

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Lithuania be elevated to the Special 301 Priority Watch List for 2003. The primary reasons for this elevation are the fact that Lithuania has one of the highest piracy levels in the region, and that it is a major distribution outlet for illegal optical discs flowing in from Russia and Belarus, transshipping into Scandinavia, Eastern and Western Europe. These piracy and transshipment problems have negative impacts far beyond Lithuania's borders and remain unsolved due to the totally ineffective enforcement on the borders and inside the country, and despite continuing international pressure for improvement. Lithuania has been on the Special 301 Watch List since 2000 and has not resulted in any improvement in reducing piracy or resolving the inadequate enforcement measures by the Lithuanian government.

Overview of key problems: The most persistent problem confronting the copyright industries in Lithuania continues to be the lack of any effective, on-the-ground enforcement, resulting in devastatingly high piracy levels. Among the three Baltic nations, Lithuania is the worst in terms of transshipment of pirated materials through its borders. Failures by the police (especially the Economic Police), prosecutors, and by customs officials, to engage in effective domestic criminal enforcement are destroying the possibility of establishing legitimate markets for copyrighted materials in Lithuania. Despite recent legislative changes, Lithuanian law fails to provide for a TRIPS-compatible civil *ex parte* search remedy. Stronger criminal sanctions against organized crime are necessary, including the commencement of criminal searches and raids. Some industries report concerns with possible piracy ties to organized crime elements in Russia. Several serious evidentiary hurdles that impede effective criminal enforcement must be lifted. Estimated 2002 trade losses due to copyright piracy in Lithuania are at least \$16.9 million.

On the legislative front, amendments to the 1998 Copyright Act are needed to ensure its level of protection is up to modern standards, including those of the two WIPO 1996 treaties, of which Lithuania is a member. Recent advocacy by anti-copyright groups to press for amendments which would undercut the teeth of the copyright law appears to have been diverted, due to the active work of the copyright industries and the U.S. Embassy in Vilnius. Still, the Ministry of Culture's amendments continue to contain troubling provisions, which do not effectively implement Lithuania's international obligations, and the package appears to be set for a legislative vote in the Parliament (Seimas) on/about February 24, 2003.

Actions that the Lithuanian government should take in 2003: Lithuania must act to ensure improvement in both copyright legal reform as well as effective enforcement:

Legislation

- Copyright law reform must be achieved in concordance with the modern obligations of the two 1996 WIPO treaties and TRIPS;

- The government should draft optical media regulations to regulate the production, distribution and export of optical media.

Enforcement

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Police must commence criminal raids as well as implement administrative actions (such as taking licenses away from infringing kiosks) and criminal prosecutions must commence, including against those operations run by organized crime elements;
- Customs officers must start using the *ex officio* authority given to them with 2001 law amendments and strengthen their activities to intercept pirate product;
- The law must be revised to permit civil *ex parte* searches without advance notice to the suspect and courts must then issue these orders;
- The judiciary must relax its onerous evidentiary burdens (especially regarding expert reports for some industries) in criminal cases;
- Cooperation between enforcement authorities must improve, and a centralized IPR police unit should be reestablished;
- Continued implementation of the 2002 government software legalization decree is needed.

LITHUANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2002¹

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	12.0	85%	7.0	85%	7.0	85%	5.0	85%
Motion Pictures	NA	90%	1.5	NA	1.5	80%	NA	100%
Business Software Applications ²	4.9	54%	3.9	56%	NA	76%	NA	80%
Entertainment Software	NA	80%	NA	NA	3.5	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	16.9+		12.4+		12.0+		5.0+	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$2.5 million at 76% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Lithuania participates in the U.S. Generalized System of Preferences (GSP) program, which offers preferential trade benefits to eligible beneficiary countries and includes a discretionary criterion that the country must provide “adequate and effective” intellectual property rights protection.³ On April 26, 1994, Lithuania and the U.S. entered into a Trade Relations Agreement and a Bilateral Intellectual Property Rights Agreement. The Bilateral IPR obligations, intended to bring the Lithuanian law up to Berne and Geneva Phonograms Convention standards, were supposed to be in place by the end of 1995; unfortunately, this bilateral agreement never entered into effect because Lithuania did not ratify it.

In May 2001, Lithuania acceded to the World Trade Organization, and its law must currently comply with the substantive and enforcement obligations under the TRIPS Agreement. Also, the European Commission has identified problems with inadequate copyright enforcement in Lithuania and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.⁴

COPYRIGHT PIRACY IN LITHUANIA

Lithuania Is a Key Regional Transshipment Point for Pirated Products

Given its pivotal geographical location between Eastern and Western Europe, and its ineffective border enforcement, Lithuania remains a major regional transshipment area for pirated material—music CDs and audiocassettes, CD-ROMs containing entertainment and business software, videos, VCDs, DVDs and videogame cartridges. Most of the material is produced in other countries, especially Russia and more recently, Belarus. The Lithuanian market is flooded with pirate product produced in Russia. Products are then shipped through Lithuania to other countries in Eastern, Central, and Western Europe, predominantly Poland, the other Baltic States, Germany and Scandinavia. Lithuanian nationals have also been notable in UK airports as hand-carriers of pirated discs in suitcases.

