

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### POLAND

**Special 301 Recommendation:** IIPA recommends that Poland remain on the Watch List in 2007.

#### **EXECUTIVE SUMMARY**

Copyright piracy in Poland remains widespread, especially given the challenge of pirated optical disc products being burned in-country and imported into the country, growing Internet piracy plus the distribution problem caused by street piracy. Industry cooperation with many enforcement authorities remains good. However, there remain numerous problems with weak border enforcement, lengthy delays and onerous burdens in bringing prosecutions, and the failure to impose deterrent penalties, especially against recidivists. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions to the optical disc regulations, are long overdue. Furthermore, the police need to use their *ex officio* authority.

#### **PRIORITY ACTIONS IN 2007**

##### **Enforcement**

- Encourage police to take *ex officio* action to initiate investigations/raids on their own motion in the software area and for sound recordings, and to expand *ex officio* authority so as to include more than just crimes above a certain scale.
- Support the continued cooperation between industry and the Polish police and the IT team to take actions against piracy on the Internet. This should include using Government resources to arm the police with additional resources (training, IT equipment).
- Continue progress made in 2006 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. 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.
- Ban the sale and distribution of optical disc products at other stadiums, bazaars, outdoor markets and public places which sell infringing products in particular along the Polish-German border, and prosecute those cases.
- Considerably improve border enforcement to halt the increasing flow of pirate products, especially at the eastern and northern borders (Belarus, Ukraine, Russia and Lithuania), by ensuring that sufficient resources (both technical and personnel) of Polish customs agencies are dedicated to this effort, and by improving cooperation with the customs agencies in neighboring countries.
- Continue to have government officials work with rights holders regarding the enforcement of the law and regulations on optical disc production and distribution.
- Have prosecutors press for expeditious consideration of criminal copyright cases.
- Appoint specialized prosecutors in each office to handle copyright cases.
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials.
- Appoint specialized judges to handle criminal IPR cases and establish a specialized IPR court.

- Continue to conduct and support training seminars for police, prosecutors, and judges on copyright enforcement.
- Make progress on implementing the strategic goals set out by the Polish Government.

### Legal reform

- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases, especially for films, music, sound recordings and books (it appears that although *ex officio* powers now apply to all protected materials—not just software—but in practice, the authorities still request motions from some rightsholders).
- 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.
- Refrain from introducing a mechanism to regulate the relationship between private copying exception and technical protection measures provisions, and from deleting the multiple damages provision. Permit industry to continue to work to resolve issues related to technological protection measures and interoperability in the marketplace.
- Introduce criminal sanctions in the optical disc decree.
- Introduce criminal provisions addressing internet piracy (Article 118 of the Copyright Law).
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Formally withdraw Poland’s reservation to Article 12 of the Rome Convention.

<b>POLAND</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Business Software <sup>2</sup>	264.0	58%	202.0	58%	197.0	59%	171.0	58%	107.9	54%
Entertainment Software <sup>3</sup>	NA	75%	NA	60%	109.3	94%	NA	NA	337.7	91%
Sound Recordings & Musical Compositions	24.0	35%	25.0	31%	36.0	37%	34.0	45%	45.0	45%
Motion Pictures <sup>4</sup>	NA	NA	102.0	66%	30.0	35%	30.0	30%	25.0	30%
Books	NA	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA
<b>TOTALS</b>	<b>288.0</b>		<b>334.0</b>		<b>377.3</b>		<b>240.0</b>		<b>520.6</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Poland under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Poland, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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.

<sup>4</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **COPYRIGHT PIRACY IN POLAND**

**Optical disc piracy, street piracy, the Stadium and outdoor markets:** Hard good piracy continues to shift from CDs and DVDs toward the burning of CD-Rs and DVD-Rs. Digital piracy has worsened because “burning” has become widespread throughout the country. The vast majority of pirate optical discs are sold at public markets. In addition, Polish pirates are making locally burned discs specifically for German consumers, and distributing them at markets on the Polish-German border and in Germany.

