

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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October 30, 2002

Ms. Kira M. Alvarez
Director for Intellectual Property
Section 301 Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Poland: Request for public comments
concerning identification of countries under
Section 182 of the Trade Act of 1974, 67 Fed.
Reg. 63186 (October 10, 2002)

Dear Ms. Alvarez and the Committee:

The Section 301 Committee requested public comments concerning the identification of countries under Section 182 of the Trade Act of 1974. The Committee is seeking information regarding several “out of cycle reviews” (OCR) as part of the 2002 Special 301 annual review. In February 2002, the International Intellectual Property Alliance (IIPA) submitted a detailed filing on Poland in the Special 301 process.¹ Since that time, IIPA and our member associations have been active -- in Poland, in Washington D.C. and in Brussels -- pressing for improvement in the Poland enforcement and legal system.

USTR, in its April 30, 2002 Special 301 decisions, stated that “Poland has a substantive copyright piracy and trademark counterfeiting problem, the most glaring symbol of which is the Warsaw Stadium and the unauthorized retail activity that is carried on in those premises. ... Poland’s enforcement efforts at the Stadium so far have been insufficient to halt the sale of pirated and counterfeit goods.” Furthermore, USTR indicated it would look to the Polish government taking actions against piracy and counterfeiting at the Stadium through unannounced and numerous raids against retailers that lead to prosecutions which “should be significant enough in number to stem the sale and distribution of pirated and counterfeit goods at the Stadium.” Finally, USTR said that it would look to Poland “to sustain an adequate and effective enforcement effort against IOPR violators in order to establish a deterrent effect in Poland, including at the Stadium.”

¹ The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. Our 2002 report on Poland is posted on our website at <http://www.iipa.com/rbc/2002/2002SPEC301POLAND.pdf>.

IIPA Recommendation: Elevate Poland to the "Priority Watch List"

IIPA recommends that Poland be elevated to the Special 301 "Priority Watch List." The primary reason for this elevation is the pervasive piracy problem of the Warsaw Stadium, which remains a very visible example of inadequate and ineffective enforcement against copyright rights. Progress has not been made on detering piracy and counterfeiting at that stadium. Although raids are occurring, prosecutions that lead to a deterrent level of penalties are rarely imposed.

In addition to the Stadium problem, optical disc piracy in Poland is becoming a major problem, even faster than the industries anticipated. Poland has 9 operating optical disc plants with 44 CD lines and 14 DVD lines, including the newly established Thompson Multimedia plant near Warsaw with 10 DVD lines. Capacity is estimated at approximately 350 million units per year. Piratical product is being produced at some of these plants. Pirate optical media product is also entering Poland via its borders, as USTR also recognized in its 2002 Special 301 announcement. Given the growing problem of optical disc piracy, legislation is needed to control optical media production in Poland. Finally, IIPA and its members remain concerned about the adequacy of the recently adopted amendments to the copyright law, amendments which are aimed at implementing the WIPO Treaties and should enter into force on January 1, 2003.

Since USTR's April 2002 announcement, the Business Software Alliance reports that it has received good cooperation from the Polish government in its education and marketing campaigns and on enforcement against unauthorized use of business software in a commercial setting, so-called 'end-user piracy' of business software, for which the Polish government should be commended.

Update on Copyright Piracy in Poland

Rampant piracy and ineffective enforcement, combined with engrained organized crime elements, remain synonymous with the infamous Warsaw Stadium (Dziesięciolecie Stadium). The Stadium operates without major changes, despite continued and permanent but practically insignificant police actions. In addition to industry efforts regarding the pervasive problem with the Stadium, the European Commission also has identified the Stadium as a problem.² In its March 8, 2002 "Report of the Committee for Counteracting Infringement of Copyright and Related Rights concerning the observance of Copyright and Related Rights in Poland," the Polish government also acknowledges that the Dziesięciolecie Stadium is "a source and centre of all kinds of criminal offences committed in Warsaw." This Committee, which was appointed in 2001, created four working groups: analysis, legislation, stadium and education, which were to examine and study the problems in their assigned portfolios during 2002.

