

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Romania remain on the Watch List in 2003 because of its ongoing enforcement and legal deficiencies that result in high piracy levels in this country.

Overview of key problems: The copyright industries continued to confront very high piracy rates and significant losses in Romania during 2002 because of long-standing systemic inaction by government authorities. Romanian anti-piracy efforts are uncoordinated and a low priority for prosecutors and courts reluctant to impose deterrent penalties, and these efforts are woefully under-funded. For many years the Romanian government has pledged to raise the level of commitment by police, prosecutors, border officials and the courts so that criminal cases would target large-scale operations and impose deterrent penalties. Also, the government agreed to commit the anti-piracy resources necessary for effective enforcement. But most of these promises have gone unfulfilled. Border enforcement must also be a priority as pirate products easily enter the country for sale in the local market, and also is shipped to other countries. The police have been conducting raids but Romanian prosecutors refuse to follow through and have not pushed for deterrent sentences for those cases they do prosecute. This is the major stumbling block to successful and effective enforcement. Also, Romania does not afford viable civil *ex parte* search remedies in its copyright law or in practice—a blatant violation of its TRIPS obligations. ORDA, a government agency, needs to improve its interagency coordination skills, its willingness to work with all rightsholders' groups, its verification and enforcement of the hologram system, and its monitoring of illegal products in the marketplace. Estimated trade losses due to copyright piracy in Romania were \$74.5 million in 2002.

Actions which the Romanian government should take in 2003: Long overdue actions which the Romanian government should take to improve the copyright situation include—

- High-level government officials instructing the enforcement agencies to make piracy a priority and to set goals for tough anti-piracy sanctions. The enforcement agencies must then commit to undertake these goals with clear lines of authority for copyright enforcement among the competing agencies. Plus, the government of Romania must provide the needed resources. Thus, the Prime Minister, along with the ministers of Interior, Finance, Culture and Justice must tackle piracy in a cohesive manner to get on-the-ground enforcement results.
- Encouraging the economic police to substantially increase the number of anti-piracy raids and to bring more cases to the prosecutors.
- Providing training to police officers in order to improve the quality of the files presented to the prosecutors and instruct police to impose administrative fines in small-scale piracy cases, as opposed to opening criminal files, in order to avoid bottlenecks at prosecutorial level.

- The Prosecutor General should appoint at least one IPR specialized prosecutor in each district and direct prosecutors to move criminal cases to their completion and push for deterrent penalties, especially directed at large-scale operations and repeat offenders. Prosecutors should also be instructed to, as a rule, keep the rightsholders concerned informed of the outcome of their criminal investigations and their decisions.
- Amending the copyright law to provide clear legal basis for civil *ex parte* search authority, a TRIPS requirement especially critical to the business software community.
- Improving border enforcement by providing customs officials with *ex officio* authority to make inspections and seizures and encouraging continued consultations and coordination with rightsholders' organizations.
- Ensuring that ORDA increases its inspections and verification of the use of holograms in the marketplace and improving ORDA communications with all rightsholders' groups, without exception.
- Revising the hologram decree to be consistent with the concerns of the motion picture, business software, and entertainment software industries (to move from a mandatory ORDA-regulated one, to a voluntary system for these industries).
- Imposing deterrent sentences (in criminal courts) and fines (in both criminal and administrative courts).
- Amending the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties' obligations.
- Refraining from introducing changes in the criminal code that would lower the level of penalties, including imprisonment, provided for copyright crimes.

ROMANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	6.0	55%	6.0	65%	6.0	60%	6.0	60%	6.0	50%
Records & Music	15.0	75%	14.0	70%	11.0	55%	25.0	85%	20.0	90%
Business Software Applications ²	16.4	72%	15.7	75%	17.1	77%	9.8	81%	17.6	86%
Entertainment Software	35.2	97%	NA	95%	6.9	91%	NA	NA	NA	NA
Books	2.0	NA								
TOTALS	74.6		37.7		43.0		42.8		45.6	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA finalized its 2001 numbers in mid-2002, and those figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Romania has bilateral and multilateral trade obligations related to copyright and enforcement. In 1992, Romania entered into a Trade Relations Agreement with the U.S., which included a Side Letter on Intellectual Property Rights; this agreement entered into force in November 1993. Romania participates in the U.S. Generalized System of Preferences (GSP) program, which requires that it provides U.S. copyright owners with “adequate and effective” protection of intellectual property rights.³ In 1996, Romania became a member of the World Trade Organization, and its WTO TRIPS Agreement obligations are in force.

