

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Poland be elevated to the Special 301 Priority Watch List. The primary reasons for this elevation are widespread piracy and ineffective enforcement related to the Warsaw Stadium and the widespread optical disc piracy. Poland has wavered between the Watch List and the Priority Watch List over the past decade; during 2002, USTR was expected to conduct an out-of-cycle review on Poland's intellectual property rights practices, but the results of that review are not yet available.

Overview of key problems: Progress has not been made on deterring piracy and counterfeiting at the Dziesięciolecie Stadium (also known as the Warsaw Stadium). Although police and customs officials conduct daily raids at the stadium, few prosecutions are brought and court decisions with deterrent sentences are rarely imposed. The presence of organized criminal elements in the Stadium has magnified the problem, yet incredibly, both Polish federal and municipal officials are unwilling to take the necessary actions to close it down. These criminal enterprises, having gone largely unchallenged, are now leaving the confines of the Stadium and spreading their operations throughout the country. Meanwhile, optical disc piracy in Poland is becoming a major problem, even faster than the industries anticipated, with production capacity now far in excess of local demand. To address this problem, Poland should implement regulations on the production, distribution and export of optical media. Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. Civil judges need to issue swift decisions (including *ex parte* search orders) in copyright infringement cases. Trade losses due to piracy in Poland were estimated to be \$491 million in 2002.

Actions which the government of Poland should take in 2003:

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Ban the sale of all optical media product containing copyrighted materials and hard-good copyrighted products in the bazaars and outdoor markets including the Warsaw Stadium;
- Conduct more raids in and around the Warsaw Stadium, and follow up with swift prosecutions;
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern borders (Belarus, Ukraine, Russia) by ensuring that sufficient resources (both technical and personnel) to Polish customs agencies are dedicated to this effort, and by substantially improving cooperation with the customs agencies in the neighboring countries;

- Pass regulations regarding optical disc production and distribution;
- Ensure that delays in prosecuting criminal cases and issuing *ex parte* search orders in civil litigation are minimized;
- Consult with rightsholders prior to and during any legislative efforts to amend the Law on Copyright and Neighboring Rights;
- Ratify the two WIPO 1996 treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) by immediately depositing Poland's instruments with WIPO, and fully implement the treaties into the Law on Copyright and Neighboring Rights;
- Provide full protection to U.S. and other foreign repertoire, and withdraw Poland's reservation to Article 12 of the Rome Convention;
- Conduct and support more training seminars for police, prosecutors, and judges on IP enforcement.

POLAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002 ¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Entertainment Software	337.7	91%	115.8	90%	103.1	85%	70.9	60%	72.1	62%
Motion Pictures	25.0	30%	25.0	27%	25.0	25%	25.0	25%	25.0	25%
Records & Music	45.0	45%	37.0	30%	31.0	30%	22.0	40%	16.0	40%
Business Software Applications ²	78.4	50%	77.1	53%	82.7	54%	130.0	60%	113.3	61%
Books	5.0	NA	6.5	NA	7.0	NA	7.5	NA	7.0	NA
TOTALS	491.4		261.4		248.8		255.4		233.4	

The U.S. Trade Representative (USTR), in his April 30, 2002 Special 301 decision, stated that “Poland has a substantive copyright piracy and trademark counterfeiting problem, the most glaring symbol of which is the Warsaw Stadium and the unauthorized retail activity that is carried on in those premises. . . . Poland’s enforcement efforts at the Stadium so far have been insufficient to halt the sale of pirated and counterfeit goods.” Furthermore, USTR

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$55.8 million at 49% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

indicated it would look to the Polish government taking actions against piracy and counterfeiting at the Stadium through unannounced and numerous raids against retailers that lead to prosecutions which “should be significant enough in number to stem the sale and distribution of pirated and counterfeit goods at the Stadium.” Finally, USTR said that it would look to Poland “to sustain an adequate and effective enforcement effort against IPR violators in order to establish a deterrent effect in Poland, including at the Stadium.” 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.³ Finally, a Special 301 out-of-cycle review on Poland was scheduled for late 2002; there, IIPA recommended that Poland be elevated to the Special 301 Priority Watch List.⁴

COPYRIGHT PIRACY IN POLAND

Optical media piracy is growing and regulations must be adopted.

Domestic CD production: Forensic examination has confirmed the production of pirated CDs in Poland. The current total capacity of Poland’s optical disc plants is estimated at 316 million discs per year. This includes the 293 million discs per-year capacity of the seven operational CD plants with 49 lines (of which four are adapted to DVD production) as well as the capacity of the new Thompson Multimedia plant with 10 DVD lines, with an annual production capacity of over 23 million discs. This clearly exceeds the legitimate demand in Poland.

