

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# ESTONIA

### EXECUTIVE SUMMARY

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IIPA recommends that Estonia be added to the Special 301 Watch List. While Estonia has instituted a number of significant legal reforms and the legal authorities have undertaken important anti-piracy efforts in the past, in 2001 the piracy situation and the absence of deterrent penalties resulted in a situation serious enough to warrant placement on the Special 301 lists.

Estonian officials, working with industry, must act to stop the Internet, hand-to-hand piracy, large-scale operations in the markets, and the collectively large-scale losses at the border. While the government of Estonia in the past correctly identified and agreed to crack down on open-air markets and to effectively enforce its borders, these problems remain at the forefront of the copyright industries' ongoing concerns. Over a year ago, Estonian police acted to reduce the severe amount of piracy in the Kadaka market. Unfortunately, as a consequence, the pirates simply moved to other markets and turned to Web-based piracy distribution. Plus, several stalls selling pirate product still exist in the Kadaka and Merekeskus markets. Similar aggressive anti-piracy actions must be taken against other distribution channels. Specifically, pirated goods are distributed widely via the Internet, and hand-to-hand (the "suitcase" problem and in small shops.) in and outside of Tallinn. Although some Estonian officials have cooperated with the copyright industries, recent efforts have been sporadic and inconsistent. Effective enforcement includes expeditious prosecution and deterrent sentencing, and this has not occurred. Estimated trade losses for 2001 are placed at \$11.3 million (without including the entertainment software or book publishing industry numbers which are unavailable).

Estonia made significant progress in reforming its legal regime in recent years, including within the last year. However, several critical problems in the law remain. For example, there is no civil *ex parte* search remedy available for copyright owners; this tool is one of Estonia's WTO TRIPS obligations. In addition, foreign sound recording producers continue to suffer discriminatory treatment in Estonia, and to cure this, Estonia should swiftly withdraw its reservation to the Rome Convention. For these reasons, Estonia should be placed on the Watch List this year.

**ESTONIA: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	1.5	40%	2.0	60%	NA	60%	NA	60%	NA	99%	NA	100%
Sound Recordings / Musical Compositions	9.0	60%	9.0	60%	9.0	70%	8.0	85%	4.0	80%	NA	NA
Business Software Applications <sup>1</sup>	0.8	69%	NA	69%	NA	72%	NA	NA	NA	97%	NA	NA
Entertainment Software	NA	90%	3.7	98%	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>11.3+</b>		<b>14.7+</b>	<b>14.7+</b>	<b>9.0+</b>		<b>6.0+</b>		<b>4.0+</b>		<b>NA</b>	

## COPYRIGHT PIRACY IN ESTONIA

When Estonia acceded to the WTO in 1999, it was obligated to meet not only the substantive copyright provisions of the TRIPS Agreement, but also the enforcement obligations. In addition to its multilateral obligation, Estonia is also under a series of bilateral obligations. First, Estonia currently participates in the U.S. Generalized System of Preferences (GSP) program, which includes certain discretionary criteria related to Estonia's providing "adequate and effective protection of intellectual property rights."<sup>2</sup> Second, on April 19, 1994, Estonia signed a bilateral IPR trade agreement with the United States, pledging to improve its level of protection and enforcement and to join the Berne and Geneva Phonograms Conventions, among other things. Unfortunately, this bilateral agreement did not enter into effect.

Even though the Estonian market is relatively small, it is dominated by piracy in almost every copyright sector. In the past few years, the copyright industries have undertaken many training and educational programs to assist Estonian officials in understanding both the substantive copyright law obligations as well as the importance of effective enforcement, and it is hoped that these programs will finally start to show some positive results. Many anti-piracy training programs have been conducted in cooperation with the copyright industries, including the IIPA and its members, the Finnish Copyright authorities, EU PHARE and the United Nations UN/ECE IPR program for Eastern Europe. These programs included training for customs officials, police, prosecutors, judges and government officials from certain ministries. The Motion Picture Association, (MPA), the International Federation of the Phonographic Industry (IFPI), the Business Software Alliance (BSA), and Sony Interactive Corporation established a joint anti-piracy organization now called the Estonian Organization for Copyright Protection (EOCP). With its participation in the government Copyright Commission and the Kadaka Market special police unit,

<sup>1</sup> BSA loss numbers for 2001 are preliminary.

<sup>2</sup> In 2000, \$11.1 million of Estonian imports to the United States benefited from the GSP program, accounting for 2% of its total imports to the U.S. For the first 11 months of 2001, \$13 million of Estonian goods (or 5.8% of Estonia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 24.9% increase over the same time period last year.

the EOCP has worked hard to raise anti-piracy issues within the government of Estonia at the highest levels.

