

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

ESTONIA

EXECUTIVE SUMMARY

Special 301 recommendation: For the second year in a row, IIPA recommends that Estonia be added to the Special 301 Watch List. While Estonia has completed some legal reforms and the authorities have undertaken some anti-piracy actions in conjunction with the industries, the piracy situation in Estonia continues to be bleak and the absence of deterrent enforcement warrants placement on the Special 301 lists.

Overview of key problems: Estonian officials must act decisively to stop Internet piracy, hand-to-hand piracy, large-scale organized crime operations in the markets, and the collectively large-scale losses caused by poor border enforcement. Internet piracy is on the rise in Estonia, including direct download piracy (like warez sites), mail order piracy, streaming and peer-to-peer and files sharing networks, as well as CD-R burning. The problems at the border and in the markets remain of serious concern despite the fact that several years ago the Estonian government correctly identified and agreed to crack down piracy on open-air markets and to secure its borders. Unfortunately, as a consequence of successful police efforts to combat piracy in the notorious Kadaka market in Tallinn in 2000, the pirates simply moved to other markets (e.g., Merekeskus in the passengers' harbor of Tallinn, which is the gate to Finland and other Scandinavian countries) and turned to Web-based piracy distribution. More anti-piracy actions must be taken against pirated goods distributes in other channels, such as via the Internet, "hand-to-hand" piracy and the tourists-related "suitcase" piracy in the known shopping malls for (Finnish) tourists, Merekeskus and Sadamarket in Tallinn. Estimated U.S. trade losses due to copyright piracy in Estonia for 2002 were at least \$16.7 million.

Effective enforcement includes expeditious prosecution and deterrent sentencing, and this has not occurred. Last year, Estonia reformed its criminal legal system by adopting a new Penal Law and Misdemeanor Act; this abolished the old Soviet administrative legal system. Although some Estonian officials have cooperated with the copyright industries, recent efforts have been sporadic and inconsistent. Despite progress in reforming its legal regime in recent years, several critical problems in the copyright law remain. For example, there is no civil *ex parte* search remedy available for copyright owners; this tool is one of Estonia's WTO TRIPS obligations. Furthermore, despite of the fact that Estonia finally took the political decision after three years of the strong international pressure and changed (not withdrew) its full reservation to Article 12 of the Rome Convention, the U.S. record producers are not protected equally with the Estonian and other international producers, and thus, in the discriminatory situation. Nevertheless, this step eventually eliminated the major concern of foreign phonogram producers—the lack of remuneration for the broadcasting and communication to the public of their recordings. However, in order to provide adequate and full protection for sound recordings in electronic environment, further amendments to the copyright law are needed to elevate its standards up to those found in the two 1996 WIPO treaties, which Estonia has still not ratified.

Actions which the Estonian government should take in 2003: To correct the deficiencies, the Estonian Government should take the active concerted actions on the enforcement and the legislative front, including—

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Improve border enforcement inspections and seizures;
- Improve criminal enforcement by increasing the number of police actions, bringing prosecutions, and issuing deterrent sentences;
- Encourage enforcement authorities to actively use new simple criminal enforcement measures and the issuance of deterrent fines provided in the new Penal Law and the Misdemeanor Act;
- Amend the law to provide for civil *ex parte* searches, as required by TRIPS;
- Amend the law to provide statutory damages, a TRIPS-compatible remedy which assists courts' in awarding damages in civil copyright infringement actions;
- Urgently ratify the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty and fully implement those into its national law, in consultation with the copyright industries.
- Encourage the Estonian police to enter into a Memorandum of Understanding with industry groups EOCP and BSA; this MOU will highlight the important issues regarding intellectual property crime and encourage more cooperation.

ESTONIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	9.0	60%	9.0	60%	9.0	60%	9.0	70%	8.0	85%
Motion Pictures	2.0	30%	1.5	40%	2.0	60%	NA	60%	NA	60%
Business Software Applications ²	5.7	52%	3.3	53%	NA	69%	NA	72%	NA	NA
Entertainment Software	NA	NA	NA	90%	3.7	98%	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	16.7+		13.8+		14.7+		9.0+		6.0+	

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

² BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$800,000 million at 69% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Estonia is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program which requires beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners.³ 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. Unfortunately, this bilateral agreement never entered into effect. Estonia joined the World Trade Organization (WTO) in 1999 and is obligated to have implemented both the letter and the spirit (performance) of the TRIPS Agreement. The European Commission too has identified problems with inadequate copyright enforcement in Estonia and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.⁴

COPYRIGHT PIRACY IN ESTONIA

CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate and widely available Internet broadband connections. The Estonian Organization for Copyright Protection (EOCP)⁵ reports that the videogame, film and recording industries all report that the CD-R and Internet piracy phenomena are continues growing rapidly in Estonia.

Optical Media Piracy in Estonia

Optical disc (OD) piracy: There are still no known CD plants operating within Estonia (Lithuania is the only Baltic nation known to have an industrial CD plant). The Estonian market remains flooded with illegal OD product manufactured in other countries, notably Russia, Ukraine and Belarus via other Baltic States. BSA reports that CD piracy is still at the “cottage industry” stage in Estonia, and does not appear to be well-organized, to-date. There has been a decrease in the influx of entertainment software products.

As the result of the failure of the police to use its *ex officio* authority and only sporadic actions by customs officials (especially in some border regions), pirate material has flowed unimpeded into and out of Estonia from neighboring countries. The industries had hoped that the October 2000 promise by customs officials to heighten border measures, especially against the tourists-related “suitcase” piracy in the passengers’ harbor in Tallinn, would provide effective. Unfortunately, customs raids against “suitcase” piracy are extremely rare and sporadic to be effective tool to stop the import and transit flow of pirate material.

Customs and EOCP’s joint raids in Tallinn’s harbor on Finnish tourists showed some positive results. In 2000, Estonian and Finnish anti-piracy organizations organized “warning banners” for the harbor in 2000; this had a big impact and was widely discussed in the Finnish

³ For the first 11 months of 2002, \$13.6 million worth of Estonian goods (or 8.7% of Estonia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.4% increase over the same time period last year. For more information on the history of Estonia under Special 301 review, see Appendices D and E of this submission.

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

⁵ ECOP is an anti-piracy organization comprised *inter alia* of representatives from the Motion Picture Association, (MPA), the International Federation of the Phonographic Industry (IFPI), and Sony Interactive Corporation.

and Estonian media. After two years, the anti-piracy organizations decided to take the banners down because the anti-piracy message had been successfully delivered. According to BSA, Estonian customs was successful, especially at the border with Latvia, the Tallinn seaports and airports, and the portion of the Russian border adjacent to St. Petersburg. EOCP reports that as a general trend the import of pirated goods is decreasing due to the substantial growth of locally produced illegal CD-Rs.

Transshipment: EOCP and customs have not yet discovered how widespread and systematic is the transshipment of pirated goods through Estonia. Its Baltic neighbor, Lithuania, is the regional leader in transshipment (in part due to its geographical location combined with ineffective border controls). Industry reports indicate that there have been a few transit cases in which Russian music repertoire was intercepted in Estonia. The copyright industries remain concerned that this could become a significant problem and urge ongoing vigilance by Estonian customs. The recording and motion picture industries confirm that the main transshipment location is Finland. From there, the pirated products are allowed unfettered access to other Western European countries within the borders created by the Schengen Treaty. Joint industry and customs investigations into the sources of possible transshipment sources continue.

Internet Piracy

Rapidly increasing Internet piracy in Estonia continues to be a growingly serious concern the copyright industries. Internet piracy comes in various shapes and forms, most prevalent of those are: (1) mail order piracy, which involves the Internet to access marketplace (e.g., online auction houses) and uses mail order distribution to deliver illegal goods; (2) direct download piracy, which would include IRCs and file transfer protocols (FTP) as well as compression techniques (like MP3 and MP4); (3) peer-to-peer and file-sharing networks such as Napster, Gnutella, KaZaA, StreamCast (formerly MusicCity.com, operator of Morpheus), and Grokster; and, (4) digital streaming piracy like digital jukeboxes to the lesser extent. MPAA reports that it is Internet piracy which is the biggest problem facing the motion picture industry in Estonia.

