

**Team for Counteracting Infringements of Copyright
and Related Rights**

REPORT

on observance of

COPYRIGHT

AND

RELATED RIGHTS

IN POLAND

for 2007

Warsaw, 2008

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I. Introduction

„Report on observance of copyright and certain related rights“ (hereinafter also referred to as „the Report“) has been elaborated pursuant to par. 3 of the regulation of the President of the Council of Ministers of 9 November 2000 establishing the Team for Protection of Copyright and Related Rights (hereinafter also referred to as „the Team“).¹ The document has been drafted on the basis of the material submitted by public bodies, organisations for collective management of copyright and related rights and other social partners acting in the field of protection of copyright and related rights. This is the seventh edition of the Report.

The Report focuses on assessment of facts and phenomena on the field of copyright and related rights, which took place in 2007, as well as on description of activities which began in 2007 and were continued or completed in 2008.

Many tasks have been and still are valid. Activities related to protection of copyright, related rights and other rights to intellectual property, such as reduction of piracy in fairs and markets, maintaining high level of control at the state border, continuous training of employees and officers, are long term tasks, which are constant by nature. Therefore successive reports include aspects, which are invariable in cases related to these infringements. Some other tasks are of variable or individual nature. Development of IT systems supporting activities related to combating counterfeiting and piracy, or various educational programmes and activities may be mentioned among these.

The study contains detailed data on the number of cases related to infringement of copyright, related rights and other intellectual property rights, as well as on the quantities of pirated or counterfeited goods intercepted.

The Report refers only to a certain - though very important and visible – aspect of problems related to infringement of intellectual property rights. However legal provisions,

¹ Regulation no. 83 of the President of the Council of Ministers of 9 November 2000 creating the Team for Counteracting Infringements of Copyright and Related Rights (M.P. No. 36, item. 727). „Section 3 The tasks of the Team include preparing motions and proposals related to facilitating coordination of activities of government administration within fighting the infringement of copyright and related rights, in particular:

- 1) Presenting the President of the Council of Minister with current analysis on the situation within respecting copyright and related rights,
- 2) Presenting the activities aimed at counteracting the infringement of copyright and related rights and fighting infringements,
- 3) Preparing proposals of legislative changes aimed at more effective enforcement of copyright and related rights, carrying out interim evaluation of the development of activities within fighting the infringement of copyright and related rights.”

joint initiatives undertaken together with other public administration units, such as the Patent Office of the Republic of Poland, or finally combating economic crime, smuggling, protection of the borders, are closely linked and related to a much broader area than simply protection of copyright and related rights. These cases relate to intellectual property rights in general, including such rights as a unique right to a database or industrial property rights. In order to avoid misleading impression that some of the activities carried out by specific services are related only to a certain aspect of the rights while omitting others, this document – despite the fact that by definition it is devoted to copyright and related rights – also refers to „other intellectual property rights“.

Previous reports have met with approval both in Poland and abroad. They were presented to – *inter alia* – European Commission and United States' administration. Polish systemic solution met with interest from the European Commission and UN Economic Commission for Europe.

The report for 2007 will also be translated into English and sent to international partners of Poland.

II. General issues

1. Current legal environment

1.1. Acts of Polish law

The primary legal act, on which the protection of copyright and related rights is based, is the Act of 4 February 1994 on copyright and related rights (Journal of Laws 2006, No. 90, item 631, as amended). Other provisions, auxiliary in nature, include in particular:

- Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws No 43, item 296, as amended);
- the Broadcasting Act of 29 December 1992 (Journal of Laws 2004, No. 253, item 2531, as amended);
- Act of 16 April 1993 on combating unfair competition (Journal of Laws 2003, No. 153, item 1503, as amended);
- Act of 6 June 1997, Penal Code (Journal of Laws, No. 88, item 553, as amended);
- Act of 30 June 2000, Industrial Property Law (Journal of Laws 2003, No. 119, item 1117, as amended);
- Act of 27 June 2001 on protection of databases (Journal of Laws, No. 128, item 1402, as amended);
- Act of 5 July 2002 on protection of certain services provided by electronic means and based on or consisting in conditional access (Journal of Laws No. 126, item 1068, as amended);
- Act of 18 July 2002 on provision of services by electronic means (Journal of Laws No. 144, item 1204, as amended);
- Act of 19 June 2004, Customs Law (Journal of Laws, No. 68, item 622, as amended);
- regulation of the Minister of Justice of 16 October 2002 on designation of district courts adjudicating cases related to infringement of copyright and related rights (Journal of Laws No. 180, item 1510, as amended);

- regulation of the Minister of Culture of 2 June 2003 on designation of categories of devices and media used for recording of productions and payments levied on sales of these devices and carriers carried out by producers and importers (Journal of Laws No. 105, item 991);
- regulation of the Minister of Culture of 27 June 2003 on payments made by owners of reprographic equipment (Journal of Laws No. 132 , item 1232);
- regulation of the Minister of Culture of 30 April 2004 on the register of information on manufacturing of optical discs and types of identification codes (Journal of Laws No. 124, item 1301);
- regulation No. 83 of the President of the Council of Ministers of 9 November establishing the Team For Counteracting Infringements of Copyright and Related Rights (PM No. 36, item 727).

1.2. International agreements

- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed at Rome on 26 October 1961 (Journal of Laws 1997, No. 125, item 800);
- Convention establishing World Intellectual Property Organisation, signed at Stockholm on 14 July 1967 (Journal of Laws 1975, No. 9, item 49);
- Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, signed at Paris on 24 July 1971 (Journal of Laws 1990, No. 82, item 474);
- Universal Copyright Convention revised at Paris on 24 July 1971 (Journal of Laws 1978, No. 8, item 28);
- Agreement on Trade Related Aspects of Intellectual Property Rights, annex 1 to the Agreement establishing World Trade Organization, signed at Marakesh on 15 April 1994 (Journal of Laws 1996, No. 32, item 143);
- World Intellectual Property Organisation Copyright Treaty, signed at Geneva on 20 December 1996 (Journal of Laws 2005, No. 3, item 12);
- WIPO Performances and Phonograms Treaty, signed at Geneva on 20 December 1996 (Journal of Laws 2004, No. 41, item 375);

1.3. European Union Law

- Directive of the Council of 14 May 1991 on the legal protection of computer programmes (91/250/EEC) (OJ L 122 of 17 May 1991, p. 42; Special Edition in Polish, chapter 17; vol. 1, p. 114);
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248 of 6 October 1993, p. 15, Special Edition in Polish, chapter 17, vol. 1 p. 134); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on legal protection of databases (OJ L 77 of 27 March 1996, p. 20; OJ L Special Edition in Polish, chapter 13; vol. 15, p. 459);
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ L 167 of 22 June 2001, p. 10; OJ L Special Edition in Polish, chapter 17; vol. 1, p. 230);
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ L 272 of 13 October 2001, OJ L Special Edition in Polish, chapter 17; vol. 1, p. 230);
- Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ L 196 of 02 August 2003, p. 7; OJ L Special Edition in Polish, chapter 2; vol. 13, p. 469);
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157 of 30 April 2004, p. 45; OJ L Special Edition in Polish, chapter 17; vol. 2, p. 32);
- Commission Regulation (EC) No 1891/2004 of 21 October 2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain

intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ L 328 of 30 October 2004, p. 16)

- Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (OJ L 284 of 27 October 2005, p. 10);
- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ L 376 of 27 December 2006, p. 28);
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (OJ L 372 of 27 December 2006, p. 12).

2. Description of criminal activity against copyright and related rights in Poland

In the Team's opinion the most prevalent infringements of copyright and related rights in Poland include:

- production and/or distribution of illegal copies of phonograms or videograms, computer programs, artwork and folk art (this applies, to a large extent, to ICT systems, such as Internet),
- publication and distribution of book without valid licences, underdeclaration of the number of printed copies by legal publishers and not declaring reprints (against terms of licence),
- illegal marketing of the so-called information society services, including – inter alia – electronic duplication of databases or press articles within commercial monitoring of newspapers and magazines, and their subsequent distribution and publication (both in Internet and Intranet),
- theft of TV signal in cable networks, digital platforms and via Internet,
- reprographic copying of works.

The development of new technologies is accompanied by emergence of a new generation of commercial users, who use music, films and other items covered by legal protection via ICT systems, such as Internet. Provision of legitimate services via Internet is becoming a substantial challenge and requires adequate management of copyright and related rights. The term Internet as used in this study refers to an ICT system, pursuant to Article 2, section 3 of the Act of 18 July 2002 on provision of services by electronic means².

² ICT system is a group of cooperating IT devices and software for processing and storing as well as sending and receiving data through telecommunications networks with the use of proper end equipment for a given kind of network, pursuant to the provisions of the Telecommunications Act of 21 July 2000 (Journal of Laws No.73, item 852, as amended).

III. Activities undertaken in 2007 by government administration (members of the Team for Counteracting Infringements of Copyright and Related Rights) in relation to piracy and their results

1. Ministry of Culture and National Heritage

1.1. Legislative work

Act of 9 May 2007 amending the act on copyright and related rights and certain other acts, implementing provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

On 9 May 2007 an act was approved amending the act on copyright and related rights and certain other acts, implementing provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It was published in the Journal of Laws No. 99, item 662, and came into force on 20 June 2007.

It introduced detailed regulations pertaining to civil procedures in cases of infringement of intellectual property, such as author's property rights, related rights, rights to databases, industrial property rights and rights to plant varieties.

The changes affected the following acts of law:

- Act of 4 February 1994 on copyright and related rights;
- Act of 17 November 1964 – Code of Civil Procedure;
- Act of 30 June 2000 – Industrial Property Law
- Act of 27 July 2001 on protection of databases;
- the Legal Protection of Plant Varieties Act of 26 June 2006.

Furthermore, pursuant to Art. 18, par. 1 of the Directive, which provides that three years after the date of its implementation, i.e. on 29 April 2006, each Member State shall submit to the Commission a report on the implementation of the Directive, the Ministry of Culture and National Heritage began analysing application of provisions implementing the

Directive in practice. Final report will be drafted on the basis of data from civil departments of common courts (collection of data on adjudicated civil cases is carried out in cooperation with the Ministry of Justice) and data from bodies associating entities entitled to specific intellectual property rights.

1.2. Twinning contract „*Transition Facility* – Strengthening the protection of intellectual and industrial property rights”

Pursuant to the provisions of the twinning contract, which was signed by Minister Tadeusz Kozek, Undersecretary of State in the Office of the Committee for European Integration on behalf of the Ministry of Culture and National Heritage and remaining beneficiaries of the project on 29 November 2005, the implementation of measures of „*Transition Facility 2004 PL04 – IB – OT03 – Strengthening the protection of intellectual and industrial property rights*” project began on 1 January 2006. The project was completed in 2007, and the development of database within Data Provision System will be completed in the first half of 2008.

The Ministry of Culture and National Heritage was one of the beneficiaries of the project developed together with a Danish partner and committed itself to co-finance measure implemented under the project. The funds granted the Ministry of Culture and National Heritage towards this purpose from „*Transition Facility*” amounted to 300,000 EUR. The remaining beneficiaries were: the Ministry of Finance (leading ministry), the Ministry of Internal Affairs and Administration (the Police and Border Guards) and the Patent Office.

The main objective of the programme was to continue the fight against infringements of intellectual property rights. Another objective of the programme was to effectively and systematically strengthen protection of these rights in Poland. In case of the Ministry of Culture and National Heritage the tasks implemented within the project included organisation and delivery of trainings and conferences for the employees of the Ministry as well as non-government organisations involved in protection of copyright and related rights. Furthermore, EU experts carried out analyses of selected documents pertaining to the field in question.

In 2007 following activities were organised under the project:

- training on „Optical disks – piracy and parallel imports“, which took place on 12-14 February 2007 in Warsaw;

- conference on „Copyright and related rights – management in digital environment“, which took place on 18- 19 April 2007 in Warsaw;
- training on „Radio and TV digital transfer“, which took place on 21- 23 May 2007 in Warsaw;
- trainings on „Management of rights in digital environment (DRM)“ and „Media Law“, which took place on 11- 13 September 2007 in Warsaw;
- conference summarising the project, which was organised in collaboration with other institutions- beneficiaries of the project on 25- 26 October 2007 in Radziejowice.

An analysis of implementation of Council Directive 93/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission in selected EU Member States was also carried out. The objective of the analysis was to determine if there were any European practices in the field of collective management of copyright and related rights pertaining to satellite and cable transmission. It was the first so extended review drafted in this area.

The document was drafted on the basis of a questionnaire sent to collective copyright management bodies in all EU Member States. In addition, Switzerland joined the research. 34 organisations involved in collective copyright management from 22 European countries submitted their answers to the questionnaire.

Polish and English version of the document can be found at the website of the Ministry of Culture and National Heritage at the following address: <http://www.mkidn.gov.pl/website/index.jsp?catId=539>.

1.3. International activities and cooperation with international organisations

1.3.1. Legislative work in the European Union forum

Proposed Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights

The Ministry of Culture and National Heritage participated, as the leading ministry, in works on the position on proposed Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006) 168).

The objective of the Directive is to improve effectiveness of the fight against piracy and other infringements of intellectual property rights. The proponent expects that it will help to eliminate existing differences between penal systems approved by various Member States and - in consequence – to fight more effectively this type of crime, which more and more often takes the organised form and the development of which negatively influences the economy and such factors as consumers' health and safety. The draft Directive envisages coordination of provisions pertaining to crime related to intellectual property and aims at encouraging cooperation between the Member States in the field of combating this crime.

The European Parliament presented its position on the project in April 2007. It was presented to the Council, however, due to substantial disagreement between the Commission and certain Member States pertaining to both the scope of the Directive and Community's competences in laying down measures of penal nature in an act belonging to the first pillar (Directive), the work was discontinued.

As to the principle, Poland supports Commissions initiative while pointing out to a number of legal problems resulting from it.

1.3.2. Actions within the framework of the EU trade policy

The Ministry of Culture and National heritage is coordinates Poland's activities within the TRIPS Council as well as all other activity related to enforcement of intellectual property rights undertaken within EU (Art. 133 of the Treaty establishing the European Community).

The proposal from US and Japan is the newest initiative in this area. The so called ACTA agreement (*Anti – Counterfeiting Trade Agreement*) would take a form of a treaty establishing „golden rules“ of enforcement of intellectual property rights and promote their implementation. ACTA would include aspects related to TRIPS Council competences (exclusive Community competences), as well as activities of World Intellectual Property Organization or (Organization for Economic Cooperation and Development (national competences). The countries most involved in observance of intellectual property rights, i.e. EU Member States, Switzerland, USA and Japan would be the founder members.

Poland supported for this initiative. The negotiation mandate for the European Commission was approved in April 2008. The first round of negotiations took place on 3- 4 June 2008 in Geneva.

