

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland remain on the Watch List in 2009.

Executive Summary: Copyright piracy in Poland remains widespread in both the hard goods and Internet areas. Local burning of pirated products continues and street piracy and flea markets are sources of manufacture and distribution of this piracy. Open-air markets along the German border sell pirated and counterfeit products that hurt the legitimate industries in Poland and Germany. Although there has been a good amount of cooperation between industry and police to take action against online infringements and hard goods piracy, numerous prosecutorial bottlenecks and an ineffective judiciary cause criminal cases to dead-end. The continuing failure to impose deterrent penalties against copyright infringers only contributes to the piracy situation in Poland. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions in the optical disc regulations and passing anti-camcording legislation, are still needed. Last summer, the Polish government adopted its new IPR strategic plan for 2008-2010, but the government team responsible for the anti-piracy elements has not been active, and the private sector is not aware of any actions taken to-date under that plan.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Poland in order to improve the adequate and effective protection of copyrighted materials:

Enforcement

- Implement the strategic goals outlined in the government's annual strategy plan regarding the prevention of copyright infringement.
- Encourage police to take *ex officio* actions in all copyright areas (in addition to the work already done in business software) and expand *ex officio* authority beyond crimes of a certain scale.
- Support the continued cooperation between industry, Polish police, and its information technology team to take actions against Internet piracy. This should include using Government resources to arm the police with additional resources for training and IT equipment.
- Ban the sale and distribution of pirated optical disc products at stadiums, bazaars, outdoor markets and public places, in particular along the Polish-German border, and prosecute those involved in such activity. Ensure that sufficient resources (both technical and personnel) are dedicated to this effort and to improving cooperation with the customs agencies in neighboring countries.
- Direct prosecutors to press for expeditious consideration of criminal copyright cases.
- Appoint specialized prosecutors in each office to handle copyright cases.
- Investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials using existing organized crime legislation.
- Continue working with rights holders on the enforcement of optical disc regulations.
- 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.

Legal reform

- Introduce criminal sanctions in the optical disc decree.
- Adopt anti-camcording legislation.
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Amend the copyright law to correct deficiencies in several key areas, including those that affect copyright protection in the online environment. The amendment process should be transparent and permit rights holders' input.
- Formally 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: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Business Software ²	438.0	55%	348.0	57%	251.0	57%	202.0	58%	197.0	59%
Entertainment Software ³	NA	NA	76.0	60%	NA	75%	NA	60%	109.3	94%
Sound Recordings & Musical Compositions ⁴	100.0	27%	28.0	36%	24.0	35%	25.0	31%	36.0	37%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	102.0	66%	30.0	35%
Books	NA	NA	NA	NA	NA	NA	5.0	NA	5.0	NA
TOTALS	538.0		452.0		275.0		334.0		377.3	

COPYRIGHT PIRACY IN POLAND

Internet piracy: Internet piracy is rising in Poland due to increasing broadband penetration and wider Internet household penetration. The estimated number of Internet users there has grown to 16 million, representing about 41% of the population (according to www.internetworldstats.com). Peer-to-peer (P2P) file-sharing networks such as DC++, Gnutella, eDonkey and BitTorrent are popular sources of pirated copyright content online. Infringing files are also distributed through File Transfer Protocol (FTP) servers and one-click web hosting sites (also known as “cyberlockers”) such as rapidshare.com and megaupload.com. The Business Software Alliance (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 also increasing.

Internet piracy continues to evolve and can affect different copyright sectors differently. For example, a research study commissioned in September 2008 by ZPAV (the Polish organization that represents the sound recording industry) showed that downloading music from the Internet is very common; 45% of Internet users in Poland (i.e. around 6 million persons) engage in such activities. However, compared to 2006, the number of peer-to-peer users significantly dropped from 74% in 2006 to 41% in 2008. The main reasons for not using P2P networks for downloading music are: (1) the growing use of other forms of downloading content (such as cyberlockers, blogs, social networking sites, legitimate music sites); (2) the lack of necessary knowledge about how P2P networks function; (3) fears about viruses and malicious spyware; and (4) the belief that such activity constitutes a copyright infringement. The results of the survey also show that the number of Internet users downloading music from legitimate online music services is on the rise. Compared to 2006, this figure almost doubled, from 15% to 28%, a positive sign. Although mobile piracy of music is spreading, Internet piracy is most prevalent.