COPYRIGHT PIRACY IN ROMANIA

Optical Media Piracy: Importation and Local Production

Importation across the porous border: The copyright industries in Romania are faced with the importation of large quantities of pirate audiocassettes and CDs, videos, DVDs and CD-ROMs containing entertainment and business software, as well as videogame cartridges. The recording industry reports that most of this material is produced in and imported from Russia and other neighboring countries. An estimated 60% of the pirate CD material is coming from Russia, Moldova, Ukraine (as inventory from past years’ piratical production there) and Serbia & Montenegro. Perhaps 15-20% of the pirate market is held by small CD-R operators. The main entry points for pirate material are Siret and Dornesti (by truck and train) on the Ukrainian border, Nadlac and Bors on the Hungarian border, Portile de Fier and Moravita on the Yugoslav border, Calmabat and Giurgiu on the Bulgarian border and Albita, Giurgiulesti and Iasi on the border with Moldova. It is estimated that 10% of the illegal material enters Romania from the former Yugoslavia, with Russia being an additional source.

The Business Software Alliance (BSA) reports that most of the CDs containing illegal business software are copies made in Bucharest of Ukrainian master CDs. Poor border enforcement, and little or no effective police and prosecutorial activity, have allowed piracy to continue unabated in this manner. Additionally, the law governing the protection of intellectual property under customs provisions is inefficient and ineffective; it cannot properly regulate the transport of pirated material, and does not provide for adequate notification of rightsholders regarding searches and seizures. IDSA continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) continue to be produced in or shipped from mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

Local production: Back in 2000, the recording industry reported production of CDs in Romania, mostly of Rumanian repertoire. However, local pirate CD production is not the main problem in Romania. The Kanami CD plant was issued a SID code and has been using it since last year. Given the low levels of local production of optical media, it is premature at this time for the industries to suggest that the Romanian government adopt an optical disc regulatory regime. For the entertainment software industry, there has also been a significant increase in the level of CD-R burning in Romania.

³ For the first 11 months of 2002, \$995.5 million worth of Romanian goods (or 14.9% of Romania’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 2.3% increase over the same period in 2001. For more details on Romania’s Special 301 history, see Appendices D and E to this filing.

MPIAA reports that optical disc piracy continues to thrive in Romania. In 2002, ROACT, the local audiovisual anti-piracy organization, seized over 18,500 pirate discs, the majority of which were pirate DVDs imported from the Ukraine. However, pirate VCDs, both locally pressed and imported, remain popular, with quantities seized at the same level as in 2001.

High piracy levels continue in all industry sectors.

The Business Software Alliance (BSA) continues to report high levels of piracy in Romania, as in year's past. Hard-disk loading piracy especially is becoming an increasingly serious problem as police still refuse to take any action against this form of piracy. Police are willingly raiding a number of small end-user targets, while hard disk loaders and larger end-user targets remain safe from enforcement. As a result, widespread use of unlicensed software in both private and public sector remains a concern. The Romanian government should continue down the path towards implementation of effective software asset management practices, and to work closely with the private sector in doing so. Internet-based piracy has become more sophisticated, with online advertisements asking potential end-users to request software by sending an e-mail message to an address given in the advertisements. Estimates for 2002 business software piracy losses and piracy levels in Romania are \$16.4 million at 72%.

The Interactive Digital Software Association (IDSA) reports that the pirate PC game market is 80% gold disc (burned discs) and 20% silver (pre-recorded discs pressed at an industrial CD plant). Pirated software for videogame console platforms are all silver CDs. The silver CDs are all coming from Russia and Ukraine; pirated videogame product (in cartridge format) is coming from Asia. Reports indicate that Russian organized crime groups ship much of this material. Pirated videogames sell for about 3 Euros (US\$3.25). Significant quantities of pirated CDs being imported into the country are severely damaging the ability of entertainment software companies to develop the console market in the country. Improving the country's border enforcement measures is crucial to stemming the unhindered flow of pirated product into the country.

