

INTERIM MEASURES IN IP LITIGATION FROM THE MACEDONIAN PERSPECTIVE

Abstract: *Despite the fact that litigation is supposed to be the final option in the event of an infringement of the intellectual property rights, many rights-holders awaiting the final outcome of the lawsuit could minimize the chances to success, especially in cases when a danger of imminent and irreparable harm occur. Therefore, due attention must be granted to the specific measures for permanent protection of intellectual property rights.*

This article takes a sectoral approach to the enforcement of intellectual property rights and it focuses on interim (provisional) measures. It provides an overview of the most important features of the statutory regulation of interim measures in the Republic of Macedonia, in comparison to the most important international and European documents on the subject question. The main goal of this article is to analyze the level of harmonization of the national legislation with the EU legislation.

Keywords: *interim relief, interim measures, intellectual property rights, IP litigation.*

1. Introductory remarks

The request for interim measures is powerful and frequently the key legal remedy available to litigants in civil cases. The efficacy of the civil proceedings could be severely harmed if, after the completion of the proceedings, the party that succeeded in the dispute cannot exercise its rights, due to the reason that the assets that could satisfy the claim were sold or placed out of reach and, consequently, made unavailable for that party. Even more, the mere course of the proceedings might be affected, if evidences that might influence the resolution of the dispute are hidden or destroyed by one of the parties of the dispute, or by a third party. Interim relief, or the lack of it, can have a substantial or even determinative effect on the outcome of any

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case, whether submitted to litigation or arbitration.¹ Perhaps, the interim measures are not substitute for civil litigation, but there is no doubt that they have essentially similar goals as the litigation itself.

The European Court of Human Rights (ECtHR) also acknowledges the significance of the interim measures in the determination of “civil rights and obligations”. In *Micallef v Malta* case, the ECtHR observed that there is widespread consensus among the Council of Europe Member States, which either implicitly or explicitly provides for the applicability of Article 6 guarantees of the European Convention on Human Rights (ECHR) to interim measures, including injunction proceedings.² It seems that this case is a turning point in the ECtHR case law, as in the same judgment the ECtHR stated that:

*“The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge’s decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same ‘civil rights or obligations’ and have the same resulting long lasting or permanent effects.”*³

From the perspective of the intellectual property rights, this interim (preliminary, interlocutory, provisional) relief is even more important and it can essentially affect the final outcome of the IP dispute. In the majority of cases, the enforcement of intellectual property rights via interim relief seems to be crucial. Speaking about the importance of the interim relief in obtaining quick and early protection of a copyright, professor Westberg said: *“This right can be so diluted in value that the applicant would not be served by the relief that a subsequent injunction could give. There are, for all purposes, no copyrights left to protect.”*⁴ Therefore, several international conventions, as well as European Regulations and Directives have already compelled the Member States, in separate areas of IP law, to empower their national courts to impose interim measures against infringers.

At international level, the instrument that had the greatest effect is the Agreement on Trade-Related Intellectual Property Rights (TRIPS) of the WTO.⁵ The TRIPS Agreement introduced global minimum standards for protecting and enforcing nearly all forms of

¹See: Raymond J. Werbicki, “Arbitral Interim Measures: Fact or Fiction”, Chapter 8, *AAA Handbook on International Arbitration & ADR*, 2010, 89-103, p. 89.

²See: *Micallef v Malta*, Application no. 17056/06, Judgment of October 15, 2009, para. 78.

³*Ibid*, para.79. The new approach of ECtHR in: section 5, subsection (c), para. 83- 86.

⁴See more in: P. Westberg, *Interim Measures and Civil Litigation*, *Scandinavian Studies in Law*, Vol. 51, 2007, p. 533-558.

