

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Poland remain on the Special 301 Priority Watch List and that an out-of-cycle review be conducted later in 2004.

Overview of key problems/achievements: Imports of pirated copyrighted products — most in optical disc format — remain a top piracy problem in Poland. Furthermore, optical disc (OD) production within Poland grew in 2003 at a faster pace than anticipated, and production capacity is now far in excess of local demand, with over 385 million units capable of being produced by seven operating Polish OD plants. Given this excess production, it is imperative that Poland implement regulations on the production, distribution and export of optical media (such proposals are included in its recent amendments to its copyright legislation). The serious problems of high volume of piratical imports and generally ineffective border enforcement remain particularly troubling.

In 2003, the Polish government devised a national strategic plan to combat copyright piracy. Some industries report progress made in lowering the amounts of pirated and counterfeited products at the Dziesięciolecie Stadium (also known as the Warsaw Stadium), yet others report that progress is temporary and cosmetic. The presence of organized criminal elements in the Stadium remains a concern, as does the fact that these criminal enterprises are now leaving the confines of the Stadium and spreading their operations throughout the country. Industry cooperation with police agencies throughout Poland remains generally good. Polish customs became more active in 2003 than in prior years. However, few prosecutions are brought and court decisions with deterrent sentences are rarely imposed. The Polish court system is full of thousands of backlogged copyright cases (this problem, sadly, is not restricted only to IPR cases). Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. Copyright reform efforts were adopted by the Council of Ministers in December 2003, and reforms are expected to be adopted in 2004 as Poland joins the European Union.

The copyright industries acknowledge the several notable achievements Poland made in 2003. Several of the elements of the government's anti-piracy action plan were met last year. Progress was made in reducing piracy in the Warsaw Stadium, drafting copyright law amendments which include optical disc regulations, depositing instruments for the two WIPO Internet treaties, and amending the criminal code to expedite certain procedures. However, the situation is still quite fragile, thus an out-of-cycle review is necessary. It will take some time to adopt amendments to the copyright law and adverse changes could be made in the Parliament. It remains imperative to monitor progress in this legal reform as well as evaluating the piracy situation in the Warsaw Stadium and its expected June 2004 public contract tender. Huge domestic OD capacity in Poland remains a serious concern. Border enforcement, especially at

Poland's eastern and northern borders, must be strengthened. Actions taken (and not taken) by prosecutors and the courts have been less than acceptable; the actual imposition of deterrent penalties has been missing entirely for many years.

Actions which the government of Poland should take in 2004

Legal Reform

- Continue to consult with rightsholders during legislative efforts in early 2004 to pass amendments to the Polish Law on Copyright and Neighboring Rights;
- Continue to consult with rightsholders to adopt the regulations on optical disc manufacture in the copyright law as well as in the secondary decree;
- Refrain from over-regulating collective management of copyright and neighboring rights;
- Withdraw Poland's reservation to Article 12 of the Rome Convention.

Enforcement

- Halt the sale and distribution of all optical media product containing copyrighted materials and hard-goods copyrighted products in and around the Warsaw Stadium as well as in other stadiums, bazaars, outdoor markets and public places which sell infringing products, and prosecute these cases;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern and northern borders (Belarus, Ukraine, Russia and Lithuania) 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;
- Bring criminal copyright prosecutions more expeditiously;
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials;
- Assign more judges to criminal IPR cases;
- Appoint specialized prosecutors in each office to handle copyright cases;
- Conduct and support more training seminars for police, prosecutors, and judges on copyright enforcement. Many were conducted in 2003, and training should continue in 2004.

POLAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	34.0	45%	45.0	45%	37.0	30%	31.0	30%	22.0	40%
Entertainment Software	NA	NA	337.7	91%	115.8	90%	103.1	85%	70.9	60%
Motion Pictures	30.0	30%	25.0	30%	25.0	27%	25.0	25%	25.0	25%
Business Software Applications ²	NA	NA	107.9	54%	77.1	53%	82.7	54%	130.0	60%
Books	5.0	NA	5.0	NA	6.5	NA	7.0	NA	7.5	NA
TOTALS	NA		520.6		261.4		248.8		255.4	

COPYRIGHT PIRACY IN POLAND

Optical media production in Poland continues to grow, making the adoption of OD regulations more urgent.

