

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland remain on the Watch List in 2010.

Executive Summary: Copyright piracy in Poland is commonplace in both the hard goods and Internet areas, though the depth of the problem is not as dire as that found in neighboring countries. 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, though raids last year resulted in lowering the visibility of this problem. There has been no progress on banning the sale of optical discs sale in the trading rules of the local marketplaces. The business software sector experiences the greatest damage due to piracy in business organizations. Internet piracy, especially involving peer-to-peer (P2P) file-sharing networks, is on the rise. The Polish police are to be commended for their diligent work on Internet piracy cases; more resources for them would greatly aid this effort. 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 remain. Civil litigation is not a viable option. The continuing failure to impose deterrent penalties against copyright infringers, with respect to physical piracy and online piracy, contributes to the challenge in Poland.

The Polish government is in the midst of implementing its IPR strategic plan for 2008-2010. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions in the optical disc regulations and passing anti-camcording legislation, are still needed. Other efforts to examine amending the copyright law to address online issues and to regulate collecting societies is underway. Criminal procedures must be made more efficient and streamlined to avoid unnecessary delays. To avoid a high recidivism rate, Polish courts must impose adequately deterrent sentences.

Priority actions requested to be taken in 2010: IIPA believes that proper implementation of these eight points, at a minimum, by the Polish government in the near term will contribute to a higher level of IPR protection and will raise the efficiency among Polish law enforcement agencies.

- Enforcing local sale bans on pirate OD product, and monitoring markets both at the border and on the streets.
- Strengthening the divisions within police units which are responsible for Internet monitoring and gathering evidence for criminal proceedings so that more actions can be pursued.
- Appointing and training specialized IPR prosecutors and harmonizing evidentiary procedures.
- Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs
- Including *ex officio* actions in the copyright and criminal law.
- Introducing anti-camcording legislation.
- Withdrawing the reservation to Article 12 of the Rome Convention.
- Clarifying the law on the protection of technological protection measures to eliminate the need for evidence of an end-infringement and adding criminal provisions for the distribution of circumvention devices.

Special 301 out-of-cycle review of 2009: In our Special 301 submission for 2009, IIPA outlined 15 proposed actions--both enforcement-related and legislative--that we believed the Polish government should take to address copyright-specific enforcement and legislative issues.¹ In its April 2009 Special 301 Report, the Office of the U.S. Trade Representative announced that Poland would undergo an out-of-cycle review to monitor progress on intellectual property rights protection and enforcement.² On November 9, 2009, IIPA recommended to USTR that Poland remain on the Watch List,³ and there we identified the seven areas of continuing concern (as listed above and discussed below). As of this 2010 filing, USTR has not yet issued its decision regarding its 2009 out-of-cycle review.

COPYRIGHT PIRACY IN POLAND

The copyright industries face myriad forms of piracy in Poland, all of which harm the ability of the rights holders of the legitimate products to do business.

Business software piracy in organizations (end-user piracy): The Business Software Alliance (BSA) reports that 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. In addition, more and more illegal software products are being distributed via the Internet. BSA supports and promotes initiatives aimed at the implementation of voluntary auditing procedures to be applied by corporate end-users. From a public awareness perspective, the Ministry of Economy has cooperated with BSA in promoting software asset management in business under its "Zrób to Samo" (Do the SAME) campaign. The aim of the campaign was--by promoting an example of Software Asset Management (SAM) good practice at the Ministry of Economy in the form of a case study and by other marketing initiatives--to encourage the Polish entrepreneurs and the public administration entities to implement a software assets management program including performance of a software audit. The expected result of the program was also to increase an awareness of Polish small- and medium-size businesses and the public administration entities in the field of intellectual property rights as well as efficient promotion of SAM policy as a professional standard within each organization. The Ministry took active role in the campaign.

¹ The seven elements IIPA propose for 2010 also were included in IIPA's 2009 Special 301 submission, see <http://www.iipa.com/rbc/2009/2009SPEC301POLAND.pdf>. An eighth issue on technological protection measures has been added for this report. For more information on Poland and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more of IIPA's 2010 issues, see our cover letter at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf.