Pirate videogames are sold in specialized shops, kiosks, Internet sellers and outdoor markets. To show the extent of the problem, there are approximately 100,000 people playing the popular FIFA 2002 (soccer) videogame, but only 1,000 legitimate copies of the game have been sold in the entire country. There was a big shopping mall but the industry, with much diligence, was able to convert the sellers into vendors of legitimate products. Companies have conducted public education efforts aimed at consumers and have issued product incentives, but it remains difficult to expand the market given the widespread piracy. In addition, there are now several thousand Internet cafes in Romania. Only about 5% have licenses from videogame publishers; the rest are using either illegal product or non-licensed product. Some companies have been taking enforcement actions against smaller establishments, some of which have resulted in settlements. Online anti-piracy efforts have also been undertaken, with some sending takedown notices to Romanian Internet service providers, but there are no estimates as to compliance rate at this time. IDSA estimates that the overall value of pirated entertainment software products present in Romania was \$35.2 million in 2002, with an estimated piracy level of 97%.

The primary problem confronting the recording industry continues to be the vast amounts of illegal material (CDs and cassettes), mostly from Russia and previously produced inventory from Ukraine, which enter Romania due to weak border controls. The serious problem with music CD-R piracy continued in 2002. The piracy level for international repertoire

alone is higher at approximately 75%, representing trade losses for the U.S. industry of around \$15 million. The estimated overall piracy level for sound recordings is 60%, with estimated trade losses for both U.S. and international repertoire at \$25 million for last year. Piracy of international repertoire consists mainly of best hits compilations, which contain the best tracks of a great variety of albums, with one pirate copy frustrating the sale of several legitimate albums. As a result, the damage to the industry is much higher than the number of pirate copies would suggest. Investigations show well-organized networks of "mules" transporting pirated products using well-established routes; these mules now transport only small quantities (fewer than 1,000 pieces) through different border stations, thus reducing the risk of losing large quantities of goods and money. The recording industry reports successes at the seizure level, but few prosecutions. The quantities seized are often small but the number of repeat offenders is high. The lack of deterrent penalties, the continued dismissal of cases by prosecutors for "lack of social harm" and the absence of a deterrent threat against pirates from the Central Economic Police mean that the music pirates in Romania have little fear of being punished for their illegal activities.

The overall audiovisual piracy rate in Romania, including both videocassette and optical disc piracy, is estimated to be approximately 55%. This improvement over previous year's rates is the result of the blatant and overt piracy found in almost every retail video store having been much reduced. The Motion Picture Association of America (MPAA) reports that annual losses due to audiovisual piracy in Romania are estimated to be \$6 million in 2002. Optical disc piracy is a flourishing business in Romania. VCDs remain a popular format, with the number of discs seized by ROACT remaining at its 2001 level. DVD seizures soared, however: twice as many pirate DVDs were seized than VCDs. Unfortunately, retail stores are still involved in pirate activities, however these are now limited to back-to-back copying, selling after rental rights have expired, and under the counter deals for well known customers. The most popular method of distribution of pirate materials is at street markets; there are over 400 regular markets in Romania and 250 other markets open at various times. The Internet is also being used to distribute movies, both through the sale of hard goods and downloads. Internet cafes are opening up all over Romania and they allow customers to download and burn movies onto CD-ROMs.

Cable television is widely available in Romania, and inexpensive at only US\$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, dubbing them into Romanian. Some stations also broadcast pirate videos.

Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania, amounting to an estimated loss of \$2 million in 2002.

COPYRIGHT ENFORCEMENT

Inaction by Romanian enforcement officials has been very frustrating for the copyright industries. The Romanian government showed it could engage in effective enforcement, at least with regard to raids and seizures. After the copyright law was adopted in 1996, the Romanian government undertook a series of very effective raids directed at audio and video

piracy. But that was a phenomenon that lasted only a few months; since then, on-the-ground enforcement has not reached an appropriate level to address the wide-scale piracy problem. And, even with successful raids, effective enforcement is hampered due to prosecutorial indifference and the lack of police resources to pursue large-scale pirate operations or repeat offenders.

The Romanian government and WIPO signed a bilateral “Program of Cooperation” in June 2001 whereby WIPO would assist the Romanian government in modernizing its IP system. Among the various actions agreed to be WIPO reported activities were “initiatives to upgrade the intellectual property enforcement system in Romania, intensified training in intellectual property, and concrete assistance to combat piracy of music, software, and audiovisual materials.” While such training and assistance, in all forms, is welcome, the true test should be whether the Romanian government actually takes concrete action to improve the enforcement situation. To date, it has not.