Up until January 2001, Lithuanian customs officials did not have the proper (*ex officio*) authority to do their jobs. Unfortunately, customs officials have not used their *ex officio* power at all so far. Indeed, the recording industry reports customs did not take any anti-piracy actions in 2002. This unacceptable behavior continues to hamper their key potential in the field of IP protection in the region. These officials must start using their authority to commence criminal investigations and seizures when they detect illegal activity.

Optical Media Piracy

There is one known CD manufacturing plant in Lithuania. In the absence of any state control or supervision of the plant’s activity, the possibility that it is involved in unauthorized production cannot be discounted. The Lithuanian plant, which competes with other plants in the

³ During the first 11 months of 2002, \$3.6 million worth of Lithuanian goods (or 1.3% of Lithuania’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 68.2% decrease from the same period in 2001. For more details on Lithuania’s Special 301 history, see Appendices D and E of this 2003 Special 301 submission.

⁴ To access the European Commission’s October 2002 annual report on EU enlargement and Lithuania, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

region (largely Polish and Russian plants) in meeting largely domestic and Baltic orders, is expected to expand, increasing its production capacity within the Baltic region. Industry reports indicate that the plant plans to expand and increase its capacity, possibly to include DVD production. In the course of 2002, the plant acquired new and modern equipment. It is anticipated that the plant's annual optical media manufacturing capacity is in the region of 8 million discs per year. This clearly exceeds the legitimate demand in the Lithuanian pirated copyright market.

In order to avoid the possibility of illegal CD production within Lithuania, steps must be taken quickly to regulate optical disc plants. Lithuania should work with all the copyright industries to adopt proper tools to regulate the production, distribution and export of optical media. For more details, see the industries' recommended elements of any OD regulatory regime at the end of this report.

Internet Piracy

Internet piracy is establishing itself in Lithuania. Many sites contain web advertising of infringing copyrighted hard goods. The recording industry group IFPI reports that, in 2002, it identified and sent 15 "cease & desist" notices to 60 infringing sites estimated to be contained around 16,500 illegal files. As a result, 36 of those sites (i.e., 62%) were removed from Internet. The local recording industry group FGPA sent out 32 "cease & desist" notices in 2002. FGPA reports that upon FGPA's and performers' request, the police initiated only one administrative case against the website offering illegal music products on Internet (www.music.lt). Generally speaking, the Lithuanian enforcement authorities have not addressed piracy on Internet almost at all, which resembles their inactivity to combat with the physical piracy. Despite the increasing figures, several websites have been operating with impunity for over three years without any prosecutorial action to shut them down. To date, there are also no court cases dealing with the Internet piracy. MPAA also reports that there are many amateur websites marketing pirate videocassettes, VCDs and parallel imported DVDs. Cooperation with the ISPs (Internet service providers) reportedly has been less than satisfactory.

Another popular form of music piracy on the Internet in Lithuania is selling recorded CD-Rs (mostly in MP3 format) by announcing lists available in Web pages or in special announcements sections and then delivering these CD-Rs by mail (or some other way) directly to the customer. These same techniques are used for distributing pre-recorded CD-Rs for pirated entertainment software products, in addition to the numerous "warez" sites providing pirate videogames for download.

Piracy Remains High Across All Industries

The recording industry reports that the music piracy situation in Lithuania continued to worsen in 2002. The streets of the main cities are still full of kiosks selling pirate CDs and videocassettes. The levels of piracy for sound recordings and music in Lithuania continued to be as high as 85% in 2002 (the same since 1999). As with the developing trend elsewhere in the region, the share of pirated audiocassettes in overall music piracy is decreasing. Currently, around 25% of all pirated sound carriers are audiocassettes and 75% pirated CDs (and CD-Rs). The legitimate music industry in Lithuania is struggling for survival in the midst of piracy. Organized criminal groups are now involved in heavy pirate CD traffic, with extremely limited enforcement activity by the authorities. Despite what is understood to be further major pirate distribution groups in action, 2002 has not seen a repeat of the successful actions of the two

previous years, which netted over 100,000 and 200,000 pirated discs respectively. Estimated trade losses due to recording and music piracy were \$12 million in 2002.⁵

In addition to the high levels of domestic music piracy, one of the main problems for the recording industry is that Lithuania is the main transit country for pirate CDs from Russia and Belarus. This product is then shipped to Estonia and Latvia as well as to Poland and other neighboring countries. However, investigating the transshipment of CDs through Lithuania has proven very difficult as Lithuanian customs do not use its ex officio authority to seize the shipments in transit. Regrettably, the recording industry has to report that customs did not conduct any anti-piracy actions in 2002.

