

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Poland is an important market for all the copyright industries. In June 2000, Poland accomplished a long-sought goal of the copyright industries: adopting amendments to make the Polish copyright law comply with the WTO TRIPS Agreement. This four-year effort represented a major achievement, and the TRIPS-plus law was passed only after the Sejm split the larger comprehensive copyright legislative package into two pieces in order to increase the chances that the non-controversial TRIPS bill would pass. The new amendments corrected several, but not all, of the TRIPS deficiencies, including providing a point of attachment for sound recordings and protecting pre-1974 foreign sound recordings. Sadly they did not include provision for civil *ex parte* civil searches or clarify the scope of the existing law on this point. In fact, more objectionable provisions were inserted into this June 2000 legislation which will require additional resolution. The second copyright bill containing numerous controversial provisions to which the copyright industries object remains pending in the Sejm.

Given the passage of the June 2000 copyright legislation, IIPA supported USTR's decision in its out-of-cycle review to move Poland from the Priority Watch List to the Watch List in November 2000.¹ However, much remains to be done to improve enforcement if piracy levels are to remain low and if legitimate businesses are to thrive. In order to ensure that progress continues in Poland, on both enforcement and legislative reform, IIPA recommends that Poland remain on the Watch List and that another out-of-cycle review be conducted. In particular, this out-of-cycle review should focus on distinct and tangible improvements made in halting the activities involved in the sale and distribution of piratical materials at the Warsaw Stadium. IIPA suggests that this review be conducted not later than early September 2001. If the activities in the Stadium should happen to move to other location(s), we expect that situation also will be evaluated in this review.

The lack of effective criminal and civil copyright enforcement in Poland continues to be a major problem for all industries. The most visible example of the pervasive piracy is the numerous open stalls at the Warsaw Stadium. Organized crime elements are involved in the distribution of pirated materials, thus making it impossible for some of the industries to take any anti-piracy action because the danger is too high. Cooperation between police and the industries in anti-piracy raids and seizures of infringing goods continue to be positive, and results are encouraging despite the high levels of piracy and the infiltration of organized crime

¹ Press Release 00-77, Office of the U.S. Trade Representative, "USTR Announces Results of Special 301 Out-of-Cycle Reviews," November 8, 2000. Ambassador Barshefsky stated, "While we believe this [passage of the new copyright legislation] is an important step, it is critical that Poland also address remaining intellectual property problems, including weak enforcement against piracy and counterfeiting." For a full history of Poland's placement on the Special 301 lists, see Appendices D and E of this submission. Poland is also a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program which includes a criterion requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. In 1999, \$293 million of Poland's imports to the United States benefited from the GSP program, accounting for nearly 36.4% of its total imports. For the first 11 months of 2000, \$289.5 million of Polish goods entered the U.S. under the duty-free GSP code.

elements in piracy. However, few criminal cases reached the sentencing stage and most cases languished at the investigative or prosecutorial stage and then were dropped. Poland must correct the failures of its judicial enforcement system if it is to stem the growth of piracy. The overall trade losses due to piracy in Poland are estimated at almost \$249 million in 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	25.0	25%	25.0	25%	25.0	25%	25.0	25%	30.0	20%	39.0	25%
Sound Recordings / Musical Compositions	21.0	30%	22.0	40%	16.0	40%	9.0	35%	9.0	15%	10.0	22%
Business Software Applications ²	92.6	55%	130.0	60%	113.3	61%	86.1	61%	152.7	73%	113.1	75%
Entertainment Software ³	103.1	85%	70.9	60%	72.1	62%	68.2	59%	76.4	65%	72.9	63%
Books	7.0	NA	7.5	NA	7.0	NA	13.0	NA	13.0	NA	13.5	NA
TOTALS	248.7		255.4		233.4		201.3		281.1		248.5	

COPYRIGHT PIRACY IN POLAND

The market for legitimate products in Poland, which only a few years ago seemed promising, has been seriously damaged, for the music, motion picture, business and entertainment software industries. Some of the obstacles to effective enforcement were found in legal deficiencies in the 1994 Polish copyright law. The June 2000 copyright law amendments (discussed in further detail, below) did correct two major problems which affect enforcement — the lack of protection for pre-1974 foreign sound recordings and the low level of criminal penalties — and added new tools. IIPA and its members expect that the effective implementation of the new copyright law will deter piracy in Poland.

