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Abstract

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COMMENT

PROTECTION OF COMPUTER SOFTWARE PROGRAMS UNDER THE 1994 POLISH COPYRIGHT LAW

Tenley K. Adams*

INTRODUCTION

The political and economic transformation of Poland from a socialist command economy to a democratic system based on free-market principles has been underway since 1989. That year, the Polish government permitted democratic elections to take place and shortly thereafter initiated economic liberalization under the direction of Finance Minister Edward Balcerowicz. Government efforts to implement the foundations of a stable and functioning democratic regime have required commensurate efforts to develop a legal infrastructure consistent with that objective.

One area in which the Polish government has attempted to introduce legislative reform is that of intellectual property. In

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1. See PAUL R. GREGORY & ROBERT C. STUART, SOVIET ECONOMIC STRUCTURE AND PERFORMANCE 17 (3d ed. 1986). The term “command economy” refers to an economic system in which resources are allocated according to administrative orders rather than market forces. Id.


U.S.-Polish bilateral relations, the nexus between intellectual property protection and positive economic growth in Poland assumes particular importance in the computer software industry, both because of the preeminent position of U.S. software manufacturers in many international markets, including Poland, and because of the enormous potential that the Polish computer industry offers for U.S. software producers. While U.S. software makers have an economic interest in entering, or continuing to invest in, the Polish computer market, such investment depends on adequate protection of U.S. software products under Polish intellectual property laws. Failure to provide satisfactory levels of protection will erode U.S. software producers’ incentive to commit to a significant economic presence in Poland, despite the increasingly fertile market that the country represents. Conversely, by ensuring protection of software, the Polish government will promote increased investment in the domestic software market, as U.S. firms will realize greater profits through legitimate sales and marketing channels.

An adequate and effective copyright law is one essential step in providing genuine protection for U.S. software products.

the need for change in this area. *Id.* These include Poland’s need for Western capital in the form of foreign direct investment in order to support economic restructuring, the importance of international trade in such economic growth, and the expanding role of intellectual property in international trade. *Id.*; see Ray V. Hartwell & Judith Y. Gliniecki, *Poland’s New Copyright Law*, 4 Eastern Eur. Rep. (BNA), at 321 (Apr. 11, 1994) (noting increasing importance of intellectual property in international arena).


9. See *id.* at 929-30, 940-42 (arguing that inadequate protection of intellectual property has led some U.S. companies to restrict access to their products in Central Europe in effort to curb piracy).

10. See *id.* at 940 (arguing direct correlation exists between creation of favorable investment climates and high levels of foreign direct investment in Central and Eastern European countries).

The Polish Copyright and Neighboring Rights Act of February 4, 199412 ("1994 Polish Copyright Law") signifies the Polish government’s recognition of the benefits that inhere to their economy with increased protection of intellectual property.13 The law was signed by President Wałęsa on February 14, 1994,14 and while not free of defects,15 represents a considerable achievement in light of Poland’s continued efforts to join the international community in the sphere of intellectual property protection.16

This Comment provides a study of the 1994 Polish Copyright Law and examines whether the law will lead to increased investment in the Polish software market by U.S. software publishers. Part I discusses the U.S. and Polish computer software industries and the role of U.S. software companies in Poland. Part I also analyzes the 1952 Polish Copyright Law and the problems it precipitated, as well as the dilemma of software piracy as a function of copyright law. Finally, Part I discusses the forces of change that culminated in the enactment of the 1994 Polish Copyright Law. Part II provides an analysis of the provisions in the 1994 Polish Copyright Law that directly concern computer programs.17 Part III argues that U.S. software publish-
ers should greet the new Polish Copyright Law enthusiastically because the law conforms with international, regional, and bilateral agreements and offers a genuine remedy for the problem of software piracy in Poland. This Comment concludes that the new Polish law will promote increased investment in the Polish computer software market by U.S. software companies.

I. COMPUTER SOFTWARE AND COPYRIGHT LAW: A POLISH PERSPECTIVE

The computer software market represents an expanding and important sector of the economy for many industrialized nations, particularly the United States.18 Poland, having only recently discarded its seventy-five-year-old legacy of communist governance, has emerged as a potentially lucrative market for many U.S. software producers.19 Strong copyright laws are essential to ensuring protection of authors’ rights in computer programs.20 Poland’s outdated legislation in this area has prevented many potential investors from entering the Polish software market, and discouraged others from increasing the level of such investment where it already exists.21 This phenomenon, together with a number of internal and external pressures, ultimately convinced the Polish government that reform of its copyright law was a prerequisite to attracting additional foreign direct investment by U.S. software makers.22


The computer software industry is one of the fastest-growing sectors of the U.S. economy,23 dominating the world market in

with sufficient information by which to gauge the level and type of protection offered in the law vis-à-vis U.S. copyright law.

18. BUSINESS SOFTWARE ALLIANCE, NEWS RELEASE (1994) [hereinafter BSA NEWS RELEASE].
20. BSA FACT SHEET, supra note 11.
22. Soltysinski, supra note 4, at 2.
23. BSA FACT SHEET, supra note 11. The Business Software Alliance estimates that the U.S. software industry grew 269% over the last ten years. Id. From 1982 to 1990, the BSA estimates that the value added by the software industry to U.S. GDP increased at a real annual growth rate of 16.4%. Id.; see INTERNATIONAL INTELLECTUAL PROPERTY
prepackaged software sales\textsuperscript{24} and representing one of the few U.S. industries regularly contributing to a positive balance of trade.\textsuperscript{25} In 1992, the software industry accounted for over \textbf{US$36.7 billion} in value added to the U.S. economy,\textsuperscript{26} and presently employs approximately \textbf{421,000 people}.\textsuperscript{27} Since 1987, the software industry has employed new workers at an annual rate of \textbf{6.6\%},\textsuperscript{28} more than any other comparably-sized sector of the U.S. economy.\textsuperscript{29} Rapid growth in the domestic software industry and recognition of the potential profits that international markets represent for their products has prompted many U.S. software publishers to turn their marketing efforts abroad.\textsuperscript{30} Since 1989, Poland's commitment to building a market economy open to and eager for U.S. investment has led many U.S. firms to focus greater attention on Poland in their marketing strategies.\textsuperscript{31}
Poland has emerged as one of the leading consumers of computers and computer software products in Eastern Europe,\(^{32}\) as well as the fastest-growing computer market in the region.\(^{33}\) Privatization of the economy\(^{34}\) and political liberalization have created unprecedented opportunities for Polish entrepreneurs to initiate or enter into joint ventures with Western computer companies, or more frequently, to launch small computer-related enterprises of their own.\(^{35}\) By mid-1993, there were approximately 2500 registered computer companies in Poland offering hardware, software, and computer services.\(^{36}\) By mid-1994, conservative industry observers estimated the number at 3500; more optimistic estimates placed the number at 6000.\(^{37}\)

The unprecedented changes occurring in Poland since 1989, and the fertile software market that such changes have generated, have not gone unnoticed by the U.S. software industry.\(^{38}\) Major software publishers have responded to the nascent market opportunities either by entering the Polish market for the first time or by increasing the level of investment already committed.\(^{39}\) While problems of hyperinflation and underdevel-
oped banking and telecommunications infrastructures accompanied the introduction of draconian economic reform measures throughout 1991, U.S. computer firms recognized Poland's potential as a country of forty million well-educated consumers, many of them computer-literate. Over the last three years, convertibility of the Polish currency, the zloty, lower trade barriers, and the growing sophistication of Polish consumers in the information technology area has rendered the Polish market even more attractive to U.S. computer firms. To some extent, this interest is evident in the continued dominance of U.S. computer programs in the Polish software market.

U.S. firms rely on a variety of investment methods in participating in the Polish computer software market. As in other non-U.S. markets, the most prevalent types of investment in Poland are opening wholly-owned subsidiaries; creating cooperatives and partnerships; and establishing joint ventures with Polish companies. Polish producers have relied primarily on niche markets, such as Windows text editors and anti-virus programs, to maintain a position in the domestic software market.

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40. See Wojtowicz, supra note 3 (discussing implementation of Finance Minister Balcerowicz's "shock therapy" economic measures designed to curb hyperinflation and stabilize Polish economy).

41. Hooper, supra note 19, at A7H; Dyson, supra note 39.

42. See Hooper, supra note 19, at A7H (describing Poles' gradual appreciation of, and demand for, higher-quality computer products).

43. See Andrzej Dyzewski, Polski Rynek Komputerowy w Sektorach [The Polish Computer Market in Sectors], COMPUTERWORLD, June 1994, at 25 (listing top Western software producers, according to off-the-shelf sales, as Novell, Microsoft, SCO (Santa Cruz Operations), Lotus, Computer Associates, Borland International, Symantec, WordPerfect Corp., and Autodesk). Recently, the Polish domestic software market has witnessed a growing demand for programs developed specifically to increase efficiency within the production processing market. Id. The market for such applications has spurred the growth of Polish software firms that are technologically advanced and that specialize in system integration. Id. Authors of the report acknowledge that the Polish domestic computer software market remains relatively little known, a result of that market's low concentration of capital. Id.; see Poland: Future of Polish Computing in "Niche Markets," Reuter Textline, May 19, 1994, available in LEXIS, Intlaw Library, TXTLINE File. Because the Polish operating system market continues to be dominated by U.S. software firms, Polish producers have relied primarily on niche markets, such as Windows text editors and anti-virus programs, to maintain a position in the domestic software market.

44. See Hooper, supra note 19, at A7H (describing variety of cooperative ventures between Polish and U.S. computer software companies).

45. See Sherer, supra note 31, at 22. In 1992 and 1993, Microsoft was already planning to open wholly owned subsidiaries in Prague, Budapest, and Warsaw. Id. at 22; Hooper, supra note 19, at A7H. IBM established a wholly owned subsidiary in Poland in November 1991. Id.
tive ventures with Polish software developers, often to develop Polish-language versions of the most popular U.S. software packages, and concluding licensing agreements with Polish dealers and distributors. As in the United States, U.S. firms operating in Poland engage in fierce competition in an effort to increase demand for their software products. Frequently, they offer promotional discounts, organize public exhibitions of new products or new product versions, and present special awards to Polish dealers and distributors who perform particularly well in a given year. As part of the effort to gain market share, U.S. firms like Microsoft, Lotus, and WordPerfect now offer Polish-language ("Polonized") versions of their most popular software products, indicating both a long-term commitment to the Polish market and recognition of the increase in sales that such

46. Robert Jakubowski, Wojna na Słowa [A War of Words], GAZETA WYBORCZA, June 21, 1994, at 1; Interview with Ignacy Grzybowski, Marketing and Software Expert, Mad-Land Sp. z o.o. (Apple distributors) in Warsaw, Poland (June 19, 1994); Interview with Waldemar Sielski, Director, Microsoft Poland, in Warsaw, Poland (July 5, 1994). Mr. Sielski notes that Microsoft, WordPerfect Corp., Lotus, and Apple's Polish distributor, SAD Ltd., are among the U.S. firms that regularly engage in such cooperative agreements to "Polonize" English-language versions of word processing and other software products. Id.

47. BUSINESS SOFTWARE ALLIANCE, GUIDE TO SOFTWARE MANAGEMENT (1994) [hereinafter BSA GUIDE TO SOFTWARE MANAGEMENT]. The BSA publication defines a software license agreement as an agreement that states the terms of usage, as permitted by the copyright owner, for the specific software product to which it pertains. The license agreement accompanying software is stated explicitly in the software documentation or on the computer screen when the program is started. The price of software covers the legal acquisition of the software license and binds the purchaser to use the software only according to the terms and agreements stated in the license.


49. Jakubowski, supra note 46, at 1.

50. See id. at 1 (describing price discounts offered by Microsoft and WordPerfect to users of competing word processing programs and outlining special Polish-language features); Witold Lampe, CorelDRAW! na Pipta [An "A" for CorelDRAW!], GAZETA WYBORCZA, June 21, 1994, at 1 (advertising debut in Poland of version 5.0 of graphic design program CorelDRAW!); Michal Szafranski, Zdradzamy Chicago [Betraying Chicago], GAZETA WYBORCZA, Aug. 2, 1994, at 1 (presenting detailed review of Chicago, Microsoft's new operating system).
software localization facilitates.\textsuperscript{51}

B. The 1952 Polish Copyright Law and Its Consequences

The copyright law in effect when U.S. software manufacturers first entered the Polish market in the mid-1980's dates from July 10, 1952 ("1952 Polish Copyright Law").\textsuperscript{52} That year, the Polish communist government passed the copyright statute to replace the law in effect since 1926.\textsuperscript{53} The 1926 copyright law, Poland's first, was considerably advanced for the time,\textsuperscript{54} providing the right known as droit de suite\textsuperscript{55} when the laws of few other countries in Europe did so.\textsuperscript{56} In fact, the 1926 law was advanced enough in providing copyright protection of intellectual property to permit Poland to join the 1928 Rome text of the Berne Convention,\textsuperscript{57} which requires that member countries confiscate unauthorized copies of copyrighted works.\textsuperscript{58}

Polish intellectual property lawyers generally agree that the 1952 Polish Copyright Law did provide protection for computer programs, if only in theory rather than in practice.\textsuperscript{59} That is,

\begin{itemize}
\item \textsuperscript{51} Dyżewski, supra note 43, at 27; Jakubowski, supra note 46, at 1.
\item \textsuperscript{52} Ustawa z Dnia 10 Lipca 1952 Roku o Prawie Autorskim, Dz. U. z dn. 31.VII.1952 r. Nr 54, poz. 284 [Copyright Statute Law No. 284 on Copyright] (as amended up to Oct. 23, 1975) [hereinafter 1952 Polish Copyright Law]; see Janusz Fiolkka, Protection of Computer Programs in Light of the New Copyright Law, COPR. WORLD, Apr. 1994, at 18-19 (analyzing protection granted computer software programs under old law compared to that granted under 1994 law).
\item \textsuperscript{53} Ustawa z Dnia 29 Marca 1926 Roku o Prawie Autorskim, Dz. U. z 1935 r. Nr 36, poz. 260 [Copyright Statute Law No. 260 on Copyright]; ANDRZEJ KARPOWICZ, AUTOR-WYDAWCÁ: PORADNIK PRAWA AUTORSKIEGO [AUTHOR-PUBLISHER: A GUIDEBOOK TO COPYRIGHT LAW] 149 (1994).
\item \textsuperscript{54} Se Karpowicz, supra note 53, at 149-50 (discussing 1926 Polish copyright law in context of existing European copyright legislation).
\item \textsuperscript{55} LAW ON COPYRIGHT, supra note 15, at 5. "Droit de suite" refers to the right guaranteeing the author's remuneration in the form of royalties for the sale of an original artistic work and manuscripts of literary and musical works. Id.
\item \textsuperscript{56} JAN BŁESZYSKI, PRAWO AUTORSkie I PRAWA POKREWNE [POLISH COPYRIGHT AND NEIGHBORING RIGHTS LAW] 4 (1994).
\item \textsuperscript{58} Berne Convention, supra note 57, art. 16, 102 Stat. at 2860, 828 U.N.T.S. at 249, 251.
\item \textsuperscript{59} Soltysiński, supra note 4, at 5; Fiolkka, supra note 52, at 18-19. The 1952 Copyright Law was not the only basis for copyright protection in the field of computer pro-
\end{itemize}
computer programs could be treated as scientific or literary works under Section 1 of the 1952 law and enjoy copyright protection if they satisfied the requirement of fixation and contained elements identifying the program's creator. While such protection accorded with the manner in which both European and U.S. copyright laws protected computer programs, Polish creative and academic circles recognized that a number of provisions restricting the author's rights rendered protection of programs far more limited than pure statutory analysis would suggest.

The 1952 law, founded on communist principles, introduced changes in the earlier law that expanded public access to cultural goods by providing for broad exceptions to the au-

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60. 1952 Polish Copyright Law art. 1. The provisions read, "Copyright shall subsist in every literary, scientific or artistic work, in whatever form." Id.

61. Fiolka, supra note 52, at 19; see 17 U.S.C. § 101. According to Section 101 of the U.S. Copyright Act, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." See Karpowicz, supra note 53, at 19-20 (providing similar definition of fixation concept).

62. Fiolka, supra note 52, at 19. The author bases his conclusion on the decision of the Gdańsk Appeals Court in 1998, holding that computer programs were subject to copyright protection. Id. at 18 (citing Unisoft Ltd. v. Programowanie Maszyn, App. Ct., Gdańsk (1993)).