1.3.3. World Intellectual Property Organization WIPO

WIPO Treaty on the protection of broadcasting organizations

Work on the Treaty continued at the second special session of the WIPO Standing Committee (18- 20 June 2007), which – however – ended in a fiasco. Therefore the WIPO General Assembly, which took place at the turn of September and October took a decision, that further work on the Treaty on the protection of broadcasting organizations will continue at the Committees regular sessions, and the decision on the diplomatic conference will be made after the compromise on the objective, scope and subject of the Treaty is achieved.

Since the beginning of the work on the Treaty Poland supported its approval. It is necessary in order to update international protection of broadcasts (until now based primarily on the standard established by the Rome Convention in 1961) and to remove inequality in the level and scope of protection in comparison to artistic performances and phonograms. Therefore it was a priority for Poland to summon a diplomatic conference, which would

approve a new treaty on protection of broadcasting organizations in the shape that would ensure protection in the current technical environment of radio and TV broadcasting.

1.3.4. Cooperation with the administration of the United States of Northern America

In 2007, the Office of the United States Trade Representative drafting the annual Special 301 Report on infringement of intellectual property throughout the world decided to keep Poland in the list of countries remaining on the Watch List due to the persistent level of infringement of intellectual property rights³. The countries on the list are the ones in which piracy is a problem, however not as serious as in the case of countries in the so called *Priority Watch List* (i.e. the list of countries with an exceptionally high piracy coefficient). Poland has ceased to be in the priority list as of 1 May 2004.

Despite measures taken, Poland has remained in the Watch List in the 301 Report for 2008.⁴

1.3.5. Other activities

In 2007 the representatives of the Ministry of Culture and National Heritage participated in:

- Third Global Congress on combating counterfeiting and piracy. The Congress was organised by the World Intellectual Property Organisation, World Customs Organisation and INTERPOL, with the support and participation of global business community. It took place in Geneva on 30- 31 January 2007, under the motto „*Shared Challenges – Common Goals*”;
- the meeting of the OECD Informal Advisory Group on Counterfeiting and Piracy of the Organisation for Economic Cooperation and Development devoted to discussion on the progress of drafting the report on „Impact of Piracy and

³http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf

⁴http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf

Counterfeiting on Economy“ The meeting was held in Paris on 19- 20 February 2007.

1.4. Register and control of optical discs manufacturing

The register of optical discs has been created in the Department of Law and Legislation of the Ministry of Culture and National Heritage pursuant to the regulation of the Minister of Culture of 30 April 2004 on the register of information on the register of production of optical discs and types of identification codes (Journal of Laws 2004, No. 124, item 1301). The regulation came into force on 2 June 2004.

The Ministry of Culture and National Heritage collects and analyzes data submitted by the manufacturers of optical discs. The entrepreneur running businesses in question are obliged to apply identification codes to all equipment and item in the process of optical discs manufacturing.

The Act of 4 February 1994 on copyright and related rights obliges the manufacturers to submit information on equipment for manufacturing and duplication of media in their possession and identification codes applied to the Ministry of Culture and National Heritage. By 10th of each month, an entrepreneur is obliged to submit information covering the preceding month and related to the overall volume of production and its type, orders processed away from premises and usage of equipment for manufacturing and multiplication of optical discs. Thus, the legislator requires the manufacturer to submit a notification of each translocation of equipment. The objective of this measure is to counteract setting up of illegal facilities, which would remain outside of the official fiscal system. Within the inspection powers of the Minister of Culture and National Heritage and taking into account provisions pertaining to freedom of economic activity, an inspection may be carried out in order to confirm the compatibility of manufacturer's declaration with actual state of affairs.

There were 4 inspections of optical discs manufacturers carried out in 2007, during which official samples of production were taken.

Negotiations with the Chief Police Headquarters are now under way on the procedure for submitting the samples of media to the Central Criminal Laboratory for analysis.

On- going tasks of the Ministry of Culture and National Heritage include keeping the register of optical discs both in the electronic and traditional form – on paper, as well as

preparing current analyses necessary for law enforcement purposes and for the use of entities entitled to copyright or related rights. Information included in the register constitutes a system for verification of manufacturers and are used for verification of data and as evidence in cases of infringements found, such as not having full rights for a commissioned item.

1.5. Team for Protection of Copyright and Certain Related Rights

There were two meetings of the Team held in 2007 – on 10 January and 27 March. The participants included permanent members of the Team as well as the representatives of the Ministry of Foreign Affairs, Patent Office and National Broadcasting Council invited to participate in the activities of the Team. There were also meeting held with representatives of collective copyright and related rights management organisations and other protection organisations involved in protection of copyright and related rights.

During the works of the Team proposals were presented aiming at prevention of further infringements of copyright and related rights and other intellectual property rights, as well as proposals for counteracting these infringements. These assumptions were included in „The Strategy of activities for protection of copyright and related rights“ for 2007.

On the basis of material submitted by government administration bodies, collective copyright and related rights management organisations and other social partners, the „Report of the Team for Counteracting Infringements of Copyright and Related Rights on Observance of Copyright and Related Rights“in Poland in 2006 was elaborated.

The Council of Ministers approved both above mentioned documents on 3 July 2007.

1.6. The Internet Group

In the light of the absence of effective methods for detection and processing of cases related to Internet, the level of exposure of persons infringing copyright and related rights, who make illegal file available in the net is still insignificant. The scale of this phenomenon remains undefined, as there is a lack of systematic research that would allow judging it. In order to change this state of affairs, the Internet Working Group within the Team was established in 2005.

The members of the Working Group include“

- representatives of collective copyright and related rights management organisations and other social partners involved in protection of copyright and related rights (experts, specialists on engineering and architecture of ICT system and legal affairs);
- a representative of a Warsaw District Prosecutor's Office;
- experts from the Criminal Office, Department for Combating Economic Crime of the Chief Police Headquarters and Police Academy in Szczytno;
- a representative of the Customs Service of the Republic of Poland;
- representatives of the Ministry of Culture and National Heritage;
- representatives of internet providers.

The task of the group is to analyse the threats in the field of infringement of - first of all – copyright and related rights, development of methodology for detection and combating crime against intellectual property in the Internet and coordination of cooperation on combating intellectual piracy between law enforcement bodies and organisations involved in collective management of copyright and related rights and other social partners protecting copyright and related rights supporting the Police.

One of the primary tasks of the Internet Group was to develop effective methods of limiting internet piracy. The work on the document „Methodology of police work on detecting and combating Internet intellectual piracy“ had begun in 2006 and was then continued in 2007 in the meetings on 9 and 23 March.

On 27 March 2007 the Team approved the document and recommended its implementation in the Police. It was also forwarded to the Ministry of justice to assist prosecutors and judges involved in combating piracy. Relevant bodies have already received the „Methodology“.

The Police Academy in Szczytno developed an extensive IT tool (communication tool combined with a discussion forum) assisting group members in solving problems and communicating quickly.

The on going process of developing the method of counteracting Internet crime still includes the following aspects:

- the necessity to detect and document infringements of copyright and related rights;
- defining the procedures for cases related to infringements of copyright and related rights;

- validity of initiating the legislative process as regards amendment of provisions which would allow for effective and swift legal sanctions against entities infringing these rights;
- application of technical solutions preventing activities infringing copyright and related rights in organised academic networks and other scientific and educational institutions.

2. Ministry of Internal Affairs and Administration – the Police and the Border Guards

2.1. The Police

In 2007, the Police implemented tasks related to detection and combating of intellectual and industrial piracy within the government „Strategy of activities for protection of copyright and related rights“. The primary areas of activity included tasks aiming at limiting piracy in the trade of intellectual property and industrial production.

Police information shows that – as was the case last year – the threat to the domestic market resulting from production and supply of pirated goods is primarily present in the following areas.

2.1.1. Infringements of property rights in phonography

Most of the time the threat of phonographic piracy in the country takes the following three forms:

- reproduction and sales of media containing phonograms, primarily printed or recorded on CD, DVD, CD – R and DVD – R. Around 90% of illegal production of music records is carried out in neighbouring countries, mainly in Russia, Ukraine, Lithuania and in small quantities in the Czech Republic. Records are smuggled and sold mainly by Russian speaking criminal groups.
- illegal supply of music in the Internet (both single titles and albums) compressed to mp3 format. Websites offer thousands of newest titles for unauthorised downloads. Copied intellectual property is then distributed in market places and exchanges;
- playing back music, without the consent of copyright and related rights owners, in public places, discos and other entertainment and catering establishments. Illegal distribution of music prevails in small towns, where awareness of the fact that such activities infringe the rights is small, and the owners of the rights and the persons entitled have limited possibilities of pursuing their protection.

2.1.2. Infringements of property rights for films

In the recent period the biggest threat in this area was posed by:

- sales of illegally reproduced films on DVD-r; this pertains mainly to big cities, where these dealings take place primarily in marketplaces; the trade is mainly in the hands of citizens of former USSR states;
- distribution of films via Internet, where each user can either order a specific film or download it from an FTP server, as well as film viewing on websites with the use of streaming technology.

2.1.3. Infringements of copyright and related rights in the field of computer software

The primary symptom of the threat posed by this type of criminal activity is illegal duplication and distribution of computer programmes on recordable media (CD-R and DVD-R). The illegal market is supplied by persons selling pirated software, smuggled mainly from countries east of Poland. Internet is more and more frequently used as a source of software, which is then multiplied on optical disks and introduced to the market. In majority of cases pirated software is used by entities carrying out economic activity.

The primary mechanisms of this criminal activity include:

- use of pirated software in conducting current economic activity (even by significant companies);
- trade in illegally acquired software on computer exchanges and market places;
- offering pirated software in the Internet;
- illegal distribution of software via Internet services.

2.1.4. Stealing of TV signal

In this area following threats have been identified:

- distribution of TV broadcast without authorisation or against conditions of such authorisation by entities carrying out commercial activities, e.g. cafes, restaurants, pub (this pertains both „live“ broadcasts and retransmissions);
- extending a programme package by additional channels by a subscriber, without modification of a contract with an operator;
- illegal connection (without applicable contract and subscription payment) to reception equipment facilitating reception of cable networks TV signal;
- setting up of local, for example housing estate, „pay cable TVs“ without required licences, registry entries or violating provisions of a contract – such illegal TVs frequently supply a large number of subscribers;
- retransmissions of TV broadcasts without signing contracts with proprietors of rights;
- illegal TV signal sharing via Internet.

The dynamic development of Internet increases the threat of these pathologies. Offenders frequently use codes supplied in websites, which enable them to reprogram access cards and bypass access protection used by TV broadcast suppliers.

2.1.5. Infringements of property rights to book publications

Infringements in this area include:

- sales of illegally xeroxed books and brochures;
- illegal publication of books without contracts with copyright and related rights owners, and illegal increase of number of copies of bestsellers;
- illegal distribution of electronic versions of book via Internet (so called *e-books*)

2.1.6. Final remarks

Law enforcement authorities responsible for fighting this type of crime face the necessity to undertake systematic detection activities because of:

- expected increase of the threat coming from crime related to illegal manufacturing and sales of counterfeited products and illegal distribution of copyright protected work;
- reputable international companies entering the Polish market, which increases the threat of counterfeiting the products they offer;
- increasing involvement of criminal groups in counterfeiting food, medicines and toys, which puts health and lives of unaware consumers under threat.

The development of IT system, primarily through broadband Internet access constitutes a substantial threat of illegal activity infringing the rights of proprietors of copyrights, related rights and other intellectual property rights. Substantial number of Internet services is used for illegal distribution of music, films, games and software as well as for stealing of TV signal. Offenders' feeling of impunity when using Internet for criminal activity stems from their conviction of their anonymity, cross-border nature of activity and the necessity to possess specialised IT knowledge in order to detect and fight this type of crime. Currently following mechanisms of Internet criminal activity have been identified:

- sales and distribution of protected files via websites;
- distribution of files via *ftp* servers. So called warez groups are a significant problem – organised, small circles of people who exchange films, music, software

or e-books through *ftp* servers. In many cases file servers are located on local networks available only to own subscribers;

- illegal distribution of works via so-called file warehouses. Servers to which substantial numbers of files are sent and from which other Internet users may then download them gain more and more popularity;
- file swapping via *Peer-to-Peer (P2P)* networks. This process consists in making files available via software dedicated for centralised and decentralised networks (e.g. *KaZaA, eDonkey, EMule, BitTorrent, eXeem, Gnutella, Fast Track, Direct Connect, DC++*). Internet user may search network for computers with available content and download pirated copies, while distributing own resources at the same time;
- distribution of files via *Peer- to-Mail (P2M)* e-mail accounts Files are first split with the help of relevant software (*E-Dek, MoorHunt, Durie, Openp2M*), and then sent to an e-mail account. Information on titles of works is supplied in closed discussion fora, which also contain information on logins and passwords to these accounts, consolidation and expansion passwords;
- *sharing* of digital platforms facilitating illegal provision of TV signal by a subscriber to other Internet users, often after a specific amount of money has been paid;
- distribution of files facilitating stealing of TV signal through data which can be downloaded from a server, with codes enabling upgrading basic package to a full one.

In 2007 the activities of the Police made it possible to stop the criminal activity of 3 165 locations (copying facilities, shops, rental shops, wholesalers and manufacturers) and 378 persons conducting criminal activity via Internet. 434 541 CDs and DVDs have been secured. The victims have preliminary estimated their losses at PLN 92 million. In total 4 144 preliminary legal proceeding related to infringement of copyrights, i.e. pursuant to the Act of 4 February 1994 on copyright and related rights and Penal Code have been initiated. Often the investigated cases were of evolutionary nature due to multithreaded mechanism of criminal activity and substantial number of suspects. In the above mentioned number of preliminary investigations started 33 071 criminal offences were identified. In 2007 8 496 preliminary proceeding were concluded in total. Property worth ca. PLN 2 071 thousand was secured.

Crime against intellectual property is detected and combated within routine activities of the Police. It is also related to implementation of government activities pertaining to protection of copyright and related rights. Within the Team for Counteracting Infringements of Copyright and Related Rights „Stadion” and „Internet” working groups were established, in which the Police play a key role. The tasks of the groups in question include analyzing the threat and developing the methodology for law enforcement authorities activities related to fighting intellectual piracy.

Despite the improving results of the activities of the Policy, the threat from crime related to infringement of broadly understood intellectual property right systematically increases from year to year. It is noticeable that the criminal activity is moving from marketplaces to Internet auctions and computers are used more and more often as tools for crime. This situation led to establishment of the „Internet” working group within the Team for Counteracting Infringements of Copyright and Related Rights. The task of this group is to analyze the threats in the area of intellectual property rights infringement and to coordinate cooperation in combating intellectual piracy between law enforcement authorities and institution or organisations supporting the Police. „The Methodology of police work in detection and combating intellectual piracy in the Internet“ has been developed. The materials have been distributed to field units for official use.

In the process of combating infringements of intellectual property the Police cooperate directly and on an on-going basis with collective copyright and related rights management organisations, institutions, foundations and private organisations which support the Police in fighting piracy. The purpose of this cooperation is to exchange expert knowledge, information on new mechanisms of criminal activity, possibilities of identification of pirated products and formal and legal environment facilitating more effective fight with infringers of intellectual property rights.