⁵The TRIPS agreement was signed in Marrakesh, Morocco on April 15, 1994 and came into force on January 1, 1995.

intellectual property rights. In addition to the minimum protection standards, the TRIPS Agreement also introduced detailed obligations on the enforcement of intellectual property rights. All Member States have to comply with these standards by modifying, where necessary, their national regulations according to the rules of the Agreement. Part III of this Agreement deals with enforcement of intellectual property rights and contains special provisions on provisional measures.⁶ The Republic of Macedonia became a member of WTO on April 4, 2003 and the TRIPS Agreement came into effect at the same time.

At European level, Directive 2004/48/EC on the Enforcement of Intellectual Property Rights (IPRED)⁷ has been implemented in order to promote harmonization in this field on the procedural level and to reduce the infringements of intellectual property rights. IPRED requires the EU Member States to make certain measures available to rights-holders, including the ability to apply for an injunction (interlocutory or permanent) intended to prevent an imminent infringement or to forbid the continuation of the alleged infringement (Articles 9 and 11). It also specifies that these measures, like other procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by the IPRED shall be fair and equitable and shall not be unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays. They must also be effective, proportionate and dissuasive and they should be applied in such a manner as to avoid the creation of barriers to legitimate trade and to allow the application of safeguards against their abuse (Article 3).⁸

Therefore, this paper seeks to contribute to the study of the interim measures in the European context, focusing on the interim measures from the Macedonian perspective. We shall commence with definition, characteristic and purpose of the interim measures. Thereafter, we shall focus on the types of interim measures and conditions for granting them and lastly, we shall elaborate different procedural issues regarding the granting and enforcing of interim measures.

2. Definition, characteristics and purpose of interim measures

Interim measures are relief (also referred to as “provisional” or “conservatory” relief) that the court may grant to a party before the final judgment on the merits of the case, in order to protect the party’s position or assets pending judgment. The interim measures typically take a form of an injunction restraining a party from disposing of or

⁶See: Section 3, Article 50 of the TRIPS Agreement.

⁷Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, (known as “(IPR) Enforcement Directive” or “IPRED”), *Official Journal of the European Union* L 157/45-86.

⁸For more information about the IPRED see: K. Huniar, The Enforcement Directive: Its Effects on UK Law, *EIPR*, 2006, p. 92-99.

otherwise dealing with its assets, or from taking (or refraining from) other action necessary to ensure that a final award will be enforceable.⁹ They can also take a form of an order that specific assets are frozen, or alternatively, seized, pending the judgment, or that an amount of money is paid into court on an interim basis. The interim measures remain in force until the litigation is disposed of, until the preconditions for enforcement are met, or until the need for temporary protection exists.¹⁰

In the legal theory, there is a distinction among three main categories of interim measures. These are: a) conservatory measures, which tend to secure the future satisfaction of a substantive right; b) regulatory measures, granted in order to settle provisionally disputed situations between the parties, and c) anticipatory measures, which temporarily satisfy the substantive right before its setting by final judgement.¹¹

Several characteristics are immanent to interim measures: a) they are ancillary to the aim of the main proceedings i.e. substantive legal action on the merits of the case; b) they are based on the principle of disposition; c) they are provisional in nature, not final and definitive; d) they are temporary, meaning that they are time limited; e) they are variable in a sense that they can be modified and finished when necessary; and f) they are proportional to the objectives of the parties.¹²

The above mentioned leads us to the conclusion that the purpose of the interim measures is to preserve the rights and interests of the parties in civil cases, by preventing irreparable damage or loss that can occur before the court makes a final decision on the merits of the claim.

The interim measures are most frequently requested in cases involving debt claims or property disputes in situations when the debtor threatens or intends to remove or dispose of his property to defraud his creditor or if the defendant in the suit threatens to dispossess the claimant or otherwise cause injury to the claimant in relation to the disputed property. The interim measures are also requested in family law cases (such as the cases of maintenance, the guardian and upbringing of children etc), as well as in IP litigation.

In most IP cases (usually infringement cases), the proceedings on the merits are preceded or at least accompanied by requests for interim measures, in particular when there is necessity for averting of imminent danger, retaining unchanged a status subject to the law-suite or need of legal protection of special appreciation. The purpose of the

⁹See: A. Јаневски - Т. Зороска – Камилловска, *Граѓанско процесно право, книга трета, извршно право*, Скопје, 2011, p. 211.

