

**Ministerstwo
Kultury
i Dziedzictwa
Narodowego.**

**Report on the implementation in Poland of Directive 2004/48/EC
of the European Parliament and of the Council of 29 April 2004
on the enforcement of intellectual property rights**

Warsaw, April 2009

Introduction

Article 18, paragraph 1 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter referred to as “the Directive” or “Directive 2004/48/EC”) specifies that three years after its implementation, which expired on 29 April 2006, each Member state shall submit to the Commission a report on the implementation of the Directive.

In order to unify the assessment made by Member States, the European Commission has developed a common methodology for collecting data used in the reports.¹ On the basis on this methodology, the Ministry of Culture and National Heritage has prepared questionnaires which have been sent to private entities employing regulations implementing the Directive and to district courts, throughout the medium of the Ministry of Justice and appellate courts.

The following report has been prepared on the basis of answers to questions included in the questionnaire, provided by the Ministry of Justice and by the following entities:

- within the scope of copyright and related rights:
 - HetMan Agency Marek Cierniak;
 - The National Chamber of Audiovisual Producers;
 - The Polish Chamber of Electronic Communication (representing operators of cable networks – users of copyright and related rights);
 - Polish Radio S.A.;
 - Radio Zet sp. z o.o. (limited liability company);
 - Association of Polish Architects (collective management organization);
 - Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych SAWP (Polish Musical Performing Artists’ Society, SAWP) (collective management organization);
 - The Authors’ Association ZAiKS (collective management organization);
 - The Polish Filmmakers Association (collective management organization);
 - The Association of Folk Artists (collective management organization);
 - The Association of Polish Artists and Designers (collective management organization);
 - The Polish Society of the Phonographic Industry (collective management organization);
- within the scope of industrial property:
 - The American Chamber of Commerce in Poland;
 - The Polish Federation of Engineering Associations - NOT;
 - The Polish Association of Branded Goods Manufacturers ProMarka;
 - Association for the Protection of Industrial Property;
- within the scope of plant varieties:
 - The Polish Seed Trade Association.

The report covers the period from the day when the Act implementing the Directive entered into force (June 20, 2007) until the end of 2008.

¹ Document MARKT/D/2/MF/DE/ec/D(2007)8877.

Part I – Information provided by administration and justice administration bodies

1. Changes in legal regulations introduced due to the implementation of Directive 2004/48/EC

1.1. The way of implementation

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights was implemented by virtue of the Act of 9 May 2007 amending the Copyright and Related Rights Act and other selected Acts (Journal of Laws No. 99, item 662). The Act has unified civil law measures employed in the case of infringements of intellectual property rights, i.e.:

- copyright and related rights,
- sui generis database right,
- right in registration of a topography of integrated circuits,
- right of protection for a trademark,
- right in registration of an industrial design,
- right of patent and additional right of protection,
- right in registration of a geographical indication,
- right of protection for a utility model,
- exclusive right to a plant variety.

The Act entered into force on 20 June 2007 and introduced changes in the following legal acts:

- the Copyright and Related Rights Act of 4 February, 1994 (Journal of Laws of 2006, No. 90, item 631, as amended), hereinafter referred to as “the Copyright Act”;
- The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws No. 43, item 296, as amended), hereinafter referred to as “the C.C.P.”;
- The Industrial Property Law Act of 30 June 2000 (Journal of Laws of 2003 No. 119, item 1117, as amended), hereinafter referred to as “the Industrial Property Law”;
- The Protection of Databases Act of 27 July 2001 (Journal of Laws No. 128, item 1402, as amended), hereinafter referred to as “the Act on the protection of databases”;
- The Act on legal protection of plant varieties of 26 June 2003 (Journal of Laws No. 137, item 1300, as amended), hereinafter referred to as “the Act on the protection of plant varieties”;

1.2. Article 4 – Individuals entitled to apply for the application of the measures, procedures and remedies.

The Copyright Act has extended the right to assert claims specified in Article 79, paragraph 1 to all persons entitled on account of copyright and (pursuant to Article 101) on account of related rights.

Additionally, the right to assert claims concerning infringements of intellectual property rights is held by (no changes have been made within this framework):

- database producer (Article 11, paragraph 1 of the Act on the protection of databases) and his legal successor (Article 2, paragraph 2);
- entitled under patent, additional right of protection, right of protection for a utility model or entitled under the right in registration of an industrial design (Article 287, paragraph 1 and Article 292, paragraph 1 of the Industrial Property Law);
- entitled under the right in registration of a topography of integrated circuits (Article 293, paragraph 1 of the Industrial Property Law);
- entitled under the right of protection for a trademark (Article 296, paragraph 1 of the Industrial Property Law);
- entitled under the right in registration of a topography of integrated circuits (Article 302, paragraph 1 of the Industrial Property Law);
- entitled under an exclusive license entered into the register to use an invention, a utility model, an industrial design, a trademark or a topography of integrated circuits (Article 76, paragraph 6, 100 paragraph 1, Article 118, paragraph 1 of the Industrial Property Law);
- any organization enjoying the status of legal entity and created to represent interests of the undertakings, which has been granted a right of protection for a trademark intended for use in the course of trade by that organization and by the entities grouped therein (Article 136 of the Industrial Property Law);
- an organization entitled to represent interests of the producers, running its business activities on a given territory, entitled to the right in registration of a geographical indication (Article 176, paragraph 2 and Article 189 of the Industrial Property Law);
- a grower of a plant variety, i.e. a person who has grown or discovered and introduced a plant variety, employer of such a person or a party to the agreement within the framework of which the other party to the agreement has grown or discovered and introduced a plant variety or legal successors of such persons (Article 2, paragraph 1, subparagraph 7 of the Act on the protection of plant varieties).

1.3. Article 5 – Presumption of authorship or ownership.

The presumption of authorship or ownership for the purposes of applying measures and procedures specified in the Directive is related to the area of copyright and related rights. In order to adapt regulations to the provisions specified in the Directive, the Copyright Act extends the use of presumption of authorship (Article 8, paragraph 2) to goods protected by related rights (Article 101). The analogous presumption has been introduced with regard to the producer of databases (Article 6, paragraph 2 of the Act on the protection of databases).

