

Dissuasive outcomes for rightholders: examining recent Lithuanian copyright law cases under Directive 2004/48/EC

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I. Introduction

Directive 2004/48/EC on the Enforcement of Intellectual Property Rights (IPRED) was a significant legislative achievement in harmonizing IP enforcement rules within the European Single Market. It incorporated elements of international IP law, notably World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights rules, into both the European Union (EU) Acquis and substantive EU law in areas such as copyright law and civil procedure. IPRED was crucial for addressing the challenges posed by online IP infringements and harmonizing substantive rules just before the major expansion of the EU. It has been moderately successful in achieving this goal, as IP piracy has steadily been declining in the EU.¹ IPRED has led to the creation of a common legal framework where the same set of tools is applied across the EU.

In 2011, the European Commission conducted a public consultation on the implementation of IPRED. This was followed by a 2016 evaluation of IPRED in order to further improve the application and enforcement of IP rights (IPRs). The resulting Evaluation Report² and 2017 IPRED Study³ (the Study) suggested that the measures, procedures and remedies set out therein have effectively helped better protect IPRs throughout the EU and remain fit for purpose.

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1 EUIPO, *Online Copyright Infringement in the European Union: Music, Films and TV (2017–2020), Trends and Drivers* (2021), DOI:10.2814/505158.

2 European Commission, 'SWD(2017) 431 – IPR Enforcement Directive Evaluation post RSCC' (28 November 2017). Available at <https://ec.europa.eu/docsroom/documents/26601> (accessed 24 April 2023).

3 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, V Peter et al, *Support study for the Ex-Post Evaluation and Ex-Ante Impact Analysis of the IPR Enforcement Directive (IPRED): Final Report* (Publications Office of the European Union 2017). Available at <https://data.europa.eu/doi/10.2873/903149> (accessed 24 April 2023).

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Abstract

- This article examines two recent copyright law cases in Lithuania, where rightholders attempted to enforce their rights against online copyright pirates. These cases exposed essential limitations and difficulties in interpreting IP enforcement rules under Directive 2004/48/EC (IPRED) and the pertinent national copyright law. While the rightholders ultimately won both cases, the legal victories proved to be Pyrrhic. The courts delivered very restrictive interpretations of the substantive rules, which proved discouraging and disproportionately costly for any rightholder attempting to enforce their copyright against online infringers.
- This article examines the key rules of IPRED that relate to these cases and discusses how they were interpreted and applied by the judiciary. As a result, the limitations of these rules and inconsistencies in their interpretation by national courts become apparent.
- The article highlights the urgent need for clarification of IP enforcement rules in the European Union, particularly focusing on the status, purpose and scope of the general obligation and the broad interpretation of IPRED. In the author's opinion, this approach will efficiently align the national implementation of that directive with the evolving online piracy landscape, without necessitating major legislative reforms.

Nevertheless, issues were raised in 2016 regarding the observation that the provisions of IPRED were not implemented and applied in a uniform manner in all EU countries. Thus, the European Commission proposed that the EU legal framework for the civil enforcement of IPRs could benefit from the clarification of certain aspects of IPRED, allowing more consistent and effective interpretation and application. This clarification was provided through a Guidance Communication in 2017 when the European Commission adopted a package of measures to further improve the application and enforcement of IPRs and strengthen the fight against counterfeiting and piracy. In particular, the final Guidance Communication⁴ (the Communication) was introduced with the intent of clarifying the IPRED rules, where there had previously been differing interpretations in different EU countries.

Notwithstanding this regulatory effort, the online infringement of IP persists and remains one of the key areas of concern for protection in the EU.⁵ There are obviously multiple complex reasons for this phenomenon, yet it is at least partially caused by the failure of substantive copyright and procedural law rules, which make enforcement unfeasible and irrational for rightholders. This was highlighted in two recent copyright cases resolved in Lithuania in 2019 and 2021, respectively. These cases, which are analysed later, are representative of the legal challenges that rightholders face in defending their rights. It is essential to note that the challenges analysed here are not mentioned once in the aforementioned study and are barely addressed in the Communication. Therefore, this article presents a novel contribution to the field.

The author believes that some of these challenges result from the opaque language of IPRED, which was not sufficiently clarified in the Communication, thus leaving national judiciaries to their own interpretations.⁶ Other challenges result from the insufficient coordination of case law interpreting substantive EU copyright law at the EU level or the limitations of IPRED itself. The latter may only be addressed through the further clarification thereof or via legislative action at the EU level. The purpose of this article is to examine these challenges in the context of the positions taken by the courts in two recent Lithuanian copyright enforcement cases, to discuss the legal arguments and rationale that may be used to

overcome these challenges and to begin to shape a different approach towards future enforcement and regulatory efforts.

This article focuses on the perspective of Lithuanian copyright law and civil procedure law. However, given the fact that Lithuania has been a member of the EU since 1 May 2004 and has implemented IPRED since 2006, there are reasons to believe that the challenges analysed here are not unique to Lithuania. Moreover, most of these challenges are not limited to copyright and equally affect the enforcement of other IPRs. Therefore, this article has broad implications for the whole of the EU in improving the enforcement of IPR across the European Single Market.

It is noteworthy that legal scholarship on IPRED is rather limited. Research largely focuses on basic commentary,⁷ specific IPRs,⁸ narrow issues such as website blocking⁹ or Court of Justice of the European Union (CJEU) case commentaries and overviews of national implementation.¹⁰ More in-depth research has addressed the problems and effects that IPRED has caused in national IP law after transposition¹¹ or comparative law studies across multiple jurisdictions.¹² A thorough review of the relevant literature on IPRED is provided in the Study, yet neither the IPRED research literature nor the Study itself addresses the triad of issues analysed in this article: general obligations *vis-a-vis* pertinent national rules (Article 3, IPRED), the presumption of authorship and ownership (Article 5, IPRED) and evidence rules in IP cases (Article 6, IPRED). Therefore, this article

4 European Commission, 'Communication from the Commission to the Institutions on Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights' COM(2017)708 final.