Concerted efforts must continue at the Dziesieciolecie (Warsaw) Stadium (also known as Jarmark Europa), and other mini-stadiums, to combat trade in pirated and counterfeit goods. The situation at the Dziesieciolecie Stadium continues to improve slowly. The recording and motion picture industries report that the Warsaw Stadium has declined as a source of pirate distribution in recent years, due to the stadium administrator (DAMIS)’s contractual obligations that include a total ban on the trade in optical discs and accompanying enforcement authority for security employees of the administrator. For the entertainment software industry, the Stadium continues to be a distribution point for pirated video game product but is not longer the significant threat that it was in past years. According to law enforcement agencies, the Stadium still serves as a “redistribution point” of pirated materials, which are traded in large quantities for further distribution in other regions of Poland. Organized criminal elements are still believed to be engaged in the warehouse distribution at this Stadium.

In November 2005, ZPAV submitted a petition to the Warsaw authorities to close down the marketplace at the Stadium. The authorities supported this motion but the final decision was under the authority of the Ministry of Education. Even though the Damis contract expires in June/July 2007, it is not at all certain that the market will be closed down since the government is worried about the number of lost jobs this would cause.

Illegal trade has now expanded at “bazaars” and public markets in other parts of the city (such as the electronic market WOLUMEN) and is growing in other regions, 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 Anti-Piracy Coalition (a group of private sector associations) collected detailed information about markets located at the Polish-German border and in Wrocław (similar work still needs to be done for Cracow and Poznan), which was sent to the Ministry of Interior. Contacts should now be taken with the Provincial Authorities that should then organize meetings with the markets’ administrators. Similar to the Warsaw Stadium, the Anti-Piracy Coalition also suggested banning the sale and distribution of OD products at other bazaars and flea-markets. Despite the Coalition’s efforts, there has been no noticeable improvement at these other bazaars and markets.

**Imported pirated discs due to weak border enforcement:** Most industries report that this situation got worse in 2006, as more imported pirated discs entered the Polish market. Specifically, the problem of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, entering Poland continued in 2006. ZPAV reports an increased number of imports compared to 2005. Almost 100% of seized pirate pressed discs come from former Soviet Union countries (particularly Russia, Belarus, and Ukraine) on trains, trucks and cars and are distributed in almost every metropolitan area. It is believed that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these imported discs. This organization trickles down to the local level as the illegal trade taking place in public markets is highly organized and generally controlled

by criminal gangs. The recording industry (ZPAV) observes that the majority of pirate carriers smuggled from the East remain in Poland, however many of them are further distributed to Germany and other countries of the EU. For 2006, ZPAV reports an alarming drop in the number of seizures made at the border and subsequent cases brought (see discussion in the enforcement section), underlining the urgent need of increased and improved border enforcement.

**Internet piracy in Poland is growing steadily.** Internet piracy is steadily growing as a result of increasing broadband penetration and wider Internet household penetration. The main focus of interest of Internet users now lies in peer-to-peer (P2P) services (such as Emule, eDonkey, BitTorrent and Direct Connect), but the sale of hard goods through websites and networks remains a concern. Music files also are still distributed through websites and FTP servers. ESA reports that Internet piracy of entertainment software is likewise becoming of 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, but P2P use is on the rise. 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. Major actions undertaken by industry groups and the Polish police during 2006 are described in the Enforcement Section, below. In addition, the Polish Ministry of Culture is supporting a team of private and public sector representatives working on methodology (for police and prosecutors) addressing the issue of internet piracy.

A recent market survey data has been conducted on the Polish online market. This survey, done in July 2006 by an independent third party company (GEMIUS), shows the popularity of P2P sites. 74% of those Internet users that download music from the Internet are P2P users. 36% of these users responded that, each week, they download one to five copies of music and sound recordings and then make them available for public download (without authorization from the rightsholders, common in P2P file-sharing practice). This means that every week about nine million music files are being shared by Polish users. Survey results also show that 53% of P2P users are younger than 25 years old. 81.4% of those surveyed said they use their personal computers. Only 9.9% of P2P users buy music from legal Internet stores after they have downloaded the files from P2P services. The same study also shows that Internet users' fear of viruses, spyware and malware, as well as worries about legal action, are providing a deterrent to illegal P2P file-sharing; 25% of Internet users who shun P2P say that viruses are the main reason for their decision to stick with legal sites.