1.4. Article 6 – Evidence.

1.4.1. Paragraph 1.

Hearing of evidence specified in the Directive complies with basic rules specified in the Polish regulations concerning the civil procedure, i.e.: it is adversary, which means that it is instituted at the request of an entitled person and takes into account a judicial review of the

legitimacy of the motion, which requires the justification of the legitimacy of claims. The parties may submit evidence covering evidence from documents or objects which are in the possession of the opposing party (Article 248, 249, 293 and 308 of the C.C.P.).

It is also possible to accept samples of a reasonable size of a significant number of musical works or any other subject of protection as an appropriate evidence, pursuant to Article 231 of the C.C.P., introducing a general rule, according to which the court may regard as established the facts essential for the decision in the case if such a conclusion can be drawn from other established facts (the so called factual presumption).

1.4.2. Paragraph 2.

An obligation to provide bank, financial or commercial documents which are under the control of an opposing party, may be ruled, regardless of whether we deal with an infringement on the “commercial scale” – provisions of the C.C.P. concerning the hearing of evidence do not introduce any restrictions in this respect. The protection of official secrets of an entrepreneur and of other statutory-protected secrets is guaranteed by provisions introduced in the following acts: Article 80, paragraph 2 of the Copyright Act, Article 11a, paragraph 2 of the Act on the protection of databases, Article 286¹, paragraph 3 of the Industrial Property Law and Article 36b, paragraph 2 of the Act on the protection of plant varieties.

1.5. Article 7 – Measures for preserving evidence.

1.5.1. Paragraph 1.

Articles 310 – 315 of the C.C.P. provide for the possibility of filing motions to secure evidence. By the time the Copyright Act was amended, it specified the right and the jurisdiction of the court with reference to a motion to secure evidence and with reference to a request to oblige an individual who infringes legal regulations to provide information and access to necessary documents, the Act also specified time limit for the court to examine the above-mentioned motions. This regulation has been preserved and is present in the amended Act, additionally guaranteeing to keep secret all information obtained in this way; in order to guarantee compliance with the provisions of the Directive, relevant references to selected provisions of the C.C.P. concerning proceedings to secure claims (Article 80, paragraph, 1 subparagraph 1 and 2, paragraph 2 and paragraph 6). Analogous provisions have been introduced into the Act on the protection of databases (Article 11a, paragraph 1, subparagraph 1 and 2, paragraph 2 and paragraph 6), into the Industrial Property Law (Article 286¹ paragraph 1 subparagraph 1 and 2, paragraph 3 and paragraph 9) and into the Act on the protection of plant varieties (Article 36b, paragraph 1, subparagraph 1 and 2, paragraph 2 and paragraph 6).

The motion to secure evidence shall be duly documented and justified (Article 312 of the C.C.P.). As a matter of principle, the opponent shall be notified about securing of evidence and shall participate in the process of taking evidence (Article 313 and 314 of the C.C.P.), the opponent may also demand the repeal or amendment of a decision concerning the act of securing the evidence (Article 742).

1.5.2. Paragraph 2.

The court may condition the issuance of a ruling to secure any of the evidence from payment of a security deposit (Article 80, paragraph 4 of the Copyright Act, Article 11a,

paragraph 4 of the Act on the protection of databases, Article 286¹ paragraph 6 of the Industrial Property Law and Article 36b, paragraph 4 of the Act on the protection of plant varieties).

1.5.3. Paragraph 3.

Upon issuing the interim order, the court shall set the time in which the proceedings have to be instituted under pain of the annulment of security. This time limit shall not be longer than two weeks (Article 733 of the C.C.P.).

1.5.4. Paragraph 4.

If the creditor has not instituted an action in the prescribed time limit or has withdrawn a suit to institute an action, and also when such a request of his has been dismissed, when the proceedings have been dismissed or when the security has been annulled, the debtor has the right to seek from the creditor a redress of damage caused by the execution of the security (Article 746 of the C.C.P.).

1.5.6. Paragraph 5.

The institution of incognito witness, which in Poland is employed exclusively in criminal proceedings and which in the Directive has been specified as optional, has not been introduced into the civil law procedure.

1.6. Article 8 – Right of information.

Before the implementation of the Directive, a claim to information was only available in the Copyright Act. It has been preserved in the amended provisions, however with reference to the infringing party it has a broader sense than the one specified in the Directive, as it covers any information being material to the claims related to the infringement (Article 80, paragraph 1, subparagraph 2 and 3). Analogous request has been introduced into the Act on the protection of databases (Article 11a, paragraph 1, subparagraph 2 and 3) and into the Act on the protection of plant varieties (Article 36b, paragraph 1, subparagraph 2 and 3). In the Industrial Property Law Act these requests do not go beyond the requirements specified in the Directive (Article 286¹ paragraph 1, subparagraph 2 and 3 and paragraph 2). This Act also provides the possibility to refuse to provide information in specified cases (paragraph 4).

A decision ordering that information be provided by the infringing party may be used regardless of whether rights have been infringed on a “commercial scale”. The possibility to use such an order with reference to persons other than the infringing party has been limited and covers only activities which aim at making profit or other economic benefit, either directly or indirectly, however it does not apply to situations in which consumers have acted in good faith.

1.7. Article 9 – Provisional and precautionary measures.

1.7.1. Paragraph 1.

Provisional and precautionary measures are fully regulated in the unchanged provisions of the Code of Civil Procedure. General rules which refer to securing the claims cover the act of securing the claims related to intellectual property rights, in particular non-monetary property claims (Article 755 of the C.C.P.).

Unlike the Directive, provisions of the procedure do not specify any types of provisional measures which may be imposed by the court. The Directive specifies such regulations as seizure or delivery up of the goods suspected of infringing an intellectual property right, so as to prevent their entry into or movement within the channels of commerce.

Pursuant to Article 755 of the C.C.P., when the subject matter of the security is a claim other than a monetary claim, the court issues orders as it deems suitable in a given case. Thus, security measures specified in the provisions of the Directive may also be employed.

Additionally, Article 1051 of the C.C.P. provides for the possibility of imposing a fine in the case of failure to fulfill the court's judicial decision ordering to refrain from actions specified therein.

Security of claims and the prohibition to desist from the infringement of intellectual property rights may be employed with reference to intermediaries pursuant to Article 422 of the Civil Code, which introduces the responsibility of an individual who induces to cause damage, of an assisting individual and of a person who benefited from the damage. No changes in this respect have been introduced.

