

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### LITHUANIA

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** Lithuania should remain on the Watch List in 2005.

**Overview of Key Problems:** Copyright owners in Lithuania continue to confront generally poor and ineffective on-the-ground enforcement, especially at the border, which is evidenced by the sustained high piracy levels. The government has neither dedicated the resources, nor expressed the high-level commitment necessary to enforce the laws adopted during the past several years to slow piracy. Lithuania, as a result of geography, is extremely vulnerable to transshipment problems of pirated materials through its borders, which is why border enforcement is so critical, and unfortunate that it is so critically lacking. Two years ago, customs officers were properly vested with *ex officio* authority to inspect, intercept, and seize suspect shipments of pirated product entering the country, but they are not using this authority. In addition, customs, police and other enforcement agencies need to engage in cooperative enforcement especially to deal with the challenges of the organized criminal groups engaged in piracy (and there is evidence of ties to Russian organized criminal syndicates). Stronger criminal sanctions are necessary, including the commencement of criminal searches and raids. Also, the courts continue to place evidentiary hurdles to proper enforcement, including requirements for unnecessary expert reports which only serve to delay judicial consideration. Criminal penalties and administrative fines remain low and thus are not deterrents to piracy.

Lithuania amended its copyright law in 2003 in an effort to further harmonize its law with the EU, which it joined effective May 1, 2004; but the law still has many deficiencies outlined in this report. Also in 2003, Lithuania enacted a new criminal code and criminal procedure code. One potential deficiency in the criminal code was resolved in 2004 when a panel of Supreme Court judges ruled that the new criminal penalties do apply to the reproduction or distribution of illegal copies of sound recordings, as well as to other works.

#### **Actions to be Taken by the Lithuanian Government in 2005**

**Enforcement actions needed:** High level officials in the Lithuanian government need to demonstrate an interest and take meaningful activity to slow rampant piracy of music, film and software. To do this, IIPA recommends the following actions:

- The IPR Division in the Economic Police (the Criminal Police Investigation Bureau) should focus its work on the key source of persistent piracy in Lithuania, i.e., against organized crime syndicates. If necessary this work should be undertaken in cooperation with other enforcement agencies, in particular with the anti-organized crime department in the police.

- Commencement by police of criminal raids; implementation of administrative actions (for example, withdrawing business licenses from infringing kiosks); commencement of criminal prosecutions.
- Customs officers, in particular the Customs Criminal Service, are urged to commence actions, including *ex officio* actions to intercept pirate product smuggled into the country.
- Simplifying and eliminating cumbersome and complicated procedures in criminal and administrative IPR cases; relaxing the onerous evidentiary burdens in criminal cases.
- Developing coordinated and cooperative strategies between and among enforcement authorities as well as with right holders' organizations.

**Legislative actions needed:** There are three major law reforms still needed for effective IPR protection and enforcement:

- Adoption of optical media regulations to properly license and enforce the production, distribution, import and export of optical media.
- Correction of the deficiencies in the copyright law as detailed in this report.
- Adoption of a government order regarding the legal use of business software within state institutions to improve implementation of the 2001 decree of the Minister of Internal Affairs concerning recommendations on such uses.

<b>LITHUANIA</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2000-2004<sup>1</sup></b>										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
<b>Records &amp; Music<sup>2</sup></b>	15.0	80%	13.5	85%	12.0	85%	7.0	85%	7.0	85%
<b>Motion Pictures</b>	1.5	65%	NA	NA	NA	90%	1.5	NA	1.5	80%
<b>Business Software<sup>3</sup></b>	11.0	58%	10.0	58%	4.6	53%	3.9	56%	NA	76%
<b>Entertainment Software<sup>4</sup></b>	NA	85%	NA	90%	NA	80%	NA	NA	3.5	98%
<b>Books</b>	NA	NA								
<b>TOTALS</b>	27.5		23.5		16.6		12.4		12.0	

As a result of Lithuania's accession into the EU in 2004, Lithuania lost its eligibility for the U.S. trade preferences known as the Generalized System of Preferences (GSP). However, other trade agreements with the U.S., such as those contained in the U.S.-Lithuanian bilateral investment treaty (BIT), including key national treaty obligations, remain in force. The latter was

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>2</sup> 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 U.S. dollar value.

