

7 REGULATION OF INTERNET SERVICE PROVIDER LIABILITY: DOES IT REALLY WORK? LITHUANIAN LEGISLATION AND COURT PRACTICE

* Dr Kristina Janušauskaitė

ABSTRACT

In January 2011 the EU Commission presented its report, which assessed for the first time the implementation of the EU Enforcement Directive. One of the major issues signalled by the Commission was the specific challenges of the digital environment, including the liability of Internet Service Providers in cases of infringement of intellectual property rights on the Internet. In the European Union, the concept of such a liability has been embodied in the Directive on Electronic Commerce, the Enforcement Directive and other EU legislative tools. However, the implementation of the rules – to effectively tackle infringements of IP rights on the Internet – was left to the discretion of national legislators of the Member States. This article focusses on the regulation of ISP liability under the legislation of one of the new EU Member States – Lithuania. This will highlight the provisions established in the EU Directives regarding ISP liability and the implementation of such provisions by Lithuania: whether these provisions (namely, injunctions against intermediaries) work in practice and what changes can be expected in view of the Commission's assessment. In addition, the 'gold standard' of enforcement of IP rights, as provided for in the Anti-Counterfeiting Trade Agreement (ACTA), namely in its section on enforcement of IP rights in the digital environment, will be considered.

Keywords: IP enforcement, EU Directives, intermediaries, Internet Service Providers, injunctions, commercial scale.

I. INTRODUCTION

On 11 January 2011 the EU Commission ('the Commission') presented its report ('the Report' or 'the Commission's Report')¹ to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights ('the Directive' or 'the Enforcement Directive').² The Report was the first assessment of the implementation of the Directive and its impact on the

* **Dr Kristina Janušauskaitė, LL.M.** (Lithuania) is lecturer of International and European Intellectual Property Law and Commercialization of IP courses at Vilnius University (Lithuania). She received her Master's degree at law from Vilnius University (Lithuania), LL.M. IP from Munich Intellectual Property Law Centre (Germany) and Dr jur. degree from Ludwig-Maximilians-Universität München (Germany). She is admitted to the Bar in Lithuania and works as Counsel in a law firm in Vilnius. She is engaged in a number of WIPO projects as an external consultant. She dedicated her doctoral studies to the revision and analysis of the harmonizing provisions of the EU Enforcement Directive and their implementation in Lithuania, Latvia and Estonia in view of the development of IP protection in the Baltic region.

¹ European Commission, 'Commission Staff Working Document: Analysis of the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States Accompanying document to the Report from the Commission to the Council, the European Parliament and the European Social Committee on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights', [2010] COM(2010) 779 final, 2010.

² Directive 2004/48/EC of the European Parliament and of the Council of 29 April, 2004, on the enforcement of intellectual property rights [2004] OJ L 195, 2.6.2004, pp. 16 to 25 (note: to be implemented by 29 April 2006 (Article 20 of the Directive)).

enforcement of intellectual property in Europe, and was prepared on the basis of the answers and observations provided by EU Member States.³

The Enforcement Directive largely incorporated civil law measures under the Agreement on Trade-Related Intellectual Property Rights (TRIPS) into the EU legal framework. However, the Directive's provisions in many cases go beyond the minimum provisions laid down in the TRIPS Agreement; for instance alternative measures, asset-freezing injunction, market recall, lump-sum as a form of damages, and publication of judicial decisions are covered.⁴ Furthermore, the Directive was based on the practices enshrined in the legislation of Member States that proved to be most effective before its adoption (the so-called 'best practices approach'). Moreover, Member States could likewise add sanctions and remedies that were more favourable to IP right holders.⁵ The Directive provided a minimum but relatively flexible legal framework for enforcing IP rights.