1.7.2. Paragraph 2.

Claims may be secured regardless of whether infringements occur "on a commercial scale".

Pursuant to Article 747, point 1 of the C.C.P, monetary claims may be secured, inter alia, through an order to seize real estate, remuneration for work, debt claims on a bank account or other liability or other economic rights. Further security measures are possible pursuant to Article 755 of the C.C.P., which allows for any form of security, including the act of blocking a bank account.

Securing claims for payments arising from the infringement of intellectual property rights may also take the form of a commitment to pay certain amounts to an entitled individual on agreed dates. Such a decision is made after conducting a hearing, unless the court discontinues a motion or a person obliged to pay compensation has recognized the claim (Article 753-753² of the C.C.P.).

An entitled person may request to have his-her claims secured if he/she makes the claim and a legal interest in securing such a claim plausible. Such a legal interest appears when the lack of security will prevent or seriously impede the fulfillment of judicial decision made in a given case or if it will in a different way prevent or seriously impede the achievement of the aim of proceedings in a case (Article 730¹, paragraph 1 and 2 of the C.C.P.).

1.7.3. Paragraph 3.

A person requesting security of claims is obliged to make the circumstances which justify such a request plausible (Article 736, paragraph 1, subparagraph 2 of the C.C.P.).

1.7.4. Paragraph 4.

Article 735 of the C.C.P. specifies that the court examines the motion for security in an in camera session, without prior delivery of the copy of the motion to a participant. The obligation to hear the case has only been introduced in the Industrial Property Law (Article 286¹, paragraph 7).

Pursuant to Article 741 and Article 742, paragraph 1 of the C.C.P., a defendant has the possibility to demand the repeal, dismissal or amendment of a valid interim measure when the circumstances for security have changed. Pursuant to Article 742, paragraph 2 of the C.C.P., the ruling concerning the quashing or limiting of the interim order may only be given after a hearing.

1.7.5. Paragraph 5.

Article 744 paragraph 1 and 2 of the C.C.P. specify that the security may be annulled in the case of rejecting or discontinuing a suit or an application, and also when proceedings have been discontinued (paragraph 1), as well as in the case when an application or a suit have not been filed within the time limit specified in the order, or in the case of instituting proceeding concerning a claim other than the one specified in the application for security (paragraph 2). The time limit specified for filing an application or a suit, if a motion for security has been filed prior to instituting the proceedings, shall not exceed two weeks (Article 733 of the C.C.P.).

1.7.6. Paragraph 6.

Pursuant to Article 739 paragraph 1 of the C.C.P., the court may make the execution of the security order conditional upon the provision of a deposit by the creditor to secure the claims by the debtor arising from the execution of the order.

The court may condition the issuance of a ruling to desist from the infringement from payment of a security deposit (Article 80, paragraph 4 of the Copyright Act, Article 11a, paragraph 4 of the Act on the protection of databases, Article 286¹, paragraph 6 of the Industrial Property Law and Article 36b, paragraph 4 of the Act on the protection of plant varieties).

1.7.7. Paragraph 7.

The debtor has the right to seek from the creditor a redress of damage if the creditor has not instituted an action in the prescribed time limit or has withdrawn a suit, and also when such a request of his has been discontinued, when proceedings have been discontinued or when the security has been annulled (Article 746 of the C.C.P.).

1.8. Article 10 – Corrective measures.

The changes that have been made consisted in introducing into the Copyright Act (Article 79, paragraph 1, subparagraph 2 and paragraph 4), into the Act on the protection of databases (Article 11, paragraph 1, subparagraph 2 and paragraph 4), into the Industrial Property Law (Article 286) and into the Act on the protection of plant varieties (Article 36a, paragraph 1, subparagraph 2 and paragraph 4) a general regulation which allows for a flexible use of measures aimed at eliminating the consequences of an infringement, including measures provided for in the Directive.

1.9. Article 11 – Injunctions.

The possibility to file a motion for injunction, whereby a party is required to refrain from the infringement, is a novelty only in the Act on the protection of plant varieties (Article 36a, paragraph 1, subparagraph 1), while other Acts have already provided such a possibility and thus amended regulations only duplicate this regulation (Article 79, paragraph 1,

subparagraph 1 of the Copyright Act, Article 11, paragraph 1, subparagraph 1 of the Act on the protection of databases and Article 287, paragraph 1 and Article 296, paragraph 1 of the Industrial Property Law). Unlike the Directive, the above-mentioned provisions do not specify any types of provisional measures which may be imposed by the court.

Securing claims and the injunction to desist from the infringement of intellectual property rights may be employed with regard to intermediaries, pursuant to Article 422 of the Civil Code, which introduces the responsibility of an individual who induces to cause damage, of an assisting party and of a person who benefited from the damage. No changes in this respect have been introduced.

1.10. Article 12 – Alternative measures.

Polish legal regulations provide for the possibility to confine the order to obliging the infringing party to pay adequate amount of money to the creditor, as an alternative to an injunction ordering to desist from the infringement or to redress its consequences. Such a measure has been introduced in Article 79, paragraph 3 of the Copyright Act, Article 11, paragraph 3 of the Act on the protection of databases, Article 287, paragraph 3 and Article 296, paragraph 1a of the Industrial Property Law Act and Article 36a, paragraph 3 of the Act on the protection of plant varieties.

1.11. Article 13 – Damages.

1.11.1. Paragraph 1.

A regulation providing for the possibility to request that the consequences of the infringement are redressed pursuant to general provisions of the Civil Code or that damages amounting to, depending on the subject matter covered by the security, single or multiple the amount of respective remuneration or of a license fee are paid has been introduced into respective Acts (Article 79, paragraph 1, subparagraph 3 of the Copyright Act, Article 287, paragraph 1 and Article 296, paragraph 1 of the Industrial Property Law, Article 11, paragraph 1, subparagraph 3 of the Act on the protection of databases and Article 36a, paragraph 1, subparagraph 3 of the Act on the protection of plant varieties).

By the time any amendments have been made, the request to pay double or triple the amount of remuneration functioned solely in the provisions of the Copyright Act.

A creditor may also request compensation for the infringement of personality rights² pursuant to Article 24 and 448 of the Civil Code. No changes have been made in this respect.