<sup>3</sup> BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Lithuania, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$17 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

accommodated by a September 2003 understanding by the European Commission with several EU-accession countries, including Lithuania, and with the United States.<sup>5</sup>

## **COPYRIGHT PIRACY IN LITHUANIA**

**Border enforcement:** Given its pivotal geographical location and due to 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. Most pirate product is smuggled into Lithuania, which has great border enforcement challenges (with Latvia, Belarus and Poland) and especially given that its neighbor Russia is a major producer of illegal material. In fact, Lithuania is the preferred destination for pirated product made in Russia and material made in or shipped through Belarus, as well as Poland and, to a lesser extent, Ukraine. Products are shipped through Lithuania to other European countries, principally to Poland, but also to Latvia, Estonia, Scandinavia and Germany. Based on incidents of materials seized by British customs (of hand-carried CDs and DVDs), it is likely that material is being shipped throughout Europe. All of this is why border enforcement should be the number one priority for IPR enforcement agencies in Lithuania.

It has been four years since Lithuanian customs officials obtained the proper (*ex officio*) authority to undertake border searches and investigations. But this legal change, while welcome, has not been used effectively by border authorities. In fact, practice has already shown that customs officials are unlikely to search vehicles (especially from EU countries), and in the case of drivers entering from Belarus have even allowed for self-policing “reports” to be filed days after entry. In 2004, there were no *ex officio* actions taken by customs officials regarding copyright and neighboring rights infringements. There were two cases where customs officials asked the local recording industry group (FGPA) for its expertise on detained goods, but in both cases the materials turned out to be legal; there were also five trademark actions. As a result of poor enforcement at the border, organized criminal groups involved in IPR piracy are able to operate through border crossings unhindered.

**Optical media piracy:** There is one known CD manufacturing plant in Lithuania—Baltic Optical Disc (BOD)—producing for the local market as well as neighboring Latvia and Lithuania. In 2003, the plant had a single line. Now it has two lines (but only one is reportedly operating). The total plant capacity is estimated at 7 million discs per year including CD-R (blank disc) replication. However, the plant’s current annual capacity is estimated to be 5.5 million discs. In March 2003, the recording industry (IFPI) filed a criminal complaint against BOD alleging pirate production. Despite expectations that an investigation would be completed and initiated before the courts by now, the investigation is still pending in the Prosecutor’s Office. This is why Lithuania needs to adopt a comprehensive optical disc licensing and enforcement regime to properly regulate plants like BOD and any others that may open. IIPA and its members have provided the government of Lithuania (Ministry of Culture) with draft model optical disc

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<sup>5</sup> U.S. State Department, “U.S. Welcomes EC Decision on Bilateral Investment Treaties,” September 3, 2003 at <http://www.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/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous reports on Lithuania at <http://www.iipa.com/countryreports.html>. Lithuania did participate in the Generalized System of Preferences (GSP) trade program until May 1, 2004 when it joined the European Union. During 2003, \$6 million worth of Lithuanian goods entered the U.S. under the duty-free GSP code; in 2004 (through April), that figure was \$1.8 million.

regulations which have been adopted in other countries, and we urge the Lithuanian government to make this a priority, including tying licensing of plants to criminal sanctions for illegal plant owners and operators. The government of Lithuania (Ministry of Culture) has scheduled a roundtable discussion on piracy, including optical disc piracy in April 2005.

**CD-R piracy:** A common form of music piracy in Lithuania is the sale of pre-recorded CDs and CD-Rs via the Internet (web pages and targeted e-mails) which contain lists of available selections. Hard copies are delivered 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. The share of seized recorded CD-Rs in the pirate market is not substantial, composing currently about 5-10% of the illegal market. The local recording industry group (FGPA) estimates that approximately 80% of all blank media sold were used for illegal copying of music, films and computer games.