## **The Growth of Internet Piracy and Optical Media Piracy in Estonia**

CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate. The videogame, film and recording industries all report that the CD-R and Internet piracy phenomena are growing in Estonia. In fact, for the recording industry, the rapid growth of CD-R piracy of music has overshadowed the existing import problem of pirated sound recordings. Internet piracy in Estonia and the suitcase problem continue to challenge this industry. In April 2001, the private sector (including the EOCP) concluded a Memorandum of Understanding with Estonian Internet Service Providers (ISPs) that enables the effective survey (notice) and removal (takedown) of infringing materials from the Internet.

According to the most recent information, there are still no known CD plants operating within Estonia. Nevertheless, the Estonian market remains flooded with illegal material manufactured product in other countries, notably Russia and Ukraine. As the result of the lack of *ex officio* authority by the police and only sporadic actions by customs officials (especially in some border regions), pirate material has flowed unimpeded into and out of Estonia from neighboring countries. The industries had hoped that the October 2000 promise by customs officials to heighten border measures, especially against "suitcase" piracy, would provide effective. Customs and EOCP's joint raids in Tallinn's harbor on Finnish tourists showed some positive results. In addition, Estonian and Finnish anti-piracy organizations organized "warning banners" for the harbor; this had a big impact and was widely discussed in the Finnish and Estonian media. According to BSA, Estonian customs was successful, especially at the border with Latvia, the Tallinn sea and airports, and the portion of the Russian border adjacent to St. Petersburg.

There does not yet appear to be widespread, systematic transshipment of pirated goods through Estonia, as there is in Lithuania, for example. Industry reports indicate that there have been a few transit cases in which Russian music repertoire was intercepted in Estonia. The copyright industries remain concerned that this could become a significant problem and urge ongoing vigilance by customs. Industry investigations into the sources of possible transshipment sources continue.

## **Piracy Levels Are High Across All Copyright Sectors**

Piracy of sound recordings and music remains widespread in Estonia. The estimated level of audio piracy remained constant, at 60% for 2001. Only in November 1999 did Estonia finally correct the major obstacle to enforcement of sound recordings when it adhered to the WTO TRIPS Agreement and thus, for the first time, establish a point of attachment for foreign sound recordings. Estimated trade losses due to the piracy of sound recordings and musical compositions in Estonia in 2001 were \$9 million. Recorded musical works are being widely distributed on the Internet and copied hand-to-hand (cassettes and CD-R), and are still (albeit to a lesser degree) being sold in the two main markets in the Tallinn region (the Kadaka Market and Merekeskus), and along the Eastern Estonian border with Russia. A local group of copyright organizations (EFU) and EOCP continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. EFU and EOCP also work together in running educational seminars for police and customs officials.

The Interactive Digital Software Association (IDSA) estimated levels of entertainment software piracy in Estonia is at 90%. The entertainment software industry, like the other industries, is hurt especially by lax border enforcement that allows material to flow freely into and out of Estonia. Much of this entertainment software material comes from Russia and Belarus, and is controlled by organized crime groups. However, as a result of the closing of many of the stalls in the large open markets, the piracy of entertainment software has gone “underground” into small shops and stores. There is very little retail piracy anymore, as most piracy is operated out of private homes. As a result, the offering of illegal material over the Internet, which is then distributed by mail, has grown rapidly. The EOCP has contributed to better enforcement, as well as several training programs on the problems of the entertainment software industry. Estimated 2001 trade losses due to videogame piracy are not available.

The Motion Picture Association (MPA) reports that the domestic production of high quality, prerelease Finnish-language pirate videos and their sale to Finnish tourists remains a grave concern because of Estonia’s geographical proximity to Finland. In fact, the Finnish Anti-Piracy Center now estimates that 6% of the Finnish video market is comprised of pirate copies brought from Estonia. The main piracy centers are located in Tallinn and towns in the northeast. The importation of high quality pirate product from Russia and Latvia is also a major problem. These prerelease titles are sourced from camcorder recordings in U.S. cinemas, usually made a few days after U.S. release. False contracts, especially Russian “sub-license agreements,” are used to lend a semblance of legitimacy to the trade, confusing enforcement authorities. Estonian officials should be encouraged to continue to work with Finnish authorities and the Finnish Anti-Piracy Center to train police, prosecutors and especially judges, and to adopt effective enforcement operations, to continue to stop the flow of pirate videos from Estonia into Finland.

The estimated video piracy level is 40% in Estonia, with pirate videos available in retail outlets and occasionally in open-air markets. For the motion picture industry, the Kadaka Market in central Tallinn has been more or less brought under control after a series of raids and media campaigns in 2001. Kadaka’s displaced suppliers, however, have migrated to mail order and Web-based marketing, and are pressuring smaller shops in town to stock their product. MPA confirms that Internet piracy, in the form of both Web-based marketing and downloadables, is becoming a serious concern. It is also being used for the sale of pirate smart cards. Through cooperation with the police, several infringing sites have been closed down. Estimated trade losses due to audiovisual piracy in Estonia amount to \$2.0 million in 2001.