63. LAW ON COPYRIGHT, supra note 15, at 5-6.

64. Bleszynski, supra note 56, at 4; LAW ON COPYRIGHT, supra note 15, at 5.

65. LAW ON COPYRIGHT, supra note 15, at 5. Cultural goods refers to those works of authorship that fall within the subject matter of copyright, as defined in Article 1 of the 1952 law. Id. One result of the changes introduced by the 1952 Polish Copyright Law was to diminish the bargaining power of creators vis-à-vis the Polish government. Id.; see 1952 Polish Copyright Law art. 1(2) (enumerating works constituting cultural goods,
The law also gave wide discretion to the Ministry of Culture in determining how and when the work of an author, producer, or publisher may be disseminated. The Ministry's broad powers included the right to establish a binding scheme of remuneration for certain categories of works and to curtail freedom of contract. Finally, the law included a compulsory license for all published works permitting public dissemination by the press and broadcasters without the consent of the author. The author's right to decide whether and under what circumstances to disseminate his creative work was therefore rendered subordinate to the preferences of the Minister of Culture, whose priority was furthering the vaguely defined interest of propagating education and culture.

Furthermore, although the 1952 law did provide remedies for copyright infringement in the form of damages, accounting for profits, and criminal sanctions, few copyright owners including works expressed in print, in verbal form, or in writing, art. 1(2)(1), musical works, art. 1(2)(2), works of fine art, art. 1(2)(3), and works of choreographic and cinematographic art, art. 1(2)(4)).

66. See 1952 Polish Copyright Law art. 22.
67. See id. arts. 16-24.
68. See id. art. 33(1)-(2). Those provisions read: "(1) The Council of Ministers may fix the basis and rates of remuneration for authors, as well as a model contract for all or any of the creative domains. (2) All contractual stipulations contrary to the regulations established under paragraph 1 shall be void." Id.
69. Id. art. 23.
70. See Interview with Teresa Drozdowska, Director, Legal Department, Polish Ministry of Culture and Art, in Warsaw, Poland (July 11, 1994). The Polish Ministry of Culture and Art is the governmental body responsible for the development and enforcement of copyright law in Poland. Id.
71. 1952 Polish Copyright Law art. 16; LAW ON COPYRIGHT, supra note 15, at 5; see Schwartz, supra note 25, at 129 (noting that such restrictive copyright laws were typical for most of formerly communist countries of Eastern Europe, particularly with respect to author's economic rights). The transition to free market economies should remove many of the once obligatory limitations on copyright. Id.
72. 1952 Polish Copyright Law arts. 53-55. Article 53 states that "[t]he author whose personal rights have been infringed may demand that the infringement cease and its consequences be nullified." Id. art. 53(1).
73. Id. arts. 56-58. Article 56 states that "[t]he author . . . shall have the right to require the person who has infringed his property rights to cease the infringement, to pay over the profits obtained therefrom, and, in the case of willful infringement, to pay damages." Id. art. 56.
74. Id. arts. 59-60. Article 59 states that "[a]ny person who infringes the copyright of another person in any other manner in order to secure material or personal advantages, shall be liable to imprisonment for not more than one year or to a fine of not more than 30,000 zlotys, or both." Id. at 59(2).
whose rights were infringed initiated legal proceedings.\textsuperscript{75} Reluctance to bring such cases was caused by several factors, the most important of which was the attitude of judges and prosecutors, who were generally inclined to dismiss infringement cases as not sufficiently harmful to the public.\textsuperscript{76} A second factor was the institutional inefficiency of the Polish legal system with respect to enforcement of the rights of authors.\textsuperscript{77} Third, the high costs and long duration associated with the Polish court procedure and the limited possibility of obtaining compensation commensurate with the sustained losses persuaded many copyright owners not to bring suit.\textsuperscript{78} Finally, the dearth of intellectual property attorneys, who were dissuaded from pursuing a specialization in this field largely because of the above-mentioned practical and systemic deficiencies, created an additional disincentive for copyright owners to resort to the courts.\textsuperscript{79} Together, these factors created disrespect for the rights granted under the 1952 law and encouraged infringers to engage in the activities prohibited by the law's provisions.\textsuperscript{80}

Thus, despite theoretical protection of computer software programs provided by Poland's 1952 copyright statute, the law proved unsatisfactory in guaranteeing authors' rights and insufficient in deterring copyright infringement.\textsuperscript{81} Not only were the law's remedies and enforcement procedures limited or non-exis-

\textsuperscript{75} See Fiolka, \textit{supra} note 52, at 18-19.

\textsuperscript{76} See Karpowicz, \textit{supra} note 53, at 11-12 (maintaining that total indifference on part of procurators and police in problem of piracy was primary factor in growth of piracy in country and that law enforcers placed piracy very low on their list of priorities); see also Fighting Piracy, \textit{Warsaw Voice}, Nov. 17, 1991, available in LEXIS, World Library, PAP File (discussing reluctance of publishers under old copyright law to bring actions in Polish courts in cases of copyright infringement).

\textsuperscript{77} Fiolka, \textit{supra} note 52, at 21. A number of deficiencies in the Polish legal system led to poor copyright enforcement, particularly the fact that judges and law enforcement agencies were poorly paid and ill-equipped to deal with this type of illegal activity. \textit{Id.}

\textsuperscript{78} \textit{Polish Copyright and Neighbouring Rights Act}, \textit{supra} note 13, at 20.

\textsuperscript{79} Fighting Piracy, \textit{supra} note 76; Interview with Anna Wojciechowska, Attorney at Międzyuczelniany Instytut Wymalaczości i Ochrony Własności Intelektualnej [Interdepartmental Institute on Inventiveness and Protection of Intellectual Property], in Kraków, Poland (July 18, 1994).

\textsuperscript{80} Interview with Anna Wojciechowska, \textit{supra} note 79.

\textsuperscript{81} Bleszyński, \textit{supra} note 56, at 5; Interview with Anna Wojciechowska, \textit{supra} note 79.
tent, but, in contrast to legislative developments taking place in other countries in the intellectual property arena, the Polish law failed to reflect ongoing technological developments, and thus proved archaic when compared with international copyright reform efforts.

C. The Relationship Between Piracy and the Law of Copyright

Strong copyright laws and effective enforcement mechanisms are essential elements in curbing software piracy and promoting growth of the software market. Intellectual property laws provide what most software industry and legal authorities believe to be the best form of software protection. Because

82. See supra notes 65-71 and accompanying text (discussing deficiencies in 1952 Copyright Law provisions on protecting computer software).
83. Błeszynski, supra note 56, at 5.
84. Id. at 9.
85. Id.; LAW ON COPYRIGHT, supra note 15, at 5-6. One manifestation of the obsolescence of the 1952 Polish Copyright Law is the fact that in 1971, Poland was unable to sign the Paris text of the Berne Convention. Id. at 6. In addition, high piracy rates in Poland evidenced the inadequacy of copyright protection and impressed upon Polish legislators the urgency of copyright reform. Id. at 6.
86. BSA GUIDE TO SOFTWARE MANAGEMENT, supra note 47, at 2. Software piracy is defined as the unauthorized copying or use of a computer program in a manner other than what is permitted by copyright law or by the author as stated in the software licensing agreement. Id.
87. See Waters, supra note 5, at 941-45 (discussing correlation between protection of intellectual property rights and piracy); BSA News Release, supra note 18.
88. Scott, supra note 27, at 3-67 to 3-70; see Robert A. Gorman & Jane C. Ginsburg, Copyright for the Nineties 688-90 (4th ed. 1993) (citing Final Report of the National Commission on New Technological Uses of Copyrighted Works (July 31, 1978) [hereinafter CONTU Final Report]). Four types of legal protection exist for computer programs: copyright, patent, unfair competition, and trade secrecy. Id. at 688. Although none of these is mutually exclusive, each method is based on different legal concepts, and consequently provides a different type and scope of protection. Id. at 688-90. These alternatives are generally regarded as less suitable means of protecting property rights in computer programs because, based on their legal requirements and policy aims, they may restrict competition and hinder the dissemination of information to a greater extent than copyright law. Id. Among the advantages of copyright law are the broader scope of protection for computer software, based on copyright's modest requirements of fixation and low level of originality, in contrast to patent law's prerequisites of novelty and nonobviousness, and trade secret law's demand for continued secrecy. Scott, supra note 27, at 3-67; Patent Act, 35 U.S.C. § 101 (1988 & Supp. V 1993). Another advantage is the ease of acquiring protection under copyright law, because copyright attaches as soon as fixation occurs in a tangible medium of expression, whereas patent and trademark acquisition demand a complex and costly application process. Scott, supra note 27, at 3-67. A third advantage is the fact that copyright in computer programs endures for 50 years, while patents last for only 17. 17 U.S.C. § 302(a) (1988 & Supp. V 1993); 35 U.S.C. § 154 (1988 & Supp. V 1993). While trade
software development costs far exceed the costs of software duplication,89 software developers will continue to disseminate their products only if they can spread their costs over multiple copies of the work and are assured protection against unauthorized copying.90 The aim of copyright law as applied to computer programs is to balance the interests of developers, users, and licensees in relation to the use, copying, translation, development, and duplication of software programs.91 Failure to strike an appropriate balance by providing inadequate protection to the rights of authors in computer programs stifles innovation within the industry and discourages software publishers from entering potentially lucrative international markets.92

1. A Brief Background on Piracy in Poland

Polish computer software pirates assume a variety of forms, from large government institutions to individual home users.93 As in the United States, individual business users in Poland often reproduce a software application several times over for interoffice use.94 While software industry professionals recognize that some users in Poland may be unaware that such copying is illegal,95 piracy is also prevalent among computer professionals, secret protection is, in theory, interminable, accidental disclosure or reverse engineering will terminate protection. Scott, supra note 27, at 3-68. Finally, copyright grants the benefits of automatic international copyright protection in most industrialized countries resulting from U.S. membership in the Berne Convention and the Universal Copyright Convention. Id.; Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2751, 216 U.N.T.S. 132 (revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178) [hereinafter U.C.C.].

89. See Webster's Ninth New Collegiate Dictionary 388 (9th ed. 1990) (defining "duplicate" as, inter alia, "to make an exact copy of").
91. Scott, supra note 27, at 2-3 to 2-4.
who know or should know that their actions are prohibited. Although users of illegal programs may not represent a significant problem when considered in the context of small businesses or individual home users, the extent of the problem becomes more evident when the pirate is a large state or private enterprise.

One consequence of software piracy, and one reason it deters many would-be U.S. investors from entering the Polish market, is the long-term effects that piracy has on the process of reinvestment and new product development. Pirates are able to conduct business precisely because they can bypass the process of research and development, by far the most cost-intensive stage of new product development. Thus, legitimate software developers lose their incentive to create new programs, such as "Polonized," or local-language versions for Polish end-users, because they must compensate for the losses by additional investments of time and money merely in order to remain competitive.

96. Id. at 177-78.
97. Grzegorz Brzozowicz & Bogdan Kowalski, Ustawa o Prawie Autorskim: Autor! Autor! Autor! [The Copyright Law: Author! Author! Author!], GAZETA WYBORCZA, May 23, 1994, at 1. It is these users, among whom illegal copying of software is the norm and not the exception, who are the target of the new copyright law. Id.

98. Waters, supra note 5, at 943-44. Piracy of intellectual property hurts producers in two ways: directly, by causing them to lose sales to their pirate competitors, who sell for lower prices, or royalties that authorized licensees are obliged to pay; and indirectly, because consumers who may be unsophisticated in computer software and buy the pirated goods unknowingly receive lower-quality products, hurting the producers' goodwill and reducing demand for the genuine product. Id. at 943.

99. Id.; Szemplińska, supra note 93, at 8.

100. Szemplińska, supra note 93, at 8; see BSA GUIDE TO SOFTWARE MANAGEMENT, supra note 47 (outlining policy guidelines for individuals and corporations to ensure legal software use). According to the BSA, the costs to the individual user of pirated software programs are considerable. Id. Original software manufacturers build a variety of quality controls into their programs, both in order to ensure product reliability and to protect against infection against computer viruses. Id. Because pirated copies contain no such protection, users of such programs are at constant risk of data destruction. Id. Increasingly, businesses purchase software applications for use in multiuser environments, such as company-wide local area networks ("LANs"), where viruses spread quickly to every connected computer. Id. For businesses taking advantage of such networking capabilities, pirated software may mean significant or even irreparable damage to the entire company operation. Id. Furthermore, most computer software companies provide technical support by way of telephone, on-line, or on-site service; basic employee training; and thorough documentation shipped together with the program package. Id. Such support is available to authorized customers in case users require technical assistance while using the program. Id. Dealers of pirated software, for
Since Poland's computer industry began to develop rapidly in the period following the fall of communism, the most popular locus for selling pirated computer programs has been what is known as the "gielda," or open-air market, found in almost every city in Poland. What began in the late 1980's as meetings among computer hobbyists soon became a universal phenomenon. In small curtained booths, computer programmers and other software enthusiasts operating as pirates sold illegal copies of licensed computer programs to any interested purchasers. Depending on how many "copying" computers the pirate had at his disposal, he could earn from one million zloty, about US$50, to several million zloty a month. As late as May 1994, computer users unable or unwilling to pay retail price could purchase the latest version of almost any popular software program at the gielda, even when the original software manufacturer had not yet released that version in Poland.

obvious reasons, do not offer such support, putting users of illegal copies at a severe disadvantage when problems arise. Additional benefits of using original software include full upgrades and discounted prices for new releases of existing program applications, none of which are available to users of pirated versions.

101. See JAN STANISLAWSKI, WIELKO SŁOWNIK POLSKO-ANGIELSKI [THE GREAT POLISH-ENGLISH DICTIONARY] 276 (1964) (defining "gielda" as "(stock) exchange; money-market; black market").

102. Kulisiewicz, supra note 95, at 177.


104. Id. At the gielda, buyers could purchase even the most expensive Western software programs, which sold for US$500 to US$1000 retail, for as little as 20,000 to 30,000 zloty, or about US$2 to US$3. Id. According to software entrepreneurs whose acquaintances dealt in pirated programs until the summer of 1994, an interested buyer could purchase software at the gielda either by requesting the program title and paying the specified amount, about 20,000 to 30,000 zloty, or by bringing a blank floppy disk and asking the pirate to copy the desired program, reducing the price by anywhere from 5000 to 10,000 zloty. Id.; see Janusz Zurek, Giedy do Podziałenia? [Black Marketeers: Going Underground?], GAZETA WYBORCZA, Feb. 15, 1994, at 1. The entire process took about one and a half minutes. Id. To avoid detection, software pirates sold the programs only a few hours a day.

105. Id. at 1. Most pirates concealed their programs on gigantic 1.2 GB hard drives, CD-ROMs, magneto-optical disks, or "streamers" (magnetic tape). Id. One pirate earned half a billion zloty (US$25,000) by selling pirated programs using approximately a dozen computers.

106. Id. This income is significant when one considers that in Poland, the average monthly income is about US$250. Id. In February 1994, the record holder among pirates at the Katowice gielda was copying on the average 4000 diskettes a month. Id.

107. Id.; see Kulisiewicz, supra note 95, at 177-79. Legitimate retail establishments that market and sell illegally copied software is another alarming manifestation of organized piracy. Id.; BUSINESS SOFTWARE ALLIANCE, SOFTWARE REVIEW 5 (June 1994).
The primary reason behind pirates' indifference to the risks involved in such illegal business transactions is their belief that such activities are not prohibited under copyright law. As long as pirates are convinced that the protection guaranteed copyright owners is either nonexistent or ambiguous, and that software program authors will not bring claims as a result, they lack any incentive to cease their illegal activities. Under these circumstances, piracy levels in Poland are unlikely to decrease.

2. The Correlation Between Poor Copyright Protection and High Piracy Rates

Prior to the enactment of the 1994 Polish Copyright Law, U.S. software manufacturers were faced with the problem of inadequate copyright protection in Poland. Widespread piracy of computer programs prompted many companies to reduce investment in the Polish market, despite recognition of the country's enormous market potential. Smaller companies, although no less eager to participate in Poland's emerging computer software industry, were discouraged from entering altogether. The prevalence of software theft was predominantly

[hereinafter BSA SOFTWARE REVIEW (June 1994)]. While there is no precise data available regarding the number of such retailers, the problem is significant enough that the U.S.-based Business Software Alliance ("BSA") has made shops selling pirated software the prime target of their anti-pirate investigations in Poland. Id.; IIPA PETITION, supra note 23. The BSA is a member organization of the International Intellectual Property Alliance ("IIPA"), which consists of eight separate associations representing a significant segment of the U.S. copyright industries. Id. The BSA is formed of leading U.S. software companies, including Aldus Corp., Microsoft, WordPerfect, Novell, Apple Computer Corp., Autodesk, Intergraph Corp., Lotus Corp., and Santa Cruz Operation, to increase public awareness of the legal protection of computer software. Id. BSA forms alliances with software companies worldwide to distribute information to users and retailers about how to manage the acquisition and use of software while complying with the law. Id. BSA also submits annual filings to the United States Trade Representative identifying countries which may be eligible for trade sanctions as a result of widespread piracy in the country, and testifies before Congress and international government entities concerning the software industry, copyright protection, and other intellectual property issues. Id.