The Interactive Digital Software Association (IDSA) reports that all of the pirated entertainment software product (especially prerecorded silver discs) is now coming from Russia. Distribution of pirated material in the country is controlled by Russian organized crime syndicates which are now affixing “logos” or “brand names” to their products. These pirated materials are then stored in Lithuania for distribution throughout Eastern and Central Europe, as well as for distribution in Lithuania itself. There is a small but growing local market involved with burning videogames for the PC on gold discs, now at about a 30% piracy level. In addition, Internet piracy is rapidly rising. As recently as 2000, estimated videogame piracy levels were over 90% of the market. There has been some improvement in the domestic market due to enforcement actions being undertaken by entertainment software companies. Retail piracy is moving to the flea markets, kiosks, and taking to the Internet. The biggest problem, by far, for this industry is the flood of Russian-produced pirated entertainment software into Lithuania, both for domestic consumption and transshipment to surrounding countries. This industry also reports problems with ineffective enforcement by Lithuanian customs officers. Estimated level of piracy of entertainment software products in Lithuania was 80% in 2002.

The Business Software Alliance (BSA) reports that the piracy rate for business software in Lithuania dropped slightly over the past year to 53% in 2002. The Gariunai flea market remains a notorious source of pirated materials, although police activities to remedy this have increased. It is believed that the market attracts “piracy tourism” from neighboring countries. BSA believes that there is steady improvement with regard to central government use of software. Since the 2001 government software management decree issued by the Ministry of Interior, funds have been allocated by Central Government for licenses to procure legal software, although the extent to which this has been applied is unclear. Local governments remain a source of serious concern for BSA. Estimated U.S. trade losses due to business software piracy in Lithuania increased to \$4.9 million in 2002.

The Motion Picture Association of America (MPAA) reports that Lithuania continues to be the least developed market of the Baltic states for audiovisual products. Although it is the largest of the three Baltic countries, MPA member companies do release legitimate films in local cinemas and on video with subtitles and local publicity materials. It is estimated that the video piracy rate remains around 90%. Pirate cassettes are duplicated locally using Russian-language masters. The country is also a conduit for pirate product to Poland and Germany and other Baltic states, and has a porous border with Belarus. The legitimate video industry is trying

⁵ This figure reflects the conclusion of a more in-depth examination of the market than has taken place in the past. It reflects more accurate information rather than a rapid surge in losses inflicted by piracy of U.S. recorded music. It also includes a very conservative estimate of the losses inflicted by pirate activity at the Baltic Optical Disc CD plant, which exports part of its output to other countries in the region. There is little doubt that previous reports underestimated the scope of the problem, but the recording industry has no mechanism for reassessing past estimates.

to make inroads into this predominately pirate market, and local partners of several MPA members work closely with enforcement officials, particularly the tax police. These companies conduct extensive media campaigns, highlighting every enforcement action and every legislative initiative undertaken by the authorities. The Internet is beginning to take hold, and amateur websites are marketing pirate product. Cooperation with Internet Service Providers (ISPs) has reportedly been good in getting such sites removed. Television piracy is also reported to occur in Lithuania, with small cable stations showing unlicensed blockbuster movies.

COPYRIGHT ENFORCEMENT IN LITHUANIA

In order to comply with its WTO TRIPS multilateral obligations and its bilateral trade obligations, the Lithuanian Government must express its political will to put all of its enforcement tools into effective working order. The Criminal Code, the Customs Code, the Civil Procedure Code, and appropriate administrative sanctions all form the enforcement arsenal necessary to fight commercial piracy in Lithuania. In addition to passing its copyright law in 1998, Lithuania approved improvements to its criminal code in 2000 and revised its customs code in 2001 to include the all-important *ex officio* authority to allow customs authorities to properly seize suspect material at the border. All these provisions must now actually be implemented in practice, and judges, customs officials, police and prosecutors must start their actions to stop the organized criminal piracy activities within Lithuania.

Poor Coordination Between the Criminal Enforcement Agencies

The Ministry of Finance decided to liquidate the specialized IPR unit (Tax Police), effective April 1, 2002, and Tax Police officials had IPR enforcement removed from their portfolio. The copyright industries find the liquidation of the Tax Police to be a huge step backwards in the copyright enforcement, since it was the only enforcement authority that started to build up the proper copyright enforcement by making more concrete efforts, which started to show some encouraging successful results.

The Economic Police and customs officers remain the only Lithuanian agencies with jurisdiction to pursue copyright infringements. Regretfully, local reports indicate that there is no communication and co-operation between these two law enforcement agencies. Furthermore, the Economic Police is reported to be weak in cooperating with other enforcement agencies responsible for IPR. In September 2002, the Economic Police created an IPR unit of three officials, which unfortunately takes very few actions against IPR crimes if any at all. The Economic Police has indicated that they cannot add more specialized IPR investigators to its operations due to limited budget resources.⁶ The bottom line is that the copyright industries are gravely concerned that the number of effective anti-piracy actions in Lithuania will decrease without a larger, specialized IPR unit.

