



**World
Trademark
Review**

Trademark Litigation 2017

A Global Guide

Latvia

Agency TRIA ROBIT

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Legislative framework and causes of action

Framework

In Latvia, the legal framework for trademarks consists of international agreements, EU directives and regulations, and domestic laws and ordinances.

Latvia is a party to all major international IP agreements, including the Paris Convention for the Protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Key national legislation includes:

- the Law on Trademarks and Geographical Indications, last amended on December 8 2015;
- the Civil Procedure Law, last amended on December 10 2015; and
- the Law on the Industrial Property Institutions and Procedures, adopted on June 18 2016.

The relevant EU legislation consists of:

- Regulation 207/2009 of February 26 2009

on the EU trademark;

- Directive (EU) 2015/2436 of December 16 2015 to approximate the laws of the member states relating to trademarks; and
- Directive 2004/48/EC of April 29 2004 on the enforcement of IP rights.

The case law of the European Court of Justice consisting of preliminary rulings on the interpretation of EU regulations and directives is also a significant source of law, although it is not formally part of the Latvian legal framework.

Causes of action

Causes of action can be divided into two sub-groups:

- infringement proceedings, where the exclusive rights attached to a trademark have been violated; and
- cancellation proceedings, which include actions against other parties' registered rights (eg, trademark invalidity and revocation actions) and appeals against the decisions of Industrial Property Board of Appeal.

The common grounds for both sub-groups are:

- registration or use of an identical or similar sign on identical or similar goods or services;
- registration or use of an identical or similar sign on dissimilar goods or services, where the earlier mark enjoys a reputation or well-known status and the use takes unfair advantage of, or is detrimental to, the distinctiveness or reputation of the earlier mark; or
- the reproduction, imitation, translation or transliteration, liable to create confusion, of a well-known trademark (even if the latter is unregistered), in respect of identical or similar goods or services.

Additionally, unfair competition may be invoked as a cause of action for infringement proceedings in case of use or imitation of a competitor's trademark, if such use may be misleading as regards to the identity of the market participant or the origin of the goods or services. Available causes for cancellation proceedings additionally include absolute and relative grounds for trademark refusal and non-use during a for of at least five successive years.

Alternative dispute resolution

Mediation

Mediation is not mandatory, but it is a judge's (court's) obligation to recommend to parties to use mediation to resolve their dispute in in civil cases, including trademark matters. However, in practice, mediation has so far not been used. Court-recommended mediation is suggested to parties in court proceedings before all court instances, including the Supreme Court in cassation proceedings. The parties have the right to decide freely on:

- their participation in the mediation;

- the date of commencement of the mediation;
- the selection of a mediator;
- the course of the mediation, within the limits determined by the mediator; and
- the discontinuation and termination of mediation with or without entering into an agreement.

Mediation during court proceedings is available until the case has been examined on the merits, if the parties are willing to take part. Mediation is conducted by one or several certified mediators, who can be selected by the parties or, in case of dispute, recommended by the Council of Certified Mediators and appointed by a court.

Arbitration

Arbitration proceedings are not applicable to trademark litigation and thus parties may not bring the matter to the arbitration court.

Litigation venue and formats

Trademark litigation in Latvia follows the civil litigation procedure, although under the jurisdiction of specifically designated courts and specific rules. Thus, Latvia's trademark courts are the Riga City Vidzeme Suburb Court as the court of first instance, the Riga Regional Court as the court of appeal and the Supreme Court as the court of cassation (final instance).

Forum shopping is not available; all actions must be brought under the specific jurisdiction of the courts listed above, irrespective of other factors.

Jury trials do not exist under Latvian law. All trademark matters are examined solely in bench trials by one judge alone (at first instance) or by collegia of three or five judges (in appeal or cassation instance).



Surveys are rarely used in trademark litigation as the courts often find them to be so poorly designed and lacking in objectivity as to carry no probative value

Damages and remedies

Available remedies

The claimant in a trademark litigation case may seek a wide variety of remedies; however, these depend greatly on whether the plaintiff has initiated cancellation or infringement proceedings.

The available remedies in cancellation proceedings generally include:

- full revocation or full invalidation of the challenged trademark;
- disclaimer of some elements of the challenged trademark from the scope of protection; and
- limitation of the list of goods and services to which the challenged trademark applies.

