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Intellectual Property in Transition Economies: Assessing the Latvian Experience

Simon Helm

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Cover Page Footnote

The author gratefully acknowledges the advice of Professor Marianne Levin. The assistance of Clare Carlisle and Mark Ridgway of Allen & Overy, Inga Kacevska of Skudra & Ūdris, and Diana Place, as well as the many helpful officials of the Latvian customs, patents, prosecutors', and foreign affairs offices who provided data, is also acknowledged.

Intellectual Property in Transition Economies: Assessing the Latvian Experience

By Simon Helm*

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INTRODUCTION

In 1991, the Republic of Latvia reclaimed its independence, alongside its Baltic neighbors, Estonia and Lithuania. The country

emerged from the Soviet Union burdened by the legacy of fifty years of Soviet socialism in all areas of the state and the economy. Like many of the former socialist states of Central and Eastern Europe, Latvia embarked upon an ambitious transition program to establish its political participation in modern Europe and economic participation in the global market. Having restored its pre-Soviet constitution and institutions by 1993,¹ Latvia set about to re-order its economy by taking private property as the basis of a market-oriented economy with both public and private sector participation.

In matters relating to intellectual property, Latvia inherited the Soviet system, which formally subjugated the interests of inventors, authors, artists, and recorded performers to those of the “state of the whole people.”² In addition to pressure from the developed Western economies, several other factors prompted Latvia to recognize the importance of granting private property rights in intellectual products: its emergence from the socialist bloc at precisely the time that intellectual property was assuming a significant role in the world economy, the fall of socialism in Europe coinciding with the commercialization of the Internet, and the rise of the so-called “new economy.” Moreover, an effective recognition and commercial exploitation of intellectual property rights also required the development of the appropriate institutions. Thus, while ownership of company stock or valuable tangible assets such as real estate were given the highest priority in Latvia’s

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¹ Latvia was founded as a democratic republic based on its 1922 constitution, but in the decade before World War II, the country was subject to the dictatorship of Kārlis Ulmanis. The restoration of independence saw the reintroduction of the constitution previously adopted by the country’s 1922 Constituent Assembly. See ANATOL LIEVEN, *THE BALTIC REVOLUTION: ESTONIA, LATVIA, LITHUANIA AND THE PATH TO INDEPENDENCE* 69–71 (2d ed. 1994).

² Konst. SSSR (1977), *translated in* Basic Documents on the Soviet Legal System (W.E. Butler ed., 1983).

transition program, intellectual property rights also received early and substantive consideration.

In the decade following the restoration of independence, Latvia made rapid strides to align its legal system with those of the European Union (EU) member states, as it prepared for its own accession.³ Latvia now stands in the first tier of the former socialist countries that are getting ready for EU admission, which appears a certainty⁴ following the approval of the Treaty of Nice⁵ and a referendum in September 2003.⁶ However, Latvia still faces many challenges on the path to an intellectual property regime that attracts inward investment, fosters a vibrant internal market for intellectual property, and encourages technology transfers.

Latvia's situation is not unique. To a greater or lesser degree, all of the former socialist countries of Central and Eastern Europe have experienced difficulty in establishing an effective and robust intellectual property system. Since the collapse of socialism, piracy of intellectual property products has been widespread and even dominant in some markets of Central and Eastern Europe.⁷ While the establishment of basic legal norms which conform to modern standards has been relatively straightforward for these countries, in practice there remain many problems. Procedural laws sometimes restrict the ability of intellectual property owners to exercise the rights granted to them by other statutes, and perceptions of corruption or inefficiency in the judicial and police

³ See generally 2002 Regular Report on Latvia's Progress Towards Accession, COM(2002)700 final [hereinafter 2002 Report], available at <http://europa.eu.int/comm/enlargement/report2002/#report2002> (last visited Oct. 22, 2003).

⁴ See EU2002.dk, The Danish Presidency, *Milestones in the Enlargement*, at <http://www.eu2002.dk/eu/default.asp?MenuElementID=5190> (last visited Oct. 14, 2003).

⁵ Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C 80) 1 (2001).

⁶ Latvia held a referendum to ratify the accession treaty on September 20, 2003. See Europa – The European Union On-Line, *The Accession Process* [hereinafter Europa – The European Union On-Line, *The Accession Process*], at http://europa.eu.int/comm/enlargement/negotiations/accession_process.htm (last visited Oct. 15, 2003).

⁷ Robert Lyle, *Film, Video and TV Piracy Cuts Deeply into Company Profits*, Radio Free Europe/Radio Liberty, at <http://www.rferl.org/nca/special/bootleg/boot7.html> (Sept. 1996).

systems discourage inward investment. Moreover, in countries emerging from decades of command economics and authoritarian politics, the right balance between the interests of owners and users of intellectual property has sometimes been difficult to find.

This Article begins by considering the dynamics underlying transition in the intellectual property sector in Latvia and highlighting the importance of geopolitical and economic motives. It proceeds to trace the historical development of intellectual property law, from the first steps taken by an independent Latvia after World War I through a half-century of Soviet socialism. It follows with a discussion regarding the legislative reform program undertaken by Latvia following its secession from the Soviet Union, for each of the principal categories of intellectual property law, and an examination of Latvia's institution-building project. Certain problems of transition relating to the enforcement of intellectual property rights in Latvia are singled out for closer attention—principally in relation to piracy, perceptions of corruption, and problems of judicial capacity and independence. Finally, the Article concludes with a set of recommendations to improve the intellectual property regime in Latvia through enhanced Baltic cooperation, increased judicial capacity, efforts to build a legal culture and “soft” institutions, and increased responsibility by rights-holders for enforcement activity.

I. THE DYNAMICS OF TRANSITION

It was not a foregone conclusion in the early 1990s that a country undertaking a review of its intellectual property system, in the context of pressing economic difficulties and thorough structural reforms, would align its intellectual property legislation to that of the main Western economies.⁸ In many African, Asian, and Latin American countries with emerging economies or in transition from socialist to market economies, the Western legislative economic model has proved unattractive.

⁸ Several of the countries that emerged from the Soviet Union have taken a slightly different route or been more hesitant in moving in this direction. See James Nurton, *Preparing for Take Off*, *MANAGING INTELL. PROP.*, Sept. 1996, at 27.

The question was addressed in the debates surrounding the Agreement on Trade Related Intellectual Property Rights (“TRIPS Agreement”) of the World Trade Organization (“WTO”).⁹ Countries with emerging economies argued for a more flexible system because, in their view, the TRIPS Agreement reflected the interests of advanced economies. Although the countries with emerging economies lost at the negotiating table,¹⁰ their arguments have been reinvigorated with the growing debate over development-related issues, such as the accessibility of drugs in developing countries like South Africa and Brazil.¹¹

The view that countries with emerging economies cannot afford to adopt fully developed intellectual property systems based on the Western model has attracted sympathy from several leading intellectual property jurists. Sir Hugh Laddie, a judge in the High Court of England and Wales and the author of several leading texts on intellectual property law, joined the TRIPS Agreement debate in 2002 with the comment that, “[w]hether you are the richest or poorest country in world, you have to sign up to Trips to join the WTO club I personally have the deepest possible misgivings over this as it applies to developing countries.”¹²

Sir Hugh’s comments coincided with the release of the final report of the UK Commission on Intellectual Property Rights (“UK Commission”), a team of experts interested in the impact that the intellectual property regimes promoted by developed Western countries has on Asian, African, and South American nations.¹³ The UK Commission was appointed by the British Labour

⁹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

¹⁰ Henry Olsson, *The Implementation of the TRIPS Agreement – The Swedish Experience*, in TRADE RELATIONS AND INTELLECTUAL PROPERTY RIGHTS IN THE BALTIC SEA REGION 35 (Ministry for Foreign Affairs of Sweden ed., 2000).

¹¹ See Charlotte Denny & James Meek, *Drug Giants Made to Swallow Bitter Pill*, GUARDIAN, Apr. 19, 2001, available at 2001 WL 19602587.

¹² Jan Harvey, *I Am the Law*, LEGAL WEEK, July 11, 2002, available at 2002 WL 26453261.

¹³ See COMM’N ON INTELL. PROP. RTS., INTEGRATING INTELL. PROP. RTS. & DEV. POLICY (2002) [hereinafter INTEGRATING INTELL. PROP. RTS.], available at http://www.-iprcommission.org/graphic/documents/final_report.htm (last visited Oct. 29, 2003).

government to assess the concerns voiced during the Uruguay Round of WTO negotiations and the difficulties that countries with developing economies were experiencing in developing a modern intellectual property system.¹⁴ The UK Commission summarized its key finding as follows:

It is an article of faith in the international community that integration on appropriate terms into the world economy is a necessary condition for development. The question from our point of view is what are the appropriate terms for that integration in the field of [intellectual property rights]. Just as the now-developed countries moulded their [intellectual property] regimes to suit their particular economic, social and technological circumstances, so developing countries should in principle now be able to do the same.¹⁵

Although its Gross Domestic Product (“GDP”) per capita, on a purchase power parity basis, was only US\$8,300 in 2002, comparable to US\$7,600 for Brazil, US\$9,500 for Botswana, and US\$8,500 for Costa Rica,¹⁶ Latvia has not linked itself with the developing countries in the political debates surrounding the TRIPS Agreement or subsequent intellectual property arrangements. In the 1990s, as Latvia emerged from the Soviet socialist mold, the world economic system was being brought into broad alignment with the Western model as the power and prestige of the United States and the EU member states enabled them to cement the TRIPS Agreement as a cornerstone of the WTO.¹⁷ While the trade representatives of many emerging economies resisted the TRIPS Agreement or sought the benefits of

¹⁴ See generally Comm’n on Intell. Prop. Rts., *The Work of the Commission*, at http://www.iprcommission.org/graphic/work_of_the%20_commission.htm (last visited Oct. 31, 2003).

¹⁵ INTEGRATING INTELL. PROP. RTS., *supra* note 13, at 8.

¹⁶ CIA, *The World Factbook, Field Listing – GDP – Per Capita*, at <http://www.cia.gov/cia/publications/factbook/fields/2004.html> (last visited Oct. 15, 2003) (all dollar amounts are reported in U.S. currency).

¹⁷ See TRIPS Agreement, *supra* note 9. A comprehensive summary of the TRIPS Agreement is available at http://www.wto.org/English/docs_e/legal_e/ursum_e.htm#n-Agreement (last visited Oct. 15, 2003).

exceptional transitional periods,¹⁸ Latvia approached the task of rebuilding its intellectual property system primarily as a European country rejoining democratic Europe.¹⁹

As did Estonia and Lithuania, Latvia aimed to create an intellectual property regime aligned with EU standards at the earliest opportunity.²⁰ Particularly since the Russian currency crisis of 1998, the Baltic states have made a determined effort to break away from the Russian sphere of influence and link themselves with the more secure and prosperous countries to their west.²¹ Latvia's position between Estonia and Lithuania, both geographically and economically,²² makes it a useful indicator of the strides that the Baltic states have made together. Their transition has been influenced by their respective Western sponsors—as is shown in the example of Latvia, who received attention and assistance from Sweden²³—with whose support they have each made significant efforts to adapt their legislation and practices to conform with general European and Western standards.²⁴

A. Geopolitical Factors

From the first days following the restoration of its independence, Latvia's political orientation has been toward

¹⁸ TRIPS Agreement, *supra* note 9, art. 65(3) (providing for transitional arrangements for states moving away from centrally-planned economies).

¹⁹ See Eduards Bruno Deksnis, *Baltic Accession to the European Union: Challenge and Opportunity*, in *THE BALTIC STATES AT HISTORICAL CROSSROADS* 79, 81 (Tālavš Jundzis ed., 1998).

²⁰ See Nurton, *supra* note 8, at 27.

²¹ See Morten Hansen & Romans Pāncs, *The Latvian Labour Market: Signs of Normalization?*, *TRANSITION NEWSLETTER* (World Bank Group, Washington, D.C.), Mar.–Apr. 2002, at 38, 38, available at <http://www.worldbank.org/transitionnewsletter/Archives/2002.htm> (last visited Oct. 15, 2003); see also Morten Hansen & Romans Pāncs, *The Beveridge Curve and the Matching Function: Indicators of Normalization in the Latvian Labour Market*, CERGE-EI, Global Development Network – Regional Research Competition, at http://www.cerge-ei.cz/gdn/regional_research_competition/#RRCI (last visited Oct. 15, 2003).

²² See Tabitha Parker, *Emerging Markets: Eastern Europe Enforcement Issues Remain High on Agenda*, *MANAGING INTELL. PROP.*, Mar. 2001.

²³ Finland had the largest role in assisting Estonia, while Denmark was the principal sponsor for Lithuania. See Nurton, *supra* note 8, at 27.

²⁴ See *id.*

integration with Western Europe, fueled in part by security concerns, as reflected in efforts to join the EU and the North Atlantic Treaty Organization.²⁵ Latvia's geopolitical position is a key factor that compels it to associate with Western Europe and distance itself from Russian influence and control.²⁶

Latvia's national consciousness also links it to the rest of Europe.²⁷ Before it was part of the Russian Empire, Latvia was under Germany's influence, followed by Swedish control.²⁸ The Latvian population is divided between a significant Russian minority and a Latvian national group that has maintained Scandinavian and Germanic influences.²⁹

The strongest external political and economic factor compelling Latvia to adopt a modern intellectual property system is the influence of the EU, since Latvia is a candidate for accession in May 2004.³⁰ Although for a time regarded as being in the second tier of hopeful countries, Latvia managed to advance its

²⁵ See NATO OTAN, NATO Update, *NATO Invites Seven Countries to Accession Talks*, at <http://www.nato.int/docu/update/2002/11-november/e1121c.htm> (Nov. 21, 2002).

²⁶ See Francesca Mereu, *Latvia: Is Russia Still a Security Threat?*, Radio Free Europe/Radio Liberty, at <http://www.rferl.org/nca/features/2001/11/01112001080651.asp> (Nov. 1, 2001); see also Richard Rose, *How Free from Fear Are Citizens in Transition Societies?*, TRANSITION NEWSLETTER (World Bank Group, Washington, D.C.), May–June 2002, at 18, 19 (noting that two-thirds of Latvians regard Russia as a security threat), available at <http://www.worldbank.org/transitionnewsletter/Archives/2002.htm> (last visited Oct. 30, 2003).

²⁷ See Int'l Strategies, Inc., Export Hotline: Export Issues, *Latvia*, at <http://home3.americanexpress.com/smallbusiness/resources/expanding/global/reports/11141020.shtml> (1998) [hereinafter Int'l Strategies]. Latvia's large exile community mainly in the United States, but also in the Scandinavian countries and Australia, among others, influenced Latvian politics after the restoration of its independence. This influence focused on the global perception of Latvia as an advanced country, albeit one with limited economic resources.

²⁸ In 1628, Gustav Adolf designated Riga as Sweden's second capital city. See generally Versia, *Riga History*, at <http://www.eunet.lv/Riga/history.html> (last visited Oct. 15, 2003).

²⁹ See, e.g., CIA, The World Factbook, *Latvia* [hereinafter CIA, *Latvia*], at <http://www.cia.gov/cia/publications/factbook/geos/lg.html#People> (last updated Aug. 1, 2003). For a general comparison between Latvia's roots and those of its Baltic neighbors, see also Edgars Dunsdorfs, *The Baltic States – Common Features and Distinctions*, in THE BALTIC STATES AT HISTORICAL CROSSROADS 311, 314 (Tālav Jundzis ed., 1998).

³⁰ See Europa – The European Union On-Line, *The Accession Process*, *supra* note 6.

position enough to join in the first wave of accession.³¹ To assess whether prospective member states have reached a sufficient stage of development for EU membership, the European Commission looked at their intellectual property regimes during the Accession Partnerships negotiations. Latvia formed an Accession Partnership in March 1998, which was modified in December 1999.³² The Accession Partnerships gave each candidate country five years to conform to EU best practices for recognition and enforcement of intellectual property rights, apply for membership in the European Patent Organization, and accede to the main intellectual property conventions.³³

In its 2001 annual report on Latvia's candidacy, the European Commission determined that Latvia had broadly brought its intellectual property legislation in line with the *acquis communautaire*.³⁴ The same report, however, concluded that Latvia's intellectual property system faced serious challenges, noting that: "Little visible progress was made during the last year concerning the enforcement of intellectual property rights, which remains an issue of major concern. In the areas of customs and taxation, encouraging steps have been taken to strengthen the administrative structures, and these efforts should continue."³⁵

The Council of the EU noted that Latvia still had to take "urgent action" to "strengthen enforcement of intellectual and industrial property rights, in particular in police and customs, and improve cooperation among them." Latvia was called upon to: "Increase efforts to fight against piracy and counterfeiting; [and]

³¹ See BBC News, *EU Set to Spread East*, at <http://news.bbc.co.uk/1/hi/world/europe/473541.stm> (Oct. 13, 1999).

³² See Council Regulation 622/98, 1998 O.J. (L 85) 1-2, available at http://www.europarl.eu.int/enlargement/cu/agreements/pdf/160398a_en.pdf (last visited Oct. 15, 2003).

³³ CHRISTEN BOYE JACOBSEN, IMPLEMENTING THE ACQUIS COMMUNAUTAIRE – THE FIGHT OVER 80,000 PAGES 26 (Riga Grad. Sch. of L., Working Paper No.7, 2002), available at <http://www.rgsl.edu.lv> (last visited Oct. 15, 2003).

³⁴ 2001 Regular Report on Latvia's Progress Towards Accession, SEC(2001) 1749, at 52-53, available at <http://europa.eu.int/comm/enlargement/report2001/#report2001> (last visited Oct. 16, 2003).

³⁵ *Id.* at 39.

intensify training for enforcement bodies including judges and prosecutors.”³⁶

In 2002, the European Commission again confirmed that Latvia’s program of legislative reform has generally brought it into alignment with the *acquis communautaire*,³⁷ but again noted that some further effort was still required to ensure enforcement against music, software and video piracy.³⁸ Although the European Commission “provisionally closed” the chapter on intellectual property rights, it singled out for further attention the Latvian judicial system’s role in curbing piracy. The European Commission report notes that, “even though considerable efforts have been made to train judges in various aspects of national and international intellectual and industrial property rights law, the track record of convictions in criminal cases remains rather poor.”³⁹

The weaknesses exhibited in the areas of enforcement are perhaps understandable since Latvia, like its neighbors, had to create a modern intellectual property system from a standing start.⁴⁰ In relation to the Accession Partnerships, it has been noted that:

The starting point of the candidate countries was feeble. We have to remember that formally the Soviet system did not adhere to the rule of law, but to the supreme guiding role of the Communist Party. Consequently, the administrative system could be technically inadequate, intransparent, and complex, in some areas enormous, in others quasi-non-existent, often corrupt, and with a bureaucratic tradition of avoiding personal responsibility and initiatives, and for the purposes of a state with mostly inadequate theoretical training. And the same applied—maybe even more—to the court system.⁴¹

³⁶ Council Decision 2002/88 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with Latvia, 2002 O.J. (L 44).

³⁷ See 2002 Report, *supra* note 3, at 132.

³⁸ *Id.* at 61–62.

³⁹ *Id.* at 62.

⁴⁰ JACOBSEN, *supra* note 33, at 31.

⁴¹ *Id.*

As a member of the EU, Latvia will be part of one of the largest free trade zones in the world and it must develop, as soon as possible, a stable and effective intellectual property system to prevent distortions in the European marketplace.

B. Economic Factors

A second set of motives for Latvia developing its intellectual property system relates to the need to promote an economic environment which is capable of attracting investment and promoting the transfer of technology to the country. According to a relatively recent study on foreign direct investments (“FDIs”) (hereinafter referred to as the “FDI Study”), there is a direct link between the strength of a country’s intellectual property regime and the scale and composition of the FDI received.⁴² The study’s conclusion is that a weak intellectual property regime directly impacts a country’s economy, as FDI tends to be more limited and directed toward sales and distribution rather than manufacturing.⁴³ Under these conditions, “investors with characteristics typical of multinational corporations (MNCs), such as high R&D and advertising intensity, are more willing to engage in distribution or open a representative office than to undertake local production,”⁴⁴ because the high risk associated with infringement makes it more difficult to obtain investment funds.⁴⁵

The FDI Study points to some important issues for transition economies and suggests that providing an adequate intellectual property regime is an important factor for successful transition and growth.⁴⁶ Intellectual property is one of the world’s most

⁴² See BEATA SMARZYNSKA, COMPOSITION OF FOREIGN DIRECT INVESTMENT AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN TRANSITION ECONOMIES 2 (Centre for Economic Policy Research, Discussion Paper No. 2228, 1999) [hereinafter FDI STUDY], available at http://www1.worldbank.org/wbiep/trade/papers_2000/IPRarticle.pdf (last visited Oct. 29, 2003). This paper was later revised and published by the World Bank Group in 2002. See BEATA SMARZYNSKA, COMPOSITION OF FOREIGN DIRECT INVESTMENT AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN TRANSITION ECONOMIES: Evidence from Transition Economies (World Bank Group, Working Paper No. 2786, 2002).

⁴³ See FDI STUDY, *supra* note 42, at 2.

⁴⁴ *Id.* at 1.

⁴⁵ See *id.* at 13 n.22.

⁴⁶ See *id.* at 1 n.2.

important goods—for example, in the United States, the intellectual property sector accounts for some five percent of GDP⁴⁷—so it makes sense for Latvia to seriously pursue access to improved technology to renovate the obsolete industrial base that it inherited from the Soviet Union.⁴⁸ The importance of FDI for transition economies is that it is a primary mechanism for technology transfer. The FDI Study suggests that “[s]ince multinational corporations . . . generally transfer their most recent technologies to their affiliates, while only older ones are sold or licensed outside the corporation, FDI may be the only way for many countries to gain access to the latest and especially to certain key technologies.”⁴⁹

Empirical studies, however, have failed to correlate formal intellectual property rights protection, as measured through membership in a given international treaty, and FDI.⁵⁰ There is a sense in the literature that regimes which do provide formal recognition and protection for intellectual property rights, but which in practice require rights owners to incur high transaction

⁴⁷ See U.S. Dep’t of State, *USPTO Director Discusses Intellectual Property Theft in Asia* (Patent and Trademark Office Chief Rogan’s Testimony), at <http://usinfo.state.gov/regional/ea/uschina/uspto423.htm> (Apr. 23, 2002).

⁴⁸ See, e.g., U.S. COMMERCIAL SERVICE, *LATVIA COUNTRY COMMERCIAL GUIDE FISCAL YEAR 2002*, available at <http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-LATVIA2002-CH-2:-004D5193> (last visited Oct. 21, 2003).

⁴⁹ FDI STUDY, *supra* note 42, at 6.