Moreover, law enforcement authorities cooperate directly with artists, authors, performers and producers whose intellectual property right have been infringed.

Crime against copyright and industrial property rights is the most dynamically evolving type of crime. Modern technologies facilitate mechanisms of criminal activity which have been unknown so far. In order to follow new trends and directions in counteracting, the Police implemented training activities.

Following activities have been carried out under the programme for improvement of professional skills of the Criminal Department of Chief Police Headquarters:

- under the *Twinningowego Project* – „*Transition Facility 2004* – Strengthening of intellectual and industrial property rights protection – the series of 9 trainings, each for 30 officers from field units, who have been familiarised with European Union legislation, mechanisms of criminal activity and methods of detection and combating piracy used by police forces of EU Member States. The trainings were delivered by experts from Denmark, Belgium, Northern Ireland and other countries. The last training in the series was organised for representatives of the Police, Border Guards and Customs Service of the Ministry of Finance.
- 6th conference on „TV signal theft“ with participation of 23 officers from Voivodship, Warsaw and Chief Police Headquarters involved in duties in this area;
- Chief Police Headquarters, together with the Police Academy in Slupsk, organised 3rd International Scientific Conference on „Forensic and Legal Aspects of Intellectual Crime“ with 150 participants – representatives of law enforcement authorities and institutions, organisations and businesses supporting police activities in detection and combating piracy;
- Chief Police Headquarters, together with the Police Academy in Slupsk, organised 10th Conference on „Technical Aspects of IT Crime“ with 130 participants – representatives of law enforcement authorities and institutions, organisations and businesses supporting police activities in detection and combating piracy;

In the area of infringements of intellectual property, the provisions of the Act of 4 February 1994 on copyright and related rights comply with the requirements of the EU law. Currently there are no legal obstacles, which would prevent effective fight against piracy. Increased effectiveness in fighting this type of piracy depends on greater involvement of resources and on more efficient functioning of Customs Services and Border Guards, as well on law enforcement authorities better utilising the possibilities for persecution and punishing of offenders on the basis of the Act currently in force.

Following should be taken into account when implementing the Police’s tasks related to detection and combating piracy in 2008:

- systematic improvement of identification of criminal groups which organise smuggling, manufacturing, distribution and trade in counterfeited articles and products;

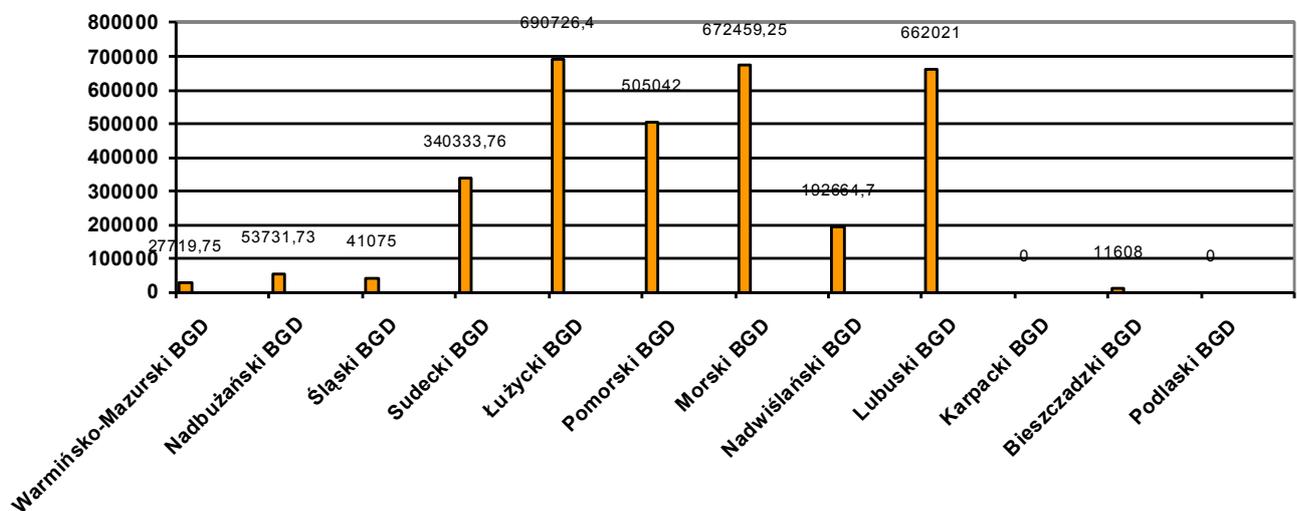
- intensification of activities in the areas adjacent to the western Polish borders, due to the dislocation of criminal activities from the centre of the country;
- improvements of methods for cooperation with the Customs Service, Border Guards, services reporting to the Minister competent for finances and collective copyright management organisations, copyright and related rights proprietors and owners of trademarks and licences;
- coordination of activities, particularly in international cases investigated in cooperation with other services;
- Internet monitoring as regards detection of pathologies and crime;
- continuation and improvement of tactics as regards depriving offenders of the fruits of crime;
- detecting and uncovering methods of legalising illegally acquired funds, thus eliminating sources of financing the activities of organised crime groups.

2.2. Border Guards of the Republic of Poland

Border Guards activities related to protection of intellectual property protection in Poland in 2007 were undertaken in the scope defined in „The Strategy of Activities for Protection of Copyright and Related Rights“ for 2007, within the strategic objectives remaining the responsibility of the Minister of Internal Affairs and Administration.

While implementing the mission of the Strategy, an analysis of exposed infringements of intellectual property and activities undertaken so far by the Border Guards was conducted. As a result of the analysis of this phenomenon one may notice, that in 2007 the main areas of the criminal activities were south-western and northern regions of Poland. Most cases of infringement of the Act of 4 February 1994 on copyright and related rights took place in the area of duties of Lubuski, Luzycki, Morski, Nadwislanski, Pomorski and Sudecki divisions of Border Guards.

The value of goods infringing copyright impounded by the Border Guards in 2007



When carrying their tasks related to counteracting of infringements of copyright and related rights, Border Guards cooperated closely with relevant Police and customs administration units in the area. The initiated activities were aimed in limiting smuggling of pirated phonograms, videograms and computer software, as well as their distribution within the country. According to the approved principles, suppliers, distributors and smugglers of pirated products were the main targets of activities undertaken primarily in marketplaces in the border zone.

During these activities one could notice further improvement of coordination and exchange of information between the services acting together.

As a result of Border Guards' activities related to the protection of copyright and related rights in the period between January and December 2007 fruits of crime of an estimated value of PLN 3 171 621.59 were secured, including:

- 10.741 CDs with music,
- 18.443 DVDs with films,
- 2.188 CDs with computer games,
- 815 records with Play Station games,
- 308 VHS cassettes,
- 222 CDs with computer software,
- 45 hard disks or computers with illegal software,
- clothes, watches and perfume with a counterfeited trademark of an estimated value of PLN 366 095.73

An important part of Strategy implementation was to continued cooperation of Border Guards units with representative of entities managing marketplaces. As a principle market place managers were contacted each time inspection was conducted in a market place, and they were also contacted on a regular basis with a view to preventive activities.

In 2007 Border Guards took an active part in a series of trainings organised within the *Twinning contract „Transition Facility 2004 – Strengthening the protection of intellectual and industrial property rights”*. The representatives of investigation and border departments of Border Guards participated in trainings, workshops, symposia and conferences organised by the Border Guards (in 2007 14 training were organised within TF 2004, in which 248 Border Guards officers participated), the Ministry of Finance and the Ministry of Culture and National Heritage.

3. The Ministry of Finance – Customs Service of the Republic of Poland

3.1. Improving effectiveness and on-going coordination of activities of State services in fighting piracy

3.1.1. Improving effectiveness of activities of Customs Service

In 2007 the Customs Service continued activities related to combating infringements of intellectual property rights and analysis of interceptions of pirated and counterfeited goods in order to define trends new risk areas for customs inspection.

Intercepted pirated and counterfeited products amounted to 6.1 million items. For comparison, in 2006 2.2 million of such products were intercepted. This translates into 300% increase of the number of intercepted pirated and counterfeited products. This confirms intensification of the activities of the Customs Service and their increased effectiveness. Such a good result was achieved primarily thanks to increased number of training and improved cooperation with the Police and the Border Guards.

3.1.2. Maintaining the high level of controls on the State border

This target was primarily implemented through continuation of activities included in the *Twinning contract „Transition Facility 2004 – Strengthening the protection of intellectual and industrial property rights”* concluded between the Polish and Danish government administrations. The contract placed particular emphasis on training customs officers serving in Customs Service units located on the external border of the European Union (eastern border, airports and sea ports). Within the tasks resulting from the contract 13 trainings were organised, in which 380 customs officers participated. Majority of the officers trained were recruited from border customs offices. Representatives of the Customs Service also participated in training organised by the Border Guards and the Police. The objective of this type of training was to familiarise the participants with characteristic features of work in each of these services and to develop methods of cooperation, particularly as regards exchange of information and coordination of activities.

One of the most important activities within the *Transition Facility* project was organisation of a conference on 17-19 September 2007 which summed up the training component of the project. Participants included management of the Customs Service, management level personnel of all customs chambers and experts from EU Member States involved in project implementation. The training activities under the project were given high scores both for their quality and usefulness for strengthening the protection of intellectual property rights.

Furthermore, 2007 saw the continuation of the benchmarking programme with the participation of customs administrations from Poland, Germany, United Kingdom and Lithuania aiming at increasing the level of enforcement of intellectual property rights on the eastern border and improving cooperation on the international level, with a particular view to coordination of the activities of Polish and Lithuanian services. The final report from benchmarking activities drafted by the Polish Customs Service and containing recommendation for all Member States was sent to the European Commission and published on its website.

In order to implement conclusions of the report, drafted on the basis of best practices of the customs services of the Member States participating in the benchmarking exercise, on 18 May 2007 Intellectual Property Rights Protection Department of the Ministry of Finance organised a working meeting for intellectual property coordinators from all customs chambers.

The representatives of customs chambers were compelled to draft guidelines for the Customs Service related to:

- risk analysis – defining high risk areas as regards infringement of intellectual property rights,
- model application for customs protection – additional form containing data on minimum quantity of goods, which the proprietor of intellectual property rights is interested in being seized,
- simplified procedure related to destruction of pirated and counterfeited goods – instruction manual for customs chambers.

The drafts were used during the activities of working groups devoted to revision of the Community legislation initiated by the European Commission.

3.1.3. Development of IT systems supporting activities of the Customs Service of the Republic of Poland, Border Guards of the Republic of Poland, the Police and the Prosecutor's Office related to fighting piracy and infringements of other intellectual property rights.

Pursuant to the provisions of the Polish and Danish *Twinning Contract* PL04-IB-OT-03 within *Transition Facility* project, 2007 saw the continuation of work on development of „VINCI“ IT system.

The last meeting of the Project Council established in the Ministry of Finance for development of the Vinci system, with the participation of representatives of the Danish government administration, took place on 9 November 2007. Poland confirmed completion of works covered by the *twinning* contract and commenced further implementation of the project with own human and financial resources.

As of the end of 2007, the progress of the work on system development was following:

- progress of the project – 97%,
- completed pilot implementation,
- beginning of data entry from applications for intellectual property protection to the system.

Pursuant to approved arrangement the system will become operational in the first half of 2008.

Furthermore, consultations were continued with the Patent Office of the Republic of Poland on development of a component which will facilitate direct access from the Vinci system to the Patent Office's data base. The objective of this activity is to access information on registered industrial property rights (trade marks, patents, industrial designs) and data of persons who registered them, via Data Provision System (DPS). It is expected that access to the data base of the Patent Office via DPS will reduce the time of searching for information necessary to identify a product as regards intellectual property rights protection.

3.2. Limiting piracy in marketplaces

3.2.1. Checks on observance of law by administrators of the marketplace in 10th Anniversary Stadium and other Warsaw marketplaces.

In 2007 the Customs Service continued the activities aiming at reducing piracy in marketplaces. In the course of 540 inspections, officers of Crime Control Department of the Customs Chamber in Warsaw in cooperation with the Police, the Municipal Police and Fiscal Office employees seized 470 thousand pirated and counterfeited products including 52 863 pirated optical discs. Compared to 2006, there was 80% increase in the number of inspections and over 200% increase in the number of seized products.

3.2.2. Effective supervision over observance of copyright, related rights and other intellectual property rights in marketplaces, in particular along the western border.

Within implementation of this strategic objective inspection activities carried out by Customs Service continue.

Spectacular achievements in detection of intellectual property rights infringements in 2007 include:

- interception of 7 thousand shirts with emblem of famous sports clubs by officers of the customs chamber in Szczecin. Market value of the goods amounted to ca. PLN 1.5 million;
- operation carried out by officers from the customs chamber in Rzepin, which ended in seizure of pirated goods in the form of 3 440 CDs and 1 255 DVDs (4 695 pieces in total. The interception was carried out in two stages: as a result of an inspection of a car 300 CDs and 188 DVDs were found, than after premises where the car was previously parked were searched further 3 140 CDs and 1 067 DVDs were seized. It was the first this year such substantial seizure of pirated recordings intended primarily for marketplaces in the border zone in the customs chamber in Rzepin. The operation not only eliminated a substantial number of pirated recordings from the market, but also had a preventive function – closure of „a warehouse“ – another seizure, which also prevented goods manufactured with

infringement of – this time – industrial property rights from entering marketplaces, was also carried out by the customs chamber in Rzepin. The officers from the Crime Control Department seized 1 619 boxes, i.e. 19 422 pairs of shoes with „Speedo“ trademark;

- closure of illegal plant bottling counterfeited alcohol by officers from the customs chamber in Poznan. Manufacturing equipment and alcohol of the market value in excess of PLN 820 thousand were seized;
- officer from the customs chamber in Poznan closed illegal optical discs manufacturing plant. On top of finished pirated products (over 1.4 thousand records and 700 sleeves) 10 computers with printers and 8 recorders were seized.

Police officers took part in most of these operations and the excellent cooperation between the Customs Service and the Police is worth particular attention.

3.3. Improving the knowledge and skills of customs officers

Because of the upward trend in the threats that appear in the area of intellectual property rights via Internet, this subject attracted interest of the Customs Service. The knowledge of customs officer on combating Internet crime should be systematically broadened, mainly through taking part in trainings with the participation of the Police and the Prosecutor's Office as well as organisations representing copyright and related rights proprietors. In 2007 representatives of customs administration took part in all trainings organised by the Ministry of Culture and National Heritage.

3.4. Education activities aiming at increasing social and legal awareness of criminal nature of infringements of copyright, related right and other intellectual property rights and the role of State administration in combating these infringements

In the first half of 2007 work was started on organisation of the second edition of the contest, this time with the participation of the American Chamber of Commerce. The motto for the contest was selected: „Choose the original“. The Ministry of Finance is the institution coordinating the whole of the undertaking. Organisational matters related to the contest are the responsibility of the Fine Arts Academy in Warsaw. The contest is organised under the auspices of the Ministry of Culture and National Heritage and the American Chamber of Commerce. In the first half of 2007 several organisational meetings took place, at which the contest rules were approved. The contest was announced in September 2007, and its conclusion is planned for the first half of 2008.

