



Uniwersytet
Wrocławski



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2011, 18(1), p. 113–126.

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN LITHUANIA: SITUATION AFTER THE IMPLEMENTATION OF DIRECTIVE 2004/48/EC ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Ramūnas Birštonas, Leonas Virginijus Papirtis

Mykolas Romeris University, Faculty of Law,
Department of Civil and Commercial Law
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 2714 587

E-mail: birstonas@mruni.eu; papirtis@gmail.com

Received 17 December, 2010; accepted 12 February, 2011

Abstract. *Article deals with the situation of enforcement of intellectual property rights in Lithuania after the implementation of 2004 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. First, the authors outline the importance of the proportionality principle which is embedded in the text of the directive, but sometimes may be overlooked because of the rhetoric openly orientated to right holders. Then, the legislative changes in Lithuania's intellectual property laws and tendencies in case law are analyzed. The main findings of the research show that despite considerable changes in Lithuanian laws, the situation in case law was not in fact influenced.*

Keywords: *intellectual property, enforcement, infringement, Directive 2004/48/EC, injunctions, damages*

Introduction

On 20 May 2004 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights¹ (the Directive) entered into force. Article 20 of the Directive stipulated the duty of Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 29 April 2006. Two objectives of the Directive are to be discerned. First, the very essence of the Directive qua directive points to establishing harmonized laws of Member States and eliminating the disparities which, according to the Directive, “are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community.”² There is a strong opinion expressed in the academic circle that this objective could not be achieved properly because of the principle of favourability, which allows Member States to maintain or introduce means more favourable to right holders.³ It is expected to receive more information about the success of harmonization following the Commission’s report on the application of the Directive, which should be drawn according to Article 18.

The second objective that this article focuses on is directed towards enhancing the level of protection of intellectual property rights.⁴ The enactment of the Directive was guided by an idea that more effective means of enforcement in the hands of right holders would lead towards better protection and, as a consequence, promote innovation and creativity.⁵ The Directive was implemented in Lithuanian law four years ago, therefore we might be able to evaluate its success.

The goal of the article is to assess the real impact the Directive had on the Lithuanian litigation practice. In pursuit of the above aim, the research analyses how the requirements set forth in the Directive have been complied with in the Lithuanian laws on intellectual property, paying particular attention to deviations from the mandatory provisions of the Directive. Further, the research analyses the statistical data showing the variation in the number of intellectual property cases before and after implementation of the Directive and the tendencies of application of certain remedies and measures in case law. The proportionality principle which, in the authors’ opinion, is of major importance for due assessment of the interpretations set out in case law is considered separately. As the Directive confined to harmonisation of civil measures, criminal sanctions are not analysed.

1 OJ L 195, 02/06/2004, p. 16–25.

2 Recital 8.

3 van Echoud, M., *et al. Harmonizing European Copyright Law. The Challenges of Better Lawmaking*. Kluwer Law International, 2009, p. 300.

4 Cornish, W. R., *et al. Procedures and Remedies for Enforcing IPRS: the European Commission’s Proposed Directive*. *E.I.P.R.* 2003, 25(10): 447; Massa, Ch.; Strovel, A. The Scope of the Proposed IP Enforcement Directive: Torn Between the Desire to Harmonise Remedies and the Need to Combat Piracy. *E.I.P.R.* 2004, 26(6): 224.

5 Recital 3.

1. Proportionality Principle Embedded in the Directive

Before starting analysis of the implementation of particular provisions of the Directive and application thereof in Lithuania, one main question should be asked: what is the infringement of intellectual property rights, at the combat against which the measures, procedures and remedies referred to in the Directive have been targeted? The above question is necessary for further analysis, not only as certain general theoretical postulate, the practical value of which would be determined as such. On the contrary, the authors consider that it is impossible to understand the case law of remedies in Lithuania (in fact, in any country) and duly assess it in the abstract manner, without considering particular disputes in which the provisions of remedies have been employed. And intellectual property disputes may be of very different. Some possible examples include the following:

- A competitive company produces and/or imports and trades in protected objects of intellectual property rights
- Distribution of pirated goods
- Public communication of musical works in public places
- File sharing
- Reprographic reproduction of the whole book
- Single reproduction of the copy of work illegally made available on the Internet.

It is quite clear that these infringements are of different nature and causing different consequences; therefore, they cannot be assessed in exactly the same manner. Thus, it is impossible to properly realize how intellectual property rights are protected without finding out the nature of the infringement against which the defence was directed.

