

of a work, or a termination of a distribution of a work. Moreover, in case of economic rights infringement, a copyright holder had a right to claim damages.

As far as invention and rationalization rights were concerned, all disputes regarding acceptance of an offer for invention or rationalisation were solved according to the administrative provisions, except the disputes regarding a priority for a rationalization offer, an amount of remuneration, an assessment of such remuneration and its payment and an establishment of a fact of use of a rationalization offer. Such disputes could be solved in the courts as well. However, the administrative procedures were mainly used<sup>99</sup>. Disputes concerning industrial design were solved either in courts or by administrative or administrative-court procedure. It should also be mentioned that judges or a panel of judges in the administrative procedures were not always lawyers<sup>100</sup>. This fact also certainly could influence the lower legal quality of the decisions and judgements in the cases.

### III. *The period of substantial changes of IP rights protection (1990/1991 – 1994)*

#### 1. Adoption of the new national IP legislation

Beginning in 1988-1989, the Baltic countries lived through one of the most important changes in their 20th century history, namely, the liberation from Soviet occupation. This led to the very difficult process of making changes to their national legislations, including those on intellectual property regulation, while facing a rapid transformation from a centralized economy into a free market. Certainly, after the declarations of independence of the Baltic countries in 1990-1991, the Russian core of the “front culture” had been clearly disposed of. While the influence of the Russian economy declined, the relationship between the Western European countries and the Baltic countries began to grow. Later the Western European/Baltic relationship developed to a high institutional level, *i.e.* in the form of membership in the EU or NATO. Even so, a sizable Russian minority in the Baltic States, especially in Latvia and Estonia<sup>101</sup>, and the inheritance of the Soviet mentality towards social,

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<sup>99</sup> See Soviet Civil Law, p. 236 et seq.

<sup>100</sup> With a reference to the commentaries regarding the articles on the disputes on, *e.g.* ownership of an invention and payment of a remuneration, it is observed that the cases could be heard by the representatives from the organizations in which an invention had been made and the trade-unions or the courts, Art. 566, *Commentary of Civil Code of the Lithuanian SSR*, p. 370.

<sup>101</sup> The Russian-speaking population comprises approx. 29 % of the whole population in Latvia, approx. 26 % in Estonia and approx. 6 % in Lithuania, following the information provided by the national statistic departments, see in *Statistics Department of Estonia (2008)*, *Statistics Department of Latvia (2008)*, *Statistics Department of Lithuania (2008)*. As argued, the presence of large Russian-speaking minorities in Latvia and Estonia reflect the Soviet legacy; see more in *Elsuwege*, *State Continuity and its Consequences: The Case of the Baltic States*, pp. 381–384.

economic, and cultural issues still contribute to a substantial relationship between the Baltic countries and the Russian Federation to this day<sup>102</sup>.

As in many other legal fields, beginning in 1991-1992, the contemporary Parliaments of the newly-independent Baltic States had to make speedy and sometimes difficult decisions regarding the ambiguous economic situation and the unstable political system at that time, taking into account the existing legislation of the first independent republics (importantly, the legislation was re-established following the principle of *restitution in integrum*<sup>103</sup>). Generally, the Baltic countries were bound to Soviet legislation until their independence in 1990-1991; however, there were some exceptions which naturally reflected the contemporary political and legal situation. For instance, Soviet copyright legislation in Estonia was valid until the adoption of the national Copyright Act in 1992<sup>104</sup>, which was the first independently drafted and enacted copyright law in the history of Estonia, based on the principles of the Berne Convention<sup>105</sup>, the Rome Convention<sup>106</sup>, some ideas from the WIPO Model Copyright Act, and the copyright laws of the Nordic and continental legal tradition countries<sup>107</sup>. At that time, the Estonian Copyright Law was in compliance with all international obligations and major EU requirements. In Lithuania the 1990 Law on Provisional Basic Law established that all other laws, including the 1964 Civil Code, which were valid in Lithuania until 11 March, 1990, continue to be valid, if they do not contradict with the Provisional Basic Law. However, such a lasting application of Soviet legislation could not be tolerated, neither for economic nor for political reasons<sup>108</sup>.