4. The Ministry of Justice – the National Public Prosecutor’s Office

4.1. Collective analysis of the result of examination prosecution files of crimes related to infringements of copyright, related rights and other intellectual property rights, in which in the first half of 2007 decisions on discontinuance or conditional discontinuance were taken, and cases in which a court delivered a sentence on acquittal or forwarded a case to the prosecutor to be supplemented.

Pursuant to the directive contained in the letter of the Director of the Presidential Office of the National Prosecutor’s Office of 20 June 2007, ref. PR I 807–1/07 all appellate public prosecutor’s offices examined files of criminal prosecutions in cases related to crimes against intellectual and industrial property, in which in the first half of 2007:

- prosecutor issued a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 3 of the Code of Criminal Procedure, because of minor social harm caused by the act;
- prosecutor issued a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 10 of the Code of Criminal Procedure, because there was no motion for prosecution from persons entitles;

- prosecutor submitted an application for conditional discontinuance to the court;
- the court returned the case to the prosecutor for the preparatory proceedings to be supplemented;
- the court acquitted the defendant.

The objective of these examinations was to find out:

- if the decision on discontinuance of proceedings pursuant to Article 17, par. 1 items 3 and 10 was justified;
- if the prosecutor's application for conditional discontinuance was justified;
- reasons for the court returning the case to the prosecutor for the preparatory proceedings to be supplemented;
- reasons for acquitting defendants.

The examination cover the total of prosecutions related to crimes defined in the Act of 4 February 4 on copyright and related rights, but also in the Act of 30 June 1994 – Industrial Property Law, the Act of 5 July 2002 on protection of certain services provided by electronic means and based on or consisting in conditional access, the Act of 16 April 1993 on combating unfair competition and Article 278 par. 2, Article 291 and Article 292 in connection with Article 293 par. 1 of the Penal Code.

4.1.1. Cases, in which decisions on discontinuance of proceedings pursuant to Article 17, par. 1 point 3 of the Code of Criminal Procedure were issued

The examination covered 73 preliminary proceedings concluded in the first half of 2007 with a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 3 of the Code of Criminal Procedure, because of minor social harm caused by the act which was the subject of proceedings.

The analysis of the files showed, that in most cases justified their position as regards minor social harm of the acts with the manner and circumstances in which crimes were committed, motives of perpetrators and their attitude after perpetration, small value of the material profit, short period of using the illegal software, small number of media which were the subject of perpetration, small damage and the circumstances of repairing it and concluding a licence agreement.

In general it should be concluded, that decisions acknowledging minor social harm in cases related to public performance of music were supported by the fact that the parties came into agreement and damage was repaired, while in case related to illegal acquisition of software or purchase of media with illegally duplicated software by small number of programmes and their relatively small value (in several such cases representative of wronged parties were not interested in prosecuting the perpetrators).

The analysis of cases discontinued pursuant to Article 17, par. 1, point 3 of the Code of Criminal procedure does not give grounds for questioning these decisions, though in some cases justification provided by prosecutors should be considered as insufficient.

There were cases where proceedings were discontinued due to minor social harm caused by the act, while proper grounds for discontinuation should in fact be no motion for prosecution on the part of entitled person.

For example, in the case of the District Prosecutor's Office in Ciechanow related to unauthorised commercial Internet distribution of the plan of the city of Ciechanow taken from the publication of „Cartail Mapy Polski”, the investigation of possible infringement of Article 116, par. 1 and 2 of the Act of 4 February 1994 on copyright and related rights was launched without prior obtaining the motion for persecution from the wronged party. This omission was not rectified in the course of the investigation, as the motion for prosecution was submitted by the Customer Service Manager of the wronged party, who presented a written authorisation given to him, however it did not comply with requirements set out in the Code of Criminal Procedure. Due to the fact that the parties to the proceedings concluded a licence agreement for the distributed work and because of the statement of the wronged party, that it would not pursue any claims, the prosecutor issued a decision on discontinuance of proceedings due to minor social harm of the act, despite evident absence of a motion on the part of the entitled person.

In most of the examined case it was concluded, that prosecutors' assessment of factual circumstances was correct, as was the legal classification of acts. There were however mistakes made in this respect, for example, in the case of the District Prosecutor's Office in Gorzow Wielkopolski, where the subject of the proceedings was wrongly defined as the crime against Article 116, par. 2 of the Act of 4 February 1994 on copyright and related rights, while the suspect duplicated somebody else's phonographic work and videograms at home with the help of a computer with a view to sell them, while not being authorised to do so by

having a licence contract with copyright proprietors (which in fact satisfies the criteria of a crime against Article 117, par. 1 and 2 of the above mentioned Act.)

4.1.2. Proceeding concluded by prosecutors' applications for conditional discontinuance of prosecutions

The examination covered files of 208 cases concluded in the first half of 2007 by submitting an application for conditional discontinuance of preparatory proceedings against persons suspected of crimes against intellectual and industrial property.

In most cases it was concluded, that in fact there were full grounds for submitting such motions, both factual and formal. Evidence collected in these cases justified the position taken, that the circumstances of perpetration did not raise any doubts. Positions taken in the motions and related to minor social harm of the acts and existence of positive prediction, that suspects would not commit crimes in the future.

Motions for conditional discontinuance of proceeding were mostly submitted in cases related to: illegal acquisition of software belonging to other persons; dealing in stolen software; appropriation of authorship of somebody else's work; illegal multiplication of musical programmes and their distribution, as well as public performance of somebody else's musical works without authorisation.

In justifying their motions, the prosecutors often mentioned circumstances such as payment of owed monies and conclusion of a licence agreement.

Taking into account findings indicating incidental nature of infringements of rights protecting intellectual or industrial property, small number of media purchased for personal used or insignificant value of damage, the decisions of the prosecutors should be considered right.

It should also be noted, that court verdicts usually agreed with the motions of the prosecutors, both in the essence of the solution and in the proposed conditions.

Only in isolated cases the justification of motions for conditional discontinuance of proceeding raised doubts, especially related to the presence of the prerequisite of minor social harm. A case of the District Prosecutor's Office in Sosnowiec may be an example, where distribution of 69 thousand copies of CDs was involved.

Motions for conditional discontinuance of proceedings were found unjustified in three cases in the jurisdiction of the Appellate Prosecutor's Office in Lublin:

- the case in the District Prosecutor's Office in Chelm, the subject of which was the incident consisting of illegal purchase of computer programmes and distribution of music files. The value of illegally acquired software spoke against considering it as causing minor social harm – it was in excess of PLN 17 thousand, therefore the court rejected the prosecutor's motion for conditional discontinuance of proceedings. Irrespective of the above, the construction of charges raises doubt: the prosecutor assumed one act against Article 118, Section 3 of the Act of 4 February 1994 on copyright and related rights, Article 293, par 1 and Article 292, par. 1 of the Penal Code, while actual concurrence of crimes against Article 278, par. 2 and Article 116, Section 1 of the Act of 4 February 1994 on copyright and related rights should be assumed;
- the case in the District Prosecutor's Office in Zamosc, the subject of which was the incident consisting of copying music to a hard disk and its subsequent public performance (charge based on Article 117, Section 1 and Article 116, Section 1 of the Act of 4 February 1994 on copyright and related rights in connection with Article 11, par. 2 and Article 12 of the Penal Code, the court agreed to the motion of the prosecutor and decided on conditional discontinuance of proceeding, despite the prematurity of the motion. In this case charging the suspect with an act against Article 116, Section 3 of the Act of 4 February 1994 on copyright and related rights should be considered, as there were grounds for suspicion, that the suspect made this activity a permanent source of income, which however would require further investigation;
- in the case of the District Prosecutor's Office in Krasnik a motion for conditional discontinuance of proceedings related to an act against Article 278, par. 2 of the Penal Code was submitted, despite absence of circumstances indicated in Article 66, par. 3 of the Penal Code. Taking into account the fact, that the purchase was related to one computer programme only, it could be considered as an act of lesser significance or the proceedings could be discontinued on the grounds of minor social harm.

The analysis of cases, in which the prosecutor submitted a motion for conditional discontinuance of proceedings leads to the conclusion, that the prosecutors relatively

frequently do not pay attention to compliance with the conditions of Article 66, par. 3 of the Penal Code. At the same time, the conditional discontinuance of proceedings against perpetrator of an act, which carries a penalty of up to 5 years of imprisonment is only possible, if he or she reconciled to the wronged party, repaired the damage or agreed the manner in which it would be repaired.

On the occasion of examining cases, in which prosecutors submitted motions for conditional discontinuance of proceedings to courts, it turned out that not everyone is familiar with the regulation of the Minister of Justice of 16 October 2002 – issued pursuant to Article 123 of the Act of 4 February 1994 on copyright and related rights - on designation of district courts adjudicating on cases related to crimes against copyright and related rights (Journal of Laws, No. 180, item 1510, as amended), which provides that cases related to crimes defined in Article 115- 119 of the above mentioned Act, from the area of jurisdiction of a given regional court (subject to provisions of par. 2) shall be adjudicated by district courts in towns, which are the seats of regional courts.

4.1.3. Cases, in which decisions on discontinuance of proceedings pursuant to Article 17, par. 1 point 10 of the Code of Criminal Procedure were issued

The cases falling in this category were for the first time examined by the Appellate Prosecutor's Offices – there were 216 examined in total.

As a result of the analysis carried out, no cases of discontinuance of proceedings pursuant to Article 17, par. 1, point 3 of the Code of Criminal Procedure despite filing a motion for prosecution by an entitled person were found. However, the cases where proceedings were launched in spite of the absence of such motions were disclosed.

In general, the Police units which conducted investigations asked properly identified wronged parties to file statements requesting prosecution, but there were cases of invalidity of some of these statements. Most of the time it resulted from the fact, that the statements were submitted by persons not authorised to represent a wronged party (e.g. a motion for prosecution was submitted by one board member of a harmed company, while proper representation required a statement of will from two members of the board) or by plenipotentiaries who did not fulfil the criteria set out in the Code of Criminal Procedure (e.g. antipiracy specialist in the harmed Audio and Video Producers Organisation).

In several cases the wronged parties did not submit their statements in the time indicated in the notice at all, or even failed to react to subsequent prosecutor's notices requesting filing of a motion for prosecution. These cases were rightly considered as being equivalent to refusal of filing such motion.

There were however cases of invalid motions being accepted, which could not have legal consequences provided for by the procedural law, but resulted in an obligation for an authority conducting proceedings to repeat notice requesting submission of a valid motion.

The decision on withdrawal of a motion for prosecution was most of the time motivated by entitled persons with the fact that they effected an agreement and relevant licence contracts with entities distributing work without authorisation. Prosecutors permitted withdrawal of motions in such situations, however it was found in the examined cases, that a relevant disposition on permission for the motion for prosecution to be withdrawn by the entitled person was not issued pursuant to the provisions of Article 12, par. 3 of the Code of Criminal Procedure and par. 86, Section 3 of the regulation of the Minister of Justice of 11 April 1992 – Rules of internal procedure of common organisational units of the Prosecutor's Office, or the minutes of such activity were not taken pursuant to Article 143, per. 1, item 1 of the Code of Criminal Procedure, with an official note indicating that the entitled person expressed his or her will to withdraw a motion by phone being made instead, for example.

When examining cases falling into this category, the different positions were observed as to decisions taken on material evidence, even within the jurisdiction of the same Appellate Prosecutor's Office. For example in the area of jurisdiction of Poznan Appellate Prosecutor's Office:

- in the case handled by District Prosecutor's Office in Wrzesnia and related to introduction to the market of cosmetics with counterfeited trade marks of a number of well-known cosmetic companies (incl. „Chanel”, „Christian Dior”, „Kenzo”, „Calvin Klein” or „Armani”) the prosecutor made a decision to hand over the secured products to the court together with a motion for forfeiture to be ruled;
- in the case in the District Prosecutor's Office in Poznan – Old Town, in which introduction to the market of cameras with counterfeited trade marks of „Canon” and „Sony” brands was exposed, it was decided that the seized product will be held in storage until expiration of the period of limitation to prosecute;

- in the case of the District Prosecutor's Office in Poznan – Grunwald initiated after bottle tops and self-adhesive labels with counterfeited trade marks of „Old Polish”, „Smirnoff” and „Finlandia” were found in post, it was decided that the secured items should be returned to the Customs Chamber in Poznan.

There were also situations in which the proceedings were discontinued due to the absence of the motion for prosecution, while the acts subject to proceedings were indictable. In these cases, because the parties came to an agreement and reached out-of-court settlement, one could possibly consider to discontinue the proceeding due to minor social harm.

The decision of the District Public Prosecutor in Ostroleka, who decided to discontinue investigation related to the acquisition of computer programmes without required authorisation by a person acting with a view to achieve material benefit, i.e. act against Article 278, par. 2 of the Penal Code in connection with Article 118, Section 1 of the Act of 4 February 1994 on copyright and related rights in connection with Article 11, par. 2 of the Penal Code. Justification of decision on discontinuation of proceedings due to absence of motion for persecution referred to the sentence of the Supreme Court of 14 June 2002 in the case ref. II KKN 267/01 (LEX 54399), in which a legal view was expressed, that „it is not acceptable to prosecute a perpetrator ex officio in the situation, where the act contains factual elements of crimes prosecuted ex officio and prosecuted after a motion for prosecution is submitted, while at the same time the motion for prosecution is absent. However, this „unacceptability“ does not refer to the possibility of prosecution, but to the possibility to assume cumulative legal classification of the act. Thus, the elements of the act consisting in acquiring somebody else's computer programme without the consent of the entitled person are subject to prosecution ex officio. When instructing the District Public Prosecutor in Ostroleka to initiate proceedings pursuant to Article 327, par 1 of the Code of Criminal Procedure, his attention was drawn to wrongly assessed cumulative classification of the act according to Article 118, Section 1 of the Act of 4 February 1994 on copyright and related rights (illegal trade related to computer software only, and not to media).

4.1.4. Cases returned to the prosecutor by the court for the proceedings to be supplemented

In this area 40 cases returned to the prosecutors by the courts for supplementation in the first part of 2007 were examined.

As a result of this examination it was found that the reasons for returning were following:

- wrong legal classification of acts and vague wording of charges;
- substantial deficiencies of preparatory proceedings (e.g. no verification of suspect's plea);
- absence of independent expert's opinion or its incompleteness;
- not all wronged parties or their authorised representatives determined;
- absence of motions for prosecution from entitled parties;
- undetermined size of damages.

It should be noted that the spread of reasons for returning files to prosecutors for supplementation was relatively even in the first half of 2007 with none of the reasons particularly dominating.

4.1.5. Cases with acquittal

The examination covered 15 cases, in which in the first half of 2007 the courts acquitted defendants of the charges.

