

# **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

## **2001 SPECIAL 301 REPORT**

# **ESTONIA**

### **EXECUTIVE SUMMARY<sup>1</sup>**

---

Over the past several years, Estonia has made significant progress in reforming its copyright legal regime, including accession to the major treaties. The once major deficiency, the absence of a point of attachment for foreign sound recordings, has been corrected. But a problem remains beyond the legal reforms: enforcement. The Government of Estonia has correctly identified and agreed to crack down on the open-air markets and to effectively enforce its borders, especially who against "suitcase" pirates have plagued the industries for years. But not enough action has actually been undertaken to fully address these problems. Although Estonian officials have been very cooperative with the copyright industries, actual on-the-ground enforcement steps are needed to truly treat these problems.

In the past year, a new problem has come to light; it is now clear that there is discriminatory treatment of foreign sound recording producers in Estonia in contravention of the national treatment obligations of the U.S. -- Estonia Bilateral Trade Agreement of 1994. The Estonian Broadcasting Union (ERL) claims that American phonogram producers and performers should not enjoy the right of equitable remuneration for the broadcasting of their material in Estonia, although they provide these royalties for the broadcasting of Estonian material. In fact, U.S. repertoire has never been compensated for its broadcast even though it is eligible for such compensation. Estonia must address this very serious legal deficiency.

In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000); it also acceded to the Rome Convention (effective April 28, 2000). This followed a series of legal reforms undertaken in 1999 including the adoption of numerous new laws, and adherence to the World Trade Organization (WTO) on November 13, 1999. In fact, the history of Estonian legal reform began soon after its independence with the adoption of a modern copyright law that went into force on December 11, 1992. On January 21, 1999, Estonia enacted additional amendments to the Copyright Act, as well as to the Criminal Code, the Code of Administrative Offenses, and the Customs Act, partly in anticipation of ratification of the WTO TRIPS Agreement. Those provisions went into force on February 15, 1999. Most significant in the package of amendments was a provision to give customs officials the necessary *ex officio* authority to seize infringing goods at the border. In addition, the increases in criminal sanctions especially for administrative offenses, were hailed as a very positive step by the software industry in particular.

On April 19, 1994, Estonia signed a bilateral IPR trade agreement with the United States, pledging to improve its level of protection and enforcement, and to join the Berne and Geneva Phonograms Conventions, among other things. Estonia did join Berne, and as of, 2000, the Geneva Phonograms Convention as well. When it acceded to the WTO in 1999, Estonia obligated itself to meet not only the substantive copyright provisions of the TRIPS Agreement, but

---

<sup>1</sup> For more details on Estonia's Special 301 history, see IIPA's "History" Appendix to filing.

the enforcement obligations as well. But Estonia is currently a very serious pirate market domestically, and serves as a major warehouse and exporter of material throughout the region. These commercial pirate activities are substantially damaging markets not only in Estonia, but also in the Scandinavian countries (Finland and Sweden) and other parts of Eastern and Western Europe. For this reason, IIPA recommends that Estonia be added to the Special 301 Watch List this year.

**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1995 - 2000**

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	2.0	60%	NA	60%	NA	60%	NA	99%	NA	100%	NA	100%
Sound Recordings / Musical Compositions	9.0	60%	9.0	70%	8.0	85%	4.0	80%	NA	NA	NA	NA
Business Software Applications	NA	69%	NA	72%	NA	NA	NA	97%	NA	NA	NA	NA
Entertainment Software <sup>2</sup>	3.7	98%	NA	NA								
Books	NA	NA										
Total	14.7		9.0									

## COPYRIGHT ENFORCEMENT

---

### The Need for Estonia to Act Against the Open Illegal Markets and to Better Police its Borders

The most serious enforcement problem in Estonia is its role as a regional distributor of illegal material, including optical media material. Pirated material – audio CDs, CD-ROMs containing entertainment and business software, videos and audiocassettes, and videogame cartridges – regularly moves between Estonia and neighboring countries due to poor border enforcement. Material that enters Estonia from other countries is warehoused there due to poor on-the-ground enforcement, and then shipped to other countries in Eastern Europe, and especially into Finland and the other Scandinavian countries. A significant amount of pirated material from Russia, Ukraine, Latvia and Lithuania reaches Estonia. Most of the material is produced elsewhere in the region, for example in the vast optical media production facilities now operating in Ukraine. The lack of effective enforcement in Estonia is significantly harming legitimate markets in Finland, Sweden and other countries in the region. In addition, department store sales of illegal material in the suburbs of Tallinn, as well as sales of some (albeit less) material at open markets, have hindered the ability of the legitimate markets in Estonia, Latvia and Lithuania to take hold.

