

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Poland be placed on the Watch List in 2022.<sup>1</sup>

**Executive Summary:** Internet piracy is a significant problem in Poland, severely hampering Poland's market for legitimate sales of film and television content, music, books, and entertainment software. In June 2017, Deloitte published a report that found that in 2016 Internet piracy cost Poland over 3 billion PLN (US\$757 million) of lost GDP, 836 million PLN (US\$211 million) of lost tax revenues, and 27,500 lost jobs.<sup>2</sup> According to the report, in 2016, 51 percent of Internet users in Poland (more than 12 million Poles) used websites offering illegal access to content, and illegal websites in Poland received revenues of 745 million PLN (US\$188 million). Moreover, as discussed below, more recent data, including from the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2021 and APP Global's Piracy Landscape Report from December 2019, demonstrates that the rate of Internet piracy has continued to grow.

Unfortunately, the Government of Poland has failed to provide adequate and effective enforcement mechanisms to combat online piracy. Poland should implement Article 8(3) of the European Union (EU) Copyright Directive (2001/29/EC), which requires Poland to ensure that no-fault injunctive relief is available against intermediaries whose services are used for piracy. Poland also has failed to institute best global practices for Internet service provider (ISP) liability, including failing to properly implement Articles 14 and 15 of the EU E-Commerce Directive (2000/31/EC). Furthermore, Poland's enforcement officials do not take effective actions against online piracy under the existing law and Poland maintains several market access barriers that limit consumers' access to legitimate content. Poland should address the deficiencies in its enforcement framework, including the lack of adequate and effective mechanisms to combat online piracy.

#### **PRIORITY ACTIONS REQUESTED IN 2022**

- Ensure adequate and effective enforcement against online piracy, including by correctly implementing Article 8(3) of the EU Copyright Directive.
- Ensure Poland's ISP liability regime is consistent with global best practices, including by fully implementing Articles 14 and 15 of the EU E-Commerce Directive.
- Ensure the faithful implementation of Article 17 of the DSM Copyright Directive.
- In accordance with case law in the EU, take effective enforcement actions against unlicensed services, including sites that link to pirated content.
- Improve criminal enforcement by following through on more criminal investigations and issuing deterrent sentences against infringers.

---

<sup>1</sup>For more details on Poland's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Poland's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>A summary of the 2017 Deloitte report on Internet Piracy is available in English at [http://zpvav.pl/pliki/aktualnosci/Deloitte/Broszura\\_piractwo\\_EN\\_Final.pdf](http://zpvav.pl/pliki/aktualnosci/Deloitte/Broszura_piractwo_EN_Final.pdf).



## **THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN POLAND**

Online piracy is a serious problem in Poland. A recent APP Global report found that operators of known infringing sites, such as *Filman.cc*, operate in the open and enjoy a positive perception by the public.<sup>3</sup> Many piracy sites even are permitted to maintain the appearance that they are legal businesses. For example, *cda.pl* is listed on the Warsaw Stock Exchange and *Chomikuj* has filed defamation claims for being referred to as pirates. The piracy landscape is dominated by piracy streaming services that hinder the growth of legitimate streaming services in the country. According to the APP Global report, a selection of 156 websites that provide access to infringing content generated 193 million visits from Poland in December 2019. The majority (90%) of the visits to these sites were to local Polish sites.<sup>4</sup> Poland also has seen recent growth of pirate IPTV services, which provide bundles of illegal retransmissions of linear channels, often via a dedicated set top box or simply via an app. These services are typically subscription-based and examples include *weeb.tv*, *hejo.tv*, *polbox.tv*, and *siptv.pl*. In addition, according to the video game industry, from the time period of December 2020 – November 2021, Poland ranked ninth globally in peer-to-peer (P2P) piracy.

According to IFPI's 2021 Music Consumer Study, Poland had the highest music piracy rate out of seven EU countries included in the study, with 37.9% of Internet users from Poland (and 50.1% of 25-34-year-olds) having pirated music at least once in the previous month. According to the Study, the most popular piracy destinations in Poland were domestic-run cyberlockers that targeted a Polish audience. For example, *Chomikuj* had been used by 16% of users to download music in the previous month and had 18.4 million visits from Poland in Q3 2021. *Ulub.pl* had been used by 13% of Internet users with 6.4 million visits in Q3. Cyberlocker visits rose by 8.1% between Q2 and Q3 2021. The Study highlights that stream ripping is the key music piracy threat in Poland. 32% of Internet users said they had used stream ripping to illegally download music, while 17% had obtained pirated music from cyberlockers like *Chomikuj* and *Ulub*, and 11% had downloaded from BitTorrent sites like *ThePirateBay* and *1337x*. The most popular stream ripping websites received millions of visits according to data from SimilarWeb, including *2conv* (3.1 million visits from Poland in Q3 2021), *YTMP3.cc* (2.6 million visits from Poland in Q3 2021), *SaveFrom.net* (1.6 million visits from Poland in Q3 2021), and Polish language site *Pobieracz.net*. Stream ripping activity was up 9.1% between Q2 and Q3 2021.