EOCP reports that it sent the total of 226 cease and desist letters to the websites consisting of illegal material in 2002. As a result and in co-operation with the Internet Service Providers (ISPs) the total of 340 sites on Internet consisting illegal files and offering illegal CD-Rs for sale were closed in 2002. During 2002, BSA also identified 136 sites based on Estonian ISP reports; 134 warning letters were sent, 90 pages were taken-down by the ISPs and 37 by the content providers themselves. Estonia has been in the press recently because three Estonian software programmers developed the file-sharing KaZaA software, having been commissioned to do the work by a company based in the Netherlands, which in turn sold the software to another company based in. Copyright infringement litigation brought by U.S. film and record companies against Sharman Networks Ltd. (the current owner of KaZaA software) has been filed in the United States.

In April 2001, the private sector (including EOCP) concluded a Memorandum of Understanding (MoU) with Estonian Internet Service Providers (ISPs) that enables the effective survey (notice) and removal (takedown) of infringing materials from the Internet. This MoU has been essential thus far in the fight against Internet piracy. And at the same time, due to the massive piracy in FTP servers, this MoU needs to be updated. In order to combat this new piracy form, the copyright industries (EOCP and BSA) need in particular: (1) free and 24-hour access to all FTP servers, including passwords, etc; (2) the immediate removal of pirated files

(the current MoU requires 48 hours' response time, and (3) the identification of FTP users by ISP company.

Piracy Levels Are High Across All Copyright Sectors

Piracy of sound recordings and music remains widespread in Estonia. The rapid growth of CD-R piracy of music has overshadowed the existing import problem of pirated sound recordings with pre-recorded repertoire. In 2002, the share of illegal CD-Rs of all seized optical discs containing music was around 50-60%, which is more than doubled if compared to 2001, when the same equivalent was 20-30% CD-Rs. The estimated level of music piracy remained constant, at 60% also for 2002. Only in November 1999 did Estonia finally correct the major obstacle to enforcement of sound recordings when it adhered to the WTO TRIPS Agreement and thus, for the first time, establish a point of attachment for foreign sound recordings. Estimated trade losses due to the piracy of sound recordings and musical compositions in Estonia in 2002 were \$9 million. Recorded musical works are being widely distributed on the Internet and copied hand-to-hand (mainly CD-Rs), and are still (albeit to a lesser degree) being sold in the main markets in Tallinn (the Kadaka Market, Merekeskus and Sadamarket also near the passengers' harbor in Tallinn as a newcomer in 2002), and along the Eastern Estonian border with Russia. The local anti-piracy group EOCP continues to assist the police in developing production identification systems and preparing legal actions and evidentiary material. EOCP also works together with BSA in running educational seminars for police and customs officials.

The Motion Picture Association of America (MPAA) reports Estonia is a country of considerable concern for audiovisual piracy because of its geographic proximity to Russia. Pirate Russian products are particularly affecting the eastern part of Estonia. As the production of pirate materials in Russia increases, the amount of pirate product being sold to tourists in Estonia rises. Estonia has long been considered by Finnish tourists to be a place where they can stock up on counterfeit goods at the numerous street markets located in and around Tallinn. Retail piracy exists, but most pirates tend to distribute their product at street markets, through mail order, and over the Internet. At the present time, the rate of video piracy is estimated to be approximately 30-35%. Optical disc audiovisual piracy levels are about 5%; bringing the overall audiovisual piracy rate to 30%. EOCP is also worried about the influence of Moscow DVD factories. As Estonia does not have any optical media production facilities, and DVD-R technology is not so widespread, the influence of Moscow DVD factories is feared to become significant. EOCP emphasizes the need of customs control on border to be more effective and well-organized. False contracts, especially Russian "sub-license agreements," remain a problem and create issues in determining legitimacy. The main piracy centers are located in Tallinn and in towns in the northeast. However, piracy at the Kadaka and two other shopping malls in Tallinn passengers' harbor (Merekeskus, Sadamarket) has been largely controlled. The situation will change further in early 2003 with the planned reorganization of the Kadaka market as its displaced suppliers migrate to the Tallinn harbor area to be closer to the tourists. Internet piracy, in the form of both web-based marketing and illegal downloading, is becoming a serious concern. The Internet is also being used for the sale of pirate smart cards. Through cooperation with the police and ISPs, several hundred infringing sites and links have been closed down. Cable and satellite television (smart cards) piracy are also present in Estonia (with estimated piracy rates of 20% and 95% respectively). Annual losses to the U.S. motion picture industry due to audiovisual piracy in Estonia were estimated to be approximately \$2 million in 2002.