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

Imports of piratical optical media: Pirated optical media products (CDs, DVDs, and CD-ROMs) include illegal sound recordings, audiovisual products, videogames and business software applications.

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

³ For the first 11 months of 2002, \$304 million worth of Polish goods (or 30.6% 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 14.9% from the same period in 2001.

⁴ See 67 Fed. Reg. 63186 (Oct. 10, 2003); IIPA’s comments on the Poland 2002 OCR are posted on www.iipa.com.

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.

The audiovisual industry reports that Polish pirates sell high-quality counterfeit cassettes and CD-ROMs to German consumers who purchase them at open markets along the Polish-German border. According to MPA, customs seizures indicate that the DVDs are being brought into Poland from the C.I.S. countries of the Ukraine, Belarus, and Russia. The most popular method of importation is through personal vehicles and passengers' luggage, but there is also evidence of hidden compartments in trains and trucks.

The entertainment software industry reports that almost all PC products are imported from Russia, with smaller amounts coming from Belarus. The Interactive Digital Software Association (IDSA) 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 pirated entertainment software is now wholly controlled by organized criminal enterprises (and more than likely a single syndicate) 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, including Germany.

In order to combat the OD problem, the Business Software Alliance (BSA), in conjunction with the International Federation of the Phonographic Industry (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. Both BSA and IFPI had reason to believe that the plant was cooperating with firms in the Czech Republic to produce the CDs. Unfortunately, BSA reports that the case was dismissed by the Polish prosecutors.

Need for optical disc regulation: Given the OD piracy problem, there is an urgent need for optical disc legislation; the unregulated and uncontrolled optical media production in Poland must be addressed. During the summer of 2002, the recording industry presented the Minister of Culture with detailed proposals on OD regulations, after discussions with the legal advisors in this ministry. IIPA also shared a model proposal with the U.S. embassy.

To be effective, an optical disc plant law must (1) require plants to obtain a business license to commence production; (2) establish a basis for regulators to deny, suspend and revoke the license upon evidence of illegal activity; manufacturing licenses must require the listing of machinery and equipment and the raw materials used in the production of optical discs; (3) require import and export licenses and enable searches of these licensees; (4) require the plants to apply internationally recognized identifiers on the goods and machinery; to keep records of production, clearance of rights, destination of products, use of raw material; to notify changes in the stock of equipment; and to cooperate with the police upon inspection; (5) require plant inspections and in particular, "surprise" plant visits, including means for the rightholders' organizations to participate in such plant visits, to obtain evidence and forensic tests, and access the plant's records; and (6) require a comprehensive list of enforcement procedures, remedies, sanctions, powers granted to authorized officers, including the powers to seize equipment and discs during plant visits. To the best of our knowledge, there are no developments to report regarding the implementation of any optical media regulations. The industries look forward to working with Polish officials to achieve comprehensive OD legislation.

Piracy is rampant at the Warsaw 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 worsened during 2002. Organized crime elements are clearly 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 for those people attempting to enforce the law. Illegal immigrants, such as those from Armenia, are still the dominant group in the illegal optical disc trade there. The Stadium serves as a centralized distribution point for pirated optical media material. Pirated optical media products (CDs, CD-ROMs and DVDs) include illegal audio, software (of business applications and entertainment) and audiovisual material. The United States is not alone in complaining about this blatant piracy haven; the European Commission also has identified the Stadium as a problem.⁵ The Polish government also acknowledged that the Dziesięciolecie Stadium is “a source and centre of all kinds of criminal offences committed in Warsaw.”⁶ The question remains: what actions will the Polish government take to stop this stadium blight? Below is a discussion of the various industries’ particular problems with the Warsaw Stadium. (IIPA’s suggested actions to curb the problems at the Warsaw Stadium follow in the next section, on enforcement.)

Optical discs containing pirate materials found throughout the Warsaw Stadium:

The Stadium exemplifies the convergence of serious optical disc piracy, organized crime involvement in distribution, and the result of weak border measures.

Huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania and Russia. 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. 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. ZPAV reports that, in 2002, 282 raids (resulting in criminal cases) were conducted and 273,583 pirate recordings were seized in Warsaw alone. Raids at the Warsaw Stadium account for approximately 90% of these figures.

With respect to entertainment software piracy in Poland, there has been absolutely no improvement during 2002. 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 publisher’s member companies can be purchased at the Stadium, and thus this is the most significant source of pirate entertainment

⁵ See European Commission, 2002 Regular Report on Poland’s Progress Toward Accession, October 9, 2002 at pp. 61-62, available at http://europa.eu.int/comm/enlargement/report2002/pl_en.pdf.