Criminal enforcement in Romania is ineffective.

No clear lines of authority plus poor interagency cooperation and communication by ORDA lead to disappointing results.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Ministry of Culture. The National Police, the other body that should play an active role in IPR enforcement, never created a specialized unit for IPR protection, and there are only a handful of police officers assigned to IPR protection. Staff changes within government agencies with IPR responsibilities have contributed toward an overall lack of efficiency. ORDA continues to face severe internal and budgetary problems, which is hurting its ability to work effectively. Resource scarcity 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.

The only way enforcement will be effective is if the Romanian government clearly indicates that copyright enforcement is a priority and commits the needed resources to the police, including its the Anti-Organized Crime Directorate, the National Economic Crimes Unit, and to ORDA to undertake the proper criminal enforcement activity. 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, pending consideration for a number of years, 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) passed in 2000.

ORDA’s working relationship with the police is frustrated by poor communication and a lack of clear authority and resources, all of which significantly hinder effective enforcement. In addition, effective enforcement is seriously frustrated by ORDA’s attempt, through a proposal of legislative changes, to completely sideline the rightsholders’ representatives in the area of enforcement. By excluding the rightholders’ organizations, ORDA is gravely undermining an enforcement system that is already weak and often ineffective.

Working with rightsholders: Throughout 2002, ORDA continued to instruct local police units in writing not to allow UPFR representatives to participate in anti-piracy raids as observers. Such unjustified intervention has on several occasions prevented the local recording industry group and the police from carrying out effective enforcement actions. ORDA's active policy aimed at excluding UPFR is contrary to internationally accepted enforcement practice, not warranted by any part of the Romanian legislation, counterproductive and reprehensible. ORDA should immediately be instructed by the Prime Ministers' office and the Ministry of Culture to cease this campaign of exclusion. In 2002, the recording industry carried out 42 joint actions with ORDA and 353 joint actions with the police. A total of 29,108 CDs and 4,449 audiotapes were seized during these joint actions

The police take raids but are reluctant to act in some cases.

The copyright industries continue to report that the Romanian police generally exhibit a positive attitude in cooperating with industry representatives on investigations and raids.

The business software industry reports that, despite generally good cooperation from Romanian police especially in actions against small end users, piracy continues to flourish. This is so despite a large increase in the number of criminal raids conducted in 2002. BSA reports that the authorities still are unwilling to undertake raids on large end-users, and concentrate their efforts instead on smaller infringing companies. Although the police, in general, are very cooperative and frequently conduct raids, only a few raids have taken place against companies with more than 10 computers and the police absolutely refuse to raid any resellers selling computers to end users with unlicensed software (HDL). In 2002, Romanian police raided 452 end-users and 38 resellers, which is about 200 more than the number of raids carried out in 2001. Raids on smaller end users were common, continuing trends in recent years in which it has been suspected that police unwillingness to undertake raids of large end users stems from the political influence wielded by such targets and their owners. Practically all the software resellers targeted by the police in 2002 were street resellers of CDs containing illegal software or small computer cafes. Romanian authorities, for instance, raided a network of five resellers and confiscated 2,780 CDs in April, and raided another reseller in June and confiscated USD 32,130 worth of illegal products. These types of raids are common. BSA also reports that ORDA was responsive to complaints regarding piracy during 2002; however, ORDA does not have a sufficient number of inspectors to deal with the volume of business software piracy cases. ORDA cooperated with Romanian police to conduct raids in Craiova and Bucharest, in particular.

In 2002, the recording industry reports 353 joint actions with the Romanian police. Partly as a result of training organized by UPFR, the police increased the number and efficiency of its joint and individual anti-piracy actions: In the first half year of 2002, the police seized 49,951 illegal sound carriers (compared to 34,206 seized by the police during the all 2001). In July 2002, the recording industry, working with the police, engaged in an operation at three different locations simultaneously, with the resulting seizure of pirated materials being the largest ever to take place in Romania. The operation netted 11,617 CDs, 11,617 inlay cards, plus 3,650 jewel boxes; the forensic examination revealed that half of these CDs were industrial pressed and the other half were burned CD-Rs containing both international and local repertoire. Ongoing investigations continue to reveal connections to Moldova and Ukraine as well as Romanian ones. UPFR has signed several Memoranda of Understanding with police departments and other agencies (including customs) to assist in anti-piracy cooperation.

