

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland be placed on the Watch List in 2011.

Executive Summary: IIPA appreciates the efforts the Government of Poland has undertaken in general to improve intellectual property rights protection and enforcement, which led to its removal from the Watch List last year. However, the copyright industries continue to face significant hurdles to effective protection and enforcement for their content in Poland and thus, IIPA believes Poland should now be included on the Watch List.

Since Poland was removed from the Special 301 Watch List in 2010, the Government of Poland has not made progress on the previously announced IPR strategic plan, and the Ministry of Culture has failed to announce a new three-year plan or to move forward with its Interministerial Team in 2011. As a result, there is currently no national strategy to address piracy. Police and public prosecutor's offices still need coordinating centers, and there is no meaningful effort to conduct copyright cases generally, or to undertake actions to address a growing problem of the markets along the Polish-German borders. While there was indeed some progress in lowering piracy levels, which also contributed to Poland's removal from the Watch List in 2010, copyright holders continue to face significant difficulties enforcing their rights. Locally burned pirated products continue to be sold on the streets and in flea markets, though some industries have reported marginal improvements in this area. Open-air markets along the German border sell pirated and counterfeit products that hurt legitimate industries in Poland and Germany. There has been no progress on banning the sale of optical discs in the local marketplaces. The business software industry continues to experience high rates of unlicensed software use in the business sector and has launched a number of collaborative efforts with the Government of Poland to raise public awareness about this problem. 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 substantial amount of cooperation between industry and police to take action against online infringements and hard goods piracy, numerous prosecutorial bottlenecks ultimately prevent cases from moving forward. The continuing failure to impose deterrent penalties against copyright infringers, or issue transparent reports of the results of court procedures, contributes to the challenge in Poland, as does the frequent termination of preliminary proceedings. 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 are underway.

PRIORITY RECOMMENDED ACTIONS FOR POLAND IN 2011:¹

In light of the experiences of the copyright industry in Poland during 2010, the top enforcement priorities for the IIPA (many of which are outstanding actions from the government's IPR strategic plan for 2008-2010), are:²

- Revitalize the Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights, and form a new strategy focusing on legal reform, strengthening enforcement resources, and cooperative dialogues.
- Enforce local sale bans on pirate optical disc (OD) product, and introduce and implement criminal sanctions to the Copyright Law to monitor production and sale of OD in markets both at the border and on the streets.

¹For more details on Poland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

²For details, see IIPA's 2010 submission at <http://www.iipa.com/rbc/2010/2010SPEC301POLAND.pdf>.



- Strengthen the divisions within police units which are responsible for Internet monitoring and gathering evidence for criminal proceedings so that more actions can be pursued.
- Appoint and train specialized IPR prosecutors and harmonize evidentiary procedures.
- Facilitate increased *ex officio* actions under the copyright and criminal laws.
- Introduce anti-camcording legislation.
- Withdraw the reservation to Article 12 of the Rome Convention.
- Clarify the law on the protection of technological protection measures to eliminate the need for evidence of an infringement, and provide for protection against the distribution of software-based circumvention devices.
- Expand the Ministry of Economy initiative to promote implementation of software asset management practices in other ministries and create a best practice for private businesses.
- Efficiently utilize newly enacted authority provided to tax inspectors to verify software license compliance in businesses.

COPYRIGHT PIRACY IN POLAND

Piracy of copyright works continues to harm the markets for legitimate sales of film, music, books, entertainment software, and business software in Poland. Sales of pirated physical goods by street vendors and in open markets have decreased slightly in recent years, particularly in Warsaw, but continue to be visible in other large cities and along the Polish-German border. Internet piracy, meanwhile, has increased, and is a problem for all of the copyright sectors.

Business software piracy in organizations (end-user piracy). The Business Software Alliance (BSA) reports that the unauthorized copying and use of software by 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 downloaded from online auction sites and hyperlinks. BSA's preliminary estimate from research firm IDC on the PC software piracy rate in Poland in 2010 is 54%, unchanged from 2009. That corresponds to a commercial value of pirated U.S.-vendor software of US\$311 million in 2010.³ BSA has collaborated with the Ministry of Economy to improve public awareness and promote software asset management in businesses under its "Zrób to Samo" (Do the SAME) campaign. The aim of the campaign is to encourage Polish entrepreneurs and public offices to implement a Software Asset Management (SAM) program, including software audits, by promoting a case study example of SAM good practices at the Ministry of Economy along with other marketing initiatives for IPR awareness among small- and medium-size businesses. More efforts like this by the Government of Poland to promote the acquisition and use of legal business software would benefit the Polish economy.⁴

³BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Poland. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

⁴See The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted by International Data Corporation (IDC), which was issued in September 2010 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 generate \$1.1 billion in GDP, (...continued)

Hard goods piracy – optical disc piracy, street piracy, and the outdoor markets. Hard goods piracy of copyrighted materials continues in Poland, but is on the decline relative to the increase in Internet piracy. Local industry reports that large-scale piracy at open street markets is no longer the problem it was four or five years ago, although piracy of film, music, and software products continues at Polish-German border as well as in Krakow and Wroclaw (albeit from a smaller number of vendors and in lesser amounts). 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.

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 hard copy music piracy in Poland at the overall level of 25% (and slightly higher, 27%, for U.S. repertoire). 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 center for illegal distribution. Pirate copies can still be found at marketplaces in Cracow and Wroclaw. However, after successful raids by border guards at local marketplaces along the Polish-German border, the supply of pirate discs has significantly diminished; this is a significant success. As discussed below, Internet piracy is the greatest threat to the music and recording market, occurring predominantly via infringing cyberlockers, hyperlinks and peer-to-peer (P2P) services, as well as mobile piracy. Most often the Internet Service Providers (ISPs) react promptly to ZPAV's notices and remove infringing content. As far as illicit P2P file-sharing networks are concerned, the ISPs prefer to co-operate with the police. The level of physical piracy remained the same from 2009, but Internet piracy estimates 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\$130 million in 2010, the bulk of which was due to Internet piracy.

The Entertainment Software Association (ESA) reports that the physical piracy market now primarily consists of domestically burned pirated optical disc goods, available largely from flea markets and street vendors or sold through Internet advertisements. For at least one ESA member company, physical piracy in Poland has decreased significantly while legitimate product sales increased in 2010. Burned pirate copies of games are more readily available in places other than the major cities. However, the main channel for piracy is via P2P networks.

The vast majority of cases initiated by local enforcement relate to pirate product burned for personal use or distribution among peers, and a very small portion of this pirate product is for commercial sale. According to the Motion Picture Association (MPA) and its local Polish organization FOTA, the problem of movie piracy in Poland has undergone a major shift in 2010, migrating from street piracy to online piracy which is now the most serious problem for the motion picture industry. Locally burned discs, which increasingly contain multiple titles, and imported Russian-made pressed discs, still 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 two up to eight movies. Infringing use of P2P networks as well as cyberlockers (chomikuj.pl and wrzuta.pl) and illegal streaming websites are the most prevalent sources of unauthorized online 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

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\$155 million in new tax revenues, and an additional 1,812 IT jobs. The benefits would be even greater if Poland achieved a 10 point reduction over two years, which would generate \$1.4 billion in GDP and \$209 million in tax revenues.

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. The growth of Internet access in Poland, including broadband connections, is fast outpacing government efforts to control Internet piracy. As a result, the estimated 22.4 million Polish Internet users (58% of the population, according to www.internetworldstats.com) represent an increasingly challenging market for legitimate content providers to reach. As films are more readily available online, the motion picture industry reports a reduction in rental shops and the volume of rental DVDs distributed in Poland. Internet websites offering an exchange of links to illegal content were very active. Illicit 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"). BSA continues to report that much of its Internet piracy concern in Poland relates to websites offering illegal copies of software for download and resale, but illicit P2P use is also increasing. A significant increase in infringements is being noted on social networking websites such as: wrzuta, chomikuj, and pobieraczekcommercial. A worldwide Internet monitoring program that IFTA conducted in the last quarter of 2009 for 90 of its Members films recorded over 4.5 million instances of infringements via P2P networks and almost 50,000 instances of OSP infringement. Poland ranked in the top ten countries for illegal downloading with over 150,000 instances of infringements over P2P networks.

Internet piracy of video games continues to rise, and in 2010 Poland ranked among the top ten countries worldwide in terms of unauthorized file sharing on P2P networks. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 3.64 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Poland, placing Poland ninth in overall volume of detections in the world.⁵ Pirate videogames are also readily available for purchase on Polish Internet auction sites such as Allegro.pl.

COPYRIGHT ENFORCEMENT IN POLAND

The national anti-piracy plan. In 2000, the Polish government created an "Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights," to be headed by the Ministry of Culture and including the participation of the key Polish enforcement agencies on intellectual property rights issues (including the Ministry of Justice, the Ministry of Interior and Administration, and Police Headquarters) as well as copyright industry participants. The Intergovernmental Team issues strategic plans every three years. In mid-2008, the Government of Poland adopted an IPR strategic plan for 2008-2010. In November 2009, the 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). However, the Intergovernmental Team no longer meets, and local industry reports that the Ministry of Culture has reduced its engagement in IPR enforcement issues.

