

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Romania remain on the Watch List in 2004.

Overview of key problems: Ongoing enforcement and legal deficiencies continue to result in high piracy levels in Romania. Optical disc piracy is widespread in Romania; pirated products enter from Russia and the Far East, often via the Ukraine border and the Bucharest airport. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Romanian anti-piracy efforts often remain uncoordinated and a low priority for the police, prosecutors and courts, and their 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. The police have been conducting raids but prosecutors usually refuse to follow through and fail to press for deterrent sentences for those cases they do prosecute. This is a major stumbling block to successful and effective criminal enforcement. In fact, a Romanian court of appeal has dismissed a case in which the recording industry was awarded damages for infringement. Also, the public prosecutor's office dropped a case citing "lack of social harm," even where damages to the business software industry were over US\$100,000. The industries are also very concerned about the dangers working in environments where corruption exists.

Romania still does not afford viable civil *ex parte* search remedies in its copyright law or in practice, a clear TRIPS violation. ORDA (the Romanian copyright office) 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. More human and financial resources should be allocated to support ORDA's activities. Border enforcement must also be made a priority because pirate products easily enter the country for sale in the local market. Constant staff changes in the enforcement agencies have contributed to a general lack of efficiency. The prosecutor assigned to IPR matters with the General Prosecutor's Office attached to the Supreme Court of Justice was replaced four times in 2003. At the police level, there are unexpected "promotions" of successful enforcement agents to totally unrelated departments. All of these issues have seriously undermined the effectiveness of numerous industry- and U.S.-funded training programs.

Actions which the Romanian government should take in 2004

Enforcement

- High-level government officials must instruct the enforcement agencies to make piracy a priority, order the involvement of the anti-organized crime department and set goals for

tough anti-piracy enforcement actions and sanctions. The Prime Minister, along with the ministers of Interior and Administration, Finance, Culture and Religious Affairs, and Justice must tackle piracy in a cohesive manner to get on-the-ground enforcement results. The enforcement agencies must then commit to undertake these goals with clear lines of authority for copyright enforcement among the competing agencies.

- Encourage the economic police to increase substantially the number of anti-piracy raids, to extend their actions to the distribution networks supplying illegal street sellers and to bring more cases to the prosecutors.
- Provide training to police officers in order to improve the quality of the files presented to the prosecutors. Instruct police to impose administrative fines in small-scale piracy cases, as opposed to opening criminal files, in order to avoid prosecutorial bottlenecks. Also ensure that the police officers trained in IPR matters are not arbitrarily re-assigned to other matters, so that training efforts undertaken are not futile and resources are not wasted.
- Have the government and high-level officials in the Ministry of Interior and Administration clearly state that the IPR enforcement is a priority for the police. During 2003, various internal orders were transmitted by which IPR case results were not taken into consideration when evaluating police officers' annual performance.
- Ensure that the Prosecutor General refrain from constantly changing the prosecutor responsible for coordinating intellectual property cases (four in less than two years) and finally start appointing the promised IPR specialized prosecutors in each district. The Prosecutor General should also direct prosecutors to move criminal cases to their completion and push for deterrent penalties, especially directed at large-scale operations and repeat offenders. The list of such prosecutors should be made public, so that the rightsholders can contact the prosecutors for specific cases. Prosecutors should also be instructed to, as a rule, keep the rightsholders informed of the outcome of their criminal investigations and their decisions. Provide training for these IPR prosecutors.
- Improve border enforcement by having customs officials actually use their *ex officio* authority to make inspections and seizures and encourage continued consultations and coordination with rightsholders' organizations.
- Ensure that ORDA refrains from providing hologram permissions to highly suspect companies and increases its inspections and verification of the use of holograms.
- Imposing deterrent, non-suspended sentences (in criminal courts) and fines (in both criminal and administrative courts) and stop dismissing cases involving repeat offenders.
- Establish a system at the borders to track the importation of blank optical media products, especially given the prevalence of blank CD-Rs used to burn infringing content.

Legislation

- Revise 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).
- Amend the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties' obligations.
- Amend the copyright law to provide a clear legal basis for civil *ex parte* search authority, a TRIPS requirement especially critical to the business software community.
- Abolish the "musical stamp" tax.
- Introduce and enforce a general prohibition of street sales of optical discs.

