

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### LITHUANIA

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** Lithuania should remain on the Watch List in 2006.

#### **Actions to be Taken by the Lithuanian Government in 2006:**

##### **Enforcement**

- The Lithuanian Government should express a strong political will and a commitment to eradicate copyright piracy and act accordingly in a sustained manner by instructing all enforcement authorities to make piracy a priority problem.
- The IPR Division in the Economic Police (the Criminal Police Investigation Bureau) should focus their work on the key source of persistent piracy in Lithuania, i.e., against organized crime syndicates and large-scale operations in close and active cooperation with the anti-organized crime department and other enforcement agencies.
- The prosecutors should follow up with prompt prosecutions.
- Administrative sanctions should be imposed (for example, withdrawing business licenses from infringing kiosks);
- Customs officers, in particular the Customs Criminal Service, should commence actions, including *ex officio* actions to intercept pirate product smuggled into the country.
- Cumbersome and complicated procedures in criminal and administrative IPR cases should be simplified and eliminated, and the onerous evidentiary burdens in criminal cases relaxed.
- Coordinated and cooperative strategies among enforcement authorities as well as with right holders' organizations should be developed.

##### **Legislation**

- Adopt optical media regulations to properly license and enforce the production, distribution, import and export of optical media.
- Introduce the effective enforcement provisions to the Copyright Law by fully implementing the EU Enforcement Directive, in particular, the provisions on sampling and presumption of ownership. Correct the deficiencies in the copyright law as detailed in this report.
- Adopt 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.

Lithuania does have several trade agreements with the U.S., such as those contained in the U.S.-Lithuanian bilateral investment treaty (BIT), including key national treaty obligations, which remain in force.<sup>1</sup>

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<sup>1</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/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous IIP reports on Lithuania at

**LITHUANIA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2001-2005 <sup>2</sup>**

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>3</sup>	12.2	58%	11.0	58%	10.0	58%	4.6	53%	3.9	56%
Records & Music <sup>4</sup>	12.0	85%	15.0	80%	13.5	85%	12.0	85%	7.0	85%
Entertainment Software <sup>5</sup>	1.7	88%	NA	85%	NA	90%	NA	80%	NA	NA
Motion Pictures <sup>6</sup>	NA	NA	1.5	65%	NA	NA	NA	90%	1.5	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>25.9+</b>		<b>27.5</b>		<b>23.5</b>		<b>16.6</b>		<b>12.4</b>	

## **COPYRIGHT PIRACY IN LITHUANIA**

**Piracy at the borders:** Piracy at the borders remains a priority problem experienced by the copyright industries. Given its pivotal geographical location (especially to Russia) and weak border enforcement, in 2005 Lithuania remained a major regional transshipment area for pirated material—music CDs and audiocassettes, CD-ROMs containing business software, videos, home-burned CD-Rs and DVD-Rs, DVDs, videogame cartridges and DVDs and CDs containing entertainment software. Most pirate product originates from Russia and is smuggled into Lithuania and Poland either directly or through Belarus. There is also an established transport from Lithuania to Poland. Pirate products are also shipped to other European countries using air traffic routes via Scandinavian countries. This is 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.

Five years have passed since Lithuanian customs officials obtained the proper (*ex officio*) authority to undertake border searches and investigations. But this legal change, while welcome, still has not been used effectively by border authorities. 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.

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<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.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>3</sup> BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Lithuania, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>4</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>5</sup> ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

<sup>6</sup> MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

MPA notes that the pirates are beginning to change their distribution mechanics. Given that transportation of contraband and pirated materials across borders is risky and does have some costs, they are turning more toward producing pirated copies of films inside Lithuania. In contrast, the recording industry reports that the importation of pre-manufactured pirated discs still prevails over CD-R burning.

**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 Estonia. Note that BOD opened its subsidiary near Tallinn in Estonia. In 2003, the plant had a single line; in 2004 it had two lines (but only one was reportedly operating). In 2005, the plant had two lines and the total plant capacity was estimated at 7 million discs per year including CD-R (blank disc) replication. 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 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. Despite efforts by the recording industry to organize a roundtable discussion on introducing optical disc regulation, the Government did not engage on this initiative. This seems to indicate that optical disc regulation is not a priority for the Lithuanian Government. Most disappointingly, the recording industry's criminal case against BOD was dropped, as the prosecutor let the two year deadline elapse.