Police, Prosecutors and Judges Must Enforce Lithuanian Laws

The new criminal code adopted in May 2000 provided criminal penalties for copyright infringement, given the *ex officio* authority to commence intellectual property infringement cases on their own volition (that is, without a specified complaint from the copyright or neighboring

⁶ Interestingly, the Lithuanian government did find funding to establish the State Expertise Centre under the State Forensic Bureau.

rightholder). The key is that this authority must now be utilized by the prosecutors to engage in effective enforcement action against IPR crimes. These penalties must now be applied to organized criminal syndicates working in Lithuania to stop the piracy. So far, the results are disappointing.

Recording industry experience: The recording industry reports that raids occur very sporadically, but there is no deterrent effect to this activity. The Economic Police refuses to provide any statistics related to its IPR activities.

The local recording industry group FGPA reports that it continued to assist the police actively in both administrative and criminal cases. According to the 2002 statistics, FGPA provided the total of 19 specialist opinions for 3,462 seized sound carriers (of those 3,448 CDs, 14 audiocassettes) in administrative cases, and the total of 21 expert opinions for 245,286 sound carriers (of those 244,481 CDs, 865 audiocassettes) in criminal cases.

Prosecutorial follow-up is almost non-existent in Lithuania. The music industry reports that the two recent major seizures of over 100,000 pirated CDs in 2000 and over 200,000 pirated CDs in 2001, have not received any prosecutorial follow-up whatsoever and is feared to be closed. The recording industry reports that in early February 2002, they won their first criminal copyright case for copyright infringement of music in Lithuania. The penalty imposed was one-year probation and confiscation of the seized materials. The Tax Police initiated the case in spring 2000.

Business software experience: BSA reports that in 2002, there were 52 raids and seizures directed at flea markets, resellers and end users. Forty-three tax police raids took place against illegal end users of business software (the same number as in 2001).

In 2002, there were 26 administrative judgments at lower court level, a reduction on the number (42) handed down in 2001. As at early 2003, several further administrative cases are pending. Also in 2002, the tax and economic police also initiated nine criminal actions against resellers and end users. BSA has continued to obtain criminal judgments against both end users and resellers in 2002, including:

- Criminal judgment against reseller, sentence of 6 (six) months (suspended), and the confiscation of substantial number of CDs;
- Criminal judgment against reseller, sentence of one year imprisonment (suspended) and the confiscation of substantial number of CDs;
- Criminal judgment against reseller, sentence of six-month imprisonment (suspended for a one year), confiscation of assets in the amount of 1000 Litas (US\$282), confiscation of CDs and seven PCs.

Also in 2002, BSA continued to obtain civil judgments in both reseller and end-user cases: in total, 20 judgments at District Court/Court of Appeal level were handed down, resulting in damages awards in excess of 1,000,000 Litas (US\$310,000). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 27 settlements with end-users and resellers in 2002, for a total value of 170,000 Litas (US\$52,700).

BSA received an alarming ruling in October 2002 from the Lithuanian Supreme Court. In a criminal case brought against the director of a company suspected of end-user piracy, it was found that the term "commercial purposes" did not extend to end-user piracy, but rather was limited to distribution only. The Supreme Court interpreted "commercial purpose" only to

“distribution” of illegal copies, which happens when the infringer receives direct income from this activity (as opposed to an indirect benefit). The director was acquitted on this basis. BSA is exceptionally concerned at this ruling as it effectively decriminalizes end-user piracy. BSA has asked the Supreme Court to issue a corrective Practice Direction confirming that “commercial purposes” are not limited solely to “distribution,” and that the Ministry of Justice makes this clear also when the new criminal code is brought into effect in May 2003.

Civil Actions: *Ex Parte* Searches and Damages

The Lithuanian Copyright Act purports to include the critical enforcement tool of civil *ex parte* search orders but it fails to provide a TRIPS-compatible version. Because the law allows prior notice to be provided to the intended defendant, the usefulness of this search order is completely undermined. As a result, the BSA has not made any requests for a civil *ex parte* search order. Simply put, the law must be changed in order to comply with TRIPS.

The Lithuanian Parliament drafted a proposed civil search law in late 2002, which was presented in January 2003. BSA, together with other rightholders, objected to several provisions within the draft law, which were felt to be incompatible with TRIPS Article 50. Parliament has accepted the proposed changes put forward by BSA/rightholder groups, and the law is due to be enacted on February 24, 2003.

Also early in 2003, the Lithuanian Parliament proposed an amendment to the “statutory” damages laws present in the Copyright Act, seeking to replace those provisions with a capped remedy of the equivalent to US\$35 to \$35,000. BSA objected strongly to this change, as it will result in an effective cap on statutory recoveries for infringement of a rightholder’s rights, as opposed to being calculated by reference to a work or number of copies. Consultations are ongoing with the Lithuanian government with a view to modifying the proposal, so that statutory damages are awarded on a per-copy or per-work basis. The proposals are due to be presented to Parliament on February 24, 2002.

Some entertainment software companies report that they have had some success through civil enforcement. A majority of the cases are settled to the satisfaction of the company.