---

<sup>2</sup> IDSA estimates for 2000 are preliminary.

In 2000, the Government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. In fact, in December 2000, several key ministers took a high profile fact-finding tour of the notorious Kadaka Market in central Tallinn to witness the piracy firsthand. They also observed that many of the illegal stalls were closed before their arrival, due to an organized "early warning system" that has repeatedly been used to thwart police and other enforcement officials. After the tour they pledged to take Cabinet-level steps to effectively shut down the market stalls, including amendments to the city's rent laws, if necessary, to go after the landlords of the stalls as third party infringers.

In May 2000, the Tallinn police formed a special unit aimed at solving the problems with the Kadaka Market; the unit has been ordered to work directly with the private sector's anti-piracy organization (Estonian Organization for Copyright Protection, EOCP – a joint effort of the Motion Picture Association, {MPA}, the International Federation of the Phonographic Industry, {IFPI}, and Sony Interactive Corporation). In fact, the number of stalls selling illegal material in the Kadaka Market has been dramatically reduced this past year as a result of police and private industry action (from an estimated 160 stalls to the current 6 to 10). Also, amendments are now pending to the Consumer Protection Act to close down the stalls found marketing pirate product. These certainly are all positive developments that must be fully carried out to finally put an end to this marketplace piracy.

Until this year, anti-piracy enforcement activity by the Estonian government had consisted of nothing more than sporadic raids and seizures at the open markets. In the past, to add insult to injury, confiscated goods from some industries (music and audiovisual material in particular) were sometimes returned to the pirates. Further, many confiscated goods remain in police custody and penalties are not imposed because the "owners" of the pirated goods cannot be identified; only the salespeople are apprehended and then released.

With the establishment of the Kadaka Market police unit, enforcement has improved significantly at that market; now, those same results must be sought, in other markets and other cities. In fact, while most of the copyright industries report good cooperation or at least a willingness of police to assist with enforcement, results are lacking because there are still not significant resources in place to conduct enforcement activity properly. As noted, the Kadaka shopping mall is the greatest offender. Hundreds of thousands of CDs and CD-ROMs (especially musical recordings and entertainment software) are sold there. These markets hurt not only the local copyright market, but also cater to tourists; the so-called "suitcase exports" to Scandinavia (especially Finland) are doing grave harm to the legitimate markets in these countries.

The market sales have been compounded in years past by the lack of effective customs activity. In 1999, the customs police were given proper authority to improve the situation. In October 2000, the customs police announced that they would start seizing outgoing material concealed in suitcases, and would prosecute offenders. Also, in a parliamentary reversal, the treatment of parallel imports as pirate copies was readopted as an amendment to the Copyright Act in October 2000, following the legalization of parallel imports in January 2000. The anti-piracy organization (EOCP) reports an increase in customs activity in light of the new border operations, a growing number of cases, and the introduction of a new officer designated specifically for IP investigations. The new regulations will permit suitcase seizures of material where under the old provisions such seizures were limited to copies confiscated in market transactions. These are all welcome developments, since more effective border enforcement is clearly needed. For example, the software industry reports only four seizures in all of 2000.