The business software industry estimated that 52% of business software in use in Estonia was unauthorized in 2002, a slight decrease from the prior year. The Business Software Alliance (BSA) estimates that the U.S. trade losses due to software piracy in Estonia increased to \$5.7 million in 2002.

The entertainment software industry reports that Internet piracy is the primary form of piracy for its products in Estonia. There appears to be very little “silver” discs in the market, although flea markets do continue to be a source of the factory-produced discs that is available. There are now numerous warez sites offering pirated entertainment software for CD-R burning operations. The move to the Internet is in part attributed to the increased number of street market raids run by Estonian police. The EOCP has contributed to better enforcement, providing training programs for addressing piracy problems of the entertainment software industry.

COPYRIGHT ENFORCEMENT IN ESTONIA

Estonia’s laudable legal reforms alone have not been enough to deter piracy in that country. Estonia must adopt practices that result in effective criminal, civil, administrative and especially border enforcement, in order to comply with the TRIPS Agreement and bilateral obligations. The Estonian Government should express the political will to implement effective IPR law enforcement and include this in its list of priorities.

Simply stated, Estonian officials, working with industry, must act to halt internet piracy. A keen example of the problem in Estonia occurred when the motion picture industry and the recording industry attempted to obtain discovery from persons in Estonia with important knowledge about illegal P2P (file distribution) utilities. In the summer of 2002, the plaintiffs in the MGM v. Grokster case (pending in the U.S. District Court for the Central District of California) submitted a letter of request to the Estonian central authority for the taking of testimony and documentary evidence from the Estonian company, Bluemoon Interactive, and its principals. Information in the record of the U.S. case showed that Bluemoon played a key role in the development and operation of the computer system and service that the defendants were using to facilitate and profit from millions of users’ infringement of plaintiffs’ copyrights in the United States. The record also indicated that, owing to its key position, Bluemoon was in the possession of critical evidence (including the source code of the defendants’ FastTrack system and other related documentation) that otherwise would probably be unavailable to the plaintiffs. In October 2002, after hearing argument about Bluemoon’s objections to the letter of request, the Tallinn City Court totally denied plaintiffs’ request to take any of the requested discovery despite their clear importance to the copyright industry.

Furthermore, Estonian enforcement officials, working with industry, also must act to stop “hand-to-hand” piracy, large-scale organized crime operations in the markets and the collectively large-scale losses at the border. Customs officials responsible for the on-ground enforcement initiated unacceptably few anti-piracy enforcement activities in 2002. BSA reports that with respect to software piracy matters, the police now treat these cases as a low priority matter. This change in attitude may be the result of an upper level police directive re-ordering priorities in the force. Although most of the copyright industries reported good cooperation by the police in running some street market raids, the police activities remain insignificant when combating with piracy. Furthermore, judicial enforcement was almost nonexistent. EOCP

together with other copyright industries organized the total of eight educational seminars for the police, customs, prosecutors and judges in 2002.

Ineffective Border Enforcement

The Estonian Government needs to take more assertive actions to halt the illegal imports of pirated 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 Russia and Belarus via Latvia and Lithuania 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. Most of the material is produced elsewhere in the region, principally in the vast optical media production facilities now operating in Russia. The lack of effective enforcement in Estonia is significantly harming legitimate markets for copyrighted products, such as sound recordings, audiovisual and entertainment software, in Finland, Sweden and other countries in the region.