Illegal production of CD-Rs (blank CDs) needs to be investigated and illegal producers prosecuted. In 2004, the Criminal Police Investigation Bureau (CPIB), with the assistance of the Lithuanian Music Industry Association (LMIA), took a few notable actions against the CD-R pirates. In February 2004, the CPIB and LMIA discovered an illegal CD-R burning laboratory in Vilnius containing musical recording devices, nine CD-R burners and more than 6,000 pirate copies and subsequently in a related warehouse, 30,000 additional pirate discs. Two suspects were arrested and a criminal case was initiated and is now on-going. In another case, in December 2004, the CPIB and LMIA discovered an illegal CD-R production facility in Kaunas containing 20 CD-R burners, 20,000 CD-Rs consisting of music, 10,000 blank CD-Rs and 2,800 DVDs. The police initiated a criminal case, which is on-going.

**Internet piracy:** Many Lithuanian websites contain advertising for infringing copyrighted hard goods. The numbers of such sites are increasing and the sites are operating with impunity (since 1999) because there has not been a single prosecutorial action to shut them down. The trend now is to move these illegal websites to servers located outside Lithuania. The motion picture industry (MPA) also reports that there are many amateur websites marketing pirate products and parallel imported DVDs. The copyright industries report that despite a cooperation agreement concluded on April 26, 2004 between the Internet service providers (ISPs) and local rightsholders, no actions have been taken against Internet piracy. To illustrate the lack of willingness of the ISPs, in 2004 the local recording industry association (FGPA) sent nine notifications of the existence of illegal websites to the ISPs, yet only two of those sites were closed.

To date, there have been no criminal or civil cases dealing with Internet piracy. In 2004, IFPI identified and sent 56 cease and desist notices to 36 infringing sites estimated to contain around 270 illegal files. Fourteen of the 36 sites were taken down from the Internet. In December 2004, on LMIA's motion, the Criminal Police Investigation Bureau closed down six Internet sites offering films, music, computer games, and software. In 2004, FGPA sent the Economic Police an additional eight notifications with the information on 28 illegal websites, to which the police did not react. The Economic Police claim they have neither the time nor resources to tackle Internet piracy. Moreover, the police, prosecutors and the courts interpret the laws to limit enforcement actions against Internet pirates only if there is proven commercial profit, rather than economic harm to rightholders. According to the business software industry (BSA), in 2004, there were four criminal, one administrative and one civil case initiated in relation to Internet software piracy. The courts granted a single criminal judgment, two criminal

orders, one administrative judgment and one civil judgment; in addition, one criminal case is pending due to an ongoing investigation. The total amount of fines adjudged in criminal and administrative Internet cases is US\$616.50 and, in the one civil case (Bliznikas) US\$10,451.76.

In general, the enforcement authorities do not treat the offering for sale of pirate CDs and CD-Rs as a requisite commercial activity; instead there is a requirement that at least one copy must be purchased to prove commercial intent. The Special Internet Crimes Investigation Unit has not taken any action against Internet IPR piracy (focusing instead on hacking and pornography).

**High piracy levels:** Pirated products in Lithuania are sold in markets, kiosks and retail outlets. In recent years, the only noticeable improvements have been in the center of Vilnius. The marketplaces in Vilnius where pirate product is sold are the Kalvarijos market, and the Garuinai, Antaklnis and Paergale markets, especially on the weekends. Hordes of commercial tourists from Latvia visit, especially the Garuinai market on Saturdays. Illegal distribution has changed in the past few years, moving more to hand-to-hand piracy (i.e., people illegally offering pirate products for sale in offices and other public places such as cafés, bars, restaurants by carrying the catalogues as well as the products) of CDs and DVDs, especially of international repertoire.

