

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Poland be placed on the Watch List in 2023.<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 the experience of the copyright industries, all indications are that the situation has worsened in recent years. 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% 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). Recent data, including from the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) and APP Global's Piracy Landscape Report from December 2019, demonstrates that the rate of Internet piracy has continued to grow.

The Government of Poland has so far failed to provide adequate and effective enforcement mechanisms to combat online piracy, raising questions regarding compliance with the enforcement provisions of the WTO TRIPS Agreement. Poland should make clear that its national legislation is in line with European Union (EU) law by implementing Article 8(3) of the EU 2001 Copyright Directive (2001/29/EC), which ensures that no-fault injunctive relief is available against intermediaries whose services are used for piracy. The Polish Government chose not to implement this provision, despite an obligation to do so, under the assumption that the prescribed injunctive relief is already available in Polish civil law. However, Polish courts have held that Polish civil law does not provide no-fault injunctive relief as required by Article 8(3). The Polish legislature should clarify the issue by finally implementing into national law Article 8(3), which dates back to 2001.

Although Poland 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), the situation could be remedied through proper application of the EU Digital Services Act. Regarding the 2019 EU Digital Single Market (DSM) Copyright Directive (2019/790) and SatCab Directive (2019/789), the Polish transposition is still ongoing. Unfortunately, the most recent draft legislation includes several concerning provisions that deviate to some extent from the Directives.

Finally, Poland's enforcement officials do not take sufficient 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 2023**

- 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.
- Fully implement the DSM Copyright Directive.
- Take effective enforcement actions against unlicensed services, including sites that link to pirated content, in

<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

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

- accordance with EU case law.
- Improve criminal enforcement by following through on more criminal investigations and issuing deterrent sentences against infringers.

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

Online piracy is a serious problem in Poland. A 2019 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, even though the site has been structurally infringing for many years and was declared directly responsible for copyright infringement by the Polish Supreme Court in May 2022.<sup>4</sup> 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>5</sup> Poland also has seen recent growth of pirate Internet protocol television (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*, and *polbox.tv*. In addition, according to the video game industry, in 2022 Poland ranked eighth globally in the number of connections by peers participating in unauthorized file sharing of video games of all kinds on peer-to-peer (P2P) networks (up from ninth globally the prior year), as well as of incidents of P2P infringement of games on personal computers.

According to IFPI's 2022 MCS, Poland had the highest music piracy rate out of eight EU countries included in the study, with 38.5% of Internet users from Poland (and 50.5% of 16-24-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 12.5% of users age 16-64 to download music in the previous month and had 19.4 million visits from Poland in Q3 2022. The Study highlights that stream ripping is the key music piracy threat in Poland. 30.9% of Internet users said they had used stream ripping to illegally download music, while 24% had obtained pirated music from cyberlockers like *Chomikuj* and *Ulub*, and 13% 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 *2convert.net* (2.2 million visits from Poland in Q3 2022), *mp3y.download* (2.0 million visits from Poland in Q3 2022), *savefrom.net* (1.3 million visits from Poland in Q3 2022), and Polish language site *Pobieracz.net* (1 million visits from Poland in Q3 2022).

Poland also suffers from other forms of piracy, including instances of illegal camcording (with two new cases reported in 2022) 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 inconsistent and inadequate. The operators of websites that post infringing hyperlinks, whether text links or embedded streaming links, try to avoid responsibility by arguing they are merely linking to external content that has already been made available to the public. The creation of specialized intellectual property (IP) courts in 2020 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

<sup>3</sup> See APP Global piracy landscape report, December 2019.

<sup>4</sup> 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. After a lengthy appeals process, in May 2022 the Supreme Court finally ruled that platforms sharing illegal content from their users are indirect infringers and thus should be held liable for abetting. According to the decision, the illegal content must disappear from *Chomikuj.pl* and the portal must pay compensation to the creators in the amount of 540,000 PLN. However, it is important that *Chomikuj.pl* has an active role in content sharing activities. While this is a positive development, the length of time for these proceedings illustrates how these delays can undermine effective civil enforcement.

<sup>5</sup> See id.