The business software industry estimated that 69% of business software in use in Estonia was unauthorized in 2001. The Business Software Alliance (BSA) estimates that the U.S. trade losses due to software piracy in Estonia were \$800,000 last year.<sup>3</sup>

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<sup>3</sup> According to a mid-2001 report issued by Datamonitor, it reported that the Estonian government lost about 330 million kroons (about US\$18.1 million) in unreceived tax revenues due to software piracy in Estonia in 2000. It also attributed to software piracy a loss of over 1.1 billion Estonian kroons (about US\$56 million) in retail software sales in 2000.

# **COPYRIGHT ENFORCEMENT IN ESTONIA**

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## **Estonia Fails to Meet Its TRIPS Obligations to Provide Expeditious and Deterrent Criminal, Civil, Administrative and Border Enforcement**

Estonia's laudable legal reforms alone have not been enough to deter piracy in that country. Estonia must adopt practices that result in effective criminal, civil, administrative and especially border enforcement, in order to comply with the TRIPS Agreement. Raising the anti-piracy problem to the interministerial level of the Cabinet in 2000 was helpful in calling the government's attention to the problem.<sup>4</sup>

Simply stated, Estonian officials, working with industry, must act to stop the Internet, hand-to-hand piracy, large-scale operations in the markets and the collectively large-scale losses at the border. Customs officials were willing to initiate anti-piracy enforcement activities last year. However, the police reversed their willingness in year's past to take action. In fact, BSA reports that with respect to software piracy matters, the police now treat these cases as a low priority matter. This change in attitude may be the result of an upper level police directive re-ordering priorities in the force. In contrast, most of the copyright industries reported good cooperation by the police in 2001 in running some street market raids, but judicial enforcement was almost nonexistent.

### **Ineffective Border Enforcement**

A top priority for the Estonian Government must be to clamp down on the massive number of illegal imports of musical recordings and business and entertainment software. In addition, the government should take actions to reduce the rapid growth of Internet piracy and hand-to-hand piracy.

Estonia continues to act as a regional distributor of illegal material, including optical media material. Pirated material – audio CDs, CD-ROMs containing entertainment and business software, videos and audiocassettes, and videogame cartridges – regularly moves between Estonia and neighboring countries due to poor border enforcement. Material that enters Estonia from other countries is warehoused there due to poor on-the-ground enforcement, and then shipped to other countries in Eastern Europe, and especially into Finland and the other Scandinavian countries. A significant amount of pirated material from Russia, Ukraine, Latvia and Lithuania reaches Estonia. Most of the material is produced elsewhere in the region, for example in the vast optical media production facilities now operating in Ukraine. It appears that Lithuania remains a transshipment country for illegal product that reaches Estonia, the product itself mainly being made in Russia, Belarus and Ukraine. The lack of effective enforcement in Estonia is significantly harming legitimate markets for copyrighted products, such as sound recordings, audiovisual and entertainment software, in Finland, Sweden and other countries in the region.

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<sup>4</sup> Fortunately, a draft plan to create a government-imposed stickering system in 2000 was rejected by the inter-ministerial agency (and by the Parliament late in 2000). Such systems are counterproductive to effective enforcement. Instead, the copyright industries have been allowed to develop and maintain their own identification systems, which are much more effective at fighting piracy. For example, video distributors today use and finance their own private stickering system that is administered by EOCP.

The anti-piracy organization (EOCP) reported an increase in customs activity in light of the new border operations, a growing number of cases, and the introduction of a new officer designated specifically for IP investigations. For example, BSA reports that in 2001, customs seized 318 CD-ROMs, 158 of which were identified as being illegal.

**The “Suitcase” Problem:** Since part of the piracy problem in Estonia is still due to the importation of infringing materials, it is essential that border measures be strengthened and enforced in practice. As already noted, Estonia did improve its customs code as part of its WTO accession package, giving customs officials the appropriate *ex officio* authority to seize suspicious material without a court order or at the behest of the right holder. Now that authority has to be effectively utilized. Customs officials admit to problems with the detection of illegal material; hopefully, the numerous training sessions held in recent years by the copyright industries will improve this situation.

Most encouraging was the announcement last year by the Estonian customs authorities that they would seize the suitcase material and thus address this major border enforcement problem. This is crucial because both the new Estonian customs law and the Finnish copyright law have a personal use importation exception (which has the effect of allowing small amounts of pirated materials in personal luggage into Finland).<sup>5</sup> As a result, a flood of CDs and CD-ROMs (consisting mostly of entertainment software), as well as videos, is imported into Finland by tourists returning from Tallinn. For example, in June 2001, Estonian customs raided Finnish tourists leaving Estonia and confiscated a large number of pirate music CDs and videos. The tourists were fined.

