

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY¹

In 2000, as they have for the past several years, the copyright industries continued to confront very high piracy rates and losses in Romania, as the result of little or no improvement in the enforcement regime. This is true even though important reforms were undertaken in the mid-1990s significantly to improve the copyright legal regime in Romania. Improvements with the laws and even cooperation from the police for some industries have not been enough to overcome the large-scale commercial piracy problems. In the software industry, for example, the police are willing to conduct low-level raids. But enforcement cannot improve because the overall Romanian anti-piracy efforts remain woefully under-funded and are a low government priority.

The legal reforms have, however, been significant. In 1998, Romania joined the Paris Act of the Berne Convention (they have been Berne members since 1927), and the Geneva Phonograms Convention. In so doing, Romania fulfilled obligations it made in the U.S.-Romania Trade Agreement of 1992, and among other things, provided a clear point of attachment for foreign sound recordings for the first time. In 1996, Romania became a member of the World Trade Organization. Last year, the Parliament ratified and in February 2001, the government of Romania deposited, its instrument of ratification to the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Unfortunately, the Romanian enforcement regime lags significantly behind the legal reforms. In fact in 1996, when Romania joined the WTO, it announced its intention to avail itself of the four-year transition period to give the country additional time to meet its obligations under the TRIPS Agreement. Romania has still not met its TRIPS enforcement obligations even a year after that transition period ended (January 1, 2000). In fact, Romania has undertaken very little enforcement activity since 1996 when the new copyright law was adopted (effective on June 24, 1996). This has been very frustrating for the copyright industries because the Romanian government showed that it could engage in effective enforcement when it provides the necessary resources and willpower. This was demonstrated the first year after the copyright law was adopted, when the Romanian government undertook a series of very effective raids directed at audio and video piracy. But that was a one-year phenomenon, and since then on-the-ground enforcement has been almost nonexistent mostly due to prosecutorial indifference, and the lack of police resources to go after large-scale operations. For several years, the Romanian government has pledged to commit to anti-piracy resources and effective enforcement, but those promises have gone unfulfilled.

The piracy trade losses and rates remain high for most of the copyright industries in spite of relatively good copyright and neighboring right laws in Romania. In sum, Romania must meet

¹ For more details on Romania's Special 301 history see "History" Appendix to filing.

its TRIPS Agreement enforcement obligations and bring these piracy levels and losses down. It must implement its existing criminal, civil, administrative, and border remedies, and it must amend some of these provisions to make them more effective to deter piracy. IIPA recommends that as a result of these enforcement failures, Romania should remain on the Watch List in 2001.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	6.0	60%	6.0	60%	6.0	50%	10.0	50%	20.0	90%	20.0	90%
Sound Recordings / Musical Compositions	11.0	55%	25.0	85%	20.0	90%	15.0	90%	15.0	85%	16.0	85%
Business Software Applications ²	NA	NA	9.8	81%	17.6	86%	12.4	84%	8.3	86%	12.7	93%
Entertainment Software ³	6.9	91%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	NA	NA	NA	NA
TOTALS	25.9		42.8⁴		45.6		39.4		45.3		114.0	

COPYRIGHT ENFORCEMENT

Criminal, Civil and Border Enforcement

The three areas of copyright enforcement in need of significant improvement are the criminal enforcement sanctions and operations, civil procedures, and the need to adopt effective border enforcement measures. In sum, the copyright industries (especially the software industry) have begun to receive some cooperation from the police to conduct raids and seizures of infringing product, but they have all had virtually no prosecutorial support even for the few raids and seizures that are conducted. The software industry reports marginal improvements in the levels of prosecutorial action in 2000. So in sum, there are few criminal cases to report.

Neither are there many successes under civil or administrative remedies, even though there are strong remedies available. That is due in large part to the lack of resources and expertise, and the low priority given to these matters, by the government of Romania.

There are some important deficiencies in the law hampering enforcement. There are still no provisions in the Copyright Act to actually provide for civil *ex parte* search orders in the

²BSA loss numbers for 2001 are not yet available. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available and so were not reported. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴IIPA reported overall losses to the copyright industries at \$33+ million in 1999. This number was adjusted upward to reflect the addition of the BSA number in its mid-2000 adjustments.

