

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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November 9, 2009

Submitted to www.regulations.gov

Jennifer Choe Groves
Senior Director for
Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street NW
Washington, D.C. 20508

Re: Docket: USTR-2009-0001
Poland: Special 301 Out-Of-Cycle Review
IIPA Comments on the Status of Copyright
Protection and Enforcement
74 Fed. Reg. 51215 (October 5, 2009)

Dear Ms. Groves:

This submission by the International Intellectual Property Alliance ("IIPA") responds to USTR's request for comments concerning "acts, policies and practices regarding the adequacy and effectiveness of intellectual property protection and enforcement" in Poland as part of the Out-of-Cycle review announced by USTR on April 30, 2009. In sum, IIPA recommends that Poland remain on the Special 301 Watch List.

About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA is comprised of seven member associations (listed in the letterhead below), which in turn represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world. IIPA has participated in the Special 301 process since its inception 20 years ago.

IIPA's February 2009 Submission on Poland

IIPA prepared a country report on Poland as part of our February 2009 submission to USTR in the annual Special 301 process. There we outlined 15 proposed actions -- both enforcement-related and legislative -- that we believed the Polish government should take to address the copyright-specific enforcement and legislative issues still outstanding there.¹

¹ See IIPA 2009 Special 301 report on Poland, posted at <http://www.iipa.com/rbc/2009/2009SPEC301POLAND.pdf>.

Continuing Concerns in Poland

The elements below were all listed in IIPA's 2009 Special 301 filing, and remain an integral part of improving the copyright landscape in Poland. Proper implementation of these points by the Polish Government in the near term will, we believe, contribute to a higher level of IPR protection and will raise the efficiency among Polish law enforcement agencies.

1. Enforcing local sale bans on pirate OD product, and monitoring markets both at the border and on the streets. Taking action with the local governments to introduce bans on the sale and distribution of optical discs at local marketplaces is needed. Regular monitoring of producers and distributors of pirate discs by these law enforcement agencies is also recommended. The recording industry (IFPI) conducted a review of 10 markets at the end of July 2009. These markets were predominantly at the Polish German border but did also include internal cities. Approximately 70% of the markets contained stalls selling counterfeit music discs which were openly on sale. There were a high quantity of stalls at these markets and there was no sense of concern from stall holders.

In addition, market monitoring should continue to be taken with respect to marketplaces along the Western border of Poland. The recording industry reports that although they conducted surveys at markets in these cities, they are unaware of any market raids at these venues. Furthermore, monitoring of marketplaces in Krakow and Wroclaw that are well-known for the sale of pirate and counterfeit materials is necessary.

2. Strengthening police actions against internet piracy. The copyright industries work closely with the police and greatly appreciate the support that they get. However, frequent personnel changes in the National Police Headquarters and the Ministry of Interior lead to constant changes in organizational structures, and often the professionals who have been trained and obtained significant and necessary expertise in copyright matters are transferred to other, non-IP units. Strengthening these police internet teams with additional personal and technical resources within the existing police structure remains important.

On a positive note, IIPA members report that the Police Economic Crime Department in Warsaw has taken down the country's largest file-sharing portal, instantly denying access to more than 4 million visiting infringers and arresting the administrators as they planned to expand their business. On October 26, 2009, police took action against the administrators and arrested two Warsaw residents, aged 21 and 41 years. While the site was registered in Poland, the site administrators had purchased server space on a number of servers abroad and allowed users to open free accounts for the storage of illegal content. Links to the content were also posted to external sites and the administrators had not taken any appropriate crime reduction action; the trading and exchange of illegal content was a simple process of uploading and downloading for free. This site allowed visitors to exchange copyrighted content on a massive scale, including the trading of movies, computer games, music and computer software. Police investigation revealed that there had been 120 million visitors to the site. During the ensuing search of the suspects' residence, police seized documentation, portable memory drives, pirated software and computer equipment, and a car, in anticipation of the future court penalty.

3. Appointing specialized IPR prosecutors and harmonizing evidentiary procedures. The appointment of prosecutors who possess specialized knowledge indispensable in copyright cases (including technical knowledge of the reproduction of optical discs like CDs, DVDs, CD-Rs and DVD-Rs, and the functioning of internet infrastructure and peer-to-peer (P2P networks)) -- within the existing

structure of the Ministry of Justice -- is strongly recommended. The copyright sectors believe that such cooperation with specialized prosecutors will facilitate public/private anti-piracy activities. Maintaining organizational continuity among the prosecutors, independent of any changes in political personnel, is also critical. In addition, various regions in Poland currently have different requirements as to submitted evidence and documents. It is essential to have the procedures unified in practice and especially to understand all of the complicated issues related to the distribution of files on the internet.

4. Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs production. Poland has a decree (2004) that regulates and governs the production of optical discs in Poland. At the time of its enactment and since then, the copyright industries have expressed concerns about effective enforcement given the lack of criminal sanctions in that decree for the failure to perform the obligation of reports by some plants. Such sanctions were proposed by the Senate during the course of the legislation process, but the Sejm never approved them. Another legislative vehicle containing such provisions to the copyright law has been ready for several years, but the government has not moved forward, despite the lack of any known legislative opposition. In February 2009 as a result of intelligence obtained by the industry and passed to Polish authorities, police raided two plants (in Warsaw and Rybnik) and recovered 54,000 infringing units of pirate music and film manufactured at two plants. This product was for the Dutch market.

5. Introducing *ex officio* actions. The introduction of *ex officio* procedures, in both the Polish criminal law and amendments to the copyright law, are needed to provide more effective procedures in internet piracy cases. To this end, the Polish copyright industries submitted specific proposals to address the present lack of criminal penalties for internet piracy to the Intergovernmental Team for Counteracting Copyright and Related Rights Infringements back in 2005, and have held various discussions with the government sector (including police, public prosecutors). Regrettably, years have passed and the Polish government has thus far failed to move forward with any specific proposal to address this. It is essential that the government introduce satisfactory amendments on this point, and commit to pressing the Sejm for adoption by a date certain. For example, three months from the date of introduction should be sufficient in this case. We ask that the U.S. government obtain the Polish government's views on this important issue.

6. Introducing anti-camcording legislation. Anti-camcording legislation should be adopted in Poland to require jail sentences, preferably of up to a year or longer for the first offense, with a higher penalty for any subsequent offense. Such legislation is imperative to curb the illicit camcording in Poland of motion pictures and would significantly benefit the Polish film industry as their work is frequently stolen from theaters. We ask that the U.S. government obtain the Polish government's views on their willingness to pursue this goal.

7. Withdrawing the reservation to Article 12 of the Rome Convention: The continuing lack of protection for foreign repertoire has greatly complicated licensing discussions between the relevant collecting societies and commercial users. While Poland's reservation under Article 12 may not be inconsistent with its international obligations, maintaining its "reservation" is just a politically correct way of expressing a policy based on denial of national treatment and discrimination against foreign rightholders with respect to broadcast rights, and should not be tolerated. In addition, the absence of protection for U.S. repertoire undermines the position of the entire sector, and removal of the reservation is supported by Polish rightholders.

Recommendation: Remain on the Watch List

For the reasons outlined above, IIPA believes that Poland should remain on the Special 301 Watch List as a result of this out-of-cycle review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Maria Strong". The signature is written in a cursive, flowing style.

Maria Strong
for the
International Intellectual Property Alliance (IIPA)