Hard goods piracy -- optical disc piracy, street piracy, and the outdoor markets: Hard goods piracy of copyrighted materials has shifted toward localized burning of CD-Rs and DVD-Rs. Polish pirates also are burning discs specifically for German consumers, distributing them at markets on the Polish-German border and in Germany. The vast majority of pirate optical discs are sold by street vendors and at public flea markets. The 2007 closure of the Warsaw

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For more information on Poland and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more of IIPA 2009 issues, see our cover letter at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² BSA’s 2008 statistics are preliminary, represent the U.S. software publishers’ share of software piracy losses in Poland, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

³ ESA’s reported dollar figures (2007) reflect the value of pirated product present in the marketplace as distinguished from definitive industry “losses.” The above results reflect only piracy of PC games in this market.

⁴ RIAA reports that of its \$100 million overall estimated losses for 2008 in Poland, \$90 million is due to digital piracy.

⁵ MPAA’s 2005 estimates reflect a methodology that analyzed both physical/“hard goods” and Internet piracy.

Stadium was a positive step, and some industries report that they have not observed the emergence of any new, stadium-type centers of pirate distribution. The Warsaw Wolumen market became almost free of counterfeited and pirated product after raids against its main supplier of pirated product were conducted in June 2007. Instead, illegal trade has expanded to "bazaars" and public markets in other parts of Warsaw and is highly organized and generally controlled by criminal gangs. Concerted anti-piracy efforts must continue at these street bazaars and flea markets and should include a ban on the sale and distribution of optical disc products at these locations.

There are particular problems at the borders. Pirated discs (both DVD-R and pressed DVDs) are being sold at marketplaces in Poland, including bazaars at the Polish-German border and then smuggled to Germany and possibly other EU countries. In addition, imported pirated discs (CDs, DVDs, and CD-ROMS) continued to enter the Polish market in 2007, but quantities appeared to decline during 2008. During 2008, there were several raids at the border markets. The music industry reported that much lower quantities of pirated music products were less visible last year. Similarly, FOTA has noticed a decrease in the supply of pirated audiovisual discs after the raid in 2008 and seizure of over 70,000 pirated discs and 159 burners.

Several years ago, the problem of domestic production of pirated pressed optical discs diminished. Poland's OD capacity continues to exceed one billion units per year. Despite the overcapacity, there is little evidence to suggest that Polish plants are involved in pirate production of optical discs or are exporting pressed discs. The excess capacity of the Polish manufacturing lines supplies EU markets with legitimate products. Foreign demand for optical discs is so high in the region that some Polish plants sub-contract production to some other countries, including the Czech Republic or Ukraine. (The high production capacity in Poland is mainly due to the presence of one of TechniColor's largest plants which exports almost all of its production.) Nevertheless, such a large production capacity in Poland (bigger than Russia, Ukraine, Bulgaria) requires strong optical disc regulations that contain criminal sanctions, if only to minimize the risk of this capacity being used for illegal purposes. Poland's 2004 OD law does not contain criminal sanctions, and the copyright sector has long recommended that such sanctions be available.

One very recent example shows, however, that in addition to illegal underground manufacturing, some Polish plants are involved in illegal production. Early February 2009 raids by Polish police dismantled an organized criminal syndicate that produced and distributed pirated music and films on an industrial scale. The pirate operation had distributed an estimated 9 million albums, making it what is believed to be the largest copyright infringing disc operation ever shut down by police action in Europe. Officers in Warsaw and southern Poland detained four people for questioning as a result of the raids, including the 38-year-old man thought to have masterminded the operation. The gang is suspected to be behind the *Masterbox* series, which consisted of DVDs containing pirate product, including more than 40 music albums in MP3 format. There have been 38 editions of the copyright infringing series, with the most recent 15 pressed in Poland. The trade value of the music in the Polish pressed editions of this long-running counterfeit series was estimated to be approximately US\$25 million. Officers raided three premises, two replicating plants in Warsaw and Rybnik, and a professional distribution plant in Zabki. IFPI investigators suspected the source of the *Masterbox* series after German customs officers passed on seized counterfeit CDs and DVDs to its forensics team who traced the discs' origins back to the plants in Poland and identified the operator of the clandestine factory who was in the process of buying equipment to increase his manufacturing capacity. Police seized copyright infringing DVDs containing pre-release versions of films such as *Slumdog Millionaire* and *The Wrestler*. Previous volumes of *Masterbox* contained hit albums such as Razorlight's *Slipway Fires* and Andrea Bocelli's *Incanto*.

