

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Poland remain on the Special 301 Watch List in 2006.

Actions Which the Government of Poland Should Take in 2006:

Enforcement

- Continue to work with rights holders regarding the enforcement of the law and regulations on optical disc production and distribution.
- Continue progress made in 2005 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.
- Continue to monitor DAMIS' performance in banning the sale and distribution of OD products at the Warsaw Stadium, and terminate the lease agreement if the terms of its obligations under the lease are not met.
- 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 improving cooperation with the customs agencies in neighboring countries.
- Police should take *ex officio* action to initiate investigations/raids on their own.
- Have prosecutors press for expeditious consideration of criminal copyright cases.
- 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.

Legal reform

- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases.
- Refrain from introducing a private copying exception to the technical protection measures provisions, and from deleting the multiple damages provision, as recently proposed by the Ministry of Culture in the draft amendments to implement the EU Enforcement and Copyright Directives.
- Amend the current copyright law provisions governing the legal protection of technological measures to correct existing inadequacies and reduce the scope of the overly broad private copy exception, which is currently inconsistent with the three-step test found in TRIPS Article 13.
- Introduce criminal sanctions in the optical disc regulations.

- Refrain from over-regulating collective management of copyright and neighboring rights.
- Withdraw Poland's reservation to Article 12 of the Rome Convention.

POLAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	102.0	66%	30.0	35%	30.0	30%	25.0	30%	25.0	27%
Business Software ³	212.3	58%	197.0	59%	171.0	58%	107.9	54%	77.1	53%
Entertainment Software ⁴	NA	60%	109.3	94%	NA	NA	337.7	91%	115.8	90%
Records & Music	25.0	31%	36.0	37%	34.0	45%	45.0	45%	37.0	30%
Books	5.0	NA	5.0	NA	5.0	NA	5.0	NA	6.5	NA
TOTALS	344.3+		377.3		240.0		520.6		261.4	

COPYRIGHT PIRACY IN POLAND

In particular, ineffective enforcement remains a problem in Poland. Hard piracy has shifted slightly from CDs and DVDs to a significant use of CD-Rs and DVD-Rs, as well as a shift of to Internet piracy, which is steadily growing. The copyright industries continue to work with Polish officials on both policy and operational enforcement matters. On September 13, 2005, the Polish Council of Ministers adopted a Report of the Committee for the Prevention of Copyright and Neighboring Rights Infringement. According to the Government's press release, six strategic goals for 2005 were outlined in that document: (1) to increase the efficiency and improve the coordination of the state authorities' activities (police, border guard, customs) in fighting piracy; (2) to increase the efficiency of the justice system's activities in fighting piracy; (3) to draft appropriate changes to the law, related to the need for improvement in conducting proceedings regarding infringements of copyright and neighbouring rights; (4) to limit piracy at bazaars and street markets; (5) to increase the efficiency of enforcement authorities' actions against Internet piracy; and (6) to monitor the activities of public administration bodies. This strategy is based on a principle of "partnership" between the public sector and private industry; in fact, industry representatives did participate in the Committee for the Prevention of Copyright and Neighboring Rights Infringement, an Inter-Ministerial

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf. For more details on Poland's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and refer as well to Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

industry entity. The implementation of the Government's action plan is proceeding slowly (the judicial portion has not been improved) and was further slowed in 2005 pending the results of back-to-back Parliamentary and Presidential elections.

Domestic OD production in Poland: Optical disc (OD) production within Poland continued to grow in 2005. The number of lines in the nine plants (the same number of plants as in 2004) increased from 101 lines in 2004 to 122 lines in 2005. The estimated production capacity of these plants amounted to 775 million units per year in 2005, compared to 597 million units per year in 2004. The 122 production lines exclude CD-R production figures. There is one dedicated DVD plant with 41 lines (Technicolor). In addition, there are a total of 19 DVD lines in the other plants.