⁵⁰ See CARSTEN FINK & CARLOS A. PRIMO BRAGA, *HOW STRONGER PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AFFECTS INTERNATIONAL TRADE FLOWS* 13 (World Bank Group, Working Paper No. 2051, 1999) (concluding that the relationship between strong intellectual property regimes and international trade flows is ambiguous and in need of further research), available at http://www.wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_99031911113671 (last visited Oct. 21, 2003); see also MICHAEL W. NICHOLSON, *INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TECHNOLOGY DIFFUSION* 22 (Mar. 2002) (suggesting that the adoption of stronger intellectual property rights regimes has a positive impact on technology transfers but that the overall impact does not “alleviate any wealth differences arising from the existing North-South technology divide”) (paper prepared for the “Responding to Globalization: Societies, Groups, and Individuals” Conference in Boulder, Colorado, April 4–7, 2002), available at <http://www.colorado.edu/ibs/PEC/gadconf/papers/nicholson.html> (last visited Oct. 29, 2003).

costs through inefficient enforcement procedures, nonetheless discourage technology transfer.⁵¹

The difficulty in assessing the relationship between a strong intellectual property regime and FDI is that there are other factors which may correlate with the presence of a strong intellectual property rights system, such as a program of a tax incentives:

[T]here seems to be no statistically significant relationship between the perceived strength or weakness of a country's intellectual property rights protection . . . and the extent of U.S. direct investment in that country in the late 1980s and early 1990s. . . . Preliminary results suggest that U.S. firms tend to transfer somewhat newer technology to countries with relatively strong intellectual property rights protection than to countries with weak protection.⁵²

Isolating the impact of intellectual property rights is a challenging task that requires further research, since, on a theoretical level, there is continuing debate about the impact of a strong intellectual property system on transition economies.⁵³ The FDI Study, however, notes that “the ‘signaling value’ of the intellectual property regime has become extremely important in recent years.”⁵⁴ The study concludes that “[i]t is likely that potential investors perceive the adequacy of the [intellectual property rights] regime as an indication of the government's attitude towards FDI, which would explain why all kinds of FDI, and not only those in technology-intensive sectors, are deterred by a weak [intellectual property rights] regime.”⁵⁵

On a more subjective basis, the problems of weak intellectual property protection affect the level of commercial interest for

⁵¹ See FINK & BRAGA, *supra* note 50, at 3; see also NICHOLSON, *supra* note 50, at 15.

⁵² Edwin Mansfield, *Unauthorized Use of Intellectual Property: Effects on Investment, Technology Transfer, and Innovation*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 107, 141 (Mitchel B. Wallerstein et al. eds., 1993).

⁵³ See FINK & BRAGA, *supra* note 50, at 13; see also Nicholson, *supra* note 50, at 22.

⁵⁴ FDI STUDY, *supra* note 42, at 18 (citing Sanjaya Lall, *Investment, Technology and International Competitiveness*, in THE NEW GLOBALISM AND DEVELOPING COUNTRIES 232–59 (John H. Dunning & Khalil A. Hamdani eds., 1997)).

⁵⁵ FDI STUDY, *supra* note 42, at 18.

potential investors for the Baltic region. This was the focus of a July 2001 survey conducted by the Coalition for Intellectual Property Rights (“CIPR”), a U.S.-based interest group which includes some of the world’s largest tobacco, alcohol, and apparel companies.⁵⁶ Asked to evaluate a set of challenges facing successful business operations in the Baltic states, respondents across the Baltic region ranked intellectual property protection behind tax and customs issues, but ahead of government corruption, investment laws, court systems, “noncompliance,” and shareholders rights.⁵⁷

According to the CIPR Baltic States Survey, the key areas requiring attention in Latvia were trademark protection, trademark infringement and trademark piracy, while issues of patents, copyright and domain names ranked lower on the list.⁵⁸ The survey report concluded that there is a “crisis of confidence” in the intellectual property regimes of the Baltic states.⁵⁹ Usually, the research on the Central and Eastern European transition economies is focused on investment laws and shareholders rights,⁶⁰ but companies report a keener interest in the challenges of intellectual property protection in the Baltic states. While the qualities of a modern legal framework and the protection of investments through corporate vehicles are important considerations for transition studies, additional research needs to be done to assess the capability of the intellectual property systems to support investment decisions in the Baltic region.

⁵⁶ See COALITION FOR INTELL. PROP. RTS., FINAL REPORT ON AN OPINION SURVEY OF INTERNATIONAL AND DOMESTIC COMPANIES IN LATVIA, ESTONIA, AND LITHUANIA: INTELLECTUAL PROPERTY PROTECTION AND ENFORCEMENT IN THE BALTIC STATES 2 (July 13, 2001) [hereinafter CIPR BALTIC STATES SURVEY], available at http://www.cipr.org/activities/riga_survey_07_2001.htm (last visited Oct. 21, 2003).

⁵⁷ See *id.*

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 7.

⁶⁰ See, for example, the research published by the European Bank for Reconstruction and Development in its regular LAW IN TRANSITION series. This series is available online at <http://www.ebrd.com/pubs/find/index.htm> (last visited Oct. 21, 2003).

II. HISTORICAL BACKGROUND

Latvia twice gained its independence from Russian-dominated empires, in 1918 and 1991.⁶¹ With constitutional structures that remained relatively stable for hundreds of years, Sweden, Britain and the United States have been able to develop sophisticated intellectual property systems, while Latvia suffered successive violent disruptions to its constitutional order with the ebb and flow of foreign armed forces on its soil.

Since the modern international system of intellectual property law began to take shape at the end of the nineteenth century, Latvia has been under the control of the Russian empire, a short-lived Bolshevik republic, a democratic republic, and an autocratic order influenced by the corporatist state of Mussolini.⁶² In addition, it has experienced forced accession to the Soviet Union, occupation by German forces, the return of the Red Army and Soviet rule, a period of nationalist awakening, separation from the Soviet Union, and the restoration of its democratic republic.⁶³ In the twentieth century, there were two main periods of Latvian history that influenced the approach to intellectual property rights in Latvia after 1991: the Independence Period between 1918 and 1940,⁶⁴ and the Soviet Period from 1940 to 1991.⁶⁵

A. *The Independence Period*

Latvia was part of the Russian empire until the 1917 Socialist Revolution opened the road to independence in 1918.⁶⁶ Between the two world wars, the Latvian state was generally weak, but it promoted a market-based economy and undertook measures to conform with the emerging world system of intellectual property.⁶⁷ On July 16, 1919, the young Latvian government approved the law titled *Changes in the Rules on Inventions, Models and Trade*

⁶¹ See generally Versia, *supra* note 28.

⁶² See LIEVEN, *supra* note 1, at 65.

⁶³ See *id.*

⁶⁴ See *id.* at 61–64.

⁶⁵ See *id.* at 65.

⁶⁶ See *id.* at 96–99.

⁶⁷ See *id.* at 55.

Marks Protection Notes and Patent Rules of Issuance.⁶⁸ With this law, Latvia incorporated into its own legislative scheme several clauses of the pre-revolution Russian industrial property law of 1913.⁶⁹

On May 17, 1922, the Latvian Constituent Assembly adopted the Law on Changes to the Rules on Inventions, Models and Trade Marks Protection Notes and Patent Rules of Issuance, also based on the Russian legislation of 1913. The law was subsequently amended in 1924, 1925, and 1930.⁷⁰ In 1933 and 1935, Latvia adopted legislation on unfair competition which had as its object, in part, the regulation of trademarks and trade names. A draft law on copyright was prepared by the Latvian Ministry of Finance in 1939, but was not adopted, and Latvia retained the Russian copyright law of 1911 that it had incorporated into its own law.⁷¹

Latvia took a number of early steps to link itself to international trends in intellectual property law, such as joining the Paris Convention for the Protection of Industrial Property on August 20, 1925.⁷² Latvia also joined the Berne Convention for the Protection of Literary and Artistic Works on May 15, 1937,⁷³ but it was absorbed into the Soviet Union in 1940 and its international treaty commitments relating to intellectual property law were abrogated *de facto*.⁷⁴

This inter-war period is crucial in Latvian history, not only because it represents the first modern period of political independence; but also because the development of its national industrial base⁷⁵ and the initial codification of its laws⁷⁶ took place during this time.

⁶⁸ See GEORGIJS POĻAKOVŠ, RŪPNICISKA IPASUMA IPASNIEKA TIESĪBAS [INDUSTRIAL PROPERTY LAW] 53 (Rīga, Biznesa augstskola Turība 2001).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See WIPO, Paris Convention for the Protection of Industrial Property, *Contracting Parties*, at <http://www.wipo.int/treaties/ip/paris/index.html> (last updated Oct. 15, 2003).

⁷³ See WIPO, Berne Convention for the Protection of Literary and Artistic Works, *Contracting Parties* [hereinafter WIPO, *Berne Convention Parties*], at <http://www.wipo.int/treaties/ip/berne/index.html> (last updated Oct. 15, 2003).

⁷⁴ See WIPO, *Berne Convention Parties*, *supra* note 73.

⁷⁵ See Deksnis, *supra* note 19, at 86.

B. *The Soviet System*

Apart from a brief occupation by Nazi Germany, in the period between 1940 and 1991, Latvia was a Soviet Socialist Republic (“SSR”). Laws on intellectual property in the SSRs were formally adopted by national parliaments through the elaboration of their respective civil codes,⁷⁷ but in practice the policy of the Latvian SSR was controlled by the Communist Party of the Soviet Union.

Within the Soviet Union, private property rights, including intellectual property rights, were displaced by concepts of socialist property and subsumed by the requirements of socialist construction.⁷⁸ Nevertheless, the Soviet Union did address some issues of intellectual property in its early days. Copyright was not recognized in the broader sense, but a law on authorship was adopted in 1925, restated in 1928, and maintained in essentially the same form until the revision of the civil laws in the post-Stalin reforms of the 1960s.⁷⁹ Although popular authors may have secured advantages such as heightened sociopolitical status, such benefits may have been more closely correlated to conformance with the Marxist-Leninist ideology of the Communist Party than to commercial success.⁸⁰ Similarly, successful inventors generally did not receive the same rewards as did those from the Western nations, but instead found individual favor with state organs.⁸¹

In the area of copyright, the Soviet Union joined the Universal Copyright Convention (“UCC”)⁸² on May 27, 1973,⁸³ but it

⁷⁶ See Kalvis Torgāns, *Commercial Rights in the Baltic States*, in *THE BALTIC STATES AT HISTORICAL CROSSROADS* 294, 300–01 (Tālav Jundzis ed., 1998) [hereinafter Torgāns, *Commercial Rights*].

⁷⁷ See, e.g., *GUIDE TO THE COMMERCIAL AND CORPORATE LAW OF EASTERN EUROPE* ¶ 902 (David Winter ed., 1991).

⁷⁸ See ALFRED WATKINS, *FROM KNOWLEDGE TO WEALTH: TRANSFORMING RUSSIAN SCIENCE AND TECHNOLOGY FOR A MODERN KNOWLEDGE ECONOMY* 20 n.39, (World Bank Group, Working Paper No. 2974, 2003) (noting that most of the intellectual property during the Soviet regime belonged to the public, and not particularly to the inventor), available at <http://econ.worldbank.org/view.php?type=5&id=24163> (last visited Oct. 29, 2003).

⁷⁹ See W.E. BUTLER, *SOVIET LAW 197–98* (2d ed. 1998).

⁸⁰ See WATKINS, *supra* note 78.

⁸¹ See *id.*

⁸² Convention and Protocols Done at Paris July 24, 1971, July 24, 1971, 25 U.S.T. 1341 [hereinafter Universal Copyright Convention].

remained outside the broader requirements of the Berne Convention.⁸⁴ When the Soviet Union joined the UCC, it qualified its accession to avoid retroactive application. This strategy was also employed by the United States and several other countries on their accession to the UCC or Berne Convention, but in the context of more developed copyright systems.⁸⁵ The result for the Soviet Union was that, until 1973, foreign authors did not receive the benefit of copyright protection within the country; and, even then, past acts of unauthorized reproduction were not redressed. For the Soviet Union, the unauthorized reproduction of foreign copyrighted materials was not only a sanctioned activity but one undertaken, in the first place, by the state through its monopolistic publishing system.⁸⁶ This problem, which amounted to state appropriation without compensation, presented a trade problem for Western countries during the period of socialism, as they were deprived of a significant export market for intellectual products.⁸⁷ The Soviet Union did not foster a legal culture that respected intellectual property rights,⁸⁸ and it may be more accurate to say that state policy was instead to promote a systemic disrespect for and abuse of private intellectual property rights.

In the Soviet Union, the civil code provided an inventor with “the right to demand recognition of his authorship [of a discovery]

⁸³ See UNESCO.ORG, *States Parties: Universal Copyright Convention and Annexed Protocols*, at 7 n.28, at http://www.unesco.org/culture/copyright/html_eng-convention.shtml (last visited Oct. 29, 2003).

⁸⁴ See Vitaly Babenko, *And Another Thing . . . Joining Berne the Russian Way*, 7 LOGOS (1996), available at <http://www.osi.hu/cpd/logos/AndanotherthingbyBabenko.html> (last visited Oct. 21, 2003).

⁸⁵ See *id.*

⁸⁶ See Eugene Garfield, *Some Implications of the Soviet Union's Becoming Party to the Universal Copyright Convention*, 15 CURRENT CONTENTS 5 (1973), available at <http://www.garfield.library.upenn.edu/essays/V1p428y1962-73.pdf> (last visited Oct. 21, 2003).

⁸⁷ See generally Maxim Voltchenko, *Itar-Tass Russian News Agency v. Russian Kurier: Federal District Court Applies the Berne Convention, United States and Russian Copyright Laws to Prevent Piracy in Mass Media*, 1998 B.C. INTELL. PROP. & TECH. F. 042401 (Apr. 24, 1998), at http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/index.html.

⁸⁸ See Emily Downes, *Looking Westwards*, MANAGING INTELL. PROP., available at <http://legalmediagroup.com/mip/includes/print.asp?SID=350> (last visited Oct. 29, 2003).

and priority in the discovery,”⁸⁹ but inventors were only theoretically able to acquire the equivalent of a patent.⁹⁰ The Statute on Discoveries, Invention, and Rationalization Proposals defined the manner in which such recognition could be granted, as approved by the Council of Ministers of the USSR.⁹¹ Article 110 of the 1961 Fundamental Principles of Civil Legislation in the USSR allowed an inventor to demand recognition of his or her “authorship” through the grant of an “Author’s Certificate,” and also to seek the exclusive right to his or her invention.⁹² In practice, however, patents were generally obtained only by foreigners investing in the Soviet Union.

Under the Soviet system of Author’s Certificates, one class of certificates was based upon published works.⁹³ Following Latvia’s withdrawal from the Soviet Union, this class of certificates was recognized to be generally incompatible with patent protection based on the Western model, and filing for a new patent was not possible after the legislative reforms of the 1990s on the basis of prior publication. The other class, “Classified Certificates,” did not require publication and in limited cases may have offered Western-style patent protection.⁹⁴ The essence of the certificate system was that, while the inventor received recognition and perhaps limited financial compensation, the right to exploit the invention was reserved to the socialist state.⁹⁵ The cost of obtaining a patent, in the socialist countries that permitted a patent, generally proved prohibitive to national inventors; indeed,

⁸⁹ Fundamental Principles of Civil Legislation of the U.S.S.R. and of the Union Republics [F.P. Civ. L.] art. 107, *Vedomosti Verkhovnogo Soveta SSSR*, Issue No. 50, Item No. 525 (Dec. 8, 1961) (Lat.), *translated in* JOHN N. HAZARD ET AL., *THE SOVIET LEGAL SYSTEM* 343 (3d ed. 1977).

⁹⁰ Marko Slusarczuk et al., World Technology Evaluation Center Panel Report on Display Technologies in Russia, Ukraine and Belarus – Final Report (Loyola College, 1994) (National Technical Information Service Report No. PB95-144390,) *available at* http://www.wtec.org/loyola/displays/c7_s8.htm (last visited Oct. 29, 2003).

⁹¹ F.P. Civ. L. art. 110.

⁹² *Id.*

⁹³ *See* SLUSARCZUK, *supra* note 90.

⁹⁴ *Id.*

⁹⁵ *See* Otmar Rafeiner, The Situation and Development of Industrial Property Protection in Europe, Particularly in the Context of Development in Central and Eastern Europe, Address at Pattinova ‘97 (May 5–7, 1997), *available at* <http://www.cordis.lu-patinnova/src/rafeiner.htm> (last updated Jan. 26, 1998).

according to one author, only thirteen Soviet citizens received patents prior to 1991.⁹⁶ In any event, the ability of inventors to enforce their rights under patents was negligible in practice.⁹⁷

There were at least three factors that inhibited the proper exercise of such limited patent rights as in the Soviet Union:

First, unlike [Author's Certificates (AC)] which were virtually free, Soviet patents were costly to apply for and maintain. Second, by opting to apply for a patent instead of an AC, an inventor could not be certain that the patent would be granted. But the inventor was almost certainly forgoing the valuable social benefits accruing to holders of AC's and, possibly, exposing himself to retaliatory measures for preferring personal enrichment at the expense of the "good of the whole people." And finally, Soviet law stipulated that the State owned all inventions created (i) in the course of an inventor's employment at a state enterprise or research institute, (ii) via the use of property belonging to the state, or (iii) with budget resources appropriated by the State. In these cases, which constitute the vast majority of inventions created during the Soviet period, inventors were eligible only for [ACs].⁹⁸

The disparity between Soviet and more generalized systems of intellectual property led to Soviet authors, inventors, and composers being deprived of the rights enjoyed by their Western counterparts to exploit and control the use of their works. There were limited exceptions, which depended in large measure upon the attitude of Western countries to the exercise of moral rights. In 1953, for example, the famous composers Dimitri Shostakovich and Sergei Prokofiev lost a case brought in the United States to prevent the use of their music in an anti-communist film because the moral rights of Soviet authors were not recognized by the

⁹⁶ John M. Romary & Howard A. Kwon, *The New Patent Regime of the Russian Federation*, Address at NATO Conference in Moscow (Sept. 1995) (citing Thomas C. Stansmore, *Licensing in the New Russian Federation*, 28 *LES NOUVELLES* 98 (1993)) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

⁹⁷ Romary & Kwon, *supra* note 96.

⁹⁸ WATKINS, *supra* note 78 (citations omitted).

United States.⁹⁹ In France, however, the doctrine of moral rights was found to extend to the authors.¹⁰⁰ Ironically, given the political uses to which art was put in the Soviet Union, while the Soviet civil code extended to authors rights analogous to the rights of paternity and integrity, there are no publicly reported cases of such rights being enforced through the Soviet courts. The position of Soviet-era authors was more fully addressed in the Uruguay Round of WTO negotiations, which saw many works become eligible for copyright protection.¹⁰¹

Despite the Cold War, the Soviet Union did respond to pressure from Western countries to afford some protection to their intellectual property imports,¹⁰² and itself saw the opportunity to improve its balance of trade through scientific and technical exports.¹⁰³ In response to these pressures, some effort was made to reform the patent system in the Soviet Union over a number of years. The USSR acceded to the Paris Convention for the Protection of Industrial Property in 1965 and joined the Madrid Agreement Concerning the International Registration of Trademarks in 1976. The reform process advanced slowly in the 1980s:

A draft “Law on Inventive Activity” was published on December 27, 1988, heralding a dramatic change in attitude on the protection of rights to inventions in the former USSR. The draft included provisions abolishing Inventor’s Certificates and recognizing new patentable subject matter such as chemical compounds and pharmaceutical products. Although the draft was eventually rejected by the Commission of the Supreme Soviet, it set an important precedent for further negotiation and deliberation on patent-law reform.¹⁰⁴

⁹⁹ See *Shostakovich v. Twentieth Century-Fox*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff’d*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949); see also Ronald B. Standler, *Moral Rights of Authors in the USA*, at <http://www.rbs2.com/moral.htm> (last modified May 28, 1998).

¹⁰⁰ See Standler, *supra* note 99.

¹⁰¹ Romary & Kwon, *supra* note 96.

¹⁰² *Id.*

¹⁰³ See Garfield, *supra* note 86.

¹⁰⁴ Romary & Kwon, *supra* note 96.

More substantial patent reform was undertaken by the Soviet Union in 1991,¹⁰⁵ and a new trademark law was passed in 1992,¹⁰⁶ but by the end of that year the union had itself broken up and a newly independent Latvia had started to assess the requirements of its intellectual property regime for itself.

Within the Soviet Union, there was limited opportunity for the courts and administrative organs to consider the resolution of disputes relating to intellectual property rights. The closest class of claims were those made by inventors for bonuses under incentive programs to promote the introduction into production processes of economizing innovations. Although the Council of Ministers of the Soviet Union promulgated the Decree on Trademarks in 1962,¹⁰⁷ that year is also the last in which a trademark case was heard under the Soviet system.¹⁰⁸

The break-up of the Soviet Union had the potential to create some difficult political problems in the sphere of intellectual property. A number of Soviet institutions had shared the creation and use of intellectual property with their former colleagues now located in other countries, potentially creating disputes over ownership.¹⁰⁹ It also brought forward the need to consider the

¹⁰⁵ *Id.*

¹⁰⁶ See Cynthia Vuille Stewart, *Trademarks in Russia: Making and Protecting Your Mark*, 5 TEX. INTELL. PROP. L.J. 1, 6 (1997).

¹⁰⁷ *Id.* at 3.

¹⁰⁸ See *Protecting Intellectual Property Rights in the Former Soviet Union*, at <http://www.gowlings.com/resources/publications.asp?showWhat=35> (Sept. 6, 2000).

¹⁰⁹ SLUSARCZUK, *supra* note 90. Consider also the following explanation:

The problem of the former USSR's "intellectual heritage" remains unsolved. According to the chief adviser for the Verkhovna Rada Science and Education Committee Hennadiy Androshchuk, after the USSR's collapse Russia kept 500,000 active invention copyright certificates marked "For Restricted Use" that had never been published and could be made patents. According to expert estimates, about a quarter of them (125,000) belong to Ukrainian inventors. There is not even a list of these inventions in Ukraine, let alone their specifications. The same is true of the classified copyright certificates of the former USSR (also about 500,000). Some of them have been made patents of the Russian Federation. This situation may create difficulties for Ukrainian enterprises when they venture to enter the international hi-tech markets.

Vladimir Sidenko, *Protection of the Intellectual Property in Ukraine: Problems and Solutions*, 43 (367) ZERKALO NEDELI (Nov. 3-9, 2001), at <http://www.mirror-weekly.com/nn/show/367/32785>.

effect of the nationalization or non-recognition of intellectual property rights under the Soviet system. For example, Bayer, the German pharmaceuticals company, found that the post-Soviet Russian courts were unwilling to recognize its ASPIRIN trademark, as it had failed to re-register the mark in the Soviet Union under Soviet law.¹¹⁰ The legal effect of regime changes which impacted on intellectual property rights had previously been considered in cases brought before German, Italian, French, British, and U.S. courts.¹¹¹ The issue is particularly important in the modern context, with the growing importance of global brands and famous marks, because the beneficiaries of expropriated marks on occasion try to register the marks abroad, where they may come into conflict with the original rights-holders.¹¹²

A dispute on this pattern arising from the former Soviet Union is the struggle between a private Dutch company and a Russian state enterprise over the mark, STOLICHNAYA, which is used in association with vodka. The problem is explained by a trademark agent from Riga:

The process of partition of the Soviet IP heritage has not come to an end yet. In the USSR, many similar products, such as vodkas, produced by different distilleries, used to bear the same trade marks [sic], for example, Moskovskaya and Stolichnaya. Now, some of these distilleries find themselves in different independent states.¹¹³

Indeed, vodka is currently being produced in both Russia and Latvia under the STOLICHNAYA trademark by unrelated enterprises. Although the mark was sold for US\$300,000 by Russian bureaucrats in 1997, the Russian government has been accused of trying to re-nationalize the brand to capitalize on its greatly expanded market value (now estimated to be US\$1.4

¹¹⁰ See Stewart, *supra* note 106.

¹¹¹ See *Testimony of Ignacio Sanchez for Barcardi-Martin Before the Subcomm. on Courts, Internet, & Intell. Prop. of the Comm. on the Judiciary*, 105th Cong. (May 21, 1998), available at <http://www.house.gov/judiciary/42011.htm> (last visited Oct. 30, 2003).

