



30 May 2014

## Position Paper on the Promotion and Protection of Intellectual Property

### 1. Executive Summary

In Latvia, intellectual property (IP) rights- intensive industries contribute 21% of employment and 32% of GDP, thus placing the country near the bottom in the rank of European Union countries on both measures.<sup>1</sup>

The Latvian government has repeatedly emphasised its goal of supporting the development of high value added products, strengthening and facilitating cooperation between businesses and research institutions, and fostering applied research, as input for new products. This will lead to an increase in the value of intellectual property assets originating in Latvia.

It is possible to develop the potential and become a significant net producer and exporter of intellectual property, and to attract intellectual property intensive industries to Latvia—given the right conditions.

IP holders investing in Latvia anticipate that their rights will be protected *on par* with other countries in the region and the EU. The achievement of a fully functional system of promoting and protecting intellectual property is one of the key conditions for innovation.

As Latvia evolves from being a consumer of intellectual property originating elsewhere, to a net producer of IP, users and creators need to understand how to properly access, protect and commercialize intellectual property.

FICIL proposes six key action points for the government's short to mid-term priorities:

- 1) The **promotion of intellectual property should be considered an integral part of economic policy**;
- 2) **Legislative obstacles** to effective IP protection should be eliminated;
- 3) The **capacity of institutions that enforce** intellectual property rights should be strengthened;
- 4) A **horizontal, united administrative capacity** in the government structures responsible for IP policy development and implementation should be developed;
- 5) **Education** about intellectual property should be prioritized;
- 6) A **balance** between right-holders and society should be ensured.

## 2. Recommendations

### **1) Consider the promotion of intellectual property as an integral part of national economic policy**

The government must ensure that the promotion and protection of IP is integral to developing and updating the economic policies of the country and its regions. A horizontal, coordinated approach is essential with the aim of developing and attracting intensive IP investment to Latvia. The question of: “How will a given (legislative) policy measure the impact of attracting and/or developing intensive IP investment to Latvia?” must become an inseparable part of the policy making process, to drive the productivity and competitiveness of the national economy.

We particularly emphasize insufficient IP competency within the public sector and a corresponding lack of a timely and sufficient policy response to contemporary challenges, for example, with regard to non-cultural types of copyright (e.g. concerning computer programs).

### **2) Eliminate legislative obstacles to the effective protection of intellectual property**

There is room for improvement in substantive and procedural law, as well as in policies to develop and strengthen the capacity of responsible public bodies to enhance IP protection in Latvia and to bring our legal framework in line with best practices in Europe:

- Authors’ rights to revoke work should be limited, in particular with regard to work in the software and audio-visual industry
- Procedural law must give sufficient weight to the time-sensitivity of IP cases
- Professional and vocational training of prosecutors and judges must address the specifics of new circumstances and challenge ingrained and obsolete interpretations of law e.g. the concept of “substantial harm” in the realm of software and audio-visual work.
- Consider the possibility of specialisation (pooling resources) within courts to raise the quality of decisions and judgments regarding IP protection

### **3) Improve the enforcement of intellectual property rights**

An effective system for the enforcement of intellectual property rights is essential for brand owners, content creators, inventors and designers to successfully develop and market their products. The government must focus on several key areas to improve the *status quo*:

- Any preliminary injunctions granted must ensure the required level of protection to diminish and/or recover potential commercial loss
- The effectiveness and competence of the Economic Police must be increased to ensure fair and rapid enforcement of IP rights
- The complexity and length of court proceedings, lack of homogenous case law is presently unacceptable, given the time-sensitive character of IP violations. The hands-off approach of judges in managing cases, in order to minimise procedural manipulation, favours unscrupulous litigants (see also Position paper No 3/2013. Facilitating efficiency of court system)<sup>ii</sup>

### **4) Develop the administrative capacity of government structures responsible for the development of intellectual property policy**

Ensure the effectiveness of the current administrative system, including via the concentration and more effective use of resources: create a unified Intellectual Property Rights Office (IPRO) on the basis of the current Patent Office, with responsibility for all the main areas of IP (patents, trademarks, design rights and copyright) to better serve inventors, creators, IP users and the public. We believe such an office would be most effective under the Ministry of the Economy. Ensure that the IPRO adequately coordinates activities with the Ministries of Justice; Education and Science; and Interior; and universities' Technology Transfer Offices.<sup>iii</sup>

To increase legal certainty of registrations issued by the Patent Office, FICIL supports the introduction of pre-registration searching of prior rights (for trademark owners) and substantive examination of patent applications.

