

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# POLAND

### EXECUTIVE SUMMARY

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IIPA recommends that Poland remain on the Watch List and that an out-of-cycle review be conducted this year. The lack of effective criminal and civil copyright enforcement in Poland continues to be a major problem for all industries. Cooperation between customs, police and the industries in anti-piracy raids and seizures of infringing goods continued to be positive in 2001 with respect to actions taken in many cities. In this regard, raiding results were encouraging despite the high levels of piracy and the infiltration of organized crime elements. However, few criminal cases reached the sentencing stage and most cases have languished at the investigative or prosecutorial stage. The judiciary also needs to improve its performance, and issue deterrent sentences in an expeditious fashion. All these elements are part of Poland's current TRIPS obligations and its bilateral obligations to the U.S. under the Generalized System of Preferences (GSP) program.

Most disturbingly, there has been no significant progress in the past year on deterring piracy at the Dziesięciolecie Stadium, known as the "Warsaw Stadium." Numerous open stalls sell pirated copyright materials, especially recordings and videogames. While customs officials, along with the police, conduct almost daily raids in the Stadium, business in piracy remains as brisk as ever. The Polish customs officers have documented that Stadium operators announce enforcement raids over the loudspeaker system as the raids occur. Both Polish federal and municipal officials are unwilling to take specific steps to close this Stadium. IIPA and local copyright owners have long advocated that this Stadium should be closed. Pirate optical media continue to enter Poland from Ukraine, Lithuania and more recently Belarus. Poland should regulate the production, distribution and export of optical media. The overall trade losses due to piracy in Poland are estimated at \$236 million in 2001.

On the legislative front, some copyright-related legislation remains unresolved. On a positive note, Poland accomplished a long-sought goal of the copyright industries: adopting amendments in June 2000 to make the Polish copyright law comply with the WTO TRIPS Agreement. However, this 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 second copyright bill containing numerous controversial provisions is legislatively dead, but could be taken up in the near future. Additionally, further clarifications to the law governing *ex parte* civil searches need to be made for this measure to be effective in the fight against piracy. Although at least one application for an *ex parte* civil search was granted in 2001, the procedural delays that are a part of the current implementation of the underlying law entirely detract from the effectiveness of the measure. Ratification of the two WIPO treaties, with passage of copyright law amendments and implementing regulations, are important to the copyright industries.

Given all these concerns with Polish enforcement and legislative issues, IIPA recommends that Poland remain on the Watch List and that an out-of-cycle review be conducted no later than September 2002. In particular, this out-of-cycle review should focus on several elements:

## Enforcement

- Immediate closure of the Warsaw Stadium. If the activities in the Stadium should happen to move to other location(s) in Poland, that situation must also be addressed by Polish authorities and falls within the scope of this out-of-cycle review.
- Intensified raids, both in and through the Warsaw Stadium, to halt activities related to the sale and distribution of pirated copyright materials. This goes beyond the quick-hit raids to include measures to crack the organized crime rings controlling the Stadium and its finances and the remove businesses in the Stadium which are not able to provide immediate, tangible authorization from right holders to sell copyrighted products.
- Consistent, every-day actions conducted by the basic units of the police, customs, border guard at street markets and bazaars throughout Poland. These efforts should be directed at eliminating the coordination centers for pirate production and distribution (including smuggling). This effort will require improved cooperation with the relevant authorities of the Ukraine, Belarus, Lithuania, Czech Republic, Germany and Russia.

## Legislative-Related

- The special government IPR Task Group (led by the Ministry of Culture) should release its report on IPR protection in Poland as soon as possible. This report (which will include only general recommendations) then needs the approval of the government. The next step should be to develop, swiftly, a detailed plan to outline strategies for the permanent and consistent improvement of IPR rights, including law enforcement, legislation, and training. This plan should contain both short-term actions (e.g., closing down street markets selling pirated products, constant police raiding and seizures) and longer term objectives (judicial reform to speed up the slow court processes in IPR cases).
- Prompt ratification of WIPO treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).
- Draft legislation to amend the Law on Copyright and Neighboring Rights to implement the obligations of the WIPO treaties and the EU Directives should be released for industry review and comment before legislative introduction.

IIPA suggests that this review be conducted not later than early September 2002. The closure of the Warsaw Stadium should occur on an expedited basis, without delay.

**POLAND: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

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 <sup>1</sup>	37.0	30%	31.0	30%	22.0	40%	16.0	40%	9.0	35%	9.0	15%
Business Software Applications <sup>2</sup>	55.8	49%	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
<b>TOTALS</b>	<b>240.1</b>		<b>238.8</b>		<b>255.4</b>		<b>233.4</b>		<b>201.3</b>		<b>281.1</b>	

## COPYRIGHT PIRACY IN POLAND

This section provides an overview of the general market situation with respect to piracy for the copyright industries in Poland, including optical media piracy, internet piracy and the more traditional forms of piracy. The next section addresses the distinct piracy and enforcement problems which afflict the Warsaw Stadium.

**Overview of Law Reform and Piracy:** The market for legitimate products in Poland, which only a few years ago seemed promising, has been seriously damaged, especially for the music and entertainment (videogame) software industries. In the mid-1990s, some of the obstacles to effective enforcement were found in legal deficiencies in the 1994 Polish copyright law. The June 2000 copyright law amendment 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 also added key enforcement tools. IIPA and its members hoped that the effective implementation of the new copyright law would deter piracy in Poland; so far, that result has not occurred, with the levels of piracy remaining relatively constant for most (not all) industries in 2001.