The suitcase problem (piracy): This “suitcase” problem (piracy) involves foreign tourists purchasing pirated material in Estonian shops and then exiting the country. The tourists-related “suitcase” piracy problem is prevalent in the known shopping malls for (primarily Finnish) tourists in Merekeskus and Sadamarket in Tallinn. The 2001 announcement by the Estonian customs authorities that they would seize the suitcase material was a positive step toward addressing the border enforcement problem. Both the Estonian customs law and the Finnish copyright law have a personal use importation exception, which has the effect of allowing small amounts of pirated materials in personal luggage into Finland. 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. However, the local anti-piracy organization EOCP reports that customs anti-piracy are almost non-existent and seized quantities reach up to 10-30 pirated units per raid, which is unacceptably out-of-balance with the scale of the piracy problem in Estonia. Customs officials admit to problems with the detection of illegal material; hopefully, the numerous training sessions held in recent years by the copyright industries will improve this situation. The new 2002 Penal Law also affects customs, which has to impose the penalties following the new law. However, the new law does not affect the core enforcement of customs.

Invalid licenses: Customs officials report that there are many shipments of Russian materials that are entering Estonia, with the Russian distributor claiming the same invalid license to distribute the material there (i.e., “within the territory of the USSR”). Like the police, customs officials claim they have no means of verifying the validity of these 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. Most importantly, these materials are legally regarded as pirated copies according to Article 80 of the Copyright Law, and those cases should be dealt similarly to the piracy cases.

Punishment for storeowners: Enforcement against storeowners is hampered because the appropriate officials do not know the proper procedures to take in these piracy cases. In addition to the procedural problem of the verification of documents, there is the problem of identifying legal versus illegal copies. Neither significant criminal nor administrative remedies

have been properly utilized. Businesses, especially illegal kiosks and stores that sell pirated material, are not fined in most cases, 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. EOCP and other copyright industries report that the 2000 adopted Licensing Law has not been used effectively to revoke the business license of stores that have been caught selling pirated material. Police should be more active in officially requesting from local city authorities the revocation of the trade licenses of pirates as an additional penalty for the storeowners.

Police Raids and Coordination Efforts Should Be Improved

The open market problem has diminished; however, the restructured Kadaka Market needs to be monitored: The illegal open markets first appeared in the 1993-1994 time period. In October 2000, the government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. As a result of police and private industries action, the number of stalls selling illegal material in the Kadaka Market was dramatically reduced. The Kadaka Market was restructured in October 2002 and operates as one supermarket chain. There are still five or six kiosks operating in the premises of the previous Kadaka Market; however, the traditional “under-the-counter” piracy problem continues. The Kadaka Market falls under the jurisdiction of one of Tallinn’s police districts, which generally does not initiate any activities to close the kiosks. Now the successful decrease of pirate activities in the Kadaka Market in 2002 must be repeated in eliminating the remaining piracy in the Kadaka Market, other markets and other cities. These markets not only hurt the local copyright market, but also, cater to tourists, thus contributing to the tourists-related “suitcase” piracy.

Police cooperation with industry was mixed in 2002: Unfortunately, the amount of police raids to combat piracy has not increased during the past years. EOCP reports that police organized the total of 36 raids in 2002. These raids were organized jointly with EOCP and concerned music, film and interactive games piracy. EOCP reports that in 2002 it conducted the total of 56 expert reports for the total of 17,069 pirated units (of those 6,618 CDs, 2,454 CD-Rs, 342 audiocassettes, 5,075 VHSs, 469 VCDs, 302 DVDs, 1915 PlayStation® carriers). In July 2002, EOCP and the Estonian Central Criminal Police Department conducted a raid in the Merekeskus market which result in the seizure of over 3,000 pirate music CDs, 600 pirate videotapes, 1,000 copies pirated videogame software, and almost 200 pirated DVDs; two people were arrested. This was a particularly successful raid in that not only was there a considerable amount of pirate product seized, but the officers showed great initiative in locating a pirate warehouse on the premises that stored additional product. The case is still in the police.

The Recording Industry Association of America (RIAA) reports that the police have made some raids and seizures, mostly at outdoor markets. A local group of industry organizations (EFU and EOCP) continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. For example, in February 2001, the Economic Police raided a warehouse in Tallinn and seized some 20,000 music CDs. In a subsequent operation, the Tallinn police raided a duplicating factory in a private home outside the city, and seized approximately 30,000 pirate units on different media. It appeared that this well stocked house was a likely supplier to the Kadaka and Merekeskus markets. However, the police generally exhibit less interest, especially at the leadership levels, to develop and take anti-piracy actions in a concerted manner.

