

## § 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 practices, 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.