The recording industry reports that the music piracy situation in Lithuania is still unacceptably high. Although the overall level of piracy in Lithuania was about 60% in 2004, the levels of piracy for international repertoire is substantially higher, around 80%. Currently, around 10% of all pirated sound carriers are audiocassettes and 90% are pirated CDs and CD-Rs. The average retail price of pirate CDs with the most popular international repertoire is 10 to 15 Litas (~US\$3.00 to US\$5.80), sometimes 8 Litas for “outdated” repertoire as opposed to the 55-60 Litas (~US\$18.00) for full-priced legitimate CD with international repertoire. Based on police seizures (in 2004), 80% of pirate products in the markets is international repertoire, 15% is Russian and 5% is local repertoire. The legitimate music industry in Lithuania has been struggling for years to survive. Recent, otherwise highly successful international releases sold more than ten times as many copies in neighboring Latvia and Estonia than in Lithuania (even though Lithuania has a much larger population). This clearly illustrates the massive levels of piracy of international repertoire. Organized criminal groups are now heavily involved in trafficking pirate CDs, with very limited enforcement undertaken by the authorities. The estimated trade losses due to recording and music piracy were \$15 million in 2005.

The Entertainment Software Association (ESA) reports that piracy has grown worse in the last year, with pirated products flooding the country from Russia, Ukraine and even Belarus. Pirated products remain readily available at retail and flea market venues. It is believed that the same piracy syndicates operating in Russia also control distribution in Lithuania. As noted above, Internet piracy is also growing, although it still used largely to advertise pre-recorded pirated products. Piracy at Internet cafés is also problematic, as only 10% of the 400 cafés in the country are licensed. Some ESA member companies have brought cases against small retail outlets. However, these cases typically are settled. One recent such case involved 6,000 pirated video game discs seized by the (tax) police; the case was settled with nominal damages paid by the vendor. With the unabated flow of pirated products from Russia and Ukraine, it is imperative that the Lithuania’s border enforcement regime be improved. Some ESA member companies have begun recording their trademarks with customs authorities, but unfortunately, this has not resulted in any border actions.

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. In 2004, 35 inspections, including five major raids, were undertaken by the Criminal Police. Regular day-to-day inspections are undertaken by Vilnius City Police department officials. At present, the open sale of large quantities of business software at flea markets has diminished. 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; in December 2004, a guidebook for government officials on software management was translated into Lithuanian and sent to administrators in government ministries.

The motion picture industry (MPA) still finds that Lithuania is the least developed market of the three Baltic nations. The MPA estimates that the video piracy rate in Lithuania is 65%, with total losses estimated at \$1.5 million in 2004. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. TV and local cable piracy are also problems (often screening pirate copies of blockbuster films). The legitimate video industry is trying to make inroads into this predominately pirate market, with local partners of several MPA members trying to work with enforcement officials, and also reducing prices significantly to compete with the ample pirate product in video or DVD, for sale or rent.

## **COPYRIGHT ENFORCEMENT IN LITHUANIA**

For years, Lithuanian law enforcement agencies complained that they needed adequate training before they could conduct proper enforcement. There have been years of training programs undertaken by governments, IIPA and other industry representatives. For example, there was a program held under the auspices of the EU in 2004, and a U.S. government program in January 2005 for police, customs officials, prosecutors and judges. Yet, the problems of poor enforcement persist, in large measure because IPR enforcement tends to be given a low priority by senior Lithuanian government officials, and due to inadequate resources. After years of training and legal reforms, it is time for judges, customs officials, police and prosecutors to properly start acting against IPR pirates, especially against organized crime syndicates active within Lithuania.

**Poor coordination among the criminal enforcement agencies:** In 2002, the Ministry of Finance abolished a specialized IPR unit in the Tax Police. Since that time, the Economic Police and Customs are the only Lithuanian authorities with jurisdiction to pursue copyright infringements. Unfortunately, there has been little to no communication or cooperation between these two agencies and other law enforcement agencies. In 2002, a Division of Intellectual Property Protection, the Criminal Police Investigation Bureau within the Economic Police was established. So, at present the three bodies with responsibility for IPR enforcement are the Economic Police, the Criminal Police and Customs—but still, there is little communication or cooperation between and among these three organizations, which is needed for effective enforcement. Moreover, there is no central police authority or clear division of authority and responsibility to further the coordination of IPR investigations at the national level. Currently there are only five officials dealing with IP issues in the Criminal Police Division. The Economic Police have to date resisted adding IPR investigators because of limited resources. The copyright industries have for years requested that the Lithuanian government provide the

necessary resources for the Criminal Police Investigation Bureau. In the absence of these resources, the Economic Police have, for the past several years, directed their actions against small-scale pirates instead of focusing on large-scale pirate operations, businesses, and organized criminal syndicates. IIPA and its members continue to urge the government to properly staff and resource the Criminal Police Investigation Bureau, to direct the bureau to re-target large-scale operations and criminal syndicates, and that these actions are undertaken with the active cooperation of the anti-organized crime department and other enforcement agencies.