² USTR's 2009 Special 301 Report on Poland stated: "Poland will remain on the Watch List in 2009 and the United States will conduct an OCR to monitor progress on IPR protection and enforcement. The OCR will focus in particular on Poland's implementation of the National IPR Action Plan for 2008-2010 issued by Poland's Team for Counteracting Infringements of Copyright and Related Rights. The development of this plan may reflect a renewed Polish Government commitment to addressing persistent IPR problems. The United States recognizes: the police closure in early 2009 of one of the largest pirated optical disc distribution operations in Europe; the Government closure in 2007 of the notorious Warsaw Stadium market, where large quantities of counterfeit and pirated goods were being sold; and the efforts by law enforcement agencies to combat hard goods piracy. Poland has yet to make adequate progress against Internet piracy and the trade in pirated and counterfeit goods in markets on Poland's border with Germany. The U.S. copyright industries report that raids conducted at these border markets in early 2008 by Poland's Border Guard have begun to have a positive effect, but sustained enforcement actions are needed. In addition, Poland should take concrete steps to achieve its goal of increasing the effectiveness of criminal proceedings and prosecutions of IPR crimes, including encouraging its prosecutors and judges to seek and impose deterrent-level sentences. The United States encourages Poland to commit additional resources and attention to addressing these IPR protection and enforcement issues. We will monitor Poland's implementation of its National IPR Action Plan through the OCR." Posted at <http://www.ustr.gov/sites/default/files/Watch%20List.pdf>.

³ IIPA's Nov. 9, 2009 submission on Poland's out of cycle review is at <http://www.iipa.com/pdf/IIPAPolandOCRsubmissionFINAL110909.pdf>.

More efforts by the Polish government to promote the acquisition and use of legal business software would benefit the Polish economy.⁴ SAM policies should be implemented in more governmental entities, like in the Ministry of Economy. There are also numerous flea markets that still sell pirated software, e.g. in Kraków Balice and in Wrocław. BSA uses criminal enforcement and relies on good police cooperation to carry out Internet investigations. As reported last year, while the biggest Polish auction site is cooperative in limiting a scale of illegal distribution, it is still very often used for illegal distribution of software. BSA's preliminary estimates of trade losses due to business software piracy in Poland for 2009 are \$362 million, with a 54% piracy level.⁵ This represents a slight drop in the piracy levels from 56% in 2009 and a larger drop in estimated losses (from \$389 million).

Hard goods piracy -- optical disc piracy, street piracy, and the outdoor markets: Hard goods piracy of copyrighted materials has shifted toward local burning of CD-Rs and DVD-Rs. The vast majority of pirate optical discs are sold by street vendors and at public flea markets. 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.

Polish pirates are also burning discs specifically for German consumers, distributing them at markets on the Polish-German border and in Germany. 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 over the last two years.

There has not been any significant change in the nature and scope of the piracy of music and sound recordings in Poland over the past year. The local recording industry association, ZPAV, estimates music piracy in Poland at the level of 27%. Fewer and fewer pressed pirate discs can be found on the streets, and most pirate carriers available at local marketplaces are CD-Rs. ZPAV has not observed an emergence of any major centre of pirate distribution. Pirate copies can still be found at marketplaces in Cracow and Wrocław. However, after successful raids by Border Guard officers at local marketplaces along the Polish-German border, the supply of pirate discs has significantly diminished, and this is a significant success. As discussed further below, Internet piracy is hurting the music and recording market the most. Such piracy occurs predominantly via cyberlockers, hyperlinks and P2P. Mobile piracy is spreading but Internet piracy is most prevalent. Most often the Internet Service Providers (ISPs) react promptly to ZPAV's notices and remove the infringing content. As far as peer-to-peer file-sharing networks are concerned, the ISPs prefer to co-operate with the police. According to ZPAV, the estimated level of music piracy in Poland was 25% in 2008, with the estimated piracy levels for U.S. music repertoire slightly higher at 27%. The level of physical piracy remains on the same level in 2009 but internet piracy estimates--which is the primary problem-- are approximately 20% higher (based on information regarding the Internet user activity in P2P and rapidly developing social networking websites). Estimated losses due to music piracy in Poland rose to US\$118 million in 2009, with the bulk of this due to Internet 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

⁴ 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.