The analysis of the records showed, that as in the second half of 2006, acquittal judgments were passed in cases related to Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law, in connection with the content of the Supreme Court's resolution of 24 May 2005, ref. I KZP 13/05 (OSNKW 2005, No. 6, item. 50), which provided that „introduction to the market“ referred to in the above Act shall mean the first introduction of the goods bearing a counterfeited trade mark to the market by a manufacturer or importer. In these cases however, the defendant could only be attributed secondary introduction of counterfeited goods to the market, or their purchase from such persons. The reason for acquittal of defendants was the courts assumption that their behaviour lacked the statutory features of a wrongful act.

A case of the District Prosecutor's Office in Lodz, in which 3 persons were charged on Article 305, Sections 1 and 3 of the Act of 30 June 2000 - Industrial Property Law. The court sentenced on of the defendants, who imported goods from China and then counterfeited „Rossignol“ trade marks, however it acquitted the defendant's daughter and wife, who were selling the counterfeited products at a market place stand.

Another reason for acquittal of defendants charged on Article 116, Section 2 and 3, Article 117, Section 1 and Article 118, Section 1 of the Act of 4 February 1994 on copyright and related rights was insufficient evidence. Incompleteness of evidence resulted in premature procedural decisions in the form of indictment. Deficiencies of evidence related primarily to unclarified essential circumstances of events which were subject to proceedings.

Yet another reason for acquittals was the fact, that prosecutors penalised act not legally punishable. For example, the District Prosecutor's Office in Nowa Sol accused of a person, who acquired videograms in the form of 18 film titles via Internet and held them on CD-R records, of the act under Article 118, Section 3 of the Act of 4 February 1994 on copyright and related rights.

In the court's assessment the defendant did not perpetrate acquisition of the carrier, and Article 118 of the Act of 4 February 1994 on copyright and related rights does not contain any stipulation reflecting a disposition of Article 293 of the Penal Code. Therefore the defendant's activity consisting in downloading of videograms from Internet could not be classified as crime under Article 118, Section 3 of the Act of 4 February 1994 on copyright and related rights.

4.1.6. Final remarks

The results of the examination of the records lead to the conclusion, that in relation to the previous period, the proceedings related to acts subject to analysis are carried out in a more and more discerning manner. This is confirmed by – among other things – insignificant number of complaints filed by the wronged parties against the decisions concluding preparatory proceedings.

In general the decisions taken by prosecutors in the examined cases may be assessed as correct. Though some mistakes did happen, they were not really substantial and their number was relatively small.

The most frequent irregularities consisted in:

- initiating prosecutions despite unfavourable circumstances in the form of the absence of the motion for prosecution;

- accepting motions for prosecution from persons who are not authorised to act on behalf and for the entity representing the rights of the wronged party or persons inadequately authorised;
- absence of the expert opinion confirming that secured products are marked with counterfeited trade marks (including the case, when the counterfeiting was confirmed on the basis of photo documentation sent by fax);
- absence of confirmation, that the secured goods are marked with trademarks protected in the territory of the Republic of Poland;
- classification under Article 118, Section 1 of the Act of 4 February on copyright and related rights of the unpunishable acts consisting in downloading work from Internet, while the wording of the provision expressly means, that it is distribution of a specific object carrying a work, artistic performance, phonogram or videogram, that is the crime;
- assessing erroneous legal classification of acts, in particular under Article 116, Section 1 of the Act of 4 February 1994 on copyright and related rights, while the act constituted an offence under Article 118, Section 1 or Article 117, Section 1 of the above mentioned Act;
- accepting, in the decisions on presenting charges, and then in the decisions on discontinuance, of incorrect descriptions of acts, inadequate for the statutory features of a prohibited act, in particular under Article 118, Section 1 of the Act of 4 February 1994 on copyright and related right. This crime consists in purchasing or facilitating sales of an object which is a carrier of work, artistic performance, phonogram or videogram distributed or multiplied without authorisation or against the conditions of this authorisation, and not in „possession“, „storing“ or „using“ such an object, which prosecutors wrongly assess in descriptions;
- appointing experts, who have claims to taking part in the proceedings as the wronged parties, rather than appointing independent experts;
- narrowing the circles of harmed entities;
- premature bringing of indictment, despite incomplete evidence, while diligence in collecting this evidence would result in discontinuation of proceeding due to establishing, that activity of a suspect does not fulfil the criteria of a forbidden act or in assessing different legal classification of an act;

- superficial justification of decisions concluding preparatory proceedings.

The increasing quality of preparatory proceeding obviously requires further improvement. Reports submitted by appellate prosecutors indicate the need for further training of prosecutors in the field of copyright and related rights in order to eliminate discovered mistakes, but in particular related to more complicated factual conditions.

On the basis of the examined cases it was concluded, that obtaining necessary motions for prosecution from the wronged parties remains a problem for the prosecutors. In many cases these parties have their seats outside of the country and there are problems with determining their representatives in Poland. Motions for prosecution are often submitted by persons not authorised to act. The wrong parties do not take position on prosecution, which – because of procedural time limitations – makes the prosecutors identify the absence of their answer as the absence of the will to prosecute.

The prosecutors point to difficulties in hearing the representatives or plenipotentiaries of the parties harmed by crimes against copyright or industrial property rights and to cases of refusal to submit motions in cases with insignificant damage and small chances to find a perpetrator or in cases where settlement was agreed upon.

As regards representatives of the STOART Association, there is criticism related to the lack of adequate documentation of the activities with their participation in premises where allegedly somebody else's work is used without authorisation. Notifications from this organisation are often based only on a brief memo, which is to be the only evidence confirming the fact, that –for example – music was played in the premises. The memos on all cases have the same contents, they do not contain information on the kind of distributed music, or on equipment used. Neither are they signed by third persons, in the presence of whom the premises were inspected, which may raise doubts as to whether the inspection was in fact carried out. It is important in as much, as suspects repeatedly deny being inspected by representatives of the association or having talked to them.

The duration of preparatory proceedings is extended by long period of waiting for expert analyses, necessary to determine all wronged parties, as well as by the period of waiting for the damages caused by the crime to be assessed by the entities authorised to represent wronged parties.

There are also problems with assessing the damage in cases where the forfeited products bearing logos of specific harmed companies do not reflect the original products of these companies in shape, volume and other physical qualities (e.g. bottles of perfume with of

a volume other than original), which poses problems for the manufacturer of the original in assessing the damage.

Another problem is substantial expenditure related to remuneration of experts in cases where analyses related to phonographic products are carried out (CDs, DVDs, video cassettes).

It is necessary to regulate cooperation of law enforcement authorities and customs offices in the area of efficient identification of harmed entities, in particular the ones with their seats outside of the country, and obtaining motions for prosecution from them, which in cases under Article 305, Section 1 and 2 of the Act of 30 June 2000 – Industrial Property Law, is the condition of initiating the preliminary proceedings.

In the course of the examination of the records, a problem was detected consisting in law firms representing the right of wronged parties not being interested in submitting motions for prosecution, while at the same time demanding that the prosecutors take action aimed at eliminating products with forfeited trademarks from the market. At the same time when proceedings are discontinued due to absence of motion for prosecution submitted by an entitled person, there are no grounds for submitting motion for forfeiture of seized items to the court. Because of discrepancies, it is necessary to develop uniform practices in treatment of material evidence in such situations.

What needs to be emphasized is the persistent impact of the already mentioned resolution of the Supreme Court of 24 May 2005, ref. I KZP 13/05 (OSNKW 2005, No. 6, item. 50) on the task of the Public Prosecutor's office related to prosecution of crimes under Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law. The resolution contained a clearly stated legal assessment of the term „introduction to the market“, which left the behaviour of persons offering such goods for further sales beyond penalising.

It is becoming a rule – in each instance of discontinuance of proceedings related to acts under Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law – that responsibility of persons taking part in the trade of products with counterfeited trade marks is considered as regards exhausting the disposition of Articles 291 or 292 of the Penal Code. However the scope of the term „dealing in stolen property“ defined in the Penal Code stands against the practice developed by prosecutors in this area. The Supreme Court in its resolution of 19 July 1995, ref. I KZP 27/95 (OSNKW No. 9-10 from 1995, item 60) took the position, that responsibility for dealing in stolen property depends on acquiring an object through a

forbidden act, while „acquiring“ should be understood as taking its possession through a forbidden act.

It is beyond doubt, that while goods marked with counterfeited trade marks are the subject of a forbidden act, they are not acquired through such act. It is therefore difficult to prove that a person who buys, helps to sell, accepts for concealment or helps to conceal, committed a crime of dealing in stolen property.

Because of the problems, which the legal assessment of the Supreme Court related to the term „introduction to the market“ created for the practice of the prosecutors, it was necessary to consider the proposal of prosecutors to amend Article 305 of the Act of 30 June 2000 – Industrial Property Right in order to facilitate prosecution of all persons infringing rights protecting trademarks and participating in the trade.

Act of 29 June 2007 amending the Act - Industrial Property Law (Journal of Laws No. 136, item 958) took the above question into account by amending Article 305 of the Act. Provisions related to this matter came into force on 31 August 2007.

4.2. Collective analysis of the result of examination prosecution files of crimes related to infringements of copyright, related rights and other intellectual property rights, in which in the second half of 2007 decisions on discontinuance or conditional discontinuance were taken, and cases in which a court delivered a sentence on acquittal or forwarded a case to the prosecutor to be supplemented.

Pursuant to the directive contained in the letter of the Director of the Presidential Office of the National Prosecutor's Office of 3 December 2007, ref. PR I 807-1/07 all appellate public prosecutor's offices examined files of criminal prosecutions in cases related to crimes against intellectual and industrial property, in which in the second half of 2007:

- prosecutor issued a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 3 of the Code of Criminal Procedure, because of minor social harm caused by the act;
- prosecutor issued a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 10 of the Code of Criminal Procedure, because there was no motion for prosecution from persons entitled;
- prosecutor submitted an application for conditional discontinuance to the court;
- the court returned the case to the prosecutor for the preparatory proceedings to be supplemented;
- the court acquitted the defendant.

The objective of these examinations was to find out:

- if the decision on discontinuance of proceedings pursuant to Article 17, par. 1 items 3 and 10 of the Code of Criminal Procedure was justified;
- if the prosecutor's application for conditional discontinuance was justified;
- reasons for the court returning the case to the prosecutor for the preparatory proceedings to be supplemented;
- reasons for acquitting defendants.

The examination covered the total of 517 prosecutions related to crimes defined in the Act of 4 February 1994 on copyright and related rights, the Act of 30 June 2000 – Industrial Property Law, the Act of 5 July 2002 on protection of certain services provided by electronic means and based on or consisting in conditional access, the Act of 16 April 1993 on

combating unfair competition and Article 278 par. 2, Article 291 and Article 292 in connection with Article 293 par. 1 of the Penal Code.

4.2.1. Cases, in which decisions on discontinuance of proceedings pursuant to Article 17, par. 1 item 3 of the Code of Criminal Procedure were issued

The examination covered 83 preliminary proceedings concluded in the second half of 2007 with a binding decision on discontinuance of preparatory proceedings pursuant to Article 17 par. 1, point 3 of the Code of Criminal Procedure, because of minor social harm caused by the act which was the subject of proceedings.

The analysis of the files showed, that in most cases justified their position as regards minor social harm of the acts with the manner and circumstances in which crimes were committed, motives of perpetrators and their attitude after perpetration, small value of the material profit, short period of using the illegal software, small number of media which were the subject of perpetration, small damage and the circumstances of repairing it and concluding a licence agreement.

In general it should be concluded, that decisions acknowledging minor social harm in cases related to public performance of music were supported by the fact that the parties came into agreement and damage was repaired, while in cases related to illegal acquisition of software or purchase of media with illegally duplicated software by small number of programmes and their relatively small value (in several such cases representative of wronged parties were not interested in prosecuting the perpetrators).

The analysis of cases discontinued pursuant to Article 17, par. 1, point 3 of the Code of Criminal procedure does not give grounds for questioning these decisions, though in some cases justification provided by prosecutors left plenty of room for improvement. There were also cases where proceedings were discontinued due to minor social harm caused by the act, while proper grounds for discontinuation should in fact be absence of motion for prosecution on the part of entitled person, but the number of such cases was relatively insignificant.

However taking into account a small percentage of cases in this category discontinued in the second half of 2007 it should be concluded, that assessment of evidence before the material decision was taken was usually discerning. It is a proof that the prosecutors did not play down activities infringing protection of intellectual and industrial properties and did not assess their social harm hastily.

4.2.2. Proceeding concluded by prosecutors' applications for conditional discontinuance of prosecutions

The examination covered records of 136 cases concluded in the second half of 2007 by submitting an application for conditional discontinuance of preparatory proceedings against persons suspected of crimes against intellectual and industrial property.

In most cases it was concluded, that in fact there were full grounds for submitting such motions, both factual and formal. Evidence collected in these cases justified the position taken, that the circumstances of perpetration did not raise any doubts. Positions taken in the motions and related to minor social harm of the acts and existence of positive prediction, that suspects would not commit crimes in the future.

Motions for conditional discontinuance of proceeding were mostly submitted in cases related to: illegal acquisition of software belonging to other persons; dealing in stolen software; appropriation of authorship of somebody else's work; illegal multiplication of musical programmes and their distribution, as well as public performance of somebody else's musical works without authorisation.

In justifying their motions, the prosecutors often mentioned circumstances such as payment of owed monies and conclusion of a licence agreement.

Taking into account findings indicating incidental nature of infringements of rights protecting intellectual or industrial property, small number of media purchased for personal used or insignificant value of damage, the decisions of the prosecutors should be considered right.

It should also be noted, that court verdicts usually agreed with the motions of the prosecutors, both in the essence of the solution and in the proposed conditions.

Only in isolated cases the justification of motions for conditional discontinuance of proceeding raised doubts, especially related to the presence of the prerequisite of minor social harm. The case of the District Prosecutor's Office in Lukow, related to purchase of 19 computer programmes worth at least PLN 170 thousand and used by the perpetrator in business activities, may be an example. The value of the software and the way it was exploited might indicate a level of social harm higher than minor, however the parties came to

an agreement and agreed on the manner of repairing the damages, which the court surely took into account when deciding on conditional discontinuance of proceedings.

In the case from the area of jurisdiction of the District Prosecutor's Office in Chelm a motion for conditional discontinuance of proceedings was deemed unjustified. In this case, the perpetrator's act was classified under Article 278, par. 2 of the Penal Code, which because of the potential penalty and absence of circumstances of Article 66, par. 3 of the Penal Code made the submission of the motion inadmissible. It should be noted however, that the act pertained to four programmes of the value of PLN 2 276, which might justify classification under Article 278, par. 2 and 3 of the Penal Code (the motion has not been considered yet).

The analysis of cases, in which the prosecutor submitted a motion for conditional discontinuance of proceedings leads to the conclusion, that the prosecutors relatively frequently do not pay attention to compliance with the conditions of Article 66, par. 3 of the Penal Code. At the same time, the conditional discontinuance of proceedings against perpetrator of an act, which carries a penalty of up to 5 years of imprisonment is only possible, if he or she reconciled to the wronged party, repaired the damage or agreed the manner in which it would be repaired.