**Invalid Licenses** Customs officials reported to IIPA that there are many shipments of Russian materials that are entering Estonia, with the Russian distributor claiming the same invalid license to distribute there (i.e., “within the territory of the USSR”). Like the police, customs officials claim they have no means of verifying the validity of these contracts, and no ability to stop this material. EOCP, however, has made itself readily available to assist in determining the authenticity of the Russian contracts, and the problem is reportedly becoming less common.

**Punishment for Store Owners** Enforcement against storeowners is hampered because the appropriate officials do not know the proper procedures to take in these piracy cases. In addition to the procedural problem of the verification of documents, there is the problem of identifying legal versus illegal copies. Neither significant criminal nor administrative remedies have been properly utilized. Businesses, especially illegal kiosks and stores that sell pirated material, are not fined often enough, nor are their business licenses revoked; either of these measures would represent important additional steps toward proper copyright enforcement and should be addressed by the interministerial officials responsible for IPR enforcement. The industries expect that the new 2000 licensing law will accomplish the revocation of such business licenses. The EOCP has seen several examples of the Licensing Law being used to revoke the business license of stores that have been caught selling pirated material.

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<sup>5</sup> Estonian law does not allow customs to make checks on passengers’ personal luggage without reasonable cause. Despite this, Estonian customs has developed a practice of conducting random spot checks on the personal luggage of tourists, identifying several instances where tourists have been caught attempting to ship pirated products back to Finland. As yet, no challenge has been made to the seizures, but clearly the potential exists for the challenge to be made.

## **Police Raids and Coordination Efforts Should Be Improved**

### **The Open Market Problem Has Almost Disappeared**

The illegal open markets appeared over four years ago. In October 2000, the government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. For example, in December 2000, several key ministers took a high profile fact-finding tour of the notorious Kadaka Market in central Tallinn to witness the piracy firsthand. They also observed that many of the illegal stalls were closed before their arrival, due to an organized “early warning system” that had repeatedly been used to thwart police and other enforcement officials. After the tour, they pledged to take Cabinet-level steps to effectively shut down the market stalls, including amendments to the city’s rent laws, if necessary, to go after the landlords of the stalls as third party infringers. Also as a result of this survey, the Cabinet took action to support passage of various legal reforms, including the Copyright Act, Commercial Lease Act, and Consumer Protection Act.

As a result of police and private industry action, the number of stalls selling illegal material in the Kadaka Market was dramatically reduced, from an estimated 160 stalls to 6 to 8 stalls. To date, there is no available information whether the 2001 amendments to the Consumer Protection Act are working to close those few remaining stalls at Kadaka. The good news is that the Kadaka Market will be restructured in October 2002. It will have one supermarket chain and the stalls and kiosks will be shut down. The Kadaka Market falls under the jurisdiction of one of Tallinn’s police districts.

Now the success in shutting down the Kadaka Market problems must be repeated in other markets and other cities. These markets not only hurt the local copyright market, but also, cater to tourists, thus contributing to the “suitcase” problem.

### **Police Cooperation with Industry Faltered in 2001**

The Recording Industry Association of America (RIAA) reports that the police have made some raids and seizures, mostly at outdoor markets. A local group of industry organizations (EFU and EOCP) continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. For example, in February 2001, the Economic Police raided a warehouse in Tallinn and seized some 20,000 music CDs. In a subsequent operation, the Tallinn police raided a duplicating factory in a private home outside the city, and seized approximately 30,000 pirate units on different media. It appeared that this well stocked house was a likely supplier to the Kadaka and Merekeskus markets. However, the police generally exhibit less interest, especially at the leadership levels, to develop and take anti-piracy actions in a concerted manner.

BSA reports a disappointing and dramatic slowdown in police activity in relation to both resellers and end users in 2001. In 2001, 15 raids took place, seven against resellers, eight against end users. Of the reseller raids, approximately 700 CDs were seized, and in the end-user raids, 427 software programs were examined, 200 of which being identified as unlicensed. Although 87 PCs were examined during the course of raids, none were confiscated (a reversal of previous practice). BSA reported that 2001 was an extremely poor year in terms of the amount of raids undertaken by the Estonian police against illegal resellers. BSA agrees that a general upgrading of

the Kadaka market area will marginalize the presence of illegal resellers of pirated software, although it is likely to relocate, as opposed to eradicate, the problem. Although prosecutors and judges remain committed to effective IPR enforcement, the BSA is disadvantaged by the fact that the police forces now regard software piracy enforcement as a low priority matter. In 2001, a mere 20,000 kroons (USD\$1,100) was levied in fines relating to software piracy cases.

