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HARMONIZATION OF THE ENFORCEMENT OF IP RIGHTS IN  
EUROPE: WHAT'S NEXT?

# Comparative IP Academic Workshop Working Papers

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## *Introduction*

As reported, by the end of 2008 all EU Member States implemented the EU Enforcement Directive<sup>1</sup> into their national laws<sup>2</sup>. Revision and analysis of the implementing national legislation allows estimating which civil IP enforcement means and measures have been newly introduced, added or removed by the national legislators<sup>3</sup>. Evaluation of actual implementation of the Directive, *i.e.* considering its goals and objectives to approximate the national laws as to ensure a high, equivalent and homogeneous level of IP protection in all Member States and to establish an effective enforcement infrastructure, will require some time, though. Needless to say, such evaluation can be accomplished only by reviewing the actual court practice related to infringements of IP rights in all EU countries and comparing it with the practice which existed before the adoption of the Directive.

Some conclusions and observations can, however, be made by taking into account the harmonizing provisions of the Directive, the whole current EU-wide legal framework on IP enforcement and evident outcomes of the implementation of the Directive. Such findings are important when debating the necessity of the Enforcement Directive in general as well as evaluating other legislative proposals in the field of IP enforcement in Europe such as the 2005 EU Commission's proposal regarding a directive on criminal measures aimed at ensuring the enforcement of IP rights<sup>4</sup>. The mentioned proposal mainly advocates for strengthening of criminal measures against IP counterfeiting and piracy in order to combat organized crimes against IP rights in a more efficient manner. It also seeks to harmonize certain criminal prosecution means and sanctions.

In the meantime, while the Draft Criminal Enforcement Directive is still being debated at the EU institutions and is likely to stay on the proposal level for some time, it seems that such a phenomenon as growing internet piracy or piracy at the EU external borders inevitably forces thinking about immediate measures which can help fighting them and which are different from those embodied in the Enforcement Directive and proposed in the Draft Criminal Enforcement Directive. As far as legislative ideas and concrete initiatives related to prevention and prosecution of online infringements of IP rights are concerned, it is noticeable that enforcement measures should cover, *inter alia*, establishment of effectively functioning codes of conduct. The legislative solutions could furthermore focus on co-regulation related to the improved rules on liability of internet service providers (ISPs) and rights of Internet subscribers<sup>5</sup>. Last but not least, improvements in national enforcement infrastructures (police, prosecution authorities, courts, etc.) and national jurisprudence are to be considered.

### *I. Current legislative IP enforcement framework in the EU*

Although the necessity of the Directive was strongly contested in terms of its legal context, scope and character<sup>6</sup>, it is considered as the first attempt to comprehensively harmonize certain aspects of civil enforcement of IP rights on the so-called "horizontal" basis in the EU. Already in the Explanatory Memorandum<sup>7</sup> the EU Commission pointed out the priority of the intervention of the Community into the field of enforcement of substantive IP rights by covering the rights which had already been harmonized on the basis of the EU-wide instruments. The aims of the Directive were therefore focused on *acquis communautaire* relating to the substantive IP rights which could be effective only through having an instrument on enforcement of those rights. The Directive was to ensure proper functioning of the Internal Market, to create an adequate level of enforcement of IP rights by virtue of IP

enforcement-related standards in the TRIPS Agreement, namely, its Part III. By adopting the Directive, it was intended to extend the best IP enforcement practices to all EU Member States with a special focus on the countries in which enforcement was the weakest (especially the newly acceding countries).

Before the Enforcement Directive, the EU directives harmonizing the substantive IP rights, which had been adopted prior to the 2003 Commission's Proposal and which had to be implemented by the Member States<sup>8</sup>, did not provide extensive enforcement mechanisms, be they civil, administrative or criminal. Only episodic provisions on procedures or remedies in cases of infringements of IP rights could be found in some of the directives, for instance, in the so-called Computer Programs Directive, E-Commerce Directive or Copyright Directive<sup>9</sup>. While adopting the Enforcement Directive, such procedures and remedies have been taken out of the scope of its regulation. Also, the EC Regulation 1383/2003<sup>10</sup> can be seen as a "horizontal attempt" prior to the Directive, however, covering only sectoral instruments such as measures which should be taken by or procedures applicable to national customs authorities as far as piracy at the borders was concerned.