Still not all the prosecutors are familiar with the regulation of the Minister of Justice of 16 October 2002 – issued pursuant to Article 123 of the Act of 4 February 1994 on copyright and related rights - on designation of district courts adjudicating on cases related to crimes against copyright and related rights (Journal of Laws, No. 180, item 1510, as amended), which provides that cases related to crimes defined in Article 115- 119 of the above mentioned Act, from the area of jurisdiction of a given regional court (subject to provisions of par. 2) shall be adjudicated by district courts in towns, which are the seats of regional courts.

4.2.3. Cases, in which decisions on discontinuance of proceedings pursuant to Article 17, par. 1 item 10 of the Code of Criminal Procedure were issued

The cases falling in this category were again covered by examination carried out by the Appellate Prosecutor's Offices it was done for the first time in the first half of 2007 – there were 250 examined in total.

As a result of the analysis carried out, only one case of discontinuance of proceedings pursuant to Article 1, par. 17, point 1 of the Code of Criminal Procedure despite filing a motion for prosecution by an entitled person were found. However, the cases where proceedings were launched in spite of the absence of such motions were relatively frequent.

In general, the Police units which conducted investigations asked properly identified wronged parties to file statements requesting prosecution, but there were cases of invalidity of some of these statements. Most of the time it resulted from the fact, that the statements were submitted by persons not authorised to represent a wronged party (e.g. a motion for prosecution was submitted by one board member of a harmed company, while proper representation required a statement of will from two members of the board) or by plenipotentiaries who did not fulfil the criteria set out in the Code of Criminal Procedure (e.g. antipiracy specialist in the harmed Audio and Video Producers Organisation).

In several cases the wronged parties did not submit their statements in the time indicated in the notice at all, or even failed to react to subsequent prosecutor's notices requesting filing of a motion for prosecution. These cases were as a rule considered as being equivalent to refusal of filing such motion. There were however cases of discontinuance of proceedings because of the absence of the motion, without prior notice requesting the wronged party to take position on the matter.

The decision on withdrawal of a motion for prosecution was most of the time motivated by entitled persons with the fact that they effected an agreement and relevant licence contracts with entities distributing work without authorisation. Prosecutors permitted withdrawal of motions in such situations, however unfortunately the minutes of such activity were not taken pursuant to Article 143, par. 1, item 1 of the Code of Criminal Procedure, with an official note documenting a telephone conversation being made instead, for example.

There were also cases discovered, where the proceedings were discontinued pursuant to Article 17, par. 1, item 10 of the Code of Criminal Procedure, despite the fact that they

were related to acts prosecuted ex officio, where submission of motion for prosecution is not required. Usually this was the result of wrong legal classification of the acts.

There were also cases of premature discontinuation of proceedings. An example may be the case of District Prosecutor's Office in Biala Podlaska related to introduction to the market of three watches with counterfeited trademarks of three different manufacturers. In case of one of the watches the activities were limited to accepting a written statement from one of the patent agent offices stating that this entity was no interested in prosecuting the perpetrator, without verifying that the entity was authorised to represent the wronged party. In case of remaining watches activities were limited to filing police memos, which said that the harmed companies did not have their representations in Poland.

4.2.4. Cases returned to the prosecutor by the court for the proceedings to be supplemented

In this area 36 cases returned to the prosecutors by the courts for supplementation in the second part of 2007 were examined. In particular the courts obliged the prosecutors to:

- precisely define the charges and assess correct legal classification;
- appoint independent and reliable experts or specialised institution and seek their opinions on legitimacy of computer programmes, console games, films and music and establish their value;
- define and evidence the damage in respect of all acts committed by defendants;
- identify all wronged parties or their authorised representatives;
- obtain motions from prosecution from all entitled persons.

Most of the prosecutors' complaints against decisions of courts in this matter were not taken into consideration.

4.2.5. Cases with acquittal

The examination covered 12 cases, in which in the second half of 2007 the courts acquitted defendants of the charges.

The reasons for acquittals are partly the result of legislative and interpretative changes of provisions of Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Right, which occurred between the day a prosecutor concluded proceedings and the day of court's judgment.

For example, the District Prosecutor in Koszalin, on 26 October 2005 submitted a motion for conditional discontinuance of proceedings against a person, who introduced to the market socks illegally marked with „Adidas”, „Nike” and „Puma” trademarks, i.e. an act under Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Right. In a ruling of 22 December 2005 the District Court in Koszalin took the prosecutor's motion into consideration and conditionally discontinued the proceeding, imposing certain obligations on the defendant. Since these obligations were not fulfilled, the court resumed the conditionally discontinued proceeding, and in the sentence of 7 November 2007 acquitted the defendant.

The reason for the acquittal was a different legal assessment made by the court as regards the collected evidence. The difference resulted not only from the substantial change in the wording of provisions of Article 305, section 1 of the Act of 30 June 2000 – Industrial property Right, introduced by Article 1, item 66 of the Act of 29 June 2007 amending the Act – Industrial Property Right (Journal of Laws No. 136, item 958), but also from changes in jurisdiction related to this provision in the period between submission of the motion for conditional discontinuance of proceedings and adjudication after the proceedings were resumed, as well as from necessity to apply to the case the principles defined in the disposition of Article 4 of the Penal Code.

On the day the defendant committed the act he was charged with, the provision of Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law provided: „Persons marking products with counterfeited trademarks with the intention to introduce them to the market or persons introducing products with such trademarks to the market shall be subject to fine, restriction of freedom or imprisonment for up to two years“. According to view prevailing in the doctrine and jurisdiction then in force related to the scope of the premise of „introduction to the market“ (whether it means first introduction to the market or any subsequent activity undertaken for this purpose) the act of which the defendant was

accused met the criteria of the crime defined in this provision, thought it was not so obvious at that time already and was subject to controversies in the light of the resolution of the Supreme Court of 24 May 2005 in the case with ref. I KZP 13/05.

In the subsequent period jurisdiction related to Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law evolved towards assessment, that „introduction to the market shall mean the first introduction of the goods bearing a counterfeited trade mark to the market by a manufacturer or importer.

The sentence of the District Court in Koszalin was delivered on the grounds of the amended provision of Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Law which has the following wording: „Persons marking products with counterfeited trademarks or registered trademarks, which they are not authorised to use, with the intention to introduce them to the market or persons trading in products with such trademarks...“. Therefore the court was right in referring to intertemporal provisions and rules indicated in Article 4, par. 1 of the Penal Code, which prescribe the application of an act more lenient for the defendant.

However another reason for acquittal of defendants charged on Articles 116, 117 and 118, of the Act of 4 February 1994 on copyright and related rights was insufficient evidence. Incompleteness of evidence and failure to verify the line of defence of suspects resulted in premature procedural decisions in the form of indictment. Deficiencies of evidence related primarily to unclarified essential circumstances of events which were subject to proceedings. Yet another reason for acquittals was the fact, that prosecutors penalised acts not legally punishable.

4.2.6. Final remarks

The results of the examination of case records lead to conclusions which are almost identical with the ones formulated after the examination of cases processed in the first half of 2007.

The quality of proceedings related to acts subject to the analysis was varied and in significant number of cases should still be considered unsatisfactory. The way the examined proceedings were concluded should in general be judged as appropriate, however assessment of correct legal basis for decisions on discontinuance and proper justification of final decisions require more diligence.

Still, the most frequent irregularities consisted in:

- initiating prosecutions despite unfavourable circumstances in the form of the absence of the motion for prosecution;
- accepting motions for prosecution from persons who are not authorised to act on behalf and for the entity representing the rights of the wronged party or persons inadequately authorised;
- narrowing the circles of harmed entities;
- insufficient intensity of procedural activities, which resulted in extended duration of proceedings;
- absence of expert opinion confirming, that the secured goods are marked counterfeited trademark or absence of confirmation that the secured articles are marked with trademarks protected in the territory of the Republic of Poland;
- classification under Article 118, Section 1 of the Act of 4 February on copyright and related rights of the unpunishable acts consisting in downloading work from Internet, while the wording of the provision expressly means, that it is distribution of a specific object carrying a work, artistic performance, phonogram or videogram, that is the crime;
- assessing erroneous legal classification of acts, in particular under Article 116, Section 1 of the Act of 4 February 1994 on copyright and related rights, while the act constituted an offence under Article 118, Section 1 or Article 117, Section 1 of the above mentioned Act;
- accepting, in the decisions on presenting charges, and then in the decisions on discontinuance, of incorrect descriptions of acts, inadequate for the statutory features of a prohibited act;
- in cases related to act under Article 116 of the Act of 4 February 1994 on copyright and related rights, assessing that the period of unauthorised distribution of somebody else's work was limited only to the period ending on the date when the crime was reported, without verifying in the course of proceeding if the subsequent period could also be included in the charges;
- appointing experts, who have claims to taking part in the proceedings as the wronged parties;
- premature submission of indictment, despite deficiencies of evidence material;

- superficial justification of decisions concluding preparatory proceedings.

Recurrence of this kind of errors proves that there is still the need for trainings in this area, even at the level of legislative regulation and taking into account possible complexities of matter related to both evidence and legal issues. It is however necessary to emphasise the fact, that as the result of constant periodical examination of records the errors are pointed to and removed when possible.

Obtaining necessary motions for prosecution from the wronged parties remains a problem for the prosecutors. Sometimes it proves insufficient interest on the part of entitled entities, but equally often it is a result of the fact, that these persons have their seats outside of the country and there are problems with identification of their representatives in Poland. Motions for prosecution are often submitted by persons, who are not authorised to act, and the wrong parties do not take positions on the subject of prosecution, which is assessed by prosecutors in various ways. Some of them assume, that the absence of a position is equivalent to refraining from submitting a motion for prosecution and discontinue proceedings.

There are still difficulties related to identification of the wronged parties and in many case this is due to the lack of understanding of the role played by collective management organisations, also on the part of the courts.

The prosecutors still point to difficulties in hearing the representatives or plenipotentiaries of the parties harmed by crimes against copyright or industrial property rights and to cases of refusal to submit motions in cases with insignificant damage and small chances to find a perpetrator or in cases where settlement was agreed upon.

As regards representatives of the STOART Association, there is still criticism related to the lack of adequate documentation of the activities with their participation in premises where allegedly somebody else's work is used without authorisation. Notifications coming from these organisations still often take the form of a brief memo, almost identical in all cases, lacking information on the kind of distributed music or equipment used. It is not signed by any third persons in the presence of whom premises were inspected, which results in suspects' questioning the very fact that inspections were carried out at all.

Another problem to which the prosecutors point is the lack of adequate cooperation with the Police, which results in the necessity for the investigation activities to be carried out by prosecutors themselves. Officers carrying out investigation often lack appropriate theoretical knowledge, or preparation related to the subject matter, perform their duties

superficially, without prior consultation with prosecutors on matters such as securing material evidence and its proper description.

Moreover, investigations are carried out in a protracted manner, despite interventions on the part of prosecutors, though it has to be admitted, that in most cases the duration of preparatory proceeding is extended by long period of waiting for expert analyses, necessary to identify all wronged parties, as well as waiting for entities authorised to represent wronged parties to calculate damages caused by crimes. Another problem is substantial expenditure related to remuneration of experts in cases where analyses related to phonographic products are carried out (CDs, DVDs, video cassettes).

It should be noted, that because of the problems, which the legal assessment of the Supreme Court related to the term „introduction to the market“, the prosecutors' community welcomed the amendment of Article 305, Section 1 of the Act of 30 June 2000 – Industrial Property Right, the current wording of which facilitates prosecution of all persons infringing rights protecting trademarks and participating in the trade. Effectiveness of preparatory proceedings related to cases falling into this category will be subject to another analysis.

5. Ministry of National Education

The Ministry of National Education did not report any activities related to combating infringements of copyright and related rights in 2007.

6. Ministry of Science and Higher Education

Within the competences of the Minister of Science and Higher Education the questions pertaining to limiting the unfavourable impact of phenomena related to infringements of copyright and related rights are primarily the responsibility of the Ethics and Science Unit – the advisory team of the Minister. Pursuant to par. 3 of regulating No. 45 of the Minister of Science and Higher Education of 15 October 2007 on establishment of interdisciplinary Ethics and Science Unit (Journal of Laws of MoS&HE, No. 5, item 64), tasks of the Unit include formulating opinions and conclusions in cases pertaining to infringement of ethics in science, which are submitted for the meetings of the Unit by the Minister. In practice the Unit primarily investigates cases of infringement of good scientific practice principles, including, *inter alia*, infringement of principles of authorship and co-authorship of scientific

publications. The question of co-authorship of collective publications, including publications constituting a basis for applications for acquiring scientific degrees and titles, was many times a subject of activities and discussions of the Unit. The Unit considered it appropriate to seek opinions of the Scientific Policy Committee and Scientific and Technical Council of Science on these matters.. On receipt of the position of the Council of Science, the Unit also decided to organise a meeting with the participation of representatives (the President and the Secretary) of the Central Committee for Degrees and Titles.

On the basis of the opinions of the Ethics and Science Unit, the minister competent for matters of science drafts statements and positions containing guidelines on observance of principles of good practices in scientific research, in particular these which are financed from the State budget. These positions are then published on the Ministry's website and despite their not having a regulatory nature, practice shows that research and scientific circles do take notice of their content. One of the most important statements of this nature related to doubled applications for co-financing of research projects referring to the same content and implemented by same research teams (self-plagiarism in fact, i.e. multiple instances of selling the same product) This type of conduct was deemed as infringement of the rules governing applications for co-financing in tendering procedure and the Minister refuses to grant funds in such cases, though after hearing applicants' clarifications.

Furthermore, with a view to protect the principles of good scientific practice, including observance of intellectual property rights, the provision of item 6 was introduced to Article 4 of the Act of 8 October 2004 on principles of financing science (Journal of Laws, No. 2390, as amended) obliging the minister competent for matters of science to take into consideration opinions of Ethics and Science Unit when granting funds.

IV. Activities undertaken in 2007 by collective copyright and related rights management organisations and other social partners involved in protection of copyright and related rights in relation to piracy and the results of these activities

The Ministry of Culture and National Heritage, being the coordinator of the Strategy, has an open access to information on its implementation. In the view of the Ministry attention should be drawn to coordination of activities of State services and collective copyright and related rights management organisations and other social partners involved in protection of copyright and related rights.

The attitude of these organisations, as well as the officers of the Police, the Border Guards, the Customs Service and the Patent Office, deserves the special praise. Their involvement and professionalism contributed to many cases of combating piracy and counterfeiting.

The information presented in this part of the Report has been prepared by collective copyright and related rights management organisations and other entities participating in the activities of the Unit. They also contain opinions characteristic to their respective fields of activity.

