Recommendations for improving Lithuanian intellectual property law, policy and enforcement

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The recommendations for improving Lithuanian intellectual property law, policy and enforcement shall embrace three complimentary areas of action:

1) Legislative action recommendations;
2) Policy recommendations:
3) Enforcement/administrative recommendations.

Legislative action recommendations

Review of the Lithuanian intellectual property policy trends, law and enforcement an issue done in January-March 2007 drew conclusions that the legislative regulation of intellectual property enforcement in Lithuania is rather modern and fully complies with the international standards. Case law in the administrative and civil judiciary also suggests fairly effective enforcement systems, where most of the problematic issues have been sorted out in the 2001-2005 period.

From a purely legal point of view only two significant first tier gaps were identified:

- lack of regulation (and liability) for internet specific intellectual property infringements, such as infringements on the internet (WWW, FTP, P2P), linking or cyber-squatting;
- incompatibility (inability to downgrade) of the criminal and administrative liability (what essentially is a matter of statutory limitation terms of the administrative liability).

Possible solution for the former issue may be enacting the amendments, which would identify internet copying, distribution, P2P access, etc. activities, as the aggravating circumstances, for the existing IPR infringement rules. The rationale for such amendment may be the higher damaging effect of online IPR infringements due to worldwide unlimited accessibility of the IPR infringing content. Linking shall be included into the list of IPR infringements, and possibly even criminalized, since it is substantially similar to the reproducing of the unlawful

IPR content. Cyber squatting issues shall be addressed in a special regulation for the domain names, which is proposed by the MRU scholars.

The incompatibility (inability to downgrade) of the criminal and administrative liability shall be addressed through amendment of the administrative statutory limitation rules. In particular the administrative liability statutory limitation shall be on hold for the reasonable period (not exceeding 12 months) when the criminal investigation of the same activity is ongoing.

Additional legislative re-consideration was suggested to the qualifying criteria of the criminal and administrative liability for intellectual property infringements. In particular, assuming the difficulties that the judiciary and the prosecution have faced with applying the "commercial purpose" criteria, it is recommended to supplement this criteria with the alternative criteria of the "significant harm" and/or "selfishness", which would allow certain expansion in criminalization intellectual property violations, and would be especially useful for tackling online violations of intellectuals property, where direct monetary gain is extremely difficult to prove.

The administrative penalties available for IPR infringement in Lithuania (currently from 1000 to 2000 for first time offenders) may be worth reconsidering. Although it is difficult to consider the current level of penalties as a legal gap, assuming the mostly selfish nature of IPR infringements (especially piracy), as well as huge economic progress in the Lithuanian society over the last decade (current penalties were introduced at the beginning of 1998), it may be appropriate to consider certain increase of the applicable administrative penalties.

Separate note shall be made with respect to court jurisdiction matters. Since the abolishment of the exclusive jurisdiction of the district courts in the IPR cases (in March 2003) the quality of judicial review has not suffered, and in many cases improved, especially when swift and accessible local action is necessary. What remains inappropriate is the remaining exclusive jurisdiction of the district courts as the first instance in civil cases involving moral rights infringement claims. Due to generally higher case load at the district courts, as well as dissipation of the judges specializing in IPR cases, the IPR case trial in the district courts (as the courts of first instance) are handled inefficiently. Thus, it may be recommended to reconsider the exclusive jurisdiction of the district courts as the first instance in civil cases involving moral rights infringement claims, reassigning such cases to the local courts.

We may also suggest a revision of the Item 8 Part 1 Article 259[1] of the Code of Administrative violations, which allows the representatives of the collecting societies, or other IPR associations to participate and influence the protocol of the administrative infringement. Assuming that the collecting societies and/or right holders have a clear economic interest in applying the administrative liability (which prejudices and streamlines later civil action, where the collecting societies and/or right holders themselves act as the plaintiffs), such interested parties shall be legally excluded from the possibility to affect the administrative enforcement, even though the said rule is not known to be abused in the latest several years.

All said legislative gaps, as well as review of sanctions for IPR infringements, shall only be addressed through legislative fixes – revision of the Article 214[10] of the Code of Administrative Violations of the Republic of Lithuania, as well as revision of Articles 191-194 of the 2003 Criminal Code of the Republic of Lithuania. Additional revisions may also be necessary to the Law on Copyright and Related Rights, as well as the Civil Procedure Code of the Republic of Lithuania (which currently regulates the jurisdiction issues). Hopefully the above mentioned administrative liability issues will be addressed in the new Code of Administrative Violations, which is currently being drafted.

