

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY

Special 301 recommendation: Lithuania should remain on the Watch List in 2004.

Overview of key problems: The most persistent problem confronting the copyright industries in Lithuania is the lack of effective, on-the-ground enforcement, both in-country and at its borders, resulting in high piracy levels. Over the years, no senior Lithuanian politician has expressed any signs of political will and commitment to enforce copyright legislation and halt piracy. Among the three Baltic nations, Lithuania remains most affected by transshipment of pirated materials through its borders. Customs officers still do not fully use their *ex officio* authority to inspect, intercept and seize suspect shipments of pirated product entering the country. Moreover, there has been no evidence of co-operating between customs, police and other enforcement agencies in challenging the organized criminal groups engaged in piracy. Stronger criminal sanctions are necessary, including the commencement of criminal searches and raids. Some industries report concerns with possible piracy ties to organized crime elements in Russia. The courts continue to place hurdles in requiring unnecessary expert reports, which only serve to delay judicial consideration. Criminal penalties and administrative fines remain low, and have not served to deter piracy in Lithuania.

On the legislative front, Lithuania amended its copyright law in 2003 in an effort to further harmonization with the EU, but failed to account for industry input on several key issues, including removing statutory damages, not expanding the scope of exclusive rights for producers of sound recordings, and inserting a private copying exception to the technological measures provision. Furthermore, the new Penal Code and the Penal Procedural Code came into force in 2003. Of significant concern, Article 192 of the new Penal Code blatantly violates the TRIPS Agreement by affording penalties for illegal reproduction and distribution involving only copyrighted works, but omitting sound recordings.

Actions to be taken by the Lithuanian government in 2004

Enforcement

- The Lithuanian Government should immediately express the political will to take radical steps to significantly reduce the massive music, film and software piracy in Lithuania, which has a huge negative impact on the legitimate industries in Lithuania and in other countries in the region.
- Re-establish a central, dedicated and professional IPR Unit within the police structures, that would undertake the systematic elimination of the massive piracy in the country and co-ordinate the anti-piracy activities with other law enforcement agencies.
- 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 mostly smuggled into the country.
- The current cumbersome and complicated procedures in criminal and administrative IPR cases should be simplified and shortened. The judiciary must relax its onerous evidentiary burdens in criminal cases.
- Cooperation between enforcement authorities as well as with right holders' organizations must improve.

Legislation

- The government should draft optical media regulations to regulate the production, distribution and export of optical media.
- Adopt a proposed government order regarding the legal use of business software within state institutions. This would improve the implementation of the 2002 government software legalization decree.
- Acknowledge that the 2003 amendments to the Copyright Act did not fully reflect the necessary reform in the post-TRIPS environment needed to effectively enforce rights and provide effective, deterrent remedies.

LITHUANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	13.5	85%	12.0	85%	7.0	85%	7.0	85%	5.0	85%
Motion Pictures	NA	NA	NA	90%	1.5	NA	1.5	80%	NA	100%
Business Software Applications ³	NA	NA	4.6	53%	3.9	56%	NA	76%	NA	80%
Entertainment Software	NA	90%	NA	80%	NA	NA	3.5	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS⁴	NA		16.6		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 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² The music industry figures represent the piracy level of international repertoire. The losses figure increased due to the increase of consumers demand and the decrease of the US\$ value.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's 2003 Special 301 filing, BSA's 2002 estimated losses of \$4.9 million and levels of 53% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Lithuania, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Lithuania (including U.S. publishers) and (b) losses to local distributors and retailers in Lithuania.

⁴ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Lithuania were \$16.9 million. IIPA's revised total loss figures are reflected above.

In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Lithuania.⁵

COPYRIGHT PIRACY IN LITHUANIA

Lithuania is still the main regional transshipment point for pirated products. Given its pivotal geographical location and 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, home-burned CD-Rs and DVD-Rs, DVDs and videogame cartridges. The main form of pirate imports is smuggling. Of the three Baltic States, Lithuania has the greatest border enforcement challenge, sharing borders with Russia, Belarus and Poland. It is the preferred destination for pirate product from Russia and Belarus, as well as Poland and Ukraine. Products also are shipped through Lithuania to other European countries, principally to Poland but also to Latvia, Estonia, Scandinavia and Germany.

