

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### POLAND

**Special 301 Recommendation:** IIPA recommends that Poland remain on the Watch List in 2008.

## **EXECUTIVE SUMMARY**

Copyright piracy remains widespread Internet piracy is rising rapidly, and although there has been a good amount of cooperation between industry and police to take action against online infringements and hard goods piracy, more work is needed and the police need more resources to accomplish this important task. In addition, the burning and import of pirate product remain key challenges. Street vendors and flea markets continue distribute pirated products. A major positive development was that the lease for the notorious Warsaw Stadium was terminated and it was closed in September 2007. However, sprawling pirate open-air markets along the German border continue to seriously hurt the legitimate industry in Poland and Germany. Weak border enforcement, lengthy delays and onerous burdens in bringing prosecutions, and the failure to impose deterrent penalties remain systemic deficiencies. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions to the optical disc regulations, are long overdue. The larger problem remains that there is a lack of leadership exhibited by the Polish government on implementing its national anti-piracy plan. Now that the 2007 election cycle is over, the copyright industries hope that the national anti-piracy strategy will be re-energized in 2008.

## **PRIORITY ACTIONS IN 2008**

### **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 IT 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 optical disc products at stadiums, bazaars, outdoor markets and public places, in particular along the Polish-German border, and prosecute those cases.
- Halt the increasing flow of pirate products across the border, especially at the eastern and northern borders, ensuring that sufficient resources (both technical and personnel) are dedicated to this effort and improving cooperation with the customs agencies in neighboring countries.
- Continue working with rights holders on the enforcement of optical disc regulations.
- 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.
- 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**

- Amend copyright law's technological protection measures provisions to correct inadequacies and reduce the scope of the overly broad private copy exception.

- Refrain from introducing a mechanism to regulate the relationship between private copying exception and technical protection measures provisions. Permit industry to continue to work to resolve issues related to technological protection measures and interoperability in the marketplace.
- Introduce criminal sanctions in the optical disc decree.
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Adopt anti-camcording legislation.
- Formally withdraw Poland's reservation to Article 12 of the Rome Convention.

<b>POLAND</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2003-2007<sup>1</sup></b>										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software<sup>2</sup></b>	<b>337.0</b>	<b>57%</b>	251.0	57%	202.0	58%	197.0	59%	171.0	58%
<b>Entertainment Software<sup>3</sup></b>	<b>76.0</b>	<b>60%</b>	NA	75%	NA	60%	109.3	94%	NA	NA
<b>Sound Recordings &amp; Musical Compositions</b>	<b>28.0</b>	<b>36%</b>	24.0	35%	25.0	31%	36.0	37%	34.0	45%
<b>Motion Pictures<sup>4</sup></b>	<b>NA</b>	<b>NA</b>	NA	NA	102.0	66%	30.0	35%	30.0	30%
<b>Books</b>	<b>NA</b>	<b>NA</b>	NA	NA	5.0	NA	5.0	NA	5.0	NA
<b>TOTALS</b>	<b>441.0</b>		<b>275.0</b>		<b>334.0</b>		<b>377.3</b>		<b>240.0</b>	

## COPYRIGHT PIRACY IN POLAND

**Internet piracy:** Internet piracy is on the rise in Poland, due to increasing broadband penetration and wider Internet household penetration. Peer-to-peer (P2P) file-sharing networks such as DC++, Gnutella, eDonkey and BitTorrent are the most popular sources of pirated copyright content online. Files are also distributed through File Transfer Protocol (FTP) servers and international cyberlockers, as well as international video hosting sites 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 on the rise. Internet piracy, particularly through the BitTorrent and eDonkey protocols, is also a growing concern for the entertainment software industry. There are an estimated 11.4 million Internet users in Poland, about 30% of the population (according to internetworldstats.com). The Polish police continue to scour the Internet in search of illegal music, film files and software, conducting raids where appropriate.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf). For information on the history of Poland under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>3</sup> ESA's reported dollar figures reflect the value of pirated product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The above results reflect only piracy of PC games.

<sup>4</sup> MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

**Optical disc piracy, street piracy, and outdoor markets:** Hard goods piracy has shifted to the burning of CD-Rs and DVD-Rs. Polish pirates 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 at public markets. The most notorious stadium market, the Dziesięciolecie (Tenth Anniversary Stadium in Warsaw), was finally closed in September 2007. (A new national stadium will be built for the 2012 European Football Championships at this location.) Despite this positive development, it should be stressed that other distribution points have replaced the Warsaw Stadium and the pirate trade in Poland is far from dried up. For example, 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 bazaars, flea markets and mini-stadiums, and should include a ban on the sale and distribution of optical disc products at these locations.