It is to be noted that the Directive gives particularly scant attention to the conception of infringement of intellectual property. The infringement of intellectual property is understood as a self-evident evil which must be repressed. In principle, the only reference explaining the danger of such infringements in a more elaborate manner (and at the same time the necessity for fighting against them) is Recital 9 which *inter alia* states that “infringements of intellectual property rights appear to be increasingly linked to organised crime and increasing use of the Internet enables pirated products to be distributed instantly around the globe.”

Such rigorous assessment of infringements of intellectual property rights is not very unexpected in consideration of the context within which the Directive has been adopted.⁶ It should be noted that the Green Paper on Combating Counterfeiting and Piracy in the Single Market⁷ which mainly focussed on combating against massive infringements causing significant damage should be considered to be the origin of the Directive.

6 For a detailed legislative history of the Directive see *European Copyright Law*. Walter, M. M.; von Lewinski, S. (eds.). Oxford: Oxford University Press, 2010, p. 1201–1210. Kur, A. The Enforcement Directive—Rough Start, Happy Landing? *IIC* 2004, 7: 821–825.

7 Green Paper of the Commission of the European Communities on “Combating Counterfeiting and Piracy in the Single Market” of 15 October 1998 COM (98) 569 final.

On the other hand, it would not be true to say that the Directive does not entirely speak about the existence of different infringements of rights. Recital 17 providing for that “the measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement” has been specifically intended for the proportionality principle. The proportionality principle has also been mentioned separately when speaking of the application of particular remedies, measures or procedures, for example, in Article 3(2), Article 10(3).⁸

The proportionality principle has also been reflected in the Directive in an alternative manner, since it directly establishes different sanctions in consideration of the nature of the committed infringement. This includes the provisions of the Directive relating the emergence of certain more severe consequences or, conversely, lighter consequences depending on whether the infringement has been committed for commercial purposes or with no fault of the infringer (e.g. Article 6(2), Article 12).

Thus, the Directive gives the legislative bodies and particularly the courts of Member States sufficient opportunities to differentiate sanctions according to the nature of the infringement.

2. Implementation of the Directive in the Lithuanian Laws on Intellectual Property

Lithuania complying with afore-mentioned provision referred to in Article 20 of the Directive has adopted the following amendments to the laws on intellectual property:

- Law on Supplementing and Amending Articles 2, 4, 11, 12, 14, 15, 16, 17, 22, 38, 40, 42, 43, 44, 45, 46, 47, 51, 53, 54, 56, 57, 61, 65, 72, Chapter 4 of the Republic of Lithuania Law on Copyright and Related Rights and Annex to the Law;⁹
- Law on Amending Chapter 7 of the Republic of Lithuania Patent Law and Supplementing the Annex to the Law;¹⁰
- Law on Amending and Supplementing Chapter 10 and Article 56 of the Republic of Lithuania Law on Trademarks and Supplementing the Annex to the Law;¹¹
- Law on Amending and Supplementing Chapter 8 of the Republic of Lithuania Law on Design and Supplementing the Annex to the Law;¹²

8 European Copyright Law, *supra note* 6, p. 1222–1223.

9 *Official Gazette*. 2006, No 116-4400.

10 *Official Gazette*. 2006, No 72-2668.

11 *Official Gazette*. 2006, No 72-2670.

12 *Official Gazette*. 2006, No 72-2669.

- Law on Amending and Supplementing Articles 1, 10, Chapter 6 of the Republic of Lithuania Law on Legal Protection of Topographies of Semiconductor Products and Supplementing the Annex to the Law;¹³
- Law on Amending and Supplementing Articles 1, 2, 4, 5, 18, 19, 24, 26, 29, 37, Chapter 10 of the Republic of Lithuania Law on the Protection of Plant Varieties and Supplementing the Annex to the Law.¹⁴

Evaluation of the made amendments to the laws requires noticing that new provisions concerning enforcement of intellectual property rights in all the above laws were drafted on the same pattern, closely following the text of the Directive. All mandatory provisions of the Directive have been moved to the laws on intellectual property; furthermore, all laws on intellectual property established non-mandatory provisions with regard to alternative measures (Article 12 of the Directive) and possibility for the recovery of profits, where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity (Article 13.2).

