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THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN A EUROPEAN CONTEXT

Summary: The article analyzes the overall configuration of the rules contained in the European legal sources for enforcement of intellectual property rights. It starts from the assumption that the legal regulation of intellectual property rights in a national legal system assumes the existence of a fast, efficient and enforceable system of legal protection of intellectual property rights from infringement. With this in mind, the paper analyses the basic principles of legal protection of intellectual property rights contained in the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, as a European legal source. Moreover, the basic principles of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights are considered as standards or as general principles to which the laws and practices of all Member States should aspire, in order to demonstrate its tendencies to promote intellectual effort and the protection of immaterial goods.

Key words: intellectual property rights, European sources, enforcement, principles

1. Introduction

It is certainly clear that the legal regulation of intellectual property rights has territorial effect. This means that each state, within its sovereignty, decides on the types of intellectual property rights, on their content, *i.e.*, the scope of the powers established by these rights, on their legal

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limitations, on their holders, on their duration, on their transfer and, finally, on the modalities of their protection against infringement and endangerment. In other words, the intellectual property rights exist as subjective rights within a framework recognized by national legislation. However, the role and importance of intellectual property rights in international and domestic trade, and their functions to promote creativity, investment and overall development of the community, calls for international regulation of various aspects of intellectual property rights.

Hence, despite the territorial nature of intellectual property rights, a highly developed international legislation in the field exists. In the initial period of this regulation, greater attention is paid to the rights of foreigners, *i.e.*, the so-called national treatment of foreigners and persons who have a domicile in other Member States of the international legal act.³ For this purpose, the so-called international unions are formed, as the Paris Union established on the basis of the 1883 Paris Convention for the Protection of Industrial Property, and the Berne Union established on the basis of the 1886 Berne Convention for the Protection of Literary and Artistic Works. These conventions regulate more fundamental issues related to intellectual property rights. However, one of their characteristics is the so called national treatment. Foreign persons are equated with domestic persons; also persons having a domicile in one of the Member States of the international act are assimilated.⁴

However, this regulation has demonstrated several drawbacks. This does not mean that international acts have not achieved their goal. Nevertheless, given the time of adoption of the Paris Convention and the Berne Convention, it took its toll. The development of new technologies, the need for establishing new intellectual property rights and the needs of modern life, in general, lead to the emergence of new mechanisms for the regulation of various aspects of intellectual property rights. As far the flaws are concerned, more fields can be identified. One of those fields is the enforcement of intellectual property rights. Enforcement of intellectual property rights, in fact, covers the implementation modalities of the actual legal framework for the content of the intellectual property rights in the practice.

³ Cf. J. Дабовиќ-Анастасовска, Н. Гавриловиќ, 'Меѓународните стандарди за авторскоправна заштита и домашното авторско право' ['International Standards for Copyright Protection and Domestic Copyright Law'], *Правник* 171-172, 2006, 12 ff.

⁴ Cf. Article 2(1) of the Paris Convention and Article 3(2) of the Berne Convention.

With the adoption of the Paris Convention and the Berne Convention, the international activity in the field of regulation of intellectual property rights does not cease. On the contrary, international regulation experiences real flourishing. Thus, in 1967 the Convention Establishing the World Intellectual Property Organization was adopted. The World Intellectual Property Organization is a specialized agency of the United Nations and is the main driver of the promotion of the protection of intellectual property rights at the international level.⁵ However, despite numerous international sources in the field of intellectual property rights, the issue of the enforcement of these rights, for the most part, remains the work of national legislation. Otherwise put, although states agree to give up part of their sovereignty in the area of regulation regarding some substantive matters of intellectual property rights, the field of actual enforcement of the legal content of these rights remains, for the most part, the work of national legislation and national procedural rules.

The situation changed in 1994, when the Agreement on Trade Related Aspects of Intellectual Property Rights, *i.e.*, the so-called TRIPS Agreement, was adopted within the World Trade Organization. Having regard to the provisions of the TRIPS Agreement, and ten years after its adoption, the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights was adopted within the European Union. With the adoption of the 2004 Enforcement Directive, the European Union becomes actively involved in international efforts to formulate adequate means related to the enforcement of intellectual property rights, after the numerous activities for regulating substantive legal issues.⁶

These acts, each in its own way, lay the foundation for harmonization of the mechanisms for enforcement of intellectual property rights. While the TRIPS Agreement acts internationally, and is applicable to all Member States of the World Trade Organization, the Enforcement

⁵ Under Article 2(viii) of the Convention, intellectual property shall include the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

⁶ Cf. J. Дабовиќ-Анастасовска, Н. Гавриловиќ, 'Аспекти на хармонизација на домашното право на интелектуална сопственост со правото на ЕУ' ['Aspects of the Harmonization of Domestic Intellectual Property Law with EU Law'], *Зборник од научната расправа "Методи на хармонизација на националното законодавство со правото на Европската Унија"* (ур. В. Камбовски, Т. Бендевски, Г. Галев), Македонска академија на науките и уметностите, Скопје 2008, 317 ff.

