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Re: Poland: 2004 Special 301 “Out-of-Cycle Review” on Intellectual Property Rights Practices, 69 Fed. Reg. 60928 (October 13, 2004)

To the Section 301 Committee:

This post-hearing submission responds to the Committee’s request for comments regarding Poland’s “out-of-cycle” review in the 2004 Special 301 process. In sum, we recommend that Poland remain on the Special 301 “Watch List.”

### **ABOUT THE IIPA**

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,300 companies producing and distributing materials protected by copyright laws throughout the world. The copyright-based industries continue to provide major contributions to the U.S. economy, jobs and foreign sales/exports.<sup>1</sup> IIPA has participated in the annual Special 301 process for years, and in February 2004, we filed extensive comments on the copyright industries’ views regarding enforcement and legal reform in Poland.<sup>2</sup>

<sup>1</sup> In October 2004, the IIPA released its latest economic report entitled *Copyright Industries in the U.S. Economy: The 2004 Report*, the tenth such study written by Stephen Siwek of Economists Inc for IIPA. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data shows that in 2002, the U.S. “core” copyright industries<sup>1</sup> accounted for an estimated 6% of U.S. Gross Domestic Product (GDP), or \$626.6 billion and the “total” copyright industries accounted for an estimated 12% of U.S. GDP or \$1.25 trillion. The “core” copyright industries employed 4% of U.S. workers in 2002 or 5.48 million persons. Factoring out the difficult economic year of 2002, between 1997-2001, the “core” copyright industries’ employment grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39% per year). Finally, in 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, motor vehicles, equipment and parts, and aircraft and aircraft parts.

<sup>2</sup> See Poland, IIPA, 2004 Special 301 Submission to the U.S. Trade Representative, February 13, 2004, posted at <http://www.iipa.com/rbc/2004/2004SPEC301POLAND.pdf>.

## **THIS “OUT-OF-CYCLE REVIEW” AND COPYRIGHT / ENFORCEMENT ISSUES**

On May 3, 2004, USTR announced its decision to place Poland on the Special 301 “Watch List” and conduct an out-of-cycle review in later 2004.<sup>3</sup> Specifically:

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

IIPA's comments focus on the four copyright- and enforcement-related elements identified by USTR in its May 2004 announcement.

### **(1) Strengthening anti-piracy and anti-counterfeiting measures at the Warsaw Stadium and continuing effective raids and prosecutions against piracy and counterfeiting activities across the country**

**Stadium Governance Issues:** DAMIS, the administrator of the Warsaw Stadium, has again won the bid for marketplace administration. The administration contract (awarded July 1, 2004) now includes detailed provisions and obligations which DAMIS must undertake to regulate the Stadium marketplace, including enforcing a total ban on the trade of optical discs. This provision gives DAMIS security employees the authority to remove individuals trading pirate carriers from the marketplace premises, secure pirate goods and pass them to the enforcement agencies.

Recent reports by several industry representatives indicate that DAMIS security, working with local police, are in fact taking action to ban trading in optical discs -- a significant improvement over the situation preceding the new contract. In addition, Polish police, customs and border guard officers continue their activities at the Warsaw Stadium, disclosing storage places for pirated products (see enforcement discussion, below).

It remains imperative to continue to evaluate how DAMIS meets the obligations of its contract; if it fails to do so, then its contract should be terminated.

**Piracy at the Warsaw Stadium:** The Motion Picture Association (MPA) reports that DAMIS employees and law enforcement authorities (police, customs and border guards) have therefore coordinated actions to enforce the new regulations at the Warsaw Stadium (also known as Jarmark Europa) and this has resulted in a significant drop of the number of stalls carrying optical discs from over

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<sup>3</sup> See Office of the U.S. Trade Representative, 2004 Special 301 Report, May 3, 2004, posted at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/2004\\_Special\\_301/asset\\_upload\\_file16\\_5995.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf).

