance into the account, indicated by the court, an amount of money necessary to disseminate the information concerning the court decision or the court decision itself.

*Third*, the whole court decision or a part of it, or the information concerning the court decision can be disseminated. The plaintiff can choose any from those three options, and the court, considering the circumstances of the case, decides on the manner of dissemination of the court decision and the extent of the dissemination. If the requesting party asks for dissemination of information about the court decision, the text of such information should be presented, and it can be corrected by the court. It is presumed that the publication of the court decision can cover the names of the parties, motivation and resolution parts or certain parts of them. As follows from the formulation of the national provision on publication of decisions, a short description about the circumstances of the case can be presented as well<sup>886</sup>. The Lithuanian judicial practice, though, demonstrates that only a so-called resolution part of a court decision is used to be published<sup>887</sup>.

*Fourth*, only the court decision in force can be published, unless the court decides otherwise. Following the rules of the CCPs of the Baltic countries, court decision

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884 See previous discussion on Art. 15 of the Directive in section (a)(vi) of supra sub-chapter IV.A.2.

885 Similarly in Latvia, under Art. 250(17)(2) of the CCP, and based on the request of the applicant, the court is entitled to order the court judgement to be fully or partially published in newspapers and other media. The similar provision is laid down in Art. 445(5) of the Estonian CCP.

886 See in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 72.

887 As follows from the information provided 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)*.

can be appealed to either appellate or cassation courts<sup>888</sup>. Therefore, inconclusive court decision or information about it can be disseminated in specific circumstances when there is a need, for instance, to stop further possible infringing activities or to avoid negative consequences.

Moreover, the court should indicate the form of publishing of the court decision, the length of the publication, place considering the interests of the parties to the case and the principle of proportionality. Following the corresponding court practice of other countries such as Germany or Austria, it is observed that the requesting party also requires to present evidence that publication of the judicial decision is based on the reasonable interest which is the question of fact and is to be estimated by the court. Although it is argued that publicity measures need to be acceptable for both parties by considering the interests of both of them<sup>889</sup>, the main aim of it is to inform the public about the infringing activities and to prevent against further infringements of IP rights. It is assumed that such measure can have a deterrent effect, especially in the Baltic societies where the awareness of IP rights and their protection has to be strengthened<sup>890</sup>.

## V. Concluding remarks

It can be observed that the Baltic countries implemented the mandatory provisions on damages, legal costs, corrective measures as well as publication measures as set out in the Enforcement Directive. The optional solutions such as alternative measures (Article 12 of the Directive) have been also transposed in the Lithuanian Copyright Law, which is not the case for Latvia and Estonia. The main observations regarding the listed implementing provisions are provided as follows.

First, while examining the implementing provisions on damages and, especially, the court practice on the subject-matter, it is observed that the practice on adjudicating actual damages, also loss of profits or infringer's gained profits is very modest in the Baltic countries. It can be observed (on the limited basis, though) that in Latvia and Estonia actual damages, including loss of profit calculated on the basis of royalty fees, has been applied. Differently, in Lithuania the court practice before the im-

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888 For instance, a term to submit an appeal to the district courts or the Court of Appeals is 14 calendar days, and to submit a cassation appeal to the Supreme Court is 30 calendar days in Lithuania. See also the court system (first instance, appellate instance and cassation instance courts) of the Baltic countries in *supra* § 3C.IV.1.a).

889 See in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 73.

890 On this point Decision of 29 January 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB "VTeX" vs. UAB "Fima"* should be mentioned. Awareness about IP infringements in the locally well-known company "Fima" and successful case against them made an input for formation of so-called "IP mentality and thinking" which still developing in Lithuania, as previously discussed in *supra* § 4A.II.

plementation of the Directive and afterwards is more focused on compensation instead of damage as alternative damage calculation method.

Considering operative, preventive and punishing nature of the compensation instead of damages, it can be concluded that a possibility of claiming such compensation was an effective mean to combat a still high-rated piracy in the Baltic region (taking into consideration that compensation has been applied in Lithuanian practice since 1994). Moreover, compensation, which is relatively easier to assess and substantiate, seems a favourable enforcement tool to IP right holders in view of civil proceedings, their length and cost. In turn, its input regarding simplification of the substantiation process in civil IP litigation for the local judges can be also noticeable. License analogy, as alternative and newly implemented method to compensate damages, has not been applied in the national court practice in Lithuania yet (the same applies for Latvia and Estonia). Actual application of license analogy can arguably confirm if it really serves its aims in the future. It is presumed, however, that at least in Lithuania IP right holders will keep on requesting compensation instead of damages due to the established court practice on the issue.

*Second*, it can be also observed that the national courts adjudicate non-pecuniary damage for infringements of moral rights of authors and performers which does not directly fall under the scope of the Directive. It should be stressed, though, that adjudication of such damage in cases of infringements of personal moral rights of authors and performers cannot be held as subsidiary remedy, *i.e.* each infringement of those rights should be the basis to adjudicate non-pecuniary damage as long as all civil legal liability conditions are proved. The amount of such damage is to be established according to the criteria assessed by the court in each individual case.

*Third*, although the national provisions on legal costs, which have been already embodied prior to the adoption of the Directive, are in full compliance with the harmonizing provisions on the legislative basis, a difference between legal costs which are to be reimbursed by the losing party under the court decision and actual legal costs paid by the winning party can be sizeable. In turn, a party – IP right holders – who intend to litigate in the court regarding the infringement of IP rights in question should closely assess litigation costs to the fullest extent possible before starting any legal action.

*Furthermore*, the national court practice on corrective measures shows an actual implementation of the harmonized provisions on the issue and its practical application, whereas the practice on alternative measures, which have been opted by Lithuania only, is still to come. Considering a number of cases regarding unintentional or negligent infringements of IP rights, the more extensive application of alternative measures is deemed to be justified. The same can be applied to the institute of publication measures. More extensive application of this very enforcement tool can sustain its preventive character and role that are significant to enforcement of IP rights in the Baltic region.

**G. Other national IP enforcement measures which do not fall under the scope of the Directive**

**I. Other sanctions for IP infringements in view of Article 16 of the Directive**

Although the scope of the Enforcement Directive covers civil enforcement measures, procedures and remedies, criminal measures, being an important tool in enforcement of IP rights, have been already debated while drafting the Directive<sup>891</sup>. It was decided not to include them under the scope of the Enforcement Directive; however, more extensive debates on the issue were moved onto another level, *i.e.* drafting a directive on criminal IP enforcement measures<sup>892</sup>. Thus, as far as IP rights are concerned, the consideration of the existing criminal, also administrative sanctions under the Baltic legislation, which can be currently viewed together with civil IP enforcement measures and which can be affected in case Draft Criminal Enforcement Directive is adopted in the future, are to be briefly reviewed and examined.

1. Administrative and criminal liability and sanctions under the Baltic legislation
  - a) General overview of the national provisions

By virtue of Article 16 and Recital 28 of the Enforcement Directive which refers that without prejudice to civil and administrative measures, procedures and remedies covered by the Directive the Member States may also apply other appropriate sanctions in case of infringements of IP rights<sup>893</sup>, it should be noted that such sanctions, *i.e.* administrative and criminal, are stipulated in the national criminal and (or) administrative legislation of the Baltic countries. Already before the adoption of the Enforcement Directive, administrative and criminal liability against infringements of IP rights and relevant sanctions were embodied in the national legislation of the Baltic countries by virtue of obligations and international standards set out in the Berne Convention, Rome Convention and Paris Convention<sup>894</sup>.

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891 See more about such discussions in *supra* § 5A.I.1.

892 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission): COM (2006) 168 final, April 26, 2006 (hereinafter – the “*Draft Criminal Enforcement Directive*”). Also see *Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive on Criminal Enforcement Measures (2006)*.

893 *Ref.* also to Art. 61 of the TRIPS Agreement which embodies provisions regarding criminal procedures related to infringements of IP rights.

894 See overview regarding Baltic countries’ accession to the listed international treaties in *supra* § 3B.III.2.

The implementing legislation on IP rights in Lithuania refer that administrative and criminal liability for violations of IP rights are defined respectively by the Code of Administrative Offences and the Criminal Code. In Lithuania administrative liability for copyright and related rights infringements is constituted in Article 214<sup>10</sup> of the Code of Administrative Offences<sup>895</sup>. The criminal liability is established for both offences regarding moral, if applied, and economic rights, as they are defined in the legislation on IP rights, in the current Criminal Code<sup>896</sup>. Additionally, criminal liability is established for illegal use of a trademark (Article 204 of the Criminal Code). As concerns sanctions in case of administrative and criminal cases, a fine together with confiscation of infringing copies of works or phonograms as well as their manufacture materials or devices can be imposed for administrative infringements of copyright and related rights. Sanctions for criminal offences vary from fines to community works, deprivation of liberty or arrest, or imprisonment up to three years, depending on the factors such as repetition of a criminal offence, its intentional and serious character, also a degree.

Similarly, the Latvian Code of Administrative Offences provides administrative liability for infringement of copyright and neighbouring rights and illegal use of objects of copyright and neighbouring rights<sup>897</sup>, whereas the Criminal Law of Latvia expands criminal liability for violation of inventors' and designers' rights, for infringement of copyright and neighbouring rights, and unlawful acts with objects of copyright and neighbouring rights<sup>898</sup>. Sanctions for the listed administrative offences are fines with the confiscation of infringing copies and materials, whereas for criminal offences imprisonment (up to five years), custodial arrest, or community service along with fines and with or without confiscation of property are constituted.

In comparison with Lithuania and Latvia, in Estonia more infringing activities against IP rights are criminalized. Criminal liability is established for a number of violations in the Criminal Code<sup>899</sup>. Similarly as in other Baltic countries, sanctions

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895 Art. 214(10) was embodied in the Soviet Code of Administrative Offences as of 1985. Due to adoption of new IP legislation in Lithuania, the article has been amended several times in 1996, 1998, 2002 and in 2009. The amendments mainly stipulated more precise formulation of an infringement of copyright and related rights.

896 (1) Appropriation of authorship, (2) illegal reproduction of copyrightable work and distribution, import, export, carriage and storage of illegal copies, (3) destruction or damage of copyright and related rights management information, (4) illegal removal of copyright and related rights technical protection measures, and (5) infringement of industrial property rights are established in Arts. 191, 192, 193, 194, 195, respectively, of the Lithuanian Criminal Code (wording as from 25 October 2000, amended in July 2009). Before 2000 the 1961 Soviet Criminal Code, which also laid down criminal liability for copyright infringements, was in force.

897 Secs. 2046, 1558, respectively, of the Latvian Code of Administrative Violations.

898 Secs. 147, 148, 149, respectively, of the Latvian Criminal Law (wording as from 17 June 1998, amended in 2004).

899 Criminal liability is established for (1) authorship, (2) manufacture of pirated copy, (3) possession of unlawfully reproduced computer programmes, (4) unlawful direction of works or objects of related rights towards public, (5) trade in pirated copies, (6) removal of technical means of protection preventing violation of copyright and related rights, (7) illegal receipt of

for the listed criminal offences also vary from imprisonment up to three years to fines and confiscation of property.

As far as practical application of administrative and criminal liability is concerned, it should be noted that a number of administrative and criminal cases have been initiated on the basis of such provisions during the last years in the Baltic countries<sup>900</sup>. This has been partly reflected in the decreasing rate of IP piracy, especially due to prevention being played by administrative and criminal sanctions, as generally referred<sup>901</sup>. However, many issues remained, especially those related to online piracy, hard-disk loader piracy, optical media piracy, etc.<sup>902</sup> Notably, in Lithuania criminal cases were often finalized by adopting criminal orders against the infringers and by imposing criminal fines to them<sup>903</sup>. As follows from the court practice regarding IP criminal cases in Lithuania, the criminal fines adjudicated on the basis of the criminal orders vary in the range 500 to 4,000 Lit<sup>904</sup> with the confiscation and destruction of illegal items. Noticeably, there were also criminal cases in which deprivation of liberty was imposed<sup>905</sup>.