⁶ See Polish government document, “Report of the Committee for Counteracting Infringement of Copyright and Related Rights Concerning the Observance of Copyright and Related Rights in Poland,” dated March 8, 2002.

software in Poland and surrounding countries. Prices for these CD-ROMs range from less than \$1 to \$5 (for PlayStation® products), and include materials not yet released legitimately to the Polish market. Operations run by pirates have become increasingly sophisticated such that pirate entertainment software has been localized for the Polish consumer by the pirates *before* the legitimate distributor can place legitimate, localized products in the market. Criminal syndicates have now taken over not only distribution in the Stadium, but also the surrounding countryside. An IDSA member company reports that all of its pirated CD videogame software sold in Poland is priced exactly at PL20 (about US\$5) with absolutely no deviations—whether sold in the Stadium or other areas in Warsaw, Gdansk, Katowice or Poznan. This “uniform pricing” for pirate entertainment software is indicative of only one thing—that sales are controlled by organized criminal syndicates. The small CD-burning operations that once dominated the Stadium market have now been run out of business by these larger, more sophisticated criminal enterprises. More recently, the Vietnamese triads (those from the Vietnam/Cambodia/Laos region) have made a serious move to control pirate videogame product in the Stadium. There continue to be fights to control this piratical market.

The motion picture industry reports that the popularity of DVDs has caused a resurgence of piracy at the Warsaw Stadium markets. In the past, the only threat to the audiovisual industry posed by the Stadium involved poor quality videocassettes. Now the Stadium is one of the major venues used by pirates to distribute CD-ROMs and counterfeit DVDs professionally pressed in Russia. FOTA, the local audiovisual anti-piracy organization, estimates that 70% of all pirate DVDs coming into the country are being sold in the Stadium. In October 2002, FOTA raided the home of a well-known Ukrainian pirate that sold optical discs at the Stadium; over 2,000 pirate DVDs were seized. FOTA seized a total of 17,109 pirate DVDs in 2002 (compared to 481 pirate DVDs seized in 2001). They also seized over 30,000 CD-Rs containing movies.

The business software industry reports that Warsaw Stadium indeed harbors pirated and counterfeit business applications software. However, criminal cases coordinated by the Business Software Alliance (BSA) outside of the Stadium do not generally appear to be connected to organized crime elements associated with the illicit activities with the Stadium.

Involvement by the municipal and state authorities with the stadium’s ownership and operations: The Polish government is directly involved with the Stadium; state owns the land on which the Stadium is situated. The Central Sports Center leases the land to a private company, DAMIS. Another local agency involved is the administration board of the Warszawa Praga Południe Communities; this group is part of the district that houses the Stadium and purportedly is also a party to the Stadium’s lease. The Central Sports Center submitted DAMIS’ 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 being liquidated). The Stadium’s lease to DAMIS has been renewed. The Polish government’s vested interest in the Stadium suggests one reason why no concrete, sustained and definitive action to close the Stadium or eradicate the trade in pirate copyrighted goods has taken place over the years.

In November 2001, ZPAV 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 of the police to determine the identity of the sellers (despite film documentation submitted together with the crime notifications). The issue of possible criminal liability of the above-mentioned institutions was not considered at all.

ZPAV has appealed the decision to discontinue proceedings in all cases. Once again, this experience clearly shows the weakness of the enforcement system.

Internet Piracy in Poland is Growing.

Internet piracy is a steadily growing problem in Poland. It should be noted that, even though police action in fighting Internet piracy is not yet at a satisfactory level, the co-operation in this field is at least much better than in the fight against physical piracy in Poland, especially in the Warsaw Stadium.

The recording industry is doing everything within its power to tackle the problem. ZPAV continues to identify and take action against music sites making available unauthorized music files on the Internet. In 2002, 99 websites with 8,320 files were shut down following ZPAV's "cease and desist" letters. Also, in January 2002 one Napster-like service with approximately 45,580 files shared was closed down upon ZPAV's notification. In general, the ISPs' reactions have been prompt and effective. However, many Internet users turned to file sharing services such as KaZaA and Grokster, which are increasingly popular in Poland. ZPAV also informs the police about identified websites containing lists of tracks in MP3 format offered for further CD-R replication. The police focus on identifying offenders and securing evidence. As of September 2002, the police carried out eight raids aimed at website owners offering burned CD-Rs with music. In total, this site offered over 23,000 albums. In these cases criminal proceedings are pending.

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

IDSA reports that while there is some Internet piracy of entertainment software in the country, the lack of broadband or high-speed access does not make this a significant problem at this time.

BSA reports that much of Internet piracy in Poland relates to websites offering illegal copies of software for download and resale, and other forms of piracy such as peer-to-peer file sharing are on the increase. However, Internet piracy does not appear to be as prevalent as it could be in such a developed market and the BSA is monitoring this rise in Internet use as a method of distributing illegal software to end users. In September 2002 the police conducted an Internet reseller raid in Wroclaw. The police seized 3,269 CDs and two computers loaded with illegal software and this demonstrates the police willing to action raids.