### **5) Prioritizing education about intellectual property**

Education about IP in schools, university and in the public sector, and awareness raising for the private sector, is key to a more effective implementation of the goal.

### **6) Ensuring a balance between the interests of right-holders and society**

In order to strike the proper balance between the interests of copyright holders and society, the Latvian government should be an active participant in the European effort to update copyright rules. The government should be pro-active in seeking solutions that ensure both fair remuneration to right-holders and access by the public to copyrighted material.

The blank tape levy, as the legacy system for ensuring payment to right-holders for private copying, needs to be reviewed in the light of technological advances and new proposals such as the “cultural access fee.”

## **3. Rationale for Recommendations**

### **1) Consider the promotion of intellectual property as an integral part of national economic policy**

Intellectual property creates value from ideas. The value of intellectual property often outweighs that of a company's physical assets. As Latvia evolves from a consumer of IP originating elsewhere, to a net producer, the users and creators must understand how to properly access, protect and commercialize intellectual property.

The experience of FICIL members suggests that the system of improving intellectual property – its enforcement and protection, along with the supporting education and awareness on IP protection -- is essential for raising trust in Latvia's economy, including foreign investment in high value-add industries. Such aspects ought to become an integral part of policy considerations in the development of Latvia's economy, including via FDI.

FICIL sees substantial room for investment and development. This belief is supported by data: In 2013, the European Patent Office and the Office for Harmonization in the Internal Market released the first-ever Europe-wide analysis of the contribution of intellectual property rights-intensive industries to economic performance and employment. The findings were that IPR intensive industries contributed approximately 26% of employment and 39% of GDP in the EU.

In Latvia, IPR intensive industries contributed 21% of employment and 32% of GDP, placing it near the bottom of the rank of European Union countries on both measures.<sup>iv</sup>

In analysing IP rights by country of origin in the EU, Latvia ranked 22/27 for patents, 26/27 for trademarks and 22/27 for design rights. Latvia also ranked next-to-last in the share of jobs attributed to companies from other EU member states. The top-ranked country, Germany, boasts a 28.2% share of all EU cross-border jobs.

Latvia has traditionally assigned responsibility for intellectual property rights to the Ministry of Justice. We believe that, to re-orient IP firmly as an economic area, IP policy and registration of rights would properly be under the Ministry of the Economy, as it is in many highly developed economies, including the United Kingdom and the United States.

## **2) Eliminate the legislative obstacles to effective IP protection**

### **2.1. Copyright law**

Latvian Copyright Law prescribes that the author is granted unrestricted rights to the revocation of his work, meaning that the author may, at any time, request that the use of a work be discontinued. The author has a duty only to compensate the direct losses which have been incurred by the user due to the discontinuation (Section 14 (1) (3)). Such a regulation introduces uncertainty into every contract for a copyrighted work, including works produced by employees, and goes far beyond Latvia's obligations to protect authors' rights as defined in international and European legislation. In order to improve the current situation:

1) There must be reasonable limits on an author's right to revoke a work. For instance, such rights could be limited in the case of audio-visual works, computer programs, authorship of architects and in works created during employment.

2) The Latvian Copyright Law must be amended to limit "moral rights" in the case of computer programs to limit uncertainty when software is sold or licensed, or when investors seek assurances that software is not subject to future claims by employees or contractors. In line with the practice of countries such as Finland, "moral rights" for software must be distinguished from the much broader concept of "moral rights" for traditional and cultural works such as books, music or paintings.

### **2.2. Civil procedure law**

Improvements to procedural matters should be addressed in several important aspects.

1) FICIL proposes the assignment of jurisdiction in all IP cases (including copyright) to the Riga Regional Court. This would encourage the development of specialized knowledge by judges and improve the quality and predictability of judicial decisions. As required under European law, the Riga Regional Court already has exclusive jurisdiction over cases concerning trademarks, patents, design rights and indications of geographical origin. Adding copyright would be a natural next step to consolidating judicial expertise and resources.

2) Intellectual property matters are often time-sensitive. Each day that justice is delayed can cause irreparable damage to the rights-holder. The regulation and interpretation of Latvian law need to be responsive to objective facts:

- Robustly enforcing existing procedural time limits
- Aiming to resolving preliminary injunction matters within six weeks.