**Burning and CD-R piracy:** Unchanged for 2005, the most 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 continued at the same level. 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 although it is increasing, composing currently about 15% of the illegal market. The recording industry 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.

**Internet piracy:** Also unchanged in 2005, Lithuanian websites continued to 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. Notably, no criminal raids were made or any cases (criminal/administrative) initiated by the police *ex officio* against ISPs/host/administrators or websites in 2005. Police targets are only physical persons offering unlicensed software on the Internet. Usually, police place an order by e-mail or indicated telephone number and carry out a trap purchase, followed by the search of premises. The mentioned cases are called "Internet" only because of the lead (advertisement on s/w offer) found on the Internet. 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 business software industry reported a surge in 2005 of unlicensed software communicated to the public via file transfer protocol (FTP) servers.

The copyright industries report that, despite a cooperation agreement concluded on April 26, 2004 between the Internet service providers (ISPs) and local right holders, no actions have been taken against Internet piracy. The recording industry considers the agreement unhelpful and has

suggested terminating or redrafting it. The amended version was communicated to the ISPs in summer 2005, but the right holders never received a reply. This clearly illustrates a lack of willingness by the ISPs to cooperate against copyright crimes on Internet. In 2005 the local recording industry kept sending notifications of the existence of illegal websites to the ISPs and the police, all of which were ignored. IFPI identified and sent 10 “cease and desist” notices to 28 infringing sites in 2005; 26 of those sites (93%) were taken down. The Special Internet Crimes Investigation Unit (in the Economic Police) has not taken any action against Internet IPR piracy (focusing instead on hacking and pornography). 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 right holders. In 2005, BSA sent notifications concerning illegal software on three FTP sites to parties to the ISP Agreement. In each case the specific infringing files identified in the notification were removed, but the FTP sites were left in operation.

A key deficiency in the current Lithuanian law is that the infringement of the right to communicate to the public is not criminalized under the law, and, according to the software industry, criminal liability against the operators of FTP services can only be based upon the infringement of the distribution and reproduction rights. This creates further difficulties because there is a “commercial purposes” standard applied to such offenses, a level of intent which is not always present in these cases. As a result, 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. BSA reports that in 2005, only two criminal cases were initiated against individual resellers of unlicensed software on the Internet. Three preexisting criminal cases were concluded – one resulted in a criminal order to pay a fine of US\$430, one resulted in compulsory medical treatment due to the adjudged insanity of the infringer, and the third case was settled.

**High piracy levels across all sectors:** Pirate products in Lithuania continued to be sold in markets, kiosks and retail outlets in 2005. As we have acknowledged before, 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. 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, and 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 2005, 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 Litas (~US\$3.45), sometimes 8 Litas for “outdated” repertoire as opposed to the 50-65 Litas (~US\$17-22.40) for full-priced legitimate CD with international repertoire. As mentioned above, CD-R burning is severely harming the legitimate market. Based on police seizures (in 2004), 80% of pirate products in the markets is international repertoire, 15% is Russian and 5% is local repertoire; this breakdown continued in 2005. The legitimate music industry in Lithuania has been struggling for years to survive. In 2004, 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 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 Business Software Alliance (BSA) reports there was a growth in Internet-based piracy during 2005, especially large amounts of unlicensed software communicated to the public via the use of file transfer protocols (FTP) services. The Internet service providers (ISPs) do not engage in monitoring of these servers, and therefore there has been little activity on the part of law enforcement officials against operators of FTP services. The problem of hard disk loading by hardware and software retailers remains a problem, causing significant losses to the local software distribution channel. On the retail side, BSA continues to report for 2005 that the Gariunai flea market in Vilnius and similar markets across Lithuania remain sources of pirated materials, although police activities to address this problem have increased and there has been a drop in the open/visible sale of large quantities of software at flea markets. 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 exact extent to which this has been applied in-practice is unclear. Estimated trade losses due to business software piracy were \$12.2 million in 2005, though overall piracy remained relatively constant at 58%. Reversing high levels of software piracy in Lithuania could improve the local economy.<sup>7</sup>

The motion picture industry (MPA) continues to report that, in 2005, Lithuania remains the least developed market for audiovisual works of the three Baltic nations. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. MPA estimates that in 2005, 80-85% of the pirate DVDs are imported from Russia (and perhaps some from Belarus) and 15-20% are locally manufactured (using DVD-R and CD-Rs burned on personal computers). The pirate discs are sold in rental outlets and on street markets across Lithuania. Internet piracy (both downloading and hard goods) is increasing. TV and local cable piracy are also problems (often screening pirate copies of blockbuster films). The legitimate video industry is still 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.