The list of available remedies in infringement proceedings includes:

- injunctions against use of the disputed trademark or confusingly similar signs;
- injunctions against any third parties (eg, intermediaries or any other parties whose services are used to infringe the trademark) to perform certain activities – that is, to provide services through which the trademark is being infringed or the infringement is made possible;
- compensation for damages and moral harm;
- right to information and obtainment and preservation of evidence by the court; and
- preliminary injunctions.

Preliminary injunctions: Preliminary injunctions are available in trademark infringement actions only and are not applicable to cancellation actions. Claimants in trademark infringement proceedings are entitled to request a preliminary injunction to be applied against a potential infringer until the case is heard by the court and the final decision is delivered. In the majority of cases the court decides on the injunction at a separate court hearing, inviting both parties to participate. *Ex parte* decisions are rare and subject to special requirements set by law.

The claimant may apply for several remedies among those prescribed by law, but the court has the sole right to decide on an injunction and its extent. If the claimant requests several remedies, the court may grant only some of them; however, the court may grant

provisional protection only upon the request of the claimant (ie, not *ex parte*). In practice, the court carefully analyses all relevant circumstances and case law.

Injunctive relief: Typically, the relief granted by the court in infringement cases consists of:

- prohibiting the use of a certain trademark or the provision of certain services bearing the disputed sign;
- removing the infringing products from trade; and
- ordering the destruction of the infringing products at the infringer's expense.

The court may also award damages.

Where appropriate, it may also order a third party that is an indirect or unintentional infringer to take specific actions to prevent or stop the infringing activity; however, the court will rarely award damages against those parties.

Typical relief in cancellation actions includes removal of the disputed trademark from the register or limitation of the scope of protection by excluding some goods or services or disclaiming some elements.

Damages

Damages are available in infringement actions, but not in cancellation proceedings. As a general rule, the claimant may choose one among the following types of damages – that is, it cannot apply for several types with regard to the same infringement:

- reimbursement of direct and indirect actual losses, including lost profits;
- payment of a licence fee (ie, a lump sum that the infringer would normally have to pay to use a trademark under licence); or
- payment of unfair profits made by the infringer from the unauthorised use of a trademark.

Latvian law does not provide for punitive or statutory damages; each amount is calculated on the basis of the evidence submitted by the parties and the court has sole discretion to limit the amount of damages.

Irrespective of whether damages are

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requested or granted, the claimant may seek compensation for moral harm suffered in connection with the infringement. This concept generally applies to natural persons, on the presumption that natural persons may be psychologically affected by the infringement, which would not be adequately compensated by the award of damages. However, legal persons may also suffer some harm in relation to their business reputation, public image and relations with consumers, which can be reimbursed separately from damages.

Evidencing the case

Evidencing is a core issue in any litigation and trademark litigation is no exception. The general rule is that each party must prove the facts upon which it bases its claims or objections, and submit all evidence unprompted. In exceptional circumstances, the court may order a party to submit evidence if there are good reasons why the party was unable to submit it itself. Typical evidence includes explanations by the parties supported by various types of documentary



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and real evidence; however, witness statements are not used in trademark matters.

Expert witnesses

Although the law provides for the possibility for the parties to invite an expert if specific knowledge is needed to clarify facts relevant to the matter, in practice, expert witnesses are not used in trademark proceedings. The common view is that trademark disputes do not require specific knowledge; it is a matter of evaluating the facts and the law. However,

parties are not precluded from inviting experts if they consider it necessary. In such cases, the court will assess the expert's opinions as it would any other evidence, unlike situations where the court itself appoints the expert, in which case the expert's opinion weighs more in the eyes of the court than any other evidence produced by the parties.

Survey evidence

Surveys are rarely used in trademark litigation as the courts often find them to be so poorly designed and lacking in objectivity as to carry no probative value. However, they are used where there is no other reliable source of information or evidence. This is typically the case when seeking to prove descriptiveness or non-distinctiveness of a sign, or to support a claim that a trademark has an enhanced degree of recognition among consumers. There are no statutory or common rules as to the requirements to be satisfied for a survey to have probative value (eg, the minimum number of consumers to interview); the courts evaluate each survey on a case-by-case basis.

Investigations

Rights holders do not commonly hire professionals to conduct full investigations, but they will nevertheless need to gather basic information regarding the commercial activities and allegedly infringing actions of the other party before filing an infringement action. This may include the collation of general information about the alleged infringer, as well as the collation of actual evidence necessary for the action. In cancellation actions, by contrast, investigations play an important role – especially in cases of revocation due to non-use or genericisation.