The re-establishment of the legal systems in the Baltic countries began with the adoption of the Constitutions: the Estonian Constitution was adopted on 28 June, 1992<sup>109</sup>, by referendum, the Lithuanian Constitution on 25 November, 1992<sup>110</sup>, also

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102 See Laurinavičius et al., Aspects of Geopolitics of the Baltic Countries, p. 27.

103 See refs. to the national legislation during the Interwar period in supra § 3B.I; also in Pisuke, Estonia: Copyright and Related Rights, p. 103.

104 Copyright Act was adopted on 11 November 1992 and entered into force on 12 December 1992 (hereinafter – the “Estonian Copyright Law”).

105 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, and amended on September 28, 1979 (hereinafter – the “Berne Convention”).

106 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961 (hereinafter – the “Rome Convention”).

107 See Pisuke, Estonia: Copyright and Related Rights, p. 105.

108 As pointed out in Mikėlėnas, Reform of Civil Law in Lithuania, p. 52.

109 Art. 32 of the Estonian Constitution provides that “*the property rights of everyone are inviolable and enjoy equal protection*”. This provision should be read together with Art. 39 which establishes that “*authors shall have the inalienable right to their work*” and that “*the state shall protect intellectual property rights*” as well as with Art. 25 which provides that “*everyone shall have the right to compensation for moral and material injuries caused by anyone’s unlawful action*”.

110 Under Art. 23 of the Lithuanian Constitution “*property shall be inviolable*” and “*the rights of ownership shall be protected by law*”. Art. 42 provides that “*the law shall protect and defend the spiritual and material interests of authors which are related to scientific, technical, cultural, and artistic work*”.

by referendum, and the Latvian Constitution on 15 February, 1922<sup>111</sup>, by resuming its validity. These constitutions provided the basis for the protection and enforcement of intellectual property rights, for the applications of the provisions of international treaties, including treaties related to intellectual property rights, as well as for the national court system.

The adoption of the new Constitution in Lithuania was followed by the work on the drafting of a new national Civil Code<sup>112</sup> which was supposed to embody the transition from a planned and completely centralized economy into market relations and to also establish new principles of property relations regulation. Considering the regulation of intellectual property rights, it should be noted that the Law on Amendments and Supplements of the 1964 Civil Code covered in full a new Chapter on Copyright which was based on the international intellectual property treaties. However, due to increasing conflicts between the provisions of the supplemented and amended Civil Code and other individual laws in Lithuania, the Civil Code lost its significance<sup>113</sup> which necessitated an adoption of a new comprehensive and systematic Civil Code, the concept of which had been already elaborated while amending the 1964 Civil Code. The concept reflected the civil codes of Italy, Holland, and the Quebec Province of Canada.

Estonia and Latvia followed instead a more German legal approach, while still considering the civil practice of the above mentioned countries<sup>114</sup>, and, as initially suggested, also covered the separate chapter (the Sixth Book) on Intellectual Property with an incorporation of all national intellectual property laws which were valid at that time. After a long and difficult process of the approximation and coordination of the suggested draft, the new Lithuanian Civil Code was adopted in 2000 and came into force on 1 July, 2001<sup>115</sup>. However, contrary to the original draft, it did not comprise intellectual property regulation, which was left to special IP laws.

Most of those individual laws were already existent in 2001 in Lithuania in the field of the protection of trademarks<sup>116</sup>, patents<sup>117</sup>, designs<sup>118</sup>, computer programs

111 As established in Art. 105 of the Latvian Constitution, everyone has the right to own property which shall not be used contrary to the interests of the public, though property rights may be restricted only in accordance with law. Art. 113 additionally provides that “*the State shall recognise the freedom of scientific research, artistic and other creative activity, and shall protect copyright and patent rights*”.

112 In Lithuania the drafting process started in 1991. The supplements and amendments to the 1964 Civil Code were handed in 1992 to the Supreme Council. The Parliament finally adopted them on 17 May, 1994, as referred in *Mikelėnas*, Reform of Civil Law in Lithuania, p. 53.

113 As argued, the special individual laws regulated very different situations which were not coordinated. They even reflected the conflicts among the then state institutions and created “chaos and anarchy in the sphere of property regulations and in court practice as well”, as observed in *Mikelėnas*, Reform of Civil Law in Lithuania, p. 54.