Romanian law. The only existing measures provide for the securing of evidence to prevent “imminent damage or to secure redress” and the current practice is for Romanian judges to deny a request for an *ex parte* search on the basis of that provision. Provisions in Romania’s Civil Code (Article 239) are similarly ineffective. These provisions permit rightholders to request a court bailiff to “record certain [evidentiary] facts” outside the normal procedures for gathering proof, and clearly fall short of granting *ex parte* searches. There are provisions in the Criminal Code that provide for *ex parte* search orders. However, there are reports that these provisions also are not working effectively. In order to comply with the TRIPS Agreement, the civil and criminal *ex parte* search provisions must be made to work effectively.

Last, the Romanian government must adopt provisions to permit *ex officio* search orders by Customs officials, and it must effectively train and run its border enforcement operations. It is critical that Romania’s border enforcement system improve due to the ease in which pirated product, including optical media, is being imported into and exported from Romania.

The Romanian government has recently stepped up its customs training programs partly due to pressures resulting from its prospective European Union accession; this in turn has improved enforcement at its borders according to some industry reports. Unfortunately, corruption has been a problem, but recent changes in the top ranks of the Customs authority should lead to more effective controls. Equally important however, are the resources made available to Customs to do its job well. In May 2000, the unit specially created for the protection of intellectual property within Customs was dismantled and there are now only six people in the central Customs office with responsibility for fighting against IPR smuggling and piracy. The government of Romania must commit more resources effectively to combat this problem.

Protection and Enforcement Obligations

Romania currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights . . .” At the same time that Romania is causing millions of dollars of losses to the U.S. due to piracy, it imported \$63.1 million worth of products without duty, or over 14.6% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$70.3 million worth in the first 10 months of 2000. Romania should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

COPYRIGHT PIRACY

As noted above, the levels of copyright piracy in Romania are very high -- 81% for the business application computer software industry (in 1999, the last year of available figures); 60% for the motion picture industry; and 55% for the sound recording industry. Except in the music industry, where a large number of seizures were undertaken in 2000, there has been little fluctuation the past few years in the piracy rates due to the lack of enforcement activity on the ground in Romania. Because much of the piracy is a result of organized criminal enterprises, the copyright industries cannot rely on civil and administrative remedies to stop this piracy. The

government of Romania must devote the resources and will power to take action; the best way to do this is to utilize the criminal code to stop this organized criminal activity.

Over the past few years, Romania has faced the importation of large quantities of pirate audiocassettes and CDs, videos, and CD-ROMs containing entertainment and business software; most of this material has been produced in and imported from Ukraine and other neighboring countries. Poor border enforcement, and little or no effective police and prosecutorial activity, have allowed piracy to continue unabated in this manner.

In 2000, for the first time, the recording industry reported production of CDs in Romania (mostly of Romanian repertoire). The Kanami CD plant has unfortunately also refused to date to use the Source Identification (SID) codes; the SID codes, along with other optical media regulations, can be used effectively to stop this form of piracy. The motion picture industry also reports that there is a legitimate optical media plant in Bucharest operating without any reports of the production of pirate product there. Most of the pirate CD material (an estimated 60%) is coming from Ukraine; perhaps 15-20% of the pirate market is the result of small CD-R operators. The two main entry points for pirate material is Siret (by truck and train) and Galat-Reni (by boat) along the Danube. It is estimated that 20% of the illegal material once entered Romania from the former Yugoslavia; during the war in Kosovo, this trade was moved to other locations.

Many of the copyright owners have relied on enforcement assistance from the Romanian Copyright Office (ORDA). However, even with responsibility for copyright enforcement, the office's resources for effective enforcement, like that elsewhere in the government, are in short supply. The Business Software Alliance (BSA) reports, for example, that in the past, they relied on both the Romanian police and ORDA officials to conduct raids. Unfortunately, at the end of 1999, BSA reported that ORDA had stopped conducting such raids; but then, in 2000, they recommenced. As in years past, Romanian enforcement agencies still lack critical resources. This is true in all of the law enforcement organizations such as the National Economic Crimes Unit (the economic police), the financial police, the ONC (National Film Office, formerly the CNC), as well as the local police, prosecutors and the judiciary. Still there are reports that some agencies, such as the Ministry of Finance and the Competition Office (enforcing the 1996 competition law) have conducted isolated anti-piracy actions.

The only way enforcement will be effective is if the Romanian government commits the needed resources to the police, the National Economic Crimes Unit, and to ORDA to undertake the proper criminal enforcement activity. Besides a lack of resources, a lack of clear lines of authority within the government has hampered effective enforcement. IIPA has called on the government in the past to clearly define the organizational responsibilities for copyright enforcement, and we continue to do so. Amendments to the 1996 copyright law have been pending consideration for a number of years that would extend copyright enforcement to organizations other than ORDA to officially act in IPR enforcement activities. These amendments, submitted by local copyright industry representatives have been repeatedly ignored; they were excluded from the two "emergency ordinances" (administrative decrees) that were recently passed.