**Imported pirated discs and weak border enforcement:** Imported pirated discs (CDs, DVDs, and CD-ROMS) continued to enter the Polish market in 2007. Forensic examination of pirate sound recordings conducted by the international recording industry indicates that Russia is the main source of prerecorded pirate discs in Poland. The industry continues to believe that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these imported discs. Law enforcement agencies have failed to recognize the many blatant examples of the organized nature of IP crime in Poland such as the highly organized criminal activity at the Polish-German border markets.

**Domestic OD production in Poland:** Poland’s OD capacity now exceeds one billion units per year. It is important to note, however, that the excess capacity of the Polish manufacturing lines supplies EU markets with legitimate products. Since Poland’s accession to the EU, Polish optical disc plants primarily execute orders coming from other EU countries rather than orders from the local market. 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.)

Despite this large overcapacity, there is little evidence to suggest that Polish plants are involved in pirate production of optical discs or are exporting pressed discs. In June 2005, the police seized 54,000 DVDs in a raid against a warehouse in Warsaw. Samples were supplied in early 2007 and MPA/IFPI joint forensics lab matched all samples to CODIC, one of the nine OD plants operating in Poland. This is still the only time locally replicated pirate discs were found in Poland. The forensic report was submitted to the police in May 2007 and it was determined that CODIC ceased its activities in 2005. However, a DVD line is missing and the criminal case has been re-opened.

Nevertheless, such a large production capacity in Poland (bigger than Russia, Ukraine, Bulgaria) requires strong OD regulations, if only to minimize the risk of this capacity being used for illegal purposes. Therefore, the copyright industries maintain their call for the introduction of criminal sanctions in the existing OD regulation.

**Piracy of music and sound recordings:** Piracy affecting the recorded music industry in Poland remains severe, given the growth both optical disc piracy and Internet piracy. According to the local recording industry group ZPAV, Internet piracy is causing serious damage to the cultural sector as it hinders the development of legitimate on-line services, such as eMusic, iPlay, Melo, mp3.pl, Onetplejer and Soho. The overall music piracy level in Poland is 25%. The largest amount of pirated music can still be found at marketplaces situated along the Polish-German border, mostly smuggled from the East. Forensic examination of pirate products seized/purchased in Poland in 2006-2007 conducted by IFPI Secretariat indicates that Russian optical disc plants are the main source for finished industrially manufactured product. Since the closure of the Warsaw Stadium, ZPAV so far has not observed the emergence of any similar large centers of pirate distribution, but rather a multitude of smaller distribution points in various parts of the country. The estimated piracy level for U.S. music repertoire is 36%, and the estimated trade losses due to physical piracy for 2007 are \$28 million. These estimates do not include losses inflicted by digital piracy. The industry believes the high levels of music piracy in Poland continue because of the following issues: (1) inefficiency of law enforcement agencies in recognizing and prosecuting organized crime activities of pirate distribution both in the country and abroad; (2) lengthy delays in bringing and completing copyright cases, court requests for submission of additional evidence even in the simplest copyright cases; (3) lack of consistent actions and

severe penalties against repetitive copyright infringers which gives them a feeling of impunity; and (4) lack of efficient enforcement at the borders to curb the flow of pirate products, especially at the eastern and northern borders of 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 open air markets and through street vendors. While the volume of counterfeit *Nintendo* products sold at the retail level has remained the same, retail sales of mod chips and game copiers have increased. Internet piracy continues to rise, and in 2007, a member company's monitoring of P2P networks (specifically the BitTorrent and eDonkey protocols) for several key game titles indicated that Poland has the second highest volume of P2P downloads in the Central Eastern European region (Hungary's rate is higher). Poland typically accounted for about 2% of global downloads of the monitored game titles (for example, one publisher monitored nearly 21,000 downloads of a top game title in Poland within eight (8) weeks of its launch).