One of the major issues mentioned by the Commission in the Report is the specific challenge of the digital environment. These challenges refer mainly to challenges relating to Internet Service Providers (ISPs) and their liability in cases of infringement of IP rights on the Internet. In other words, the Commission noted that more efforts should be conducted in order to establish a system of application of ISP liability to function more effectively in practice. The Commission specifically pointed out that many websites were still either hosting or facilitating the online distribution of protected works without the consent of right holders, and called for a clearer assessment of the limitations of the existing legal framework.⁶

Although the Directive has enhanced the effectiveness of IP enforcement, the Commission noted that it was not designed to address the challenges posed by the Internet. The Commission additionally pointed out that clarification was needed concerning the use of provisional and precautionary measures, such as injunctions, procedures of gathering and preservation of evidence (including the relationship between the right of information and protection of privacy), the meaning of various corrective measures, etc.⁷

It was justly observed that Member States have rarely taken up the optional provisions of the Directive, which could potentially lead to different outcomes in terms of enforcement tools at the national level. It was noted in the Report that cases of Member States adopting rules more favourable to right holders than those provided by the Directive were rare.⁸ Such observations can be found in the context of the proposed Anti-Counterfeiting Trade Agreement (ACTA) regarding ISP liability in the digital environment, namely Chapter 2, Section 5 of ACTA, which, among others, embodies the provision regarding disclosure of information of a subscriber, whose account was allegedly used for an infringement.

From a policy point of view, the Report encourages the examination of national legislation and court practice where ISP liability is concerned. It is important to assess what else is to be done in order to enhance the effective enforcement of intellectual property when infringements are increasingly committed in the digital environment.

³ *supra* 1.

⁴ The Enforcement Directive, Article 12, Article 11, Article 10(1)(a), Article 13(1)(b), Article 15, respectively.

⁵ *ibid.*, Article 2(1).

⁶ *supra* 1, pp. 4 to 5, paragraphs 1 and 3.1.

⁷ *ibid.*, page 6, paragraphs 3.2, 3.3.

⁸ *ibid.*, pp. 8 to 9, paragraph 3.7.

In reality, the implementation of the provision on injunctions against intermediaries is becoming crucial due to the widespread use of Internet services, the growth of information technology services and the increasing number of IP rights-infringing content on the Internet (which is not an exception for the Baltic States, including Lithuania). Considering the preventive role of the injunctions, local and foreign intermediaries need to be aware of this provision and take all possible technical and administrative precautionary measures to control the content of services which are provided by them and used by third parties for infringements. This is of particular importance, as mentioned by the Commission, since the current legislative and non-legislative instruments are not powerful enough to combat online IP infringements effectively. It was additionally observed that the favourable position of intermediaries to contribute to the prevention and termination of online infringements should be explored more closely.⁹

This article thus analyses the manner in which the liability of intermediaries, especially ISPs, is regulated in one of the new EU Member States¹⁰ – Lithuania. Further, the EU directives (addressing ISP liability) which were implemented in Lithuania by amending its IP legislation will be examined. Moreover, the aspects of practical applicability of such liability will be discussed: firstly, the workability of injunctions against intermediaries on a national level; and, secondly, the interpretation of the term 'commercial activity' in the digital environment in view of civil, administrative and criminal liability of ISPs under Lithuanian legislation and court practice.

II. LIABILITY OF INTERNET SERVICE PROVIDERS UNDER EU LEGISLATION

Injunctions against intermediaries are generally considered within the sphere of their liability in cases of infringing content online downloaded by third parties. Following the practice of the European Court of Justice, the term 'intermediaries' can be described as operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services, etc.¹¹ Under Lithuanian Copyright Law, an intermediary is a natural or legal person, including a branch or an affiliate of a foreign legal person, registered in Lithuania that provides network services consisting of the transmission of information submitted by third parties in a network or providing the possibility to use a network and/or store the submitted information.¹²

By virtue of Articles 12-15 of the Directive on Electronic Commerce¹³, intermediaries are not generally liable for IP infringements online, except in the cases where they:

⁹ *supra*, page 7, paragraph 3.3. Note: generally, the Commission seems to call for more mutual cooperation among state institutions, private stakeholders and intermediaries.

¹⁰ Lithuania enjoys the status of EU Member State since 1 May 2004, together with Latvia, Estonia, Slovenia, the Slovak Republic, the Czech Republic, Poland, Malta, Cyprus, and Hungary. Notably, the accession into the EU process started in 1998 in the Baltic countries. Since then, IP laws have been approximated with the EU legislation in Lithuania, Latvia and Estonia.