Local industry representatives report that, as of the end of 2010, the government has not yet adequately addressed several key elements of the strategic plan of 2008-2010. At the time of the Mid-Year Report, the police were able to report a few high-profile criminal cases against Internet piracy. Moreover, BSA has had a successful collaboration with the Ministry of Economy on programs to promote software asset management in business. However, there is still much room for improvement, especially with respect to bringing criminal copyright prosecutions through to judgment. Leads provided by industry to police are often not taken by prosecutors, who especially turn

⁵These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

away complicated criminal cases. 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 undertaken due to budget cuts.

Police enforcement generally. IIPA members report good cooperation with Polish law enforcement, but cite a need for better resources and training. Border and street market enforcement remains a priority for many rights holders. Meanwhile, greater expertise and cooperation are needed to tackle rising Internet piracy.

One ESA member reported assisting in about 850 new cases referred by Polish enforcement in 2010, but that this was a decrease from 2009. Most cases involved small numbers of product. Only about 14% of all new cases involved more than 10 copies of pirated product and about 5% involved more than 100 pirate copies. The largest seizures were of about 140 pirate copies and the average seizure was of 25 pirate copies. The actions supported by ESA's member involved mainly PC games, but also console games.

Enforcement by tax authorities. IIPA welcomes the enactment into law during 2010 of amendments to the tax law that broaden the powers of tax inspectors to reveal, combat and prevent crimes and offenses against intellectual property. This came into force in the summer of 2010. BSA has assisted in a training for tax inspectors to facilitate use of this authority and looks forward to seeing it used by tax inspectors on a regular basis during 2011 to verify software license compliance and create a significant deterrent of software piracy by businesses.

Enforcing local sale bans on pirate optical disc product, and monitoring markets both at the border and on the streets. Although local copyright industry representatives report progress on reducing street and open market piracy, pirate optical discs continue to be available throughout Poland. While pirate sound recordings are less prevalent at border markets, DVD-Rs are still widely available at the borders, and pirated product of music, film, and software are available in large quantities in Wroclaw, Krakow, and other marketplaces outside of Warsaw.

Local governments should be encouraged to introduce bans on the sale and distribution of pirated optical discs at local marketplaces. Regular monitoring of producers and distributors of pirate optical discs by these law enforcement agencies is also recommended. In most cases, the State Treasury owns and leases the land where bazaars and outdoor markets are situated. A simple and fast solution would be an obligation for market administrators, imposed by local authorities as a condition of a land lease, to include in their rules and regulations a provision that bans pirated optical discs at marketplaces, followed by consistent enforcement of this rule by the marketplace's security agencies. Unfortunately, IIPA members have noted no progress toward implementing this off-recommended simple solution.

According to local recording industry's statistics, law enforcement agencies (Customs and Police) at near-border markets as well as at flea markets in Wroclaw and Krakow conducted 43 raids and 43 preliminary criminal proceedings. The music industry's losses in these cases were estimated at 452,099 PLN (US\$158,076), and 19,461 carriers in different formats were seized.

Enforcement authorities should continue to monitor markets along the Western border of Poland. The activity of the police and border guards at bazaars and outdoor markets in this area should be increased. The same individuals control and organize the replication of CD-Rs and production and distribution of counterfeit cigarettes – all dedicated to the German market. The international recording industry (IFPI) conducted a review of 10 markets at the end of July 2009. These markets were predominantly at the Polish-German border but also included internal cities. Approximately 70% of the markets contained stalls openly selling counterfeit material. The material was high quantity, and was sold openly by stall holders without fear of penalty. The industries recommend further monitoring of marketplaces in Krakow and Wroclaw.

Strengthening police actions against Internet piracy. The copyright industries continue to report good cooperation with Polish police. However, rights holders note that Polish enforcement authorities still lack experts trained in IP crimes and need financial resources to obtain experts' opinions in complex cases including Internet

piracy cases; the failure to do so has resulted in investigation delays. Continued cooperation between industry, Polish police, and their respective information technology teams should be supported to improve Internet piracy actions. This should include using government resources to provide 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 be an important step forward. In addition, the number of police officers who investigate copyright infringement cases is insufficient. Local industry reports that in many units, teams dealing with Internet crimes are limited to one or two officers, a problem that significantly limits the actions that can be brought for copyright infringement. Following a number of budget cuts, police also have shown resistance to undertaking complex cases because of concerns about "covering costs" for forensic experts for secured hard drives. Further, the expertise of police IT specialists is not honored by the courts – the courts require an independent expert, which is quite an expense for the police.