Although Lithuanian customs officials obtained the proper (*ex officio*) authority to do their jobs in January 2001, they have barely used their *ex officio* powers so far (see discussion below). For example, the recording industry reports that the customs took anti-piracy actions in one case in spring 2003, where the intercepted goods turned out to be legitimate. As a result of this, industry information, backed by the numbers and constant availability of newly released pirated discs on the local market, shows that the organized groups involved in the trade are able to operate through border crossings unhindered. 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, Baltic Optical Disc (BOD). In 2002, the plant acquired new and modern equipment. The number of lines is not known; industry believes that production is limited to CDs, not CD-R. Although the company's website (www.infobalt.lt) does refer to DVD production, it is believed that BOD's current production is limited to CDs (BOD is not involved in CD-R production). Industry estimates that the annual optical media manufacturing capacity approximated 3.5 million discs per year. This Lithuanian plant now competes with other regional plants in meeting orders domestically and from rest of the Baltics, Scandinavia and Germany, and is expected to expand and increase its capacity, possibly to include DVD production. IFPI has lodged a criminal complaint against the plant for unauthorized production of numerous titles when in possession of its original equipment, and this is under investigation by the Prosecutor's office. Against this backdrop, the absence of any state control or supervision of the plant's activity is a situation that should be rectified as a matter of urgency.

In order to avoid further illegal CD production, Lithuania should start working with the copyright industries to adopt proper tools to regulate the production, distribution and export of optical media.⁶

⁵ U.S. State Department, "U.S. Welcomes EC Decision on Bilateral Investment Treaties," September 3, 2003 at usinfo.state.gov. For more information on the history of Lithuania under Special 301 review, see IIPA's Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous IIPA reports on Lithuania at <http://www.iipa.com/countryreports.html>. Lithuania currently participates in the Generalized System of Preferences (GSP) trade program; during the first 11 months of 2003, \$5.5 million worth of Lithuanian goods (or 1.6% of Lithuania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

Internet piracy and CD-R piracy: Many Lithuanian sites contain web advertising of infringing copyrighted hard goods. Despite the increasing figures, several websites have been operating with impunity since 1999 without any prosecutorial action to shut them down. However, the trend is to transfer illegal websites to the servers outside Lithuania, which has been used as a convenient argument by the enforcement authorities for not taking action. MPAA also reports that there are many amateur websites marketing pirate products and parallel imported DVDs. Cooperation with the ISPs (Internet service providers) has been virtually non-existent.

To date, there are no court cases dealing with Internet piracy. In 2003, IFPI identified and sent 18 “cease and desist” notices to 56 infringing sites estimated to contain around 11,200 illegal files. Nineteen of those sites (i.e., 34%) were removed from Internet. In 2003, the local music industry group FGPA sent to the Economic Police the information of 10 illegal websites, 2 of which the police closed down and 2 of which were closed down in co-operation with FGPA and Internet Service Providers (ISPs). The Economic Police claims that it has no time and resources for tackling with the piracy on Internet. Moreover, the general interpretation of police, prosecutors and courts is that the enforcement actions against Internet piracy should be taken only if the commercial profit of such activity is proved. At the same time, the offer for sale of pirate CDs and CD-Rs is not considered as a proof of commercial activity. Also, the special Internet Crimes Investigation Unit does not consider piracy to be a problem and does not take any actions against piracy on Internet.