Inadequate Border Enforcement

Much improvement is needed to stem the tide of pirated products entering Lithuania and being transshipped to other countries, as discussed above. Despite the adoption of the new customs code in January 2001, which afforded customs officials with the authority to make *ex officio* seizures (on their own initiative), such *ex officio* actions have rarely taken place. Lithuanian customs officials complain about the lack of cooperation with other Lithuanian agencies (including the Border Police) and their own inability to develop and complete piracy cases. It is crucial, that Lithuanian Customs start using its *ex officio* authority and taking actions against IPR crimes.

Administrative Fines Are Too Low in Copyright Cases

Lithuanian’s administrative penalties are inadequate and non-deterrent. BSA and the recording industry report that the only available sanctions under the Administrative Code are monetary fines, which are less than the level of damages inflicted on the rightholder. These fines range between 1,000-2,000 Litass (US\$300-600) in copyright piracy cases. Regrettably, in

practice, the courts tend to apply the fines in the range of 100-200 Litas, sometimes 500 Litas. At the very least, the courts should stop finding the excuses to lower the fines and impose the statutory fines. Furthermore, the fines for repeated infringements should be at least in the level of 5,000 Litas. Unfortunately, amendments to strengthen these penalties are facing strong opposition in the Lithuanian Parliament. BSA is unaware of any proposals to increase administrative penalties. BSA believes that the level of administrative penalties is too low to constitute a genuine deterrent: In the 26 administrative judgments made in 2002, the average fine was 700 Litas (US\$220).

The Burdensome Problem of “Expert Opinions”

There is a burdensome evidentiary problem related to proof of ownership affecting several copyright industries.⁷ As with other countries in the region, the problem is that the courts will not apply a presumption of ownership. Therefore, in order to prove that a suspect product is in fact pirate, an “independent specialist” must reach a conclusion, which is then presented as evidence. The police have reported numerous instances where even after they conducted raids, the perpetrators would likely not be prosecuted because the police were required to get an expert opinion (that can include a “recognized” specialist) to determine proof of ownership for each copy seized. Further, expert witnesses are needed cases to proceed. Private citizens, even though expert in this area of the law, are often barred; thus, only designated experts in some cases are allowed to serve this function, completely hampering those cases from moving forward.

The recording industry reports that its rightsholders also still have to go through extremely cumbersome expert reports to pursue administrative actions against piracy. For example, every single CD has to be accounted for and inventoried. Furthermore, sometimes every single song on every single CD has to be accounted for and even listened to. The problem, especially for the recording industry, is that the seizures are mostly done only as the last part of illegal distribution chain, where there are respectively small amounts, but a very large variety of titles, which makes it difficult to account for all of them. And, as the regulations require, the recording industry has to account for every seized unit, in order to be sure that the case is concluded successfully. When the authorities and the industry make very large seizures (such as over 200,000 CDs in one action), the burden to complete such reports is completely onerous and counterproductive to efficient enforcement. According to the regulations, the plaintiff has six months to prepare an expert report; the recording industry is doing its best to prepare these cases within a three-month time span.

The judiciary still has the tendency to not accept the opinions of the music industry in some cases. However, due to the years of “pioneering” this practice is slowly diminishing. Nevertheless, the recording industry believes strongly that legislative reform in the copyright act to establish a presumption of ownership is crucial to resolving this enforcement roadblock and expediting case processing.

⁷ The BSA indicates that this issue is no longer a problem for the business software industry in Lithuania. That is because a presumption of ownership is now applied by the courts for business software works. The difficulty remains for individually created copyrighted works, and in the production of evidence pertaining to the retail value of those works. This is because certain acts only “qualify” as offenses when the retail value of the work exceeds a certain amount (100 times the minimum wage). In those cases “expert” evidence is required to confirm ownership in the work as well as the retail value.

MCAA notes that expert reports have to be filed for every product seized. Still, local distributors report having had cases processed relatively quickly (six months), but that many cases have been postponed because of technicalities found in the papers submitted.

In early 2002, the Ministries of Culture, Justice and Interior, along with the Prosecutor's Office, established a separate public center under the State Forensic Bureau, which would provide expert opinions in copyright cases with the approximate budget of US\$32,000 (120,000 Litas). This new State Expertise Centre started to operate late 2002 and currently employs two persons (instead of initially planned six). The Centre is like a "formalizer" of the expert reports, which will be continuously provided by the copyright industries. The recording industry believes that the creation of such a center is not a priority requirement in seriously challenging the piracy problem. These statutory opinions are contrary to European practice, whether the private sector usually provides the expert opinions on seized goods. It would be far preferable for these funds to be dedicated to creating an effective separate IPR police unit (like the liquidated Tax Police). Apparently, the ineffective and uncooperative Economic Police is applying to be an intermediary of the Centre's budget between the State and the Centre. This effort should be stopped, as it will hamper the attempt to get some order in the copyright enforcement.

Other Hurdles to Investigations

False contracts: Several years ago, the copyright industries reported that police and prosecutors are similarly unable to deal effectively with false contracts that are common in this region. Lithuanian judges have indicated that there have been some difficulties allowing legal entities to commence copyright suits; however, some industries (software) report that this has not been a problem for them. This problem has diminished over the years, thanks to the activities of the Tax Police.