An initiation of criminal and administrative cases for IP infringements is important for application of civil measures and remedies. Needless to say, those cases con-

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information society services and broadcasting, (8) violation of exclusive rights of owner of patent, utility model, trade mark, industrial design or layout-design of integrated circuit, (9) trade in counterfeit goods, (10) disclosure of invention or industrial design, (11) violation of rights arising from plant variety right, (12) unlawful use of registered geographical indications in Chapter 14 of the Estonian Criminal Code (wording as from 1 September 2002, amended in 2007), Arts. 219, 222, 2221, 223, 224, 225, 2251, 226, 227, 228, 229, 230, respectively.

900 *E.g.*, in Lithuania the Supreme Court considered 2 criminal cases in 2002, 4 in 2004, also 4 in 2007 regarding infringements of IP rights (mainly copyright and related rights infringements), as indicated in *Lithuanian Supreme Court Information (2008)*.

901 See also *WIPO*, the Enforcement of Intellectual Property Rights by Means of Criminal Sanctions: An Assessment, p. 7.

902 The issues are listed in *2008 Special 301 Report IIPA Special Mention: Lithuania*, pp. 262-264.

903 As follows Art. 418 of the Lithuanian Code of Criminal Procedure (wording as from 9 April 2002, amended in 2008), criminal orders can be rendered in cases where a fine or alternatively a fine can be imposed to an accused person, and an accused person reimburses or eliminates damages which occurred due to IP infringement, or obliges himself to reimburse damages. There should be also a prosecutor's request for a criminal order and an accused person's consent. In cases of criminal orders, the criminal procedure is simplified, *i.e.* there is no court hearing on the subject-matter.

904 From ca 145 Euro to ca 1,158 Euro, as follows from criminal cases: *e.g.*, Vilnius City 2nd Circuit Court, Criminal Case No. 1-516-35/2008, Criminal Case No. 1-473-487/2008; also Klaipėda City Circuit Court, Criminal Case No. 1-598-526/2007. Criminal fines are also imposed to the legal persons (companies) which can be held liable for infringements of IP rights as well (the same for Latvia and Estonia).

905 *E.g.*, under Ruling of 29 January 2002 of Lithuanian Supreme Court, Criminal Case 2K-102/2002, the convicted S.P. was imposed 3-months deprivation of liberty (enforcement postponed for 1 year) together with 60-hours of community works. Moreover, a civil claim in the amount of 63,059 Lit<sup>905</sup> (ca 18,263 Euro) has been submitted in this case (transferred to be heard under the civil procedure).



tain a lot of primary evidence about infringements of IP rights which are collected by the police officers and prosecutors and which allows the right holders to take speedier civil actions by helping to estimate damages, to evaluate which other civil enforcement means can be taken against the infringers. Besides the important evidence such as specialists' or experts' statements, a criminal judgement as such has a *prejudicial effect* in civil cases, *i.e.* the facts regarding infringement, its character and scope, etc., which are established in the judgement are not repeatedly examined in the civil proceedings<sup>906</sup>.

The further overview focuses on, *first*, certain aspects of administrative and criminal liability regarding infringements of economic rights of copyright and related rights' holders, which mostly occur in administrative or criminal IP enforcement practice in the Baltic countries and which is mostly relevant for the current civil enforcement practice in the corresponding jurisdictions. *Second*, possibilities to adjudicate pecuniary damages in administrative and criminal proceedings are discussed.

## b) Relevant aspects of administrative and criminal liability

As seen from the brief reference to the legislative provisions of Lithuania and Latvia, two types of liability, administrative and criminal, is established for offences of infringements of IP rights, *i.e.* offences regarding economic IP rights can be prosecuted and sanctioned according to the procedure against administrative offences and the criminal procedure. Such separation is not provided in Estonia, though. The Estonian legislator embodied the compositions of criminalized activities, as listed above, in the Criminal Code only. Two types of liability originate from the Soviet concept of liability for certain administrative infringements and criminal offences<sup>907</sup>. Such separation was based on seriousness of certain infringements, however, nowadays loses its practical sense due to very similar compositions of IP infringements and offences in Lithuania, as further analysed.

By examining the provisions on administrative and criminal liability for infringements of economic IP rights, a certain distinction is to be made. Before the amendments in July 2009<sup>908</sup>, Article 214<sup>10</sup> of the Lithuanian Code of Administrative Offences provided administrative liability for illegal reproduction, distribution, public performance, any other use in any way and with any means of literature, scientific or art works (including computer programs and databases), audiovisual work or phonogram for pecuniary gain as well as storage of them for the same purposes<sup>909</sup>.

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906 *Ref.* to Art. 182(3), the Lithuanian CCP.

907 It is referred that objective ground to have administrative liability was the necessity for decriminalization of some criminal activities by considering the level of danger of the activities, as described in *Petkevičius*, *Administrative Liability*, pp. 17, 66-67.

908 Article 214(10) of the Code of Administrative Offences was amended on July 15, 2009 and came into force as from July 28, 2009.

909 A fine from 1,000 up to 2,000 Litas (in case of repeated infringement – up to 3,000 Litas (*i.e.*, up to ca 579 euro, and for repeated infringements up to ca 869 euro) together with confiscation of illegally published, reproduced, distributed, used or stored items, and illegal reproduction devices can be imposed for an administrative offence.

According to Article 192 of the Lithuanian Criminal Code, which was also amended in July 2009<sup>910</sup>, illegal reproduction of literature, scientific, art or any other work, or a part thereof, or import, export, distribution, carriage or storage of illegal copies thereof for commercial purposes, provided that the amount of such copies calculated on the basis of retail price of legal copies more than 100 MLS<sup>911</sup>, was punishable by imposing community works or fine, or deprivation of liberty, or arrest, or imprisonment up to 2 years. Both natural and legal persons were liable for such administrative and criminal offences.

Thus, before the amendments administrative liability was established for both infringements of copyright and related rights<sup>912</sup>, whereas the Criminal Code did not mention related rights. Such legislative drawback was solved by the Lithuanian Supreme Court which interpreted Article 192 of the Criminal Code as covering related rights<sup>913</sup>. The court, however, did not mention criminal liability for offences against *sui generis* rights. The administrative liability stipulated use of the protected objects in both material (reproduction, public distribution, including rent) and immaterial form (public performance, communication to the public, including making available), whereas the criminal liability covered material use only. Such legislative inaccuracy was criticised especially by referring to infringements which were committed by digital means. The mentioned legal discrepancies regarding administrative and criminal liability for offences against economic rights of copyright and related rights holders were intended to be solved by adopting the mentioned amendments in July 2009.

As follows from the amended formulations of the Code of Administrative Offences and the Criminal Code of Lithuania, both administrative and criminal liability can be applied for (1) illegal reproduction, and (2) distribution (including import and export), storage and transportation of works or the subject matter of related rights. Thus, the question how to distinguish the application of these two types of legal liability for the same illegal activities is crucial.

As to illegal reproduction of copyright and related rights' subject-matter, objectively, *commercial purposes* in an infringer's activities is a decisive criterion as to which type of legal liability – administrative or criminal – would be applied in a concrete case of illegal reproduction of copyright or related rights' subject-matter. According to the Code of Administrative Offences illegal reproduction is not

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910 Article 192 of the Criminal Code of Lithuania was amended in July 9, 2009. The amendments came into force as from July 23, 2009.

911 MLS is 130 Litas (ca 38 Euro) in Lithuania (2007 data).

912 From the disposition of Art. 214(10) of the Code of Administrative Offences was not clear, though, if all related rights are covered, as argued in *Mizaras*, Copyright Law (Vol. II), p. 505.

913 The court argued that such legal discrepancy originated from the default formulation of Art. 142(1) of the 1961 Lithuanian Criminal Code which was valid until 2000, when the new Criminal Code as adopted, as follows from Ruling of 20 April 2004 by Lithuanian Supreme Court, Criminal Case No. 2K-218/2004, also Ruling of 9 May 2006 by Lithuanian Supreme Court, Criminal Case No. 2K-354/2006.

‘linked’ with *commercial purposes* anymore, whereas under the Criminal Code illegal reproduction should be committed for *commercial purposes*.<sup>914</sup>

Another criterion which is to separate administrative from criminal liability for illegal distribution, storage and transportation is an amount of illegal copies of the copyright or related rights’ subject-matter involved in an infringing activity. Such objective criterion is not applied in cases of illegal distribution (in those cases, the criterion of *commercial purposes* will be applied). Thus, if an amount of illegal copies is more than 100 MLS, the criminal liability is applied, if less, the administrative liability. An amount of illegal copies is calculated on the basis of the retail price of legal copies of the copyrightable subject-matter or the subject-matter of related rights<sup>915</sup>. In absence of legal copies, a price of a reproduced original work at issue is the basis to calculate an amount of illegal copies. The mentioned position was criticised by referring, in opposite, that both retail price of original work and legal copies of the protected work in question which are on the retail market can be the basis to estimate a retail price, similarly to the practice regarding adjudication of civil damages for infringements of IP rights<sup>916</sup>.

Article 192 of the Criminal Code does not cover the so-called illegal use of immaterial copies, namely illegal public performance, communication to the public and making available to the public of copyrightable items or subject-matter of related rights. Such infringing activities committed for *non-commercial purposes* are covered by the Code of Administrative Offences of Lithuania. However, decriminalization of illegal public performance, communication to the public and making available to the public for *commercial purposes* remains an issue, especially with regard to prevention of IP infringements in the Internet. Considering the distinction criteria between administrative and criminal liability, it should be noted that the current Lithuanian IP legislation actually leaves a room for strict liability for less dangerous IP crimes and provides no criminal liability for IP crimes online..

Last, but not least, similarly to criminal liability, administrative liability is applied when intent is proved in the infringer’s activities; however, in contrast to criminal liability, indirect intent in administrative cases suffices as well.

As mentioned, the amended Article 214<sup>10</sup> of the Lithuanian Code of Administrative Offences of Lithuania refers to non-commercial as well as commercial purposes, whereas Article 192 of the Lithuanian Criminal Code to commercial purposes. Before the amendments in July 2009, the term “pecuniary gain” was used in the Code of Administrative Offences which was interpreted similarly to the term “commercial purposes”. The interpretation and practical application of the mentioned term was and still is especially relevant for initiation of administrative and criminal cases.

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914 The German as well as French IP legislation does not establish “commercial purposes” as a requirement to apply criminal liability, as observed in *Mizaras*, Copyright Law (Vol. II), pp. 498-499.

915 See Decision 14 February 2006, Lithuanian Supreme Court, Case No 2K-7-3-2006, *under Art. 192(1), 182(1), Criminal Code*.

916 See *Mizaras*, Copyright Law (Vol. II), p. 491-493.

Specifically, in order to apply administrative liability for infringements of copyright and related rights, as provided in Article 214<sup>10</sup> of the Code of Administrative Offences, non-commercial acts are sufficient for illegal reproduction, public performance, communication to the public of the protectable subject-matter. For illegal distribution, transportation or storage commercial purposes are required. Article 192 of the Criminal Code, on the other hand, requires commercial purposes to be established for any of the listed illegal activities. Considering the complexity of both articles, as analysed above, the distinction between two types of liability regarding some illegal activities committed for commercial purposes and some not brings more confusion into the actual practice.

The confusion already existed before the amendments in July 2009 when there was no requirement to prove commercial purposes to apply criminal liability for illegal reproduction. Such confusion was earlier confronted by Panevėžys District Court in Lithuania which requested the Lithuanian Constitutional Court to interpret if the formulations of the previous Article 214<sup>10</sup> of the Code of Administrative Offences of Lithuania (which provided administrative liability for illegal reproduction for pecuniary gain) and Article 192 of the Criminal Code (which provided for criminal liability for illegal reproduction without establishing commercial activities) implicated that the national legislator had established more strict liability for less dangerous infringement (considering the concept that administrative liability was applicable to less dangerous (less severe) infringements)<sup>917</sup>. Now, when the corresponding laws were amended, the confusion seemed to be solved, except the question regarding decriminalized illegal use of immaterial copies for commercial purposes, as previously discussed.