¹⁰Ibid, p. 183.

¹¹For more details see: M. Dika, *Граѓанско оvršno право, I knjiga, Opće građansko ovršno право*, Zagreb, 2007, p. 850.

¹²See: C.A. Esplugues, “Provisional Measures in Spanish Civil Procedure”, in: R. Stürner and M. Kawano, (eds.), *Comparative Studies on Enforcement and Provisional Measures*, Tübingen, Mohr Siebeck, 2011, p. 207. Also available at SSRN: <http://ssrn.com/abstract=1952743>.

requested interim measures is to ensure that IPR infringements cease as soon as possible.

3. Legal framework for interim measures in IP litigation in Macedonia

The increasing awareness about the significance of the intellectual property rights for the progress and prosperity of the country has resulted with very cautious steps in statutory regulation of this domain in the Republic of Macedonia. The guiding principle in this process was the perception that “without effective means of their enforcement, innovation and creativity would be discouraged and investment diminished”.¹³

Starting from 1993 and 1996, when the first Law on industrial property and the Law on copyrights were enacted, the statutory regulation of the intellectual property rights was constantly improved and it has reached a long-awaited expression with the new Law on industrial property (IPL) of 2009¹⁴ and the new Law on copyright and neighbouring rights (CL) of 2010.¹⁵

The IPL, as well as the CL contain separate provisions on judicial protection of industrial property rights and copyrights,¹⁶ amongst which there are provisions for interim (provisional) measures in IP cases.¹⁷ Although these laws have special provisions on interim measures in IP case (*lex specialis*), the procedure for granting such measures is also governed by the Law on security of claims (SCL) of 2007¹⁸ (*lex generalis*).¹⁹ A subsidiary application of the SCL derives from Article 313/7 of IPL and Article 175/6 of CL.²⁰

4. Types of interim measures in IP cases and conditions for imposing them

4.1. Interim measures in industrial property rights cases.

According to Article 313/1 of IPL, the court may impose the interim measures upon request of the person who can lodge an action for infringement of his/her rights established by this Law, if he/she can

¹³This principle is set down in para. 3 of the Preamble of IPRED.

¹⁴*Official Gazette of RM*, no. 21/09 and 24/11.

¹⁵*Official Gazette of RM*, no. 115/10 and 51/11.

¹⁶See: Part X of IPL and Chapter 5 of CL.

¹⁷For different approach in some European countries see: G. Cumming, M. Freudenthal, R. Janal, *Enforcement of Intellectual Property Rights in Dutch, English and German Civil Procedure*, 2 ed., Kluwer Law International, 2008.

¹⁸*Official Gazette of RM*, no. 87/2007.

¹⁹The SCL sets down rules for different types of remedies for securing claims, such as judicial pledge on movables, judicial mortgage, preliminary measures, provisional measures and fiduciary transfer of ownership. The list of these remedies in the SCL is not *numerus clausus*, as it provides for the possibility to set down another type of remedies, according to some other laws.

²⁰Those articles read as follows: “In the procedure for granting interim measures the regulations for security of claims shall be applied, if otherwise is not provided by these laws”.

present evidences in order to make probable that his/her right has been or is likely to be infringed. It is evident that the granting of interim measures is subject to two specified preconditions. First, there should be a *prima facie* case in favour of the claimant, which means that the claimant must prove that it is allowed to enforce the alleged right and that there are good reasons to believe that such right has been or is likely to be infringed by the defendant.²¹ In other words, this condition refers to the reasonable probability of claimant's success with the alleged claim. *A contrario*, if, upon examination, it appears that the facts alleged by the applicant cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved. Second, although the IPL does not explicitly prescribe it, the claimant must prove that the activity of the alleged infringer will cause irreparable harm before the issuing of a first-instance decision, if an interim injunction would not be imposed.²² In addition, depending on the specific interim measure requested, the court may require submission of further evidence showing the need for imposing the requested measure.²³