Domestic production in Poland: The estimated total capacity of the seven operating optical disc plants in Poland is 385.6 million discs per year (as of January 2004) — a 20% increase compared to estimated annual capacity of 316 million discs which IIPA reported in its February 2003 Special 301 report. One industry estimate places the total legitimate demand in Poland for all copyrighted content on discs at 120 million discs per year. Needless to say, the legitimate demand for optical discs in Poland and in this region (where there already is a huge overcapacity, such as in Russia, Ukraine, the Czech Republic) has certainly not increased by 20% in a matter of months.

There have been some changes in OD plant ownership over the last year. The “New City” plant was sold to a British company. The lines earlier used by “Pomerania Optical Disc” and “Yield” have been purchased by a new plant, “Vegart,” and are still not operational. Most importantly, it should be highlighted that the Polish law enforcement agencies were extremely ineffective in the pending Pomerania court case (see discussion, *infra*) where the equipment was allowed to be sold to Vegart while under the control of the courts.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission, and is available on the IIPA website at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more details on Poland Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

² BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA’s statistics for 2003 will be finalized in mid-2004 and also posted on the IIPA website. BSA finalized its 2002 numbers in mid-2003, and those revised figures are reflected above.

OD PLANTS IN POLAND	ESTIMATED TOTAL MAXIMUM ANNUAL CAPACITY ³
OPERATIONAL PLANTS (7)	
DIGIPRESS	12,274,950
DIGI RECORDS	7,358,400
GM RECORDS	93,129,750
MEGAUS	22,403,700
PM / SNAKE'S MUSIC	9,887,850
TAKT	165,695,400
TECHNICOLOR HOME ENTERTAINMENT SERVICES (FORMERLY THOMSON MULTIMEDIA)	74,880,480 ⁴
TOTAL	385,630,530
NON-OPERATIONAL PLANTS (2) :	
SILESIA	
VEGART (YIELD PLUS POMERANIA/GENERAL GROUP)	
Source: IFPI, December 2003	

Already, over the last few years criminal investigations and prosecutions have been brought by Polish authorities against several CD plants.⁵

Imports of piratical optical media: A large volume of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, continues to enter Poland. Large amounts of pirate music CD imports (amounting to about 85% of the pirated music) still enter Poland mainly from Ukraine, Lithuania, Belarus and Russia. Pirate movie DVDs are mostly produced in Russia. Pirate entertainment software products are imported from Russia (CD format), from Malaysia (DVD format) and China (cartridge format).

According to the Polish police, these compact discs and other media are being produced and distributed via a network of plants and distribution chains that illegally smuggle product into Poland and are run by regional organized criminal elements. The Polish police and customs still

³ Actual production capability of machines can vary, depending on age and condition of the equipment. The "Total Maximum Annual Capacity" figure is estimated at 75% of what could potentially be annual capacity.

⁴ Thomson announced that it will expand its DVD capacity at its Technicolor facility in Poland to 200 million units/year; see Thomson Press Release, <http://www.thomson.net/gb/06/c03/030918.htm> (Sept. 18, 2003). If this production capacity is realized, the estimated OD capacity in Poland (using the above figures) could balloon to 511 million units/year.

⁵ With respect to enforcement efforts against plants involved in illicit production, there are currently eight criminal proceedings against five CD plants in Poland, two of which were initiated against Silesia and Pomerania/General Group in 2001. In 2003, two cases were instigated — against DigiPress and another one against Pomerania/General Group. Three of the eight criminal cases (two against the Selles plant, initiated in 2000 and 2002, and one against Pomerania/General Group) are pending in the courts due to the notoriously slow Polish judicial system; the remaining five cases (Silesia, Pomerania/General Group, Digi Records, Yield and DigiPress) are still at the prosecutorial level. The Polish recording industry group ZPAV has requested that the National Police Headquarters investigate the incident in the Silesia CD plant in Wroclaw, where one of the CD lines was moved out of the plant while it was under police custody. The Investigation Department of the National Police Headquarters has 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.

regularly seize pirate CD shipments, particularly from Ukraine, Russia and Belarus, 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. 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. For example, Customs has found individuals carrying over 4,000 pirate discs.

Need for optical disc regulation: Given the high volume of domestic OD capacity and the weak border situation which permits pirate imports, there is an urgent need for optical disc legislation in Poland. The copyright industries, both in Poland and in the U.S., have long advocated that Poland adopt optical disc regulations. It is imperative to recognize that following the decision in the Action Plan of the Polish Inter-Ministerial IPR Protection Committee (adopted by the government in August 2003), the Council of Ministers approved the optical disc regulations as the part of the Copyright and Neighboring Rights Law amendments. These amendments include a separate chapter on optical disc manufacture as well as a secondary regulation to be issued by the Minister of Culture. The draft amendments were sent to the Polish Sejm in January 2004 (see discussion, below).