5 EUIPO (n 1).

6 M Norrgård, 'The role conferred on the national judge by directive 2004/48/EC on the enforcement of intellectual property rights' (2005) 6 *ERA Forum*, 503–514.

7 I Stamataoudi (ed) *Copyright Enforcement and the Internet* (Kluwer Law International 2010); I Stamataoudi and O Vrins, 'The Enforcement Directive' in I Stamataoudi and P Torremans (eds) *EU Copyright Law* (2nd edn Edward Elgar Publishing 2021).

8 A Kur, 'Enforcing Design Rights throughout Europe' in H Hartwig (ed) *Research Handbook on Design Law* (Edward Elgar Publishing 2021), 283–302.

9 M L Montagnani and A Y Trapova, 'Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market' (2018) 26 *International Journal of Law and Information Technology* 294–310.

10 F Petillion (ed) *Enforcement of Intellectual Property Rights in the EU Member States* (Intersentia 2014).

11 N Chetcuti, 'An in-depth analysis of the enforcement directive (IPRED), its effectiveness and application in Maltese Law' LL.D Dissertation 2014. Available at <https://www.um.edu.mt/library/oar/handle/123456789/2088> (accessed 24 April 2023); H-P Götting et al (eds) *Enforcing Intellectual Property Rights: Necessary Instruments versus Over-Enforcement* (Baden-Baden, Nomos 2012). <https://doi.org/10.5771/9783845240862>; M Schaffner, 'Two years on: the French experience of the enforcement directive' (2010) 5 *Journal of Intellectual Property Law & Practice* 178–185. <https://doi.org/10.1093/jiplp/jpp232>; V Visean, 'The implementation of Directive 2004/48/EC in Romania' (2009) 2009 *Romanian Journal of Intellectual Property Law* 140–186.

12 G Cumming et al *Enforcement of Intellectual Property Rights in Dutch, English and German Civil Procedure* (Alphen aan den Rijn Wolters Kluwer 2008).

presents a contribution to the field of IP law enforcement literature. It must be noted that IP law literature on these issues, especially the issue of evidence in IP enforcement cases, is extremely scarce—or even absent (at least in the English research literature). Evidence rules are not generally specific to IP law, and IP law scholars are hesitant to wade into the field of judicial procedure. There are also lingering concerns that judicial procedure rules fall outside of the regulatory competence of the EU and that the pertinent IPRED rules (Article 6) already encroach on exclusive national sovereignty. This is the reason why commentary on these rules is minimal in the Study and in the Communication and even in the authoritative commentaries of the IPRED.¹³ As a result, national courts face a vacuum of sources when trying to interpret these rules and need research commentary and guidance to better understand them.

The first section of this article outlines the subject matter of the two analysed cases. Subsequent sections discuss the relevant IPRED rules as follows: Section 2—Article 3: General Obligation, Section 3—Article 5: Presumption of Authorship or Ownership and Section 4—Article 6: Evidence. In this way, these sections address the significance of the IPRED rules in the context of the analysed cases. The conclusions of this paper discuss the urgent need for further clarification of IPRED.

I. An overview of the *visosknygos.lt* and *linkomanija.net* cases in Lithuania

The principal case (the *visosknygos.lt* case) was resolved in 2021 by the Lithuanian Court of Appeal (civil case No. e2A-467-241/2021). This analysis focuses on the 25 February 2021 and 25 May 2021¹⁴ rulings of the Lithuanian Court of Appeal, the former of which presented the court's interpretation of the key substantive and procedural laws. This interpretation was then referenced in the latter ruling.

The plaintiffs in the *visosknygos.lt* case were the five largest book publishers in Lithuania, whose portfolio included the most prominent Lithuanian and foreign authors, including J.K. Rowling, John Irving, George Orwell and others. The defendants were a group of individuals who had jointly (as established by the court) operated the *visosknygos.lt* e-book piracy website, which offered subscription-based access to hundreds of pirated e-books and operated for several years. By the time that the case was brought to the court, the website had been

redesigned and forwarded to a new domain at *visosknygos.com*. This presented pivotal issues pertaining to evidence since the scope of the operation was only surveyed after the redesign, and partial evidence from both versions was presented in support of the scope of the original operation at the *visosknygos.lt* domain. Only one defendant was clearly known to the plaintiffs at the outset of the case since the defendants used various anonymization techniques to hide their identities online. This presented a legal conundrum common in cases against copyright infringement: the difficulties of attempting enforcement against unknown infringers.

The main legal issues that were decisive in the *visosknygos.lt* case were proof of copyright by the publishers and the admissibility of partial evidence (relying on the sample of evidence). A referral to the CJEU asking for guidance on interpreting the IPRED rules was denied by the Lithuanian Court of Appeal. Cassation in this case was also denied by the Supreme Court of Lithuania.

For guidance on admitting and assessing evidence, the courts in the *visosknygos.lt* case relied on an earlier case resolved in 2019 by the Supreme Court of Lithuania (the 4 July 2019 ruling in civil case No. e3K-3-236-969/2019¹⁵), which is also analysed in this article to the extent that it decisively interpreted Article 6 of IPRED. This earlier case is best known as the *linkomanija.net* case.

The *linkomanija.net* case involved a domain-blocking request by the Lithuanian collective copyright organization (collecting society) against the main Lithuanian internet service providers (ISPs) for the domain of this popular torrenting website. The key argument made in the *linkomanija.net* case, which was then reused in the *visosknygos.lt* case, was the interpretation of the IPRED evidence rules (Article 6)—especially the sample of evidence principle. It is worth mentioning that the operator of the torrenting website was also not identifiable, and therefore, the case focused on ISPs allowing access to the infringing website, instead of the actual perpetrator.

The *visosknygos.lt* and *linkomanija.net* websites were for-profit operations, distributing hundreds of pirated copies of copyright works. Thus, both cases addressed the situation of copyright infringements on a commercial scale. Both ended with final rulings in favour of the plaintiffs, but these victories proved to be Pyrrhic due to the time and costs involved. These cases spent a disproportionately long time in the courts before final binding judgments were reached (both were initiated in 2016),

¹³ Ibid.