114 See *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*, pp. 52, 56.

115 Hereinafter – the “*Lithuanian Civil Code*”.

116 Law on Trademarks, adopted on 10 October 2000, entered into force on 1 January 2001 (which changed the Law on Trade Marks and Service Marks, as of 1993), amended on 8 June 2006, entered into force on 28 June 2006 (hereinafter – the “*Lithuanian Trademark Law*”).

and databases<sup>119</sup>, copyright and neighbouring rights<sup>120</sup>. Additionally, the laws regarding the protection of firm names, layout-design (topographies) of semiconductor integrated circuits, plant varieties have been adopted.

As far as IP rights were concerned, a similar solution and legislative line has been undertaken in Estonia, which, slightly differently from Lithuania, adopted its new civil legislation on the basis of the 1940 civil code draft and in the form of five different codified laws<sup>121</sup>. While codifying its civil legislation, Latvia also resumed the validity of its 1937 Civil Code<sup>122</sup>. However, similarly to Lithuania both national legislating bodies did not include IP provisions in the codified legal acts. Since 1992, when the newly adopted Estonian Copyright Law came into force<sup>123</sup>, the Estonian Parliament has issued all main individual laws in the field of patents<sup>124</sup>, trademarks<sup>125</sup> and industrial designs<sup>126</sup> by complementing those laws with the ones on the protection of geographical indications, utility models, and layout-designs of integrated circuits. Similarly, in Latvia the IP laws have been also adopted during the first decade after the declaration of independence, starting with the national Patent Law<sup>127</sup>, the Law on Trademarks and the Law on Industrial Design Protection<sup>128</sup>, the

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- 117 Patent Law, adopted on 18 January 1994, entered into force on 1 February 1994, amended on 28 October 2008, entered into force on 11 November 2008 (hereinafter - the "*Lithuanian Patent Law*").
  - 118 Law on Designs, adopted on 7 November 2002, entered into force on 1 January 2003 (which changed the Law on Industrial Design, as of 1995), amended on 1 July 2008, entered into force on 17 July 2008 (hereinafter - the "*Lithuanian Design Law*").
  - 119 Law on the Legal Protection of Computer Programs and Databases, as of 1996 (invalid from 9 June 1999; changed by the 1999 Law on Copyright and Neighbouring Rights).
  - 120 Law on Copyright and Related Rights, adopted on 18 May 1999, newly adopted on 5 March 2003, entered into force on 21 March 2003, amended on 13 March 2008, entered into force on 27 March 2008 (hereinafter – the "*Lithuanian Copyright Law*").
  - 121 See *Heiss (Hrsg.)*, Zivilrechtsreform im Baltikum, p. 52.
  - 122 See *Ibid*, pp. 21, 22.
  - 123 See supra Ft. 104 herein.
  - 124 Patents Act, adopted on 16 March 1994, entered into force on 23 May 1994, amended on 15 March 2007 (hereinafter - the "*Estonian Patent Law*").
  - 125 Trademarks Act, adopted on 1 October 1992, newly adopted on 22 May 2002, entered into force on 1 May 2004, amended on 1 January 2007 (hereinafter - the "*Estonian Trademark Law*").
  - 126 Industrial Design Protection Act, adopted on 18 November 1997, entered into force on 11 January 1998, amended on 15 March 2007 (hereinafter - the "*Estonian Design Law*").
  - 127 Patent Law, adopted on 31 March 1993, newly adopted (except Chapter V) with an entry into force on 20 April 1995, the current version entered into force on 1 March, 2007 (hereinafter – the "*Latvian Patent Law*").
  - 128 Law on Trademarks and the Republic of Latvia Law on Industrial Design Protection, adopted on 7 April 1993, changed by the Law of the Republic of Latvia on Trademarks and Indications of Geographical Origin, as from 15 July, 1999, last amended on 8 February 2007 (hereinafter – the "*Latvian Trademark Law*"), and Law on Industrial Designs, adopted on 18 November 18 2004, substituted the previous "Rules on Industrial Design", as of 15 April 2004, last amended on 8 February 2007 (hereinafter – the "*Latvian Design Law*").