1.11.2. Paragraph 2.

Article 79, paragraph 1, subparagraph 4 of the Copyright Act, Article 287, paragraph 1 and Article 296, paragraph 1 of the Industrial Property Law, Article 11, paragraph 1, subparagraph 4 of the Act on the protection of databases and Article 36a, paragraph 1, subparagraph 4 of the Act on the protection of plant varieties provide for the request to recover the obtained profits. Such a provision is a novelty only in the Act on the protection of plant varieties, since before the introduction of amendments, growers could only make their request pursuant to the provisions of the Civil Code (on account of unjustified enrichment).

² Article 23 of the Civil Code in the catalogue of personality rights enumerates scientific, artistic, inventory and innovative works. Reputation (renown) is also included within the category of personality rights.

1.12. Article 14 – Legal costs.

Issues concerning legal costs are regulated by the provisions of the Code of Civil Procedure. Since these regulations have already complied with the requirements of the Directive, no amendments therein have been introduced.

As a matter of principle, the party losing the case shall be under the obligation to reimburse legal costs (Article 98, paragraph 1 of the C.C.P.). In particularly justified cases, the court may adjudge from the losing party only part of the costs or not charge it with the costs at all (Article 102 of the C.C.P.).

1.13. Article 15 – Publication of judicial decisions.

Polish legal regulations concerning civil procedure have not included any provisions referring to publication of judicial decisions. In order to implement the Directive, such a provision has been introduced in Article 79, paragraph 2, subparagraph 1 of the Copyright Act, Article 287, paragraph 2 and Article 296, paragraph 1a of the Industrial Property Law, Article 11, paragraph 2 of the Act on the protection of databases and Article 36a, paragraph 2, subparagraph 1 of the Act on the protection of plant varieties.

The Copyright Act, the Act on the protection of databases and the Act on the protection of plant varieties additionally introduce the possibility to request that the announcement of appropriate content and form is made in press (see the above-mentioned provisions).

1.14. Article 16 – Sanctions by Member States.

The request ordering that the infringing party pay adequate amount of money to Fundusz Promocji Twórczości (Creativity Promotion Fund), already provided in the provisions of the Copyright Act, has been left unchanged (Article 79, paragraph 2, subparagraph 2).

Additionally, all of the above-mentioned Acts provide for legal sanctions for infringements of intellectual property rights. These regulations are very diverse, depending on the nature of a given act (e.g. significantly restricted in the case of patents).

2. The increase of the number of civil cases concerning infringements of intellectual property rights

Entering into force of the Act of 9 May 2007 amending the Copyright and Related Rights Act as well as other selected Acts has not led to a significant increase in the number of civil cases concerning infringements of intellectual property rights.

The number of such cases is not significant. According to the information provided by the Ministry of Justice, in 2007, all regional courts concluded 279 cases concerning the protection of copyright, 163 cases related to the protection of trademarks and utility models and 48 cases in which claims were based on other provisions of the Industrial Property Law. In the first half of 2008, regional courts concluded 153 cases concerning the protection of copyright, 79 cases related to the protection of trademarks and utility models and 13 cases referring to claims concerning other industrial property rights. Statistical analysis covering the

second half of 2008 has not been made yet, however data referring to 2007 and to the first half of 2008 shows that there was no significant increase in number of cases falling under the above-mentioned categories.

Additional information shows that the number of cases concerning the protection of intellectual property differs, according to the jurisdiction of an appellate prosecutor's office. During the whole period covered by the analysis (from June 2007 to December 2008), courts within the jurisdiction of Warszawa Appellate Prosecutor's Office registered approx. 180 cases, while courts within Kraków Appellate Prosecutor's Office registered approx. 60 cases. Courts which are under the jurisdiction of other Appellate Prosecutor's Offices registered from several to over a dozen cases.

3. The impact of introduced changes on the development of the information society

Due to a short period during which the above-mentioned changes have been in force, it is not possible to observe any visible impact of these changes on the development of the information society.

4. Other experiences related to the implementation of the Directive

The basic problem which appeared during the legislative process concerning the implementation of the Directive consisted in the difficulty to adapt measures specified therein to rules adopted in the Polish civil procedure. The final evaluation as to whether this task has been completed successfully will be possible only on the basis of judicial decisions issued pursuant to amended legal regulations. Currently, the number of these judicial decisions is rather small.

Discrepancies which appeared during legislative works also concerned the fact whether the level of protection should be identical in all amended Acts (which was suggested in the initial draft of an act prepared in the Ministry of Culture and National Heritage) or whether, in accordance with a suggestion included in the clause 17 of the Preamble to the Directive, should be determined in each case in such a manner as to take due account of the specific features of each intellectual property right. Eventually, the second idea has been adopted, and as a result, changes introduced in the Industrial Property Law fulfill exclusively minimal requirements specified in the Directive³, while other regulations go beyond these minimal requirements. Such a solution is criticized by individuals entitled on the account of industrial property rights.

5. Article 5 – Presumption of authorship or ownership.

5.1. Using the presumptions.

³ It was justified, inter alia, with the concern referring to the possibility of using measures provided in the Directive by entrepreneurs to compete with other entrepreneurs (entitled and using industrial property rights, mainly patents).

During the period covered by the analysis, the parties rarely invoked this presumption during legal proceedings.

5.2. Rebutting presumptions.

Attempts to rebut these presumptions are occasional.

6. Article 6 and 7 – Evidence and measures for preserving evidence

6.1. Accepting a sample of goods as evidence.

There were only three cases in which an aggrieved party petitioned for the acceptance of a reasonable sample of goods infringing intellectual property rights of that party as sufficient evidence which proves that the whole batch of given goods infringes the rights in question. In all these cases the evidence was accepted by the court.

6.2. Protecting witnesses.

The institution of *incognito* witness, which in Poland is employed exclusively in criminal proceedings and which in the Directive has been specified as optional, has not been introduced into the civil law procedure.

7. Article 8 – Right of information.

During the analyzed period, courts issued 42 decisions ordering that the information on the origin, distribution network, quantity and price of goods or services which infringe intellectual property rights be provided by the party infringing intellectual property rights or by a third party.

8. Article 9 and 11 – Provisional and precautionary measures and injunctions

8.1. Using precautionary measures and injunctions against intermediaries

These measures have been used with regard to persons specified in Article 422 of the Civil Code in three cases.