¹¹² See *id.*

¹¹³ Downes, *supra* note 88.

billion globally).¹¹⁴ Before Latvia's largest distillery, Latvijas Balzams, was acquired by Sojuzplodimport, the successor to the STOLICHNAYA brand in Russia which had re-registered itself in the Netherlands, the two companies were engaged in their own struggle over the right of Latvijas Balzams to continue making and selling vodka under the STOLICHNAYA brand as it had since 1945. In that dispute, the Latvian courts had consistently found for the local company and against the foreign one.¹¹⁵ There have been other examples of Latvian courts finding for local companies in trademark disputes, which led to some claims of judicial protectionism.¹¹⁶

Although the break-up of the Soviet Union significantly diminished Russian influence in Latvia, Latvia's socialist experience and its proximity to Russia continue to impact upon the country's intellectual property regime. After the 1998 ruble crisis, Latvia became an economic beneficiary of Russian policy by acting as a finance haven as uncertainty surrounding the ruble and tax demands encouraged capital flight to Riga.¹¹⁷ It, however, has also become one of the most important transit links in the chain of organized piracy originating in Russia. Accordingly, Latvia's efforts to develop and enforce its intellectual property system cannot be taken in isolation but must be assessed with reference to the regimes in effect across its borders. The lasting legacy of socialism, which dismantled Latvia's nascent intellectual property system and then replaced it with one adapted to the requirements of a command economy and the political dictatorship of the working class, is a problem of transition with both internal and external dimensions.

¹¹⁴ See Mark McDonald, *Spirited Tug of War over Top Russian Vodka Brand*, MERCURY NEWS, Oct. 20, 2002, at <http://www.siliconvalley.com/mld/siliconvalley/news-/4327026.htm>.

¹¹⁵ See Maris Krautmanis, *Judicial Pothole on the Road to the European Union*, NEATKARIGA RITA AVIZE (NRA), July 17, 2001 (presented at the Coalition for Intellectual Property Rights Baltic Survey Roundtable), available at http://www.cipr.org/activities/conferences/riga_07_2001/nra_071601.htm (last visited Oct. 24, 2003).

¹¹⁶ See generally Nurton, *supra* note 8, at 28.

¹¹⁷ See Int'l Strategies, *supra* note 27.

The challenge, after fifty years of Soviet socialism, is for Latvia to rebuild institutions that are capable of managing and enforcing intellectual property rights at a modern level. Externally, it is under pressure to renovate its intellectual property regime to justify its participation in the European Union and the WTO. It is also hindered by organized crime, which regards Latvia as a staging area for piracy operations. Internally, Latvians have been left without a culture of respect for intellectual property rights.¹¹⁸ As in most countries that were part of the communist regime, the police and customs officials lack the understanding and motivation to enforce intellectual property rights vigorously, and judges consider incorporeal property to be trivial or apply remedies ineffectively.¹¹⁹

III. LEGISLATIVE REFORM

On May 4, 1990, the Supreme Soviet of the Latvian SSR passed the Declaration on the Restoration of Independence of the Republic of Latvia and initiated a transition period to full independence.¹²⁰ The Republic of Latvia was restored on August 21, 1991 with the adoption of the Constitutional Law on the Republic of Latvia Status as a State.¹²¹ The law confirmed the status of the 1922 Constitution of the Republic of Latvia,¹²² which already included provisions for protection of certain intellectual property rights.¹²³ Article 113 of the Latvian Constitution (*Satversme*) provides that “[t]he State shall recognize the freedom

¹¹⁸ See generally Stewart, *supra* note 106.

¹¹⁹ See generally *id.*

¹²⁰ See Law on the Statehood of the Republic of Latvia (1991) (Lat.), available at <http://www.ttc.lv/New/lv/tulkojumi/E0017.doc> (last visited Oct. 22, 2003) (translated by the Translation and Terminology Centre).

¹²¹ Ineta Ziemele, *The Role of State Continuity and Human Rights in Matters of Nationality of the Baltic States*, in *THE BALTIC STATES AT HISTORICAL CROSSROADS* 248, 252 (Tālav Jundzis ed., 1998).

¹²² *Id.* at 252–53.

¹²³ See SATVERSME [CONSTITUTION] art. 113 (Lat.), available at http://www.saeima.lv/-LapasEnglish/Constitution_Visa.htm (last visited Oct. 22, 2003) (translated by the Translation and Terminology Centre).

of scientific research, artistic, and other creative activity, and shall protect copyright and patent rights.”¹²⁴

Although express reference is not made to trademark rights, neighboring rights, trade secrets or designs, the provision is functionally equivalent to article 1, section 8 of the U.S. Constitution, which reserves to Congress the authority “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹²⁵

Despite the numerous challenges that it faces, Latvia has taken the necessary steps to ensure that it has a framework of intellectual property legislation which is broadly aligned to Western practices. The scale of this task to develop a juridical system acceptable for a member of the European Union is illustrated by the challenges of even the most straightforward undertaking: the obligation to translate 80,000 pages of EU legislation into Latvian.¹²⁶ Latvia’s official translators are unable to complete the task without inventing entirely new words and phrases and, by the end of 2002, they had completed only two-thirds of the task. The process was slowed by the defection of two skilled lawyer-translators from the Terminology & Translation Centre to an EU agency, where their salaries reportedly increased by a multiple of ten.¹²⁷

A. *International Instruments*

One of the key factors in the development of the Latvian intellectual property regime is the participation of the country in international systems and the adoption of the major international instruments of public international law relating to intellectual property. The *Satversme* provides that international obligations which have been ratified by the Latvian parliament (*Saeima*) have

¹²⁴ *Id.*

¹²⁵ U.S. CONST. art. I, § 8.

¹²⁶ See Jacobsen, *supra* note 33, at 31.

¹²⁷ J. Michael Lyons, *EU Preparations Help Reinvent Language*, BALTIC TIMES, Dec. 19, 2002, available at 2002 WL 9218274.

effect in Latvian law.¹²⁸ The principal Latvian intellectual property laws contain provisions clarifying that, in the event of inconsistency between the domestic laws and any relevant international instruments, the provisions of the international instruments shall take precedence.¹²⁹ Formally, therefore, since the ratification by the *Saeima* of the TRIPS Agreement in 1999, it has also had direct application under Latvian law insofar as it is inconsistent with domestic intellectual property laws.¹³⁰ Latvian law does not elaborate any rules for reconciling contradictory provisions in different international instruments.

Latvia has also been at the forefront of recent international efforts to bring international copyright instruments into the digital age, including by the ratification of the World Intellectual Property Organization (“WIPO”) Copyright Treaty¹³¹ and the WIPO Performances and Phonograms Treaty.¹³² It is also acquiring a more prominent international profile; for example, by the election of the director of the Latvian Patent Office (“LPO”) as vice-chair of the WIPO General Assemblies for a two-year term commencing in 2001.¹³³

¹²⁸ SATVERSME art. 68 (providing that “[a]ll international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the Saeima”).

¹²⁹ See Law on Trademarks and Geographical Indications art. 2(5) (1999) (Lat.) [hereinafter 1999 Trademark Law], available at http://inventions.lza.lv/-eng/likumi/precu_zimes.asp (last visited Oct. 22, 2003) (translated by the Latvian Patent Office); Patent Law of the Republic of Latvia art. 50 (1995) (Lat.) [hereinafter 1995 Patent Law], available at <http://inventions.lza.lv/-eng/likumi/patenti.asp> (last visited Oct. 22, 2003) (translated by the Latvian Patent Office).

¹³⁰ For more details on enforcement procedures under the TRIPS Agreement, see J. H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335 (1996–1997).

¹³¹ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997); see WTC Notification No. 15, WIPO Copyright Treaty Accession by the Republic of Latvia (Mar. 22, 2000), available at <http://www.wipo.org/-treaties/notifications/wct/0015.html> (last visited Oct. 29, 2003).

¹³² World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997); see WIPO, WIPO Performances and Phonograms Treaty, *Contracting Parties*, at <http://www.wipo.int/treaties/ip/wppt/index.html> (last updated Oct. 15, 2003).

¹³³ LATVIAN PATENT OFFICE, ANNUAL REPORT 2000–2001, at 40 [hereinafter PATENT OFFICE 2001 REPORT].

B. Domestic Laws

The first steps toward a legislative system for the protection of intellectual property in Latvia were taken in the early days of independence. Latvia currently has a system of intellectual property law which covers copyright and neighboring rights, patents, trademarks and marks of geographical origin, designs, trade secrets and know-how, integrated circuit topographies, and plant breeders rights.¹³⁴ Rights are protected through three channels: civil rights are protected under the discrete normative acts for different classes of intellectual property and through the Latvian Civil Code (*Civillikums*); the Latvian Administrative Offenses Code regulates certain prohibited acts, which are also specified in the intellectual property legislation; and the Latvian Criminal Code (*Krimināllikums*) regulates acts which have a criminal character.¹³⁵

The UN/ECE Advisory Group on the Protection and Implementation of Intellectual Property Rights for Investment (“Advisory Group”) has undertaken the most thorough and critical analysis of Latvian intellectual property law to date. The Advisory Group undertook a consultative visit to Latvia on November 13–14, 2000, where it met with Latvian officials from the responsible state ministries, autonomous agencies, representatives from the judiciary, and special interest groups.¹³⁶ As a result of their

¹³⁴ See generally Pēterona Patents, *Laws*, at <http://www.petpat.lv> (last updated Oct. 20, 2003).

¹³⁵ See generally Ilona Ceica & Ligita Vasermane, *Latvian Law Guide*, 31 INT’L J. LEGAL INFO. 20 (2003), available at <http://llrx.com/features/latvia.htm> (last visited Nov. 4, 2003).

¹³⁶ UN/ECE ADVISORY GROUP ON THE PROT. & IMPLEMENTATION OF INTELL. RTS. FOR INVS., REPORT OF THE CONSULTATIVE VISIT TO LATVIA I (Aug. 2001) [hereinafter ADVISORY GROUP] (noting that it met with the “Ministries of Culture, Foreign Affairs, Interior, Justice, Economy and Welfare as well as with representatives from the Latvian Competition Board, European Integration Bureau, State Customs Administration, Contraband Combating Centre, Economic Police, Latvian Development Agency, National Cinematography Centre and the State Patent Office. Several representatives of the judiciary also attended from the Latvian Supreme Court, Riga and Vidzemes District Courts and the Riga Regional Court. The UNDP Resident Representative in Latvia was also present. The following right holders’ associations attended the meeting: Latvian Performers’ and Producers’ Association, Latvian Copyright Agency and Software

consultations, the Advisory Group concluded that, while Latvia's intellectual property legislation was already at that time broadly in alignment with international standards, a number of areas required improvement or clarification.¹³⁷ As noted above, the European Commission and interest groups have also prodded the Latvian government to improve their intellectual property legislation.

In this section are reviewed the principal normative acts of the Latvian government relating to intellectual property law, together with certain problems arising from the current legislative scheme. On the basis that, as a whole, the body of legislation promulgated by Latvia is considered by the relevant experts to meet appropriate international standards, the principal focus of this section is on certain exceptional or controversial features of the legislation as it has been adopted.

1. Copyright Act

The Latvian parliament adopted the Law on Copyright and Neighboring Rights in May 1993 ("1993 Copyright Law").¹³⁸ One special feature of the 1993 law is a provision which extends the term of copyright in works which were either completely prohibited or restricted from use in Latvia during the period of the Latvian Soviet Socialist Republic, approximately, from June 1940 to May 1990.¹³⁹

The most recent version of the Latvian copyright law was passed on April 6, 2000 and came into force on May 11, 2000 ("2000 Copyright Law").¹⁴⁰ The Ministry of Culture, which has responsibility for the 2000 Copyright Law, indicates that the terminology of the act is intended to reflect that used in the WIPO

Copyright Agency."), available at <http://www.unece-ipr.org/2001-08-28-LatviaFinalReport.doc> (last visited Oct. 22, 2003).

¹³⁷ See *id.*

¹³⁸ Law on Copyright and Neighboring Rights (1993) (Lat.) [hereinafter 1993 Copyright Law], available at <http://www.unesco.org/culture/copy/copyright/latvia/sommaire.html> (last visited Oct. 22, 2003) (translated by the United Nations Educational, Scientific and Cultural Organization).

¹³⁹ See *id.* art. 30.

¹⁴⁰ Copyright Law (2000) (Lat.) [hereinafter 2000 Copyright Law], available at <http://www.ttc.lv/New/lv/tulkojumi/E0098.doc> (last visited Oct. 22, 2003) (translated by the Translation and Terminology Centre).

Copyright Treaty but acknowledges that there may be problems with the translation of certain concepts into Latvian.¹⁴¹

Latvia has delayed aspects of the copyright regime relating to “public lending” in relation to rental rights until 2003, as it does not have the resources to implement the related provisions. While regulations regarding a “blank tape levy,” to collect royalties from the sale of blank recordable media to distribute the costs of piracy to the content industries, have been drafted, the collective rights agencies were reported to be in conflict regarding the administration of the royalties.¹⁴²

The 2000 Copyright Law contains a novel feature in relation to moral rights. Among other “inalienable rights,”¹⁴³ authors are accorded “the right of inviolability—the right to permit or prohibit the making of any transformation, change or addition either to the work itself or to its title,” in addition to “the right to initiate proceedings (including unilateral repudiation of a contract without compensation for losses) for any distortion, modification or other transformation of his work, as well as for any infringement of author’s rights that may damage honor or reputation.”¹⁴⁴

While provisions in copyright legislation protecting authors’ moral rights to prevent adaptations of their works in forms which may adversely affect their reputation are not unusual, in line with article 6*bis* of the Berne Convention,¹⁴⁵ it is not common for authors to retain inalienable rights to prevent any adaptation whatsoever. Such broad provisions could have the unhappy consequence of holding subsequent assignees of the copyright hostage to the moral rights of authors in order to make changes to works which are necessary to properly exploit them; for example, by undertaking “pan and scan” editing of films to facilitate

¹⁴¹ See ADVISORY GROUP, *supra* note 136, at 4.

¹⁴² See *id.* at 5.

¹⁴³ 2000 Copyright Law art. 14.

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., Copyright Act, R.S., ch. C-42, § 28(2) (1985) (Can.) [hereinafter Canadian Copyright Act] (providing that the author’s moral right to the integrity of a work is infringed “only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution”).

television broadcasting.¹⁴⁶ If such changes do not adversely affect the honor or reputation of the author, then fetters on the ability of the copyright owner to adapt or authorize the adaptation of the subject work can only have negative consequences. Article 6*bis* of the Berne Convention provides:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.¹⁴⁷

Article 18(5) of the 2000 Copyright Law goes further than the requirements of the TRIPS Agreement; and perhaps unnecessarily so.¹⁴⁸ The Advisory Group noted in its final report that such a broad grant of moral rights could cause problems on an author's death, as the rights do not appear to pass.¹⁴⁹

The moral rights provisions in the 2000 Copyright Law also do not take into account the almost purely commercial and technical character of certain works, such as software code, which have been excluded from moral rights protection under the UK Copyright Act,¹⁵⁰ among others.

In relation to neighboring rights, Latvia joined the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Rome Convention") with a reservation relating to article 12, as permitted by article 16(i)(a)(iii).¹⁵¹ Latvian officials expressed an intention

¹⁴⁶ See, e.g., DVDPost.be, Sydney Pollack, *Comments*, at http://www.dvdpost.be/-directors.php?directors_id=78 (last visited Oct. 22, 2003) (summarizing the circumstances of a Danish court's agreement with director Sidney Pollack that the creation of a "pan and scan" version of his 1975 film, "The Day of the Condor," represented a violation of his moral rights, though ultimately finding for the other party).

¹⁴⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6*bis*, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971).

¹⁴⁸ See 2000 Copyright Law art. 18(5).

¹⁴⁹ See ADVISORY GROUP, *supra* note 136, at 5.

¹⁵⁰ Copyright, Designs and Patents Act, 1988, c. 48, § 81(2) (Eng.).

¹⁵¹ WIPO, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *Contracting Parties*, at <http://www.wipo.int/treaties/-ip/rome/index.html> (last updated Oct 15, 2003).

in 2001 to lift their reservation but no action has been taken to date.¹⁵²

2. Patent Act

In 1992, the Latvian Council of Ministers adopted provisional measures to enable the re-registration in Latvia of inventions, designs and trademarks which had previously been registered in the USSR Patent Office.¹⁵³ The first Latvian patent law following the restoration of independence was adopted in 1993 (“1993 Patent Law”)¹⁵⁴ The patent law adopted in 1995 (“1995 Patent Law”)¹⁵⁵ is generally recognized to practitioners as being consistent with Western legislative models. The 1993 Patent Law had preceded the TRIPS Agreement and required amendment to conform with its provisions, particularly in relation to compulsory licensing.¹⁵⁶ The 1995 Patent Law provides for the grant of compulsory licenses in the following circumstances:¹⁵⁷

- 1) a patented object or a product manufactured by means of using a patented process is of vital importance to the welfare of the residents of Latvia or for the interests of the economy or national security of Latvia, but the patent owner or his licensee, either is not using the invention or is using it to an extent, which does not really satisfy interests of the Republic of Latvia; or
- 2) an invention being of great economic significance, cannot be exploited without the use of another earlier patented invention; under these circumstances, the owner of

¹⁵² See ADVISORY GROUP, *supra* note 136, at 5.

¹⁵³ For a case that mentions the Council of Ministers’ February 28, 1992 Order for Provisional Protection of Inventions, Designs, and Trademarks, see the Patent Office of the Republic of Latvia Board of Appeal decision, dated November 1, 2002, available at <http://www.petpat.lv/Cases/dec.walker.htm> (last visited Oct. 22, 2003). See also Keijo Heinonen, *Latvia – Patents – News*, 5 EIPR D-93–94 (1992).

¹⁵⁴ See, e.g., Consumer Project on Technology, Watch Country, *Latvia*, at <http://www.cptech.org/ip/health/phrma/301-99/latvia.html> (last visited Oct. 22, 2003).

¹⁵⁵ 1995 Patent Law (1995) (Lat.).

¹⁵⁶ See ADVISORY GROUP, *supra* note 136, at 4.

¹⁵⁷ 1995 Patent Law art. 39(2).

the previous patent may request a license in return for the use of the later patented invention.¹⁵⁸

The Agreement on Extension of European Patents to the Republic of Latvia was entered into between the Latvia and the European Patent Organization in 1994.¹⁵⁹ A European patent application and a European patent granted on such application may be extended to Latvia with the same effect as the national patent application and the national patent.¹⁶⁰

Applications for patents under the 1995 Patent Law are assessed by the LPO on the basis of compliance with registration formalities rather than on the substance of the claims. The LPO has itself noted, in discussions with the Advisory Group, that “the Patent Law of Latvia does not provide for full examination therefore some of the [domestic applications for] some of the inventions might not comply with the novelty and inventive step criteria.”¹⁶¹

Under the Latvian patent system, license agreements do not take effect until they have been registered with the LPO.¹⁶² A fee of LVL 30 is payable for each patent which is the subject of a license agreement.¹⁶³

3. Trademarks

The Department of Trademarks and Industrial Designs (“DTID”) of the LPO commenced its activity in March 1992 with a staff of just one person.¹⁶⁴ From 1992 to 1995, the staff rose to 8.5 full-time equivalents, as the DTID undertook the task of re-registering nearly 9,500 trademarks from the former Soviet Union.¹⁶⁵ The staff were supported in this task by specialists

¹⁵⁸ *Id.*

¹⁵⁹ See LATISS Agency, Legislation, *The Republic of Latvia Patent Law*, at http://www.latiss.lv/legislation/lv_patent.shtml (last visited Oct. 29, 2003).

¹⁶⁰ See 1995 Patent Law art. 18(1).

¹⁶¹ PATENT OFFICE 2001 REPORT, *supra* note 133, at 16.

¹⁶² See 1995 Patent Law art. 38(4).

¹⁶³ *Id.*

¹⁶⁴ PATENT OFFICE 2001 REPORT, *supra* note 133, at 22.

¹⁶⁵ *Id.*

seconded by the Swedish Patent Office.¹⁶⁶ Although the law on trademarks¹⁶⁷ came into force in 1993 (“1993 Trademark Law”), examination of new applications for trademarks did not commence until 1995, when the re-registration of marks from the former Soviet Union was nearly complete.¹⁶⁸ Further delays were occasioned by the immaturity of the trademark system in Latvia, and the LPO admits that processing of trademark applications still has not reached the “ideal examination pace.”¹⁶⁹

The 1993 Trademark Law was found to be lacking in certain respects. Accordingly, the restated Law on Trademarks and Indications of Geographical Origin was adopted in 1998, which entered into force on July 15, 1999 (“1999 Trademark Law”).¹⁷⁰ The 1999 Trademark Law represented an improvement by, among other things, including new procedures to allow applications for trademark registrations to be refused by the Patent Office¹⁷¹ or opposed by interested persons,¹⁷² or for the revocation of registrations by application to the courts,¹⁷³ if the relevant application for registration had been clearly made in bad faith.¹⁷⁴

The amendments were made necessary by the proliferation of trademark applications made by Latvians in anticipation of foreign companies entering the Latvian market.¹⁷⁵ In a representative case,

¹⁶⁶ *Id.*

¹⁶⁷ See Ladas & Parry, *Latvia – New Trademark Law* (June 2000), at http://www.ladas.com/BULLETINS/2000/0600Bulletin/Latvia_NewTrademarkLaw.html (last visited Oct. 22, 2003).

¹⁶⁸ PATENT OFFICE 2001 REPORT, *supra* note 133, at 21–22.

¹⁶⁹ *Id.*

¹⁷⁰ 1999 Trademark Law (1999) (Lat.).

¹⁷¹ See *id.* art. 6(2).

¹⁷² See *id.* art. 18(2).

¹⁷³ See *id.* art. 31(1).

¹⁷⁴ For more detail on “trademark grabbing” practices in Latvia, see Alexander von Fuener, *Infringement of Industrial Property Rights in the Russian Federation and the Baltic Republics*, available at <http://www.bmwi.de/textonly/Homepage/download/english/Enforcement.pdf> (last visited Oct. 2, 2003) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

¹⁷⁵ See Office for Harmonization in the Internal Market – Trade Marks and Designs, *Latvia, Case Law of the Republic of Latvia of Trademark Refusal/Invalidation on the Grounds of Bad Faith Application from the Applicant/Owner*, at 1 [hereinafter *Trademark Case Law*], at <http://oami.eu.int/EN/enlargement/mechanisms.htm> (last visited Oct. 29, 2003).

an application was made to register the marks, CALVIN KLEIN, POLO RALPH LAUREN, and THE GAP, in Latvia by a person with no connection to the Calvin Klein Trademark Trust, the Polo/Lauren Company LP or Gap (ITM) Inc., the registrants of the corresponding Community Trademarks,¹⁷⁶ or their associated companies. On the basis of the 1993 Trademark Law, which allowed applications to be refused if they were for marks which were identical or confusingly similar to famous marks which were known in Latvia, the LPO refused to register the marks, CALVIN KLEIN and POLO RALPH LAUREN. The application, however, for THE GAP was accepted for publication by the LPO, as the mark was not well known or used in the country at that time. Opposition proceedings commenced by Gap (ITM) Inc. failed, as the 1993 Trademark Law did not prohibit bad faith registrations, and the company could not prove that THE GAP was a well-known mark in Latvia. The mark was later revoked by the Regional Court of Riga on the basis that it was not being used,¹⁷⁷ but the need for reforms to the 1993 Trademark Law was evident.