The Entertainment Software Association (ESA) reports that piracy in Lithuania increased slightly, to 88%. Pirated products continuing to flood the country from Russia, Ukraine, Belarus, and even Poland. 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, with some groups having "branded" their pirated products, purporting to be the legitimate producer of such pirated goods. 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 began recording their trademarks with customs authorities in 2004, but unfortunately, this has not resulted in any border actions, as border enforcement continues to be extremely weak. Internet piracy is also growing concern for the entertainment software industry. The estimated value of pirate entertainment software in Lithuania was \$1.7 million in 2005.

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<sup>7</sup> BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a drop in Lithuania's piracy rate from 58% to 48% could add \$76 million to its economy, create roughly 480 new jobs, and increase local industry sales by more than \$45 million. For Lithuania's government, the cumulative effect of this growth could mean an additional \$10 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Lithuania.pdf>.

## **COPYRIGHT ENFORCEMENT IN LITHUANIA**

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. 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).

Currently, the three bodies with responsibility for IPR enforcement are the (1) Special Internet Crime Investigation Unit (formerly the Economic Police), (2) the IPR Division within the Criminal Police Investigation Bureau, and (3) Customs—but still, there is little communication or cooperation among these three organizations. The Lithuanian government indicated that the IPR Division in the Criminal Police is the centralized body which coordinates IPR investigations at the national level. The Economic Police have to date resisted adding IPR investigators because of limited resources, and have focused their actions against small-scale pirates instead of focusing on large-scale pirate operations, businesses, and organized criminal syndicates.

**Ineffective border enforcement:** 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. Customs officers have *ex officio* authority to inspect, intercept, and seize suspect shipments of pirated product entering the country, but they are not using that authority fully. 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. Customs officials still insist that a major contributor to poor enforcement is the nature of the internal EU market; this excuse, however, obviates the fact that much of the pirated product is coming in over the border with Russia. 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.

An entertainment software company reports that it had two Customs seizures in 2005, resulting in the seizure of approximately 10,000 products. One case was closed without incident. However, the second case remains ongoing. On June 2, 2005, the Customs authorities seized an estimated 1,700 counterfeit Nintendo products. The defendant challenged the seizure, claiming that the products were for her “personal use.” Due to the rather large amount of the seized products, Customs initiated an administrative copyright case. The court surprisingly found in favor of the defendant. The Customs authorities were then prevented from comparing the counterfeit goods to genuine samples during the hearing and the court demonstrated a lack of understanding of intellectual property law, misinterpreting EU and national rules and provisions on Customs actions. The company noted that the Customs authorities’ lack of experience in IPR matters also affected the outcome. It is thus necessary that both the Customs authorities and the courts be better educated on intellectual property crimes.

**Raids lead to few prosecutions and non-deterrent sentencing.** Despite results with raids, the problem remains that the police do not follow the criminal cases through prosecution and judicial sentencing. In addition, Lithuanian prosecutors gained more tools to use in IPR actions when the new criminal code and criminal procedure code entered into force in May 2003. However, since then, prosecutors have brought only a few IPR criminal cases and their general performance is poor. In some cases (for example, in music piracy), cases have been terminated due to the

expiration of various procedural deadlines (e.g., the recording industry case against the optical disc plant).

According to official government statistics, there were 303 criminal cases and 197 administrative investigations brought against suspected copyright infringers in 2005. The authorities reported seizing a total of 265,700 optical discs. The share of music, film and software of the seized illegal material is unclear. To the recording industry's knowledge, music represents a small share of the overall seized quantities.