**Training Efforts:** The private sector has worked hard to train Polish officials on copyright law and enforcement. 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 organization associated with the MPA); and the Business Software Alliance's (BSA) representative in Poland. This effort was supported by the EU PHARE program. Many successful raids and seizures have been undertaken by cooperation of these organizations and the police. Industry organizations have also undertaken numerous efforts to train Polish enforcement authorities, including police, customs, prosecutors and judges. The motion picture industry, through its local anti-piracy organization FOTA, conducted 15 seminars for police departments as well as judges and prosecutors. The music industry, IFPI Warsaw and ZPAV, held

<sup>1</sup> RIAA's 2000 loss estimate of \$21.0 million reported in IIPA's 2001 Special 301 submission has been revised to \$31.0 million.

<sup>2</sup> BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$92.6 million at 55% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

18 training seminars for customs officers, customs inspectorates, and border guard units. A December 2001 judicial IPR training program was sponsored by the Ministries of Culture and Justice and co-organized by ZPAV.

There is a need for constant training sessions for policemen, customs and border guard officers, prosecutors, judges in the field of IPR protection and methods of fighting piracy. This activity is very important, especially since there are frequent staff changes in these agencies, and so the training sessions should really be repeated every year. The Polish government should take steps to ensure regular training. In addition, the government should consider developing an educational program of schools (what is copyright, how and why should it be protected, emphasizing that immaterial and material goods should be equally protected, etc). Such knowledge is currently not being provided (and the age group of 13-25 is the largest target group for the sales of music, films, software, computer games, etc.).

**IPR Task Force of Government and Industry:** There are at least two Polish government groups studying the Stadium. First, a task force established by the November 2000 decree issued by the Prime Minister is led by the Ministry of Culture (in 2000, by the then Minister of Culture and National Heritage in charge). In October 2001, the Ministry returned to its former name of the Ministry of Culture (leaving out the term “of national heritage”). The task force consists of four groups (responsible for analyses, education, legislation and the Stadium). In the fall of 2001, different rights holders organizations (such as ZPAV, FOTA, BSA and ZAiKS) presented the task force with comprehensive reports on the current IPR protection situation in Poland. The “Analyses Group” has been preparing an official government report, and this draft is close to being released. The report apparently only contains general recommendations, not specific, detailed plans which would outline a permanent strategy to improve the problems the report will identify. Second, a regular working group (not a task force *per se*) is coordinating with the Governor of the Mazovian District. Both groups are studying the Stadium issue, and presumably will be able to make a recommendation whether or not to close the Stadium.

## **Traditional Forms of Piracy Remains Embedded in the Polish Markets**

The level of recording and music piracy in Poland in 2001 was 30%, with estimated trade losses amounting to \$37 million. Approximately 90% of all pirate CDs available on the market have been smuggled to Poland through the eastern border; they came from the Ukraine, often via different transit routes (Lithuania, Belarus). Therefore, cooperation with customs is the recording industry’s highest priority. In 2001, 1,001,180 pirate units (carrying musical recordings) were seized by Polish enforcement authorities (police, customs, border guard).

The year 2000 was announced by the President of Customs as the Year of Intellectual Property. ZPAV did not expect overnight changes, but has been encouraged by positive attitudinal changes compounded with concrete anti-piracy activities. The newly appointed President of the Central Board of Customs has officially confirmed that the Polish customs administration will continue to take particular interest in the issues of intellectual property protection. In the last quarter of 2001, assisted by ZPAV and FOTA, the customs office in Warsaw undertook efficient and perfectly organized activities against pirate distribution at the Warsaw Stadium. As a result, in October and November 2001, over 100,000 pirate CDs were seized. The Polish customs regularly organizes local and central seminars for the newly appointed customs officers, focusing on the protection of intellectual property. ZPAV representatives, participate in such seminars, they share their knowledge and present new solutions which, having been discussed with customs and prosecutors’ office representatives might facilitate procedures of IPR protection.

The recording industry continues to report that the Warsaw Stadium remains the biggest point of pirate music CD distribution (wholesale and retail). Other main centers of pirate distribution include: open markets along the Poland-Germany border; electronic markets in Kraków and Wrocław; large used car markets (e.g., in Lublin); open markets in other Polish cities: Poznań, Łódź, Katowice, Szczecin. CD-R piracy and MP3 (recordings in MP3 format fixed on carriers) are still an insignificant phenomenon. Eleven (11) CD plants are operational in Poland (34 lines); eight of them have introduced the SID code, and six have an agreement of cooperation signed with IFPI Warsaw and ZPAV.

The new copyright law (discussed below) provided 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 forwarded to the Polish recording industry group some information on the register and they have been verifying this information and corresponding with companies who have registered their stock. The recording industry has not yet received any information on the results of the program, despite the fact that ZPAV assisted the former Ministry of Culture in the preparation of a database which would allow for an assessment of the actual situation in this field. The good news is that not many pre-1974 recordings are being sold at the retail level.

The entertainment software industry reports that their major problems in Poland are related to the high volume of sales of pirated and counterfeit videogame products at the Warsaw Stadium. The entire "crown" of the Stadium has been taken over by vendors selling pirate videogames and music. The same organized crime syndicate controls the sales of both pirated videogame and music recordings. 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 90% in 2001. This increase is reflected in the significant increase in the estimated trade losses due to this form of piracy, which amounted to \$115.8 million in 2001. IDSA member companies report that the pirated CD-ROMs (silver discs) are coming primarily from Russia and Belarus, with some from Ukraine. For example, pirated copies of videogame software for the PlayStation platform are selling for less than US\$1.00; over 80% of this market is lost to the pirates. Already 20% of the PlayStation2® market is lost to piracy in Poland.

