

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland be placed on the Watch List in 2024.¹

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. Recent studies, including a July 2023 Deloitte report examining Internet piracy in Poland, the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2023 (MCS), and APP Global's Piracy Landscape Report from December 2019, demonstrate the magnitude of the growing Internet piracy problem in Poland. 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 finally implementing Article 8(3) of the EU 2001 Copyright Directive (2001/29/EC) into its national law. 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 draft legislation prepared during the previous Polish government includes several concerning provisions that deviate to some extent from the Directives. Finally, Poland's enforcement officials do not take sufficiently effective actions against online piracy under the existing law, and Poland maintains several market access barriers that limit consumers' access to legitimate content.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Ensure adequate and effective enforcement against online piracy including by following through on more criminal investigations and issuing deterrent sentences against infringers.

Legal Reforms

- Correctly implement Article 8(3) of the EU Copyright Directive and take effective enforcement actions against unlicensed services, including sites that link to pirated content, in accordance with EU case law.
- Ensure Poland's ISP liability regime is consistent with global best practices.
- Fully implement the DSM Copyright Directive.

Market Access

- Remove market access restrictions that negatively impact the U.S. creative industries.

ENFORCEMENT

- **Ensure adequate and effective enforcement against online piracy including by following through on more criminal investigations and issuing deterrent sentences against infringers.**

Online piracy is a serious problem in Poland. In July 2023, Deloitte published a report on Internet piracy of video-on-demand (VOD) and live streaming audiovisual content that found that as of July 2023 the losses of the

¹ 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/2024/01/Appendix-B-2024.pdf>.

audiovisual market due to Internet piracy in Poland may reach approximately three billion PLN (US\$752 million) annually, costing approximately 1.8 billion PLN (US\$451 million) of lost revenues of the State Treasury.² According to the report, approximately 40% of Internet users in Poland used websites offering illegal access to content, and in 2023 approximately 7.3 million Internet users in Poland used websites offering illegal access to content. The value of consumption of pirate audiovisual content in Poland amounts to approximately 7.36 billion PLN (US\$1.84 billion) annually. While this represents a decrease of about 11% over the past six years, the Deloitte report predicted a growth in piracy levels between 2023 and 2030 due to the emergence of new pirate online content services that use new payment technologies (such as cryptocurrencies) that are more difficult to track and global piracy services targeting Polish users. Among other things, the report recommended amending Poland's copyright enforcement laws to provide a legal basis for injunctive relief and to improve its ISP liability framework.

Some operators of known infringing sites, such as *Filman.cc*, operate in the open and enjoy a positive perception by the public. Many piracy sites are even 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 2022.³ The content landscape is populated by piracy streaming services that hinder the growth of legitimate streaming services in the country. A review of SimilarWeb traffic data shows that 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.⁴ 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 2023 Poland ranked eleventh 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.

According to IFPI's 2023 MCS, Poland, for the third year running, had the highest music piracy rate out of eight EU countries included in the study: 37% of Internet users from Poland (and 50.9% of 16-24-year-olds) had pirated music at least once in the previous month.⁵ The MCS highlighted that stream ripping remained the key music piracy threat in Poland. 28% 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 12% 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 *notube.net* (3.4 million visits from Poland in Q4 2023), *savefrom.net* (3.2 million visits from Poland in Q4 2023), *y2down.cc* (2.3 million visits from Poland in Q4 2023), and Polish language site *Pobieracz.net* (1.2 million visits from Poland in Q4 2023).

Poland also suffers from other forms of piracy, including instances of illegal camcording (with two 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. Criminal and civil actions against pirate services are generally ineffective due to the slowness of the legal process in Poland. Criminal investigations languish

² See Deloitte 2023 piracy study, available in Polish at https://sygnal.org.pl/wp-content/uploads/2023/07/2023_raport_kradziezinternetwideo_deloitte.pdf.

³ 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 *Chomikuj* was taking an active role in sharing illegal content from its users 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. 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.

⁴ See id.

⁵ See International Federation of the Phonographic Industry (IFPI), *Engaging With Music 2023*, available at https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023_full-report.pdf.

and do not result in deterrent sentences. Polish courts are seriously backlogged. The operators of websites that post infringing hyperlinks, whether text links or embedded streaming links, attempt 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 has 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 judicial question to the Supreme Court, which decided not to respond to the question. Thus, justification of this decision has yet to be obtained. Finally, as discussed below, Poland's legal framework is inadequate, leaving copyright owners unable to effectively enforce their rights online and piracy services free to continue operating and growing unencumbered. In particular, 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.

LEGAL REFORMS

- **Correctly implement Article 8(3) of the EU Copyright Directive and take effective enforcement actions against unlicensed services, including sites that link to pirated content, in accordance with EU case law.**

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.”⁶ 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. EU law allows Member States to rely on existing law, but the fact remains that Article 8(3) injunctive relief—a mature remedy in most other Member States—is not established in Poland. The lack of effective 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 the injunctive relief required by Article 8(3). Implementation of Article 8(3) was not central to the holding of the 2017 Warsaw Court of Appeals decision regarding the infringing service *Chomikuj.pl*. 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 injunctive relief in line with Article 8(3) is available under Polish law.

In sum, there is confusion because the Polish government and the Courts disagree on the state of the law. The Government of Poland should 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.

- **Ensure Poland's Internet service provider (ISP) liability regime is consistent with global best practices.**

⁶ See Article 8(3) of the EU Copyright Directive 2001/29 (Copyright Directive). Recital 59 of the Copyright Directive explains, “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.”

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, but discussions were put on hold. The process to amend Poland's e-commerce legislation began in January 2024, as the Polish Ministry of Digitalization announced public consultations regarding a bill implementing the Digital Services Act.

- **Fully implement the DSM Copyright Directive.**

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.⁷ Subsequent versions of the bill, after public consultations and inter-governmental consultations, were published in November 2022 and January 2023. Due to objections raised by various stakeholders, the draft legislative proposal was not approved by the government and was not sent to Parliament before the October 2023 legislative elections.

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 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 digital services and streaming platforms would need to negotiate separately with the various collective management organizations (CMOs) representing performers and authors. The remuneration right, coupled with the requirement of the intervention of CMOs add 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

⁷ 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.

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.”⁸ 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 ten 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 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.

MARKET ACCESS

- **Remove market access restrictions that negatively impact the U.S. creative industries.**

Poland has several unreasonable market access barriers that should be removed, or at least limited, to increase consumers’ access to legitimate content. These include:

Broadcast Quotas: Domestic broadcasters must dedicate over 33% of their quarterly broadcasting time to programming produced originally in Polish and at least 50% of their quarterly broadcasting time to European programming, excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping, and 10% of this must be by independent producers. In addition, half of this 10% must have been produced in the last five years.

Mandatory Financial Contributions: Starting in 2022, non-domestic EU broadcasters must contribute 1.5% of revenues from the Polish market to the Polish Film Fund.

⁸ 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/>.

Video-on demand (VOD) Quotas: As prescribed under EU law, domestic on-demand services must allocate at least 30% of their catalogues to European works and ensure the prominence of those works.

Foreign Ownership Restrictions: Poland limits non-European Economic Area (EEA) ownership in a broadcasting company to 49%. A broadcasting license may be granted to a foreign person, or a subsidiary controlled by a foreign person, whose registered office or permanent place of residence is located in EEA.

Tax Treatment of U.S. Audiovisual Works: The Cinematography Law includes levies on box office, broadcasters and cable operators' revenue, revenue of providers of VOD services, and DVD sales to finance subsidies for Polish and European films.

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 (General Obligations) and 61 (Criminal Procedures).