The software industry reports that end-user piracy has received scant attention from the special IPR enforcement unit, although the software industry has had good cooperation with the IPR unit on certain enforcement actions and high-ranking officers in the unit. The Central Criminal Police consider end-user piracy to be a serious problem, but not one that they are tasked with dealing with. They are of the view that it is for individual police departments to address. Those departments lack both the motivation and authority to take on such actions.

MPA reports that a major raid occurred in February of 2001, where the Economic Crime division of the Tallinn police raided a residential apartment containing stacks of cardboard boxes filled with over 2,000 pirate optical discs. Apart from the discs seized, the raid is significant in that a computer was also found holding valuable marketing data regarding pirate sales at the Kadaka shopping mall. Two persons were taken into custody pending further investigation. Using information obtained from the raid, the police discovered a large duplication lab in a private house where further evidence of direct links to Kadaka and Merekeskus shopping malls and six people were arrested. In total, over 5,000 pirate videocassettes were seized in 2001.

### **Prosecutorial Delays and Evidentiary Burdens**

Beyond the sporadic seizures and raids, prosecutorial delays and legal roadblocks have so far prevented effective civil, administrative, and criminal prosecution. Evidentiary burdens block effective enforcement because they present significant hurdles to cases moving forward. For example, false contracts are presented to and accepted by the courts. Estonian officials have, so far, been unable to craft viable methods to verify documents. The EOCP has provided great assistance in this regard because of its around-the-clock availability to the authorities.

Problems remain with false contracts, especially Russian sub-license agreements, which are ubiquitous in the smallest kiosks and in video and audio shops. They lend a semblance of legitimacy to the trade, and impede effective enforcement by authorities because of the confusion created. Estonian officials acknowledged in discussions with IIPA members that they have been unable to devise an effective means to defeat them. BSA reports that it is encountering more "false invoicing" problems in its cases. Following BSA end user actions, targets frequently produce fraudulently obtained or falsified invoices which purport to show that software programs were acquired prior to enforcement action taking place. The police find this a difficult issue to deal with effectively.

### **No Civil *Ex Parte* Search Authority and No Statutory Damages**

As with criminal remedies, civil remedies in Estonia are extremely weak. There is virtually no jurisprudence regarding the calculation of damages in IP cases. Estonia's failure to provide *ex parte* civil procedures also is a significant shortcoming. Unfortunately the 1992 copyright law, even with the 1999 amendments, does not include either a provision for statutory damages or a

provision concerning *inaudita altera parte* searches. TRIPS requires that this civil *ex parte* search authority be provided and applied.

Another 1999 amendment to the Code of Civil Procedure, permitting judges to consider search order applications without the opposing party present, suggested that civil *ex parte* searches would be viable; but unfortunately, experience has shown that the provision did not work that way in practice. The BSA expects more tests of these provisions in the near future and would welcome clear and effective legislative amendments on applicable damages.

### **Administrative Proceedings Are Rather Successful**

Administrative proceedings are widely used by the copyright industries. In fact, these procedures are perceived as a rather effective tool in Estonia, given the difficulties with the criminal and civil enforcement regimes. Administrative penalties are significant, providing for a maximum of two years imprisonment and over 500,000 kroons (US\$27,500) in fines. In October 2000, amendments were adopted to extend the deadline for providing documentary evidence against a suspect in order to initiate a case to a more realistic two-year timetable.

Enforcement efforts for the business software industry continue to be hindered by the fact that the present penalties for software piracy offenses are far too low to deter piracy and there are no statutory damages available. Legal entities can only be charged under the Estonian administrative code; only natural persons can be charged under the criminal code. Penalties under the administrative code are mostly limited to fines (and, in certain instances, partial or total business closure), and the rate of imposition of fines is low. The 1999 amendments raised the range of fines significantly. The BSA expected that these higher fines would be imposed in practice in 2000, but even with statutory increases, the total amount of the fines levied in 2000 decreased, because of the application of the provisions by judges, and because diminished police cooperation led to less enforcement activity. The only encouraging sign was that there were no cases resolved in favor of end users.

### **Few Judicial Sentences Are Issued, None of Them at Deterrent Levels**

The recording industry reports that there have been barely any effective judicial actions - no effective civil judgments nor criminal convictions, and only a few administrative fines. Until 1998, customs officials in Estonia were unable even to seize material because they lacked the necessary authority; starting in October 2000, they agreed to seize the so-called "suitcase" materials as well. There were a number of police seizures of CD material (usually in the 3,000 to 5,000 range) in 2001 as in years past.

The 1999 amendments included many important enforcement tools for the business and entertainment software industries. The amendments expanded the definition of an infringing use; imposed liability for end-user piracy upon legal entities; increased the range of fines for copyright offenses; and made pirated copies and PCs subject to seizure. Also, the 1999 amendments made legal entities liable for end-user piracy, with fines ranging from 150,000 to 500,000 kroons (US\$8,250 - \$27,500), depending on the conduct at issue. In practice, the fines are now imposed on a per copy basis, of 7,500 to 100,000 kroons (US\$433 - \$5,775) per copy, with a total not to exceed 500,000 kroons (US\$27,500).

