

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Poland remain on the Special 301 Watch List in 2005.

Overview of Key Problems/Achievements: Over the past year, the Polish government made progress in the areas of copyright law reform and heightened enforcement. The copyright industries acknowledge the several notable achievements Poland made in 2004. Several industries note that progress was made in reducing piracy in the Dziesieciolecie (Warsaw) Stadium. Amendments to the copyright law were adopted, and the implementing decree regarding optical disc manufacture was also passed.

Unfortunately, longstanding problems related to significant piracy levels and effective enforcement remain. Optical disc (OD) production within Poland continued to grow in 2004, and the production capacity of over 597 million units/year still far exceeds local demand. Given this excess production, it is imperative that Poland enforce its regulations on the production and distribution of optical media (such provisions 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. Continued effort and vigilance is needed to properly implement the new optical disc decree as well as to improve enforcement against both hard goods piracy and Internet piracy.

Industry cooperation with police agencies throughout Poland remains generally good. Customs activities increased in 2004. Cases continue to be initiated but few full 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 to IPR cases). Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. The presence of organized criminal elements in the Warsaw Stadium and around the country remains a significant concern. Estimated trade losses due to piracy in Poland were US\$355 million in 2004.

Actions Which the Government of Poland Should Take in 2005

Legal reform

- Refrain from over-regulating collective management of copyright and neighboring rights;
- Withdraw Poland's reservation to Article 12 of the Rome Convention;
- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases;
- Consider introducing criminal sanctions in the optical disc regulation;

- Add the unauthorized downloading of copyrighted files onto personal computers to Article 118 of the Copyrights and Related Rights Act.

Enforcement

- Continue to consult with rightsholders regarding the execution of the law and regulations on optical disc manufacture;
- Continue to 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;
- Evaluate how DAMIS (administrator of the Warsaw Stadium) meets the obligations of its contract to enforce IPR rights at the Warsaw Stadium;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern and northern borders (Belarus, Ukraine, Russia), by ensuring that sufficient resources (both technical and personnel) of 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;
- Continue to conduct and support training seminars for police, prosecutors, and judges on copyright enforcement.

POLAND
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Records & Music	36.0	37%	34.0	45%	45.0	45%	37.0	30%	31.0	30%
Entertainment Software²	109.3	94%	NA	NA	337.7	91%	115.8	90%	103.1	85%
Motion Pictures	30.0	35%	30.0	30%	25.0	30%	25.0	27%	25.0	25%
Business Software³	175.0	58%	171.0	58%	107.9	54%	77.1	53%	82.7	54%
Books	5.0	NA	5.0	NA	5.0	NA	6.5	NA	7.0	NA
TOTALS	355.3		240.0		520.6		261.4		248.8	

On May 3, 2004, USTR announced its decision to place Poland on the Special 301 Watch List and conduct an out-of-cycle review later in 2004.⁴ IIPA participated in the review, recommending that Poland remain on the Watch List.⁵ On January 19, 2005, USTR issued its out-of-cycle-review decision to maintain Poland on the Special 301 Watch List.⁶

COPYRIGHT PIRACY IN POLAND

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf. For more details on Poland's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and refer as well to Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

² ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Poland, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$301 million) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ See Office of the U.S. Trade Representative, May 3, 2004, posted at the website http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_59_95.pdf. Specifically: "The United States will conduct an out-of-cycle review in the fall to ensure that Poland continues and even reinforces its efforts to strengthen IPR protection and enforcement and addresses remaining concerns. Results of the out-of-cycle review will be based on Poland's taking action in all the following areas: 1) strengthening anti-piracy and anti-counterfeiting measures at the Warsaw Stadium and continuing effective raids and prosecutions against piracy and counterfeiting activities across the country; 2) strengthening the protection of test data submitted by innovative pharmaceutical companies; 3) taking substantive steps to implement a coordination mechanism between the Health Ministry and the patent agency; 4) strengthening border enforcement; 5) signing into law and implementing new copyright amendments and optical disc regulations; and 6) taking concrete, effective steps to strengthen domestic enforcement of IPR. Other significant developments related to IPR will also be considered during the review."