Imports of piratical optical media: 2005 saw a continuing problem of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, entering Poland. Forensic analysis shows that the vast majority of pirated music found in Poland was manufactured in Russia and smuggled into Poland. The rest came from Belarus, Lithuania and Ukraine. Although there was sizeable law enforcement action to discover and seize pirate products, seizures at the borders constituted a minor percentage of all seizures. These products are distributed via a network of plants and distribution chains run by regional organized criminal elements. Burned CD-Rs and MP3s in Poland are becoming more and more significant. Those CD-Rs that were seized contained professionally prepared artwork, indicating a greater financial involvement of criminal groups. The estimated piracy levels for international/U.S. music repertoire is 31%, and the estimated trade losses due to piracy of sound recordings was \$25.0 million in 2005. Pirated entertainment software products in optical disc formats were imported primarily from Russia and Ukraine. The Polish Police and Customs officials 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.

Piracy remains high across all sectors. The Entertainment Software Association (ESA) continues to report that in 2005, the manufacturing and distribution of pirated entertainment software remains controlled by organized criminal enterprises (and more than likely a single syndicate) operating throughout the region. Imports of pirated entertainment software on optical disc format continue to be sourced largely from Russia and Ukraine (some appear to be transshipped through Lithuania), with the video games already localized into the Polish language. In addition, the ready availability of counterfeit cartridge-based games at retail shops remains problematic. Piracy at Internet cafés is also a problem; of the estimated 1,000 cafés in the country, only about 5-10% are licensed. The estimated piracy level of entertainment software in Poland is 60%. While cooperation with both the Police and Customs has improved significantly, resulting in cases being initiated against smaller establishments, piracy at the Stadium remains problematic as distribution and piracy activity there continues to be directed by organized criminal groups with ties to Russian and/or Ukrainian groups.

The motion picture industry reports that in 2005 audiovisual piracy levels appear to have worsened. Pirate DVDs continue to be imported into Poland and distributed in almost every metropolitan area. Russian-sourced pirate DVDs are the biggest problem because they undermine the legitimate theatrical and home entertainment industries. 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. Cable network operators often use illegal decoders and pirate cards to distribute programs on their networks without license. When Canal Plus in Poland changed its smart cards it had a substantial positive impact on fighting 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. The illicit recording of movies at movie theaters (“camcorder piracy”) is a major source for pirated motion pictures available over the Internet, as well as on street corners and flea markets. For 2005, MPA’s methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to Internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Poland (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Poland due to audiovisual piracy (including both hard goods and the Internet) were \$102 million, and the estimated piracy level was 66%.

The Business Software Alliance (BSA) reports that piracy levels in Poland remain relatively high. 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). At the retail level, numerous flea markets selling pirate products provide a source of pirated software. Estimated 2005 losses due to business software piracy in Poland rose to \$212.3 million, with a small (1%) drop in the piracy level to 58%. Lowering the business software piracy level in Poland could contribute significantly to the Polish economy.⁵ 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 Association of American Publishers (AAP) reports steady levels (from years past) 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, which harms both English language and Polish language materials. The Government of Poland should work with university administrations and lecturers to ensure that proper measures are taken to cultivate a climate of respect for copyright on university campuses.

Internet piracy in Poland remains a concern. Internet piracy has been a steadily growing problem in Poland. Music files are still distributed through websites and FTP-servers. However, the main focus of interest of Internet users lies in peer-to-peer services. EMule, eDonkey, Bit Torrent and Direct Connect are the most popular file-sharing softwares. The Polish police continue to scour the Internet at their discretion in search of illegal music, film files and software and conduct raids where necessary.

In 2005, 80 criminal Internet cases, where computer equipment together with pirate CD-Rs were secured, were instigated by the police, according to recording industry statistics. In these cases charges were pressed against 12 individuals offering CD-Rs on the Internet and making available unauthorized music files in P2P networks. Other cases are pending. ZPAV has good relations with all major ISPs (around 10) in Poland, who reportedly react promptly to ZPAV cease and desist letters and remove infringing content. In 2005, the ISPs removed 83 websites and FTP servers with a total of 4,725 infringing files upon ZPAV's notification.

⁵ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Poland.pdf), using 2004 data, found the following: a 10-point drop in Poland's 59 percent piracy rate could create 4,300 jobs and pump \$2 billion into the economy. It could also increase local industry revenues by more than \$1.3 billion and generate \$238 million in additional tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Poland.pdf>.