300 to approximately 10. However, FOTA (the local audiovisual anti-piracy association in which MPA participates) reports that consumers are still able to purchase DVDs by finding peddlers who roam the Stadium carrying catalogues of their stock. In addition, MPA confirms the recording industry report that illegal trade has now expanded at “bazaars” and public markets in other parts of the city; for audiovisual materials, this especially includes the electronic market Wolumen in Warsaw and in other regions of the country (such as ŁKS Stadium in Łódź, Balice market in Kraków, Hala Ludowa in Wrocław, city market Berna Str. Dolna Wilda district in Poznań, and bazaars located along the Polish-German border). The illegal trade taking place in these public markets is highly organized and controlled by criminal gangs. FOTA has provided a list of all problematic locations to the Governmental Group that deals with copyright infringement.

The entertainment software industry reports that there has been little change in its industry’s situation at the Stadium. Pirated entertainment software products are still widely available, whether through the vendors that roam the Stadium or through vendors that sell at stalls throughout the Stadium. Much of the pirated CD-based game products are burns, not industrial-producer (“silvers”) products. In recent years, silvers produced in Russia and Ukraine flooded the Polish markets; it seems that the pirates have shifted to local burning. The Entertainment Software Association (ESA) likewise shares the concerns of the other copyright industry associations that piracy is also becoming widespread in “bazaars” and “mini-Stadiums” across the city and in other regions of Poland.

The recording industry reports that the situation regarding the distribution of optical discs with music content at the Stadium has radically changed, in a positive fashion, in recent months. Since May 2004, the industry (IFPI and ZPAV, the local industry anti-piracy association) has observed that pirate disc distribution at the Stadium has been largely limited, not eliminated. From January 1-September 1, 2004, a total of 87,241 units of pirated sound recordings were seized at the Stadium and 107 criminal and fiscal proceedings instigated. Activities undertaken by law enforcement agencies at the Stadium led to the movement of distributors to other marketplaces such as an electronic marketplace called Wolumen in Warsaw and bazaars located along the Western border. Noticeable pirate distribution of pirated sound recordings (as well as pirate movies) now appears in marketplaces and bazaars in: Szczecin, Świnoujście, Kostrzyn, Gubin, Slubice and Sieniawka; also at a computer marketplace in Wrocław, WILDA marketplace in Poznan and BALICE in Krakow.

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

## **(2) Strengthening border enforcement**

The copyright industries report mixed results with the Polish government efforts to strengthen border enforcement practices.

MPA reports that Polish border enforcement has been strengthened in two ways. First, at the beginning of the year, Polish Customs created special Mobile Groups in the Regional Customs Houses to investigate and conduct raids inside the country. These Mobile Groups are quite active and are coordinating actions with the audiovisual industry. Second, the manpower at the Eastern borders has been reinforced by approximately 1,000 Customs officers reassigned to the Eastern borders as a result of

Poland's accession in the EU. FOTA reports that the quantity of seized pirate audiovisual products at the eastern border has remained at a constant level.

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

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

While the software industries have continuing concerns on border enforcement, members of the ESA report that they have had a lot of positive interaction with Polish Customs. The Customs authorities have responded positively to the anti-piracy training provided by some ESA member companies. It is hoped that these training exercises will result in an increase in the level of Customs border enforcement actions, particularly in seizures of suspected infringing products. The ESA member companies are organizing another training exercise to be held in Krakow in October.

### **(3) Signing into law and implementing the new copyright law amendments and the optical disc regulations;**

**Copyright Law Amendments 2004:** The amendments to the Polish copyright law were officially published on April 30, 2004, just in time for Poland's accession to the EU. The goal of this legislative package was to implement certain aspects of the WIPO internet treaties, and specifically, the EU Copyright Directive, which were not already accomplished in the Polish law. In general, the amendments contained several improvements, including those proposed made by the various copyright sectors over the course of the last two years.