**Audiovisual piracy:** Internet piracy is the motion picture industry's top priority, followed by piracy at markets and bazaars along the Polish-German border and in some large cities (such as Warsaw, Krakow and Poznan). According to the Motion Picture Association (MPA), also of concern is the illegal exchange of movie files on P2P systems at university campuses and the merging of films and Polish subtitles downloaded from the Internet which are then burned on DVD-Rs and sold at local markets. The local burning problem has increased while the import of pirate pressed discs has decreased as is evidenced by the seizures (roughly 50% pressed / 50% burned last year but has now shifted to 25%/75%). Although there is no evidence to date of any MPA member companies' movies having been camcordered in Polish theatres, the number of camcording incidents of Polish movies is on the increase. For example, the films "Ryś," "Testosteron," "Dlaczego nie," and "Świadek Koronny" were all theatrically released in the first quarter of 2007, and sold at local bazaars and available on Polish Internet sites a mere few days after their theatrical release. Also, another local hit ("Katin") was pirated in the post-production process and appeared on the Internet in early November 2007, before its theatrical release. One major studio closed its home entertainment office in Poland because of difficult market conditions, including piracy.

**Business software piracy:** BSA reports that piracy levels in Poland remain relatively high. One of the largest piracy and enforcement challenges faced by BSA and its members in Poland continues to be the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy). It seems, however, that distribution via Internet (including P2P and auctions) is becoming a bigger problem every year. At the retail level, numerous flea markets still sell pirated software. Estimated 2007 losses due to business software piracy in Poland were \$337 million, with the piracy level at 57%. 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. According to a 2008 report issued by BSA-IDC, 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.<sup>5</sup>

**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.

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<sup>5</sup> The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

## **COPYRIGHT ENFORCEMENT IN POLAND**

The local copyright-based industries continue to work well together to ensure that the government gives copyright law and enforcement the necessary attention. In addition, these groups participate in the Governmental Group on copyright infringement, invited by the Minister of Culture to take part in the Group's working sessions as special experts. In addition, a team of police officers, court experts and anti-piracy coalition's representatives prepared a methodology for conducting investigations into Internet copyright infringement cases. On March 27, 2007, the Governmental Group approved this project, and since October 1, 2007, the methodology for handling Internet copyright infringements has been available for authorized police officers and prosecutors throughout Poland.

**Lack of governmental will to fight piracy:** The activities of the Governmental Group significantly slowed down in the aftermath of the 2005 elections and practically stopped in mid-2007, pending upcoming elections. The copyright industries are hopeful that the new Government will be more open to meeting with private sector representatives of the copyright industries. The Governmental Group should resume its activities in early 2008, under the leadership of the recently appointed Ministry of Culture.

**Police actions:** The industry groups continue to report good cooperation with police authorities.

The recording industry (ZPAV) reports that the police conducted many well-coordinated raids in 2007. 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. According to ZPAV's statistics, in 2007, in 306 of the 1,122 criminal cases that were instigated/launched, the police did so after receiving a complaint from ZPAV. In 749 of these 1,122 cases, the police did so on their own initiative, and the remaining 66 cases were instigated by Customs as well as one by the border police. One of the primary enforcement problems for the recording industry is lack of efficient enforcement at the eastern and northern borders to curb the flow of pirate products from Russia, Belarus and Ukraine. Local regulations resulting from the EU Customs Regulation 1383/03 simply are not applied in practice. ZPAV has often discussed this issue at the meetings of the Intergovernmental Group for Counteracting Copyright Infringements. The other ongoing and still very serious enforcement problems are the prosecutorial bottlenecks and burdensome evidence requests by courts.

The audiovisual industry also has a good relationship with law enforcement and numerous raids were run in 2007. For the first 11 months of 2007, FOTA (the local motion picture group) assisted in 920 investigations that resulted in 917 police raids and 907 criminal cases. The raids resulted in the seizure of 38,000 DVDs, 132,000 DVD-Rs and CD-Rs, and 900 computers. Most of the seized discs (both pressed and burned) contained between four and eight movies. 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. A particularly successful operation in June 2007 targeted a small organized criminal group that was the main pirate supplier of pirate discs to the Wolumen electronic market. The Economic Crime Division of the Warsaw-Zoliborz Regional Police Unit, with the assistance of FOTA, conducted simultaneous raids against six private apartments spread over three districts of the capital city of Warsaw. The raids resulted in the seizure of 8 computers, 7 printers, 14 DVD burners, more than 4,500 pirate DVD-Rs and 28,000 zlotys (~US\$ 10,000). The gang's four members (three Polish citizens and one national from Georgia) was well organized, with two of its members in charge of downloading the movies from the Internet and burning them on DVD-Rs, and the other two organizing the pirate trade.