¹¹ Case No. C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U.* [2008] ECR I-271.

¹² Article 78 paragraph 2, Lithuanian Copyright Law.

¹³ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178, 17 July 2000, 1.

- (a) Initiate the transmission;
- (b) select the receiver of the transmission;
- (c) select or modify the information contained in the transmission; or
- (d) are aware of the infringing content on their websites, networks or servers, including infringing copies or references.

Thus, the burden of proof for liability of intermediaries is based on their culpability (intent or gross negligence) in order for damages to be awarded. Notably, the Commission mentioned in its Report that it would be useful to clarify that injunctions do not depend on the liability of intermediaries in order to enhance the efficiency of injunctions.¹⁴

Although the general obligation to monitor content online is not established in the Directive on Electronic Commerce¹⁵, intermediaries can be requested to control the content of interested parties (IP right holders) and inform them accordingly.¹⁶ While there are no specific provisions which establish such a duty in Member States' national legislation, requests from IP right holders may be considered, in view of the requirements to observe personal data protection and confidentiality of information, while assessing the evidence regarding IP rights infringements and ordering injunctions against intermediaries by the courts.

On the other hand, the Enforcement Directive does not directly regulate the liability of ISPs. As will be further discussed in the paper, the Enforcement Directive addresses the liability of intermediaries in a few provisions relating to injunctions. Notably, both Directives were fully or partially implemented by EU Member States.

As mentioned above, Article 91(a) and Article 11 of the Enforcement Directive embody the possibility for national courts to order interlocutory injunctions as well as permanent injunctions against intermediaries. The aspects of the practical application of such provisions are established in European Court of Justice practice.¹⁷ Importantly, permanent injunctions against intermediaries are to be applied without prejudice to Article 8 paragraph 3 of the Copyright Directive¹⁸, which establishes that Member States are required to ensure that right holders are in a position to apply for an injunction against intermediaries, whose services are used by a third party to infringe copyright or related rights. As discussed above, ISP liability is limited, and Member States have to observe this requirement while amending their legislation.

¹⁴ *supra* 1, page 8, paragraph 3.3.

¹⁵ Case No. C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U.* [2008] ECR I-271, paragraphs 50 to 71.

¹⁶ For instance, mutual cooperation was established in the Memorandum of Understanding signed by the IT companies and IPR holder associations in Lithuania in 2003. It can be also agreed with the opinion that notice and take-down procedures should be taken as a ground to release host providers from liability, except the cases of intent or gross negligence. See: W Osthau 'Fighting Piracy and Counterfeiting in the Light of the European Principles of eCommerce – The eBay Strategy and Experience' *GRUR Int.*, 2007, pp. 644 to 648.

¹⁷ Case No. C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U.* [2008] ECR I-271, paragraph 34.

¹⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2000] OJ 2001, L 167/10.

It should be noted that court practice relating to the liability of ISPs, particularly with regard to the granting of injunctions, varies in each country. The European Court of Justice also plays an important role in forming court practice in this regard. In a recent case, it decided the liability of online market-place operators, such as eBay, for trademark infringements committed by users; the injunctions which may be granted against such operators¹⁹, and touched on the necessity of increasing ISP liability in this regard.

In the *L'Oréal v. eBay* case, the Court held that the operator had played such an active role as to give it knowledge of the data or control thereof relating to the offers for sale, when it provided assistance which entailed, in particular, optimizing the presentation of the online offers for sale or promoting those offers. When the operator plays an 'active role' of this kind, it cannot rely on the exemption from liability which EU law confers on online service providers such as operators of Internet marketplaces, pursuant to Article 14 of the Directive on Electronic Commerce. Moreover, the European Court of Justice stated that EU law requires Member States to ensure that national courts are able to order operators to take effective, proportionate, and dissuasive measures against such breaches.²⁰

