

## The scope of 'commercial scale' in Estonian criminal law

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In a relatively recent judgement in a criminal case, the Supreme Court of Estonia ruled that that the terms 'trade scale' and 'commercial scale' are not synonymous. The concept 'commercial scale' in criminal law cannot be interpreted in such a broad sense as the concept 'trade scale'.

A. Gubinski allegedly committed a copyright infringement, therewith violating section 222<sup>1</sup> of the Estonian Penal Code. Gubinski argued that did not commit a crime since (i) it had not been proven that the files found in his computer could be regarded as a copyrightable computer program and (ii) that he did not gain profit as a result of possessing the computer program. The prosecutor argued that it was clear that Gubinski possessed a computer program that had to be regarded as copyrightable subject matter and that any kind of unlawful possession of a computer program should be sanctioned if it is the intention of the possessor to gain profit from using the computer program. In this case it was evident that the clear and only intention of Gubinski was to use the computer program for his own business activities, not to sell it.

According to the Estonian Supreme Court, unlawful use of a copyright protected computer program is only sanctioned criminally when the person possessing and using the computer program has a clear intention to benefit systematically and repeatedly. The "commercial scale" requirement is not fulfilled when the person only intends to obtain some financial benefit, e.g. as a result from using the program himself. Therefore the accused person, Gubinski, could not be considered to have committed a copyright infringement as laid down in section 222<sup>1</sup> of the Estonian Penal Code. Although both courts in lower instances had convicted A. Gubinski, the Estonian Supreme Court took the position that Gubinski had to be acquitted.

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