Industry summaries of recent developments throughout Poland appear below:

Recording industry: The Warsaw Stadium remains a major source of pirated music product. According to information compiled by the recording industry, over 590,000 illegal copies of sound

² European Commission, 2002 Regular Report on Poland's Progress Toward Accession, October 9, 2002 at pp. 61-62, available at http://europa.eu.int/comm/enlargement/report2002/pl_en.pdf.

recordings have been seized and 1,378 criminal proceedings have been initiated during the first nine months of 2002. In addition, CD-R burning and Internet piracy continue to develop rapidly reaching up to over 5% of all seized illegal sound carriers (around 30,000 CD-Rs), a year ago this figure did not exceed 2.5 %. ZPAV (the local recording industry group), local Internet service providers and police are working together in the fight against Internet piracy.

Entertainment Software: Recent reports indicate that the organized crime syndicates continue to control distribution throughout Poland and also control the illegal trafficking at the Stadium. Apparently there has been a major infiltration into control of the Stadium by Vietnamese triads who are sourcing product from the Vietnam/Cambodia/Laos region. There have been more fights for control. IDSA reports that where it was once thought that videogame piracy controlled by the Russian syndicates was contained within the Stadium, the current situation has changed to include a broader reach. One IDSA member company reports that all of its pirated CD videogame software sold in Poland is sold at the exact same price and in the same configurations, whether it is sold at the Stadium or elsewhere in Warsaw, Gdansk, Katowice, or Poznan. Everything is precisely PL20 -- no higher, no lower. This phenomenon never happens unless all the sales are controlled by one party, often an indicator of organized crime involvement. Former small retailers of piratical videogame CD-Rs are complaining that the organized crime syndicates are driving them out of business. In addition to CD-R product, silver CDs of videogames, manufactured in Russia, are found throughout Poland. Finally, mini-stadiums are spreading throughout the country, controlled it appears by the same syndicates who control the Warsaw Stadium; this makes everyone's job much tougher now than if the Stadium had been shut down a year ago.

Motion pictures: MPA reports that the piracy situation in Poland regarding audio-visual entertainment has changed significantly. Whereas only a year ago the main problem facing the motion picture industry was videocassette piracy, pirate optical discs in the form of burned CD-ROMs and Russian DVDs have now appeared. The Russian DVDs are a relatively new phenomenon for Poland. FOTA (the local motion picture industry group) seized 481 pirate DVDs in 2001, and in 2002 so far, they have already seized over 11,400. FOTA estimates that 70% of all pirate DVDs coming into the country are currently being sold in the Stadium. The remainder are being sold in other street markets and a small percentage on the Internet. The distributors are 50% Polish and 50% from the former USSR. Customs seizures indicate that the DVDs are being brought into Poland from the C.I.S. countries of the Ukraine, Belarus, and Russia. The most popular method of importation is through personal vehicles, but there is also evidence of hidden compartments in trains and trucks. The motion picture industry, through FOTA, worked with law enforcement and in July raided a street vendor known to be selling Russian DVDs. The Warsaw vendor and a deliveryman were arrested and over 4,000 pirated DVDs (including *Spiderman*, *Harry Potter* and *Star Wars: Attack of the Clones*) containing subtitling options for Polish, Czech, Hungarian, Icelandic, Dutch, Bulgarian, Indian, Turkish, Danish, Swedish, Finnish, Greek, Norwegian and Arabic options were seized. This market transformation toward pirate DVDs was not expected by either the government or the industry. The socio-economic climate in Poland, as well as the lack of DVD player penetration, seemed to indicate that the consumers would not embrace optical disc piracy. Unfortunately, the Polish people have rapidly accepted this new technology. The number one problem in Poland facing the audiovisual industry (FOTA's) program is optical disc piracy.

In addition to causing huge issues for the industry, digital piracy has also reawakened the audio-visual counterfeiting market in the infamous Warsaw Stadium. For the past several years, the MPA has reported that it was not affected by pirate product being sold or distributed in the Stadium. Up until November 2001, the only material FOTA found at the Stadium were videocassettes of poor quality and pornographic films. Now however, the Stadium is one of the major venues used by pirates to distribute CD-ROMs and counterfeit DVDs professionally pressed in Russia. The situation is worsening every month. So far, FOTA has filed 800 legal actions through August 2002; they filed 802 actions in all of 2001.