1. Antipiracy Coalition: Business Software Alliance (BSA), Foundation for the Protection of Audiovisual Works (FOTA), Polish Society of the Phonographic Industry (ZPAV)

1.1. Foundation for the Protection of Audiovisual Works (FOTA) and Polish Society of the Phonographic Industry (ZPAV) – joint activities

In the assessment of FOTA/ZPAV, the level of protection of the Polish market against unauthorised distribution of phonograms and videograms in 2007 is similar to this observed in 2006, i.e. the expected improvement in the protection of the market did not take place. This pertains primarily to infringements in the Internet, but also to traditional method applied by perpetrators – sales of illegally multiplied media in marketplaces – particularly marketplaces located near the Polish western border.

Further increase in the number of recordable records (DVD-R) offered for sale is observed, they now already account for more than 50% of the overall supply of media illegally multiplied on optical discs. It confirms increasing activity of local producers and suppliers of pirate media. It now became a rule, that one record contains several films, which substantially influences the extent of losses of film distributors.

Substantial majority of the activities of the law enforcement authorities targets distributors and sellers of illegally multiplied music and films.

The reason for the decrease in the number of the recording „studios“ in which the illegal carriers are manufactures may be the alleged „diffusion“ of manufacturing – organised solely for local needs of marketplaces in small towns.

The phenomenon of recording video films in cinemas with the use of amateur film cameras, which was previously pointed out, has now become a common practice. In around 9 cases out of 10, the sources of pirated copies of a motion picture that first enter the market are the copies made with a video camera. In countries where there is a demand for films with local version of dialogues (dubbing), pirates record soundtracks during public screenings and combine them with an image from a DVD containing a foreign language version or with an image downloaded from the Internet.

Films prepared in this manner are made available in the net or on media (e.g. DVD-R) before the first screening or while the film is shown in cinemas.

In the view of FOTA/ZPAV, the penal provisions of the Act of 4 February 1994 on copyright and related rights currently in force, do not provide sufficient instruments for combating this type of business.

According to the assessment of FOTA/ZPAV, unauthorised distribution and swapping of music and film files via the Internet is now a primary (with tendency to increase) method of criminal activity carried out by persons infringing intellectual property rights. The results of a research show that around 75% of net users use P2P type software facilitating file swapping.

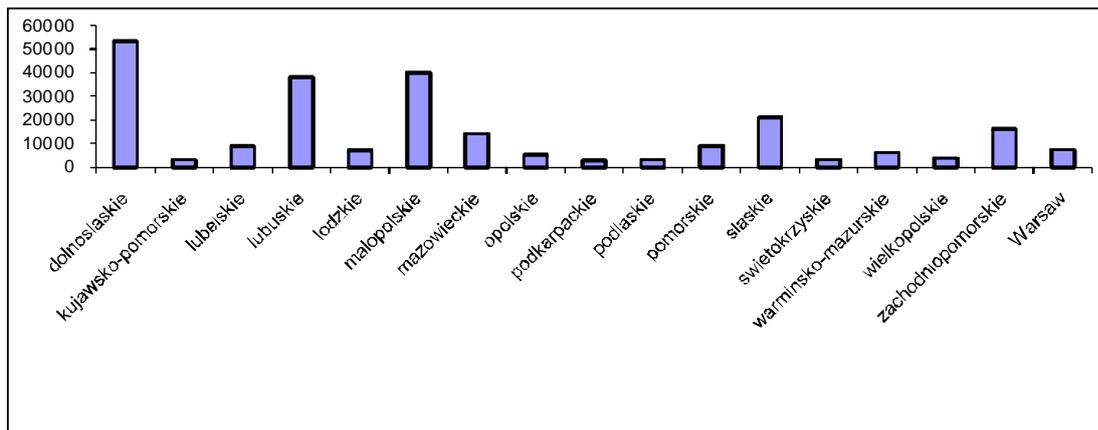
The noticeable greatest activity in swapping unauthorised music and film files over academic networks is worrying. It proves inadequate supervision of network administrator over the relevant servers.

The research commissioned by the Association of Film Distributors shows that over 1.8 million of Internet users download files containing films, of which 185 thousand acquire newly released films in this manner, which indicates the substantial scale of this phenomenon.

FOTA/ZPAV support the activities of the Police in the process of detecting and documenting instances of infringement of rights of audio and video producers, however these activities are not sufficient. Only few of the Police units undertake activities related to combating infringements of copyright and related rights in the Internet. The achievements of Silesian, Lower Silesia, West Pomeranian and Warsaw police units in this area should be mentioned at this point.

According to FOTA/ZPAV there is a necessity to introduce the amendments to provisions of Article 118 of the Act of 4 February 1994 on copyright and related suggested in the report for 2006, which would facilitate faster and more effective enforcement of these rights.

In the first half of 2007 FOTA/ZPAV – within their participation in implementation of objectives included in „The Strategy for protection of copyright and related rights“ – took an active part in trainings organised for the Police, the Border Guards and the Customs Service under the *twining programme* „*Transition facility*“ as well as in the drafting of „The methodology of the police work in detection and combating of illegal distribution of copyright protected work in the Internet“ by the Internet Group.



The number of pirated media containing music, intercepted by all services in the territory of Poland in 2007
(Statistical data from ZPAV register)

During the on-going monitoring of the market the representatives of ZPAV detect pirated CDs and DVDs, which are sent for forensic examination to IFPI in London within the framework of the implemented programme.

ZPAV activities are particularly targeting pre-premiere material with sound recordings.

Still, the results of mechanoscopic examination of media with Polish and international repertoire found in the territory of Poland carried out by IFPI Secretariat show that substantial majority, nearly 90% of CDs and DVDs, are the media printed in Russia.

At same time this indicates lower activity of the Polish customs administration as regards detection and interception of illegally multiplied optical media in the eastern border of Poland, which is also the border of the European Union.

The information in possession of ZPAV/FOTA indicates, that over the years of functioning of Regulation 1383/03 not a single case of proceedings provided for in this Regulation took place.

Technological potential of optical carrier pressing facilities in Poland exceeds 1 billion of media per year, and the information in possession of ZPAV shows, that the operating facilities quite often use plants in other countries, e.g. Lithuania or Hungary for additional production, due to the fact that own equipment cannot process the volume of accepted orders.

The legal provision which provide for obligation to apply *SID IFPI* codes to pressing equipment are not in force in the territories of the above mentioned countries, which in consequence, after the media are introduced to the Polish territory, may cause confusion when assessing legitimacy of media offered for sale.

1.2. Foundation for the Protection of Audiovisual Works - FOTA

In the assessment of the Foundation for the Protection of Audiovisual Works FOTA the year 2007, as 2006, did not bring the expected improvement in the protection of the market against unauthorised distribution of phonograms and videograms. This situation pertains to both optical media and infringement in the Internet.

This is reflected – *inter alia* – in the decrease of the numbers of prosecutions against persons infringing copyright and related rights to audiovisual works registered by the Foundation.

There was a success however, which may be perceived in a national scale – practically complete of sales of counterfeited carries in Warsaw electronic products exchange in Wolumen Street. This was the result of an on-going, systematic activity of the local police unit, which eliminated both sellers and manufacturers illegally multiplying and supplying pirated media to the exchange in question. The problem of Warsaw's „Europa Market“ was also solved by administrative decisions related to the construction of the National Stadium, and the fact that the illegal trade in phonogram was partly moved to the vicinity of the western Polish border. Unfortunately there was a substantial increase of the supply of film files in the Internet, particularly in the *BitTorrent* programme instead.

In 2007 932 requests for assessment of 201 360 secured media with works, 138 computers and 813 hard disks were submitted. The structure of illegally recorded optical media offered for sale has changed, as the further increase of the number of recordable media (DVD-R) is observed. While few years ago the share of pressed DVD records (primarily smuggled across the eastern border) was as big as 85%, it decreased to 45 – 50% recently. This may be the sign of local producers and suppliers of pirate media becoming active.

It should be noted, that more and more frequently one record contains several films, which substantially influences the extent of losses of film distributors.

The number of the so called „laboratories“, that is place where music and films were copied on recordable media on a large scale, detected by the Police have decreased. Substantial majority of the activities targeted distributors and retail sellers of illegally multiplied works.

The proposal – submitted on many occasions by the Antipiracy Coalition - for administrative ban on sales of both optical media containing protected material as well as blank media with recorded content, which worked well for the marketplace in the 10th Anniversary Stadium, was not applied elsewhere.

Legal obligation of administrators and owners of grounds, on which the trade takes place, to take measures aiming at elimination of the trade with pirated goods would take the burden of multiple, costly operations off the Police and other State services.

The analysis of case records in possession of the Foundation shows the continued practice of appointing experts even in cases, where infringement of copyright and related right is beyond doubt and defendant pleads guilty. Equally common is the practice of appointing experts on IT technology or patent law to assess legitimacy of media contents, who – while not having expertise on property rights to works or licences – request this information from wronged parties and then include this information in their opinions. Such practice increases the cost of the proceedings and extends their duration. There are also more and more frequent cases of appointing so called „independent experts“ in cases, in which the opinion was already elaborated by FOTA Foundation. The appointed experts use FOTA’s opinions and do not contribute to the case, apart from increasing its cost.

Documentation of seized media is a time consuming process. FOTA – similarly to ZPAV – suggests that inspection is described only for a representative sample of a specific batch of impounded media. This solution would substantially shorten the proceedings in this category of cases.

Unauthorised distribution and swapping of film and music files via the Internet is now a phenomenon with a substantially upward trend. The results of a research carried out show that around 75% of net users use P2P type software facilitating file swapping.

Estimates of the market show that over 1.8 million of Internet users download files containing films, of which ca. 200 thousand acquire newly released films in this manner, which indicates the substantial scale of this phenomenon.

FOTA supports the activities of the Police in the process of detecting and documenting instances of infringement of rights of audio and video producers, however these activities are not sufficient. Only few of the Police units undertake activities related to combating infringements of copyright and related rights in the Internet.

According to FOTA as well as other members of the Antipiracy Coalition there is a need – voiced already in the previous years - for amendments to the legislation which would facilitate faster and more effective enforcement of these right.

It pertains to the possibility to collect material from internet services providers for the needs of criminal or civil proceedings.

It is proposed that the wording of Article 118 of the Act of 4 February on copyright and related rights is supplemented by provisions that would allow prosecution of behaviour consisting in introduction of unauthorised film or music files available in IT system to a person's computer.

Provisions currently in force consider only a purchase of an object which is a media for work to be an act of dealing in stolen property, while „internet fencing‘ is not a forbidden act.

Similar situation pertains to Article 118¹, which should be supplemented by including software intended for unauthorised removal or by-passing effective technical safeguards against playback, reproduction and multiplying of work or objects of related rights. Currently this is the most common way of duplicating content.

Another growing problem are activities of Internet users consisting in providing links to websites containing illegal films, music or software located on foreign servers.

Identification of such a server is not particularly difficult for law enforcement authorities, what is a problem is blocking such a site, because of the length of procedures which are carried out within international legal assistance.

Equally important problem, which substantially influences the scope of infringements of the law in Poland, is illegal recording of films while they are shown in cinemas.

In around 9 cases out of 10, the source of pirated copies of a motion picture that first enter the market are such copies. In countries where there is a demand for films with dubbing, the so called „pirates“ often secretly record soundtracks during public screenings and combine them with an image from a DVD containing a foreign language version or with an image

downloaded from the Internet. Films prepared in this manner are made available in the Internet or pirated DVD discs before the first screening or while the film is shown in cinemas.

In Poland this phenomenon has been and still is a serious threat not only to distributors of foreign films, but primarily to legally operating Polish audio and video industry.

Another problem faced by legal distributors is distribution of film soundtrack translations.

In order to make films comprehensible to viewers, „pirates“ translate dialogues into a desired language and upload them on websites built for this purpose. The translations are then downloaded for the Internet by interested parties and combined with image with the help of special software. Closing of a website located on a foreign server, through which subtitles were illegally distributed, in April 2007 limited the phenomenon of film piracy in Poland for several months. Unfortunately new websites providing similar illegal services bring the situation from before joint activities of the Police, Fota and ZPAV.

Film prepared in this manner are distributed – primarily in the Internet and on media (e.g. DVD-R) before their first screening or simultaneously with their cinema distribution, which causes losses not only for media distributors, but also for cinema distributors and reduces amounts which could support the Polish cinematographic industry.

1.3. Business Software Alliance – BSA

For over ten years BSA has been involved in matters related to enforcement of intellectual property rights and educational activities undertaken together with other social partners. Each year sees a substantial increase in the number of cases related to infringement of authorship rights to software. There are no comprehensive data on activities carried out by BSA members in relation to prosecutions that would allow to determine the number of cases started and concluded in 2007, however it may be estimated that software producers associated in BSA were involved – in varying degrees – in over 1000 cases all over Poland, which were started in 2007 and before.

In BSA's view, one of the milestones in 2007 in the area in question, was the beginning of closing down of stands and the „Jarmark Europa” marketplace in 10th Anniversary Stadium, which for many years had been an important location of trade in products infringing copyrights and laws protecting trademarks.

Another important event was the approval of the Act of 9 May 2007 amending the act on copyright and related rights and certain other acts, implementing provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

In the area of improving the social awareness, in 2007 BSA carried out a number of educational initiatives related to observance of copyright.

Together with auction portal allegro.pl, BSA has launched information and education campaign, within which an Internet vortal www.kupiedobrypomysl.pl was started, related to principles of legal trade in software and threats resulting from use of illegal software. A competition for antipiracy commercial with the motto „I will buy a good idea“ has been organised within this campaign. It is the common knowledge, that auction portals are often used by persons distributing products infringing copyright.

In January 2007 a training seminar under the auspices of BSA was organised for entities involved in software auditing and consulting in licence management. The content of the training included matters related to legal liability for infringement of software copyright, principles of licensing most popular software and procedures of software management.

Together with the Antipiracy Coalition, BSA carried out an information campaign „TOP 500“ targeting all higher education institutions and 500 biggest companies in Poland. In the letter sent to the recipients matters related to the use of servers, company computers and the Internet in the light of legal consequences of copyright infringements, as well as security threats were discussed. The addressees of this campaign were also invited to participate in a free training for persons responsible for IT resources in schools and businesses.

BSA, together with other members of the Antipiracy Coalition and the Authors' Association ZaiKS carried out the second stage of the education project „Be Original“ targeting gymnasium students all over Poland and implemented in cooperation with the Ministry Of National Education and the Ministry of Culture and National Heritage. The objective of the project is to promote respect for the work of artists among young people and to counteract infringements of intellectual property. It is the continuation of the initiative started in 2006. The second stage included over 20 meetings with students of gymnasiums and high schools all over Poland with the objective of making the young people aware of threats related to the use of the Internet, both in terms of security and infringements of the law.