Another issue relates to interpretation of the term “*commercial purposes*” itself. Although in IP criminal cases the courts tend to interpret the term as it is defined in the Copyright Law of Lithuania, the interpretations also vary.<sup>918</sup> For instance, in one of its latest decisions on illegal reproduction and use of copyrightable software the Lithuanian Supreme Court stressed that the mere fact of reproduction of software in the company did not automatically constitute commercial advantage or gained prof-

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917 See Ruling of the Constitutional Court of the Republic of Lithuania regarding the request of the applicant Panevėžys District Court if Article 214(10) paragraph 1 of the Code of Administrative Offences of the Republic of Lithuania and Article 192 Paragraph 1 of the Criminal Code of the Republic of Lithuania is in compliance with the constitutional principal of a legal state as set out in Article 31 Paragraph 4 of the Constitution of the Republic of Lithuania, 13 November 2006 (Request No. 42/2006 (remitted). Note: the Constitutional Court, however, refused to examine such request arguing that Panevėžys District Court had not provide any legal arguments which could prove a contradiction of the mentioned articles and the Constitution of Lithuania, namely, its Art. 31(4) on the constitutional principle of a legal state. Although unexamined, the request of Panevėžys District Court brought the attention that more precise and clear distinction between administrative and criminal liability is to be made by Lithuanian legislator.

918 See examination of the term “commercial purposes” in supra § 5C.II.2.c).

its<sup>919</sup>. According to the decision, the national courts should consider all relevant factors such as the type of software products in use in order to establish commercial activities of the accused person, i.e. for example, if the company's main activities focus on reproduction of foodstuff, and there is illegal graphical software application found installed in the company's computers, it can be considered by the courts that such software was not used for commercial purposes. Differently from previous judgements which were related to the interpretation of "commercial purposes" as "direct or indirect economic or commercial advantage, excluding acts by end consumers acting in good faith", also from the position expressed in the criminal law theory<sup>920</sup>, the Supreme Court of Lithuania narrowed the interpretation of the term by limiting it to those cases of use of copyrightable objects when direct economic profit is gained from using them only.

Thus, as concluded by the Supreme Court, the mere fact of using illegal copyrightable software in the company does not automatically constitute "*commercial purposes*". It should be estimated if profit was gained by the company by using each copy of infringing software. The Court, however, made a mistake by not applying criminal liability for illegal reproduction activities which did not require proof of *commercial purposes* at that time (Article 192 before the 2009 amendments was applicable). The judgement is extremely relevant for further enforcement of IP rights, namely application of criminal liability, and it can change the criminal enforcement of IP rights "landscape". In order to initiate a criminal IP case under Article 192 of the Lithuanian Criminal Code, the police and prosecutors will need to clearly examine and state in the procedural documents only those works which are used in direct commercial activities by the company, which is not always easy to prove

c) Adjudication of civil damages in administrative and criminal cases

As a rule, compensatory damages (losses), which were incurred due to administrative infringements or criminal offence against IP rights, can be requested by the aggrieved IP right holders in civil proceedings on the basis of the provisions set out in the national IP legislation and the Estonian and Latvian CCPs. Once a judgment in a criminal case is rendered and enforced, it has prejudicial effect which has a lot of positive implications for hearing a civil case regarding the same infringement and damage (losses) suffered because of it.

*First*, a criminal judgement stands for significant aspect in civil proceedings, *i.e.* the plaintiff is not obliged to prove illegal activities; what requires to be proved is a requested amount of damages (losses), instead.

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919 On June 20, 2008 the Expanded Board of Seven Judges of the Supreme Court of Lithuania rendered the judgment in Criminal Case No. 2K-7-201/2008 regarding illegal reproduction and use for commercial purposes of infringing copies of copyrightable works.

920 Commercial purposes are to be interpreted in its wider context, *i.e.* not covering acts from which a direct economic benefit is gained, but also those acts from which economic benefit is gained indirectly, as interpreted in Ivoška, G. (2009). Crimes Against Intellectual and Industrial Property. In Commentary of the Criminal Code of the Republic of Lithuania. Special Part. (1st Ed., pp. 395 – 415). Vilnius: Valstybės įmonė registrų centras, p. 405.

*Second*, a plaintiff is exempted from a stamp-duty to be paid for a civil claim. Court rulings in administrative cases are also considered as important evidentiary mean which can confirm or deny infringing activities; however, they do not enjoy the prejudicial effect and can be proved or rejected by other evidence and evidentiary means.

Under the national legislation of the Baltic countries there is a possibility, though, to request damages (losses) earlier, *i.e.* during administrative or criminal proceedings. Similarly to Latvia, where a civil action is possible under administrative procedures, following Article 37 of the Lithuanian Code of Administrative Offences, the court has a right, but not an obligation, to solve a question regarding pecuniary losses suffered by natural or legal persons due to an administrative infringement of IP rights despite the amount of such losses<sup>921</sup>.

Article 69 of the Lithuanian Criminal Code likewise establishes that pecuniary damage should be compensated or eliminated within the established term by the court, if it has been done to persons as well as property. The Lithuanian Code of Criminal Procedure<sup>922</sup> defines that pecuniary, also non-pecuniary damage can be adjudicated in criminal proceedings on the basis of a free of stamp duty claim by natural or legal person (so-called civil claimant in criminal proceedings). A civil claim is considered following the rules of the Code of Criminal Procedure and the CCP, if required, for instance, to calculate the amount of damages (losses).

In administrative cases, which started to be initiated against copyright and related rights infringements due to the amendments introduced to the Lithuanian Code of Administrative Offences in 1998, the courts used to meet aggrieved parties' requests to compensate losses automatically without estimation of the requested losses, just on the basis of a rough estimation, for instance, of a price of a legal sale of IP products which actually meant compensation for damages (losses) under the 1999 and 2003 Copyright Law. The similar case practice, *i.e.* to refer civil claims to be considered under the civil procedural rules, has been established in the criminal cases. One of the biggest issues was that, similarly to administrative cases, the IP right holders used to request to adjudicate damage which was based on a price of a legal sale of the IP products in question, as it was formulated in the then Lithuanian Copyright Law<sup>923</sup>. The Lithuanian Supreme Court, however, interpreted that compensa-

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921 It is also referred in the mentioned Code that, in all other cases, which are not defined, losses can be adjudicated according to the civil procedure. The provisions do not specify how such pecuniary damages (losses) are to be estimated, what evidence is to be provided to prove damages suffered, etc. It is to be presumably performed under the special IP laws and the CCPs by leaving discretion for the courts to form a certain practice on the issue. However, in practice both Latvian and Estonian judges are willing to transfer the requests for damage to be heard under the civil proceedings.

922 Chapter II, Sections IX (adjudication of damage when a civil claim is not submitted) and X (adjudication of damage in case of submission of civil claim) of the Lithuanian Criminal Code.

923 *E.g.*, the damage based on the price of legal sales (retail price) of the software used without authorization was adjudicated by the Judgment of 20 September 2001 of the Klaipėda District Court, Criminal Case No. 2-85/2001, *G. Astrauskas under Article 142(1) of the Criminal*

tion as such cannot be adjudicated in criminal cases on the basis of civil claims because it is not material damage in its strict sense<sup>924</sup>. The consultation by the Supreme Court partly reflected the ongoing discussion regarding compensation institute at that time<sup>925</sup>. It was furthermore the reason why IP right holders did not submit requests for adjudication of pecuniary damage in criminal cases, as the courts used to leave such requests untried by referring them to be heard under the rules of the CCP or reject them<sup>926</sup>.

## II. Border measures under the EC Regulation 1383/2003

### 1. General remarks

Following the recent reports regarding IP piracy in the Baltic countries<sup>927</sup>, the transshipment of infringing IP products, especially pirated optical media, also pirated CDs, DVDs, counterfeits with infringing trademarks, etc., have been reported as issues which are to be especially tackled with more effective application of border measures in the Baltic countries. The phenomenon of infringing IP products which are imported, exported or transported at the borders of or within the Baltic countries is mainly due to their geographical situation<sup>928</sup>. At the same time the significant increase of custom authorities' activities is observed. Such increase reflects the current tendency of a growing number of seizures of infringing IP products at the EU's external borders as well<sup>929</sup>.

Border measures were already applied before the adoption of the Enforcement Directive in the Baltic countries as well as the EC Regulation 1383/2003 coming into force in 2004<sup>930</sup>. Pursuing the standards set out in Articles 54 to 63 of the TRIPS Agreement, the national custom authorities acted on the basis of the national legisla-

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*Code.* The judgement confirmed by Lithuanian Supreme Court, Decision of 8 October 2002, Criminal Case No. 2K-656/2002, *G. Astrauskas under Article 142(1) of the Criminal Code.*

924 See *Lithuanian Supreme Court, Consultation No. B3-25 of 27 September 2001.*

925 See *refs.* to the discussion on the subject-matter in *supra* § 5F.I.1.c)(2).

926 Civil claims have been rejected, for instance, by the Judgement of 2 March 2004 of the Klaipėda District Court, Criminal Case No. 2A-78/2004, arguing that the civil claimants did not suffer damage, as the selling of the computer with illegal software installed had been stopped by the police, *i.e.* the infringing copies have not been circulated for which the profit would have been gained. Again, the court omitted the argument regarding installation (reproduction) of software for which commercial gain was not required.

927 Lithuania especially remains a key transshipment country for pirated materials from Russia and other source countries in the EU for further exportation to countries such as Estonia and Germany. Such issues as ineffective border measures in Lithuania, also lack of the regulation to stop the transshipment inside of the country, were indicated in 2008 *Special 301 Report IIPA Special Mention: Lithuania*, p. 264.

928 See overview about geopolitical situation, also IP piracy in the Baltic countries in *supra* § 3A. and § 4A.II., respectively.

929 See EU Commission Press Release on “*Customs seizures of counterfeit goods at the EU's external border*“ (May 2008).

930 See *refs.* in *supra* Ft. 163 herein.

tion at that time which was displaced by the Regulation 1383/2003<sup>931</sup>. A number of successful cases while applying the customs procedures have been reported since 2004<sup>932</sup>. Most of them related to transit shipment of counterfeit goods, which were intended to be distributed in the neighbouring countries, from China through Russia<sup>933</sup>. In 2006 the number of cases of application of border measures increased; moreover, the increasing number of requests of IP right holders to apply such measures regarding protected trademarks, patents or designs has been especially noted<sup>934</sup>. This can be partly explained by more active work and increasing competence of custom officers in the process of detecting pirated and counterfeited goods as well as timely response and assistance of IP right holders regarding their identification and further measures. The same tendencies have been recently reported in the EU as well<sup>935</sup>.

On the basis of the EC Regulation 1383/2003, also their national laws on customs and relevant secondary legislation on the subject matter, the custom authorities of the Baltic countries can decide regarding detention of goods allegedly infringing IP rights. Decisions can be based either on IP right holders' applications for action by the customs authorities or rendered *ex officio* by the customs authorities. Although the Enforcement Directive does not directly refer to any border measures which are to be taken in order to stop infringing goods being imported or exported from the corresponding jurisdictions, the closely connected application of such measures and civil remedies, as pursued by the Directive, are to be briefly discussed.

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- 931 The relevant national laws (also those valid prior to the EC Regulation 1383/2003) regarding application of border measures are listed in *Vrins, Schneider (ed.), Enforcement of intellectual property rights through border measures* (2006), p. 684 (for Lithuania), p. 657 (for Latvia), pp. 367-368 (for Estonia).
- 932 In 2006 Lithuanian custom authorities detected 79 cases of importation of IP rights infringing goods (in 2005 there were 47 such cases). Most of them were related to counterfeit trademarks (ADIDAS, PUMA, NIKE, NOKIA, SIEMENS, BURBERRY, etc.). There were cases of potentially dangerous to consumers goods (e.g., toys) detected, as reported *Lithuanian Customs Department Information* (2006), p. 12.
- 933 See *refs.* to relevant cases in Estonia and Lithuania in *Vrins, Schneider (ed.), Enforcement of intellectual property rights through border measures* (2006), pp. 368-369, 686.
- 934 The number of requests from the right holders increased (165 requests in 2006), as reported *Lithuanian Customs Department Information* (2006), p. 12. Such numbers can be also compared with overall statistics on border measures in EU as well as in other jurisdictions which represent higher number of cases, see more at *Vrins, Schneider (ed.), Enforcement of intellectual property rights through border measures* (2006), pp. 76, 77. More than 10,000 application from the industry were reported in 2006 in EU Commission Press Release on "*Customs seizures of counterfeit goods at the EU's external border*" (May 2008).
- 935 Custom seizures at the external EU borders increased 17 % in 2006, as reported in EU Commission Press Release on "*Customs seizures of counterfeit goods at the EU's external border*" (May 2008).