¹⁴ 25 May 2021 Ruling of the Lithuanian Court of Appeal in the civil case No. e2A-467-241/2021. Available at <https://liteko.teismai.lt/viasasprendi/mupaiseska/tekstas.aspx?id=d66eed12-527a-4360-b6c2-b13fe4d7624e> (accessed 24 April 2023).

¹⁵ 4 July 2019 Ruling of the Supreme Court of Lithuania in the civil case No. e3K-3-236-969/2019. Available at <https://liteko.teismai.lt/viasasprendi/mupaiseska/tekstas.aspx?id=25185182-37a2-4206-906d-9a2631f3ac31> (accessed 24 April 2023).

and neither resulted in the awarding of significant damages. They raise major questions about the adequacy of the existing copyright law for addressing online copyright infringement, at least in Lithuania. This article analyses them following the structure of IPRED.

The author consulted the plaintiffs in the *visosknygos.lt* case but was not involved in the *linkomanija.net* case. The citations of the courts in English (including the footnotes) are the author's own translations; however, pertinent court rulings in Lithuanian are linked where available.

2. Article 3. General obligation

IPRED was introduced in recognition of the difficulties in enforcing IPRs. In order to address these difficulties, Article 3 of IPRED specifically established a general obligation of the Member States 'to provide for the measures, procedures and remedies necessary to ensure the enforcement of the IP rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays.' Moreover, '[t]hose measures, procedures and remedies shall also 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'.

These overarching general obligations set out the guidelines for the interpretation of the remainder of IPRED,¹⁶ yet their opaque and generalist language may mislead practitioners into assuming that these rules are simply declarative and are immaterial for the rest of the text. This is a huge mistake. If one omits the direct application of Article 3 in interpreting the remainder of IPRED and pertinent national law, this will lead them to idiosyncratic and verbatim interpretations of the specific rules prescribed by IPRED, which are detached from the generality and purpose of the entire directive. In this context, it is important to note the urge of the CJEU to interpret IPRED broadly, as was highlighted in IPRED case law: 'for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.¹⁷

It is no accident that the Communication specifically refers to Article 3 of IPRED more than 20 times, as it is absolutely critical in correctly understanding and interpreting both IPRED itself and national law rules based on

it. The rules of Article 3 of IPRED shall be the *lex specialis* with respect to the general national rules of evidence and judicial procedure (*lex generalis*) in IP enforcement cases. However, in the national laws implementing IPRED, at least in Lithuania, Article 3 is not directly transposed. Instead, it is dissolved into the general principles of substantive IP laws and procedural law, without any specificity as regards the enforcement of IPR. For copyright, there is no specific section, article or part that would implement Article 3 in the statutory texts of Lithuanian copyright law. Among copyright jurists, it is assumed that this general obligation is a kind of common sense of copyright law, which exists without express language in national law.

Despite the implicit guidance of the CJEU and IPRED commentators highlighting the idea that national courts have to set aside national law rules that prevent the effective application of EU law in the context of IPRED,¹⁸ in practice courts struggle to implement the general obligation and instead treat it as inferior to the national rules of evidence and judicial procedure. The two cases analysed here provide explicit empirical proof of such a lapse in the implementation of the general obligation. While both cases present questions pertaining to the subject matter of Article 3 of IPRED, the courts completely failed to apply it. To be precise, the arguments of the courts in the 25 February 2021 and 25 May 2021 rulings of the *visosknygos.lt* case are completely devoid of any reference to or mention of Article 3 of IPRED, nor do they discuss the general obligation, suggesting that the courts essentially ignored it. The *linkomanija.net* case saw mention of the latter only briefly, and only with respect to the proportionality of the remedy sought in the case (the blocking of the website by the ISPs), instead of considering it in interpreting the other IPRED rules (eg Article 6). In the final ruling in the *visosknygos.lt* case on 25 May 2021, the court mentioned Article 3 of IPRED only in reciting and denying the request to refer the case to the CJEU. The court argued that it had sole discretion and no obligation to refer to the CJEU and that the request would undermine both the basic principle of the national language being used in the judicial proceedings and the existing practice of the Supreme Court of Lithuania.

In the author's opinion, this lapse in directly applying the general obligation rules under Article 3 of IPRED, and the refusal to check the role and *lex specialis* status thereof with the CJEU, was a critical error. This resulted in the improper interpretation of the IPRED rules and seriously

16 Norrgård (n 6).

17 Judgment in *New Wave CZ as v Alltoysw spol, sro*, C-427/15, EU:C:2017:18, para 19.

18 Cumming et al (n 12) 6.

undermined the enforcement of IPR, as is elaborated further later.

3. Article 5. The presumption of authorship or ownership

By the time of the enactment of IPRED, the presumption of authorship was established in the substantive copyright law of all EU Member States through accession to the Berne Convention for the Protection of Literary and Artistic Works (specifically Article 15(1) thereof). Article 5(a) of IPRED reiterated the Berne Convention's presumption of authorship rule, which states that authorship is applicable to the author of a literary or artistic work in the absence of proof to the contrary. To be regarded as an author, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for the author's name to appear on the work in the usual manner. The true intention of this reiteration was not just to repeat the Berne Convention, but instead actually extend the same presumption to the ownership of related rights, as was done in Article 5(b) of IPRED.¹⁹ Unfortunately, the EU legislator did not account for an earlier precedent in some Member States, where the presumption of authorship was already interpreted broadly to essentially mean the presumption of copyright ownership. The lack of common understanding of the concept of authorship or ownership of copyright and related rights is another matter where the laws in different Member States diverge significantly, as is noted in the literature.²⁰

The explicitness of the language of Article 5(a) of IPRED has been somewhat confusing to the courts. The language used has directed courts towards a strict and narrow interpretation of the presumption of copyright, which happened to be detrimental to the rightholders in the *visosknygos.lt* case. In order to establish their rights to enforce copyright, the plaintiffs in the *visosknygos.lt* case relied on the presumption of copyright ownership, which had pre-IPRED precedent in Lithuanian copyright law. They additionally utilized a sample collection of contractual documents demonstrating their acquisition of the copyrights to the most prominent books that were illegally copied and distributed on the *visosknygos.lt* website. The plaintiffs argued that, as the aggregator of the underlying copyrights, the book publisher would own the

independent composite copyright to a particular edition of each book.