Copyright Law<sup>129</sup>. The listed laws have been also complemented by, *inter alia*, other important laws in the field of IP protection such as topographies of semiconductor chips, plant varieties and pharmaceuticals.

The adoption of those laws meant an explicit transposition of Soviet legal norms into modern IP laws which were to comply with international obligations as well as help to accommodate modern technologies, innovations, and creations in the Baltic market. Moreover, as far as IP rights were concerned, the newly-embodied provisions undoubtedly expressed the implementation, at least on the legislative level, of the legal traditions and experience of other countries<sup>130</sup> and they have been continuously amended due to the accession of the Baltic countries into the EU.

## 2. Adherence to the international treaties on IP protection

In the five to seven year period following the declaration of the second independence, the Baltic countries, as sovereign states, entered into all-important international multilateral treaties in the field of IP rights<sup>131</sup>. These complemented the bilateral treaties in the field of investment protection that had been signed with, for instance, the Russian Federation and the United States, and which, as a rule, directly listed IP rights as an investment. However, the bilateral agreements did not contain explicit provisions relating to the enforcement of IP rights. The general enforcement provisions were covered by other bilateral instruments, *i.e.* the treaties on trade relations and IP rights<sup>132</sup>.

In view of the time period, the relatively speedy adherence to the international treaties was explained by the fact that, *first*, many of the at that time valid international treaties had already been signed by the Baltic countries due to a formation of a

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129 Copyright Law, adopted on 11 May 1993, newly adopted on 10 May, 2000, amended on 6 December 2007 (hereinafter – the “*Latvian Copyright Law*”).

130 *E.g.*, while drafting the Lithuanian Copyright Law (its 1999 wording), the French traditions of copyright protection with a focus on a distinction of moral and economic rights, therefore, distinguishing, for instance, certain remedies, were considered. Moreover, the then wording of law also reflected the key provisions of the EU directives which had been previously adopted. See more in Mizaras, *Lithuanian Copyright: Historical and Modern Aspects and Trends of Development*, pp. 836, 837.

131 All international treaties in the field of industrial property rights to which the Baltic States acceded or re-accessed to after the second independence are listed by the national patent offices; see *Estonian Patent Office Information (2008)*, *Latvian Patent Office Information (2008)*, also *Lithuanian Patent Office Information (2008)*.

132 *E.g.*, Article XI of the Agreement between the United States of America and the Republic of Lithuania on Trade Relations and Intellectual Property Rights Protection as of 26 April 1994 provides not only general provisions on enforcement of IP rights, but also the specific procedural and remedial aspects of civil actions, provisional measures, including also the ones applied on *ex parte* basis and criminal procedures. The similar agreement with Latvia as of 6 July 1994 embodies the identical provisions. See *Garrison*, *Intellectual Property, Treaty II.17(B)-1*; also Agreement between the United States of America and the Republic of Latvia on the Relations and Intellectual Property Rights Protection. *Note*: the mentioned enforcement provisions in the bilateral treaties on trade relations actually reflected the provisions as set in Arts. 1714-1717 of NAFTA as well as Part III of the TRIPS Agreement.

modern IP legal system during the first independence (1918/1919–1940/1941)<sup>133</sup>, and, *second*, the adherence to those treaties was absolutely necessary for the substantial changes in the national laws regarding, *inter alia*, protectable subject-matter, mandatory minimal protection requirements, and effective and equal protection of IP rights<sup>134</sup> after the breakdown of the Soviet Union.

Formally, after the declarations of independence in 1990/1991, the general position of the newly formed governments of the Baltic States was that agreements to which the USSR or the Estonian, Latvian, or Lithuanian SSRs were parties were not automatically valid in the new independent Republics<sup>135</sup>, so formal ratification steps by the national legislators had to be made. Accession to the international treaties, signing bilateral treaties, and compliance, at least formally, to international standards during the Soviet occupation is to be considered a significant political step which allowed the Baltic countries, though not directly involved, to introduce and respect international obligations. Notably, some of the international treaties in field of patents, designs and trademarks are pending for ratification at the national parliaments<sup>136</sup>.