8.2. Securing monetary claims.

The act of securing monetary claims with regard to a person infringing intellectual property rights was observed in 12 cases.

8.3. Making motions to secure claims plausible.

In the case of motions to secure claims, the following ways of making the claim or the legal interest plausible were employed:

- providing evidence in the form of documents (e.g. certificates of registering a trademark, whether national or the EU one, protection certificates for trademarks, an agreement concluded with a creator, expert's reports prepared

at the request of a party, financial documents specifying the size of production, correspondence between the parties);

- attaching a sample of a product or a packaging bearing both a product's own mark and a mark violating the law;
- submitting photographic documentation proving that a trademark has been employed illegally;
- providing printed copies of defendant's WebPages and press advertisements where information infringing protection rights of entitled persons has been included.

9. Article 10 – Corrective measures.

9.1. Employing corrective measures.

During the period covered by the analysis, courts ordered to redress the consequences of infringements of intellectual property rights in 22 cases.

9.2. Ways of redressing the consequences of infringements other than the ones specified in the Directive.

There were several cases in which courts ordered to redress the consequences of infringements in a different way than by recalling from the channels of commerce, awarding a creditor adjudged damages in advance (amount of money) or by destroying illegally manufactured (or marked) products or measures and materials used to manufacture these products (or to mark them):

- in two cases the court ordered to publish the apologies;
- in one case the court ordered to desist from the infringement of rights in registration of specified Community trademarks, particularly by desisting from offering and trading in goods bearing a trademark which infringes the trademark of a complainant, desisting from storing such goods in order to offer and trade in these products, desist from using Community trademarks of a complainant in commercial documents and in advertisements, including the cases of using them on defendant's websites, and by ordering to submit a declaration of a specified content and publishing it in a specified form;
- in two cases the court ordered to publish the conclusion of its decision in press;
- in two cases the court ordered a publication of press advertisements and the prohibition of import, sale and trade.

10. Article 12 – Alternative measures.

During the period covered by the analysis, in four cases the court ordered that adequate amount of money be paid to the creditor as it decided that a decision to desist from the infringement or to redress its consequences would be disproportionately severe for the infringing party.

11. Article 13 and 14 – Damages and legal costs

11.1. Setting the amount of damages.

During the period covered by the analysis, in the majority of cases damages for a caused damage on general terms were not adjudged. In the cases of setting the amount of damages when redressing damages on general terms, the amount of damages was set on the basis of:

- the amount of receipts from the use of works, as well as the nature and the scope of using these works;
- frequency and extent of infringements of intellectual property rights;
- agreement in which the amount of damages was specified;
- rates of remuneration awarded in such cases;
- testimonies of witnesses and expert's opinions;
- previous license agreements.

Redressing the caused damage by paying amount of money was adjudged in 101 cases. In all these cases a factor determining the choice of such a way of redressing damages was the creditor's request.

11.2. Changing the amount of damages.

After the Act of 9 May 2007 amending the Copyright and Related Rights Act, as well as other selected Acts entered into force, no change in the amount of awarded damages has been registered.

11.3. Compensation for "moral prejudice".

This kind of compensation for infringing personality rights was requested only in 12 cases. It was adjudged in 6 cases.

11.4. Recovery of profits.

In 12 cases the aggrieved party requested from a person who infringed intellectual property rights to recover profits which the latter gained.

11.5. Taking into account lost profits when setting the amount of damages.

Pursuant to provisions of civil law regulations, lost profits are always taken into account when compensating for damages.

11.6. Factors, other than the ones specified in the Directive, which are taken into account when setting the amount of damages.

See point 11.1.

11.7. Lump sum damages.

The amount of the sum of money which may be paid as an alternative, as far as compensation for damages on general terms is concerned, is specified in the Act. The Copyright Act and the Act on the protection of databases additionally take into account a presumption of culpability.

11.8. Legal costs.

Issues concerning legal costs are regulated by the provisions of the C.C.P. Since these regulations have already complied with the requirements of the Directive, no amendments therein have been introduced.

11.9. Employing the “principle of equity” when adjudging legal costs.

In four cases the unsuccessful party was adjudged to pay either a part of legal costs or not to pay any legal costs at all.

12. Article 15 – Publication of judicial decisions.

12.1. Cases of publishing a judgement.

During the period covered by the analysis, court’s decisions were published with regard to 15 cases.

12.2. Ways of publishing.

During the period covered by the analysis, courts ordered that declarations in press and on a web site be published.

13. Article 17 – Codes of conduct.

Article 110² of the Copyright Act (which entered into force on 1 May 2004) specifies that operators who conduct economic activity within the scope of production and reproduction of optical carriers, shall be obliged to use identification codes in all the equipment and the elements thereof in the course of optical carriers production process. The Minister of Culture and National Heritage shall ensure that this obligation is fulfilled.

14. “Commercial scale”

Evidence, referred to in Article 6, paragraph 2 and Article 9, paragraph 2 of the Directive, as well as a decision ordering that information be provided by the infringing party (Article 8, paragraph 1) may be used regardless of whether rights have been infringed on a “commercial scale”. The possibility to use such an order with regard to persons other than the infringing party has been limited and covers only activities which aim at making profits or other economic benefits, either directly or indirectly, however it does not apply to situations in which consumers have acted in good faith.

Part II – Information obtained after consultations with entitled entities

1. Article 4 – Individuals entitled to apply for the application of the measures, procedures and remedies

The fact of entering into force of the Act of 9 May 2007, in practical terms provided more possibilities to go to court and present one's claims only in the case of infringing the exclusive right to a plant variety protected on the national level, since only in this Act a catalogue of claims was a novelty. Before this amendment have come into force, an entitled person, specified in Article 2, paragraph 1, subparagraph 7 of the Act on the protection of plant varieties (i.e. a person who has grown or discovered and introduced a plant variety, employer of such a person or a party to the agreement within the framework of which the other party to the agreement has grown or discovered and introduced a plant variety or legal successors of such persons), were entitled solely to lodge claims specified in the Civil Code.

The Copyright Act has extended the legitimacy to assert the claims specified in Article 79, paragraph 1 to all persons entitled on account of copyright and (pursuant to Article 101) related rights, however, already pursuant to the provisions of previous regulations, this protection was performed not only by directly entitled persons but also by other persons – for the benefit of entitled persons, employing different structures: statutory representation and trust (collective management organizations – Article 105, paragraph 1), exclusive and nonexclusive license (Article 67, paragraph 4) or a commission.