Beyond the sporadic seizures and raids, prosecutorial delays and legal roadblocks have so far prevented effective civil, administrative, and criminal prosecution. Evidentiary burdens block effective enforcement because they present significant hurdles to cases moving forward. For example, false contracts are presented to and accepted by the courts. Estonian officials have, so far, been unable to craft viable methods to verify documents. The EOCP has provided great assistance in this regard because of its around-the-clock availability to the authorities. Problems remain with false contracts, especially Russian "sub-license agreements" which are ubiquitous in the smallest kiosks and in video and audio shops. They lend a semblance of legitimacy to the trade, and impede effective enforcement by authorities because of the confusion created. Estonian officials acknowledged in discussions with IIPA members that they have been unable to devise an effective means to defeat them.

A serious problem for judicial enforcement is the fact that the courts are not applying a presumption of ownership or authorship. The police reported to IIPA officials numerous raids of significant quantities that could not be prosecuted because the police were required to get an expert opinion (at one time available from only one individual in the entire government) to determine proof of authenticity for each copy seized. It is not even clear under Estonian law whether legal entities can commence a copyright suit. The few cases that do move forward result in the imposition of inadequate civil and criminal penalties, a complaint heard by IIPA and its members and even by members of the police and customs officials in Estonia.

Administrative proceedings remain ineffective, in part due to the very short deadlines combined with the practical application of these provisions. Under the original provisions, a decision had to be taken within two months after the seizure, which did not leave enough time to submit all the necessary supporting documents, especially when mixed with the documentary evidentiary hurdles. The two-month timetable proved unreasonable because the police were not prompt in their submission of evidence to the right holder representatives; as of October 22, 2000 the deadline has been extended to a more realistic two years. Under the old provisions, time and again, administrative cases were dismissed and the pirate materials returned to the police. These administrative proceedings have been especially frustrating because the new administrative penalties are significant, providing for a maximum of 2 years' imprisonment and over 50,000 Crown (US \$2,750) in fines.

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

In 1998, the police did create a special IPR unit under the authority of the Central Criminal Police, but it has not been able to effectuate the type of enforcement necessary to stop organized criminal pirating operations. At the beginning of 2000, an individual police official in every regional police department (17 in total, in a country of 1.4 million people) was assigned to combat fraud, piracy and counterfeiting. The motion picture industry reports good cooperation with these units, although they remain limited in resources. Other industries, however, report that the IPR unit has not yet adequately addressed IPR issues, and has been side-tracked on other tasks.

The software industry reports that end-user piracy has received scant attention from the IPR unit, although the software industry has had good cooperation with the IPR unit on certain

enforcement actions and high-ranking officers in the unit and the Central Criminal Police consider end-user piracy to be a serious problem. The software industry hopes that additional training and the development of more expertise, combined with the political willingness of the government to take action, will lead to better results in 2001.

To date, there are still no known CD plants operating within Estonia. However, the Estonian market is flooded with illegal material manufactured in other countries, notably Ukraine and Russia. Two years ago, the police reported they would consider recommending adoption of optical disc production and distribution monitoring systems; but no such action was ever taken. In addition to traditional piracy, CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate. As the result of the lack of *ex officio* authority by the police and, to date, only sporadic actions by the customs officials (especially in some border regions), pirate material has flowed unimpeded into and out of Estonia from neighboring countries. It is hoped that the new customs activity, especially against "suitcase" piracy, will prove effective. The police need the proper authority and resources to do a better job, and there needs to be better prosecutorial follow-up of raids to deter pirates.

Piracy of sound recordings and music remains widespread in Estonia. The estimated level of audio piracy is 60% for 2000 (down from 70% a year ago). It was only in November 1999 that Estonia finally corrected the major obstacle to enforcement of sound recordings when it adhered to the WTO TRIPS Agreement and thus, for the first time, established a point of attachment for foreign sound recordings. Estonia also joined the Rome and Geneva Phonograms Conventions in 2000.

Trade losses due to the piracy of sound recordings and musical compositions in Estonia in 2000 were \$9 million (the same as in 1999).

The Recording Industry Association of America (RIAA) reports that the police have made some raids and seizures, mostly at outdoor markets, but that the absence of *ex officio* authority by police made their activity sporadic at best. Pirate products are still being sold in the two main markets in the Tallinn region (the Kadaka Market and Merekeskus), and along the Eastern Estonian border (with Russia). A local group of organizations (EFU) and, since early 2000, EOCP, continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. EFU and EOCP also work together in running educational seminars for police and customs officials.