Optical Media Piracy in Poland Remains a Serious Problem

Imports of piratical optical media are on the rise

The huge amount of pirate CD imports coming into Poland mainly, from Ukraine, Lithuania and the Czech Republic, first reported in 1999, did not decrease during 2000. These pirated optical media products (CDs, DVDs, CD-ROMs) include illegal audio, audiovisual, and software (of business applications and entertainment) material. The CD and other media are being produced and distributed via a network of plants and distribution chains that illegally cross borders, and that are run by regional organized criminal elements. The police and Customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$109.2 at 58% were reported as preliminary. Those BSA numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

smuggling), which strongly indicates that thousands of pirated optical discs are finding their way onto the Polish markets daily.

The entertainment software industry reports that almost all PC product was imported, from Ukraine, Russia, Belarus (and still Bulgaria). There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. The manufacturing and distribution of entertainment software is being undertaken by organized criminal enterprises operating throughout the region. Illegal material is produced in some countries (often in Russian) including Hungary, Ukraine and Poland, and distributed in a major cross-border exchange, to a number of countries.

The Business Software Alliance (BSA), in conjunction with the IFPI, currently is investigating one Polish replicator believed to have exported disks into western Europe for distribution in Denmark. In that case, Polish police, acting upon the request of the BSA and IFPI, raided the replicator near Katowice and seized equipment, 43,000 CDs, and documentation. The BSA and IFPI had reason to believe that the plant was cooperating with firms in the Czech Republic to produce the CDs. The case is currently before Polish prosecutors, however, and has been since early 2000.

The Motion Picture Association (MPA) reports that most of the pirate video production in Poland is diffuse and small scale, and therefore hard to stop. Nevertheless, in 2000, many successful raids against pirate duplication sources were run by the MPA, mostly through joint cooperation efforts with other industry counterparts, consisting of the representatives of the BSA and the IFPI.

The Warsaw Stadium and its link to organized crime

Widespread piracy at the Dziesięciolecie Stadium in Warsaw continues at completely unacceptable levels. The dire and dangerous situation at the Stadium, which is full of pirate optical media product, has not improved. Only recently have the police undertaken some raiding activity at the Stadium. In November 2000, the motion picture industry conducted a major raid which resulted in the arrest of three persons who were suspected suppliers to the stadium market. Because of the danger involved, it is very difficult for industry alone to conduct investigations. The Polish authorities must direct their attention to halting the rampant activities involving in the sale and distribution of piratical materials at the Warsaw Stadium. Attention must also be paid to monitor whether this kind of large, organized activity is being established at other locations.

According to press reports, Armenians (along with other foreign nationals) have been selling mainly pirated CDs as well as smuggled alcohol and cigarettes at the Stadium for years. In July 2000, a Ukrainian died from multiple stab wounds, while his would-be victim, a 38-year-old Armenian who was shot in the head, went to the hospital in critical condition. One press report indicated that the Polish police believe that gangsters at the Stadium extort approximately U.S.\$50,000 from Armenians alone "for protection" every week.

Poland should consider regulating optical media production, distribution and export

According to our most recent reports, there are 12 CD plants are operational in Poland, with 26 operational lines. Nine of these plants have introduced the SID Code; seven have an agreement of cooperation signed with IFPI Warsaw and ZPAV. However, the size of local

production is, for the moment, small compared to the massive pirate imports, especially from Ukraine and Lithuania.

In order to avoid a possible growth of illegal CD production within Poland, steps must be taken to regulate optical disk plants. Poland should regulate the production, distribution and export of optical media. Such regulations would include provisions to close plants that are caught illegally producing copyrighted material, to seize infringing product and machinery, and to monitor the importation of raw materials (optical-grade polycarbonate) used in the production of CDs, DVDs and CD-ROMS and other optical disc media. Also, all of the plants must be required to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers. To the best of our knowledge, there are no developments to report regarding the implementation of any optical media regulations.

Copyright Piracy Levels in Poland Remain High Across All Industries

In October 1998, a special Anti-Piracy Coalition was founded by three organizations — ZPAV (the local association of the International Federation of the Phonographic Industry, IFPI); FOTA (a Polish MPA-associated organization); and the Polish branch office of Business Software Alliance (BSA). This effort is supported by the EU PHARE program. Many successful raids and seizures have been undertaken by cooperation of these organizations and the police. Unfortunately, copyright piracy levels remain high in Poland for all industries.