**Domestic OD production in Poland:** Optical disc (OD) production within Poland saw a minor decrease in 2006. According to information available to ZPAV, currently there are 11 active OD plants in Poland with an estimated 153 manufacturing lines (as compared to 122 in 2005). Production capacity of these plants is estimated at approximately 830 million units per year. Despite this large production capacity, there is no evidence to suggest that Polish plants are involved in pirate production of optical discs. The high production capacity in Poland is mainly due to the presence of one of TechniColor's largest plants which exports almost 100% of its production, legitimately. Instead, forensic examination of sound recordings conducted by the recording industry indicates that 85% of sound recordings taken from the Polish market were manufactured in Russian plants. ZPAV reports good cooperation with the Ministry of Culture in carrying out joint visits to OD plants and with the Polish forensic unit (under the police department).

**Piracy of music and sound recordings:** Piracy affecting the recorded music industry in Poland remains severe, given the growth last year in both optical disc piracy and Internet piracy (especially P2P). ZPAV statistics show that, in 2006, 312,451 physical carriers with pirated music were seized by Polish law enforcement agencies. Additionally, in Internet cases the total value of computer equipment seized by law enforcement amounted to PLN 486,000 (about US\$162,000). With respect to international repertoire, estimates of the level of music piracy in Poland in 2006 rose

to 35%, and the estimated trade losses due to piracy of music and sound recordings was \$24.0 million.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that organized criminal involvement in the manufacturing and distribution of pirated entertainment software is somewhat in decline given the rise of domestic burn-to-order operations. Though some factory-replicated products still enter the market, the majority of the pirated game products seized are burned copies and factory replicated pirated video game products are now rarely found in Poland. Counterfeit videogames in cartridge format from Asia are entering the market and remain readily available at informal markets. 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 75%. As noted above, piracy at the Stadium continues but is not the severe problem that it used to be for the industry. Overall, there has been some improvement in the market due to increased support from the police.

**Audiovisual piracy:** The motion picture industry reports that in 2006 audiovisual piracy worsened. This is largely due to unrelenting optical disc piracy coupled with increased Internet piracy. Internet piracy has steadily increased due to increased broadband availability and wider Internet household penetration. Pirate DVDs imported into Poland and DVD-R piracy problems are huge. Although imported pressed discs represented 85% of the problem a few years ago, the local motion picture anti-piracy organization (FOTA) estimates that burned CD-Rs and DVD-Rs represent between 50% and 55% of the pirate optical discs in the local market. Moreover, these burned discs increasingly contain multiple titles. In addition, the illicit recording of movies in 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. Additionally, cable network operators often use illegal decoders and pirate cards to distribute programs on their networks without license although these operators have been significantly restricted due to numerous actions taken by the police in cooperation with FOTA. With regard to smart card piracy, the change of the smart cards used by Canal Plus in Poland has had a substantial positive impact on combating piracy and the new codes have not yet been broken. Unfortunately, a new form of piracy is emerging where pirates buy one legitimate smart card and use it to share access to Pay TV with other people via the Internet.

**Business software piracy:** 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 2006 losses due to business software piracy in Poland rose to \$264.0 million, with the piracy level staying the same (58%). Lowering the business software piracy level in Poland could contribute significantly to the Polish economy. 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.

**Book publishing piracy:** The Association of American Publishers (AAP) reports steady levels of illegal photocopying of academic texts and journals in and around universities. Industry representatives report that in some cases they are losing the majority of their market to this type of individual photocopying, which harms producers of 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.

## COPYRIGHT ENFORCEMENT IN POLAND

Industry cooperation with police agencies throughout Poland remained generally good in 2006. However, this level of cooperation has slightly slowed down as the new government's main focus is on violent crime and corruption and not on copyright infringements. Sustained, comprehensive and deterrent actions which result in lower piracy levels have not yet occurred in the Polish marketplace.

**Police actions:** The industry groups continue to report good cooperation with police authorities in 2006. For example, the recording industry (ZPAV) reports that the police conducted well coordinated raids in specific regions, particularly during ZPAV's Internet campaign in October 2006. In most cases, ZPAV assists the police prior to raids and during the aftermath, when expert product verification is required.. ZPAV reports several positive police actions in 2006 including: (A) regular actions against distributors of pirate sound recordings at marketplaces along the Polish-German borders; (B) actions undertaken at the initiative of some police units against major internet uploaders; and (C) the introduction of the subject of intellectual property rights protection to the curriculum of police training programs.