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

The recording industry reports that there have been barely any effective judicial actions - no effective civil judgments nor criminal convictions, and only a few administrative fines. Until 1998, Customs officials in Estonia were unable even to seize material because they lacked the necessary authority; starting in October 2000, they also agreed to seize the so-called "suitcase" materials as well. There were a number of police seizures of CD material (usually in the 3000 to 5000 CDs range) in 2000. In one series of raids on the Kadaka Market in November and December 2000, approximately 20,000 CDs were seized.

During the past several years many anti-piracy training programs have been conducted in cooperation with the copyright industries, including the IIPA and its members, the Finnish Copyright authorities, and EU PHARE. These programs included training for customs officials, police, prosecutors, judges and government officials (in the ministries and parliament).

For the Motion Picture Association (MPA), the domestic production of high quality Finnish-language pirate videos and their sale to Finnish tourists remains a grave concern in 2000. The main piracy centers are located in Tallinn and towns in the northeast. The importation of high quality pirate product from Russia and Latvia is also a major problem. Unauthorized parallel imports of Zone 1 DVDs (programmed for playback and distribution in North America only) and signal theft are also important problems.

The estimated video piracy level is 40%, with pirate videos available especially in retail outlets. Even with the closure of many stalls, the Kadaka Market just outside Tallinn (and the smaller scale Merekeskus Sea-Center in Tallinn) cater to tourists, selling thousands of high-quality counterfeit and pre-release (both theatrical and video) Finnish-language audiovisual cassettes, complete with color packaging and fake holograms. Many of these counterfeits are copied in Estonia from original Finnish-language videos. Pre-release titles imported from Russia and Latvia are sourced from camcorded recordings in U.S. cinemas, usually made a few days after U.S. release. The Finnish Anti-Piracy Center estimates that 6% of the Finnish video market is comprised of pirate copies brought from Estonia (that is down from 15% last year).

Cable and satellite television piracy are also present in Estonia (an estimated 20% and 90% respectively). Another major problem for the motion picture industry is the sale of pirate smart cards for satellite reception via the Internet. The law needs to be amended to protect against signal theft. Under law reforms made in early 1999, cable operators are required to abide by copyright law or lose their licenses. Unfortunately, the Cable Broadcast Law (1999) did not empower the Broadcast Department, the body responsible for issuing licenses, to conduct its own investigations. Currently then, a revocation results from a recommendation by the Broadcast Department to the Copyright Committee in the Ministry of Culture. This procedure is cumbersome, but can work.

As a result of the formation of the Kadaka Market special police unit, and good cooperation with industry, not only have the number of illegal stalls been reduced, but the Finnish authorities report a significant decline in the number of Finnish-language audiovisual materials leaving Estonia for Finland. With pre-raid tip-offs becoming less and less common, several successful raids have been run by police, according to the MPA. In May 2000, an interdepartmental contingent of 50 officers raided the Kadaka Shopping Mall, seizing 5,000 videotapes, a television, and a few VCRs. The number of stalls selling pirate product has to date been sharply reduced; as noted above, only eight stalls now remain.

As already noted, the MPA, the IFPI, local film and music distributors, and Sony Interactive Corporation, established a joint anti-piracy organization now called the Estonian Organization for Copyright Protection (EOCP). With its participation in the government Copyright Commission and the Kadaka Market special police unit, the EOCP has worked hard to raise anti-piracy issues with the Government of Estonia at the highest levels.

Estonian officials should be encouraged to continue to work with Finnish authorities and the Finnish Anti-Piracy Center to train police, prosecutors and especially judges, and to adopt effective enforcement operations, to continue to stop the flow of pirate videos from Estonia into Finland.

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

The business software industry (Business Software Alliance or BSA) reports that Estonia made some enforcement progress in 2000, with a modest number of raids on resellers. For the most part, cooperation with the police, prosecutors and judges is reported to be good. In the case of the police, cooperation is much better at the lower levels than at the upper levels. Those who are actually conducting raids have been helpful. The problem is that the upper echelons of the police do not see IPR enforcement as a priority. The BSA reports good cooperation in Tallinn with the Central Criminal Police. However, the special IP group formed by the CCP has not been working. As other industries also reported, these police officials have been side-tracked with non-IPR business.