Besides, Lithuania took advantage of the favourability clause and provided for not a few provisions that exceed the requirements referred to in the Directive for the benefit of right holders. First, all amendments to the afore-mentioned laws established that as an alternative to damages right holders and other authorised persons may claim up to twice the amount of royalties and fees which would have been due if the infringer had requested authorisation to use the objects of the intellectual property rights, and where the infringer acted intentionally or with negligence. In the cases of recovery of profit from the infringer by taking advantage of the provision corresponding to Article 13(2) of the Directive, the Lithuanian laws envisaged a special rule on the burden of proof: when determining the profits of the infringer, the right holder 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. Furthermore, the Lithuanian laws on intellectual property implementing the provision of the Directive concerning the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets (Article 9.2), requires no element of commercial scale.

Second, the Lithuanian laws on intellectual property provide for other remedies not set out in the Directive. One of such remedies referred to in all laws on intellectual property is the recognition of rights. Besides, in cases when a right holder is granted personal moral rights, in the event of infringement thereof, special remedies have been envisaged, e.g. redress of non-pecuniary damage. Such special remedies have been established in the Law on Copyright and Related Rights. Finally, there are special remedies envisaged only in some laws on intellectual property, e.g. establishment of non-infringement (set forth in the Patent Law and the Law on the Protection of Plant Varieties) or compensation (envisaged in the Law on Copyright and Related Rights).

13 *Official Gazette*. 2006, No 72-2671.

14 *Official Gazette*. 2006, No 118-4453.

However, at the same time it is to be noted that it was possible to apply almost all remedies and measures referred to in the Directive already before their implementation in the Lithuanian laws, at least in cases of the infringement of copyrights, rights to design or trademarks. Having in mind the fact that since 2001 Lithuania has assumed obligations according to the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), such situation is natural. The only completely new remedy established in the course of implementation of the Directive was publication of judicial decisions (Article 15 of the Directive); another novelty was alternative measures (Article 12 of the Directive). Moreover, in certain respects after implementation of the Directive the level of enforcement even decreased, since after amendments to the Law on Trademarks and Law on Design made in 2006 one of the previously applicable remedies, i.e. compensation, considered to be a particularly effective remedy and generally applied in the case law instead of the recovery of damage disappeared. Thus, the changes in the law made as a result of the implementation of the Directive cannot be unequivocally described as the rising of the level of the protection of right holders.

3. Summarizing of Judicial Proceedings of Intellectual Property Cases

As it has already been mentioned, Article 18 of the Directive provides for the obligation of the each Member State to submit to the Commission a report on the implementation of the Directive three years after the date of moving the provisions of the Directive. In the course of fulfilment of the above provision the State Patent Bureau of the Republic of Lithuania has drawn up the national report on the implementation of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights for the period of 2005-2008 for the European Commission. Pursuant to the data on the cases summarized in the afore-mentioned national report, the following data has been provided:

	Trademark cases			Patent cases			Design cases			Copyright cases		
	First-instance	Appellate instance	Cassation instance	First-instance	Appellate instance	Cassation instance	First-instance	Appellate instance	Cassation instance	First-instance	Appellate instance	Cassation instance
2005	34	5	3					1	1	115	3	3
2006	13	7	5	1	2					136	1	3
2007	46	14	2		1			1		124	6	2
2008	50	10	3	1	2					95	4	4

Meanwhile there is no data of two other protected intellectual property rights, i.e. enforcement of the rights to plant varieties and the rights to topographies of semiconductor products in courts.

The tendencies have not changed during the following year. During the period of 2009–2010, there was no data on the new initiated patent cases, hearing of the two cases initiated in the previous year in the appellate and cassation instance have been finished.¹⁵ During the same period, one design case has been heard.

Although there is no precise statistics of trademark cases, during the period of 2009–2010, the first instance heard 5 trademark cases, the appellate instance—19 cases, the cassation instance—5 cases.

During the same period the appellate instance heard 12 copyright cases, the cassation instance—6 copyright cases. As earlier, there is no data about the enforcement of the rights to plant varieties and the rights to topographies of semiconductor products in courts.

The provided data quite clearly suggests the tendencies of litigation in intellectual property cases: more active disputes arise only over two intellectual property rights, i.e. trademark rights and copyrights. Meanwhile, other intellectual property rights are not protected in courts at all (this applies in the cases of the rights to plant varieties and the rights to topographies of semiconductor products) or the number of such cases is particularly low (in the cases of patents and design). It should be added that even available case law of litigation of patent cases is not beneficial in terms of dealing with the issue, since some part of disputes have been resolved by concluding a reconciliation agreement or the issues concerning not the protection of exclusive rights, but the validity of the patent or payment of compensation for the use of the invention have been resolved.