The bad faith provisions of the 1999 Trademark Law have been used successfully to prevent the usurpation of goodwill associated with unregistered trademarks. Since 1994, Latvia's largest brewery, Aldaris A/S, had been producing beer under the mark, APINĪTIS. On March 17, 1999, a competitor, Brends SIA, applied to register APINĪTIS for use in association with beer. Aldaris responded by commencing opposition proceedings and making their own, later application to register the mark. The APINĪTIS mark did not have the quality of a well-known mark in Latvia, so Aldaris relied in the opposition proceedings upon the bad faith provisions of the 1999 Trademark Law. The opposition was successful, as it was found that the sole shareholder of Brends was a former sales representative of Aldaris who had knowledge of Aldaris' use of the APINĪTIS mark and its visibility in the Latvian beer market as a result of his tenure as an Aldaris employee.¹⁷⁸

¹⁷⁶ These are the results of an online search of the Community Trade Mark Consultation Service, conducted by the author on January 6, 2003.

¹⁷⁷ See Trademark Case Law, *supra* note 175, at 4.

¹⁷⁸ See *id.* at 4–5.

The Latvian Supreme Court had the opportunity to consider the application of the bad faith provisions of the 1999 Trademark Law in the SMIRNOV case, decided in 2000.¹⁷⁹ The LPO had accepted the registration of a figurative mark which contained the term, SMIRNOV, in its Cyrillic form, as well as the extension to Latvia of three similar marks on the basis of international registrations. The application for each of the registered marks was Torgovy Dom Potomkov Postavschika Dvora Ego Imperatorskogo Velichestva P.A. Smirnova, a Russian company. The action brought by UDV North America Inc., the then-owner of the SMIRNOFF mark in the United States,¹⁸⁰ for an order revoking the SMIRNOV trademark registrations, had been rejected by the Regional Court of Riga. On appeal, the Supreme Court reversed the decision of the Regional Court on the basis that the SMIRNOV marks were not only confusingly similar to the well-known SMIRNOFF mark but that the applications for registration of the SMIRNOV marks were clearly made in bad faith.¹⁸¹

Another major change introduced in the 1999 Trademark Law enables the owners of trademarks in other Paris Union countries to apply for the revocation of a trademark registration if a representative or agent of the owner has registered the owner's mark in Latvia in their own name without the prior consent of the owner.¹⁸²

On January 5, 2000, Latvia joined both the Madrid Agreement Concerning the International Registration of Trademarks ("Madrid Agreement") and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol").¹⁸³ The result has been a decline in applications under the national procedure and an increase in applications under the

¹⁷⁹ See *id.*

¹⁸⁰ See Cocktail Times, *Ready-to-Drink (RTD) Cocktails Fact Sheet*, at <http://www.cocktailtimes.com/indepth/rtd/rtd.shtml> (last visited Oct. 29, 2003) (noting that the SMIRNOFF brand passed to Diageo as part of a global re-division of the ready-to-drink market in December 2001).

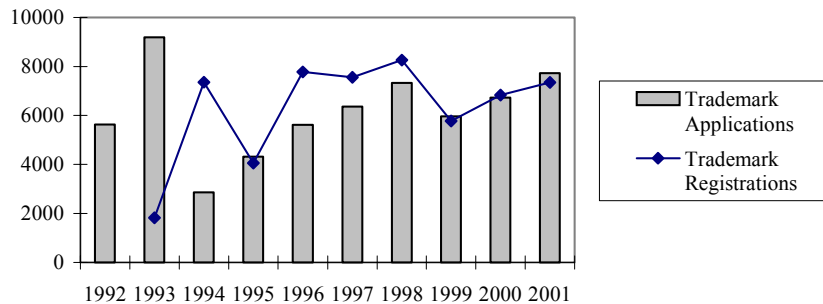
¹⁸¹ See Trademark Case Law, *supra* note 175, at 5.

¹⁸² 1999 Trademark Law art. 9(4) (1999) (Lat.).

¹⁸³ See WIPO, Madrid System for the International Registration of Marks, *List of Members*, at <http://www.wipo.org/treaties/registration/madrid/> (last visited Nov. 24, 2003).

Madrid Protocol. Indeed, some two-thirds of applications for registration of trademarks in Latvia in the years 2000 and 2001 related to marks to which the Madrid Agreement and Madrid Protocol apply.¹⁸⁴

Trademark Applications and Registrations in the Latvian Patent Office, 1992–2001



Source: Latvian Patent Office Annual Report, 2000–2001.

Applications may be received in the LPO in languages other than Latvian. The applicant has a three-month grace period in which to submit a Latvian translation of the application.¹⁸⁵

In trademark infringement proceedings, it has been noted that the standard that is applied by the Latvian courts is that of “actual confusion,” rather than the “likelihood of confusion.”¹⁸⁶ This is explained on the basis that “[t]here have been too few relevant court cases and no reliable research into the court practice to help

¹⁸⁴ See PATENT OFFICE 2001 REPORT, *supra* note 133, at 26–27.

¹⁸⁵ See ADVISORY GROUP, *supra* note 136, at 4.

¹⁸⁶ *Id.*; see also Gerd F. Kunze & Brigitte Lindner, Intellectual Property Protection in Latvia 44 (Oct. 3, 2000) (unpublished manuscript, on file with the author) (“In trademark infringement cases there seems to be a problem inasmuch as the courts apply a too narrow standard of confusing similarity. They apply the wrong rule (in the past applied by courts in some countries) that the more a trademark is known to consumers the less they will confuse it with another similar trademark.”).

For an example of the consideration of the “likelihood of confusion” by the Latvian courts, see *Societe des Produits Nestle S.A. v. Board of Appeal of the Patent Office of the Republic of Latvia*, Case No. C-2110/2 (Collegium Board of Civil Cases of the Dist. Ct. of Riga 2001), available at <http://www.kdk.lv/mainnews35.htm> (last visited Oct. 29, 2003) (copy translated by the KDK Patent Agency).

practitioners determine appropriate legislation and the application of the likelihood of confusion standards in the courts.”¹⁸⁷

Perhaps the shortage of trademark cases lies behind the 2002 dispute between two Latvian trademark agencies, the Tria Robit Agency and that of Marius Jakulis Jason.¹⁸⁸ Jason, a U.S. citizen and lawyer, maintains offices in Vilnius, Tallinn, and Riga. He provides legal services across the Baltics from his base in Vilnius, primarily in the area of intellectual property law. Since 1996, he has maintained the mark, A.A.A. BALTIC SERVICE COMPANY, on the Latvian register of trademarks.¹⁸⁹ In 2001, however, Tria Robit Agency, which also conducts business as AAA Tria Robit, commenced proceedings in the District Court of Riga to revoke Jason’s registration on the basis of non-use.¹⁹⁰ The district court initially granted an order revoking Jason’s registration in May 2002, but in September 2002 the decision was reversed by the Supreme Court.¹⁹¹ The appeal turned on the fact that the mark had actually been used in Latvia by Jason in advertising his practice and soliciting work from firms in Latvia.¹⁹² In the proceedings there might be detected not only a local bias on the part of the district court, but also evidence of the competitive culture which frustrates the development of an organized intellectual property bar in the Baltic states.

4. Advertising Law

The Latvian advertising law (“Advertising Law”)¹⁹³ regulates aspects of competition which interface with trademark law. For example, it is prohibited by the Advertising Law to “imitate the

¹⁸⁷ ADVISORY GROUP, *supra* note 136, at 5.

¹⁸⁸ *See* Jason v. Tria Robit Agency, Case No. PAC-613 (Riga Sup. Ct. 2002) (appeal of the decision of the Collegium Board of Civil Cases of the District Court of Riga), available at <http://www.kdk.lv/mainnews39.htm> (last visited Oct. 31, 2003) (copy translated by the KDK Patent Agency).

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ Advertising Law (2000) (Lat.), available at <http://www.ttc.lv/New/lv/tulkojumi/-E0048.doc> (last visited Sept. 28, 2003) (translated by the Translation and Terminology Centre).

advertising text, slogan, visual representation, audio, or other special effects of another advertiser without the consent of the advertiser or to carry out any other forms of activities which may create confusion or mislead in regard to the advertiser and the advertised goods or services.”¹⁹⁴

The Advertising Law also prohibits comparative advertising, which may create confusion between the advertiser and a competitor, or their respective firm names, trademarks, brand names, or other “distinguishing marks, goods or services.”¹⁹⁵ Comparative advertising which displays goods or services “as an imitation or copy of such good [sic] or services as there is a protected trademark for” is prohibited,¹⁹⁶ as it is if it “unfairly” uses the “name (firm name), trademark, brand name or other distinguishing marks of a competitor or the reputation of the designation of origin of a competing good.”¹⁹⁷

These provisions of the Advertising Law replaced earlier provisions from the Latvian competition law of 1997.¹⁹⁸ As part of the same package of reforms, a revised law on competition was adopted in 2001¹⁹⁹ (entering into force on January 1, 2002) (“2001 Competition Law”), which was intended to more closely track the competition rules of the European Union.²⁰⁰ The 2001 Competition Law prohibits unfair competition, including the “the utilisation or imitation of a legally used name, distinguishing marks or other features of another market participant . . . if such use may be misleading as regards the identity of the market participant” and “the imitation of the name, external appearance,

¹⁹⁴ *Id.* § 4(2)(7).

¹⁹⁵ *Id.* § 9(3)(3).

¹⁹⁶ *Id.* § 9(3)(6).

¹⁹⁷ *Id.* § 9(3)(5).

¹⁹⁸ For a discussion about the Latvian competition law of 1997, see for example, Europa – The European Union Online, Activities of the European Union Summaries of Legislation, *Latvia*, at <<http://europa.eu.int/scadplus/leg/en/lvb/e12104.htm>> (last visited Oct. 6, 2003).

¹⁹⁹ Competition Law (2001) (Lat.) [hereinafter 2001 Competition Law], available at <http://www.ttc.lv/New/lv/tulkojumi/E0026.doc> (last visited Sept. 16, 2003) (translated by the Translation and Terminology Centre).

²⁰⁰ *Id.* For example, the 2001 Competition Law nullified, after a six-month transitional period, a number of Cabinet Regulations relating to exemptions that were based on the competition law of 1997.

labelling, or packaging of goods produced or sold by another market participant, or the utilisation of trademarks, if such imitation or utilisation may be misleading as regards the origin of the goods.”²⁰¹

Fines for unfair competition may be imposed by the Competition Council, provided that they are not less than LVL 250 and do not exceed five percent of the “net turnover during the previous financial year” of the market participant which is the subject of the fine.²⁰² Civil complaints, including claims for the recovery of damages, may also be brought before the courts.²⁰³

Latvia is considered by many brand owners to be an important staging area for access to the Russian market.²⁰⁴ Stable and Western-oriented but with a sizable Russian minority and established trading links with Russia, Latvia has also benefited from the currency crisis which has affected Russia. Although the Baltic republics were shaken by the ruble crisis, they remain a haven for Russians who are worried about future financial crises. Latvia’s banks are flooded with Russian money and, because the Lat is a relatively valuable currency and more stable than the ruble, Latvia is seen as a more reliable financial center. There is a perception that brand owners undertake less risk when they establish distribution facilities in Latvia than they would in Moscow or St. Petersburg.²⁰⁵

5. Designs

The Law on Industrial Design Protection of the Republic of Latvia (“1993 Design Law”),²⁰⁶ which entered into force on May 4, 1993 as part of Latvia’s first wave of post-Soviet reforms in intellectual property law, provides the framework for the

²⁰¹ *Id.* § 18(3).

²⁰² *Id.* § 19.

²⁰³ *Id.* § 20.

²⁰⁴ See Nurton, *supra* note 8, at 28.

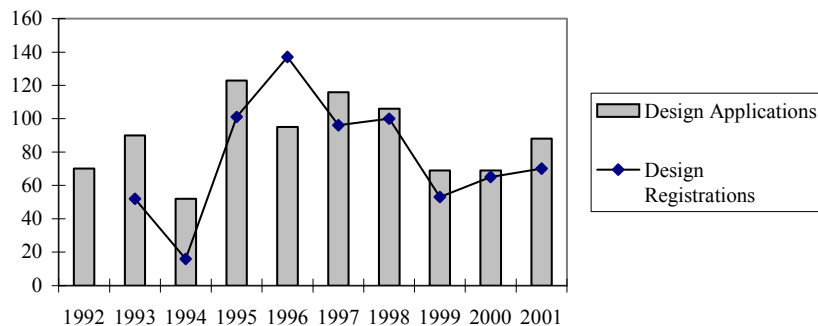
²⁰⁵ *Id.*

²⁰⁶ Law on Industrial Design Protection of the Republic of Latvia (1993) (Lat.) [hereinafter 1993 Design Law], available at http://159.148.90.160/eng/-likumi/dizainparaugu_aizsardziba.asp (last visited Sept. 16, 2003) (translated by the Latvian Patent Office).

protection of designs in Latvia. The 1993 Design Law gives the owner of a registered design, or “design patent,”²⁰⁷ certain exclusive rights in the external appearance of industrial articles for an initial period of five years.²⁰⁸ The protection afforded by the 1993 Design Law may be extended for up to two consecutive five-year terms.²⁰⁹

Applications for design patents represent only a small portion of the activity of the LPO. The historical trend for applications essentially follows the pattern for trademarks.

**Industrial Design Applications and Registrations in the
Latvian Patent Office, 1992–2001**



Source: Latvian Patent Office Annual Report, 2000–2001.

The LPO does not examine design patents but merely assesses the compliance of an application with the required formalities. If the application meets the requirements of the LPO, it proceeds to publication, and interested persons may commence opposition proceedings within six months of the date of publication.²¹⁰

²⁰⁷ *Id.*

²⁰⁸ *See id.* art. 11(1).

²⁰⁹ *See id.* art. 11(2).

²¹⁰ *See id.* art. 8.

6. Trade Secrets

Trade secrets were not recognized or protected in the Soviet Union until the 1990s.²¹¹

Latvia initially protected trade secrets through the law on competition. In 2002, Latvia promulgated its new Commercial Law (*Komerclikums*),²¹² which updated the treatment of trade secrets to address the requirements of part III of the TRIPS Agreement.²¹³ Section 19 of the Commercial Law provides:

A commercial secret comprises such things of an economic, technical or scientific nature associated with the undertaking of a merchant, and information which is recorded in writing or by other means, or is not recorded, which have an actual or potential financial or non-financial value, and which, by their coming into the disposition of another person, may cause losses to the merchant, and in relation to which a merchant has taken reasonable measures to preserve secrecy.

A merchant has exclusive rights to commercial secrets.

A merchant has the right to request the protection of commercial secrets, as well as compensation for losses, which have been caused by the illegal disclosure, or utilization of the commercial secrets.²¹⁴

The express provisions reserving “exclusive rights to commercial secrets” are unusual. The rights in relation to commercial secrets are not enumerated. The provisions are accordingly very wide in their application; even wider than the best known model legislation, the Uniform Trade Secrets Act (“UTSA”) in the United States. The UTSA is directed toward the

²¹¹ See P. Bradley Limpert & Oxana Iatsyk, *International Protection of Trade Secrets*, at 35 (2001), at http://www.gowlings.com/resources/publicationPDFs/ip_tradesecrets.pdf (last visited Oct. 22, 2003).

²¹² Commercial Law (2002) (Lat.), available at <http://www.ttc.lv/New/lv/-tulkojumi/E0040.doc> (last visited Oct. 22, 2003) (translated by the Translation and Terminology Centre).

²¹³ *Id.*

²¹⁴ *Id.*

misappropriation of trade secrets, and spells out the circumstances where a misappropriation may be found to have occurred. The Latvian legislation is more blunt in its approach: although it refers to the “illegal disclosure or utilisation” of trade secrets, the conditions of legality or illegality cannot be readily ascertained from the statute.

One consequence of the construction of the Latvian statute is that merchants are expressed to have “exclusive rights” in relation to sub-patentable or unpatented inventions which are commercial secrets. The result is to confer upon the merchant a level of protection for commercial secrets which exceeds that granted for patented inventions.

An exception is in relation to commercial agents, which are subject to special statutory obligations regarding commercial secrets. Section 60 of the Commercial Law provides for a continuing obligation restraining commercial agents, following the termination of their commercial agency agreements, from using or disclosing to third parties any commercial secrets which are “entrusted” to them or of which they have “become aware in relation to his or her activities for the benefit of the principal.”²¹⁵

The requirement of article 39(2) of the TRIPS Agreement is that member states provide a mechanism for persons to prevent “information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices.”²¹⁶ The term, “contrary to honest commercial practices,” is clarified in footnote 10 of the TRIPS Agreement to mean, “breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.”²¹⁷ This approach applies to information which meets three conditions:

- (1) It is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components,

²¹⁵ *Id.*

²¹⁶ See TRIPS Agreement, *supra* note 9, art. 39(2).

²¹⁷ *Id.* art. 39(2) n.10.

generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

(2) It has commercial value because it is secret.

(3) It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.²¹⁸

This definition is comparable to that used in North American legislation, including the model UTSA.²¹⁹ The Canadian Uniform Trade Secrets Act (like the USTA, a model developed by experts in different federal jurisdictions to promote uniformity but always subject to the sovereignty of the legislature in each jurisdiction to choose whether to adopt the act in part, in whole, or at all) creates an exception to clarify when responsibility arises, providing: “A trade secret is not acquired by improper means if it is developed independently or arrived at by reverse engineering.”²²⁰

Swedish legislation, which has wider application than the North American model laws, appears to have been a model for the Latvian statute;²²¹ but it is aimed at preventing “unwarranted infringements,” whereas the Latvian statute appears to go further. The Latvian legislation, if it is intended to have similar results, could be amended to incorporate express carve-outs in the same manner as the North American laws and to more closely track the requirements of the TRIPS Agreement.

An overlapping layer of protection is also provided by the 2001 Competition Law, which identifies and prohibits as unfair competition “[t]he acquisition, utilisation or distribution of information, which includes the commercial secrets of another market participant, without the consent of such participant.”²²²

²¹⁸ *Id.*

²¹⁹ See UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985).

²²⁰ TRADE SECRETS ACT § 6(2) (Unif. Law Conference of Canada 1989), available at <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1t1> (last visited Oct. 23, 2003).

²²¹ See Act on the Protection of Trade Secrets (1990) (Swed.), available at http://www.certh.gr/cordis/t_en/p/se/p_r51_en.asp-actid=519.htm (last visited Oct. 23, 2003).

²²² 2001 Competition Law § 18(3)(4) (2001) (Lat.).

This provision is not fully consistent with the requirements of article 39(2) of the TRIPS Agreement, either. In particular, the 2001 Competition Law does not require an inquiry to determine whether any of the prohibited acts were undertaken “in a manner contrary to honest commercial practices,”²²³ but only whether there has been consent. This shortcoming in the drafting has the clear capacity to affect what are otherwise proper competitive practices.

7. Integrated Circuits

Latvia adopted the Law on Protection of Topographies of Semiconductor Products in March 1998. The law is based upon Council Directive 87/54/EEC²²⁴ on the legal protection of topographies of semiconductor products of December 16, 1986.

8. Plant Breeders' Rights

The rights of plant breeders are protected in Latvia by the 1993 Law on the Protection of Plant Varieties. The law was amended to update its administrative provisions effective January 1, 2000.²²⁵

C. Criminal and Administrative Law

Offenses relating to infringement of intellectual property rights may be prosecuted under either the criminal or administrative law of Latvia. It is not always clear whether a case of alleged infringement should be pursued by the state organs through the administrative or criminal processes; and, in practice, the decision appears to be a function of the value of the goods involved.²²⁶ In order to commence a criminal action, the state needs to show criminal intent; with the result that, in the absence of evidence of intent, the police may be unable to act under the Latvian Criminal Law to seize counterfeit goods.²²⁷ To take the example of a video rental shop which has received pirated video products to replenish

²²³ TRIPS Agreement, *supra* note 9, art. 39(2).

²²⁴ 1987 O.J. (L 24) 36.

²²⁵ See Pētersona Patents, *Amendments in the “Law on Protection of Plant Varieties”*, at http://www.petpat.lv/recentd/plant_varieties.htm (last visited Oct. 23, 2003).

²²⁶ See ADVISORY GROUP, *supra* note 136, at 6.

²²⁷ See generally Ceica & Vasermane, *supra* note 135.

its stock, if the shop's proprietor was deceived into purchasing the illegal videos, then the police would be unable to exercise their powers under the criminal law to seize and, at the direction of the courts, destroy those copies.

The problem is not necessarily addressed by directing proceedings through the administrative process. While article 204.6 of the Latvian Administrative Offenses Code provides for a fine of up to LVL 250 for unauthorized use of copyrighted works, it does not provide for the confiscation of the subject property.²²⁸ Rather, under the present system, the police and state prosecutors are unable to act and the rights-owner is left with their civil remedies.

The dual system of administrative and criminal penalties has also resulted in some difficulties. For example, Latvia presently lacks a central database to assist in the efficient prosecution of actions. The result is that the prosecutors are not always aware that an administrative prosecution is being pursued, so that criminal sanctions are brought to bear at the same time as administrative proceedings.²²⁹

1. Criminal Law

The Latvian Criminal Law provides for a number of offenses related to intellectual property.

a) Violation of Invention Rights

Section 147 of the Criminal Law makes it an offense for a person to, among other things, intentionally disclose an invention without the consent of the "owner of the invention right prior to the

²²⁸ See, e.g., INT'L INTELL. PROP. ALLIANCE, 2003 SPECIAL 301 REPORT 529 ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT, available at http://www.iipa.com/-special301_TOCs/2003_SPEC301_TOC.html (last visited Oct. 23, 2003) (explaining that article 204.6 of the Latvian Administrative Offenses Code provides only for a monetary fine as penalty for unauthorized use of copyrighted materials).

²²⁹ In-person interview by the author with special prosecutors in Riga, Latvia (Sept. 10, 2002).

application for patent.”²³⁰ This provision is both unusual and broad in the way that it criminalizes speech about technical developments. Presumably, the clause is intended to preserve the ability of the “owner of the invention right” to make an application for a patent; however, if that really is the intention of the legislators, the provision is unnecessary.²³¹ Breaches of confidence by certain confidants may already have a criminal character by virtue of section 145 of the Criminal Law, which prohibits the intentional disclosure of “confidential information of another person” by a person who is required by their position or employment to maintain such information in confidence.²³² The penalty for violation of section 145 is custodial arrest, community service, or a fine of up to twenty times the minimum monthly wage.²³³ This provision already supplements the requirements of article 5(5) of the 1995 Patent Law, which requires *both* employees and employers, where an employee has made an invention in the course of his or her employment, to “refrain from any disclosure of the essence of the invention before a patent application has been filed.”²³⁴

The ability of an inventor to apply for a patent, if details of the invention are disclosed to the public, is preserved by article 2(5) of the 1995 Patent Law in certain circumstances.²³⁵ Disclosure of an invention is not a bar to a patent application made within twelve months of the date of a disclosure if the disclosure is made by the inventor or by “a third party who has directly or indirectly obtained this information from the inventor.”²³⁶ The right to make the application, in the case of an invention made by an employee in the course of his or her employment, belongs to the employer.²³⁷

²³⁰ Criminal Law § 147(1) (2000) (Lat.), available at <http://www.ttc.lv/New/lv-tulkojumi/E0032.doc> (last visited Oct. 23, 2003) (translated by the Translation and Terminology Centre).

²³¹ *Id.*

²³² *Id.* § 145.

²³³ *Id.*

²³⁴ 1995 Patent Law art. 5(5) (Lat.).

²³⁵ *Id.* art. 2(5).

²³⁶ *Id.*

²³⁷ *Id.* art. 5(1).