Progress in Reducing the Levels of Piracy at the Warsaw Stadium

What is distinct about 2003 is that the Polish government has been energized to address the problems associated with piracy at the Dziesięciolecie Stadium. This stadium has historically served as a centralized distribution point for pirate optical media material; it exemplified the convergence of serious optical disc piracy, organized crime involvement in distribution, and weak border measures. Widespread piracy at the Warsaw Stadium has been identified as a serious problem by the copyright industries⁶ as well as the U.S. government⁷ and the European Commission.⁸ Finally, the Polish government also acknowledged that the Warsaw Stadium is “a source and centre of all kinds of criminal offences committed in Warsaw.”⁹ A particularly objectionable fact has been that the Polish government has been directly involved with the Stadium; the state owns the land on which the Stadium is situated.¹⁰ The industries vigorously objected to the government's vested interest in the Stadium because it suggested why no concrete, sustained and definitive action to close the Stadium or eradicate

⁶ 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, we stressed two actions: (1) 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), and (2) intensified raids in and through the stadium.

⁷ See Press Release 200-28, U.S. Trade Representative, “Special 301 Report Finds Some Progress on Intellectual Property Protection, but Significant Improvements Needed,” (May 1, 2003), with USTR's report on Poland posted at <http://www.ustr.gov/reports/2003/special301-pwl.htm#poland>.

⁸ 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.

⁹ 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,” adopted by the government on May 20, 2003.

¹⁰ 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 trade in pirate copyrighted goods had taken place over the years. Recent reports indicate that the Central Sports Center will not extend a full contract to DAMIS, but only allow it to operate the Stadium until June 2004, when at such time a new administrator will be chosen in a public bidding process.

In terms of piracy at the Stadium and anti-piracy action taken by the authorities there, the copyright industries report mixed results on achieving progress in 2003. For those reporting progress, the continuing concern remains whether the progress will be maintained effectively, such that there is no backsliding or worsening of the situation there. Progress in removing pirated audiovisual films, sound recordings and business software from the Warsaw Stadium is reported by these three industry sectors. MPA, IFPI and BSA report significant progress in reducing the amounts of pirated recordings and audiovisual products openly offered for sale within the Stadium. One estimate suggests that since May 2003, the amount of pirate CDs for these products at the Stadium has declined by some 80-90%. So far, this situation has been sustained. There are no open stands, and sales of infringing products take place only by vendors holding bags of pirated materials. It is critical to sustain this low level of piratical activity, and not let it resume to prior notorious levels, or spread to other stadium facilities.¹¹

Progress at the Stadium in 2003 was not achieved in reducing piracy in all copyright industry sectors. It is true that all industries remain very concerned about the underground nature of the piracy problem associated with this stadium, and continue to closely monitor the situation to confirm that the reductions in piracy levels will remain, and not return to notorious levels of the past.

Piracy Levels in Poland Remain High

Entertainment software piracy remains very high with no concrete progress made in 2003. The Entertainment Software Association (ESA) reports that 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. Almost all PC-based product is being imported into Poland from Russia and Ukraine. The predominant form of entertainment software piracy continues to be factory-produced silver CDs and DVDs, most of which are manufactured in Russia, and readily available throughout Poland. Such OD entertainment software products are usually sold in plastic sleeves, with no manuals included. Prices for these products range from US\$3 to \$5, and include materials not yet released legitimately to the Polish market. In addition, significant quantities of pirate cartridge-based games arrive in Poland from the Greater China region. Operations run by entertainment software 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. Interestingly, the local (legal) Polish distributors' names are usually stripped off the packaging, but the original publisher's name remains. Mini-stadiums are spreading throughout the country, controlled it appears by the same syndicates that have controlled the pirate entertainment software trade at the Warsaw

¹¹ Although the Warsaw Stadium has received the most attention in recent years, there are other stadium-style flea markets in Poland. The Polish government already has identified other trouble spots such as the LKS football stadium in Lodz, the marketplace in Balice in Krakow, Wilda bazaar in Poznan and the Hala Ludowa sports hall in Wroclaw.