The conclusion is that after implementation of the Directive, the dynamics of the number of cases has not shown more active enforcement of intellectual property rights than before implementation of the Directive is even more important in terms of our aims. The only category of cases where a significant rise in the number of cases has been noticed is the category of trademark cases; however, one should have in mind that mostly trademark cases include claims concerning declaring the trademark invalid and the Directive does not include the requirements of such nature. Furthermore, during the period of 2009–2010 the number of the cases falling within the above category dramatically decreased. Therefore, it may be safely said that the implementation of the Directive has not exerted any impact on the number of cases regarding enforcement of intellectual property.

The same conclusion may also be found in the responses sent by a majority of courts which constituted the basis for preparation of the national report: no real influence to the enforcement of intellectual property rights has been noticed.

Unaltered and low number of certain intellectual property rights cases suggests not only the ineffectiveness of the remedies, particularly since the number of disputes falling within other categories, i.e. copyright and trademark cases, is rather high. Such number evidences only one thing: the market of the products of intellectual property rights existing in Lithuania is too small for higher number of disputes to arise¹⁶ (the authors take

15 Here and hereinafter in this article the submitted data summarized by the authors of the article has been obtained using the legal document search system Infotek.Praktika.

16 It is easy to ground this thesis by facts, i.e. there are no registered topographies of semiconductor products in the Republic of Lithuania.

the fact that disputes over intellectual property rights arise more often than the cases are initiated for granted, since a major part of disputes is resolved without applying to the court; as a general rule, publicity is not given to the data on such disputes).

Another possible reason of low litigation would also not be related to legal regulation of protection which implies legal sophistication of the society in the field of intellectual property rights. Intellectual property rights have gained commercial importance only after Lithuania regained its independence in 1990 and upon movement to the market based on private property and freedom. Some more time had to pass for commercialisation mechanisms of intellectual property rights to finally gain speed, and legal regulation appeared later (e.g. the Patent Law and the Law on Trademarks in 1994, Law on Copyright and Related Rights only in 1999). Naturally, it is related to inadequate knowledge of society, including business representatives of the opportunities provided by intellectual property rights. Even when speaking of copyright cases it should be noted that, in principle, the case law of database right protection¹⁷ does not exist. For the majority of Lithuanian society database right have remained *terra incognita*, therefore, although there are certain preconditions, people do not take advantage of the considered remedies out of ignorance.¹⁸

In such circumstances, legal regulation of remedies cannot exert any influence.

On the other hand, as it has already been mentioned, the Law on Copyright and Related Rights and Law on Trademarks, the infringement of the rights protected by which mainly leads to judicial disputes envisaged similar and event more effective measures and remedies already before implementation of the Directive. Naturally, implementation of the Directive could not really change the situation.

4. Application of Particular Remedies and Measures in the Lithuanian Case Law

It should be considered that not particularly active litigation for intellectual property rights determines another aspect relevant for our research, i.e. lack of the information on application of certain part of remedies and measures in the courts of Lithuania. More particularly, there is no precise data of the practical application of alternative measures. Furthermore, there is no reliable data how the provisions concerning evidence and measures for preserving evidence, right of information or recovery of profits from the *bona fide* infringer were applied in Lithuania before and after implementation of the Directive.¹⁹

17 Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases of 11 March 1996, Article 7-11.

18 The authors draw this conclusion because very often a dispute grounded by copyrights may be grounded by the rights of database producers. As indicated above, in practice it is seldom done.

19 The national report on implementation of the Directive provides the data on the application of alternative measures and the right to information, but the author could not find publicly available cases where the above remedies would be applied and the data set out in the report are not fully reliable, for example, it contains data on the application of alternative measures in 2005 when at that time such remedy has not been envisaged in any law on intellectual property.