The request for interim measure can be lodged prior to filing the substantive legal action on the merits of the case, which means before the main proceedings are commenced, as well as at any point during the proceedings (*arg. ex.* Article 313/7 IPL).²⁴ If the interim measure is imposed prior to the commencement of proceedings, the applicant will be ordered to initiate proceedings for justifying that measure within a specified time limit, not exceeding twenty (20) days from the day of the delivery of the decision to the applicant (Article 313/7 IPL).²⁵ If the proceedings on the merits are not initiated within this time limit, the decision for interim measure shall cease to have effect.

The list of interim measures set down in the IPL is not *numerus clauses*.²⁶ The industrial property right owners may request

²¹ It means that the claimant has to "provide reasonably-available evidence in order to satisfy the court with a sufficient degree of certainty that the applicant is the right-holder and that his right is being infringed, or that such infringement is imminent". See Article 9/3 of the IPRED.

²² It explicitly derives from Article 35/2 of the SCL.

²³ From the comparative point of view, these are more or less the preconditions for granting interim measures in the majority of legislations, not only in Europe, but worldwide. For example, in the UK (but also in Australia, Canada, etc.) in assessing whether to grant an interim measure, the courts follow the principles laid down in *American Cyanamid Co. v Ethicon Ltd case* (1975). According to this case: 1) the claimant can show that there is a serious issue to be tried; 2) the court considers that the balance of convenience must be in favour of the rights-holder, taking into account all circumstances, including the strength of the case, the adequacy of a remedy in damages for either part following the outcome of the final hearing (and the parties' ability to pay those damages) and 3) the status quo of the pending trial must be preserved.

²⁴ See also Article 31 of the SCL.

²⁵ In line with Article 7/3 of IPRED.

²⁶ Articles 34 and 36 of the SCL also include a general reference to any measure that the court may consider necessary to grant in certain civil cases.

the court to apply one or several²⁷ of the following interim measures, which may be relevant to IP infringements:

- Prohibiting all acts of infringement and their continuation;
- Seizure, excluding from commerce and preserving the infringing products and the means of manufacturing them, as well as documents connected with infringement,²⁸
- Other similar measures provided for by law.²⁹

The IPL also sets down provisions applying in cases of infringements committed on a commercial scale or, more precisely, in situations where the infringement of an industrial property right is committed during the commercial activity with an intention to earn profit, causing at the same time irreparable harm. In such a situation, besides the previously mentioned interim measures, upon request of the claimant, the court can order precautionary seizure of the movable and immovable property of the alleged infringer (defendant) that are not in direct connection with the infringement, including the blocking of his/her bank accounts and other assets (Article 313/2 IPL). The injured party (claimant) must demonstrate the circumstances likely to endanger the recovery of damages and to present evidences therefore.

In order to exercise this power, the competent court is empowered to order the alleged infringer or some other persons handling such documents and information, to communicate the bank, financial or commercial documents or an appropriate access to the relevant information (Article 313/3 IPL). The court is obliged to secure the secrecy of keeping the information and to forbid their abuse.

4.2. Interim measures in copyrights cases. Provisions similar to the above-mentioned are set down for provisional protection

²⁷See Article 39 of the SCL.

²⁸See, for example Decision TS. no. 102/10 of 28.12.2010 of the Primary Court in Strumica, for granting an interim measure “to list and seizure all the products of the defendant d.p.t.y. M. d.o.o.e.l.S., that are packed in wrapping material which infringes the registred trade mark, exclude them for commerce and the marketplaces, as well as seizure of documents, equipment and means for their further production“ – (Решение ТС.бр.102/10 од 28.12.2010 година на Основен суд во Струмица, со кое е определена привремена мерка “да се изврши попис и заплена на сите производи на тужениот д.п.т.у. М. д.о.о.е.л. С. кои се пакувани во амбалажа која ја повредува заштитената трговска марка, нивно исклучување од промет, од местата каде што се продаваат, како и заплена на документите, опремата и средствата за нивно понатамошно производство”), explained in the Judgment on the merits TS. no.3/12 of 22.5.2012, available at: <http://www.osstrumica.mk/Odluki.aspx?odluka=3063>.