MPA also highlights several positive developments with the Polish police last year. For example, in August 2006, officers from the Metropolitan Police's Economic Crimes and Corruption Unit raided a garage in Warsaw and seized 18,597 pirate discs. The discs were commercially-pressed DVDs each containing, on average, four titles, with off-set printed covers. Three computers and a laptop were also confiscated. The haul totaled some 1,000 different movies, both Polish and international releases (recent and catalogue). From the police investigation which was conducted with the assistance of FOTA, it appears that the movies were sourced in Poland as camcorder, downloaded or DVD rips, and burned to master DVD-Rs. The copies were then professionally pressed and covers printed at labs in Russia, Belarus and the Ukraine, and then smuggled back into Poland for distribution country-wide.

BSA notes that in 2006 the Polish police remained one of the most active in Eastern Europe in investigating cases of software piracy and in conducting *ex officio* raids (the Polish Criminal Code does provide *ex officio* authority for software piracy crimes). BSA does not have 2006 statistics available, but notes that many actions are taken.

ESA reports that police support for its member companies has been positive, and in fact, increased in 2006, which some of its members hazard has resulted in some improvement to the market. The local police are active and seek member assistance when specific problems arise relating to cases that the police have commenced through *ex officio* actions. ESA member companies report that the number of actions initiated by law enforcement has been relatively high. Most of the enforcement actions are still conducted at the street vendor level, though also increasingly against Internet vendors. Actions against so-called "big fish" (or large operators) are not the norm, though with the shift to distribution of predominantly burn-to-order products from typically "mom-and-pop" operations, it is perhaps to be expected that larger targets are not found.

Following is a summary of some industry enforcement efforts in 2006. The recording industry (ZPAV) reports that from January-15 December 2006, 1,026 criminal cases were initiated in Poland: 962 by the police, 61 by customs, and 3 by the border guard. In addition, 76 more criminal cases were commenced based on work done by ZPAV against major uploaders during its October 2006 internet campaign. The motion picture industry (FOTA) reports that from the January-7 December 2006, there were 1,186 investigations (compared to 1,643 in 2005), which resulted in the seizure of 136,574 DVDs (compared to 215,618 in 2005), 133,715 CD-Rs/DVD-Rs (132,000 in 2005) and 450 computers and hard discs (482 in 2005).

MPA and FOTA report three problems with the Polish police last year: (1) Unfortunately, there is no central unit within the Police Headquarters assigned to supervise and coordinate the activities of the regional police Internet units. (2) The test program agreed between FOTA and the Warsaw Municipality at the beginning of September 2005 whereby the Municipality agreed to finance the cost of 100 police officers to conduct daily controls at the market focusing on IP violations was abandoned when the Director of the Warsaw Security Department left in the beginning of the 2006. Pirates at the Wolumen market have now resumed their illegal activities. (3) A long-standing problem is that the police do not have the authority to initiate investigations *ex officio*. This authority would significantly help in the anti-piracy fight.

ZPAV observes at least two systemic difficulties. First, law enforcement agencies are not proficient in recognizing and prosecuting organized crime activities of pirate distribution both in the country and abroad, coordinating with other law agencies in other countries. ZPAV continues to send letters on this issue and has also done several presentations evidencing the existence of an organized crime factor. However, the law enforcement agencies still do not consider that there is enough evidence to support this. Second, there is a lack of consistent actions and severe penalties against repetitive copyright infringers which gives them a feeling of impunity.

