

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 *Fourtoun 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.