The Estonian courts have heard a few audiovisual piracy cases in which they have applied fines of between 10,000 and 15,000 kroons (US\$550 - \$800). As has been true in years past, judges still dismiss cases because pirates present false contracts as evidence of their good intentions. A more serious problem is the fact that the courts have not applied prison sentences in any audiovisual piracy cases to date. MPA has also experienced problems finding out the disposition of its cases because of communications problems with the police.

## **LEGAL REFORM IN ESTONIA**

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The history of Estonian legal reform began soon after its independence with the adoption of a modern copyright law that went into force on December 11, 1992. On April 19, 1994, Estonia signed a bilateral IPR trade agreement with the United States, pledging to improve its level of protection and enforcement, and to join the Berne and Geneva Phonograms Conventions, among other things. The Estonian government believes that this bilateral is null and void because its parliament never ratified this agreement.

In the late 1990s, Estonia undertook a series of legal reforms to join the international trade and copyright community. On January 21, 1999, Estonia enacted additional amendments to the Copyright Act, as well as to the Criminal Code, the Code of Administrative Offenses, and the Customs Act, partly in anticipation of ratification of the WTO TRIPS Agreement. Those provisions went into force on February 15, 1999. Most significant in the package of amendments was a provision to give customs officials the necessary *ex officio* authority to seize infringing goods at the border. In addition the increases in criminal sanctions, especially for administrative offenses, were hailed as a very positive step by the software industry in particular. (Later in 2001, additional amendments to the copyright law and related laws were made in an effort to improve anti-piracy efforts). Estonia adhered to the World Trade Organization (WTO) on November 13, 1999. In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000) and the Rome Convention (effective April 28, 2000).

### **Copyright Law Amendments of 1999**

In 1999, the first of two expected packages of legal reforms to improve the legal and enforcement regime was adopted in Estonia. The first set (January 1999) comprised provisions granting customs the authority to seize goods without a court order; improvements in civil, administrative and criminal remedies (including a provision to make end-user piracy by legal entities an administrative offense); amendments relating to collective administration (including for retransmission via cable); and provisions necessary to implement the European Union rental directive. IIPA supported the substantial and significant improvements that Estonia has undertaken since its independence, and especially the 1999 amendments directed at IPR enforcement

The second set of amendments was originally scheduled for consideration in 2000, but this was postponed. These amendments when adopted would fulfill Estonia's remaining obligations for compliance with TRIPS, the EU directives, and the new "digital" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The latter set of amendments for digital treaty ratification and implementation was delayed awaiting the final

completion and implementation by the members of the European Union of the Copyright Directive. As a result, it appears that the earliest Estonia will consider legislative efforts will be 2003.

Estonia should be encouraged to further amend its copyright law to: (1) provide for minimum statutory damages, relieving the plaintiff of having to prove actual damages in cases involving copyright disputes between all parties, including legal entities; (2) expressly afford civil *ex parte* search authority; (3) supplant the current right of remuneration for sound recording producers for the broadcasting, public performance and other communication to the public of their phonograms with exclusive rights (as well as fix the unequal treatment noted above, even under the right of remuneration for foreign producers); (4) correct the current disproportionate sharing of the home audio tape levy between authors and producers; (5) add a right of presumption of authorship for sound recording producers (currently afforded only to “works”); and (6) delete Article 62(2), the author’s rights “safeguard clause” which is unnecessary and inconsistent with the Rome Convention (Article 1). In addition, the Estonian government should completely implement the October 2000 decision by customs officials to seize parallel import material with effective border enforcement.

Finally, the important issue of retroactivity should be clarified. Estonian officials must make clear how the law does in fact treat pre-existing works and sound recordings. IIPA interprets current law and treaty obligations as providing for a minimum of protection for works and sound recordings first published within the past 50 years, and some copyright officials and academics have privately concurred with this view. For example, due to Estonia’s entry into the WTO on November 13, 1999, a foreign sound recording is (per the WTO) entitled to protection under the Estonian Copyright Act if published on or after November 13, 1949. The same is true for works. The history of Estonian membership in the Berne Convention is complicated, however. Estonia “joined” Berne on October 26, 1994; but, prior to the August 1940 occupation by the Soviet Union, Estonia was a member of Berne (Berlin text) from June 9, 1927. Estonian copyright officials claim that for “works,” there is clear retroactive protection under Article 18 of Berne and under TRIPS. This was demonstrated, they argue, when an amendment to deny retroactivity was defeated at the time of the adoption of the copyright law in 1992. Clearly, the WTO TRIPS Agreement obligates Estonia to provide such protection for pre-existing works and sound recordings. But to date, there have been no cases; in fact, one court decision in 1997 denied retroactive protection for performers’ rights, because the court reasoned that no neighboring rights protection existed before the 1992 law. Estonian officials should publicly and clearly state how these TRIPS obligations are being satisfied for both works and sound recordings.