**Internet piracy enforcement:** The industries report that cooperation with criminal authorities on Internet cases is good. MPA also reports that the police, despite suffering a lack of resources, has shown increased interest in dealing with infringements on the Internet.<sup>5</sup>

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<sup>5</sup> The following six cases involving enforcement against internet piracy in 2006 are illustrative. The cases were joint actions carried out by MPA, ZPAV and BSA (the Antipiracy Coalition): (1) In January 2006, police in the northern city of Koszalin arrested five administrators of a pirate server called "HUB." Since May 2005, over 2,400 users of the server worldwide shared an estimated 88,000 gigabytes of pirate movies, music, games and software. Following the arrests, Polish police conducted 120 raids on homes in Koszalin, and a further 55 raids across the entire country. These raids yielded over 30 PCs and approximately 100 hard drives. (2) In March 2006, FOTA investigators and police in Lublin, together with officers from the Economic Delinquency Department of the City Police in Biala Podlaska, seized the main server of one of the Internet companies functioning in the Bialski district. It is estimated that more than 400 individuals were freely using the server, uploading and sharing illegal files with films, music and computer programs. In order to attract new customers, the provider was distributing fliers in which he offered access to 1,000 GB data with the newest films, games and music. Most of the ISP users were secondary school students whose parents were unaware of these illegal activities. The net administrator was a 26-year-old IT student of one of the renowned private high schools in Warsaw. (3) On October 16, 2006, a FOTA investigator together with officers from the Economic Delinquency Department of the Provincial Police Unit in Wroclaw arrested a pirate who was distributing illegal copies of computer programs, games and films in DVD and DIVX formats. The suspected pirate operated his business from his home. However, the server was housed at the home of a second individual who had agreed to store the equipment in return for access to the server's content; this person was also arrested. The suspected pirate operated this "business" as his main source of income. The server with 2 TB capacity (including 10 hard discs with about 2,000 films and 500 computer programs), 2 computer central units, 4 hard discs and about 40 DVDs and CDs were seized. (4) On October 11, 2006, police officers from 16 districts throughout Poland under the supervision of the Economic Crimes unit from Police HQ in Warsaw coordinated searches of 72 premises in an operation focusing on people illegally sharing encrypted TV signals through the Internet. A technologically-complicated form of TV signal theft, signal "sharing" is the latest form of signal piracy in Poland where one encryption card is used to give access to multiple users. The piracy was first identified by officers from the Provincial Police's Economic Crimes unit in Radom. In the first action of this kind, the police were assisted by investigators from FOTA and representatives from Cyfra+. Forty-two people believed to have been profiting from this piracy were arrested and their homes searched. Seizures included 115 computers, 117 decoders, 89 code-cards, 3,900 CDs, 66 HDDs, plus 100 other pieces of electronic equipment. The operation also disclosed details of 1,100 illegal subscribers who will be the subjects of further investigations. (5) In a follow-up to the October 16 raid in Wroclaw and the arrest of two individuals for copyright offences, analysis of the equipment seized has resulted in further arrests. On November 8, a 35-year-old man suspected of distributing pirate computer programs and games, as well as DVDs containing films, was arrested by police officers in Warsaw. A search of his home revealed a computer server and about 4,000 DVDs including illegally copied content. The police have further established that the suspect, believed to have been the ringleader of the group, was using a computer server at his place of employment in Jelenia Góra for his pirating activities. In Wroclaw, further arrests were made of three men between 20 and 25 years of age who are believed to have been involved with circumventing the encryption on legal copies and also with counterfeiting covers inserts. A search of their homes resulted

In mid-October 2006, as part of its worldwide campaign against Internet piracy, the international recording industry commenced 76 criminal actions against people involved in the file-sharing of music. These actions targeted major “uploaders” using all the well-known P2P services, including BitTorrent, eDonkey, DirectConnect, Gnutella, Limewire, SoulSeek and WinMX. ZPAV reports that 76 cases were initiated during this campaign.

Although activities conducted by the police to address Internet piracy are praiseworthy, MPA reports that only a few units are ready to undertake such Internet actions, due to lack of professional equipment and of the necessary knowledge to prosecute intellectual property infringements on the Internet. During the first meeting at the end of 2005, after reactivation of the Governmental Group dealing with copyright infringement, it was decided that an Internet sub-committee be established to work on criminal procedures and training manuals for Internet crimes. Unfortunately, this sub-committee consists of only two people, so its actual impact will likely be limited. The training manuals are supposed to be implemented in the course of 2007.