By partially eliminating the distinction between infringements of IP rights committed on a commercial scale and other infringements, also taking criminal law provisions out, the Directive strengthened its positions in terms of full-scale harmonization in the context of civil enforcement measures only. Due to the Directive, the following substantive civil enforcement measures are nowadays harmonized in the EU: (1) right of information; (2) corrective measure; (3) injunctions; (4) alternative measures; (5) damages, and (6) publication of judicial decisions<sup>11</sup>. All substantive measures can be applied in complex while adopting a court decision on the merits of the case, whereas the right of information can be also applied while considering an IP infringement case. Most importantly, as far as a full-scale harmonization of civil IP enforcement was concerned, the Directive established procedural enforcement measures which covered: (1) evidence and measures for preserving evidence; (2) provisional and precautionary measures<sup>12</sup>; and (3) legal costs<sup>13</sup>. The procedural measures were generally aimed at ensuring enforcement of final court decisions, also collection and preservation of collected evidence in IP infringement cases or prevention from infringing IP rights and/or deterring from infringing them. Most of the harmonizing provisions in the Directive were introduced considering IP enforcement practices in the countries such as France, Germany, Belgium and UK<sup>14</sup>.

Although the implementation of all harmonizing civil procedural enforcement measures was mandatory to the Member States, the Directive left certain open possibilities for the national legislators to implement the provisions on substantive enforcement measures and remedies. This, unfortunately, can be seen from some vague provisions embodied in the Directive. Additionally, as follows from the character of some provisions, the Member States should consider the national legislation on the subject-matter which existed before the adoption of the Directive and which provided more favourable treatment to IP right holders. There were also provisions in the Directive which had an optional nature<sup>15</sup> and were to be implemented in view of the general objectives listed in the Recitals of the Directive.

Although it was clearly expressed by the EU Commission that the enforcement rules provided under TRIPS could vary and, thus, there was an actual need to harmonize them within the EU<sup>16</sup>, the fact that the Directive still shows obscurity in its terms can prompt a reverse conclusion. Weak harmonizing effects can be expected due to the general complexity

of the provisions on enforcement of IP rights in the Directive as well as a different nature of those rights. In order to highlight this point, some attention was later brought to the fact that, for example, some enforcement measures or remedies applicable in cases of copyright infringements might not be effectively applicable to infringements of trademarks or patent rights<sup>17</sup>. IP infringements also vary, *i.e.* those committed on a large scale and the so-called ordinary small-scale infringements<sup>18</sup>.

All these aspects require certain knowledge and practical expertise of national judges who hear IP infringement cases. Besides, different legal traditions, also divergent levels of legal education and practice play a huge role in actual application of the harmonized provisions. On the other hand, being more a political rather than legal result, the adoption of the Directive partially helped to foster certain processes related to creation of a more effective IP enforcement system in new EU acceding countries<sup>19</sup>.

## *II. Implementation of the Enforcement Directive: example of the Baltic countries*

As an example, the drawbacks of the Directive, its legal context and certain implementation outcomes can be depicted while referring to the implementing national legislation and IP enforcement practice in the Baltics – Lithuania, Latvia and Estonia. Since the declaration of their independence in 1990 and 1991 the Baltic region has faced a relatively speedy transformation from the post-Soviet legal tradition to the so-called western one. By analysing those (mostly legislative at the moment) outcomes, uncertainty regarding the provisions set out in the Directive can be observed. As already noted, the obscurity of some formulations embodied in the Directive (which, noticeably, was drafted incredibly quickly) remains as one of the main issues associated with its implementation. The examination of the implementation of the Directive in the Baltics serves as an example of difficulties that can, in fact, arise after transposing the harmonized provisions of EU law into the national legislation, especially when it comes to practical application.

