

cient degree of certainty, as set out in Article 9 of the Directive. Moreover, more favourable solutions are provided by the Lithuanian legislator in terms of assurance of compliance with permanent injunctions, *i.e.* such assurance also covers also other forms, except of penalty payment.

Such implementing solutions can be considered as more favourable for IP right holders in view of Article 2(1) and aims and objectives of the Enforcement Directive, as long as the principle of proportionality is observed. Notably, the national courts are to carefully examine individual circumstances of each case, *i.e.* the nature of an infringement, its character, which can also mean examining if commercial purposes were involved in the infringing activities. It is very important to stress that by imposing injunctions, also ordering other procedural provisional measures, the courts are able to distinguish between infringements committed on commercial scale and other infringements, as application of injunctions can have a serious effect on, for instance, business of the alleged infringer, etc. It is especially relevant while talking about injunctions against intermediaries which can be anticipated in the upcoming judicial practice in the Baltic countries.

F. Damages, legal costs and other enforcement measures

I. Adjudication of damages in IP rights infringement cases in view of Article 13 of the Directive

1. Actual damages and alternative methods to calculate damages: dilemma in the national IP infringement cases

Before starting to examine the current implementing provisions on reimbursement of actual damages as well as alternative methods to calculate them and national court practice, especially focusing on the Lithuanian practice on the issue, it can be generally mentioned that in the Soviet legal doctrine the general rule regarding reimbursement of damages existed: damages were to be reimbursed either by paying in kind or by recovering losses in full⁷⁵⁸. No alternative methods to compute damages, which would be specific to copyright or industrial property rights cases, were established.

758 Such principle has been established in Art. 496 (as amended in 1994) of the Soviet Civil Code of 7 July 1964 (valid until 1 January 2001 in Lithuania). The same was applicable to Latvia and Estonia; see also *Dietz et al.*, *Urheberrecht in Mittel- und Osteuropa*. Teil II, pp. 18, 76, see also *refs.* to the legislative acts applicable to IPRs during the Soviet Union in *supra* § 3B.II.1.

a) General remarks regarding compensation of damages

Harmonizing provisions regarding calculation of damages, as embodied in Article 13 of the Enforcement Directive by supplementing Article 45 of the TRIPS Agreement, are considered as one of the key aspects in the field of harmonization of enforcement of IP rights. The formulation of the very article⁷⁵⁹ refers to the well-established notion that the aim of reimbursement of damages is to compensate harm suffered by a right holder due to his rights infringement which is frequently difficult to assess due to immaterial character of the subject-matter of IP rights. It also stipulates that in order to adjudicate damages in IP infringement cases, the cumulative conditions for civil legal liability are to be fulfilled.

The named article specifically points out the fault of infringer (“*knowingly, or with reasonable grounds to know*”) and covers two methods to calculate damages in IP infringement cases: (i) *compensatory damages* and (ii) so-called “*licence analogy*”. As follows from the formulation of Article 13 of the Enforcement Directive, both alternative methods should be implemented in the national laws.

The prior-to-implementation national provisions regarding methods to calculate damages which were suffered due to IP rights infringements generally differed in the European countries. While drafting provisions on damages in the Directive, it was intended to compile arguably best practices on calculation of damages which existed in some countries⁷⁶⁰. Following comments regarding the initial draft proposal⁷⁶¹, the final formulation of Article 13 reflects the possibility for the national courts to choose between two alternatives: either to set actual damages (including lost profits, unfair profits gained by the infringer, also moral prejudice caused to right holders) or to set damages as a lump sum (on the basis of *at least* the amount of royalties to be paid for an authorization to use IP right in question).

Article 13 of the Enforcement Directive has been fully implemented in the Lithuanian legislation. The implementing national IP laws in Lithuania provide for three methods to compensate damage in IP infringement cases:

- Reimbursement of actual damages, including the possibility to request for infringer’s gained profits which can be considered as losses⁷⁶²; or
- Compensation instead of damages (losses)⁷⁶³; or

759 See previous discussion on Art. 13 of the Directive in *supra* § 5A.II.1.e).

760 Before the adoption of the Directive, the calculation of damages was based on either actual losses suffered, or infringer’s profits, or payment of royalties which would have been due if the infringer had requested authorization to use the right, as listed in *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 14; also referred in *Mizaras*, Compensation as a Civil Remedy for Protection of Authors’ Rights, p. 138.

761 See *Fourtoun Report (2003)*, pp. 18-19.

762 Arts. 77(1)(6), 83(2) and (3) of the Lithuanian Copyright Law; also Arts. 41(1)(4), 41(5)(2) and (3) of the Patent Law; Arts. 50(1)(4), 51(2) and (3) of the Trademark Law; and Arts. 47(1)(4), 48(2) and (3) of the Design Law of Lithuania.

763 Arts. 77(1)(7), 83(4)(1), the Lithuanian Copyright Law.

- Royalties or fees which would have been due if the infringer had requested authorisation to use the works or other objects of the protected rights under national IP rights (license analogy)⁷⁶⁴.

Thus, Lithuanian Copyright Law provides for ternary mechanism to compensate damages: compensation for actual damages as well as two alternative methods to compute damages⁷⁶⁵. The Lithuanian laws on industrial property, however, omit provisions regarding compensation instead of damages as alternative method. The method of calculation of damages in a specific IP infringement case can be alternatively chosen by a right holder, *i.e.* a plaintiff cannot use a combination of the assessment methods, but rather choose one way of calculating damages⁷⁶⁶. Notably, actual damages and compensation instead of damages have been already embodied prior to the implementation of the Directive⁷⁶⁷. License analogy, however, is a new institute in the national IP laws of Lithuania.

The national legislation of other two Baltic countries – Latvia and Estonia – establishes compensation for damage (actual damage) to be paid by the infringers. Following the Estonian Copyright Law, also laws on industrial property, the courts could impose a compensation for economic and moral damage caused through the infringements of IP rights which is, *inter alia*, to be assessed to the rules as established in the Law of Obligations Act⁷⁶⁸. The Estonian Trade Marks Law, for example, namely provides for compensation for economic damage caused intentionally or due to negligence, including loss of profit and moral damage. The almost identical provisions are constituted in the Latvian Copyright Law which provides that compensation of losses, including lost profits, or compensation pursuant to the discretion of the courts could be adjudicated. And, similarly to Estonian provisions, the Latvian laws on industrial property rights embody the reimbursement of damages⁷⁶⁹.

764 Art. 83(4)(2), the Lithuanian Copyright Law; also Art. 41(5)(4) of the Patent Law, Art. 51(4) of the Trademark Law, and Art. 48(4) of the Design Law.

765 The alternative methods to compensate damages are provided in the laws of other countries such as Germany, Austria, Switzerland, US, France, as referred in *Mizaras*, Copyright Law (Vol. II), p. 328.