4.1. Provisional and Precautionary Measures

The possibility for application of provisional and precautionary measures (Article 9) has been provided for in certain laws on intellectual property of the Republic of Lithuania (the Law on Copyright and Related Rights, the Law on Trademarks and the Law on Design) before implementation of the Directive; furthermore, the above measures could be applied in any case according to the provisions set forth in the Code of Civil Procedure of the Republic of Lithuania. Indeed, these measures were and are often applied in practice and the Lithuanian law doctrine has already paid attention²⁰ to some negatively evaluated tendencies of the case law. More specifically, the case law set out the well-established position that application for provisional protection measures, i.e. abandonment of practices infringing rights, cannot coincide with the heads of the claim, the decision on which is taken after hearing the substance of the case. Such tendency of the case law has also continued after implementation of the Directive.²¹ It is evident that the afore-mentioned direction of the case law is not in compliance with the provisions of the Directive. It is likely that the case law will finally change after the recent decision made by the Court of Appeal of Lithuania which *expressis verbis* explained that the injunctions set out in the claim does not prevent the court from application of provisional and precautionary measures analogous in their content.²²

4.2. Injunctions

Injunctions are one of common remedies for infringed rights; therefore, it is not surprising that the afore-mentioned remedy could be applied in all cases of infringements of intellectual property rights already before implementation of the Directive. No major practical issues arise in application of the above remedy: upon establishment of the infringement, in principle, it is applied automatically. Attention should be paid only to one aspect of the case law, i.e. sometimes judicial decisions insufficiently definitely indicate what practices are prohibited. For example, a decision on injunction for one newspaper not to use the fragments of another newspaper made by the court of first instance in one case was acknowledged as too abstract.²³ In another case the court prohibited the defendant communicate to the public *de facto* any object of copyright and related rights.²⁴ It is evident that such all-inclusive injunction should be deemed disproportionate.

20 Pajeda, V. Laikinųjų apsaugos priemonių taikymo intelektinės nuosavybės apsaugos bylose ypatumai [Peculiarities of Provisional Protection Measures Usage in Intellectual Property Protection Cases]. *Jurisprudencija*. 2007, 11(101).

21 For example, Ruling of the Court of Appeal of Lithuania of 26 April 2007 in the case No 2-247/2007. But see Ruling of the Court of Appeal of Lithuania of 13 September 2007 in the case No 2-564/2007 in which measures were applied.

22 Ruling of the Court of Appeal of Lithuania of 26 August 2010 in the case No 2-1046/2010.

23 Ruling of the Court of Appeal of Lithuania of 22 December 2008 in the case No 2A-349/2008.

24 Ruling of the Court of Appeal of Lithuania of 22 December 2008 in the case No 2A-349/2008.

4.3. Corrective Measures

Corrective measures have been directly envisaged in the Law on Copyright and Related Rights, the Law on Trademarks and the Law on Design already before implementation of the Directive. As a rule, their application also does not cause major practical issues and upon establishment of the fact of infringement they may be applied semi-automatically. Nevertheless, it's worth noting that, following the proportionality principle, the court is not obliged to apply corrective measures at all times when an infringement of intellectual property rights is established, i.e. when their application would imply a disproportionate sanction against the respondent. Examples of such waiver may be found in the case law before the implementation of the Directive.²⁵

4.4. Recovery of Material Damage and Compensation

As it has already been mentioned, upon implementation of the Directive the provisions establishing the compensation, the amount of which shall be determined according to the price of protected object by increasing it up to 200% or up to 300% if the infringer has committed the infringement deliberately were deleted from the Law on Trademarks and the Law on Design. The compensation remained effective only in the Law on Copyright and Related Rights, but it should be noted that determination of its amount has been changed several times. Before the amendments to the laws made before 2003 the compensation was calculated according to the rules analogous to the rules referred to in the Law on Trademarks and the Law on Design. The calculation of the compensation set forth in the version of the law effective during the period from 2003 to 2006 has been changed establishing that its amount, from 10 to 1000 minimal standards of living, shall be determined by the court having regard to the culpability of the infringer, his property status, causes of unlawful actions and other circumstances are of significance to the case, as well as the criteria of good faith, fairness and reasonableness. Upon amendments made after 2006 the minimum amount of the compensation which may be awarded, i.e. 10 minimum living standards, has been withdrawn. Thus, in this respect the compensation referred to in the Law on Copyright and Related Rights has also been reduced. As already stated, the compensation was and remains the most common remedy used by right holders. The effectiveness of the above remedy arises out of the fact that right holders are not obliged to justify the amount of incurred losses and the amount of the compensation is determined by the court. The case law shows that courts flexibly apply the above institute in consideration of the status of the parties of the dispute, their relations, the amount of losses incurred by the right holder and other important circumstances. Consequently, not a few judicial decisions, in which the amount of the requested compensation was significantly reduced²⁶ and, in exceptional cases,