The Baltic countries as well as all other EU Member States had to implement the Directive by 29 April 2006<sup>20</sup>. By examining how the Directive has been implemented in the Baltics, it can be observed that the current civil IP rights enforcement scheme generally reflects the required level of measures, procedures and remedies promulgated by the Directive. This is especially true of the current legislation in place. In many cases, though, a number of substantive and procedural aspects of enforcement, which were intended to be harmonized within the EU and which were also new to some other European countries (such as pre-trial measures to preserve evidence, the right of information concerning third parties, damages, also the so-called “license analogy” for reimbursement of damages<sup>21</sup>, alternative measures), represented novel challenges to the legislative and court practice of the Baltic countries.

Notably, many of the provisions of IP legal enforcement such as provisional measures, interlocutory or permanent injunctions, corrective measures, adjudication of actual damages (losses), legal costs and publication of judicial decisions had been already embodied and applied in the Baltic practice before the adoption of the Directive. Furthermore, some provisions and concepts which were very rare in European IP litigation practice, for instance, *compensation instead of damages* which was frequently criticised as importing the doctrine of punitive damages from the Anglo-Saxon legal environment (namely, the US), had been established in IP legal doctrine and court practice in Lithuania since 1994. Many sound cases were heard by the national courts before adopting the implementing legislation which formed

a strongly debated court practice at that time<sup>22</sup>. Additional changes to the law were mainly due to the accession by the Baltic states into the EU process, starting in 1998, which, *inter alia*, required embracing general revision and improvements in national legislation which, as said, can be considered as a positive result.

However, certain questions remained such as whether substantive and procedural measures and remedies were applied in practice effectively before the implementation of the Directive, what pertinent tendencies could be discerned from the then court practice (which, admittedly, was modest, especially concerning patent and design rights), and what improvements in this legal field were necessary. Despite IP civil enforcement measures and remedies, as well as the enforcement infrastructure and its players (*i.e.*, special IP police divisions, prosecutors working on IP cases, experts, specialists specializing in IP matters, the courts competent to hear IP cases, etc.) after having been put in place, actual IP enforcement practice remained quite patchy. Such an outcome was mainly due to heritage of the Soviet legal doctrine which was for some time still reflected in the national codes of civil procedure, and also to some human factors such as frequent reluctance of national judges to enforce the law in matters related to IP because of the specificity of the issues raised. The divergent case practise was also influenced by legislative discrepancies in the national IP laws before the implementation of the Directive in the Baltic legislation.

This can be well illustrated by the Lithuanian Supreme Court practise in situations where important legal matters regarding IP enforcement had to be tackled, and where issues such as authorship presumption, calculation of compensation instead of damages, moral damages, and also the Directive-relevant term “*commercial purposes*,” were salient<sup>23</sup>. Such disputed aspects, which were customary in other European countries, were unorthodox and problematic in the context of nascent IP enforcement practice in the Baltic countries in general. Some of the highlighted problems that arose in the early stages of the Baltic IP enforcement practice have been already solved. This has been partly achieved by following the definitions, aims and objectives of the Directive, however, the implementation of which can further lead to heterogeneous outcomes in the Baltic IP litigation practise.

Additionally, as mentioned above, legal practice in the Baltic jurisdictions still indirectly expresses specific aspects of the Soviet legal doctrine, together with features of a developing legal tradition, while at the same time striving to adopt enforcement novelties such as *as civil (ex parte) searches* or the *licence analogy* as alternative methods of computation damages<sup>24</sup>. Certain tension is frequently observed in the decisions of the local courts, where the so-called high “western” IP protection standards meet local “IP mentality and thinking.” Such factors play a substantial role and should be further closely considered in discussions of other proposed EU instruments in the field of IP enforcement, namely, the Draft Criminal Enforcement Directive.

Although it has been criticised on many legal fronts – such as, *inter alia*, the lack of legal precision in its scope and subject-matter, the lack of legal justification for its very existence (due to the TRIPS Agreement already being in place), or ineffective harmonization in some cases – it should be admitted that the implementation of the Directive in the Baltic countries has prompted certain processes in the field of protection of IP rights in general that would not otherwise have come about. It led to comprehensive revision and improvements in IP legislation on a full scale, *i.e.* before the Directive enforcement provisions in national IP laws differed (which in many cases led to flaky or flawed lawmaking outcomes). It also fostered

amendments to a few substantive provisions in the national IP laws, such as those related to *locus standi* in civil litigation or presumption of related rights (right of performers) in civil proceedings. The implementation of the Directive has furthermore led to strengthened protection of IP rights, thereby playing a significant role in prevention of IP counterfeiting and piracy, and in raising awareness about IP in general.