Piracy Continues Throughout Poland.

Recording industry: The recording industry reports that the Warsaw Stadium remains a major source of pirated music product. According to information compiled by the recording industry, over 784,000 illegal copies of sound recordings have been seized, and 1,659 criminal proceedings were initiated in 2002. In addition, CD-R burning and Internet piracy continue to develop rapidly, reaching up to over 6% of all seized illegal sound carriers (around 33,000 CD-

Rs); a year ago this figure did not exceed 2.5%. The trio of ZPAV (the local recording industry group), local Internet service providers and police are working together in the fight against Internet piracy. During 2002, the recording industry learned that the annual capacity for optical disc production of 316 million discs was much greater than previously estimated. The estimated piracy levels for international/U.S. music repertoire is 45%; estimated trade losses due to piracy of sound recordings rose to \$45 million in 2002.

Entertainment software: The entertainment software industry suffers from widespread piracy in Poland, exacerbated by the organized crime elements involved in distribution of piratical products and the uncontrollable market that is the Warsaw Stadium. In fact, the IDSA reports that where it was once thought that videogame piracy controlled by the Russian syndicates was contained within the Stadium, the current situation has changed to include a much broader reach (as already mentioned in the preceding section on optical media piracy). Illegal material is produced in such countries (often in Russian) as Hungary, Ukraine and Poland, and distributed in a major cross-border exchange to a number of countries in the region. The predominant form of entertainment software piracy continues to be factory-produced silver CDs, most of which is manufactured in Russia, and is readily available throughout the country. Pirate CD entertainment software products are usually sold in plastic sleeves, with no manuals included. Interestingly, the local (legal) Polish distributors' names are usually stripped off the packaging, but the original publisher's name remains. IDSA reports that the level of pirated PC games has grown tremendously over the past year. There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. Finally, mini-stadiums are spreading throughout the country, controlled it appears by the same syndicates that now control the Warsaw Stadium; this makes enforcement efforts much tougher for copyright holders and police alike, a circumstance which could have been avoided if the Warsaw Stadium had been shut down a year ago. IDSA estimates that the overall value of pirated entertainment software products present in Poland was \$337.7 million in 2002, with an estimated piracy level of 91%.⁷

Motion pictures: The audiovisual piracy situation in Poland has changed significantly in the last two years. While videocassette piracy still exists, and will probably continue to exist for many years, the most significant audiovisual piracy problem facing Poland today is optical disc piracy. This market transformation toward pirate DVDs was not expected by either the government or the industry. Pirate discs, mainly home-burned CD-ROMs and Russian-made DVDs, have raised piracy rates to approximately 30%. The distribution of these pirate products is seriously affecting both the home video and theatrical markets. As reported above, FOTA's seizure totals for all of 2002 are over 17,000 pirate DVDs (compared to 481 pirate DVDs seized in 2001). At this time, FOTA claims that Russian pirate DVDs are the number one problem facing the motion picture industry. In July 2002, the industry, working with local law enforcement raided a street vendor known to be selling pirate Russian DVDs. The Warsaw vendor and a deliveryman were arrested and over 4,000 pirate DVDs (including *Spiderman*, *Harry Potter and the Sorcerer's Stone* and *Star Wars: Attack of the Clones*) containing subtitles in Polish, Czech, Hungarian, Icelandic, Dutch, Bulgarian, Indian, Turkish, Danish, Swedish, Finnish, Greek, Norwegian and Arabic were seized. These discs are generally entering the country in personal vehicles, trucks, and trains. A recent customs seizure on the Polish-Belarus border netted over 4,500 pirate DVDs containing the latest titles that were still being shown in Polish cinemas. MPAA reports that cross-border piracy with Germany continues to be a serious problem, with

⁷ IDSA has revised its methodology for deriving the value of pirate videogame products in-country. IDSA reports that the increase in the value of pirated videogame products in Poland appears to have increased significantly in 2002 primarily due to the methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the PC market, a market segment which rapidly grew during 2002.

high-quality counterfeit cassettes and CD-ROMs being sold to German consumers at open markets along the Polish-German border.

MPA also reports that the level of cable television piracy is estimated to be about 15%. The key issues are the illegal retransmission of encrypted programs and the use of pirate smart cards. Cable network operators often use illegal decoders and pirate cards themselves to distribute programs in their networks without license. However, changing the smart cards used by Canal Plus in Poland has had a substantial positive impact against piracy. Internet piracy can also be found throughout the country, although it is the Warsaw police who are the most advanced at conducting raids. For the audiovisual industry, Internet piracy in Poland is not a massive problem for the industry right now due to the efforts of FOTA. As reported above, the Internet is primarily used for the sale of hard goods through websites and networks, but several cases of illegal download offers have also been presented to Polish prosecutors. MPAA estimates that losses due to audiovisual piracy in Poland amounted to \$25 million in 2002.