766 Right holders' discretion to choose, alternatively, adjudication of actual damage or compensation for damages has been applied by the national courts before the implementation of the Directive, see, *e.g.* Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB "VTeX" vs. UAB "Fima"*. Such practice also reflects German practice on the issue, as observed in *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15.

767 See *refs.* to prior-to-implementation of the Directive national provisions on damages and the implementing amendments in *supra* § 5B.I.1.

768 Art. 81 of the Copyright Law; Art. 53(1)(1) of the Patent Law; Art. 84(1) of the Industrial Design Law; and Art. 57(1)(2) of the Trade Marks Law; also Art. 1043 of the Law of Obligations Act of Estonia.

769 Art. 69(1)(4) of the Copyright Law; Art. 45(4)(3) of the Latvian Patent Law, Art. 28(4)(2) of the Latvian Trademark Law, and Art. 48(1)(1) of the Latvian Industrial Design Law.

Similarly to the Lithuanian legislation, actual damage includes loss of profit under Estonian and Latvian legislation⁷⁷⁰.

b) Actual damages (losses)

(1) Civil legal liability conditions

As previously referred, the prior-to-implementation national provisions on compensatory damages in Lithuania already covered specific regulation regarding computation of actual damages. The implementing provisions on the issue did not stipulate any new distinctive changes in terms of the elements that are to be considered while estimating economic negative consequences faced by the right holders due to their IP rights infringement in order to adjudicate actual damages. The current provisions on damages in the national IP laws which are to be applied together with the corresponding provisions set out in the Lithuanian Civil Code⁷⁷¹ identically provide that:

“When appraising the amount of damage (losses) actually caused by the infringement of the rights <...>, the court shall take into account the substance of the infringement, the amount of the inflicted damage, lost profits as well as other expenses suffered by the right holders, other circumstances.“

Thus, material damage is to be calculated by applying general civil principles to prove damage which was suffered by a right holder⁷⁷². All general conditions of civil liability against civil delicts⁷⁷³ which are embodied in Articles 6.246 – 6.249 of the Lithuanian Civil Code are to be fulfilled: (1) illegal activities or inaction, (2) fault (intentional illegal activities or inaction or negligence), (3) damage (negative consequences that occurred due to illegal activities or inaction), (4) causality between illegal activities or inaction and damage suffered⁷⁷⁴.

As follows from the national court practice regarding IP rights infringements cases in Lithuania, the cumulative conditions for civil legal liability are usually examined in each case. The issue regarding fault (intent or negligence) is assessed on the basis of objective criteria, *i.e.* on the assessment of a person's activities who acts according to objective reasonable standard of certain behaviour (*bonus pater familias*). By referring to illegal activities and inaction of a person, it is important to con-

770 *E.g.*, Art. 57 of the Estonia Trademark Law stipulates that the proprietor of a trade mark may file an action against a person infringing the exclusive right for compensation for pecuniary damage caused intentionally or due to negligence, including loss of profit and moral damage (the same established in Art. 817 of the Copyright Law, Art. 53 of the Patent Law, Art. 50 of the Utility Models Law, Art. 84 of Industrial Design Law of Estonia).

771 Arts. 6.245-6.255 of the Lithuanian Civil Code which provides the definition of civil liability, its forms, conditions for civil liability, the definition of non-pecuniary damage, cases of exemption from civil liability, preventive claim, etc.

772 The same applies to alternative methods to calculate damages, *i.e.* compensation instead of damages (losses) and license analogy under the Lithuanian legislation.

773 Lithuania followed the French concept regarding civil delicts, as referred in *Mizaras*, Copyright Law (Vol. II), p. 302.

774 As also referred in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 84.

firm causality between them and damage suffered. As far as IP rights are concerned, such confirmation is not an easy task⁷⁷⁵. Given the national court practice on the issue, the important role has been additionally played by the Lithuanian Supreme Court which in 2002 adopted a landmark consultation by stating that:

“Infringement of copyright or related rights practically always means damage suffered *ex facto* because, due to every illegal use of a work, a right holder loses profits, his (her) reputation, also his (her) name can be diminished, and the infringer gains the profits due to the fact that he (she) does not pay an approved royalty fee to the right holders for using his (her) rights.”⁷⁷⁶

In the referred consultation the Supreme Court, *inter alia*, interpreted the issue of a price of a legal sale on the basis of which the compensation instead damages had to be assessed⁷⁷⁷. The consultation which, as a matter of fact, was to be followed by the lower national courts⁷⁷⁸, helped the right holders as well as the national courts to overcome certain substantiation issues which were related to material damage suffered due to infringement of IP rights. The consultation also stressed a causality aspect between illegal activities (or inaction) and damage in the civil proceedings⁷⁷⁹.

Last but not least important aspect related to calculation of actual material damage is fault of the infringer: *intent or negligence*. Similarly to the formulation set out in Article 13 of the Enforcement Directive, also in view of Recital 29 thereof, which stresses out the difference between intentional and negligent infringements, the implementing national legislation as well as the prior-to-implementation legislation on IP rights of the Baltic countries made the same differentiation. Article 83(2) of the Lithuanian Copyright Law briefly refers to “*substance of the infringement*” as the element that should be estimated and is very important while calculating material damage in copyright infringement cases. The identical provisions are embodied in the Lithuanian industrial property laws. In order to estimate this ‘substance’, a reference to Article 6.248(2) of the Lithuanian Civil Code should be made which stipulates specific provisions regarding fault of an infringer.

Importantly, according to Article 6.248(1) of the Lithuanian Civil Code, despite its type (intent or negligence), *an infringer’s fault is presumed, i.e.* an infringer is obliged to prove his innocence. Such presumption is well-established in the Lithuanian legal doctrine and court practice regarding infringements of IP rights. Moreover, following the doctrine of general delict, a presumption of an infringer’s fault covers a presumption of illegal activities⁷⁸⁰. In comparison, there is no such pre-

775 See Mizaras, Copyright Law (Vol. II), pp. 306-307.

776 See Supreme Court of Lithuania, Consultation No. A3-64/2002.

777 See further discussion in *infra* § 5F.I.1.c)(2).

778 See overview regarding the role of the Lithuanian Supreme Court and effect of its consultations in *supra* § 3C.IV.1.b).

779 Although the Supreme Court consultation was related to the application of the provisions of the Lithuanian Copyright Law (wording as of 2003), it could be presumably considered in cases of trademark and design infringements, as the compensation institute has been embodied in the prior-to-implementation Lithuanian Trademark Law and Design Law.