The level of recording and music piracy in Poland dropped over the past year to 30% for 2000. The total trade losses in the recording industry were \$21 million in 2000. In 2000, nearly 670,000 pirate CDs and nearly 35,000 pirate audiocassettes with a total estimated value of over \$5.8 million were seized by Polish enforcement authorities (police, customs, border guard). Approximately 97% of all pirate CDs available on the market have been smuggled to Poland through the eastern border; nearly 90% comes from the Ukraine. Therefore, cooperation with customs is the recording industry's highest priority. The year 2000 was announced by the President of Customs, Mr. Zbigniew Bujak, as the Year of Intellectual Property. ZPAV, the recording industry anti-piracy organization, did not expect overnight changes and immediate success when it comes to anti-piracy activities. Reportedly, top-level customs officials as well as officers at the borders have actually started to perceive intellectual property rights infringements as a serious problem which causes damages not only to private business, but to the State Treasury. It is hoped that this attitudinal change will result in more effective customs activity in the field of detecting and seizing pirate sound recordings in 2001.

The Warsaw Stadium remains the biggest point of pirate CD distribution (wholesale and retail). Other main centers of pirate distribution include: open markets along the Poland-Germany border; electronic markets in Krakow and Wroclaw; large used car markets (e.g., in Lublin); open markets in western Poland cities: Poznań, Łódź, Katowice, Szczecin. CD-R piracy and MP3 (recordings in MP3 format fixed on carriers) are still an insignificant phenomenon. Twelve CD plants are operational in Poland (26 lines); nine of them have introduced the SID Code, seven have an agreement of cooperation signed with IFPI Warsaw and ZPAV.

The new copyright law (discussed below) provides for a one-year sell-off period for recordings containing pre-1974 repertoire which had already been manufactured when the new law came into force (July 22, 2000) and were stored in warehouses of companies dealing with their production and distribution. All such recordings needed to be registered at the Ministry of Culture and National Heritage within a period stated in the law. The Ministry has recently forwarded to the Polish recording industry group full information on the register and they are

currently verifying this information and corresponding with companies who have registered their stock.

BSA reports, for example, that even though there has been sustained police cooperation in recent years, the level of piracy remains unacceptably high. Estimated 2000 trade losses due to business software piracy in Poland was \$92.6 million, at a 55% piracy level.

The entertainment software industry in particular, reported an unabated high volume of sales of illegal product at flea markets such as the Warsaw Stadium. Several hundred stalls there sell illegal entertainment and business software, as well as illegal sound recordings (cassettes and CDs). The entertainment software industry reported good cooperation with Customs authorities in the seizure of counterfeit and parallel import product. The Interactive Digital Software Association (IDSA) indicates that the estimated level of entertainment software piracy on all platforms exploded in Poland from 60% in 1999 to 85% in 2000. This increase is reflected in the significant increase in the estimated trade losses due to this form of piracy, which amounted to \$103.1 million last year.

In 2000, video piracy continues to be the most significant form of piracy for MPA member company operations in Poland. Such piracy, primarily involving pre-theatrical-release and pre-video-release titles, is widespread in rental outlets and street markets throughout Poland. These pirate videocassettes are commonly copied from videos recorded in local cinemas (still in English with subtitles), with voiceovers in Polish. Phantom companies often are identified on pirate videocassette labels as the "authorized distributor" of the film. In addition, approximately 50% of rental shops, mostly the smaller outfits, make back-to-back copies of legitimate videos for copy depth, reducing legitimate sales. The overall video piracy rate has stabilized at 20-25%. Cross-border piracy continues to be a serious problem with Germany. Polish pirates manufacture high-quality counterfeit cassettes specifically for German consumers, who purchase them at open markets alongside the Polish-German border. Cable television piracy is not a major problem because the National Broadcasting Council (NBC) requires all operators to be licensed. Cable licenses may be and have been revoked for violation of the law. With the passage of adequate anti circumvention legislation, FOTA, the local anti-piracy organization, is now able to take action against the theft of pay-television signals. The first such case commenced in October 2000.

Internet piracy is beginning to appear in Poland. MPA reports that Polish Websites that advertise the sale of pirate videocassettes and VCDs (video compact discs) have been uncovered. The police and FOTA both find it difficult to identify the owners of such sites because of national data protection legislation. Pirate VCDs are also starting to appear on the market, but are mainly limited to pornographic material. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Poland were constant at \$25 million in 2000.

AAP reports that there is photocopying, mostly of journals in universities. There is no detectible full book commercial piracy. Local publishers and licensees of trade books do enforce their licenses. Book piracy losses dropped slightly, to \$7 million in 2000.

COPYRIGHT ENFORCEMENT IN POLAND

Over the last several years, the copyright industries have continuously faced several major enforcement obstacles in Poland despite concerted efforts by industry anti-piracy actions. Many elements of Poland's enforcement regime are incompatible with its TRIPS enforcement obligations including: the failure to impose deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; and the lack of deterrent civil damages imposed in practice (three times the retail value is generally considered such a deterrent). The failure of the judicial system coupled with the rise in the production and distribution throughout the region of illegal material has been a serious setback for the copyright industries in Poland over the past few years.