The business software industry reports that piracy levels in Poland remain relatively high despite excellent police cooperation in recent years and throughout 2002. The biggest piracy and enforcement challenge faced by BSA continues to be the unauthorized copying and use of applications software within legitimate businesses (corporate end-user piracy). A case concluded in January 2002 in Poland highlighted that this form of piracy is evidenced also within large-scale businesses. To combat this piracy, BSA uses both criminal and civil actions predominantly relying on good police cooperation to carry out raids. Preliminary estimated U.S. trade losses due to business software piracy in Poland in 2002 were \$78.4 million, with 50% piracy level.

AAP reports that there is illegal 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 dropped slightly over the past year, to \$5.0 million in 2002.

COPYRIGHT ENFORCEMENT IN POLAND

Several major enforcement obstacles in Poland continue despite concerted efforts by industry anti-piracy actions. Many elements of Poland's enforcement regime remain 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. 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.

Regretfully, the activities of the Polish Intergovernmental Task Force for the Protection of Copyright and Related Rights, established in 2000, do not witness a genuine interest of the Polish government to effectively and rapidly tackle the rampant piracy in the country. The main noticeable achievement of the task force during its more than two years of existence is the delivery, in March 2002, of a general report on the intellectual property situation in Poland and a short action plan. Eventually, in January 2003, the task force invited all relevant law enforcement agencies and other government bodies involved in IPR protection to submit proposals on how to solve the piracy problem at the Warsaw Stadium. It should be noted that

the enforcement agencies involved in the occasional raids on the Stadium have indicated on several occasions in the past that they do not possess the required manpower and resources to carry out sustained and decisive anti-piracy actions at the Stadium. The majority of these agencies stressed that closure of the Stadium would be the only viable solution. Alternatively, the “second best” option would be to officially ban the sale of all copyright products (legitimate and pirate) in bazaars and outdoor markets, including the Stadium. This corresponds to a proposal recently submitted locally by the recording industry and long sought by IIPA. Clearly, the establishment of the task force is a positive step. However, this alone will not solve the massive piracy problem in Poland. The Polish government should, without any further delay, take substantially more effective concrete measures in its anti-piracy campaign.

Actions to be Taken at the Warsaw Stadium

For years, 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. In particular, two actions are necessary:

- **Banning the sale of all optical media products and other copyrighted materials in and around the Warsaw Stadium (and in other bazaars and outdoor markets in the country):** A strict and easy way to stop the sale and distribution of pirated materials in the Stadium is to ban their trade. 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 and educational material) as well as other pirated product such as videos, DVDs 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. In addition to immediately halting the sale of copyrighted products within the Stadium, these efforts should also be expanded to reach commercial-scale illegal activity operating through the Stadium (where products might not ultimately be intended for sale within it) by making use of inspections of the overnight flow of trucks into and out of the Stadium. Furthermore, the sale of all optical media products should be explicitly prohibited in the lease of the Stadium administration DAMIS.
- **Intensified raids in and through the stadium:** The Polish government should conduct series of enforcement actions, both in and through the Stadium. 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. In addition, pirates are notified of the police presence once a raid begins so that they can take evasive steps to hide their products. This warning system has made raids completely ineffective. 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.).

Polish Police Run Raids, But Deterrence Lacking

In comparison to the lawlessness in the Stadium, there have been some positive copyright enforcement efforts outside the Stadium. The industries generally report that cooperation between enforcement agencies (police, customs) and the industries in anti-piracy raids and seizures of infringing goods continue to be positive, which has led to encouraging results outside Warsaw. The Polish police and customs have been undertaking joint operations for some time. However, the Polish judicial authorities have lagged in imposing deterrent penalties against pirates of copyrighted matter. Moreover, 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.

Recording industry: The local recording industry (ZPAV) reports that good relations with the enforcement agencies have led to more law enforcement activity and successful anti-piracy actions in cities other than Warsaw, such as, Kraków, Gorzów Wielkopolski, and key border towns: Biała Podlaska, Przemyśl. For example, the Łódź Customs House seized 56,000 pirate carriers in Radość near Warsaw, and the Kłodzko Border Guard raided a storage in Marki near Warsaw and found 30,000 illegal units meant for further distribution at the Stadium. During 2002, 1,659 criminal cases were initiated against distributors of pirate sound recordings. A total of 784,200 pirate units were seized (of which, 714,700 were CDs, 21,172 audiocassettes, and 32,851 CD-Rs) with a total value of approximately US\$5.9 million.