MPA reports that police cooperation has been improving in Tallinn, but that it has proven difficult to motivate officers in Eastern Estonia and other parts of the country. Most activities in 2002 either involved the Internet or piracy at the street markets. Videocassette piracy still exists, but is no longer the primary concern for the industry as Internet and optical disc piracy have grown substantially in importance. The vast amount of CD-Rs available on the market indicates that discs are burned locally. EOCP and BSA has proposed a Memorandum of Understanding with the police that will highlight the important issues regarding intellectual property crime and encourage more cooperation. It is hoped that this memorandum will serve to define and prioritize the issues facing the police so that they can better direct their efforts.

BSA reports that the disappointing trend of dramatically reduced police action regarding end-user piracy continued in 2002. Between January and October 2002 no police enforcement action took place in respect of end-user piracy in Estonia. This is especially damaging for BSA as the absence of an effective civil search remedy means that the lack of police enforcement activity is especially damaging. In November 2002, BSA discussed the chronic lack of software piracy enforcement with the Ministry of Internal Affairs, which undertook to authorize enhancing enforcement activity in the end-user piracy area. This apparent reverse in policy has resulted in a certain amount of encouragement. In October-December 2002, a total of three end-user enforcement actions were undertaken by the police in the Tallinn area. The current situation is encouraging; in January 2003, four police actions took place across Estonia. In 2002, 16 reseller related raids took place against small-scale illegal resellers of business software products across Estonia. In total, 3,686 CDs were seized, many of which included illegally copied software programs.

Prosecutorial Delays and High Evidentiary Burdens

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. 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. BSA reports that it is encountering more "false invoicing" problems in its cases. Following BSA end user actions, targets frequently produce fraudulently obtained or falsified invoices which purport to show that software programs were acquired prior to enforcement action taking place. The police find this a difficult issue to deal with effectively.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS ESTONIA IN 2002		
ACTIONS	EOCP ^a	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	46	21
By Police	36	20
By Customs (unofficial by EOCP)	About 10	1
Number of cases commenced (including Internet cases)		21
Number of defendants convicted (including guilty pleas)	NA	1
Acquittals and Dismissals	NA	0
Number of Cases Pending	NA	20
Total number of cases resulting in jail time	1	0
Suspended Prison Terms	1	1
Maximum 6 months	1	0
Over 6 months	0	1
Over 1 year	0	0
Total Suspended Prison Terms	1	1
Prison Terms Served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Prison Terms Served (not suspended)	0	0
Number of cases resulting in criminal fines	NA	0
Up to \$1,000	NA	0
\$1,000 to \$5,000	NA	0
Over \$5,000	NA	0
Total amount of fines levied	NA	0

^a EOCP is a joint organization that represents the music, film, and interactive games industry. They note the difficulty in many instances of separating music, film and game piracy cases, especially because the pirates sell all products. EOCP does not have separate statistics for criminal and misdemeanor cases. However, the Ministry of Justice confirmed to EOCP that the courts' archives will be digitized, which will make the stats available to the general public.

Few Judicial Sentences Are Issued

Since the various amendments to the criminal code and the border code, there have been very few prosecutions, few criminal convictions and a few fines. As has been true in years past, judges still dismiss cases because pirates present false contracts as evidence of their good intentions. However, there are relatively few court cases due to the continuous legal reforms in the criminal law. BSA does have approximately 20 cases current pending before Estonian courts.