780 See Mizaras, Copyright Law (Vol. II), p. 304. This had been explicitly confirmed in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

sumption in Germany or Switzerland, also France where fault of the infringer (a defendant) should be proved by the plaintiff⁷⁸¹. As referred by some scholars, the presumption of the infringer's fault, which notion was intercepted from the French legal doctrine, especially when intentional activities are concerned, can also be valued critically and can be renounced in delict cases in Lithuania⁷⁸². On the other hand, from the practical point of view, the presumption is significant and helpful for IP right holders (plaintiffs) in the civil proceedings as it facilitates a substantiation process.

The national court practice in Lithuania shows that almost in all cases the right holders argue for intentional activities or inaction of the infringers. As far as software copyright infringements are concerned, it is frequently argued that software cannot be reproduced without knowing, *i.e.* reproduction activities involve conscious understanding about activities being committed⁷⁸³. On the other hand, national courts intend to consider other circumstances, for instance, such as types of works which have been reproduced that can show unintentional character of illegal activities of the infringer. It is also argued that, as a matter of fact, in most of the cases of copyright infringements the infringers act negligently (on the basis of mere or big negligence). At the same time, it is referred that in those cases there should be more requirements for negligence to be stated in copyright infringement cases, for instance, a mistake or ignorance of the protection of IP rights, or wrong legal advice do not justify illegal activities or inaction of an infringer⁷⁸⁴.

(2) Reimbursement of direct material damages

As argued, in view of the Baltic case practise reimbursement of direct material damages plays a quite modest role in the field of IP rights⁷⁸⁵. It is due to, *inter alia*, specificity and character of IP rights, various ways to distribute and use products with IP rights involved, hence, difficulties to estimate a concrete amount of damages suffered because of infringements of IP rights. Such factors can be well illustrated by analysing the current Lithuanian legislative formulation on the issue.

According to Article 6.249(1) of the Lithuanian Civil Code, direct damages mean loss of or injury made to property and expenses related to infringement of rights. Thus, in order to calculate damages, a value of property, namely a value of IP rights should be established, due to the notion that IP rights are a valuable asset. Although it can be difficult to assess the value of the infringed IP rights, certain criteria to calculate damages based on such value can be defined. It can be either (i) an objective value of IP rights or (ii) value of the material object in which IP rights are embodied.

781 As referred in *Mizaras*, Civil Remedies for Infringement of Copyright, p. 90, such presumption can be applied in cases of mere negligence in Austria, though.

782 See *Mizaras*, Copyright Law (Vol. II), p. 304.

783 As referred in Decision of 3 May 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-311/2006, *Microsoft Corp., Symantec Corp., BĮ UAB "VTeX" vs. UAB "Vilpostus"*.

784 See *Schricker (Hrsg.)*, Urheberrecht. Kommentar (2006), § 97 para 51; also *Mizaras*, Copyright Law (Vol. II), p. 305.

785 See *Mizaras*, Copyright Law (Vol. II), p. 307.

IP rights can be evaluated and, for instance, expressed in terms of money and accounted in account-books of companies. They are a taxable subject-matter and can be defined as an investment⁷⁸⁶, etc. Notably, a balance value of IP rights is usually their purchase value (*i.e.* price a user pays for an authorization to use an IP right in question).

Thus, while calculating damages in IP infringement cases, it is important to estimate the value which was prior to the infringement and after it, but, as it can be rightly assumed, such estimation is not easy to make. It is especially due to the fact that many of the infringements occur not by directly harming IP subject-matter, but when IP rights are used without authorization (license) from right holders which means that their possibilities to use their own works or other IP subject-matters are reduced. Reduction of such possibilities can be mostly assessed as loss of profits. The same estimation can be made when the subject-matter of IP rights is not yet in use as well, etc.⁷⁸⁷

Moreover, direct material damage can also occur when injury or loss is made to the material object in which IP right is embodied, for instance, when an original work of art, photography, an audiovisual work, design work or a patented invention is directly destroyed or harm is done thereto.

According to Article 6.249(1) of the Lithuanian Civil Code, direct material damage also covers expenses related to IP rights infringement. Such expenses can encompass expenses regarding establishment of an infringement (for collecting information, providing some control measures, etc.), especially when an infringement concerns rights administrated by the collecting societies. They can also involve pre-procedural expenses regarding elimination of negative consequences, for instance, those regarding reimbursement of damages without civil proceedings, as well as all other expenses regarding an infringement, for instance, expenses related to preventive measures taken by an IP right holder, collection of evidence, phone conversations, written communication, etc.⁷⁸⁸

It has been also provided in the national laws that infringing copies of works or other objects of the protected rights may be handed over to the respective right holders, if so requested. It is presumed, therefore, that if the court applies the latter provision, this fact can be taken into account as “other important circumstance” while assessing an amount of material damage⁷⁸⁹.

786 *E.g.*, Art. 2(1) of the Lithuanian Law on Investment of 7 July 1999 (last amended as from 2 November 2004).

787 See *Mizaras*, Copyright Law (Vol. II), pp. 322-323.

788 The practice to adjudicate such infringement-related expenses is also known in other countries, *e.g.* Germany, as referred in *Ibid.*, p. 324.

789 See *Vileita*, Commentary of the Lithuanian Law of Copyright and Article 214(10) of the Administrative Code, p. 183.

(3) Loss of profit

Loss of profit is generally considered as pecuniary profits which could have been gained if there were no infringing activities⁷⁹⁰. It is stipulated in Article 6.249(1) of the Lithuanian Civil Code that loss of income is income which a person would have gained if there were no illegal activities⁷⁹¹. The Lithuanian Civil Code does not provide any specific criteria how loss of profit is to be estimated; though, such provision is embodied in the implementing Lithuanian Copyright Law, namely its Article 83(3) which covers objective and subjective factors that are to be examined while adjudicating loss of profit in IP infringement cases. The identical provisions are embodied in the industrial property legislation in Lithuania as well⁷⁹².

The mentioned Article 83(3) of the Copyright Law stipulates that the amount of loss of profit shall be set taking into account the profits that would have been received when legally using works or other objects (taking into consideration royalties and fees which are normally paid for lawful use of such works or other objects, or royalties and fees which are paid for lawful use of similar works or other objects, or royalties and fees most suitable for the modes of use of a work or any other object), as well as taking into account concrete circumstances which might have created conditions to receive profits (works performed by owners of rights, used materials and implements, negotiations on conclusion of agreements pertaining to the use of a work, etc.). According to the Estonian legislation, it is possible to claim loss of profit, which, as practice shows, is calculated by taking into account loss of license fees that should have been paid⁷⁹³. Notably, loss of profit is considered a profit which is gained through legal activities only, *i.e.* if profit has been gained through activities that were not in compliance with, for instance, fair competition rules or public order, etc., they cannot be adjudicated.