Piracy of music and sound recordings: Piracy affecting the recorded music industry in Poland remains severe, given both optical disc piracy and Internet piracy. One development has been that fewer pressed pirate discs can be found on the market; in fact, pressed pirate discs with pre-release or newly released content have not been discovered for the last few months. After successful raids by Border Guard officers at local marketplaces along the Polish-German border, the supply of pirate music discs significantly diminished. Since August 2008, ZPAV has observed a return of this border piracy phenomenon but on a smaller scale. The number of pirate products available at marketplaces in the south of Poland (the region of Silesia) has recently increased; pirate discs are also offered at bazaars in Krakow and Wroclaw. At these locations, no ban on the distribution of pirated products has been introduced. ZPAV has not observed any major seizures of pirate carriers at the Eastern borders of Poland. Another development in early 2008 was that a new channel of pirate disc distribution was discovered by the Polish customs administration. Pirate discs were being sent via post in small packages containing not more than 100 units. In response, now all post office customs units have been instructed to open suspicious packages that could contain discs. According to the local recording industry group ZPAV, the estimated level of music piracy

in Poland remains at 25%, with the estimated piracy levels for U.S. music repertoire slightly higher at 27%. Trade losses due to physical piracy are estimated at \$10 million, while an additional \$90 million can be attributed to the digital piracy of music in Poland.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that the pirate market now primarily consists of domestically burned pirated optical disc goods, available largely at flea markets and through street vendors. Internet piracy continues to rise, and in 2008, Poland was again among the top ten (10) countries for infringing download activity. In fact, during a 4-week monitoring period (December 2008), for 13 popular game titles, activities of Polish BitTorrent and eDonkey users were estimated to have downloaded more than 393,000 infringing copies, making Poland the number 5 country worldwide in number of infringing game copies and number 5 in terms of infringing copies made per capita. Networks maintained by Polish Telecom were implicated in 3.6% of the infringing activity estimated to have occurred during the industry studies, placing it 4th on the list of the world's most active ISPs. Online sales of pirated hard goods video game products also continues, particularly on local auction sites such as www.allegro.pl. In 2008, a high volume seller was referred to the police who quickly took action against the seller.

Audiovisual piracy: According to the Motion Picture Association (MPA) and its Polish sister group FOTA, the problems of movie piracy in Poland remained relatively unchanged during 2008. FOTA noticed a decrease of the supply of pirate product on the street markets along Poland, specially in Warsaw, but at the same time Internet piracy is on the rise due to increasing broadband penetration and wider Internet household penetration. Locally burnt discs, which increasingly contain multiple titles, and imported Russian made pressed discs, pose a serious threat to the theatrical and home entertainment markets. Large quantities of DVD-Rs with illegal content can still be found at marketplaces situated along the Polish-German border and some of the biggest cities (Wrocław, Kraków, Poznań). The majority (about 65% in 2008) of pirate discs are recordable (DVD-R and CD-R) and pressed discs (about 35%) are imported from former USSR countries. Websites offering illegal Polish subtitles are also a serious concern as the uploading of pirate copies of new releases are invariably followed by the posting of a Polish language dialogue list, enabling the creation of localized subtitled pirate copies. Usually a single disc includes from 2 up to 8 movies. In addition, camcording piracy has been reported in Poland; for example, locally produced movies such as *Katryń*, *Lejdis*, and *Nie Kłam Kochanie*, were illegally camcordered in Polish theaters, available at local bazaars, and on the Internet days after their local release. As noted above, P2P networks as well as cyberlockers and FTP servers are the most prevalent sources of unauthorized online protected content of movies.

Business software piracy: The Business Software Alliance (BSA) reports that while the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy) continues to be the focus of its Polish anti-piracy campaign and inflicts damaging economic losses, more and more illegal software products are being distributed via the Internet. In fact, the biggest Polish auction site is used for distribution of OEM (original equipment manufacturer) products in violation of OEMs' distribution agreements. Numerous flea markets still sell pirated software. Estimated 2008 losses due to PC software piracy in Poland were \$438 million, with the piracy level at 55%. 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. Efforts to promote the acquisition and use of legal business software would benefit the Polish economy.⁶

Book and journal piracy: The publishing industry reports steady levels of illegal photocopying of academic texts and journals in and around universities. Industry representatives report that they are losing a significant portion of their market to this type of 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.