No Civil *Ex Parte* Search Authority and No Statutory Damages

Civil remedies in Estonia are extremely weak. Estonia's failure to provide *ex parte* civil procedures also is a significant shortcoming. Furthermore, there is virtually no jurisprudence regarding the calculation of damages in intellectual property cases. 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. TRIPS requires that this civil *ex parte* search authority be provided and applied. 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. BSA mounted an inconclusive test case in 2002, which did not result in a definite ruling on the existence or otherwise of the remedy.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS ESTONIA IN 2002		
ACTIONS	EOCP	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	1	0
Post Search Action		0
Cases Pending		0
Cases Dropped		0
Cases Settled or Adjudicated	1	0
Value of loss as determined by Rightholder (\$USD)		0
Settlement/Judgment Amount (\$USD)	\$1,000	0

New Misdemeanor Law Replaces Administrative Proceedings

Administrative proceedings in Estonia were widely used by the copyright industries were a rather effective tool, given the difficulties with the criminal and civil enforcement regimes. As of September 1, 2002, Estonia started to apply new criminal law regime by bringing the new Penal Law into force. The new law abolished the whole old administrative procedure as such. Instead, there is more modern misdemeanor procedure for primary offences of distribution of pirated copies. The repeated offence will be prosecuted by criminal law. The maximum penalty for misdemeanor copyright offence is the fines amounting 18,000 kroons (US\$1,234) for private person and 50,000 kroons (US\$3,427) for legal person. The new Penal Law provides for a maximum three years' imprisonment or up to 25,000,000 kroons (US\$1.7 million) in fines.

Enforcement efforts for the business software industry 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. Legal entities can be charged under the Estonian criminal code. Penalties under the code vary, according to the level of the offense. As noted above, the potential maximum fines are high.

COPYRIGHT AND RELATED REFORM IN ESTONIA

Overview: 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. In the late 1990s, Estonia undertook a series of legal reforms to join the international trade and copyright community. 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. (Later in 2001, additional amendments to the copyright law and related laws were made in an effort to improve anti-piracy

efforts). In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000) and the Rome Convention (effective April 28, 2000). New penal code amendments entered into force on September 1, 2002. The Estonian Copyright Law was amended (entered into force November 2002) in order to harmonize the provisions of the copyright license agreements with the Obligations' Law.

Ratify the WIPO treaties: Estonia should urgently start the ratification of the two 1996 WIPO digital treaties and to adopt provisions to implement them in order to protect sound carriers in the electronic environment against Internet piracy and other forms of digital piracy. Most importantly, the Copyright Law should include the effective protection of technological measures and rights management information. Estonia was a signatory to both treaties in 1997, and preparatory work was undertaken in the Ministry of Culture to draft legislation to implement the treaties. IIPA encourages Estonia to move quickly with this ratification and implementation. Estonia plans to implement the EU Copyright Directive in 2003.

Copyright Law Developments

The 1999 amendments: In 1999, the first of two expected packages of legal reforms to improve the legal and enforcement regime was adopted in Estonia. The first set (January 1999) comprised 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. IIPA supported the substantial and significant improvements that Estonia has undertaken since its independence, and especially the 1999 amendments directed at IPR enforcement

2001 amendments to the Copyright Act: The Estonian parliament adopted amendments to the copyright law that prohibit trade in specific goods if the legal person holding a license trades in pirated products.⁶ Additional amendments were made to the Commerce Lease Act and the Consumer Protection Act that reportedly outline the rights and obligations of parties to the lease and permit them to implement certain measures to protect their rights. These amendments entered into force on June 11, 2001. Unfortunately, these amendments did not address the outstanding substantive, legal deficiencies outlined, below.

2002 amendments to the Copyright Act: The Estonian Parliament adopted the amendments to the Copyright Law in order to harmonize the provisions of the copyright license agreements with the Obligations' Law. The abovementioned amendments entered into force in November 2002.

Future amendments needed: A set of copyright amendments was originally scheduled for consideration in 2000 to fulfill Estonia's remaining obligations for compliance with TRIPS, the EU directives, and the two WIPO treaties. However, these amendments for digital treaty ratification and implementation were delayed and reasoned to await the final completion and implementation by the members of the European Union of the Copyright Directive. As a result, Estonia will start relevant legislative efforts in spring 2003 and expects to implementation to be completed by the end of 2003.

⁶ "Estonia: New Laws Enacted to Control Importation of Counterfeit Goods," World Intellectual Property Report, Sept. 2001 at p. 7.