BSA notes that in 2006 the Polish police remained very active in investigating cases of software piracy and in conducting *ex officio* raids (the Polish Criminal Code does provides *ex officio* authority for software piracy crimes).

Entertainment software publisher relationships with law enforcement authorities continue to be positive with generally high levels of cooperation. Police actively initiate actions involving entertainment software products, though in 2007, focus appeared directed primarily at games on optical disc format rather than all industry products. An ESA member company reports that hundreds of cases involving its products

were initiated in 2007, though most involved retailers with typically small quantities of burned product (between 1-2000 burned copies). Enforcement authorities still generally require a industry right holders to file a motion to pursue charges after the seizures. Given the number of cases, this is both an expensive and time consuming burden.

**Internet piracy enforcement:** The industries report that cooperation with criminal authorities on Internet cases was very good in 2007. The police continue to investigate instances of Internet piracy and look for copyright infringers at their own discretion -- this is quite a positive development. 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.

The Polish music industry joined the international campaign against illegal P2P file-sharing in October 2006. Polish police, often assisted by ZPAV representatives, conducted raids in various regions of Poland. Below details of the most important actions in 2007:

**8 January 2007:** Police officers from Internet crime department of the Municipal Police in Koszalin detained two residents who had illegal Microsoft commercial software installed on 4 computers. Both individuals were the operators of an FTP server connected to the network of a residential complex. Illegally reproduced music, films, computer games and software were made available on the server. About 70 users had access to the network which operated since August 2006. Police officers secured one computer with two hard disk drives, a laptop and 7 additional hard drives. The contents of secured equipment were to be examined by IT experts.

**12 January 2007:** Officers from the economic crime police in Koszalin searched 12 apartments during an action against P2P file-sharers. 16 hard disk drives with a total capacity of 1.3 terabytes were seized.

**5 February 2007:** Police officers in Katowice working with officers in Myslowice seized two FTP servers with a total capacity of 480 GB and a computer with hard disc drive of 80 GB during a search at the office of a local Internet access provider. The computer with installed P2P software was used to download and distribute copyrighted content, including music, outside the internal structure of the network; the FTP servers were used to distribute downloaded files among customers of the internal network.

**18 February 2007:** Police officers from the Regional Police Headquarters in Lublin carried out raids in Pulawy and Lublin against major file-sharers in P2P networks. The file-sharers used DC++ software and two local hubs distributing music and films. The police raided 29 flats and secured 38 computers, 10 hard disc drives and over 2,000 CD-Rs and DVD-Rs.

**14 March 2007:** Police officers from the economic crime department of the Regional Police Headquarters in Opole, in co-operation with officers in Głogówek, raided four apartments where suspects disseminated music and films using P2P services. The suspects made available over 12,500 music files. The police secured computer equipment, DVD-Rs and CD-Rs with copyright protected content as well as illegal satellite television cards and decoders. The suspects face a penalty of up to 3 years' imprisonment.

**22 March 2007:** Police officers from the economic crime department of the Regional Police Headquarters in Lodz, in co-operation with the film and recording industries, detained a 48-year old resident of Pabianice who downloaded films from the Internet and offered them for sale. The suspect was involved in this activity for two years and had a professional website with a large repertoire. He sold hundreds of discs a month and turned his activity into a regular source of income. The police secured 5 computers and 1,500 discs, as well as the individual's car. The man will be charged with copyright infringement and will face a penalty of 5 years' imprisonment.

**27 April 2007:** Police officers from the economic crime department of the Regional Police Headquarters in Kielce detained six individuals who shared music, films and computer programs over a computer network. Police officers secured five computers, six hard disc drives and almost 500 CD-Rs and DVDs. The suspects face a penalty of up to 5 years' imprisonment.

**23 May 2007:** Police officers from the economic crime department in Poznan detained six students of one of the city's universities. They face charges of unlawful dissemination of music, software and computer games on the Internet, using an internal computer network and P2P software. As a result of the raid, hard disc drives, CDs and DVDs with over 2 TB of data were seized. During one week, about 1,400 users shared files. At least 4 persons directly conducted pirate activity – these were the server's administrators. The other two individuals downloaded files from the Internet for the purposes of creating a 'pirate library.' Detained students face a penalty of up to 5 years' imprisonment. .