⁵ See IIPA, Letter to USTR on Poland's out-of-cycle review, November 4, 2004, posted at the website http://www.iipa.com/rbi/2004_Nov4_IIPA301_OCR_Recommendation_Poland.pdf.

⁶ See Office of the U.S. Trade Representative, "U.S. Announces Results of IPR out-of-cycle reviews for Poland and Taiwan," May 3, 2004, posted at http://www.ustr.gov/Document_Library/Press_Releases/2005/January/U.S._Announces_Results_of_IPR_Out-of-Cycle_Reviews_for_Pol_Taiwan.html.

Optical Media Production in Poland and the Need for Enforcement

Domestic production in Poland: In 2004, there were 9 optical disc (OD) plants in Poland, with 101 production lines (excluding CD-R production). The estimated capacity is 597.2 million discs per year. (In 2003, IIPA members reported an estimated capacity of 385.6 million discs in 2003, a 20% increase from the estimated 316 million discs in 2002.) There is one dedicated DVD plant with 41 lines (Technicolor). In addition, there are a total of 19 DVD lines in other plants. To provide a sense of this large capacity, the sales of legitimate music CDs in Poland in 2004 was 11.5 million units (not including the sales of cover mounts and inserts which is a big market). Moreover, some CD production is destined for export, for example, the production at Technicolor is strictly export (100% for the EU market outside Poland) and approximately 45% of the production at Takt is destined for the EU market (outside Poland). In sum, an estimated total of 321.4 million optical discs manufactured at Technicolor and Takt is destined for export.

OD PLANTS IN POLAND	ESTIMATED TOTAL MAXIMUM ANNUAL CAPACITY
OPERATIONAL PLANTS (9)	
DIGIPRESS	14,724,950
DIGI RECORDS	7,358,400
GM RECORDS	93,129,750
MEGAUS	22,403,700
PM / SNAKE'S MUSIC	9,887,850
TAKT	191,187,000
TECHNICOLOR HOME ENTERTAINMENT SERVICES (FORMERLY THOMSON MULTIMEDIA)	235,425,000
VEGART	16,960,000
CODIC	6,200,000
TOTAL	597,276,650

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 and music DVD 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. Pirated entertainment software products are imported from Russia (games for play on personal computers), and from Ukraine and Malaysia (games for play on consoles) and China (cartridge-based games). 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 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 into 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.

Piracy levels in Poland remain high.

Entertainment software piracy remains very high. 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, or manufactured locally through CD-R burning operations. The predominant form of entertainment software piracy for console-based product continues to be factory-produced silver CDs and DVDs, most of which are manufactured in Russia, Ukraine and Malaysia, and are readily available throughout Poland. Games for play on personal computers appear to be moving toward “burn” operations. 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. 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 Stadium. Trade in entertainment software products in the stadium has not decreased at all, though it has gone underground (i.e., pirated products are no longer on open display but are easily found mixed in among counterfeit goods). There is no evidence at this time of pirate entertainment software being produced within Poland in any of the OD plants. Piracy at Internet cafés is also a problem; of the 600 cafés in the country, only about 3% are licensed. ESA estimates that the value of pirated videogame product in the Polish marketplace was \$109.3 million in 2004, with a 94% piracy rate.

Music piracy remains high but some improvement was noted in 2004. The estimated piracy levels for international/U.S. music repertoire is 37%, and estimated trade losses due to piracy of sound recordings were \$36 million in 2004. The major problem facing this industry is still the huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) that 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 local recording industry organization ZPAV reports that the total number of pirated sound recordings seized in Poland in 2004 was 577,417 units, with an estimated value of 16,363,233 PLN (US\$5.3 million). Pirate music DVDs have been appearing more commonly—in 2004, 25,693 units were seized which accounts for 4% of all seizures. The amount of seized CD-Rs and CD-RWs with music was 35,196 units, which represents about 6% of all sound recordings seized in 2004 in Poland. In addition, 81,478 albums in MP3 format were seized (either on physical copies or on computers); this is 14% of all seizures made. In 2004, 335 proceedings have been instituted related to CD-R and CD-RW piracy and 222 cases related to MP3 piracy. The problem of CD-Rs and MP3s 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 insufficient given the scale of the phenomenon. Pirate CD-Rs are mostly distributed at markets along Poland's western border. The problem was explicitly pointed out in the appeal of the Anti-Piracy Coalition sent to the Minister of Culture (and also to the head of the Government Committee for the Prevention of Copyright and Neighboring Rights Infringement) in July 2004. The letter urged the Minister to take immediate steps to act against this phenomenon. ZPAV reports that no such action was undertaken. Further, it appears that the committee has either failed to disseminate this message downwards, with instructions on how to tackle the problem, or it has not disseminated it across the board. The net result is that the market activity of summer 2004 highlighted by ZPAV to the Minister has been continuing unabated, and continues now. In criminal cases involving CD-R piracy, computer hardware (including CD burners) was seized both in private users' apartments and state institutional premises. The total value of the seized equipment is 209,500 PLN (US\$67,568). In one case the prosecutor qualified the crimes as organized crime group activity.