Even after the adoption of these 2004 amendments to the Polish copyright law, there remains a fair number of issues not addressed in these amendments which industry sectors have long requested redress.<sup>4</sup> Finally, continued vigilance will be needed as it is possible, indeed likely, that the Polish

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<sup>4</sup> For example, issued unaddressed/unresolved in the 2004 copyright law amendments include: (a) the need for broader exclusive rights for producers of phonograms and for performers; (b) the need to strengthen enforcement provisions, such as affording *ex officio* powers of authorities in copyright infringement actions, improving the scope of injunctive relief; enhancing criminal liability; providing presumptions of ownership; and affording stronger criminal penalties (the EU's issuance of its new Enforcement Directive may ameliorate some of these inadequacies, though separate and additional work will be needed to increase the criminal sanctions under the law); (c) the narrowing of an overly broad exhaustion rule providing that the imports of copyrighted products that were put into

collecting societies may try yet another run at introducing/passing legislation which would likely be opposed by IIPA members.

**Optical Disc Decree and Enforcement Thereof:** The 2004 copyright law amendments also required the Ministry of Culture to issue implementing regulations to implement the optical disc production provisions of the copyright law. This decree was officially published on June 2, 2004.<sup>5</sup> As of this particular moment in time, the Polish OD Decree appears to be a sufficient legal instrument to control the production of optical discs. However, the lack of criminal sanctions remains a troubling concern. If the OD plants do not adequately observe the provisions of the Decree, it may become necessary to introduce criminal sanctions.

Publication of the OD Decree was the first stage of implementation; enforcement of the regulations, and their usefulness in combating piracy, are the more critical elements. There are now more OD plants in Poland. In February 2004, IIPA reported that there were 7 operational OD plants; there are now nine (9) operational plants in Poland.<sup>6</sup>

Due to the fact that not all of the OD plants use one information technology system, a universal format allowing for further data processing was prepared, and reports indicate that this system was finalized a few months ago. Independently of that effort, the local recording industry (ZPAV) continues its program of co-operation with particular CD plants on the basis of modified Memorandum of Understandings with each plant.

Efforts to create the register for OD machines, their implements, the businesses which own them, plus other information required in the decree, have commenced. The Ministry of Culture already has called for the operational optical discs plants to register lines and equipment. The majority of OD plants positively responded to the appeal of the Ministry of Culture to submit data to the register. A two-person team of inspectors has been established at the Ministry of Culture to control the optical disc production. In October 2004, these inspectors, supported by police, conducted inspections in two OD plants (one of which had failed to register their replication activity with the Ministry in due time). The Ministry is still in the process of completing their reports on these inspections.

#### **(4) Taking concrete, effective steps to strengthen domestic enforcement of IPR.**

While the industries report generally favorable cooperation from Polish police officials, they report varying degrees of results in-practice.

##### **Criminal Investigations and Cases**

The recording industry views the activity of enforcement agencies with regards to the instigation of criminal proceedings is at a similar level as in the former period. However, the quantities of seized

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circulating in any country with which Poland has free-trade zone agreements is not a copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive).

<sup>5</sup> As a matter of comparison, the Polish optical disc decree is much more minimalist than the kind of comprehensive OD regulations which IIPA members and the U.S. government have pressed in other territories in Asia, Russia and Ukraine, for example.

<sup>6</sup> These nine plants are: DigiPress; DigiRecords; GM Records; Megaus; PM/Snake's Music; Takt; Technicolor Home Entertainment Services; VEGART; and CODIC.

pirated sound recordings are much smaller than prior periods. Pressed pirate CDs, most often smuggled from Russia and Ukraine dominate the market. Also visible is growing distribution of CD-Rs. Furthermore, there is a lot of pirate activity involving pirated music on the Internet. Activities conducted by police, such as identification and detention of individuals organizing illegal distribution of pirate recordings on the internet as well as securing servers with stored music files, are praiseworthy. However, only a few police units are ready to undertake such internet actions, due to lack of professional equipment and lack of necessary knowledge to prosecute intellectual property infringements on the internet. Unfortunately, a recommendation in the government's 2003 strategy plan to create specialist positions in particular police units to monitor the internet in search of intellectual property infringements has not been implemented. Furthermore, the judicial practice of calling experts in obvious cases is still a matter of concern, especially to the recording industry (as reported in IIPA's 2004 301 report); this practice causes higher costs for the courts and delays prosecutions.