By controlling the unauthorized disclosure of an invention, without distinguishing between information which is misappropriated or obtained through otherwise legal means, section 147 of the Criminal Law has the potential to restrict valuable debate and discussion about technical developments.²³⁸ The provision criminalizes disclosures prior to the making of a patent application; however, an inventor may delay the making of a patent application indefinitely if the invention is not implemented or publicly disclosed, extending the period in which disclosures by other persons may be subject to criminal penalties.

In cases of independent invention, the 1995 Patent Law gives priority to the inventor who is first to file their application.²³⁹ It is often the case that competitors are working simultaneously to achieve technical developments and are generally aware of the activity of their competitors. If an inventor were to publish details of an invention which they were aware had been developed at nearly the same time by a competitor, in order to make the technology generally available, then the application of section 147 could become problematic. Who is the rights owner in such circumstances? The 1995 Patent Law allows each inventor to make an application for a patent; however, the first-to-file rule will control the priority of claims.²⁴⁰ How is a determination made that a right has arisen or that the subject of the claimed invention is not patentable? The 1995 Patent Law sets the standards for the grant of patents, but the Criminal Law is less sophisticated in its approach to pre-application disclosures; and such uncertainty is especially undesirable when violators may be subject to up to three years imprisonment or sizeable fines.

Section 147 may also stifle useful debate and discussion. It is not clear whether the legislators intended to prevent only disclosures to the public at large, or whether they expected section 147 to also control private discussions. On any construction, it may criminalize policy discussions relating to inventions for which a patent application has not yet been filed. To the extent that there is tension between the constitutional obligations of the state to

²³⁸ Criminal Law § 147 (2000) (Lat.).

²³⁹ See 1995 Patent Law art. 4(2).

²⁴⁰ See *id.*

protect patent rights and freedom of speech, it may be preferential to resolve it, not through the Criminal Law, but by letting inventors take their own technical and commercial measures to maintain their inventions in secrecy. Such an approach would also seem to be more consistent with Latvia's obligations under article 39 of the TRIPS Agreement.

b) Infringement of Copyright

Intentional infringement of copyright or neighboring rights is punishable under section 148 of the Criminal Law if it infringes "the rights of the author to publishing or communication and to use of the work" or "the rights of the owners of neighbouring rights."²⁴¹ Repeated violations of section 148 or violations associated with participation in conspiracies are subject to enhanced penalties.²⁴² In any case, confiscation of property is a punishment at the discretion of the court.²⁴³

The formulation of section 148 is unsatisfactory because it is not clearly aligned with the provisions of the 2000 Copyright Law. Under the 2000 Copyright Law, the uses of works which are reserved to authors are exhaustively enumerated in article 15(1), so the compound formulations of "publishing . . . and . . . use of the work" or "communication and . . . use of the work" are redundant and confusing.²⁴⁴ The reference to "publishing" is not in alignment with the provisions of article 15(1); apparently being derived from the definition of "making available a work" in the 1993 Copyright Law, a concept which was conceptually broader than "publishing" and encompasses it.²⁴⁵ While the author's right to "make the work available to the public by wire or by other means" has been amended, but preserved, in order to comply with article 8 of the WIPO Copyright Treaty, the definition supporting its interpretation has been dropped in the 2000 Copyright Law.²⁴⁶ The 2000 Copyright Law now focuses on the author's rights of

²⁴¹ Criminal Law § 148(2).

²⁴² *Id.*

²⁴³ *Id.* § 148.

²⁴⁴ 2000 Copyright Law art. 15(1) (Lat.).

²⁴⁵ 1993 Copyright Law art. 1 (Lat.).

²⁴⁶ 2000 Copyright Law art. 15(1).

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communication to the public²⁴⁷ and distribution to the public.²⁴⁸ For clarity in the Criminal Law, it would be preferable for section 148 to be drafted in a manner which is more closely aligned with the 2000 Copyright Law. The reference to “neighboring rights” in section 148²⁴⁹ is more easily determined by reference to chapter VIII of the 2000 Copyright Law, which elaborates them more clearly as “related rights.”

By linking “use” of a work to “publishing or communication,”²⁵⁰ section 148 does not address directly infringement of an author’s right to control the reproduction of works. It would be helpful for users, rights-holders, prosecutors, and the courts if the interface between the Criminal Law and the 2000 Copyright Law were to be drawn with greater precision in the future.

c) Benefiting from Infringement of Copyright

Section 149 of the Criminal Law makes it illegal in Latvia to “[commit] unlawful sale of objects of copyright and neighbouring rights, or [derive] other financial benefit from the use of such objects, as are published, communicated, performed in public or otherwise used, infringing copyright or neighboring rights.”²⁵¹

Repeated violations of this section, or violations associated with participation in conspiracies, are subject to enhanced penalties.²⁵² As in the case of section 148, the court is able to order confiscation of property in addition to other penalties.²⁵³

The drafting of this provision creates similar difficulties to those discussed above in connection with section 148 of the Criminal Law. Essentially, the offense relates to the “unlawful sale” or derivation of “other financial benefit” from the use of an object of copyright or neighboring rights that infringes copyright

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ Criminal Law § 148(1).

²⁵⁰ *Id.*

²⁵¹ *Id.* § 149(1).

²⁵² *See id.* § 149(2).

²⁵³ *See id.* § 149.

or neighboring rights.²⁵⁴ The concept of “use” ought, again, to be interpreted by reference to article 15(4) of the 2000 Copyright Law.

Section 149 relates, more clearly than section 148, to the sale of illegal copies of works, the public performance of movies, and the rental or unauthorized lending of copyright works.²⁵⁵ It is not clear, however, whether the private reproduction of a computer program, to take an example of an infringing act which is prevalent in Latvia, would confer a “financial benefit” sufficient to attract the operation of section 149.

Activities undertaken in support of infringements are also captured by section 149. While the creation of facilities for the reproduction of protected works for use by others—for example, by the creation of master media for the production of records or CDs—may properly fall within section 149(1), an additional offense is created by section 149(3) for the acquisition of the referenced objects for the purposes of sale, storage, or concealment.²⁵⁶

d) Use of Trademarks

Section 206 of the Criminal Law makes it a criminal offense to use or counterfeit “a trademark or other distinguishing mark for the goods or services of another person.”²⁵⁷ The same provision makes it an offense to knowingly use or circulate “a counterfeit mark.”²⁵⁸ Presumably, the intention of the *Saeima* was not to criminalize the wearing of ADIBAS running shoes, if their markings caused confusion with the ADIDAS mark, so the meaning of “use” in this section should be taken to be equivalent to “use for commercial purposes.” As a leading Latvian author on intellectual property law notes:

This norm is not questionable as far as it envisages criminal responsibility for forgery of a trade mark for its intended

²⁵⁴ *Id.* § 148.

²⁵⁵ *See id.* §§ 148–49.

²⁵⁶ *See id.* § 149(3)

²⁵⁷ *Id.* § 206(1).

²⁵⁸ *Id.*

use or distribution, but it is questionable why this law envisages criminal responsibility for use of any other person's trade mark. It seems that this clause is in conflict with Law on Trade Marks, Article 28 of which provides for unlawful uses of trade marks to have civil responsibility and points out that the persons responsible are subject to administrative or criminal responsibility only if the breach is done with the intention of doing it. This norm of the Criminal Law is also to some extent in conflict with TRIPS, Part II, Articles 42–49, on the means of protection of civil rights. The TRIPS Agreement, Article 61, determines that participating countries have to ensure criminal responsibility if what is happening in such cases is intentional forgery of trade marks on a commercial scale.²⁵⁹

In fact, article 61 of the TRIPS Agreement does not require enforcement measures found in criminal laws to be directed to forgeries only on a “commercial scale.”²⁶⁰ Rather, the provision requires criminal laws to address such forgeries as a minimum position.²⁶¹ In this light, section 206 of the Criminal Law could be drafted with greater precision, to clarify that the legislature's intention is to address commercial crimes rather than those associated with “use” in its wider sense.

e) Unauthorized Acquisition of Software

The unauthorized reproduction of “computer software, files, or databases stored in the memory of a computer system” is punishable by virtue of section 242 of the Criminal Law, but only if “substantial harm is caused thereby.”²⁶² Because all software is stored “in the memory of a computer system” to facilitate reproduction, any unauthorized copying of computer software, files, or databases could be captured by this provision; however, the threshold of “substantial harm” creates difficulties in two respects.²⁶³ First, it does not restrict the unauthorized reproduction

²⁵⁹ POĻAKOVŠ, *supra* note 68, at 68.

²⁶⁰ TRIPS Agreement, *supra* note 9, art. 61.

²⁶¹ *Id.*

²⁶² Criminal Law § 242(1).

²⁶³ *Id.*

of computer software, files, or databases where the harm is not “substantial.” Second, while the harm that is relevant for section 242 would presumably be the commercial harm experienced by the owner of the rights in the computer software, files, or databases, it is not clear whether the court adjudicating the charge should look also to other types of harm. If a person were to copy the client list of a firm, for example, it may have economic consequences for the owner of the list; but it may also impact upon the privacy rights of individuals.

It would seem helpful for the Latvian government to clarify at what stage “harm” becomes “substantial,” and therefore criminal, rather than leaving the matter solely to the interpretation of the criminal courts. At a minimum, article 61 of the TRIPS Agreement requires member states to use their criminal laws to address copyright infringement which is “on a commercial scale.”²⁶⁴ The Latvian formulation ought to be clarified by reference to this minimum requirement.

f) Copy Protection and Smart Cards

Section 243 of the Criminal Law makes it an offense for a person, without authorization, to: modify, damage, or destroy information stored in an “automated computer-based system”; knowingly enter “false information into an automated system”; or knowingly damage or destroy “information bearing devices, computer software or protection systems, if substantial harm is caused thereby.”²⁶⁵ This provision protects copy protection systems and smart cards, and controls acts such as password cracking. As with section 242, it is not clear from the drafting when “substantial harm” may be caused, making further clarification desirable. From the standpoint of intellectual property law, the significance of section 243 is that it imports into Latvian law a prohibition on efforts to circumvent copy protection and digital rights management systems.

²⁶⁴ TRIPS Agreement, *supra* note 9, art. 61.

²⁶⁵ Criminal Law § 243.

g) Other Administrative Approaches

In order to control the spread of illegal copying, the Latvian National Radio and Television Board has provided for the revocation of licenses from any broadcasters which are unable to demonstrate that they are appropriately licensed to show the films which they broadcast.²⁶⁶ The Latvian Radio and Television Law permits broadcasters to use programs, films, broadcasts, stories, and other copyrighted works of other authors subject to the provisions of the 1993 Copyright Law and international agreements binding on Latvia.²⁶⁷ Amendments to the Radio and Television Law in 2001, however, failed to take account of the repeal of the 1993 Copyright Law and its replacement by the 2000 Copyright Law.

2. Procedure

Latvia lacks an effective procedure for proving copyright infringement in mass piracy cases. According to Raili Maripuu, a specialist on Eastern European piracy working with the International Federation of Phonograph Industries (“IFPI”), the Latvian procedure for handling pirated goods is cumbersome at best.²⁶⁸ The Latvian procedure requires every CD in a seized cache to be inspected, whether there are one or 10,000 copies, which unnecessarily increases the enforcement resources in proportion to the scale of the putative infringement. Maripuu contrasts the situation in Estonia, where the Estonian Organization for Copyright Protection, a recording industry-sponsored agency, can conduct a visual inspection to provide evidence and does not have to undertake forensic examination of every copy. She also points out that, in England, the British Phonographic Industry Ltd (“BPI”) provides witness statements in mass piracy cases to

²⁶⁶ See Info. Tech. (IT) Landscape in Latvia, *Legal Environment*, at http://www.american.edu/carmel/zk5687a/Legal_Environment.html (last visited Oct. 28, 2003).

²⁶⁷ Radio and Television Law § 17(6) (2003), available at <http://www.policy.hu/myagmar> (last visited Oct. 23, 2003) (translation).

²⁶⁸ Raili Maripuu, *Collective Management of Rights – Case Studies*, Sept. 11–12, 2002 (slide show materials presented at a UN/ECE training seminar for judges, prosecutors, and police in Riga, Latvia).

confirm that they have examined some of the CDs and checked with the rights-holders to determine whether licenses have been granted. The problems of gathering evidence are recognized by officials from the State Prosecutors' Office and the Ministry of the Interior, and work is underway to simplify the current procedures.²⁶⁹

In the absence of independent expert evidence, the Latvian police appear reluctant to seize goods on the evidence of a putative rights-owner.²⁷⁰ In addition, the Criminal Law does not always provide for the seizure of counterfeit materials and the means of their reproduction, although some are confiscated by the discretion of the court.²⁷¹ The 2000 Copyright Law contains a presumption of copyright ownership in favor of a rights-holder; however, it does not apply to holders of neighboring rights, such as producers and performers.²⁷² In Estonia, by contrast, the burden of proof has been shifted by the copyright law onto the accused infringers to establish that they have received all necessary permissions from the relevant rights-owners.²⁷³

D. Civil Remedies

The Latvian code of civil procedure allows for certain pre-trial relief, including preliminary injunctions and orders for the preservation of evidence.²⁷⁴ These aspects of the code of civil procedure resulted from an overhaul of the civil procedure law in 1998; Latvia having previously relied upon the 1963 Soviet code, as amended.²⁷⁵ The discrete normative acts also provide civil remedies for specified acts of infringement or unfair competition.

²⁶⁹ See ADVISORY GROUP, *supra* note 136, at 7.

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See Maripuu, *supra* note 268.

²⁷³ See *id.*

²⁷⁴ See generally Kalvis Torgāns, *Latvian Contract Law and the EU*, 6 JURIDICA INT'L 38 (2001) [hereinafter Torgāns, *Contract Law*], available at http://www.juridica.ee/get_doc.php?id=300 (last visited Oct. 23, 2003).

²⁷⁵ See *id.* at 40.

IV. INSTITUTIONAL REFORM

Latvia has established a number of key institutions to address intellectual property issues. Some Latvian legal scholars have been critical of the lack of a unified approach to intellectual property issues in the country, noting that the different areas of intellectual property are under the authority of different government agencies.²⁷⁶ In 2001, however, the Cabinet of Ministers approved a “Strategic Development Program on Advancement and Protection of Intellectual Property, 2001–2005” to develop inter-ministerial coordination.²⁷⁷ The Advisory Group noted in its final report that the Ministry of Culture had also contributed a 2001–2002 Strategic Action Plan to Ensure Protection of Copyright and Neighboring Rights, 2001–2002 as part of the same process.²⁷⁸ In practice, however, many coordination efforts are being delayed by a lack of funding arrangements.²⁷⁹

A. Institutions

Latvia’s enforcement infrastructure is composed of the following key institutions.

1. Economic Police

The Economic Police is a distinct police force with two permanent staff members dedicated to intellectual property infringement.²⁸⁰ They are able to draw for support on other areas of the Economic Police and the Center of Expertise of the Ministry of the Interior. When taxation issues arise, the Financial Police may also become involved; however, their efforts are generally concentrated on crimes involving tobacco and alcohol, which attract the greatest revenue for the state.²⁸¹

²⁷⁶ See 1 INFORMACIJAS UN KOMUNIKACIJU TIESĪBAS [INFORMATION AND COMMUNICATIONS LAW] 206 (Riga, Biznesa augstskola Turība 2002).

²⁷⁷ See ADVISORY GROUP, *supra* note 136, at 17.

²⁷⁸ *Id.*

²⁷⁹ Statement made by the Latvian state prosecutors (unpublished manuscript, on file with the state prosecutors).

²⁸⁰ ADVISORY GROUP, *supra* note 136, at 18.

²⁸¹ *Id.*

Despite their relatively small numbers, the Economic Police have been very active. In 2000, the Economic Police seized:

- 19,556 audio CDs for a total value of LVL 58,668
- 865 software CDs for a total value of LVL 2,595
- 3,658 play CDs for a total value of LVL 10,974
- 43 DVDs for a total value of LVL 860
- 23,662 videocassettes for a total value of LVL 59,155
- 6,656 audiocassettes for a total value of LVL 9,984²⁸²

Within the Economic Police, a dedicated unit has been formed to deal with intellectual property issues. The state promised additional resources to increase the staff of the intellectual property unit of the Economic Police from two to ten in the 2002–2003 period.²⁸³

2. State Customs Administration

The activity of the State Customs Administration (“Customs”) in supporting intellectual property enforcement has been hampered by a lack of procedures for cooperation with the Economic Police.²⁸⁴ Although the Latvian Code of Criminal Procedure allows Customs to initiate criminal inquiries in relation to the transport of counterfeit goods, in the absence of a defined procedure no action has been taken.²⁸⁵ As late as 2001, Customs also reported that it does not collaborate actively with the state police; in practice, because no procedures have been elaborated.²⁸⁶ Even so, in 2001, Customs detained goods worth US\$1.2 million.²⁸⁷

Steps are being taken to raise the level of understanding of Customs officials. Specialized training is being provided; for example, a seminar was held in Riga in September 2002, under the auspices of the Ministry of Culture, to help prosecutors, judges,

²⁸² *Id.*

²⁸³ *See id.*

²⁸⁴ *See id.* at 12.

²⁸⁵ *See id.* at 8–10.

²⁸⁶ *See id.* at 9.

²⁸⁷ *See* Correspondence from Ainars Lagons, Intellectual Property Rights Protection Unit of Latvian State Customs Administration, to Simon Helm (Sept. 4, 2002) (on file with the author).

and customs officials improve their understanding of intellectual property issues (“Training Seminar”).²⁸⁸ Such programs are of a high quality: speakers at the Training Seminar included a specialist from the state prosecutors’ office, a representative from IFPI, intellectual property counsel from a multinational company with significant brands, a German judge with expertise in intellectual property issues, and a local lawyer who represents many foreign rights-owners in their infringement claims.²⁸⁹

Additional resources are clearly needed to enable Customs to store and manage seized goods. Beginning in 2004, Customs will have the responsibility to manage a section of the border of the European Union with Russia and Belarus, and significant investment will be needed before then to ensure that the Customs organ is able to perform its functions at the highest professional level. Since September 1, 1999, a specialized Intellectual Property Protection Unit has been established within the Enforcement Division of Customs.²⁹⁰ To strengthen their capacity, two additional positions were added in 2002 to the unit.²⁹¹ In addition, to highlight the importance of border enforcement measures to protect intellectual property rights, within each shift of the customs control group an official has been designated to specialize in the issue.²⁹² An electronic database of trademarks, with descriptions of protected goods and contact information for rights-holders, was expected to be ready by the end of 2002 in order to enhance the resources available to support Customs officers.²⁹³

In the European Union, there are two principal Community instruments for controlling the import of counterfeit goods. The first is Council Regulation 3295/94 of December 22, 1994, which prescribes common measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights.²⁹⁴ The second

²⁸⁸ The author attended the training seminar in person.

²⁸⁹ *See id.*

²⁹⁰ *See* Kunze & Lindner, *supra* note 186, at 105.

²⁹¹ *See* Correspondence from Ainars Lagons, *supra* note 287.

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ 1994 O.J. (L 341).

is Commission Regulation 1367/95 of June 16, 1995, which provides for the implementation of the Council Regulation.²⁹⁵

The main special instrument relating to intellectual property and border control in Latvia was the Decree of the Cabinet of Ministers of February 2, 1999, which entered into force on July 1, 1999 (“1999 Regulation”).²⁹⁶ The 1999 Regulation was replaced in 2001 with a new Cabinet of Ministers regulation on customs measures for the protection of intellectual property (“2001 Regulation”).²⁹⁷ Although it was intended to remedy some of the shortcomings in the previous decree, the 2001 Regulation was roundly criticized by at least one practitioner as “one step forward, two steps back.”²⁹⁸ The particular difficulty appeared to be:

First, the answer to the main question—whether the right holder must submit a case to the court for further consideration of the merits—is not provided for in the Regulation. Second, it is not clear under what head an applicant who applies for seizure of goods is to be held liable for compensation in a case when goods appear after all not to be counterfeit. In addition, the terms for the procedure for detention of alleged counterfeit goods and further decision on seizure are not specified. There are also other important issues that the Regulation fails to regulate.²⁹⁹

The new regulation is an improvement on the old regulation, at least in that it enables action by licensees. It also more clearly specifies the proof of rights, whether by ownership or license, that

²⁹⁵ 1995 O.J. (L 133).

²⁹⁶ Regulations on the Customs Control Measures for the Protection of Intellectual Property, Cabinet Reg. 43 (Feb. 9, 1999) (Lat.), available at <http://www.ttc.lv/New/lv/tulkojumi/E0196.doc> (last visited Oct. 28, 2003) (translated by the Translation and Terminology Centre).

²⁹⁷ Procedures for the Performance of Customs Control Measures for the Protection of Intellectual Property, Cabinet Reg. No. 325 (July 24, 2001) (Lat.) [hereinafter 2001 Regulation], available at <http://www.ttc.lv/New/lv/tulkojumi/E0250.doc> (last visited Oct. 28, 2003) (translated by the Translation and Terminology Centre).

²⁹⁸ Vladimir Anohin & Victoria Streltsova, *Latvia: IP Enforcement Steps Up*, MANAGING INTELL. PROP., LITIG. Y.B. 2001 28, 28, available at <http://www.-legalmediagroup.com/mip/includes/print.asp?SID=1177> (last visited Oct. 24, 2003).

²⁹⁹ *Id.* at 28–29.

is required from an applicant seeking the assistance of Customs in relation to the transit of purported counterfeit goods.

In common with the 1999 Regulation, the 2001 Regulation provides an exemption for “non-commercial goods that are in the personal luggage of natural persons and do not exceed the quantity specified with respect to tax relief.”³⁰⁰ By the law, On Customs Duty (Tariffs), which has been in force since July 3, 2002, natural persons are permitted to transport up to ten copies of media carrying material which is the subject of copyright or neighboring rights.³⁰¹ Although the intention is to set a *de minimis* level and to allow Customs officers to seize CDs and video tapes which are being transported in bulk,³⁰² the exemption nevertheless can result in the transportation of high value products for non-commercial purposes, contrary to the provisions of the TRIPS Agreement. Under the 1999 Regulation, travelers were allowed to transport up to three kilograms of goods, which in the case of CDs would allow for a large number of goods to be imported.³⁰³

Latvia has organized some high profile events to publicize its work to control the import of pirated products. For example, in December 2001, the Latvian government took part in the public destruction of cigarettes confiscated in a number of incidents.³⁰⁴

A 2001 EU report on Latvia’s candidacy took note of certain steps taken to address the need for a more effective customs administration:

The implementation capacity at the border and in the judiciary has been somewhat strengthened, and training for staff of the law enforcement bodies and the judiciary has been carried out The Establishment of the Intellectual Property Supervision and Co-ordination Council as a co-ordinating institution facilitating co-operation among state institutions, municipalities and NGOs dealing with the

³⁰⁰ 2001 Regulation, Cabinet Reg. No. 325 ¶ 4.

³⁰¹ See Correspondence from Ainars Lagons, *supra* note 291.

³⁰² See 2001 Regulation, Cabinet Reg. No. 325 ¶ 4.

³⁰³ See Kunze & Lindner, *supra* note 186, at 108.