### *III. The Enforcement Directive and current IP enforcement issues*

Some initiatives to harmonize criminal measures and sanctions or some aspects of them within the EU have been already expressed while drafting the EU Enforcement Directive in 2003<sup>25</sup>. Such initiatives, however, were not finally accepted, which can be considered as a legally reasonable solution, indeed. However, soon later on those initiatives found a way to be presented as a new proposal for an EU directive on harmonization of criminal measures in 2005. Although being attractive on a few aspects, the EU legislative proposal on harmonization of criminal measures could not avoid heavy criticism. On the other hand, it demonstrated a necessity to evaluate actual criminal enforcement of IP rights status in the EU Member States more carefully, to draw a stricter borderline between criminal law, its concepts and principles, and IP law and to consider how much such a directive would affect the functioning of the Internal Market, other rights and interests<sup>26</sup>.

The proposal should be seen in the context of the existing national enforcement infrastructures after the implementation of the Enforcement Directive, considering legal traditions of criminal law and criminal procedure that vary from country to country, the issues faced by the national courts hearing criminal IP infringement cases, also IP awareness and compliance in general. Notably, in some countries the harmonizing civil measures can be applied together with administrative and criminal measures. The same applies to customs and civil enforcement measures. As far as the Baltic countries are concerned, for example, the strict separation of civil, administrative and criminal procedures is considered to be a relic of the Soviet era that needs to be set aside. Combining administrative measures, criminal measures and civil remedies (especially when it concerns collection and presentation of evidence, as well as adjudication of damages) may allow IP right holders to enjoy their rights in a more effective manner – particularly when specificity of evidence, substantiation in IP infringement cases and also the principle of economy in procedures, is taken into account.

Moreover, the Draft Criminal Enforcement Directive cannot avoid its further testing in view of another rapidly spreading phenomenon – internet piracy. As noted, fighting against internet piracy in many cases requires other creative and effective means than just imposing strict criminal sanctions and reinforcing criminal prosecution. There are a few harmonizing provisions in the Enforcement Directive which refer to the cases when IP infringements occur online and which should be applied considering the provisions set out in the mentioned E-Commerce Directive. Those provisions mainly concern interim and precautionary measures, also injunctions that can be applied to intermediaries – internet service providers<sup>27</sup>.

In addition, as it can be observed from Article 17 of the Directive, it has been intended to create a system of certain codes of conduct at the EU level that can be helpful to fight against internet piracy within the EU. Although no comprehensive case practice related to liability of ISPs within the EU can be presented and no due estimation of the court practice on the issue can be done referring to all EU countries yet, some helpful references regarding internet cases can be already found in the practice of the European Court of Justice (ECJ)<sup>28</sup>.

Alongside with the interpretations by the ECJ, first ideas regarding creation of a harmonized system of codes of conduct were expressed<sup>29</sup>. On the other hand, the initiatives to look for other solutions to control illegal content online such as, for instance, compulsory licenses to be paid for using the protected IP content on the Internet, should be duly considered.

### Conclusion

All current proposals and initiatives regarding enforcement of IP rights in the EU demonstrate that the current legislative IP enforcement framework, even if it was positive in dealing with some IP enforcement issues in the Member States, especially those related to civil IP enforcement, is not sufficient to fight against new ways of IP counterfeiting and piracy, particularly when internet piracy is concerned. The EU-wide IP enforcement framework therefore requires: (1) constant revision of the national court practice regarding the implemented civil enforcement measures and remedies; (2) improvements in IP enforcement infrastructures, in particular in new EU Member States (encompassing national police and prosecution authorities, also national judicial systems) in order to ensure an effective enforceability of IP rights; (3) due and careful consideration of proposals on strengthening criminal sanctions against crimes of IP counterfeiting and piracy within the EU in view of worldwide initiatives and policies on the issue; (4) also rapid contemplation and implementation of new methods of enforcement, especially related to internet piracy. Finding new constructive enforcement mechanisms should be done in view of other rights and interests as well as human rights, as specifically pointed by the ECJ.