Following structural changes at the National Police Headquarters in 2005, new police teams consisting of IT specialists and experts in the Regional Police Headquarters were established. This is a very positive sign as those teams will be dealing with criminal activity on the Internet. At present teams of Internet specialists actively operate in the following cities: Katowice, Rzeszow, Koszalin, and Gorzow Wielkopolski. As a result of reorganization, the special and coordinating IP unit was eliminated; however, the new head of the Polish police has assured right holders that it will be restored. ZPAV recently submitted a draft cooperation agreement to the National Police Headquarters. The draft covers a broad range of issues in general, including those meant to fight against Internet piracy.

MPA indicates that Internet piracy for its products appears to be somewhat contained. That is because Internet piracy of its material is primarily focused on the sale of hard goods through web pages and auction sites. ESA reports that Internet piracy of entertainment software in the country is likewise becoming an increasing concern. 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 rise. The industries report that cooperation with criminal authorities on Internet cases is good. Rights holders considering legal actions against Internet piracy face difficulties in identifying infringers because of restrictions imposed by Polish law. Rights holders using civil processes are unable to obtain the identity of a suspected infringer from the ISP; however, this information may be obtained from public criminal authorities. The various rights holder groups such as ZPAV, FOTA and BSA cooperate closely in their actions against Internet piracy through the jointly founded Anti-Piracy Coalition. In 2005, the Coalition sent a mailing to the management boards of the 500 biggest Polish companies providing information about the risks they undertake for the unauthorized and uncontrollable use of the Internet by their employees (including software security issues). The Internet investigators in these groups regularly share information about pirate sites and jointly assist in police raids.

COPYRIGHT ENFORCEMENT IN POLAND

On a positive note, industry cooperation with police agencies throughout Poland remained generally good in 2005.

Progress at the Warsaw Stadium: The Dziesieciolecie (Warsaw) Stadium (also known as Jarmark Europa) has historically served as a centralized distribution point for pirate optical media material. Starting in 2004, for some industries, the notorious piracy situation in the Stadium started to improve. In 2005, overt trade in pirated copyrighted materials across all industry sectors in the Warsaw Stadium did diminish; vast volumes of these products are no longer visible, although underground distribution (using peddlers and runners to deliver products on request) continues. For instance, entertainment software products are no longer openly displayed but remain available from individuals who approach potential buyers and offer to provide pirated games. Or, the customer may simply make inquiries as to where or from whom such pirated products may be obtained and will be readily directed to those can provide the desired pirated product. Security forces working for the Stadium administrator, DAMIS, work with local police to enforce the ban on trading in optical discs, which was a requirement in their lease contract. Polish police, customs, and border guard officers continue their activities at the Warsaw Stadium, disclosing storage places for pirated products. Concerted efforts must continue at the Warsaw Stadium and other mini-stadiums, to combat trade in pirated and counterfeit goods.

The situation at the Dziesieciolecie Stadium continues to improve slowly. The market operator "Damis" introduced new regulations including a ban on the trade of optical discs at the marketplace. As a result, sale of pirate material at the Stadium was largely limited although it does

not mean that the problem is solved. According to law enforcement agencies, the Stadium still serves as a “redistribution point” of pirate pressed carriers, which are traded in large quantities for further distribution in other regions of Poland. In November 2005, ZPAV submitted a petition to the Warsaw authorities to close down the marketplace at the Stadium. In reply, the authorities supported this motion but the final decision is in under the authority of the Ministry of Education, owner of the Stadium's area.

Bazaars and flea markets: Illegal trade has 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. There have been some positive enforcement efforts undertaken by the Warsaw Municipality. Considering the noticeable increase in pirate products available at the Wolumen electronic market, FOTA and the Warsaw Municipality agreed on a test program at the beginning of September 2005 that involved FOTA, the Security and Crisis Situation Department of the Warsaw Municipality, the Economic Delinquency Police Unit of Warsaw-Zoliborz, the Police Officers of the Crime Prevention Department and the Customs Office. The Municipality agreed to finance the cost of 100 police officers to conduct daily controls at the market focusing on IP violations only. According to FOTA, the daily presence of uniformed police officers looking exclusively for pirate products had quick and measurable impact, and almost all visible piracy disappeared. The strategy culminated, on October 22, 2005, in a joint operation by FOTA and local law enforcement authorities dismantling the pirate lab and storage area of the main supplier of pirate products to this market. The Police seized more than 48,000 pirate discs in the operation (an exact breakdown of blank discs versus burnt discs with movies, games and software is unknown at this stage), 3 computers with 4 DVD burners in each, 2 monitors, 1 scanner, 8 printers, and 32 packages of CD stickers and paper for printers. This raid was the successful result of a test program that may now be extended to other markets in Warsaw and throughout the country.