MPAA reports that its local colleague, ROACT, in December 2001 signed a Memorandum of Understanding with the police responsible for street markets, and this has had a positive impact on the amount of pirate material found at the markets. This result shows that once law enforcement authorities make intellectual property crimes a priority, they can have a substantial impact. In 2002, the motion picture industry assisted on 449 raids.

Few prosecutions, more dismissals, and no deterrent sentences

Little progress: The recording industry filed 209 criminal cases involving recording piracy in 2002. Romanian prosecutors dropped at least 50 of these cases. At the end of 2002, five record piracy cases were pending trial and eight court decisions were issued in 2002; all in all, 24 cases are pending trial.

In 2002, despite constant efforts, ROACT secured a judicial decision in only one case. MPA confirms that prosecutors remained far too ready to drop cases, through a lack of understanding of the damage caused by copyright offenses.

BSA reports some progress in enforcement by the Romanian courts during 2002. There were nine judgments during 2002 involving illegal use of business software, two more than in the previous year; however, most of these judgments were appealed. In September, the BSA obtained two convictions of end-users for infringement before the courts in Cluj Napoca, and were awarded US\$ 4,000 and US\$2,500. Significantly, the company representatives were convicted of criminal copyright infringement and fined nominal amounts. Later, in October and November, the BSA secured two further judgments against internet cafes, and were awarded over US\$4,500 in total damages. These damages represented full retail value of the infringed products, and two senior members of management were criminally fined. The software industry's experience shows that these judgments, even of minor fines, require a considerable exertion of effort and time to obtain, and represent a small fraction of the total cases initiated by police.

Non-uniformity in prosecutorial action. All industries report that prosecutors often refuse to pursue criminal cases because they find that there has been "a lack of social harm" in piracy cases. That is, once this invisible threshold has not been met in the view of the prosecutors, the cases are dismissed—this thereby acts as a prosecutorial excuse to dispose of cases. In addition, BSA reports that the attitude of prosecutors towards cases involving illegal copies varies in different regions. Prosecutors in Bucharest frequently hand out only administrative fines in software cases instead of filing charges and prosecuting in court. The recording industry reports that, up till now, the prosecution in Bucharest Sector 4 has rejected all criminal copyright infringement files. The Public Ministry in this sector does not include a prosecutor specialized in IPR, has never sent any of its prosecutors to the various trainings organized by the copyright sector and is known to have dismissed cases of multiple repeat offenders. Other examples where cases involving multiple repeat offenders are consistently dismissed are the prosecutors' office in Suceava County, Sibiu and Arges County.

Concerns over corruption: Corruption among enforcement officials remains a severe problem in Romania. Moreover, there is minimal prosecution of corrupt acts. Part of the reluctance of police in raiding large companies suspected of infringement may arise from the political influence wielded by such large companies. Factors suggesting that corruption is at least partly responsible for piracy problems in Romania include the lack of any cases forwarded by public prosecutors to Bucharest courts; the fact that few cases arise from the customs police; and there is disinterest on the part of the Anti-Organized Crime Directorate in copyright piracy

cases. In fact, an order from the Supreme Council for National Defense in 2001, which instructed the Anti-Organized Crime Directorate to take action against large-scale copyright crime, failed to have any effect, as the Deputy Head of the Police subsequently instructed the anti-organized crime units throughout the country to disregard the order. This blatant act of insubordination was left without any further consequences.

Lengthy court proceedings: Criminal judgments of even minor fines against copyright infringers require a considerable exertion of effort and time. The average amount of time needed to obtain a criminal court decision is between one and two years, whereas a ruling on appeal requires another 18 to 36 months.

No deterrent penalties issued: There have still been no reports of any effective (i.e., non-suspended or time-already-served) jail terms imposed to date in Romania for copyright piracy—four years after the “new” laws were enacted. This unacceptable result occurred despite the fact that the copyright industries in the last two years have begun to receive some cooperation from the police to conduct raids and seizures of infringing product. All industries continued to report they had virtually no prosecutorial support in 2002, even for the few raids and seizures that were conducted.

Civil *ex parte* search authority is still missing.