Estonia should be encouraged to further amend its relevant national laws to:

- 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;
- Expressly afford civil *ex parte* search authority;
- 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 rights;
- Add a right of presumption of authorship for sound recording producers (currently afforded only to “works”). Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rights holders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Estonia should introduce a presumption of ownership for phonogram producers. The principle of presumption of ownership is not, in fact, a new phenomenon in Latvia’s legislation. Estonian Copyright Law includes the same principle for authors.
- Delete Article 62(2), the author’s rights “safeguard clause” which is unnecessary and inconsistent with the Rome Convention (Article 1).

In particular, with respect to WIPO treaties’ implementation, Estonian law must:

- Ensure that the right of reproduction covers temporary copies;
- Adopt an exclusive right of communication to the public, including a right of making available
- Allow rightsholders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that right holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in circumventing devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.
- Allow rightsholders 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.

The Rome Convention Reservation Must Be Withdrawn

The Government of Estonia finally made the laudable political decision to start protecting the foreign repertoire. On November 6, 2002, after two and one-half years of strong international pressure the Parliament finally adopted the law amendment to change the full reservation to Article 12 of the Rome Convention. The amendments entered into force on December 14, 2002, and the Estonian Ministry of Foreign Affairs deposited the relevant instruments in the U.N. Secretariat on January 9, 2003.

However, Estonia did not withdraw the full reservation, but changed it with the so-called “reciprocal treatment reservation”, which gives the foreign repertoire the same protection as the other Member States of the convention protect Estonian repertoire in their territories. This means that the broadcasting and public performance rights of the U.S. nationals are still not protected. Therefore, the Estonian government should be urged to withdraw its other reservation to Article 5(3) of the Rome Convention and apply the simultaneous publication criteria. This would enable to protect the sound recordings of those U.S. nationals, who have released their recordings within 30 days after the first release date in the U.S. in any of the Member States of the Rome Convention.

Criminal, Civil and Administrative Remedies

1999 amendments: On January 21, 1999, a variety of amendments to the Estonian criminal code were adopted, as were 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 (Criminal Code Articles 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” (Criminal Code Article 281).

The Copyright Act amendments [Articles 83(5) and 6)] provided end-user software piracy fines that can be levied against legal entities of between 150,000 to 250,000 kroons (US\$10,290 to \$17,155) for the “use,” including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US\$1,370 to \$3,430) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US\$17,155 to \$34,310) 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. The maximum statutory fines in the Copyright Act for software piracy were raised from 250,000 up to 500,000 kroons (US\$14,130 to \$28,260). 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\$423 to \$5,650), in addition to the permissible confiscation of the computer hardware.

New 2002 penal code and misdemeanor law: As of September 1, 2002, Estonia started to apply new criminal law regime by bringing the new Penal Law into force. The new law abolished the whole old administrative procedure as such. Instead, there is more modern misdemeanor procedure for primary offences of distribution of pirated copies. The new Penal Law creates a distinction between categories of offenses along a “crime/misdemeanor” model. Industries reports indicate that, under Article 14 of the penal code, non-natural legal entities (such as companies) will face criminal liability for, among other things, piracy offenses, which will attract fines in the range of 50,000 to 25 million kroons (US\$3,430 to \$1.7 million), with the additional potential penalty of the liquidation of the company concerned. Some industry groups are consulting with the Ministry of Culture over gaps with respect to the penalties applied to software piracy cases. Misdemeanors are likely to attract penalties of 200 to 18,000 kroons

(US\$14 to \$1,235) for living, natural persons, 50,000 to 500,000 kroons (US\$3,430 to \$34,310) for legal entities.

Civil procedures code: A new civil procedure code has been drafted, and we understand that a civil *ex parte* remedy is provided.

Border Measures (2001)

In June 2001, the Parliament adopted legislation that improves border measures regarding pirated and counterfeit goods. This new legislation, entitled “The Prevention of Import and Export of Goods Infringing Intellectual Property Rights Act of 2001,” entered into force on September 1, 2001.⁷ Estonian officials must significantly improve their on-the-ground enforcement efforts at the border, as discussed above. In addition, the Estonian government should completely implement the October 2000 decision by customs officials to seize parallel import material with effective border enforcement.

⁷ *Id.* IIPA does not have the text of this legislation on importation measures and therefore cannot provide more detailed comments at this time.