25 Ruling of the Court of Appeal of Lithuania of 29 July of 2002 in the case No 2A- 250/2002.

26 Ruling of the Civil Division of the Supreme Court of Lithuania of 2 June 2006 in the case No 3K-3-270/20006, Ruling of the Court of Appeal of Lithuania of 8 June 2006 in the case No 2A-248/2006.

the requested amount was not awarded at all²⁷ may be found. Conversely, in the event of long lasting and intense infringement and good financial situation of the defendant, courts may award the maximum amount of the compensation.²⁸

Meanwhile, the classic institute of damage compensation in the Lithuanian courts is applied particularly rarely, but in this case, the court also observes special damage calculation rules. For example, all laws on intellectual property establish the possibility for considering the benefit gained by the infringer as the losses corresponding to the provisions of Article 13(1)(a) of the Directive and such method of determination of the amount of the damages is applied in practice.²⁹

After all, in all laws on intellectual property, considering and exceeding the possibility referred to in Article 13(1)(b) of the Directive, the material damage requested to be awarded may be calculated in consideration of royalties or fees which would have been due if the infringer had requested authorisation to use the objects of intellectual property rights, and where the infringer acted intentionally or with negligence—up to twice the amount of such royalties and fees. However, the available case law suggests that compensation continues to remain the most popular remedy applied in practice.

4.5. Publication of Judicial Decisions

As it has already been mentioned, publication of judicial decisions is one of the few real novelties embedded in the Lithuanian law upon implementation of the Directive. Although the case law of the above remedy is still in the development stage, it has already been successfully applied several times. Furthermore, there is an example of such situation when the court dismissed the requirement of publication of the judicial decision on the ground that the respondent has benevolently remedied the infringement and compensated the caused damages, thus, observed the proportionality principle.³⁰

Conclusions

To sum up the findings set out in the article, it may be stated that the Enforcement Directive has not exerted any major impact on the case law of enforcement of intellectual property rights in Lithuania. The main reasons are not legal at all: the Lithuanian intellectual property market is simply too small and there are no preconditions for active litigation. This automatically means that practical importance of intellectual rights enforcement is not high. For example, as stated above, in practice the provisions con-

27 Ruling of the Civil Division of the Supreme Court of Lithuania of 11 June 2007 in the case No 3K-3-48/2007.

28 Decision of Vilnius Regional Court of 23 May 2007 in the case *LATGA-A v. Čilija UAB*; Ruling of the Court of Appeal of Lithuania of 7 April 2010 in the case No 2A-41/2010.

29 Decision of Šiauliai Regional Court of 23 January 2008 in the case No 2-94-372/2008; Decision of Vilnius Regional Court of 3 June 2009 in the case *Microfibres, Inc. v. Dinasas UAB*.

30 Ruling of the Court of Appeal of Lithuania of 26 April 2010 in the case No 2A-337/2010.

cerning enforcement have not been applied in the cases of patents, plant varieties and topographies and there were only several design cases where remedies were applied.

Nevertheless, the legal reasons may also be indicated. The main reason is that the Lithuanian right holders could take advantage of effective civil remedies and measures already before adopting the Directive and the Directive has not brought in any substantial novelties (the only really new remedy is the publication of judicial decisions). Moreover, both before implementation of the Directive and currently the law of the Republic of Lithuania envisages the remedies not directly related to the implementation of the provisions referred to in the Directive, for example, compensation and provisions of double licence fee, redress of non-pecuniary damage. As stated, the most popular remedy is compensation.

Further, it would not be completely true to maintain that the Directive has not exerted any impact on the intellectual property law of Lithuania. It established certain floor of enforcement standards and apparently pushed the enforcement of intellectual property rights towards the direction more favourable for right holders even if in practice not all opportunities have been exploited.