Directive serves as a mechanism for harmonization of laws of Member States of the European Union in the field concerned. So, we can say that there is a relatively developed system of activities related to the enforcement of intellectual property rights, at international level and at the level of the Member States of the European Union are concerned.⁷

The legal sources mentioned, each given the specificity of the bodies within which the particular source is adopted, represent the basic instruments which determine the position of the enforcement system for protection of intellectual property rights. Within each of these sources, specific mechanisms addressed to WTO Member States and Member States of the European Union, respectively, are adopted and should be implemented in national systems, in order to achieve a harmonized approach to the question of the mechanisms for the enforcement of intellectual property rights.

The mechanisms for enforcement of intellectual property rights, regulated in these two sources, contain their own specificities and govern the issues in their own way. However, the content of the TRIPS Agreement and the Enforcement Directive embodies certain principles that can serve as guidelines for setting of national systems for the protection of intellectual property rights. Hence, hereafter we analyze exactly these general principles, with the emphasis placed on the Enforcement Directive. The analysis of the provisions of the Enforcement Directive is not aimed to show their particular operation, but the features that the national system should possess in order to establish a fast, efficient, and effective system of legal protection of intellectual property rights from infringement and endangerment.

2. Enforcement Principles under the Enforcement Directive

2.1. The Enforcement Directive in General

The adoption of the 2004 Enforcement Directive⁸ is a consequence of the desire of the European Union to engage in international efforts for arranging the implementation of the protection of intellectual property rights. The Enforcement Directive,⁹ in its characteristic features, is the

⁷ Cf. A. Kur, T. Dreier, *European Intellectual Property Law: Text, Cases and Materials*, Edward Elgar, Cheltenham - Northampton, MA 2013, 435-442.

⁸ *Official Journal* L 195, 2.6.2004, 16-25.

⁹ Cf. C. Seville, *EU Intellectual Property Law and Policy*, Edward Elgar, Cheltenham - Northampton, MA 2009, 408-409.

crown of the Union's activities in the field of legal regulation of intellectual property rights. Previously, at EU level, a number of instruments that regulate certain aspects of intellectual property rights were adopted. However, all these sources regulated substantive issues at most. The Enforcement Directive, however, focuses on the enforcement of intellectual property rights with the end of achieving a certain degree of harmonization of laws of the Member States of the Union, and with regard to the issue of procedural aspects, *i.e.*, the implementation of intellectual property rights protection.

Legally speaking, the Enforcement Directive is addressed to the Member States of the European Union and they are obliged to implement it into national law.¹⁰ The legal source, in other words, does not entail direct application as is the case with regulations. This approach of the bodies of the European Union shows that there is not a sufficient determination to approach the complete arrangement of matters of intellectual property law, although the existence of a unified system for obtaining, content, effect, and protection of intellectual property rights is undoubtedly an important element for establishing and functioning of the internal market.

Issues related to intellectual property rights, thus understood, are clearly outlined in the preamble to the Enforcement Directive. The preamble states that the achievement of the internal market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. Thus, the protection of intellectual property is an essential element for the success of the internal market and is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

Contextual observation of intellectual property rights, in the said manner, is one of the central issues which should be further developed, in order to realize the goals of fully integrating the national markets of Member States. This is because the completing of the internal market cannot be achieved, although often this issue is treated as already almost closed, without the incorporation of aspects of intellectual property rights. This from very simple reason that trade in goods and services very often coincides with the incorporation of an intellectual property right.

¹⁰ Cf. Case C-328/07 *Commission of the European Communities v Grand Duchy of Luxembourg*, Official Journal C 92, 12.4.2008, 9, Case C-341/07 *Commission of the European Communities v Kingdom of Sweden*, Official Journal C 171, 5.7.2008, 11, and Case C-395/07 *Commission of the European Communities v Federal Republic of Germany*, Official Journal C 183, 19.7.2008, 5.