3) Section 34(5)(1) of the Civil Procedure Law should be amended to delete the listing of what may be considered intellectual property rights, which unnecessarily limits the definition of intellectual property rights. Objects such as domain names, trade secrets and other types of IP are not listed. Thus, this norm limits the application of the preliminary measures provided by Section 30 (2) of the law and limits right-holders' options to counter the limit of losses in a case of copyright infringement. Instead, the definition of intellectual property rights could safely be left for interpretation according to its general meaning, provided by legal norms, legal science and case law.

### 2.3. Criminal law

The draft Guidelines for Intellectual Property Protection in Latvia for 2014-2018 (pending approval by the Cabinet of Ministers) state that law enforcement institutions apply inconsistent interpretations of the legal concept of "substantial harm" with regard to the infringement of intellectual property rights. One of the proposed initiatives is to elaborate common guidelines for the application of the term "substantial harm" in IPR protection related cases.

We refer to two specific cases concerning copyright regulation where such guidelines are required:

1) The norms as currently enforced do not correspond to reality. For example, the Supreme Court has incorrectly held that the "substantial harm" in criminal copyright cases can be found only if each right holder individually has been harmed **in excess of EUR 1 600 EUR**. Hence, it is nearly impossible to criminally enforce infringement of works created by multiple authors (software producers, song writers etc.). Most cases involve numerous right holders which do not reach the monetary threshold of substantial harm individually. In the realm of economic crime the **requirement lacks objective grounds** and does not allow right holders to defend their rights.

2) The Criminal Law and related legislation (The Law On the Procedures for the Coming into Force and Application of the Criminal Law) lack a consistent definition of "substantial harm", essential to finding criminal liability in copyright infringement cases. At the moment, the law requires **both** substantial financial harm and harm to non-material interests.

These two grounds of liability should be separated, so criminal liability may attach if there is substantial financial loss **or** actual or potential harm to non-material interests. Section 23 of the Law On the Procedures for the Coming into Force and Application of the Criminal Law provides that the criteria for jeopardising such interests may be specified in an annex to the Law, which, however, has not yet been elaborated.

3) Similarly to norms of the Civil Procedure Law (above) Article 206 of the Criminal law artificially limits the realm of protection of copyright (e.g. omitting domain names from the listing therein). We believe Article 206 should be re-drafted.

### 2.4 Availability of judicial decisions

We refer to the FICIL Position Paper on Proposals for Facilitating the Efficiency of the Court System (2013/No.3) and reiterate that the publication of decisions in civil matters, including interim decisions in IP disputes, is essential to ensuring proper judicial development and legal certainty.

Full texts of judicial decisions today are freely available only to the parties. The exaggerated "making anonymous" of such decisions when distributed by specific request to non-parties, which

includes editing them to remove the names of trademarks or lyrics of songs in dispute, is counter-productive and not necessary to respect data protection laws.

### **3) Improving the enforcement of intellectual property rights under Latvian law**

For brand owners, creators, patent owners and designers to successfully develop and market their products, a functioning system for the enforcement of intellectual property rights is essential. This requires that the people charged with enforcing the laws discharge their duties competently. Instead, both enforcement and regulation is inconsistent and suboptimal in both criminal and civil matters. We focus on the most prevalent of the problems:

#### **Civil matters**

##### *Interim and final disposition of disputes*

- Compared to Estonia and the Nordic countries, the interim measures in Latvia place a very high burden of proof on the party asking for measures. Instead, the threshold should be lowered, but with serious penalties for parties who abuse the system.

##### *Damages awards*

- We note that awards for monetary damages in IP infringement cases are low and are limited in scope

#### **Criminal matters**

We have noted the following:

##### *Effectiveness of the Economic Police*

- Lengthy and therefore ineffective investigations
- A lack of initiative in investigating more complex IP related cases
- Insufficient knowledge of the subject area

##### *Effectiveness of the Criminal Police*

- Criminal police are charged with enforcing judgments in civil matters, including in IP disputes. If the police fail in this duty, then civil judgments are meaningless.

### **4) Develop the administrative capacity of government structures responsible for the protection of intellectual property and development of IP policy**

The Ministry of Culture, which is responsible for copyright, has two employees responsible for this policy. We deem it sufficient, however, there is a pressing need for resources to provide government experts to consult and help educate the public, with regard to the non-cultural types of copyright such as those concerning computer programs in particular.