The business software industry reports that piracy levels in Poland remain high for such a developed market, even despite sustained police cooperation in recent years. The good news is that 2001 represented some progress in addressing this situation, as estimated 2001 trade losses due to business software piracy in Poland declined significantly in 2001 to \$55.8 million, with a 49% piracy level. Internet piracy, which has become one of the most significant forms of piracy, was also targeted by prosecutors in 2001. For example, in October 2001, the police raided a reseller that had been distributing illegal software via the Internet through its own Web page. The police seized more than 3500 CD-Rs during this raid and detained four suspects. Moreover, the police obtained a list of 700 customers of the reseller that they have indicated they will use for further investigation of unauthorized users. BSA reports continuing and good co-operation with the Polish police in combating piracy. The police carried out a number of high profile raids on large companies in 2001. For example, in January 2001 the police in co-operation with the BSA conducted a raid on the Proznan branch of a multinational company. The police seized 120 computers and unlicensed software belonging to a number of software manufacturers. The BSA,

also reported increasing and positive activity by Polish prosecutors during 2001. For example, prosecutors began forwarding customer lists found in raids of pirate resellers to the police for investigation. In one city, the prosecutor ordered an investigation of 500 customers of a pirate reseller.

The Motion Picture Association (MPA) has noticed that the number of illegal optical discs has been rising at a dramatic rate, while videocassette piracy remains stable. The economic situation in Poland is such that the majority of the public is not able to afford DVD or personal computers. As such, the market for pirate videocassettes is expected to remain buoyant for several more years. However, the Internet has created a new market for those interested in optical discs and downloads. Furthermore, the crime of signal theft has been increasing as people become aware of the opportunities available through smart card piracy. In response to these technologies, FOTA (the local anti-piracy group) organized 15 seminars in 2001. Most of them were for police departments and law enforcement, but there was also a highly successful presentation to judges and prosecutors dealing with the issues of copyright protection, including EU accession requirements and the Internet.

The motion picture industry reports that video piracy continues to be the most significant form of piracy in Poland, even though it decreased in 2001. Such piracy, primarily involving pre-theatrical 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. These shops also engage in the purchase of newly pirated videos in order to rent them to the public and trade with other video stores. The overall video piracy rate has stabilized at 20-25%. Cross-border video 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 along the Polish-German border. Cable television piracy is estimated to be about 15%. The biggest issues are the illegal retransmission of coded programs and the use of pirated smart cards. MPA reports that the optical disc market for filmed entertainment has been growing in Poland, and there is an optical disc piracy rate of 50%, which as a result, brings the overall video piracy rate up to 27% for 2001. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Poland were estimated to be \$25 million in 2001.

AAP reports that there is photocopying, mostly of journals in universities. There is no detectable full book commercial piracy. As reported in prior years, local publishers and licensees of trade books do enforce their licenses. Estimated trade losses due to book piracy in Poland are placed at \$6.5 million.

## **Optical Media Piracy in Poland Is Growing**

**Imports of piratical optical media:** Back in 1999, the most pirate CD imports into Poland came from Ukraine, Lithuania and the Czech Republic. These pirated optical media products (CDs, DVDs, and CD-ROMs) include illegal audio, audiovisual, and software (of business applications and entertainment) material. The recording industry reports that huge amounts of music CD imports (amounting to about 85% of the pirated music) still enter Poland mainly from Ukraine, Lithuania and Russia. 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 Polish police and customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase smuggling), which strongly indicates that thousands of pirated optical discs are finding their way onto the Polish markets daily.

More recently, the entertainment software industry reports that almost all PC product was imported from Russia, with smaller amounts from Belarus. 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 two Polish replicators believed to have exported disks into western Europe for distribution in Denmark and Holland. In that case, Polish police, acting upon the request of the BSA and IFPI, raided the replicator near Katowice and Łódź 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. Currently, Polish prosecutors are waiting for a reply to their request for legal assistance issued to the prosecutor's offices in Denmark, the Netherlands and the Czech Republic.

The Motion Picture Association (MPA) reports that many of the optical discs seized have been imported from other countries. However, the introduction of CD burning technology has created a domestic problem, with individuals producing their own discs and distributing them over the Internet. As was the case with counterfeit videocassettes, the production in Poland is diffuse and small scale, and therefore hard to stop. Nevertheless, in 2001, 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.

MPA reports that the optical disc market for filmed entertainment has been growing in Poland. In the last month of 2001, a few illegal DVDs appeared, but the public is primarily interested in VCDs and CD-ROMs containing films. Since only one legal distributor is offering the VCD format, the remaining VCDs found are illegal copies. CD-recordable pirate product is usually copied at home and then sold at bazaars and on the Internet. Their quality differs according to the original source material, but at times can be comparable to VHS quality. MPA's estimate of the optical disc piracy rate in Poland for its products is 50%.

**Domestic CD Production in Poland:** There are 11 CD plants that are operational in Poland, with 34 operational lines. Eight of these plants have introduced the SID code; six 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. However, in 2001 criminal proceedings were instituted and pending against another two CD plants: Silesia and Pomerania. The Pomerania case was commenced upon the complaint of ZPAV and IFPI for infringing copyright and neighboring rights. Investigations indicate that pirate production in Pomerania took place with the assistance of DOC Data, a German CD plant.