A glaring TRIPS deficiency in the Romanian copyright law is the lack of an effective civil *ex parte* remedy. There are no provisions in the copyright act actually to provide for civil *ex parte* search orders in the Romanian law. The only existing measures provide for the securing of evidence to prevent “imminent damage or to secure redress.” The current practice is for Romanian judges to deny a request for an *ex parte* search on the basis of that provision. Moreover, the provisions of the Civil Code and Criminal Code are similarly ineffective in providing such a remedy. Romania’s Civil Procedure Code (Article 239) permit rightsholders 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 permit police (*ex parte*) searches, but these provisions, too, are not used effectively and are not available to rightsholders. In order to comply with the TRIPS Agreement, civil *ex parte* search provisions must be made to work effectively, and the police must engage in criminal searches. BSA confirms that no civil *ex parte* searches were granted in Romania in 2002.

Border measures must improve.

Some industries confirm some minor improvement in the actions taken by customs officials to stem the flood of pirated products entering Romania. However, the flood remains. Any improvement is a far cry from a fully effective border control regime. 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, because it is far too easy for pirated product, including optical media, to be imported into and exported out of Romania.

Customs and border police must step up *ex officio* action and contact the rightsholders every single time they catch illegal copyright material, be it smuggled by private persons or officially imported by companies. The Romanian government had stepped up its customs training programs partly due to pressures resulting from its prospective European Union

accession. More resources must be 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 five people in the central customs office with responsibility for fighting IPR smuggling and piracy.

Romanian Law No. 202 of 2000 allows customs officials to detain *ex officio* shipments suspected of infringing IP rights, whereupon the IP owner is to be immediately contacted by the authorities. However, customs clearance will be granted unless the IP owner registers a formal application with the General Customs Office, and provides a related tax, within three days of being informed. This deadline has proved unworkable in practice, and as a consequence infringing product routinely crosses the Romanian border.

Inconsistent enforcement by ORDA of the Hologram Decrees

Passage of the Two Hologram Decrees

Two decrees were issued requiring the affixation of holograms to certain copyrighted products. 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. Second, in August 2000, a decree (a so-called “emergency ordinance”) was enacted bringing software and audiovisual works under a stickering program. The software industries were able to get amendments passed to make that decree acceptable to them in order to help police act against illegal distributors and permit quick access to information on piracy cases initiated by ORDA.

The motion picture industry was and remains opposed to this decree (which was actually initiated by its local representatives in an entirely different form) because it imposed a state-mandated (ORDA-approved) hologram sticker system on audiovisual works. It requires the application of “distinctive marks” on each copy of an audiovisual work and obliges all distributors (who must be registered at the National Film Office and receive certificates for every title) to purchase stickers. Each sticker cost 500 lei or approximately two cents. This type of a state-mandated sticker 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. In addition, there is the problem of corrupt government officials giving the pirates the legitimate stickers to place on their product. Alternatively, it prevents the legal distributor from getting product into the marketplace, because ORDA’s bureaucracy works very slowly and inefficiently. Pirate material is thus more readily available than legal material.

The provisions pertaining to audiovisual works and software went into force on February 1, 2001. The local motion picture industry group, ROACT (then known as ARA), fought to prevent the introduction of any sticker system by ORDA and the Ministry of Culture. Rather than accept a state-organized system, ROACT is working to amend the Ordinance so that it or another non-governmental organization can manage it. Until the upper and lower houses of parliament (Senate and Chamber of Deputies) both agree to reject the Ordinance, it will remain applicable under the Law of Ordinances. The Ordinance should be revised to be consistent with the concerns of the motion picture and software (both business and entertainment) industries.

The ordinance (as amended) also introduced new penalties for IPR infringements and permits rightsholders to have control over certain criminal proceedings. Under the provisions, rightsholders 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 can 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. Although there was some discussion in a Parliamentary commission of extending the mandatory stickering regime to business software, such a measure did not progress in 2002. The BSA remains opposed to extending the stickering regime to business software.

Inconsistent enforcement of the Decrees

Despite ORDA's inconsistent to poor enforcement of the hologram decree, the recording industry nevertheless continues to support the use of holograms for its products. Record producers purchased 16,925,552 holograms in 2002, compared to 16,400,000 in 2001. However, the hologram program did not result in productive monitoring of the production or importation of sound recordings, as was hoped. In fact, as expected, the holograms were placed on illegal products. Large numbers of holograms were delivered to small companies with only a small catalog that could not possibly sell the quantities they pretended to sell.