108. See supra notes 65-81 and accompanying text (discussing inadequate software protection under pre-1994 Polish copyright laws).


110. Migut, supra note 109, at 9.

111. See supra notes 52-85 and accompanying text (discussing 1952 Polish Copyright Law).

112. Heritage, supra note 11.

113. Id.; Arnst, supra note 94.
the result of the limited protection granted authors under the 1952 Polish Copyright Law and the inadequacy of available remedies stipulated therein.\textsuperscript{114} Although the statutory infirmities of the Polish copyright law were largely endemic to the intellectual property laws in force throughout the countries of Eastern Europe,\textsuperscript{115} losses to piracy of computer programs following the collapse of socialism were particularly substantial in Poland.\textsuperscript{116}

While in the United States and other industrialized countries software sales comprise about seventy percent of total expenditures on computer equipment, in Poland that figure is twenty to thirty percent.\textsuperscript{117} This figure illustrates the extent of illegal trade in the country.\textsuperscript{118} In 1991, losses to piracy of computer programs in Poland were estimated at over US$100 million.\textsuperscript{119} By 1994, most industry observers placed the figure at US$200 million annually, indicating that approximately ninety-four percent of all software currently in use in Poland is illegal.\textsuperscript{120}

\textsuperscript{114} See supra notes 63-81 and accompanying text (discussing provisions of 1952 Polish Copyright Law protecting computer software).


\textsuperscript{116} See Schwartz, supra note 25, at 144 n.78; IIPA Petition, supra note 23, at 9 (noting that Poland has highest level of piracy in Eastern Europe, with estimated trade losses due to piracy of US$190 million in 1992).

\textsuperscript{117} Polish Computer Imports in 1992 Estimated to be Worth $1.5 Billion, Rzeczpospolita, Sept. 17, 1992, at P3.

\textsuperscript{118} Id.


\textsuperscript{120} Poland: Software Producers to Launch War on Polish Piracy, Reuter Textline, Mar. 1, 1994, available in LEXIS, Intlaw Library, TXTLNE File; see Interview with Teresa Drozdowska, supra note 70 (confirming percentage estimate); Interview with Waldemar Sielski, supra note 46 (same); Interview with Ignacy Grzybowski, supra note 46 (same); Interview with Renata Beresińska, Project Manager, TechMex, in Bielsko-Biała, Poland (June 28, 1994) (same); Interview with Arkadiusz Kaczyński, Vice President, Karen
The prevalence of less expensive pirated copies of computer programs has forced several U.S. firms to sell their best-selling products at substantial discounts. Some Polish companies maintain that the largest discounts, where products are sold under production cost, are tantamount to the practice of dumping, and harm the less well-financed Polish domestic firms. Consequently, Polish companies must take similar price-reduction measures to remain competitive. Nonetheless, even these firms acknowledge the results of market research data indicating the particularly harmful effect piracy has on U.S. software companies. Regardless of the legitimacy of such price-reduction measures, however, there is no doubt that piracy has suppressed the growth of local software development and programming companies, a long-term effect from which recovery will be difficult. Concern about the piracy problem is also significant in light of the losses incurred by the Polish state treasury as a result of illegal program use.

3. Strong Protection Under U.S. Copyright Law and Lower Piracy Rates

Strong protection of computer software through copyright law leads to correspondingly low piracy rates. The U.S. com-

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121. Arnst, supra note 94. According to industry executives, many companies have discounted their prices not only in order to combat rampant piracy, but also in recognition that many users cannot afford standard list prices. Id. Borland International estimates that in 1991 there were approximately 600,000 illegal users of Borland products in Eastern Europe. Id.

122. Romaniuk, supra note 93, at 11.

123. Id.

124. Id. According to the article, research from Polski Rynek Oprogramowania ("PRO"), the Polish Software Market association, reveals that the number of legal Polish software users is several times higher than legal users of Microsoft, Lotus, and WordPerfect combined. Id.

125. Szemplińska, supra note 93, at 8. Indeed, Polish software producers estimate that Polish programs comprise only about 10-20% of the software market. Id.

126. Heritage, supra note 11. In 1991, the International Federation of the Phonographic Industry ("IFPI") estimated that piracy of music cassettes alone cost the state treasury a minimum of US$25 million. Id. Losses to piracy of computer programs were even larger. Id.

127. See Waters, supra note 5, at 941-42 (ascribing losses to piracy in developing nations as result of unsophisticated intellectual property laws).
puter software industry represents one of the fastest-growing segments of the domestic economy. In addition, the United States, where computer programs have enjoyed copyright protection since 1964, maintains the highest percentage of legal users of computer software in the world.

Software publishers' first response to the problem of software piracy was to integrate technical elements, such as special codes, into programs so that users could not duplicate the programs. Many firms soon realized, however, that besides making programs more difficult for legal users to copy onto their hard drives, such codes could be cracked by pirates. Software producers came to rely on industry associations, such as the Business Software Alliance and the Software Publishers Association.

128. BSA FACT SHEET, supra note 11. The BSA reports that the industry grew at a rate of 269% over the last ten years, contributing US$56.7 billion to the U.S. economy in 1992 alone. Id. In addition, U.S. software publishers hold 75% of the global market for prepackaged software sales. Id.

129. SCOTT, supra note 27, at 3-12. In 1964, the United States Copyright Office began registering computer software as a form of literary expression under its "rule of doubt." Id. Under the then-effective Copyright Act of 1909 (Act of March 4, 1909, ch. 320, 35 Stat. 1075), a computer program was registrable if it met the following requirements: the assembly, selection, arrangement, and editing of the literary expression must constitute an original authorship; the program's author must deposit a human-readable form of the program (usually a printout) if the program was published solely in a machine-readable form; the author must apply for registration; and the author must provide an explanation of how the program was first made available to the public and the form in which the program copies were published. Id. at 3-12 to 3-13.

130. BUSINESS SOFTWARE ALLIANCE, SOFTWARE REVIEW 5 (Feb. 1994) [hereinafter BSA SOFTWARE REVIEW (Feb. 1994)]. The percentage of legal users of computer software in the United States is estimated at 65%; see BSA NEWS RELEASE, supra note 18. Industry data and market analysis estimate worldwide losses to piracy of computer software programs at US$12.8 billion per year. Id. In 19 European countries, total losses to software piracy in 1993 exceeded US$4.9 billion; in 11 Asian countries, the figure was US$3.9 billion; and in the United States and Canada, US$2.4 billion. Id.; Philip Elmer-Dewitt, NABBING THE PIRATES OF CYBERSPACE, TIME INT'L, June 13, 1994, at 40-41 (discussing problem of piracy resulting from downloading copyrighted programs from electronic networks known as bulletin board systems ("BBSs") around the world). Piracy within the BBS forum represents one of the most formidable challenges for copyright owners and anti-pirate groups, as technological advances have made BBS-based data compression and transmission extremely rapid and BBSs extremely popular. Id. Since anyone owning a computer and a modem can distribute, and illegally download, software silently and instantaneously, BBSs exacerbate the existing piracy problem considerably. Id. at 40.

131. Elmer-Dewitt, supra note 130, at 40; Interview with Teresa Drozdowska, supra note 70. Some software companies continue to rely on this method to deter at least some pirates from illegal activities. Id.

132. Elmer-Dewitt, supra note 130, at 40.

133. See supra note 107 (describing Business Software Alliance).
sociation,\textsuperscript{134} formed specifically to protect the interests of authors of computer programs, to track, discover, and prosecute abusers.\textsuperscript{135} The foundation for these associations' efforts to protect and enforce authors' rights in computer programs was, and remains, the law of copyright.\textsuperscript{136}

In October, 1976, the U.S. Congress passed the revised Copyright Act of 1976,\textsuperscript{137} which took effect on January 1, 1978.\textsuperscript{138} While the statute does not provide express protection for computer programs within the subject matter of copyright,\textsuperscript{139} it does provide copyright protection to literary works created after the law became effective.\textsuperscript{140} Because computer programs had been protectible as literary works under the Copyright Act of 1909,\textsuperscript{141} and because the legislative history of the 1976 Copyright Act demonstrates the U.S. Congress' intent to continue to

\begin{itemize}
  \item \textsuperscript{134} See \textit{Computer Software Association Established}, Polish News Bulletin, July 1, 1992, \textit{available in} LEXIS, Intlaw Library, PNBUL File. The Software Publishers Association ("SPA") is a U.S.-based organization that affiliates publishers and distributors of computer software in the United States and Europe. \textit{See} Elmer-Dewitt, supra note 130, at 40-41. It is through associations like the SPA that software publishers attempt to combat piracy of their copyrighted programs. \textit{Id. at} 41. The SPA runs spot checks and audits on large corporations, and brings suit when illegal software reproduction and use is discovered. \textit{Id.} In addition, the SPA operates a hotline on which individual users can report such activities anonymously. \textit{Id.} In 1994, the organization was receiving between thirty and forty calls a day, collecting over US$3.5 million annually in fines and penalties. \textit{Id.}
  \item \textsuperscript{135} Elmer-Dewitt, supra note 130, at 40-41.
  \item \textsuperscript{136} \textit{Business Software Alliance, United States: Software Piracy and the Law} (1994); \textit{Gorman & Ginsburg, supra} note 88, at 685. Prior to 1976, most computer program authors were satisfied with the level and form of protection provided by trade secret law, as contractual arrangements allowed the author an acceptable means by which to restrain the program user from studying, and possibly illegally reproducing, the hardware and software components of the integrated system. \textit{Id.} Because most computer companies at this time were "vertically integrated" (a single manufacturer providing customers with both the hardware system and the accompanying, often proprietary, software), such contractual agreements were a convenient and efficient way to protect a firm's rights in its software programs. \textit{Id.} As the computer software market developed away from such vertical integration arrangements, however, protection of software through other legal means became crucial. \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{140} \textit{Scott, supra} note 27, at 3-14.
  \item \textsuperscript{141} Act of March 4, 1909, ch. 320, 35 Stat. 1075; \textit{see} supra note 129 and accompanying text (describing registration of computer software under Copyright Office rule of doubt).
\end{itemize}
provide such protection, the 1976 Act effectively removed computer programs from the “rule of doubt” classification of copyrightable works.

The Computer Software Copyright Act of 1980 provided express protection for computer programs by amending section 101 of the 1976 Copyright Act to include a definition of computer program in the very first chapter of the statute. Based on this unequivocal protection, software publishers are confident that U.S. copyright law provides effective remedies in case their rights are violated. They therefore have a strong incentive to invest in research and development of new products, both domestically and abroad. In the United States, as in other countries, software manufacturers reinvest a portion of each dollar that users spend on programs into new product research and development. This promotes the production of higher-quality

142. Scott, supra note 27, at 3-14; CONTU Final Report, supra note 88.

143. Scott, supra note 27, at 3-14 to 3-18. Prior to adoption of the 1976 Copyright Act, however, Congress responded to the problem of software piracy by establishing the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) in 1974. Id. at 3-18. The purpose of the Commission was to gather information on computer uses of copyrighted works and to recommend changes in the copyright laws that would reconcile the competing interests of authors and the public in computer software and databases. Id. at 3-18 to 3-19; see Apple Computer, Inc. v. Formula Int’l, Inc., 562 F. Supp. 775, 781 (C.D. Cal. 1983), aff’d, 725 F.2d 521 (9th Cir. 1984) (holding that “[i]t is crystal clear that CONTU recommended that all computer programs, fixed in any method and performing any function, be included within copyright protection” and “[t]here likewise can be no doubt but that Congress accepted that recommendation and embodied it in the 1980 amendments to the Copyright law”); Williams Elecs., Inc. v. Artic Int’l, Inc., 685 F.2d 870, 875 (3d Cir. 1982) (holding that “copyrightability of computer programs is firmly established after the 1980 amendment to the Copyright Act”).


145. Scott, supra note 27, at 3-23; see 17 U.S.C. § 101 (1988 & Supp. V 1993) (defining a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"); see Scott, supra note 27, at 3-19 to 3-20. The primary foundation for the amendment was the Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU"), submitted in 1978. Id.

146. Kulisiewicz, supra note 95, at 177-78.

147. See Waters, supra note 5, at 942 (noting that ability of developed nations to maintain a share of international intellectual property market depends on new technology development and that piracy has detrimental effect on such development).

and more advanced software.\textsuperscript{149}

The software industry in the United States is characterized by fierce competition and rapid technological development.\textsuperscript{150} The protection provided for computer programs under U.S. copyright law facilitates the software industry's success.\textsuperscript{151} It is this type of protection that U.S. software publishers will continue to seek when deciding which international markets offer profitable long-term investment opportunities.\textsuperscript{152}

D. Forces of Change

The need for legal reform in the intellectual property arena in Poland stems from several factors, among which are the inadequacy of protection provided under the 1952 Polish Copyright Law,\textsuperscript{153} the high piracy rates found among Polish software users,\textsuperscript{154} and the corresponding reluctance of many U.S. software firms to invest in the Polish market.\textsuperscript{155} In addition, impetus for change in the Polish copyright law came from a number of external considerations that were unrelated to the Polish software industry itself or to U.S. participation therein.\textsuperscript{156} These external forces of change took two forms.\textsuperscript{157} First, the Polish government used the standards established by international conventions and regional trade or political association agreements in drafting the provisions of a new copyright law.\textsuperscript{158} Second, the U.S.-Polish Business and Economic Relations Treaty of

\begin{itemize}
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See Siwek & Furlichtcott-Roth, supra note 6, at 1-2 (summarizing U.S. software industry and role in U.S. and world markets).
\item \textsuperscript{151} Id.
\item \textsuperscript{152} See Waters, supra note 5, at 940-41 (describing link between intellectual property protection and willingness to introduce products in Central Europe); Fenwick & West, International Legal Protection for Software—1991 Update, SOFTWARE PROTECTION, Jan. 1991, at 1 (advising software firms to ensure copyright protection for computer programs prior to distributing their products in given market).
\item \textsuperscript{153} See supra notes 52-85 and accompanying text (discussing 1952 Polish Copyright Law).
\item \textsuperscript{154} See supra notes 93-127 and accompanying text (discussing software piracy in Poland and poor copyright protection for computer programs under Polish laws).
\item \textsuperscript{155} See supra notes 98-107, 111-20 and accompanying text (discussing effect of high piracy rates in Poland on software publishers).
\item \textsuperscript{156} Bleszyński, supra note 56, at 3-4, 7-8.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See id. at 7-8 (discussing Polish government's reliance on international conventions and EC legislation in determining provisions of new copyright law).
\end{itemize}
March 21, 1990159 ("Bilateral Treaty") and subsequent application of specialized trade mechanisms together exerted influence on hastening enactment of the 1994 Polish Copyright Act.160

1. Models for Change

Since 1989, the economic exigencies caused by the ongoing process of restructuring and reform in Poland have created a need for capital and investment from abroad.161 Copyright law has assumed an increasingly important role in economic activity.162 Thus, countries in which copyrightable goods represent a significant portion of economic activity, such as the United States,164 look to copyright law when deciding which markets represent profitable investment opportunities.165 The scope of copyright protection available to authors of computer programs depends not only on the national copyright law of a given country, but also on mutual membership in international conventions.166 For this reason, owners of copyright in computer pro-

160. See Soltyśiński, supra note 4, at 4-5 (discussing role of U.S.-Polish Bilateral Treaty in drafting of new Polish copyright law).
161. Waters, supra note 5, at 929, 956-37. The author points out that the sources of capital for newly emerging democracies in East Central Europe are limited to domestic capital savings, exports, and foreign investment. Id. Since domestic savings are minimal and many exports remain uncompetitive because of their low production quality, foreign capital represents the most realistic means of bringing in much-needed hard currency into those countries. Id. at 956-37.
162. Hartwell & Gliniecki, supra note 5, at 921. The scope of copyright law has expanded significantly in recent years so that copyright law now plays a role in economic activity with both "product" and "geographic" dimensions. Id. That is, application of copyright law is no longer limited to traditional fields of creative work, such as books, paintings, films, and sound recordings, but now extends to an array of new technologies, including computer programs and database design. Id. In addition, technological advances facilitating instantaneous transmission of copyrighted products make uniform protection under compatible copyright laws essential. Id.
163. For purposes of this Comment, "copyrightable" refers to any product or good that is subject to copyright protection.
164. See supra note 128-30 and accompanying text (discussing role of computer software industry in U.S. economy).
165. Waters, supra note 5, at 929.
166. Fenwick & Wést, supra note 152, at 1; Soltyśiński, supra note 4, at 2. Reform of Poland's intellectual property laws is especially important because both primary international copyright conventions, the Berne Convention and the Universal Copyright Convention, are based on the principle of national treatment. Id. Thus, legislation in
grams often precede entrance into another country's software market with an examination of the extent to which that country conforms to those conventions.167

2. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works168 ("Berne Convention") is a series of six agreements concluded over the period of eighty-five years, the first of which was completed in Berne in 1886, and the most recent signed in Paris in 1971.169 The Berne Convention provides protection for literary and artistic works in all member states,170 and requires that each member state provide certain minimum standards of protection.171 These standards include: 1) the subject matter of protection must include every production in the literary, scientific, and artistic domain, regardless of the mode or form of its expression;172 2) certain rights must be recognized as exclusive: translation, public performance, broadcast, reproduc-
tion, motion pictures, and adaptations and arrangements;\textsuperscript{175} 3) the minimum term of protection is the life of the author plus fifty years;\textsuperscript{174} and 4) available remedies must include the right of seizure of infringing goods.\textsuperscript{175}

Poland became a signatory to the Berne Convention on June 28, 1919.\textsuperscript{176} The last Berne Convention text ratified by Poland is that of Rome, in 1928.\textsuperscript{177} Prior to the passage of the 1994 Polish Copyright Law, Poland had adhered only to the administrative provisions of the 1971 Paris text.\textsuperscript{178} It did so by relying on Article 28 of the Berne Convention,\textsuperscript{179} which permits a country to exempt itself from the substantive provisions in Article 1 through 21.\textsuperscript{180} Thus, Poland was able to provide a lower level of protection and still remain Berne-compatible.\textsuperscript{181} The 1994 Polish Copyright Law satisfies the substantive provisions of the Paris text as well, incorporating a number of provisions that are fully compatible with the key principles of the Berne Convention as described above.\textsuperscript{182}

\textsuperscript{173} \textit{Id.} art. 11, 102 Stat. at 2854, 828 U.N.T.S. at 241.
\textsuperscript{174} \textit{Id.} art. 7(1), 102 Stat. at 2853, 828 U.N.T.S. at 235.
\textsuperscript{175} \textit{Id.} art. 16(1), 102 Stat. at 2860, 828 U.N.T.S. at 249.
\textsuperscript{176} Karpowicz, \textit{supra} note 53, at 127.
\textsuperscript{177} Berne Convention, \textit{supra} note 57, 102 Stat. at 2860, 828 U.N.T.S. at 249, 251.
\textsuperscript{178} Karpowicz, \textit{supra} note 53, at 127; Berne Convention, \textit{supra} note 57, 102 Stat. 2853, 828 U.N.T.S. 221.
\textsuperscript{179} Berne Convention, \textit{supra} note 57, art. 28, 102 Stat. at 2853, 828 U.N.T.S. at 269, 271.
\textsuperscript{180} \textit{Id.} arts. 1-21, 102 Stat. at 2854-55, 828 U.N.T.S. at 225-53. Article 7(7) of the Paris text permits countries bound by the Rome text of Berne to provide for shorter terms of protection. \textit{Id.}; Karpowicz, \textit{supra} note 53, at 127-28; Schwartz, \textit{supra} note 25, at 144.
\textsuperscript{181} Karpowicz, \textit{supra} note 53, at 127.
\textsuperscript{182} Polish Copyright and Neighbouring Rights Act, \textit{supra} note 13, at 7; 1994 Polish Copyright Law, Dz. U. Nr 24, poz. 83 (Feb. 4, 1994). Of particular importance are Article 1(1) (providing that subject matter of copyright includes any manifestation of creative activity of an individual nature, regardless of its value, designation, or manner of expression; Article (2)(1) (providing that work expressed in words, mathematical symbols, and/or graphic signs shall be subject matter of copyright, irrespective of its value); Article 7 (recognizing higher level of protection than that provided for in Polish law if such protection is granted under international agreement to which Poland is party); Article 36 (providing for term of protection of 50 years after author's death); and Article 74(1) (providing that computer programs shall be subject to protection as literary works). 1994 Polish Copyright Law arts. 1(1), 2(1), 7, 36, 74(1).
3. The Universal Copyright Convention

The Universal Copyright Convention\textsuperscript{183} ("U.C.C.") concluded in 1952, requires all signatory states to provide adequate and effective protection of the rights of copyright owners in literary, artistic, and scientific works.\textsuperscript{184} The U.C.C., like the Berne Convention, adheres to the principle of national treatment,\textsuperscript{185} so that member states are obligated to grant the same copyright protection to works of nationals of any other member state, or published for the first time in any other member state, as it grants to its own nationals.\textsuperscript{186} Thus, software programs published by U.S. authors or published for the first time in the United States are protected in any other member country to the extent that country provides protection for computer software.\textsuperscript{187}

4. GATT and Trade-Related Aspects of Intellectual Property

The Trade Related Aspects of Intellectual Property ("TRIPs") discussions,\textsuperscript{188} which took place during the Uruguay Round of the GATT negotiations on international trade,\textsuperscript{189} provide for comprehensive copyright protection for computer software.\textsuperscript{190} The TRIPs provisions require that all GATT nations


\textsuperscript{184} Id. art. 1, 6 U.S.T. at 2733, 216 U.N.T.S. at 134.

\textsuperscript{185} See supra note 171 (defining principle of national treatment).

\textsuperscript{186} U.C.C., supra note 88, art. 2, 6 U.S.T. at 2733-34, 216 U.N.T.S. at 136; Scott, supra note 27, at 3-248.9. Unlike the Berne Convention, however, there is no automatic principle in the U.C.C., allowing member states to require authors to comply with notice and other formalities in order to receive copyright protection. U.C.C., supra note 88, art. 3, 6 U.S.T. at 2734, 216 U.N.T.S. at 142; Scott, supra note 27, at 3-248.9. Furthermore, the U.C.C. defines publication as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." U.C.C., supra note 88, art. 6, 6 U.S.T. 2740, 216 U.N.T.S. at 142. The Berne Convention, meanwhile, defines publication to mean that the work has been made available to the public in sufficient quantities, regardless of the form in which the work has been expressed. Berne Convention, supra note 57, art. 3(3), 102 Stat. at 2854, 828 U.N.T.S. at 221.

\textsuperscript{187} Fenwick & West, supra note 152, at 4.


\textsuperscript{190} TRIPs, supra note 188, art. 10, 33 I.L.M. at 1201; Fenwick & West, supra note 152, at 6. Prior to conclusion of the Uruguay Round of GATT, where rules governing
extend copyright protection to computer programs as literary works. The scope of such protection includes a number of exclusive rights granted to the copyright owner, among which are the right to copy or reproduce a work in whole or in part; translate, revise, or otherwise adapt or prepare derivative works; distribute copies of the work for sale or rental; and communicate the work publicly. In addition, the TRIPs provisions offer copyright protection for a term of life of the author plus fifty years, and require that all GATT nations provide judicial remedies for copyright infringement.

The TRIPs provisions establish standards of copyright protection on a wide scale and provide effective enforcement mechanisms that may not be available under the national copyright laws of member states. They therefore permit software publishers to enjoy an additional level of protection for their copyrighted works in the international arena. Moreover, the GATT provisions on protection of computer software represent a concerted effort on the part of the international community to combat software piracy and thereby foster the continued growth of the software industry worldwide.

5. The EC Directive

In December of 1991, Poland concluded an Agreement on Association with the European Communities ("EC Association Agreement"). As part of the agreement, the Polish government agreed to adapt its intellectual property legislation to the intellectual property standards were first introduced, the Berne Convention represented the leading international agreement on copyright protection. 191 TRIPs supra note 188, art. 10(1), 33 I.L.M. at 1201; BSA SOFTWARE REVIEW (Feb. 1994), supra note 190, at 4; FENWICK & WEST, supra note 192, at 5-6.
192. TRIPS, supra note 188, arts. 10-11, 33 I.L.M. at 1201-02; FENWICK & WEST, supra note 152, at 6.
193. TRIPS, supra note 188, art. 12, 33 I.L.M. at 1202; BSA SOFTWARE REVIEW (Feb. 1994), supra note 150, at 4.
194. Id. at 4.
195. See Waters, supra note 5, at 948-50 (arguing that Western nations have urged inclusion of intellectual property protection under GATT largely in order to gain access to such enforcement mechanisms).
196. BSA SOFTWARE REVIEW (Feb. 1994), supra note 130, at 4; Waters, supra note 5, at 949-50.
197. BSA SOFTWARE REVIEW (Feb. 1994), supra note 130, at 4.
requirements and principles binding in the EC Directive on the Legal Protection of Computer Programs ("EC Directive"), issued in May of 1991. One of Poland's primary considerations in assuming that obligation was the goal of full integration into the European Union.

Under the EC Directive, all Member States are required to grant protection to computer programs, under copyright law, as literary works within the meaning of the Berne Convention. Article 4 of the EC Directive grants authors of computer software programs a number of exclusive rights, many of which are common to modern copyright law. These include the right to control the reproduction of a computer program by any means and in any form, in whole or in part; the right to control the translation, adaptation, arrangement, or other alteration of a computer program; and the right to control distribution of the program to the public, including the rental of the original program or copies thereof.

Exceptions to the exclusive rights of a copyright owner in a computer program are set forth in Article 5. Included among the exceptions is the right to perform the exclusive acts stipulated in Article 4 where, in the absence of specific contractual provisions, such acts are necessary for the use of the program by the lawful owner in accordance with the program's intended purpose, including error-correction. Another exception is the right of a lawful owner of a computer program to make a back-up copy. Finally, the owner of a lawful copy of a computer

200. POLISH COPYRIGHT AND NEIGHBOURING RIGHTS ACT, supra note 13, at 8.
203. Id. art. 4(b), O.J. L 122/42, at 44 (1991). This article also provides that "[i]nsofar as loading, displaying, running, transmission or storage of the computer program necessitates such reproduction, such acts shall be subject to authorization by the rightholder." Id. art. 4(a), O.J. L 122/42, at 44 (1991).
204. Id. art. 4(b), O.J. L 122/42, at 44 (1991).
205. Id. art. 4(c), O.J. L 122/42, at 44 (1991). The provision also recognizes the doctrine of first sale. Id. According to the doctrine, the sale of a copy of the program in the European Community by the rightholder or with his consent exhausts the distribution right of that copy within the Community. Id.
208. Id. art. 5(2), O.J. L 122/42, at 44 (1991). Exercise of this right cannot be prevented by contract. Id.
program is permitted to observe, study, or test the program's functioning in order to examine the ideas and principles underlying the program.\textsuperscript{209}

The EC Directive also provides for the right of decompilation, or reverse engineering.\textsuperscript{210} Such acts may only be performed if they are indispensable to obtain information needed to achieve interoperability of an independently created program with other programs.\textsuperscript{211} The term of protection granted to copyright owners in computer programs originally conformed to the Berne Convention provision of life-of-the-author plus fifty years.\textsuperscript{212} This term was extended to seventy years by the EC Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights of October 29, 1993.\textsuperscript{213}

Remedies are set forth in Article 7 of the EC Directive.\textsuperscript{214} Member States are required to provide appropriate remedies to copyright owners where a person commits any of a stipulated number of acts.\textsuperscript{215} These include circulating a copy of a program with knowledge that it is an unlawfully acquired copy;\textsuperscript{216} possessing such an infringing copy for commercial purposes;\textsuperscript{217}

\begin{itemize}
\item \textsuperscript{209} Id. art. 5(3), O.J. L 122/42, at 45 (1991). Such acts are permitted only if they are carried out "while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do." \textit{Id.}
\item \textsuperscript{210} See \textsc{Brian Pfaaffenberger}, OR'S \textsc{Computer User's Dictionary} 454 (2d ed. 1991) (defining reverse engineering as "[t]he process of systematically taking apart a computer chip or application program to discover how it works, with the aim of imitating or duplicating some or all of its functions"); \textsc{Scott}, supra note 27, at 3-215. The most common method of performing reverse engineering is through the process of decompilation, in which a developer uses a specialized program, known as a decompiler or disassembler, to translate object code into a human-readable form in order to study the underlying object code. \textit{Id.}
\item \textsuperscript{211} EC Directive, supra note 199, art. 6(1), O.J. L 122/42, at 45 (1991). Article 6 stipulates three conditions that must be satisfied in order to exercise the right of decompilation. \textit{Id.} These are: 1) the acts must be performed by a lawful user of the program, id. art. 6(1)(a), O.J. L 122/42, at 45; 2) the information necessary to achieve interoperability must not already be available to that user, id. art. 6(1)(b), O.J. L 122/42, at 45; and 3) the acts must be confined to only those portions of the program which are necessary to achieve interoperability, id. art. 6(1)(c), O.J. L 122/42, at 45. Pursuant to article 9(1), the provisions of article 6 cannot be altered by contract. \textit{Id.} art. 9(1), O.J. L 122/42, at 45.
\item \textsuperscript{212} Berne Convention, supra note 57, art. 7(1), 102 Stat. at 2854, 828 U.N.T.S. at 285.
\item \textsuperscript{214} EC Directive, supra note 199, art. 7, O.J. L 122/42, at 45 (1991).
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} Id. art. 7(1)(a), O.J. L 122/42, at 45 (1991).
\item \textsuperscript{217} Id. art. 7(1)(b), O.J. L 122/42, at 45 (1991).
\end{itemize}
or circulating or possessing any means whose sole intended purpose is to facilitate the circumvention of any technical feature that may have been built into the program to protect it against unlawful copying.\textsuperscript{218} In addition, infringing copies of a computer program are liable to seizure according to the laws of the Member State concerned.\textsuperscript{219}

2. U.S. Influence on Poland’s Copyright Law Reform

International conventions and regional agreements were not the only factors the Polish government took into consideration in drafting the text of the 1994 Polish Copyright Law.\textsuperscript{220} Bilateral agreements represent another source of copyright protection for computer programs.\textsuperscript{221} This mechanism played a pivotal role in U.S. efforts to hasten Poland’s preparation, amendment, and passage of the 1994 Polish Copyright Law.\textsuperscript{222}

a. The U.S.-Polish Bilateral Treaty

On March 21, 1990, the United States and Poland concluded a business and economic relations treaty.\textsuperscript{223} Among the primary objectives of the Bilateral Treaty are to further the development of business and economic ties; increase economic cooperation in the form of investment by nationals and companies; and ensure fair and equitable treatment of investment in order

\begin{itemize}
  \item \textsuperscript{218} Id. art. 7(1)(c), O.J. L 122/42, at 45 (1991).
  \item \textsuperscript{219} Id. art. 7(2), O.J. L 122/42, at 45 (1991).
  \item \textsuperscript{220} LAW ON COPYRIGHT, supra note 15, at 7-9.
  \item \textsuperscript{221} FENWICK & WEST, supra note 152, at 1; Soltyśiński, supra note 4, at 4-5.
  \item \textsuperscript{222} Soltyśiński, supra note 4, at 4-5.
  \item \textsuperscript{223} U.S.-Polish Bilateral Treaty, supra note 159, 29 I.L.M. 1194. The Treaty was ratified by the U.S. Senate on October 28, 1990. Schwartz, supra note 25, at 147; see Soltyśiński, supra note 4, at 4. The Bilateral Treaty encountered some opposition within certain Polish Parliamentary circles before it was approved in July, 1991 and signed by President Wałęsa shortly thereafter. Id. The central debate concerned provisions of the Bilateral Treaty relating to the time frame established for Poland’s compliance with certain Bilateral Treaty provisions. Id. Some legislators complained that a more reasonable transition period for implementation should have been granted to Poland, particularly given the lengthy and complex legislative process in Poland and Parliament’s “heavy agenda.” Id. Another criticism centered on the fact that given the decisive comparative advantage enjoyed by U.S. software makers, the United States should have offered concessions in other trade areas, such as agriculture. Id. Arguably, the controversy surrounding the Bilateral Treaty’s ratification in Poland actually prolonged the process of revising Poland’s intellectual property laws. Id.
\end{itemize}
to create a stable framework for investment. Provisions of the Bilateral Treaty are based on the recognition of Poland’s desire to build a stable investment environment by reducing the role of state enterprises and privatizing the economy.

Recognizing the tremendous potential of the Polish market, and dissatisfied with the inadequate protection provided under the 1952 Polish Copyright Law, U.S. copyright industries exerted pressure on the United States Trade Representative ("USTR") to ensure that the agreement included express provisions for protection of intellectual property. Accordingly, Article IV expressly provides for adequate and effective protection and enforcement of intellectual property rights. Article I defines such rights as those relating to literary and artistic works, industrial designs, semiconductor mask works, trade secrets, trademarks, service marks, and trade names. Most important for U.S. software publishers, Article IV extends copyright protection to computer programs as literary works.

In addition, several Annexes, Protocols, and Letters exchanged by the U.S. Trade Representative and the Polish Undersecretary of State, reiterating the requirement of providing protection to computer programs, were signed together with the Bilateral Treaty. The attached Side Letter to the Bilateral Treaty states that Poland will adhere to the Paris text of the Berne Convention no later than January 1, 1991, and will extend copyright protection to computer software before December 31, 1991.

225. Id.
226. See supra notes 52-85 and accompanying text (discussing 1952 Polish Copyright Law).
227. Soltysinski, supra note 4, at 5.
230. Id. art. IV, S. TREATY Doc. No. 101-18 at 6, 29 I.L.M. at 1203.
232. See supra note 231 and accompanying text (describing USTR’s Side Letter to Undersecretary of State at Polish Ministry of Foreign Economic Relations).
233. Side Letter, supra note 231; see Soltysinski, supra note 4, at 3 (discussing Bilat-
By late 1992, the Polish government still had not adopted satisfactory legislation providing for protection of intellectual property. Because failure to amend its copyright law meant that Poland was in violation of the time frame set forth in the Bilateral Treaty, organizations such as the International Intellectual Property Alliance ("IIPA") and the Business Software Alliance ("BSA") appealed to U.S. trade authorities to utilize existing trade enforcement mechanisms to force Poland's compliance with the provisions of the Bilateral Treaty.

b. Special 301

Copyright industries in the United States have played a key role in governmental efforts to improve the overall trade imbalance due to their consistently strong economic performance.

234. Interview with Ryszard Marklewicz, Deputy Director of the Międzyuczelniany Instytut Wymalaczosci i Ochrony Własności Intelektualnej, in Kraków, Poland (June 23, 1994). Failure to adopt new copyright legislation occurred despite the fact that immediately following the signing of the Bilateral Treaty the Polish Parliament began to study legislative amendments which would have brought the country's copyright law into compliance with the Bilateral Treaty. Id.; Schwartz, supra note 25, at 146. In 1990, two drafts of a new copyright law were submitted to the Sejm (Polish Parliament), but were never acted upon. Id. For several reasons, the 1990 draft was regarded as unacceptable both to many Polish legislators and to U.S. observers. Id. Most problematic were the provisions concerning subject matter of copyright, which, according to the draft, required "creative activity of individual character," suggesting that a higher standard of originality may be required, a prerequisite that could prove especially troublesome in the high technology area. Id.

235. See supra note 107 and accompanying text (discussing IIPA organization).

236. See BSA News Release, supra note 18 (describing BSA functions); BSA GUIDE TO SOFTWARE MANAGEMENT, supra note 47 (same).

237. IIPA PETITION, supra note 23, at 19; World Intellectual Property Rep. (BNA) No. 5, at 129 (May, 1992). During a visit to the U.S. in May, 1992, Prime Minister Jan Olszewski assured the U.S. that the proposed intellectual property legislation then under review in Parliament would enable the Bilateral Treaty to come into force. Id. Mr. Olszewski added, "I can assure you that all obligations [under the Treaty] will be implemented in these new regulations." Id.

238. See SWEK & FURCHTGOIT-ROTH, supra note 6, at 1 (discussing role of U.S. software industry in U.S. domestic economy); Schwartz, supra note 25, at 125 (arguing that role of copyright in efforts to improve trade imbalance is result of industry's strong trade performance).
and the influence they are able to exert in the U.S. Congress.\textsuperscript{239} Thus, the U.S. government has made a concerted effort to link copyright with international trade issues.\textsuperscript{240} Such linkage has assumed particular importance in light of the worldwide losses to piracy in the intellectual property arena.\textsuperscript{241}

Increasing losses attributable to piracy in the late 1980's prompted leading members of the industry to exert pressure on the USTR to enact a special amendment to the Trade Act of 1974\textsuperscript{242} aimed at ensuring protection of intellectual property rights in the international arena.\textsuperscript{243} The Omnibus Trade and Competitiveness Act of 1988\textsuperscript{244} ("OTCA") added Section 301, requiring the USTR to treat as an unreasonable trade practice a non-U.S government's refusal to provide adequate and effective protection of intellectual property rights.\textsuperscript{245} Sections 301(b) and (c) require the USTR to take appropriate and feasible action to compel the non-U.S country to cease such unreasonable practices.\textsuperscript{246} and lists several actions the USTR may take toward this end.\textsuperscript{247} These include the imposition of import restrictions on imported goods and services from that country.\textsuperscript{248} Section 301(a) requires that if the USTR finds that a country is engaging in unreasonable practices, the USTR must take one of three steps: invoke one of the 301(c) sanctions, attack the practice using one of the GATT mechanisms for dispute resolution, or determine that the non-U.S. country is taking steps to cease the practice.\textsuperscript{249} These statutory procedures are collectively referred

\textsuperscript{239} Schwartz, \textit{supra} note 25, at 124-25.
\textsuperscript{240} See Waters, \textit{supra} note 5, at 940-47 (discussing interplay between intellectual property protection and trade).
\textsuperscript{241} Id. at 941-43; IIPA \textit{Petition}, \textit{supra} note 25, at 2.
\textsuperscript{243} Davis, \textit{supra} note 92, at 508-09.
\textsuperscript{244} 19 U.S.C. §§ 2101-2495.
\textsuperscript{245} 19 U.S.C. § 2242(a)(1)(A); \textit{Paul B. Stephen III, et al., International Business and Economics: Law and Policy} 401 (1993); see Davis, \textit{supra} note 92, at 517. For Special 301 purposes, a non-U.S. country denies adequate and effective protection of intellectual property if that country denies adequate and effective means under its domestic laws for non-citizens or nationals of that country to secure, exercise, and enforce rights related to patents, process patents, registered trademarks, copyrights, and mask works. \textit{Id.}
\textsuperscript{247} \textit{Stephen et al., supra note 245}, at 401; 19 U.S.C. § 301(a).
\textsuperscript{248} 19 U.S.C. § 301(c).
\textsuperscript{249} \textit{Id.} § 301(a).
to as the Special 301 action.\footnote{\ref{1995} See Davis, \textit{supra} note 92, at 516-22 (providing detailed analysis of Special 301 procedures and applications). Special 301 actions commence with an annual report known as the National Trade Estimate Report, submitted by the USTR and listing non-U.S. states that erect significant barriers to trade of U.S. exports protected by intellectual property laws. \textit{Id.} at 516. Within thirty days of the report's submission, the USTR must designate those states eligible for treatment under Special 301. \textit{Id.} at 517. Once the 301 list is released, negotiations may begin with the offending country and, if no satisfactory resolution is reached, sanctions may be imposed within a year to 18 months. \textit{Id.} at 519.}

Originally, Special 301 provided only a single designation, that of "priority" countries, which engage in the most onerous or egregious acts, policies, or practices.\footnote{19 U.S.C. § 2242(b)(1)(A).} In 1992, a modified approach was established, whereby priority and secondary "watch lists" were added as categories under the Special 301 designation.\footnote{\textit{Waters}, \textit{supra} note 5, at 957.} These countries' intellectual property trade practices are regarded as serious, but not as severe as those of the priority countries.\footnote{\textit{Id.}} Another modification occurred in 1993, when the USTR added two trade mechanisms aimed at inducing non-U.S. nations to comply with internationally recognized intellectual property norms.\footnote{\textit{Id.} at 958.} These include "immediate action plans," establishing requirements and setting deadlines to monitor a country's progress, and "out of cycle reviews," consisting of periodic reviews of an offending country's progress.\footnote{\textit{Id.}}

Following Poland's failure to comply with the provisions set forth in the U.S.-Polish Bilateral Treaty,\footnote{\textit{See supra} notes 223-37 and accompanying text (discussing history and content of U.S.-Polish Bilateral Treaty).} U.S. copyright owners urged that the USTR include Poland among the priority nations eligible for Special 301 consideration.\footnote{\textit{IPA Petition}, \textit{supra} note 23, at 11-12.} The listing would have lowered Poland's trade status with the United States from the previous year, when the country had been designated a priority watch list nation.\footnote{\textit{Id.} at 11.} Instead, continuing negotiations between the two countries and evidence that the Polish government was engaging in sincere efforts to amend its intellectual property laws\footnote{\textit{USTR Cites Hungary, Poland, Russia for Improving Protection of Rights, Eastern}
but instead to add an out-of-cycle review. When the Polish Parliament adopted the new Polish copyright law on February 4, 1994, on the recommendation of the IIPA the USTR downgraded Poland from a priority watch list country to a watch list country.

II. THE 1994 POLISH COPYRIGHT LAW

The 1994 Polish Copyright Law is the culmination of a concerted effort on the part of Polish legislators, intellectual property attorneys, and private producers of intellectual property goods. The law, while not free of defects, illustrates Poland's continuing attempts to reform its legal infrastructure in order to fully integrate with the European Union and the other Western industrialized countries. Provisions of the new law comply with the two major international copyright conventions, the Berne Convention and the U.C.C. The law also satisfies the requirements set forth both in the TRIPs provisions of GATT and in the EC Directive. Finally, the law fulfills Po-


260. IIPA Petition, supra note 23, at 11. Throughout 1993 and during the first months of 1994, while Poland remained on the USTR's priority watch list, trade sanctions were not imposed because of the Polish government's continuing efforts to draft a new Bilateral Treaty-compatible copyright law. Id.

261. Polish Copyright and Neighbouring Rights Act, supra note 18, at 7.

262. USTR Cites Hungary, Poland, Russia for Improving Protection of Rights, supra note 259, at 388. Upon downgrading Poland's Special 301 listing, USTR Mickey Kantor commented, "The U.S. will closely monitor implementation and enforcement of rights provided under the newly enacted copyright law and hopes to see rapid improvement in the Polish Government's efforts to combat piracy." Id.

263. Interview with Ryszard Markiewicz, supra note 234.

264. See Law on Copyright, supra note 15, at 7 (discussing effect of new law). "No copyright law achieves perfectly balanced justice, either in respect of international treaties or even the objective needs of the national copyright scene. Poland's new law is no exception." Id. Many of these perceived defects, however, concern issues about which the international legal community is already divided. Id.

265. Id. at 7. The enactment of the new Polish copyright law represents "the liberation of the Polish cultural community from half a century of legislative stagnation." Id.; Interview with Teresa Drozdowska, supra note 70.

266. See supra notes 168-87 and accompanying text (discussing Berne Convention and U.C.C.).

267. See supra notes 188-97 and accompanying text (discussing GATT TRIPs provisions).

land's obligations as stipulated in the U.S.-Bilateral Treaty.\textsuperscript{269}

A. Legislative History

Polish intellectual property authorities recognized the substantive shortcomings of the 1952 Polish Copyright Law\textsuperscript{270} as early as the 1950's, when legislators and copyright experts first sought to introduce revisions in the law by forming a copyright commission to draft proposed changes.\textsuperscript{271} Nothing came of these efforts, however, and subsequent amendments represented merely cosmetic changes to the 1952 law.\textsuperscript{272} It was only in 1989, as political and economic changes stimulated the nascent development of a market economy, that the Polish government appeared ready to modify the copyright law.\textsuperscript{273} The threat of trade sanctions, particularly from the United States,\textsuperscript{274} renewed and intensified legislative efforts to improve Poland's deficient system of protection.\textsuperscript{275} In 1989, the Polish Parliament rejected the draft of a new copyright law, primarily because the draft failed to include provisions for neighboring rights and express protection of computer software programs.\textsuperscript{276} A new draft version was sent to Parliament in April of 1992 for further work by a special parliamentary copyright commission.\textsuperscript{277}

In December 1992, the Polish Parliament fused a separately drafted anti-piracy law with the main body of the draft copyright law.\textsuperscript{278} The anti-piracy law contained provisions imposing stringent criminal sanctions for piracy in the commercial arena.\textsuperscript{279} At the same time, legislators and intellectual property interest groups agreed to a compromise solution on the issue of neighboring rights, according to which those rights were merged with

\textsuperscript{269} See supra notes 223-37 and accompanying text (discussing provisions of Bilateral Treaty).
\textsuperscript{270} 1994 Polish Copyright Law, Dz. U. Nr 24, poz. 83 (Feb. 4, 1994).
\textsuperscript{271} LAw ON COPYRIGHT, supra note 15, at 5.
\textsuperscript{272} KARFOWICZ, supra note 53, at 148-49. Amendments to the 1952 Polish Copyright Law were adopted in 1975, Dz. U. Nr 34, poz. 184, and early 1989, Dz. U. Nr 35, poz. 192. Id. at 149.
\textsuperscript{273} KARFOWICZ, supra note 53, at 11.
\textsuperscript{274} See supra notes 238-62 and accompanying text (discussing Special 301 trade mechanism and applicability to Poland).
\textsuperscript{275} Sołtyński, supra note 4, at 5-6.
\textsuperscript{276} Interview with Ryszard Markiewicz, supra note 234.
\textsuperscript{277} Id.; LAw ON COPYRIGHT, supra note 15, at 6.
\textsuperscript{278} Interview with Ryszard Markiewicz, supra note 242.
\textsuperscript{279} Id.; Interview with Teresa Drozdowska, supra note 70.
the copyright law provisions. The parliamentary commission continued to streamline the statute during the following six months. On May 23, 1993, however, Polish President Lech Wałęsa dissolved the Polish Sejm and Senate, Parliament’s lower house and upper house, respectively, and recalled all unfinished legislation. Four months later, a newly formed Polish Parliament appointed a second copyright commission, which undertook the legislative reform process anew.

On January 7, 1994, the Sejm approved the Polish Copyright and Neighboring Rights Act by a vote of 408 to 1. After offering several minor changes, the Senate remanded the law to the lower house, which unanimously approved the amendments on February 4. On February 14, President Wałęsa signed the law, which the official Dziennik Ustaw published on February 23, 1994. Most of the law’s provisions took effect only following a three-month grace period, on May 23, 1994.

B. Protection of Computer Programs Under the 1994 Polish Copyright Law

Of particular interest to U.S. software publishers, provisions of the new Polish law are founded upon many of the same copyright concepts found in the U.S. copyright statute. They therefore provide a convenient means of comparison for U.S.

280. Interview with Teresa Drozdowska, supra note 70. According to Drozdowska, the compromise was necessary because of the theoretical differences among the Commission members. Id. Some favored inclusion of the neighboring rights provisions in the text of the new copyright law, while others maintained there should be two separate pieces of legislation. Id.

281. Interview with Ryszard Markiewicz, supra note 242.

282. Id.

283. Id. The new government accepted the almost completed version of the copyright bill, and forwarded it to the Sejm as a "pilny projekt," the equivalent of the U.S. legislative fast-track procedure, requiring the Parliament to begin discussion of the law within one month. Id.

284. Poland’s Sejm Clears Copyright Law; Measure Expected to be Passed by Senate, Int’l Bus. & Fin. Daily (BNA) (Jan. 13, 1994); Rafał Szustarski, Sejm Wykuł Ciężki Młot na Piratów [The Sejm Delivers a Heavy Blow on Pirates], Życie Warszawy, Feb. 5, 1994, at 4. Only Ryszard Grodzicki from the SLD party voted against the law. Id.


287. Id. art. 129.

288. The footnotes in Part II, Section B of this Comment will provide analogous references to U.S. copyright law, where applicable.
software publishers to identify the scope and substance of protection available under the new law. Provisions that are pertinent to protection of copyrights embodied in computer programs include the subject matter of copyright, exclusive rights and limitations thereto, the right of decompilation, term of protection, available remedies in case of infringement, and enforcement mechanisms.

1. Computer Programs as Subject Matter of Copyright

Under the 1994 Polish Copyright Law, computer programs are subject to protection as literary works. Protection encompasses all forms of expression of the work, including any documentation that accompanies the program pertaining to design, manufacture, and usage. The law embraces the idea-expression dichotomy found in many European copyright statutes and in the U.S. 1976 Copyright Act by expressly denying protection to the ideas and principles underlying any element of the program, including interfaces.

2. Exclusive Rights and Limitations on Those Rights

Article 74(4) of the 1994 Polish Copyright Law vests the computer program author with a number of specific and exclu-
Economic rights. Economic rights include the right to permanent or temporary reproduction of the program, in whole or in part, by any means and in any form; the right to translation, adaptation, alteration of the system, or any other changes in the program; and the right to public dissemination, including rental or lease. These rights are, however, subject to certain limitations, which are codified in provisions that account for the uniqueness of computer programs as copyrightable works and the attendant necessity of tailoring copyright legislation accordingly. First, the right to reproduction gives way to the right of a lawful owner of a computer program to make a copy for purposes of installation, display, application, transmission, and storage without the authorization of the copyright holder.

295. 1994 Polish Copyright Law art. 74(4); see POLISH COPYRIGHT AND NEIGHBOURING RIGHTS Act, supra note 13, at 68. Economic rights are rights constituting the financial components of copyright law, as distinct from moral rights, which pertain to the right of the author to maintain the integrity of his work. Id. Economic rights permit the copyright author, within limits set forth in copyright law, to condition any public use of work upon payment of remuneration. Id. In particular, economic rights include the right to publish or otherwise reproduce the work for public dissemination within the field of exploitation the author has chosen. Id. Economic rights are equivalent to exclusive rights granted authors under U.S. copyright law. See 17 U.S.C. § 106 (1988 & Supp. V 1993). Section 106 of the 1976 Copyright Act grants owners of copyright in computer programs a number of exclusive rights, including the right to reproduce the copyrighted work, id. § 106(1); to prepare derivative works based upon the copyrighted work, id. § 106(2); to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, id. § 106(3); and to perform the copyrighted work publicly, id. § 106(4).

296. 1994 Polish Copyright Law art. 74(4)(1); see 17 U.S.C. § 106 (1988 & Supp. V 1993). U.S. copyright law recognizes the right to reproduce a computer program as exclusive to the copyright owner. Id.; see GORMAN & GINSBURG, supra note 88, at 692-93. Given the nature of computer programs, normal program use includes the implied authority to reproduce a program in order to use it as intended by the copyright owner. Id. The author's right to reproduce a computer program includes the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a form that is fixed and from which it can be perceived, reproduced, or otherwise communicated, either directly or with aid of machine or device. Id.

297. 1994 Polish Copyright Law art. 74(4)(2).

298. Id. art. 74(4)(3); see 17 U.S.C. § 106(3) (1988 & Supp. V 1993) (granting copyright owner exclusive right to distribute copies of copyrighted work to public by sale or other transfer of ownership).

299. BYRASKA, supra note 290, at 86-88.

300. 1994 Polish Copyright Law art. 75(2)(2); see 17 U.S.C § 117 (1988 & Supp. V 1993). The U.S. law provision expressly permits the lawful owner of a copy of a computer program to adapt or copy the program without the copyright owner's authorization as long as the copy or adaptation is essential to utilization of the program, id. § 117(1), and is made for archival purposes only. Id. § 117(2); see GORMAN & GINSBURG, supra note 88, at 693. U.S. copyright law recognizes that limitations on further repro-
Second, the exclusive right to translation, adaptation, or alteration of the program may be performed by a lawful owner of a program copy if such acts, including error-correction, are carried out in accordance with the program’s purpose. Three, the right to public dissemination is limited by the doctrine of first sale. According to this doctrine, upon the first sale of a copy on which the program has been fixed, by the copyright owner or with his authorization, the right to dissemination expires. This limitation does not, however, affect the copyright owner’s separate right to control the lease or rental of a program or a program copy. Finally, the 1994 Polish Copyright Law permits a legitimate owner of a computer program to prepare a reserve copy for archival purposes, as long as such preparation is indispensable to usage of the program and is not used concurrently with the original program copy.

301. 1994 Polish Copyright Law art. 75(1). The article includes the proviso, “unless the contract provides otherwise,” enabling the parties to contract away the lawful program owner’s right to perform the acts specified in Article 74(1) and (2), in the same way that the copyright owner may agree to relinquish control through contract. See 17 U.S.C. § 117 (1988 & Supp. V 1993) (discussing analogous provision in U.S. law); Council Directive No. 91/250, supra note 199, art. 5(1), O.J. L 122/42, at 44 (stipulating that error correction falls within the “intended purposes” of the program).

302. 1994 Polish Copyright Law art. 74(4) (3); see 17 U.S.C. § 109 (1988 & Supp. V 1993) (providing for application of first sale doctrine to exclusive rights in computer programs). According to the first sale doctrine in the United States, the author’s exclusive control over distribution of his work terminates once he has distributed the work, or has authorized such distribution, to the public by exercising the right of first sale. Thereafter, the owner of a lawful copy of the program may sell or otherwise dispose of the possession of that copy without the authorization of the copyright owner, and without violating the author’s copyright. Id. § 109(a). With respect to computer programs, however, the lawful owner of a copy of the program owns a copy and not the copyright attaching to the work. Thus, the right to resell does not include the right to reproduce or adapt the work for such resale. Id.

303. 1994 Polish Copyright Law art. 74(4)(3).


3. Reverse Engineering/Decompilation

The 1994 Polish Copyright Law does not expressly grant the lawful owner of a computer program the right to decompile. According to Article 75(2)(2), however, the acts of observing, studying, and testing the functioning of the computer program do not require permission of the copyright owner as long as they are performed solely in order to determine the underlying ideas and principles of the program. In addition, the program owner must carry out these acts during the installation, display, application, transmission, or storage of the program. Moreover, Article 75(2)(3) grants the lawful program user the right to reproduce the code or translate its form if such acts are indispensable to obtain information necessary to achieve interoperability of an independently created computer program with other computer programs. Unlike the preparation of an archival copy, the rights associated with decompilation may not be altered by contract.

Polish legislators did, however, take into account the legitimate concerns of computer software manufacturers that the right to decompilation may be subject to abuse by developers who could reverse engineer a program in its entirety and thereby unfairly capitalize on the efforts of the original developer in order to publish a competing program. For this reason, decompilation rights are subject to stringent limitations. First, the reverse engineering operations must be performed by a licensee or other authorized user of the program. Second, the infor-

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306. See supra note 232 (defining decompilation).
307. 1994 Polish Copyright Law art. 75(2)(2); see Scott, supra note 27, at 3-215 to 3-218. Permissibility of reverse engineering through decompilation is unsettled in U.S. courts. Id. Owners of copyright in computer programs insist that decompilation constitutes infringement because it amounts to unauthorized adaptation or translation, while software developers maintain that decompilation is a fair use or a permissible adaptation under section 117. Id. at 3-216.
308. 1994 Polish Copyright Law art. 75(2)(2).
309. Id. art. 75(2)(3).
310. Id. art. 76; Interview with Teresa Drozdowska, supra note 70. In large part, the rather generous decompilation rights granted to a lawful owner of a computer program are meant to apply in cases where the copyright holder has not made available the interface specifications necessary to develop compatible programs, a prerequisite to the right to decompile. Id.
311. Interview with Teresa Drozdowska, supra note 70.
312. 1994 Polish Copyright Law arts. 75(3)(1)-(3).
313. Id. art. 75(2)(3)(a).
information required to achieve interoperability must not have been previously readily available to such an authorized user. Third, the right of decompilation is confined to those parts of the original computer program that are necessary to achieve interoperability. In addition, any information that is lawfully obtained by means of observation, study, testing, or code reproduction or translation is restricted, and may be used only in order to achieve interoperability with an independently created computer program. Likewise, such information may not be transmitted to others, unless such transmission is necessary to achieve interoperability with an independently created computer program. Finally, the information may not be used to develop, manufacture, or market a computer program that is substantially similar in expression, or any other activities infringing the copyright.

The provisions on decompilation evidence an attempt on the part of Polish legislators to achieve a workable balance between the interests of software developers, who may be prejudiced by broad allowed uses, and those of lawful owners of computer programs, whose rights to normal exploitation of the program should not be curtailed. Thus, the law authorizes the development of compatible software for personal and business purposes. At the same time, copyright holders are protected by the prohibition against development of clone software and by the significant degree of control that the copyright owner retains through the restriction imposed on decompilation.

4. Term of Protection

The Polish copyright law provides that economic rights of the author expire fifty years following the death of the author, or for joint works, fifty years following the death of the last surviving author. The lack of specificity as to the end for which the decompiler intends to develop an interoperable program suggests that a rightful user may produce a program that not only is compatible with original program, but one that is also competing. The law authorizes the development of compatible software for personal and business purposes. At the same time, copyright holders are protected by the prohibition against development of clone software and by the significant degree of control that the copyright owner retains through the restriction imposed on decompilation.

314. Id. art. 75(2)(3)(b).
315. Id. art. 75(2)(3)(c).
316. Id. art. 75(3)(1).
317. Id. art. 75(3)(2).
318. Id. art. 75(3)(3); see Interview with Teresa Drozdowska, supra note 70. The lack of specificity as to the end for which the decompiler intends to develop an interoperable program suggests that a rightful user may produce a program that not only is compatible with original program, but one that is also competing. Id.
320. Id.
321. Id. at 76-81; Hartwell & Gliniecki, supra note 5, at 328.
Economic rights in an anonymous work or in an unpublished work are exhausted fifty years from the date of first publication or from the date of the work's coming into being, respectively, unless the creator's identity is disclosed with his consent before that time. The duration of economic rights in a work published for the first time within the last ten years of the period of protection is automatically extended for an additional ten years.

5. Special Exceptions Applicable to Computer Programs

The final provision of Chapter 7 of the Polish law, Article 77, articulates those rights and restrictions applicable to copyrighted works which do not apply to computer programs. In general, the excluded provisions pertain to the permitted uses of a copyrighted work, and serve to reiterate Polish legislators' recognition of the special consideration that computer programs warrant in the field of intellectual property protection. One such provision extends the scope of personal use granted to owners of already disseminated works to the circle of persons remaining in close personal relationships to the owner. Exclusion of computer programs from this provision reflects the right of a copyright owner in a computer program to maintain

323. 1994 Polish Copyright Law art. 36; see 17 U.S.C. § 302(a) (1988 & Supp. V 1999) (drawing no distinction between published and unpublished works, both being subject to same period of protection). Anonymous works, pseudonymous works, or works made for hire are subject to copyright protection for a term of seventy-five years from the year of the first publication of the work or 100 years from the year of the work's creation, whichever expires first. Id. § 302(c). If, however, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of the Copyright Office before the end of such term, the copyright in the work endures for the life-plus-fifty-years term based on the life of that author whose identity has been revealed. Id. § 302(c).
324. 1994 Polish Copyright Law art. 38; see 17 U.S.C. § 303 (1988 & Supp. 1999) (providing that unpublished works created before January 1, 1978 and not yet protected by statutory copyright or in public domain are subject to same term of protection as life-plus-fifty or seventy-five/one-hundred-year terms provided for new works). All works that fall into this category are guaranteed protection for at least twenty-five years. Id.
325. 1994 Polish Copyright Law art. 77.
326. Interview with Teresa Drozdowska, supra note 70.
327. 1994 Polish Copyright Law art. 23. Specifically, the provision refers to family, kin, or social relations as within the scope of permitted personal use. Id.
exclusive control over the use of his program after it has been published, control usually exercised by means of an exclusive or non-exclusive license or special contractual arrangement.\textsuperscript{328}

Another provision excluding computer programs concerns the right of scientific and educational institutions to use or prepare copies of a published program for didactic or research purposes.\textsuperscript{329} The right of libraries, archives, and schools to make copies of published programs available free of charge is also exempted.\textsuperscript{330} Non-applicability of these provisions to computer programs is intended to protect the copyright holder's retention of control over the use of his program after it has been published and disseminated.\textsuperscript{331}

6. Remedies

The 1994 Polish Copyright Law provides for an array of civil and criminal remedies against infringers.\textsuperscript{332} Creators whose rights have been infringed may demand that the infringer cease all infringing activities and return any profits made or pay double that amount.\textsuperscript{333} Intentional infringers are liable for triple the amount of the benefits derived from the infringing activities, and the creator in such cases may also demand compensation in the form of actual damages for any injury resulting

\textsuperscript{328} Interview with Teresa Drozdowska, \textit{supra} note 70.

\textsuperscript{329} 1994 Polish Copyright Law art. 27; \textit{see} 17 U.S.C. § 107(1) (1988 & Supp. V 1993) (providing that one consideration in determining whether doctrine of fair use applies is whether reproduction is for nonprofit educational purposes).

\textsuperscript{330} 1994 Polish Copyright Law art. 28. Such institutions also have the right to prepare single copies of published works not available on the market for the purpose of complementing their collections, \textit{id.} art. 28, and to prepare and disseminate copies of published works for use in their own documentary studies. \textit{id.} art. 30(1); \textit{see} 17 U.S.C. § 108 (1988 & Supp. V 1993) (providing that it is not infringement of copyright for libraries and archives to reproduce copies of protected works for purposes such as criticism, comment, news reporting, academic study, or research). These rights are subject, however, to certain restrictions, including the requirement that the reproduction or distribution be made without the aim of the commercial gain, \textit{id.} § 108(a)(1), and that the library or archival collections be made open to the public or at least to researchers conducting specialized research in the relevant field. \textit{id.} § 108(a)(2).

\textsuperscript{331} Interview with Teresa Drozdowska, \textit{supra} note 70.

\textsuperscript{332} 1994 Polish Copyright Law arts. 79, 80, 115-123.

\textsuperscript{333} \textit{id.} art. 79; \textit{see} 17 U.S.C. §§ 502-505 (1988 & Supp. V 1993) (providing four different types of civil remedies in case of copyright law violations). Such remedies include injunctions, \textit{id.} § 502, impounding and disposition of infringing articles, \textit{id.} § 503, liability for actual damages and profits and statutory damages up to US$100,000 per infringement, \textit{id.} § 504, and costs and attorney's fees. \textit{id.} § 505.
from the intentional activity.934

One remedy available to the copyright owner whose economic rights have been violated is the option of demanding that an infringer who engages in commercial activities, for his own benefit or for the benefit of another person or entity, pay damages to a specially established Fund for the Promotion of Creativity.935 The Fund is administered by the Ministry of Culture and may allocate its resources in a number of ways.936 For example, the Fund may provide stipends and social assistance to creators, or cover the publishing expenses of works that are considered of particular cultural and scientific importance.937

Article 80 provides for prompt action by the court having jurisdiction over an action for infringement.938 The court must rule within three days on claims relating to production of evidence and the issuance of a preliminary injunction.939 In addition to the power to issue an injunction, the court may also order the forfeiture to the State Treasury or to the copyright owner of any illegally produced copies of protected works and any equipment or devices used by the infringer in the course of illegally producing such copies.940 This latter provision, by presuming that the equipment used in the production of infringing products is the property of the perpetrator,941 represents an attempt to defeat the frequently offered defense in infringement actions that such machines are owned by third parties.942

The Polish law also provides for criminal penalties for copyright infringement or other illegal appropriations of copyrighted works.943 Fines and terms of imprisonment of up to two years

934. 1994 Polish Copyright Law art. 79.
935. Id. arts. 79(2), 111. The sum may not less than double the probable profits obtained as a result of the infringing activity. Id. art. 79(2).
936. Id. art. 113.
937. Id.
938. Id. art. 80. Usually, such court is located in the territory of the infringing party's principal place of business or where the infringer's assets are located. Id. art. 80(1).
939. Id. arts. 80(1), 80(3).
940. Id. arts. 80(2)-(7).
941. See id. art. 121 (stipulating that in case of conviction for violation of copyright law, court shall order forfeiture of all infringing objects linked to offense, even if they do not belong to infringer).
942. POLISH COPYRIGHT AND NEIGHBOURING RIGHTS ACT, supra note 13, at 21.
may be imposed for appropriating the authorship of another person's work;\textsuperscript{544} for misleading others as to the authorship of a work;\textsuperscript{545} or for disseminating a work without properly identifying the author.\textsuperscript{546} In addition, anyone who unlawfully disseminates or reproduces a copyrighted work for purposes of economic gain may be subject to three years imprisonment.\textsuperscript{547} The penalty can be increased to up to five years imprisonment in cases where such illegal activities represent a regular source of income for the infringer or are performed as part of an ongoing criminal commercial activity.\textsuperscript{548} Finally, the law provides for the imposition of comparable criminal penalties in cases where one purchases, assists in the marketing, accepts, or helps to conceal an object that serves as a carrier of an unlawfully reproduced or disseminated work.\textsuperscript{549}

7. Enforcement Mechanisms

A unique aspect of the new Polish copyright law is the provision for what are called \textit{organizacje zbiorowego zarządzania prawami autorskimi lub prawami pokrewnymi} ("organizations for collective administration/management of copyrights or neighboring rights").\textsuperscript{550} Such organizations, formed exclusively with the permission of the Ministry of Culture and subject to the Ministry's supervision,\textsuperscript{551} are comprised of associations of authors, performing artists, producers, or broadcast organizations functioning for the purpose of collectively administering, protecting, and exercising the copyrights or neighboring rights granted under the new law.\textsuperscript{552} In order to receive a license from the Ministry, a

\textsuperscript{544} 1994 Polish Copyright Law art. 115(1).
\textsuperscript{545} Id.
\textsuperscript{546} Id. art. 115(2).
\textsuperscript{547} Id. arts. 116(2), 117(2).
\textsuperscript{548} Id. art. 116(3).
\textsuperscript{549} Id. art. 118.
\textsuperscript{550} Id. arts. 104-110.
\textsuperscript{551} Id. arts. 104(2)(2), 104(2)(3), 104(3).
\textsuperscript{552} Id. art. 104(1).
collective management organization must guarantee competent administration of the copyrights or neighboring rights and, in cases where the organization is found to have violated the permit, such license may be revoked.\textsuperscript{559}

Collective administrative organizations are authorized to administer and protect the work within the particular field or fields of exploitation in which the organization has been issued a license to operate, and to enforce such rights as are granted within the relevant field.\textsuperscript{554} The meaning of "administration" is not expressly defined in the provisions relating to collective organizations.\textsuperscript{555} It may be deduced from those provisions, however, that administration includes the right to demand information or access to records of an infringing party to determine the appropriate remuneration due the copyright holder\textsuperscript{556} and to exercise or enforce all the rights and powers granted under the new law.\textsuperscript{557} The organizations may not, without reason, withhold consent to the use of works falling within its administration nor refuse to accept under its administration any copyright or neighboring rights.\textsuperscript{558}

Disputes among collective administrative organizations will be arbitrated under the auspices of a specially appointed Copyright Commission,\textsuperscript{559} which consists of forty arbiters appointed by the collective organizations themselves.\textsuperscript{560} The Copyright Commission's functions include approval or disapproval of the remuneration tables described above and settlement of disputes resulting from the application of such tables.\textsuperscript{561} Most importantly, the collective organizations are authorized to cooperate with local police and other law enforcement agencies to carry out raids of suspected formal or fly-by-night pirating enterprises.\textsuperscript{562}

\textsuperscript{559} Id. arts. 104(3), 104(5). Violations warranting revocation of the license include failure to properly perform duties entrusted to the organization and acting beyond the scope of the permit. Id. art. 104(5).
\textsuperscript{554} Id. art. 105(1).
\textsuperscript{555} Id. arts. 104-110.
\textsuperscript{556} Id. art. 105(2).
\textsuperscript{557} Id. art. 104(1).
\textsuperscript{558} Id. arts. 106(2), 106(3).
\textsuperscript{559} Id. art. 108(1).
\textsuperscript{560} Id. arts. 108(1), 108(2).
\textsuperscript{561} Id. art. 108(3).
\textsuperscript{562} Interview with Teresa Drozdowska, supra note 70.
8. Amnesty Provision

The Polish law took effect on May 23, 1994, three months after publication in the Polish official legislative journal, Dziennik Ustaw, on February 23. One provision, Article 124, however, became effective immediately upon publication. This article contains a critical provision creating an amnesty ("abolicja") for users of illegally obtained copies of copyrighted software released and installed prior to the date of the law's coming into force. The adoption of this article sparked a heated debate among intellectual property and software industry commentators. Persons possessing such unlawful copies are not liable for copyright infringement committed before that date, and are permitted to continue to use those program copies in the same manner without additional authorization or remuneration to the copyright holder. Any additional reproduction or dissemination of the now "legalized" program, however, is expressly prohibited, and will subject the program user to liability according to the remedial provisions under the new law. The primary reason for effectuating Article 124(3) immediately upon publication was to prevent users of unlawfully obtained software from using the provision to obtain pirated programs quickly and legalize them over the three-month grace period.

One consequence of the amnesty provision is that producers and distributors will bear tremendous financial losses by virtue of their incapacity to recover the costs of the illegally obtained software. Because the law permits thousands of illegal owners of software to continue using pirated copies with virtual

363. 1994 Polish Copyright Law art. 129.
364. Id. art. 129.
365. Id. art. 129(3).
366. Stanislaw Marcini Stanuch, Dla Kogo Amnestia [Amnesty for Whom?], GAZETA WYBORCZA, Jan. 11, 1994, at 1; Interview with Ryszard Markiewicz, supra note 234. Markiewicz, who participated in the drafting of the new law, notes that one reason the amnesty issue became the subject of such volatile debate is that legislators and legal advisors refused to discuss aspects of the amnesty such as whether it should apply to application programs only or to both application and operating system programs. Id. Rather, from the outset the debate was limited to a "yes" or "no" resolution, exacerbating tensions and precluding a more equitable solution for producers. Id.
367. 1994 Polish Copyright Law art. 124(3).
368. See id. art. 124(3) (establishing amnesty).
370. Stanuch, supra note 366, at 1.
impunity, private software industry representatives, both in Poland and in the United States, fought aggressively to exclude any such amnesty.³⁷¹ Ultimately, the decision of Polish legislators to include the amnesty was based on economic considerations, as it was acknowledged that the financial resources of the government were inadequate to compensate hundreds of injured producers for the value of their stolen software.³⁷² This argument appeared valid to many proponents of the amnesty in light of the fact that the largest number of users benefiting from the amnesty are regional administrative agencies and government institutions.³⁷³ Most of these institutions are already strapped for resources and thus not in a financial position to compensate software copyright owners for the illegally obtained programs.³⁷⁴

While some software industry representatives remain unconvinced of the justifications put forward by the Ministry of Culture,³⁷⁵ others acknowledge that the amnesty represents a compromise, which was necessary due to the realities of the recent

³⁷¹. Id.; Catching Up to Russia and Bulgaria, supra note 369, at 13; Migut, supra note 109, at 8-9.

³⁷². Catching Up to Russia and Bulgaria, supra note 369, at 13; Stanuch, supra note 366, at 1. According to Stanuch's article, the problem lies in the fact that many purchasers of mainframe software bought the programs as part of a hardware bundle in the former Soviet Union or German Democratic Republic, and believed that the products were original. Id. As it turned out, a large percentage of the purchases were pirated reproductions of IBM programs, the Soviet or East German vendors having made only insignificant changes in the program. Id.; see Interview with Teresa Drozdowska, supra note 70. Drozdowska maintains that the amnesty was also granted because legislators assumed that it would be unfair to impose liability on persons who committed the infringement prior to the new law's coming into force, even though those programs were protected under copyright. Id.

³⁷³. Migut, supra note 133, at 9; Szempińska, supra note 93, at 7.

³⁷⁴. Migut, supra note 109; Stanuch, supra note 366, at 1. According to the Stanuch article, Wieslaw Matras, a computer scientist at the Kraków Department of Regional Administration, maintains that the stakes are indeed high for such administrative agencies, since the monthly cost to the Kraków Department alone would be more than forty thousand marks. Id.

³⁷⁵. See Interview with Maciek Sikorski, supra note 120 (opposing amnesty); Interview with Krystian Nyczka, Director, Seko-Optimus, in Bielsko-Biała, Poland (June 28, 1994) (same); see also Kulisiewicz, supra note 95, at 173 (noting that Leszek Korolkiewicz, marketing director for Unicorn, Polish software service and support, reported significant losses to piracy, and regards amnesty as negative aspect of new law). Kulisiewicz also reports that Zbigniew Maliński, president of Malkom, a software publisher, criticizes the amnesty not only because of the harm it causes to producers, but also because legislators included the amnesty without any effort to garner the support of the software firms themselves. Id.
political and economic transformation.\textsuperscript{376} Both opponents and advocates of the provision acknowledge that in the long term, losses suffered by software publishers will be mitigated by the inability of illegal users to take advantage of the special privileges (e.g., free or reduced-price upgrades, hotline assistance, and on-site service), frequently offered by software companies to authorized users.\textsuperscript{377} Exclusion from such benefits may ultimately convince, or even require, "amnestied" users to purchase legal copies of the software programs.\textsuperscript{378}

III. THE 1994 POLISH COPYRIGHT LAW IS A PROMISING LEGISLATIVE ACHIEVEMENT THAT OFFERS NEW OPPORTUNITIES FOR U.S. INVESTORS

The Polish Copyright Law and Neighboring Rights Law of February 4, 1994 represents a step forward in Poland's efforts to modernize its intellectual property legislation with a view to encouraging continued and increased investment by U.S. software manufacturers in the Polish computer software market. Prior to adoption of the new law, Poland's emerging status as a key market for investment by U.S. computer software firms was in jeopardy as a result of the inadequate level of copyright protection provided under the Polish 1952 Copyright Law\textsuperscript{379} and the rampant spread of piracy engendered by that law.\textsuperscript{380} The new law should alleviate many of the concerns of U.S. software industry representatives concerning protection of their copyrights, and prompt reluctant investors to enter the Polish market. The basis of this optimistic prognosis is threefold. First, the new Polish law complies with international copyright conventions and regional agreements, such as the Paris text of the Berne Conven-

\textsuperscript{376} See interview with Renata Beresinska, supra note 120 (commenting that amnesty was most realistic solution to problem of outstanding illegal software copies); Interview with Waldemar Sieliski (Microsoft), supra note 46 (expressing generally favorable opinion of law). Sieliski commented that although he was unenthusiastic about the amnesty provision, he believed its effect would become clear only in the future, as new products are released on the Polish market and Microsoft can attempt to gauge losses attributable to the amnesty by measuring the level of demand for such new products. Id.

\textsuperscript{377} Migut, supra note 109, at 9.

\textsuperscript{378} Id.

\textsuperscript{379} See supra notes 52-85 and accompanying text (discussing 1952 Polish Copyright Law).

\textsuperscript{380} See supra notes 98-127 and accompanying text (discussing piracy in Poland).
tion, the EC Directive on the Legal Protection of Computer Programs,\textsuperscript{381} and the TRIPs provisions of GATT.\textsuperscript{382} Secondly, the law satisfies the conditions set forth in the U.S.-Polish Bilateral Treaty, which had remained a contentious issue with U.S. trade representatives and software industry spokespersons.\textsuperscript{383} Third, the similarities between the U.S. and Polish laws in providing protection for computer software programs provide a convenient means for U.S. software publishers to comprehend the level of protection that their products will enjoy in Poland.\textsuperscript{384} Finally, the statutory and organizational enforcement mechanisms established under the new Polish law will contribute to a lower level of software piracy in Poland.

A. Compliance with International Conventions and the U.S.-Polish Bilateral Treaty

Compliance with the requirements set forth in international conventions will facilitate Poland's adherence to the Paris text of the Berne Convention for the Protection of Literary and Artistic Works.\textsuperscript{385} While the Berne Convention does not require express protection for computer programs, it articulates a number of rights that member states must recognize as exclusive and that are relevant to the protection of computer software.\textsuperscript{386} The 1994 Polish Copyright Law's conformity with the Berne Convention is particularly important for U.S. copyright owners in light of the U.S. adherence to the Berne Convention, which became effective on March 1, 1989.\textsuperscript{387} The fact that the United States and Poland are both U.C.C. members is likewise important for U.S. software publishers.\textsuperscript{388} Such significance stems from the fact

\begin{footnotesize}
\textsuperscript{381} See supra notes 198-219 and accompanying text (discussing EC Directive on Legal Protection of Computer Programs).
\textsuperscript{382} See supra notes 188-97 and accompanying text (discussing TRIPs provisions of GATT).
\textsuperscript{383} See supra notes 223-37 and accompanying text (discussing U.S.-Polish Bilateral Treaty).
\textsuperscript{384} See supra notes 288-378 and accompanying text (examining and comparing Polish and U.S. copyright laws).
\textsuperscript{385} See supra note 57 and accompanying text (discussing Berne Convention).
\textsuperscript{386} See supra notes 168-82 and accompanying text (discussing provisions of Berne Convention).
\textsuperscript{388} See Orrin G. Hatch, \textit{Better Late Than Never: Implementation of the 1886 Berne Convention}, 22 \textit{Cornell Int'l L.J.} 171 (1989). The United States was a founding member
\end{footnotesize}
that mutual membership in these conventions will provide a level of protection to U.S. copyright owners in addition to that provided in the text of the new Polish law alone. The benefits of added protection suggest that U.S. software publishers will increasingly look to the Berne Convention and the U.C.C. as a means of evaluating the adequacy or inadequacy of a country's protection of their copyrighted products.

Moreover, because a number of U.S. computer software companies exhibited genuine interest in Poland's potential as a stable and growing computer market long before enactment of the new law, Poland's adherence to the substantive provisions of the Berne Convention will convince many U.S. investors that entry into the Polish software market is a profitable enterprise. This evaluation, in turn, will lead to increased levels of investment. Indeed, Poland's adherence to the Berne Convention may well prove conclusive in persuading some U.S. software producers, who have been reluctant thus far to enter the Polish market for fear of bearing immense losses due to piracy, that they can no longer afford to bypass Poland.

The new law's compliance with the EC Directive on the Legal Protection of Computer Software also represents a significant step forward in Poland's integration into the international legal community. Polish legislators were fully aware that compliance with the EC Directive was a prerequisite to eventual membership in the European Union. Consequently, those provisions in the new Polish law concerning computer programs are

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389. Bleszynski, supra note 56, at 7-8; Scott, supra note 27, at 3-35. The primary consequence for U.S. owners of copyright following from mutual membership in the Berne Convention is that such owners are no longer required to simultaneously publish their work in the United States and Poland, since publication for the first time in the United States provides automatic copyright protection in all other Berne member states. Id. Another advantage to U.S. copyright owners is the abolition of formalities such as requirements regarding notice, deposit, registration, and recordation. Id.

390. See Fenwick & West, supra note 152, at 1 (stating that mutual membership in international conventions is important factor in determining extent of protection for computer software).

391. See Interview with Marcin Krzywdzinski, supra note 120 (predicting that U.S. investors will not be discouraged from participating in Polish software market as long as Poland continues to enact legislative measures designed to bring their laws into line with European Union).

392. Polish Copyright and Neighbouring Rights Act, supra note 18, at 8-9.
modeled extensively on the EC Directive. This similarity reinforces the striking improvement that the 1994 Polish Copyright Law represents over prior legislation governing computer software protection.

In addition, the 1994 Polish Copyright Law was drafted with a view toward satisfying the requirements of international trade negotiations such as GATT. In fact, the law fulfills the mandatory intellectual property protection measures set forth in the TRIPs provisions. In this regard, the law signals to U.S. copyright owners the Polish government’s commitment to providing genuine copyright protection of computer software programs.

U.S. software manufacturers should also recognize the special bilateral relationship formed between the two countries by the signing of the U.S.-Polish Bilateral Treaty. Prior to conclusion of this agreement, manifestation of U.S. dissatisfaction with the level of protection provided under existing Polish copyright legislation was evident in the threat of imposition of economic sanctions through application of the Special 301 enforcement mechanism. The 1994 Polish Copyright Law, embracing computer software programs as literary works, satisfies the Bilateral Treaty’s requirement of adequate and effective protection of intellectual property. This development will increase U.S. software publishers’ willingness to participate in the Polish computer software market.

B. Statutory Similarity: A Useful Mechanism for U.S. Software Publishers

Another reason U.S. investors will find the new law encouraging stems from the substantial similarity between the U.S. and Polish copyright laws with respect to the concepts that underlie

393. Interview with Teresa Drozdowska, supra note 70; Interview with Ryszard Markiewicz, supra note 234.
394. See Hartwell & Gliniecki, supra note 5, at 321 (noting that new law is “another significant and positive step in Poland’s development of a legal infrastructure that will complement and support the country’s rapidly growing market economy”).
395. Interview with Teresa Drozdowska, supra note 70.
396. POLISH COPYRIGHT AND NEIGHBOURING RIGHTS ACT, supra note 13, at 8.
397. See supra notes 223-37 and accompanying text (discussing Bilateral Treaty).
398. See supra notes 238-62 and accompanying text (discussing Special 301 mechanism).
protection of computer software programs. Such similarity should permit U.S. software manufacturers to readily comprehend the scope of protection extended by the Polish law, thereby ensuring a considerable degree of predictability in relying on the new law’s provisions. Provisions with primary relevance in the sphere of computer software programs, including the subject matter of copyright, exclusive rights and exceptions thereto, the right of decompilation, term of protection, fair use provisions, available remedies, and enforcement mechanisms all find their analog in the U.S. copyright statute.

One of the benefits that inhere in such statutory similarity is the reduction in transaction costs associated with first-time entry of U.S. software firms into the Polish computer market. Because intellectual property attorneys advising U.S. software companies prior to their entry into Poland will be able to readily familiarize themselves with the provisions of the new Polish law, legal fees for such services will decrease, resulting in correspondingly higher profit margins. The significance of such similarity is clear when one considers that for some firms, particularly smaller firms with less available investment capital, ease of understanding and applying the rights granted under the new Polish law, as well as lower transaction costs, will prove determinative in the decision whether or not to enter the Polish software market. For larger U.S. firms, many of which are already active participants in Poland’s software industry, while the similarity may not prove determinative, it will undoubtedly prove influential in making investment decisions.

The new Polish Copyright Law embraces many of the same principles found in the U.S. law. Nonetheless, a few basic differences do exist. The most important of these are the Polish law’s structural recognition of the distinction between copyright and neighboring rights and the substantive division of copyright into the moral rights and economic rights enjoyed by the

399. See supra notes 288-378 and accompanying text (examining and comparing Polish and U.S. copyright laws).

400. See POLISH COPYRIGHT AND NEIGHBOURING RIGHTS ACT, supra note 13, at 66 (defining neighboring rights as rights granted to artistic performers, producers, and broadcasters authorizing or prohibiting reproduction of their performances, productions, and broadcasts within a specific field of exploitation).

401. FENWICK & WEST, supra note 152, at 3. The concept of moral rights, also known as “personal rights,” protect the author’s association with his work, and are recognized in most European copyright systems. Id.
work's author.\footnote{106} The distinction between moral and economic rights adopted by Polish legislators is not recognized in U.S. copyright law.\footnote{107} This dissimilarity should not, however, prove troublesome to U.S. software producers because the Polish law's provisions concerning protection of computer programs excludes certain moral rights granted to authors of other literary works.\footnote{108} In the Polish law, moral rights are indefinite in duration and not subject to waiver or transfer.\footnote{109} They include the right to claim authorship of the work, the right to designate the work with one's own name or pseudonym or make it available anonymously, the right to inviolability of the content and form of the work, the right to decide when to make the work available to the public, and the right to supervise or control the manner in which the work is used.\footnote{110} Article 77 of the 1994 Polish Copyright Law states that the last three moral rights listed above do not apply to software programs.\footnote{111} Given the absence of moral rights protection in U.S. copyright law, the exemptions in the sphere of computer programs bring the Polish law closer to the approach adopted by the United States.\footnote{112} The limitation on moral rights with respect to software programs means that U.S. software producers may exert their economic rights under the Polish law without having to engage in unfamiliar legal analysis to determine the scope of protection provided by the Polish law.\footnote{113}

Furthermore, the Polish law's unequivocal provision for a limited right of decompilation goes further than U.S. law, in part because U.S. courts have had only few occasions to grapple with the problems associated with reverse engineering of computer

\footnote{106} See 1994 Polish Copyright Law, Dr. U. Nr 24, poz. 83 (Feb. 4, 1994), arts. 16-35, arts. 85-103 (concerning moral and economic rights, and neighboring rights, respectively); \textit{Polish Copyright and Neighbouring Rights Act}, supra note 13, at 16 (arguing that provision for neighboring rights in new copyright law is significant in that it reflects Poland's recognition of international norms in this area). \footnote{107} Hartwell & Gliniecki, supra note 5, at 321 (noting that neighboring rights are not recognized under U.S. copyright law). \footnote{108} 1994 Polish Copyright Law arts. 16-35; Hartwell & Gliniecki, supra note 5, at 321. \footnote{109} \textit{Id.} art. 16. \footnote{110} \textit{Id.} art. 16. \footnote{111} 1994 Polish Copyright Law art. 77. \footnote{112} Interview with Teresa Drozdowska, supra note 70. \footnote{113} \textit{Id.}
programs. U.S. courts remain divided on the issue of decompilation and development of interoperable software. Regardless of U.S. judicial interpretation, however, the Polish law places strict limitations on the right of decompilation. Therefore, U.S. software developers active in the Polish market should not be concerned that their copyrights will be impaired in the area of reverse engineering.

C. Enforcement

While the 1994 Polish Copyright Law provides an impressive array of civil and criminal remedies against infringers, satisfaction on the part of U.S. software publishers ultimately depends on the efficacy of such provisions. Efficacy, in turn, depends on the degree to which Polish government and private agencies enforce the law. One likely consequence of the stringent remedies provided in the new law is that potential pirates will be deterred from engaging in illegal activities because the costs associated with those acts will be regarded as prohibitively high. Admittedly, the rigorous penalties provided for in the new law may not eradicate piracy completely or immediately. They will, however, significantly reduce both the prevalence and the profitability of illegal copying. Computer software pirates, who are resolute in their intention to continue their illegal activities, are forewarned of the seriousness with which such actions are regarded by Polish authorities.

The law's inclusion of a separate statutory provision for legal enforcement of copyrights in the form of collective management organizations signifies a commitment on the part of Polish legislators to combat piracy of computer software. Because they are empowered with express authorization to administer and protect copyrighted works, these organizations offer the first genuine prospect for copyright owners in computer software programs to protect the exclusive rights enumerated in the new Polish law, and to enforce violations of those rights. Indeed,

410. See, e.g., Sega Enterprises, Ltd. v. Accolade, Inc., 785 F. Supp. 1392 (N.D. Cal. 1992) (holding that where decompilation is sole means of gaining access to ideas and functional elements embodied in computer program, decompilation is fair use of copyrighted work).

411. See supra note 307 (discussing treatment of decompilation in U.S. courts).

412. See supra notes 300-21 and accompanying text (discussing decompilation under new Polish law).
press reports and other widespread media coverage of the content and projected impact of the new law throughout the Summer and Fall of 1994 are indicative of the importance with which both software industry representatives and the general public view the law. Industry commentators report, moreover, that police actions already undertaken pursuant to the law's provisions illustrate that such enforcement has begun in earnest. While cynics remain among both computer industry observers and among pirates themselves, a general consensus prevails that the new law's impact on piracy will be significant.

In determining the extent to which the law will be observed in the coming months, however, it is necessary to distinguish between types of Polish users engaging in unlawful activities. First are those who actively engage in software pirating activities, so-called "professional" pirates. Second are those individual or business users who purchase unauthorized versions of software programs either because they are unaware that such purchases constitute illegal acts or because they are not in a financial position to lay down the considerable investment that legal copies of software programs require.

The distinction is important because, while certain anti-piracy measures may prove efficacious in dealing with one group of illegal users, for example, office personnel relying on word processing programs on a daily basis and yet unaware that the programs were obtained illegally, those same methods may not remedy the problem among more sophisticated users, who knowingly and repeatedly purchase pirated software. To be sure, the mere existence of the new copyright law and its provisions for the imposition of criminal and civil sanctions will deter some users from continuing their unlawful activities. The more

413. Bohdan Szafrański, URM Kontrokuje Kompytery [The URM Controls Computers], GAZETA WYBORCZA, Aug. 16, 1994 (describing anti-piracy campaign launched by Council of Ministers Office against government administrative agencies relying almost exclusively on pirated versions of computer software); Zurek, supra note 104 (discussing way in which several pirates operating in Warsaw's largest open-air markets have reacted to new law, some withdrawing from illegal activities altogether, others vowing to continue selling pirated versions but camouflaging their activities by openly trading in legal goods).

414. Interview with Waldemar Sielski, supra note 46 (expressing general satisfaction with new law, acknowledging that it is "not ideal, but no law is"); Interview with Renata Beresifiska, supra note 120 (expressing positive opinion of law); Interview with Krystian Nyczka, supra note 375 (commenting on efficacy of new law, reflected in efforts of end-users to legalize their software by purchasing authorized versions).
intransigent pirates, however, may not take the law seriously unless they witness a determined, consistent, and effective attempt on the part of law enforcement agencies to ensure that the law is observed.\textsuperscript{415}

Commitment of local law enforcement agencies to combating software piracy is one necessary component of this concerted effort.\textsuperscript{416} The efforts of collective management organizations, as well as the efficiency of their supervision by the Ministry of Culture’s specially appointed Copyright Commission,\textsuperscript{417} will also be integral to this objective, and it is in this area that both Polish and U.S.-based watchdog agencies, namely, the Polish Software Market (“Polski Rynek Oprogramowania” or “PRO”) association and the U.S.-based Business Software Alliance (“BSA”), may play a critical role.\textsuperscript{418}

Regardless of how zealously local law enforcement agencies exert efforts to locate and penalize software pirates in Poland, such efforts will prove futile as long as such agencies work alone, as Polish police readily admit.\textsuperscript{419} Shortage of personnel is not the only reason traditional law enforcers are ill-equipped to effectively combat software piracy. Another reason Polish enforcement agencies are unable to undertake the investigation and prosecution of software piracy single handedly is that they lack the training and expertise necessary to understand the technical complexities associated with distinguishing between legal and il-

\begin{footnotesize}
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\item \textsuperscript{415} Prawo Autorskie: Bicz na Piratów [Copyright Law: An Attack on Pirates], PAP/Redakcja Krajo, Wadomooś 193, May 27, 1994. Some Warsaw pirates seem determined to continue engaging in illegal software trade. \textit{Id}. Specifically, they are planning to avoid confiscation of their pirating instruments by changing their manner of doing business. \textit{Id}. Instead of operating “copying booths” at open-air markets throughout the country, these pirates are posting announcements indicating a number to call in order to purchase illegally copied software programs. \textit{Id}.
\item \textsuperscript{416} Zurek, \textit{supra} note 104; Magda Papuzińska, \textit{Pod Rządami Piratów [Under the Rule of Pirates]}, \textit{Gazeta Wyborcza}, Feb. 8, 1994, at 2.
\item \textsuperscript{417} See 1994 Polish Copyright Law art. 108(1) (establishing Copyright Commission); \textit{see also} Facsimile from Teresa Drozdowska to Author (Dec. 12, 1994) (reporting that as of December 12, 1994 Ministry of Culture had not yet appointed Copyright Commission) (on file with Author).
\item \textsuperscript{418} Kulisiewicz, \textit{supra} note 95, at 177-79.
\item \textsuperscript{419} Zurek, \textit{supra} note 104. The author reports that policemen at the Katowice Regional Command Center for Economic Crimes acknowledge that they cannot imagine enforcing the new law against software pirates on their own, and that they will depend on the assistance of producers and industry representatives to enforce the new law effectively. \textit{Id}.
\end{enumerate}
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legal computer programs.\textsuperscript{420}

In light of such infrastructural deficiencies, cooperation between official law enforcers and special interest ("anti-piracy") groups within the software industry assumes particular urgency. Because such groups are comprised of companies and individuals having extensive knowledge of the industry and of the various forms in which software piracy appears, their efforts can be channeled into anti-piracy campaigns according to the nature, motive, and frequency of the particular pirating activity. This type of collective activity is both more efficient and less costly, an essential consideration in Poland where neither the government nor private enterprises are in a position to expend large sums of money in anti-piracy efforts.

As early as July of 1992, as Polish legislators came under mounting international pressure to reform the copyright law and undertake genuine efforts to curb software piracy, Polish software producers recognized the potential effectiveness of collective enforcement in furthering these goals. The PRO was formed in Warsaw for precisely this purpose.\textsuperscript{421} Since its formation, members of the PRO, representing Polish and non-Polish authors, publishers, and licensed distributors of computer software, have conducted public awareness campaigns directed

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\textsuperscript{420} Papuzińska, \textit{supra} note 416, at 2. Discussing the unfamiliarity of the Polish police with computers and computer programs, one software company president explained, for the time being, the police department does not have any specialists. We would have to stand over every single policeman and indicate to him what is stolen and what is not. We are not in a position to do that... There should be a government agency for protection of copyright, a specialized task force, like there is in the West.
\end{quote}

\begin{quote}
\textsuperscript{421} Id. It is important to note, however, that even prior to the new law's enactment, some cities organized training sessions to instruct officers how to cooperate with copyright "professionals" in enforcing the new copyright law and appointed "specialists" within the police department itself whose job was to familiarize their co-officers with the new law's provisions. \textit{Id}. Unfortunately, these otherwise commendable efforts were introduced too late to be of genuine use in enforcing the new law once it entered into force in May 1994. \textit{Id}. Nonetheless, continued efforts along these lines will signify to Polish software users that law enforcers are indeed serious about combating the piracy problem. \textit{Id}
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\textsuperscript{421} See Computer Software Association Established, Polish News Bulletin, July 1, 1992, available in LEXIS, World Library, PNBUL File (comparing PRO to U.S.-based Software Publishers Association); Elmer-Dewitt, \textit{supra} note 130 (discussing some of SPA's functions, including running spot checks and audits on large corporations suspected of using pirated software, bringing lawsuits and suing for damages, and operating hotlines for reporting use of illegally acquired software).
\end{quote}
mainly at users who unknowingly used pirated software, or "inadvertent" pirates. The organization has also lobbied Polish legislators in an effort to formulate regulations to protect the interests of software copyright owners and combat piracy by ensuring compliance with the copyright laws.422

Since passage of the 1994 Polish Copyright Law, efforts by the PRO to protect against abuse of copyrights in computer software have continued.423 Following enactment of the law, the BSA, the U.S.-based anti-piracy organization, joined the PRO's efforts.424 As with its programs in other countries where piracy represents a serious obstacle to continued growth of the software industry, the BSA recognizes that the mere existence of a modern copyright law in Poland is not enough to remedy the piracy phenomenon. Consequently, it has actively addressed the problem by conducting public policy, educational, and enforcement programs in an effort to raise public awareness of what copyright law is and to explain the rights and responsibilities of software users under the new law.425 In April 1994, the BSA held a seminar in Warsaw for judges, police, and prosecutors, focusing on the mechanics of conducting raids and other enforcement measures, several of which have already been carried out.426 In addition, the BSA recently established a marketing firm in Poland, which cooperates with the PRO in publicizing such anti-piracy campaigns and encouraging copyright owners whose rights have been infringed to bring legal actions against abusers.427 The

422. See Computer Software Firms Fight Piracy, Reuter Textline, Jan. 16, 1993, available in LEXIS, Intlaw Library, TXTLINE File (describing various measures the PRO has taken in combatting piracy, including printing distinctive Polish-language insignias on their software programs indicating to purchasers that program copy is legal).

423. Facsimile from Teresa Drozdowska to Author (Dec. 12, 1994) (on file with Author).

424. See supra note 107 (describing BSA); BSA Expands Programs in Eastern Europe, in BSA Software Review (Feb. 1994), supra note 130 (describing recent anti-piracy efforts in Eastern Europe). The report notes that the BSA represents the majority of leading U.S. software companies in over fifty countries worldwide, including the countries of East Central Europe and the former Soviet Union. Id. Since its establishment in 1988, the BSA has sought to promote the growth of the computer software industry and effectively combat the problem of piracy by working with governments around the world to guide their implementation of legislation to deal with copyright piracy. Id.


426. Papuzińska, supra note 416.

427. Telephone Interview with Bill McGuire, Regional Head, East Central Europe, Business Software Alliance (Nov. 15, 1994). According to McGuire, the BSA practice is to gain power of attorney from the injured software company, then file a civil action
BSA also worked with the Ministry of Culture in determining the procedure for establishing collective management organizations, and continues to work with the Ministry in developing strategies for the organizations' functions. Thus far, Polish and U.S. watchdog agencies report that results of such joint BSA-PRO enforcement efforts prove promising.

The success of such official and unofficial enforcement measures does not imply, however, that individual enterprises, public and private, should not carry out collateral campaigns against internal copyright violations. This is particularly true with respect to larger businesses and administrative agencies, where piracy is known to be widespread. In this area, BSA education of end-users through continued anti-piracy campaigns throughout the country should prove effective, as control over software use within a given organization is ultimately within the power of corporate management officials. It is these officers who oversee purchasing and installation of office software programs and who may thereby force compliance with the copyright law.

Initial costs to corporate and individual software users may
increase as legitimate purchases impact on the budgetary constraints of many nascent Polish enterprises, regardless of size. It is precisely the entrepreneurial class of users in Poland, however, who are most dependent on continued U.S. investment in the form of Polish-language versions of software applications, discounted upgrades of popular programs, and advantageous service and licensing agreements. These users know that U.S. software programs are enormously helpful, if not necessary, in running their businesses in the productive and efficient manner that software facilitates. Thus, as an increasing number of such users gain an appreciation of the rights of software suppliers, fewer and fewer will attempt to circumvent those rights and will instead choose to invest in the purchase of original, legal versions of computer software. In turn, as long as U.S. software companies recognize a concerted effort on the part of Polish users to comply with the new Polish Copyright Law, and witness a concomitant growth in profits resulting from increased sales of their products, U.S. companies will acknowledge those efforts through increased investment in Poland.

CONCLUSION

The 1994 Polish Copyright and Neighboring Rights Act is an impressive legislative achievement, signifying in unequivocal terms the Polish government’s recognition of the importance of providing adequate and effective copyright protection to computer software programs. The law will promote increased investment in the Polish software market on the part of U.S. companies seeking expanding and profitable opportunities abroad for marketing and selling their software products. The 1994 Polish Copyright Law remains an untested piece of legislation, and it is still uncertain how thoroughly Polish software users will respect the law’s provisions. Moreover, while positive signals from Polish and U.S. software companies and anti-piracy organizations indicate a genuine commitment to copyright law enforcement, it is yet unclear how effectively the new law will be enforced by Polish law enforcers and Polish judicial authorities. Nonetheless, the 1994 Polish Copyright Law, providing genuine protection to U.S. copyright owners in computer software, as well as innovative

users will begin to make sure that the programs they purchase and use are legitimate. Id.
and realistic means of enforcing those rights, represents a commendable improvement over existing legislation. Effective copyright protection is a prerequisite to a mutually advantageous business environment between the United States and Poland in the computer software arena. The 1994 Polish Copyright Law facilitates precisely this environment, and U.S. software companies should greet the law with appropriate enthusiasm.