Border enforcement still needs improvement. The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law in order to accede to the European Union. In 2005, reports indicate that Polish Customs conducted 171 actions at the borders and inside the country, resulting in the seizure of over 115,900 pirate discs containing movies and interactive games. 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. Only 20 cases were instigated by customs and border guards. In 2005, FOTA reported good cooperation with Customs officials. ESA member companies report that there has been continued cooperation with the Customs authorities in 2005, resulting in more seizures at the border. ESA member companies began registering their trademarks with Customs last year, which appears to have helped with seizure activities. Entertainment software companies are pleased with the high levels of cooperation, and encourage the Customs authorities to continue to address the influx of pirated products into the country.

Enforcement of the new Optical Disc regulations: The 2004 Copyright Law amendments required the Ministry of Culture to issue regulations to implement the optical disc production provisions of the Copyright Law. The Polish OD Decree (published on June 2, 2004) appears sufficient to control the production of optical discs. If the OD plants do not adequately comply with the provisions of the decree, it may become necessary to introduce criminal sanctions which are not in the current decree. In 2004, the Ministry of Culture called for the operational optical disc plants to

register their lines and equipment. All OD plants, except Technicolor, positively responded to an appeal of the Ministry of Culture to submit data to the register. A two-person team of inspectors was established at the Ministry of Culture to control optical disc production. The first inspection (Fall 2004) indicated the need to include criminal sanctions for plants ignoring the provisions to submit information regarding equipment and production details, such as the locations of manufacturing stampers. The industry submitted a recommendation to add criminal sanctions for the Government Strategy for the year 2005, but it does not appear to have been incorporated into the final recommendations. By the end of 2005, 14 inspections were carried out in 9 OD plants; no negative reports were issued. 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.

Criminal prosecutions remain ineffective. The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids. However, problems pressing forward with cases through prosecution continued in 2005. Eleven prosecutors were appointed at the end of 2004 but they still need IPR training. In 2005, law enforcement agencies instigated 1,221 criminal as well as fiscal proceedings in cases where music producers' rights were infringed. As a result of actions undertaken by Police, Customs and the Border Guard, 492,000 pirate carriers, worth 14,340,000 PLN (about US\$ 4,547,700) were seized and computer equipment, worth 299,000 PLN (about US\$ 94,850) was secured.

The recording industry reported significant actions carried out by the police in 2005. The full details of these actions are at: http://www.zpav.pl/dzialania/efekty_ang.asp?rok=2005 In sum, these included:

Supplier of pirate CD-Rs to the Warsaw Stadium: On April 1, 2005, as a result of actions undertaken by local police units, one of the largest suppliers of pirate CD-Rs for the Warsaw Stadium, together with his co-worker, were detained in Warsaw. The police also searched an apartment rented by the suspect. As a result about 20,000 recorded CD-Rs and CDs, a few cardboard boxes filled with inlays, 55 CD label templates for label printings, CD label films and 6 computers with 6 burners each were secured.

CD-R/DVD-R laboratory: On April 27, 2005, the police unit combating economic crime at the Regional Police Headquarters in Gorzow Wielkopolski closed down an illegal CD-R/DVD-R laboratory. The raid was conducted on the basis of intelligence provided last year by the Polish Anti-Piracy Alliance (comprising of FOTA, the BSA and ZPAV) concerning the supply of pirate products to flea markets along the Polish-German border. During the operation a few thousand pirate CD-Rs and a few burners were seized. The goods were distributed in the whole region, but especially at marketplaces located along the Polish-German border. The distributors were equipped with burners, so that one home "laboratory" could produce about 1,500 discs a day. The goods were then sent to dealers by post. Police officers searched dozens of apartments and houses. During one of the searches, when the owner tried to convince police officers that he had nothing to do with illegal CD-Rs, a postman arrived with a parcel containing a new delivery of pirate discs. As a result of the operation 10 people were charged with copyright infringement; they face penalties of up to five years imprisonment and heavy fines.