⁵ BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), 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. These 2009 estimates will be finalized in mid-2010.

piracy continues to rise, and in 2009, Poland was again among the top ten (10) countries for infringing download activity. ESA estimates there to have been approximately 264,946 infringing copies⁶ made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Poland during December, 2009. This comprises approximately 2.75% of the total number of illegal copies made by P2P users globally during this period. These figures place Poland as number 9 in highest overall volume of P2P game downloads, and number 11 in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Polish Telecom and Netia SA were responsible for approximately 63% of this activity occurring in Poland -- more than 167,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. The number of unauthorized downloads of games for mobile devices has also grown, with sites such as www.mobilebice.pl providing direct links to pirated content.

The growing rate of online piracy of entertainment software is made possible only because of the widespread availability of circumvention devices that are needed in order to disable the technological protection measures (TPMs) utilized by game publishers and console makers to prevent the playback of pirated games. Because Poland's TPM provisions provide for no criminal or civil sanctions for the distribution of such devices, there is nothing to deter pirates from entering the very lucrative market and selling circumvention devices.

According to the Motion Picture Association (MPA) and its Polish sister group FOTA, the problems of movie piracy in Poland remained relatively unchanged during 2009. 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 and Kraków). The majority of pirate discs are recordable (DVD-R and CD-R). 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. As noted above, P2P networks as well as cyberlockers and FTP servers are the most prevalent sources of unauthorized online protected content of movies.

The publishing industry reports that illegal photocopying of academic books and journals at copy shops in and around universities continues to be problematic. University administrators should be encouraged to adopt policies that promote appropriate use of copyrighted works on university campuses. The industry also notes that online piracy is a growing concern, with scanned books available for download from websites which unfortunately are typically hosted in Russia, thus making enforcement against such sites difficult. The Polish authorities are generally more responsive in cases involving online piracy, but appear to have no interest in taking action against copy shops engaged in illegal photocopying.

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 20 million, representing 52% of the population (according to www.internetworldstats.com). Internet websites offering exchange of links to illegal content were very active 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"). Polish Internet users often use international services to

⁶ This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

share copyright protected files, such as rapidshare.com and hotfile.com as well as Usenet services such as newshosting.com (located in the United States). Any form of filtering these services would significantly reduce the levels of Internet piracy in Poland. 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. A dynamic increase in infringements is being noted on social networking websites such as: wrzuta, chomikuj, odsiebie, pobieraczek-commercial website. IFTA reports that a worldwide Internet monitoring program it conducted in the last quarter of 2009 for 90 of its Members films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. Poland ranked in the top ten countries for illegal downloading with over 150,000 instances of P2P infringements.

COPYRIGHT ENFORCEMENT IN POLAND

The national anti-piracy plan: 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”), which was created in 2000, and the copyright private sectors participate in the meetings of this group.

Two working groups have been established within the framework of the Intergovernmental Committee for the Prevention of Copyright Infringements: “Internet” and “Optical Disc”. The Internet Group which consists of representatives of the private sector and the Ministry of Culture and National Heritage, Ministry of Justice, State Prosecutor’s Office and the Ministry of Interior, including the Main Police Office, has been working on proposals of amendments to the criminal part of the Copyright and Neighboring Rights Law. The Optical Disc Group began to work on the proposals of amendments to the Copyright and Neighboring Rights Law in the part referring to the optical disc production control and the Decision which regulates the law in this aspect.

In mid-2008, the Polish government adopted its IPR strategic plan for 2008-2010 (it issues such plans every three years). In November 2009, the Polish Ministry of Culture issued a comprehensive report on its accomplishments under the national plan during the first half of 2009 (“Special Report dealing with the Implementation of the Program For the Protection of Copyright and Related Rights 2008-2010”, or “Mid-Year Report” here). The good news is that the police certainly have conducted a few high-profile cases against Internet piracy (strategic goal No. 4). The Ministry of Economy also has cooperated with the BSA in promoting software asset management in business (strategic goal No. 5–education). However, there is still much room for improvement, especially with respect to bringing criminal copyright prosecutions through judgment (strategic goals No. 1 and No. 2–improvement of effectiveness). Leads provided by industry to police are often not taken by prosecutors who reject institution of more complicated criminal proceedings. Finally, some of the plan’s elements, such as those items that involve the purchase of necessary equipment or expansion of personnel have been delayed or not taken due to budget cuts.