²⁹Compare with Article 9/1 of IPRED specifying that the judicial authority may: “a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right-holder”, as well as “b) order 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.”

of copyrights. According to Article 175/1 of the CL, the court may impose the interim measures upon the request of the person who can lodge an action for infringement of his/her rights established by this Law, if there is a justifiable doubt for infringement of his/her right, in order to cease or desist any infringing act.

The court can order one or several interim measures, such as:

- Preventing direct infringement of the right;
- Temporary prohibition of infringement of the right or conditional order for paying a sum equivalent to the prescribed fine for that kind of infringement or laying the deposit in order to reimburse that kind of benefit;
- Seizure or prohibition of copy distribution which cause suspicion for infringement of rights, prohibition of its import and circulation for commercial purpose; and
- Other similar measures according to law.

The interim measures are usually imposed against alleged infringers. However, the CL also allows interim measures against intermediaries whose services are being used to infringe an IP right (Article 175/2 CL).³⁰ Consistent with IPRED, the CL sets down that the interim relief is not conditional on the intermediary being liable, so the right-owner is not obliged to prove that the intermediary is “aiding” or “abetting” the infringement or has contributed to the infringement due to his negligence or by failing to observe certain duties.

Furthermore, if the infringement is committed with an intention to acquire an economic advantage, and the injured party (claimant) demonstrates that the infringement will cause irreparable harm to him/her, the court can order precautionary seizure of movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. For the purposes of exercising this power, the court is empowered to order transfer of bank and financial documents or an appropriate access to the relevant information. The court is obliged to secure the secrecy of keeping the information and to forbid their abuse (Article 175/3 CL).

The request for interim relief for copyright protection can be filed prior to filing an infringement action, as well as at any point during the proceedings (*arg. ex.* Article 175/5 CL). If the interim measure is imposed prior to the commencement of proceedings, the applicant will be ordered to commence the proceedings for justifying that measure within a specified time limit, not exceeding twenty (20) working days from the day of delivery of the decision to the applicant. If the proceedings on the merits are not initiated within this time limit, the order for interim measures shall cease to have effect.

³⁰Unlike the IPRED, the CL does not mention the third parties. Compare with Article 9/1 (a) of IPRED: “*an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right*”.

5. Ex parte orders and the right of defence

On account of their nature and purpose, the requests for interim measures should be treated with a certain degree of urgency. The courts are obligated to deal with requests for interim measures promptly, without delay and with due diligence.³¹

Interim measures are usually granted after the court has heard both parties (*audiatur et altera partem*). Therefore, both parties should be convened to a hearing before the court in order to have an opportunity to be heard.³²

In IP cases, there is frequently need that the interim measures are granted promptly without the defendant having been heard. This happens mainly in cases when it is unlikely that the rights-holder will be able to recover damages or if there is a risk that evidence will be destroyed, or that the proceedings will be delayed by hearing the defendant, thus causing irreparable harm to the rights-holder, when the prior service of the application for an interim measure would be likely to hinder the effective enforcement of the precautionary measure or seizure, or when possible counter-arguments by the defendant would be invalid.³³ It is obvious that in these cases the principle *audiatur et altera partem* could compromise the final purpose of the measure, on account of which there is a need to order the interim measure without the party against whom it is directed having been summoned to appear. In addition, the intention is to enforce this measure without prior service on that party. Therefore, the IPRED provides that the Member States should ensure that their national courts are empowered to take the provisional measures, when appropriate, without having to hear the defendant, in particular where any delay would cause irreparable harm to the right-holder (Article 9/4 of IPRED).³⁴

Similar provisions for issuing interim measures on *ex parte* basis can be found in the Macedonian law. The Macedonian IPL (as well as CL) provides for *ex parte* orders on interim measures in the following cases of particular urgency: if the applicant provides reasonably available evidence to satisfy the court with a sufficient degree of certainty that otherwise the interim measures will not give an effect or there is a danger of irreparable harm (Article 313/4 IPL

³¹According to Article 3 of the SCL, the procedure for securing the claims is urgent. The court is obliged to deal with the case not later than three days from the day of receiving the request.