Poland also suffers from other forms of piracy, including instances of illegal camcording and hard goods piracy. Poland is flooded with imports of toys and other goods, illegally bearing trademarks owned by producers of audiovisual content, hindering their ability to exploit these marks in Poland. Despite efforts of the customs administration, illegal goods manufactured in Asia are easily accessible in Poland.

Enforcement against online piracy is extremely inconsistent and wholly inadequate. Most criminal referrals do not proceed and cases that are pursued are often struck or dropped without justification. The operators of websites that post infringing hyperlinks, whether text links or embedding streaming links, try to avoid responsibility by arguing they are merely linking to external content, which has already been made available to the public. In addition, Poland's courts are backlogged and judges issue non-deterrent sentences in copyright infringement cases. The creation of specialized intellectual property (IP) courts has not brought about needed improvements. Moreover, the Polish press recently reported that the IP courts have refused to allow plaintiffs to demand names of physical persons (private individuals) engaged in infringing activities, unless they are engaged in a registered business activity. The practice has been that the names of such individuals could be obtained through a court order. Recently, however, the Circuit Court in Warsaw issued a refusal and the Court of Appeals hearing the case in the second instance directed an official

---

<sup>3</sup>See APP Global piracy landscape report, December 2019 <https://mpaa.sharepoint.com/b/s/EMEAlegal/EWddDjdwu49Bky-YdiQH8kQBex8CMRp8vUkVh3Ro8JOrqQ?e=OgREll>.

<sup>4</sup>See id.

judicial question to the Supreme Court, which is to provide an interpretation for this case. Civil actions against pirate services are ineffective due to the slowness of the legal process in Poland. For example, in 2015 Polish film makers obtained a court order against the *Chomikuj.pl* content hosting platform related to the availability of infringing copies of Polish movies, requiring that *Chomikuj* implement various measures to prevent the availability of infringing content. This decision was confirmed by the Krakow appeals court in 2017 but remains on appeal before the Supreme Court. Finally, as discussed below, the Government of Poland has not implemented Article 8(3) of the EU Copyright Directive, which would provide for a key enforcement tool against online piracy, and instead leaves piracy services free to continue operating and growing unencumbered in Poland.

## **COPYRIGHT LAW AND RELATED ISSUES**

Poland's legal framework is inadequate, leaving copyright owners unable to effectively protect and enforce their rights online in the face of devastating, widespread piracy. Poland lacks adequate enforcement mechanisms against online piracy because it has not implemented Article 8(3) of the EU Copyright Directive, which requires Poland to provide for no-fault injunctive relief against intermediaries whose services are used for infringement. In addition, Poland's ISP liability framework falls short of global best practices and the EU Directive. Amending Poland's copyright enforcement laws to provide a legal basis for injunctive relief and to improve its ISP liability framework were among the recommended conclusions of the 2017 Deloitte report on Internet piracy.<sup>5</sup> To address its escalating Internet piracy problem, Poland should enact enforcement mechanisms that are adequate and effective to combat online piracy, including by implementing Article 8(3) of the EU Copyright Directive and Articles 14 and 15 of the EU E-Commerce Directive. In addition, Poland should ensure that its implementation of Article 17 of the DSM Copyright Directive is done faithfully.

**Lack of Injunctive Relief:** Article 8(3) of the EU Copyright Directive requires Member States to ensure that injunctive relief is available “against intermediaries whose services are used by a third party to infringe a copyright or related right.” Unfortunately, Poland has not implemented this provision. Since accession to the EU, the Government of Poland has claimed that its existing legal tools are sufficient to achieve the goals set by the Directive and, therefore, implementation of this Article is unnecessary. Yet, as discussed above, piracy remains a significant problem in Poland and existing tools are inadequate for rights holders to effectively enforce their rights online. The lack of injunctive relief remedies is particularly problematic given the popularity of local, Polish language pirate sites.