Another popular form of music piracy on the Internet in Lithuania is selling pre-recorded CDs as well as recorded CD-Rs by announcing lists available in web pages or via e-mail to a special circle of people or in special announcements sections and then delivering these CD-Rs by mail 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 pirated videogames for download. However, the share of the seized recorded CD-Rs in the pirate market is not substantial, composing currently about 5-10% of the illegal market. Nevertheless, it should be pointed out that the value of the sales of blank sound and other media carriers in 2003 exceeded 20 million Litas (US\$7.3 million), which is about the same level as the legitimate music sales in Lithuania. The local recording industry group FGPA estimates that around 80% of all sold blank sound carriers were used for illegal music copying.

Piracy remains high across all industries. Markets, kiosks and retail outlets in Lithuania remain full of pirated products. The situation has improved a little bit only in the center of Vilnius. The main market places in Vilnius are centrally located Kalvarijos market, and the Garuinai, Antaklnis and Paergale markets, where most of the illegal trading is conducted on the weekends. Hordes of commercial tourists from Latvia visit especially the Garuinai market on Saturdays. Due to the constant international pressure, the form of illegal distribution has started to change more and more to the hand-to-hand piracy (i.e., people illegally offering pirate products for sale in offices and other public places such as cafes, bars, restaurants by carrying the catalogues as well as the products). The most popular is trading with CDs and DVDs with international repertoire.

⁶ The authors' collection society, LATGA-A, entered into a private contract with Baltic Optical in 2003 in order to ensure the payment of mechanical royalties to the authors of musical compositions. This deal has nothing to do with controls necessary to monitor optical media production.

The recording industry reports that the music piracy situation in Lithuania has continued to worsen. The levels of piracy for sound recordings and music with international repertoire in Lithuania was 85% in 2003. Currently, around 10% of all pirated sound carriers are audiocassettes and 90% are pirated CDs and CD-Rs. The average price of the pirate CD with the most popular international repertoire is 10 Litas (~US\$3.00), sometimes 8 Litas for the "outdated" repertoire as opposed to the 55-60 Litas (~US\$18.00) for the full-priced legitimate CD with international repertoire. The legitimate music industry in Lithuania has been struggling already for years to survive. The recording industry reports that due to the worsening situation a minimum of 5 local record labels and 8 legitimate music shops have been closed down in past 3 years. Organized criminal groups are now heavily involved in pirate CD traffic, with extremely limited enforcement activity by the authorities. Estimated trade losses due to recording and music piracy were \$13.5 million in 2003.

The Entertainment Software Association (ESA) reports that pre-recorded silver discs, distributed by Russian organized crime syndicates (and stamped with their "logos" or "brand names") continue to flow into Lithuania. While there are also CD-burning operations for PC games (so-called gold discs), this represents only about 10% of the pirate product available. Internet piracy, meanwhile, continues to grow. Although enforcement actions are being undertaken by entertainment software companies, market improvement remains flat. Retail piracy is moving to the flea markets, kiosks, and the Internet. The biggest problem for this industry is the flood of Russian-produced pirated software into Lithuania, both for domestic consumption and transshipment. This industry also confirms problems with ineffective enforcement by Lithuanian customs officers. Estimated piracy rate for entertainment software in Lithuania rose to 90% in 2003.

The Business Software Alliance (BSA) reports that the Gariunai flea market in Vilnius (and similar markets across Lithuania) remains a source of pirated materials, although police activities to address this problem have increased. BSA believes that there is steady improvement with regard to central government use of software. Since the 2001 government software management decree, funds have been allocated by Central Government for licenses to procure legal software, although the extent to which this has been applied is unclear. In October 2003, BSA launched a month-long informational campaign to support legalization of business software applications in small to medium-sized business settings.