³²The right to be heard is the key element of a “fair trial” or a “fair hearing”. The notion of “fair hearing” requires adversarial proceedings, in which the parties to civil proceedings have the opportunity to know and comment on the observations filed or evidence adduced by the other party.

³³Injunctions in Intellectual Property Rights, p. 3, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf.

³⁴This is in line with Article 50/2 of the TRIPS Agreement, which states that: “The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the rights-holder, or where there is a demonstrable risk of evidence being destroyed”.

and Article 175/4 CL).³⁵ *Ex parte* interim measures can also be ordered in cases of infringements committed on a commercial scale on account of similar preconditions: if the applicant provides reasonably available evidence to satisfy the court with a sufficient degree of certainty that otherwise the interim measures will not give an effect or if it is necessary in regard to the particularly serious infringement circumstances (Article 313/5 IPL).

In cases where *ex parte* interim measures are ordered, the court will deliver the order (decision) to the potential infringer (Article 313/6 IPL and Article 175/4 CL).³⁶ According to IPRED, the affected party (defendant) could contest the measures. Therefore, he/she is granted a right to request review of the decision issued by the court, asking the measures to be modified, revoked or confirmed. The relevant decision has to be issued within a reasonable period after the notification of the measures. In the procedure of rendering this decision, the person affected by the measure has right to be heard (Article 9/4, para.2 IPRED). This time, the delay caused by hearing of the affected person cannot endanger the interest of the applicant because the adequate interim measure has already been granted.

6. Duration of the interim measures

As it was mentioned previously, the interim measures are temporary, meaning that they are time limited. According to Articles 313/7 of the IPL and 175/5 of the CL, in the decision for granting the interim measure, the court determines the duration of the measure.³⁷ Although the IPL and the CP have no explicit provision, it is beyond any doubt that, upon the applicant request, the court may extend the duration of the interim measure, if the circumstances on the basis on which the measure is granted have not been changed. The request for time limit extension can be submitted before the expiration of the fixed time limit (*arg. ex.* Article 40 of SCL). If the circumstances upon which the measure is granted have changed, the court revokes the measure upon the request of the defendant.

7. Deposit (security) as a condition for granting interim measures

According to Article 9/6 of the IPRED, the competent judicial authorities may make the provisional measures subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant.

³⁵Article 175/4 of CL expressly sets down that the applicant should provide reasonably-available evidence that: a) he/she is right-holder, b) his/her right is being infringed; and c) he/she may suffer irreparable harm due to a delay in the proceeding.

³⁶Compare with Article 9/4 of IPRED stating that: "In that event, the parties shall be so informed without delay after the execution of the measures at the latest".

³⁷See also Article 40 of SCL.

Neither the IPL, nor the CP contains provision for lodging an adequate security as a condition for granting interim measures. Nevertheless, the corresponding provisions are set down in the SCL. Namely, according to Article 38 of this law, the court may condition the granting of interim measure by lodging adequate security to ensure compensation for any harm suffered by the defendant.

8. Compensation for the injury caused by interim measures

The IPRED also calls for compensation for the injury caused by granting and enforcing the interim measures. Namely, in cases where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures (Article 9/7 of IPRED).