Recommended action items in the Special 301 context: Below is a summary of the eight actions (numbering simply identifies the action, not in any particular priority) that IIPA believes merits continued attention and results by the Polish government.

1. Enforcing local sale bans on pirate optical disc product, and monitoring markets both at the border and on the streets. There has been recent progress reported on reducing the piracy problem, especially of recorded music at the borders. When it comes to street fairs not at the borders, more work can be done.

According to the local recording industry’s statistics regarding the activity of law enforcement agencies at near-border markets as well as flea markets in Wrocław and Krakow, 54 raids were conducted and 54 preliminary criminal

proceedings were initiated in result of these actions. The music industry's losses in these cases were estimated at 535,000 PLN (US\$181,800), and nearly 40,000 carriers in different formats were seized, mostly DVDs with music compressed to mp3 format, copied locally. The local music anti-piracy group (ZPAV) has noted no progress with regard to including the ban on optical disc sale in the trading rules of the marketplaces (which is the easiest and least costly solution which could regulate this issue, a solution requested by ZPAV on many occasions) .

Market monitoring should continue to be taken with respect to marketplaces along the Western border of Poland. The activity of the police and Border Guard at bazaars and outdoor markets in this area should be increased. It turns out that these businesses intertwine and the same organizers control and organize the replication of CD-Rs and production and distribution of counterfeit cigarettes. Both products are dedicated to the German market. To give a sense of this border problem, the international recording industry group IFPI conducted a review of 10 markets at the end of July 2009. These markets were predominantly at the Polish German border but did also include internal cities. Approximately 70% of the markets contained stalls selling counterfeit music discs which were openly on sale. There were a high quantity of stalls at these markets and there was no sense of concern from stall holders. Furthermore, monitoring of marketplaces in Krakow and Wroclaw that are well-known for the sale of pirate and counterfeit materials is necessary.

In most cases the land, where bazaars and outdoor markets are situated, belongs to the State Treasury and it is leased by market administrators from local authorities. A simple and fast solution would be an obligation for administrators, imposed by local authorities as a condition of a land lease, to introduce to their rules and regulations a provision on the ban of optical discs at the marketplace. Such activity should be followed by consistent enforcement of this rule by the marketplace's security agencies.

Taking action with the local governments to introduce bans on the sale and distribution of optical discs at local marketplaces is needed. Regular monitoring of producers and distributors of pirate discs by these law enforcement agencies is also recommended. The government's mid-year Report indicated that police and Border Guards took actions in bazaars and marketplace, confiscating over 17,300 pirated and counterfeit goods worth PLN 5.4 million. This included some actions around the infamous "Warsaw (Tenth Anniversary) Stadium," which was closed down some years ago.

The November 2009 Midyear Report indicated that during the first half of 2009, the Customs Service was involved in 899 cases, confiscating pirate and counterfeit goods, along with other non-IPR products (such as home appliances and cigarettes) worth of EUR 19 million (US\$26 million).

2. Strengthening police actions against Internet piracy. The copyright industries work closely with the police and greatly appreciate the support that they get. However, frequent personnel changes in the National Police Headquarters and the Ministry of Interior lead to constant changes in organizational structures, and often the professionals who have been trained and obtained significant and necessary expertise in copyright matters are transferred to other, non-IP units. Strengthening these police Internet teams with additional personal and technical resources within the existing police structure remains important.

The copyright industries report that cooperation with criminal authorities on Internet cases was very good. The Ministry of Culture and Police Headquarters meet regularly with the industries and work Internet issues. Continued cooperation between industry, Polish police, and its information technology team to take actions against Internet piracy should be supported. This should include using government resources to arm the police with additional resources for training and information technology (IT) equipment. The investigation and prosecution of copyright infringements on the Internet requires technical knowledge and adequate equipment. A stable organizational structure of police Internet teams would go far, too.

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.