MPA reports that Internet piracy for its products appears to be somewhat contained. FOTA has been extremely proactive in this regard and has conducted many successful investigations and raids on Internet pirates in 2002. The police are very excited about the new technology and have been willing to assist FOTA in their activities. (This should be compared against the scenario involving the Stadium where all IP industries have difficulty in mobilizing the police to organize raids.) The pirates mainly use the Internet for the sale of hard goods, in particular home-burned CD-ROMs. Unauthorized downloading of films currently is not an issue due to the lack of high-speed access in Poland.

Business software: The Business Software Alliance (BSA) reports that Polish prosecutors continue to permit piracy cases to languish at the prosecutorial stage, or permit them to be dropped altogether. These delays and dismissals may be the result of prosecutors' (and judges') demonstrated unfamiliarity with software piracy. In addition, inadequate fines and prison terms means the BSA has obtained very few judgments in its software piracy cases. The fines and sentences imposed under these judgments have been insubstantial despite improvements in the law.

On the positive side, BSA notes that the Polish police are still among the most active in Europe in investigating cases of software piracy and in conducting *ex officio* raids. However, there has been little or no police action regarding the Stadium, which remains a major source of pirated business software in Warsaw. The BSA participated in more than 150 raids organized by the police between January and August 2002. In that time period, almost 90 companies using illegal software were raided with 420 PCs seized, and more than 30 resellers and 27 persons illegally copying and distributing software were raided. This has resulted in the seizure of 25,000 CD-ROMs and detention of 114 individuals. The police have also conducted some high profile raids including one in January 2002 involving a well-known Polish company near Warsaw; the company is a part of an international corporation which manufactures electronic equipment based in Asia. The raid resulted in seizure of almost 70 PCs and involved illegal software of almost all the BSA members. In March 2002, as a result of efficient action by the police, 1,500 copies of high quality counterfeited software of one BSA member were seized in Wrocław. The illegal CDs were to be sent to into the EU and their value exceeded US\$100,000. BSA reports that it has received good cooperation from the Polish government in its education and marketing campaigns and on enforcement against unauthorized use of business software in commercial settings, for which the Polish government should be commended.

Below is a chart which appeared in IIPA's 2002 Special 301 submission; estimated losses due to piracy in Poland amounted to \$261 million in 2001.³

**POLAND: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars)
& PIRACY LEVELS**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	25.0	27%	25.0	25%	25.0	25%	25.0	25%	25.0	25%	30.0	20%
Sound Recordings / Musical Compositions	37.0	30%	31.0	30%	22.0	40%	16.0	40%	9.0	35%	9.0	15%
Business Software Applications ⁴	77.1	53%	82.7	54%	130.0	60%	113.3	61%	86.1	61%	152.7	73%
Entertainment Software	115.8	90%	103.1	85%	70.9	60%	72.1	62%	68.2	59%	76.4	65%
Books	6.5	NA	7.0	NA	7.5	NA	7.0	NA	13.0	NA	13.0	NA
TOTALS	261.4		238.8		255.4		233.4		201.3		281.1	

For the first nine months of 2002, the recording industry reports a rise in the overall piracy level of 40-50% of units (compared to the 30% last year). Piracy of international repertoire alone reaches levels of at least 70% of the total music market of international repertoire.

IIPA Recommendations for Specific Actions to be taken by the Polish Government

(1) The Warsaw Stadium: IIPA reiterates two actions which the Poles could, and should, take to address the piracy problems associated with the Stadium⁵:

- Banning the sale of all optical media products and other copyrighted materials in and through the Warsaw Stadium: a strict and easy way to stop the sale and distribution of pirated materials in the Stadium is to ban their trade. In February 2002, IIPA recommended that the Polish authorities should act immediately to halt the sale of "copyrighted products" in and through the Stadium. This would include the sale of all optical media product (e.g., music CDs, CD-ROMs of videogames and business software, and other CDs containing any copyrighted materials, such as books) as well as other pirated product such as videos and CD-Rs containing filmed entertainment. This also would include conducting inspections of trucks entering and exiting the Stadium, as well as warehouses located around Warsaw. The list of products to be included in such stoppage include: music CDs, CD-ROMs of

³ The methodology used by the IIPA member associations to calculate these estimated piracy levels and losses is the same as that reported in our 2002 Special 301 submission, and is available on the IIPA website (www.iipa.com) specifically at <http://www.iipa.com/pdf/2002SPEC301METHODODOLOGY.pdf>.