In order to avoid a possible growth of illegal CD production within Poland, steps must be taken to regulate optical disc 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 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.

## **Internet Piracy in Poland is a New Reality**

Piracy over the Internet is beginning to appear in Poland. MPA reports Websites advertising the sale of pirate videocassettes and VCDs; the police and FOTA both find it difficult to identify the owners of such sites because of national data protection legislation. BSA reported that in October 2001, the police raided a reseller that had been distributing illegal software via the Internet through its own Web page. The recording industry (ZPAV) reports that although the number of Websites offering unauthorized MP3 files for download is not very high, a peer-to-peer exchange of music using Kazaa or Grokster software is quite popular in Poland. In 2001, ZPAV undertook the initiative to notify local internet service providers about the infringing material located on their servers. As a result, 31 Websites were taken down and hundreds of files removed upon ZPAV's notice. In general, the ISPs' response is uplifting - in most cases their reaction is prompt and effective. ZPAV closely cooperates with IFPI's Internet Anti-Piracy Unit in the fight against Internet piracy. Furthermore, ZPAV informs the police about any noticed Websites containing lists of tracks in MP3 format offered for further CDR recording of various compilations. The police, an institution authorized to institute proceedings in such cases, focuses on identifying offenders and securing relevant evidence.

## **THE WARSAW STADIUM – STATE-SANCTIONED PIRACY**

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In his April 30, 2001 Special 301 announcement, U.S. Trade Representative Robert Zoellick noted, "We look to Poland to improve its enforcement efforts, especially at the Warsaw Stadium..." IIPA and its industry representatives in Poland have long urged the Polish government to address the problems with the Stadium. Incredibly, the Stadium remains in operation, its lease having been renewed by a Polish government entity for the year 2002. The scope of piracy in this Stadium, and the lack of effective deterrence, is a blatant violation of Poland's current TRIPS obligations as well as its bilateral IPR obligations.<sup>3</sup>

Reports continue to circulate that Poland's problem of optical media and separately, the Warsaw Stadium, are tainted with organized crime involvement. Industry reports do note,

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<sup>3</sup> Poland participates in the U.S. Generalized System of Preferences (GSP) trade program, which includes a discretionary criterion requiring "adequate and effective protection" for U.S. rights holders. In 2000, \$316.6 million of Poland's imports to the United States benefited from the GSP program, accounting for nearly 30.4% of its total imports. For the first 11 months of 2001, \$264.7 million of Polish goods (or 31% of Poland's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 8.6% from the same period last year.

however, that up until now, there has not been any criminal case conducted that would confirm direct connection between organized crime and controlled distribution at the Stadium. However, the scale of the phenomenon of the Stadium clearly points toward this likely possibility. Unofficial reports from industry sources and police sources confirm the organized crime connection.

## **Involvement of the Municipal and State Authorities with the Stadium**

What makes the continued existence of the Stadium so objectionable is the direct involvement of government entities. Numerous sources (including industry representatives, U.S. officials and a Polish news magazine Wprost) confirm that the Polish State Treasury owns the land on which the Stadium is situated. Specifically, the Central Sports Center leases the land to a private company, DAMIS. Another involved local agency is the administration board of the Warszawa Praga Południe Communities, this group is part of the district which houses the Stadium and purportedly is also a party to the Stadium's lease. The Central Sports Center submitted DAMIS's application for the lease extension to the State Bureau of Sports which was in the Polish Ministry of Education before its reorganization after the November 2001 elections. The State Bureau of Sports is now being liquidated.

IIPA has been informed that the Stadium's lease to DAMIS has been renewed for one-year, through the end of 2002. While industry reports indicate that DAMIS itself will "do its best" to stop the trade of pirate products at the Stadium, DAMIS employees (which serve as security for the Stadium) regularly warn the sellers in the Stadium, by using the loudspeaker system, of actions taken by customs or the police. DAMIS clearly has a financial interest in keeping the Stadium open. In November 2001, ZPAV had submitted to the prosecutor's office 40 crime notifications against pirate CD traders at the Warsaw Stadium. Together with those documents ZPAV filed a motion to consider making the administrator of the Stadium DAMIS, the Central Sports Center and the Praga Południe Communities criminally liable for these crimes as aiders and abettors. All proceedings were discontinued due to the inability to determine the identity of the sellers (despite broad film documentation submitted together with the crime notifications). The issue of possible criminal liability of above mentioned institutions was not considered at all. ZPAV has appealed the decision to discontinue proceedings in all cases.

## **The Devastating Scope of Piracy in the Stadium**

Widespread piracy at the Dziesięciolecie Stadium, located near the center of Warsaw, continues at completely unacceptable levels. The dire and dangerous situation at the Stadium has worsened. Organized crime elements are involved in the distribution of pirated materials, especially pirated optical media product, thus making it impossible for some of the copyright industries to independently take any anti-piracy action because the danger is too high. Some reports indicate that it is becoming so dangerous that individual consumers are afraid to venture into the Stadium to purchase any product.