The BSA cooperated with police in a total of 47 raids in 2000: 17 concerned end-users of illegal business software; 30 involved resellers of illegal business software. Most of the raids took place in Tallinn. There were no raids in either Tartu or Parnu, both significant population areas. During the course of the 17 end-user raids, 105 personal computers were examined and 30 were seized; there were no personal computer confiscations ordered. As a result of reseller raids, approximately 6,300 illegal CD's were seized and confiscated. Several cases are still pending. The BSA estimates a total of 372,500 kroons (US \$21,517) was levied in fines in software piracy cases in 2000.

The 1999 amendments included many important enforcement tools for the business and entertainment software industries. The amendments expanded the definition of an infringing use; imposed liability for end-user piracy upon legal entities; increased the range of fines for copyright offenses; and made pirated copies and PCs subject to seizure. Also, the 1999 amendments made legal entities liable for end-user piracy with fines ranging from 150,000 to 500,000 kroons (US \$8,250 - \$27,500) depending on the conduct in issue. In practice, the fines are now imposed on a per copy basis, of 7,500 to 100,000 kroons (US \$433 - \$5775) per copy with a total not to exceed 500,000 kroons (US \$27,500).

In 2000, the business software industry estimated that 69% of business software in use in Estonia was unauthorized, down from 72% the year before, and making progress from the 92% first reported in 1997.

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

As with criminal remedies, civil remedies in Estonia are extremely weak. There is virtually no jurisprudence regarding the calculation of damages in IP cases. Estonia's failure to provide *ex parte* civil procedures also is a significant shortcoming. Unfortunately, the 1992 Copyright Law even with the 1999 amendments, does not include either a provision for statutory damages or a provision concerning *inaudita altera parte* searches. Another 1999 amendment to the Code of Civil Procedure, permitting judges to consider search order applications without the opposing party present, suggested that civil *ex parte* searches would be viable; but unfortunately, experience has shown that the provision did not work that way in practice. The BSA expects more tests of these provisions in the near future and would welcome clear and effective legislative amendments on applicable damages.

The Interactive Digital Software Association (IDSA) estimated trade losses due to piracy of entertainment software in 2000 at \$3.7 million and a piracy rate of 98%. The entertainment software industry, like the other industries, is hurt especially by lax border enforcement that allows material to flow freely into and out of Estonia. Much of this entertainment software material comes from Russia and Belarus and is controlled by organized crime groups. However, as a result of the closing of many of the stalls in the large open markets, the piracy of entertainment software has gone "underground" into small shops and stores. Illegal material is offered over the Internet and then distributed by mail. The EOCP has contributed to better enforcement as well as several training programs on the problems of the entertainment software industry.

## **The TRIPS Agreement Requires Effective Criminal, Civil, Administrative and Border Enforcement**

While laudable, legal reforms alone have not been enough to deter piracy in Estonia. Estonia must adopt practices that result in effective criminal, civil, administrative and especially border enforcement, in order to comply with the TRIPS Agreement. Even though the Estonian market is relatively small, it is dominated by piracy in almost every sector. While most of the copyright industries report good cooperation by the police running some street market raids, the anti-piracy resources are thin, and judicial enforcement has been almost non-existent.

In fact, Estonia faces ineffective copyright enforcement on all levels: criminal, civil, administrative and border operations. The police and customs officials are willing to initiate anti-piracy enforcement activities, but in the past they haven't done so, because of administrative problems, ineffective authority, or a lack of proper resources. The raising of the anti-piracy problem to the inter-ministerial level of the Cabinet has been very helpful in calling the government's attention to the problem. Now, Estonian officials, working with industry, must act to stop the large-scale operations in the markets and the collectively large-scale losses at the border.