The audiovisual industry sees Lithuania as the least developed market of the Baltic nations for their products. The Motion Picture Association of America (MPAA) estimates that the video piracy rate in Lithuania remains at the 90% level. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. The legitimate video industry is trying to make inroads into this predominately pirate market, and local partners of several MPA members work closely with enforcement officials. Film piracy is quite visible, for example, outside Vilnius; in Kaunas it is difficult to find a legitimate video rental. The price to rent a pirate VHS video is 1 Lita (US\$0.37), a pirate DVD rental is 3-4 Litas (US\$1.10-\$1.47) compared to 5-6 Litas (US\$1.84-2.20) for the rental of a legitimate copy. The legal, local video companies conduct extensive media campaigns, highlighting enforcement actions and legislative initiatives undertaken by the authorities. Internet piracy is becoming more prevalent, with amateur websites 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

For a long time, Lithuanian law enforcement agencies have had the necessary legislative conditions to stop piracy. Despite the satisfactory laws the copyright enforcement remains critically minimal. Therefore, it should be emphasized time and again that all these provisions must urgently be implemented in practice, and judges, customs officials, police and prosecutors must start their actions to stop organized criminal piracy activities within Lithuania.

Poor coordination between the criminal enforcement agencies: In 2002, the Ministry of Finance liquidated the specialized IPR unit in the Tax Police, whose officials had IPR enforcement removed from their portfolio. Since that time, the Economic Police and customs officers remain the only Lithuanian agencies with jurisdiction to pursue copyright infringements. Unfortunately, there is little to no communication or co-operation between these two agencies. On July 31, 2002, the Division of Intellectual Property Protection of three officials was established under the Crime Investigation Service of the Lithuanian Criminal Police (the Economic Police), which has taken only few actions against minor-scale IPR crimes and infringements. The Ministry of Culture reports that the Economic Police seized a total of 61,185 optical discs by initiating 2 criminal cases, 29 pre-trial penal investigations and making 46 administrative protocols during 2003. The regional police departments seized a total of 81,600 pirate optical discs by initiating 54 pre-trial penal investigations and making 125 administrative protocols in 2003.

The Economic Police indicated that they cannot add more specialized IPR investigators due to limited resources. The copyright industries objected strongly to these developments, afraid that the number of effective anti-piracy actions in Lithuania would decrease considerably without a larger, specialized IPR unit. The past two years have only confirmed the industries' concerns; the Economic Police has not achieved any significant results, taking only some demonstrative actions against small traders. There have been no investigations or other enforcement activities against the big pirate businesses. Therefore, the new centralized and professional IPR Unit should be established in the police structures with dedicated resources and clear concentration on anti-piracy activities.

In early 2002, the ministries of Culture, Justice and Interior, along with the Prosecutor's Office, established the Division of Intellectual Property Protection under the Lithuanian Court Expertise Centre, which would provide expert opinions in copyright cases with the approximate annual budget of US\$145,000 (~500,000 Litas). This new State Expertise Centre started to operate late in 2002 and currently employs six persons. The Centre is a "formalizer" of the expert reports, which are continuously provided by the copyright industries. These statutory opinions are contrary to European practice, where the private sector usually provides expert opinions on seized goods. By all accounts, it would have been preferable for these funds to be dedicated to creating an effective IPR police unit (like the liquidated Tax Police). The Ministry of Culture reports that the Centre received 51 requests from the Economic Police to examine a total of 100,000 optical discs in 2003 (excluding the software, where the local BSA continues to provide the expert reports]. The Expertise Centre conducted 58 expert reports on 56,438 optical discs in 2003. The local recording industry group FGPA reports that it prepared expert reports in a total of 32 cases and examined 37,592 sound carriers. It should be noted that there is another private organization representing the mixture of local recording, film and entertainment software industries, the Lithuanian Music Industry Association (LMIA), that is also active in the anti-piracy field. LMIA reports that according to the Lithuanian Criminal Police Bureau, the General

Commissar of Lithuanian Police and the Director of Lithuanian Customs signed a co-operation agreement in IPR protection field.