Nevertheless, the introduced amendment is assessed to be a good one. Entities point to the fact that a provision formulated in this way should no longer pose any interpretation problems and as a result, it should prevent situations where distributors and licensees were refused the right of action.

It should also be noted that very often only a criminal law way of prosecuting infringements of copyright and related rights is chosen (e.g. in the case of the Polish Society of the Phonographic Industry representing phonographic producers).

2. Article 5 – Presumption of authorship or ownership.

Presumption referred to in Article 8, paragraph 2 of the Copyright Act in practice proves to be very important. It is employed in proceedings against the infringing parties and undoubtedly makes legal proceedings quicker. It can also be applied to cases where criminal law measures of copyright protection are employed.

This solution is said to be a good one, since by passing the burden of proof concerning the authorship on the other party, disputes referring to this fact appear only occasionally. It happens only when there are serious doubts concerning this issue and a challenging party has sufficiently strong arguments.

One of the observed problems, which has been noted by the Association of Polish Artists and Designers, is the fact that authors of plastic works do not mark them or mark them using a pseudonym. In such cases we refer to Article 8, paragraph 3 of the Act, pursuant to which, as long as the author does not disclose his/her authorship, he/she shall be represented

by the producer or by the publisher and in the absence thereof - by the competent organization for collective management of copyright.

In the case of folk creativity, particularly folk handicraft and artistic craft, it is very difficult to identify a given work due to the fact that there is no possibility to sign it, and the identification is usually made on the basis of the technique employed to make such a work, as well as on the basis of other elements characteristic for a given author. Problems of this kind were noted by the Association of Folk Artists.

3. Article 6 and 7 – Evidence and measures for preserving evidence

3.1. Regulations concerning the fact of collecting evidence.

The assessment of regulations concerning evidence is generally positive.

According to individuals entitled on account of copyright and related rights, thanks to the implementation of the Directive, the possibility to collect necessary evidence has improved, although in reality legislative changes are not significant. Individuals point to such elements as a broader circle of persons who can be the source of information concerning infringements and the possibility to put an obligation on the defendant to present evidence against himself/herself. Conditioning the fact of allowing a motion to secure evidence on such prerequisites as making a claim plausible, the obligation to pay a security deposit or the obligation to cover possible damages which may arise as a result of securing evidence, are also accepted and considered to be reasonable.

Similar opinion is expressed by individuals entitled on account of industrial property rights, although, according to some people, the amendment of the Act has led to the tightening of conditions in which it is possible to secure evidence for the purpose of proceedings concerning infringements of industrial property rights.

The Polish Seed Trade Association, which represents plant growers, noticing slight improvement in terms of the possibility to collect evidence, due to the fact of shortening the period in which the court examines the motion for security from 7 to 3 days, postulates to adopt a solution which would allow to impose an obligation on public administration bodies to provide entitled entities (growers and their organizations) with information enabling more efficient identification of entities which infringe the exclusive right. As has been pointed out by the Association, administration bodies collect such information when they fulfill the provisions of regulations on seed science and technology, plant protection and a system of direct subsidies to agriculture.

At the same time, many entities informed that they didn't have any experience, as far as the regulation in question is concerned.

3.2. Accepting a sample of goods as evidence.

Experiences referring to the fact of applying this presumption of fact are very divergent.

The ProMarka Association and the Association for the Protection of Industrial Property confirm that a representative sample of goods infringing industrial property rights of a reasonable size is usually sufficient for Polish courts to conclude that the whole batch of goods infringes the rights in question.

In turn, as has been noticed by the Association of Polish Artists and Designers, in practical terms, evidence arising from the presumption of fact, as reasoning about facts on the basis of facts, which is allowed by law, can be abolished more easily than the presumption of law. Thus, recognizing a sample of goods infringing legal regulations, of a reasonable size, as evidence sufficient to conclude that the whole batch of a given product infringes these rights, may prove to be burdened with a significant risk of mutability.

SAWP Association and the American Chamber of Commerce refer to their negative experiences concerning the application of Article 231 of the C.C.P. by the courts. According to the SAWP Association and to the American Chamber of Commerce, courts employ this provision reluctantly and in a very limited way.

Some entities informed that they didn't have any experiences, as far as the regulation in question is concerned.

3.3. A motion to disclose documents which are controlled by the opposing party.

A solution which made it possible to oblige the infringing party to provide information and access to documents, specified by the court, which are important for the claims related to infringements of copyright and related rights has already been functioning before the introduction of the amendment in 2007. The majority of consulted entities consider this solution to be reasonable and necessary, as well as the one which has an established practice of issuing rulings. Imposing on the court the obligation to examine in an exceptionally short period of time every motion ordering that such information is provided, even the motion filed before instituting the proceedings, is considered to be crucial. One should note a 3-day period for examining a motion and a 7-day period for examining the complaint concerning the court's decision within this area, which not only makes proceedings quicker, but may also prevent the act of erasing tracks of a tort by a person suspected of infringing copyright. According to consulted entities, such a legal status secures interests of an entitled entity who enforces relevant claims in court, in a better way.

Additionally, according to the Association of Polish Artists and Designers, we should try to provide the court with an easier access to bank, financial and commercial documents which belong not only to the infringing party, but also to a person who uses goods infringing the rights in question. The Polish Filmmakers Association also point to too short time limits set by courts for filing a suit in the cases where decisions ordering a party to provide information and access to appropriate documents in pre-trial mode are issued.

On the other hand, representatives of entities benefiting from copyright and related rights refer to cases where the obligation to provide information was used to state whether a given entity fulfils obligations arising from the Copyright Act and to collect evidence of suspected infringements rather than to specify the scope of previously committed and identified infringement of copyright.

The Polish Radio, which in principle accepts the solution specified in the Directive, points to the fact that it may result in the risk on the part of an entitled person, who may use the access to information about his/her competitor for the purposes other than the protection of his/her own infringed rights. Additionally, pre-trial request to provide information by the third party may make the latter responsible in the case when such information provide knowledge about their infringing activity.