Below is a summary of the industries' criminal copyright enforcement actions in 2005:

- BSA reports that its work in 2005 with local economic police in the cities of Vilnius, Kaunas and Kalipda continues to improve, and these officials often implement end-user<sup>8</sup> raids and reseller test purchases on their own initiative (Kaunas City was the most active division and toll many software cases in 2005). However, there are few cases initiated in this manner by the economic police in other cities (like Siauliai, Panevezys and Marijampole); the lack of willingness there may be attributed to the lower priority of IP cases and workload and budget pressures. BSA notes that although criminal investigators express interest and willingness to take cases, the number of investigations initiated in hard disk loading and Internet cases is very small. In 2005, BSA reported 27 criminal cases, 27 administrative cases and 11 civil cases involving the illegal use and/or distribution of business software. This resulted in 7 criminal orders (an alternative to a criminal judgment, where the defendant admits fault and agrees to pay damages), 2 criminal judgments, 22 administrative judgments and 6 civil decisions. In total, fines in the amount of US\$9,102.69 were adjudged in criminal cases (the average fine being US\$1,011.41). In administrative cases the total amount of fines was US\$4,849.56 (the average fine being US\$220.24). While fines remain much too low – administrative fines on average were lower even than a minimal fine provided in the law (approx. US\$355) – the business software industry reports a positive tendency that all the criminal orders and judgments against end-users adopted in 2005 imposed criminal liability both against the individual infringer (i.e., the GM or IT specialist) and the legal entity (company using unlicensed software). 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.
- MPA reports that there were about 12-15 raids conducted monthly in Lithuania during 2005, which is about the same pace as in 2004. The number of pirated produce seized in 2005 seems to have decreased from 2004 (317,000 in 2004 compared to 52,000 by mid-2005). In an interesting move, the number of movies seized actually remained pretty constant because the pirates are now selling 2 to 6 movies on one pirate disc, compared to only one movie per disc in 2004.

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<sup>8</sup> BSA reports that prior confusion over the handling of end-user cases has been straightened out in practice. 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.

- ESA member companies report that the police conducted several actions in 2005. However, the progress of cases is extremely slow, and are typically against small retailers rather than large scale piracy operations. Where cases have gone forward, fines have been imposed.

**Civil actions in 2005:** In 2005, BSA obtained 6 civil judgments in the 11 reseller and end-user cases brought last year, resulting in damages awards totaling 240,293 Litas (US\$82,777). In addition, 18 settlements with end-users and resellers were reached, for a total value of 118,472 Litas (US\$40,812). These results represent a modest improvement over 2004. The Lithuanian civil search law was utilized for the first time by BSA in January 2004. Two civil searches were carried out under this law in 2005.

**Administrative fines remain non-deterrent.** Lithuania's administrative penalties are inadequate and cannot act as a deterrent to IPR violations; there was no improvement in this situation in 2005. 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\$345-\$690) in certain copyright piracy cases, although the courts tend to levy fines for only ten percent of that amount, so for 100-200 Litas (US\$35 to 69), 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. Administrative fines that are less than the minimal fine provided in Article 214(10) of the Administrative Law Infringements Code are routinely imposed. Moreover, many administrative cases result in no fine at all, with infringers merely receiving a warning.

**Continuing problems with "expert opinions":** Problems associated with required expert opinions did not diminish in 2005. First, the reliance on a government expert report is unnecessary and causes delays in trials. 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\$172,300 (~500,000 Litas). The Centre acts to formalize expert reports, even though this practice is contrary to other European systems that rely on copyright industries, rather than government reports. IIPA continues to urge the government to rededicate the resources of this operation to a specialized IPR police unit or similar enforcement operation. In addition, there are reports that the Economic Police are pressing for the development of their own expertise center, in order to centralize control over its cases; that possible development has some industries quite alarmed.

Second, Lithuanian courts still refuse will not apply a presumption of ownership for seized copyright material (such as sound recordings), which results in a burdensome evidentiary hurdle.<sup>9</sup>

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<sup>9</sup> The BSA indicates that this issue regarding presumption of owners is not 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 (as in the case of sound recordings), 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 business software industry (BSA) reports that since the new criminal procedures code went into force in 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

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.

Third, the recording industry reports that in 2005, it still 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 international album titles and film titles seized to be translated into Lithuanian before a case can commence. These burdensome requirements were 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. 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 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. The recording industry continues to express dismay that expert reports prepared by the software industry are accepted but not accepted are reports prepared by the recording industry.