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. However, as a result of the ongoing reorganization process, the special and coordinating IP unit has been disbanded; following private sector protests against this unwelcome development, the new head of the Polish police assured right holders that the unit will be restored. However, this has still not happened. ZPAV submitted a draft cooperation agreement to the National Police Headquarters (‘NPH’) covering a broad range of issues, including the fight against Internet piracy. The NPH does not seem to be willing to enter into a cooperation agreement with a private organization, but ZPAV continues to push for the conclusion of such an agreement urging the Director of the Chief Commander’s Office to intervene.

Reports suggest that civil enforcement against Internet piracy will be more complicated. Rightsholders 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. Rightsholders cannot obtain from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information may, however, be obtained via the public criminal authorities. BSA specifically recommends that the unauthorized downloading of copyrighted files onto personal computers should be clearly added to Article 118 of the copyright law.

**Border enforcement:** The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law as part of the EU accession process. More action must be taken by government authorities to halt infringing imports pouring into Poland. Official data on 2006 customs actions is not yet available.

For 2006, the recording industry reports an alarming drop in the number of seizures made at the border and subsequent cases brought. “Instigated cases” in the first chart below refers to all cases instigated by Customs, that is, not only at borders but also inside the country (e.g., trains, cars, etc); the second chart is directed at border cases involves seizures at the borders.

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in the seizure of computer servers and hard discs containing evidence of their pirating activities. So far this brings the total of arrests to six.

	Number of instigated cases in total	Quantity of seized sound recordings
2004	181	157,456
2005	177	128,528
2006	55	32,760

	Number of seizures at the borders	Quantity of seized sound recordings
2004	16	8,806
2005	15	5,957
2006	5	2,002

Source: ZPAV

On a positive note, the recording industry reports that the Polish police, working in partnership with law enforcement officials, that the Polish police (no customs officials were involved) made the biggest single seizure at border market for five years. The border towns along Poland's western frontier have long been attractive to German shoppers keen to purchase the illegal music and film titles on offer in their pirate markets. In August 2006, police from Gorzow and Zielona Gora raided the market in Slubice which is at the border crossing with Frankfurt Oder in Germany. The successful raid involved over 50 law enforcement officers and over 25,000 pirate discs seized. Duplication equipment was also seized during the action. Ten arrests were made and one of those arrested was kept in custody by the prosecutor. Over 45 retail outlets were closed down during the raid and the prosecutor has insisted that the stall holders all have to appear before him to obtain permission to re-open.

**Criminal prosecutions:** The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids, as noted above. However, problems pressing forward with cases through prosecution continued in 2006. Eleven prosecutors were appointed at the end of 2004 but they still need IPR training. MPA reports there about 5,000 pending cases at this time but not all of them are pending in courts; it seems that approximately 120 cases were concluded in 2006. Official 2006 criminal statistics are not yet available, and courts do not release such information about individual case decisions.

ESA member companies also noted that actions against street sellers continue to improve, with increased support from the police in anti-piracy actions. However, the Polish Government should also begin to investigate the upstream sources of pirated products in the market. It has also been reported that in a small number of courts, the right holder's representative or counsel is obliged to appear before the court. Such an appearance is often unnecessary as counsel is merely expected to confirm information that has already been provided to the police at an earlier stage of the proceedings, and can be introduced through a sworn statement. Though only a small number of courts currently demand the presence of the rightsholder's representative, should this practice become widespread, it will add an undue burden on rights holders by increasing their costs in bringing criminal actions.

**Expert reports add a bureaucratic layer:** The recording and software industries continue to report in 2006 the problem of Polish 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, more judges needed:** The Polish judicial system is notoriously slow. In the large urban centers, where most piracy cases are filed, it can take between three to four years before a case is concluded. Polish courts are overloaded with a substantial backlog of

cases (not just IP cases). One possible solution is to increase the number of judges and the information technology to improve overall productivity in the judicial process (although current economic conditions may preclude this). 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. ZPAV reports 5,632 criminal cases were pending in 2006. BSA reports 282 cases pending as of 2004. Additionally, Polish courts are not specialized enough and the judges are changing and leaving their positions too often. BSA and the recording industry have often expressed the opinion that special IP courts should be established. The film industry believes that it might be more practical appoint specialized judges. The bottom line is that more judges with IPR competences are needed on the courts.