According to the Criminal Police Investigation Bureau, there was a total of 131 criminal cases and 180 administrative investigations brought against suspected copyright infringers in 2004. The police reported seizing a total of 253,100 optical discs and initiating pre-trial investigations in 34 criminal cases and 23 administrative actions. The regional police departments seized a total of 64,000 optical discs. In one instance, the Criminal Police seized 13,000 pirated IP products in a smuggling case. The reports from the local music industry (LMIA) reported that a total of 239 companies were raided and over 317,000 pirated goods (in total) were seized in 2004. LMIA provided 135 expert opinions for the courts, pertaining to 54,000 items seized. LMIA also reported regional police actions undertaken in 2004 in Ukmerge, Anyksciai, Utena, Panevezys, and Siauliai. The business software industry is encouraged by increasing levels of police actions; but, as they and other industries note, the market continues to be flooded with the pirate product because the targeting has not been directed at large-scale operations and criminal syndicates.

Another emerging problem is that the police do not follow cases through to a court decision, so there is no overview of the end-result of investigations and cases. Furthermore, prosecutors and judges need to start taking effective actions against blatant piracy, ending the prosecutorial bottlenecks (and procedural hurdles) and ultimately bringing criminal cases to trial and handing out deterrent sentences. Anything short of this will serve to undermine (and hurt the morale of) positive police activity.

In 2002, the ministries of Culture, Justice, and Interior, along with the Prosecutor's Office, established the Division of Intellectual Property Protection under the Lithuanian Forensic Science Centre, which would provide expert opinions in copyright cases with the approximate annual budget of US\$145,000 (~500,000 Litas). This Forensic Science Centre has now been in operation for almost three years, with a six person staff. The Centre acts to formalize expert reports, even though this practice is contrary to other European systems that rely on private sector, rather than government reports. The reliance on a government expert report is unnecessary and causes delays in trials. IIPA continues to urge the government to rededicate the resources of this operation to a specialized IPR police unit or similar enforcement operation.

**Inadequate and ineffective border enforcement:** As has been noted, the weakest link in the Lithuanian enforcement apparatus is at the border. Given the ease of smuggling and prevalence of transshipped goods through Lithuania to other countries, there is much about border enforcement that needs improvement. This is especially critical now that the proper *ex officio* authority has been vested in customs officials, to commence their own searches, seizures and investigations. 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. In 2004, all *ex officio* actions implemented by customs authorities pertained to trademark, but not to copyright, infringements (with two instances of very small amounts of material seized by regional customs officials).

Customs officials have been regularly trained at IPR seminars, several times per year. Customs officials insist that a major contributor to poor enforcement is the nature of the internal EU market (especially now that Lithuania is an EU member).

Although IIPA and its members continue to urge better cooperation, Lithuanian customs officials claim that they do cooperate with the Economic Police. Customs cannot, under current law, take actions inside the country, so internal investigations are left to the Economic Police. There is obviously a need for the government of Lithuania to clearly define the roles and responsibilities for IPR enforcement among the agencies. Customs reports that the cooperation with rightholders (such as FGPA, the local recording industry association, and LATGA-A) is generally good and that they regularly request that such rightholders contact them with additional complaints. One major complaint by the local recording industry association is the high cost of commencing an application—500 Litas (US\$188).

**Criminal enforcement needs to improve:** A new criminal code and criminal procedure code entered into force in May 2003, giving prosecutors more tools to use in IPR actions. However, for the second year, the prosecutors have brought only a few IPR criminal cases even though their authority to do so has been strengthened by the 2003 revisions. The recording industry reports an increasing number of obvious criminal music piracy cases ending due to the expiration of deadlines (procedural hurdles) or defendants being exonerated. The business software industry (BSA) reports that in 2004, the police and prosecutors commenced 22 criminal cases.