ORDA needs to be much more thorough when it checks the background of companies for which it issues holograms. In addition, it should be more cognizant of companies ordering excessive numbers of holograms. Finally, ORDA needs to invest more manpower in inspecting and monitoring the actual use of the holograms in the market. ORDA should also use its position and competence to annul or suspend the certificates under the National Phonogram Register of those companies that have infringed the hologram decree or that are involved in copyright piracy.

It remains essential that the UPFR, the local recording industry group, remain in charge of the administration of the hologram program. IIPA urges the government of Romania to prevent ORDA from seeking any legislative changes that would unrightfully exclude UPFR from the administration of the hologram program; the recording industry initiated this program and must be permitted to continue to administer it.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

In 1996, Romania became a member of the World Trade Organization. In 1998, Romania joined the Paris Act of the Berne Convention (it was a member of the Rome Act of Berne from 1927) and the Geneva Phonograms Convention, thereby fulfilling obligations it made in the U.S.-Romania Trade Relations Agreement of 1992. 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).

Copyright Act of 1996

Enforcement aspects: The Copyright Act of 1996 strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian ROL to 10

million ROL (US\$6 to \$315) and imprisonment of one month to five years (Articles 140-142). 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.

Unfortunately, Romanian judges have interpreted these sanctions as requiring fines for first offenses, and imprisonment only for subsequent offenses. The fine levels in the criminal provisions have also been ravaged by inflation and are now too low to effectively deter piracy, particularly by criminal organizations in Romania. The criminal code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed.

Three actions could improve the current dearth of prosecutions and absence of deterrent sentences. First, fines should be tied to more stable figures to avoid the effects of hyperinflation. Second, ORDA's "exclusive" authority to investigate and identify pirate product (Article 142) needs to be interpreted more expansively. ORDA has a small staff (which has been increased to 10 investigators—three inspectors in the National Registries and Collecting Society Directorate and seven inspectors in the Law Enforcement and Control—to cover the whole country; they are not capable of properly handling all investigations. Third, the act of "offering" pirate product for commercial sale should be sanctioned with criminal penalties (currently, a sale has to be completed).

Criminal code: The criminal code also needs to be amended. It should make clear that possession of infringing materials, including the possession of the equipment used to make infringing material, could result in criminal sanctions. Much to the concern of the copyright industries, the Ministry of Justice has started drafting amendments to Criminal Code (44/53) that would change the current penalties to a substantially lower level. Prison sentences would be reduced to a maximum of only two years (compared to the current five years foreseen in the Copyright Act). Prison sentences foreseen for "normal" property theft in the Romanian Criminal Code are up to ten years. Lowering the penalties for intellectual property theft to a mere and obviously non-deterrent two years is against the principles set out by the TRIPS Agreement and would indicate that the Romanian legislature does not even remotely consider intellectual property theft a serious crime.

Substantive copyright protection: The 1996 law continues to contain several deficiencies. New international norms in the digital age have been scripted since the law's passage, and further amendments are needed.

- There are no express provisions in the copyright act to actually provide for civil *ex parte* search orders, as discussed above and as required by TRIPS. The government of Romania refers to Civil Code provisions (Article 239) as providing equivalent protections but these are neither *ex parte* provisions *per se*, nor could they work effectively in any case at securing evidence. No civil searches were executed in 2002, so there is no effective protection.
- With respect to the ownership by and rights of audiovisual producers, one provision currently requires cinemas to get prior authorization from and to compensate authors of music performed in publicly exhibited films; this is unusual and hinders film distribution in Romania. A second provision unfairly divides performance royalties and will further hurt the film distribution business, and will have an adverse market impact.

- As a WTO member, Romania must make it clear in its legal system that it is providing full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement.⁴
- Amendments are needed to effectively implement Romania's obligation under the WIPO treaties (see discussion, below).

WIPO Treaties

Romania officially ratified both of the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), by depositing its instruments of ratification with WIPO in February 2001. This was a very positive step. The ratification and eventual implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce. Efforts are now underway to make all of the necessary amendments to the laws of Romania to comply with the treaties.

The copyright law does correctly provide 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. For example:

- Adopting a more complete right of communication to the public, including a right of making available; and provisions to allow rightsholders to enforce their rights against the circumvention of technological protection measures.
- Providing appropriate technological protection measures (including remedies and sanctions). These are tools that rightsholders 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.
- Protecting "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.

⁴ 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 in the market. The WTO Agreement clearly requires 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.