Entertainment software: 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. The continued lack of action against the pirate syndicates in the Stadium is giving these criminal groups the impetus to expand their operations throughout the country given that it is quite clear that the government is unwilling or unable to take action against them. IDSA believes that any progress in stemming rampant piracy in Poland can only be achieved by both the closure of the Stadium and police action against the criminal syndicates operating in the surrounding areas.

Motion picture industry: The motion picture industry reports that police enforcement initiatives in 2002 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. This positive working relationship resulted in 1,143 raids and in the filing of 1,103 legal actions. 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 the many training seminars FOTA has conducted over the last few years. Unfortunately, problems with Customs in 2002 caused the protection along the border to lapse. This lack of enforcement has had the direct result of allowing thousands of pirate DVDs to enter the country. Customs seizures severely dropped off in 2002 and it is hoped that the restructuring of the Customs department will address this problem.

With respect to broadcast piracy, the Broadcast Act has been in force since June 1993. The National Council for Radio and Television has granted broadcast and cable licenses, which are revocable for failure to comply with license provisions. MPAA reports that the Broadcast Law does not contain an explicit copyright compliance requirement, but Article 45 does provide that a cable operator's registration be revoked 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 National Council for Radio and Television should immediately revoke cable operators' registrations if they violate such a ban.

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

Prosecutorial and Judicial Delays in Criminal Cases

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 problems are systemic and can be found throughout the Polish courts. 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.

BSA reports that Polish prosecutors continue to permit piracy cases to languish at the prosecutorial stage, or permit them to be dropped altogether. These delays and dismissals may be the result of prosecutors' (and judges') demonstrated unfamiliarity with software piracy cases. BSA has managed to obtain only very few judgments in its software piracy cases and the fines and sentences imposed under these judgments have been insubstantial despite improvements in the law.

The recording industry notes a growing tendency of appointing independent experts to secure the proof of ownership even in simplest copyright cases, where neither the defendant nor his attorney calls for submission of additional evidence. In practice, the independent expert's opinion is identical to the one provided by the rights holders' representatives but substantially extends the proceedings in time and raises their cost. In some regions the police often decide not to instigate proceedings or limit the number of cases due to the fact that the costs of appointing independent experts are too high.

The motion picture and the recording industries believe 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. The more cases that are filed, the greater the backlog. The recording industry, ZPAV, reports 3,870 criminal cases are currently pending. For the motion picture industry, FOTA had over 2,700 cases pending in the criminal courts at the end of 2001. In 2002, FOTA filed over 1,100 new cases, but only 120 cases were resolved by the courts. The backlog has created a situation where cases are "lost" within the system and will probably never be closed.

Polish courts fail to apply deterrent sanctions

A common problem experienced by all the copyright industries is the failure of the Polish judiciary to issue deterrent sentences in criminal copyright infringement cases.

The motion picture industry reports that the sentencing of defendants continues to be a major disappointment. Imprisonment has not generally been used as a deterrent measure, but in February 2002, a court did finally impose a one-year prison sentence on a pirate who had been operating in the Warsaw Stadium. This single sentence, however, was an anomaly, since all other convicted pirates received only suspended sentences. In 2002, FOTA secured 76 convictions, only one of which resulted in the imposition of a prison term. These weak sentences, combined with the excessive delays in bringing a case to trial, are proof of the ineffectiveness of the Polish judicial system to deter IP crime. While the majority of cases that actually see a courtroom do result in guilty verdicts, this is due more to the good preparatory work of the police than to the effectiveness of the judicial system itself.

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 US\$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 1,659 cases were initiated in 2002. According to available data, over US\$12,000 in penalties to be paid by the infringing parties (distributors of pirate products) had been adjudged to ZPAV (the injured party) in 2002. 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. In December 2002 the Regional Prosecutor in Gdynia filed charges against Pomerania Optical Disc for infringing the rights of Polish and international phonographic producers and causing them over US\$4 million of damages.

The business software industry continues to be concerned about weak judgments and delays in the legal process. BSA is not aware of any criminal judgments resulting from the 129 criminal end-user raids undertaken by the police during 2002. A number of BSA current 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, BSA reports that they usually result in fines of between US\$0 (zero) and \$1,000.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS POLAND IN 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	1143	129	1659
Led by Police		129	1428
Led by Customs		0	174
Number of cases commenced	1103	129	1659
Number of defendants convicted (including guilty pleas)	76	17	36
Acquittals and Dismissals	44	61	137
Number of Cases Pending	3663	300	1466
Total number of cases resulting in jail time	1	5	36
Suspended Prison Terms	75	5	
Maximum 6 months		5	1
Over 6 months		0	8
Over 1 year		0	27
Total Suspended Prison Terms		5	36
Prison Terms Served (not suspended)	1	0	0
Maximum 6 months		0	0
Over 6 months	1	0	0
Over 1 year		0	0
Total Prison Terms Served (not suspended)		0	0
Number of cases resulting in criminal fines	75	6	33
Up to \$1,000		6	27
\$1,000 to \$5,000		0	6
Over \$5,000		0	0
Total amount of fines levied		~US\$1000	US\$12,611

Border measures must be strengthened to reduce piratical imports.