Enforcement is also hampered because the appropriate officials do not know the proper procedures to take in piracy cases. In some agencies, including the economic police and customs, high turnover rates due to low pay have added to enforcement inefficiencies. In addition to the procedural problem of the verification of documents, there is the problem of verification of legal vs. illegal copies. Administrative remedies have not been properly utilized. Businesses, especially illegal kiosks and stores that sell pirated material, are not fined often enough, nor are their business licenses revoked; either of these measures would represent important additional steps toward proper copyright enforcement and should be addressed by the inter-ministerial officials responsible for IPR enforcement.

Since a considerable part of the piracy problem in Estonia is due to heavy importation of infringing materials, it is essential that border measures be strengthened and enforced in practice. As already noted, Estonia did improve its Customs Code as part of its WTO accession package, giving customs officials the appropriate *ex officio* authority to seize suspicious material without a court order or at the behest of the right holder. Now that authority has to be effectively utilized. Customs officials admit to problems with the detection of illegal material; hopefully the numerous training sessions held in recent years by the copyright industries should improve this situation. Most encouraging is the announcement by the Customs authorities that they would seize the "suitcase" material and thus address this major border enforcement problem. This is crucial because the Finnish copyright law has a personal use importation exception. As a result, a flood of CDs and CD-ROMs (consisting mostly of entertainment software), as well as videos, is imported into Finland by tourists returning from Tallinn. It is essential that the Estonian police do a better job raiding and seizing material at street markets (especially closing the remaining stalls at the Kadaka Market and the other major markets); that they follow up with prosecutions; and that they seize this illegal material in Estonia at the border. The Criminal Code has for years included appropriate remedies against commercial pirates. However, convictions are very difficult to obtain. The Code was improved in 1999, but unless convictions begin, it will not yield any improvements.

In the past few years the copyright industries have undertaken many training and educational programs to assist Estonian officials in understanding both the substantive copyright law obligations as well as the importance of effective enforcement, and it is hoped that these programs will finally start to show some positive results.

## **Additional Protection and Enforcement Obligations**

Estonia currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." At the same time that Estonia caused millions of dollars of losses to the U.S. due to piracy, it exported \$11.2 million worth of products to the US without duty, or over 5% of its total exports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$10.4 million in the first 10 months of 2000. Estonia should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement for copyrighted material.

## **LEGAL REFORM**

---

### **Copyright Law Amendments**

In 1999, the first of two expected packages of legal reforms to improve the legal and enforcement regime was adopted in Estonia. Included in the January 1999 amendments were provisions granting Customs the authority to seize goods without a court order; improvements in civil, administrative and criminal remedies (including a provision to make end-user piracy by legal entities an administrative offense); amendments relating to collective administration (including for retransmission via cable); and provisions necessary to implement the European Union rental directive.

The second set of amendments were originally scheduled for consideration in 2000, but they have been postponed. These amendments would have fulfilled Estonia's remaining obligations for compliance with TRIPS, the EU Directives, and the new "digital" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Clearly, the latter set of amendments, for digital treaty ratification and implementation, it now appears that will await completion by the European Union of its own Copyright Directive.

One new legal issue that must be addressed immediately is the unfair treatment of foreign phonogram producers. When it ratified the Rome Convention, Estonia made a reservation under Article 16(1)(a)(i) concerning Article 12. The Ministry of Culture announced in November 2000 that it plans to withdraw this reservation by the end of 2002 (or early in 2003); the government believes that broadcasters need a transition period before paying royalties for the public performance of recordings. This full reservation is a violation of the European Union Accession Agreement (Article 66) that includes a right of equitable remuneration for neighboring rights holders. The Estonian Broadcasting Union (ERL) has repeatedly taken the position that according to the current Estonian Copyright Act, American phonogram producers and performers do not have the right to equitable remuneration for the public performance (broadcast) of sound recordings in Estonia. This position is completely contrary to Estonia's national treatment obligations set out in Chapter II, Article II, paragraph 1, of the U.S. Bilateral Agreement of 1994 with respect to the "protection and enforcement of intellectual property rights" which includes these neighboring rights. There is no reason for such a transitional period. Estonia should be urged to revoke this reservation and to fix the law to clarify that U.S. repertoire and producers are covered by the right of equitable remuneration.