A summary of criminal copyright enforcement statistics for 2004 is as follows: the recording industry (IFPI) reported 239 raids conducted by the police with LMIA (the local music industry association). The business software industry reported 71 raids total, 51 of those conducted by the police. Further they reported 22 business software criminal cases commenced; 14 defendants convicted; 2 acquittals and 17 cases pending. Of the convictions only one resulted in any jail time, a six month (maximum) sentence; twelve of the other cases resulted in fines (six of less than \$1,000; five of between \$1,000 and \$5,000 and one over \$5,000). The software industry reported a total of US\$15,937.50 in fines levied in all the criminal cases in 2004.

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, two unfavorable rulings by the Lithuanian Supreme Court had cast doubt on criminal liability with respect to end-user piracy. The two cases (in 2003)—*Orana* and *Amalkera*—raised before the Lithuanian Supreme Court the question of whether end-user piracy constituted an act for a “commercial purpose.” The Supreme Court in those cases held to a restrictive definition of “commercial purposes,” limiting it to situations where products are distributed or sold, but not used. On October 7, 2004, based on a BSA initiated matter, the Supreme Court adopted a new consultative ruling and extended the definition of “commercial purposes” to end-user piracy. According to this ruling, acts carried out for commercial purposes are those carried out for both direct and indirect economic or commercial advantage.

**Civil actions report:** In 2004, BSA obtained civil judgments in reseller and end-user cases: in total, six judgments at District Court/Court of Appeal level were handed down, resulting in damages awards totaling 218,326 Litas (US\$81,512). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 19 settlements with end-users and resellers in 2004, for a total value of 80,978 Litas (US\$30,234). 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:** Lithuania’s administrative penalties are inadequate and cannot act as a deterrent to IPR violations. BSA and the recording industry report that the only available sanctions under the Administrative Code are monetary fines, rather than the suspension or revocation of licenses which would act as deterrents to resellers and certain other pirates. Even when fines are imposed, they are very low and thus not nearly equal to the harm done to rightholders; nor are the fines enough to deter future piracy. The current level of fines available is 1,000-2,000 Litas (US\$378-\$756) in copyright piracy cases, although the courts tend to levy fines for only ten percent of that amount, so for 100-200 Litas (US\$38 to 76), hardly enough to act as a deterrent. Efforts to increase both the statutory amounts in the Parliament (including multiple fines for repeat infringers), and to get the courts to impose higher fines in actuality, have failed in the past several years. IIPA and its members believe that the level of fines, and the actual amounts levied, remain too low to deter infringers.

**Procedural hurdles—“expert opinions”:** The Lithuanian courts will not apply a presumption of ownership for seized copyright material, which results in a burdensome evidentiary hurdle.<sup>6</sup> In order to prove that a suspect product is 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, suspects were never prosecuted because the police were required to get an expert opinion to determine proof of ownership for every single copy seized. Private citizens, even though expert in this area of the law, are barred from rendering opinions; only designated experts are allowed to serve this function, keeping those cases from moving forward.

The recording industry has to provide cumbersome expert reports to pursue administrative actions. For example, every single CD seized by the police 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. Another problem is the General Prosecutor’s Office, which requires all titles international album and film titles seized to be translated into Lithuanian before a case can commence. These burdensome requirements were recently confirmed by the police during a U.S.-funded training program (in January 2005). When the authorities and industry officials complete a large seizure (for example, in the tens or hundreds of thousands of units), the burden to complete such reports is onerous and thus acts to block enforcement actions. According to regulations, the plaintiff has six months to prepare an expert report; the recording industry tries to complete its works within three months, but the judiciary still tends not to accept the opinions of the music industry in

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<sup>6</sup> 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.

some cases. The recording industry believes that legislative reforms are necessary to establish a presumption of ownership, in order to resolve this enforcement roadblock and to expedite cases.