Pirated DVD imports remain 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 discs began to appear in substantial numbers at the end of 2002 and volumes have continued to increase in 2004. FOTA (the local audiovisual anti-piracy organization, in which the Motion Picture Association participates) seized over 123,000 DVDs in 2004 (compared to 481 in 2001, 17,000 in 2002 and 51,000 in 2003). The discs contain subtitling options in Polish, as well as for 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. CD-R piracy is also a major problem, and FOTA estimates that CD-Rs represent between 50% and 55% of the pirate optical discs in the local market. 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 2004, FOTA has seized over 80,000 pirate discs containing movies. The level of cable television piracy in Poland is estimated to be 10%, a decline from prior years. 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. 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.

End-user software piracy and retail problems. The Business Software Alliance (BSA) 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 challenges 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 predominantly uses criminal enforcement and relies on good police cooperation to carry out raids. Additionally BSA supports and promotes initiatives aimed at the implementation

of voluntary auditing procedures to be applied by corporate end-users. The number of such audits carried out by Polish businesses has dramatically increased from 2003 to 2004, with many businesses being responsive.

Unauthorized photocopying of books continues. The Association of American Publishers (AAP) reports steady levels of 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.

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. 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. As a follow up to the campaign, the coalition organized two training seminars in June 2004 in Gdansk and Warsaw for representatives of large corporations and academic institutions in the country. The main topics of the seminars were the risks of Internet piracy on computer networks, liability for copyright infringements, and the management of IT resources. The seminars were attended by representatives of the largest companies and academic institutions in Poland.

Music files are still distributed through the websites and FTP-servers; however, the main focus of Internet users lies in peer-to-peer services such as KaZaA, e-Donkey, Bit Torrent and Direct Connect. In 2004, nine raids against Internet pirates were carried out by the police upon ZPAV (the music industry) initiative. In these cases charges were pressed against 16 individuals offering CD-Rs on the Internet and making available unauthorised music files on FTP-servers. It has to be emphasised that more and more often the police scour the Internet at their own discretion in search of illegal music, film files and software and conduct raids where necessary. In 2004, 67 Internet criminal cases, where computer equipment together with pirate CD-Rs had been secured, were instigated by the police. In September 2004, a criminal group of computer hackers operating in Poland, the United States, Australia, the United Kingdom and Slovakia has been closed down by the police unit combating economic crime in Gorzow Wielkopolski (western Poland). The offenders hacked into computer systems of Polish and foreign academic institutions and used free space of their in house computers. They stole new releases of computer games, software, films and music and distributed them on a large scale on the Internet and at local marketplaces. The police in Gorzow arrested eight prime players of the group. The evidence discovered allowed prosecutors to press charges against particular individuals. Hackers face penalty of up to 8 years imprisonment. The case is pending.

In general, the relations with ISPs are satisfactory. They react promptly to ZPAV's cease and desist letters and remove the infringing content. In 2004, 104 www sites and ftp servers with 9,160 files were removed from the Internet upon ZPAV's notification.

The motion picture industry also reports that Internet piracy for its products appears to be somewhat contained. With respect to filmed entertainment, Internet piracy is primarily focused on the sale of hard goods through web pages and auction sites. MPA indicates that, in 2004, FOTA conducted 119 successful investigations and raids, mostly against Internet pirates who were offering burned CD-Rs on their web pages or through auction sites. Although 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 continues to report 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 continue to be increase.