**Civil court fees remain expensive.** No changes in expensive court costs were noted in 2005. 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 right holders 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. That advocacy contains two erroneous views: 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 the industries have recommended should be adopted and applied. Perversely, under Article 82(4) the high court fees can be waived if the civil case is coupled with a criminal case – that is if the damages in the civil case are adjudged to have been caused by a criminal act. This gives plaintiffs a powerful financial incentive to pursue duplicative criminal charges even when they heed the government’s call to bring civil cases.

**Training:** In 2005, BSA hosted six training seminars for Lithuanian police, prosecutors and customs officials. One of the trainings was a pan-Baltic event, including enforcement officials from Latvia and Lithuania.

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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).

## **COPYRIGHT LAW AND RELATED REFORMS IN LITHUANIA**

**Copyright Act of 1999, as amended in 2003:** Since 1999, Lithuania has enacted a number of significant copyright law reforms.<sup>10</sup> Its 1999 copyright law (Act No. VIII-1185), though a major step forward, also contained some serious deficiencies. Four years later, additional revisions to the copyright law were adopted (effective March 21, 2003) in order to comply with the WTO TRIPS obligations, the WIPO Treaties, and various EU directives. At the time, the copyright industries acknowledged the positive elements<sup>11</sup> in the 2003 legislation and also expressed concerns and reservations about several amendments which were (and are) inconsistent with Lithuania's bilateral and multilateral copyright obligations.<sup>12</sup>

**Proposed Legislation:** IIPA understands that, as part of Lithuania's accession to the European Union, additional revisions to its laws were initiated in 2005.

- Proposed implementation packages of the EU Resale Right Directive and the Enforcement Directive were prepared by the Ministry of Culture, discussed by the relevant ministries, and were approved by the government on December 7, 2005. This legislative package is currently being considered by the Parliament, with adoption expected by the end of April 2006. (IIPA does not have an English copy of the proposal and has no comments at this time on the substance of this bill.)
- Proposed amendments to Articles 192, 193, 195 (1) of the Criminal Code; Articles 154 (1) and 158 (1) of the Criminal Procedure Code; and Articles 9 (1) of the Law on Operative Actions were prepared by the Police Department under the Ministry of Interior in the first part of 2005. The primary issues were increasing sanctions to 4 and 6 years of imprisonment, according to the damages caused by the crime, and adding a right of communication to the public. To date, intellectual property crimes have been considered minor (subject to no more than 3 years of imprisonment). Operative measures may be applied only with regard to

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<sup>10</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>11</sup> The 2003 copyright law amendments included several positive reforms, such as: included protection for temporary copies (Article 2(1)); 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 to 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).

<sup>12</sup> Problems with the 2003 amendments included, for example: Article 79, which weakened, or at least left unclear, the formulation for the recovery of damages in Lithuania; the right of communication to the public does not clearly apply to all disseminations as it should; the law contains a private copying exception to the right holders' application of technological protection measures which is far too broad and undercuts the copyright owner's rights for digital dissemination; producers of sound recordings do not have exclusive rights with respect to broadcasting and communications to the public (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; 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; and 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).

certain more serious crimes. Thus, by increasing sanctions in the above-mentioned Articles of the Criminal Code, amendments in the Criminal Procedure Code and Law on Operative Actions were made in order to classify intellectual property crimes as more serious crimes and apply operative measures.

Reports indicate that the above-mentioned amendments have not yet been cleared by other responsible ministries. .

**Optical media law:** This remains a priority for the industries in Lithuania. IIPA and its members have been pressing the Lithuanian government for a number of years, without success, to draft and implement optical media regulations. Despite numerous attempts the Lithuanian Government has not responded to the recording industry initiative to open the drafting process of an optical disc law. IIPA urges the Lithuanian government to seriously consider the key elements of what is considered the international model for optical disc legislation.<sup>13</sup>

**Government software legalization issues:** 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. 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. 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. BSA has been active over the past several years in training and raising awareness of software legalization in both the government and the private sector. In 2005, BSA provided state officials with a Lithuanian-language guidebook on software management and conducted a number of seminars and conferences.

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<sup>13</sup> IIPA's key elements for effective optical disc regulations appear in our 2003 Special 301 report, and were presented to the Government of Lithuania (see footnote 10, above).

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