In 2005, the industries were informed that the then-new Minister of Justice planned 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. In November 2006 the President of Poland signed the law on the establishment of 24-hour courts. They will run from mid-March 2007 and will deal with minor offences and misdemeanors such as acts of hooliganism, theft, pickpockets and drunk drivers. The industries hope that the new system will limit delays in completing small-scale copyright piracy cases. Still not known are what categories of offenses will be considered by such courts.

**Polish courts fail to apply deterrent sanctions:** Although the majority of cases brought to court conclude with guilty verdicts, sentences have been insufficient to provide a reasonable level of deterrence. The average fine has not increased over time (usually about US\$50 to US\$150) and imprisonment has not generally been used. 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 2006. In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases.<sup>6</sup> As noted, the fact that Polish courts require an expert opinion on each seized disc or cassette is problematic. To the best of the industries' knowledge, there were major sentences in 2006 related to copyright infringement.

**Civil copyright enforcement:** BSA has not conducted any civil actions in Poland in the last four years. 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 was able to legalize its software shortly before raids were conducted. The *ex parte* provisions be further clarified so that judges could begin to implement such procedures. It can take up to three years for a civil copyright infringement case to be closed. BSA reports that all recoveries are collected through settlements.

**Lack of consistent government leadership in anti-piracy strategy:** The government has not consistently implemented the national strategic goals. For example, in December 2003, the Council of Ministers approved an anti-piracy strategy plan, emphasizing increased inter-disciplinary cooperation and the prioritization of intellectual property crimes. There the Council called for the National Public Prosecutor to appoint two prosecutors in every office to assist on such crimes, and also reiterated the need for intensified actions using all resources within Poland such as the police, border guards, and Customs. Since then, the Governmental Group dealing with copyright

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<sup>6</sup> 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.

infringement issues every year a report describing the activities of the current year and the strategies for the following year.<sup>7</sup>

Despite the appointment of 11 prosecutors at the end of 2004 (who still remain to be properly trained), the implementation and realization of these plans is generally proceeding slowly. In 2005, it seemed that government actions slowed in advance of the elections. The activities of the Governmental Group were then temporarily suspended following the resignation in mid-2005 of the Ministry of Culture's Head of Legal Department who was also the Head of the Governmental Group. Although he was temporarily replaced, the Governmental Group only fully resumed its activities in May 2006.

## **COPYRIGHT AND RELATED LEGAL REFORM 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 troubling issues raised by the copyright industries were not addressed in the 2004 amendments.<sup>8</sup> In addition, the 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT) in several ways: (a) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal); (b) inadequate protection of rights management information, and (c) a number of new exceptions, including the private copy exception is too broad and there is no express implementation of the three-step test. In order to improve Internet enforcement, the unauthorized downloading of copyrighted files onto personal computers should be added to Article 118 of the Copyrights and Neighboring Rights Act.

**Implementation of the EU Enforcement Directive:** The Polish Government has been working on amendments to both the Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. A revised bill to implement the Enforcement Directive was issued on November 13, 2006 for inter-ministerial consultation; it was adopted by the Government on November 21 and sent to Parliament on December 6, 2006. IIPA members have not yet seen an

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<sup>7</sup> A government strategy for 2007 regarding the prevention of copyright infringements was presented. However all the points from the previous year were repeated. The necessity of efficient implementation of tasks by state institutions has been underlined. 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.

<sup>8</sup> For example, other problems (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, and using the *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).

English translation but we understand the earlier concerns related to the right to information have been addressed. Industry will continue to monitor these developments.

**Future legislation:** Furthermore, concerns remain about possible future, and separate, legislation in at least two areas. First, the industry is concerned about any effort to regulate the relationship between the private copying exception, technological protection measures, and interoperability; this is best left to the marketplace. Second, Article 70, amended in the 2000 legislation, involves a remuneration paid by users of an audiovisual work to a collecting society. This provision, which is highly detrimental to motion picture companies, makes it more difficult for foreign works to resist collective management of author/performer remuneration rights. The Copyright Law as amended in 2004 includes several amendments related to collecting societies, and the copyright-based industries have been concerned in recent years that additional amendments might be proffered. It is difficult to say when if legislation affecting this measure might be drafted and considered by the parliament.