Much of the distribution of pirated products is at a wholesale level. A Polish news magazine, Wprost, ran a cover story on the Stadium in its June 17, 2001 edition, describing the extent of lawlessness which involves levels of corruption beyond mere piracy and counterfeiting. It is clear that huge volumes of product are sold in the Stadium, generating large amounts of revenue for the local government. Wprost reported that one official from the Praga Poludnie district of Warsaw (where the Stadium is located) estimated that as much as 85% of an annual 11 million zlotys in marketplace fees (or about US\$2.58 million) comes from the Stadium alone.

Meanwhile, Polish police officials estimate that the value of illegal transactions at the stadium is more than 12 billion zlotys annually (about US\$2.8 billion). Also according to Wprost, 30,000 CDs are being sold daily at the Warsaw Stadium (with a total value of approximately US\$85,000), 15,000 discs with software (with a total value of approximately US\$73,000), along with many other pirated and counterfeit products.

The Stadium also serves as a centralized distribution point for pirated optical media material. Pirated optical media products (CDs and CD-ROMs) include illegal audio, software (of business applications and entertainment) and audiovisual material (in CD-R format). Some DVDs have been located at the Stadium recently, but currently they are too expensive for the average consumer.

Let us turn to industry specifics. Huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania and Russia. ZPAV has recently obtained information from the Organized Crime Department of the Lithuanian police about the seizure in Vilnius of, among others, 110,000 pirate CDs with Polish repertoire. ZPAV has been representing the Polish recording companies in the current investigation. There has been no decrease in these amounts over the past year. The CDs 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. Because of the large volume of seized goods, the recording industry (ZPAV) pays for warehouse space in Warsaw where the pirated materials seized by the authorities are stored and secured. The industry also pays for the destruction of the pirated goods. Since it takes a long time for the court to issue final decisions, pirate materials have been stored in warehouses for years, even for cases initiated as long ago as 1993.

The recording industry reports that the police and customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase smuggling), which strongly indicate that thousands of pirated optical discs are finding their way onto the Polish markets daily. For example, Polish customs has increased its efforts in late 2001, seizing over 114,000 pirate music CDs at the Stadium during the months of October and November 2001 alone. It is important to note that the recording industry reports that pirate audiocassettes are produced locally in Poland, but this is less than 1% of the product.

The entertainment software industry reports that almost all PC based product is now imported from Russia, with a small amount imported from Belarus. The Interactive Digital Software Association (IDSA) reports that the entire catalogues of some of its videogame publishers member companies can be purchased at the Stadium, and thus this is the most significant source of pirate entertainment software in Poland and surrounding countries. Prices for these CD-ROMs range from less than \$1 (for Playstation1 products) to \$5, and include materials not even released legitimately to the Polish market. The pirates are so sophisticated that pirate videogames have been localized for the Polish consumer by the pirates *before* the legitimate distributor can place legitimate, localized products in the market. Most of the pirate CD videogame product is sold in plastic sleeves, and no manuals are included. Interestingly, usually the local (legal) Polish distributor's names are stripped off the packaging, but the original publisher's name remains. There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. 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 manufacturing and distribution of entertainment software is being undertaken by organized criminal enterprises operating throughout the region

The business software industry also reports that the Stadium harbors pirated and counterfeit business applications software. The Business Software Alliance (BSA) did not report any progress in 2001 with respect to the Stadium. BSA's criminal cases outside of the Stadium do not involve the gangs and organized crime elements involved in the illicit activities with the Stadium.

The motion picture industry reports that the Stadium only has a few stalls (5 to 10) selling pirated film products (compared to hundreds for the other industries). Part of the reason why the Stadium has less film piracy is that the DVD format has not yet widely penetrated the Polish market, thus the optical media distribution network for this product has not yet fully developed. Another reason is that, because of the language barrier, pirate video product in Poland is locally produced and most of the pirate products available at the Stadium are imported. The last few months of 2001 has shown an increase in the amount of optical discs being offered at the Stadium. The most popular format is CD-ROMs containing films compressed in the DivX format.

MPA received a late-breaking report that on February 13, 2002, a video pirate who had been operating out of the infamous Warsaw Stadium was sentenced to one year in prison. This sentence was not suspended, and it marks the first time that a video pirate has received jail time.

## **The Copyright Industries Outline Specific Actions Which Will Result in the Closure of the Warsaw Stadium**

IIPA and the local copyright industries have advocated that the Polish government (which applied to the former government as well as the new government) take several specific actions to address the economic blight caused by the lawlessness of the Warsaw Stadium. Here is our three-point set of recommendations:

**1. Closure:** IIPA and local representatives have long advocated that the Stadium be closed. In 2000, the copyright industries hoped that the Stadium lease would not be renewed for the year 2001, but it was renewed. Again, IIPA and our colleagues requested that the Polish government, including its municipal authorities, refuse to renew the lease on the Stadium when it was to expire on December 31, 2001. The lease, however, was renewed. It is important to realize upfront that some Polish officials, along with the private company DAMIS, will not want to close the Stadium, given their financial interests. Local resistance (by both Polish officials as well as Polish community leaders) is a substantial obstacle to achieving this goal. To repeat, both the IPR Task Force (led by the Ministry of Culture) and the group working with the Governor of the Mazovian District are studying this issue of the possible closure of the Stadium issue.

**2. Intensified Raids:** Second, the Polish government should conduct series of enforcement actions, both in and through the Stadium. This effort would reflect a redoubling of efforts at the Stadium because hundreds of raids have already been run in 2001. It is important to report that 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. As described above, raids are conducted almost daily, resulting in the seizure of pirated materials. In late 2001, industry reports that Stadium actions are carried out primarily with the Border Guard, General Customs Inspectorate and the Warsaw Customs House, and less often with the Warsaw police. However, police from the Department of Combatting Economic Crime often act independently and undertake almost daily actions. They seize less product and focus more on detaining suspects.