In sum, IIPA lauds the substantial and significant improvements that Estonia has undertaken since its independence, and especially the 1999 amendments directed at IPR enforcement. Estonia should be encouraged to further amend its law to: (1) provide for minimum statutory damages, relieving the plaintiff of having to prove actual damages, in cases involving copyright disputes between all parties, including legal entities; (2) eliminate the compulsory notice requirement for sound recordings; (3) supplant the current right of remuneration for sound recording producers for the broadcasting, public performance and other communication to the public of their phonograms with exclusive right (as well as fix the unequal treatment noted above, even under the right of remuneration for foreign producers); (4) correct the current disproportionate sharing of the home audio tape levy between authors and producers; (5) add a right of presumption of authorship for sound recording producers (currently afforded only to "works"); and (7) delete Art. 62(2), the author's rights "safeguard clause" which is unnecessary and inconsistent with the Rome Convention (Art. 1). Finally, the

Estonian government should fully implement the ruling of October 2000 that Customs officials will seize parallel import material with effective border enforcement.

Estonian officials must make clear how the law does in fact treat pre-existing works and sound recordings. IIPA interprets current law and treaty obligations as providing for a minimum of protection for works and sound recordings first published with the past 50 years, and some copyright officials and academics have privately concurred with this view. For example, due to Estonia's entry into the WTO on November 13, 1999, a foreign sound recording is (per the WTO) entitled to protection under the Estonian Copyright Act if published on or after November 13, 1949. The same is true for works. The history of Estonian membership in the Berne Convention is complicated however. Estonia "joined" Berne on October 26, 1994; but, prior to the August 1940 occupation by the Soviet Union, Estonia was a member of Berne (Berlin) from June 9, 1927.

Estonian copyright officials claim that for "works" there is retroactive protection under Article 18 of Berne and under TRIPS. This was demonstrated, they argue, when an amendment to deny retroactivity was defeated at the time of the adoption of the copyright law in 1992. Clearly, the WTO TRIPS Agreement obligates Estonia to provide such protection for pre-existing works and sound recordings. But to date, there have been no cases; in fact, one court decision in 1997 denied retroactive protection for performers' rights, because the court reasoned that no neighboring rights protection existed before the 1992 law. In sum, Estonian officials should publicly and clearly state how these TRIPS obligations are being satisfied for both works and sound recordings.

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

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

## A Summary of the Criminal Code, Civil Code and Administrative Remedies Amendments (1999)

On January 21, 1999, a variety of amendments to the Criminal Code were adopted, as well as important civil and administrative remedies; these provisions went into force on February 15, 1999. The criminal penalties include: criminal seizure provisions; up to two years' imprisonment for certain moral rights or economic rights violations; up to three years imprisonment for piratical copying including import or export of pirate copies. (Crim. Code Arts.

277 – 280). In addition, the penalties include up to two years imprisonment for manufacturing, acquisition, possession or sale “of technical means or equipment designed for the removal of protective measures against the illegal reproduction of works or against the illegal reception of signals transmitted via satellite or cable.” (Crim. Code Art. 281)

In addition, the Copyright Act was amended (Art. 83(5), (6)) to provide end-user software piracy fines that can be levied against legal entities of between 150,000 to 250,000 kroons (US \$8,250-US \$13,750) for the “use,” including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US \$1,100 – US \$2,750) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US \$13,750 – US \$27,500) for the manufacturing of pirated copies by legal entities. The same amendments repealed the provision that made natural persons liable for infringement under the Administrative Code, and instead made natural persons liable for similar actions under the Criminal Code.

On December 9, 1999, additional amendments were adopted pertaining to software infringements. Under the December amendments, the maximum statutory fines in the Copyright Act for software piracy were raised from 250,000 up to 500,000 kroons (US \$27,500). The law was also clarified so that for each illegal program confiscated, the fines will now range from 7,500 to 100,000 kroons (US \$413 – US \$5,500), in addition to the permissible confiscation of the hardware.