## 2. Border measures and civil remedies as implemented under the Enforcement Directive

Differently from civil measures and remedies set out in the Enforcement Directive, it should be noted that the EC Regulation 1383/2003 establishes administrative customs measures which application is not related to civil litigation regarding protection of the infringed IP rights. However, validity of customs measures, which are applied regarding goods infringing IP rights, depends on the fact if a right holder requests the court to apply those civil measures and remedies regarding to the same infringement<sup>936</sup>.

By virtue of Article 13 of the EC Regulation 1383/2003, if within 10 working days of receipt of the notification of suspension of release or of detention, the customs office is not notified that proceedings have been initiated to determine whether IP right has been infringed or certain provisional measures have been applied, release of the goods should be granted or their detention should be ended, as appropriate, subject to completion of all customs formalities. This does not apply in case of administrative or criminal liability. Hence, in order to ensure the validity of customs measures for longer period, civil, administrative or criminal proceedings are to be initiated by the right holders. In case such proceedings have been already initiated, the relevant documents such as a copy of the court decision, etc. are to be submitted to the customs authorities. In case a civil claim on the subject matter in question is rejected, customs measures are to be revoked as well.

The national customs authorities are to destroy goods which are found to infringe IP rights (which can be done by the court only) or dispose them outside commercial channels in such a way as to preclude damage to the right holder, without compensation of any sort and at no cost to the right holders. Other measures can be taken in order to deprive other persons from gaining economic profit from the transaction, e.g. removing labelling with protected trademarks from the counterfeit goods. Notably, subject to certain conditions which include the agreement of the right holder, Article 11 of the Regulation also allows the Member States applying a simplified procedure, i.e. when the goods infringing IP rights can be destroyed without a court decision on the subject-matter. Lithuania has chosen such possibility<sup>937</sup>.

The goods can be also transferred to the right holders or to persons indicated by them. Such possibility is also established in the Lithuanian Copyright Law. The court applies further civil remedies concerning the deterred goods infringing IP

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936 Notably, in one of the cases Lithuanian Supreme Court argued that the courts should be more active and prompt IP right holders to choose not only destruction of illegal infringing IP items, but also other measures (transfer of items to the right holder, for instance), according to the circumstances of the case, see Decision 24 November 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-1069/2003, *Italian Company "Diesel S.p.A." vs. UAB "Mita", Klaipėda Territorial Customs as a third party*.

937 The simplified procedure of destroying goods which infringe IP rights is also regulated under the *Order by the Chief Director of the Customs Department of the Republic of Lithuania No. 1B-288*.

rights, *i.e.* corrective measures<sup>938</sup>, or in case of administrative or criminal liability appropriate sanctions<sup>939</sup>.

### III. Concluding remarks

By reviewing the national legislation and practice regarding administrative and criminal liability and sanctions for infringements of IP rights, the following aspects should be mentioned.

*First*, criminal liability for certain infringements of IP rights is established in all Baltic countries. Lithuanian and Latvian legislation also constitutes administrative liability for such infringements by establishing certain legal standards which allow to distinguish crimes and administrative offences. In the course of application of the provisions in the national Criminal Codes, also Codes of Administrative Violations, certain legislative discrepancies are however observed. This especially concerns Lithuania where the national provisions seem to be chaotic due to inconsistency and different interpretation of “*commercial scale*”, *i.e.* the clear line between administrative and criminal liability for copyright and neighbouring rights infringements is missing, which, in turn, necessitates tentative legislative improvements to be adopted<sup>940</sup>.

*Second*, application by both civil remedies, which are embodied in the implementing national legislation due to the Enforcement Directive, as well as the border measures as set out in the EC Regulation 1383/2003, can help the right holders to protect their rights more effectively. This is especially true if an IP right holder is active and involved into the custom procedures by providing the application to the custom authorities. The practical concerns, however, mainly refer to the competence of the customs authorities which are to detect goods infringing IP rights. The help from the right holders, *i.e.* timely applications to apply customs measures, which are submitted along with samples and description of legal and, if possible, illegal IP goods, or timely reaction in case such measure is applied *ex officio* by the customs authorities play a substantially important role in IP enforcement practice.

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938 See examination of the provisions regarding application of corrective measures in *supra* § 5F.III.1.

939 See *refs.* to the national legislation on administrative or criminal liability for infringements of IP rights in *supra* § 5G.I.1.

940 As referred, the draft amendments regarding the Lithuanian Code of Administrative Offences on the issue are pending.



## § 6 Conclusions and observations

### A. *Implementation of the Enforcement Directive in the Baltic countries: outcomes*

After examining how the EU Enforcement Directive has been implemented in the Baltic countries – Lithuania, Latvia and Estonia – it can be observed that the current civil IP rights enforcement scheme generally reflects the required level of measures, procedures and remedies which were promulgated by the Directive. This is especially true of the current legislation in place. In many cases, though, a number of substantive and procedural aspects of enforcement, which were intended to be harmonized within the EU and which were also new to some other European countries (such as pre-trial measures to preserve evidence, the right of information concerning third parties, damages, also so-called “license analogy” for the reimbursement of damages, alternative measures), represented novel challenges to the legislative and court practice of the Baltic countries.

Notably, many of the provisions of IP legal enforcement such as provisional measures, interlocutory or permanent injunctions, corrective measures, adjudication of actual damages (losses), legal costs and publication of judicial decisions had been already embodied and applied in the Baltic practice before the adoption of the Enforcement Directive. Furthermore, some provisions and concepts which were very rare in European IP litigation practice, for instance, compensation instead of damages which was frequently criticised as importing the doctrine of punitive damages from the Anglo-Saxon legal environment (namely, the US), had been established in IP legal doctrine and court practice in Lithuania since 1994. Additional changes to the law were mainly due to the accession by the Baltic states into the EU process, starting in 1998, which, *inter alia*, required embracing general revision and improvements in national legislation.

Certain questions remained, however, such as whether substantive and procedural measures and remedies were applied in practice effectively before the implementation of the Directive, what pertinent tendencies could be discerned from the then court practice (which, admittedly, was modest, especially concerning patent and design rights), and what improvements in this legal field were necessary. Despite IP civil enforcement measures and remedies, as well as the enforcement infrastructure and its players (*i.e.*, special IP police divisions, prosecutors working on IP cases, experts, specialists specializing in IP matters, the courts competent to hear IP cases, etc.) having been put in place, actual IP enforcement practice remained quite patchy. Such an outcome was mainly due to heritage of the Soviet legal doctrine which was for some time still reflected in the national codes of civil procedure, and also to some human factors such as frequent reluctance of national judges to enforce the law in matters related to IP because of the specificity of the issues raised. The diver-

gent case practise was also influenced by legislative discrepancies in the national IP laws before the implementation of the Directive in the Baltic legislation.

This can be illustrated by the Lithuanian Supreme Court practise in situations where important legal matters regarding IP enforcement had to be tackled, and where issues such as authorship presumption, calculation of compensation instead of damages, moral damages, and also the Directive-relevant term “*commercial purposes*,” have been salient. Such disputed aspects, which were customary in other European countries, were unorthodox and problematic in the context of nascent IP enforcement practice in the Baltic countries in general. Some of the highlighted problems that arose in the early stages of the Baltic IP enforcement practice have already been solved. This has been partly achieved by following the definitions, aims and objectives of the Directive, however, the implementation of which can further lead to heterogeneous outcomes in Baltic IP litigation practise.

By analysing those (mostly legislative at the moment) outcomes, uncertainty regarding the provisions set out in the Enforcement Directive can be observed. The obscurity of some formulations embodied in the Enforcement Directive (which, noticeably, was drafted incredibly quickly) remains as one of the main issues associated with its implementation. The examination of the implementation of the Directive in the Baltic countries serves as an example of difficulties that can, in fact, arise after transposing harmonized provisions of EU law into the national legislation, especially when it comes to practical application.

Additionally, as mentioned above, legal practice in the Baltic jurisdictions still indirectly expresses specific aspects of the Soviet legal doctrine, together with features of a developing legal tradition, while at the same time striving to adopt enforcement novelties such as *civil (ex parte) searches* or the *licence analogy* as alternative methods of computing damages. Such tension is frequently observed in the decisions of the local courts, where high so-called “western” IP protection standards meet local “IP mentality and thinking”. Such factors play a substantial role and should be further considered in discussions of other proposed EU instruments in the field of IP enforcement, namely, the Draft Criminal Enforcement Directive.

Although it has been criticised on some legal fronts—such as, *inter alia*, the lack of legal precision regarding its scope and subject-matter, the lack of legal justification for its very existence (due to the TRIPS Agreement already being in place), or possibly ineffective harmonization in some cases – it should be admitted that the implementation of the Enforcement Directive in the Baltic countries has prompted certain processes in the field of protection of IP rights in general that would not otherwise have come about. *First*, it led to comprehensive revision and improvements in IP legislation on a full-scale, *i.e.* before the Directive enforcement provisions in national IP laws differed (which in many cases led to flaky or flawed lawmaking outcomes). *Second*, it fostered amendments to a few substantive provisions in the national IP laws, such as those related to *locus standi* or presumption of related rights (right of performers) in civil proceedings. *Third*, the implementation of the Directive has frequently led to strengthened protection of IP rights, thereby playing

a significant role in the prevention against IP counterfeiting and piracy, and in raising awareness about IP in general.

It is noticeable, on the other hand, that some aspects of IP enforcement nowadays deserve more attention. The newly implemented enforcement provisions, which also provide for more favourable treatment of IP right holders instruments in view of the Directive, may make valuable contributions towards solving currently unsolved problems. *First*, they may help address internet piracy – a phenomenon which is present not only in the Baltic states, but worldwide, and which calls for effectively applied means of enforcement, especially provisional measures, injunctions, and corrective measures. *Further*, more complex application of civil enforcement means in administrative and criminal procedure should be embraced, especially where adjudication of damages is concerned. The same applies to customs and civil enforcement measures. The strict separation of civil, administrative and criminal procedures is considered to be a relic of the Soviet era that needs to be set aside. Combining administrative measures, criminal measures and civil remedies (especially when it concerns collection and presentation of evidence, as well as adjudication of damages) may allow IP right holders to enjoy their rights in more effective manner – particularly when specificity of evidence, substantiation in IP infringement cases and also the principle of economy in procedures, is taken into account.

Moreover, the current civil IP enforcement scheme stemming from the Directive, embodied in the implementation of national legislation, can prompt IP right holders to be more active in initiating, for example, *civil (ex parte) searches*, by not being dependant on police or prosecution offices; and it may also prompt them to consider pursuing enforcement measures and remedies in more complex manner. This study on the implementation of the Enforcement Directive in the Baltic countries, in view of their development of a system for the protection of IP rights, is intended to highlight the main trends of IP litigation in the respective jurisdictions and to help local and foreign IP right holders to anticipate likely outcomes in cases of IP litigation.

### ***B. Further strengthening IP rights enforcement: incentives to innovate and create in the Baltics?***

The IP enforcement landscape has certainly changed in the Baltic countries during the last decades and, admittedly, it has not been due only to the harmonization of the laws associated with European-wide legislation, including the Enforcement Directive, but also to other social and economic processes which have been closely intertwined. Additionally, many incentives have been implemented in order to foster local innovations, R&D activities in both public and private companies, and also in educational institutions, through various projects in the Baltic countries.