³⁰⁴ See Danil Smirnov, *Can You Spare a Smoke, Pal? Large Amount of Illegal Cigarettes Publicly Destroyed in Latvia*, TELEGRAF, Dec. 11, 2001, available at http://www.cipr.org/activities/latvia_destruct/telegraf.htm (last visited Oct. 28, 2003).

issues of intellectual property rights protection has started. At the regional level, customs officers were appointed to each of the 5 regional anti-smuggling divisions to strengthen the enforcement of intellectual property rights.³⁰⁵

To address the risks of corruption in Customs, a code of conduct was promulgated in 2001.³⁰⁶ Latvia was one of the first countries to adopt a code of conduct for customs officials following the Arusha Declaration of the World Customs Organization (“WCO”), and the Latvian code is based on the WCO’s model.³⁰⁷

3. Ministry of Welfare

The Ministry of Welfare is responsible for licensing the distribution of pharmaceuticals.³⁰⁸ It has the ability to require certificates of origin from licensed companies, in order to establish the place of manufacture of pharmaceutical products imported to Latvia.³⁰⁹ There have been disturbing reports from Russia of counterfeit pharmaceuticals, and controls on pharmaceuticals provide an important interface between intellectual property law and consumer safety issues.³¹⁰

³⁰⁵ 2001 Regular Report on Latvia’s Progress Towards Accession, SEC(2001) 1749.

³⁰⁶ NAT’L CUSTOMS BOARD OF THE STATE REVENUE SERVICE, CUSTOMS OFFICIALS OF LATVIA CODE OF CONDUCT (2001), *available at* <http://www.vid.gov.lv/eng/-2vidinf/docs/208-01.pdf> (last visited Oct. 28, 2003).

³⁰⁷ *See id.*

³⁰⁸ Regulations for Licensing of Certain Types of Entrepreneurial Activities, Cabinet Reg. 348 (1999) (Lat.), *available at* http://www.baltictrade.lv/files-/special_conditions.html (last visited Dec. 3, 2003) (translated by the Translation and Terminology Centre).

³⁰⁹ *See* ADVISORY GROUP, *supra* note 136 at 14.

³¹⁰ *67% of Counterfeit Pharmaceuticals in the RF Are Imitations of Domestic Products – RF Ministry of Health*, INTERFAX, Oct. 9, 2001, *available at* <http://www.cipr.org-/activities/aipm/interfax.htm> (last visited Dec. 3, 2003) (unofficial translation).

4. Courts

Latvia's court system is organized on the basis of the 1993 Law on Judicial Power,³¹¹ as amended. There are three main tiers of courts:

- district courts, which have jurisdiction in Latvia's six administrative districts and act as the courts of first instance in all civil, criminal, and administrative matters
- regional courts, which act as appellate courts to review the decisions of the district courts and as courts of first instance in the more limited circumstances provided by the Civil Code, including intellectual property cases³¹²
- the Supreme Court, which is the final court of appeal and is divided into the Senate and the Houses of Court³¹³

Judges undergo training at the Judicial Training Center in Riga. Perhaps because intellectual property cases rarely come before the Latvian courts, judges receive only scant instruction in intellectual property matters. Although funds for judicial training are limited, in 2002 the budget for the Judicial Training Center in Riga included LVL 60,000, an increase of fifty percent over the 2001 budget allocation.³¹⁴

Latvia has published appellate decisions and decisions of the Constitutional Court. Publication of court decisions did not begin, however, until 1997, with the publication of the decisions of the

³¹¹ Law on Judicial Power (1993) (Lat.), available at <http://www.ttc.lv/New/lv/-tulkojumi/E0036.doc> (last visited Oct. 24, 2003) (translated by the Translation and Terminology Centre). In addition, the Constitutional Court also exists to ensure that the laws of local authorities, the laws of the national government, and executive actions comply with the Latvian Constitution and other laws.

³¹² In particular, these cases involve disputes with values greater than LVL 15,000, matters involving immovable property, and certain other cases.

³¹³ Although the 1993 Law on Judicial Power anticipates the Houses of Court being divided between the Civil House, Criminal House, and Economic House, only the first two houses have been established. See U.S. COMMERCIAL SERVICE, *supra* note 48. The Supreme Court has not ruled on any intellectual property cases to date, save for a matter relating to the pricing of royalties under a regulatory tariff.

³¹⁴ See 2002 Report, *supra* note 3, at 23.

Supreme Court.³¹⁵ Supreme Court decisions have been published annually thereafter; while the decisions of the district courts commenced with the publication of cases for the years from 1999 to 2000.³¹⁶

5. Patent Office of the Republic of Latvia

One of the early acts of the Latvian government in 1991 was the decision of the Supreme Council of the Republic of Latvia, *On the Re-establishment of the Patent Office at the Republic of Latvia*.³¹⁷ The Patent Office started to function shortly after the February 1992 decision of the Council of Ministers of the Republic of Latvia, *On the Establishment of the Patent Office of the Republic of Latvia*.³¹⁸

Activity at the LPO has been growing consistently since the office commenced its activities in the early 1990s. Given the relative size of the Latvian economy, where research and development have not assumed a prominent role,³¹⁹ the majority of patents granted are European patents which are extended to Latvia under the European Patent Convention.³²⁰

³¹⁵ See Torgāns, *Contract Law*, *supra* note 274, at 40.

³¹⁶ See *id.*

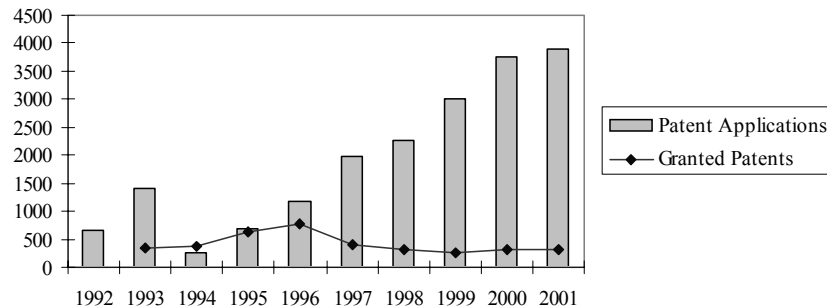
³¹⁷ See, e.g., A. Draveniece & U. Viesturs, *Innovation Problems in Economies in Transition: The Case of Latvia* figure 3, at <http://195.13.136.125/Viesturs/-INNOV98.html> (last visited Oct. 29, 2003).

³¹⁸ PATENT OFFICE 2001 REPORT, *supra* note 133, at 8.

³¹⁹ See Ingrid Hering, *Emerging Markets: Eastern and Southern Europe: A Year of Change Looms*, *MANAGING INTELL. PROP.*, Feb. 2002, at 31, available at <http://www.legalmediagroup.com/mip/includes/print.asp?SID=1282> (last visited Oct. 24, 2003).

³²⁰ *Id.*

**Patent Applications and Grants in the
Latvian Patent Office, 1992–2001**



Source: Latvian Patent Office Annual Report, 2000–2001.

The above chart illustrates the level of activity undertaken by the LPO through 2001. The spike of 1,409 applications for 1993 is principally the result of 1,079 documents from the former Soviet Union being filed for re-registration. In 1992, of 666 applications, some 520 fell within the same category.³²¹ The figures shown in the chart include registered pharmaceutical patents granted under the Agreement between the United States of America and the Republic of Latvia on Trade Relations and Intellectual Property Protection on July 6, 1994.³²² According to the terms of that agreement, Latvia undertook to provide transitional protection for pharmaceutical products if they met the following four tests:

- The subject matter had not been susceptible of product patent protection in Latvia prior to February 28, 1992 but became patentable with the implementation of the Latvian patent law.
- A U.S. patent for the same subject matter had been granted based on an application made at least a year before the date on which Latvian patent protection became available.

³²¹ PATENT OFFICE 2001 REPORT, *supra* note 133, at 8.

³²² Agreement between the United States of America and the Republic of Latvia on Trade Relations and Intellectual Property Protection, July 6, 1994, U.S.-Lat., Hein's No. KAV 4020, State Dep't No. 95-49 [hereinafter U.S.-Lat. Agreement on Trade Relations], available at 1995 WL 105329; PATENT OFFICE 2001 REPORT, *supra* note 133, at 8.

- The subject product had not been marketed in Latvia prior to the date on which pharmaceutical products became eligible for patent protection in Latvia.
- The subject product had not been manufactured in Latvia prior to the date on which pharmaceutical products became eligible for patent protection in Latvia.³²³

Pursuant to the U.S.-Latvian agreement, the holders of U.S. patents for pharmaceuticals at least could expect to receive nominally reciprocal patent protection in Latvia for the balance of the term of their U.S. patents.³²⁴

In February 2002, an article in *Managing Intellectual Property* explained that “[a]s with other countries in the region, Latvian judges are more knowledgeable about trademark infringement than patents because of the dearth of these cases.”³²⁵ While two to three trademark disputes come before the Latvian courts each month, there were only two patent-related cases litigated in Latvia between 1992 and 2000. Of those, only one actually related to a claim of patent infringement.³²⁶

The LPO has expressed concern that the diversion of office fees (called “state fees” in the legislation and appropriated for the general state revenue) is hindering its development. The director of the LPO, Zigrīds Aumeisters, has called for the office fees to be left with the LPO in order to ensure that its activities are appropriately funded.³²⁷ In 2001, the income of the LPO exceeded its expenditures LVL 622,300 to LVL 396,300, the bulk of that income, some LVL 589,100, coming from office fees.³²⁸ From the perspective of patent applicants, the application of those fees to improving the quality and resources of the LPO seems an attractive proposition. The American Bar Association is currently pressing

³²³ See U.S.-Lat. Agreement on Trade Relations, *supra* note 322, ch. 2, art. 6.

³²⁴ See *id.*

³²⁵ Hering, *supra* note 319, at 31.

³²⁶ See Kunze & Lindner, *supra* note 186.

³²⁷ PATENT OFFICE 2001 REPORT, *supra* note 133, at 8.

³²⁸ PATENT OFFICE 2001 REPORT, *supra* note 133, at 42.

for a similar position in relation to the fees paid to the U.S. Patent and Trademark Office.³²⁹

Latvia has received continued support in the development of its trademark expertise, principally from the European Union. Instruction has been provided through seminars organized by the European Patent Organization through the Regional Intellectual Property Program, which is an ambitious program to support the development of national intellectual property infrastructure in the transition countries.³³⁰

Latvia was invited to join the European Patent Convention for the July 1, 2002 round, but it deferred acceptance until 2003 in order to ensure that appropriate measures are in place to discharge its obligations.³³¹ In order to participate fully in the activity of the European Patent Organization, Latvia will also need to ensure that its databases are available in Esp@cenet.³³² It will also need to develop its technical infrastructure to enable it to participate in WIPONET, the electronic filing and processing system developed by WIPO.

6. Special Prosecutors' Office

There are currently two Latvian special prosecutors specializing in the field of intellectual property. The focus of their activity is mainly directed toward instances of copyright

³²⁹ See U.S. Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform: Hearing on H.R. 2049 Before the Subcomm. on Courts, Internet, & Intell. Prop. of the Comm. on the Judiciary, 107th Cong. (2002) (statement of Charles P. Baker, Chair, Section of Intell. Prop. Law Am. Bar Ass'n).

³³⁰ See *RIPP Seminars for Central and Eastern European Countries*, 4/00 EPIDOS NEWS ONLINE (Apr. 2000), at http://www.european-patent-office.org/news/epidosnews/-source/epd_4_00/9_4_00_e.htm.

³³¹ See Press Release, European Patent Office, Four Central and Eastern European States Join the European Patent Organisation (May 28, 2002), available at http://www.european-patent-office.org/news/pressrel/2002_05_28_e.htm (last visited Oct. 24, 2003).

³³² PATENT OFFICE 2001 REPORT, *supra* note 133, at 8. Esp@cenet is a service of the European Patent Organisation that provides up-to-date, searchable patent application information. European Patent Office, *About the Esp@cenet Network*, at <http://ep.espacenet.com/espacenet/ep/en/help/1.htm> (last updated May 20, 2003).

infringement—in particular, the distribution of unauthorized copies of music and video media and computer software.³³³

One of the problems that the prosecutors face is that judges do not necessarily have a clear understanding of intellectual property issues. For example, Latvia has experienced many cases concerning the unlicensed musical performances of music in cafes.³³⁴ These cases tend to come before the administrative tribunals, where the judges deal with the problems lightly. Verbal reprimands are not uncommon, although the Administrative Offenses Code provides for matters to be referred to the prosecutors to determine whether criminal charges ought to be laid. The *Saiema* is currently considering legislative amendments to the 2000 Copyright Law in order to clarify the measures to be taken in such cases.³³⁵

The special prosecutors have also been hampered by the reluctance of other officials, particularly in rural areas, to take on intellectual property-related cases. Although Latvia has promulgated an extensive framework of intellectual property legislation, the officials responsible for enforcing it are sometimes unfamiliar or uncomfortable with it. When cases are prosecuted, judges are sometimes uncertain how or whether to enforce the various remedies provided by law. For example, in a case that concerned the distribution of pirated media, the special prosecutors noted that the judge failed to say anything about what should be done with the illegal copies when giving judgment.³³⁶ Although, from 1991 to 2002, the number of copyright infringement cases going to court grew steadily, the special prosecutors detected a reluctance on the part of the judiciary to treat them as particularly serious offenses.³³⁷

The special prosecutors also point to the lack of experience in the police forces as a weakness for intellectual property enforcement.³³⁸ In one instance, the police improperly prepared a

³³³ See *supra* note 229.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

protocol for dealing with intellectual property offenses.³³⁹ As a result, action was taken under the wrong provision of the Administrative Offenses Code, and the infringing materials were returned to the perpetrators.³⁴⁰

7. Trademark and Patent Agents

Latvia has established a profession of patent agents and trademark agents. The Register of Professional Patent Attorneys was opened under the supervision of the Department of State Registers and Documentation in 1993, but the number of patent professionals remains small.³⁴¹ There were no registrations in 2000, and only three registrations were made in 2001, bringing the total number of names on the register to thirty-eight.³⁴² Patent attorneys and trademark agents are represented through their organization, the Patent Attorney Association of Latvia.³⁴³

B. Foreign Assistance

Latvian institutions have received considerable assistance from their Scandinavian neighbors, and continued external links are regarded as important for the development of Latvia's enforcement capacity. For example:

Justice Minister Ingrida Labucka, Supreme Court Chairman Andris Gulans, Constitutional Court Chairman Aivars Endzins, and UN permanent coordinator in Latvia Jan Sand Soerensen signed an agreement in Riga on 18 January 2002 for the project "Judicial System Support," BNS reported. The judges said that past cooperation with the UN was instrumental in training Latvian judges, improving their performance, and getting valuable assistance for further judicial reforms in the country. The project enabled judges to undergo training in foreign countries and the European Union court. Gulans expressed satisfaction that the project

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ PATENT OFFICE 2001 REPORT, *supra* note 133, at 32–33.

³⁴² *Id.*

³⁴³ See ADVISORY GROUP, INTELLECTUAL PROPERTY RIGHT PROTECTION IN LATVIA (2002) (unpublished document on file with author).

calls for further measures to raise public awareness of the role of courts, since members of the Latvian judiciary have found themselves to be “outcasts” because the public and other branches of power have failed to realize and appreciate the importance of their work.³⁴⁴

Sweden, in particular, has played an active role in promoting transition in Latvia. The Stockholm School of Economics has established a campus in Riga and conducted research on transition economies,³⁴⁵ while the Swedish Patent and Trademark Office has provided technical assistance and advice.

V. PROBLEMS OF TRANSITION

In order to discharge its responsibility, the Latvian state faces numerous problems arising from the economic and political transition from socialism to a market economy and democratic state:

- lack of a developed legal culture to support the formal framework of a modern intellectual property system
- lack of experience in arbitrating intellectual property disputes, including a lack of local legal precedent from which to draw
- lack of experience in state intellectual property offices in evaluating applications for registrable intellectual property rights and enforcing existing rights
- widespread piracy of the products of intellectual property, including the near-dominance of illegal software, videos, and CDs in the consumer media market
- perceptions of corruption in all branches of government

³⁴⁴ Salius Girmius, *Latvia, UN Sign Agreement on Judicial System Support*, RFE/RL NEWSLINE (Jan. 22, 2002), at <http://www.rferl.org/newsline/2002/01/3-CEE/cee-220102.asp>.

³⁴⁵ See generally Stockholm School of Economics in Riga, Conferences, *Microlevel Studies of the Transition in the Baltic States* (describing the conference's focus on transition processes, as organized by the school in 1995), at <http://www2.ssergia.edu.lv> (last visited Nov. 2, 2003).

- lack of independence and prestige among the judiciary

In the short term, despite a legislative program almost a decade old, it is probably unrealistic to expect the development of a legal culture in Latvia of the same quality as that found in the Western democracies. It is estimated that Latvia will take up to thirty years to reach the living standards of the European Union;³⁴⁶ and it may be that it takes as long for the country to nurture a legal culture of equivalent quality. Latvia's development, nevertheless, proceeds apace.

As a general reference, for each year since 1997 the European Bank for Reconstruction and Development has conducted a Legal Indicator Survey ("LIS") to assess the development of legal regimes in Latvia and its neighbors, among others.³⁴⁷ The survey considers development both in terms of formal legislation and its enforcement.³⁴⁸ The survey reflects the fact that, although formal legislation may be advanced, the independence and quality of the judiciary, the state resources available for enforcement, and other factors may combine to frustrate the exercise of formal rights.³⁴⁹

In the 2001 LIS, Latvia scored an overall "4-," as a result of its composite "4-" score for extensiveness and "4" for effectiveness.³⁵⁰ This reflected a shift from the 2000 Legal Indicator Survey, in which Latvia's overall "4-" rating was composed of a "4" rating for extensiveness and a score of "4-" for effectiveness.³⁵¹ Although these results reflect questions related

³⁴⁶ See Oleg Bozhko, *Have Living Conditions Improved?*, BALTIC COURSE, Summer 2002, available at http://www.baltkurs.com/english/archive/summer_2002/02economics.htm (last visited Oct. 29, 2003).

³⁴⁷ See EUROPEAN BANK FOR RECONSTRUCTION & DEV., TRANSITION REPORT 2001: ENERGY IN TRANSITION 32 [hereinafter TRANSITION REPORT 2001]; see also Anita Ramasastry, *EBRD Legal Indicator Survey: Assessing Insolvency Laws After Ten Years of Transition*, in THE EUROPEAN RESTRUCTURING AND INSOLVENCY GUIDE 2002/2003, 311, 311 (Stephen Taylor ed., 2002), available at <http://www.europeanrestructuring.com/chapters/pdfs/EBRD.pdf> (last visited Oct. 27, 2003).

³⁴⁸ See TRANSITION REPORT 2001, *supra* note 347; see also Ramasastry, *supra* note 347.

³⁴⁹ See TRANSITION REPORT 2001, *supra* note 347; see also Valts Kalnins, *Judiciary and Legal System*, Database for Bus. & Public Admin., at http://www.balticdata.info/latvia/politics/latvia_politics_administration_judiciary_and_legal_system_basic_information.htm (Oct. 2001).

³⁵⁰ See TRANSITION REPORT 2001, *supra* note 347.

³⁵¹ *Id.*

more specifically to commercial law and corporate law, they may be of some help in assessing the position of Latvia's legal regime as against the assessments for other countries. The Baltic states all scored "4-" overall in the 2000 and 2001 LIS.³⁵²

Statistical indicators do little, however, to explain the problems which Latvia is facing in improving its intellectual property regime in the context of its transition program. The three factors that stand out for the purposes of this Article are piracy, perceptions of corruption, and the problems of judicial independence.

A. Piracy

The former socialist countries of Central and Eastern Europe have experienced significant problems in the transition from socialist to capitalist economies. While they have made real strides in adopting more modern legislative regimes, recognizing and protecting intellectual property rights, to a varying degree they all have significant problems with intellectual property enforcement.³⁵³ Among the worst offenders are Belarus, Ukraine, and Russia.³⁵⁴ Their proximity, trading links, and even familial ties with these countries is a problem for the Baltic states. Between them, the Baltic states account for approximately US\$100 million of counterfeit and pirated goods each year, although production of counterfeit products appears to take place, in the main, outside of those three countries.³⁵⁵

1. Domestic Piracy

Pirated goods are sold openly in Latvia's Central Market, which is located in close proximity to the main ground

³⁵² See *id.*; see also EUROPEAN BANK FOR RECONSTRUCTION & DEV., TECHNICAL COOPERATION: HELPING BUILD A BRIGHTER FUTURE: EBRD REPORT TO THE DONOR AND OFFICIAL CO-FINANCING COMMUNITY 2002-03 73 (2003), available at <http://www.ebrd.com/pubs/tc/03/tc03ch12.pdf> (last visited Oct. 27, 2003).

³⁵³ See U.S. TRADE REPRESENTATIVE, 2003 SPECIAL 301 REP., available at <http://www.ustr.gov/reports/2003/special301.htm> (last visited Oct. 27, 2003).

³⁵⁴ See *id.*

³⁵⁵ See Ilze Timbare, *Indifference Towards Intellectual Property Security*, NEATKARIGA RITA AVIZE (NRA), July 14, 2001 (presented at the Coalition for Intellectual Property Rights Baltic Survey Roundtable), available at http://www.cipr.org/activities/-conferences/riga_07_2001/neatkariga_071401.htm (last visited Oct. 27, 2003).

transportation terminals. Stalls in the Central Market offer a range of merchandise, from athletic shoes to unauthorized versions of CDs, without serious interference by state authorities or the administrators of the market.³⁵⁶ In 2003, video outlets serving a Russian-speaking audience were openly displaying copies of *Terminator 3* for sale in DVD format weeks before the film was released in Latvia or even London.³⁵⁷

Latvian consumers have a marked taste for “new wave” artists, and the latest Depeche Mode and Madonna albums can be found in the Central Market with a typical price of between LVL 2 and LVL 3.³⁵⁸ That price is very competitive when compared to the sticker price of between LVL 9 and LVL 11 for official commercial versions of the same albums in the main music shops in Riga.³⁵⁹ The pirates also have the advantage of being able to make available added “bonus tracks,” including alternate mixes copied from CD singles which may have been released in other markets. Although pirated versions are readily distinguished from authorized releases by the oversaturated colors of the cover artwork, the best reproductions are aurally indistinguishable from genuine copies. Lower quality versions do circulate, mainly compiled from MP3 files downloaded from the Internet; many fans, however, appear willing to take the risk in order to obtain limited release versions of songs or simply to obtain Western media at a price better reflective of average earnings in Latvia.³⁶⁰

As the following chart shows, the ability of a Latvian consumer to purchase a CD at regular retail prices is markedly lower than

³⁵⁶ In a conversation with the author, Latvian state prosecutors explained that due to the limited scale of marketing, the display of pirated works in the Central Market is not a priority for enforcement institutions, even though the open display of pirated works is a worrying sign for copyright owners. See *supra* note 229; see also Press Release, International Federation of the Phonographic Industry (“IFPI”), IFPI Raises Eastern Europe Piracy Concerns at Forte Riga (June 2, 2000), available at <http://www.ifpi.org/site-content/press/20000602.html> (last visited Oct. 27, 2003).

³⁵⁷ This was observed by the author in the main shopping district of Jurmala, a popular resort town outside of Riga.

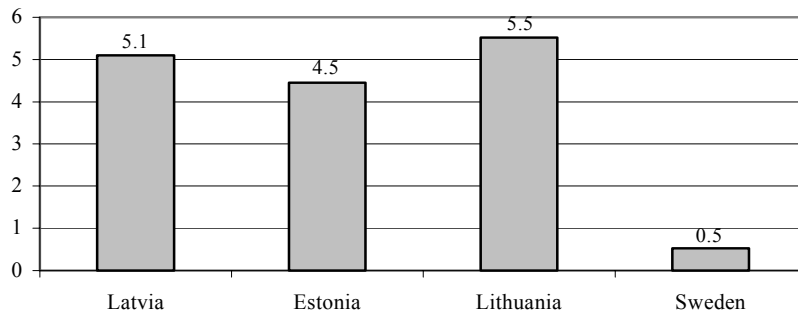
³⁵⁸ These typical prices are based on an investigation conducted by the author in Riga.