Due to the refusal of the Government of Poland to enact effective online enforcement mechanisms, domestic and international rights holders lodged complaints against Poland with the European Commission (EC) for failure to implement Article 8(3) of the Copyright Directive (complaint reference CHAP(2015)02644). In response, the Government of Poland asserted that there is no evidence that its legal system is not in line with Article 8(3) and that its current legal regime has achieved the Article's objective, pointing to Articles 422 and 439 of the Civil Code and Article 11 of the Enforcement Directive. Among other things, rights holders responded that while the Civil Code provisions regulate aspects of civil enforcement, the provisions do not provide a legal basis for no-fault injunctive relief against third parties. A 2017 Warsaw Court of Appeals decision explicitly confirmed that Article 8(3) was not implemented into Poland's legal system, although the court dismissed the application to disable access to an infringing service (*Chomikuj.pl*) on other grounds— that the application did not properly name the parties against whom injunctive relief was sought—and the part of the decision relating to the implementation of Article 8(3) was not central to the holding.

In sum, there is confusion because the Polish government and the Courts disagree on the state of the law. The Government of Poland can easily clarify the situation by taking the necessary steps to implement Article 8(3) in

---

<sup>5</sup>See supra fn. 2.

order to provide rights holders with a mechanism for adequate and effective enforcement against online piracy, which continues to grow unabated.

**Internet Service Provider (ISP) Liability Framework Fails to Meet Global Best Practices:** Poland's ISP liability framework is inadequate because it does not meet global best practices for notice and takedown and does not provide for other measures demonstrated to be effective in preventing or restraining infringement. Poland has incorrectly implemented Articles 14 and 15 of the EU E-Commerce Directive, which provide the minimum requirements for the ISP liability framework in the EU. Poland's Act on Providing Services by Electronic Means (E-Services Act), which implements Articles 14 and 15 of the EU E-Commerce Directive, has various shortcomings that have made it extremely difficult for rights holders to effectively enforce their rights. In a complaint to the EC (case EU-Pilot 8165/15/CNCT), rights holders raised these shortcomings, including the following: (i) a service provider is required to take action only if it has actual knowledge of the infringement, not if there is "awareness of facts or circumstances from which the illegal activity or information is apparent," as required by the E-Commerce Directive; (ii) the law only requires "disabling access to infringing content" as opposed to "removing" it, as required under the Directive; and (iii) there is no legal basis to seek injunctions against service providers, as required in Article 14(3) of the Directive. The Polish government responded to the allegations by, in effect, arguing that these shortcomings were to some extent already addressed and remedied by case law. However, the situation remains unclear and, to avoid commercial and legal uncertainty, the law should be changed to comply with international and EU standards.

Draft legislation to amend Poland's e-commerce legislation to address these deficiencies has been pending since April 2012, but no progress has been made since then. In June 2016, the Council for Digitalization, an advisory body to the Minister of Administration and Digitization, proposed a resolution to resume work on the amendments to the e-commerce legislation under the current government. However, the advisory body is no longer active, and the matter currently rests with the Ministry of Digitization, with no discussions currently pending regarding the amendment of Poland's e-commerce legislation, despite continued encouragement by rights holders.

**Implementation of Article 17 of the DSM Copyright Directive:** Although Poland did not meet its obligation to implement the DSM Copyright Directive by June 2021, transposition legislation is expected to move forward soon and should be completed in the second quarter of 2022. In the meantime, the Ministry of Culture has issued a motion document (a formal approval to begin drafting a legislative proposal) that describes the key elements of the transposition. Overall, the motion document indicates that Poland intends to implement Article 17 of the DSM Directive faithfully. That being said, according to recent reports, the government is considering to implement Article 17 together with an extended collective licensing mechanism, which would weaken exclusivity of copyright in Poland.

The Government of Poland has also separately challenged aspects of Article 17 with the Court of Justice of the EU (CJEU). So far, only the Advocate General Opinion has been released, which advised rejection of the challenge of Poland's government. The CJEU judgement in this case is expected early in 2022.

## **MARKET ACCESS**

**Foreign ownership restrictions:** Pursuant to Article 35 of the 1992 Radio and Television Law, Poland limits ownership in broadcasting companies to 49 percent. Poland's Parliament is currently discussing a draft law that, if enacted, would further complicate the ability of U.S. companies to invest or support Polish broadcasting companies.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

The deficiencies in Poland's enforcement framework, including the lack of effective remedies to combat pervasive online piracy, are inconsistent with Poland's obligations under the TRIPS enforcement provisions, including Articles 41 and 61.