The composite copyright of the publisher or manufacturer is the case with many modern objects of copyright and is especially prominent in computer software, 3D models, etc. Historically, it was first observed in film, which was one of the first creative forms transcending individual authorship.²¹ These works are the result of the creative effort of a group of individuals, and in order to publish, distribute and commercialize them, one person has to aggregate the rights of each and every contributor. Books may also fall into this category. When an object of copyright is a composite, in order to publish it, the rightholder (eg the book publisher) shall obtain a permission regarding the totality of copyrights with respect to all distinct works comprising the composite work. In the case of a book, as an example, composite copyrights usually consist of

- the copyright to the original work;
- the copyright to the translation (eg in the *visosknygos.lt* case, the majority of the books were Lithuanian translations of foreign language originals);
- the copyright to the illustrations of the book and
- the copyright to the book layout (the copyright to the overall design of the book).

A composite work may include multiple other composite works created in different periods, by different authors and so on. In each particular work, the scope and validity of composite rights may differ.

In order for a composite work to be legally published and distributed, the publisher of the work must aggregate the said composite copyrights. Frequently, these rights are acquired not directly from the authors but indirectly through authors' agents, foreign publishers, collecting societies, etc. Rights may also be acquired directly from authors through employment or service agreements. In this way, the rights that a publisher has in each composite work are based on a complex set of legal relationships and transactions. A publisher of a composite work who has acquired the entire copyright complex may state this in the work in the usual manner—ie with a (c) mark.

Without the publisher assembling the composite of rights, the professional publishing business would be impossible, as only in exceptional cases does the original author design, illustrate, translate and publish their books themselves. The same is also commonplace in computer software, audiovisual products, music and other areas of the copyright industry.

19 S Ricketson and J C Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn OUP Oxford 2006), 358–402.

20 M Lattacher, 'Authorship matters! Authorship in the EU with a focus on film' (2022) 5 *Stockholm IP Law Review* 56–67. Available at https://stockholmiplawreview.com/wp-content/uploads/2022/10/Online_2_IP_Jubileumsnummer-2022_A4.pdf (accessed 24 April 2023).

21 D A Gerstner and J Staiger (eds) *Authorship and Film* (Routledge New York and London 2003), 4.

The presumption of authorship rules in Article 15 of the Berne Convention were introduced with respect to individual authors; however, since then, the broader application of this presumption to all kinds of rights of ownership has been invoked in both case law and jurisprudence.²² In Lithuania specifically, there was an earlier Supreme Court of Lithuania precedent established in 2006,²³ where the court clarified that the presumption of authorship in exceptional circumstances shall be indicative in establishing the holder of the copyright to a computer program.²⁴

In this precedent, the ‘appear on the work in the usual manner’ and ‘in the absence of proof to the contrary’ conditions of the presumption of authorship were instrumental for the court in establishing the identity of the rightholder. The court held that an undisputed reference to copyright ownership in the copyrightable work indicating that a specific person is the exclusive holder of all rights (the owners of computer software copyright in this particular case) is an acceptable way to substantiate the ownership of these rights.

Lithuanian copyright law (Article 12 of the Lithuanian Law on Copyright and Related Rights) also seems to support the broader application of the presumption of authorship: ‘An author **or other copyright holder** may notify the public of his or her property rights by using a copyright mark. It consists of three elements: the letter C in a circle or in brackets, the name of the author or other copyright holder and the year of the first publication of the work’ (emphasis added).

Interestingly, the phrase ‘other copyright holder’ was introduced during the transposition of IPRED into Lithuanian copyright law, and hence, there was a claim that it had to be interpreted in view of the specific language of IPRED.

The aforementioned Supreme Court of Lithuania precedent and this small hint in substantive law gave rise to the hope that in 2021 the courts would interpret the presumption of authorship broadly in favour of the holders of composite copyrights, including book publishers. Moreover, in support of their rights, the plaintiffs in the *visosknygos.lt* case provided thorough evidence of copyright ownership notices in all pertinent works. For each book involved in the case, a copy of the book covers and title sheets—indicating the publisher and their copyright references, international standard book number (ISBN) and bibliographical data—was provided, and this evidence was not disputed.

Nevertheless, as was already noted, the aforementioned earlier precedent was established before IPRED was transposed into Lithuanian copyright law. Ultimately, in the 2021 attempt to interpret the presumption of authorship, the narrow language of Article 5(a) of IPRED prevailed, precluding the broad interpretation of the presumption of authorship.

It is important to note that the copyright public notice rule (which is not even mentioned in IPRED) and the authorship presumption rule are autonomous and not directly linked. Thus, a public copyright ownership notice presented in the usual manner shall be independently accepted as proof of ownership. Such a notice may also be separately relied on as a basis for the presumption of authorship/ownership, if applicable. The presumption of authorship is not *expressis verbis* linked to the copyright mark or the copyright notice. For the presumption to apply, it is sufficient to indicate the author in the work in the usual manner. In book publishing, it is customary to indicate the author, translator, publisher and layout designer in various ways—not only through copyright notices but also in the title pages, bibliographic description, covers, book annotation, etc. Moreover, ISBNs²⁵ are used to identify books and their individual publishers. Bibliographic descriptions of books (used for citation) that identify the author and the publisher are also standardized. The use of any of these methods shall be satisfactory to meet the requirement of ‘to appear on the work in the usual manner’ in Article 5(a) of IPRED (and Article 15(1) of the Berne Convention).

The courts in the *visosknygos.lt* case focused on the express language of Article 5(a) of IPRED and ruled that the authorship presumption only applies to individual authors and not to publishers. The earlier precedent was dismissed based on specific language that limited it to computer software cases. It was also deemed that

22 Ricketson and Ginsburg (n 19).

23 3 May 2006 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-311/2006. Available at <https://liteko.teismai.lt/viesasprendimupaiska/tekstas.aspx?id=1b821332-4182-4d11-8690-3f70e3f894e6> (accessed 24 April 2023).

24 The full argument of the court reads: ‘The panel of judges agrees with the cassator’s argument that this presumption applies only to the author of the work itself, and not to the holder of the author’s economic rights. At the same time, the panel of judges notes that the presumption of authorship rule must be applied with regard to the specificity of copyright as an object of civil law. [...] For the author themselves, the presumption of authorship rule applies with respect to both moral and economic rights. Other holders of copyright cannot rely on this presumption. [...] The panel finds that—in view of the fact that, under the law, the exclusive property rights to computer programs created by an employee in the performance of their duties belong to the employer [Art. 2.3 of the Directive 91/250/EEC], the plaintiffs’ exclusive property rights are indicated in the computer programs themselves, and the defendant has not presented evidence disproving this—the courts rightly regarded the plaintiffs as proper holders of exclusive property rights in the computer programs at issue.’

25 ‘What is an ISBN?’. Available at <http://www.isbn-international.org/content/what-isbn> (accessed 24 April 2023).

the IPRED rules and the Communication (Section V.4) firmly established the narrow interpretation of the presumption of authorship for the benefit of authors only, while the ownership presumption thereunder is only provided for the owners of related rights, rather than for copyright.

In a 25 February 2021 ruling in civil case No. e2A-467-241/2021 (the *visosknygos.lt* case), the Lithuanian Court of Appeal ruled that, according to the case law of the Lithuanian Court of Cassation and Lithuanian national copyright law, there is no presumption of copyright for publishers, and they cannot rely on the sample of evidence principle. As a result, the court needed to see evidence that the plaintiffs held the economic rights for all 400 works mentioned in the lawsuit, and only then could it decide on whether the plaintiffs were entitled to enforce their exclusive rights under national copyright law.²⁶

The author believes that this reasoning of the court was fundamentally flawed in multiple ways:

26 The full argument of the court reads: '8. In the present case, the plaintiffs (book publishers) have applied to the courts for protection of their economic copyrights in the specific works published by them. The plaintiffs argued that their copyright was infringed by the defendants' illegal reproduction and distribution of the works on the www.visosknygos.lt website. The defendants opposed the action and contended that it should be dismissed, inter alia, on the ground that the applicants had not shown that they held the copyright in the specific works.

[...]

12. [National copyright law] provides that the economic rights of authors may be transferred by contract, by inheritance or by any other means prescribed by law. [...] the economic rights of authors may be transferred by publishing contracts. Under this agreement, the author or other copyright holder transfers or grants to the publisher, for an agreed royalty, the right to reproduce by print or other means a work of literature, science or art, by producing a reasonable number of copies to meet reasonable public needs and the right to distribute them.

13. According to the case law of the court of cassation, the publisher's right to reproduce a work conferred by a publishing contract does not extend to the publisher's obligation to distribute the reproduced work unless the parties have agreed in the contract to grant such a distribution right. The obligation of the publisher to distribute their reproduced work arises only if such a right is granted to them by a publishing contract (Item 28 of the Order of the Supreme Court of Lithuania of 6 December 2016 in civil case No. e3K-3-497-611/2016).

14. [National copyright law] establishes the presumption of authorship, according to which a natural person whose name is customarily indicated in a work is to be regarded as the author of that work, unless proven otherwise. The Court of Cassation, interpreting [these rules], has stated that the rule of presumption of authorship applies to the author's own moral and economic rights, but other holders of copyright cannot rely on this presumption (Supreme Court of Lithuania ruling of 3 May 2006 in Civil Case No. 3K-3-311/2006).

[...]

16. Thus, according to the relevant legal framework and the case law of the Court of Cassation, the presumption of copyright on the part of publishers is absent, and without the possibility to rely on the sample of evidence principle, the courts hearing the case, in order to properly decide the case, had to establish that the plaintiffs were the rightful holders of the economic rights of all 400 works referred to in the lawsuit, who are entitled to enforce their exclusive rights in the manner provided for in [the national copyright law]. NB: the sample of evidence principle is explained further in this article.

First, although this interpretation appears to be in line with the strict wording of Article 5(a) of IPRED, which uses narrow language in mentioning only the individual author, the objectives of EU copyright law that require a 'high level of copyright protection in the EU' (see recital 4 of Directive 2001/29/EC; recitals 10 and 21 of IPRED) and the general obligation of Article 3 of IPRED have to be taken into consideration. The purpose of IPRED, as stipulated in Article 3, is to facilitate the ability of holders of copyright and related rights to defend their rights by providing them with measures, procedures and remedies that are fair and equitable and shall not be unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive. To the author, the said rules primarily mean that the wording of the substantive law must not be interpreted restrictively as regards copyright protection, and very similar situations shall be treated equally *per analogiam*. In any particular case, the rules benefiting the author shall extend at least to the first owner of the composite copyright, as they are both the sources of the work and are in identical situations with respect to enforcing their rights.

Second, one objective of IPRED was the expansion of the presumption of authorship to the presumption of the ownership of related rights.²⁷ Note that the title of Article 5 of IPRED is not limiting and is indicative of its general intent. This intent further implies the need for non-restrictive interpretation and has to be taken into account.

Third, as was rightly pointed out by the Supreme Court of Lithuania in a 2006 precedent, the 'presumption of authorship rule must be applied with regard to the specificity of copyright as an object of civil law'. This implies that, in any particular case, the specifics of a book as a composite copyright object and the specificity of online commercial infringement have to be taken into account. It is very important that the same principle is reiterated in recital 17 of IPRED: measures, procedures and remedies should be determined in each case in a manner allowing the specific characteristics of that case to be taken into due account, including the specific features of each IPR. Again, this implies that the specifics of composite copyright, book publishing and the commercial scale of infringement had to be taken into account in the *visosknygos.lt* case, but they were not. At the very least, composite copyright rightholders shall have the possibility to establish the ownership of their copyright—if not through presumption, then by the usual means accepted in copyright law. These means involve relying on the copyright

public notice rules, which provide autonomous evidence of copyright ownership and a prerequisite condition for the presumption of copyright.

Fourth, the general obligations under Article 3 and recital 17 of IPRED indirectly hint that the IPRED rules have to be interpreted broadly. The need for a broad interpretation of IPRED has also been supported by both CJEU case law²⁸ and commentators.²⁹ There is no specific rationale in IPRED outlining why copyright and related rights must be subject to different levels of protection. For the presumption of authorship, it shall entail that there are no particular reasons why the circle of subjects that this presumption benefits should be narrower than in the case of the presumption of the ownership of related rights. If the presumption applied only to specific objects of copyright, eg copyright in computer software, and not to the owners of rights in other composite copyright objects as well as to the holders of related rights, then the holders of copyright in other works—even if they had made efforts to state their rights publicly—would be discriminated against and subjected to a lower level of protection of their rights. This clearly contravenes the goals of both IPRED and EU copyright law.

Improper reliance on an earlier precedent—the 6 December 2016 ruling of the Supreme Court of Lithuania in civil case No. e3K-3-497-611/2016³⁰—deserves a separate mention. The court clearly erred by relying on this case law, as it explicitly deals with a publisher's obligation (not their right) to actively distribute published work, and there was no dispute over whether the publisher had the right to distribute work under a publishing contract in the cited case.

The broad interpretation of the presumption of authorship in the case of computer software already enjoys support in the case law (see above). The broad presumption of authorship is also substantiated by the practice of French courts in interpreting generally the same substantive rules. According to a doctrine developed by French courts,³¹ a legal person acting in their own name can

rely on the presumption of copyright to the extent of their rights until it is rebutted. This case law in France is an example of the divergence of the substantive copyright law that is harmonized by IPRED; therefore, it is extremely relevant for the interpretation and application of the same norms across the whole EU.

Undisputed copyright notice made in the 'usual manner' and present in historic records shall be sufficient evidence for recognizing the ownership of copyright, even if it is not formally recognized as the presumption of copyright. This is especially important in cases of composite copyright ownership. Yet, in the *visosknygos.lt* case it was not accepted by the court. The lack of direct transposition of the general obligation under Article 3 of IPRED alone is a warning sign, as it suggests the ambiguity of the national rules implementing IPRED and is thus a sufficient basis on which to question the relevant national law in the CJEU.

4. Article 6. Evidence

One of the key novelties introduced by IPRED into substantive copyright law was the sample of evidence rule introduced in Article 6(1):

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. **For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.** (emphasis added)

This rule was introduced as an option to avoid overstepping the regulatory powers of the EU in legislating on judicial procedure rules, which are reserved for national law under the EU founding treaties. The rule is explicitly based on the *reasonable evidence* principle of the common law civil procedure rules and is especially prevalent in the USA, where a matter of infringement of rights is often decided by a jury based on a certain evidentiary threshold.³² This principle is generally alien to the continental European civil procedure,³³ where the *principle of free*

²⁸ n 17.

²⁹ M Giannino, 'CJEU holds that right to information within Article 8 of Enforcement Directive can be asserted in separate proceedings' (2017) 12 *Journal of Intellectual Property Law & Practice* 636–638, <https://doi.org/10.1093/jiplp/jpx115>.

³⁰ 6 December 2016 ruling of the Supreme Court of Lithuania in the civil case No. e3K-3-497-611/2016. Available at <https://liteko.teismai.lt/viesasprendimupaiska/tekstas.aspx?id=55e81418-9861-4d93-9756-60a5f3bd9c1f> (accessed 24 April 2023).

³¹ Cour de cassation, civile, Chambre civile 1, 28 November 2012, 11–20.531, Inédit: Available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000026709932> (accessed 24 April 2023); Cour de cassation, civile, Chambre civile 1, 14 novembre 2012, 11-15.656, Publié au bulletin: Available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000026642342> (accessed 24 April 2023); Cour de cassation, civile, Chambre civile 1, 10 juillet 2014,

13-16.465, Inédit: Available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029244944> (accessed 24 April 2023).

³² T Waldman, 'Origins of the legal doctrine of reasonable doubt' (1959) 20 *Journal of the History of Ideas* 299–316, <https://doi.org/10.2307/2708111>.

³³ A Stein, *Foundation of Evidence Law* (OUP Oxford 2005), 107–140, 214–244.

evaluation of evidence, allowing individual judges to evaluate evidence based on their internal convictions, is the predominant rule. In some countries, this even requires the *full conviction of the judge*, be it a *conviction intime* or a *conviction raisonnée*—a reasoned or reasonable conviction (meaning that the judge must justify their decision through valid arguments).³⁴ The *reasonable evidence rule* clearly goes against the *full conviction rule*, and this conflict is well versed in the literature on evidence law³⁵ but is glossed over by IP scholars and IPRED commentators.³⁶

The optionality of the reasonable evidence rule is a clear hint at the aforementioned controversy. However, the critical flaw in this rule is not its optionality, but the limitation of the rule strictly to procedural requests for evidence, rather than for general evidence of copyright infringement. This limitation has been noted by defendants in copyright infringement cases and has eventually made its way into copyright infringement case law.

The most damaging aspect of online copyright infringement is that, in most cases, it involves the mass infringement of a multitude of works. This is especially true for commercial-scale infringements— websites focused on reproducing and distributing copyright works. The *visosknygos.lt* case involved more than 400 books published by the plaintiffs and illegally reproduced and distributed by the defendants, while many more books by other publishers were likely infringed upon on the website. The *linkomanija.net* case presented the infringement of thousands of audiovisual and music works. If some form of proportional and reasonable evidence rules were not applied, this would mean that parties intending to enforce their copyright would have to produce evidence for each and every work that is infringed upon, which is obviously extremely burdensome.

In the case of the infringement of hundreds of works or more, it is disproportionately difficult and expensive for the enforcing parties to produce evidence in respect of each copyright object to which their rights have been infringed and to do so in the manner required for such evidence to be admissible in a court of law according to the typical rules of a civil procedure. It is important to note that this is relevant both (I) to the evidence of the ownership of copyright to each and every infringing work and (II) to the evidence of the actual infringement of each and every work.

There was some hope that the notion of a sample of evidence as a form of reasonable evidence could be relied

upon as a special rule in this situation, as happened in the lower Lithuanian courts (the Vilnius District Court and the Lithuanian Court of Appeal) in the lead-up to the review of the *linkomanija.net* case by the Supreme Court of Lithuania. The plaintiff (the collecting society) in this case relied on a sample of works to establish the scope of the infringement, as it was extremely burdensome to catalogue all of the torrent files offered on the website. The lower courts agreed that the sample of evidence rule should apply in establishing the scope of the infringement (see Sections 41 and 114 of the 4 July 2019 ruling in the civil case No. e3K-3-236-969/2019), yet the Supreme Court of Lithuania adhered to the strict language of IPRED and struck down this interpretation. In the said ruling, the court argued that the principle of selectively assessing a sample of all evidence under national copyright law is not the appropriate procedural tool in order to determine the existence or non-existence of facts relevant to the final judgment, as required by the civil procedure rules. Instead, this principle is intended to assess, on a preliminary basis, the existence of rights infringement only to the extent necessary for deciding on an interim measure, such as a request to obtain evidence from the opposing party.³⁷

In the *linkomanija.net* case, this argument was not decisive as the plaintiff was a collecting society, which can (and, in this case, did) rely on other special rules applicable to collecting societies in order to substantiate their rights to enforce copyright. The author believes that in the *linkomanija.net* case the Supreme Court of Lithuania was limited by the facts of the particular case, where copyright was enforced by a collecting society not against copyright infringers but against internet intermediaries. Therefore, the court was simply indolent when it came to explaining the relevance of Article 3 of IPRED for the general interpretation of the sample of evidence rule under Article 6 of

37 The full argument of the court reads: '115. It should be noted that the provisions of [national copyright law] were enacted through the implementation of the provisions of Article 6 of Directive 2004/48/EC. [National copyright law] provides that a court which has provided all the evidence reasonably available and sufficiently substantiated its claims, and which has indicated the evidence available to the opposing party and substantiated its claims, may recover the requested evidence from the opposing party in accordance with protection of confidential information. The court considers a sufficient sample of the number of products to be convincing evidence that there has been a violation of the rights established by this law.'

116. Having regard to the foregoing, the panel of judges finds that the principle of selective assessment of sample of all facts under [national copyright law] is not the right procedural tool which may be used to rule on the existence or non-existence of facts relevant to the final judgment, that is within the meaning of [the civil procedure rules] when assessing all evidence. This principle is intended to assess, prima facie, the existence of an infringement of rights and only to the extent that such an assessment is necessary for deciding on an interim measure [...], i.e., request to obtain evidence from the opposing party.'

34 M Schweitzer, 'The civil standard of proof – what is it, actually?' (2016) 20 *International Journal of Evidence & Proof* 217.

35 Ibid.

36 Cumming et al (n 12) 70, 104, 295.

IPRED, yet the interpretation in the linkomanija.net case proceeded as the general rule of evidence in the latter case law.

In the *visosknygos.lt* case, this interpretation was critically detrimental in establishing both copyright ownership and the scope of infringement. It was expressly cited by the Lithuanian Court of Appeal in the 25 February 2021 and 25 May 2021 rulings in the *visosknygos.lt* case, highlighting the inability to rely on the broad authorship presumption and the inability to rely on the sample of evidence rule.³⁸

Regardless of the actual facts of these cases, the author believes that the sample of evidence rule always needs to be interpreted in the context of the general obligations of Article 3 of IPRED—that is, copyright protection shall be ‘fair and equitable and shall not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays’. Moreover, it shall be ‘effective, proportionate and dissuasive’ and shall provide for ‘safeguards against abuse of the rules’. Requiring official translations for the full chain of evidence for each and every

work while disallowing evidence of copyright notice in the ‘usual manner’ is an obvious departure from the general obligations according to Article 3 of IPRED.

In view of the specific circumstances of the *visosknygos.lt* case—where most of the pirated books were Lithuanian translations of foreign originals, meaning that the evidence of copyright ownership was not in Lithuanian and was thus subject to foreign law—the requirement to provide full evidence with official translations for each and every book is clearly unnecessarily complicated and costly, entails a significant delay and is neither effective nor proportionate. It is certainly dissuasive—not to the perpetrators (the defendants) but to the rightholders in enforcing their rights, which is ironic in the context of Article 3 of IPRED.

Even in the absence of specific rules, the sample of evidence principle may be derived from the said general obligations and the principle of proportionality, which is a mandatory element of the rule of law. The principle of proportionality shall limit verbatim interpretations of the substantive copyright rules and the evidence rules of civil procedure. This is highlighted in the Communication (Section III.1) but was obviously not evident to the courts.

It is important to note that the general obligations under Article 3 of IPRED specifically mention the costs of enforcement as an important consideration. The costs of remedies must be proportionate, reasonable and fair and, crucially, must not exceed the value of the remedy itself. It is clearly disproportionate to require that the applicant incur costs pertaining to the translation of hundreds of pages of documents in order to establish copyright ownership, where such costs are in excess of the potential damages and where evidence of undisputed historical copyright notices in the ‘usual manner’ was not admitted. These rules are *lex specialis* to the general rules of evidence and judicial procedure and even other specialized substantive laws.³⁹ Ascertaining *lex specialis* status is particularly important for the protection of copyright against mass copyright infringements online on a commercial scale, where requiring the production of all officially translated evidence and documents substantiating the ownership of the copyright (full chain of legal relationship, succession and rights licensing or assignment starting from the original authors) of a large number of composite copyright objects is unmistakably disproportionate and unfair and would render the remedy itself economically meaningless. The cost of translations would

38 The full argument of the court reads: ‘15. The case-law of the court of cassation also states that the principle of the sample of evidence ([national law reference]) is not the right procedural tool which may be used to rule on the existence or non-existence of facts relevant to the final judgment, that is within the meaning of [the civil procedure rules] when assessing all evidence. This principle is intended to assess, prima facie, the existence of an infringement of rights and only to the extent that such an assessment is necessary for deciding on an interim measure [...], i.e., request to obtain evidence from the opposing party. (Section 116 of the 4 July 2019 Ruling of the Supreme Court of Lithuania in civil case No. e3K-3-236-969 / 2019).

16. Thus, according to the relevant legal framework and the case-law of the Court of Cassation, the presumption of copyright on the part of publishers is absent, and without possibility to rely on the sample of evidence principle, the courts hearing the case in order to properly decide the case had to establish that the plaintiffs were the rightful holders of the economic rights of all 400 works referred to in the lawsuit, who are entitled to enforce their exclusive rights in the manner provided for in [the national copyright law]. In the present case, in order to support their rights, the applicants have submitted contracts with the authors. However, most of the written evidence (publishing contracts) provided by the applicants is presented in foreign languages and is not accompanied by translations into the official language [as required by the laws of civil procedure].

17. The panel of judges notes that in accordance with [the laws of civil procedure], all procedural documents and their annexes shall be submitted to the court in the official language, except for the exceptions provided for in the [laws of civil procedure] and other legal acts. Documents not translated into Lithuanian are inadequate evidence and the court may not rely on them ([references to the national laws of civil procedure]). The Court of Appeal did not find any exceptions to relieve the applicants of the obligation to provide written evidence translated into the official language. In their appeal, the applicants claim that they have submitted partial translations of the sample of these documents, and this was not taken into account by the court of first instance. In the opinion of the panel of judges, notes made by pencil (pen) on some contracts in Lithuanian cannot be considered a proper translation within the meaning of [the laws of civil procedure], as the person who performed the translation is not indicated. In addition, the notes are made only for the titles of the works and the term of the concluded contracts, but for the other essential terms—such as the content of the transferred rights—there are no notes’.

39 M Bräuß, ‘Hamburg court rules that copyright enforcement trumps bank secrecy’ (2017) 12 *Journal of Intellectual Property Law & Practice* 86–89.

exceed the damages claims made in the case several times and would be disproportionately time-consuming.

In addition to *lex specialis* and economic considerations, there are other important arguments as to why the requirement of full evidence is disproportionate: (I) the disclosure of such documents would disclose the confidential information and personal data of unrelated parties (eg the terms of a contract for celebrity authors and authors' agents) and (II) jurisdictional complications may be uncovered, where contracts are subject to foreign substantive law and the ownership/assignment of rights need to be interpreted in the context of pertinent law, thus presenting a major complication of the burden of proof.

One additional feature of the *visosknygos.lt* case was that the plaintiffs were also competitors. Therefore, the plaintiffs had an additional legal obligation to protect confidential information from each other, as competition laws could be violated. However, national civil procedure laws do not provide for any safeguards in this case.

As was already mentioned, in the *visosknygos.lt* and *linkomanija.net* cases, the courts did not even consider Article 3 of IPRED when deciding on the burden of proof and evidence, which in IP enforcement cases is a *lex specialis* with respect to the basic national rules of evidence and judicial procedure.

II. Conclusions

IPRs without enforcement amount to little more than bragging rights. This is why legislators worldwide have made significant efforts to develop a specialized legal framework for enforcement in the realm of IP law.

IPRED has been a significant legislative achievement that has aided the enforcement of IPRs within the Single Market. However, in the context of the rapidly evolving scale and nature of infringements, the language of IPRED is increasingly showing its age. Infringers have managed to adapt to the rules of IPRED and navigate the intricacies of legal language when challenged in a court of law. The recent Lithuanian case law examined in this article demonstrates how the principles of IPRED have been eroded by verbatim interpretations and a lack of direct transposition. The *visosknygos.lt* and *linkomanija.net* cases have exposed essential limitations and difficulties in interpreting the rules of Articles 3, 5 and 6 of IPRED and pertinent national copyright law, which have not been addressed in previous research and case

law. The national law and the courts have not ascertained that the rules of IPRED are *lex specialis* with respect to the basic rules on the enforcement of legal rights and judicial procedure and have to be interpreted broadly in consideration of the purposes of IPRED. This results in a significant lapse in the role of the general obligation (Article 3 of Directive IPRED) for the general rules of the burden of proof and evidence in IP enforcement cases and creates excessively restrictive interpretations of the presumption of copyright (Article 5 of IPRED) and evidence rules (Article 6 of IPRED).

Although the eventual outcomes of these cases were victories for the rightholders, these legal wins proved to be Pyrrhic. In both instances, the courts delivered highly restrictive interpretations of the substantive rules, which are dissuasive and disproportionately costly for rightholders attempting to enforce their copyright against online mass infringers in the future.

This situation undoubtedly contributes to the persistence of online infringement of IPRs, as rightholders are deterred by the excessive burden of proof and economically disincentivized from enforcing their rights. It is important to note that the problems identified are not specific to copyright, as restrictive interpretations of a general obligation, burden of proof and evidence rules would apply to all cases of the enforcement of IPRs.

This state of affairs highlights the urgent need for clarification of IP enforcement rules within the EU, extending beyond the Guidance Communication COM(2017)708 final. The author specifically advocates for the initiation of new EU-level consultations and studies and potentially an updated Communication focused on clarifying Article 3 of IPRED and a broad, objective-cognizant interpretation of IPRED. In the author's opinion, the general obligation, if ascertained correctly, provides sufficient space to align the national implementation of IPRED with the evolving online piracy landscape without necessitating major legislative reform at the EU level. In the eastern EU Member States, this approach may be the most expedient way to address the generic evidence and judicial procedure rules in national law in IP law cases since national courts are eager to look towards EU-level official guidance on interpreting EU law. The legal analysis, arguments and reasoning presented in this article may be consulted in this process and also utilized to address—and, ideally, shape—the approach in future enforcement cases.