COPYRIGHT ENFORCEMENT IN POLAND

Mixed Progress in Reducing the Levels of Piracy at the Warsaw Stadium

The Dziesięciolecie (Warsaw) 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. Progress in many, but not all, areas has been in process over the last two years.

Governance of the stadium has been a critical issue over the years. DAMIS, the administrator of the Warsaw Stadium, has again won the bid for marketplace administration. The administration contract (awarded July 1, 2004) now includes detailed provisions and obligations which DAMIS must undertake to regulate the stadium marketplace, including enforcing a total ban on the trade of optical discs. This provision gives DAMIS security employees the authority to remove individuals trading pirate carriers from the marketplace premises, secure pirate goods and pass them to the enforcement agencies. Reportedly DAMIS security, working with local police, is in fact taking action to ban trading in optical discs—a significant improvement over the situation preceding the new contract. In addition, Polish police, customs and border guard officers continue their activities at the Warsaw Stadium, disclosing storage places for pirated products (see enforcement discussion, below). It remains imperative to continue to evaluate how DAMIS meets the obligations of its contract; if it fails to do so, then its contract should be terminated.

The copyright industries have mixed reports on the levels of piracy at the stadium affecting their particular industries. FOTA reports that DAMIS employees and law enforcement authorities (police, customs and border guards) have coordinated actions to enforce the new regulations at the Warsaw Stadium (also known as Jarmark Europa) and this has resulted in a significant drop of the number of stalls carrying optical discs, from over 300 to approximately 10. However, FOTA also reports that consumers are still able to purchase DVDs by finding peddlers who roam the stadium carrying catalogues of their stock. In addition, FOTA confirms the recording industry report that illegal trade has now expanded at “bazaars” and public markets in other parts of the city; for audiovisual materials, this especially includes the electronic market Wolumen in Warsaw, and in other regions of the country (such as ŁKS Stadium in Łódź, Balice market in Kraków, Hala Ludowa in Wrocław, city market Berna Str. Dolna Wilda district in

Poznań, and bazaars located along the Polish-German border). The illegal trade taking place in these public markets is highly organized and controlled by criminal gangs. FOTA has provided a list of all problematic locations to the governmental group that deals with copyright infringement.

The entertainment software industry reports that there has been little change in the industry's situation at the stadium. Pirated entertainment software products are still widely available, though no longer on open display. Pirated video game products can still be found through the stadium's roaming vendors or through those that sell at stalls throughout the stadium (at times hidden among the vendors' other counterfeit products). Much of the pirated CD-based game products are burns, not industrial-producer ("silver") products. In recent years, silvers produced in Russia and Ukraine have flooded the Polish markets; pirates also appear to be shifting their operations to local burning. The Entertainment Software Association (ESA) shares the concerns of the other copyright industry associations that piracy is becoming widespread in "bazaars" and "mini-Stadiums" across the city and in other regions of Poland.

The recording industry reports that the situation regarding the distribution of optical discs with music content at the stadium has radically changed, for the better in recent months. In 2004, 150 proceedings were instigated against distributors of pirate music products at the stadium (31,563 CDs with Polish repertoire and 77,327 CDs with international repertoire, 5,727 music DVDs, 5,770 albums in MP3 format and 193 CD-Rs were seized). Since May 2004, the industry (IFPI and ZPAV, the local industry anti-piracy association) has observed that pirate disc distribution at the stadium has been largely limited, though not eliminated. DAMIS has been informing ZPAV about any changes introduced in their mode of operation—for example, a video camera monitoring system of the top of the stadium has been installed and is available to enforcement authorities. The number of security employees was increased. Although such continuous monitoring has eliminated the open trading in pirate products, the copyright industries question the deterrence of these security patrols as pirates appear simply to go through the motions of hiding their discs until the patrol has passed. However, the local recording industry estimates a decrease of 80% in the supply of pirate discs in the stadium. Activities undertaken by law enforcement agencies at the stadium led to the movement of distributors to other marketplaces such as Wolumen in Warsaw and bazaars located along the Western border. Noticeable pirate distribution of pirated sound recordings (as well as pirate movies) now appears in marketplaces and bazaars in Szczecin, Świnoujście, Kostrzyn, Gubin, Slubice and Sieniawka, and at a computer marketplace in Wrocław, WILDA marketplace in Poznan and Balice in Krakow.