Thus, the law stipulates that royalties and fees which are normally paid for lawful use of such works or other objects can be considered as *objective factor* to assess loss of profit. It can be proved on the basis of tariffs that are established for use of such works⁷⁹⁴, previous license agreements which have been signed between plaintiff and other third persons, or defendant and other third persons, also on the basis of royalty fees and any other written evidence regarding payment for an authorization

790 Such description is established in the Lithuanian Civil Code, Art. 6.249(1). Loss of profit, as it is formulated in the Lithuanian IP legislation, is established in other jurisdictions such as Germany, Austria, as referred in *Mizaras*, Copyright Law (Vol. II), p. 317.

791 *Note*: the term “loss of income” instead of “loss of profit” is used in the Lithuanian legislation. Due to more common terminology in English on the subject-matter, the term “*loss of profit*” is used hereinafter.

792 See *refs.* to the provisions in the Lithuanian IP legislation on the subject-matter in *supra* Ft. 762 herein.

793 The Estonian courts have taken into account the plaintiff’s testimony regarding the ordinary licence fees in order to assess pecuniary damage (as loss of profit) caused to the plaintiff, as follows from, *e.g.*, Estonian Supreme Court Decision No 3-2-1-84-98 of 25 June 1998 regarding copyright infringement, *J.Einard vs. P.Laurits, H-E.Merila & AS Iguaan*.

794 Such tariffs are established by the national collective administration societies; see *refs.* in *supra* § 3C.II.2.

to use the protectable subject-matter. It is also referred that circumstances of each individual case, *i.e.* any discounts that could have been offered by the right holder, profit only as a percentage from the royalty fee, should be considered (*subjective factor*). Most importantly, as follows from the legislative formulation regarding loss of profit, causality between infringing activities and IP right holder's loss of profit should be proved.

Loss of profit proving process, however, can be ineffective and, as the case practice regarding adjudication of right holders' loss of profit in IP infringement cases in Lithuania shows, it is rarely used⁷⁹⁵. The reference can be made, though, to some cases regarding infringements of other "grey area" rights such as personality rights⁷⁹⁶ and a few cases regarding infringements of copyright⁷⁹⁷. The court decision in the latter case regarding copyright infringement did not, however, demonstrate a profound examination and calculation of loss of profit. It rather referred to the rule regarding burden of proof related to loss of profit, *i.e.* the defendant had to provide all relevant evidence in order to calculate its illegally gained profit⁷⁹⁸. The aspect of causality between the infringing activities and loss of profit (in particular case, the infringer's gained profits) has been briefly discussed.

Moreover, while formulating the provisions on pecuniary damage, the Lithuanian legislator also embodied that *profits made by the infringer* may, at the request of the right holders or their representatives, be recognised as losses. It can be argued that such formulation is not clear in terms of definition if an infringer's gained profit is a separate type of damages or one of the factors that should be considered in order to estimate loss of profits by the right holder. The similar confusion can be noticed by referring to the formulation of Article 13(1)(a) of the Enforcement Directive⁷⁹⁹. It can be agreed, though, that in order to adjudicate an infringer's gained profits all civil legal liability conditions are to be accordingly proved⁸⁰⁰. An infringer's gained profits can be likewise the basis to calculate loss of profit by the infringer by considering the compensatory aim of adjudication of damages, *i.e.* an infringer's gained profits deemed to be corresponding loss of profits by the right holder. In case an in-

795 Different practice, for instance, has been established by the German court practice where account of profits is a frequent way of calculating damages, as observed in *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15. As it will be further examined, instead of calculation of loss of profit, alternative methods to calculate pecuniary damage such as compensation instead of damages has been used by the right holders in cases of infringements of IP rights in Lithuania.

796 The plaintiff's loss of profit, or, as referred by the court, the profit which was gained or could be gained by the defendant, was adjudicated for the infringement of the right to one's image, as seen in Decision of 15 March 2004, Lithuanian Supreme Court, Civil Case No.3K-3-197/2004, *L. Karalius vs. UAB "Ieva" et al.*

797 *E.g.*, Lithuanian Court of Appeal, Civil Case No. 2A-98/2007, *B.V.-F. vs. National M. K. Čiurlionis Art Museum, UAB "Fodio" and the Ministry of Culture of the Republic of Lithuania.*

798 Such procedural rule of burden proof was embodied in Art. 79(5) of the prior-to-implementation of the Directive Lithuanian Copyright Law (wording as of 2003).

799 See examination in *supra* § 5A.II.1.e).

800 About general civil legal liability conditions see more in *supra* § 5F.I.1.b)(1).

fringer's gained profits are higher than can be proved by the right holder, the rest of the gained profits can be proved on the basis of *unjustified enrichment*⁸⁰¹.

(4) An infringer's gained profit; unjustified enrichment

By virtue of Article 83(5) of the implementing Lithuanian Copyright Law, as far as cases of negligence are concerned (where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity), the court may, at the request of the right holder in question order the recovery of profits. The laws also embody references how those profits can be calculated. Such references can be also taken into consideration while calculating profits gained by the infringer in general. It is said that:

"The profits of the infringer shall be considered to be all that the infringer saved and (or) received by infringing the protected rights <...>. The profits of the infringer shall be determined and recovered regardless of the fact whether or not the owner of the rights himself would have gained the similar profits. When determining the profits of the infringer, the owner of the rights must present only the evidence, which would confirm the gross earnings received by the infringer; the amount of the net earnings (earning after the deduction of expenses) must be proved by the infringer himself."⁸⁰²

Therefore, as far as the Lithuanian legislation is concerned, a claim for infringer's gained profits can be based on either (i) civil legal liability rules (which are in compliance with the provision embodied in Article 13(1)(a) of the Enforcement Directive), or (ii) *unjustified enrichment* rules (which reflect the provision set out in Article 13(2) of the Enforcement Directive). By virtue of the implementing legislation in Lithuania, in both cases (civil legal liability or unjustified enrichment), the following principles to adjudicate an infringer's gained profit are to be observed⁸⁰³: (i) only actual (not hypothetical) profit, (ii) net profit (after deduction of non-infringement related expenses), (iii) profit gained only because of infringing activities or inaction (profit gained due to other activities which are not related to IP rights infringing activities are to be deducted) can be adjudicated. As it can be observed, the right holder is to prove gross earnings; net earnings are to be proved by the infringer which allows facilitating a substantiation process in civil proceedings.

Provisions regarding unjustified enrichment were embodied prior to the implementing amendments in 2006 in Lithuania, i.e. an infringer's gained profits could be adjudicated even if there was no infringer's fault involved in the infringing activities by calculating the gained profit despite the fact that such profit could have been gained by the right holder or not. These two aspects separated unjustified enrich-

801 As it is laid down in Art. 6.242 of the Lithuanian Civil Code.

802 The provision is established in Art. 83(5) of the Lithuanian Copyright Law; also Art. 41(5)(5) of the Patent Law; Art. 51(5) of the Trademark Law; and Art. 48(5) of the Design Law.