Stadium. There is no evidence at this time of pirate entertainment software being produced within Poland in any of the OD plants.

The recording industry is being devastated by optical disc piracy in Poland. The estimated piracy levels for international/U.S. music repertoire is 45%; estimated trade losses due to piracy of sound recordings were \$34 million in 2003. The major problem facing this industry remains that huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania, Belarus and Russia. The volume of these imports is based on customs seizures from cars, trucks and buses, and those seizures are only the tip of the iceberg, given the large quantities found in the markets. These pirated products are then distributed via a network of plants and distribution chains that illegally cross borders, which are run by regional organized criminal elements. The recording industry reports that the Warsaw Stadium is no longer the major source of pirated music product in Poland. The industry is also very concerned with the high capacity of the seven Polish OD plants and the possibility that such capacity levels might involve production of pirated music. The local recording industry, ZPAV, reports that the total number of pirated sound recordings seized in Poland in 2003 were 621,750 units, with an estimated value of 16,821,973 PLN (US\$4.4 million). The amount of seized CD-Rs with music (including CD-Rs with MP3 files) was 47,474 units, which represents about 8% of all sound recordings seized in 2003 in Poland. In 2003, 177 proceedings have been instituted against distributors of pirate CD-Rs. As a result of enforcement agencies' actions a few single one-pocket computer burners were seized together with computers.

The problem of CD-Rs in Poland is systematically becoming more and more significant, and especially popular with youths. The seized CD-Rs have professionally prepared artwork, which indicates greater financial involvement of criminal groups involved in such activity. The police actions conducted in this field are disproportionate to the scale of the phenomenon. However, ZPAV notes an increase in 2003 in the proceedings instigated against individuals involved in the distribution of recorded CD-Rs over the Internet. Upon the motion of ZPAV, over a dozen raids were conducted by the police in which CD-Rs and computer equipment were seized.

Pirated DVD imports are the top motion picture piracy problem in Poland. Pirate DVDs continue to be imported into Poland and are distributed in almost every metropolitan area. Russian-sourced pirate DVDs are the number one piracy problem for the motion picture industry in Poland, as these pirated goods are threatening to overtake the legitimate theatrical and home entertainment industries. In the past, the primary point of distribution was the Warsaw Stadium, but this appears to have changed in recent months due to government and industry efforts to halt the blatant piracy at the stadium and around Warsaw. These pirate DVDs began to appear in substantial numbers at the end of 2002 and volumes have continued to increase in 2003. In 2003, FOTA seized over 51,000 pirate DVDs, all believed to have been produced in Russia. The discs contain Polish subtitling options as well as other Eastern European languages. The titles include pre-theatrical releases and current DVD releases. It is believed that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these discs. Most pirate audiovisual product is brought across the border by cars, trains, trucks, and buses. Problems include poor border controls and very little coordination among the various government agencies. In the summer of 2003, there were several significant Customs seizures that may indicate an increased willingness to address the problem. CD-R piracy is also a major problem, and FOTA estimates that CD-Rs represent 50% of the pirate optical discs

in the local market. FOTA is pursuing the same strategies against CD-R pirates that were effective in combating videocassette piracy. Not surprisingly, CD-Rs are the generally accepted format used by pirates selling hard goods over the Internet. Seizure totals are smaller because pirates work on a burn-to-order basis. Still, in 2003, FOTA has seized almost 49,000 pirate CD-R discs. The level of cable television piracy in Poland is estimated to be 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 to distribute programs on their networks without license. However, the changing of the smart cards used by Canal Plus in Poland has had a substantial impact on piracy.

End-user software piracy and retail problems: The business software industry reports that piracy levels in Poland remain relatively high. However, there has been a significant decline in business applications piracy in the last decade, when the piracy level was 75% of the market (in 1995). One of the largest piracy and enforcement challenge faced by BSA and its members in Poland continues to be the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy). To combat this piracy, BSA uses criminal enforcement predominantly, and relies on good police cooperation to carry out raids. (BSA brought no civil actions in 2003).

Unauthorized photocopying of books continues: AAP reports rampant illegal photocopying of academic texts and journals, most often undertaken on an individual basis by students in universities. Traditional print piracy remains quite low, having been completely overtaken by photocopying. AAP members report that in some cases they are losing the majority of their market to this type of individual photocopying. This is happening with both English language and Polish language materials. The government should work with university administrations and lecturers to ensure that proper measures are taken to cultivate a climate of respect for copyrights on university campuses. Estimated trade losses due to book piracy in Poland were \$5 million in 2003.