Persons entitled on account of industrial property rights point to a slight limitation of available measures in comparison with the Copyright Act (which provides more extended

protection than the one provided for in the Directive), while plant growers point to noncompliance of the adopted regulation to trade in agriculture. In the latter case, the lack in Polish legislation of regulations imposing on farmers the obligation to create and store at least basic documents concerning the activity which they conduct within the framework of plant production has been mentioned as one of the most fundamental problems.

Some entities informed they didn't have any experiences, as far as the regulation in question is concerned.

4. Article 8 – Right of information.

4.1. The impact of regulation on the possibility to find and identify entities infringing legal regulations.

According to some entities, the so called claim to information has not contributed to the discovery and identification of entities infringing legal regulations. Entities point to its insignificant role, due to ambiguities concerning the introduction of relevant regulations in the Polish civil procedure.

The way the Directive is implemented is criticized by entities entitled on account of industrial property rights, due to the possibility of imposing the information obligation only in the case when obtaining appropriate information is necessary to enforce claims and when at the same time, a claim is highly probable, as well as due to the possibility of instituting proceedings.

At the same time, many entities, including the ones which have criticized the introduced regulation, informed about the lack of experience, as far as its practical application is concerned.

4.2. The impact of the regulation on the amount of damages.

None of the consulted entities have relevant practical experience within this scope.

5. Article 9 and 11 – Provisional and precautionary measures and injunctions

5.1. Using precautionary measures and injunctions against intermediaries

As a matter of principle, the regulation is assessed in a positive way: it allows for avoiding the escalation of infringements, if the party is awarded security, it significantly improves its situation in proceedings, and it may encourage the opposing party to start amicable negotiations.

A large number of entities do not have any practical experiences, as far as the application of these regulations is concerned.

5.2. Ways of securing claims employed in the cases where there is a risk of inability to compensate for the damage.

Among the most frequently used methods we may find:

- securing monetary claims (including movable property, immovable property, cash);

- prohibition to undertake specified tasks by one party, usually the prohibition to illegally use works, prohibition to trade in goods which infringe the rights in question;
- setting the amount of security deposit.

Some entities informed that they didn't have any practical experience, as far as the regulation in question is concerned.

5.3. Making motions to secure claims plausible.

Among the methods most frequently used by collective management organizations managing copyright and related rights, we may find:

- presumption of the right to act of a collective management organization (Article 105, paragraph 1 of the Copyright Act);
- filing copies of contracts by which a given organization is connected with authors, as well as contracts on mutual representation with foreign associations for copyright protection;
- presenting the correspondence with an entity infringing legal regulations;
- submitting copies of optical discs' covers, recordings, press releases, etc.;
- obligation to pay to the creditor specified amount of money, on specified dates.

Other entities most frequently present in the court:

- legal arguments, supported by collected evidence concerning infringements,
- decision issued by the Patent Office or by other competent authority to award such rights;
- presenting samples or photographs concerning legal property.

Some entities have mentioned difficulties in employing plausibility, since courts tend to equalize this measure and the obligation to examine the whole evidence.

Some entities informed that they didn't have any practical experience, as far as the regulation in question is concerned.

5.4. Using regulations concerning enforcement proceedings (securing damages) in order to guarantee the fulfillment of injunction to desist the infringement.

Article 1051 of the C.C.P. provides for the possibility to impose a fine in the case of failure to fulfill the court's judicial decision ordering to refrain from actions specified therein.

No information concerning the application of this measure is available.

6. Article 10 – Corrective measures.

6.1. Ways of eliminating the effects of infringements.

Ways of eliminating the effects of infringements employed by courts include:

- re-introducing primary status or destroying illegally manufactured copies;
- conferring the property of illegally manufactured copies on compensation (occasionally);
- re-calling disputable goods.

However, this measure is not used very often.

6.2. Ways, other than the ones specified in the Directive, of redressing the consequences of infringements.

No information about other methods is available.

6.3. Exempting the infringing party from the costs of redressing the consequences of infringements.

No information about any such cases is available.

7. Article 12 – Alternative measures.

This solution is assessed negatively by the majority of entities, inter alia due to the fact that it admits the possibility of tolerating infringements of legal regulations and that it lowers the level of protection, although we lack experience in this respect. Some entities don't even see the possibility to employ this regulation in practice.

There are only a few entities which point to positive aspects of the regulation, such as the fact that it contributes to amicable dispute settlements and lowering the costs of proceedings.

Generally, we lack practical experience in employing this measure.

8. Article 13 and 14 – Damages and legal costs

8.1. The impact of the implementation of the Directive on the increase in the number of adjudged compensations.

No impact of introduced changes on the amount of adjudged compensations has been observed.

8.2. Ways of setting damages on general terms.

Individuals entitled on account of copyright very rarely assert claims for this kind of damages as they rather concentrate on lump sum damages.

As a matter of principle, the element which decides about whether damages should be awarded or not is the presumption of culpability, while the amount of damages is set on the basis of lost profits and anticipated profits lost as a result of the infringement. For example (as has been mentioned by the HetMan Agency), in cases concerning infringements of copyright referring to computer programs, when setting the amount of damages, evaluated elements include the market value as of the day of setting the amount of damages, profits made by the manufacturer, costs related to manufacturing one copy and costs of optical discs on which the program was recorded.

In order to set the amount of damages for individuals entitled on account of industrial property rights, the following aspects (as specifies the Association for the Protection of Industrial Property) are taken into account: decline in demand or in manufacturing the creditor's products, forced drop in prices of these products, costs of a necessary modification of business activity or costs of changing the production profile, impairment of the property value of infringed rights, costs borne by the creditor in terms of eliminating the consequences

of a given infringement, including costs of advertisements and promotion connected with the necessity to inform the public opinion about the infringement.

When setting the damages due to the aggrieved party (with the reservation that the damage is proved earlier, even in the amount which is not specified), very often reference was made to the decision of the court which could adjudge “appropriate amount”, pursuant to Article 322 of the C.C.P. if the court deems the proof of the level of the demand to be impossible or extremely difficult.

8.3. Lump sum damages.

The way of setting the amount of lump sum damages is specified in the amended Acts.

8.4. Changes in terms of charging the unsuccessful party with legal costs.

Amendments introduced in 2007 have not resulted in any changes, as far as legal costs are concerned. General provisions of the C.C.P., which meet the requirements of the Directive, apply to this subject matter.