For example, IFPI and its Polish affiliate ZPAV report that in 2001, over 200 criminal cases were instigated in the result of raids at the Stadium, in which 166,095 pirate units had been seized (in that 17,359 CDs with Polish repertoire and 143,280 with international repertoire), all at a value of over US\$1 million. In October and November 2001 alone, due to an increased activity of the Warsaw Customs Office, over 100,000 pirate CDs were seized there. During these raids, infringing merchandise is seized. The suspects involved are detained, most of these were foreigners, of which some 80% were Armenian. Many of these suspects were then deported. However, industry reports that the deported suspects often return to Poland with fake passports and resume their illicit activities.

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.). It is important to increase enforcement actions in and through the Stadium *now* so as to catch those involved in the distribution chain immediately, before the Stadium is closed and its activities possibly (likely) relocated to another site in the Warsaw area.

**3—Banning the Sale of All Copyrighted Products:** Third, 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. This second element includes halting the sale of all optical media product within the Stadium, and follows naturally from the first element – increasing enforcement actions in the Stadium. The list of products to be included in such stoppage include: music CDs, CD-ROMs of 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.

The recording industry believes that the Polish enforcement agencies do not apply measures provided by the law to fight music-related organized crime. Although the actions aim at the seizure of illegal products, so far there is no specific case that would indicate the use of measures to prove activity in the organized criminal groups. This also constitutes one of the reasons of poor coordination of activities conducted by the enforcement. However, a large seizure of pirate CDs in Marki (outskirts of Warsaw) serve as a positive example. On November 9, 2001, Border Guard officers seized 21,600 pirate CDs in a private house. Eight persons (Armenian citizens) were detained. As a result of further proceedings, seven of them underwent deportation procedures. One Armenian was arrested in Poland for the purposes of investigation; recently an indictment has been submitted to court.

## **COPYRIGHT ENFORCEMENT IN POLAND**

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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 and lengthy delays in bringing and completing both criminal and civil infringement cases. Obviously the blatant problem of the Warsaw Stadium is a major gap in Poland's enforcement regime.

As discussed above, Polish customs officials and police have been active in 2001, but piracy is getting worse in copyright industries other than business software. 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 penalties in the amended copyright law are generally strong in relation to local market conditions, providing fines of up to US\$175,000 and jail sentences of up to five years. The key is whether they will be imposed in practice by the Polish judiciary. Regarding civil litigation, the BSA reports however, that because civil remedies for copyright infringement are favorable in Poland (at least as a matter of law), most defendants settle cases before they reach judgment in court. None of BSA's civil cases reached judgment in 2001. Please refer to the enforcement charts at the end of this country report for further information regarding enforcement actions in Poland taken in 2000 and 2001.

### **Polish Police Have Been Active in Raids But Cannot, Alone, Reduce Piracy**

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 pirates of copyrighted matter. Moreover, although prosecutors are relatively quick to file cases, few cases progress quickly from the complaint stage to the hearing stage, because of procedural delays. Even when they do, the level of criminal penalties that are applied are 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.

In comparison to the lawlessness in the Stadium, generally positive copyright enforcement efforts outside the Stadium have taken place. The industries generally report that 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 elements in piracy. The Polish police and customs have been undertaking joint operations for some time. For example, ZPAV reports more enforcement success in anti-piracy actions in cities other than Warsaw, such as Wrocław, Kraków, Gorzów Wielkopolski, and key border towns: Biała Podlaska, Przemyśl. During 2001, 1,734 criminal cases were initiated against distributors of pirate sound recordings. A total of 1,028,915 pirate units were seized (e.g. 948,893 CDs, 43,831 audiocassettes, 22,805 MP3 files and 13,386 CD-Rs) with a total value of approximately US\$6.26 million.

The motion picture industry reports that police enforcement initiatives in 2001 continued to improve in the face of heavy piracy. FOTA has worked closely with both the national police in Warsaw and with regional and local police throughout the country. It also coordinates activities

with the national Chief of Police. Cooperation with FOTA's sister anti-piracy operation in Germany (the GVU) and the Polish customs authorities has also increased, especially in the wake of many training seminars FOTA has conducted over the last few years. Police activities against cable networks' operators and people distributing pirate smart cards have been very effective, resulting in 87 cases being filed in 2001. Given the high levels of intellectual property piracy in the country, the Polish government should ensure that adequate resources are committed to enforcing copyright legislation. MPA and FOTA report that 809 raids were conducted in 2001, with 802 criminal cases being filed. These raids resulted in the seizure of over 58,000 VCDs and 16,000 videocassettes. Unfortunately, only 70 cases were resolved by the judicial system during this same time period.

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. The law clearly states that a station can have their right to the retransmission of the broadcast revoked, but there still exists ambiguity over whether the NBC can revoke or reject their registration based upon copyright violations.

BSA reports that, as in years past, they received exceptional support from Polish police, particularly in end-user cases. Polish police raided, either upon BSA or BSA-member request, or *ex officio*, 153 end users. Although a number of the targets were individual end users, there were raids involving multinational companies, joint stock companies, high-tech companies, advertising agencies and private schools. Police also conducted 251 reseller raids. These figures, which are greater than the analogous figures for 2000, indicate greater activity by the police in 2001. Raids on flea markets in Warsaw, Wroclaw and Katowice, and a number of hard-disk loaders were among the raid targets of police during 2001. Overall, the BSA was pleased with the support it received from the police.