³⁵⁹ *Id.*

³⁶⁰ Bozhko, *supra* note 346 (indicating that average monthly earnings in Latvia are US\$269).

that of a Swedish purchaser.³⁶¹ Assuming that demand for CDs in the Latvian and Swedish markets is equivalent on a per capita basis, it is reasonable to presume that the disparity in purchasing power stimulates the supply of pirated substitutes in Latvia.³⁶²

Percentage of Gross Average Monthly Income Required to Purchase a US\$15 CD



Sources: Statistika Centralbyran (Statistics Sweden) and Organization for Economic Co-Operation & Development.

In order to dampen the market for cheaper counterfeit products, some producers have revised their pricing in the Latvian market. In 1999, for example, Microsoft cut the license fees for several of its products by sixty percent in Latvia, a substantial discount against their pricing in nearby countries.³⁶³ Even so, packaged software piracy accounts for a substantial part of the black market in products of intellectual property in Latvia.³⁶⁴

³⁶¹ See Statistika Centralbyran [Statistics Sweden], *Average Monthly Salary for Salaried Employees in All Occupations in the Private Sector from May 2001 to May 2002* (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal). Latvian, Estonian, and Lithuanian data for the same period comes from ORG. FOR ECON. CO-OPERATION & DEV., *MAIN ECONOMIC INDICATORS: NON-MEMBER COUNTRIES* (December 2002) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal). All currency conversions were made by the author on November 11, 2002, using the Universal Currency Converter at <http://www.xe.com>.

³⁶² See Andris Straumanis, *Online Piracy Is Least of Latvian Problems*, LATVIANS ONLINE, May 21, 2001, at <http://www.latviansonline.com/features/feature-napster.shtml>.

³⁶³ See *CNNfn: Market Coverage* (CNNfn television broadcast, Sept. 7, 1999), available at 1999 WL 28019866.

³⁶⁴ See generally PRICEWATERHOUSECOOPERS, *THE CONTRIBUTION OF THE PACKAGED SOFTWARE INDUSTRY TO THE EASTERN EUROPEAN ECONOMIES 7-9* (Mar. 1999) (study

As relative prices cannot entirely explain the prevalence of pirated goods in the Latvian market, some consideration should also be given to the role of Latvia as a distribution channel for pirated goods sourced from its neighbors, the role played by a lack of legal culture which respects private intellectual property rights, the low level of resources provided to the state enforcement agencies, and the level of activity of rights-holders and their interest groups. Indeed, Microsoft attributed a trebling of its sales in Latvia in the second half of 1999, and an estimated fall in the national software piracy rate from ninety percent to eight-five percent by the end of the first quarter of 2000, to an aggressive anti-piracy campaign, in which price reductions were accompanied by police raids.³⁶⁵

There have been no prosecutions in Latvia for cases of Internet piracy, although the problem is as prevalent in Latvia as in other formerly socialist countries. In the first eight months of 2002, the IFPI sent 122 cease-and-desist letters to the operators of Web sites making unauthorized copies of copyright materials available for downloading. As a result, fifty-two sites closed down or ceased their illegal activities.³⁶⁶

Latvia has a vibrant cultural industry. Besides popular composers from the Soviet days like Raimonds Pauls, Latvia has produced a number of artists with international appeal. The country's pride in "Brain Storm," which placed third in the 2000 Eurovision Song Contest, was surpassed only by the surprise Eurovision victory of Maria Naumova in 2002.³⁶⁷ The foreign success of these artists is important for Latvia's self-image, and their reliance upon adequate intellectual property protection to earn a living from their crafts is recognized.³⁶⁸

commissioned by the Business Software Alliance), available at <http://www.bsa.org/usa/globalib/econ/sieuroecon.pdf> (last visited Oct. 27, 2003).

³⁶⁵ *Weekly Crier: News Highlights from Lithuania, Latvia and Estonia*, CITY PAPER'S BALTICS WORLDWIDE (Feb. 7-14, 2000), at http://www.balticsww.com/wkcrier/0124_0320_00.htm.

³⁶⁶ See Maripuu, *supra* note 268.

³⁶⁷ See *Latvia's Marija Naumova Wins Eurovision Song Contest*, SYDNEY MORNING HERALD (May 27, 2002), available at <http://www.smh.com.au/articles/2002/05/27/1022243303936.html> (last visited Oct. 27, 2003).

³⁶⁸ See Straumanis, *supra* note 362.

2. Neighboring Countries

Latvia's efforts to enforce intellectual property rights are challenged by its position as a transshipment route for nearby countries which produce pirated and counterfeit goods. Pursuant to the Trade Act of 1974, the U.S. Trade Representative each year publishes a Special 301 Report, identifying weaknesses in the intellectual property regimes of other countries which may have an impact on U.S. trade.³⁶⁹ Of the countries neighboring Latvia, Russia, Belarus, and Lithuania are consistently included in the Special 301 Watch List, published by the U.S. Trade Representative, as countries from which additional efforts to improve their intellectual property regimes are required as a priority.³⁷⁰ A *New York Times* report in 2002 suggested that the Russian government was even making its property available for the operation of pirating manufacturing facilities.³⁷¹ Neighboring Estonia, while escaping the Special 301 Watch List in recent years, nevertheless has serious problems with piracy, as the growth of broadband data network services has encouraged migration of pirates from optical and magnetic media to the Internet.³⁷²

The enforcement situation in nearby Ukraine is so poor that the U.S. Trade Representative has designated it as a "priority foreign country."³⁷³ Ukraine, according to data published by IFPI, has the capacity to produce seventy million optical discs a year, although domestic demand is approximately five million a year.³⁷⁴ An internationally recognized center for piracy, on December 20, 2001 the Ukrainian parliament rejected proposed reforms to restrict

³⁶⁹ Pub. L. No. 93-618, § 182, 88 Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. § 2242 (2000)).

³⁷⁰ U.S. TRADE REPRESENTATIVE, 2001 SPECIAL 301 REP., available at <http://www.ustr.gov/enforcement/special.pdf> (last visited Oct. 27, 2003).

³⁷¹ See Sabrina Tavernise, *Russian Music Pirates Use Government Property*, N.Y. TIMES, Aug. 20, 2002, at A4.

³⁷² See *Estonia Grapples with Computer Software Piracy*, BBC WORLDWIDE MONITORING, Jan. 30, 2002 (information gathered from Aripaev Web site, Tallinn, in Estonian).

³⁷³ See U.S. Dep't of State, *U.S. Releases Special 301 Report on Intellectual Property*, at <http://usinfo.state.gov/topical/econ/ipr/02043007.htm> (Apr. 30, 2002).

³⁷⁴ IFPI, *Ukraine Loses GSP Benefits and Trade Sanctions Loom for Failure to Tackle Piracy*, at <http://www.ifpi.org/site-content/press/20010807.html> (Aug. 8, 2001).

optical media piracy.³⁷⁵ In retaliation, the United States slapped US\$75 million sanctions on the country, which was forced to adopt amended legislation, albeit by only the slimmest of margins.³⁷⁶ It may be too soon to tell what effect the legal changes have had; but even if Ukraine succeeds in slowing down the pirates, it may be that illegal CD production simply shifts to other areas with weak enforcement capability, such as Belarus. That would not stop the pipeline of pirated products through the Baltics.

In 2000 and 2001, the International Intellectual Property Alliance (“IIPA”) recommended that Latvia be placed on the Special 301 Watch List, having regard to continuing shortcomings in Latvia’s enforcement regime in general and the lack of border and police measures against counterfeit goods and pirated media in particular.³⁷⁷ The IIPA noted in its 2001 report that:

The Latvian market is overloaded with pirated cassettes, videos, game cartridges and optical media product either produced by or shipped through its neighbors, Lithuania and Ukraine. All three of these countries have very poor border enforcement, and since Lithuania and Ukraine are known for their export capabilities, the Latvian market with its own border enforcement problems is ripe to receive this illegal material.³⁷⁸

Latvia does not have any CD manufacturing capacity domestically; rather, it is a transit point for pirated goods.³⁷⁹ The country, with its large Russian-speaking minority, also represents part of the foreign market for counterfeit Russian products. The perception of Latvia’s state prosecutors is that pirated products are produced outside of Latvia, mainly in the East, and that Latvia is

³⁷⁵ See Press Release, U.S. Trade Representative, United States Imposes \$75 Million in Tariffs on Ukraine for Continued Piracy of Sound Recordings and Optical Media (Dec. 20, 2001), available at <http://www.ustr.gov/releases/2001/12/01-115.htm> (last visited Oct. 27, 2003).

³⁷⁶ See *id.*

³⁷⁷ See INT’L INTELL. PROP. ALLIANCE, 2001 SPECIAL 301 REPORT, LATVIA, available at <http://www.iipa.com/countryreports.html#L> (last visited Oct. 27, 2003).

³⁷⁸ *Id.* at 407.

³⁷⁹ See *supra* note 356 and accompanying text.

used as a transit route to the European Union.³⁸⁰ Within Latvia, the state prosecutors identify the biggest problem as the supply of illicit copies to video rental enterprises, rather than direct sales to consumers.³⁸¹ While, at the principal retail outlets, such as the large Randoms shop in Old Riga, videos generally contain holographic security seals affixed by legitimate manufacturers, those supplied by video rental stores often exhibit the degraded quality of pirated products.³⁸² The distribution of pirated products is known to be undertaken by organized criminal groups, rather than on a “cottage industry” basis; and the links between these activities and other criminal acts make the tackling of intellectual property offenses a priority for the Latvian state.³⁸³

Latvia’s efforts have enabled it to be removed from the Special 301 Watch List in 2002, which is a positive indicator of its progress. Nevertheless, according to data from the IIPA, in the 2000–2001 period piracy accounted for seventy-five percent of the market for motion picture videos in Latvia, while piracy ate into sixty-six percent of the recorded music market and seventy-seven percent of the market for business software applications.³⁸⁴ Overall, on IIPA data, pirated products caused losses to the copyright industries of US\$5.5 million in 2000 and US\$6.1 million in 2001 in Latvia.³⁸⁵

B. Perceptions of Corruption

Worryingly, in the CIPR Baltic States Survey, the factor that was rated as being the greatest importance in improving the intellectual property regime in Latvia was “cleaning up corruption in enforcement authorities,” ranking ahead of specialized training

³⁸⁰ See *supra* note 229.

³⁸¹ *Id.*

³⁸² This was observed by the author.

³⁸³ See *supra* note 229.

³⁸⁴ INT’L INTELL. PROP. ALLIANCE, USTR 2002 “SPECIAL 301” DECISIONS AND IIPA ESTIMATED U.S. TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND ESTIMATED LEVELS OF COPYRIGHT PIRACY FOR 2000–2001 (July 2002), available at http://www.iipa.com/pdf/2002_Jul11_USTRLOSSES.pdf (last visited Oct. 29, 2003).

³⁸⁵ *Id.*

and education measures.³⁸⁶ *Managing Intellectual Property* reported in March 2001 that corruption is a key problem for enforcement: “Corruption is well-developed in Latvia It is very common for people to tip counterfeiters off when a raid is planned, but there are some number of people within customs and the police force our firm trusts.”³⁸⁷

Corruption is a pressing internal and external political issue for Latvia in all areas of the state. When Andris Argalis took office as mayor of Riga in 2000, he announced his intention to address problems of “top-level corruption” in the Riga Municipal Housing Privatization Commission by firing the leaders of the commission once they returned from a “business trip” to Tunisia.³⁸⁸ The same strict punishment is not meted out to all corrupt officials in Latvia. Indeed, Latvia is perceived as having the highest corruption rating of the Baltic States, according to Transparency International, a non-profit group.³⁸⁹

In the 2002 Corruption Perceptions Index published by Transparency International, Latvia ranked fifty-second in the world, together with Sri Lanka, Morocco, the Czech Republic, and the Slovak Republic.³⁹⁰ Although this result represents an improvement on Latvia’s 2001 ranking of fifty-ninth in the world,³⁹¹ it nonetheless highlights a problem which requires urgent attention by the authorities. Latvia has received external assistance to address the problem, including World Bank funding and grants from Denmark to assist in researching of experience with the

³⁸⁶ CIPR BALTIC STATES SURVEY, *supra* note 56, at 15.

³⁸⁷ Ingrid Hering, *Emerging Markets: Eastern Europe Enforcement Issues Remain High on Agenda*, MANAGING INTELL. PROP., Mar. 2001, at 22–26 (quoting Victoria Streltsova of Agency Tria Robit).

³⁸⁸ See *New Riga Mayor Fights Corruption*, 1 BALTIC STATES REPORT NO. 17 (May 15, 2000), available at <http://www.rferl.org/balticreport/2000/05/17-150500.html> (last visited Oct. 27, 2003).

³⁸⁹ See Transparency Int’l, *Corruption Perceptions Index 2002* (providing rankings of countries in terms of “the degree to which corruption is perceived to exist among public officials and politicians”), at <http://www.transparency.org/cpi/2002/cpi2002.en.html> (Aug. 28, 2002).

³⁹⁰ See *id.*

³⁹¹ See Transparency Int’l, *2001 Corruption Perceptions Index*, at <http://www.transparency.org/cpi/2001/cpi2001.html#cpi> (last visited Oct. 29, 2003).

Latvian judicial system.³⁹² According to the World Bank Corruption Report, “high-level corruption” in Latvia is determined to be “quite serious” in nature.³⁹³ At the center of the problem, according to the World Bank Corruption Report, is the phenomenon of conflicts of interest.³⁹⁴

1. Accountability

One of the problems specifically identified by the World Bank Corruption Report is over-reliance by the government of Latvia on autonomous agencies to exercise devolved powers without an appropriate regime to ensure their accountability.³⁹⁵ The Radio SWH controversy, which broke out in 2002, may illustrate the problem.

The Copyright and Communication Consulting Agency/Latvian Copyright Agency (“AKKA/LAA”) arose from the reorganization of the State Copyright Protection Agency within the Ministry of Culture.³⁹⁶ In 2000, AKKA/LAA won several court decisions arising from disputes between the agency and radio broadcasters. The result was that broadcasters were required to enter into agreements with the agency and to pay “about 5 to 10% from income for music broadcasting.”³⁹⁷

In the summer of 2002, AKKA/LAA filed a lawsuit against one of Riga’s most popular radio stations, Radio SWH, for

³⁹² See WORLD BANK, REFORMING PUBLIC INSTITUTIONS AND STRENGTHENING GOVERNANCE: A WORLD BANK STRATEGY 57 (2000), available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_00121405313676 (last visited Oct. 29, 2003).

³⁹³ *Id.* at 102.

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 107.

³⁹⁶ See Heiki Pisuke & Merit-Ene Ilja, *Copyright Developments in the Baltic States*, 32 COPYRIGHT WORLD 30, 32 (July/Aug. 1993); WORLD INTELL. PROP. ORG., WIPO GUIDE TO INTELLECTUAL PROPERTY WORLDWIDE (2d ed. 2003), at <http://www.wipo.int/about-ip/en/ipworldwide/index.html> [hereinafter WIPO GUIDE]. The section relating to Latvia is at <http://www.wipo.org/about-ip/en/ipworldwide/pdf/lv.pdf>.

³⁹⁷ Alnis Garkājis, *What Is/Was Actual (Broadcasting; Latvia)*, at <http://www.iclub.lv/alnis/actual.htm> (last modified Oct. 17, 2003).

nonpayment of royalties.³⁹⁸ The lawsuit was the latest in a series of court actions taken by the agency.³⁹⁹ A public row over the lawsuit ensued, in which each side put its case in the national newspaper, *Diena*.⁴⁰⁰ After AKKA/LAA explained its lawsuit to the press, the president of Radio SWH responded.⁴⁰¹ Radio SWH admitted that, while it had been paying copyright royalties from 1995, it had stopped making payments in 1999.⁴⁰² SWH explained that it accepted the general requirement that money should be paid to composers; it disputed, however, the amounts and disagreed with the process which allows a private agency to determine the rates.⁴⁰³

Broadcasting royalty rates in Latvia are assessed against broadcasters on the basis of the proportion of programming which is dedicated to pre-recorded music.⁴⁰⁴ Every year, broadcasters submit details to the National Council of Radio and Television, which confirms the assessments.⁴⁰⁵ The rates themselves, however, are determined by AKKA/LAA. Under the AKKA/LAA tariff, a Latvian radio station playing 100 percent of its editorial content as music can expect to pay ten percent of its profits. In nearby Estonia, the rate is just 5.5 percent, while Lithuanian radio stations pay only 2.5 percent of their profits.⁴⁰⁶ While AKKA/LAA justifies its tariffs on the basis of rates recommended by the International Confederation of Societies of Authors and Composers (“CISAC”), Radio SWH has disputed the existence of these rates. In this context, Radio SWH has explained in its press

³⁹⁸ See Nathalie Bardovskaya, *Dorogie Deschevie Avtori [Expensive Cheap Authors]*, 29 KOMMERSANT BALTIC, July 22, 2002, available at http://www.kba.lv/news.php?p_id=130&f_id=1577&n_id=4980 (last visited Sept. 18, 2003).

³⁹⁹ See *id.*

⁴⁰⁰ See *id.*

⁴⁰¹ See Zigmars Liepiņš, *Orvels un AKKA/LAA [Orwell and AKKA/LAA]*, DIENA, Aug. 9, 2002, available at <http://www.diena.lv/komentari/lasit.php?id=160315> (last visited Oct. 13, 2003).

⁴⁰² See *id.*

⁴⁰³ See Indira Ozola, *Noklusetais par autoratlīdzību [Things Concealed About Royalties]*, DIENA, Aug. 12, 2002, available at <http://www.diena.lv/komentari/lasit.php?id=160510> (last visited Oct. 13, 2003).

⁴⁰⁴ See Bardovskaya, *supra* note 398.

⁴⁰⁵ *Id.*

⁴⁰⁶ Liepiņš, *supra* note 401.

accounts that it prefers to take the matter to the courts for a decision.⁴⁰⁷

In the final report of the Advisory Group, it was noted that:

According to the Ministry of Culture, fees charged by collecting societies are established without consultations with the users, that is, contrary to the stipulations of the Copyright Law, which requires that fees/royalties to be collected should be negotiated upon by the parties (users and collecting societies). As a result, fees paid by the users turn out to be too high. At the same time, three court cases involving the collecting societies against broadcasters have been initiated, and in all three cases the collecting societies won and received payments.⁴⁰⁸

Indeed, section 65 of the 2000 Copyright Law requires organizations that administer economic rights on a collective basis to “agree with the users of works regarding the amount of remuneration, procedures for payment and other provisions with which licenses are issued.”⁴⁰⁹ Section 67 of the 2000 Copyright Law requires the Ministry of Culture to supervise copyright collectives; and, in particular, to ensure that:

- (1) the provisions regarding collection and apportionment of remuneration are fair;
- (2) the administration expenditures are justified;
- (3) the apportionment of remuneration and payments occur in accordance with the procedures specified;
- (4) the issuance of a license is not denied without substantiated basis.⁴¹⁰

The Ministry of Culture is empowered to issue binding directions to the copyright collectives and to initiate proceedings in the courts to dismiss the management of these agencies if such

⁴⁰⁷ *Id.*

⁴⁰⁸ ADVISORY GROUP, *supra* note 136, at 5.

⁴⁰⁹ 2000 Copyright Law (2000) (Lat.) § 65(1).

⁴¹⁰ *Id.* § 67(1)–(2).

directions are not complied with.⁴¹¹ The Ministry, however, does not appear to have exercised its authority to resolve the royalty disputes, leaving the courts to hear the cases.

Part of the problem may be that the Latvian legislature has delegated the authority to set tariffs to an agency which represents the interests of rights-holders, but has not established the regulatory framework to effectively balance those interests with the interests of users. An administrative solution may be found in the establishment of an independent agency to confirm or reject copyright royalties and balance the interests of copyright collectives and rights users. An example is the Copyright Board in Canada. Invested with quasi-judicial powers, the Copyright Board functions as an arbitral tribunal, and its decisions have the effect of superior court judgments.⁴¹² Under the Canadian model, collective rights administrative societies are required to submit an annual tariff, which is then published.⁴¹³ The Copyright Board has jurisdiction to receive submissions from interested parties in relation to the proposed tariff and to make any amendments to the tariff that it considers necessary.⁴¹⁴ Canadian law also sets tariffs for wireless broadcasters based upon their advertising revenues.⁴¹⁵ In cases where an individual license cannot be agreed between the collective rights administration society and a user, the Canadian scheme provides for the submission of the dispute to the Copyright Board for resolution.⁴¹⁶

C. *Judicial Independence*

The Latvian judiciary suffers from a prestige deficit in their own country. There is evidence, however, that, despite the guarantee of independence in article 82 of the Latvian Constitution, their independence is not properly respected. In a

⁴¹¹ *See id.*

⁴¹² *See* Copyright Board of Canada, *Our Mandate*, at <http://www.cb-cda.gc.ca/aboutus/mandate-e.html> (last updated July 7, 2001).

⁴¹³ *See* Copyright Board of Canada, *1999–2000 Annual Report Mandate of the Board*, at <http://www.cb-cda.gc.ca/aboutus/annreps/mandate-e.html> (last updated July 7, 2001).

⁴¹⁴ *See* Canadian Copyright Act, R.S., ch. C-42, § 68 (1985) (Can.).

⁴¹⁵ *See id.* § 68.1.

⁴¹⁶ *See id.* § 70.2.

1997 case, relating to the failure of Bank Baltija, the judges hearing the matter resigned, citing political pressures.⁴¹⁷ A major report by the Soros-funded Open Society Institute noted that reform of the Latvian judiciary is being hampered by interference by the executive.⁴¹⁸ Latvian judges are vulnerable to political influence, in part, because they do not enjoy security of tenure until they have passed a two-year “probationary period” and have been confirmed by the parliament.⁴¹⁹ According to the Open Society Institute, there are several reported instances of parliamentarians abusing the judicial system for political ends.⁴²⁰

The tension between the judicial and executive branches broke into the open with the public statement by Latvia’s President Vaira Vike-Freiberga on May 21, 2002 that “trials are becoming a circus, which turns the entire justice system into a joke.”⁴²¹ The President of the Latvian Judges Society, Ivars Bickovskis, responded a week later, acknowledging that judges have to work to improve respect for their offices but suggesting that “the fundamental [problem] is the state’s irresponsibility in bringing order to the judicial system.”⁴²²

The Latvian judiciary is relatively young and inexperienced, compared to many other countries. Only half of Latvia’s judges held a judicial position while Latvia was a member of the Soviet Union.⁴²³ One reason for the relative inexperience of the judiciary is a prohibition in the law that prevents certain Soviet-era officials from holding judicial office.⁴²⁴ Similar restrictions are found in

⁴¹⁷ See FREEDOM HOUSE, NATIONS IN TRANSIT 1999–2000 387 (Adrian Karatnycky et al. eds., 2000), available at http://www.freedomhouse.org/research/nitransit/2000/-latvia/latvia_rol.htm (last updated Dec. 14, 2000).

⁴¹⁸ See Press Release, Open Society Institute, Judicial Capacity in Latvia (Nov. 6, 2002), available at <http://www.eumap.org/whatsnew/pressinfo/1036523233> (last visited Oct. 27, 2003).

⁴¹⁹ See *id.*

⁴²⁰ See *id.*

⁴²¹ *Judges Reject President’s Criticism of Latvian Judiciary*, 3 BALTIC STATES REPORT NO. 19 (June 7, 2002), available at <http://www.rferl.org/balticreport/2002/06/19-070602.html> (last visited Oct. 27, 2003).

⁴²² *Id.*

⁴²³ See Kalnins, *supra* note 349.