The influx of pirate product into Poland and insufficient activities to stop this massive illegal import on the border, as discussed above, is a serious matter, which requires immediate improvement. Central Board of Customs and its IPR Coordination Center were closed on April 1, 2002. This closure created major uncertainty as to which entity within customs is responsible for coordinating IPR matters. The responsibilities of the Central Board of Customs were transferred directly to the Ministry of Finance. There are three separate bodies within the Ministry of Finance responsible for IPR issues:

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

Furthermore, the Customs Service has acknowledged that restructuring caused significant confusion regarding the competences in the respective customs bodies.

The top priority for the Polish government must be to clamp down on the massive number of illegal imports of musical recordings, business and entertainment software, and audiovisual products. 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 rightsholders. 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.

Unfortunately, local customs offices have become less active and the number of seizures has been falling. Due to the increasingly high numbers of pirate products (mostly optical media) entering Poland, this customs reorganization remains a cause for serious concern. 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 on every level.

Enforce Organized Crime Legislation Against Pirates

Poland already has legislation to fight organized crime (regulated in Article 258 of the Criminal Code) and this reportedly also extends to copyright infringements. The Polish government must make the political decision to stop organized crime in the Warsaw Stadium, and also in other pirate street markets in Wroclaw, Krakow, Katowice, Szczecin and other locations. The organized crime elements are becoming more entrenched, making enforcement almost impossible. Enforcement authorities must take steps to initiate actions under these additional criminal remedies. IIPA hopes that the U.S. government will take greater steps to assist Polish officials in law enforcement efforts against organized crime elements, and particularly as that affects copyright piracy in Poland, under the rubric of the U.S.-Poland Letter of Agreement on law enforcement coordination, signed on November 13, 2002.⁸

Civil Copyright Litigation

Civil ex parte Measures: As IIPA and BSA have noted before, 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. 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. BSA did not carry out any civil actions in Poland during 2002.

Delays in civil cases: The problems in the Polish judicial system are so pervasive that it can take up to five years for a civil copyright infringement case to be heard

Failure to assess deterrent damages: BSA reports that the Polish courts fail to impose deterrent damages in civil cases, which historically involve business software end-user

⁸ U.S. State Department Fact Sheet, “U.S.-Poland Letter of Agreement,” Nov. 13, 2002, available at <http://www.state.gov/r/pa/prs/ps/2002/15090pf.htm>. The value of this assistance package, to be administered by the State Department’s Bureau of International Narcotics and Law Enforcement Affairs, is \$1.3 million, and contains projects in the following areas: anti-corruption curriculum development; combating international organized crime; courtroom security; support for the financial intelligence unit; and police modernization and training.

piracy cases. 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.

COPYRIGHT LAW REFORM AND RELATED ISSUES

A brief summary of recent copyright legislative developments in Poland is important in order to identify key issues related to successes, problems and/or omissions in selected legal and enforcement mechanisms that impact anti-piracy efforts and commercial market development.

The 1994 Copyright Act, As Amended Through 2000

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. 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 copyright reforms required by TRIPS during the four-year transition. Thus, before the 2000 copyright law amendments, several key features of the Polish IPR regime were not compatible with the TRIPS obligations, specifically: (1) the point of attachment for the protection of foreign sound recordings (TRIPS Articles 3 and 14) had to be clarified; (2) express protection for pre-1974 (foreign) sound recordings, in line with TRIPS Article 14.6, needed to be afforded; and (3) the law did not appear to permit civil *ex parte* searches, a particularly useful tool used by the software industry (and a TRIPS requirement). Poland missed its TRIPS implementation deadline of January 1, 2000 because no such copyright legislation was adopted.

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 a separate non-controversial bill, thus ensuring its adoption. These 2000 amendments went forward to correcting many of the TRIPS deficiencies in Poland's copyright law. 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;
- 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 only the 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 to be effective;

- Permitted collecting societies, as injured parties, the standing to file a criminal complaint for copyright infringement. However, the relevant provision leaves doubt as to whether the police and public prosecution services will take action *ex officio* for all criminal offences under the copyright act. Given the importance of the issue a further clarification is necessary.
- Added a neighboring right (25-year term) for publishers who for the first time publish or disseminate an unpublished public domain work. Also added 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.