Inadequate and ineffective border enforcement: Much improvement is needed to stem the tide of pirated products entering Lithuania mostly by smuggling and being transhipped to other countries, as discussed above. Despite the adoption of the new customs code in January 2001, which afforded customs officials the authority to make *ex officio* seizures, such *ex officio* actions rarely take place. The Customs Violation Prevention Division and the Customs Criminal Service are the two customs departments responsible for tackling with the import-export of illegal optical discs and smuggling respectively. The Lithuanian Customs Violation Prevention Division reports two detentions of sound carriers: (1) In spring 2003, the CDs with Russian repertoire were intercepted, which turned out to be legitimate but infringed authors' rights, and (2) On 13 September 2003, the smuggling of 400 CDs with international repertoire were discovered on the train from Russia. Lithuanian Customs finds it more difficult and almost impossible to detect the pirate goods as opposed, for example, to counterfeit goods, because the nature of pirate sound and other carriers is very specific and the goods can be easily hidden. At the same time, the Customs Violation Prevention Division does not see the lack of training as a problem and evaluates the level of knowledge of the customs officials as more than satisfactory. Customs officials receive IPR seminars regularly, 2-3 times per year. Customs sees the poor enforcement in the internal EU market as a major contributor to the problem in Lithuania.

Lithuanian customs claims to co-operate with the Economic Police and the Border Police. In 2003, customs organized four joint control operations with the Economic Police in the internal markets to collect intelligence only. Customs cannot take actions inside the country (this is considered to be amended in near future so that customs could act in internal market in certain fields, including the IPR) and has no information whether the Economic Police followed these control visits up. Customs reports that the co-operation with right holders (such as FGPA and LATGA-A) is good and highlights the need for more applications from the right holders. The local recording industry group FGPA reports of one (1) filed application in 2003; however, no follow-up actions were taken by Customs. The major problem for the local struggling recording industry with filing the applications is the high application fee of 500 Litas (US\$184). Furthermore, in spring 2003 FGPA offered its assistance to the Customs Criminal Service but again has not received any follow-up. Finally, the customs reports that there was no co-operation with the State Expertise Centre in 2003. It is crucial that Lithuanian Customs use its *ex officio* authority and take actions against IPR crimes.

Criminal enforcement (police, prosecutors and judges) needed strengthening. A new criminal code and criminal procedure code entered into force in May 2003. However, this authority must now be utilized by prosecutors to engage in effective enforcement action against IPR crimes. So far, the results are disappointing. The overall statistics of the prosecutions and court proceedings is not available. However, the recording industry notes that there were only few court cases in 2003, the applied fines were the average of 300 Litas (US\$110), and no imprisonment sentences were imposed. The recording industry reports that seven criminal cases against pirates were positively settled outside the court by the prosecutors' criminal orders, i.e., the infringers pleaded guilty and were fined with 500-2,000 Litas (US\$184-\$734), and the seized products were confiscated. Unfortunately, reportedly one of the prosecutors (who dealt with four of the seven cases above) has been transferred from the IPR responsibilities.

BSA notes that Lithuanian police do have *ex officio* actions in both end-user and reseller cases across Lithuania which lead to both administrative and criminal actions. However, BSA has received unfavorable decisions from the Lithuanian Supreme Court in connection with criminal liability in respect of end-user piracy. In two cases (*Orana and Amalkera*), the Lithuanian Supreme Court was asked to consider whether or not end-user piracy constituted an act for “commercial purposes.” The Supreme Court has taken a restrictive view of the definition of “commercial purposes,” stating that it covers situations whereby products are distributed/sold, but not used. The absence of an effective criminal remedy for acts of end-user piracy is a potentially serious issue for BSA. BSA intends to reapply to the Supreme Court for a review of the basis upon which these decisions were reached, as well as drawing the issue to the attention of the Lithuanian Copyright Council. BSA also intends to request that the Lithuanian Government specifically consider this issue in its implementation of the EU Copyright Directive, and in particular, Article 8 of the Copyright Directive dealing with appropriate sanctions.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS LITHUANIA IN 2003		
ACTIONS	SOUND RECORDINGS	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	N/A	
By Economic Police		75
By Regional Police		
By Customs	2	--
Amount of infringing product seized during raids (above)	143,185 **	421
By Economic Police	61,185	
By Regional Police	81,600	
By Customs	400	
Number of cases commenced by Economic and Regional Police (including Internet cases)		12
Criminal case	2	
Pre-trial penal investigations	83	
Administrative protocols	171	
Number of defendants convicted (including guilty pleas)		16
Acquittals and Dismissals		6
Number of Cases Pending		17
Total number of cases resulting in jail time		5
Suspended Prison Terms		
Maximum 6 months		1
Over 6 months		-
Over 1 year		4
Total Suspended Prison Terms		5
Prison Terms Served (not suspended)		-
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		-
Number of cases resulting in criminal fines		11
Up to \$1,000		7
\$1,000 to \$5,000		4
Over \$5,000		
Total amount of fines levied		US\$10,018