Internet Piracy in Poland Remains a Concern

Internet piracy has been a steadily growing problem in Poland, as it has around the world. In general, however, the industries report that the problem to date is relatively contained, and the cooperation with criminal authorities as well as Internet Service Providers (ISPs) in 2003 has been good. Reports indicate that the police take actions against Internet piracy increasingly at their own discretion. Also, the largest portal owners regularly monitor their servers. The recording industry reports that the biggest problem is widely used peer-to-peer services like KaZaA, e-Donkey and DirectConnect. At the same time the distribution of illegal music files through the websites and FTP-servers continues. In 2003, the police pressed charges against 21 individuals offering recorded CD-Rs on the Internet upon ZPAV's request. However, no proceedings have been brought against P2P users so far. The ISPs removed 112 websites and FTP-servers with 11,575 files from the Internet upon ZPAV's notification.

The motion picture industry also reports that Internet piracy for its products appears to be somewhat contained. MPA indicates that FOTA has conducted many successful investigations and raids on Internet pirates. With respect to filmed entertainment, Internet piracy is primarily focused on the sale of hard goods through websites and networks, but several cases of illegal download offers have also been presented to Polish prosecutors. Unauthorized downloading of films currently is not a major issue due to the lack of high-speed access in

Poland. ESA 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.

The various rightsholders groups such as ZPAV, FOTA and BSA cooperate very closely in their actions against Internet piracy through the jointly founded Anti-Piracy Coalition. In June 2003, the coalition launched an educational campaign informing Internet users about the risks resulting from uploading and downloading illegal files of music, film and computer software. The campaign letters were sent to 627 of the largest companies and 84 academic institutions in Poland. In October 2003, the coalition provided the interested companies and academic institutions with free software to audit computer applications and files, allowing maintenance of a rolling inventory of installed applications and files. To date, 191 packages with the software have been distributed.

COPYRIGHT ENFORCEMENT IN POLAND

The Polish Interagency IPR Committee Develops Anti-Piracy Strategies

In 2002, a Polish interagency committee (the Interdepartmental Committee for Counteracting Acts of Infringement of Copyright and Related Rights) completed its survey on the copyright piracy situation in Poland. On May 20, 2003, the Minister of Culture held a press conference to announce the government's commitment to fight piracy and to tackle the problem of the Warsaw Stadium. In mid-2003, the IPR Interministerial Committee developed a strategy, outlining its main goals (along with interim objectives) to combat piracy in Poland.¹² This strategy was accepted by the government in August 2003. In December 2003, the committee met to discuss the IPR strategy plan and noted five achievements: (1) the supply of pirated goods in the Dziesięciolecie Stadium has been reduced; (2) the Warsaw Stadium contract to DAMIS will not be extended past June 2004, and there will be a public tender for a new administration of that stadium; (3) the National Public Prosecutor outlined a methodology on the criminal IPR cases and this methodology has been forwarded to all prosecutors, and two prosecutors in every Public Prosecutor's Office of Appeal will be in charge of giving professional advice on IPR cases within their office; (4) intensified anti-piracy actions have been carried out by the police, border guard and customs service, and; (5) the draft amendments to the Act on Copyright and Related Rights (which include provisions regarding the production of optical discs) have been prepared and approved by the Council of Ministers.

These efforts represent the Polish government's revitalized attention to the severe piracy problems in Poland, and the government appears to be addressing the major piracy issues. However, the copyright industries believe that much more work still needs to be done to reverse

¹² The five strategies to be completed by the end of 2003 were: (1) To improve the effectiveness, efficiency and coordination undertaken by law enforcement agencies (police, border guards, customs); (2) to improve effectiveness and efficiency of actions taken by the criminal justice system; (3) to analyze current regulations and if needed draft amendments to improve the efficiency of anti-piracy measures; (4) to limit and subsequently eliminate piracy at the Dziesięciolecie Stadium; and (5) to monitor the activities of the public administration. These goals are to be implemented by various Polish government agencies, working in conjunction with the private sector.

the piracy situation and engage in, and sustain, more effective and deterrent enforcement measures. 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 generally positive. The Polish police and customs performed more joint operations in 2003 than in prior years. However, the Polish judicial authorities are still slow, and rarely impose deterrent penalties in copyright cases. Few cases progress expeditiously from the complaint stage to the hearing stage because of procedural delays.