- Refrain from introducing a general private complaint obligation for the prosecution of copyright crimes.
- Refrain from introducing changes in the criminal code that would lower the level of penalties, including imprisonment provided for copyright infringements.
- Refrain from over-regulating and interfering with the collective management of rights.

ROMANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level								
Motion Pictures	8.0	35%	6.0	55%	6.0	65%	6.0	60%	6.0	60%
Records & Music	18.0	80%	15.0	75%	14.0	70%	11.0	55%	25.0	85%
Business Software Applications ²	NA	NA	20.7	70%	15.7	75%	17.1	77%	9.8	81%
Entertainment Software	NA	NA	35.2	97%	NA	95%	6.9	91%	NA	NA
Books	2.0	NA								
TOTALS ³	NA		78.9		37.7		43.0		42.8	

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. In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Romania.⁴ In December 2003, President Bush asked the U.S. Senate to approve a protocol between the U.S. and Romania to preserve the BIT after Romania joined the European Union in 2007.⁵

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$16.4 million and levels of 72% were identified as preliminary. BSA's revised 2002 figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Romania, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Romania (including U.S. publishers) and (b) losses to local distributors and retailers in Romania.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Romania were \$74.6 million. IIPA's revised loss figures are reflected above.

⁴ For more details on Romania's Special 301 history, see IIPA's "History" appendix to filing, at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. With respect to the GSP program, during the first 11 months of 2003, \$103 million worth of Romanian goods (or 15.3% of Romania's total exports to the U.S. from January to November 2003) entered the U.S. under the duty-free GSP code, representing a 7.8% increase over the same period in 2002.

⁵ U.S. State Department, "U.S.-Romania Investment Treaty Protocol Sent to U.S. Senate," Dec. 9, 2003, available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=December&x=20031209163752osnhojac1.789492e-02&t=xarchives/xarchitem.html>.

COPYRIGHT PIRACY IN ROMANIA

The Growing Problem of Optical Media Piracy

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. A large part of the pirate music CD material is coming from Russia and is shipped through Moldova and Ukraine. The share of CD-Rs containing illegal music in the Romanian pirate market is steadily growing. 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 Serbia and Montenegro border, Calmafat and Giurgiu on the Bulgarian border, and Albita, Giurgiulesti and Iasi on the Moldovan border. 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 Romanian (especially in Bucharest and its vicinity) from Ukrainian master CDs. The Entertainment Software Association (ESA) continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) continue to be produced in or shipped mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

Local production: Local pirate CD production is not the main problem in Romania. There is one known optical disc plant. There is no local blank CD-R production. Rather, blank CD-Rs are imported, and there has been an increase in the volume of illegal local CD-R burning of copyrighted products in Romania. 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. However, establishing a system at the borders to track the importation of blank optical media products might be a valuable effort.

High piracy levels continue across most industry sectors.

The Entertainment Software Association (ESA) 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 entertainment software for console platforms are primarily silver CDs, imported from Russia; while pirated cartridge-based videogames continue to be shipped 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 is severely damaging the ability of entertainment software companies to develop the console market in the country. Pirate entertainment software is sold in specialized shops, kiosks, Internet sellers and outdoor markets.

The largest segment of the consumer market for entertainment software is young people who prefer to buy pirated games in CD-R format. Two years ago, the internet cafés posed the biggest challenge.⁶ There are still several thousand Internet cafes in Romania, of which only about 5% have licenses from entertainment software publishers; the rest are using either illegal product or non-licensed product. Some companies have been taking enforcement actions

⁶ Eryka Lang, "PC games market, invaded by pirates," Dec. 30, 2003, available at www.expres.ro/afacerti/?news_id=141534.

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. 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

The recording industry faces the increasing problem caused by local CD-R burning of its recorded music. Another constant problem is the large amount of illegal material (CDs and cassettes), mostly from Russia and previously produced inventory from Ukraine, which continues to enter Romania due to weak border controls. 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 piracy level for international repertoire alone is higher at approximately 80%, representing trade losses for the U.S. industry of around \$18 million. The estimated overall piracy level for sound recordings (local and foreign) is 55%. 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. The recording industry reports some successes at the seizure level, but very 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 and courts for “lack of social harm,” the absence of a deterrent threat against pirates from the Central Economic Police and the lack of involvement of the anti-organized crime department mean that the music pirates in Romania, most of whom are part of organized criminal syndicates, have little fear of being punished for their illegal activities.