Direct Connect hub: On June 29, 2005, police officers from the economic crime department of the Regional Police Headquarters in Gorzow Wielkopolski detained two individuals who distributed illegal software, films, and music on an internal network based on Direct Connect hub. Two individuals, employees of a company providing Internet services, sold illegal software through their own computer network. The whole system was based on offering new users of the network access to the Internet together with a financially attractive access to resources

gathered on the servers of the company. Under the cover of a legitimate company, individuals distributed illegal software, music, and films among their customers and derived financial benefits from these activities. The police officers established that about 2,000 persons took advantage of the offer. Losses incurred by software, film and music producers due to this illegal activity may reach 6 million PLN (about US\$1,903,000).

Burning Lab: On October 29, 2005, police officers from Lublin secured two CD and MC (cassette) replication lines, 11,500 CD-Rs with music, 20,000 MCs, 1,200,000 CD/DVD inlays and 200,000 hologram stickers, including 3,400 original holograms with scratched out numbers. Police officers found a burning laboratory in one of rented houses in a small village near Lublin. The replication lines were also equipped with a label printing machine; CDs were packed in boxes, foiled and provided with a hologram sticker. It was found that most of the pirate goods reached the Warsaw Stadium.

CD-R seizures at the Poland-German border: On December 18, 2005, police officers from Zgorzelec seized about 10,000 CD-Rs at a near border marketplace in Sieniawka (Polish-German border). Three individuals, suspected of distributing pirate carriers with music and films, were detained. The prosecutor used preventive measures such as bail (5 to 10,000 zł) and police supervision. Also on December 22, 2005, police officers from Gorzow Wielkopolski in cooperation with IFPI/ZPAV seized around 12,000 pirate CDs at a near-border marketplace in Leknica (Polish-German border).

The recording industry reports that they continue to experience the following problems with the police and prosecutors:

- The unnecessary practice of calling independent experts (in investigations).
- Lengthy delays in bringing and completing copyright cases due to a huge backlog of cases in the courts. This does not apply only to copyright cases. The new Minister of Justice plans to introduce changes in the functioning of the judiciary by establishing 24-hour courts, where cases will have to be tried within a very short period. We still do not know what categories of offenses will be considered by such courts; however, we hope that the new system will limit delays in completing copyright cases.

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. Many of the hard goods cases are started *ex officio* by the Polish police. In software piracy, BSA reports that the Polish Criminal Code provides *ex officio* authority for software piracy crimes.

ESA member companies also noted that actions against street sellers greatly improved in 2005. However, the Polish Government should also begin to investigate the upstream sources of pirated products in the market, i.e., the syndicates and large-scale importers that facilitate and control the flow of pirated products into the Polish market. It is possible to conducting *ex officio* cases against computer piracy, including entertainment software, in accordance with the Polish Criminal Code. Music and film piracy cases require that an application be filed by the damaged party.

The motion picture industry (FOTA) reports that in 2005, it conducted 1,679 investigations, resulting in the seizure of 217,980 DVDs, 246,895 other carriers, and 488 computer and hard discs,

all reflecting an increase from 2004. MPA reports that its most significant actions carried out by the police in 2005 were:

Police seize large DC++ hub. On April 26, 2005, FOTA and Police officers from Bydgoszcz raided 9 apartments in the city and seized 11 PCs, including two that were being used for a DC++ hub, 15 hard discs (6 of which were used for the hub) and more than 1,500 CD-Rs and DVD-Rs containing films. The hard discs contained over 1.5 terabytes of movie software and music files. Nine individuals were detained for questioning, one of whom was the 18-year old operator of the hub and one of whom was a professor at the Bydgoszcz Science Academy. As is typical in emerging Internet countries, the hub was a private hub restricted to users in the Fordon district of the city connected to the local ISP. The ISP is a cable operator called Gavex that cooperated with FOTA to dismantle the hub. The Police have been able to secure the logs on the DC++ hub, which they may now use to initiate criminal actions against top users.