Concurrently the thorough commentary (explanation and interpretation of the new rules) for the amendments shall be produced in order to elaborate on the content, scope and purposes of the change, and to avoid the case law interpretations of the new rules.

A somewhat secondary legislative issue of a second tier, which is indirectly related to the enforcement of intellectual property, is the need to rebalance the intellectual property legislation (levies, exceptions, technical protection means, supervision/transparency of collective administration), which is outlined in prominent recent European studies[1]. In particular, the recommended action shall include:

[1] Lucie Guibault, et al. Study on the Implementation and Effect in Member States' Law of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. February, 2007. http://www.ivir.nl/publications/guibault/Infosoc_Executive_Summary.pdf

- reshaping of the copyright and related rights exceptions (Articles 20-33 of the Law of Copyright and Related Rights of the Republic of Lithuania), in particular:
- allowing multiple instances of private copying within a family;
- elaborating the exceptions available to libraries, educational and academic activities (ensuring balance of access to knowledge (A2K) and intellectual property rights protection);
- allowing mandatory overriding over technical protection measures, in case voluntary surrender thereof to activities allowed by exceptions does not happen;
- decriminalizing of circumvention of the technical protection measures in cases where its is necessary for research, as well as enabling of the legitimate activities allowed by exceptions;
- review of the copyright levy system:
- levies shall be strictly based on the economic effect of copyright and related rights exceptions, rather than the „foreign tariffs";
- levies on library, educational and academic use of copyrighted works shall be eliminated;
- levies shall be eliminated in cases where DRM technologies are applied by the right holders;
- levies shall be imposed only on individual uses (allowed by exceptions) of copyrighted material, rather than all imports or sales of the media ;
- introducing of supervision and leverage into efficiency and transparency of the collecting societies, which currently raise questions of corruption, protectionism and unfair advantage to certain groups of copyright holders[2]. In particular, the legislative measures may include – independent auditing of the distribution of the monies by the collecting societies, eliminating double management (and concurrent fees) where individual rights management (licensing) is applied, also enabling openness to novel collective and individuals rights management solutions (such as Creative Commons).

The above second tier measures shall strengthen the public appreciation of intellectual property, as the instrument for knowledge and culture dissemination, rather than just commercial enjoyment of few parties (especially wealthy foreign institutions). Measures

[2] See e.g. 19 September 2006 conclusions No. Nr. 4-1-3290 of the Special Investigations Service of the Republic of Lithuania „On the anti-corruption review of the Lithuanian copyright and related rights legislation"

aimed at collecting societies would allow them to obtain certain public trust, the lack whereof is major obstacle in expanding their activities. The 19 September 2007 Resolution No. 997 of the Government of the Republic of Lithuania (amending 29 August 2003 Resolution No. 1106) already introduces certain welcomed revisions for the copyright levies in Lithuania, however none of the aforementioned principal issues were resolved. Recommendations may only be implemented through the legislative review of the Law on Copyright and Related Rights of the Republic of Lithuania.

Policy recommendations

One of the principal unresolved issues, highlighted long ago at the early stage (as early as in 2000, i.e. one year after adopting the Copyright and Related Rights Law of the Republic of Lithuania) of intellectual property enforcement efforts in Lithuania, is the lack of high profile co-ordination of all IPR related fields and operative reaction to emerging IPR issues[3]. Currently IPR issues are administered and policed by at least five ministries (Culture, Education, Economy, Interior and Justice), non-ministerial body (Information Society Development Committee at the Government of the Republic of Lithuania), the State Patent Bureau, and a large number of intra-institutional bodies. Such situation results in the essential lack of coordination of IPR policies and even conflicting secondary legislation. Although there is no doubt that specific areas of intellectual property policy shall be supervised by the institutions having most expertise in the particular area (e.g. issues pertaining to artistic matters shall be handled by the Ministry of Culture), it is at the same time worth to consider a single supervising institution, which would filter and coordinate the initiatives of the sectorial institutions. Intellectual property is inherently a broad multi-sectorial concept and as such shall not belong to any one institution. In assessing its role and contribution to the broad national development strategies IP needs to be seen through holistic approach. Assuming the major and growing role that intellectual property plays for the national economy, such uniting institution may either be the Ministry of Economy or even the non-ministerial body (such as the Information Society Development Committee at the Government of the Republic of Lithuania). Moreover, such institution shall take the role of an active manager, coordinator and intermediary among the affected institutions and parties.