The Business Software Alliance (BSA) continues to report high levels of business software piracy in Romania. Hard-disk loading piracy remains a serious problem, as police refuse to take any concerted 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. Although the number of prosecuted cases and the number of convictions increased, most public prosecutors refuse to prosecute software infringement cases for lack of social harm, and the courts have never sent a person to jail for software copyright infringement. Widespread use of unlicensed software in both private and public sector remains a concern. The Romanian government should continue down the path toward 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.

The motion picture industry reports that optical disc piracy is increasing, with product entering Romania from the Far East and Russia via the border with Ukraine and through Bucharest airport. According to the MPAA and its local anti-piracy association ROACT, DVD piracy has increased to a level of over 75% of total disc sales, sold primarily via Internet sites and street markets. Pirate optical discs (DVDs, CD-Rs and DVD-Rs) generally are sold via the Internet or press advertisements and delivered by mail or personally, on the streets. The estimated OD piracy rate for audiovisual works in Romania is over 40%. Internet cafés, which are present all over Romania, also allow their customers to download and burn movies. The

⁷ Eryka Lang, “PC games market, invaded by pirates,” Dec. 30, 2003, available at www.expres.ro/afacerti/?news_id=141534.

local anti-piracy organization, ROACT, is gathering information to organize raids on Internet cafés and private locations. Due to ROACT's good collaboration with the Transport Police and the Bucharest police, about 16,000 DVDs were confiscated in 2003. ROACT is also increasing its focus on border areas and airports. A Romanian stewardess was caught by Customs in January delivering over 1,500 pirate DVDs from the Far East to a major dealer at Bucharest airport. The level of videocassette piracy in Romania has dropped to about 30%. Most blatant retail piracy has been eliminated. The most popular distribution methods are now Internet sites and street markets. There are over 400 regular markets in Romania and 250 other markets open at various times. Cable piracy outside Bucharest continues to be a problem, even though the level of cable piracy has fallen over the last three years and is now estimated to be 10% of that market. Many 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. MPAA estimates the combined OD/video piracy rate in Romania at 35%. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania have increased to \$8 million in 2003.

MPAA also notes that falling prices for Internet connections and DVD players have generated a proliferation of pirate Internet sites advertising pirate DVDs (from Russia and the Far East) and other pirate optical discs. As ROACT has blocked access to several well known sites offering movies and/or subtitles, the pirates are increasingly seeking hosting by foreign Internet Service Providers (ISPs). ROACT plans to initiate a collaboration program with the Ministry of Communications and Information Technology to develop law enforcement efforts aimed at e-commerce and Internet crimes. There are 40 major ISPs affiliated with the Romanian ISP Association. With only one exception, all ISPs requested by ROACT to block URLs have responded positively. ROACT enjoys good cooperation with about half of the country's ISPs.

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 2003.

COPYRIGHT ENFORCEMENT IN ROMANIA

Despite regular reminders from Romania's trading partners and the private sector, as well as ongoing training under U.S. and E.U. assistance programs, anti-piracy efforts remain a low priority for Romanian prosecutors and the courts remain extremely reluctant to impose deterrent penalties. For many years the 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. Although the police have been conducting raids, prosecutors have failed to push for deterrent sentences. ORDA needs to improve its interagency coordination skills, and its monitoring of illegal products in the marketplace; the Romanian Government should allocate more human and financial resources to support ORDA's activity and efforts in enforcing the law. Constant staff changes within ORDA, the National Police offices and Customs have contributed to an overall lack of efficiency. The Romanian Government, in December 2003, adopted a national strategy plan in the field of intellectual property, but there have been no concrete results. The copyright industries look forward for tangible progress in 2004.

Criminal enforcement in Romania is ineffective.