The motion picture industry (FOTA) reports that the number of raids involving audiovisual products in Poland has increased by roughly 15% compared to last year, resulting in an increase of seized DVDs (51,000 in 2003 and 70,000 in 2004 year-to-date). Very recently, the Regional Police Unites in Radom, Kielce and Rzeszow conducted raids (based on FOTA investigations) on individual operating pirate disc labs and distributing pirate discs in street markets and via an Internet website. Over 5,000 pirate CD-Rs and DVD-Rs and 450 pirate DVDs were seized and five people were arrested. The film industry shares the recording industry's concern about internet piracy enforcement (above). Recall that on December 23, 2003, the Council of Ministers approved its government anti-piracy strategy plan made statements regarding increased inter-disciplinary cooperation and prioritization for IP crimes. The Council called for the National Public Prosecutor to appoint two prosecutors in every office to assist and advise on IP crimes, and also reiterated the need for intensified actions using all resources within Poland such as the police, border guards, and Customs. FOTA notes that the implementation and realization of these plans is proceeding, but slowly.

BSA also recently has seen positive and effective action taken by the national police, and even local police units, against internet piracy. It would appear that police cooperation and enthusiasm for these cases has increases. With respect to hard goods cases, BSA reports that Polish police remain active and cooperative in BSA cases in general, and in fight software piracy throughout Poland. Many of these cases are often started *ex officio* by the Polish police.

With respect for videogame enforcement, one member company of the ESA reports that in a three-month period (April-June 2004), 22 new cases resulted in seizure of 341 pirated ODs containing company products and 75 copies of company products found on hard drives at internet cafes. A majority of these pirate ODs were seized in Warsaw and Bydgoszcz.

### **Continuing need to improve judicial actions/deterrent results**

In our 2004 301 submission, IIPA identified a longstanding problem experienced by all the copyright industries -- the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases in an expeditious manner. Many elements of Poland's enforcement regime remain incompatible with its TRIPS enforcement obligations, including the failure to impose deterrent criminal penalties in commercial piracy cases and the lengthy delays in bringing and completing copyright infringement cases. The penalties in the copyright law are generally strong in relation to local market conditions, providing fines of up to US\$175,000 and jail sentences of up to five years.

For example, the entertainment software industry concurs that the Polish judicial system is rift with delays. ESA reports it takes approximately a year for a case to be in the preparatory proceedings

conducted by the police/prosecution before a case is submitted to the court. Some cases last years, without much advance movement. Because of the lack of judicial initiative and leadership, much of the work done by rightsholders and prosecutors winds up being wasted.

From the perspective of the film industry, the Regional Court of Warsaw seems to handle many long, unresolved cases. FOTA reports the following example: in eight (8) cases heard by the Warsaw Court within the last three weeks (October 2004 timeframe), FOTA's expert opinions were provided in 1998 for 3 cases, in 2002 for 2 cases and in early 2003 for the remaining 3 cases. However, FOTA notes that the backlog is not specific to copyright cases and is a common problem throughout the Polish Court system. This is due to the lack of human resources, few judges, and the lack of investment in new equipment and technologies. The lack of deterrent sentencing is also a very common problem. Prison sentences are almost always suspended and the fines for copyright infringement are very low (from \$50 to \$1,000). Unfortunately, this problem is also valid for repeat offenders.