Here is one example of the types of enforcement hurdles that must be overcome: 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 was not sufficiently competent. IIPA was told the report did not answer the court's legal questions, which are not even the subject of an expert report. A second report from the local music industry group FGPA was ignored by the Appellate Court on the grounds that FGPA is an interested party. The Supreme Court then noted that the statutory fines for copyright infringements are too high and sent the case back to the Appellate Court. No action was taken on the case in 2004. This case commenced in 2000, when the Tax Police seized 888 music CDs. The procedural labyrinth described above illustrates the incompetence and ineffectiveness of court procedures in copyright cases.

The business software industry (BSA) advises that following the introduction of new criminal procedures (in May 2003), expert statements in software cases by private experts pertaining to the nature of each pirated software copy have been accepted as sufficient evidence in criminal and administrative cases. BSA therefore believes that the law is satisfactory, although not ideal (because of the continued need of detailed expert reports, albeit by private, not public, experts).

**Expensive civil court fees:** The Civil Procedure Code, after its revision, 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) with the civil code rules on intellectual property rights (which had been 100 Litas). The new rule as it pertains to IPR cases must be clarified because applying a 5% civil claim rule would impose an excessive financial burden on rightsholders and could impinge on their ability to bring a case. The government of Lithuania has urged the copyright industries to bring more civil cases to lower piracy rates. This is evidence of two misunderstandings by the government: first, that civil cases can be effective against commercial pirates, including organized crime syndicates, the prime culprits of piracy—this is not so; second, that the prohibitive fees in those instances where civil cases can be effective—against certain end-user businesses, such as in software cases—will not be hampered by the prohibitive fee structure. Until this fee structure is made clear, civil IPR cases will not proceed. A flat fee of 100 Litas is a reasonable amount that IIPA recommends should be adopted and applied.

## **COPYRIGHT LAW AND RELATED REFORMS**

**Criminal Code reform:** The Criminal Code and Criminal Procedures Code were substantially revised, effective in 2003. In 2004, a panel of Supreme Court judges ruled that the protections in Article 192 of the Criminal Code applies not only to works, but to sound recordings as well. This resolved a major concern of the 2003 revisions. Article 192(1) of the Criminal Code provides penalties consisting of fines, restriction of liberty, arrest, and imprisonment of up to two years assessed against anyone who illegally reproduces a literary, scientific, artistic or other work or part of it, imports, exports, distributes or retains illegal copies for commercial purposes of such works, if the total value of the copies (retail price) exceeds 100 MGL (minimum living standard), which is approximately 125 Litas (US\$47).

## Copyright Act

Since 1999, Lithuania has enacted a number of significant copyright law reforms.<sup>7</sup> In 1999 (effective June 9, 1999) Lithuania adopted a new comprehensive Copyright Act (Act No. VIII-1185), which replaced the antiquated Soviet Civil Code. The 1999 copyright law, though a major step forward, also contained some serious deficiencies. Between 1994 and 2002, Lithuania joined many of the key international copyright and neighboring rights conventions, including the Berne Convention, the Geneva Phonograms Convention, and the Rome Convention. It also acceded to the two WIPO Internet Treaties, and last, became a member of the World Trade Organization.

In 2003, additional revisions to the copyright and related laws were adopted (effective March 21, 2003) in order to comply with the WTO TRIPS obligations, the WIPO treaties, and the various EU directives. At the time, the copyright industries expressed concerns and reservations about several of the amendments which were (and are) inconsistent with Lithuania's bilateral and multilateral copyright obligations. Unfortunately, those concerns went unheeded by the Ministry of Culture which was unwilling to consider or accept the industries' proposed revisions. IIPA understands that, as part of Lithuania's accession to the EU, additional revisions are contemplated in 2005, for example, for compliance with the EU Enforcement Directive. (Directive 2004/48/EC on Enforcement of Intellectual Property Rights).