### References

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<sup>1</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 195, 2.6.2004, pp. 16-25, to be implemented by 29 April 2006 (Art. 20, Directive) (hereinafter – the “*Enforcement Directive*”, or the “*Directive*”)

<sup>2</sup> The national implementing legislation is listed in the National Provisions Communicated by the Member States concerning Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, see [http://eur-lex.europa.eu/Notice.do?val=470580:cs&lang=en&list=470580:cs.&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#FIELD\\_BE](http://eur-lex.europa.eu/Notice.do?val=470580:cs&lang=en&list=470580:cs.&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#FIELD_BE).

<sup>3</sup> The author of this article\* dedicated its doctoral studies to revision and analysis of the harmonized provisions of the Directive and its implementation in Lithuania, Latvia and Estonia in view of the development of IP rights protection in the Baltic region. Also the comprehensive revision and analysis on, for example, German implementing legislation can be found in *Amschewitz Dennis*, Die Durchsetzungsrichtlinie und ihre Umsetzung im deutschen Recht, Geistiges Eigentum und Wettbewerbsrecht, Mohr Siebeck Tübingen, 2008. Band 21.

<sup>4</sup> Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission): COM (2006) 168 final, April 26, 2006 (hereinafter – the “*Draft Criminal Enforcement Directive*”)

<sup>5</sup> As argued in, for instance, *Hugenholtz P. Bernt*, Codes of Conduct and Copyright – Pragmatism vs. Principle, IIC, 2008, pp. 635-637.

<sup>6</sup> The strong criticism was expressed in *Cornish R. William et al.* Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive, E.I.P.R. 2003, 25(10), pp. 447 – 449; also in *Massa Charles-Henry, Strowel Alan*, 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), pp. 244 – 253.

<sup>7</sup> See the *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*, p. 5.

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<sup>8</sup> The list of the directives on the substantive IP rights has been introduced into the Statement by the Commission on the scope of Article 2 of the Enforcement Directive; see Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual property rights. OJ L 94, 13.4.2005, p. 37.

<sup>9</sup> Council Directive 91/250/EEC on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42 (Art. 7); Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1; and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001, L 167/10 (Arts. 2-6, Art. 8)

<sup>10</sup> Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ 2003, L 196/7

<sup>11</sup> Arts. 8, 10, 11, 12, 13, 15 of the Directive, respectively.

<sup>12</sup> By virtue to Art. 50 of TRIPS, both measures for preserving evidence and provisional and precautionary measures can be called “preliminary measures”, as indicated in *Straus Joseph*, Reversal of the Burden of Proof, the Principle of “Fair and Equitable Procedures” and Preliminary Injunctions under the TRIPS Agreement, *Offprints of the Journal of World Intellectual Property*, Geneva, November 2000, Vol. 3 No. 6, pp. 812-814, *ref.* also to ECJ, Judgement of 26 March 1992, Case C-261/90, OJ 1989, L 317/48.

<sup>13</sup> Arts. 6, 7, 9, 14 of the Directive, respectively.

<sup>14</sup> References to the national case practice on the basis of which the harmonized provisions were drafted can be found in the *Explanatory Memorandum of the Commission’s Proposal for a Draft Enforcement Directive (2003)*.

<sup>15</sup> *E.g.*, Member States can legislate that the judicial authorities may order recovery of profits or payment of damages, which may be *pre-established*, in cases where the infringer did not knowingly, or with reasonable grounds to know, engaged in infringing activity (Art. 13(2), Directive).

<sup>16</sup> See the *Explanatory Memorandum of the Commission’s Proposal for the Draft Enforcement Directive (2003)*, p. 12.

<sup>17</sup> See *Massa Charles-Henry, Strowel Alan*, 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), p. 252; also *Kur Annette*, The Enforcement Directive - Rough Start, Happy Landing? *IIC*, 2004, pp. 829.