The recording industry has at least two examples of excessive delays they have encountered with the Polish judicial system. First, the Regional Court in Warsaw, 7th Criminal Division, in a decision issued February 13, 2003, turned to the Court of Appeals with a request to transfer one of its cases to a different court of an equal level due to the fact that the case may soon be barred by the statute of limitations and the Regional Court has too many other cases to examine. An additional reason given by the court for the transfer was that the refurbishment/reconstruction occurring in the building where the court is seated also prolonged the court's proceedings. The indictment in this copyright case was made in 1998 and referred to a criminal act which took place in 1996. In other words, about 7 years passed between the infringement and the court's request to transfer the case. In another case last year, the Regional Prosecutor's Office in Koszalin decided (on June 9, 2003) to discontinue its copyright case proceedings due to the reason of "insignificant damage to society." The criminal act took place in 1998; after five years passed in which the court in Warsaw failed to examine the case, it then returned the case to the Regional Prosecutor's Office in Koszalin, requesting some additional acts to be carried out. It was then that the prosecution discontinued these proceedings.

### **ECONOMIC IMPACT OF PIRACY: 2003**

IIPA has received 2003 "final" estimates from one of its member, the Business Software Alliance (BSA). For 2003, the total estimated trade losses due to copyright piracy in Poland amounted to \$240 million.

#### **Estimated Trade Losses Due to Copyright Piracy (*in millions of U.S. dollars*) and Levels of Piracy in POLAND: 2003<sup>7</sup>**

INDUSTRY	2003	
	Loss	Level
Records & Music	34.0	45%
Business Software Applications <sup>8</sup>	171.0	58%

<sup>7</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf). For more details on Poland's Special 301 history, see IIPA's Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) as well as Appendix E of IIPA's 2004 301 filing (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>). Previous IIPA Special 301 filings on Poland also are posted at <http://www.iipa.com/countryreports.html>.

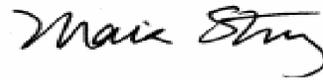
<b>Motion Pictures</b>	30.0	30%
<b>Book Publishing</b>	5.0	NA
<b>Entertainment Software</b>	NA	NA
<b>TOTAL</b>	<b>\$ 240.0</b>	
<b>INDUSTRY</b>	<b>Loss (Millions \$)</b>	<b>Piracy Level</b>

## CONCLUSION

IIPA appreciates the opportunity to provide our views on Poland, and we recommend that Poland remain on the Special 301 "Watch List." While we acknowledge progress made by the Polish government in the areas of copyright law reform and heightened enforcement, an intense level of continued effort and vigilance is needed to properly implement the new OD decree and improve enforcement against both hard goods piracy and internet piracy. All four of USTR's copyright- and enforcement-related elements for this Special 301 out-of-cycle review remain valid as the 2005 Special 301 cycle begins in the coming months.

IIPA and our members look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,



Maria Strong  
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<sup>8</sup> BSA's 2003 piracy statistics for business software piracy were not available as of the February 13, 2004 filing of IIPA's 2004 Special 301 report to the U.S. Trade Representative. In May 2004, BSA's 2003 preliminary statistics (of \$156.4 million and 62%) were posted on the IIPA website. In October 2004, BSA and IDC were able to parse out the U.S.-publishers' share only of its global piracy losses in Poland, and these revised, now final, statistics for 2003 – which comport more closely to BSA's traditional methodology for 301 purposes -- appear above. Historically, BSA's trade loss estimates reported in the Special 301 context represent losses due to piracy which affect only U.S. computer software publishers in Poland, and differ from BSA's piracy loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in Poland. In July 2004, the BSA and IDC issued a new Annual Global Piracy Survey. Unlike prior surveys, this 2004 BSA Global Survey now includes more computer applications, such as operating systems and consumer applications such as PC gaming, personal finance, and reference software, all of which were not reflected in prior BSA surveys. According to its 2004 survey, BSA reports that the piracy rate in Poland was 58% with \$301 million in estimated losses in 2003. See BSA's 2004 Global Piracy Study at <http://www.bsa.org/globalstudy/>.