The Business Software Alliance (BSA) also reports that anti-piracy and anti-counterfeiting measures have improved at the Warsaw Stadium since the new DAMIS contract was issued. BSA has noticed a decrease in the number of retail distributors selling pirated software. However, room for improvement at the stadium remains. In addition, police and prosecutors should take action against other large flea markets across Poland.

Border enforcement is improving, but needs much more strengthening.

The copyright industries report also mixed results with the Polish government efforts to strengthen border enforcement practices. In 2004, reports indicate that Polish Customs conducted 105 actions at borders and inside the country, resulting in the seizure of over 31,000 pirate discs. ZPAV reports that a total of 12,156 pirate units (including CDs, albums in MP3 format, CD-Rs and music DVDs) were seized by customs and border guard officers at Poland's

eastern border in 2004 (this accounts only for approximately 2% of all seizures made in Poland). Only 20 cases were instigated by customs and border guards.

MPA reports that Polish border enforcement has been strengthened in two ways. First, at the beginning of the year, Polish Customs created special mobile groups in the regional customs houses to investigate and conduct raids inside the country. These mobile groups are quite active and are coordinating actions with the audiovisual industry. Second, the manpower at the Eastern borders has been reinforced by approximately 1,000 customs officers reassigned there as a result of Poland's accession to the EU. FOTA reports that the quantity of seized pirate audiovisual products at the eastern border has remained at a constant level.

However, the recording, business software and film industries all report that the eastern border remains a problem, despite recent legislative customs reforms made by Poland in order to accede to the European Union. BSA also sees continued ineffective border controls with much pirated and counterfeiting software products continuing to enter Poland, especially in the East. Legal regulations, such as the use of simplified customs procedure resulting from the EU Customs Code, do not have any practical impact in combating organized smuggling of pirated materials.

The recording industry reports that, based on results of forensic examination conducted by IFPI, over 85% of seized pirated sound recordings come from Russia and Ukraine. The majority of pirate discs coming from Russia and Ukraine are seized within the country, which indicates organized smuggling. They have observed that the quantity of seized pirate recording along the Eastern Polish border has dropped considerably. The fact that Eastern border of Poland has been also an EU border since May 1, 2004, has not brought any positive changes in limiting access to pirate sound recordings on Polish territory. However, on a brighter note, the regional customs houses within the country have become more active in this field—they carry out activities coordinated with rightsholders of sound recordings, e.g., actions at marketplaces in Poznan and Wroclaw, following the agreements of particular customs houses with the local recording industry (ZPAV).

While the software industries have continuing concerns with border enforcement, members of the ESA report that there has been much improvement in the operations of Polish Customs during the last year. The customs authorities have responded positively to the anti-piracy training provided by some ESA member companies, and cooperative efforts with industry have resulted in an increase in the level of seizure activity at the borders. The industry is pleased with the level of cooperation its members have received from the customs authorities.

Enforcement of the New Optical Disc Regulations

The 2004 copyright law amendments (discussed below) require the Ministry of Culture to issue regulations to implement the optical disc production provisions of the copyright law. This decree was officially published on June 2, 2004.⁷ Right now, the Polish OD Decree appears sufficient to control the production of optical discs. However, the lack of criminal sanctions remains a troubling concern. If the OD plants do not adequately observe the provisions of the decree, it may become necessary to introduce criminal sanctions. Publication of the OD Decree

⁷ As a matter of comparison, the Polish optical disc decree is much more minimalist than the kind of comprehensive OD regulations which IIPA members and the U.S. government have pressed in other territories in Asia, Russia and Ukraine, for example.

was the first stage of implementation; enforcement of the regulations, and their usefulness in combating piracy, are the more critical elements.

Because the OD plants use different information technology systems, a universal format allowing for further data processing was prepared, and reports indicate that this system was finalized a few months ago. Independently of that effort, the local recording industry (ZPAV) continues its program of co-operation with particular CD plants on the basis of modified Memoranda of Understanding (MOUs) with each plant. ZPAV has accompanied the inspectors in some plant visits and noted a resistance in the GM plant.