⁴ BSA loss numbers for 2001 are now final. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$55.8 million at 49% were identified as preliminary. BSA finalized its 2001 numbers this summer, and these higher revised figures are reflected above.

⁵ These two recommendations track those found in IIPA's 2002 Special 301 submission. In that filing, our primary recommendation was that the Warsaw Stadium should be closed. The Stadium lease, however, was renewed, and there is no political will to shut down the Stadium. IIPA also was told that several Polish prosecutors wrote a letter to we believe the Justice Ministry in support of closing the Stadium.

videogames and business software, other CDs full of copyrighted materials (such as books and educational material), and filmed entertainment in both VHS videocassette and CD-R formats. In addition to immediately halting the sale of copyrighted products within the Stadium, these efforts should also be expanded to reach commercial-scale illegal activity operating through the Stadium (where products might not ultimately be intended for sale within it) by making use of inspections of the overnight flow of trucks into and out of the Stadium. Furthermore, the sale of all optical media products should be explicitly prohibited in the lease of the Stadium administration DAMIS.

- **Intensified raids in and through the Stadium:** The Polish government should conduct series of enforcement actions, both in and through the Stadium. USTR's April 30, 2002 Special 301 announcement focused on the need for the Polish government to improve enforcement efforts at the Stadium. Polish customs and police authorities have, in fact, conducted anti-piracy raids at the Stadium, but the scope of the problem is so large that no dent in the levels of piracy has been made. Raids are conducted almost daily, and result in seizures of pirated materials. To be clear, these "enforcement actions" within the Stadium should seek to go several steps *beyond* the quick-hitting raids that have proven ineffective in the past, and should include: (1) measures through organized crime law enforcement officials to crack the organized crime rings controlling the Stadium operations and its finances, and (2) the systematic removal of operations selling pirated products that are unable to provide immediate, tangible authorization from rightsholders to sell products (whether in the form of a license, proof of payment of taxes, etc.).

(2) Optical disc legislation: Forensic examination has confirmed the production of pirated CDs in Poland. The capacity of Poland's 9 optical media plants with 44 CD lines and 14 DVD lines with the capacity currently at least 350 million optical discs per year clearly exceeds the legitimate demand in Poland. This estimated capacity does not include the capacity of the new U.S.-based Thompson Multimedia plant with 10 DVD lines since there is no data available yet.

With respect to enforcement efforts against plants involved in illicit production, there are currently 6 criminal proceedings against 5 CD plants in Poland, two of which were initiated against Silesia and Pomerania/General Group in 2001. As for the procedural status, 2 of the 6 criminal cases (both against Selles plant, initiated in 2000 and 2002) are pending in the courts due to the notoriously slow Polish judicial system, the remaining 4 cases (Silesia, Pomerania/General Group, Digi Records, Yield) are still at the prosecution level. The Polish recording industry group ZPAV has requested that the National Police Headquarters investigate the incident in Silesia CD plant in Wroclaw, where one of the CD lines was moved out from the plant while it was under police custody. The Investigation Department of the National Police Headquarters has so far confirmed to the industry that the investigation "to determine the location of the equipment used for the CD production" is in process. The industry urges the police to speed up with the investigation and clarify the situation as swiftly as possible.

Given the OD piracy problem, there is an urgent need for optical disc legislation; the unregulated and uncontrolled optical media production in Poland must be addressed. Earlier this summer, the recording industry presented the Minister of Culture with detailed proposals on OD regulations, after discussions with the legal advisors in this ministry. To date, the Ministry of

Culture has not replied to the industry's proposals. We look forward to continuing to work with Polish officials to achieve comprehensive OD legislation.