** This 143,185 statistics represents the total number of all pirate goods seized (including music, films, and software) by all on-ground enforcement agencies (economic police, regional police and customs).

Civil actions are moving forward. In 2003, BSA obtained civil judgments in reseller and end-user cases: in total, five judgments at District Court/Court of Appeal level were handed down, resulting in damages awards totaling 131,938 Litas (US\$48,435). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 24 settlements with end-users and resellers in 2003, for a total value of 180,000 Litas (US\$66,080). The Lithuanian civil search law was utilized for the first time by BSA in January 2004. Following an application made to the Lithuanian Court for a civil search and seizure order, an order was made allowing BSA to execute a “surprise” search without providing notice to the intended defendant. The search was executed with the assistance of municipality bailiffs, and resulted in the inspection of over 50 PCs held by a private third party organization. The search revealed the use of unlicensed software, and a settlement with respect to the resultant claim was entered into shortly thereafter.

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 rightholders. These fines range between 1,000-2,000 Litas (US\$367-\$734) in copyright piracy cases. In practice, the courts tend to fine 100-200 Litas, sometimes 500 Litas. Courts should stop lowering the fines and impose the statutory amounts. Furthermore, the fines for repeated infringements should be at least 5,000 Litas. Amendments to strengthen these penalties face strong opposition in the Lithuanian Parliament. BSA believes that the level of administrative penalties is too low to constitute a genuine deterrent: In the 28 administrative judgments made in 2003, the average fine was 550 Litas (US\$200): in 2002, the average fine (based on 28 administrative judgments) was approximately 700 Litas (US\$257).

The burdensome problem of “expert opinions”: A burdensome evidentiary problem remains, as Lithuanian courts will not apply a presumption of ownership.⁷ In order to prove that a suspect product is in pirates, 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 not be prosecuted because the police were required to get an expert opinion to determine proof of ownership for each copy seized. Private citizens, even though expert in this area of the law, are often barred from giving opinions; only designated experts in some cases are allowed to serve this function, keeping those cases from moving forward.

The recording industry reports that its rightsholders also have to provide cumbersome expert reports to pursue administrative actions. For example, every single CD must be accounted for and inventoried. Sometimes every single song on every single CD has to be accounted for and listened to. The problem, especially for the recording industry, is that seizures are mostly conducted against the last part of illegal distribution chains, where there are respectively small amounts, but a large variety of titles, making it difficult to account for all of them. Furthermore, the General Prosecutor’s Office has been actively practicing its belief that

⁷ The BSA indicates that this issue is no longer a problem for the business software industry in Lithuania, because a presumption of ownership is applied 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 and retail value.

the titles of all seized international albums and films should be translated into Lithuanian. When the authorities and the industry make a large seizure (in the tens or hundreds of thousands of units), the burden to complete such reports is onerous and counterproductive to efficient enforcement. According to regulations, the plaintiff has six months to prepare an expert report; the recording industry is doing its best to prepare these cases within three months. The judiciary still tends not to accept the opinions of the music industry in some cases. However, due to the years of "pioneering," this practice is slowly diminishing. The recording industry believes strongly that legislative reform to establish a presumption of ownership is crucial to resolving this enforcement roadblock and expediting case processing.