III. THE LIABILITY OF INTERNET SERVICE PROVIDERS UNDER LITHUANIAN LEGISLATION AND PRACTICE

A. INJUNCTIONS AGAINST INTERMEDIARIES: DO THEY REALLY WORK?

Pursuant to Article 9 paragraph 1(a) and Article 11 of the Enforcement Directive, national courts are entitled to order interlocutory injunctions as well as permanent injunctions against intermediaries. According to the Directive, interlocutory injunctions can be ordered against intermediaries, whose services are being used by a third party to infringe IP rights, particularly in cases where a third party's act infringes copyright or related rights covered by the Copyright Directive. As regards permanent injunctions and in view of the previous discussion herein, national legislators should ensure that right holders are in a position to apply for an injunction against intermediaries, whose services are used by a third party to infringe intellectual property, without prejudice to Article 8(3) of the Copyright Directive.

The provisions on injunctions against intermediaries had been already embodied in Lithuanian Copyright Law prior to the implementation of the Enforcement Directive, having been transposed from the Copyright Directive of 2003. The national provisions on injunctions were, however, omitted in Lithuanian laws on industrial property which were amended in 2006. Article 78(1) of the current Lithuanian Copyright Law states that owners of copyright, related rights and *sui generis* rights (i.e. the rights of database owners) shall have the right to apply for an injunction against an intermediary with the aim of prohibiting him from rendering services in a network to third parties, who make use of these services infringing their established rights. The same provisions are embodied in the Lithuanian laws on industrial property.²¹ Similarly,

¹⁹ Case C-324/09, *L'Oréal v. eBay* [2011] ECJ, paragraph 131.

²⁰ *ibid*, paragraph 144.

²¹ Article 41(4) of the Patent Law, Article 50(4) of the Trademark Law, and Article 47(4) of the Design Law of Lithuania.

the implementing Latvian and Estonian (other two Baltic countries') legislation also constitutes a right to request an injunction against intermediaries.²²

In Lithuania, the courts can order three types of permanent injunctions against intermediaries that provide services to third parties infringing IP rights:

- (1) The suspension of transmission of information related to the infringement of the rights;
- (2) the elimination of such information if an intermediary has technical means to carry this out; and
- (3) the removal of the access to information infringing the rights, as stipulated in the national laws on intellectual property.²³

In addition, courts can apply an interlocutory injunction to this effect. Injunctions can be ordered at the request of an interested party who is required to provide any known information concerning the intermediary's networks, websites, and servers containing infringing content. Moreover, for interlocutory injunctions, the court can request an IP right holder to provide 'any reasonably available evidence in order to satisfy itself with a sufficient degree of certainty' that he or a person, for whose interests application for provisional measures is requested, is the owner or user of the rights protected and that the applicant's right is being infringed, or that such infringement is imminent.²⁴

By analysing national legislation on injunctions against intermediaries, it can be discerned that the practical application of such injunctions can be complicated for two reasons. Firstly, the difficulties that can arise in collecting 'reasonably available evidence' concerning the allegedly infringing content online. As the information in intermediaries' networks, websites or servers can be temporary, the right holders need to maintain certain systems to regularly control and collect evidence which can be a time-consuming exercise not directly related to their primary activities. It is presumed that applications to order injunctions to intermediaries can mainly follow the fact. When IP right holders detect a substantial amount of evidence of infringing content online, they should collect (print in hard copies, maintain those hard copies, etc.) evidence regarding such content, and promptly submit a request for an injunction to the court, be it interlocutory or permanent.

Similarly, right holders may also need to preserve collected evidence. Measures for preserving evidence were harmonized by the Enforcement Directive²⁵ and implemented in Lithuania. Article 81(5) of the Lithuanian Copyright Law provides that the court may apply measures to preserve relevant evidence in respect of the alleged infringement on application by

²² Article 250(10)(3)(3) of the Latvian Civil Procedural Code (provisional injunction) and Article 250(17)(3)(3) of the Civil Procedural Code (permanent injunction); also Article 69(1)(7) of the Latvian Copyright Law provides for the right to request intermediaries to cease providing services to third parties who infringe the relevant IP rights. If such request is not complied with, the claimant may bring an action against the intermediary. In Estonia, however, the law does not *expressis verbis* contain such provision, but the court may take any measure considered necessary by the court to secure an action, as provided in the Estonian Civil Procedural Code.