With respect to music piracy actions, in 2010, ZPAV reports: 1,730 criminal cases in total were instigated (177 hard goods and 1,553 Internet piracy). At least 283 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 1.07 million PLN (US\$374,545), and the estimated value of losses in Internet cases (estimated on the basis of materials) was 16.6 million PLN (US\$5.8 million). One example of a major action included: a September 8, 2010 raid by the Polish Police securing over 90 hard drives and servers of the Silesian Technical University containing over 150TB of illegal software, music and films. The action was aimed against what was supposed to be the largest warez infrastructure in Europe and was part of a European police operation against The Pirate Bay. The police are supportive in P2P piracy actions, and the music and business software industries report a certain level of cooperation with ISPs as well. Polish ISPs react promptly to ZPAV's notices and remove infringing music. As far as illicit 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 90% 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.

Appointing specialized IPR prosecutors and harmonizing evidentiary procedures. IIPA strongly recommends the appointment of prosecutors who possess the specialized knowledge that is indispensable in copyright cases (including end-user piracy of software by businesses, illegal optical disc production, and all forms of Internet piracy) within the General Prosecutor's Office and within prosecutors' offices across Poland. Local entertainment software representatives report that the investigation and prosecution stages continue to be lengthy, with an average duration of a case from initiation to verdict of from one to three years, though there was a slight improvement in this area in 2010. BSA further reports that prosecutors continue to mishandle the initial proceedings of cases due to a lack of expertise in the field. They either require full evidence of infringement before initiating a case, or decide not to conduct raids – the key element to securing evidence of infringement for software enforcement. In one case, a prosecutor dismissed a case against an end-user who claimed he downloaded the software from the Internet – the prosecutor reasoned that since software is generally available online, the consumer could not be expected to know that the software in question (in this case valued at US\$100,000) was illegal. In another case, upon receiving from rights holders a motion for prosecution, the prosecutor asked the president of the target company to produce all license agreements in the company's possession rather than investigating what software was actually installed in the target's computer system. Prosecutors continue to avoid initiating complicated cases in general. The government did undertake two training programs for enforcement representatives on IPR matters in 2010. IIPA also recommends training for specialized prosecutors within Prosecutors Offices to improve the efficiency of copyright cases.

Facilitate *ex officio* actions for all forms of copyright under the copyright and criminal laws. In Polish law, software cases are initiated *ex officio* based on the Criminal Code; however, the Copyright Law requires an application from a harmed party before actions may be initiated regarding film and music piracy, a problem particularly in cases of Internet piracy. 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 and public prosecutors). Regrettably, years have passed and the Government of Poland has thus far failed to move forward with any specific proposal to address this.

Some IIPA members noted that prosecutors take too few *ex officio* actions, where *ex officio* authority is available, due to burdensome procedural requirements. For example, prosecutors often refuse to proceed on a case unless all concerned rights holders confirm that they will support the case. Rights holders who do join cases face additional hurdles, as they must agree to appear when summoned as witness, often times only to confirm information that was already provided in a sworn statement. There is a continued need for prosecutors to be able to conduct actions more independently; *ex officio* criminal actions should not be suspended based on the failure of all injured parties to join the case.

Ongoing, systemic problems with prosecutions and the judiciary. Rights holders continue to encounter unnecessary delays in the courts, particularly in Poland's larger cities. Criminal procedures as a general matter need to be made more efficient and streamlined, and more IP experts need to be appointed and trained for quicker progress. More transparency is also still needed; rights holders that join cases as claimants should be regularly informed of progress and results. Finally deterrent penalties should be imposed. 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 to improve the IPR competency of judges.

One problem that has plagued the judiciary in Poland for years appears to be improving for at least one of the copyright sectors. The entertainment software reports that one member, which had about 1,000 cases pending in Polish courts in 2010, was informed of only 7 cases that were dropped by the prosecution (for insufficient evidence). A few cases were dropped because all of the injured parties did not join the criminal proceeding (obviously, a problem for the other parties in the case). In 2010, one ESA member reported only a small fraction its cases had any progress or results. Cases that were resolved in 2010 resulted mainly in small fines of about US\$50 to US\$100, and in exceptional cases fines reached US\$900. ESA reports that infringers usually pay small fines, but refuse to pay higher fines. All of the few prison sentences issued in 2010 for ESA cases were suspended.