These factors, together with the fact that, by operating innovation-related projects and businesses in the Baltics, companies, especially foreign ones, took account of the necessity of strengthening the enforcement of IP rights, should be acknowledged as having facilitated positive improvement in the IP regime of the Baltics. It was

mostly foreign IP right holders who were the first to initiate civil cases, and to attend administrative and criminal cases, against IP rights infringers (as observed from the analysed court practise). Although strongly criticised as being over-protective, the initial enforcement practice in the Baltics can be considered as a starting point in naturally evolving IP enforcement practice in general. It can also serve as a successful model of success for fostering local creators and innovators to contemplate and establish their own IP enforcement strategies, by duly maintaining their IP assets. Such examples allow estimating necessary improvements that were highlighted in the process of the implementation of the Directive.

Nevertheless, the current national enforcement of IP rights schemes, which, as mentioned above, are generally in compliance with the harmonized provisions set out in the Enforcement Directive, should be considered more as supporting mechanisms rather than as tools fostering development of IP rights in the Baltic region. More importantly, attention should be directed towards combating the widespread negative social mentality in the Baltics towards IP rights by spreading information about such rights, educating various groups in society, and cooperating with enforcement institutions, agencies, and courts. The Baltic region is still more representative of “consumer societies” than industrial powers; and even with a high demand of IP products being observable, knowledge about IP rights is still tenuous. It is anticipated, however, that future incentives regarding innovation and the research environment in Lithuania, Latvia and Estonia, together with an effectively functioning model for the enforcement of IP rights being put in place, will help to change such perceptions and attitudes in the Baltics.

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## § 7 Annex I: International, EU and National Legislation

### A. International Treaties

*Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*: as revised at Paris on July 24, 1971, and amended on September 28, 1979

*Paris Convention for the Protection of Industrial Property of March 20, 1883*: as revised and amended

*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*: of October 26, 1961

*Universal Copyright Convention of 1952*: as revised at Paris on 24 July, 1971

*Convention Establishing the World Intellectual Property Organization*: signed at Stockholm on July 14, 1967 and as amended on September 28, 1979

*Agreement on Trade Related Aspects of Intellectual Property Rights*: (WTO, 1994)

*WIPO Copyright Treaty*: as of December 20, 1996

*WIPO Performances and Phonograms Treaty*: as of December 20, 1996

*The bilateral treaties signed by the Baltic countries and other countries*: at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx)

*Agreement Between the United States of America and the Republic of Latvia on the Relations and Intellectual Property Rights Protection*: as of July 6, 1994, at [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005850.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005850.asp)

### B. European Union Legislation and Preparatory Acts

*National Provisions Communicated by the Member States concerning the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights*, at [http://eur-lex.europa.eu/Notice.do?val=470580:cs&lang=en&list=470580:cs,&pos=1&page=1&nb=1&pgs=10&hwords=&checktext=checkbox&visu=#FIELD\\_BE](http://eur-lex.europa.eu/Notice.do?val=470580:cs&lang=en&list=470580:cs,&pos=1&page=1&nb=1&pgs=10&hwords=&checktext=checkbox&visu=#FIELD_BE)

*Commission of the European Communities Communication from the Commission to the European Parliament and the Council on Enhancing the Patent System in Europe*: Brussels, 3 April 2007 COM(2007) 165 final

*Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights*: OJ L 94, 13.4.2005, p. 37

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*Proposal for a Directive of the European Parliament and of the Council on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights*: COM (2003) 46 final, January 30, 2003

*Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights*: (presented by the Commission): COM (2006) 168 final, April 26, 2006

- Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights:* OJ 2003, L 196/7
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001: on the harmonisation of certain aspects of copyright and related rights in the information society,* OJ 2001, L 167/10
- Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market: (Directive on electronic commerce).* OJ L 178, 17.7.2000, p. 1
- Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures:* was published in the Official Journal of the European Communities. OJ L 13, 19.01.2000, p. 12
- Commission's Green Paper of October 15, 1998: on "Combating Counterfeiting and Piracy in the Single Market",* COM (98) 569 final. Commission's Action Plan of November 30, 2000, COM (2000) 789 final
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- Council Directive 91/250/EEC on the legal protection: of computer programs:* OJ L 122, 17.5.1991, p. 42

## **C. National Legislation**

### **I. Lithuania**

- Lithuanian legislation in English is available at:* [http://www3.lrs.lt/dokpaieska/forma\\_e.htm](http://www3.lrs.lt/dokpaieska/forma_e.htm)
- The Constitution:* adopted on 25 November 1992, at <http://ww.lrs.lt> (EV)
- Law No VIII-1864 on Approval, Effect and Implementation of Civil Code:* adopted on 18 July 2000, entered into force on 1 July 2001, consolidated text at <http://ww.lrs.lt> (OV)
- Code of Civil Procedure:* adopted on 28 February 2002, entered into force on 1 January 2003, consolidated text at <http://ww.lrs.lt> (OV)
- Code of Administrative Violations:* adopted on 1 April 1985, consolidated text at <http://ww.lrs.lt> (OV)
- Criminal Code:* adopted on 26 September 2000, entered into force on 25 October 2000 (replaced the Criminal Code as of 1961), consolidated text at <http://ww.lrs.lt> (OV)
- Law on Trademarks:* adopted on 10 October 2000, entered into force on 1 January 2001 (which changed the Law on Trade Marks and Service Marks, as of 1993), last amended on 8 June 2006, entered into force on 28 June 2006, consolidated text at <http://www.vpb.lt/en/docs/3.doc> (EV)
- Patent Law:* adopted on 18 January 1994, entered into force on 1 February 1994, last amended on 28 October 2008, entered into force on 11 November 2008, consolidated text at <http://www.vpb.lt/en/docs/2.doc> (EV)
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*Law on the Legal Protection of Computer Programs and Databases*: as of 1996 (invalid from 9 June 1999; changed by the 1999 Law on Copyright and Neighbouring Rights)

*Law on Copyright and Related Rights*: adopted on 18 May 1999, newly adopted on 5 March 2003, entered into force on 21 March 2003, last amended on 13 March 2008, entered into force on 27 March 2008, consolidated text at [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=87985](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=87985) (EV)

*Law on Legal Protection of Topographies of Semiconductor Products*: adopted on 16 June 1998, entered into force on 1 July 1998, amended on 8 June 2006, entered into force 28 June 2006, consolidated text at <http://www.vpb.lt> (OV)

*Order of the Minister of Culture of the Republic of Lithuania on the Approval of the Forms of Rules, Application, Contract and Reports in regard to the Partial Financing of the Anti-Piracy Campaigns from the State Budget*: 29 June 2007, No. IV – 421, Vilnius, at <http://ww.lrs.lt> (OV)

*Order No 1R-85 of the Ministry of Justice of the Republic of Lithuania*: as of 2 April 2004 regarding “Recommendations on Maximum Amount of Fees Adjudged in Civil Cases to Attorneys-at-Law and Assistant Attorneys-at-Law for Provision of Legal Services”, at <http://ww.lrs.lt> (OV)

## II. Latvia

*Latvian legislation in English is available at*: <http://www.latiss.lv/legislation/latvia?lang=en>

*The Constitution*: adopted on 15 February, 1922, amended, accordingly, in 1933, 1994, 1996, 1997, 1998, 2002, 2003, at <http://www.saeima.lv> (EV)

*Civil Law*: consolidated text of September 1998, at <http://www.ttc.lv/lv/publikacijas/civillikums.pdf> (EV)

*Civil Procedure Law*: adopted on 14 October 1998, entered into force on 1 March 1999, last amended on 22 May 2008, consolidated text (with all amendments post 17 June 2004 not included) at <http://www.ttc.lv/New/lv/tulkojumi/E0044.doc> (EV)

*Criminal Code*: adopted on 8 July 1998, consolidated text at <http://www.legislationline.org/documents/section/criminal-codes> (EV)

*Patent Law*: adopted on 31 March 1993, newly adopted (except Chapter V) with an entry into force on 20 April 1995, the current version entered into force on 1 March, 2007, consolidated text at <http://www.ttc.lv/index.php?id=10&l=LV&seid=down&itid=16308> (EV)

*Law on Trademarks and the Republic of Latvia Law on Industrial Design Protection*: adopted on 7 April 1993, changed by the Law of the Republic of Latvia on Trademarks and Indications of Geographical Origin, as from 15 July, 1999, last amended on 8 February 2007, consolidated text (only with amendments as of 8 November 2001) at [http://www.lrpv.lv/dl/w/pz\\_lik\\_en.doc](http://www.lrpv.lv/dl/w/pz_lik_en.doc) (EV)

*Law on Industrial Designs*: adopted on 18 November 18 2004, substituted the previous “Rules on Industrial Design”, as of 15 April 2004, last amended on 8 February 2007, consolidated text at [http://www.lrpv.lv/dl/w/diz\\_lik\\_en.doc](http://www.lrpv.lv/dl/w/diz_lik_en.doc) (EV)

*Copyright Law*: adopted on 11 May 1993, newly adopted on 10 May, 2000, last amended on 6 December 2007, consolidated version (only with amendments as of 22 April 2004) at <http://www.ttc.lv/index.php?id=10&l=LV&seid=down&itid=13745> (EV)

### III. Estonia

*Estonian legislation in English is available at:* [http://www.epa.ee/client/default.asp?wa\\_id=498](http://www.epa.ee/client/default.asp?wa_id=498)

*The Constitution:* adopted on 28 June 1992, last amended on 21 July 2007, at <http://www.legaltext.ee/text/en/X0000K1.htm> (EV)

*General Part of the Civil Code Act:* adopted on 27 March 2002, entered into force on 1 July, last amended on 26 March 2007, consolidated text (as of December 2003) at <http://www.legaltext.ee/text/en/X30082K2.htm> (EV)

*Code of Civil Procedure:* adopted on 20 April 2005, entered into force on 1 January 2006, consolidated text at <http://www.legaltext.ee/text/en/X90041.htm> (EV)

*Law of Obligations Act:* adopted on 26 September 2001, entered into force on 1 July 2002, last amended on 12 December 2007, consolidated text (as of May 2004) at <http://www.legaltext.ee/text/en/X30085K2.htm> (EV)

*Criminal Code:* adopted on 6 June 2001, entered into force on 1 September 2002, consolidated text at <http://www.legislationline.org/documents/section/criminal-codes> (EV)

*Trademarks Act:* adopted on 1 October 1992, newly adopted on 22 May 2002, entered into force on 1 May 2004, last amended on 1 January 2007, consolidated text of April 2004, available at <http://www.legaltext.ee/text/en/X50063K2.htm> (EV)

*Copyright Act:* adopted on 11 November 1992, entered into force on 12 December 1992, consolidated text (as of May 2006) at <http://www.legaltext.ee/text/en/X40022K7.htm> (EV)

*Patents Act:* adopted on 16 March 1994, entered into force on 23 May 1994, last amended on 15 March 2007, consolidated text (as of April 2004) at <http://www.legaltext.ee/text/en/X40034K4.htm> (EV)

*Utility Models Act.:* adopted on 16 March 1994, entered into force on 23 May 1994, last amended on 15 March 2007, consolidated text (as of April 2004) at <http://www.legaltext.ee/text/en/X30061K5.htm> (EV)

*Industrial Design Protection Act:* adopted on 18 November 1997, entered into force on 11 January 1998, last amended on 15 March 2007, consolidated text (as of April 2004) at <http://www.legaltext.ee/text/en/X2033K6.htm> (EV)

## § 8 Annex II: Cases

*Ruling of the Constitutional Court of the Republic of Lithuania:* (Case No. 33/03) on the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania, 28 March 2006

*Ruling of the Constitutional Court of the Republic of Lithuania:* regarding the request of the applicant Panevėžys District Court if Article 214<sup>10</sup> paragraph 1 of the Code of Administrative Offences of the Republic of Lithuania and Article 192 Paragraph 1 of the Criminal Code of the Republic of Lithuania is in compliance with the constitutional principal of a legal state as set out in Article 31 Paragraph 4 of the Constitution of the Republic of Lithuania, 13 November 2006

*Lithuanian Supreme Court:* Consultation No. A3-64 on aspects of the application of some provisions of the Law on Copyright and Related Rights, 22 February 2002

*Lithuanian Supreme Court:* Consultation No. B3-25, 27 September 2001 :Resolution of the Senate of Judges of the Supreme Court of Lithuania No. 1 on “Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases”, Gazette of the Supreme Court of Lithuania “Teismų praktika”, 1998, No. 9

*Lithuanian Supreme Court:* Civil Case No. 3K-3-4/2008, LATGA-A vs. UAB “Trajektorija”

*Lithuanian Supreme Court:* Criminal Case No. 2K-7-201/2008, T.K., UAB “Tadetas”

*Lithuanian Supreme Court:* Case No. 3P-3621/2007

*Lithuanian Supreme Court:* Civil Case No. 3K-3-353/2007, B.V.-F. vs. National M.K.Čiurlionis Art Museum, UAB “Fodio” et al.