²³ Article 78(1) of the Lithuanian Copyright Law,

²⁴ *ibid.*, Article 81(4).

²⁵ Article 7 of the Enforcement Directive.

a party who has presented reasonably available evidence to support his claims that his protected rights have been infringed or are about to be infringed.

Secondly, owing to the practical difficulties in collecting 'evidence which would satisfy in itself the court with a sufficient degree of certainty about the infringement', it is practically impossible to form national court practice on the issue which is the least adjudicated on in Lithuania (there has been no case heard on the matter regarding ISP liability). In the absence of such court practice, it is difficult to anticipate how local courts would examine the information concerning the alleged infringements, which is provided in the form of, for instance, printed emails or lists regarding peer-to-peer files, or any other infringing content downloaded on File Transfer Protocol (FTP) servers. This is pertinent in ascertaining what their view would be as to the reliability of such evidence. Besides, the collection and preservation of evidence can become complex when this occurs in foreign jurisdictions and when the court may be pursued of granting a cross-border. This issue has not been addressed in the national legislation.²⁶

B. 'COMMERCIAL ACTIVITY' ONLINE: ANTICIPATED ISSUES IN VIEW OF LITHUANIAN LEGISLATION AND COURT PRACTICE

In the *L'Oreal v. eBay* case, the European Court of Justice stated that the proprietor of a trademark may rely on his or her exclusive right against an individual who sells trademarked goods online, when those sales take place 'in the context of a commercial activity'. Whether the activity goes beyond the realm of private sale and becomes commercial, is to be decided on the grounds of 'the volume and frequency of sales'. However, following the Enforcement Directive and the European Court of Justice's position, it is left to the discretion of national courts to clarify whether an online activity forms a 'commercial activity' or not on a case-by-case basis. It should likewise be noted that, as stated by the Commission in its Report, the term 'commercial scale' (defined in Recital 14 of the Enforcement Directive) was vague when it came to the practical application in the Member States.²⁷ The practical application of the term 'commercial activity' can certainly become more complex when it reaches the digital environment.

As far as IP legislative provisions in Lithuania are concerned, the implementing amendments to the Lithuanian Copyright Law in 2006, namely, the introduction of Article 2(17), literally embodied the term 'acts carried out on a commercial scale', as defined in Recital 14 of the Enforcement Directive²⁸ (the term 'commercial purposes' is used instead). The new amendment solves the question of the interpretation of the very term at the legislative level. Importantly, Article 73 of the amended Copyright Law does not link an infringement of copyright, related rights and *sui generis* rights to commercial purposes, by leaving the broad reference 'the acts which infringe any copyright, related rights and *sui generis* rights, protected by this Law and other laws, shall be deemed to be the infringement of copyright, related rights and *sui generis* rights'. Nor is this done in the industrial property legislation of Lithuania. Practically, it means that for an infringer to be liable under IP laws in Lithuania, commercial purposes in his or her activities do not count. In turn, whether an infringer infringes IP rights with commercial aims or just for private motives is irrelevant while applying liability to ISPs as

²⁶ This issue has been indirectly mentioned by the Commission in its Report - *supra* 1, page 5, paragraph 3.1.

²⁷ *supra* 1, page 9, paragraph 3.7.

²⁸ Recital 14 of the Enforcement Directive: '... Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith'.

established in Article 76(1) of the Lithuanian Copyright Law, although commercial purposes in an infringer's activities can be held as constituting aggravating circumstances when deciding on damages.

However, the issue of committing infringements on IP rights for 'commercial purposes' on the Internet can arise when it comes to administrative and criminal liability. Administrative and criminal liabilities for violations of IP rights in Lithuania are defined respectively by the Code of Administrative Offences and the Criminal Code. In Lithuania, administrative liability for infringements of copyright and related rights is defined in Article 214¹⁰ of the Code of Administrative Offences²⁹, whereas criminal liability is established for both criminal offences regarding moral (applicable to authors only) and economic rights defined in the legislation on IP rights in the current Lithuanian Criminal Code.³⁰ Infringers can be held criminally liable for:

- (1) Appropriation of authorship (Article 191);
- (2) illegal reproduction of literature, scientific, art work or the subject of the related rights and distribution, carriage and storage of illegal copies (Article 192);
- (3) destruction or damage of copyright and related rights management information (Article 193);
- (4) illegal removal of copyright and related rights technical protection measures (Article 194); and
- (5) infringement of industrial property rights (Article 195).