**31 May 2007:** A company providing Internet services in Lublin illegally distributed copyright protected content for profit. Police officers from the economic crime department of the Regional Police in Lublin raided the company's premises and private apartments of its owners. They seized 1,500 CD-Rs and DVD-Rs, financial documentation, 6 hard disc drives, two computers and a laptop. The owners uploaded music videos on a U.S. server. In order to download the file, one had to send a paid SMS (Short Message Service, used in text messaging) and obtain a password in return. Initial investigation showed that about 2,000 people made a payment and downloaded copyright-protected works. Charges of illegal distribution of copyrighted content will be laid against two 27-year-olds who face a penalty of up to 5 years' imprisonment.

**1 June 2007:** Police officers from Sosnowiec, in co-operation with officers from the economic crime department in Katowice, detained a suspect who offered illegally copied computer software, films, music and computer games. His offer, presented at a website, contained 16,000 items. During a search in his apartment, the police found over 11,000 discs with copyright-protected content and seized computer equipment. The suspect faces a penalty of up to 5 years' imprisonment.

**23 August 2007:** Police officers in Wroclaw carried out an action against Internet piracy in which 40 computers used to disseminate copyright protected content as well as a server, making file-sharing possible, were seized. Secured equipment contained over 100,000 music files, 2,500 films and around 250 computer software. The value of losses incurred by the producers is estimated at around 3.5 million zlotys.

The audiovisual industry also reports success in certain Internet actions, including some conducted with the recording industry:

**8 November 2007--police shut down Polish TopSite:** The Economic Crime Division of the Wroclaw Police shut down a Polish TopSite named "HPN" during raids at the Wroclaw Technical University and at the site administrator's home. The operation followed a five-week long joint investigation by both the recording and film industries along with the law enforcement authorities, and was organized in agreement with the University's authorities. The raids resulted in the seizure of six high-speed servers (known as a top-site) with 37 hard drives (containing 12 terabytes of disk space). The site was administered by a 29-year-old individual who was also the University's network administrator. He was arrested together with an accomplice and both were detained for questioning.

**16 May 2007--removal of largest site offering Polish Sub-Titles (Napisy.org):** Police officers from the Economic Crime units in Katowice, Cracow, Szczecin, Bialystok and Olsztyn, accompanied by film industry investigators, raided a group responsible for distributing unauthorized translations of film dialogue over the Internet through a website called [www.napisy.org.pl](http://www.napisy.org.pl) which operated via a server located in Germany. The translations were used as the source of subtitles to localize pirate copies of movies available on the Internet. Polish subtitles are a big issue because the official Polish translations often do not become available for some time after the release of major films. It is estimated that the site was regularly visited by about 700,000 Internet users and it contained dialogue lists for thousands of films. The uploading of a pirate copy of a latest release was invariably followed

by the posting of a Polish language dialogue list, enabling a localized version with subtitles to be created. The investigation, conducted by the Economic Crime Headquarters in Warsaw, was coordinated with the German film industry (GVU) and police in Germany who seized materials from the server and blocked access to the Internet site. The group was very active and investigation of the seized equipment established that four members were responsible for over 8,500 translated dialogue lists which attracted over 12 million downloads. This police operation generated a huge amount of media interest nationally and also attracted the wrath of the local hacker community who attempted a denial of service attack on the police server in revenge.

**17 April 2007--actions against administrators and operators of infringing P2P systems in academic campuses (Koszalin, Poznań, Wrocław):** Sixty police officers, accompanied by FOTA and ZPAV personnel, conducted an important raid on the campus of the 18,500-student Koszalin University of Technology where students were sharing large quantities of unauthorized copyrighted content via the university network. The students were using the DC++ file-sharing protocol. Police officers searched 40 rooms in three dormitories in which they seized 16 laptops, 61 hard drives and the main PC running the DC++ hub software. A total of 35 terabytes of movies, music and software was reportedly available to download from the network. The three administrators of the hub, all students at the university, were taken into custody. This operation was the first police action ever conducted in the dormitories of a university campus as police access on university campuses is somewhat limited by Polish laws.

**Weak border enforcement:** The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law as part of the EU accession process. Customs administration remains inadequate at border checks. For example, in 2007, only a very few border seizures of pirate sound recordings were known to have taken place.