*Lithuanian Supreme Court:* Civil Case No. 3K-3-422/2006, Autodesk, Inc. vs. UAB “Arginta”

*Lithuanian Supreme Court:* Civil Case No. 3K-3-311/2006, Microsoft Corp., Symantec Corp., BĮ UAB “VTeX” vs. UAB “Vilpostus”

*Lithuanian Supreme Court:* Civil Case No. 3K-3-270/2006, Microsoft Corp., Symantec Corp., Adobe Systems, Inc., Autodesk, Inc. vs. UAB “Kompiuterių mokymo centras”

*Lithuanian Supreme Court:* Civil Case No. 3K-3-270/2006, Microsoft Corp., Symantec Corp., Adobe Systems, Inc., Autodesk, Inc. vs. UAB “Kompiuterių mokymo centras”

*Lithuanian Supreme Court:* Civil Case No. 3K-3-209/2006, Danish Company “Kirkli A/S” (“Lego Juris A/S”) vs. UAB “Legosta”

*Lithuanian Supreme Court:* Criminal Case No. 2K-354/2006, under Art. 192, Criminal Code

*Lithuanian Supreme Court:* Case No 2K-7-3-2006, under Art. 192(1), 182(1), Criminal Code

*Lithuanian Supreme Court:* Civil Case No. 3K-3-200/2005, Microsoft Corp., Autodesk, Inc., Electronic Arts Inc. et al. vs. UAB “Tūris”

*Lithuanian Supreme Court:* Criminal Case No. 2K-218/2004, under Art. 192(1), Criminal Code

*Lithuanian Supreme Court:* Civil Case No. 3K-3-197/2004, Linas Karalius vs. UAB “Ieva” et al.

*Lithuanian Supreme Court:* Civil Case No. 3K-3-1069/2003, Italian Company “Diesel S.p.A.” vs. UAB “Mita”, Klaipėda Territorial Customs as third party

*Lithuanian Supreme Court:* Civil Case No. 3K-3-132/2003, Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB “VTeX” vs. UAB “Fima”

- Lithuanian Supreme Court*: Civil Case No. 3K-3-273/2003, J. Jakštas et al. and LATGA-A vs. UAB “Mūsų gairės”
- Lithuanian Supreme Court*: Criminal Case No. 2K-723/2003, A. Ivoškus under Article 142<sup>1</sup> of the Criminal Code
- Lithuanian Supreme Court*: Criminal Case No. 2K-467/2002, V. Zaura under Article 142<sup>1</sup> of the Criminal Code
- Lithuanian Supreme Court*: Criminal Case No. 2K-656/2002, G. Astrauskas under Criminal Code Art. 142<sup>1</sup>
- Lithuanian Supreme Court*: Criminal Case 2K-102/2002, under Art. 142<sup>1</sup>, Criminal Code
- Lithuanian Court of Appeal*: Civil Case No. 2A-123/2008, Prosecutor of Vilnius City District, La Face Records, LLC., Virgin Records America, Inc. et al. vs. UAB “Baltic optical disk”
- Lithuanian Court of Appeal*: Civil Case No. 2A-98/2007, B.V.-F. vs. National M.K.Čiurlionis Art Museum, UAB “Fodio” and the Ministry of Culture of the Republic of Lithuania
- Lithuanian Court of Appeal*: Civil Case No. 2-707/2007, “Ashburn International” vs. AB “Lukoil” et. al
- Lithuanian Court of Appeal*: Civil Case No. 2-564/2007, LATGA-A et al. vs. AB “Hesona” et al.
- Lithuanian Court of Appeal*: Civil Case No. 2-49/2006, AB “Krašto projektai” vs. UAB “Vilniaus kapitalinė statyba” et al.
- Lithuanian Court of Appeal*: Civil Case No. 2A-352/2001, Microsoft Corporation, Adobe Systems Incorporated, Symantec Corporation and BĮ UAB “VTeX” vs. UAB “Sagra”
- 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”
- 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 individual 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”
- Ruling of Panevėžys City Circuit Court*: as of 28 August 2006, Microsoft Corporation vs. J. Skodžius Firm “Skominta”
- Ruling of Vilnius City 2nd Circuit Court*: as of 4 September 2006, Microsoft Corporation, Adobe Systems, Inc. vs. UAB “Šilo bitė”
- Ruling of Kaunas City Circuit Court*: of 28 June 2004 on the request of Microsoft Corporation, Adobe Systems, Inc. vs. UAB “Autosabina”
- Ruling of Vilnius City 2nd Circuit Court*: as of 21 June 2004, Microsoft Corporation, Adobe Systems Inc. vs. AB “Panerių investicijos”
- Ruling of the Constitutional Court of the Republic of Lithuania*: (Case No. 33/03) on the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania, 28 March 2006
- Ruling of the Constitutional Court of the Republic of Lithuania*: regarding the request of the applicant Panevėžys District Court if Article 214<sup>10</sup> paragraph 1 of the Code of Administrative Offences of the Republic of Lithuania and Article 192 Paragraph 1 of the Criminal Code of the Republic of Lithuania is in compliance with the constitutional principal of a legal state as set out in Article 31 Paragraph 4 of the Constitution of the Republic of Lithuania, 13 November 2006
- Lithuanian Supreme Court*: Consultation No. A3-64 on aspects of the application of some provisions of the Law on Copyright and Related Rights, 22 February 2002

*Lithuanian Supreme Court*: Consultation No. B3-25, 27 September 2001

*Resolution of the Senate of Judges of the Supreme Court of Lithuania*: No. 1 on “Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases”, Gazette of the Supreme Court of Lithuania “Teismų praktika”, 1998, No. 9

*Lithuanian Supreme Court*: Civil Case No. 3K-3-4/2008, LATGA-A vs. UAB “Trajektorija”

*Lithuanian Supreme Court*: Criminal Case No. 2K-7-201/2008, T.K., UAB “Tadetas”

*Lithuanian Supreme Court*: Case No. 3P-3621/2007

*Lithuanian Supreme Court*: Civil Case No. 3K-3-353/2007, B.V.-F. vs. National M.K.Čiurlionis Art Museum, UAB “Fodio” et al.

*Lithuanian Supreme Court*: Civil Case No. 3K-3-422/2006, Autodesk, Inc. vs. UAB “Arginta”

*Lithuanian Supreme Court*: Civil Case No. 3K-3-311/2006, Microsoft Corp., Symantec Corp., BĮ UAB “VTeX” vs. UAB “Vilpostus”

*Lithuanian Supreme Court*: Civil Case No. 3K-3-270/2006, Microsoft Corp., Symantec Corp., Adobe Systems, Inc., Autodesk, Inc. vs. UAB “Kompiuterių mokymo centras”

*Lithuanian Supreme Court*: Civil Case No. 3K-3-270/2006, Microsoft Corp., Symantec Corp., Adobe Systems, Inc., Autodesk, Inc. vs. UAB “Kompiuterių mokymo centras”

*Lithuanian Supreme Court*: Civil Case No. 3K-3-209/2006, Danish Company “Kirkli A/S” (“Lego Juris A/S”) vs. UAB “Legosta”

*Lithuanian Supreme Court*: Criminal Case No. 2K-354/2006, under Art. 192, Criminal Code

*Lithuanian Supreme Court*: Case No 2K-7-3-2006, under Art. 192(1), 182(1), Criminal Code

*Lithuanian Supreme Court*: Civil Case No. 3K-3-200/2005, Microsoft Corp., Autodesk, Inc., Electronic Arts Inc. et al. vs. UAB “Tūris”

*Lithuanian Supreme Court*: Criminal Case No. 2K-218/2004, under Art. 192(1), Criminal Code

*Lithuanian Supreme Court*: Civil Case No. 3K-3-197/2004, Linas Karalius vs. UAB “Ieva” et al.

*Lithuanian Supreme Court*: Civil Case No. 3K-3-1069/2003, Italian Company “Diesel S.p.A.” vs. UAB “Mita”, Klaipėda Territorial Customs as third party

*Lithuanian Supreme Court*: Civil Case No. 3K-3-132/2003, Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB “VTeX” vs. UAB “Fima”

*Lithuanian Supreme Court*: Civil Case No. 3K-3-273/2003, J. Jakštas et al. and LATGA-A vs. UAB “Mūsų gairės”

*Lithuanian Supreme Court*: Criminal Case No. 2K-723/2003, A. Ivoškus under Article 142<sup>1</sup> of the Criminal Code

*Lithuanian Supreme Court*: Criminal Case No. 2K-467/2002, V. Zaura under Article 142<sup>1</sup> of the Criminal Code

*Lithuanian Supreme Court*: Criminal Case No. 2K-656/2002, G. Astrauskas under Criminal Code Art. 142<sup>1</sup>

*Lithuanian Supreme Court*: Criminal Case 2K-102/2002, under Art. 142<sup>1</sup>, Criminal Code

*Lithuanian Court of Appeal*: Civil Case No. 2A-123/2008, Prosecutor of Vilnius City District, La Face Records, LLC., Virgin Records America, Inc. et al. v. UAB “Baltic optical disk”

*Lithuanian Court of Appeal*: Civil Case No. 2A-98/2007, B.V.-F. vs. National M.K.Čiurlionis Art Museum, UAB “Fodio” and the Ministry of Culture of the Republic of Lithuania

*Lithuanian Court of Appeal*: Civil Case No. 2-707/2007, “Ashburn International” vs. AB “Lukoil” et. al



*Lithuanian Court of Appeal*: Civil Case No. 2-564/2007, LATGA-A et al. vs. AB “Hesona” et al.

*Lithuanian Court of Appeal*: Civil Case No. 2-49/2006, AB “Krašto projektai” vs. UAB “Vilniaus kapitalinė statyba” et al.

*Lithuanian Court of Appeal*: Civil Case No. 2A-352/2001, Microsoft Corporation, Adobe Systems Incorporated, Symantec Corporation and BĮ UAB “VteX” vs. UAB “Sagra”

*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”

*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”

*Ruling of Panevėžys City Circuit Court*: as of 28 August 2006, Microsoft Corporation vs. J. Skodžius Firm “Skominta”

*Ruling of Vilnius City 2nd Circuit Court*: as of 4 September 2006, Microsoft Corporation, Adobe Systems, Inc. vs. UAB “Šilo bitė”

*Ruling of Kaunas City Circuit Court*: of 28 June 2004 on the request of Microsoft Corporation, Adobe Systems, Inc. vs. UAB “Autosabina”

*Ruling of Vilnius City 2nd Circuit Court*: as of 21 June 2004, Microsoft Corporation, Adobe Systems Inc. vs. AB “Panerių investicijos”

*Estonian Supreme Court*: Civil Case No. 3-2-167-04

*Estonian Supreme Court*: Civil Case No. 3-2-1-39-03, Leonhard Lapin vs. Kihnu county

*Estonian Supreme Court*: Civil Case No 3-2-1-84-98, J.Einard vs. P.Laurits, H-E.Merila & AS Iguan

*Estonian Supreme Court*: Civil Case No 3-2-1-60-98, Tiit Räis vs. AS Laks & Ko

*Tartu Circuit Court*: Civil Case No. 2-2-188/2003, AS Flora Liit vs. AS Flora

*Tartu Circuit Court*: Civil Case No. II-2-95/96, V.Jürisson vs. AS Postimees

*Other ECJ*: Decision as of 29 January 2008, Case No C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España S.A.U. (2008)

*US Supreme Court*: Decision as of 15 May 2006, Ebay Inc. et al vs. Mercexchange LLC

*Court of Justice of the European Communities*: Decision as of 13 September 2001: Az: Case No C-89/99, IIC 2002, p. 718

*EctHR*: Chappel v. United Kingdom, 30 March 1989, Case No. 17/1987/140/194

*Anton Piller K.G. v. Manufacturing Process Ltd.*: [1976] Ch. 55 (C.A.)