Alongside the formal reasons, factual circumstances relating to the signing of the international treaties cannot be omitted. A unilateral pressure by some countries already played an obvious and significant role<sup>137</sup> during the first independence period. Such pressure, of course, obliged the Baltic countries to provide adequate and efficient IP protection not only on a legal, but also on an economic basis. However, notwithstanding the formal intentions to become an equal member of the international community, the pressure from abroad was sometimes heavily criticized by local industry and the general public at that time, as the Estonian example shows. The Estonian legislative position at that time reflected the idea that, for instance, in the field of copyright, foreign works should be permitted to be used without any restrictions in order to advance the growth of IP in the developing country<sup>138</sup>.

As far as the enforcement of IP rights is concerned, the adherence to some international treaties should receive special attention. *First*, the Berne Convention<sup>139</sup>, namely its Preamble as well as Articles 5, 6bis (after the 1928 Rome revision), also Articles 16 and 15 indirectly embody enforcement-related provisions. The accession to the Berne Convention by the Baltic countries raised interesting constitutional and international law issues, not regarding the accession as such, but concerning the retroactive protection of foreign works. The Baltic countries, as legal subjects under the basis of international public law, had never lost their independence because of

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133 *E.g.*, the Berne Convention was valid in Latvia from 1938 until its occupation in 1940. Estonia joined the Paris Convention in 1924 and the Berne Convention in 1927.

134 See *Beržanskienė*, Berne Convention and Copyright in Lithuania, p. 10.

135 See *Elsuwege*, State Continuity and its Consequences: The Case of the Baltic States, p. 384.

136 *E.g.*, Patent Law Treaty, London Agreement, etc. are meant herein, as referred in *Lithuanian Patent Office Information* (2008).

137 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 45.

138 See *Pisuke*, Estonia: Copyright and Related Rights, p. 101.

139 Lithuania joined the Berne Convention on 14 December, 1994, and Estonia rejoined it on 26 October, 1994. The Berne Convention re-entered into force on 11 August, 1995, in Latvia.

their unlawful incorporation into the Soviet Union (*ex injuria non oritur jus*)<sup>140</sup>. Estonia and Latvia were therefore bound by the Berne Convention they had signed in 1927 and 1938, respectively, even though they were not *de facto* members during the Soviet occupation (the UCC to which the Soviet Union was a Contracting State, was in force at that time). When the question about retroactive protection of foreign works was raised, the national legislators had to find a solution. The Estonian decision was clear: foreign works, as well as national works created before the 1992 Estonian Copyright Law came into force were to be protected retroactively. The related rights for performance, phonograms, and radio and television broadcasts also enjoyed retroactive protection, more precisely: the right to use them for the cases of use of such subject-matters beginning from 12 December, 1992<sup>141</sup>. The Latvian legislators solved the question of retroactive protection similarly: in August 1995 Latvia rejoined the Berne Convention, thus guaranteeing copyright protection in Latvia both for national and international authors. In Lithuania the situation was different, since Lithuania did not join the Berne Convention before World War II.

*Second*, the adherence to the 1996 WIPO<sup>142</sup> Copyright Treaty<sup>143</sup> and the WIPO Phonograms and Performances Treaty<sup>144</sup> was also followed by national legislative changes in the field of IP rights. The preventive measures by virtue of Article 14(2) of the WIPO Copyright Treaty, as well as provisions regarding the protection of TPMs<sup>145</sup> can today be found in the national copyright legislation and the Criminal Codes of the Baltic countries<sup>146</sup>.

140 See Ahola *et al.*, Baltic Region. Conflicts and Cooperation, p. 267.

141 More discussion on the issues of the validity of the Berne Convention in Estonia can be found in Pisuke, Estonia: Copyright and Related Rights, pp. 112, 113.

142 Convention Establishing the World Intellectual Property Organization (signed at Stockholm on July 14, 1967 and as amended on September 28, 1979) entered into force on April 30, 1992 in Lithuania, on January 21, 1993 in Latvia, and on February 5, 1994 in Estonia.

143 WIPO Copyright Treaty (hereinafter – the “WCT”) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty, Geneva, 20 December, 1996, in force 6 March, 2002. WCT came into force in Lithuania on March 6, 2002 and on March 6, 2002 in Latvia. In Estonia WCT entered into force on 14 March, 2010.