With respect to music piracy actions, ZPAV is satisfied with the level of co-operation with law enforcement authorities, especially with the police. According to ZPAV's statistics for 2009, 765 criminal cases in total were instigated (321 hard goods and 444 Internet piracy). At least 149 cases were instigated by police upon ZPAV initiative against file-sharers in P2P network. The estimated value of losses generated by seized copies of music were 1,587,415 PLN (~US\$523,000), and the estimated value of losses in Internet cases (estimated on the basis of materials) was 1,540,000 PLN (~ US\$5,400,000). As examples of major actions, in September 2009, four individuals responsible for the upload of a pre-release album of Kazik Staszewski, one of the best known Polish artists, were found and detained in a record time (10 days from a leak appearing on the Internet). The investigation was carried out by the police in Rzeszow and ZPAV. The case generated wide media coverage and the commitment of police officers was appreciated. In November 2009, the police shut down a service called Odsiebie.com, which allowed for hosting and sharing files. Apart from copyright protected music and films one could also find computer games and software in the service. Odsiebie.com was popular among Internet users, it was visited by about 2 million visitors a month. As the police have established, the administrators have not taken any action to limit the illegal practice.

On February 12, 2010, an Internet forum which provided links to movies and TV shows hosted on sites such as Rapidshare was raided by Polish police.⁷ Following an anti-piracy group investigation by FOTA and the police, three alleged operators of file-sharing site Filmowisko were arrested. The site, which had 30,000 members, did not host any illicit material but provided links to movies, TV shows, music and other warez stored on hosting sites such as Rapidshare, and benefitted financially from advertising on its site. In addition to the arrests police also conducted searches on site members in three other locations and seized 6 computers and 150 DVDs and CDs which allegedly contained copyright infringing content. The evidence is now being examined by forensic experts.

With respect to voluntary actions, usually 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. ZPAV collects information on the active public DC++ hubs where copyright protected music is shared. This information is forwarded to the National Police Headquarters, and then passed to local police units for further use. As a result of these actions the number of such hubs has decreased by 80% within one year. A key reason why there is so much action in the criminal sphere is because rights holders using civil processes in Poland 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. BSA reports that it does not bring P2P cases in Poland but it supports law enforcement authorities whenever it is needed; 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.

The music and recording industry has taken additional steps to identify problems with bringing criminal Internet actions. They report that ISPs asked by the police to provide personal details of suspected infringers are often unable to identify the infringer due to the following reasons: they do not keep logs or a given IP address is used by a few or even a hundred users.⁸ Such obstacles require a reform in the telecommunication law.

⁷ Blog post by Enigmax, "Three Arrested As Police Swoop on Rapidshare Link Forum," February 16, 2010.

⁸ Specifically, 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

The process of possible co-operation with ISPs is at the initial stage. The positive aspect is that the representatives of the Ministry of Culture and National Heritage participate in the talks. It is difficult to predict at the moment what will be the results of these talks and when they will be completed.

IIPA members also continue to report that the Police Economic Crime Department in Wroclaw has taken down the country's largest file-sharing portal, instantly denying access to more than 4 million visiting infringers and arresting the administrators as they planned to expand their business. For example, on October 26, 2009, police took action against the administrators and arrested two Wroclaw residents, aged 21 and 41 years. While the site was registered in Poland, the site administrators had purchased server space on a number of servers abroad and allowed users to open free accounts for the storage of illegal content. Links to the content were also posted to external sites and the administrators had not taken any appropriate crime reduction action; the trading and exchange of illegal content was a simple process of uploading and downloading for free. This site allowed visitors to exchange copyrighted content on a massive scale, including the trading of movies, computer games, music and computer software. Police investigation revealed that there had been 120 million visitors to the site. During the ensuing search of the suspects' residence, police seized documentation, portable memory drives, pirated software and computer equipment, and a car, in anticipation of the future court penalty.

Speaking more broadly, the number of police officers that could investigate copyright infringement cases is not satisfactory. The government has adopted a plan of budget cuts for the police which led to their unwillingness to undertake such cases as there is always a problem of covering costs for forensic expertise of secured hard drives. The expertise of police IT specialists is not honored by the courts — the courts require expertise of an independent expert, which is quite an expense for the police.