⁶ See [The Economic Benefits of Reducing PC Software Piracy](#), commissioned by BSA and conducted by International Data Corporation (IDC), which was issued in January 2008 and is posted at <http://www.bsa.org/idcstudy>. According to this report, the information technology sector's contribution to the Polish economy could be even bigger if Poland's PC software piracy rate were lowered by 10 percentage points over the next four years. This would create an additional 1,885 jobs, \$1.1 billion in local industry revenues and \$110 million in additional tax revenues for federal, regional, and local governments.

COPYRIGHT ENFORCEMENT IN POLAND

Government leadership on national anti-piracy plan needed: The key Polish enforcement agencies on intellectual property rights issues include the Ministry of Justice, the Ministry of Interior and Administration and Police Headquarters. The Ministry of Culture heads the special governmental team responsible for combating piracy (the "Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights"), and the copyright sectors participate in the meetings of this group.

Last summer, the Polish government adopted its IPR strategic plan for 2008-2010, but the team responsible for the antipiracy elements have not been active. The private sector (led by the Anti-Piracy Coalition, composed of BSA, ZPAV and FOTA) is not aware of any actions taken under this plan nor have any meetings related to its implementation taken place. IIPA is informed that this plan is a 54-page document where the bulk of copyright industry issues are addressed in general terms with broad-brush objectives. However, it is very difficult at this time to assess how and to what extent any of these are being implemented.

Raids with law enforcement. The industry groups continue to report good cooperation with police authorities, border guards and customs officials, the fiscal police and the prosecutors.

The audiovisual industry, led by FOTA, experienced continued cooperation with law enforcement and reports numerous raids were run in 2008. In 2008, FOTA assisted in over 875 investigations which resulted in 863 police raids and 856 criminal cases. As a result of these raids, 89,367 DVDs and 154,532 DVD-Rs and CD-Rs with illegal content were seized. Most of the seized DVDs and DVD-Rs (both pressed and burned) contained between four and eight movies. About 40% of these investigations were dedicated to Internet piracy. 75% of these cases resulted in prosecutions. MPAA reported that during 2008 that the police are taking *ex officio* actions, but only if there is organized crime involvement or if the pirate is a repeat offender aiming to make a profit.

The recording industry (ZPAV) also reports that the police conducted many well-coordinated raids in 2008. According to ZPAV's full year 2008 statistics, 348 cases were instigated, of which 317 by police, 27 by customs and 4 by border guards (29). An additional 703 cases were instigated by police upon ZPAV initiative against file-sharers in P2P networks. In most cases, ZPAV assists the police prior to raids and during the aftermath, when expert product verification is required. The police conducted numerous raids throughout the country against major file-sharers in P2P networks. Law enforcement regularly contact ZPAV if they have doubts about legitimacy of seized products. Unfortunately, the evidence submitted for criminal proceedings have still to be confirmed in a separate document by the police upon a request of a prosecutor. Although the appointment of an independent expert may be justified in P2P cases, in ZPAV's opinion it is unnecessary in cases where pirate carriers, such as CDs, DVDs, CD-Rs and DVD-Rs are involved. The whole process lengthens the proceedings and increases the costs. ZPAV conducted an additional analysis of the cases it has presented to prosecutors (discussed below). In as far as sanctions are concerned, courts most often imposed suspended prison sentences combined with an obligation to pay damages to the injured party, which is not perceived as being sufficiently deterrent.

BSA notes that in 2008 the Polish police were active in investigating cases of software piracy. BSA is aware of 70 raids conducted in Poland in 2008 related to software piracy, and there may have been more as additional cases may have been initiated by the police as *ex officio* actions (which are permitted under the Criminal Code). Over 5,000 CDs and over 450 hard drives were seized in the course of these 70 raids. BSA members have submitted 160 motions for prosecution. There are a lot of *ex officio* prosecutions, as well as prosecutions initiated at BSA requests. There are cases which are terminated by prosecutors, usually due to the fact that they may not identify a physical person responsible within a corporation. Usually, however, cases are continued and end with either conditional termination (which is a generally acceptable solution) or with suspended judgments.