Current setup of distributed institutional competence lacks both the political standing and administrative resource in order to make a difference. Ministry of Culture, which coordinates the copyright and related rights policies, is also prone to partiality issues (since the heads of the Ministry are frequently coming from the right-holder side and have strong links to the collecting societies)[4]. This is also a reason why the so called Copyright Council convoked by the Ministry of Culture (and envisaged in the Article 72 of the Law on Copyright and Related Rights) grossly failed to meet its goals. The Council is incapacitated by partiality

[3] See e.g. May 2000 report of the PHARE SEIL project
[4] See the decisions (2006 June 06 No. 27, 2007 March 29 No. 23, 2007 June 28 No. 58) of the Chief Public Service Ethics Commission (available at http://www.vtek.lt/old_dekl/sprendimai.php)

(overwhelming representation of the right-holder interests) and complete lack of representation for the social interest. As such it is unable to exercise any competence as an impartial expert or mediation body, especially in disputes where right-holder and user/social interests conflict.

Current intellectual property policies are also complicated or blindened by the lack of reliable national piracy, as well as innovation/creativity monitoring. As it was emphasized in the Review current national checks of the piracy level are completely outdated, also raise questions on the appropriateness and reliability of applied methodology (interviews for measuring piracy). Clearly, a mandatory and periodic (at least bi-annual) piracy level monitoring initiative is necessary, along with the transparent and reliable methodology). In addition to that – all major measures introduced into intellectual property regime shall be subject to thorough assessment of economic effect and impact upon innovation/creativity trends. It is inadmissible that fiscal IPR measures such as levies are introduced without any investigation of the economic and social consequences thereof, as it has happened with the introduction of the blank media levies in 2003 (as of 1 January 2004). Lack of piracy and innovation/creativity data also conceals the inefficiencies and gaps of the current legislative, policy and administrative measures, as well as institutional failures related to intellectual property system. Mandatory and periodic monitoring is also necessary to measure the enforcement effort appropriateness and efficiency (especially focusing on investigation/enforcement terms, expense, current issues, etc.). All these measures shall be preferably handled by the proposed single institution.

Consumer protection organizations in Lithuania – both state run and NGOs – need to embrace consumer aspects of intellectual property enforcement, as well as consumer rights into protected content. It is noteworthy that consumer organizations even in traditionally conservative IPR jurisdictions, such as France, have been at the forefront of both addressing consumer piracy (which increases prices for the legitimate content), as well as dealing with complex issues like technical protection measures and DRM schemes for IPR protection. Currently the National Consumer Protection Service – the main public agency involved with consumer rights – has never been involved or consulted on the new IPR enactments and policies in Lithuania. In practice such involvement may be realized through the proposed single coordinating institution.

Proposed holistic institution for handling intellectual property policy may also facilitate the necessary public infrastructure for taking advantage of IPR and IPR enforcement. Although it is commonly recognized that the right holder shall be primarily concerned with protection and enforcement of his/her IPR, in practice this does not materialize due to complexity of the available IPR regimes and major expense related to enforcement thereof. A network of IPR consultancies/clinics, acting with the key academic institutions and regional business development initiatives may be appropriate means to address these concerns.

Moreover, certain fiscal incentives are necessary in order to facilitate IPR enforcement on individual and SME level. One consideration may be recognizing the enforcement expenses as income tax deductible for individuals, as well as allowing doubling of IPR enforcement expenses as a deductible for corporate profit tax purposes. Another possibility may be ex post grants (or under exceptional circumstances ex ante) system to cover all or certain percentage of IPR enforcement expenses, similar to the existing system for compensating expenses related to obtaining European patents (cf. 2005 March 15 Order No. 4-113 of the Ministry of Economy of the Republic of Lithuania).