3. Appointing specialized IPR prosecutors and harmonizing evidentiary procedures. The appointment of prosecutors who possess specialized knowledge indispensable in copyright cases (including technical knowledge of end-user piracy of business software, the reproduction of optical discs like CDs, DVDs, CD-Rs and DVD-Rs, and the functioning of Internet infrastructure and P2P networks) -- within the existing structure of the Ministry of Justice -- is strongly recommended.

The copyright sectors believe that such cooperation with specialized prosecutors will facilitate public/private anti-piracy activities. Maintaining organizational continuity among the prosecutors, independent of any changes in political personnel, is also critical. In addition, various regions in Poland currently have different requirements as to submitted evidence and documents. It is essential to have the procedures unified in practice and especially to understand all of the complicated issues related to the distribution of files on the Internet. There is still a general problem at the prosecutorial level in that prosecutors tend to terminate more complicated proceedings or they do not initiate them at all.

Regarding music piracy, ZPAV reports the following results of the 765 cases which were instigated in 2009. First, 40 Internet piracy cases were finalized with a positive outcome—usually sentences with suspended imprisonment,

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.

requiring the payment of damages in most cases. Second, 56 physical piracy cases were finalized with a positive outcome, and 57 physical piracy cases were finalized with a negative outcome. Third, 122 Internet piracy cases were finalized with a negative outcome, the usual justification being the inability to determine the perpetrator or the lack of characteristics of a crime. Such situation is caused mainly by two factors: the inability of ISPs to provide information on the infringing users (lack of log registers) and erroneous evaluation of the evidentiary material by the prosecutors. Fourth, some of the cases were discontinued due to minor social damage, although these were not predominant. And first, the currently pending cases include: 207 Internet cases investigated, 133 physical piracy cases investigated, 75 internet piracy cases in Court, and 75 physical piracy cases in court. Finally, there are over 4,000 other criminal cases in different procedural stages.

BSA notes that in 2009 the Polish police were active in investigating cases of software piracy. BSA is aware of 150 raids conducted in Poland in 2009 related to software piracy (69 initiated by BSA and 81 known so far, performed as *ex officio*), 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). Almost 4,000 CDs and over 80 hard drives were seized in the course of these raids. BSA members have submitted 200 motions for prosecution. 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. If cases are continued they 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 2009, an ESA member company was informed that law enforcement authorities had initiated over 1,500 new cases involving its products, though most of the cases involved small quantities of seized products (typically only 15-30). 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.

With respect to audiovisual piracy actions, FOTA reports that they experienced continued cooperation with law enforcement and reports numerous raids were run in 2009. In 2009, FOTA assisted in over 650 investigations which resulted in over 600 police raids and criminal cases. As a result of these raids, 112,000 DVDs and 75,500 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 60% of these investigations were dedicated to Internet piracy. 80% of these cases resulted in prosecutions. Camcord piracy also remains a concern in Poland with the audios of three member company films sourced to Polish theaters in 2009 and already another audio sourced to Poland in 2010. These Polish audio-tracks are then coupled with video sources and uploaded to the Internet. 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. FOTA indicates that about half of its police raids and criminal cases involved Internet piracy.

4. Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs production. Poland has a decree (2004) that regulates and governs the production of optical discs in Poland. At the time of its enactment and since then, the copyright industries have expressed concerns about effective enforcement given the lack of criminal sanctions in that decree for the failure to perform the obligation of reports by some plants. Such sanctions were proposed by the Senate during the course of the legislation process, but the Sejm never approved them. Another legislative vehicle containing such provisions to the copyright law has been ready for several years, but no action has been taken. Talks are pending as to the introduction of necessary amendments to the Copyright Law and a decree of the Ministry of Culture.

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. The technological capacity of optical disc production is on the same level as in 2007 and 2008. Due to the huge number of orders from the EU, the plants use other facilities, such

as the Czech plants, to meet the demand. There continued to be scant evidence to suggest that Polish plants themselves 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 requires strong optical disc regulations that contain criminal sanctions, if only to minimize the risk of this capacity being used for illegal purposes.