The 2003 amendments made some improvements to the copyright legal regime of Lithuania (described in detail in earlier IIPA reports).<sup>8</sup> For example, the law is now explicitly clear that the right of reproduction covers direct and indirect, temporary and permanent copying in any manner or in any form [Article 2(1)]. However, many deficiencies remain, including:

- Article 79, which weakened, or at least left unclear, the formulation for the recovery of damages in Lithuania. The remedy was apparently supposed to model similar "pre-established" damages provisions on U.S. law, namely, that a right holder could elect recovery of compensatory damages in lieu of actual damages to represent actual damages in a fixed range of approximately US\$35 to US\$3,500. However it is unclear whether the damages are assessed for each act of infringement (i.e., times number of copies), or for each work infringed; if the latter, and if such remedies are the only compensatory damages, they would be much too low to properly compensate for piracy. For example, the business software industry (BSA) did file two claims in criminal cases consistent with these provisions. Damages were assessed for each copy of illegal software as a preliminary matter, but the judgments have not been finalized, leaving this matter unclear at present.

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<sup>7</sup> To review a more detailed history of Lithuanian copyright law reform efforts starting in 1999, see IIPA's February 2003 Special 301 report at <http://www.iipa.com/rbc/2003/2003SPEC301LITHUANIA.pdf>.

<sup>8</sup> 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 according 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 right of communication to the public does not clearly apply to all disseminations as it should; rather, it appears to apply only to “transmissions” (also, the law must be clear that a transmission should not exhaust the distribution right).
- Over the copyright rightholders’ strong objections, the law contains a private copying exception to the rightholders’ application of technological protection measures. The much-too-broad exception allows each consumer to make one analog or digital copy for “private purposes,” which completely eviscerates copyright owner’s rights for digital dissemination. This provision will hamper rightholders’ initiatives to provide digital services such as music streaming.
- Producers of sound recordings are not vested with exclusive rights with respect to broadcasting and communications to the public. (The law should make it clear that the remuneration claim does not substitute for an exclusive right.) In addition, broadcast royalty payments owed to U.S. phonogram producers and performers must be paid.
- The term of protection is too short; it should be extended to provide for a term of 95 years from first publication in the case of audiovisual works, or where the author is a legal entity.
- The economic rights in an audiovisual work should vest initially in the producer of the work, subject to agreements to the contrary, to facilitate licensing of films.
- The definition of an “author” of an audiovisual work is too broad.
- The act does not clearly apply to works or phonograms first and/or simultaneously published in Lithuania.
- The limitations on exclusive rights of copyright owners and producers of sound recordings remain too broad—beyond what is permissible in TRIPS. For example, the law needs to: track without exception the TRIPS Article 13 tripartite test, and clarify the vague scope of the “fair practice” definition; narrow the “personal use” exception; limit levies on blank tape and recording equipment to analog material; and, properly protect the copyright owner’s use of copyright protection technology.

**Customs Code reform:** In 2001, the customs code was amended to provide customs officials the authority to: (1) conduct searches on their own initiative, that is, *ex officio* (with or without a judicial order), all persons, objects, and vehicles that enter or leave Lithuania; (2) seize infringing copies of all works and phonograms, including parallel imports; and (3) detain all persons in possession of such illegal copies. But even with this authority the record of the last four years is one of poor enforcement because of inadequate training and execution.

**Optical media regulations:** IIPA and its members have been pressing the Lithuanian government for a number of years, without success, to draft and implement optical media regulations. One possible breakthrough on this matter is a scheduled roundtable discussion that the government has set for April 2005 with interested industry representatives. IIPA urges the government to seriously consider the key elements (eleven in total) of what is considered the international model for optical disc regulations. These are fully outlined in the IIPA 2003 Special 301 report available at [www.iipa.com](http://www.iipa.com) and were presented by IIPA to the Government of Lithuania.

**Government software legalization:** In recent years, there have been three Lithuanian government orders issued to compel the state institutions to buy and use only licensed software programs. The two orders before 2004—one in 2001 and the other in 2003—were deemed too weak or ineffective, which was why a new order was initiated in February 2004. The 2004 order was broader than the prior orders, covering all public administration

institutions—both state and municipal, and also established an Information Society Development Committee (ISDC) under the control of the Government of Lithuania to serve as a coordinating institution for the acquisition by government institutions of hardware and software. However, ISDC's attempts to implement government legalization programs stalled in 2004.

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