803 Such principles are, *inter alia*, formulated by considering and comparing the practice of other countries such as Germany, Switzerland, Austria, as referred in *Mizaras*, Copyright Law (Vol. II), pp. 376-378.

ment from civil legal liability⁸⁰⁴. Instead, the conditions to claim an infringer's gained profit on the basis of unjustified enrichment are to be fulfilled: (i) enrichment should occur without any legal ground, (ii) a fact of enrichment is to be established, (iii) enrichment should occur at the expense of other person, (iv) enrichment can be only a subsidiary form of adjudicating loss of profit or infringer's gained profits when it is not possible to prove infringer's fault and causality between infringing activities and an infringer's gained profits⁸⁰⁵.

(5) Pre-established damages

The Lithuanian legislator, however, did not opt for pre-established damages, as it is alternatively formulated in Article 13(2) of the Directive⁸⁰⁶. Such decision was mainly due to the fact that the prior-to-implementation IP laws already provided for alternative methods to compute damages such as compensation⁸⁰⁷. By assessing the amount of this compensation, the courts had to consider if the infringer acted intentionally or not knowing or without reasonable grounds to know, thus, such alternative has been already stipulated in the provisions. It can be further interpreted that the implementing provisions on computation of damages, also license analogy (as they are formulated in the current Lithuanian IP legislation) are sufficient in order to estimate infringer's fault and, according to such estimation, to adjudicate appropriate damages in IP infringement case in question.

c) Alternative methods to compute damages: is fair and adequate estimation possible?

(1) General grounds for alternative methods to compensate damages

In view of Article 45(1) and (2) of the TRIPS Agreement⁸⁰⁸, the necessity to have alternative methods for damage calculation in IP infringement cases can be already depicted by examining the harmonized provisions on damages in the Enforcement Directive and by analysing the implementing legislation on IP rights in the Baltic

804 From the procedural point of view, 3 years of statute of limitations is applied for claims regarding civil liability and damages, whereas 10 years of statute of limitations is applied to claim regarding unjustified enrichment (Art. 1.125, the Lithuanian Civil Code).

805 See *Mizaras*, Copyright Law (Vol. II), pp. 355-360.

806 See previous discussion in *supra* § 5A.II.1.e).

807 See *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, pp. 55-56.

808 As stipulated in TRIPS, Art. 45(1) and (2), the national courts shall order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity. They can also order the infringer to pay the right holder expenses, which may include appropriate attorney's fees, and, in appropriate cases, they can order, as provided in the national laws, recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

countries⁸⁰⁹. The origin of alternative methods to calculate damages is generally based on the following reasons.

First, it is frequently argued that traditional ways to calculate pecuniary damages are ineffective in cases of IP rights infringements mainly due to difficult assessment of the amount of damages and its substantiation process, as it has been referred by analysing the implementing national legislation on adjudication of actual damages⁸¹⁰. Alternative methods to calculate damages are only methods to which all civil legal liability conditions are applied, *i.e.* the legal basis is the same as for actual damages (losses).

Second, alternative methods to compensate damages can be applied only when actual damage occurred, by referring that it is difficult to assess exact amount of such damage.

Third, requesting for alternative methods to calculate damage is a right holder's right, not an obligation. Importantly, as follows from the further analysed Lithuanian court practise, right holders are not obliged to justify why they have chosen to request compensation instead of reimbursement of actual damages. It is to be noted, however, that such choice is deemed to be alternative, *i.e.* in case a right holder has chosen compensation or license analogy, request for actual damage could not be met. This rule is also observed in other countries, for instance, Germany⁸¹¹.

Fourth, alternative methods to calculate damages play a preventive role, *i.e.* they are aimed not only to compensate damage, but also to eliminate all negative consequences which occurred due to IP rights infringements and prevent from them in the future. Although such role can be criticised as reflecting the notion of punitive damages, the preventive aspect is relevant for the Baltic countries where IP mentality is still under formation and IP piracy level is relatively high⁸¹².

As follows from the formulation of Article 13(1) of the Enforcement Directive, the Member States had to implement alternative method to compensate damages as a lump sum which should be at least as amount of royalties or fees which the infringer would have paid for authorization to use the IP right in question. As already mentioned, Lithuania has fully implemented Article 13(1). The national IP legislation and CCPs of Latvia and Estonia do not contain license analogy method, at least not *expressis verbis*. Pursuant to Art. 69¹ of the Latvian Copyright Law, for instance, if it is impossible to determine the damages caused by the copyright infringement, the relevant compensation to the claimant shall be equal to the sum that the claimant would have received as royalties for granting permission to use the work. According

809 The grounds for alternative methods to compensate damages have been duly formulated in Mizaras, Copyright Law (Vol. II), pp. 325-327, by also considering the practice of other European countries, especially Germany, Austria, which legislation embodies such alternatives.

810 See previous discussion on adjudication of actual damages in supra § 5F.I.1.b).

811 See Bornkamm, IP Litigation Under the Civil Law Legal System; Experience in Germany, p. 15.

812 See overview in supra § 4A.II.

to the Estonian IP laws, it is possible to claim loss of profit which, in practice, is calculated on the basis of loss of license fees that should have been paid.

The Lithuanian legislation, however, went further: license analogy as set out in Article 13(1)(b) has been implemented in 2006, but also a legal institute of prior-to-Directive compensation instead of actual damages (losses) has been left. Compensation instead of actual damages (losses) has been widely applied in the Lithuanian case practise (namely, case practise regarding copyright infringement cases) prior to implementation of the Enforcement Directive. In Lithuania the compensation institute, as in other very minor number of European countries⁸¹³, has been transposed from the US copyright concept of *statutory damages*. However, as further analysed, it did not exactly reflect this concept⁸¹⁴. The Lithuanian case practise regarding the mentioned institute of compensation instead of actual damages and the new implementing provisions regarding license analogy are further examined.

(2) Compensation instead of actual damages (losses)

As previously referred, the institute of compensation instead of actual damages (losses)⁸¹⁵ was embodied in the Lithuanian Copyright Law on the basis of the US copyright law concept of *statutory damages*⁸¹⁶. It has been applied in the national court practice regarding infringements of IP rights before the adoption of the Enforcement Directive. Compensation has been first embodied in the 1996 Law on Computer Programs and Databases, then in the 1999 Copyright Law, also in the prior-to-implementation Trademark and Design Laws⁸¹⁷. According to the primary legislative formulation in the Copyright Law, namely its Article 67(3), which was identical to the provisions in the prior-to-implementation Trademark and Design Laws (with the implementing amendments the provisions regarding compensation in the latter laws were removed), compensation was to be calculated on the basis of *a price of a legal sale* of the product (item) or service:

“Instead of the reimbursement of losses, the owner of copyright or related rights may claim compensation, the amount of which shall be determined according to the price of legal sale of

813 Although strongly criticised for being an alien concept to the continental legal doctrine, as seen in *Starzenekij*, About Nature of Compensation for Infringements of Exclusive Rights, pp. 138-139, compensation for damages (losses) institute is also established, for instance, in the Civil Code of the Russian Federation, Art. 1301. It is set forth that a compensation in the amount of from 10,000 to 5 Million Rouble can be adjudicated upon the discretion of the court, or it can be computed as a double amount of the price to be paid, in similar circumstances of legal use, for legal item of a work or a double amount of value of rights to use a work, see *Kastalskij*, Main Novelities in Chapter Four of the Civil Code of the Russian Federation. See additional *refs.* in *supra* Ft. 419 herein.