The Masterbox case clearly indicates the necessity to introduce criminal sanctions to optical disc regulations. To summarize, one of the largest raids involving pirated discs in Europe happened in February 2009, when actions by the Polish police, working with rights holders, dismantled an organized criminal syndicate that produced and distributed pirated music and films on an industrial scale.⁹ Raids were run on two replicating plants in Warsaw and Rybnik and a distribution centre in Zabki which were involved in the production and distribution of pirate music and films in the so-called Masterbox series. The organized criminal syndicate distributed an estimated nine million albums in Europe. The initial losses incurred by the music industry were estimated at 18 million euro. The Masterbox case is still pending.

5. Include *ex officio* actions in the copyright and criminal law. The introduction of *ex officio* procedures, in both the Polish criminal law and amendments to the copyright law, are needed to provide more effective procedures in Internet piracy cases. To this end, the Polish copyright industries submitted specific proposals to address the present lack of criminal penalties for Internet piracy to the Intergovernmental Team for Counteracting Copyright and Related Rights Infringements back in 2005, and have held various discussions with the government sector (including police, public prosecutors). Regrettably, years have passed and the Polish government has thus far failed to move forward with any specific proposal to address this.

BSA reports that the police do undertake *ex officio* raids in connection with business software piracy under the Polish criminal code. The possibility for these kinds of actions does not exist in case of non-software industries who rely solely on the Polish copyright act. Even in the software cases, police usually require additional evidentiary materials from the right holders (sometimes they need almost full evidence that infringement took place). It seems that such approach results from policy of Polish prosecutors who are reluctant to undertake more complicated software piracy cases. The Midyear Report also mentions (page 86) that the number of instituted proceedings has decreased.

ESA also reports that at least one of its members has had limited success in having police initiate *ex officio* actions. Unfortunately, the utility of these *ex officio* actions has been undermined by burdensome procedural requirements, such as a requirement that all injured parties join the case, that often result in the cases being suspended. This requirement is also extremely burdensome to rights holders who join the cases, as they must agree to appear when summoned as witness, often times only to confirm information that was already provided in a sworn statement.

⁹ In this 2009 action, the 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*.

6. **Introducing 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, with a higher penalty for any subsequent offense. 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. We ask that the U.S. government obtain the Polish government's views on their willingness to pursue this goal.

7. **Withdrawing the reservation to Article 12 of the Rome Convention:** The continuing lack of protection for foreign repertoire has greatly complicated licensing discussions between the relevant collecting societies and commercial users. While Poland's reservation under Article 12 may not be inconsistent with its international obligations, maintaining its "reservation" is just a politically correct way of expressing a policy based on denial of national treatment and discrimination against foreign rights holders with respect to broadcast rights, and should not be tolerated. In addition, the absence of protection for U.S. repertoire undermines the position of the entire sector, and removal of the reservation is supported by Polish rights holders.

8. **Clarifying and expanding Poland's TPM provisions:** Poland's TPM provisions are not currently sufficient to reduce the prevalence and widespread availability of circumvention devices. As previously discussed, Poland's current TPM regime affords only civil remedies, and only then to actual acts of circumvention. Because it is difficult, if not impossible, to effectively enforce against individual acts of circumvention, the WIPO Treaties (to which Poland is a member) requires that protection extend to "preparatory acts," such as the manufacture and distribution of circumvention devices. To fulfill its international obligations, Poland must extend coverage to preparatory acts and provide criminal remedies.

Ongoing, systemic problems with prosecutions and the judiciary: In prior years, IIPA and its members have identified a series of problems in the criminal courts. The civil courts are so unworkable that no one in the copyright community uses them to pursue remedies. Most of the criminal cases are sent to the courts but very few cases result in a sentence. Despite help provided by the industries' anti-piracy staffs to the prosecutors preparing the copyright cases, very few prosecutions result. The court proceedings take a long time and this is an impediment to the expeditious and efficient prosecution of infringement cases. The lack of transparency during the proceedings is also of concern; sometimes the affected companies are notified only after the outcome of the proceedings. Furthermore, cases typically do not result in deterrent sentences, but only with the imposition of minimal fines notwithstanding the quantity of infringing material seized. Courts still appoint 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) and this causes higher costs for the courts and delays prosecutions. Many cases are backlogged (at one point, over 5000 film cases were waiting for consideration). Finally, most sentences are insufficient to provide a reasonable level of deterrence, despite the fact that the penalties in the Copyright Law are severe (providing fines of up to US\$175,000 and jail sentences of up to five years). The copyright industries believe that specialized IP courts should be established. The bottom line is that more judges with IPR competences are needed in the courts.