Poor interagency cooperation and communication: 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 Anti-Fraud Crimes Unit (the economic police), and ORDA to undertake the proper criminal enforcement activity. 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 is only a handful of police officers assigned to IPR protection. Staff changes as well as internal organizational changes within government agencies with IPR responsibilities have contributed to an overall lack of efficiency. Resource scarcity is true in all of the law enforcement organizations, including the National Anti-Fraud Crimes Unit, the financial police, the ONC (National Film Office, formerly the CNC), as well as the local police, prosecutors, and the judiciary.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Ministry of Culture. ORDA needs to improve its interagency coordination skills, its willingness to work with all rightsholders' groups, its verification and enforcement of the hologram system (see discussion on holograms, below), and its monitoring of illegal products in the marketplace. ORDA also continues to face severe internal and budgetary problems, which is hurting its ability to work effectively. The current legislation considers ORDA the only authority in copyright matters in Romania, resulting in many files being rejected because ORDA investigators (of which there are 10-20 for the entire country) were not present at the raids. The recording industry reports good news in that ORDA did not actively pursue in 2003 its prior policy aimed at excluding the local recording industry association (UPFR) from joint enforcement actions with the police.

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. Unfortunately, despite such cooperation, piracy levels remain high. Another concern is that raids are not being initiated against larger companies and organizations involved in piratical activities. The business software and entertainment software industries report a positive note in that the National Institute for Crime Research and Prevention within the police has worked with both ORDA and the National Institute for Criminology in various copyright infringement actions.

In 2003, various internal orders regarding the criteria against which the effectiveness of police officers is measured did not include intellectual property actions. Including intellectual property criteria, both the quality and quantity of cases investigated, should become a criteria for evaluation so as to provide incentives for police to conduct more raids.

Few prosecutions and many dismissals: Romanian prosecutors remain far too ready to drop copyright cases. Although the number of prosecuted IPR cases increased in 2003 and some previously dismissed cases were re-opened, prosecution continues to be a major hurdle. For example, the recording industry notes that despite a great number of music piracy cases brought last year, the prosecutor in Bucharest only pursued one criminal case in 2003. There continues to be a lack of prosecutorial knowledge about copyright cases in more rural jurisdictions. The motion picture industry (ROACT) reports that 10 criminal files have been sent to the courts in 2003, compared with only 1 in 2002. Two convictions were obtained in 2003 that resulted in fines. ROACT initiated 60 criminal cases in 2003.

All industries continue to 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. RIAA reports a typical scenario: A pirate distributor in Bucharest is raided in December 2001 and 2400 pirate optical discs are seized. The estimated damage is US\$34,000 (note: in Romania this represents the equivalent of 400 minimum monthly wages). The case is filed in February 2002 and it took until June 2003 before the prosecutor in question (Bucharest, Sector 6) decided to drop the case for “lack of social harm” (apparently, 400 minimum monthly wages does not represent social harm). A complaint against this decision was rejected in October 2003, and the appeal of that decision is still pending.

At the same time, there has been a number of cases where the prosecutors refused to recognize the validity of the powers of attorney of the rightholders’ representatives, misinterpreting a Criminal Procedure Code provision. BSA also reports that the attitude of prosecutors toward 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 the prosecutor in Bucharest Sector 4 has rejected all criminal copyright infringement files. Another negative phenomenon is the lack of transparency at the public prosecutors’ offices—there are situations in which they fail to communicate their decision in the case to the rightsholders, not allowing them to file a complaint against the decision in due time.

During 2003, the prosecutor in charge of coordinating IPR issues changed four times in a single year. There has been no progress on drawing up a list of prosecutors appointed to be responsible for IPR issues (or, at least, this list has not been communicated to the copyright community). To improve this situation with weak prosecutions, the Prosecutor General’s Office together with ROACT, the Business Software Alliance and UPFR (the local music recording industry group) was developing a program to create specialized prosecutors for IPR matters. However, the industries report no progress on this initiative.

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 low number of cases forwarded by public prosecutors to Bucharest courts; the fact that few cases arise from the customs police; the great reluctance of the Economic Police to take any action beyond simple street sellers of pirated materials against the distribution networks supplying them and the very disturbing fact that, in 2001, the Head of the Police National Inspectorate issued an order prohibiting the Anti-Organized Crime Directorate from getting involved in copyright piracy enforcement. (Note: the U.S. Embassy and Commercial Law Development Program organized an IPR Enforcement conference in Bucharest on February 3, 2004, at which the head of the Police National Inspectorate was supposed to hold a presentation on the importance of combating IPR crime; this official did not attend).