⁴²⁴ By a 1994 amendment, section 55 of the Law on Judicial Power disqualifies from judicial office persons who have been “employed in staff positions or as supernumeraries

the Latvian State Civil Service Law.⁴²⁵ Although judges in the Soviet state had to demonstrate their political credentials, and the Soviet state could hardly be considered a model for the rule of law, the restriction may eliminate from consideration an experienced group which could fulfill judicial duties in the country on the basis of previous political activity. A less restrictive policy, which considers the attributes of individuals based upon their professional abilities and pays less attention to their past willingness to participate in the Soviet state, may be less attractive to Latvian nationalists, but it would give the state greater flexibility in choosing judges. Given that many of the former socialist countries of Central and Eastern Europe have elected governments led by the social-democratic parties which emerged from the former Communist parties, it is questionable whether political discrimination based on past affiliations or state functions ought to be a characteristic of judicial selection at all.

Corruption is certainly not a feature that is attributed only to the judiciary in Latvia. According to a 2000 *Freedom House* article, citing World Bank data:

[Thirteen] percent of households and 37 percent of company employees in Latvia had paid bribes. According to the World Bank survey of households (1998) various state institutions demand unofficial payments or bribes for their services. According to public opinion the customs service asks for bribes in 48 percent of cases, prosecutors in 42 percent of cases, the road police in 39 percent of cases, courts in 38 percent of cases. The reported corruption level

of the State Security Committee of the USSR or the Latvian SSR, the Ministry of Defence of the USSR or the state security service, army intelligence service or counter-intelligence service of Russia or another state, or as an agent, resident or safehouse keeper of the aforementioned institutions.” Law on Judicial Power (1992) (Lat.).

⁴²⁵ Law on State Civil Service art. 7 (2000) (Lat.), available at http://64.49.225.236/rc_Latvia.htm#Laws (last visited Oct. 27, 2003) (disqualifying from the civil service persons who have been “full-time employees of the security services, the intelligence or the counter-intelligence services of the former USSR, the Latvian SSR or foreign countries” or have been “members of the organizations banned by laws or the Court rulings”).

in other institutions is somewhat lower but problems still exist.⁴²⁶

A later survey, conducted by the World Bank and the European Bank for Reconstruction and Development in 1999 and 2000, indicated that 5.7 percent of all bribes paid in Latvia were made to the courts, compared to just 2.7 percent in Estonia and a hefty 8.7 percent in Lithuania.⁴²⁷ Corrupt practices in the courts can act as a powerful disincentive to foreign investment, as they undermine confidence in the enforceability of contractual and property rights.

VI. RECOMMENDATIONS

A. *Baltic Cooperation*

The Nordic countries, which have strong traditional cultural and economic links, have for many years cooperated to harmonize their industrial property legislation.⁴²⁸ One of the results of Nordic cooperation has been the designation of the Swedish Patent and Registration Office as an international authority under the Patent Cooperation Treaty (“PCT”), rationalizing access to the benefits of the PCT.⁴²⁹ Similarly, the Benelux countries have streamlined their intellectual property regimes.⁴³⁰ The shared geography, modern history, security, and other interests of the Baltic states suggest that Baltic cooperation in the sphere of intellectual property, on either the integrated Benelux or looser Nordic models, ought to receive serious consideration. The benefits of closer and more formalized Baltic cooperation may include: (a) reducing the burden on each of maintaining the registration and enforcement infrastructure to protect intellectual property rights; (b) reduced

⁴²⁶ FREEDOM HOUSE, *supra* note 417.

⁴²⁷ Rudolfs Bems, *Corruption in the Baltic States: New Empirical Evidence*, 2 *BALTIC ECON. TRENDS* 12 (2002).

⁴²⁸ See Carl-Anders Ifvarsson, *International Co-Operation in the Field of Industrial Property*, in *TRADE RELATIONS & INTELL. PROP. RTS. IN THE BALTIC SEA REGION* 18, 22 (2000).

⁴²⁹ See *id.*

⁴³⁰ See, e.g., Uniform Benelux Law on Marks (1962) (Neth.); Uniform Benelux Designs Law (1966) (Neth.).

transaction costs for users, promoting transfer of technology and other forms of investment to the region; and (c) improved border controls to restrain the flow of pirated and counterfeit goods.

Latvia, Estonia, and Lithuania are all looking forward to early accession to the European Union in May 2004. Although each of the Baltic states embarked upon the road to accession at essentially the same time, at the outset of the Accession Partnerships it was by no means clear that all of them would attain the socio-political level necessary for membership simultaneously.⁴³¹ In the first years of the Accession Partnerships, Estonia was the clear front-runner and Lithuania the laggard in accession negotiations, while Latvia's candidacy appeared to be directed toward a second round of admissions.⁴³² From the beginning of negotiations with the European Commission, the differences among the Baltic states' socio-political levels have required different national approaches to legal reforms.⁴³³ In the uncertain circumstances surrounding the accession process, it was politically unlikely that any of them would wish to be constrained by any actions taken by their Baltic neighbors and jeopardize their own chance to secure an invitation for membership from the European Union.

Despite the rivalry between them, the Baltic states have managed to develop their cooperation in several areas, a process coordinated through the Baltic Council of Ministers among other channels.⁴³⁴ With the extension of invitations to all of the Baltic states in 2002, the scope for cooperation in the field of intellectual property expanded considerably. The potential exists to not only increase the sharing of information on the transportation of counterfeit goods, but also to intensify the harmonization of intellectual property legislation and enhance institutional coordination. Despite the improved political climate for Baltic cooperation, however, there still remain several potential obstacles,

⁴³¹ See BBC News, *supra* note 31.

⁴³² See *id.*

⁴³³ See generally *EU Concerns about New Members*, BCC News, at <http://news.bbc.co.uk/2/hi/europe/3244969.stm> (last updated Nov. 5, 2003) (outlining key areas of concern before each country is permitted to join).

⁴³⁴ See, e.g., Seimas of the Republic of Lithuania, *Baltic Assembly and the Baltic Council of Ministers*, at http://www3.lrs.lt/pls/inter/www_viewer.ViewDoc?p_int_tekst_id=2554&p_int_tv_id=643 (last updated Jan. 26, 2000).

including language, market size, and the impact of local politics on harmonization.

1. Language

Although they are small nations sharing a definite geographical region, the native populations of the Baltic states have little, ethnically or linguistically, in common. Unlike the Danish, Swedish, and Norwegian languages, which exhibit many common features, Latvian, Estonian, and Lithuanian are quite distinct, although they each display common influences. Language is a practical barrier to efficient investment in the Baltic states because applications to register national patents, designs, and trademarks eventually have to be translated into the language of the receiving intellectual property offices. While several small nations already within the European Union, such as Ireland and Luxembourg, share one of their official languages with larger member states, effectively making them extensions of larger markets, such as England or France, there are only 1.5 million speakers in the world for each of Estonian and Latvian, most of whom are within the borders of their own countries. In order to obtain national patent protection in each of Estonia (population 1.4 million),⁴³⁵ Latvia (population 2.4 million),⁴³⁶ and Lithuania (population 3.6 million),⁴³⁷ therefore, a foreign applicant will need to obtain legal and technical translations of their patent documentation into each of the official languages.

Were the patent offices of the Baltic states to accept national filings on the basis of a common second language, they would be able to facilitate access by rights-holders to a combined market having a population slightly smaller than Sweden's. Although each of the Baltic states has a substantial Russian-speaking minority, Russian may not be attractive as a second official language in light of the nationalist language politics which have

⁴³⁵ CIA, The World Factbook, *Estonia*, at <http://www.cia.gov/cia/publications/-factbook/geos/en.html#People> (last updated Aug. 1, 2003).

⁴³⁶ CIA, *Latvia*, *supra* note 29.

⁴³⁷ CIA, The World Factbook, *Lithuania*, at <http://www.cia.gov/cia/publications/-factbook/geos/lh.html#People> (last updated Aug. 1, 2003).

been seen in the region since the restoration of independence.⁴³⁸ Market demand for at least a second language is evident in the facts that most Latvian legislation has been published commercially in Russian; official translations are being made available in English by the Terminology & Translation Centre; and Latvian publishers have released some case law reporters for appellate decisions in Latvian, English, and Russian.

The Nordic countries may provide a model for further Baltic cooperation. Applicants are able to submit applications to a designated International Authority, the Swedish Patent and Registration Office, in any of Swedish, Danish, Finnish, Norwegian, or English for initial processing under the Patent Cooperation Treaty.⁴³⁹ This procedure allows applicants to avoid incurring translation costs until their applications have proceeded to publication.⁴⁴⁰ Although Latvia currently allows some applications to be submitted in certain foreign languages, followed by translations into Latvian within three months,⁴⁴¹ a process which allows foreign applications to submit their applications in an international language in only one office, rather than three, could effectively streamline the process and benefit all stakeholders.

2. Local Politics

The Baltic states might benefit from centralizing the activity of their state patent and trademark offices on a regional basis. Although the Baltic states are politically assertive of their separate identities, for many foreign rights owners they are regarded more

⁴³⁸ See, e.g., *Constitution Watch*, 7 EAST EUROPEAN CONST. REV. 2 (Winter 1998), available at <http://www.law.nyu.edu/eecr/vol7num1/constitutionwatch/latvia.html> (last visited Oct. 27, 2003).

⁴³⁹ See generally Swedish Patent and Registration Office, *What Is a Patent?*, at <http://www.prv.se/pdf/blanketter/patent/Why%20Patent.pdf> (last visited Oct. 27, 2003).

⁴⁴⁰ See Ifvarsson, *supra* note 428, at 22.

⁴⁴¹ See 1995 Patent Law art. 7(3) (1995) (Lat.) (“[T]he patent application shall be filed in Latvian, English, French, German or Russian. If the application has been filed in English, French, German or Russian, the applicant shall, within three months, submit the translation of the invention formula (claims), abstract of the invention and textual matter on drawings into the Latvian language. These translations shall be considered as an essential part of the application. The applicant may, subject to provisions of [a]rticle 10, [p]aragraph 3, and upon payment of the prescribed fee, submit the corrected translations of the above mentioned materials at any time of the application examination.”).

pragmatically as three components of the same regional market. For Estonia, Latvia, and Lithuania to maintain separate institutions for the registration of patents and trademarks—many if not most of which are used in all three states—is potentially inefficient and may even represent a barrier to trade between them. Rights-holders taking their brands or technology to the Baltics may be required to comply with three sets of intellectual property legislation, comply with the rules of three patent and trademark offices, make three sets of searches, submit their national applications in three languages, potentially engage three sets of patent or trademark attorneys as agents, and pay three sets of fees. They may face three sets of opposition proceedings—in three centers, in three languages, and with three sets of lawyers—in order for their applications to proceed to registration. Even the scope of protection can vary between the Baltic states. For example, Estonia protects utility models but Latvia does not.⁴⁴²

Advanced harmonization or approximation of intellectual property legislation would be a positive first step to overcome some of the inefficiencies which arise from the adoption of different laws by small and closely linked jurisdictions. Proposals to harmonize Baltic laws following the restoration of independence were not altogether successful,⁴⁴³ despite a series of trilateral free trade agreements between the Baltic states which abolished all tariffs between them by 1998.⁴⁴⁴ Although the Baltic states achieved the restoration of their independence at roughly the same time, and the independence period was rich with symbols of unity and cooperation,⁴⁴⁵ it has been suggested that cooperation has been hampered by the sense that “each country wanted to develop its own resources to the fullest and feared competition from its neighbors. They had not yet learned to cooperate, to share their resources and opportunities and to help each other.”⁴⁴⁶

⁴⁴² See Kunze & Lindner, *supra* note 186, at 8.

⁴⁴³ See Torgāns, *Contract Law*, *supra* note 274, at 43; Pisuke & Ilja, *supra* note 396, at 33.

⁴⁴⁴ See generally Deksnis, *supra* note 19, at 84–85.

⁴⁴⁵ See Mel Huang, *Ten Years After*, 1 CENT. EUROPE REV. (Aug. 23, 1999), available at <http://www.ce-review.org/99/9/amber9.html> (last visited Oct. 27, 2003).

⁴⁴⁶ Deksnis, *supra* note 19, at 82 (citing Edgar Andersons, *Towards a Baltic Union*, 13 LITHUANUS, at 5 (1985)).

There is a historical precedent for legislative coordination between the Baltic states. In the first modern period of independence, the Latvian lawyer and senator, August Loeber, led a project for the harmonization of laws regulating bills of exchange between Latvia, Lithuania, and Estonia.⁴⁴⁷ Latvia drafted a law based upon the uniform bills of exchange legislation adopted by an international conference, which was provided to Estonia and Lithuania and, following discussions in 1938, formed the basis for identical legislation on bills of exchange adopted by all three countries.⁴⁴⁸

This example of Baltic cooperation on legislative matters is unfortunately rare. The first period of independence was interrupted by the incorporation of the Baltic states into the Soviet Union. During the Soviet period, the Latvian SSR had no need to coordinate its policies with Estonia and Lithuania, as within the borders of the Soviet Union the political center in Moscow set policy for the entire union. The very idea of a “Baltic region” was suppressed and, to the extent that it was permitted, was based on a loose geographical association between the three Baltic states and even Belarus.⁴⁴⁹

In the second period of independence, it is observed that the Baltic states have developed their intellectual property legislation independently. Despite their lack of determined coordination, however, certain harmonization has occurred through the efforts of the Baltic states to accede to the European Union. The Baltic states have been heavily influenced by the separate Nordic states which have assisted their legislative programs; however, the previous harmonization efforts of the Nordic countries meant that their starting points were not as far apart as they might have been had, say, England, Germany, and France been engaged as sponsors. Further indirect pressure to harmonize their intellectual property legislation has come through the international obligations undertaken by each Baltic state. Despite this, differences remain,

⁴⁴⁷ See Torgāns, *Commercial Rights*, *supra* note 76, at 301.

⁴⁴⁸ *See id.*

⁴⁴⁹ *See generally* Hain Rebas, *Barriers to Baltic Cooperation – Opportunities for Surmounting Them*, in *THE BALTIC STATES AT HISTORICAL CROSSROADS* 319, 319–35 (Tālavš Jundzis ed., 1998).

particularly in relation to the procedures of each state for dealing with criminal and administrative offenses and civil remedies. In part, this is a consequence of the differing levels of legal development of each state at the time that it was incorporated into the Soviet Union.⁴⁵⁰ The pressure to deepen the harmonization process and to make it an objective of each Baltic state will ultimately depend on the requirements and political influence of property owners.⁴⁵¹

Harmonization and rationalization may not be without their problems. For example, the centralization of patent and trademark functions could lead to the migration of local specialists to the new center. Such movement may be motivated by the pursuit of employment opportunities with the central office, or it may be driven by the perceived benefits of practicing closer to the administrative center. The concentration of specialists from all of the Baltic states in one center may have a negative effect on the development of the local bar and the promotion of a robust legal culture at the periphery; it may, however, also encourage development on a wider level by promoting contacts between professionals from diverse backgrounds.

B. Court Reforms

Latvia needs to raise the general level of the judiciary in matters concerning intellectual property. At present, the number of disputes concerning intellectual property is limited, and Latvia does not have a specialized court to hear related disputes. As a consequence, they are routinely assigned to one or two judges of the Riga District Court.⁴⁵² While this practice permits the development of specialized judicial knowledge, it may also invite a certain subjectivity and inhibit the development of contrasting approaches.

⁴⁵⁰ See Torgāns, *Commercial Rights*, *supra* note 76, at 302–03.

⁴⁵¹ Edgars Dunsdorfs goes even further and suggests that “[a] customs union of the three Baltic states seems not to be a Utopia. . . . Certainly the legal system of the three Baltic states must be coordinated. In view of the fact that legal systems in all the three Baltic states are fundamentally based on Roman law this seems achievable.” Dunsdorfs, *supra* note 29, at 317.

⁴⁵² See Kunze & Lindner, *supra* note 186, at 44.

The relatively short history of modern intellectual property law in Latvia means that the country has not developed a substantial pool of legal specialists from which to draw judges with appropriate experience in the field. The narrow reach of its language and the peculiarities of its legal system also mean that Latvia is not able to draw readily upon the case law of other countries to assist judicial decision-making, as do many of the English speaking states, such as Canada, Australia, and New Zealand. Although Latvia has drawn on diverse international sources to develop its intellectual property legislation, it has not yet developed the practice of considering the foreign judicial interpretation of those sources.

C. Development of Legal Culture

In the future, Latvia should also encourage the related professions of advocates⁴⁵³ and patent and trademark attorneys, to organize based on the model of the Canadian Bar Association or the American Bar Association to address intellectual property issues on a specialized basis. There are some nongovernmental organizations which are active in the field of intellectual property, but they typically represent special interests and serve narrow business interests by bringing professionals and rights-holders into contact. There is also a specialized association of patent attorneys active in Latvia, though its membership is confined to registered patent attorneys.⁴⁵⁴ Professional associations that have wider membership drawn from the bar to promote training and scrutinize

⁴⁵³ See FREEDOM HOUSE, *supra* note 417. The state of the legal profession is described as follows:

The Latvian College of Sworn Advocates has a membership of more than 1,000 advocates, legal assistants, and consultants. Five hundred-forty sworn advocates and 76 assistants of advocates were working in private business in 1999. This number is a significant increase compared with previous years. Nevertheless, there is a shortage of qualified lawyers. In the mid-1990s, UN, OSCE, and the Council of Europe experts concluded that “there is a chronic lack of lawyers adequately trained in the law of human rights or with adequate competence in international law.” Latvia University produces approximately 250 lawyers per year. Moreover, other establishments of higher education have opened their programs of legal studies.

Id.

⁴⁵⁴ See ADVISORY GROUP, *supra* note 343, at 2.

both legislative and judicial activity can play important roles in the development of modern intellectual property systems.

The development of a legal culture that respects intellectual property law is a challenge for a country which is emerging from half a century of Soviet socialism. The development of nongovernmental institutions is important to cement the fundamental principles of a democratic society and to raise the alarm when they are not being respected. If corruption in the judiciary is distorting the resolution of intellectual property disputes, then an independent bar association can address the problem through its collective voice, protecting individual lawyers and related professionals from professional mistreatment. Similarly, if the interests of rights-holders are being given undue preference in legislation, then organized interest groups can appeal to public opinion to pressure legislators. The Latvian government can support the initiatives of nongovernmental institutions by providing funding and other resources.

Latvia could also take further steps to ensure the publication of court decisions at all levels. In order to achieve the most cost effective dissemination of cases, the Internet could be used to publish decisions in Latvian and other key languages.⁴⁵⁵ This could assist in the development of a stable body of law, bringing greater certainty. It may also contribute to the process of Baltic cooperation, as none of the states alone has generated a substantial volume of intellectual property disputes.⁴⁵⁶ Although the Latvian legal system is not based on precedent in the same manner as

⁴⁵⁵ See Constitutional Court of the Republic of Latvia, *Decisions of the Constitutional Court of the Republic of Latvia*, at <http://www.satv.tiesa.gov.lv/Eng/spriedum.htm> (last visited Oct. 28, 2003). It should be noted that these decisions are being published on this Web site in English. The limited jurisdiction of the Constitutional Court means that these cases are of limited interest for the purposes of assessing the position on the enforcement of intellectual property rights and the resolution of related disputes.

⁴⁵⁶ See Egils Levits, *Harmonization of the Legal Systems of Latvia and the European Union (Community) and Problems Associated with the Implementation of the Principles of a Law-Based State*, in *THE BALTIC STATES AT HISTORICAL CROSSROADS* 189, 195 (Tālavš Jundzis ed., 1998) (doubting that "Latvia's legal thinking can break out of the isolation in which it has been since the restoration of the country's independence and join the legal thinking and practice of the countries of the European Union").

common law systems, the availability of a body of case law, particularly in a specialized area such as intellectual property law, would be of tremendous benefit to rights-holders and users. It would reveal the principles of reasoning which are applied in related cases and expose poorly reasoned decisions to general scrutiny and professional criticism.

Even if the Latvian legal system is not yet used to the idea of precedent, in the field of intellectual property it will become more important as the European Court of Justice assumes its jurisdiction.

D. Action by Rights-Holders

There have been a number of private initiatives in Latvia to promote awareness of intellectual property issues, particularly in relation to the problem of piracy. A “Rock Against Piracy” event has been held periodically, giving artists a platform to address their fans directly and raise the profile of anti-piracy efforts.⁴⁵⁷ In general, however, one of the problems with the Latvian system appears to be over-reliance upon state agencies by rights-holders to address intellectual property-related disputes.⁴⁵⁸ While there is no doubt that certain acts which relate to infringement of intellectual property rights require state intervention, it also appears that many companies turn to state prosecutors for assistance in enforcing their intellectual property rights, either because they do not have experience in civil enforcement themselves or because they do not have a permanent presence in Latvia.

At the Training Seminar for judges, prosecutors, and customs officials in Riga, the legal representative for BIC, a French-based multinational that produces pens and disposable razors, explained that rights-holders prefer to rely upon the resources of the state for three reasons: (1) in order to reduce their own costs of enforcement; (2) to avail themselves of the greater scope afforded by criminal search powers; and (3) to leverage the threat of criminal sanctions to deter infringement of their intellectual

⁴⁵⁷ See TUULA HAAVISTO, CE©UP, STATE-OF-THE-ART REPORT (Dec. 15, 1999) (commissioned by the European Bureau of Library, Information and Documentation Associations and European Commission), available at <http://www.eblida.org/-cecup/docs/statefin.htm> (last visited Oct. 28, 2003).

⁴⁵⁸ See Timbare, *supra* note 355.

property rights.⁴⁵⁹ Another reason may be the reluctance of rights-holders to become involved with the organized criminal gangs which control the trade in pirated products of intellectual property. Rights-holders in at least one other Central and Eastern European country have been noted to “carry visible scars of past run-ins with criminal groups.”⁴⁶⁰

CONCLUSION

The credibility of Latvia’s intellectual property system depends upon a number of factors. The formal legislative regime for intellectual property has been assessed by the European Union to conform sufficiently with modern practices. Seemingly, the chapter on intellectual property law has been “provisionally closed,” and accession in May 2004 is all but a certainty. The Advisory Group has also expressed its broad satisfaction with the Latvian intellectual property legislation. There remain some outstanding steps to be taken to ensure that its legislation is in full conformity with international obligations and the *acquis communautaire*; but, in the decade since the restoration of its independence, Latvia has made significant progress in creating a modern legal framework for the recognition and enforcement of intellectual property rights. Certainly, political events have moved sufficiently that Latvia’s accession to the EU will not be delayed as a result of outstanding difficulties with its formal intellectual property regime.

In the area of institution building, however, Latvia faces continuing challenges. Problems of corruption, inadequate training, and a lack of transparency in judicial decision-making will require significant investments and still more time to overcome. In light of the limited resources available to the Latvian government, and the importance of the Latvian border as part of the gateway between the European Union and the Commonwealth of Independent States, further assistance should be provided by the

⁴⁵⁹ See *supra* note 288.

⁴⁶⁰ Lyle, *supra* note 7.

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European Union to support the institutions required to ensure effective enforcement of intellectual property rights.

A greater role also needs to be played by non-state actors. Lawyers have a particular responsibility to keep the executive and the judiciary in check, to promote better legislation, and to represent the interests of participants in the intellectual property system. Rights-holders, particularly those without permanent representation in Latvia, also need to make better use of civil remedies, rather than relying upon criminal sanctions to save enforcement costs. Having appreciated the benefits of the Western model of intellectual property rights, Latvia's next task is to strengthen its model through the development of a legal culture that respects private intellectual property rights in substance as well as in form.