IPR Trainings: The copyright industries continue to participate in seminars for law enforcement agencies. For example, the music industry (ZPAV) continues to participate and co-organize training seminars for police, the Border Guard and customs administration. ZPAV's workshops are included in the curriculum of the Police Academy in Szczytno and Police Education Centre, where they focus on the disclosure and collection of evidence material in Internet copyright infringements cases. ZPAV stands ready to provide training seminars for police officers and prosecutors who are interested in broadening their knowledge in this field. 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. Similarly, BSA

participates in trainings for police, prosecutors and judges. However, more training is required, particularly for prosecutors. 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. The only way to train judges is to include the subjection of copyright protection in the training programs organized by the Ministry of Justice.

The Midyear Report confirms that there have been a number of training sessions. For example, during the first half of 2009, 141 judges took part in a training courses on types of intellectual property rights and criminal remedies. More trainings were planned for December 2009.

COPYRIGHT AND RELATED LEGAL REFORM IN POLAND

Possible copyright law reform: An “Internet team” of the Intergovernmental Group for Counteracting Infringements of Copyright and Related Rights is evaluating possibilities to amend the copyright law to improve copyright protection in the online environments. Reports suggest that the proposed changes would focus on precise definitions of terminology and specifying the forms of infringements and offenses.

Copyright and Neighboring Rights Act: 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, including provisions regarding the regulation of optical disc production (issued in June 2004). Unfortunately, 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 – in addition to the deficiencies discussed earlier, 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 could pose a problem because it seems to exclude from criminal remedies a wide range of activities which are very harmful to rights holders. It should be confirmed that this criminal liability for both hard goods and online piracy is available under this article.

- 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).

Copyright amendment bill on collective management: Legislative efforts to revise the copyright law to address collective management issues have been underway for some time. 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. On January 26, 2009, the Polish government submitted to the Parliament a Bill of amendments to the copyright law containing proposals for complex regulation of collective management issues.

ON a separate track, in December 2009 the Special Sub-Commission established to draft the copyright and neighboring rights law reform in the field of rights collective management finalized its discussions. A draft text of amendments was prepared by the sub-commission, much different from the one which had been forwarded to Parliament by the government (document No. 1628). It needs to be emphasized that the representatives of the government—the Ministry of Culture and National Heritage—have been actively involved in the Sub-Commission’s work in their efforts to improve the position of rights holders in fixing tariffs and in the system of the Copyright Law Commission’s operation. The proposed changes go far beyond the 2006 decision of the Constitutional Court, which found Article 108 item 3 of the Copyright and Neighboring Rights Law unconstitutional. According to the Court, this provision did not provide the rights holders with adequate representation in the process of tariff creation by the Copyright Law Commission. The provision was deleted from the copyright law in 2006 and the legislative process in this area has been pending since then. No session of the Commission has taken place since that time and no tariffs have been approved. This situation is not favorable for all participants in this process, and especially for rights holders. The government has decided to introduce a broad reform, which, as mentioned above, goes far beyond the decision of the Constitutional Court.

The current draft – as developed by the Sub-Commission – is definitely a compromise, but needs some further work. It has been forwarded in January 2010 to many groups with a request for comments. Many comments have been provided, different in content, depending on the group submitting them (copyright and neighboring rights management organizations, broadcasting organizations, telecom chambers, etc.). A session of the Commission of Culture and Mass Media, which leads the issue in Parliament, is planned for February 16, 2010. It is difficult to say at this time which direction the parliamentary debate will go—whether there will be a second reading in Parliament or the commission shall decide to continue discussions. ZPAV representatives have been actively involved in the works of the sub-commission and parliamentary commission, but the decision will be made by the Ministers of Parliament. From the point of view of the collecting societies, this draft of copyright law reform is definitely better than the initial proposal submitted by the government. It is not good enough, however, to be fully accepted.

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) overboard 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.

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 MPA 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.