Trade within the internal market cannot be considered free if there are exclusive rights of their respective holders giving powers that can be raised against third parties. Also, the free circulation of intellectual property rights (through transfer of IPRs agreements, technology transfer agreements, license agreements, franchise agreements, etc.) is difficult to imagine if there is a different regime of intellectual property rights in different legal systems of Member States of the Union.

With the introduction of community intellectual property rights (in the field of trademarks, industrial designs, unitary patents, and partly geographical indications), the problem is partially solved. However, a number of fields for intervention remain, such as the whole system of copyright and related rights. Also, national systems of legal protection of intellectual property rights, also in the field of communitarian rights, remain in force, with some issues being harmonized through the adoption of directives and through compliance with international legal sources, as is the case of implementation of the provisions of the TRIPS Agreement.

The role of intellectual property rights in the establishing and functioning of the internal market has its substantive and its procedural sphere. While the substantive sphere refers to the issues related to the acquisition, content, and transfer of intellectual property rights, the procedural sphere concerns their protection from infringement and threats.¹¹ The declaration of the scope of a right, therefore, is not worth much unless there are appropriate mechanisms for their actual application in practice. Intellectual property rights can thus contribute to the smooth functioning of free trade in the internal market only if their content is implemented in practice, *i.e.*, if their holder can use the powers derived from their content and if the holder can react when his right has been infringed or otherwise threatened.

With this in mind, the preamble of the Enforcement Directive points out that without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, as the preamble goes on, the means of

¹¹ Cf. Case C-180/11 *Bericap Záródástechnikai Bt. v Plastinnova 2000 Kft.* 15.11.2012.

enforcing intellectual property rights are of paramount importance for the success of the internal market.

As already mentioned, the adoption of the Enforcement Directive is based, to a large extent, on the provisions of the TRIPS Agreement. The Union, in the framework of its powers arising from the founding treaties and treaties for their reform, is itself bound by the TRIPS Agreement.¹² Hence, the activities on the communitarian level, which is the case with the Enforcement Directive, appropriately upgrade the benefits of the TRIPS Agreement. Therefore, it should be underlined that the principles for intellectual property rights enforcement, regulated by the TRIPS Agreement, will not be affected in any way by the provisions of Enforcement Directive.¹³ Moreover, the preamble to Enforcement Directive states that disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the internal market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. The preamble restates that this situation does not promote free movement within the internal market or create an environment conducive to healthy competition.

All these ideas of the Enforcement Directive clearly show that the European Union shares the view that the establishment of the internal market is determined not only by substantive rules regarding intellectual property rights, but also by procedural aspects. Because of this, the Enforcement Directive introduces a set of specific European guiding principles for enforcement of intellectual property rights, which are directed to Member States. Such principles appear both in the role of fulfilling international obligations, *i.e.*, the implementation of the international principles of the TRIPS Agreement, and in the role of formulating common European standards in the field of enforcement of intellectual property rights; aimed at rounding the idea of the internal market.

Hereinafter we analyze provisions of the Enforcement Directive in the direction of extracting the principles of intellectual property rights enforcement. It should be mentioned that the Enforcement Directive does not propose a final list of what is meant by the term intellectual

¹² Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), *Official Journal* L 336, 23.12.1994, 1-2.

¹³ Article 2(3)(b) of the Enforcement Directive.

property rights, but a general formulation states that the provisions of the Enforcement Directive relate to the measures, procedures and remedies necessary to ensure the enforcement¹⁴ of intellectual property rights and, for the purposes of the Enforcement Directive, the term intellectual property rights includes industrial property rights also.¹⁵

2.2. Principle of impartiality and fairness of the measures, procedures and remedies

The principle of impartiality and fairness of the measures, procedures and remedies for the protection of intellectual property rights from infringement and threats, implies that the measures, procedures and remedies will be actually available to the holders of intellectual property rights. The availability of means of protection includes the urgency of the procedure for the protection of intellectual property rights, or that the procedures shall not be unnecessarily complicated or costly,¹⁶ or entail unreasonable time-limits or unwarranted delays. Moreover, the measures, procedures and remedies of the Enforcement Directive should be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Also, the means of enforcement of intellectual property rights should not be expensive. This is a very important feature of the Enforcement Directive, because the availability of means for protection becomes highly specified and applicable. The urgency of the procedure and the efficiency of the means of protection are objective and cover all the subjects that could require giving effect to the measures, procedures and remedies for the enforcement of intellectual property rights. By insisting, however, that the means for the protection of intellectual property rights do not constitute unwarranted financial burden on their subjects, the subjective element is

¹⁴ Cf. Case C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* 10.04.2014.