Entertainment software publisher relationships with law enforcement authorities remains positive. Police continue to initiate actions on behalf of video game publishers in the market. In 2008, an ESA member company was informed that law enforcement authorities had initiated 1500 new cases involving its products, though most of the cases involved small quantities of seized products (only 250 cases actually involved more than 10 copies of seized pirated products).

Unfortunately, despite the fact that many cases involved this company's products, in many instances the company was not informed of the filing of the cases.

Internet piracy enforcement: The copyright community participates in a Governmental Group on copyright infringement, done by the invitation of the Minister of Culture to take part as special experts. Working with a team of police officers and court experts, the anti-piracy coalition's representatives prepared a methodology for conducting investigations into Internet copyright infringement cases. Since October 1, 2007, the Police Academy issued a manual for police officers and prosecutors on the operation of P2P protocols, the disclosure of copyright infringements on the Internet, and the collection of evidence. A methodology on how to conduct Internet copyright infringement cases also has been placed on the servers of the Police Academy, following a positive opinion of this from the National Police Headquarters and the National Public Prosecutor.

Internet actions are mostly criminal: The industries report that cooperation with criminal authorities on Internet cases was very good. The police continue to investigate instances of Internet piracy and look for copyright infringers at their own discretion. Although activities conducted by the police to address Internet piracy are praiseworthy, only a few units have the necessary resources and expertise to undertake such Internet actions. In particular, the work of the Wroclaw, Gdansk, and Poznan police as well as the Headquarters of the Police should be acknowledged for positive efforts. In most cases, the rights holders provide the police with information about a possible infringement, including the Internet protocol (IP) address. The police in turn ask the ISPs to provide them with contact details of suspected subscriber.

The motion picture industry indicates that about almost half of its 863 police raids and 856 criminal cases involved Internet piracy. Because FOTA serves as an independent expert, it is required to pass all information to police. As a result, FOTA has not engaged directly in discussions with local ISPs.

Similarly, the recording industry reports that 703 cases were instigated by police in 2008 upon ZPAV initiative against file-sharers in P2P networks. Unfortunately, around 25-30% of these cases are discontinued or dismissed by the courts.

The recording industry has taken additional steps to identify problems with bringing criminal Internet actions. ZPAV analyzed all decisions involving cases that had been discontinued or where there was a refusal to initiate proceedings in Internet copyright infringement cases for the period of October 2006 through September 2008. During that timeframe, ZPAV submitted 783 crime notifications to the police and received 168 decisions to discontinue the cases and 3 refusals to instigate proceedings. In 80 decisions, the reason for discontinuation of the proceedings was the inability to identify the offender by an ISP. In other words, over 30% of ZPAV's cases were discontinued due to the inability to identify the offending subscriber. The Polish ISPs attributed this result to a lack of technical resources to identify particular offenders for the following reasons: some ISPs did not keep the logs, or a given computer was used by an indefinite number of people, or a few computers were connected to one IP address. The ISPs referred to lack of technical resources to identify particular offenders because, among others, they did not keep the logs or a given IP address was used by a few or even a hundred users. Such obstacles make the work of the police futile and therefore require a reform in the telecommunication law in 2009. ZPAV's analysis, together with copies of the decisions to discontinue the case, were forwarded to the intergovernmental team for counteracting infringements of copyright and related rights in order to make an attempt to formulate amendments to the law, including creating an obligation for ISPs to document users' activities on the network in a reliable and detailed manner under the threat of a financial and criminal penalty.

Cooperation with the Polish ISPs on Internet actions: Most often the Polish ISPs react promptly to ZPAV's notices and remove infringing music. As far as P2P networks are concerned, some of the ISPs block DC hubs at ZPAV's request but many refuse to do so. In those P2P cases, the ISPs seem to prefer to cooperate with police in such matters. BSA reports that it does not bring P2P cases; with respect to hosting and auction sites, BSA finds that if they provide the ISPs with reliable information on infringement, they usually take them down.

Few civil Internet cases: Rights holders using civil processes are unable to obtain the identity of a suspected infringer from the ISP upon communication to the ISP of an IP address; however, this information may be obtained from public criminal authorities.