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 judicial question to the Supreme Court, which decided not to respond to the question, so justification of this decision has yet to be obtained. Civil actions against pirate services are generally ineffective due to the slowness of the legal process in Poland. Finally, as discussed below, the Government of Poland has not implemented Article 8(3) of the EU 2001 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 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.<sup>6</sup> In addition, Poland's ISP liability framework falls short of global best practices and EU law. 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>7</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. 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 held 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 May 2022, the Polish Supreme Court finally rendered a long-awaited decision in the *Chomikuj.pl* case. Although the Supreme Court finalized the judgement of the Court of Appeals, affirmatively declaring *Chomikuj.pl* directly responsible for copyright infringement, the case did not clarify whether no-fault injunctive relief is available under Polish law

---

<sup>6</sup> No-fault injunctive relief refers to injunctive relief consistent with Article 8(3) of the EU Copyright Directive 2001/29, (Copyright Directive), which requires that injunctive relief is available "against intermediaries whose services are used by a third party to infringe a copyright or related right." As discussed in Recital 59 of the Copyright Directive, "In many cases such intermediaries are best placed to bring such infringing activities to an end." Accordingly, injunctive relief should be available "against an intermediary who carries a third party's infringement of a protected work...even where the acts carried out by the intermediary are exempted under Article 5."

<sup>7</sup> See *supra* fn. 2.

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) 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 "to remove or to disable" it, as required under the Directive; and (iii) there is no legal basis to seek injunctions against service providers, as required by Article 14(3) of the Directive, Article 8(3) of the 2001 EU Copyright Directive, and the 2004 EU Intellectual Property Rights (IPR) Enforcement Directive (2004/48/EC). 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. The situation remains unclear and, to avoid commercial and legal uncertainty, the law should be changed to comply with international and EU standards. However, the Digital Services Act entered into force in November 2022, and the incorrect implementation of Articles 14 and 15 of the EU E-Commerce Directive will no longer be relevant once the Digital Services Act becomes applicable in February 2024.

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 the 2019 EU Digital Single Market (DSM) Copyright Directive (2019/790) and SatCab Directive (2019/789):** The Ministry of Culture published a bill in June 2022 to amend the Copyright Act to implement both the DSM Copyright Directive and the SatCab Directive.<sup>8</sup> Subsequent versions of the bill, after public consultations and inter-governmental consultations, were published in November 2022 and January 2023. The governmental phase is close to completion and the draft should be submitted to Parliament during the first quarter of 2023.

The draft legislation includes several concerning provisions. For example, regarding the transposition of Article 17 (concerning the use of protected content by online content sharing service providers) of the DSM Copyright Directive, the Polish draft notably limits automated blocking to obvious and indisputable infringements. Poland had been critical of Article 17 for several years and filed a complaint against Article 17(4)(b) and (c) following the adoption of the Directive.

In addition, the revised draft bill proposes a non-waivable remuneration right, subject to mandatory collective rights management, for music performers, authors, and performers in respect of on-demand use of audiovisual works, including video-on-demand (VOD) use. The remuneration must be paid in addition to the contractual remuneration received by co-authors and performers in both sectors. This remuneration would make licensing more complicated as

---

<sup>8</sup> SatCab Directive is Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, and amending Council Directive 93/83 [2019] OJL130/82.

digital services and streaming platforms would need to negotiate separately with the various collective management organizations (CMOs) representing performers and authors. This remuneration right, coupled with the requirement of the intervention of CMOs adds additional unnecessary burdens, both financial and administrative, on digital music services, complicating their launch in Europe and chilling the launch of streaming services in Poland in particular. This scheme impedes proper functioning of the digital single market, the primary objective of the DSM Directive. CMOs mandated by law to exercise remuneration rights interfere with individual licensing and negotiation of compensation arrangements with authors and performers, ultimately undermining their ability to negotiate primary compensation, including up front lump-sum compensation and additional compensation tied to the success of musical or audiovisual works. Such compensation may be reduced in anticipation of remuneration demands on their behalf by CMOs throughout the exploitation chain. In addition, the rules for CMOs are not clear regarding on-demand use of audiovisual works, adding market uncertainty and potential financial burdens on digital services and authors and performers.