Police seize 54,000 pirate DVDs from Warsaw warehouse. On June 14, 2005, Police raided a warehouse in Warsaw and seized 54,000 pirate DVDs containing a total of 96 titles, including *Constantine*, *Polar Express*, *I, Robot*, *The Aviator*, and *The Flight of the Phoenix*. The raid also netted 127 masters, about 35,000 inlays and over a hundred printing blocks. The value of the seizure is estimated at over US\$1,250,000. Investigations are continuing to identify the pirates behind the operation.

FOTA and police shut down Internet auction fraud. On June 22 and 23, 2005, the Grójec Regional Police Unit, accompanied by Radom Police officers and FOTA investigators, conducted searches of nine residential addresses in Grójec. The grounds for the action were allegations of fraud in connection with Internet auctions. A group of seven people was offering pirate copies of film box sets via Internet auctions (collections included *Star Wars*, *The Godfather* and *Indiana Jones*). To establish their authenticity, the sellers arranged sham auctions in which fellow conspirators would leave positive feedback to encourage others to participate in subsequent sales. Purchasers, paying amounts between US\$60 and US\$290, found that the goods were either not sent, that parcels arrived empty, or that the discs were damaged. As a result of the search, three PCs (with four hard discs), five additional hard discs, a PC with a DVD burner and two satellite decoders were seized, along with 450 pirate DVD-Rs. Other evidence secured included counterfeit currency and bank documentation confirming payments made by people who had been defrauded. Initial estimates suggest that the fraud generated income of about US\$3,500 a month for just one of the suspects. Although seven individuals were questioned, only one was an adult; the others were found to be between 14 and 16 years old.

48,000 discs seized and pirate lab closed in Police/FOTA raid. On October 22, in a joint operation, FOTA and local law enforcement authorities dismantled a pirate lab and a storage area in Warsaw. The operation started with the interception of a car near the Wolumen electronic market in which the Police found two large bags of pirate discs. The three occupants of the car were detained for questioning but only one of the three men was involved in the pirate activity. The Police decided to search his apartment and discovered an important pirate lab. Subsequently, another apartment was searched and found to be a storage area. Overall, the Police seized more than 48,000 pirate discs (an exact breakdown of blank discs versus burned discs of movies, games and software has not been provided), 3 computers with 4 DVD burners in each, 2 monitors, 1 scanner, 8 printers, and 32 packages of CD stickers and paper for printers. According to the Police, the individual is believed to have been the main supplier of pirate discs to the Wolumen market. The Police are now proceeding with additional investigations to identify the pirate's accomplices. This operation is the result of a test program,

agreed to by FOTA and the Warsaw Municipality at the beginning of September, seeking to eradicate piracy from the Wolumen electronic market. Under this joint program (involving FOTA, the Security and the Crisis Situation Department of the Warsaw Municipality, as well as the Economic Delinquency Police Unit of Warsaw-Zoliborz, the Police Officers of the Crime Prevention Department and the Customs Office), the Municipality has agreed to finance the cost of 100 police officers to conduct daily controls at the Wolumen market focusing exclusively on IP violations. The success of this raid may encourage the extension of the program to other markets in Warsaw and throughout the country.

Police arrest administrators of pirate server. On January 4, 2006, Police in the Northern city of Koszalin arrested five administrators of a pirate server. According to FOTA, since last May, over 2,400 users of the server worldwide have shared an estimated 88,000 gigabytes of pirate movies, music, games and software. Following the arrests, Police conducted 120 raids on homes in Koszalin, and 55 additional raids across the country. These raids yielded over 30 PCs and approximately 100 hard discs. Officers from the City Police Unit in Koszalin were joined in the operation by officers from the Regional Police Unit in Szczecin, and from the Border Guards Unit in Darlowo.

Deterrent penalties lacking in the judiciary. For years, the copyright industries have identified the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases, as well as delays in any judgments. Penalties in the Copyright Law are strong in relation to local standards, providing fines of up to US\$175,000 and jail sentences of up to five years. But, the problems continued in 2005 including:

- **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.
- **Delays at the judicial level:** Polish courts are overloaded with a substantial backlog of cases (not just IP cases). This is due to the lack of resources--few judges, and the need for equipment and better technology. The lack of deterrent sentencing is also a very common problem. For the motion picture industry, FOTA reports of 4,000 cases pending in the criminal courts at the end of 2005, only about 120 cases closed all year. In the large urban centers, it takes between 3 to 4 years for a case to be concluded. ZPAV reports 5,011 criminal cases are currently pending (in 2004: 1,208 cases were instigated, and of that 1,127 are still pending). BSA reports 282 cases are still pending, as of 2004.
- **Polish courts fail to apply deterrent sanctions.** No improvement in deterrent sentencing was reported in 2005. Despite strong penalties in the Criminal Code, prison sentences for copyright infringement are almost always suspended and the fines for copyright infringement imposed are very low (from US\$50 to \$1,000). In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases.⁶ As noted, the fact that Polish courts require an expert opinion on each seized disc or cassette is problematic.