Border measures must be strengthened to reduce piratical imports.

A top priority for the Polish government must be to clamp down on illegal imports of musical recordings, business and entertainment software, and audiovisual products. Poland's eastern border is particularly porous, and large amounts of pirated product enter the country. According to Polish customs data, 366,195 pirate optical discs containing music, films and software have been used as evidence in cases instigated by customs in 2003 — 98,000 discs were seized at the eastern border alone. Customs authorities have the authority to conduct *ex officio* seizures of suspected pirated goods, and several copyright industries entered into agreements with Polish customs to improve cooperation.¹³ For the past several years, Polish customs has undergone a restructuring which caused significant confusion regarding the competences in the respective customs bodies.¹⁴

Polish customs did take some key actions last year. For example, in June 2003, customs stopped a Ukrainian vehicle that was specially designed to conceal thousands of optical discs. The recording industry reports that the Warsaw Customs House conducted biweekly raids in mid-2003, resulting in seizures ranging between 4,000 to 7,000 CDs (this reflected a similar level of operations as in 2002). BSA also reports that the Poznan customs units have been active, conducting three raids at the end of 2003 on local flea markets where imported pirated materials were being sold. There are also reports that Polish customs officers are being reallocated, with a primary focus on shoring up the country's eastern borders. This is a highly unpopular move within customs, but one that is applauded and considered necessary by those industries most affected by cross-border operations.

Several copyright industry sectors conducted training for Polish customs during 2003, and the officials seemed willing to cooperate with industry. Further funding, resources and training are necessary to support improvement in border enforcement.

¹³ 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 cooperation between the private sector and customs in the fight against piracy. These agreements are still in force, even after the 2002 reorganization of Polish Customs, but are not often used.

¹⁴ Following the 2002 reorganization of Polish Customs, there is currently one IPR office at the Ministry of Finance which employs three persons. There are also 14 customs houses throughout the country with IPR coordinators in each of them (although IPR protection is not their only responsibility).

Criminal Anti-Piracy Enforcement Involves Good Cooperation between Industry and Enforcement Agencies, But No Effective Deterrence In Practice

Polish police run many raids but deterrence is lacking: The industries generally report good cooperation with Polish enforcement agencies with investigations and raids.

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, also in cities other than Warsaw, such as, Kraków, Gorzów Wielkopolski, and key border towns of Biała Podlaska, Przemyśl and Poznan — also with regard to new categories of crimes and methodology of disclosing and securing evidence. In a recent action in Gorzow Wielkopolski, the local police found a computer server operating illegally in one of the city's high schools. This allowed the identification of over 40 private premises, where personal computers were used for downloading music, films and software. The motion picture industry also reports that police enforcement initiatives in 2003 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 and also coordinates activities with the national Chief of Police.

There have been a few problem points. In July 2003, Warsaw police raided the DigiPress plant and took exemplars from the two operating lines in the plant; the third line was under repair at the time. Despite several requests from ZPAV, the police have not taken any action by going back to the plant to obtain a complete exemplar set from each mold. Moreover, it should be pointed out that the law enforcement agencies continue to be extremely uncooperative in assisting in identifying where the machinery of the Silesia CD plant in Wroclaw was located.

ESA 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. The continued lack of action against the pirate syndicates, who originated in the Warsaw Stadium but are now spaced throughout the country, is giving these criminal groups the impetus to expand their operations. Specialized organized crime units of the police must be available to assist rightsholders who cannot stop these dangerous syndicates.

BSA notes that the Polish police are still among the most active in Eastern Europe in investigating cases of software piracy and in conducting *ex officio* raids. For example, in late 2003, BSA reports that the police have been cooperative in several Internet piracy cases. BSA reports that it has received exceptionally good cooperation from the Polish government in its education and marketing campaigns as well as in the form of police enforcement against different types of piracy (End-User, HDL, CD-ROM and Internet).

Delays are all too common at the prosecutorial level: With respect to software cases, BSA suggests that prosecutorial 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, although this pace is gradually increasing. Fines and sentences imposed under these judgments have been relatively insubstantial despite improvements in the law.

Expert reports add a bureaucratic layer: The recording industry continues to report the problem of courts appointing independent experts to secure the proof of ownership even in simplest copyright cases, even 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 rightsholders' 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.