¹⁵ Article 1 of the Enforcement Directive. In order to clarify the scope of rights covered, the Commission has issued its Statement concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, *Official Journal* L 094, 13.4.2005, 37. The Commission considers therein that at least the following intellectual property rights are covered by the scope of the Enforcement Directive: copyright, rights related to copyright, sui generis right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, and trade names, in so far as these are protected as exclusive property rights in the national law concerned.

¹⁶ Cf. Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* 24.11.2011, and Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* 16.2.2012.

also considered; *i.e.*, the possibility of practically every holder of intellectual property rights to have an actual access to achieving protection of his rights.

Finally, measures, procedures and remedies for the enforcement of intellectual property rights should not be unnecessarily complex. Such positioning of the Enforcement Directive bears in mind, also, the actual functioning of the procedures, measures and remedies. The reason for this is that the Enforcement Directive only provides for guidelines for setting up national legal solutions for the enforcement of intellectual property rights. This means that despite the fact that Member States, as well as states bound by SAAs, have a duty to implement the measures, procedures and remedies covered by the Enforcement Directive into national law, their implementation will still be made in the existing legal systems of Member States. Therefore, each specific implementation has its own characteristics, in spite of the desire for harmonization of national legal systems. Specifically speaking, while implementing the provisions of the Enforcement Directive one must bear in mind that the actual functioning of the measures, procedures and remedies shall not be complex, in the sense of situations where the authorized entities will not be able to affect their rights against infringement or threat.

The availability of means for enforcement of intellectual property rights is concretized through provisions concerning the question which entities have the right to seek enforcement of the protection. The provisions of the Enforcement Directive introduce a list of entities that can initiate proceedings for protection. Under Article 4 of the Enforcement Directive, such are: (a) the holders of intellectual property rights, in accordance with the provisions of the applicable law; (b) all other persons authorized to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law; (c) intellectual property collective rights-management bodies which are regularly recognized as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law; (d) professional defense bodies which are regularly recognized as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.

This solution of the Enforcement Directive is very important, because it explicitly identifies entities that can ask for protection. However, in the direction of the discussion of this solution as a solution that sets up a principle, it is important to make two observations.

The first remark concerns the determination of authorized claimants in the first group. The intellectual property rights holders will be able to emerge as subjects of the procedure for the enforcement of intellectual property rights only in accordance with applicable law. Concerned are the subjects that, according to national substantive provisions, appear in the capacity of holders of intellectual property rights. In other words, national law determines the circle of intellectual property rights whose holders are entitled to protection. Practically, the situation is eased by the fact that this set of provisions of national law is also subject to compliance with international acts and European sources. Thus, rights holders will be entitled to protection if national legislation recognizing the specific intellectual property right.

The second remark concerns the determination of the authorized entities in the following three groups, *i.e.*, the licensees, the collective management organizations, and the professional bodies for defense. In these three situations it is left to national legislation whether these individuals will be recognized the right to initiate proceedings for the enforcement of intellectual property rights. Hence, when these three categories of persons are concerned, there is only an authorization (and appropriate recommendation) to the Member States for granting the right to initiate proceedings, but not an obligation for Member States to recognize to these categories of persons the right of protection. Hence, it can be concluded that, in terms of these three categories of persons, the Enforcement Directive sets only a principle for the protection of intellectual property rights.

2.3. Principle of obtaining evidence which lies in the control of the opposing party

Considering that the right to protection of intellectual property rights from infringements or threats can truly be realized only in situations when the claims of the right holder, or other person authorized according to national law would be actually granted, the Enforcement Directive introduces a very important principle for obtaining evidence. We speak of situations when the right holder will be able to substantiate the merits of its claim only with the help of evidence that are under the control of the other party. For this reason, the Enforcement Directive provides for the duty of the courts to oblige the opposing party to make available the evidence which is under its control.

Such an obligation for the courts has to be employed only at the request of a party in the proceedings, and not *ex officio*. Also, such a requirement would be won only if the party making the request backs it up with its own reasonable evidence, *i.e.*, if it provides for probability that on the use of the evidence found in the other parties' possession the determination of the merits of the claim depends. Moreover, the types of evidence whose submission can be obliged are not envisaged. Under the same conditions, the opposing party may be obliged to communicate its banking, financial or commercial documents, but only if there is an allegation of commercial infringement of intellectual property rights. The existence of such a right of the holder is very important, especially in determining the amount of compensation for damage. Finally, in both situations, the right to protection of confidential information is not affected.

In terms of this principle, it is important to emphasize that the opposing party is not obliged to make such evidence available. Assessment of what will be the impact of the refusal to make available evidence which is in the control of the opposing party shall be governed by national procedural rules. Hence, the Enforcement Directive sets the principle as such; the request is only a possibility and there is a duty of the court, if such a requirement is assessed as reasonable under the circumstances of the case, to oblige the opposing party to make such evidence available for use in infringement proceedings.

2.4. Principles of the procedure for preserving evidence

Regarding the preservation of evidence the Enforcement Directive introduces a principle under which the preserving of evidence may be requested by authorized persons even before the initiation of proceedings. A claim for preservation of evidence may be made as in situations when the rights are infringed, as in situations where there is a risk of intellectual property rights infringement. The preservation of evidence, according to the Enforcement Directive, is treated as a provisional measure. The procedure for preserving evidence is dealt as a court procedure, it must be urgent and effective and may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto.

In terms of procedure, the measure of preservation of evidence can be imposed without the other party having been heard, but the party against which this measure is rendered has the right to be informed, after the execution of the measure at the latest. The applicant may be required to lodge a security as a condition for imposing the measure of preserving evidence. Finally, the Enforcement Directive imposes rules for duration and revoking of the measure.

2.5. Principle of obtaining information

Correlative to the right to have access to evidence that are under the control of the other party, the Enforcement Directive provides for the right to access information which are important for determining the infringement and the extent of the infringement of intellectual property rights. The claim for information may be lodged during the proceedings on infringement, against the alleged infringer and against others as well. Right by the last feature, among other things, this measure significantly differs from the measure to obtain evidence during the proceedings. Third persons against whom the measure can be enforced are: (a) any other person who was found in possession of the infringing goods on a commercial scale; (b) any other person who was found to be using the infringing services on a commercial scale; (c) any other person who was found to be providing on a commercial scale services used in infringing activities; or (d) any other person who was indicated by the person from the previous three categories as being involved in the production, manufacture or distribution of the goods or the provision of the services.

From the following categories of persons the claimant may seek information concerning: (a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;¹⁷ and (b) the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question. The providing of this information is aimed at determining the existence of the infringement, and at determining the amount of damage that will have to be compensated at the request of the holder in the case of a positive resolution of the subject matter of the proceedings.

¹⁷ Cf. Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271, Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* [2009] ECR I-01227, and Case C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* 19.4.2012.

2.6. Principles of the procedure for issuing provisional measures

In relation to provisional measures the Enforcement Directive regulates two situations in which those measures may be imposed, depending on whether the violation of intellectual property rights is carried out on a commercial scale or not. In both situations, provisional measures may be imposed by the courts. The courts may require the applicant to submit reasonably available evidence that is sufficient to determine that the applicant is the holder of the intellectual property rights and the right of the applicant is infringed or endangered. Also, provisional measures may be imposed without the other party having been heard, but the right to be informed of the measure at the latest after the implementation of the measure stands. Finally, rules on the duration of the measure, on its revocation, and on the request to lodge a security are introduced.

When the infringement is not committed on a commercial scale, the applicant may require the imposition of an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right. Also, the alleged infringer may be prohibited from carrying specific activities of alleged infringement on the condition to pay penalties, if this is permitted by national law. There is another possibility, and this is to make continuation of actions subject to the lodging of guarantees intended to ensure the compensation of the holder of the intellectual property right. Besides against the alleged infringer, some of these measures may be imposed against an intermediary whose services are being used by a third party to infringe an intellectual property right. Despite these provisional measures which may be imposed against the alleged infringer and against an intermediary, it is possible to seek and impose a provisional measure by ordering the seizure or delivery of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

In cases where infringement is committed on a commercial scale, if the applicant can prove the existence of circumstances that endanger the recovery of damages, judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information. The existence of these measures, in situations when there is an infringement on a commercial scale, does not mean that the measures that are available to the applicant in situations of infringement of the rights on a non-commercial

scale are not available for the subject when there is an infringement on a commercial scale also. Thus, when the circumstances of the case indicate commercial infringement, one may require the imposition of any of the available provisional measures regulated by the Enforcement Directive.