IDSA companies report that their local companies have to rely on police enforcement. Company representatives are fearful of direct involvement, citing that the situation there is extremely dangerous. Furthermore, such actions are viewed as quite useless given that the Stadium cannot or will not be shut down by the authorities. Daily raids will not affect the day-to-day business of large-scale pirate operations so long as the Stadium continues to be a viable place for them to operate. As already emphasized in this report, IDSA believes that the closure of the Stadium is vital to stemming rampant piracy in Poland.

## **Prosecutors and Courts Fail to Impose Deterrent Criminal Penalties**

The motion picture industry reports that the sentencing of defendants has been somewhat of a disappointment. The average sum of the fine has not increased over time (usually about US\$50 to US\$150), although the courts have been raising the compensations for the wronged. Polish law allows for distributors to collect damages when a pirate is found guilty. Imprisonment has not generally been used as a deterrent measure, but a court for the first time has detained a person suspected of piracy in jail until the trial begins. Once a case is brought to court, the majority have concluded with guilty judgments. MPA and FOTA report that 809 raids were conducted in 2001, resulting in 802 indictments. Only 59 convictions were handed down, all resulting in suspended jail sentences. 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 . There were 11 cases which ended in acquittals or dismissal of the charges. 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. There are currently over 2,700 FOTA cases still pending in the court system.

MPA and FOTA report that on February 13, 2002, a video pirate who had been operating out of the infamous Warsaw Stadium was sentenced to one year in prison. The man was arrested on November 10, 2000 at the Stadium, where he was selling pirate videocassettes. After he was detained, Polish authorities searched his apartment where they found 23 VCRs and over 400 pirate cassettes. In addition to the one-year sentence (which was not suspended), he also received a fine of approximately \$1,600.

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. The recording industry (ZPAV) reports that about 1,532 cases have been initiated. According to available data, the infringing parties (distributors of pirate products) paid about US\$12,000 in penalties to ZPAV, the injured party.

In late 2001, the recording industry assisted in bringing two criminal prosecutions against two CD plants. The first case is against "Silesia," a company in Wroclaw, for infringement involving both local and international music repertoire, and the second is against "Pomerania" (formerly the "General Group") in Gdansk, on the same charges. It can be said that the head of a well known organized criminal group in Poland was a member of the Board of the General Group.

For business software cases, the BSA in 1999 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 in 2001, but concerns about weak judgments and delays in the legal process remain. From over 150 police raids in 2001, prosecutors have filed approximately 50-60 court indictments, and the BSA is aware of only 11 criminal convictions to date from those cases (less than a 10% ratio of convictions to the number of raids). A number of these 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 judgments, the BSA reports that they usually result in fines of between U.S. \$0 and \$1,000.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS</b>			
<b>2000</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of Raids conducted	719	106	1870
By Police			1668
By Customs		10	202
Number of cases commenced	704		1870
Number of defendants convicted (including guilty pleas)	44		
Acquittals and Dismissals	25 / 33	7	
Number of Cases Pending	2011	7	<b>data not available</b>
Total number of cases resulting in jail time	0	4	
Suspended Prison Terms	26	3	
Maximum 6 months			<b>data not available</b>
Over 6 months	26		<b>data not available</b>
Over 1 year			
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year		10	
Total Prison Terms Served (not suspended)		10	
Number of cases resulting in criminal fines	44		
Up to \$1,000	44		
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied	719		

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS</b>			
<b>2001</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of Raids conducted	809	153	1734
By Police		153	1509
By Customs		11	225
Number of cases commenced	802	16	<b>1734</b>
Number of defendants convicted (including guilty pleas)	59	126	
Acquittals and Dismissals	11 / 17		
Number of Cases Pending	2726	5	<b>Data not available</b>
Total number of cases resulting in jail time	0	2	
Suspended Prison Terms	40	3	
Maximum 6 months			<b>Data not available</b>
Over 6 months	37		<b>Data not available</b>
Over 1 year	3		
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)		6	
Number of cases resulting in criminal fines	59	6	
Up to \$1,000	59		
\$1,000 to \$5,000	809		
Over \$5,000			
Total amount of fines levied			

Additional Note on the above criminal chart: This chart does not yet reflect the February 13, 2002 one-year sentence issued in a video piracy case arising out of the Warsaw Stadium.

#### **Additional data from the recording industry (ZPAV) on its cases:**

<b>ACTIONS</b>	<b>2000</b>	<b>2001</b>
cases discontinued	222	110
cases with suspended discontinuance	76	37
cases closed with sentences	232	35

\* This data applies to all cases pending in those years (regardless of the year they were instigated in).

## **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. At that time, Polish customs also had 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 of improving 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.

Currently the Central Board of Customs, together with the Department for Intellectual Property Protection, is under liquidation. The issues of IPR protection will be moved to the newly established customs houses, and central co-ordination of anti-piracy activities will be terminated. This solution is not a good one; it would be better to have the section that centrally co-ordinates IPR issues with regard to customs located at the level of the Ministry of Finance.