In 1999, a local anti-piracy organization known as ARA was organized by the motion picture industry (Motion Picture Association, MPA). It was hoped that this organization would ensure better cooperation among Romanian officials and the film industry, including action against pirate television and cable stations. In February 2000, a high-profile enforcement conference was organized by ARA and MPA with over 50 officials from the local and financial

police, ORDA, and customs. Interviews with the speakers at the seminar were broadcast on national television. Immediately after this seminar, the ARA and MPA reported several successful raids and seizures.

In fact, 2000 marked a turning point in the level of cooperation between the various private copyright industries and government institutions. As one example noted by many of the copyright industries, the ARA and the local U.S. Embassy officials have worked closely together to create a monthly roundtable where copyright issues (raised by the music, software, and audiovisual industries) are brought to the attention of the proper officials in the Romanian government.

The Motion Picture Association notes that there have been some notable successes undertaken against TV piracy in Romania. This is due, in large part, to the active role of HBO Romania in the anti-piracy organization, ARA. In 2000, two cable stations had their operations suspended and hundreds of illegal decoders were confiscated. The seizures of videocassettes and VCDs almost doubled in 2000, to a figure as high as 20,000 units. The penetration of VCDs and DVDs is beginning to grow higher as computers and DVD multisystem-player prices drop; these machines are now being imported into Romania in larger quantities.

For the MPA, the major problems are still video, broadcast and cable television piracy. The video piracy rate, once 100%, has decreased markedly, to approximately 60% in 2000 in the wake of limited legitimate market entry and a series of police actions under the new copyright law. Street vendors and video shops in Bucharest removed their displays of pirate product, and overt video piracy has not returned. However, the lack of consistent enforcement has allowed under-the-counter sales in video shops to continue in Bucharest, and in small towns outside of the capital, pirate tapes are still sold at weekend markets.

Cable television is widely available in Romania and inexpensive, at only U.S.\$2.50 per month. Approximately 350 small cable companies are scattered across the country. Market development and increased self-regulation by the 57 members of the Cable Television Association have helped reduce the rate of cable piracy. However, cable piracy outside of Bucharest continues to be a major problem. Most cable systems retransmit satellite television programs intended for Germany, Italy, and other Western European countries while dubbing them into Romanian. Some stations also broadcast pirate videos.

Internet piracy could become a major problem, especially because the Romanian law is silent or unclear on Internet issues. VCDs are starting to make inroads in the Romanian market, but because of low computer penetration throughout the country, pirate copies are mainly found in Bucharest. To "service" the capital city, small CD burning operations are scattered through the countryside. A limited amount of videocassettes and a large number of VCDs destined for more westerly markets are transshipped from Ukraine. Romanian law does not forbid parallel imports, so a significant number of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are also beginning to enter the upper end of the local market.

The MPA reports that annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania remained at an estimated U.S. \$6 million in 2000.

For the recording industry, the most serious legal deficiency of the last several years was corrected when Romania acceded to the Geneva Phonograms Convention (effective October

1, 1998). Actually, Romania should have been providing such protection beginning in 1996 under their WTO/TRIPS national treatment obligations, but membership in Geneva Phonograms ended any doubt; it did, however, leave a large amount of back-catalog material. The WTO Agreement clearly require that Romania provide protection for pre-existing sound recordings that are less than 50 years old. So, as a WTO member, Romania must make it clear in its legal system that it is providing this protection, if necessary through an appropriate court ruling, as required by Article 14.6 of the TRIPS Agreement. To date, the government has taken no action on this important matter.

Even after five years, the recording industry (International Federation of the Phonographic Industry, IFPI) reports that there have been no reported cases of criminal prosecutions under the 1996 law even though the penalty levels (up to U.S.\$1800 and five years' imprisonment) might, if imposed, deter piracy. As in past years, the problem has been Article 18(1) of the Criminal Code – cases are dismissed due to a lack of public interest (no social harm) under the provisions of that article. The primary problem confronting the recording industry continues to be the flood of illegal material (CDs and cassettes, now in equal amounts), most of it from Ukraine, that comes into Romania due to poor border enforcement.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Economic Police Unit. However, the National Police never created a specialized unit for IPR protection, and there are only a handful of police officers assigned to IPR protection. Further, for years provisions have languished that would amend the Copyright Act to add enforcement responsibilities to other agencies in addition to ORDA. ORDA personnel have police powers. However, the seemingly constant staff changes within ORDA (also a problem in other agencies with IPR responsibilities in the National Police offices and Customs) have contributed toward an overall lack of efficiency. ORDA continues to face severe internal and budgetary problems, which is doing grave harm to its ability to work effectively. Its working relationship with the police is frustrated by poor communication, and a lack of clear authority. The local recording industry group (UPFR) reports that this lack of authority and lack of resources has significantly hindered effective enforcement.