Further IPR training effort in Lithuania is clearly needed. Although training efforts to date have been reasonably efficient, however due to high staff turnover both at regional and even central law enforcement institutions it is still lacking. Mandatory IPR training shall be considered for all levels of police force, and for administrative officers involved with IPR, innovation and creativity related policy and administrative initiatives. Special attention needs to be put into training of individuals and SMEs engaged in creative/innovative activities (e.g. training for students in arts/technical/computer science disciplines, training for school children in key high schools). It is noteworthy that Lithuanian does not have the culture of life-long-learning, and private parties frequently do not recognize the need and benefits of seeking such training. One consideration to increase IPR awareness between such private parties may be mandatory training requirements, as a prerequisite for them to obtain state/municipal financial support (including the EU structural fund financing).

Enforcement/administrative recommendations

Primary enforcement/administrative recommendation are – to increase the funding, administrative capacities and headcount of the enforcement agencies involved with IPR infringements. Despite the admirable results achieved over the last years by the current Intellectual Property Protection Division of the Criminal Police Bureau, their efforts are undermined by the chronic lack of officers, equipment, as well as systemic issues related to poor financing of the police force. Based on the established practices in the other EU countries, it is appropriate to expand the current Intellectual Property Protection Division to at least 10 to 15 officers, while at the same time at least one officer dedicated to IPR enforcement matters shall be appointed in each administrative region. Adequate equipment, including PCs with permanent internet access, as well as photo/video equipment shall be available to these officers. Systemic issues of police financing shall be addressed as well, in order to reduced the turnover and maintain most qualified officers in the force.

Similar recommendations shall be made with respect to prosecution and court institutions. While courts have the most visible role in the IPR enforcement, it must be noted that they sometimes lack knowledge, especially when dealing with novel and complex concepts of IPR (such as database protection, infringements on the internet, electronic evidence, etc.). Additional training for judges specifically targeting these issues is therefore necessary. Prosecution officers in addition to the specialized training, and specialization within the prosecutor's offices, clearly face the same challenges as the police force – in particular the staff turnover and systemic finance problems. All these issues shall be addressed both on political and administrative level.

Said measures (especially properly equipping of the field officers) have a significant potential to resolve the evidence related problems in daily IPR enforcement, minimize the need for costly and time consuming external expertises. Having proper equipment would enable field officer to properly fix the evidence on the spot of infringement, minimize and correct reporting errors, which may lead to dismissals of the case at a latter stage.

For evidence related issues, the avoidance of the unqualified and private-party experts in evaluating the evidence is the key enforcement consideration for all enforcement tiers. Other evidence issues are expected to be addressed automatically along with the better training and

equipment available to the enforcement officers. Electronic evidence issues need to be addressed separately, what the scope of these recommendations does not allow.

It is worthwhile to consider involving intellectual property right holders with the financial/material support to the enforcement authorities, through either tax measures (e.g. by specifically taxing the substantial proceeds from the copyright levies, statutory damages and settlement awards that are being enjoyed by the members of the organizations such as the collecting societies or the BSA) or a set of incentives (see above proposal on tax incentives for IPR enforcement), or even by specifically diverting the state income from the administrative/criminal penalties for IPR infringements to the enforcement thereof.

Specific attention shall be called for the lack of IPR educational material and methodic material for daily IPR enforcement, and especially up to date reference information available to the field officers. The problem is acute, since so far in Lithuania only two university level IPR textbooks were produced, and all existing training material aimed at enforcement offices is substantially outdated. Lack of such material contributes to due process errors hence compromising the enforcement. Funding for such IPR training materials may be raised from the above suggested sources.

As it was already mentioned, a public infrastructure for taking advantage of IPR and IPR enforcement shall be considered, including a centrally located (and possibly operating under the wing of the central IPR policy coordinating institution) IPR clinic. Among other fields of activity, such clinic may coordinate the public IPR role/advantage awareness programs, as opposed to IPR liability awareness (bonuses vs. threats);

As the long term consideration the specialized pre-court institution, which may serve as a mandatory/voluntary institution for IPR disputes shall be considered. Such institution would facilitate the uniformity and consistency of the IPR case law, while at the same time ensuring specialized expertise required to deal even with the most complex and novel IPR issues. A model for such institution may be the Chief Administrative Disputes Commission or Chief Tax Disputes Commission, which successfully function in Lithuania for over a decade.