8.5. Employing the “principle of equity” when adjudging legal costs.

Adjudging the part of legal costs or not charging the losing party with any legal costs is assessed on the basis of different circumstances which apply to a given case. Causes which make the court employ the possibility provided for in Article 102 of the C.C.P. are particularly justified cases, which substantiate the exception from the rule. Most frequently, it is a difficult financial situation of the losing party or the fact that the defendant has not presented any reason to institute an action which constitutes such a particularly justified circumstance. When considering such a possibility, the court takes into account the rules of social interaction.

In the cases of infringement of industrial property rights, due to the fact that a great majority of disputes in such cases are disputes between entrepreneurs, the court should exempt the losing party from a part or from all legal costs, invoking the principle of equity only in particularly justified cases.

However, no practical experiences within this area are available.

8.6. General evaluation of regulations concerning damages and costs.

Within the scope of the Copyright Act no changes in the practical functioning of these regulations have been observed.

Individuals entitled on the account of industrial property rights think it was a good solution to introduce the calculation damages by referring to a license fee or to other type of remuneration which is due when the creditor gives its consent to use the invention or any other object of an exclusive right. It is a novelty in the Industrial Property Law. At the same time, these entitled persons demand the possibility to adjudge multiple of the above-mentioned payments – as can be adjudged within the framework of other described Acts.

9. Article 15 – Publishing court decisions

9.1. Ways of publishing court decisions.

Experiences within this scope are insignificant. Most frequently it is an order to publish in the press a declaration pointing to the fact of infringing intellectual property rights,

as well as a rectification of false information. Less frequently entitled entities demand that a part or a full court decision issued in a given case be publicly announced.

9.2. Assessing the possibility to publicly announce court decisions.

Generally, this solution is said to be a good one, although there are some signals pointing to the problems with employing this solution in courts, and due to this fact a better and more frequently used measure, available, inter alia, within the scope of the Copyright Act, is publishing a relevant declaration in the press. Publicly announcing a court decision may in many cases be more severe than financial consequences of lost proceedings. Undoubtedly, this type of measure will play informational, educational and preventive role. Another emphasized advantage is the independence of this measure from other claims.

10. Codes of conduct and identification codes.

The following organizations have introduced their internal codes of conduct:

- The Authors' Association ZAiKS adopted in 2002 the „Debt collection instruction manual”, which specifies, among other things, the rules of conduct when dealing with debts and the rules concerning the enforcement of claims in legal and executive proceedings.
- Such a code for the internal use has also been developed by the SAWP Association.
- The Association of Polish Architects also has its own code of conduct. It is the Code of Architects' Professional Ethics adopted by the General Meeting of SARP Delegates on 10 December 2006.
- The Association of Polish Inventors and Rationalizers will soon finish its works on the code of conduct.
- The National Chamber of Audiovisual Producers (KIPA) does not have its own code but the Chamber's statutory task is to undertake activities aimed at the protection of the author's economic rights and of related rights of audiovisual producers. Additionally, the KIPA Board of Arbitration has the right to settle disciplinary matters concerning the members of the Chamber who act contrary to environmental norms (rules of professional ethics). KIPA also keeps the Register of Works where authors, as well as film and TV producers can make notarial registration of their works, from a treatment to a screenplay. KIPA in cooperation with the Polish Filmmakers Association tries to shape relationships in the audiovisual industry, including proper relationships between authors and film, as well as TV, producers and between producers and broadcasters. Additionally, KIPA actively participates in the development of regulations which govern these conditions.
- The Association of Folk Artists has within its framework an amicable Arbitration by Fellow Members, which deals with infringements of copyright committed by means of copying.
- The Polish Society of the Phonographic Industry conducts educational activities aimed at better enforcement of intellectual property rights, particularly on the Internet. The second stage of an educational programme entitled “Be original” has already finished. Additionally, the Polish Society of the Phonographic Industry in cooperation with the Protection of Audiovisual

Property Foundation and Business Software Alliance continues its information campaign whose aim is to combat infringements of intellectual property rights in computer networks. The goal of the campaign is to inform the managing staff in companies and university authorities about threats connected with the distribution of unauthorized music and film files, as well as computer programs using company computers and Internet connections.

In turn, the obligation to use identification codes in the production of optical discs is generally thought to be a good solution.

11. “Commercial scale”

See point 14 in part I.

12. General evaluation and the future

12.1. The impact of introduced changes on innovation and on the development of the information society.

According to the consulted entities, the introduced amendments do not have any significant impact on innovation and on the development of the information society, although it is also emphasized that it may result from a too short period of the binding force of these amendments and that in the future amendments may contribute to the development of innovation.

12.2. The evaluation of implementation and of the effectiveness of regulations implementing Directive 2004/48/EC in Poland.

The majority of entities assess that the legal status functioning in the period before the amendments implementing the Directive were introduced was better. In their opinion, regulations were satisfactory and they were strengthened due to a rich practice of issuing rulings. It is also emphasized that measures and solutions required in the Directive are very often inconsistent with previous regimes of civil responsibility, which requires developing a new legal practice.

At the same time, however, it was indicated that we have too little experience relating to amended regulations in order to appropriately evaluate the effects of introducing these amendments.

See also comments presented below and point 4 in Part I.

12.3. Suggestions concerning the improvement of measures, procedures and remedies provided for in the Directive.

Generally, persons entitled on account of intellectual property rights positively assess the provisions of the Directive. Certain reservations have been mentioned as far as the assessment of respective regulations is concerned. However, certain organizations uniting the users of copyright and related rights criticize the direction of changes adopted in the

Directive, pointing to too many privileges given to the entitled entities, as far as the choice of protection measures is concerned.

The majority of comments provided within the framework of conducted consultations referred to the way the Directive is implemented in Poland, rather than directly to its provisions.

The most frequent reservation within the framework of industrial property rights made by entitled individuals concerned the level of adopted protection, which is lower in the Industrial Property Law Act than in the Act on Copyright (where some of the adopted measures go beyond minimal requirements specified in the Directive). As far as the protection of plant varieties is concerned, better adaptation of regulations to the practice of growers has been suggested. There were also some postulates to create, as quickly as possible, a specialized arbitration for intellectual property rights, which is supposed to eliminate discrepancies in court rulings, to enhance criminal proceedings and to include in the provisions of the Directive activities related to unfair competition (which in the Directive is only optional).