Polish courts fail to apply deterrent sanctions: Polish courts have only recently begun to hear significant numbers of criminal copyright infringement cases and have issued comparatively few decisions. However, a common problem experienced by all the copyright industries is the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases. Many elements of Poland's enforcement regime remain incompatible with its TRIPS enforcement obligations, including the failure to impose such deterrent criminal penalties in commercial piracy cases and lengthy delays in bringing and completing both criminal and civil infringement cases. The penalties in the 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.

In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases. Three significant changes were made. The first allowed copyright cases to be heard summarily, thereby providing for a faster hearing. The second allowed courts to conduct cases even in the absence of the defendant. The third obliged the courts to order the confiscation of pirate product even when the cases were dismissed. These changes should, in time, expedite the handling of copyright piracy cases in Poland.

Backlogs of cases delay judicial action: 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 recording industry, ZPAV, reports 4,500 criminal cases are currently pending. For the motion picture industry, FOTA had over 3,663 cases pending in the criminal courts at the end of 2003. Last year, FOTA filed 1,165 new cases, with only 120 cases resolved by the Polish courts.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS POLAND IN 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	1,189	154	1,336
Led by Police	1,189	154	1,207
Led by Customs			105
Number of cases commenced	1,165	102	1,336
Number of defendants convicted (including guilty pleas)	76	25	40
Acquittals and Dismissals	44	77	82
Number of Cases Pending	3,663	452	4,500 (applies to cases instigated as of 2000. No data available before)
Total number of cases resulting in jail time	0	10	12
Suspended Prison Terms		10	
Maximum 6 months		10	2
Over 6 months		-	0
Over 1 year		-	10
Total Suspended Prison Terms		-	12
Prison Terms Served (not suspended)		0	Data not available
Maximum 6 months		-	Data not available
Over 6 months		-	Data not available
Over 1 year		-	Data not available
Total Prison Terms Served (not suspended)		-	Data not available
Number of cases resulting in criminal fines	76	15	21
Up to \$1,000	76	15	21
\$1,000 to \$5,000			0
Over \$5,000			0
Total amount of fines levied		US\$2,000	Data not available*

*NOTE: Data on the amount of fines levied in sound recording cases is not available due to the fact that the courts delay in sending this information to ZPAV (sometimes this takes several months, even years).

Civil Copyright Enforcement in Poland Not Yet a Viable Remedy

BSA did not carry out any civil actions in Poland during 2002 or 2003. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland. In prior reports, BSA and IIPA had previously recommended the copyright law be further clarified so that judges could begin to implement such procedures. Procedural delays in obtaining civil order in the past have been so great that the target had been able to legalize its software shortly before any raids could be carried out. Such procedural delays vitiate the potential of *ex parte* civil searches. It can take up to five years for a civil copyright infringement case to be heard.

COPYRIGHT LAW REFORM IN POLAND

Copyright Law and Deposit of the two WIPO treaties: Poland is again considering amendments to its Law on Copyright and Neighboring Rights (1994, as amended in 2000 and 2002) in order to complete harmonization as it accedes to the European Union in 2004. After the 2002 amendments were adopted, IIPA and its members highlighted at least four deficiencies in the Polish copyright law.¹⁵

Poland succeeded in depositing its instrument of accession to the WIPO Performances and Phonograms Treaty with WIPO, with entry into force on October 21, 2003. Later in 2003, Poland deposited its WCT instrument, and the WCT will enter into force on March 23, 2004.

Copyright Law Amendments of January 2004: During 2003, the Ministry of Culture worked on a package of draft amendments to the Copyright Act, with four primary objectives:¹⁶ (1) to implement the EU Copyright Directive; (2) to provide a *droit de suite*; (3) to issue optical disc regulations; and (4) to include amendments relating to collecting societies. The locally-based copyright industries have offered numerous proposals during 2003 to support the legislative reform process. The Polish Council of Ministers approved a package of copyright law amendments (which includes a separate chapter on optical disc manufacture as well as the need to for the Minister of Culture to issue an implementing regulation on such) on December 23, 2003. This package was forwarded to the Sejm in January 2004.

First, the Polish copyright law amendment package introduces a new chapter which introduces a system to control the production and reproduction of optical discs (e.g. CDs, CD-Rs, DVDs, DVD-Rs). The copyright industries viewed the inclusion of an OD regulatory system within the copyright law amendments as a positive legislative drafting move. The Polish government indicated that its proposal is aimed at placing certain existing, voluntary obligations of the OD plants into statutory requirements. For example, the new OD chapter would establish the following key elements:

- Optical disc plant owners are required to use source identification codes in all devices throughout the whole production process.
- OD plant owners must provide monthly information regarding their production processes to the ministry responsible for controlling OD production and distribution (this will be the Ministry of Culture and National Heritage).
- The ministry will establish and maintain an accurate registry of information regarding OD plants and their production.