Rules on court fees: The industries understand that the new code on civil procedure, published in February 2002, sets the level of court fees in IPR cases at a maximum level of 3% of the value of the claim. Prior to this 2002 requirement, Lithuanian courts were inconsistent in their application of court costs, apparently confusing the general provisions (which involve 5% of the value of the claim) and the civil code rules on intellectual property rights (which had been 100 Litas). The application of this rule has to be clarified because the application of the 5% civil claim rule imposes an excessive financial burden on the rights holder and may impinge on their ability to bring a case in the first instance. The recording industry imposes the imposition of any such prohibitive court fees. A flat fee of 100 Litas has proven to be a reasonable amount and this criterion should be re-applied.

COPYRIGHT LAW AND RELATED REFORMS

There have been recent reforms to Lithuania's copyright law, criminal code, civil code and customs code. More recently, efforts to amend the 1999 Copyright Act have escalated, and close attention must be paid to that effort in order to avoid deleterious results, which could undermine, not improve, copyright protection and enforcement in Lithuania. Recent advocacy by anti-copyright groups to press for amendments, which would undercut the teeth of the copyright law appears to have been diverted, due to the diligent work of the copyright industries and the U.S. Embassy in Vilnius. However, the government's set of proposed copyright amendments still contain some troubling provisions, and a legislative vote is set for February 24, 2003.

Copyright Act (1999)

Lithuania took a major step forward to improve its legal regime with the 1998 adoption of its comprehensive Copyright Act (Act No. VIII-1185), which replaced what was essentially the revised Soviet Civil Code.⁸ The law entered into force on June 9, 1999. The Ministry of Culture was appointed by the government as the agency responsible for the implementation of the copyright law. Also, a special copyright board was formed effective January 2000 under the law, and this board includes representatives of the copyright industries to consider enforcement activities. The law even provides for the recovery of profits and statutory damages in order to be consistent with the WTO TRIPS Agreement.

With respect to international treaties, Lithuania joined the Berne Convention on December 14, 1994, and after years of delay, it joined the Geneva Phonograms Convention effective January 27, 2000. It also joined the Rome Convention on July 22, 1999. In particular, joining the Geneva Phonograms Convention was an important milestone to assure protections for U.S. and other foreign sound recordings by providing a point of attachment. Another positive note was Lithuania's accession to the two 1996 WIPO digital treaties—the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT), making it one of the original 30 countries to put these treaties into force.

While the 1999 copyright law did represent a positive step forward in Lithuania, the law contained significant deficiencies. The 1999 Act even included some, but not all, of the provisions required by the two WIPO treaties. IIPA's observations on the key remaining problems and/or omissions in the law are summarized below:⁹

- The act must ensure that the right of reproduction covers temporary copies;
- The act's right of communication to the public needs to be amended to make clear it applies to all disseminations, not just "transmissions," and that there is no exhaustion of the distribution right by transmission;
- The act must allow right holders to fully enforce their rights against the circumvention of technological protection measures (TPMs). 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. Although the Lithuanian amendments (Article 64) cover some of these activities, full implementation would include a prohibition on the manufacture, importation, sale, distribution, or other trafficking not only in devices but also in services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention (and not just the removal of a technological measure).
- The law added protections for so-called "copyright management information" that is attached to or accompanies a work, performance, or sound recording. However, it does

⁸ After regaining its independence from the Soviet Union, Lithuania amended its copyright and administrative law, albeit only slightly, in May 1994. The 1994 amendments updated the old Soviet-style civil code with two new chapters that adopted a general framework for a Berne-compatible law, but which fell short of even the minimum standards of substantive protection. In January 1996, a separate Law on Computer Programs and Databases was adopted, in part to provide laws compliant with the European Union directive on software.

⁹ In October 1998, IIPA submitted detailed comments to the Parliament on the penultimate draft of the bill, at the request of the drafters of the law and the government of Lithuania. There, IIPA's comments expressed concerns that the draft copyright bill, although a major improvement over the existing Copyright Law of 1994 (civil code), if adopted, would still contain serious deficiencies that needed to be addressed if Lithuania were to adopt a modern copyright law and an effective enforcement regime. The discussion in this section tracks most of the comments IIPA provided in that October 1998 document to the Lithuanian Parliament.

not provide the full panoply of rights for the protection against the alteration, removal, or falsification of this information, and it excludes the reproduction and offering for distribution or dissemination activities.