Article 191 establishes criminal liability regarding infringements of moral rights, and the rest of the listed articles of the Criminal Code for economic rights (as they are embodied in the national IP laws). In what concerns criminal court practice in relation to the infringement of IP rights, criminal liability for infringements of economic rights of the copyright and related rights holders, Article 192 of the Lithuanian Criminal Code is mostly relevant. It stipulates that criminal liability is established:

... for the illegal reproduction of literary, scientific, artistic works (including computer programs and databases), as well as for the subject matter of the related rights, or a part thereof, for commercial purposes, or distribution, carriage or storage of illegal copies thereof for commercial purposes, provided that the amount of such copies calculated on the basis of the retail price of legal copies (and, in cases when there are no such legal copies, on the basis of the original work which was reproduced) is more than 100 minimum living standards (MLS).³¹

Article 192(2) states that in cases where the number of illegal copies is worth more than 250 MLS, the more severe sanction should be imposed on the infringer.

²⁹ Administrative liability was enshrined in the 1985 Lithuanian Soviet Code of Administrative Offences. Due to adoption of the new IP legislation in Lithuania, the article was amended several times in 1996, 1998 and 2002.

³⁰ Lithuanian Criminal Code (in force from 25 October 2000). Before 2000, the 1961 Soviet Criminal Code, which also established criminal liability for copyright infringements, was in force.

³¹ Minimum living standard is 130 Litas (ca 38 Euro) in Lithuania (2011 data).

Conversely, similar illegal acts can be punished as an administrative infringement. Article 214¹⁰ of the Code of Administrative Offences of Lithuania constitutes administrative liability:

[F]or the illegal reproduction, distribution, public performance, any other use in any way and with any means of literary, scientific or artistic works (including computer programs and databases), as well as the subject-matter of the related rights, or a part thereof, for non-commercial purposes, as well as the distribution, carriage or storage of them for commercial purposes.

It can be observed that the provisions on administrative liability cover use of the protected objects in both material (reproduction, public distribution, including rent) and immaterial form (public performance, communication to the public, including the making available right³²), whereas criminal liability protects against material use only (thus ISPs are beyond the scope of criminal liability). However, under the administrative procedure communication to the public, including making available of the infringing content, is punishable when acts are committed for non-commercial purposes. In turn, that implies that ISPs (which are, in fact, companies making a profit from providing certain online services) will not be held liable for making available copyrightable copies on the Internet without the permission of copyright owners.

Such legislative inaccuracy stipulates that infringements committed by digital means, e.g. infringing peer-to-peer file sharing or keeping illegal content on FTP servers, are not punishable in Lithuania pursuant to the current administrative and criminal liability provisions in force. It can be agreed that the criminal provisions are to be interpreted narrowly and for this reason the courts cannot find criminal liability for infringing acts that are not clearly listed in the Criminal Code. It is evident that, without making further amendments to the existing criminal legislation on IP crimes, legal uncertainty remains.

When referring to the objective elements of IP crimes pursuant to Article 192 of the Lithuanian Criminal Code in view of ISP liability, an additional feature to examine is criminal liability for the distribution, carriage or storage of illegal copies. This can be applied only when the amount is worth more than 100 MLS and when 'commercial purposes' are established with regard to the infringer's acts. Despite previous legislative amendments, no such requirement of a 'certain amount of illegal copies' is applied to illegal reproduction. Notably, the distinction between administrative and criminal liability on this point (regarding illegal reproduction) concerns the subjective criteria – the 'commercial purposes' involved in the infringing activities.