In January 2000, a governmental decree was issued to establish a registration and hologram program for the production and distribution of phonograms. It is administered by UPFR under the supervision of ORDA. The failure to comply with these provisions results in fines and confiscation of illegal material; the provisions went into effect on March 2, 2000.

On August 31, 2000, a new decree (a so-called “emergency ordinance”) was enacted regarding software and audiovisual works. The software industries were able to get amendments to make the decree acceptable to help police against illegal distributors and permit quick access to information on piracy cases initiated by ORDA.

However, the motion picture industry was and remains very much opposed to this decree (which actually was initiated by local motion picture representatives in an entirely different form). The motion picture industry is opposed to the decree because it imposes a state-mandated (ORDA- approved) hologram stickering system. It requires the application of “distinctive marks” on each copy of an audiovisual work. This type of state-mandated stickering system, attempted in other countries (Moscow, Russia) is counterproductive to anti-piracy efforts because it results in “legalizing” pirate material once the stickers are themselves forged. Alternatively, it prevents the legal distributor from getting product into the marketplace because

the bureaucracy that issues legal stickers works very slowly and inefficiently, so pirate material is more readily available than legal material.

The provisions pertaining to audiovisual works and software reportedly went into force on February 1, 2001. The ARA (the local anti-piracy organization organized by the motion picture industry) fought to prevent the introduction of any stickering system by ORDA or the Ministry of Culture. ORDA will now apparently be responsible for monitoring the distribution of the stickers. Rather than accept a state-organized system, ARA is currently working to amend the Emergency Ordinance so that it or another nongovernmental organization can manage it. It is unclear why the stickering system was forced upon the audiovisual industry; it will oblige all audiovisual distributors (who must be registered at the National Film Office and receive certificates for every title) to purchase stickers from a state-appointed private company. Each sticker will cost 500 Rlei or approximately 2 cents. Until the two houses of Parliament (Senate and Chamber of Deputies) both agree to reject the ordinance, it will remain applicable under the Romanian Law of Ordinances.

The ordinance, as amended, also introduced new penalties for IPR infringements and it permits right holders to have control over certain criminal proceedings. Under the provisions, right holders have to provide ORDA with a model license agreement and must satisfy certain other procedural requirements.

Even though the decree was revised so that it could be supported for the most part by the software industry, because of the strong opposition from the motion picture industry, the Ordinance should either be rejected by the Parliament or it should be further revised consistent with the concerns of the motion picture and software (business and entertainment) industries.

The recording industry has had success in 2000 with raids and seizures, including one seizure of Ukraine material (CDs) in a sophisticated smuggling network. In fact, since 1999, according to the National Police, there has been over a 100% increase in the number of cases commenced (actually the number of seizures and raids undertaken). As a result, the overall level of piracy for sound recordings has declined from 85% to 55% in 2000. The U.S. trade losses were estimated at \$11 million in 2000 (down from the \$25 million in 1999). Unfortunately, like the other industries, the recording industry reports that even with success at the seizure level, there are few prosecutions.

As in past years, the business software industry (Business Software Alliance, BSA) continues to report good relations with Romanian police, but despite police assistance, piracy continues to flourish. Police are willing to raid small endusers, but with very few exceptions, appear unwilling to conduct raids of large corporate endusers, perhaps fearing political backlash.

The BSA reports that in 2000, the police undertook 175 end-user raids, although almost all were of businesses consisting of fewer than five personal computers. A modest breakthrough occurred in April, when the police raided the Ploesti branch of one of Romania's largest banks. Nevertheless, the BSA has been informed that it is difficult for such cases to progress because of the political influence wielded by such targets and their owners. Romanian police also conducted approximately 30 reseller raids, including raids involving hard-disk loaders (something they had been averse to), and some Internet resellers. With respect to the latter, the police set up sting operations that led to the arrest of a number of individuals.

Unlike past years, the BSA did manage to secure a number of judgments in end-user cases, and even obtained its first criminal conviction for end-user piracy. However, the sentences imposed were, in all instances, remarkably inadequate. A Cluj court convicted a computer-system administrator employed by an infringing enduser and imposed a U.S.\$60 fine in November 2000. This was followed by a similar conviction in December 2000 resulting in an U.S.\$80 fine. In another case, a reseller was convicted in early 2000, and received a U.S.\$54 fine.