There were, however, two recent successful actions taken at the German border. On October 3, 2007, the Police forces in Gorzow, together with officers of the Border Guards, raided the largest ever pirate lab found in Poland. The raid followed a four-month long investigation by the recording industry and the law enforcement authorities, and resulted in the seizure of 30 CD/DVD burners, 10 printers and 8,000 discs with copyrighted content (movies and interactive games). The pirate lab was located in a private apartment located in the Zary county (south-Western part of Poland, near the border with Germany) and had been in operation for about a year and a half. The pirate discs were destined to be sold at local markets in the city of Leknica that lies on the river "Lusatian Neisse" which forms the border between Poland and Germany. Approximately 90% of the discs were German language versions dedicated to German consumers visiting open air markets in Polish cities near the German border. The rest of the discs were in Russian and were destined for small local Russian speaking communities. The sources of the movies were primarily Internet downloads as well as some Russian made pirate discs.

In January 2008, Polish border police arrested eight people involved in the smuggling and manufacture of pirate CDs and DVDs. During the bust, the border police from the Klodzko region seized 66,000 CDs, DVDs, CD-Rs, and DVD-Rs, 108,000 inlay cards, as well as illegal firearms, contraband cigarettes and tobacco, plus cash (~ US\$72,000). It appears that most of the illegal music and films were produced in Russia and Ukraine and some were locally manufactured; all were destined for the German market. Four of the eight suspects were remanded to custody and the others released. The investigation continues.

**Criminal prosecutions:** Lengthy delays in bringing and completing copyright cases make it difficult to see the effects of anti-piracy activities. These delays only fuel the notion of impunity among repeat copyright infringers. Continuous exchange of personnel in law enforcement agencies has also a negative impact on enforcement efforts.

BSA reports that in 2007, the prosecutor in Torun decided to issue almost 2,000 prosecution motions against individuals who bought pirated software through an auction site. BSA began a cooperative relationship with the Allegro auction site (the biggest auction site in Poland), and the experience thus far has been a very positive one.



ESA member companies report that there has been an improvement in the prosecutorial process. In the 2007 report, it was noted that some courts required a publisher's local counsel to appear before the court, even if merely to confirm information already provided to the police through a sworn statement at the preliminary investigation stage. However, in recent months, for the cases in which ESA members have been involved, the sworn statement appended to case file has been sufficient.

**Expert reports add a bureaucratic layer:** Unchanged in 2007, the recording, software, and motion picture industries continue to report the problem of Polish courts appointing independent experts to secure proof of ownership even in the simplest copyright cases, where neither the defendant nor his attorney calls for submission of additional evidence.

**Very slow judicial system:** In the large urban centers, where most piracy cases are filed, it can take between three to four years before a case is concluded. One solution is to increase the number of judges (rather than prosecutors) and improve the quality of information technology in order to heighten productivity in the judicial process. Admittedly, difficult economic conditions may affect the ability to achieve this, but it is a solution, nonetheless. There is also a rather lengthy preliminary investigation stage (prior to the actual court proceeding) which can last between one to five years.

Additionally, Polish courts are not specialized enough and the judges are changing and leaving their positions too often. BSA and the recording industry have often expressed the opinion that 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.

**Lack of deterrent sentencing.** Industry is not aware of any major sentences issued in 2007. Although the majority of cases brought to court conclude with guilty verdicts, sentences have been insufficient to provide a reasonable level of deterrence. The average fine has not increased over time (usually about US\$50 to US\$150) and imprisonment has not generally been used 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 frustrating obstacles of cases languishing in the courts and disappointing results may cause the police to become disenchanted with working with anti-piracy organizations due to the limited chances of obtaining a satisfactory result. Furthermore, absent deterrence, pirates will simply continue on with the business of infringement, confident that any penalty imposed will be minimal. The audiovisual industry reports that it has over 4,500 cases pending in the court system, but closed only about 150 cases in 2007. Finally, the judicial practice of calling experts in obvious cases is still a matter of concern; this practice causes higher costs for the courts and delays prosecutions. ZPAV reports 5,632 criminal cases were pending in 2006.

**Civil enforcement in Internet cases:** Rightsholders 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. BSA specifically recommends that the unauthorized downloading of copyrighted files onto personal computers should be clearly added to Article 118 of the copyright law.

**Civil actions in 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 aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004).