The use of the terms 'commercial scale' or 'commercial purposes' in national legislation is not common practice in other European countries. No such terms are used in German or French IP criminal legislation for instance. On the other hand, in the United Kingdom it is

³² According to Article 2(30) of the Lithuanian Copyright Law: "'Communication to the public" means the transmission to the public of a work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them. ...'.

stipulated that the defendant must have benefited from his general criminal conduct; it is also established that the relevant benefit must be worth at least UK£5,000.³³

The interpretation and practical application of the term was and still is especially relevant for the initiation of administrative and criminal cases. Specifically, in order to find administrative liability for infringements of copyright and related rights pursuant to Article 214¹⁰ of the Lithuanian Code of Administrative Offences, non-commercial acts are sufficient for the illegal reproduction of the protectable subject matter. However, for illegal distribution, carriage or storage, commercial purposes are required. In contrast, Article 192 of the Criminal Code requires commercial purposes to be established 'for any of the listed illegal activities, except the reproduction of illegal copies'. Considering the complexity of both articles, the imposition of the requirement of commercial purposes for some illegal activities, but not for others, brings confusion into actual practice. Moreover, regarding infringements on the Internet, the confusion can become more prominent, since the national legislator did not include cases of making available of illegal copies by digital means – relevant to current IP enforcement.³⁴

The requirement of 'commercial purposes' with regard to infringements of IP rights has been repeatedly pointed out in the Lithuanian Supreme Court's decisions. In one of its recent decisions on the illegal reproduction and use of copyrightable software, the Court stressed that the mere fact of reproduction of software by a company did not automatically constitute commercial advantage or gained profits. According to the same decision, national courts should consider all relevant factors such as the type of software products in use, in order to establish commercial activities on the part of the accused person. For example, if the company's main activities focus on the reproduction of foodstuff and illegal graphical software application is found to be installed on the company's computers, it should be considered that such software was not used for commercial purposes.³⁵

As opposed to previous judgements relating to the interpretation of 'commercial purposes' (as 'direct or indirect economic or commercial advantage, excluding acts by end consumers acting in good faith'), and to the local legal doctrine³⁶, the Supreme Court narrowed the interpretation of the term by limiting it to those cases of use of copyrightable objects where 'direct economic profit' is gained from mere use. Thus, as concluded by the Supreme Court, the fact of using illegal copyrightable software in a company does not automatically lead to a finding of 'commercial purposes'. It should be considered whether or not profit was gained by the company by using each copy of infringing software. The judgement is very much relevant for the future enforcement of IP rights, namely for criminal IP cases, and could change the criminal enforcement of the IP rights 'landscape'. In order to initiate a criminal IP case under Article 192 of the Lithuanian Criminal Code, police and prosecutors will need to clearly examine and list in procedural documents only those works which are used in direct commercial

³³ L and M Blakeney, 'Counterfeiting and Piracy – Removing the Incentives through Confiscation': E.I.P.R. 30(9) (Sweet & Maxwell Ltd London 2008), page 351.

³⁴ *supra* 1, page 5, paragraph 3.1.

³⁵ Criminal Case No. 2K-7-201/2008, *T.K., UAB Tadetas*, Expanded Board of Seven Judges of the Supreme Court of Lithuania.

³⁶ 'Commercial purposes' are to be interpreted in their wider context, i.e. not exclusively in relation to the acts from which a direct economic benefit is gained, but also as regards the acts from which economic benefit is gained indirectly, as interpreted in G Ivoška, 'Crimes Against Intellectual and Industrial Property' *Commentary of the Criminal Code of the Republic of Lithuania, Special Part*. (1st edn, Vilnius: Valstybės įmonė Registrų centras 2009) pp. 395 to 415.

activities by the company, something not always easy to prove. It will be even more difficult to prove this fact, in particular to collect evidence, when an infringement takes place online. For this reason, ISP liability remains ineffective.