As mentioned above, customs officials have become more active recently in anti-piracy actions at the Warsaw Stadium, especially with respect to pirated music and entertainment software. In September 2001, the management of the Warsaw customs office has been changed. Since then, the activity of this office at the Warsaw Stadium has significantly improved, according to the recording industry. The problem is that their raids are not effective because the pirates seem to know that they are coming, and they conceal their product. There are reports of pirates leaving the stadium or covering up their illegal materials so that the police cannot search their stands.

In contrast, the BSA did not detect any improvement in stopping trans-border traffic of unlicensed works. Although customs had seemed willing to implement a software management policy within the Main Customs Office during 2000, the general elections that took place at the end of 2001 and their aftermath have halted further progress.

Currently Polish Customs is working to introducing a uniform customs database, a project conducted by the representatives of the British customs. ZPAV believes that one co-ordination center should be retained in order to direct antipiracy actions as well as conduct trainings for newly appointed customs officers.

## **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 be further clarified so that judges can begin to implement such procedures. The BSA reports that its application for an *ex parte* search was granted in March 2001. However, the procedural delays in obtaining this grant had been so great that the target had been able to legalize its software shortly before the raid. Such procedural delays vitiate the potential of *ex parte* civil searches.

## **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 last year’s Special 301 filing and as is apparent from year 2001 results, BSA’s experience on the civil front has been limited, not in large part because of the difficulties in obtaining permission to perform *ex parte* searches.

## **Delays in Both Criminal and Civil Cases Continue**

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.

The motion picture industry, led by FOTA, believes the solution 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. Currently FOTA has over 2,700 cases pending in the criminal courts. In 2000, there were over 2,000 cases that were pending at the end of that year. It can take between four and five years for a case to be decided. This problem will continue to grow as anti-piracy organizations become more successful. The more cases that are filed, the greater the backlog. The problems are systemic and can be found throughout the Polish courts, regardless of whether you are dealing with a criminal or civil case. Even if pirates are raided, arrested, and charged, there is no expectation that the court system will resolve their case within the next five years.

## **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. 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. However, this 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 noncontroversial 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 ultimately will require additional resolution. The second copyright bill contained numerous controversial provisions to which the copyright industries objected. Presently this bill is dead, but could be taken up again in the context of further planned amendments to implement the EU Copyright Directive.

Poland's government has changed dramatically with the elections in October 2001. The special government Task Group (led by the Ministry of Culture) has been preparing an 80-page paper together with the anti-piracy groups in Poland (including ZPAV and FOTA) which is to be presented to the government in February 2002. This paper is very favorable to the issues of rights holders. It is unclear how the new government will react to this paper, but the anti-piracy groups involved with it are pleased with the finished product.

### **Deficiencies in the 1994 Copyright Act: 1994-2000**

A brief review of Poland's copyright law is necessary for context. 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. Poland took its four-year TRIPS transition period, thus most of the TRIPS obligations came into effect on January 1, 2000. 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 the transition. Thus, before the 2000 copyright law amendments, several key features of the Polish IPR regime were not compatible with the TRIPS obligations, specifically:

- the point of attachment for the protection of foreign sound recordings (TRIPS articles 3 and 14) had to be clarified. Poland needed to change its copyright law to include 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. (This 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.
- The law did not appear to permit civil *ex parte* searches, a particularly useful tool used by the software industry (and a TRIPS requirement).

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. 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). However, there were numerous substantive problems and deficiencies in this 1999 legislation.<sup>4</sup>

Poland missed its TRIPS implementation deadline of January 1, 2000 because no such copyright legislation was adopted. At the time, a number of Polish legal 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. Self-execution 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.

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. 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 noncontroversial (TRIPS-related) provisions and the other containing more controversial provisions. Splitting the bill was accomplished in order to ensure more rapid consideration of the noncontroversial elements of

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<sup>4</sup> A litany of these deficiencies was outlined in IIPA's 2001 Special 301 report and is not repeated herein.

this legislation. By the end of February 2000, the Culture Committee agreed to bifurcate the bill, and the noncontroversial copyright bill passed shortly thereafter.

### **Mostly TRIPS-Complaint Amendments Adopted in June 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 noncontroversial bill. Here is a summary of the key accomplishments of this legislation:

- corrected the longstanding TRIPS retroactivity problem;
- 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;<sup>5</sup>
- permitted *ex officio* actions by Polish authorities;
- 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, and will no doubt have to be revised once the EU implements the treaties;
- A similar situation 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.
- permitted 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 this June 2000 legislation:

- The law 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. The new amendments established more extensive mandatory collective administration, thereby removing the right holders’ choices of how to receive

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<sup>5</sup> 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. The copyright law’s penalties are generally strong in relation to local market conditions, with the levels of fines available reaching up to US\$175,000.

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 in the law. Although there was at least one grant of a civil *ex parte* search request in 2001, because of the delays and difficulties in obtaining a grant, the implementation of civil *ex parte* searches in Poland is deficient vis-à-vis Article 50 of TRIPS.
- No amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

## **Ratification of the Two WIPO Treaties**

Poland should be encouraged to ratify both the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). We note that 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. As mentioned above, Poland's 2000 amendments to its copyright law did address some of the WIPO treaties' issues, but further amendments will be required (e.g., in the area of technological protection measures, for example), especially to comply with the new EU directives. Reports from the Ministry of Culture indicate that Poland may be developing a set of draft amendments to the copyright law in the April 2002 timeframe.

## **Withdrawal of Poland's Reservation to Article 12 of the Rome Convention**

Poland currently has taken an exception to Article 12 of the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), 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 its 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.

## **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.