814 As described in *Mizaras*, Compensation as a Civil Remedy for Protection of Authors' Rights, pp. 138-139.

815 Hereinafter – “*compensation*”.

816 See US Copyright Act, Art. 504(c) on statutory damages.

817 See *refs.* to the prior-to-implementation of the Directive national provisions on damages in *supra* § 5B.I.1.a)(1).

an appropriate work or object of related rights, by increasing it up to 200 per cent, or up to 300 per cent if the infringer has committed the infringement deliberately.”

Before the adoption of the Directive and further amendments to the national laws the case practise in IP infringement cases illustrated that the national courts tended to adjudicate compensation by calculating a price of a legal sale of each product (item) or service⁸¹⁸ as claimed by IP right holders⁸¹⁹. The main discussion on the judicial level, though, was focused on the definition of “a price of a legal sale”.

In 2002 the Lithuanian Supreme Court rendered a consultation and concluded that “a price of a legal sale is a retail price of a product, i.e. a final price of a product, including all taxes”⁸²⁰. Such interpretation was very much criticized by the local scholars, also the practitioners. The critics not only referred to the US concept of statutory damages which was interpreted and applied differently there (notably, statutory damages are calculated on the basis of a number of infringing activities instead of a number of infringing items in the US), but also to the over-preventive aspect of the Lithuanian model of compensation which seemed to go beyond its compensatory aim⁸²¹.

As far as the court practise regarding compensation based on a price of a legal sale was concerned, it could be observed that the most frequent plaintiffs who had claimed compensation were rich foreign companies which requested double or triple compensation amounts. On the one hand, the provision allowed such plaintiffs to pursue their rights and protect them in a speedier way without a substantiation of actual damage caused. Such practise tends to demonstrate a possible enrichment by the plaintiffs, as frequently argued by the defendants, because a retail price of the IP product in question (e.g. computer program) did not necessarily reflect an actual price of the product and covered also a fee fixed by distributors, also VAT which is paid to the state, and not to the right holder⁸²².

Despite the fact that the national courts sought to apply all civil legal liability conditions in IP rights infringement cases in order not to limit the calculation of compensation to the brief estimation of a price of a legal sale only, and the fact that the 2003 and 2006 amendments to the Copyright Law eliminated a price of a legal sale as a basis to calculate compensation and linked it with MLS instead, the discussion regarding such price has been recently elevated to the level of the Lithuanian Constitutional Court⁸²³ which is to examine if the provision on compensation instead

818 E.g., Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB “VTeX” vs. UAB “Fima”*.

819 See Mizaras, Compensation as a Civil Remedy for Protection of Authors’ Rights, p. 143.

820 See *Supreme Court of Lithuania, Consultation No. A3-64/2002*.

821 See Mizaras, Copyright Law (Vol. II), pp. 345-346.

822 Notably, in later case practise VAT started to be excluded while assessing the amount of compensation, as referred in Decision of 21 June 2006, Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

823 See also overview about the role of the Lithuanian Constitutional Court in the national judicial system in supra § 3C.IV.1.a).

of actual damages based on legal sales price was in compliance with the constitutional principles and constitutional order of Lithuania⁸²⁴.

On 10 June 2008 the Court of Appeals of Lithuania rendered a decision in a civil case regarding infringement of related rights and adjudication of compensation. The Court of Appeal decided to refer to the Constitutional Court of Lithuania with a request to examine if Article 67(3) of the Copyright Law⁸²⁵ was in compliance with the Constitution of the Republic of Lithuania (namely, principles of justice and legal state, as embodied therein). By virtue of Article 67(3), compensation as an alternative method to compensate pecuniary damages in copyright and related rights cases, was to be calculated on the basis of *a price of a legal sale* of the protected objects (*i.e.* retail price of products, including all taxes, as mentioned) which could be doubled or tripled, depending on an infringer's fault. The Court of Appeal considered such method of compensating damages being punitive and going beyond its compensatory aim⁸²⁶. The case, which is relevant to civil enforcement of IP rights in view of the implementation of Article 13(1) the Enforcement Directive on compensating pecuniary damages, is pending in the Constitutional Court of Lithuania together with the similar request in regard with adjudication of compensation under the previous wording of the Trademark Law of Lithuania⁸²⁷.

The legislative formulation regarding compensation has been introduced before the implementation of the Directive, *i.e.* in 2003 by amending the then Lithuanian Copyright Law. Article 83(4)(1) of the current Lithuanian Copyright Law establishes that, instead of claiming actual damages (losses), the right holders can claim:

“<...> compensation in the amount of up to 1,000 minimum living standards (MLS), which is set by the court, taking into account the culpability of the infringer, his property status, causes

824 On 10 June 2008, the Lithuanian Court of Appeal suspended the *Civil Case No. 2A-123/2008* regarding the infringement of related rights and adjudication of compensation and requested the Constitutional Court of Lithuania to examine if Article 67(3) of the 2003 Lithuanian Copyright Law is constitutional. The similar request has been submitted to the Constitutional Court regarding the previous formulation on compensation in Trademark Law (identical to the one in the Copyright Law) in 2006 (*the case is pending*); see Lithuanian Court of Appeal, Civil Case No. 2A-123/2008, *Prosecutor of Vilnius City District, La Face Records, LLC., Virgin Records America, Inc. et al. vs. UAB “Baltic optical disk”*. Similar considerations were also discussed in *Brockmeier*, Punitive damages, multiple damages und deutscher ordre public, p. 88 et seq., as far as German legal practice on the issue was concerned.

825 The wording as of 18 May 1999, valid till 1 January 2004 of the Lithuanian Copyright Law is referred herein.

826 It should be repeatedly noted that punitive damages were not recognised in the European legal doctrine, for instance, Germany uphold the principle of the lack of punitive elements in compensation for damages, as observed in *Schuster*, The Patent Law Wilfulness Game and Damage Awards, pp. 130-131.

827 See also *refs.* to the corresponding cases in the Constitutional Court of Lithuania and the corresponding description in *Janušauskaitė*, Litauen – Oberinstanzliche Gerichtsentscheidungen zur Durchsetzung von Urheberrechten und verwandten Rechten, p. 974.

of unlawful actions and other circumstances relevant to the case, as well as the criteria of good faith, reasonableness and justice <...>”⁸²⁸.