**Optical disc decree and the need for criminal sanctions:** Industry recommends criminal sanctions be added to the decree, given the widespread nature of pirate optical discs in the Polish market. Another reason for introducing criminal penalties is the fact that plants fail to report regularly to the Ministry, as required by the regulation. The 2004 Copyright Law amendments required the Ministry of Culture to issue regulations to implement the optical disc production provisions of the copyright law. In turn, the Polish OD Decree (published on June 2, 2004) seemed adequate at that time to control the production of optical discs. In 2004, the Ministry of Culture called for the operational optical disc plants to register their lines and equipment. A two-person team of inspectors was established at the Ministry of Culture to control optical disc production. However, the industries expressed concern then, and again now, that 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 fact, the industry submitted a recommendation to add criminal sanctions for the Government Strategy for the year 2005, but it was not included. During 2006, informal reports suggest that some plants were not fully cooperating with the inspections.

**Police *ex officio* authority:** The Criminal Code contain *ex officio* authority, giving the Polish police the power to initiate investigations on their own motion, for all cases involving the infringement of copyright and neighboring rights. The problem is that these powers should be used more often and more regularly; *ex officio* actions should not be limited to just larger cases.

**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 for any subsequent offense. A single illegal 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. The Internet sub-committee, to which the anti-piracy coalition is a member, is working on its final report that should be released in March 2007 and supplied to the Governmental Group (headed by the Ministry of Culture. Proposals for Anti-camcording provisions should be part of this report.

**Withdrawal of Poland's reservation to the Rome Convention:** Another year has passed and the Polish Government has still failed to withdraw 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.

## **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. This provision, which goes beyond what is prescribed in the EU's Television without Frontiers Directive, has a negative effect on market access. 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. No improvement in this situation occurred in 2006.

**Foreign ownership restrictions:** Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA continues to promote the reduction and elimination of such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry. No improvement in this situation occurred in 2006.

## **IPR TRAINING AND PUBLIC AWARENESS**

The copyright industries continue to participate in seminars for law enforcement agencies. In 2006, the motion picture industry (FOTA) individually or with the Anti-Piracy Coalition (including FOTA, ZPAV, BSA) participated in 16 training seminars organized across the country. These seminars were directed at police and customs officials and also to judges and prosecutors. One of the seminars was dedicated for secondary school teachers. For example, BSA participated in the training addressed to the Polish Patent Office (May 2006) and to police and prosecutors near Pila (June 2006).

The recording industry (ZPAV) continues to organize trainings on IPR issues for law enforcement agencies and participates in training programs conducted by Police Academies and prepare training materials for police officers working in the country. In 2006, ZPAV has implemented its project of training seminars for police officers dealing with copyright infringements on the Internet.

The motion picture industry (FOTA), the recording industry (ZPAV) and the business software industry (BSA) also contribute to the workings of the Governmental Group that deals with copyright infringement that was established in 2000 by the Prime Minister. These organizations are regularly invited by the Minister of Culture to take part in the Group's working sessions as special

experts. The Anti-Piracy Coalition (including FOTA, ZPAV, BSA and ZAIKS (Poland's largest collection society) also launched an education program addressed to young people. The campaign entitled "Be Original" was launched in May 2006 and was premiered at the Mazowieckie Culture Center in Warsaw. Guests were invited to view a film in which students from the 32nd Gymnasium participated, along with authors and performers who contributed to and supported this educational initiative. Guests attending the launch included popular celebrities: the singer, Patrycja Makrowska; actor, Bartosz Obuchowicz and members of the band, Sistars. So far, some 6,400 discs have already been distributed to schools and colleges. The launch was covered extensively by local and national print and broadcast media. The foregoing initiative was approved by the Polish Ministry of Education and the Ministry of Culture.

In June 2006, FOTA also participated in one-day picnic organized by the Police for primary school students at Wroclow's Wolności Square to raise the childrens' awareness about the need to "be original." Customs representatives, members of the anti-piracy alliance and various artists also attended the event and participated in the press conference during which the Police discussed piracy. The event ended with public destruction of 30,000 pirate discs by a bulldozer.