The Polish police and customs officials have been active, but piracy is getting worse. The problem of getting criminal cases through the courts remains an obstacle overall. We are still looking for the Polish courts to impose deterrent criminal penalties in piracy cases. The 2000 amendments to the 1994 copyright law permitted *ex officio* actions and included provisions against the circumvention of technical copy protection measures. These changes will add important options for rights holders beyond the previous, largely ineffective system that was based on private complaints by the injured parties. The penalties in the amended copyright law are generally strong in relation to local market conditions, providing fines of up to U.S.\$125,000 and jail sentences of up to five years. The key is whether they will be imposed in practice by the Polish judiciary.

Border Measures Must be Strengthened to Reduce Piratical Imports.

The top priority for the Polish Government must be to clamp down on the massive number of illegal imports of musical recordings and business and entertainment software. In 1998, Polish Customs authorities started to enforce the copyright law by utilizing a new Customs code which was intended to simplify Customs procedures and make it easier for authorities to seize infringing goods. In 1999, the Polish Central Board of Customs issued a Decree giving Customs officials clear *ex officio* authority to seize suspected pirate goods without a complaint or request from the right holders. Polish Customs also has a special IP department.

On January 24, 2000, the recording, motion picture and business software industries signed a Memorandum of Understanding with the National Board of Customs with the aim to improve co-operation between the private sector and Customs in the fight against piracy. The National Board of Customs declared 2000 the Year of Customs Fight Against Piracy. These are positive developments. It remains to be seen whether they will translate into a clear drop in pirate imports.

Disappointingly, the BSA did not detect any large improvement in the trans border traffic of unlicensed works. BSA reports that Customs officials appear willing to work with right holders, and are in the process of implementing a software asset management policy within the Main Customs Office.

Police Have Been Active in Raids, but Prosecutors and Courts Still Fail to Impose Deterrent Criminal Penalties.

Although the Polish police continued to carry out raids and seizures (mostly of audio, business software, and video material), the Polish judicial authorities lagged behind in imposing deterrent penalties against copyright pirates. The combination of prosecutorial follow-up, and a

failure to pursue most criminal proceedings to completion in the first part of 1999, continued the pattern of the past several years. Few cases successfully got past the significant prosecutorial delay. Even when they did, the level of criminal penalties that were applied were clearly not sufficient to deter piracy. Recently, an increased interest by prosecutors in counteracting piracy has been noticed. However, it remains to be seen whether this will translate into expeditious prosecution of all cases of piracy and, eventually, the imposition of deterrent penalties. The recording industry notes continuously increasing involvement of enforcement authorities in fighting and preventing IPR infringements.

Police conduct raids ...

FOTA reports excellent cooperation with local authorities, having worked closely with both the national police in Warsaw and with regional and local police throughout the country. MPA and FOTA report that 718 raids were conducted in 2000, resulting in 527 indictments. Seventeen judgments were issued, all resulting in suspended jail sentences. 51 cases resulted in criminal fines of less than \$1,000. A July 2000 copyright act included anti-circumvention provisions, *ex officio* actions, and increased penalties. Before the crack of dawn on November 9, 2000, the Warsaw police and FOTA, the Polish Anti-Piracy Organization, raided the X-Year's Stadium, an infamous hive of pirate activity in Poland. Over 300 pirate videocassettes were seized from vendors in the stadium. On November 10, a warehouse located near the Stadium was also raided, resulting in the seizure of over 500 pirate cassettes. In the warehouse, evidence was uncovered that led to a further raid on a pirate lab in a nearby apartment. In the apartment, 15 VCRs, 1,000 cassettes and other equipment were discovered. The owner of the apartment, a major supplier to the X-Years Stadium, was arrested along with two accomplices. They are expected to be detained for at least two months while they await trial. These successful raids add to the 700 actions already launched against copyright infringers by FOTA in Poland this year.

The Broadcast Act has been in force since June 1993. The NBC has granted broadcast and cable licenses, which are revocable for failure to comply with the license provisions. The Broadcast Law does not contain an explicit copyright compliance requirement, but Article 45 does provide that a cable operator's registration may be rejected for distributing programs in violation of the law, and that a registered cable operator can be banned from distributing a program if it violates the law. According to FOTA, it is unclear whether these provisions include violations of the copyright law. The NBC should immediately revoke cable operators' registrations if they violate such a ban.

During 2000, ZPAV and IFPI Warsaw initiated criminal proceedings have been instituted against two CD plants in Poland (according to information gathered during the investigation, the plants were involved in unauthorized production and distribution of CDs containing music and computer software on an international scale). Criminal proceedings are pending.⁴ The industry holds training sessions for enforcement authorities; prosecution and judiciary are conducted on a regular basis.