Unfortunately, there were three important problems and/or omissions in the 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 rightsholders’ 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 in the law.
- No amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

2002 Amendments to the Copyright Law

In order to more fully implement the various European Union Directives, the Polish government in 2002 undertook to amend its copyright law again. Local copyright industries did their best to improve the various provisions of the bill (especially regarding WIPO treaties’ implementation *vis-à-vis* the EU Directives) and limit potentially damaging proposals. The amendments were passed in December 2002 (Law No. 197, 1662) and entered into effect on January 1, 2003. Here is a brief overview of selected provisions; the law:

- Amended and expanded the rights for holders of neighboring rights, including performers and producers of sound recordings. For example, producers of sound recordings are afforded exclusive rights of reproduction, introduction into circulation, rental and lending, and making available to the public. However, the reproduction right as provided for phonogram producers is flawed and needs further amendments. Furthermore, producers of sound recordings receive only a right of remuneration in the cases of broadcasting, retransmission or communication to the public (see Article 94). Poland should be encouraged to give performing artists and producers of sound recordings an exclusive right of public communication, instead of merely a claim for remuneration.
- Expanded the exclusive rights for authors of works to include broadcasting, retransmission, communication to the public, making available to the public, rental, and lending (defined in Article 6; note that Poland continues to have a broad economic right to “use and exploit” works remains in Article 17).
- Article 79 was amended to provide that damages are available for those who remove or circumvent a technological protection measure (TPMs) controlling access, reproduction

or dissemination of a work (these damages also apply to producers of sound recording, *mutatis mutandis* by Article 101). Unfortunately, no further amendments appear to have been made regarding TPMs; IIPA and its members have long urged that the Polish law should include an explicit prohibition (along with associated criminal and civil liability) for the manufacture, importation, sale, distribution, or other trafficking in circumventing devices or services that are aimed at circumventing TPMs.

- Addressed the current private copying levy (in Article 20) which applies to manufacturers and imports of blank media, tape recordings/video recordings and “similar” devices, and photocopies/scanners/similar reprographic equipment. The amendments require that the levies now are to be paid to and collected by collecting societies which are to act in the interests of authors, performers, producers of phonograms and videograms, and publishers. The amendments also explicitly state the various percentages to be paid to the various groups based on the fees collected from the sale of the various devices and media.

Reports indicate that more copyright legislation may be considered during 2003, with the goal being that provisions on collective managements may be amended yet again. As a general point, it is essential to provide a clear framework allowing for successful arrangements driven by the rightsholders involved. Over-regulation and in particular imposition of tariffs have to be avoided. This situation must be closely monitored. The amendment process must be made as transparent as possible.

Further Amendments to the Copyright Law Still Needed

Despite of the recent amendments to the copyright law, it is not up to the level to provide satisfactory protection to the rightsholders. Below is the short overview of the needed amendments:

- In addition to the basic expansion of the rights of the neighboring rights holders, it is crucial to broaden the definitions of the reproduction right for phonogram producers and performers in order to comply with the international standards. The limitation to “by a particular technique” has to be removed and the scope of the right has to include the elements of: (a) direct and indirect reproduction; (b) temporary and permanent reproduction; (c) by any means and in any form; and (d) in whole or in part.
- Poland should be encouraged to give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration; this is critical in the Internet age. Market developments indicate that the future “delivery” of recorded music will increasingly be accomplished through the licensing of music services rather than the sale of physical products, and non-interactive transmissions will compete with on-demand communications for listener loyalty. Both interactive and non-interactive services must operate under market principles. To achieve this, it is essential that rightsholders, like producers of sound recordings, enjoy exclusive rights, and not merely rights to claim remuneration.
- One of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rightsholders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the

copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Poland should introduce a presumption of ownership for phonogram producers.

- It should be clarified that police and public prosecution services take action *ex officio* in respect to all criminal offenses provided under the copyright act. In particular it should be clear from the text of the copyright act that *ex officio* applies in cases where otherwise rightsholders can initiate criminal proceedings.

Ratification and Deposit of the Two WIPO Treaties

Poland has not yet acceded to the two 1996 WIPO treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty); prompt accession is a priority for the copyright industries. On January 10, 2003, the Sejm (lower house of the Polish Parliament) passed a law, which authorizes the President of Poland to ratify the WPPT. The law is now in the Senate and will then be forwarded to the President for his signature. No reservations have been made. WCT is now undergoing consultations in the parliamentary commissions. As mentioned above, Poland's 2000 amendments to its copyright law did address some of the WIPO treaties' issues (expanding scope of exclusive rights), but further amendments will be required (e.g., in the area of technological protection measures) to implement the treaties effectively.

Withdrawal of Poland's Reservation to 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. and other foreign nationals with respect to rights connected to broadcasting. 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 the recording industry'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. The local recording industry association, ZPAV, reports that there is no political will within the government to withdraw this reservation in the near future.