References

- Cornish W. R., *et al.* Procedures and Remedies for Enforcing IPRS: the European Commission's Proposed Directive. *E.I.P.R.* 2003, 25(10).
- Decision of Vilnius Regional Court of 23 May 2007 in the case *LATGA-A v. Čilija UAB*.
- Decision of Šiauliai Regional Court of 23 January 2008 in the case No 2-94-372/2008.
- Decision of Vilnius Regional Court of 3 June 2009 in the case *Microfibres, Inc. v. Dinasas UAB*.
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. *Official Journal L* 195, 02/06/2004.
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. *Official Journal L* 077, 27/03/1996.
- van Eechoud, M., *et al.* Harmonizing European Copyright Law. The Challenges of Better Lawmaking. Kluwer Law International, 2009.
- European Copyright Law*. Walter, M. M.; von Lewinski, S. (eds.). Oxford: Oxford University Press, 2010.
- Green Paper of the Commission of the European Communities on "Combating Counterfeiting and Piracy in the Single Market" of 15 October 1998 COM (98) 569 final.
- Kur, A. The Enforcement Directive—Rough Start, Happy Landing? *IIC*. 2004, 7.
- Law on Supplementing and Amending Articles 2, 4, 11, 12, 14, 15, 16, 17, 22, 38, 40, 42, 43, 44, 45, 46, 47, 51, 53, 54, 56, 57, 61, 65, 72, Chapter 4 of the Republic of Lithuania Law on Copyright and Related Rights and Annex to the Law. *Official Gazette*. 2006, No. 116-4400.
- Law on Amending Chapter 7 of the Republic of Lithuania Patent Law and Supplementing the Annex to the Law. *Official Gazette*. 2006, No. 72-2668.
- Law on Amending and Supplementing Chapter 10 and Article 56 of the Republic of Lithuania Law on Trademarks and Supplementing the Annex to the Law. *Official Gazette*. 2006, No. 72-2670.
- Law on Amending and Supplementing Chapter 8 of the Republic of Lithuania Law on Design and Supplementing the Annex to the Law. *Official Gazette*. 2006, No. 72-2669.

- Law on Amending and Supplementing Articles 1, 10, Chapter 6 of the Republic of Lithuania.
- Law on Legal Protection of Topographies of Semiconductor Products and Supplementing the Annex to the Law. *Official Gazette*. 2006, No. 72-2671.
- Law on Amending and Supplementing Articles 1, 2, 4, 5, 18, 19, 24, 26, 29, 37, Chapter 10 of the Republic of Lithuania Law on the Protection of Plant Varieties and Supplementing the Annex to the Law. *Official Gazette*. 2006, No. 118-4453).
- Massa, Ch.; Strovel, A. The Scope of the Proposed IP Enforcement Directive: Torn Between the Desire to Harmonise Remedies and the Need to Combat Piracy. *E.I.P.R.* 2004, 26(6).
- Pajeda, V. Laikinųjų apsaugos priemonių taikymo intelektinės nuosavybės apsaugos bylose ypatumai [Peculiarities of Provisional Protection Measures Usage in Intellectual Property Protection Cases]. *Jurisprudencija*. 2007, 11(101).
- Ruling of the Court of Appeal of Lithuania of 26 April 2007 in the case No 2-247/2007.
- Ruling of the Court of Appeal of Lithuania of 13 September 2007 in the case No 2-564/2007.
- Ruling of the Court of Appeal of Lithuania of 22 December 2008 in the case No 2A-349/2008.
- Ruling of the Court of Appeal of Lithuania of 29 July of 2002 in the case No 2A – 250/2002.
- Ruling of the Court of Appeal of Lithuania of 8 June 2006 in the case No 2A-248/2006.
- Ruling of the Court of Appeal of Lithuania of 7 April 2010 in the case No 2A-41/2010.
- Ruling of the Court of Appeal of Lithuania of 26 April 2010 in the case No 2A-337/2010.
- Ruling of the Court of Appeal of Lithuania of 26 August 2010 in the case No 2-1046/2010.
- Ruling of the Civil Division of the Supreme Court of Lithuania of 2 June 2006 in the case No 3K-3-270/20006.
- Ruling of the Civil Division of the Supreme Court of Lithuania of 11 June 2007 in the case No 3K-3-48/2007.