Civil copyright enforcement in Poland still not viable. BSA has not conducted any civil actions in Poland in the last four years. Instead, BSA has relied on criminal enforcement to address

⁶ There were three improvements made in this Criminal Code: 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.

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 was able to legalize its software shortly before raids were conducted. BSA and IIPA continued to recommend that 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. BSA reports that all recoveries are collected through settlements.

Trainings: The copyright industries continue to participate in seminars for law enforcement agencies. For example, ZPAV organizes and participates in training seminars for the police, prosecutors, customs and Border Guard Officers, with the main objectives of such seminars being: (a) product identification/differences between original and pirate product; (b) procedures for cooperative raids with ZPAV representatives present; (c) improved enforcement practices; and (d) cooperative Internet anti-piracy activities including the documenting of such infringements for further proceedings.

COPYRIGHT LAW IN POLAND

Copyright and Neighboring Rights Act of 1994 (as amended in 2004): Amendments to the 1994 Polish Law on Copyright and Neighboring Rights to implement certain aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004). However, a number of issues raised by the industries were not addressed in the 2004 amendments.⁷ Although Poland is a party to the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT), its legislation is still not in compliance with the treaties. The legal protection of technological measures is inadequate and the overly broad private copy exception is inconsistent with the three step test found in TRIPS Article 13.

Implementation of the EU Enforcement Directive: The Polish Government is working on amendments to both the Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. A draft was recently sent to right holders for comments. Of particular concern are two proposed provisions: (a) an exception with respect to the protection of technological measures and private copying in Article 79(5). The proposed draft amendment allows consumers in Poland to demand from right holders free analog as well as digital copying of phonograms and videograms for their personal purposes, even when protected by technological measures; (b) the continuing need to limit the currently very broad private copying exception in the Copyright Law. The EU Copyright Directive limits the personal use exception explicitly to reproduction of the works made by natural persons for their private use and not for any direct or indirect commercial purpose.

Need for anti-Camcording legislation: Anti-camcording legislation should be adopted in Poland to require jail sentences, preferably of up to a year or longer for the first offense, and a higher penalty

⁷ For example, other issues 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; (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 an copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive).

for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film's ability to recoup the investment made in its production.

Withdrawal of Poland's reservation to the Rome Convention: Unfortunately the Polish Government is uninterested in withdrawing its reservation 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 broadcasting rights. Poland also 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.

Broadcast Act of 1993: The National Council for Radio and Television has granted broadcast and cable licenses, which are revocable for the failure to comply with license provisions. MPA reports that the 1993 Broadcast Act does not contain an explicit copyright compliant 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.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas: According to the 1992 Broadcasting Act, as amended in 2000 and July 2004, broadcasters must dedicate at least 50% of broadcasting time to European productions and 10% of broadcasting time to European independent productions. Furthermore, Polish broadcasters are subject to an obligation to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in the Polish language. However, lower percentages to be determined by the National Council apply to broadcasters during the first year of transmission of their program service, thematic program services for which the number of available programs is insufficient; and program services transmitted solely via satellite or cable which in their entirety are available against payment of a fee.

Discriminatory tax treatment of U.S. audiovisual works: After years of successive drafts, the Polish government passed a new Film Law in June 2005 which includes new taxes on box-office and on video/DVD sales to finance subsidies for Polish and European films. These taxes, besides having a detrimental effect on the Polish audiovisual market, would unfairly burden MPA member companies with the cost of financing the government's cultural policy. Further, the wording of the text appears to introduce a double taxation burden on distributors, including our members.

Foreign ownership restrictions: Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA promotes the reduction and elimination of such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry.