

Current Challenges in the Polish Audio-Visual Market

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Thoughts of the audio-visual market inevitably bring to mind Rywingate and the painful and seemingly endless process of amending the broadcasting law. However, eventually Rywingate will fade away and the broadcasting law will be changed. For now, though, it appears that the above issues are slightly overshadowing the two main challenges that players in the audio-visual field face every day: piracy and an unresolved deadlock in dealing with so called *collection societies*.

Piracy

Piracy has been a serious problem since the early 1990s. It appeared with the introduction of a free market economy in Poland. At that time, provisions that would provide adequate tools for combating this problem were missing from Polish laws, leaving defenseless those industries whose very existence relies on adequate protection of copyrights (film and music producers and distributors, artists, producers of software and games). With the passage of time and with the emergence of new forms of piracy (stealing of scrambled TV signals, or the illegal copying of DVDs), the scope of copyright protection has been broadened (e.g., protection of related rights, extension of protection to Internet use of copyright works, protection of technical access barriers). In addition, adequate criminal provisions have been introduced as have customs protection of intellectual property rights. The changes in law were accompanied by anti piracy activities undertaken by various governmental bodies. From the start the private sector has vigorously toiled to reduce the scale of piracy. *FOTA*, an anti piracy foundation, has been active since 1994. Also, *ZPAV*, an organization of phonographic producers, has provided significant assistance to prosecutors and the police. *Sygnal* is another organization whose membership is made up of broadcasters and cable operators; it plans to intensify anti piracy activities as well. Although much has been accomplished, the present situation remains unsatisfactory in many respects, and indeed, music piracy has actually increased in recent years. The current statements and activities of representatives of the Polish government indicate that it is taking the issue of piracy very seriously and intends to take concrete steps to reduce this problem.

With the legislative framework already in place (some changes are still needed but it is certainly possible to combat piracy under the existing law) and with anti piracy organizations ready to assist the government in this task, one must ask what should be done to drastically reduce this plague? The answers seem to be as follows: generate more determination, conduct more training and apply greater coordination in these endeavors. The tools exist; one must now use them properly and persistently. Effective government officials should be rewarded and those who do nothing, punished. Even today some particular examples prove that this is possible to achieve. Also, once such specific coordination of activities is introduced, very good results will be produced. For example, the current system of customs protection of intellectual property rights has seen satisfactory results with the coordination of the procedures applied by customs offices as well as the training provided to customs officers, exercised formerly at the level of the Main Customs Office and currently by the Ministry of Finance.

Also, the coordination of anti piracy work between various governmental bodies is a precondition for success. For instance, customs seizures can constitute a useful tool for combating piracy but only if other bodies (i.e., public prosecutor's office and the courts) are able to issue swift decisions on further seizures of contraband goods. It is therefore essential that prosecutors and judges have a good understanding of customs procedures in particular and, far more important, of the problems of intellectual property in general. In this context it is worth mentioning that intellectual property laws are not generally taught at Polish universities unless one undertakes special courses. Therefore, most judges and prosecutors are unfamiliar with this area of law.

The next challenge is the ponderously slow court system (both criminal and civil), which decides cases against pirates and is badly in need of improvement. There are two reasons for this. Endless proceedings may be attributed to the general problems of the Polish system of courts, which are not just typical to piracy matters. However, due to the lack of experience and training, anti piracy cases have become even lengthier affairs. Judges seem to be unwilling to render decisions in this area, often hiding behind the opinions of court appointed experts, or they are frequently misled

by defense counsels, even in the clearest of cases. Frustratingly, this of course delays the judicial process and increases costs. Consequently, those engaged in piracy activities feel that they are beyond the law. Therefore, training of all state employees responsible for intellectual property laws enforcement must be intensified.

Determination, training and coordination are the key words for improving the situation.

Collection Societies

It is quite ironic that industries that devote significant resources and efforts to combating copyright infringement are themselves accused of infringing the copyrights of others. The source of these accusations are the organizations of collective management of copyrights and related rights, commonly referred to as '*collection societies*'. They are associations of (mostly) authors and performing artists. The aim of these organizations is to control and administer the use of the works of their members – a task otherwise impossible to achieve by individuals acting separately if one considers the number of ways in which works can be used. For instance, one song can, sometimes almost simultaneously, be broadcasted by several radio and television stations or performed at discotheques, nightclubs and stores. From this perspective, the existence of such organizations that is authorized to administer multi-site licensing is certainly useful. On the other hand, however, collection societies are commonly accused of acting in a bureaucratic manner, looking out for their own interests rather than those of the members, or even committing monopolistic practices. The most spectacular scandal in recent years was the investment by *ZASP*, an actors' collection society, of more than US\$ 2 million in bonds of a bankrupt shipyard. The history of difficult dealings between collection societies and the so called *users*, i.e., film distributors, television stations or cable operators, is as long as the free market economy in all these fields of business activity. It is not only long but also painful, rife with disputes, frustration and prejudice. One may also observe that the power of collection societies is being steadily increased each time Poland amends its Copyright Law. In addition, collection societies have the habit of claiming remuneration even with respect to those fields in which their competence to do so is at best dubious.

The most important concern in this area is how the collection societies set the fees that they claim from users of their repertoire. At present, tariffs applied by collection societies are subject to approval by the Copyright Law Commission, the body created by the Minister of Culture and dominated by representatives of authors and performers. Users have no right to participate in the tariff approval procedures. Therefore, collection societies are free to set their fees as they see fit since there is no independent control over the process. As a result, the combined rates applied by various organizations skyrocket, and the users – who would go bankrupt within seconds if they accepted all these demands – are forced to refuse to pay at all. The result is obvious; almost all users are parties to either pending or threatened litigation – the situation not likely to positively contribute to the further development of the audio-visual market. In spite of many calls from all groups of users, collection societies are not capable of voluntarily reducing their expectations, which would give the users a chance to comply with the provisions of the Copyright Law. Rather than that, they compete with one another and try to enforce their rights through the courts. Obviously, this situation contributes much to the stagnation in the Polish film industry. It is true that the Copyright Law has granted authors and performers privileges in the form of equitable or proportionate remuneration for the use of films. However, the legislature has been so generous that presently nobody is eager to invest money in film production, knowing that the lion's share of the proceeds would go to collection societies: for example, until recently the aggregate payments demanded by collection societies for video sales reached 18 percent of proceeds. This deadlock has lasted for years now, and there is no chance of a breakthrough of any kind unless amendments to the Copyright Law bring about some relief, including the 'zero option', i.e., cancellation of all presently binding tariffs. In addition, rather than accepting this concept, some collection societies are lobbying for the introduction of a film tax, which, in their view, could stimulate Polish film production. It seems that this additional burden may complicate the situation even more as this would probably further reduce the prospect of achieving any chance for profitability in this field.

As stems from the above, much must be done to eliminate the remaining hurdles in the Polish audio-visual sector. These hurdles cannot be eliminated without the active involvement and commitment of the government. The Council of Ministers has

promised to be active and to deliver results. It remains to be seen if this promise will be kept.