144 WIPO Performances and Phonograms Treaty (hereinafter – the “WPPT”) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) and the Rome Convention (1961) referred to in the Treaty, Geneva, 20 December, 1996, in force 6 March, 2002. WPPT came into force in May 20, 2002, in Latvia and Lithuania. After its signing in 1997, the ratification is pending in Estonia.

*Note:* as far as international treaties are concerned, the issue of the validity of the treaties should be mentioned. Under the constitutional laws of Estonia, Latvia, and Lithuania, signed international agreements come into force when they are accordingly ratified by the national Parliaments and have a valid direct effect. Even though the absence of ratification has no impact on the actual implementation of the provisions of the WIPO Treaties because of their implementation during the Estonian and EU law harmonization processes, this could be viewed as an unreasonable delay.

145 WPPT, namely its Arts. 18-19 and 23(2) set out almost identical provisions regarding TPMs and enforcement.

146 Arts. 193, 194 of the Lithuanian Criminal Code (wording as from 21 July 2007), Art. 225 of the Estonian Criminal Code (wording as from 15 March 2007), Sections 147, 148, 149 of the



Last, on 10 February, 1999, Latvia was the first to join the WTO, by adhering to one of its pillars, the TRIPS Agreement. In November, 1999, Estonia joined the WTO without recourse to any transition period<sup>147</sup>. Lithuania is a member of the WTO since 31 May, 2001. Since signing of the TRIPS Agreement, which Section III directly embodies the provisions concerning the enforcement of IP rights<sup>148</sup>, new tasks to revise and adopt the provisions in IP laws have fallen to the national legislators as well. From an IP rights enforcement perspective, the implementation of the provisions of the WIPO Treaties and the TRIPS Agreement was very much applauded by the local and foreign right-holders wishing to protect their rights more effectively. The implementation also coincided with the reforms relating to the accession into the EU processes after the 1998 EU Association Agreements with the Baltic countries had been signed<sup>149</sup>.

#### IV. *Substantial reforms in the field of enforcement of IP rights regarding the implementation of *acquis communautaire**

In the bilateral EU Association Agreements, the governments of the Baltic states stressed the importance of improvements in the field of adequate protection of IP rights<sup>150</sup>. Importantly, the mentioned agreements, also called the third generation agreements<sup>151</sup>, obliged the Baltic countries to adapt their IP legislation as a result of the harmonization directives and other legal measures which were already in force by that time.

Along with the formal objectives to improve IP protection in the Baltic countries, to amend the IP laws with obvious discrepancies and weaknesses and to speed up the presupposed integration into EU processes, some internal processes, which had

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Latvian Criminal Code (wording as from 17 October 2002), see *refs.* and overview regarding criminal liability for IP infringements in the Baltic countries in *infra* § 5G.I.

147 See *Pisuke*, Estonia: Copyright and Related Rights, p. 114.

148 The very provisions of the TRIPS Agreement (Section III), referred in view of the Enforcement Directive, are further explored in *infra* § 5A.I.2.a).

149 The EU Association Agreements entered into force on 1 February 1998 in all three Baltic countries. It should be mentioned that during the preparation for the accession into the EU the Baltic countries formulated their direction which, as believed, formed the position in regard with IP legislation and improvements as well. *E.g.*, the Estonian Government formulated the so-called ‘*Northern Dimension*’ by stressing IT networks and infrastructure as one of the most important development fields in the Baltic region; see more in *Estonian Government’s European Union Policy for 2004 -2006*, p. 37. The same political direction has been repeated in *Estonia’s European Union Policy for 2007 – 2011*, p. 41.

150 Art. 67 of the EU Association Agreements establishing an association between the European Communities, their Member States and the Republic of Estonia, also Latvia and Lithuania explicitly stated the obligations to create the level of IP protection which existed in the EU and stressed the need to improve efficient measures in the field of enforcement of the IP rights.

151 The mentioned agreements, “the most advanced and far-reaching”, envisaged the preparation of the Baltic countries to enter the EU, as referred in *von Lewinski*, Copyright in Central and Eastern Europe, pp. 47-48.