As previously pointed out, compensation is only an alternative method to calculate damages in case of civil liability and, as referred by the Lithuanian Supreme Court, the assessment of the amount of which is a question of fact⁸²⁹. Therefore, all conditions for civil legal liability are to be fulfilled in order to adjudicate it. As follows from the above legislative formulation, compensation is to be assessed on the basis of abstract criteria, including also a price of a legal sale of IP products in question⁸³⁰, which are to be examined by the court in each individual case. However, it can be presumed that compensation will not always reflect actual damage done to economic rights of the right holders. Even more, it can be higher than actual damages in some cases. This confirms the statement that compensation for damages (losses) can be considered as *quasi civil liability*⁸³¹.

(3) License analogy method

By implementing Article 13(1)(b) of the Enforcement Directive in the Lithuanian IP legislation in 2006⁸³², it was formulated that instead of requesting actual damages (losses) the right holder can alternatively ask for:

“<...> royalties or fees which would have been due if the infringer had requested authorisation to use the works or other objects of the protected rights, and where the infringer acted intentionally or with negligence – in the amount of up to two such royalties and fees”⁸³³.

Both the implementing national provision and the harmonizing provision regarding license analogy in the Enforcement Directive, which was borrowed from the well-established German legislation and case practice on the issue⁸³⁴, are based on the following factors.

First, license analogy as an alternative method to compensate damages is focused on the preventive aspect regarding IP rights infringements. It is argued, however,

828 Notably, the compensation instead of damages has not been established in the industrial property legislation in Lithuania while implementing the Directive.

829 The argument that the assessment of a compensation amount is a question of fact rather than the question of law (the latter can be heard by the Supreme Court as the cassation instance) was recently expressed in Ruling of 27 November 2007, Lithuanian Supreme Court, No. 3P-3621/2007.

830 Although not directly mentioned in the Copyright Law, a price of a legal sale is to be again considered as relevant criteria while assessing the amount of compensation within the limits established by the law, as referred by Lithuanian Supreme Court in its Decision of 21 June 2006, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

831 See *Mizaras*, Copyright Law (Vol. II), p. 348.

832 See *refs.* to the implementing legislation in *supra* § 5B.I.1.c).

833 Almost identical provisions are embodied in Art. 83(4)(2) of the Copyright Law; Art. 41(5)(4) of the Patent Law; Art. 51(4) of the Trademark Law; and Art. 48(4) of the Design Law of Lithuania.

834 See *Bornkamm*, IP Litigation Under the Civil Law Legal System; Experience in Germany, pp. 16-17; also *Peukert/Kur*, Stellungnahme des Max-Planck-Instituts der Richtlinien 2004/48/EG in deutsches Recht, p. 294.

that application of the method (the same as for compensation) cannot go beyond its compensatory aim which could mean the transposition of punitive damages concept into the European law. *Second*, it contains economic aspect as well, *i.e.* consideration that by infringing IP rights usually infringers save certain expenses which cannot be necessarily calculated as loss profits or gained profits, for instance, expenses related to production, development, distribution, entering the market, etc.⁸³⁵ *Third*, the embodiment of license analogy as alternative method to compensate damages is relevant to legal policy of the states by considering IP mentality, scale of IP rights infringements, etc.⁸³⁶

The implementing provision on license analogy in the Lithuanian IP laws reflects all the above listed factors. As it can be observed, the Lithuanian legislator did not limit the amount of royalties or fees that can be adjudicated from the infringer. In case of fault, such amount can reach two times of such royalties and fees which is in compliance with the harmonizing provision set out in Article 13(1)(b) of the Directive. Such provision, which means that the courts can, but must not adjudicate up to two times royalties or licence fees in case of an infringer's fault, plays a preventive role, *i.e.* infringers are to be aware of possible adjudication of double royalties or license fees.

The legislative provisions also confirm the notion of license analogy method being a certain abstract method for calculating damages, *i.e.* by fictionally covering actual damages and also infringement-related expenses in order to compensate damages suffered due to IP rights infringement to full-extent. Similarly to compensation institute, license analogy is applied by considering all civil legal liability conditions and is applicable to economic rights of IP right holders' only. Moreover, similarly to compensation, it can lead to overreaching amounts, which do not necessarily cover actual damages done.

d) Moral prejudice (non-pecuniary damages)

Moral prejudice caused to the right holders because of IP rights infringements is stipulated in Article 13(1)(a) of the Enforcement Directive as one of the factors that is to be considered while estimating material damages suffered. Notably, the Directive does not harmonize moral rights of IP right holders. Moral rights which are protected under the national legislation can be the legal basis to assess moral prejudice as such⁸³⁷.

In Lithuania so-called non-pecuniary damages which were suffered due to infringement of moral rights of authors or performers have been established in the national legislation and applied in court practice since the adoption of first Copyright

835 See Dreier, *Kompensation und Prävention*, p. 139.

836 It can be agreed with the opinion expressed in *Mizaras*, Copyright Law (Vol. II), pp. 334-335, that it is especially due for Lithuania (also other two Baltic countries).

837 See also discussion on the subject-matter covered by Art. 1 of the Directive in *supra* § 5C.I.

Law in 1999⁸³⁸. Similarly to Germany and Austria, where regulation of adjudication of non-pecuniary damage is established in both national Civil Codes and the corresponding IP laws, Article 84 of the current Lithuanian Copyright Law provides that:

“A person who has infringed personal moral rights of the author or performer, referred to in Article 14 and Article 52 of this Law, must redress non-pecuniary damage. The amount of such damage expressed in money shall be set by the court, in compliance with the norms of the Civil Code, which regulate redress of non-pecuniary damage.”

Notably, the cited provision refers to the list of personal moral rights of authors which are protected under the Lithuanian Copyright Law such as the right to authorship, the right to the author’s name and to the inviolability of a work⁸³⁹. A performer, accordingly, shall retain his moral rights in his direct (live) performance or the fixation of his performance, also the right to claim to be identified as the performer in connection with any use of his performance or the fixation thereof, and to object to any distortion or other modification of his performance or the fixation thereof, as well as other derogatory action in relation thereto, which would be prejudicial to his honour or reputation⁸⁴⁰. Importantly, Article 1.114 of the Lithuanian Civil Code⁸⁴¹ covers personal moral rights of authors and performers as general personal moral rights. Therefore, the case practice related to infringements of general personal moral rights is also relevant to infringements of moral rights of authors and performers⁸⁴².