IV. CONCLUSION

In its Report, the EU Commission noted that more efforts should be made to tackle infringements of IP rights in the digital environment. It is down to Member States to decide the extent to which the provisions of the Directive on Electronic Commerce and the Enforcement Directive (considering the aims and objectives of these directives) will be taken into account. It should be noted that one of the new EU Member States – Lithuania – has attempted to establish the liability of intermediaries (including that of ISPs) in its legislation insofar as the limited liability concept and other requirements provided in the aforesaid directives are concerned. However, as regards the practical application of such a liability, the modest court practice of ordering injunctions against ISPs has been noted. It is due, first of all, to the novelty of such provisions. The application of the ISP liability-related provisions becomes especially complicated in practice when it comes to the collection and maintenance of evidence which appears in a digital format and is not stable nor easily fixed. Secondly, even though the main legislative provisions are in place, there are still some legislative drawbacks in Lithuania's IP legislation (relating to the administrative and criminal liability of ISPs), which fail to counter Internet piracy effectively and need to be improved, especially in the light of the Commission's Report and ACTA provisions.

BIBLIOGRAPHY

Books and articles

Blakeney M and L, 'Counterfeiting and Piracy – Removing the Incentives through Confiscation' *E.I.P.R.* 30(9), (Sweet & Maxwell Ltd London 2008)

Ivoška G, 'Crimes against Intellectual and Industrial Property' *Commentary of the Criminal Code of the Republic of Lithuania*, Special Part. 1st edn, (Vilnius: Valstybės įmonė registrų centras 2009)

Osthaus W, 'Fighting Piracy and Counterfeiting in the Light of the European Principles of eCommerce – The eBay Strategy and Experience' *GRUR Int.*, 2007

Case Law

Case C-324/09, *L'Oréal v. eBay* [2011] ECJ

Case No. C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U.* [2008] ECR I--271

Criminal Case No. 2K-7-201/2008, *T.K., UAB Tadetas*, Expanded Board of Seven Judges of the Supreme Court of Lithuania <http://www.lat.lt> accessed 29 September 2011

Legislation

International and European Union

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement): (WTO, 1994) http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm accessed 29 September 2011

Anti-Counterfeiting Trade Agreement (ACTA) http://www.ustr.gov/webfm_send/2417 accessed 29 September 2011

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195, 2.6.2004, 16 – 25

Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights [2003] COM (2003) 46 final, January 30

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 (Directive on electronic commerce) [2000] OJ L 178, 17.7.2000

Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ 2001, L 167/10

National Provisions Communicated by the Member States Concerning the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights

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
accessed 29 September 2011

Report by the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2011]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:pdf>
accessed 29 September 2011

Commission Staff Working Document, Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property rights in the Member States. Accompanying document to the Report from the Commission to the Council, the European Parliament and the European Social Committee on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights [2010] COM(2010) 779 final

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1589:FIN:EN:PDF> accessed 29 September 2011

National: Lithuania

Code of Civil Procedure: adopted on 28 February 2002, entered into force on 1 January 2003, consolidated text <http://www.lrs.lt> accessed 29 September 2011

Code of Administrative Violations: adopted on 1 April 1985, consolidated text <http://www.lrs.lt> accessed 29 September 2011

Criminal Code: adopted on 26 September 2000, entered into force on 25 October 2000 (replaced the Criminal Code as of 1961), consolidated text <http://www.lrs.lt> accessed 29 September 2011

Law on Trademarks: adopted on 10 October 2000, entered into force on 1 January 2001 (which changed the Law on Trademarks and Service Marks, as of 1993), last amended on 8 June 2006, entered into force on 28 June 2006, consolidated text <http://www.vpb.lt/en/docs/3.doc> accessed 29 September 2011

Patent Law: adopted on 18 January 1994, entered into force on 1 February 1994, last amended on 28 October 2008, entered into force on 11 November 2008, consolidated text <http://www.vpb.lt/en/docs/2.doc> accessed 29 September 2011

Law on Designs: adopted on 7 November 2002, entered into force on 1 January 2003 (which changed the Law on Industrial Design, as of 1995); last amended on 1 July 2008, entered into force on 17 July 2008, consolidated text <http://www.vpb.lt/en/docs/4.doc> accessed 29 September 2011

Law on Copyright and Related Rights: adopted on 18 May 1999, newly adopted on 5 March 2003, entered into force on 21 March 2003; last amended on 13 March 2008, entered into force on 27 March 2008, consolidated text http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=87985 accessed 9 September 2011