First steps

Under Latvian law, a registered trademark owner may warn any third party against any use of a sign if the owner has reasons to believe that that party is infringing its exclusive rights in the sign. The common form of such warning is a cease and desist letter to the other party (in both infringement and cancellation proceedings). Although this



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step is not a prerequisite to infringement proceedings, a judge will always ask the parties whether they have tried to resolve the dispute amicably before filing a claim; where the parties have not tried, the judge as a rule will set a period (from one to three months) for the parties to conduct negotiations. However, judges will typically find a cease and desist letter sufficient evidence of an attempt to resolve matters amicably – sending such a letter will thus help to avoid delays. It may also save costs should the matter be resolved peacefully.

Another important first step, especially in infringement proceedings, is to secure evidence. This will typically include making test purchases, printing out webpages and obtaining copies of catalogues, commercial offers and advertisements with the assistance of a notary or court bailiff. Making test purchases of the infringing goods in particular is crucial to ensure the successful outcome of any infringement action. Such evidence offers the dual benefit of being almost incontestable by the infringer and commonly regarded by the courts as stronger than any other evidence.

Available defences

Two main kinds of defence are available to the defendant: one is active, the other passive. With the first approach, the defendant files counterclaims and challenges the validity of the mark owner's right through invalidation or cancellation actions based on absolute or relative grounds, or on unfair competition. With the second approach, the defendant uses the statutory defences provided by the law. These include various restrictions and

limitations of a trademark owner's exclusive rights and, in particular:

- acquiescence;
- exhaustion;
- use of own name and address, for both natural and legal persons, provided that such use is in line with honest commercial practice;
- fair prior use, provided that such use was started prior to the priority date of the trademark concerned on a commercial scale in connection with identical or similar goods or services, and was used honestly;
- descriptive use – that is, using purely descriptive or non-distinctive elements of the registered trademark which, when taken individually, may not be registered as trademarks;
- indicative use, meaning the use of terms that serve as a genuine indications on certain properties of the goods or services, such as kind, quality, quantity, functional task, value, geographical origin or other characteristics;
- referential use, including indications of intended purpose, mainly applicable to spare parts, accessories and compatible products, and use in comparative advertising on condition that under such use the differences of the mutual products are objectively highlighted in a fair manner; or
- non-commercial use – to be infringing, the use must be in the course of trade (ie, on a commercial scale) or, at least, must take unfair advantage of the mark and derive some inappropriate benefits from such use

(free-riding). This defence is not applicable in cases of dilution or if such use causes damage to the reputation of the earlier reputed trademark.

Appeals process

In principle, any party can bring an appeal against the judgment of the court of first instance for each type of action. However, restrictions apply on the right to file a cassation complaint against judgments of the court of appeal. In particular, cassation complaints are not available for cancellation actions where the opposition decisions of the Industrial Property Board of Appeal are challenged in court – the appellate court (the Riga Regional Court) is the final instance for such cases.

All appeals have a suspensive effect, except when they are brought against court decisions on preliminary injunctions. An appeal against the judgment of the court of first instance must be filed within 20 days and a cassation complaint within 30 days of issue of the full written decision. An ancillary complaint may be brought for any court decisions except final judgments, including decisions on the grant or refusal of preliminary injunctions, within 10 days of issue of the written decision.

If the appeal is brought against a decision of the court of first instance, the court of appeal examines the matter on the merits, just as the court of first instance did, except where opposition decisions of the Industrial Property Board of Appeal are challenged. In such cases the court of appeal checks only whether the lower court has:

- properly chosen, applied and interpreted the relevant substantive law;

- not breached the procedures; and
- properly established the relevant facts and assessed the evidence submitted.

Likewise, if a cassation complaint is brought against a judgment of the court of appeal, the court of cassation does not examine the matter on its merits and does not reassess evidence in the case: it simply evaluates whether the lower courts did not err on a point of law. However, the Supreme Court may reject a cassation complaint if the panel of judges considers that:

- the issues brought by the complaint have already been considered in previous case law and need not be re-evaluated; or
- the question to be answered does not have a significant impact on further judicature and there are no doubts on the interpretation of the applicable law made by the lower courts. **WTR**



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