Efforts to create the register for OD machines, their implements, the businesses which own them, plus other information required in the decree, have commenced. The Ministry of Culture already has called for the operational optical disc plants to register lines and equipment. All OD plants, except Technicolor, positively responded to the appeal of the Ministry of Culture to submit data to the register. A two-person team of inspectors has been established at the Ministry of Culture to control optical disc production.

To date, inspections have been carried out in five (5) OD plants and there have been no negative reports issued yet.⁸ ZPAV prepared inspectors of the Ministry of Culture to conduct inspections and provided the ministry with a database for storing information required in the Decree. Also, a ZPAV representative participated in inspections in selected CD plants. The first inspection last fall indicated the necessity for amendments to the Copyright Law, including the introduction of criminal sanctions for ignoring the provisions on submitting information on pressing equipment and production details, such as locations of manufacturing stampers. This recommendation already has been submitted to the Government Strategy for the year 2005.

Even before the adoption of these OD regulations, criminal investigations and prosecutions had been brought by Polish authorities against several CD plants.⁹

⁸ In practice, the inspection procedure generally tracks the following: (a) The legal department of the Ministry of Culture sent information to particular OD plants about obligations resulting from the amended law and a decree of the Ministry, such as submitting information about the production of optical discs and 'movement' of pressing equipment and accessories. The inspectors of the Ministry of Culture are authorized by the legal department and act upon a "Letter of Authorization to Conduct Inspection" signed by the Deputy Minister of Culture. This letter of authorization covers the scope of inspection, according to the provisions of the Decree of the Ministry of Culture in this field. The letter of authorization is issued for a limited period. (b) During and after the inspection, inspectors prepare an inspection report, which contains a description of activities undertaken, location of the inspection, and documentation on collected samples. Inspectors make an inventory list of pressing machines and accessories. A report on collection of samples is prepared and signed by the inspector of the Ministry of Culture and the owner/board member of the OD plant. A report on collection of samples is certified by the Ministry of Culture. (c) The inspection report together with recommendations for further action is forwarded to the inspected entity.

⁹ There are 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 constantly urges the police to speed up the investigation and clarify the situation as swiftly as possible.

Criminal investigations reflect inadequate deterrence despite good cooperation with industry.

The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids. The problem remains pressing forward with cases through prosecution, in order to gain effective deterrence.

The recording industry views the level activity of enforcement agencies with regard to the instigation of criminal proceedings as unchanged from previous years. However, the quantities of seized pirated sound recordings are much smaller than before. Pressed pirate CDs and music DVDs, most often smuggled from Russia and Ukraine, dominate the market. Also visible is growing distribution of CD-Rs. Furthermore, there is a lot of pirate activity involving pirated music on the Internet. Activities conducted by police, such as identification and detention of individuals organizing illegal distribution of pirate recordings on the Internet as well as securing servers with stored music files, are praiseworthy. However, only a few police units are ready to undertake such Internet actions, due to lack of professional equipment and lack of necessary knowledge to prosecute intellectual property infringements on the internet. Unfortunately, a recommendation in the government's 2003 strategy plan to create specialist positions in particular police units to monitor the Internet in search of intellectual property infringements has not been implemented. Officers to deal with Internet crimes were appointed at police headquarters at the regional level (*viovodships*). Furthermore, the judicial practice of calling experts in obvious cases is still a matter of concern, especially to the recording industry, because this practice causes higher costs for the courts and delays prosecutions.

The motion picture industry (FOTA) reports that the number of raids involving audiovisual products in Poland has increased by roughly 15% compared to last year, resulting in an increase of seized DVDs (51,000 in 2003 and over 123,000 in 2004). Very recently, the Regional Police Units in Radom, Kielce and Rzeszow conducted raids (based on FOTA investigations) on an individual who operated pirate disc labs and distributed pirate discs in street markets and via an Internet website. Over 5,000 pirate CD-Rs and DVD-Rs and 450 pirate DVDs were seized, and five people were arrested. The film industry shares the recording industry's concern about Internet piracy enforcement (above). On December 23, 2003, the Council of Ministers approved its government anti-piracy strategy plan and made statements regarding increased inter-disciplinary cooperation and prioritization for IP crimes. The Council called for the National Public Prosecutor to appoint two prosecutors in every office to assist and advise on IP crimes, and also reiterated the need for intensified actions using all resources within Poland such as the police, border guards, and customs. FOTA notes that the implementation and realization of these plans is proceeding, but slowly.

