

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 proportionality⁵⁶⁸, 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 practice⁵⁶⁹.

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 prove⁵⁷⁰, 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 requirements⁵⁷¹. 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 Directive⁵⁷². 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 occurs⁵⁷³.

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 countries⁵⁷⁴, before the adoption of the Directive.

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 disputed⁵⁷⁵, 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 parties⁵⁷⁶. 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 principle⁵⁷⁷ 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

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 relic 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 year⁵⁷⁸. 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 procedure⁵⁷⁹.

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 discussed⁵⁸⁰.

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 copyright⁵⁸¹, 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 noticed⁵⁸², 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

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.