As the IPL and the CP do not contain such provisions for compensation, the SCL should be applied. Article 42 of this Law states that the defendant has a right of appropriate compensation for the injury caused by the provisional measure that was unfounded or that the applicant had not justified. The request for compensation can be submitted not longer than three months from the day when the decision for ceasing the provisional measures became final. After this time limit, the defendant can exercise his/her right for compensation in a separate lawsuit.³⁸

9. Other procedural issues

Since the IPL and the CL do not set out any other provisions on interim measures, except for the above explained, the provisions of the SCL shall be applied. We will briefly go through these provisions.

As the procedure for granting an interim measure is based on the disposition principle, it starts by lodging the request (application) by the concerned party (applicant). The request for interim measure can be lodged prior to filing the infringement action, which means before the main proceedings are commenced, as well as at any point during the proceedings. It must include the facts that are deemed to justify the request, as well as the specific measure applied for to the court.

The competence for granting interim measures is governed by Articles 30 and 31 of the Law on the courts³⁹ and by Article 30 of the SCL. The Law on the courts empowers the primary courts (first instance courts) to grant interim measures. Which court will be competent to grant interim measures depends on the particular moment the interim measure is applied for by the applicant (claimant).

³⁸See: A. Јаневски – Т.Зороска – Камилловска, *Граѓанско процесно право, книга трета извршно право*, Скопје, 2011, 224.

³⁹*Official Gazette of RM*, no. 58/2006, 62/2006, 35/2008 and 150/2010.

When the request for interim measure is submitted before the main proceedings are initiated, it should be lodged to the primary court in which the future main proceedings must be commenced (Article 30/1 of SCL). According to the Law on the courts, not all primary courts are empowered to decide on IP disputes, but only the primary courts with extended competence (Article 31/2, subpara. 2)⁴⁰. Consequently, only primary courts with extended competence are empowered to grant interim measures before the commencement of the main proceedings.

If the request for interim measure is submitted in the course of the main proceedings, the court before which the main proceedings are taking place is competent to grant interim measure requested by the party, either in the infringement action itself or in a separate application while the action is pending (Article 30/2 of SCL). In the first situation, the action includes two different applications: one referring to the IP dispute and another regarding interim measures. Consequently, two different proceedings are processed simultaneously.

Upon the request for interim measure, a single judge decides (Art. 4/2 of SCL).

The SCL does not set out the time limit for granting the interim measures. However, it states that the court should take the request in work not longer than three days from lodging the request.

The court decides either to grant the requested measure or to deny the request lodged by the claimant. If the decision of the court is affirmative, it sets out the specific granted measure and its duration.

The defendant should act willingly according to the granted interim measure, otherwise it will be enforced *ex officio* by the court itself (Article 40/4 SCL). Competent to enforce the interim measure is the same court that has granted it.

10. Right to appeal

The court decision regarding interim measures may be contested by the parties. According to Article 5 of the SCL, an appeal may be lodged against the first instance decision in a time limit of three days from the day of the decision delivery. The appeal does not have suspensive effect as to the enforcing of interim measures. However, the appeal could suspend the enforcement of the interim measure, if the appellant requests suspension and offers at least the sum equivalent to one-half of the claim as deposit. A three panel judges decide upon the appeal. The decision of the panel becomes final and no legal remedies can be lodged against it (Article 6 of SCL).

11. Conclusion

On the basis of the above analysis, we can conclude that in the majority of IP cases, the key concern is to ensure that the rights and

⁴⁰In the Republic of Macedonia there are 27 primary courts: 15 out of them have basic competence, and 12 have extended competence.

the interests of the rights-holder are temporary protected, by preventing irreparable damage or loss that can occur before the court makes a final decision on the merits of the case. For that purpose, the interim measures have vital importance.

The well-known international documents, as the TRIPS Agreement and the IPRED contain provisions relating to the interim (provisional) measures and place obligations on the member states to implement into their national laws certain minimum standards concerning these measures.

From the detailed analysis given above, we may state that on the way towards EU integration, the Macedonian law has fully conformed to the provisions of the mentioned documents. Although we have not researched the real-life impact of the interim measures in IP litigation in our courts, some reverberations from the court practice clearly indicate that the courts should start granting these measures more frequently.

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