- Article 69 of the Copyright Act reportedly provides for civil *ex parte* search procedures but not without advance notice to the target. The Lithuanian law must include *ex parte* search orders, at least as required by the TRIPS Article 50. This type of search order should be available for civil cases to permit a right holder with evidence of piracy to obtain, without advance notice to the alleged infringer, a court order for an inspection of equipment and the premises of the business suspected of piracy.
- The transitional provisions of the copyright law should explicitly provide for protection for preexisting works and sound recordings in Article 72 (i.e., full retroactivity consistent with Article 18 of Berne and Article 14.6 of TRIPS). Of note, this article also fails to comply with the term of Lithuania's accession agreement with the EU, and the EU's Term of Protection Directive.
- Producers of sound recordings should be vested clearly with exclusive rights in respect of broadcasting and communication to the public. The law should make it clear that the remuneration claim does not substitute for an exclusive right. In fact, broadcast royalty payment obligations owned to U.S. phonogram producers and performers must be paid.
- The law should provide for a term of 95 years from first publication in the case of audiovisual works, or where the author is a legal entity.
- Amendments should be made to initially vest all economic rights in an audiovisual work in the producer of the work, subject to agreements to the contrary.
- The definition of an "author" of an audiovisual work is very broad and should be clarified.
- The law should provide for clear presumptions of authorship and ownership that would include not only "natural persons" but also a "legal person" ("legal entity"). This should include, for example, a provision that the producer (including a legal entity) of an audiovisual work or a sound recording is the initial owner of all economic rights. This would avoid the problem of proving ownership for illegal copies of works seized, and would permit one entity (producer) to commence legal actions on behalf of the authors and performers.
- The scope of the Lithuanian Copyright Law should apply to works or phonograms first or simultaneously published in Lithuania; the law's language requires clarification.
- The limitations on exclusive rights of copyright owners and producers of sound recordings should be narrowly tailored to fit the scope of the exceptions provided for in TRIPS. This includes: clarifying the TRIPS Article 13 tripartite test and clarifying the vague scope of the "fair practice" definition; narrowing the "personal use" exception; limiting the blank tape/recording equipment levies to analog (not digital) material; and preserving a meaningful practice of the copyright owner to add copyright protection technology to copies.
- The provisions with regard to collective management should delete the provisions that over-regulate author and producer contracts, make the collecting society more democratic, and lower the mandated administration fees.
- The copyright law should be extended to cover other organizations representing the collective interests of right holders, including anti-piracy organizations besides the one included in the law now.

Current Efforts to Amend the Copyright Act

Overview: Legislative consideration of the latest package of copyright law amendments has been postponed to late February 2003; at that time, it is expected that the Legal Committee of Parliament will pass the package to the floor. Vigilance is required to ensure that deleterious amendments are not adopted. IIPA reported in our February 2002 Special 301 submission that it was likely that copyright amendments efforts would be resurrected during 2002. There we expressed concern over efforts some Lithuanian small business groups (such as retail shop owners, but more troubling, by some organized crime groups) in 2000 which lobbied for the removal of some of the criminal sanctions for IPR violations and the reduction in the levels of compensation and damages that can be awarded to right holders under the copyright act. Since the new criminal code (2000) had only been in place for a short time, and only sparingly used, the copyright industries vociferously objected to any effort to repeal the criminal sanctions. A similar anti-copyright faction again attempted in early 2003 to undermine the level of damages available under the copyright action (see further discussion below).

The government's legislative package of 2002: The Lithuanian government has indicated its intent to continuously improve its laws and regulations in order to make them compatible with TRIPS, the WIPO treaties and the various EU directives. The Culture Ministry set up a working group/commission to propose necessary changes to the copyright law; this group of government officials included representatives from the Ministries of Culture, Justice and Finance, along with former IPR police investigators and academics. Before their work was made available in June 2002, even the local copyright owners were not consulted. By summer and fall 2002, some local and international industry groups were able to submit their comments to the various Lithuanian agencies for their continued consideration. The Ministry of Culture accepted some, certainly not all, of the recommendations made by the copyright industry sectors (referring primarily to the recording and business software industries). The package has the support of the Lithuanian Supreme Court and the Culture Ministry, thus making it a challenge to achieve further amendments to strengthen the proposal.

The objective of the Culture Ministry's amendments were aimed at improving the law up to the standards of the WIPO treaties and various EU directives; unfortunately, this effort fell short. In the Fall of 2002, the local and international copyright industries had identified several problems and issues which required further improvement. For example, comments expressed concern over the following: inadequate provisions regarding the effective implement of the WIPO treaties' obligations on technological protection measures, especially allowing to circumvent the technological protection measures for private purposes; the lack of a provision establishing a presumption of ownership in sound recordings; creation of an overbroad private copying exception, including the obligatory rule to allocate 25% of the levies for cultural, social or other similar purposes, which should be decided by right holders; troubling provisions regarding the provisions regulating the collecting societies activities, especially exempting the collecting societies from the anti-trust rules; the scope and application of obligatory collective management to the exclusive right of making available and the fact that there would be only one collecting society allowed in each field of exceptions to protection.

Legislative wrangling in late 2002 and 2003: The Ministry of Culture's package was presented to the Legal Committee of Parliament in early autumn in 2002. A second set of amendments arrived at the Parliament's door when the Legal Committee of the Parliament decided in mid-December 2002, over the objection of the Ministry of Culture, to discuss a separate submission of some 20 amendments filed by attorneys known for representing clients

who prefer to weaken copyright provisions (called the “alternative project” for discussion’s sake). In mid-December, the Legal Committee decided to insert five of the proposals from the alternative project into the Ministry of Culture’s draft. Meanwhile, the Supreme Court voiced its support for the Ministry of Culture’s package at the very late stage of the amending process, thus making any additional amendments quite challenging.