Border enforcement: One of the primary problems is lack of efficient enforcement at the eastern border to curb the flow of pirate products from Russia, Belarus and Ukraine. This shows the inefficiency of customs administration at doing border checks. FOTA also is not aware of any significant seizures done by customs offices in 2008. BSA does not monitor the situation on Polish borders but reports that the customs authorities are taking *ex officio* actions; BSA is notified sporadically about seizures made by customs authorities. In 2008, ZPAV reports that it is aware that only a few seizures of pirated sound recordings were reported at the borders, while many of them have been disclosed in the country. This problem has been discussed at the meetings of the Intergovernmental Group, but has not yet yielded any spectacular results.

Polish Customs started to use an information exchange system called 'Vinci', which is compatible with the World Customs Organization (WCO) program. The government has a plan of developing structures using a risk analysis database to examine smuggling routes of individuals and business entities. Also, it was announced in early February 2009 that there are plans to buy additional equipment for the East border.

Ongoing, systemic problems with prosecutions and the judiciary: The section below identifies some of the longstanding problems in the Polish criminal courts. Most of the cases are sent to the courts but only part of the cases result in a sentence.

Few criminal prosecutions: There continues to be a lack of expertise on the part of Polish prosecutors and criminal courts on copyright matters. The industries' anti-piracy staff constantly works with prosecutors to help prepare the copyright cases, and in other instances, argue before the courts to keep the cases active. There are at least three possible actions that the government could take to improve this bottleneck with the prosecutors: (1) direct prosecutors to press for expeditious consideration of criminal copyright cases; (2) appoint specialized prosecutors in each office to handle copyright cases; and (3) investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials using existing organized crime legislation.

An ESA member company reports that lengthy court proceedings remain an impediment to the expeditious and efficient prosecution of infringement cases. The lack of transparency during the proceedings is also of concern. In 2008, for example, of the many cases initiated by law enforcement authorities, the affected member company was only informed of the outcome at the conclusion of the proceedings when the court had already issued its verdict. Furthermore, the police have also become more reluctant to provide information pertaining to the infringer/defendant to rights holders. Transparency of police actions is essential as rights holders should be given the opportunity to take any additional measures that might be appropriate to securing and enforcing its rights against an infringer. As previously reported, the cases typically do not result in deterrent sentences, but only with the imposition of minimal fines notwithstanding the quantity of infringing material seized. For example, in two separate cases where 11 and 170, respectively, pirated video game titles were seized, only a fine of US\$133 was imposed on the two different defendants. Unfortunately, the likelihood of defendants actually paying the fines and any award of damages to the complainant is low.

Video game publishers also encounter burdensome procedures when supporting cases initiated by law enforcement. When a criminal case is brought on the basis of the Copyright Act, the police typically request that the rights holder confirm that it is the injured party (i.e., the copyright owner), identify the titles seized, provide pricing information on the products seized, and the damages it likely sustained as a result of the infringement. Notwithstanding this information having already been provided to the police, when the case is transferred to the prosecutor, this same information is again requested either in oral or written form before the case is filed with the court. During court proceedings, the rights holder's representative (in about 1% of the cases) may be summoned to appear before the court to re-affirm the information already provided in the sworn statements submitted to the prosecutor at the investigative stage. While this practice decreased in 2007 (compared to the 2006 numbers), requests for such appearances at trial again increased in 2008. This procedure is not only repetitive, it is also rather cumbersome for rights holders, and the courts should be encouraged to review, and revise as necessary, these procedures so as to minimize unnecessary duplication of procedures and make more efficient the prosecution of cases. There was marginal improvement with respect to the number of cases actually going to trial, with only approximately 10% of the cases initiated by the police being summarily dropped by prosecutors (less than the number dropped in 2007). The rationale given most frequently is that copyright infringement cases do not amount to significant social harm, though prosecutors also cite the lack of evidence, failure to apprehend the defendant, or that not all the injured parties have agreed to support the case as reasons for summarily terminating a case.

Expert reports add a bureaucratic layer: Another continuing problem in 2008 involves the courts appointing independent experts to secure proof of ownership even in the simplest copyright cases, even where neither the defendant nor his attorney calls for submission of additional evidence. This judicial practice causes higher costs for the courts and delays prosecutions. As noted above, ZPAV understands that such practice might be necessary in a complex Internet piracy cases, but should not be required for most hard goods cases.

Lengthy delays: Lengthy delays in bringing and completing copyright cases make it difficult to see the effects of anti-piracy activities. Parties have to wait a long time for the date of the main hearing, and all the parties are required to be present. There is also a rather lengthy preliminary investigation stage (prior to the actual court proceeding) which can last several years. In the large cities where most piracy cases are filed, it can take between three to five years before a case is concluded.