In BSA's view, the fundamental matters related to observance of copyright in Poland, which still require improvement and attention include:

- effectiveness of law enforcement authorities in prosecution of infringements of copyright in the Internet, including internet auctions; of course activities of some units in Poland, which deal with infringements in the Internet in a more specialised manner deserve a praise;
- long duration and protractedness of procedures, which in many cases results from excessive adherence of authorities in charge to formalities, e.g. requiring that motions for prosecutions are submitted in the form of minutes from a hearing, despite the fact that the provision of Article 143, par. 1, section 1 of the Code of Criminal Procedure expressly states, that is only an oral form of proceedings indicated there that needs to be recorded, so they are superfluous if made in writing; similar is the case with demanding motions for prosecution even in situations where a crime is prosecuted *ex officio*.

The steadily increasing for several years role of the Internet in illegal distribution of works (including software) should also be pointed out. More and more often not only evidently pirated copies of software are distributed, but also counterfeited products of high quality. This type of activity is often related to forging certificates confirming legitimacy of a given product and to international crime.

2. Authors' Association ZAiKS

In implementation of its statutory tasks in 2007, the Authors' Association ZaiKS cooperated with State authorities in counteracting infringements of copyright. In particular ZaiKS cooperated with the Police, the Public Prosecutor's Office, the Customs Service, the Border Guards and the Military Police, providing them free of charge with opinions, submitting motions for prosecution and training state officials.

In the period in question, 280 opinions on legitimacy of impounded audio media were delivered at the request of state authorities. There were 245 opinions issued for the Police units, 18 for the Public Prosecutor's Offices, 9 for courts, 4 for customs authorities in Warsaw and 4 for the Military Police.

The opinions issued were accompanied by motions for prosecution of 319 persons, 10% more than in 2006.

Proceedings in cases under Articles 116- 118 of the Act of 4 February 1994 on copyright and related rights handled by the Warsaw Police and the Public Prosecutor's Offices are forwarded to courts without indicating the Authors' Association as the wronged party („Warsaw Group“, which according to the provisions of the Strategy was meant to coordinate antipiracy activities in Mazovia region did not meet in 2007 at all).

The greatest number of opinions was issued to the Police units in following voivodships: Dolnoslaskie – 70, Slaskie -50 and Lubielskie – 36.

The losses of artists due to illegal use of their work on media subject to cases in question amounted to PLN 330 580.

Substantial majority of opinions issued in 2007 related to music recordings found in impounded computer discs or CD-R discs containing music recording in *mp3* format.

After analysis of cases, in which opinions were requested from ZaiKS, following conclusions may be drawn:

The trend to introduce to the market or publicly perform material from home made CD-R media is increasing. Another worrying phenomenon is exchange of music files via the Internet with the uses of *peer-to-peer* software.

It is visible in case of evidence material submitted by law enforcement authorities, where recordable media or computer hard disks constitute almost whole material in processed cases. Illegal CD records in CDA format accompanied by copied graphics have now become a rarity in secured evidence material.

In an attempt to improve antipirate activities ZAiKS, together with other collective management organisations within the so called Antipiracy Coalition, took part in the drafting of „The methodology of police work in detection and combating intellectual piracy in the Internet“.

The document clearly and logically systematises the work of the Police and the Public Prosecutor's Office related to cases of infringements consisting in illegal provision of files.. „Methodology“ was met with approval of law enforcement authorities. Moreover, during meetings the need for amendment of the Act of 4 February 1994 on copyright and related rights as regards interactive use of works was discussed. Concrete proposal were drafted and presented to the Ministry of Culture and National Heritage.

In the past year ZAiKS employees delivered following trainings to police officers in the area of recognition of illegal sound media:

- in March 2007 a training was provided to 43 officers in Voivodship Police Headquarters in Wroclaw;
- in September 2007 a three day training was organised in the Police Academy in Slupsk for 85 officers from various Voivodship Police Headquarters;
- in November 2007 a three day training was organised in Polanczyk for 70 officers from Podlaskie, Malopolskie, Slaskie, Swietokrzyskie and Lubelskie voivodships.

For each of the trainings, which in total covered 198 of police officers, training material in the form of a brochure distributed among the participants was prepared.

3. Polish Filmmakers Association

In May 2007 Polish Filmmakers Association launched an Internet monitoring campaign as regards infringements of copyright by *Web 2.0* (community) type portals. So far the campaign included almost 500 Polish services of this kind, both websites providing links to other services of this type and the biggest ones providing disk space for video material.

The campaign received a lot of attention, both in the press and in trade internet portals. It is hard to estimate the results of the campaign now, however as a result ca. 30% of website administrators removed illegal sites from the content of their sites. The problems encountered during the campaign included the lack of possibility to contact some website administrators and the lack of legal awareness of Internet users, to which the campaign was also to contribute.

The campaign also targeted international operators, dominating in the world market. The discussions with these entities are now under way, but there is no sign of a real will to cooperate on their part.

At the same time the Association launched a similar campaign consisting in monitoring of the Internet for content intended for new generation mobile phones and portals offering *video on demand* and *pay per view* (so called Internet cinema) services.

4. Association of TV Programme Distributors SYGNAL

The problem of TV piracy, its scale and huge losses incurred by TV industry as a result of TV signal theft were finally acknowledged and for the first time included in „The strategy of activities for protection of intellectual property in Poland“ approved for 2007. The Association of TV Programme Distributors SYGNAL, the statutory objective of which is to protect intellectual property in the form of TV signal, from its very beginning in 2002 undertook a variety of activities aiming at limiting the phenomenon of TV piracy. These activities are fully compliant with proposal of the Strategy, starting from organisation of social campaigns, through educational activities to close cooperation with law enforcement authorities, primarily with the Police.

The most important activities implemented by the Association in 2007 include: social campaign, trainings on combating TV piracy for representatives of law enforcement authorities and operations against persons stealing TV signal carried out by the members of the Association in cooperation with the Police.

4.1. Information and education activities

4.1.1. Social campaign

In 2007, the third already, nationwide education and information campaign against theft of TV signal was carried out under the motto „Shame now, punishment immediately after“.

The objective of the campaign was to increase awareness of the Poles of the fact, that TV piracy is a crime. At the same time it made the audiences aware, that illegal reception of TV is an act equally shameful, as any other theft.

The campaign was run under the auspices of the Minister of Culture and National Heritage.

The core of the campaign – which began in March 2007 and was then continued in Autumn – was a 30 second TV spot broadcast in channels owned by broadcasters associated in the SYGNAL Association and channels of other commercial stations, which made their airtime available free of charge.

The campaign was accompanied by intensive information activities. The result was a number of publications and broadcasts in nationwide, regional and trade media on piracy and the legal consequences for perpetrators.

4.1.2. Educational activities in schools

Within the framework of activities aimed at raising awareness of the harm caused by TV piracy, SYGNAL Association co-organises – together with the members of the Antipiracy Coalition and the Authors' Association ZAiKS – the second edition of the „Be Original!“ education project launched in 2006. The project continued in 2007 targeted gymnasium students all over Poland, and its objective was to generate respect for the work of artist among students, as well as their teachers and parents, and to promote respect for the property rights of distributors, broadcasters and licensors. On the other hands the authors of the projects wanted to give a warning on the consequences of stealing intellectual property.

4.2. Research on perception of TV piracy

Similarly to 2006, in 2007 the SYGNAL Association carried out a research on the Poles' perception of TV piracy (June/July 2007, GFK Polonia). The research is a source of key information, which in many cases is the base for decisions made by the Association on actions undertaken. The research proves, that opinions on theft of TV signal are still not equivocal. They show, that 68% of the Poles think that using cable TV or satellite platforms without payment and provider's knowledge is something bad, but as much as 46% think, that piracy is an evidence of being smart. Moreover, half of the respondents agree that using pay TV without the knowledge of the provider is simply thieving, but as much as 53% say that they would not lose respect for their neighbours, if they used the services in that manner. As much as half of respondents are aware, that the theft of the signal is against other subscribers, but every person out of three thinks that such activity should not be punished rigorously punished.

4.3. Cooperation with law enforcement authorities

4.3.1. Trainings and seminars

Trainings and seminars organised for police officers from departments combating economic crimes are one of the examples of cooperation with law enforcement authorities. The participants of these meetings acquire specialist knowledge on pay TVs, they familiarise themselves with technical and legal aspects which facilitate effective prosecution of persons stealing TV signal.

In 2007 9 trainings took place, in which 600 officers from Departments for Combating Economic Crime for 10 voivodships participated.

In 2007, under the programme of trainings for students of police academies, trainings were organised in police academies in Katowice, Slupsk and Szczytno. The total of over 300 students and teachers of the schools participated in the trainings.

In 2007 the Sygnal Association carried out 2 training for public prosecutors devoted to interpretation of technical terms in the Act of 5 July on protection of certain services provided electronically based on or consisting in conditional access. In total ca. prosecutors participated in the trainings.

The SYGNAL Association, together with the Chief Police Headquarters, prepared an information brochure which is to help effective detection and prosecution of crimes of TV piracy. The brochure was prepared not only for the needs of the trainings organised, but also for police officers, who do not participate in trainings organised by SYGNAL, but who - due to the functions they perform – are involved in investigation of crimes against TV operators. The brochure is distributed to police units nationwide with the knowledge and approval of the Chief Police Headquarters.

4.3.2. Cooperation with law enforcement authorities – joint operations

In 2007 the SYGNAL Association initiated and participated in a number of antipiracy operations. The leading example of joint activities with the Police was the operation against TV pirates, who – via the Allegro portal – introduced to the market illicit equipment and software for unauthorised use of services provided by operators of digital platforms. As a result of the operation, in which several hundred police officers from 16 voivodships took place, over 90 searches were carried out, over 50 computers, 10 hard disks, over 100 digital decoders, over 120 access cards and substantial quantities of other illicit equipment used to by-pass technical safeguards used by operators were impounded. The operation was carried out in the beginning of 2008, but it had been prepared in the second half of 2007. Motions for criminal prosecution of perpetrators were submitted by the SYGNAL Association, and the information about the operations was publicised in the press, internet portals, TV and radio.

4.3.3. Cooperation with law enforcement authorities – motions for prosecution

In 2007, making use of the statutory provisions, pursuant to Article of the Act of 5 July on protection of certain services provided electronically based on or consisting in conditional access, the Board Members of the SYGNAL Association, which a national organisation with the statutory objective to protect interests of entrepreneurs providing services based on or consisting in conditional access, submitted 209 motions for criminal prosecution of persons stealing TV signal.

4.4. Initiation of close cooperation with the Polish Chamber of Electronic Communication

As a result of several months of consultations, which took place in the second half of 2007, the SYGNAL Association and the Polish Chamber of Electronic Communication (PIKE) associating over 130 companies from TV and telecommunication industries, concluded an agreement on close cooperation (the beginning of 2008). PIKE declared intensive involvement in activities related to combating TV piracy and to protection of intellectual property.

The agreement with PIKE is a very important moment for the antipiracy coalition – both in terms of the Association’s development and broad promotion of the idea of respect for intellectual property, including TV signal. Joining forces in a concerted fight against piracy shows, that both the threats and the need for determined action are increasingly noticed. Cooperation with PIKE means the possibility of intensification of initiatives against TV piracy and their implementation on a much larger scale. Intensive activities in turn mean more effective protection of TV signal, rights of operator, broadcasters and copyright proprietors, as well as Polish users of TV services.

4.5. Legal barriers to effective fight against piracy

Act of 5 July 2002 on protection of certain services provided by electronic means and based on or consisting in conditional access introduced a catalogue of forbidden acts, facilitating also effective prosecution of perpetrators of acts, which until that time had not been precisely defined in a separate act. The Act defines the principles for legal protection of certain services, such as broadcasting or distribution of paid TV programmes provided electronically, the use of which depends on prior purchase of conditional access device or acquisition of individual authorisation to access a specific service by a subscriber. Therefore the Act seemed to be an effective instrument in fight against TV piracy, both for operators of digital platforms and cable operators.

In fact this Act is an unquestionable legal basis, which may be used by digital platforms, which is confirmed by extensive jurisdiction. At the same time the situation is not so unequivocal in case of cable networks. The ruling of the Supreme Court of 29 August 2007, ref. I KZP 19/07 in case of stealing TV signal from one of the cable networks confirms the necessity for urgent amendment of the Act. In the interpretation of the Supreme Court a needle, which the perpetrator used to connect to the network is not a piece of equipment and therefore does not fit into the catalogue of terms reserved for illicit equipment which make it possible to use protected services without service provider’s consent. The Supreme Court focused only on interpretation of terms used in the Act, omitting the objective of the action of the person illegally connecting to the network and the result that person achieved.

Therefore, due to numerous instances of discontinuation of proceeding for the above described reason, the Sygnal Association will propose that the Act is supplemented with the notion of objects which make it possible to by-pass safeguards used – alongside the notion of

illicit equipment – which will facilitate effective prosecution of persons stealing TV signal also in cable network resources.

V. Summary

The results of work undertaken in 2007 show that many tasks should be continued in 2008.

There still is a need to undertake activities supporting more and more effective enforcement of observance of copyright, related rights and other intellectual property rights:

In particular this pertains to:

- protection of these rights in the Internet;
- monitoring of *P2P* networks and prosecution of perpetrators;
- reinforcing controls at the State borders;
- reinforcing controls in marketplaces nationwide,
- elimination of possible delays in investigations and forwarding cases to courts;
- shortening the duration of court proceedings against persons infringing copyright, related rights and other intellectual property rights;
- differentiation of the degree of punishment depending on kinds of infringements and particular penalisation of industrial scale piracy;
- necessity to undertake activities aiming at depriving perpetrators of the fruits of their crimes (forfeiture of property, bail bonds, fines);
- pursuit to reduce the number of suspended sentences;
- campaigns aiming at increasing social awareness of the necessity to respect copyright, related right and other intellectual property rights;
- further, active cooperation of government administration with collective copyright and related rights management organisations and other social partners involved in protection of copyright and related rights.

Despite extensive organisational effort and substantial contributions of the Team's members, not all problem have been solved. The scope of the tasks turned out to be very extensive and time consuming. Some of the task require further strengthening of human resources, trainings and new legal solutions.

In the context of Poland's accession to the European Community improvement of standards of protection of copyright, related rights and other intellectual property rights has become necessary.

Poland has undertaken substantial efforts aiming at reduction of infringements and improvement of its credibility in the international arena.

Persistently implemented systemic solutions prove to be adequate and bring better and better results.

It is particularly worth pointing out to the fact, that many of the tasks of the Team For Counteracting Infringements of Copyright and Related Rights do not involve substantial budgetary funds, and many of them are carried out with involvement of collective copyright and related rights management organisations. Among the most important of these tasks the following could be mentioned: specialist trainings, educational campaigns, legal assistance, continuous monitoring of threats and public opinion polls, cooperation in drafting legal solutions or storage of pirated goods.

Despite the recorded improvement of the situation and reduced scale of threats related to trade in pirated and counterfeited articles, infringements of copyright, related rights and other intellectual property rights still remain a problem in Poland. One should take into consideration, that any permanent progress in combating piracy will only be possible with the support of international organisations. Infringements of intellectual property rights cannot be viewed as a problem of a single country, which should seek solutions on its own. Broadly understood intellectual property is of a cross-border nature and it is the heritage, which should be subject to special protection.