IPR Trainings. The copyright industries continue to participate in seminars for law enforcement agencies. For example, the music industry (ZPAV) occasionally participates in and co-organizes training seminars for police, border guard officers, and customs officials. However, ZPAV's workshops are no longer included in the curriculum of the Police Academy in Szczytno and Police Education Centre. 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 Headquarters a ceremony for the best police units that deal with IP crimes and award the so-called "Golden Badge" prizes. However, more training is required, particularly for prosecutors. FOTA regularly organizes or participates in trainings and seminars for customs, police and border guard officers. Such seminars focus on new methods of piratical activity and smuggling routes. Every year there are more than 15 such seminars or training programs.

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 was expected to evaluate possible amendments to the Copyright Law to improve copyright protection in the online environment, and to focus on precise definitions of terminology and

specific forms of infringements and offenses. Unfortunately, the "Internet Team" did not continue its work in 2010, and no future plans have been announced

Reform is needed to address obstacles faced by the music and recording industries, in particular, in bringing criminal Internet actions. Specifically, ISPs asked by the police to provide data regarding suspected infringers are often unable to identify the infringer, either because they do not keep logs or a given IP address is used by a few or even a hundred users. Such obstacles require a reform in the Telecommunications Law. The process of cooperation with ISPs to address this type of problem has begun but will require further encouragement on the part of the government, including the Ministry of Culture and National Heritage, to produce concrete solutions.

BSA reports that the Ministry of Administration and Interior is working on a new notice and takedown procedure to address web-based piracy. In January 2011, the Ministry issued a draft summary describing changes to be introduced in the e-commerce regulations. The draft will undergo consultations within the government. Specifically, the Ministry proposes to introduce a detailed notice and takedown procedure that would also include a possibility to file a counter-notice.

Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs production. The Government of Poland issued a decree in 2004 that regulates and governs the production of optical discs. Since its enactment, the copyright industries have expressed concerns about effective enforcement given the lack of criminal sanctions in that decree for the failure to perform reporting obligations. 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 still pending for the introduction of necessary amendments to the Copyright Law and a decree by the Ministry of Culture.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.

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.

Clarifying and expanding Poland's TPM provisions. Poland's technological protection measures (TPM) provisions are not currently sufficient to reduce the prevalence and widespread availability of circumvention devices. Because it is difficult, if not impossible, to effectively enforce against individual acts of circumvention, the WIPO Performances & Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) – which Poland acceded to in 2003 and 2004, respectively – require that protection extend to "preparatory acts," such as the manufacture and distribution of circumvention devices, including those implemented in software. To fulfill its international obligations, Poland should extend coverage to preparatory acts of circumvention in the form of software.

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 WCT and WPPT and of the EU Copyright Directive were adopted in 2004 (published on April 30, 2004); no new revisions were contemplated in 2010. The

⁶For more details and the history of this issue, see IIPA's 2010 submission at <http://www.iipa.com/rbc/2010/2010SPEC301POLAND.pdf>.

2004 amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004). Unfortunately, the 2004 amendments failed to fully comply with the WCT and WPPT, and also fail to fully implement various EU Directives. No legislative discussions on the amendments are pending. Below is an illustrative listing of some of the troubling issues, where key deficiencies continue to include:

- Inadequate legal protection of TPMs – 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 and overbroad exceptions to protection, including the private copy exception. 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 Berne, in Article 5.5 of the EU Copyright Directive, in the WCT and WPPT, 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 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.

Copyright amendments in the area of collective rights management were adopted and entered into force on October 21, 2010. The provisions introduce extensive procedures for adopting tariffs for the exploitation of copyrighted works by the Copyright Law Commission. The provisions are currently in the process of being implemented. Representatives of the Ministry of Culture and National Heritage have been actively involved in the development of collective management reform to improve the position of rights holders in fixing tariffs and in the system of the Copyright Law Commission’s operation. As proposed, the amendments went 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 rights holders with adequate representation in the process of tariff creation by the Copyright Law Commission. Rights holders will monitor implementation of the amendments as adopted to determine whether concerns are resolved in 2011.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas. MPAA 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, goes beyond what is prescribed in the EU's Television Without Frontiers Directive (even under its new form as the Audiovisual Media Services Directive), and 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 burden MPAA member companies with the cost of financing the government's cultural policy. Further, the language of the law appears to place a double taxation burden on distributors, including MPAA members.

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