Backlogs and lack of deterrent sentencing: Although most 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 as a deterrent measure (in some cases, sentences are simply suspended). 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.

The audiovisual industry FOTA reports that it has over 5,000 cases pending in the court system, but closed only about 200 cases in 2008. ZPAV reports 5,522 criminal cases were pending at the end of 2008. Absent deterrence, pirates will simply continue on with the business of infringement, confident that any penalty imposed will be minimal.

Need for specialized IP courts: The copyright industries believe that specialized IP courts should be established. The film industry also believes that it might be more practical to appoint specialized judges. The bottom line is that more judges with IPR competences are needed in the courts. Reportedly the Ministry of Justice was considering the creation of special IP courts, but industry does not know the status of such efforts.

Civil actions in business software cases: BSA has not conducted any civil actions in Poland for the past several 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. It can take up to three years for a civil copyright infringement case to be closed.

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, but not all, aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements of the prior law, including provisions regarding the regulation of optical disc production (issued in June 2004). However, these 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT), and also fail to fully implement various EU Directives. Below is an illustrative listing of some of the troubling issues, where key deficiencies continue to include:

- Inadequate legal protection of technological measures (for example, the law suggests that circumvention for private use might be legal, clear prohibitions should correspond to Article 6(1) and (2) of the EU Copyright Directive, remedies and sanctions should apply to all prohibited acts, and confusing provisions affecting computer programs should be clarified);
- Inadequate protection of rights management information (there are no prohibitions and no provisions on remedies and sanctions)

- Objectionable exceptions to protection, including the private copy exception, which are also far too broad. Specifically, Article 23 contains an overly broad definition of “private” as it includes persons having a “social relationship.” This approach is not in line with the 2001 Copyright Directive and would not be compatible with the three-step test (enshrined in Article 5.5 of the Directive, in the WIPO Treaty and referred to in Article 35 of the Polish Copyright Act). Second, Article 23 should expressly include the condition that the source of the work (to be “privately used”) must be legal. The Polish law should clarify that the private use defense cannot be claimed if the source of the work is illegal. Doing otherwise would not be compatible with the three-step test. It is also very important that the scope of exceptions and limitations of exclusive rights, including the scope of private use, be defined in accordance with the above international treaties. However, Article 35 of the Copyright Act lacks one of the elements of this three-step test, namely language referring to “special cases.” The industries remain 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. Library exceptions are also far too broad.
- Article 117 of the Copyright Act which refers to “criminal liability” is also a source of concern. Section 117 states that “Whoever, without authorization or against its conditions, fixes or reproduces another person’s work ... for the purpose of dissemination” shall be subject to criminal sanctions. In other words, if the work has been “fixed, reproduced...” without any authorization, this violation can only be subject to criminal remedies if the infringement was made “for the purpose of dissemination.” This condition poses a problem because it seems to exclude from criminal remedies a wide range of activities which are very harmful to rights holders. The application of criminal law to copyright infringements is important in terms of procedure; it allows for cooperation/investigation with the police. All copyright infringements should -- at least “on the books” -- be subject to this section. Judges will then use their discretionary powers to decide upon the appropriate sanctions/remedies (depending on the circumstances of the case and the seriousness of the infringement). This provision, enacted before online piracy existed, differentiates between on-line and off-line piracy, leaving a very important aspect of on-line copyright infringement immune from criminal sanctions. This approach results in a conflict with the basic principle of equality before the law.
- Clarification is recommended to improve key definitions (like “reproduction”) and clarify the scope of exclusive rights (e.g. “use” and “exploitation”) to avoid unnecessary and damaging interpretations.
- Article 70 involves a remuneration paid by users of an audiovisual work to a collecting society. It is highly detrimental to motion picture companies, making 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 that additional amendments might be proffered. It is difficult to say when legislation affecting this measure might be drafted and considered by the parliament. (It is unlikely that this article will be included in the reform package, discussed below).

It is expected that work on a more comprehensive reform of the Copyright Law will start soon in 2009.

Copyright amendment bill on collective management (2009): In 2008, the Ministry of Culture prepared extensive amendments of the Copyright Law, dealing primarily with the collecting societies system and the procedures of the Copyright Commission regarding the remuneration rates for public performance. This package has been forwarded to the Council of Ministers for further review.