*ECJ*: Judgement of 26 March 1992, Case C-261/90, OJ 1989, L 317/48

## § 9 Summary (in German)

### Zusammenfassung der Doktorarbeit

## DIE UMSETZUNG DER EU DURCHSETZUNGSRICHTLINIE IN DEN BALTISCHEN STAATEN:

### Ein Erfahrungsbericht hinsichtlich der Entwicklung des Schutzes geistigen Eigentums

Als Estland, Lettland und Litauen in den Jahren 1990/1991 der internationalen Staatengemeinschaft als souveräne Staaten beitraten, sahen sie sich nicht nur rasanten wirtschaftlichen Veränderungen ausgesetzt. Neben der Schaffung einer voll ausgebildeten materiellrechtlichen Immaterialgüterrechtsordnung und der Errichtung funktionierender Durchsetzungsmechanismen aufgrund des *acquis communautaire* sahen sich diese Staaten auch fortdauernden sozialen und kulturellen Veränderungen ausgesetzt. Dies äußerte sich insbesondere in Diskrepanzen zwischen den gesetzlich vorgeschriebenen Verfahren einerseits und den bei der Durchsetzung geistiger Eigentumsrechte tatsächlich gefundenen Lösungen andererseits sowie bei der Entwicklung innovativer Märkte in allen drei Ländern.

Es wird angenommen, dass die fortdauernden Änderungen der nationalen Gesetze, insbesondere solche hinsichtlich der Durchsetzung der Rechte am geistigem Eigentum, u.a. durch die Umsetzung der Richtlinie 2004/48/EG des Europäischen Parlamentes und des Rates vom 29. April 2004 (folgend: EU Durchsetzungsrichtlinie), nicht ohne Berücksichtigung der historischen, gesellschaftlichen, wirtschaftlichen sowie kulturellen Situation in den baltischen Staaten betrieben werden können. Dies ergibt sich aus dem Umstand, dass das Baltikum als Region das Ergebnis komplexer historischer Prozesse ist.

Beweggrund für diese Untersuchung der baltischen Staaten sind die folgenden Umstände:

- (1) Die Tatsache, dass diese Staaten als besondere Unterregion der Europäischen Union zu betrachten sind, die sich durch ähnliche, wenn nicht gar identische historische und zeitgenössische Entwicklungslinien bei der Rechtssetzung und Praxis des geistigen Eigentums auszeichnen.
- (2) Im Prozess der Einführung von Rechten des geistigen Eigentums sowie der Integration und Aufnahme in die Europäische Union formten die baltischen

Staaten eine *ad hoc* Koordinierungsgruppe innerhalb der zentral- und osteuropäischen Staaten.

Litauen ist der Hauptgegenstand der Untersuchung, wohingegen Lettland und Estland lediglich als Bezugspunkte in bestimmten Bereichen dienen, die für eine vergleichende Analyse besonders wichtig sind, um bestimmte Aspekte der Rechtsdurchsetzung zu analysieren, die bei der Implementierung der Durchsetzungsrichtlinie auftreten.

Aufgrund der historischen Umstände ist es das Ziel dieser Arbeit darzulegen, dass die baltischen Staaten soziale Spannungen erfahren haben, die aus ihrer geographischen Lage als Kreuzung zwischen Ost und West und der Dynamik der Integration in die Europäische Gemeinschaft und die westlichen Welt im Allgemeinen ausgelöst wurden. Ein weiterer wichtiger Aspekt, das angespannte Verhältnis zum geistigen Eigentum während der Besetzung durch die Sowjetunion, ist ebenfalls von Bedeutung. Trotz eines gewaltigen wirtschaftlichen Wachstums und einem positiven wirtschaftlichen Umfeld in der baltischen Region ist festzustellen, dass einige tief verwurzelte historische, soziale und kulturelle Faktoren das volle Ausmaß an positiven Wirkungen dieses Wachstums, insbesondere im Bereich des geistigen Eigentums und in der Schaffung von Märkten für Forschung und Entwicklung, verhindern.

Wie bereits erwähnt, wurden die nationalen Vorschriften im Bereich der Durchsetzung des geistigen Eigentums durch den Beitritt zur Europäischen Union am 1. Mai 2004 geändert. Diese wurden später unter Berücksichtigung von in der Zwischenzeit aufgetretenen Fehlentwicklungen bei der Einführung neuer Immaterialgüterrechte, der sich entwickelnden Rechtsprechung und den Zielen der EU-Durchsetzungsrichtlinie, die ein hohes, gleichwertiges und homogenes Niveau beim Schutz geistiger Eigentumsrechte erfordert, weiter angepasst. Die EU Durchsetzungsrichtlinie entsprang dem Gedanken, Unregelmäßigkeiten und Schwachstellen in den nationalen Gesetzen des geistigen Eigentums zu eliminieren, um große Widersprüche zwischen den nationalen Systemen der Durchsetzung geistigen Eigentums der Mitgliedstaaten zu vermeiden.

Die Arbeit erläutert, dass die Ziele, die von der Durchsetzungsrichtlinie verfolgt werden, äußerst relevant und von besonders hoher praktischer Relevanz für die Staaten des Baltikums sind. Diese sind häufig raschen Umwälzungen aufgrund der Schaffung eines effektiven Schutzes von geistigem Eigentum ausgesetzt. Weiterhin werde sie durch negative Einflüsse belastet, wie z.B. Produktpiraterie, die sich aus ihrem wirtschaftlichen, rechtlichen und politischen Umfeld ergeben. Obwohl eine positive Entwicklung des Rechts im Bereich des Kampfes gegen die Produktpiraterie auszumachen war, macht der Wandel des Erscheinungsbildes der Verletzung geistigen Eigentums durch den Anstieg von Internet Piraterie die Durchsetzung geistigen Eigentums in der Region des Baltikums umso wichtiger. Die Einführung rechtlicher Maßnahmen im Raum der EU sollen dem Ziel dienen, Verletzungen an geistigem Eigentum zu verringern und sollen unter anderem einen gleichen Standard an Rechtsdurchsetzung von geistigem Eigentum im Binnenmarkt bewerkstelligen, was

folglich die Frage nach sich zieht, ob solche Maßnahmen auf dem baltischen Markt zur Verfügung stehen.

Die Arbeit beleuchtet den Hintergrund und Struktur der Durchsetzungsrichtlinie, deren historischen Kontext sowie ihr Verhältnis zu anderen internationalen Standards hinsichtlich des Schutzes geistigem Eigentums, wie z.B. dem TRIPS Abkommen und weiterer EU Richtlinien. Dem folgt eine Betrachtung:

- (1) der geopolitischen sowie geostrategischen Lage des Baltikums;
- (2) der lokalen Gegebenheiten hinsichtlich des geistigen Eigentums (akademischer Forschung und Lehre im Bereich des geistigen Eigentums, der Industrie, der Innovationskräfte als auch lokaler innovativer Produktion).

Durch die Beantwortung der Frage, welche Rechtstradition hinsichtlich des geistigen Eigentums, falls überhaupt, die baltischen Staaten besitzen und welche Umstände das jetzige System der Durchsetzung geistigen Eigentums Estland, Lettland und Litauen beeinflussen wird rückblickend besonderes Augenmerk auf die Geschichte der baltischen Staaten gelegt. Die Struktur der Rechtsdurchsetzung sowie deren Akteure werden ebenso betrachtet. Neben der Prüfung der aktuellen Situation der Infrastruktur der Durchsetzung von geistigen Eigentums in den baltischen Staaten wird die mögliche Errichtung einer gemeinsamen Gerichtsbarkeit für gemeinschaftsrechtliche Schutzrechte aus der Perspektive des Baltikums analysiert.

Hinsichtlich des Aufbaus der Arbeit wird zunächst mit der Betrachtung der Vorschriften der EU Durchsetzungsrichtlinie und derer Umsetzung und Anwendung in der Praxis nationaler Gerichte der baltischen Staaten begonnen. Unterabschnitt A des 2. Kapitels der Arbeit blickt auf die Geschichte der Rechtssetzung im Bereich des geistigen Eigentums im Baltikum in Form der Betrachtung zweier wichtiger Zeiträume d.h. vor und nach dem Beitritt der baltischen Staaten zur EU, wobei der Fokus auf die besonders relevanten Rechte des geistigen Eigentums in der Region, nämlich dem Urheberrecht, dem Markenrecht, dem Geschmacksmusterrecht sowie dem Patentrecht gerichtet ist. Hierbei werden insbesondere die geopolitische Lage der baltischen Staaten und dessen Einfluss auf nationale Rechtsetzung, insbesondere im Bereich der Rechte des geistigen Eigentums, in Betracht gezogen. Dem historische Überblick, der sich maßgeblich mit der Rechtssetzung und der Auswertung von Statistiken befasst, folgt der 2. Teil des 2. Kapitels, welcher den aktuellen ordnungsrechtlichen und institutionellem Rahmen zur Rechtsdurchsetzung in den baltischen Staaten betrachtet, was für die weitere Untersuchung der Vorschriften der Rechtsdurchsetzung geistigen Eigentums relevant ist.

Eine Analyse der aktuellen Umsetzung der Vorschriften der EU Durchsetzungsrichtlinie, insbesondere derer hinsichtlich der gewerblichen Schutzrechte, kann nicht ohne eine Erörterung der wirtschaftlichen Entwicklung des baltischen Marktes unter Einbeziehung sozialer und wirtschaftlicher Faktoren, die im Bezug zum geistigen Eigentum stehen sowie des Umfelds für Forschung und Entwicklung stattfinden. Daher erläutert Kapitel 3 der Arbeit einige Aspekte der lokalen Forschung, der lokalen Industrie, der Innovationskraft, der Lehre und wissenschaftlichen Forschung im

Bereich des geistigen Eigentums sowie das Umfeld zur Schaffung und Anwendung innovativer Produkte im Lichte der staatlichen Regulierung und Förderung.

Nachdem der rechtliche Rahmen des geistigen Eigentums sowie das Umfeld von Forschung und Entwicklung, der kreative und innovativen Industrie und Lehre des geistigen Eigentums im Baltikum in den vorangegangenen Kapitel erläutert worden ist, betrachtet Kapitel 4 zunächst in Kürze die Vorgaben, den Anwendungsbereich sowie die Vorschriften der EU Durchsetzungsrichtlinie im Lichte des TRIPS Abkommens. Es beschreibt dann die allgemeinen prozessualen Regeln im Bereich des geistigen Eigentums in den nationalen Rechtsvorschriften und erläutert die deshalb neu geschaffenen Institutionen im Rahmen der Durchsetzung geistigen Eigentums durch einen Vergleich mit der Praxis in anderen Staaten wie beispielsweise Deutschland, Frankreich und dem Vereinigten Königreich.