## **2001 Amendments to the Copyright Act**

The Estonian parliament adopted amendments to the copyright law that prohibit trade in specific goods if the legal person holding a license trades in pirated products.<sup>6</sup> Additional amendments were made to the Commerce Lease Act and the Consumer Protection Act that reportedly outline the rights and obligations of parties to the lease and permit them to implement certain measures to protect their rights. These amendments entered into force on June 11, 2001. Unfortunately, these amendments did not address the outstanding substantive, legal deficiencies outlined above.

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<sup>6</sup> “Estonia: New Laws Enacted to Control Importation of Counterfeit Goods,” World Intellectual Property Report, Sept. 2001 at p. 7.

## **The Rome Convention Reservation Must Be Withdrawn**

The Estonian Broadcasting Union (ERL) claims that American phonogram producers and performers should not enjoy the right of equitable remuneration for the broadcasting of their material in Estonia, although they provide these royalties for the broadcasting of Estonian material. In fact, U.S. repertoire has never been compensated for its broadcast, even though it is eligible for such compensation. This is unfair to foreign phonogram producers, especially because Estonian material is provided full national treatment for all rights under U.S. law including digital public performance rights for its producers. When it ratified the Rome Convention (1961), Estonia made a reservation under Article 16(1)(a)(i) concerning Article 12. This full reservation is a violation of the European Union Accession Agreement (Article 66) that includes a right of equitable remuneration for neighboring rights holders.

The ERL has repeatedly taken the position that according to the current Estonian copyright act, American phonogram producers and performers do not have the right to equitable remuneration for the public performance (broadcast) of sound recordings in Estonia. This position is completely contrary to Estonia's national treatment obligations set out in Chapter II, Article II, Paragraph 1, of the U.S. Bilateral Agreement of 1994 with respect to the "protection and enforcement of intellectual property rights," which includes these neighboring rights.

The Ministry of Culture announced in November 2000 that it plans to withdraw this reservation by the end of 2002 (or early in 2003); the government believes that broadcasters need a transition period before paying royalties for the public performance of recordings. There is no reason for such a transitional period. Estonia should be urged to revoke this reservation and to fix the law to clarify that U.S. repertoire and producers are covered by the right of equitable remuneration.

## **Amendments Affecting Criminal, Civil and Administrative Remedies For Copyright Infringement**

**1999 Amendments:** On January 21, 1999, a variety of amendments to the Estonian criminal code were adopted, as were important civil and administrative remedies. These provisions went into force on February 15, 1999. The criminal penalties include: criminal seizure provisions; up to two years imprisonment for certain moral rights or economic rights violations; up to three years imprisonment for piratical copying, including import or export of pirate copies (Criminal Code Articles 277–280). In addition, the penalties include up to two years imprisonment for manufacturing, acquisition, possession or sale "of technical means or equipment designed for the removal of protective measures against the illegal reproduction of works or against the illegal reception of signals transmitted via satellite or cable" (Criminal Code Article 281).

The Copyright Act amendments [Articles 83(5) and 6] provided end-user software piracy fines that can be levied against legal entities of between 150,000 to 250,000 kroons (US\$8,480 to \$14,130) for the "use," including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US\$1,130 to \$2,826) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US\$14,130 to \$28,260) for the manufacturing of pirated copies by legal entities. The same amendments repealed the provision that made natural persons liable for

infringement under the administrative code, and instead made natural persons liable for similar actions under the criminal code.

On December 9, 1999, additional amendments were adopted pertaining to software infringements. The maximum statutory fines in the Copyright Act for software piracy were raised from 250,000 up to 500,000 kroons (US\$14,130 to \$28,260). The law was also clarified so that for each illegal program confiscated, the fines will now range from 7,500 to 100,000 kroons (US\$423 to \$5,650), in addition to the permissible confiscation of the computer hardware.

**New 2002 Penal Code:** A new penal code is due to come into force in Estonia in Spring 2002 (reportedly the actual date of implementation will be sometime between April and July 2002). The copyright industries report that the Penal Code is likely to create a distinction between categories of offenses along a “crime/misdemeanor” model. Industry reports indicate that, under Article 14 of the penal code, non-natural legal entities (such as companies) will face criminal liability for, among other things, piracy offenses, which will attract fines in the range of 50,000 to 25 million kroons (US\$2,800 to \$1.4 million), with the additional potential penalty of the liquidation of the company concerned. Some industry groups are consulting with the Ministry of Culture over gaps with respect to the penalties applied to software piracy cases. Misdemeanors are likely to attract penalties of 200 to 18,000 kroons (US\$11 to \$1,000) for living, natural persons, 50,000 to 500,000 kroons (US\$2,800 to \$28,000) for legal entities.