In addition to the remaining deficiencies in the proposed amendments, the industries are particularly concerned by the Ministry of Culture’s continued unwillingness to accept most of the copyright industries’ recommendations, thus sticking by the draft it circulated in the Fall 2002. The troubling provisions listed above remain unresolved. In fact, its proposal to amend Article 67(3) of the current Copyright Act would adversely affect the ability of rightholders to collect damages. The current law provides that copyright owners, instead of getting reimbursement for losses (that is, damages), may claim compensation, the amount of which will be determined according to the price at which the produce has been legally sold, by increasing it up to 200%, or 300% if willful infringement is involved. The ministry’s amendment would allow the rightholder to receive 10 to 1000 minimum wages (US\$35-3,500), with the court taking into account the kind of infringement, the income status of the infringer, his motives and other circumstances including fairness, equity and discretion. Years ago, BSA in particular worked hard with the Lithuanian government to introduce this statutory damages provision in the current law; statutory damages are an excellent means to aid rightholders and courts in applying TRIPS-compatible levels of damages. Unfortunately, the Legal Committee continues to reject leaving the current law alone and instead wants to undercut an existing strong damages remedy.

Fortunately, the Legal Committee rejected all of the proposals in the “alternative project” on January 27, 2003, and the Seimas went out of session for a month. Legislative consideration of the copyright law amendments pending before Parliament have been postponed one month, and will likely be taken up on February 24, 2003, after Parliament returns from its break. Between now and then, it is likely that both the copyright industries and the anti-copyright forces will continue to advocate their views. It is imperative that the Seimas adopt a package which satisfies Lithuania’s bilateral and multilateral copyright obligations.

Criminal, Civil and Customs Code Reform

Lithuania has revised its various codes affecting the enforcement of intellectual property rights in recent years.¹⁰ Effective implementation of these amendments, resulting in the deterrence of copyright piracy, is key.

Amendments to the Criminal Code and the Criminal Procedure Code entered into force in 2000; these contain criminal liability for unlawful reproduction, importation, exportation, distribution, or other uses for commercial purposes. Reportedly, the new provisions include fines and a two-year term of imprisonment. Also, the revisions include penalties for infringements of digital rights, that is, rights management (RMI) and technological protection measures (TPM), punishable by one and two year imprisonment terms, as well as fines. IIPA believes that these new fines and terms of imprisonment must be enforced to stop the spread of digital piracy (but see discussion above on the need to improve the copyright law’s coverage of TPMs and RMIs).

¹⁰ IIPA does not have the full translation of all these laws; this section relies on third-party summaries.

Amendments to the Civil Procedure Code entered into force in July 2001. The government believes that these amendments implemented a civil *ex parte* search remedy but the industry is clear that this remedy violates TRIPS and is therefore unavailable for copyright holders. Amendments to the customs code—the Law on the Protection of Intellectual Property in the Field of Import and Export of Goods—entered into force on January 1, 2001, with further implementation completed on October 1, 2001. These amendments give customs officials the authority to: (1) search, on their own initiative, *ex officio* (with or without a judicial order), all persons, objects and vehicles that enter or leave Lithuania; (2) seize infringing copies of audiovisual works, including parallel imports; and (3) detain all persons in possession of such goods, is vital to prevent piracy transmissions at the border.

Civil code reform: The Lithuanian Parliament drafted a proposed civil search law in late 2002, which was presented in January 2003. BSA, together with other rightholders, objected to several provisions within the draft law, which were felt to be incompatible with TRIPS Article 50. Parliament has accepted the proposed changes put forward by BSA/rightsholder groups, and the law is due to be enacted on February 24, 2003.

Government Software Legalization

The Business Software Alliance (BSA) believes that there has been steady improvement with regard to central government use of software. In May 2001, the Lithuanian Ministry of the Interior signed an order entitled “A Recommendation on the Use of Software in State Institutions and Bodies.” Since the 2001 decree, funds have been allocated by Central Government for license procurement, although the extent to which this has been applied is unclear. BSA reports that this recommendation was the first comprehensive central government software management decree in Eastern Europe. Among other things, the recommendation mandates: (1) the appointment of a Chief Information Officer, (2) the completion of an initial software inventory (follow-up audits are to be conducted at the discretion of each agency), and (3) the centralized acquisition of software. In addition to binding central government departments, the recommendation also applies to third parties that have received government funding (state-funded projects). Legalized software use in local governments remain a source of serious concern for BSA.

Optical Media Regulations

The Lithuanian government should craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following eleven elements:

- 1) Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production must take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID code) for optical discs and production parts, the licensee must take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) Licensing of export/import of materials: Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials

or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).

- 3) Requirement to apply manufacturer's code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mold for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mold or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4) License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) Search and seizure authority: Plenary authority to enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10) Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11) Possibility of closure of a plant.

The copyright industries look forward to working with the Lithuanian authorities to draft, implement and enforce comprehensive optical disc regulations.