BSA reports that, as in years past, they received exceptional support from Polish police, particularly with its end-user cases. Polish police raided, either upon BSA request or *ex officio*, 96 end users. Although a number of the targets were individual end users, there were raids involving schools, public relations agencies, music firms, and a furniture shop. Police also

⁴ Polish record producers also are being represented in a case against a CD plant in Russia. During a 1999 raid on a Russian CD plant, several thousand pirate CDs were seized, including Polish repertoire recordings as well as stampers for their production. Preliminary proceedings have now been concluded and the case is going to court. The damages for Polish record producers are expected to reach \$80,000.

conducted 30 reseller raids. Although this trend shows a decline over past years, police did manage to stage raids of flea markets in Warsaw, Wroclaw and Katowice, and a number of hard-disk loaders. Overall, the BSA were pleased with the support they received from police

... but few cases are prosecuted and decided in Poland

MPA and FOTA report that 718 raids were conducted in 2000, resulting in 527 indictments. Only seventeen judgments were issued, all resulting in suspended jail sentences. 51 cases resulted in criminal fines of less than \$1,000. Distributors do, however, manage to collect criminal damages amounting to U.S.\$500-600 per case for all parties involved. Fines are imposed on top of these penalties, ranging from U.S.\$50 to U.S.\$150 (in an unusual case over two years ago, a duplication plant in Krakow was fined \$13,000). FOTA believes the solution to the existing judicial impasse is to increase the number of judges (rather than prosecutors) and the quality of information technology (e.g., increased penetration of computers and trained support staff) so as to improve overall productivity in the court process.

The recording industry reports that penalties imposed for distribution of pirate sound recordings include: fines, damages paid to ZPAV as the injured party (usually from U.S.\$300 to \$1,000) and imprisonment (often one-year) suspended for two to three years (often all three elements combined). Penalties are more severe in cases of repeated criminal activity. For example, a woman was sentenced to eight months imprisonment for offering for sale 22 CDs and 26 audiocassettes; this was her third case in court.

In 1999, the BSA decided to settle many of its pending cases as a result of the lengthy criminal court delays it had experienced in 1998. In 2000, the BSA elected to pursue greater cases to judgment. There were some encouraging events, but concerns about prosecutors dropping prosecutions (although the Criminal Code should now permit right holders to continue such cases) and some weak judgments remain. From over 125 police raids, prosecutors have filed approximately 45 court indictments to date, and the BSA is aware of only 10 criminal convictions from those cases (only a 10% ratio of convictions to the number of raids). A number of these 125 cases remain pending at the investigative stage, or await court proceedings. The average length of time from raid to judgment is one to two years. With respect to the judgments, the BSA learned that they all resulted in fines of between U.S.\$0 and \$1,000, and seven of the ten resulted in suspended jail sentences. Four cases produced a suspended sentence of a year or less. Three cases produced a suspended sentence of between one and two years. One of these cases, however, resulted from the first conviction for the purchase of illegal software at a flea market. Prosecutors declined to bring such cases in past years. Finally, on a positive note, a Polish court in Gdansk issued the first unsuspended prison sentence, for one year, in August to a reseller who had twice before been convicted for piracy. This was a significant achievement.

Poland Must Clarify its Civil *Ex Parte* Measures and Issue Such Orders

The 2000 copyright amendments did not change any existing provisions regarding *ex parte* measures. There have been reports that such measures "theoretically" exist in the copyright law, but that there had been no actual implementation. IIPA had argued that the copyright law should provide clarify for such searches so that judges can begin to implement these procedures. Clarification remains a priority, and BSA is working to support this. BSA is testing these provisions, and filed an application in mid-January 2001. At the time of this filing (mid-February), there still had been no court determination in the matter. This delay itself has been disappointing. BSA is also waiting to see what proposals the Polish government will make for clarifying Article 80 of the current copyright law.

Civil Enforcement Must be Improved, Especially at the Judicial Level

The Polish courts fail to impose deterrent damages in civil cases, which historically involve business software end-user piracy cases. However, as IIPA reported in our 2000 301 filing, BSA's experience on the civil front has been limited, not in large part because of the companies' inability to perform *ex parte* searches, and its campaign therefore has focused on criminal actions.

Delays in Criminal and Civil Cases Continue

FOTA continues to press for more pools of experienced prosecutors to handle the growing intellectual property case backlog. A continuing problem is the notoriously slow Polish judicial system. The Polish courts have only recently begun to hear significant numbers of criminal copyright infringement cases and have issued comparatively few decisions.

