

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 Directive⁸⁹¹. 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 measures⁸⁹². 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 rights⁸⁹³, 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 Convention⁸⁹⁴.

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 214¹⁰ of the Code of Administrative Offences⁸⁹⁵. 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 Code⁸⁹⁶. 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 rights⁸⁹⁷, 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 rights⁸⁹⁸. 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 Code⁸⁹⁹. Similarly as in other Baltic countries, sanctions

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 countries⁹⁰⁰. 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 referred⁹⁰¹. However, many issues remained, especially those related to online piracy, hard-disk loader piracy, optical media piracy, etc.⁹⁰² Notably, in Lithuania criminal cases were often finalized by adopting criminal orders against the infringers and by imposing criminal fines to them⁹⁰³. 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 Litas⁹⁰⁴ with the confiscation and destruction of illegal items. Noticeably, there were also criminal cases in which deprivation of liberty was imposed⁹⁰⁵.

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-

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 Litas (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 proceedings⁹⁰⁶.

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 offences⁹⁰⁷. 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 2009⁹⁰⁸, Article 214¹⁰ 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 purposes⁹⁰⁹.

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 Litass (in case of repeated infringement – up to 3,000 Litass (*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 2009⁹¹⁰, 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 MLS⁹¹¹, 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 rights⁹¹², 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 rights⁹¹³. 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

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*.⁹¹⁴

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 rights⁹¹⁵. 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 rights⁹¹⁶.

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 214¹⁰ 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.

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 214¹⁰ 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 214¹⁰ 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)⁹¹⁷. 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.⁹¹⁸ 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-

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).

its⁹¹⁹. 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 theory⁹²⁰, 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.

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.

tion as such cannot be adjudicated in criminal cases on the basis of civil claims because it is not material damage in its strict sense⁹²⁴. The consultation by the Supreme Court partly reflected the ongoing discussion regarding compensation institute at that time⁹²⁵. 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 them⁹²⁶.

II. *Border measures under the EC Regulation 1383/2003*

1. General remarks

Following the recent reports regarding IP piracy in the Baltic countries⁹²⁷, 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 situation⁹²⁸. 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 well⁹²⁹.

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 2004⁹³⁰. 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-

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 IPA 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.