According to the current national legislation, there can be no adjudication of non-pecuniary damages in cases of infringements of authors’ or performers’ economic rights. Such possibility, however, was provided in Articles 539 and 540 of the 1964 Civil Code⁸⁴³ before the adoption of the special copyright law in Lithuania⁸⁴⁴. Non-pecuniary damage, to which all civil legal liability conditions are applied, can be adjudicated by applying other remedies, including pecuniary damage in the form of actual damages or compensation, or license analogy. Differently from the 1999 Li-

838 In Lithuania the regulation regarding moral rights of authors and performers follows the European continental tradition, as described in *Personal Non-Economic Rights and their Protection* (Articles from Scientific Conference, Vilnius (2001), p. 27.

839 Art. 14, the Lithuanian Copyright Law.

840 Art. 52, the Lithuanian Copyright Law.

841 See also *refs.* regarding so-called “grey area” rights in *supra* § 5C.1.2.b).

842 The court practice has been summarized in Resolution of the Senate of Judges of the Supreme Court of Lithuania No. 1 on “Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases”, Gazette of the Supreme Court of Lithuania “Teismų praktika”, 1998, No. 9. Similar practice is also observed in Estonia, as follows from, *e.g.*, Decision of 17 June 1996, Tartu Circuit Court, Civil Case No. II-2-95/96, *V.Jürisson vs. AS Postimees*.

843 See *ref.* to the 1964 Lithuanian Civil Code (with certain amendments valid until 1 January 2003; the Code was also valid for Estonia and Latvia) in *supra* § 3B.II.1. *Note:* the 1964 Soviet Civil Code was also valid in Latvia and Estonia.

844 In Germany, for example, it is possible to claim non-pecuniary damage occurred due to infringements of economic rights as well, if personal moral interests of right holders are infringed, as referred in *Mizaras*, Copyright Law (Vol. II), p. 377.

thuanian Copyright Law which established the amount of non-pecuniary damage from 5,000 to 25,000 Lit⁸⁴⁵, the current formulation does not refer to any exact amount of non-pecuniary damage to be adjudicated. The current provision is to be applauded because it provides for a flexible room for the courts to establish individual circumstances and harm suffered by the right holders in each individual case considering compensatory aim of such non-pecuniary damage, also its preventive aspect.

As it can be observed from the Lithuanian court practice regarding adjudication of non-pecuniary damage suffered due to infringements of general personal moral rights, the national courts usually consider nature of an infringement, its degree, an infringer's fault and other circumstances, for instance, an infringer's activities after the infringement, etc.⁸⁴⁶ "*Commercial purposes*" involved in infringing activities can be also held as important factor to determine the amount of non-pecuniary damages⁸⁴⁷. As far as cases regarding moral rights of authors are concerned, it is criticized that the court decisions lack of argumentation related to the adjudged amount of non-pecuniary compensation, *i.e.* the brief estimation of how many infringing copies of a work were used and their multiplication by the fixed amount of damage are frequently unsubstantiated⁸⁴⁸.

In Estonia, according to its Copyright Law, it is possible to adjudicate moral damages in copyright cases for authors and performers. Moral damages can be requested for copyright infringements under Article 69(1)(5) and Article 69¹ of the Latvian Copyright Law. Similarly to the Lithuanian practise, both Latvian and Estonian legislation does not establish the amount, however, it can be calculated based on the Civil Code rules at the discretion of the court⁸⁴⁹.

845 From ca 1,448 and to ca 7,241 Euro.

846 See Resolution of the Senate of Judges of the Supreme Court of Lithuania No. 1 on "Application of Articles 7 and 7(1) of the Civil Code of the Republic of Lithuania and Public Information Laws of the Republic of Lithuania in the court practice while considering personal honour and dignity civil protection cases", Gazette of the Supreme Court of Lithuania "Teismų praktika", 1998, No. 9, p. 59.

847 The reference can be especially made to the German court practice on the issue, as argued in *Mizaras*, Copyright Law (Vol. II), p. 378.

848 See in *Mizaras*, Copyright Law (Vol. II), p. 378.

849 The Estonian Supreme Court ruled in Civil Case No 3-2-1-60-98, *Tiit Räs vs. AS Laks & Ko*, that moral damage must also be adjudicated in copyright infringement cases together with pecuniary damage, as also observed in Decision of 23 May 2003, Estonian Supreme Court, Civil Case No. 3-2-1-39-03, *Leonhard Lapin vs. Kihnu county*.

II. *Legal costs as an important procedural factor in view of Article 14 of the Directive*

1. National procedural rules on legal costs

Legal costs in civil proceedings (as a rule, covering costs and other civil proceedings-relevant expenses) are an aspect which cannot be omitted while referring to civil IP litigation. Practical relevance of this aspect for civil enforcement of IP rights is unquestioned. Before starting any legal action against an infringer of IP rights, be it pre-trial measures or civil procedural or substantive measures, the aggrieved party should project expenses which can be presumably incurred in order to achieve the desired legal result. Such estimation should cover payments that can occur during civil proceedings and, importantly, honorary fees that will need to be paid to the attorneys who would be able to assess any of the above listed actions.

Needless to say, costs and expenses are not, as a rule, limited to the ones which are incurred during civil proceedings. They can similarly cover relevant payments for actions before submitting a civil claim to the court, for example, expenses regarding pre-trial collection of evidence (for an expert's opinion, etc.), communication with the infringer (phone conversations, letters, etc.), preparation of a warning letter, drafting a settlement agreement. Given that a civil case is submitted to the court, costs and expenses can increase due to unexpectedly lengthy civil proceedings, necessity to provide additional expertise or repeatedly examine certain factual aspects of the case.

Article 14 of the Enforcement Directive is namely designed to harmonize prior-to-Directive practice regarding legal costs which, as it can be presumed, differed from country to country. It is not, however, indicated in Article 14 of the Directive how exactly such legal costs are to be estimated nowadays, what "*legal costs and other expenses*" mean. Hence, it is left for the national legislators to define. The requirement that needs to be borne in mind is that legal costs and expenses are to be *reasonable* and *proportionate*. They should, as a general rule, be borne by the unsuccessful party, unless equity does not allow this⁸⁵⁰. Thus, the Directive leaves quite vague terms for the national legislators to follow. Practical application of such terms, especially of the term "*equity*", can be very complex and based on very different reasoning by the national courts.

As far as the national legislation on civil procedure of the Baltic countries is concerned, the legislative regulation on allocation of so-called litigation costs, which are to be paid by the parties in the civil proceedings, generally reflects the provision set out in Article 14 of the Directive⁸⁵¹. As a general rule, the national rules on allocation of litigation costs, which cover a stamp duty and other case-related costs and which were incurred by the winning party, should be reimbursed by the losing par-

⁸⁵⁰ See examination of Art. 14 of the Directive in supra § 5A.II.2.d).

⁸⁵¹ The allocation of legal costs and other expenses related to the civil case is regulated by Art. 93 of the Lithuanian CCP, also Art. 41 of the Latvian CCP and Arts. 162, 163 of the Estonian CCP.