COPYRIGHT LAW AND RELATED ISSUES IN POLAND

A summary of the copyright legislative developments over the last few years is important, because not only does it identify the remaining issues on the legislative agenda, it also points out omissions on selected enforcement mechanisms which in turn impact anti-piracy efforts and commercial market development.

The Copyright Act of 1994

In February 1994, Poland adopted a comprehensive copyright law, the Law on Copyright and Neighboring Rights (Law of February 4, 1994, which entered into effect on May 24, 1994). Poland then joined the substantive provisions of the 1971 Berne text, effective October 22, 1994. Although Poland also acceded to the World Trade Organization, Poland announced at that time its intention to take a four-year TRIPS transition period. In 1999, Poland adopted new customs provisions and its related enforcement practice in order to comply with TRIPS, but Poland failed to introduce the other legal reforms required by TRIPS during this four-year period.

Thus, before the 2000 amendments, several features of the Polish IPR regime were not compatible with the TRIPS obligations:

- the point of attachment for the protection of foreign sound recordings (TRIPS articles 3 and 14) had to be clarified. In short, Poland need to change its Law on Copyright and Neighboring Rights to grant a clear provision on full national treatment and a broad point of attachment consistent with international practice to avoid legal uncertainty and any risk of unfair denial of protection and enforcement for foreign sound recordings. In addition, Poland should join the Geneva Phonograms Convention. In sum, Poland had to provide protection for sound recordings based on publication or fixation (in Poland, a WTO, Rome or Geneva Phonograms Convention country), or based on a producer's residency or operations in Poland. That failure to act was seen not only as a violation of TRIPS, but also of Article IV of the 1990 Business and Economic Relations Agreement with the United States.

- express protection for pre-1974 (foreign) sound recordings, in line with TRIPS Article 14.6, needed to be afforded. With respect to domestic sound recordings, the Polish copyright law only provided protection back 20 years from the date of the last copyright reform legislation (i.e., to post-May 1974 recordings). Poland had to extend protection to pre-existing Polish and foreign sound recordings released within the past 50 years. Such full restoration is a critical component of adequate and effective protection for all sound recordings (U.S. companies in Poland own Polish repertoire and therefore have a direct interest in Polish back-catalog being protected as well). Although the Berne Convention (Article 18) requires it, Poland never clearly provided full retroactivity for all copyrighted works.
- the law did not appear to permit software right holders to conduct civil *ex parte* searches that would aid in combating end-user piracy, as required by TRIPS Article 50.

Copyright Reform Efforts Resulted in Two Separate Copyright Bills

The struggle to achieve copyright reform in Poland has been arduous. A summary of the efforts made, along with some of the legal issues, is important here because while the June 2000 law solved the TRIPS-problems, it created other problems and a second piece of copyright legislation remains pending.

Overview of the comprehensive copyright bill, circa 1999, before bifurcation

In October 1999, the Polish government submitted a copyright reform bill to the Parliament which should have brought the Polish copyright law and related legislation into substantive compliance with TRIPS.⁵ On the plus side, these amendments included a proposal to fix the sound recording problems. This package also addressed a variety of provisions intended to comply with European Union Directives and even some of the provisions of the new WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

IIPA identified several problems with the proposed legislation. Very controversial and very onerous provisions relating to collective administration and the treatment of audiovisual works (Articles 69-70) were added into the draft amendments package. The formulation for the scope of national treatment in the point of attachment provision was too limited and need to apply clearly and broadly to foreign works consistent with international practice. The draft also did not contain provisions that might clarify the existence of civil *ex parte* search authority.⁶ In

⁵This 1999 draft included provisions relating to: (1) rental rights (computer programs, sound recordings, audiovisual works); (2) provisions for the establishment of a reprographic rights organization; (3) provisions to strengthen the rights of collecting rights societies; (4) additional fair use limitations and exceptions; (5) the addition of a right of making available; (6) anti circumvention rights and copyright management information rights; (7) protection of encrypted satellite signals; (8) changes in the presumption of ownership of economic rights in audiovisual works; (9) changes in the rights relating to transfer of economic rights (all works); (10) parallel importation amendments (consistent with membership in the EU); (11) performers, rights; (12) treble damages for intentional infringements; and (13) a new Chapter XIV regarding criminal penalties, as well as procedural amendments to commence public complaints (*ex officio*).

⁶According to some copyright experts, theoretically civil *ex parte* search procedures could be construed under Chapter 12 of the Copyright Act. IIPA recommended that the law should provide clarity for such searches so that judges can begin to implement the procedures necessary to stop end-user piracy.

lieu of the proposal in Article 50 of a right of making available, Poland needed to adopt a broad right of communication to the public that includes a separate right of making available, to fully comply with the WIPO digital treaties. The technological protection measures and copyright management information provisions in Article 79 give only partial protection and include a “culpable” threshold that further weakens the effect of the provision.⁷ The same is true as regards the so-called “copyright management information” that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information because the protection provided in Article 79, Paragraph 4, falls short of the WIPO treaties’ requirements.

There were at least four other problems in the existing copyright law of 1994 that were not addressed or corrected in 1999 copyright package, including: (1) overly broad exemptions for the interception and retransmission of satellite signals; (2) a compulsory license permitting radio and television stations to broadcast certain published works; (3) very broad exceptions affecting library uses and the production of certain anthologies; and (4) any private copying exception not extending to digital copying of works or sound recordings. Nor should any private copying exception interfere with the ability of right holders to protect their works and sound recordings using technological protection measures.

Poland missed its TRIPS implementation deadline of January 1, 2000, as no legislation was adopted. A number of Polish experts suggested that the TRIPS Agreement is self-executing as from January 1, 2000. Nevertheless, the copyright industries were deeply concerned about the current legal uncertainties. Moreover, the presumed self-executing character of TRIPS, even if respected by the Polish law enforcement authorities and judiciary, would only solve the substantive enforcement problems, such as protection of pre-1974 repertoire. It would, however, not resolve the need for the introduction of increased criminal penalties for copyright infringement; special competence for criminal courts in piracy cases; and the introduction of *ex officio* prosecution (as opposed to the current system of prosecution upon private complaint).

Amendments to the copyright law necessary to make Polish law TRIPS-compliant were delayed, in part, because the proposed law contained some highly controversial provisions relating to collecting societies and rights of performers. Passage of the draft law with these provisions would have caused serious damage to Polish broadcasters, distributors and producers, as well as the U.S. film industry. The Polish collecting rights societies, who successfully secured these provisions in the original draft without input from all affected sectors, used the U.S. government pressure to pass TRIPS-compliant legislation by the end of 1999 to try to railroad the entire copyright bill through the Parliament. This would have precluded meaningful review or comment.

In November-December 1999, the copyright bill had its first reading in the Sejm, and was referred to the Culture Committee for review. The Sejm then decided to split the copyright bill into two segments: one containing the non-controversial (TRIPS-related) provisions and the other containing controversial provisions. Splitting the bill was accomplished in order to ensure more rapid consideration of the non-controversial elements of this legislation. By the end of February 2000, the Culture Committee agreed to bifurcate the bill, and the non-controversial bill passed its second reading shortly thereafter.

⁷ Technical protection measures must not be limited to the act of circumvention; they are the tools that right holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.

Copyright law amendments of June 9, 2000

Once the copyright legislation was bifurcated, the Sejm soon passed the non-controversial elements in its third reading on April 18, 2000. The Act of 9 June 2000 on the Amendment to the Act on Copyright and Neighboring Rights was signed by the President and has an "effective date" of July 22, 2000. This passage represented partial success to the bifurcation strategy in that it split out the TRIPS-needed amendments into the non-controversial bill. Unfortunately, the Polish collecting rights society added some provisions strongly opposed by the audiovisual industry to this bill (provisions which clearly were considered controversial) at the last minute. Here is a summary of the key accomplishments of the June 2000 legislation:

- corrected the longstanding TRIPS retroactivity problem. With respect to the point of attachment problem for sound recordings, the recording industry is satisfied that the Polish government's membership in the World Trade Organization provides a sufficient point of attachment for foreign sound recordings, even though the copyright law's unclear point of attachment provisions were not amended;
- created a 12-month sell-off period for inventory of pre-existing sound recordings (as well as "videograms" and radio and television programs) which will now be protected as a result in the change in the retroactivity provision (above);
- raised the levels of criminal penalties. For example: a penalty of up to two years in jail or a fine has been expanded to up to a three-year jail term or a fine. The penalty for infringement done for "material profit" has been changed from up to two years in jail or a fine to imprisonment from three months to five years. If the perpetrator has made the infringement a permanent source of income or manages a criminal activity, the penalty has been revised from a jail term of up to two years or a fine to imprisonment from one to five years;
- extended the term of protection for authors' works such as books, computer software and audiovisual material beyond the TRIPS minima to life of the author plus 70 years. (Note that the term for objects of neighboring rights' protection like producers of phonograms and performances was not extended and remains at TRIPS' level);
- included provisions on anti circumvention of technological protection measures (TPMs) and rights management information (RMI). This article still includes a "culpable" threshold that will likely weaken the provision and provides only partial protection, as IIPA indicated in our 2000 Special 301 report. IIPA had argued (to no avail) that TPMs must not be limited to the act of circumvention, and should have included a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing TPMs as well as outlawing acts of circumvention. This provision, which is far from adequate from our industries' perspective, will no doubt have to be revised once the EU implements the treaties;
- A similar situation has emerged as regards the protection of rights management information against manipulation. The provision is limited to the activity of manipulation itself and does not include – as required in the WIPO treaties – a prohibition of the further dissemination of the manipulated content. Furthermore, the protection against manipulation is limited to

author's rights thereby excluding the phonogram producers and performing artists who enjoy in Poland neighboring rights only.

- permits *ex officio* actions by Polish authorities;
- permits collecting societies, as injured parties, the standing to file a criminal complaint for copyright infringement; and
- added a neighboring right (25-year term) for publishers who for the first time publish or disseminate an unpublished public domain work. Also adds a right (with a 30-year term) for a person who prepares a "critical or scientific publication" (which is not a "work") of a public domain work.

There were three important problems and/or omissions in the June 2000 legislation, as adopted:

- it added the controversial articles 69-70 to which the MPA, the Polish film sector and the U.S. government had objected and had pressed for placement in the separate legislative package to be considered later. Article 70 provided that all economic rights in a film shall be held by the producer and several other entities for theatrical and video rental uses, and that the producers have to pay these other authors some remuneration. The new amendments give more performers the right to obtain residuals, extend the scope of uses to television, and require that the monies must be paid exclusively through collection societies (thereby removing the right holders' choices of how to receive payment and ensuring that residuals are the only way to get paid). This amendment was not required by Poland's international obligations and is very likely to affect the audiovisual market adversely.
- the availability of civil *ex parte* measures was not clarified.
- no amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

"Controversial" copyright legislation is pending

As a result of the bifurcation process of early 2000, the other half of the copyright law amendments – the more controversial half -- is still under legislative consideration in the Polish Parliament. These proposals included those controversial measures related to collective management. With respect to legislative status, the Sejm's Commission on Culture and Media began its first reading of this set of amendments on July 11, 2000. The bill is still pending in the special sub committee, and it is not likely that its consideration of this bill will be concluded before the end of this term of Parliament (Fall 2001).

Based on the controversial elements reported in last year's legislative package, this new legislation would appear to contain articles that would enhance the current practice of giving collecting societies the power to unilaterally set remuneration tables, and limit a producer's ability to assign economic rights to third parties. IIPA does not have the text of this bill and cannot provide additional comments at this time. Suffice it to say, the controversial articles 69-70 which passed in the June 2000 amendments continue to be very detrimental to the audiovisual industry and this issue must be revisited. Vigilance on this bill's legislative developments and progress is necessary.

Poland should withdraw its reservation to Article 12 of the Rome convention

Poland currently has taken an exception to Article 12 of the Rome Convention, permitting it to discriminate against U.S. nationals with respect to rights connected to broadcasting, communication to the public and public performance. Discriminatory regimes connected to reservations under Article 12 of the Rome Convention are objectionable in principle. The dismantling of discriminatory regimes connected to the communication of signals is one of RIAA's primary objectives, and these unfair, and now economically fundamental, discriminatory regimes need to be addressed. Poland should be urged to revoke their reservation to Article 12. Also, Poland should be encouraged to give performing artists and phonogram producers an exclusive right instead of merely a claim for remuneration. Today many of the primary forms of exploitation of sound recordings take place via the communication of signals rather than the delivery of physical product, and yesterday's secondary right is today's primary one.

Ratification of the Two WIPO Treaties

Poland was not a signatory to either of the two new WIPO treaties. The Polish government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Ratification of these treaties may not be immediately forthcoming, given that Poland is one of the last remaining Central European countries looking to track the timetable of the European Union's efforts.

Criminal Code Amendments Relating to Software Piracy

Criminal code amendments applicable only to software piracy were adopted in 1998 and entered into effect in 1999. The principal improvement arising from the legislation, which was applicable only to computer programs, was that it allowed Polish prosecutors to conduct proceedings on their own behalf, and without involving right holders. Subsequent amendments to the code in 2000 now permit the injured right holder to act as a party to the criminal proceedings along with or instead of a public prosecutor. Now, the BSA may file its own indictment with the court and continue proceedings after prosecutors have abandoned cases. The BSA reports that prosecutors now typically rely on the Criminal Code for stronger infringement cases, and rely on the Copyright Act provisions for weaker cases. Prosecutors have employed the code in roughly 40% of the software infringement cases tracked by the BSA.