On December 18, 2003, the Lithuanian Supreme Court declared in a criminal case on copyright piracy that the expert report from the State Expertise Bureau is not sufficiently competent. Reportedly, the report did not answer to the court's mainly legal questions, which should not be subject to an expert report. The case also involved the second report from the local music industry group FGPA, which was not taken into account by the Appellation Court on the grounds that FGPA is an interested party. Further, the Supreme Court noted that the statutory fines for copyright infringements are too high. The Supreme Court sent the case back to the appellate court. Bearing in mind that this case was commenced on June 18, 2000, when the Tax Police seized 888 music CDs, the above-described incompetence and duration of the court procedures in copyright cases even in high level courts illustrates exactly the lack of effective enforcement.

From the viewpoint of the business software industry, BSA advises that following the introduction of new criminal procedures (as from May 1, 2003) specialist statements with regard to the nature of a pirated copy work are treated as sufficient evidence of copyright infringement in criminal and administrative cases. BSA therefore believes, as a practical proposition, that the position is now satisfactory, although not ideal.

Prohibitively expensive court fees: The new code on civil procedure sets court fees in IPR cases at a maximum level of 3% of the value of the claim. Lithuanian courts were previously inconsistent in their application of court costs, 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 must be clarified because the application of the 5% civil claim rule imposes an excessive financial burden on rightsholders and may impinge on their ability to bring a case in the first instance. The Ministry of Culture, however, takes the position that the lack of civil measures taken by the recording industry is the major cause of the massive piracy problem. At the same time, the recording industry takes the position that the high court fees are the main reason why the industry has not brought any civil claims, and opposes the imposition of such prohibitive court fees. A flat fee of 100 Litas is a reasonable amount and should be re-applied. From the viewpoint of the business software industry, BSA does not report any problems with the 3% limit being applied in software cases.

COPYRIGHT LAW AND RELATED REFORMS

Criminal Code reform: The new Criminal Code and Criminal Procedures Code entered into force in 2003. However, there is a major problem with this new law in that these penalties apply only to works, not sound recordings. An informal translation of Article 192(1) of the Penal Code provides that: the person who illegally reproduced a literary, scientific, artistic or other work or part of it or imported, exported, distributed, carried or held for commercial purposes illegal copies of such, if the total value of copies by the retail price of legal copies exceeded

amount of 100 MGL (minimum living level, which is likely equivalent to 125 Litas (US\$46) be penalized in a form of public works or fine, or restriction of liberty, or arrest, or imprisonment up to two years.

Sound recordings had the unfortunate fate of being taken out from the draft wording by the Ministry of Justice as a last-minute amendment. The present wording is in blatant violation of the TRIPS Agreement and other international requirements. The courts in Lithuania are already seeing this as a great loophole for the pirates. The Culture Ministry is planning to draft the amendment to cover all objects of copyright and neighboring rights.

Copyright Act: Over the last five years, Lithuania has engaged in a number of copyright legislative reform efforts.⁸ Lithuania took a major step forward in copyright reform by adopting its comprehensive Copyright Act (Act No. VIII-1185), which replaced the antiquated Soviet Civil Code and entered into force on June 9, 1999. While the 1999 copyright law did represent a positive step forward in Lithuania, it did contain some serious deficiencies. Between 1994 and 2002 Lithuania joined many international copyright conventions, including the Berne Convention, the Geneva Phonograms Convention, the Rome Convention, as well as acceding to the two WIPO Internet treaties and becoming a member of the World Trade Organization.

During 2002-2003, the Lithuanian government proposed more amendments to its copyright law and related laws, in order to make them compatible with WTO TRIPS, the WIPO treaties and the various EU directives. The copyright industries expressed serious concern and reservations about several of the proposed amendments, and disappointment at the Ministry of Culture's unwillingness to consider and accept many of the industries' proposed revisions. The industries had urged that it was imperative that the Seimas adopt a package which satisfied Lithuania's bilateral and multilateral copyright obligations.