The Ministry of Justice has proposed the creation of an **Intellectual Property Office** on the basis of the current Patent Office, with responsibility for all areas of IP, and with the following scope of activities:

- providing public information and consultations
- registering rights
- offering research assistance for right-holders

FICIL supports such an initiative, and would support an increase in resources towards ensuring that the IPO has adequate capacity to coordinate activities with the Ministry of Education and Science, the Ministry of the Interior and universities' Technology Transfer Offices. Further, we believe that such an Intellectual Property Office would best function alongside other government

agencies focused on promoting business activity and supporting entrepreneurship as well as ensuring transfer of innovation to products (such as LIAA and the Latvian Guarantee Agency), and that the IPO should therefore be under the supervision of the Ministry of the Economy.

To increase the legal certainty and value of IP registrations issued by the Patent Office, FICIL supports the introduction of pre-registration searching of prior rights (for trademark owners) and substantive examination of patent applications. Currently, trademark owners are not informed if their application is identical or similar to an already-registered mark. Patent applications are not examined for “patentability” and are highly vulnerable to legal challenge. Both measures could be implemented on the basis of existing systems and with support from international partners.

### **5) Prioritizing and re-considering education on intellectual property**

There is generally a low level of public understanding and respect for intellectual property rights. Compared to more developed parts of Europe, there is little understanding of the issues of piracy, data theft and trademark infringement.

Intellectual property and the protection of IPRs should be an integral part of curricula starting from elementary school to university. School curriculums should include at least the basic principles of intellectual property, its nature and the dangers of piracy. IP competency should be part of compulsory courses at university. The above can be fostered, inter alia, by:

- 1) Instructing teachers about IP rights as part of pedagogical training.
- 2) Incorporating basic IP instruction (a minimum of 6-8 hours) into all bachelor level programs in: law, business, the sciences, engineering, arts and music as well as industrial design.
- 3) General public awareness campaigns.

Creating a training program to prepare qualified patent attorneys and patent judges. New study programs should be prepared with study courses in law and as well in the exact/hard sciences. Graduates of such a program will receive a professional qualification (new profession) as a Patent Attorney. This program could be implemented jointly by Latvian and foreign universities. Such training could be offered by the Patent Office, the Association of Patent Attorneys, and other professional organisations, or universities.

Furthermore, Latvia does not have any system for training European patent attorneys or practitioners who are qualified to represent clients before the forthcoming Unitary Patent Court, nor to prepare our judges to sit on the UPC. This must be rectified so that Latvian inventors have access to qualified advice when commercializing their inventions and so that patent owners can have access to proper local representation in the Unitary Patent Court. Latvian judges must have access to opportunities at the UPC, which will have one of its regional seats in Riga.

### **6) Ensuring a balance between right-holders and society**

To strike a balance between the interests of copyright holders and society, copyright restrictions should be adapted to correspond with an understanding of the rights of an information society and technological development. Latvia must actively participate in current discussions within the EU with regard to developing EU-wide regulation in support of mechanisms facilitating access to copyright protected works for private non-commercial use, whilst ensuring fair compensation for right-holders.

The blank tape levy, as the legacy system for ensuring payment to right-holders for private

copying, needs to be reviewed in the light of technological advances and new proposals such as the “cultural access fee.” The government itself should adopt responsible practices with regards to the use of proprietary software and copyright-protected content. An information society needs access to content, but the right holder should be properly compensated.

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<sup>i</sup> Available from: <https://oami.europa.eu/ohimportal/en/web/observatory/ip-contribution>

<sup>ii</sup> Position Paper on Proposals for Facilitating Efficiency of the Court System. FICIL, 2013. Available from: [http://www.ficil.lv/hidden/HC2013%20documents/webbbb/13%2005%2026\\_Court%20systems\\_ENG.pdf](http://www.ficil.lv/hidden/HC2013%20documents/webbbb/13%2005%2026_Court%20systems_ENG.pdf)

<sup>iii</sup> Letter from AmCham Latvia to the Minister for Justice Mr Jānis Bordāns, dated April 10, 2013, following a multi-party discussion under the aegis of AmCham and with the participation of the Minister for Justice

<sup>iv</sup> Available from: <https://oami.europa.eu/ohimportal/en/web/observatory/ip-contribution>