2.7. Principles of measures resulting from a decision on the merits

In cases where a decision is rendered on the merits, regarding the determination of infringement of an intellectual property right, the Enforcement Directive regulates three basic measures that can be imposed against the person found to infringe intellectual property rights. Member States are obliged to introduce the possibility of imposing of the first two measures, while the imposing of the third measure is left to the disposition of Member States.

First, the Enforcement Directive regulates the right of the authorized person to request recall from the channels of commerce, definitive removal from the channels of commerce, or destruction of goods found to be infringing an intellectual property right and, in appropriate cases when there is a danger of their reuse for infringement, materials and implements principally used in the creation or manufacture of those goods. Second, the infringer may be imposed an injunction aimed at prohibiting the continuation of the infringement.¹⁸ This injunction may be accompanied, but only if this is permitted by national law, by recurring penalty payment with a view to ensuring compliance. Thirdly, Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the previous two types of measures, for an court order of a pecuniary compensation to be paid to the injured party instead of applying the previous two measures; if that person acted unintentionally and without negligence, if the execution of the measures in question would cause him/her disproportionate harm, and if pecuniary compensation to the injured party appears reasonably satisfactory.

Besides these measures, the Enforcement Directive introduces the right to recovery of damages (Article 13) and the right of compensation for legal costs¹⁹ (Article 14). These rights are regulated by a separate part of the Enforcement Directive; the first right could only be realized against the person found in violation of intellectual property rights (this person would also be liable for reimbursement of costs incurred by the other party), while the second right would be

¹⁸ Cf. C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECR I-06011.

¹⁹ Cf. Case C-406/09 *Realchemie Nederland BV v Bayer CropScience AG* [2011] ECR I-09773.

available to any person who achieved a successful imposing of an another measure notwithstanding a decision on the merits.

2.8. Principle of publicity

Finally, Member States are obliged to ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part.

3. Conclusion

The conducted analysis result in drawing of several conclusions on the existence of European principles for intellectual property rights enforcement.

First, it is indisputable that there are serious activities, on international and on European soil, introducing a set of unique rules that will apply to procedures for the exercise of intellectual property rights protection. These actions are the result of the existence of developed consciousness (internationally and in Europe) on the fundamental role and importance of the enforcement of intellectual property rights for the development of international (and domestic, especially in the larger states) trade. It is clear that the substantive framework of intellectual property rights may have an effect only if there are actual mechanisms for implementation of the content of intellectual property rights. Otherwise, substantive rules contained in domestic and European legal sources will be reduced to a mere declaration.

This, of course, does not mean that the activities on European soil relating to substantive issues do not bear proper importance, because the rules on enforcement of intellectual property rights appear as upgrade to substantive. Also, this does not mean that the European principles are insufficient by themselves. Member States should not only regulate substantive matters in national legislation, but must also ensure their implementation through appropriate mechanisms for monitoring and reacting when a violation occurs. In any case, the fact that there are European principles for the exercise of intellectual property rights protection has a great importance as it allows, at least in principle, to set rules and to provide their real function in practice.

Second, despite the importance of the European principles for enforcement, several questions remain open. This is because the regulation is, nevertheless, fragmentary. Therefore, this text focuses on the principles, and not on specific rules, especially if we consider that the specific rules are mostly tentative. Member States, ultimately, have the disposition while inserting specific rules in existing national procedural systems. For this reason, emphasis is placed on those rules which have the character of principles; because principles, no matter how general, formulate a clear direction for implementation. Therefore, only “rewriting” European principles and specific rules in national legislation is not worth much if the guidelines set by the principles are not perceived as a stimulus for broader intervention in domestic law. A good example for this approach is the principle of impartiality and fairness of measures, procedures and remedies.

Third, from the adoption of the Enforcement Directive an appropriate period of time for evaluation of its effects in national legislations has passed. The results of these observations are very useful for determining its impact. On the other hand, the development of new technologies creates new opportunities for infringement and endangerment of intellectual property rights. In terms of the digital environment, one should also bear in mind the 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.²⁰

Finally, the implementation of European principles of intellectual property rights enforcement should be viewed only as one step in achieving a generally accepted system of intellectual property law. This is true even if one considers all the oppositions of international and European activities in the field. Widespread debate is certainly welcomed, but without forgetting that the concepts of intellectual property can only survive if there is a consensus on the role and importance of intellectual property rights and the need for efficient mechanisms for their protecting from infringement and endangerment.

²⁰ *Official Journal* L 167, 22.6.2001, 10-19.