The amendments to the Copyright Law came into force on March 5, 2003. On a positive note, the new law did mark some progress in reform.⁹ The copyright industries remain concerned that the 2003 amendments neither strengthened copyright protection nor corrected the longstanding deficiencies in the 1999 law. Unfortunately, the list below repeats many of the observations made by the industries prior to the adoption of the 2003 amendments.

- Article 79 amended the position with regard to the recovery of damages in Lithuania. The remedy now follows a model similar to the "pre-established" damages remedy present in U.S. law, namely, that a right holder may recover compensatory damages representing the losses suffered as a result of infringement, or, as an alternative, pre-established damages in a fixed range of US \$35 to 3,500. The main issue to be resolved in relation to this remedy is whether or not the pre-established range relates to each act of infringement, or each work infringed.
- The act still does not specify that the right of reproduction covers direct or indirect, temporary or permanent copying in any manner or in any form.

⁸ To review a more detailed history of Lithuanian copyright law reform efforts between 1999 and 2003, see IIPA's February 2003 Special 301 report at <http://www.iipa.com/rbc/2003/2003SPEC301LITHUANIA.pdf>.

⁹ For example, the 2003 amendments: expanded the scope of infringements (Article 73); included sanctions for the circumvention of technological measures of protection (TPMs) (Article 74) and outlined exceptions to TPMs (Article 75); provided sanctions for violations of Rights Management Information (RMI) (Article 76); expanded remedies available for rightsholders (Article 77); outlined procedures to be taken by collecting societies in their actions to protect rightsholders (Article 78); changed the scheme for the awarding of damages (Article 79) and compensation for infringement of moral rights (Article 80); elaborated on provisional measures available under the Civil Procedure Code (Article 81); specified that administrative and criminal liability is to be applied in accordance with the Administration Code and the Criminal Code (Article 82); and specified that the customs laws are to be applied to materials protected under the Copyright Act (Article 83).

- The act's right of communication to the public was not revised to apply to all disseminations, not just "transmissions" (and there must be no exhaustion of the distribution right by transmission);
- Over the industries' strong objections, the law now contains a rightsholders' obligation to accommodate the private copying exception to technological protection measures; this allows each consumer to make one analog or digital single copy for their private purposes. Digital private copying is likely to be far more widespread and have a much greater negative economic impact on the copyright sector than analog private copying. In fact, such interference is not only disproportionate and untimely, but it would also hamper rightsholders' initiatives to provide a number of attractive services in Lithuania, such as streaming services where music is streamed in real time to users over the Internet. Such services may be offered as an alternative to download services and would not be designed for users to keep copies.
- Producers of sound recordings still are not vested with exclusive rights with respect to broadcasting and communication to the public. (The law should make it clear that the remuneration claim does not substitute for an exclusive right.) Broadcast royalty payment obligations owed to U.S. phonogram producers and performers must be paid.
- The term of protection was not extended such that it would 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 were not made which would 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 was not revised to narrow its breadth.
- The act was not amended to provide that it applies to works or phonograms first or simultaneously published in Lithuania.
- The limitations on exclusive rights of copyright owners and producers of sound recordings were not amended to narrow them to track the scope of the exceptions provided for in TRIPS. For example, such amendments would have included: 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 material; and preserving a meaningful practice of the copyright owner to add copyright protection technology.

Customs Code reform: Amendments to the customs code (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. The problem with Lithuanian customs is predominately one of poor enforcement, not an inadequate customs law.

The need for optical media regulations: The Lithuanian government should draft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include at least 11 elements (which were fully outlined in IIPA 2003 Special 301 report).¹⁰

Government software legalization: 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." However, the 2003 order was not effectively implemented by the Lithuanian Government. BSA has therefore taken an initiative regarding the option of a new government order on software use within state institutions. This draft order has been prepared, and is scheduled to be approved by the Lithuanian government in February 2004. The scope of the order has been expanded: It will now be addressed to all public administration institutions (both state and municipal), and also provides for new functions of a dedicated Information Society

Development Committee under the control of the Government of Lithuania, which will act as a coordinating institution for the acquisition of hardware and software assets for use by governmental institutions.

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