(3) Application of organized crime legislation: The Polish Government must make the political decision to stop organized crime in the Warsaw Stadium, and also in other pirate street markets in Wroclaw, Krakow and Szczecin. The organized crime elements are becoming only more entrenched, making enforcement even more difficult. Poland already has legislation to fight organized crime (regulated in Article 258 of the Criminal Code) and this reportedly also extends to copyright infringements. Enforcement authorities must take steps to initiate actions under these additional criminal remedies.

(4) Border measures: Poland's Central Board of Customs and its IPR Coordination Center were closed on April 1, 2002. This closure created major uncertainty as to which entity within customs is responsible for coordinating IPR matters. The responsibilities of the Central Board of Customs were transferred directly to the Ministry of Finance. The Deputy Head of the Customs Service, Mr. Robert Kwasniak, confirmed in his letter of October 22, 2002 to the local recording industry group ZPAV that there are three separate bodies within the Ministry of Finance responsible for IPR issues:

- A central IPR body in the Customs Department of the Ministry of Finance (currently employing 2 persons), which is responsible for shaping customs IPR protection policy and cooperation with rights holders;
- A Task Force of 17 Coordinators in the respective Customs Houses who are responsible for coordinating customs control activities in their respective territories;
- An IPR protection unit at the Warsaw Customs House, appointed to deal with specific individual cases instigated on the basis of the TRIPS procedure.

Furthermore, the Customs Service has acknowledged that restructuring caused significant confusion regarding the competences in the respective Customs bodies; Customs has informed local industry that the newly established structure will increase the Customs efficiency in fighting with IPR crimes. Finally, it should be noted that the Border Guard operating under the Ministry of Interior is closely involved with any actions taken at the borders against IPR crimes.

Copyright Reform in Poland

Poland has not yet acceded to the two 1996 WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty); prompt accession is a priority for the copyright industries. IIPA understands that the WPPT has already passed all internal intergovernmental consultations, and the Ministry of Foreign Affairs has submitted the draft ratification law for WPPT to the Government. If approved by the Council of Ministers, the draft will be submitted to the Parliament for ratification followed with the signing by the President. We have heard that the papers for the WCT will be prepared for ratification in the near future. Industry hopes that accession documents for both treaties will be deposited with WIPO as swiftly as possible.

A new set of amendments to the Polish copyright law will be presented to the President in the coming days. The Polish Government proposed new draft amendments to its Law on Copyright and Neighboring Rights in the spring of 2002, aimed at regulating the activities of the collecting societies, introducing Community exhaustion, and taking into account some issues related to the digital environment (such as obligations in the EU Copyright Directive). Local sources report that a package of amendments to the copyright law amendments were passed by the Sejm (the lower house of Parliament) on September 13, 2002, and were submitted to the Senate. Reports indicate that the Senate did make some additional changes. On October 28, 2002, the Sejm voted on the Senate amendments. The copyright amendments are now on their way to the President, who has 21 days to approve the package. If the draft is not approved by the President, it goes to the Constitutional Tribunal for consideration. The amendments are expected to enter into effect on January 1, 2003. IIPA does not have the text of this legislative package; it is hoped, and expected, that the full text will now be made publicly available. The industries remain concerned about the adequacy of certain provisions seen in earlier versions of the copyright law amendments, including provisions on technological protection measures. The recent EU Country Report on Poland also indicated that further work needed to be done on the copyright legislation toward implementing the EU Directives. We will be reviewing these new amendments as soon as they are available in English.

The Ministry of Culture has appointed a new working group including rights holders and users to prepare additional amendments to the Copyright Law in the field of collective rights management. Much to the recording industry's concern, the Ministry of Culture wants to extend its control over the collecting societies by reviewing all existing permits (through causing their expiry and requesting the submission of new applications) and introducing obligatory provisions to the statutes of the societies. This would seriously undermine the current well-established and effectively functioning system of collective management for phonogram producers.

Conclusion

IIPA appreciates this opportunity to comment on the Special 301 out-of-cycle review of Poland. Because of the serious issues described above, and in particular the problems of the Warsaw Stadium and optical disc piracy, IIPA recommends that Poland be elevated to the Special 301 "Priority Watch List" as soon as possible.

Respectfully submitted,



Eric H. Smith,
President
International Intellectual Property Alliance