<sup>18</sup> *E.g.*, measures such as destruction of goods and removal from the channels of commerce should be proportionally differentiated in terms of large scale and small scale infringements of IP rights.

<sup>19</sup> At the time the Directive was adopted, 10 new Member States have joined the EU since 1 May 2004: Slovenia, Slovakia, the Czech Republic, Poland, Malta, Cyprus, Hungary, Lithuania, Latvia, and Estonia. Bulgaria and Rumania joined the EU from 1 January 2007.

<sup>20</sup> The Baltic countries adopted the implementing national laws by the end of 2006 and the beginning of 2007. Other new EU Member States, for instance, Hungary, Slovenia or Rumania implemented the Directive prior to the required deadline. Some other countries such as the Czech Republic, Cyprus or Malta adopted the implementing laws in 2006. This also applies, for example, to Spain, Italy or Finland where the national legislators passed the implementing laws in 2006. However, not all EU Member States were diligent to draft the implementing amendments within the required implementation term. Countries such as France or Germany were especially late to implement the Directive. France, for instance, implemented the Directive by adopting the amendments to its national legislation on 29 October 2007. In Germany the drafted amendments had to overcome lengthy discussions at the Parliament and were finally adopted on 11 April 2008.

<sup>21</sup> *E.g.*, the licence analogy method has been used to calculate damages on the basis of the objective calculation of a royalty amount which should have been paid by the user in case a licence agreement between such user and a right holder had been made. While assessing such amounts, the tariffs of royalties to be paid by the users which are established by, for instance, GEMA (collective administration society) in Germany, are taken into consideration.

<sup>22</sup> Importantly, on 27 March 2009 the Constitutional Court of Lithuania rendered the decision in Case No. 33/06 on the interpretation of the provision on compensation for damages which was embodied in the 2000 Trademark Law of Lithuania and concluded that such provision was unconstitutional. The disputed Law provided: “*instead of the reimbursement of losses, the proprietor may claim compensation. The amount of the compensation shall be determined according to the price of legal sale of a relevant good or service by increasing it up to 200% or up to 300% if the infringer has committed the infringement deliberately*”.

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<sup>23</sup> E.g., on 20 June 2008 the Expanded Board of Seven Judges of the Supreme Court of Lithuania rendered a judgment in *Criminal Case No. 2K-7-201/2008* regarding illegal reproduction and use for commercial purposes of infringing copies of copyrightable works. The Supreme Court narrowed the interpretation of the term “commercial purposes” (the term is used in the Enforcement Directive, Recital (14), also TRIPS Agreement 61 (“commercial scale”)) by limiting it to those cases of use of copyrightable objects when *direct economic profit* is gained from using them only.

<sup>24</sup> Many cases in relation to application of civil searches have been heard by the Lithuanian national courts. Those cases partly reflect the French concept of *saisie contrefaçon*. Such practice, however, is not observed in Estonia or Latvia. Court practice in relation to application of the license analogy method which, as noted, is already known and applied in Germany is still to come to the Baltics.

<sup>25</sup> See the Proposal for a Directive of the European Parliament and of the Council on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights: COM (2003) 46 final, January 30, 2003.

<sup>26</sup> The critical points have been clearly stated in, for example, *Hilty Reto et al.*, the Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights, IIC, 2006, pp. 970 – 977.

<sup>27</sup> Arts. 9 and 11 of the Directive, respectively.

<sup>28</sup> In its Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U. (2008)*, the ECJ concluded that by transposing the provisions embodied in, *inter alia*, the Enforcement Directive, a fair balance should be found between the various fundamental rights protected by the Community legal order, the principle of proportionality and protection of IP rights. Neither Article 8, also Article 9 of the Enforcement Directive nor Article 8 of the Copyright Directive provide an obligation for ISPs to report to IP right holders about the infringements of their rights. On the other hand, following the argumentation by the ECJ, it is not prohibited to embody such obligation in the national laws by virtue of protection of other rights, interests and freedoms of other persons.

<sup>29</sup> See more in *Hugenholtz P. Bernt*, Codes of Conduct and Copyright – Pragmatism vs. Principle, IIC, 2008, pp. 635-637.