Der Erörterung von nationalen prozessualen und materiellen Normen der baltischen Staaten folgt ein Überblick über die Durchsetzungsrichtlinie, wobei zwischen hergebrachten Rechtsinstituten, die in einigen Mitgliedstaaten schon länger existierten, und Neuheiten, die erstmals in der Richtlinie erwähnt werden, unterschieden wird. Zusätzlich werden die Vorschriften über die Person des Anspruchsinhabers (*locus standi*), der Sammlung von Beweisen, der Anwendung von Maßnahmen, die der Beweissicherung im Falle einer Rechtsverletzung dienen (insbesondere praktische Aspekte bei der Handhabung durch die litauischen Gerichte im Vergleich zu anderen Rechtsordnungen), der vorläufigen sowie vorbeugenden Maßnahmen, der Rechtsmittel, des Schadensersatzes, sonstige Maßnahmen sowie der Veröffentlichung von Gerichtsurteilen und deren Präventivfunktion erörtert. Die Handhabung durch die litauischen Gerichte und Unterschiede hinsichtlich der aufgelisteten Materie sowie einige Aspekte der Beziehung zivil-, verwaltungsrechtlicher- sowie strafrechtlicher Maßnahmen werden ebenfalls betrachtet um die Auswirkung der Umsetzung der EU Durchsetzungsrichtlinie einzuschätzen.

Die Betrachtung der zivilrechtlichen Rechtsdurchsetzung geistigen Eigentums in den baltischen Staaten hinsichtlich deren historischer, gesellschaftlicher, wirtschaftlicher und kultureller Faktoren sowie deren ökonomischer und pragmatischer Begründung, ohne welche ein Ausblick auf zukünftige Entwicklungen unmöglich wäre, haben eine unmittelbaren Bezug zu der Absicht hieraus Schlussfolgerungen zu ziehen sowie Betrachtungen und Vorschlägen zu unterbreiten. Im Anbetracht des erklärten Ziels, wirksame zivilprozessuale Vorschriften zu schaffen, was durch die EU Durchsetzungsrichtlinie vorgegeben wird, werden weitere Gesetzesvorhaben im Bereich der Harmonisierung der strafrechtlichen Durchsetzung innerhalb der EU betrachtet. Die Feststellungen und Schlussfolgerungen hierzu werden im letzten Teil dieser Arbeit (Kapitel 5) zusammengefasst.

Festzuhalten ist, dass der gegebene Rahmen der zivilrechtlichen Durchsetzung von geistigem Eigentum in Litauen, Lettland und Estland den Vorgaben der EU Durchsetzungsrichtlinie entspricht. Dies trifft insbesondere hinsichtlich der aktuellen Gesetzgebung zu. Ebenso festzustellen ist, dass eine Reihe materiellrechtlicher sowie prozessualer Maßnahmen hinsichtlich der Rechtsdurchsetzung, welche beabsichtigt waren diese innerhalb der EU zu harmonisieren und welche ebenso Neuland

für andere Europäische Staaten waren, Umwälzungen in der Rechtsgebung und Rechtsprechung der baltischen Staaten darstellen. Weitergehend ist festzustellen, dass viele Maßnahmen der Rechtsdurchsetzung geistigen Eigentums, wie beispielsweise vorläufige Maßnahmen, einstweilige und endgültige Verfügungen, Abhilfemaßnahmen, Schadensersatz, Kosten der Rechtsverfolgung sowie die Veröffentlichung von Gerichtsurteilen bereits vor der Umsetzung der Durchsetzungsrichtlinie in der baltischen Rechtspraxis enthalten waren und angewandt wurden.

Zudem hielten einige Regeln und Konzepte, die selten in der Europäischen Praxis der Rechtsdurchsetzung enthalten waren, wie beispielsweise in Litauen die Ausgleichszahlung anstelle von Schadensersatz, was häufig als Übernahme der „*punitive damages*“-Doktrin des angelsächsischen (insbesondere des US amerikanischen) Rechtskreis kritisiert wurde, seit 1994 in der Rechtslehre und Rechtsprechung des geistigen Eigentum Einzug. Zusätzliche Änderungen des Rechts resultieren aus dem Eintritt der baltischen Staaten in den Beitrittsprozess zur EU seit dem Jahre 1998, welcher unter anderem eine umfassende Revidierung und Verbesserung nationaler Rechtssetzung notwendig machte.

Trotzdem bleiben einige Fragen, wie beispielsweise, ob materiellrechtliche und prozessuale Maßnahmen und Mittel vor Umsetzung der EU Durchsetzungsrichtlinie effektiv in der Praxis verwendet wurden, offen. Hinzu kommt die Frage, welche einschlägige Tendenz der damaligen Praxis der Gerichte zu entnehmen waren und welche Verbesserungen in diesem Rechtsgebiet notwendig erschienen. Trotz vorhandenen zivilrechtlichen Maßnahmen und Rechtsmitteln, der Schaffung einer Infrastruktur zur Rechtsdurchsetzung samt Bereitstellung von notwendigem Personal verbleibt die tatsächliche Rechtsdurchsetzung noch lückenhaft. Dies resultiert hauptsächlich aus dem Erbe, das der sowjetischen Rechtslehre geschuldet ist sowie menschlichem Verhalten, wie der widerstrebenden Handhabung der Richter bei der Durchsetzung geistigen Eigentums, die der komplexen Materie geschuldet ist. Inkoherente Rechtsprechungspraxis wurde durch die Unterschiede in der Gesetzgebung der baltischen Staaten beeinflusst. Die Rechtspraxis des litauischen Obersten Gerichtshofs hierzu wurde in dieser Arbeit eingehend diskutiert.

Durch die Analyse dieser momentan meist auf die Gesetzgebung beschränkten Wirkungen wurden die Unwägbarkeiten der Vorschriften der Durchsetzungsrichtlinie hervorgehoben. Die Unklarheit mancher Formulierungen der EU Durchsetzungsrichtlinie verbleibt eine der Hauptschwierigkeiten bei ihrer Umsetzung. Die Prüfung der Umsetzung der Richtlinie in den baltischen Staaten dient als Beispiel der Schwierigkeiten, die auftreten können und tatsächlich auftreten bei der Umsetzung und vor allem der praktischen Umsetzung harmonisierter Regeln des EU Rechts in nationaler Gesetzgebung.

Zusätzlich ist, wie bereits angesprochen, in der baltischen Rechtspraxis neben der indirekten Anwendung sowjetischer Rechtslehren eine sich entwickelnden Rechts-tradition sichtbar, während zur selben Zeit angestrebt wird, neuartige Mittel im Bereich der Rechtsdurchsetzung wie die Parteidurchsuchungen oder die Lizenzanalogie als alternatives Mittel der Schadensermittlung einzuführen. Solche Konflikte sind häufig in der Rechtsprechung untergeordneter Gerichte anzutreffen, wobei die ho-

hen, sog. westlichen Standards des Schutzes geistigen Eigentums der „lokalen Mentalität und Denken“ gegenüberstehen. Solche Faktoren spielen eine entscheidende Rolle und sollten in den Erörterungen hinsichtlich weiterer Instrumente im Bereich der Durchsetzung geistigen Eigentums, insbesondere bei dem Entwurf der Richtlinie zur strafrechtlichen Durchsetzung, Beachtung finden.

Andererseits hat die Umsetzung der EU Durchsetzungsrichtlinie in den baltischen Staaten einen gewissen Prozess hinsichtlich des Schutzes geistigen Eigentums in Gang gebracht, der sonst wohl nicht eingetreten wäre, obwohl dies heftiger Kritik ausgesetzt war. Zunächst wurde hierdurch ein umfassende Überprüfung und Verbesserungen der Gesetzgebung des Schutzes geistigen Eigentums in Gang gesetzt. Zudem wurden Änderungen einiger weniger materiellrechtlicher Vorschriften der nationalen Gesetzgebung im Recht des geistigen Eigentums vorgenommen, wie beispielsweise solche zum *locus standi* oder die Inhabervermutung bei verwandten Schutzrechten in Zivilverfahren. Außerdem hat die Umsetzung der Durchsetzungsrichtlinie den Schutz geistigen Eigentums gestärkt und spielt dabei eine wichtige Rolle im Kampf gegen Produktpiraterie sowie einer Steigerung des Bewusstseins hinsichtlich des geistigen Eigentums. Festzuhalten ist, dass die neu eingeführten Durchsetzungsvorschriften einen wertvollen Beitrag hinsichtlich verschiedener ungelöster Probleme darstellen.

Zunächst könnte hierdurch das Problem der Internetpiraterie angegangen werden, welches nicht nur in den baltischen Staaten anzutreffen ist, sondern ein weltweites Phänomen darstellt und effektiv angewandte Mittel der Rechtsdurchsetzung insbesondere einstweiligen Rechtsschutz und Abhilfemaßnahmen erfordert. Zudem sollte eine komplexere Anwendung von zivilrechtlichen Mitteln der Rechtsdurchsetzung in straf- wie verwaltungsrechtlichen Verfahren Einzug halten, insbesondere wenn die Aburteilung von Schäden betroffen ist. Dies betrifft ebenso Grenzkontrollmaßnahmen und Mittel der zivilrechtlichen Durchsetzung. Die strenge Trennung von zivil-, straf- und verwaltungsrechtlichen Mitteln wird als Relikt der sowjetischen Ära betrachtet, die es zu überwinden gilt. Die Kombination von verwaltungsrechtlichen, strafrechtlichen sowie zivilrechtlichen Mitteln würde dem Rechtsinhaber ein wirkungsvolles Arsenal zur Rechtsdurchsetzung bieten, insbesondere bei der Sammlung und Darstellung von Beweisen wie auch bei der Feststellung der Höhe des Schadensersatzes.

Zudem könnte das nun vorhandene Instrumentarium der zivilrechtlichen Rechtsdurchsetzung, das auf der der Richtlinie basiert, die Rechtsinhaber geistigen Eigentums aktiver in Erscheinung treten lassen, wie beispielsweise durch Partei- Durchsuchungen, ohne hierfür auf die Polizei oder die Staatsanwaltschaft angewiesen zu sein. Dies mag ebenfalls Rechtsinhaber anhalten, ihre Rechte in komplexerer Weise durchzusetzen. Diese Arbeit über die Umsetzung der EU Durchsetzungsrichtlinie hat die Absicht, die allgemeine Tendenz der Rechtsstreitigkeiten des geistigen Eigentums in den bezeichneten Rechtsordnungen herauszuarbeiten, um heimischen und ausländischen Rechtsinhabern von geistigem Eigentum einen Leitfaden für Rechtsstreitigkeiten zu bieten.

Letztlich wird festgestellt, dass sich die Rahmenbedingungen für die Rechtsdurchsetzung geistigen Eigentums in den letzten Jahrzehnten gewandelt haben. Zugabebermaßen beruhte dies nicht bloß auf der Harmonisierung des Rechts in der EU, sondern ebenso auf zusätzlich auftretenden sozialen und wirtschaftlichen Entwicklungen, welche damit einhergingen. Zusätzlich wurden viele Anreize geschaffen durch verschiedene Projekte, die der lokalen Innovationskraft, Forschungs- und Entwicklungsvorhaben in staatlichen wie privaten Unternehmen sowie Ausbildungseinrichtungen dienen sollen. Eigeninitiativprogramme der Rechtsinhaber geistigen Eigentums haben ebenso hierzu beigetragen. Trotz all dieser positiven Entwicklungen sollten die nun vorhandenen Maßnahmen der Durchsetzung geistigen Eigentums eher als Hilfsmittel denn als Werkzeug zur Entwicklung von Rechten geistigen Eigentums im Baltikum betrachtet werden.

Weiter wird vorgeschlagen, dass es von großer Bedeutung ist, der weitverbreiteten negativen Einstellung der Menschen im Baltikum hinsichtlich geistigen Eigentum durch Informationskampagnen, der Schulung verschiedener gesellschaftlicher Gruppen und der Zusammenarbeit mit Einrichtungen der Rechtsdurchsetzung, Agenturen und den Gerichten zu begegnen. Die baltische Region stellt immer noch eher eine Gesellschaft von Konsumenten und weniger eine Industriemacht dar; auch wenn eine hohe Nachfrage an Produkten des geistigen Eigentums festzustellen ist, mangelt es jedoch an dem erforderlichen Wissen über die geistigen Eigentumsrechte. Zu erwarten ist jedoch, dass Innovationsanreize und die Schaffung eines Umfelds für Forschung in Litauen, Lettland und Estland zusammen mit einem effektiven und funktionierenden rechtlichen Rahmen für die Durchsetzung geistigen Eigentums solche Meinungen und Einstellungen im Baltikum ändern werden.





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