However, a number of troubling issues raised by the copyright industries were not addressed in the 2004 amendments.<sup>6</sup> In addition, the 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT) in several ways: (a) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal); (b) inadequate protection of rights management information, and (c) a number of new exceptions, including the private copy exception, are too broad and there is no express implementation of the three-step test. Highlighted below are several concerns:

- 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 (for example a film is illegally camcordered from a cinema, then uploaded to the Internet and subsequently downloaded by others). 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 (“three-step test”). 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.
- 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 is mostly problematic in terms of copyright enforcement as 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.
- 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.

**Implementation of the EU Enforcement Directive:** The Polish Government completed work to amend both its Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. Poland implemented the Enforcement Directive in May 2007. In connection with the Enforcement Directive implementation, there were discussions to lower the standard of protection in civil proceedings, but such decrease in standards did not take place. 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

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<sup>6</sup> Other problems (issues unaddressed/unresolved) in the 2004 Copyright Law amendments include: (a) the need for broader exclusive rights for producers of phonograms and for performers; (b) the need to strengthen enforcement provisions, and using the *ex officio* powers of authorities in copyright infringement actions; improving the scope of injunctive relief; enhancing criminal liability; providing presumptions of ownership; and affording stronger criminal penalties; (c) the narrowing of an overly broad exhaustion rule providing that the imports of copyrighted products that were put into circulation in any country with which Poland has free-trade zone agreements is not a copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive)

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.

**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 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. Industry is not aware of any official anti-piracy plan issued by the government for 2008. However, the anti-piracy coalition has repeatedly recommended adding criminal sanctions to the OD decree but without success.

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

**Withdrawal of Poland's reservation to the Rome Convention:** Another year has passed and the Polish Government has still failed to withdraw its reservation to Article 12 of the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), permitting it to discriminate against U.S. and other foreign nationals with respect to broadcasting rights. Poland also should be encouraged to give performing artists and phonogram producers an exclusive right instead of merely a claim for remuneration. Many of the primary forms of exploitation of sound recordings take place via the communication of signals rather than the delivery of physical product.

## **MARKET ACCESS ISSUES IN POLAND**

**Broadcast quotas:** According to the 1992 Broadcasting Act, as amended in 2000 and July 2004, broadcasters must dedicate at least 50% of broadcasting time to European productions and 10% of broadcasting time to European independent productions. Furthermore, Polish broadcasters are subject to an obligation to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in the Polish language. This provision, which goes beyond what is prescribed in the EU's Television without Frontiers Directive, has a negative effect on market access. However, lower percentages to be determined by the National Council apply to broadcasters during the first year of transmission of their program service, thematic program services for which the number of available programs is insufficient; and program services transmitted solely via satellite or cable which in their entirety are available against payment of a fee.

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

**Foreign ownership restrictions:** Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA continues to promote the reduction and elimination of

such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry.

## **IPR TRAININGS AND PUBLIC AWARENESS**

The copyright industries continue to participate in seminars for law enforcement agencies. Representatives of ZPAV anti-piracy group regularly organize and conduct trainings/seminars for customs, police and border guard officers. Such seminars focus on new methods of pirate activity and disclosed smuggling routes. From January 2006 through October 2007, ZPAV representatives participated as experts in the anti-piracy project financed by the European Commission and the Patent Office of Denmark; the purpose of this project was to train police, customs and border guard officers from all regions of Poland. ZPAV co-organizes and participates in law enforcement conferences on the protection of intellectual property. BSA also participates regularly in police trainings organized by police schools in Szczytno and Słupsk (at least twice a year).

ZPAV, FOTA and BSA launched a new stage of an information campaign to raise awareness of intellectual property rights infringements on computer networks. The campaign aims to inform the management of companies and educational institutions about the threats related to distribution of unauthorized music, films and computer software on their systems. In November 2007, letters were sent to 496 largest companies and 706 academic institutions in Poland with software tools to audit IT resources and Digital File Check, a program helping to find and uninstall P2P software. At the same time, ZPAV is stepping up its educational activities on Internet music among children, young people and adults. The aim is to raise public awareness of intellectual property protection. Joining with the Polish Anti-piracy Coalition, ZPAV has launched the second stage of the 'Be original' education program, which includes meeting with students, teachers and parents. The meetings present the legal and security risks of using the Internet. A special presentation called "The Internet – facts and risks" is run by Hirek Wrona, a popular music journalist, in schools all over Poland. Vivid reaction of young people to such issues shows that direct discussions are necessary and play a significant role in raising their awareness on how to stay legal and safe on the Internet.