There is no evidence justifying this remuneration right in Poland. Such a right would conflict with the normal exploitations of the content and undermine the free exercise of exclusive rights and contractual freedom, thus running afoul of international copyright norms. Moreover, the provision conflicts with a key objective of the U.S.-EU Trade and Technology Council that, as provided in the Inaugural Joint Statement, “the European Union and the United States intend to work to identify and avoid potential new unnecessary barriers to trade in products or services derived from new and emerging tech, while ensuring that legitimate regulatory objectives are achieved.”<sup>9</sup> For the reasons described, the additional right would in fact contravene this objective, creating a barrier to the cross-border provision of online content services and constituting a disproportionate limitation on the freedom of the online distributors of content to conduct their business, which is particularly egregious considering digital service providers have already negotiated licenses for the rights.

The bill also proposes that the right to a work or performance may be revoked if a contract includes an obligation for the distribution of the work or performance and the work or performance is not distributed within the timeframe as set forth in the contract. If the contract does not provide for a timeframe for the distribution of the work or performance, the right may be revoked after 10 years, provided that an additional six-month term for the distribution of the work or performance is granted.

Finally, the bill would implement “direct injection” as a part of the definition for broadcasting. On the notion of the direct injection, IIPA proposes that in line with Recital (20) of the SatCab Directive, the Polish legislation makes it clear that participation of a broadcasting organization and a signal distributor in the single act of communication to the public should not give rise to joint liability on the part of the broadcasting organization and the signal distributor for that act of communication to the public.

**Private Copying Levy:** The Polish government introduced a bill in 2022 amending the private copying levy regulations. In particular, the bill would increase the scope of devices subject to the copying levy and the entities obliged to make the payment and increase the levy from three percent to up to four percent of an amount due from the sale or market value. The specific percentage relating to the specific types of the devices and carriers will be determined by the Minister of Culture, by an ordinance, guided by the findings of a report prepared by the Polish Chamber of Artists on the of fair use of rights in Poland. Unfortunately, these changes will increase prices without accomplishing its main purposes, which is to compensate rights holders for losses suffered due to private copying. That is because a large portion of the proceeds from the levy is directed to a social fund for artists.

## **MARKET ACCESS**

**Broadcast quotas:** Effective January 1, 2022, non-Polish EU broadcasters over a certain size are required to contribute 1.5% of revenues from the Polish market to the Polish Film Fund of Polish Film Institute (PISF). Also effective

---

<sup>9</sup> See *U.S.-EU Trade and Technology Council Inaugural Joint Statement*, September 29, 2001, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/u-s-eu-trade-and-technology-council-inaugural-joint-statement/>.



in January 2022, broadcasters established in Poland are required to devote at least five percent of their quarterly transmission time to European programming produced by independent producers in the period of five years prior to broadcasting, excluding news services, advertising, teleshopping, sports broadcasts, text broadcasts, and game shows. However, the broadcasters of specialized television channels indicated in an ordinance of the National Broadcasting Council (the Polish broadcasting authority) are required to provide a lower proportion of European programming produced by independent producers over a period of five years prior to broadcasting. There are additionally programming quota requirements for broadcasters that require domestic broadcasters to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in Polish and at least 50% of their quarterly broadcasting time to European programming.

**Video-on-demand (VOD) quotas:** Effective in January 2022, VOD service providers established in Poland are required to devote at least 30% of the catalogue to European programming, including those originally produced in Polish, and ensure the appropriate programming prominence of such programming in the catalogue. The basis for calculating the percentage is the amount of programming made available in the catalogue in a given calendar quarter. One season of a series is considered as one piece of programming. Per the July 2020 Act of Cinematography, VOD service providers over a certain size are also required to contribute 1.5% of revenues from the Polish market to the Polish Film Fund of the PISF.

**Foreign ownership restrictions:** Pursuant to Article 35 of the 1992 Radio and Television Law, Poland limits ownership in broadcasting companies to 49%. IIPA appreciates President Duda's veto of an earlier effort to undermine foreign investment and encourages vigilance against any future such efforts.

**Regulatory uncertainty:** In October 2022, Poland appointed new Commissioners to the National Broadcasting Council. Some of these Commissioners appear to want to limit the reach of commercial broadcasters to favor public television, including by delaying license renewals.

## **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 WTO TRIPS Agreement enforcement provisions, including Articles 41 and 61.