The software industry's experience shows that these judgments, even of minor fines, require a considerable exertion of effort and time to obtain, and they represent a small fraction of the total cases initiated by police. The BSA reports that the average time required to obtain a criminal court decision in Romania is between one and two years. A ruling on appeal requires another eighteen to thirty-six months. This naturally remains a cause for concern.

In order to ensure that the software industry can rely on civil, as opposed to criminal, laws to enforce its rights, civil *ex parte* provisions need to be clearly included Romania's Copyright Act. Finally, ORDA officials must begin to conduct more raids against larger scale software pirates.

The Interactive Digital Software Association (IDSA) estimates losses due to piracy of entertainment software in Romania at \$6.9 million, with a piracy rate estimated at 91% in 2000. IDSA reports that prerecorded CDs of entertainment software continue to be produced in or shipped from Ukraine, Bulgaria, Russia, Belarus and other countries in the C.I.S., and even from Southeast Asia, and are transported for sale in Romania due to lax border enforcement there. Most of the material is produced and shipped by Russian organized crime groups. In addition, there are disk-burning syndicates that produce and distribute material (with the use of advertisements) via the mail in Romania. Unlike some of the other industries, IDSA reports that it has had difficulty even getting police raids and the seizure of material, but like all industries, they have had no prosecutorial successes to report. In sum, the entertainment industry is confronted with a moderately good law that is rarely enforced.

Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania. Book publishing losses in 2000 were estimated to be \$2.0 million, the same level since 1997.

LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996, Including Criminal Penalties

The Copyright Act of 1996 strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian lei to 10 million Rlei (U.S.\$8 to U.S.\$400) and imprisonment of one month to five years (articles 140-142). Romanian judges reportedly interpret these provisions as requiring fines for first offenses and imprisonment for subsequent offenses. Unfortunately, the fine levels in the criminal provisions have been ravaged by inflation, even cut by more than two-thirds in the last year. They are now too low to effectively deter piracy, particularly by criminal organizations in Romania. There have still been no reports of any jail terms imposed to date in Romania, three years after the new laws were put in place.

Due to hyperinflation, fines should be tied to more stable figures. Also, ORDA's exclusive authority to investigate and identify pirate product (Art. 142) needs to be interpreted more expansively. ORDA currently only has four investigators in the whole country; they are not capable of properly handling all investigations. Last, the act of "offering" pirate product for commercial sale should be sanctioned with criminal penalties (currently, a sale has to be completed). The criminal code needs to be amended. It should make clear that possession of illegal material, including the possession of the equipment used to make illegal material, can result in criminal sanctions.

The Copyright Act of 1996 also made other significant improvements in enforcement. It provides for: *ex officio* criminal copyright enforcement by the police; civil damages awards and/or seizure of illegal profits; preliminary and permanent injunctive relief; and seizure, forfeiture and destruction of infringing profits (Article 139). The copyright law now defines unauthorized satellite and cable retransmissions as copyright infringements. The criminal code provides that *ex parte* criminal searches are allowed against suspected pirates, but they have not been shown to work. (Civil code provisions in Article 239 have been referred to by the government of Romania as pertaining to such searches, but these are neither *ex parte* provisions *per se*, nor do they work effectively in any case, at securing evidence.)

There are several substantive changes in the law that still need to be addressed as well, especially those concerning the ownership by and rights of audiovisual producers. One currently requires cinemas to get prior authorization from and to compensate authors of music performed in publicly exhibited films; this is an unusual provision that hinders film distribution in Romania. A second provision unfairly divides performance royalties and will further hurt the film distribution business.

Finally, the good news is that Romania, a signatory to both of the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), did ratify the treaties in February 2001. Efforts are now underway to make all of the necessary amendments to the laws of Romania to comply with them. Such ratification and eventual implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce, so these efforts are strongly encouraged by IIPA and its members.

The copyright law already does correctly ensure that the right of reproduction covers temporary copies; however, it is limited to computer programs, so it must be amended to include all works in order to provide the necessary protections against digital piracy. In fact, to comply with the treaties, Romania must adopt numerous amendments. These include: adoption of a more complete right of communication to the public, including a right of making available; and provisions to allow right holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that rightholders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. A current provision in the law provides some anti-circumvention protection, but it is not as broad as the right noted above, and it is limited to computer programs.

In addition, rightholders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information.