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. Additionally, BSA has seen positive and effective action taken by the national police, and even local police units, against Internet piracy. With respect to hard goods cases, BSA reports that the Polish police remain active and cooperative in BSA cases in general, and in fighting software piracy throughout Poland. Many of these cases often are started *ex officio* by the Polish police. For example, in 2004 police in Gorzów, Poland, conducted a raid against 100 hackers and pirates selling pirated software as well as music and films and using academic computer systems for storage. The suspects face up to eight years in prison.

With respect to videogame enforcement, one member company of the ESA reports that in a three-month period (April-June 2004), 22 new cases resulted in seizure of 341 pirated ODs containing company products and 75 copies of company products found on hard drives at Internet cafés. A majority of these pirate ODs were seized in Warsaw and Bydgoszcz. Overall, the entertainment software industry has been pleased with the level of cooperation its members have received from local law enforcement authorities.

Continuing need to improve prosecutorial and judicial deterrence in copyright cases.

For years, the copyright industries have identified a longstanding problem experienced by all the copyright industries—the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases in an expeditious manner. 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 the lengthy delays in bringing and completing copyright 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.

Expert reports add a bureaucratic layer. The recording and software industries continue to report the problem of courts appointing independent experts to secure proof of ownership even in the 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 rightsholders' representatives, but this procedure 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, because the costs of appointing independent experts is too high. Despite many meetings with judges and prosecutors this has not changed.

Delays at the judicial level: From the perspective of the film industry, the Regional Court of Warsaw seems to handle many long, unresolved cases. FOTA reports the following example: in eight (8) cases heard by the Warsaw Court within the three weeks during October 2004, FOTA's expert opinions were provided in 1998 for three cases, in 2002 for two cases and in early 2003 for the remaining three cases. However, FOTA notes that the backlog is not specific to copyright cases and is a common problem throughout the Polish court system. This is due to the lack of human resources, few judges, and the lack of investment in new equipment and technologies. The lack of deterrent sentencing is also a very common problem. Prison sentences are almost always suspended and the fines for copyright infringement are very low (from US\$50 to \$1,000). Unfortunately, this is also true.

The recording industry has at least two examples of excessive delays they have encountered with the Polish judicial system. First, the Regional Court in Warsaw, 7th Criminal Division, in a decision issued February 13, 2003, turned to the Court of Appeals with a request to transfer one of its cases to a different court of an equal level due to the fact that the case may soon be barred by the statute of limitations and the Regional Court has too many other cases to examine. An additional reason given by the court for the transfer was that the refurbishment/reconstruction occurring in the building where the court is seated also prolonged the court's proceedings. The indictment in this copyright case was made in 1998 and referred to a criminal act which took place in 1996. In other words, about 7 years passed between the infringement and the court's request to transfer the case. In another case, the Regional

Prosecutor's Office in Koszalin decided (on June 9, 2003) to discontinue its copyright case proceedings because of "insignificant damage to society." The criminal act took place in 1998; after five years passed in which the court in Warsaw failed to examine the case, it then returned the case to the Regional Prosecutor's Office in Koszalin, requesting some additional acts to be carried out. It was then that the prosecution discontinued these proceedings.

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 these 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. But these tough penalties are not imposed in practice. In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases. There were three improvements: first, copyright cases can be heard summarily, thereby providing for a faster hearing; second, courts can conduct cases even in the absence of the defendant; and third, courts can order the confiscation of pirate product even when the cases are dismissed. Unfortunately, BSA continues to see weak sanctions, and it is not clear whether these improvements have had a practical affect. For example, in a recent 2004 case in Lublin, an end-user involved in extensive piracy received a one year suspended prison sentence although a vast amount of pirate software was found during a raid.

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 use of computers and trained support staff) so as to improve overall productivity in the court process. ZPAV reports 5,011 criminal cases are currently pending; in 2004, 1,208 cases were instigated, and of that 1,127 are still pending. For the motion picture industry, FOTA had over 3,663 cases pending in the criminal courts at the end of 2003; in 2004, FOTA initiated 1,280 new criminal cases and only 115 were resolved by the courts. BSA reports 282 cases are still pending.

**CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004
POLAND**

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	1,445	307	1,208
LED BY POLICE	1,340	307	1,003
LED BY CUSTOMS	105	0	181
NUMBER OF CASES COMMENCED	1,280	184	1,208
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	79	47	50
ACQUITTALS AND DISMISSALS	36	307	56
NUMBER OF CASES PENDING	4,528	282	5,011 (1,127 of those instigated in 2004)
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	43	40	21
SUSPENDED PRISON TERMS	43	40	21
MAXIMUM 6 MONTHS	7	7	7
OVER 6 MONTHS	24	7	10
OVER 1 YEAR	12	26	4
TOTAL SUSPENDED PRISON TERMS	43		21
PRISON TERMS SERVED (NOT SUSPENDED)	0	0	0
MAXIMUM 6 MONTHS	0		0
OVER 6 MONTHS	0		0
OVER 1 YEAR	0		0
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	0		0
NUMBER OF CASES RESULTING IN CRIMINAL FINES	36	38	24
UP TO \$1,000	36	35	24
\$1,000 TO \$5,000	0	3	0
OVER \$5,000	0	0	0
TOTAL AMOUNT OF FINES LEVIED	\$11,500	\$17,650	\$6,850

Civil copyright enforcement in Poland not yet a viable remedy. BSA did not carry out any civil actions in Poland during 2002, 2003 or 2004. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland mostly because of effective and efficient police cooperation. Procedural delays in obtaining civil orders 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. In prior reports, BSA and IIPA had previously recommended the *ex parte* provisions be further clarified so that judges could begin to implement such procedures. It can take up to five years for a civil copyright infringement case to be heard.

COPYRIGHT LAW IN POLAND

Copyright Law amended in 2004. Amendments to the 1994 Polish Law on Copyright and Neighboring Rights were officially published on April 30, 2004, just in time for Poland's accession to the EU. The goal of this 2004 legislative package was to implement certain aspects of the WIPO Internet Treaties, and of the EU Copyright Directive, which were not already accomplished in the Polish law. In general, the amendments contained several improvements, especially on the definition of technological protection measures and temporary reproductions, which had been proposed made by the various copyright sectors in recent years.

MPA, for example, still views the provisions, including the definition and sanction, on technological measures, as inadequate, and remains concerned that the private copy exception is too broad. These amendments also included provisions regarding the regulation of optical disc production;¹⁰ the Ministry of Culture published implementing regulations regarding the optical disc provisions of this law on June 2, 2004. However, even after the adoption of these 2004 amendments to the Polish copyright law, there remained a fair number of issues not addressed in these amendments on which industry sectors have long requested redress.¹¹

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 entered into force on March 23, 2004.

Reports suggest that the Ministry of Culture is currently preparing a list of issues subject to future copyright law reforms. These issues include amendments concerning collective management of rights and the implementation of the EU Enforcement Directive. At this stage, there is no specific draft proposal on the table and no draft is expected within next six months. Continued vigilance will be needed as it is possible, indeed likely, that the Polish collecting societies may try yet another run at introducing/passing legislation which would likely be opposed by IIPA members.

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. 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

¹⁰ For example, the new OD chapter established 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 (the Ministry of Culture and National Heritage); the ministry will establish and maintain an accurate registry of information regarding OD plants and their production; 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; and 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.

¹¹ For example, issued unaddressed/unresolved in the 2004 copyright law amendments include: (a) the need for broader exclusive rights for producers of phonograms and for performers; (b) the need to strengthen enforcement provisions, such as affording *ex officio* powers of authorities in copyright infringement actions; improving the scope of injunctive relief; enhancing criminal liability; providing presumptions of ownership; and affording stronger criminal penalties (the EU's issuance of its Enforcement Directive may ameliorate some of these inadequacies, though separate and additional work will be needed to increase the criminal sanctions under the law); (c) the narrowing of an overly broad exhaustion rule providing that the imports of copyrighted products that were put into circulation in any country with which Poland has free-trade zone agreements is not a copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive).

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.

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