On January 26, 2009, the Polish Government submitted to the Parliament a Bill of amendments to the copyright law containing a proposal for complex regulation of collective management issues. The Bill provides for user participation in the process of approving remuneration tariffs, a possibility of changing the tariffs by the Copyright Committee and a possibility of submitting appeals to the civil court regarding the decisions of the Copyright Committee. The project also includes a proposal that the collection of remuneration for public performance of sound recordings and audiovisual works shall be managed by only one collective rights management organisation indicated by the Ministry of Culture. The project met with protests of all the collecting societies as it is unfavorable to artists and performers. The first reading of the project will take place on February 19, 2009. This set of amendments clearly represents heavy-handed State interference into a sector of business that should be subject to minimum regulation, in particular where it concerns tariff-setting and the freedom for rights holders to decide when and by which society they want their rights to be managed.

Anti-camcording legislation needed: 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. Such legislation is imperative to curb the illicit camcording in Poland of motion pictures and would significantly benefit the Polish film industry as their work is frequently stolen from theaters. At present, there is no legislative vehicle for camcording legislation, despite conversations with the industry and the Ministry of Culture on this topic.

Optical disc decree and the need for criminal sanctions: Although the current optical disc decree (2004) is an adequate legal instrument for regulating the production of optical discs, the introduction of provisions on sanctions should be considered to ensure optical disc plants' compliance with its provisions. For several years now, the copyright industries have recommended that criminal sanctions be added to the decree, given the widespread nature of pirate optical discs in the Polish market. In fact, the industry submitted a recommendation to add criminal sanctions for the government national IP strategy for 2005, but it was not included. For years, the anti-piracy coalition has repeatedly recommended adding criminal sanctions to the OD decree but without success, and prospects for movement on this 2009 do not seem high.

EU Copyright Directive: The above listing of the deficiencies in the Polish law highlights the significant problems with Poland's implementation of the EU Copyright Directive. To repeat, the primary problems are: (1) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal) and RMI; (2) inadequate protection of rights management information; (3) overbroad private copy exception; and (4) other overboard exceptions and no express implementation of the three-step test.

EU Enforcement Directive: On July 20, 2007, Poland ratified and implemented the EU Enforcement Directive by amending both its Copyright Act and the Civil Procedure Code. On a positive note, Poland is one of the few EU Member States providing for pre-established damages of at least double or (in case of intentional infringement) triple the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question. On a negative note, Polish law does not correctly implement Articles 9 and 11 of the Enforcement Directive on injunctions, since it requires the establishment of liability or co-liability of intermediaries. According to both the Enforcement and the Copyright Directives, injunctive relief is to be granted irrespective of the liability of the intermediaries.

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.

IPR TRAININGS AND PUBLIC AWARENESS

The copyright industries continue to participate in seminars for law enforcement agencies. The film industry (FOTA) regularly organizes or participates in trainings/seminars for customs, police and border guard officers. Such seminars focus on the new methods of pirate activity and disclosed smuggling routes. Every year there are more than 15 such seminars or trainings. Similar, BSA participates in trainings for police, prosecutors and customs officials. The music industry (ZPAV) also co-organizes seminars in particular regions of our country, including workshops where our experts show how to disclose and archive evidence material in instances of Internet copyright infringements. ZPAV's seminars are part of the curriculum of the Police Academy in Szczytno and Police Education Centre. Also, every year, the Antipiracy Coalition (composed of BSA, ZPAV and FOTA) organizes with the Police Headquarter a ceremony for the best police units that deal with IP crimes and award the so-called "Golden Badge" prizes. ESA member companies also participated in an enforcement training program for the customs authorities that was organized by the Polish government.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas: MPA notes that Poland's broadcasters must 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 (even under its new form as the Audiovisual Media Services Directive), negatively affects market access.

Discriminatory tax treatment of U.S. audiovisual works: The 2005 Film Law includes 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, unfairly burdens MPAA member companies with the cost of financing the government's cultural policy. Further, the language of the law appears to place a double taxation burden on distributors, including MPAA members.

Foreign ownership restrictions: Foreign ownership in a broadcasting company is limited to 49% (according to Article 35 of the 1992 Radio and Television Law). MPAA promotes the reduction and elimination of such restrictions in order to stimulate the foreign investment necessary for the continued development of the television industry.