## **The Prevention of Import and Export of Goods Infringing Intellectual Property Rights Act of 2001**

In June 2001, the Parliament adopted legislation that improves border measures regarding pirated and counterfeit goods. According to press reports, this new legislation entered into force on September 1, 2001.<sup>7</sup>

## **WIPO Treaties**

Estonia should be encouraged to ratify the two 1996 WIPO digital treaties and to adopt provisions to implement them in order to protect against Internet and other forms of digital piracy. Estonia was a signatory to both treaties, and preparatory work was undertaken in the Ministry of Justice to draft legislation to implement the treaties. IIPA encourages Estonia to move quickly with this ratification and implementation.

In particular, Estonian law must: (1) ensure that the right of reproduction covers temporary copies; (2) adopt a right of communication to the public, including a right of making available; and (3) allow right holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that right holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, right holders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or

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<sup>7</sup> *Id.* IIPA does not have the text of this legislation on importation measures and therefore cannot provide more detailed comments at this time.

sound recording, including protection against the alteration, removal or falsification of this information.

## Government Software Management

BSA reports that the Ministry of Justice has implemented guidelines and rules on acquiring legal software.

### ENFORCEMENT CHARTS FOR ACTIONS IN ESTONIA (2000 and 2001)

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	EOCP <sup>1</sup>	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	107	14
By Police	N/A	14
By Customs	N/A	0
Number of cases commenced (Incl. Internet cases)	176	14
Number of defendants convicted (including guilty pleas)	N/A	3
Acquittals and Dismissals	N/A	0
Number of Cases Pending	21	11
Total number of cases resulting in jail time	0	0
Suspended Prison Terms	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Suspended Prison Terms	0	0
Prison Terms Served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Prison Terms Served (not suspended)	0	0
Number of cases resulting in criminal fines	N/A	3
Up to \$1,000	N/A	3
\$1,000 to \$5,000	N/A	0
Over \$5,000	N/A	0
Total amount of fines levied	N/A	USD1,100

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001</b>		
<b>ACTIONS</b>	<b>EOCP</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of Raids conducted <sup>3</sup>	47	6
By Police	30	6
By Customs	17	0
Number of cases commenced (incl. Internet cases)	535	6
Number of defendants convicted (including guilty pleas)	N/A	0
Acquittals and Dismissals	N/A	0
Number of Cases Pending	20	6
Total number of cases resulting in jail time	0	0
Suspended Prison Terms	1	0
Maximum 6 months		0
Over 6 months	1	0
Over 1 year	0	0
Total Suspended Prison Terms	1	0
Prison Terms Served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Prison Terms Served (not suspended)	0	0
Number of cases resulting in criminal fines	N/A	0
Up to \$1,000	N/A	0
\$1,000 to \$5,000	N/A	0
Over \$5,000	N/A	0
Total amount of fines levied	N/A	0

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS<sup>3</sup> 2000</b>		
<b>ACTIONS</b>	<b>EOCP</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of civil raids conducted	0	
Post Search Action	0	
Cases Pending	0	
Cases Dropped	0	
Cases Settled or Adjudicated	0	
Value of loss as determined by Rightholder (\$USD)	0	
Settlement/Judgment Amount (\$USD)	0	USD 161,000

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS<sup>3</sup></b>		
<b>2001</b>		
<b>ACTIONS</b>	<b>EOCP</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of civil raids conducted	5	
Post Search Action	N/A	
Cases Pending	3	
Cases Dropped	0	
Cases Settled or Adjudicated	N/A	
Value of loss as determined by Rightholder (\$USD)	1400	
Settlement/Judgment Amount (\$USD)	N/A	USD 167,000

<b>ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS</b>		
<b>ACTIONS</b>	<b>BUSINESS APPLICATIONS SOFTWARE 2000</b>	<b>BUSINESS APPLICATIONS SOFTWARE 2001</b>
Number of raids/searches conducted	36	19
Number of administrative cases brought by agency	20	7
Number of defendants found liable (including admissions/pleas of guilt)	14	9
Ratio of convictions to the number of raids conducted	0.39	0.47
Ratio of convictions to the number of cases brought	0.19	0
Number of cases resulting in administrative fines	7	0
Total amount of fines levied	USD 42,000	0
US\$0-\$1,000	0	0
\$1,001-\$5,000	1	0
\$5,001-\$10,000	5	0
\$10,000 and above	1	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	0	0

Notes –

<sup>1</sup> EOCP is a joint organization that represents the music, film, and interactive games industry. They note the difficulty in many instances of separating music, film and game piracy cases, especially because the pirates sell all products.

<sup>2</sup>EOCP does not have separate statistics for criminal and administrative cases.

<sup>3</sup> Damage claims were submitted in criminal proceedings.