preme Court is 2,800 Litas, for a representation in the court 120 Litas[857]. 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[858].

The recommendations and their actual application in practice[859] 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[860]. 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 that the actual honorary fees that can be paid by the parties to their lawyers[861]. 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[862], as set out in Article 10 of the Enforcement Directive pursuant to Article 46 of the

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[863]. Both Latvia and Estonia provide for corrective measures as well[864].

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[865]. 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[866].

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."[867]

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

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[868]. 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[869]. It is justified, therefore, to order to apply corrective measures with regard to hard disks of computers, and not computers as such, for example[870]. 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[871], whereas recall or definitive removal of materials and implements are to prevent from further infringing activities[872].

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[873]. 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[874], 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[875]. 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[876]) of putting infringing copies and/or infringing materials or implements repeatedly on the market is reasonably criticised[877].

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[878], 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[879]. In case of mere negligence, it is not possible to apply pecuniary com-

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[880]. *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[881], 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[882]. 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[883].

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., BĮ 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[884], 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[885]. 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 describtion about the circumstances of the case can be presented as well[886]. The Lithuanian judicial practice, though, demontrates that only a so-called resolution part of a court decision is used to be published[887].

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

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)*.