¹⁵ As detailed in IIPA's 2003 Special 301 report, the four major areas of remaining concern in the Polish copyright law after the 2002 amendment involved: (1) the need to broaden the definitions of the reproduction right for phonogram producers and performers in order to comply with the international standards; (2) give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration; (3) remove the cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights; (4) clarify that police and public prosecution services take action *ex officio* in respect to all criminal offenses provided under the copyright law.

¹⁶ More comprehensive discussion on the successes and challenges involved in Poland's copyright law reform over the past decade are outlined in IIPA's 2003 Special 301 report, found at <http://www.iipa.com/rbc/2003/2003SPEC301POLAND.pdf> (pages 244 et seq.).

- The minister can order an inspection of the OD plant at any time, to be carried out by an inspector who is entitled to review documents, interview personnel and secure evidence.
- Violations of the enumerated acts regarding OD manufacturing and production are subject to penalties including fines outlined in the Administrative code.
- The minister must issue an implementing decree to establish this OD regulatory regime within three months after the law amendments enter into force. OD plant owners must comply with the law's obligations within this same three-month time period.

The copyright industries look forward to working with the Ministry of Culture to ensure that an effective OD regulation is promptly issued which elaborates on the broad guidance provided by the amendments outlined in the copyright law.

Second, this legislative package also proposes to amend several substantive copyright law provisions, primarily involving changes affecting certain rights, certain exceptions to protection and collecting society issues.¹⁷ Given that the legislative draft is still under early consideration and its text could change, we offer several remarks about what we understand is the scope of this bill. The copyright industries observe that the current draft amendments omit several issues highlighted numerous times by the local private sector. Unfortunately, the proposed legislation does not address several key improvements offered by the local copyright industries during 2003 which would better align Polish law with their international obligations and international standards.¹⁸ The Polish Parliament should work with the private sector to eliminate the following deficiencies from the current law and include them to the list of draft amendments. The copyright industries will continue to monitor the passage of this copyright reform package as it makes its way through the legislative process.

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,

¹⁷ For example, the bill proposes to accomplish the following (illustrative) changes: amend the exception for temporary copying to come closer to tracking the EU Copyright Directive regarding certain transition or incidental reproductions; include a definition of technological protection measures and rights management information; amend the private copying exception to permit only single copies (this proposal remains too broad and does not track the EU Copyright Directive which limits the personal use exception to reproduction made by natural person for their private use and not for any direct or indirect commercial purposes; allowing digital copying is not normal exploitation of a work and conflicts with the three-part test); amend the entire chapter affecting the creation, organization and permissible activities of collective management organizations; adds several additional acts which are exceptions to copyright (the exceptions with research to educational and research institutions should be construed in the most narrow way possible).

¹⁸ An illustrative list of important issues omitted from the copyright law reform package which, if implemented, would serve to strengthen the Polish copyright law includes: clarifying the important distinctions between the rights of broadcasting, the communication to the public and making available; expanding the reproduction right for neighboring rights to meet international standards; extending the term of protection for producers of sound recordings beyond the TRIPS minima (and extended the term of protection as well for products whose term is not measured by the life of a natural person); strengthening the general exception language to explicitly track all three elements of the TRIPS Article 13 three-step test; further strengthening the remedies for violations involving TPMs and RMI; improving one provision to improve the ability of Polish enforcement officials to take *ex officio* action on their own initiative (such as all criminal copyright cases as well as those with an organized crime element) instead of always waiting for a rightsholder's motion; ensuring a rebuttable presumption of ownership for producers of sound recordings, such as already is afforded to authors; acknowledging that the bill's proposal to require collecting societies to distribute statutory percentages of their collections interferes with private contractual negotiation among rightsholders; removing a provision which adversely affects the freedom of negotiations which should be respected between producers of sound recordings and performers; and increasing criminal penalties (especially the minimum jail sentence from 2 years up to 3 years) and removing the "economic gain" element in order to improve deterrence.

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. 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. Reportedly the Polish government remains uninterested in withdrawing this reservation.

Broadcast Act of 1993: 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.