INTELEKTINĖS NUOSAVYBĖS TEISIŲ GYNIMAS LIETUVOJE: PADĖTIS PO DIREKTYVOS 2004/48/EB DĖL NUOSAVYBĖS TEISIŲ GYNIMO ĮGYVENDINIMO

Ramūnas Birštonas, Leonas Virginijus Papirtis

Mykolo Romerio universitetas, Lietuva

Santrauka. Straipsnyje siekiama ištirti, kokios įtakos intelektinės nuosavybės teisių gynimui Lietuvoje turėjo 2004 m. balandžio 29 d. Europos Parlamento ir Tarybos direktyvos 2004/48/EB dėl nuosavybės teisių gynimo (toliau – Direktyva) įgyvendinimas. Tuo tikslu yra analizuojama, kokie pakeitimai buvo padaryti 2006 m. priėmus intelektinę nuosavybę Lietuvoje reglamentuojančių įstatymų – Patentų įstatymo, Dizaino įstatymo, Prekių ženklų įstatymo, Augalų veislių apsaugos įstatymo, Autorių teisių ir gretutinių teisių įstatymo bei Puslaidininkinių gaminių topografijų teisinės apsaugos įstatymo – pakeitimus. Antra, yra analizuojamos teismų praktikos intelektinės nuosavybės bylose tendencijos iki Direktyvos įgyvendinimo ir po jo, nagrinėjant statistinius duomenis apie atskirų intelektinės nuosavybės teisių bylų skaičių, taip pat nagrinėjamos konkrečių gynimo būdų bei priemonių taikymo

teismų praktikoje kryptys. Be to, atskirai yra aptariama proporcingumo principo taikymo užtikrinimo svarba intelektinės nuosavybės byloje.

Išanalizavus Direktyvos įgyvendinimo procese padarytus intelektinės nuosavybės įstatymų pakeitimus, konstatuojama, kad beveik visi Direktyvoje numatyti gynimo būdai bei priemonės buvo galimi taikyti ir iki jų įgyvendinant Lietuvos įstatymuose, bent jau autorių teisių, teisių į dizainą arba į prekių ženklus pažeidimo atvejais. Vienintelis visiškai naujas gynimo būdas, numatytas įgyvendinant Direktyvą, buvo teismo sprendimo paskelbimas, taip pat alternatyviosios priemonės. Kai kuriais atžvilgiais po Direktyvos įgyvendinimo gynimo lygis netgi sumažėjo, nes po 2006 m. pakeitimų Prekių ženklų įstatyme ir Dizaino įstatyme nebeliko vieno iš iki tol buvusių gynimo būdų – kompensacijos, laikomos itin efektyviu gynimo būdu ir paprastai praktikoje taikomos vietoje žalos atlyginimo.

Pasirėmus statistiniais bylų atskirose intelektinės nuosavybės teisių kategorijose duomenimis, prieinama prie išvados, kad Direktyvos įgyvendinimas bylų skaičiui realios įtakos neturėjo. Iš pateiktų duomenų matyti, kad aktyvesni teisminiai ginčai vyksta tik dėl dviejų intelektinės nuosavybės teisių – prekių ženklų ir autorių teisių. Tuo tarpu kitos intelektinės nuosavybės teisės teismuose arba apskritai neginamos (taip yra teisių į augalų veisles ir teisių į puslaidininkinių gaminių topografijas atveju), arba jų skaičius yra itin mažas (patentų ir dizaino atveju). Apžvelgus teismų praktikos tendencijas, Direktyvos įgyvendinimo įtaka taip pat nepastebėta.

Apibendrinant tyrimo rezultatus, daroma išvada, kad Direktyvos įgyvendinimas iki šiol didesnės įtakos intelektinės nuosavybės gynimo praktikai Lietuvoje neturėjo.

Reikšminiai žodžiai: intelektinė nuosavybė, gynimas, pažeidimai, Direktyva 2004/48/EB, įpareigojimas nutraukti neteisėtus veiksmus, žalos atlyginimas.

Ramūnas Birštonas, Mykolo Romerio universiteto Teisės fakulteto Civilinės ir komercinės teisės katedros docentas. Mokslinių tyrimų kryptys: intelektinės nuosavybės teisė, daiktinės teisės, civilinė atsakomybė.

Ramūnas Birštonas, Mykolas Romeris University, Faculty of Law, Department of Civil and Commercial Law, associated professor. Research interests: intellectual property law, property law, torts.

Leonas Virginijus Papirtis, Mykolo Romerio universiteto Teisės fakulteto Civilinės ir komercinės teisės katedros docentas. Mokslinių tyrimų kryptys: intelektinės nuosavybės teisė, civilinė teisė.

Leonas Virginijus Papirtis, Mykolas Romeris University, Faculty of Law, Department of Civil and Commercial Law, associated professor. Research interests: intellectual property law, contracts, insurance law.