Lengthy court proceedings: Criminal judgments of even minor fines against copyright infringers require a considerable exertion of effort and time in Romania. 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. This unacceptable result occurred despite the fact that the copyright industries in the last three years have begun to receive some cooperation from the police to conduct raids and seizures of infringing product, as well as the support from the public prosecutors in promoting the cases to court.

The recording industry reports an extremely disturbing result in a major case, thus showing the dismal track record of the Romanian judiciary in copyright cases. In March 2002, over 2,700 counterfeit music CDs were seized; the recording industry and the Ministry of Finance filed a request to recover damages from the defendant "Suburbia Sibiu." The first two courts in Sibiu ruled in favor of the record producers (issuing a one-year jail term, awarding US\$38,000 in damages, and requiring the destruction of the seized CDs). However, in October 2003, the Alba Iulia Court of Appeal dismissed the case on appeal. The recording industry cannot take any further action; only the Prosecutor General is entitled under the Criminal Procedure Code to file an extraordinary appeal, and he had not yet done so (as of February 2004).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN ROMANIA: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	198	419	
By ORDA			6
By Police			217
By Customs		0	n/a
Number of criminal files produced (compare with no. of cases actually commenced!)		307	196
Number of (new) cases commenced	60	45	24
Number of defendants convicted (including guilty pleas)	2	74 (in which the rightholders were informed)	
Acquittals and Dismissals (in 2003)		559 (including the ones from previous years still pending)	126
Number of Cases Pending	18	11	7
Total number of cases resulting in jail time	0	11	
Suspended Prison Terms		9	
Maximum 6 months		0	
Over 6 months		2	
Over 1 year		11	
Total Suspended Prison Terms		0	7
Prison Terms Served (not suspended)		0	
Maximum 6 months		0	
Over 6 months		0	
Over 1 year		0	
Total Prison Terms Served (not suspended)		34	
Number of cases resulting in criminal fines	2	34	10
Up to \$1,000		0	
\$1,000 to \$5,000		0	
Over \$5,000		Approx. US\$4,500	
Total amount of fines levied		419	

Civil *ex parte* search authority is still missing.

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. 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 Procedure Code and Criminal Procedure 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. BSA confirms that no civil *ex parte* searches were granted in Romania in either 2002 or 2003.

Stronger Border Enforcement Needed

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. Romanian Law No. 202 of 2000, as modified in 2002, 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. 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.

A National Authority for Control was created at the end of 2003 to include some of the structures of the Customs Administration. No concrete steps against piracy have yet been taken by this authority. In terms of industry cooperation, it should be noted that the recording industry recently signed a Memorandum of Understanding with the National Border Police, and some border actions were taken in the last two months of 2003.

Still Inconsistent Enforcement by ORDA of the Hologram Decrees

In 2000, two decrees were issued requiring the affixation of holograms to certain copyrighted products; the various industries have different views on the usefulness of these hologram decrees.

First, a governmental decree was issued in January 2000 to establish a registration and hologram program for the production and distribution of phonograms. It is administered by the recording industry (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. 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 17,928,781 holograms in 2003, compared to 16,925,552 in 2002. However, the hologram program still did not result in productive monitoring of the production or importation of sound recordings, despite regular calls upon ORDA to improve control of the hologram system. In fact, 2003 saw the occurrence of a new and very unwelcome phenomenon: the purchase and subsequent resale of large quantities of holograms. This totally undermines the effectiveness of the program and ORDA is not taking the action necessary to prevent this from happening. Instead, holograms were placed on illegal products, thus only making enforcement more difficult. ORDA needs to be much more thorough when it checks the background of companies for which it issues holograms. ORDA should be more cognizant of companies ordering excessive numbers of holograms. It 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. The government of Romania should 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.

Second, in August 2000, a decree (a so-called “emergency ordinance”) was enacted, bringing software and audiovisual works under a stickering program; these provisions entered into force on February 1, 2001. This initiative affecting software was dropped, and this stickering decree currently applies only to audiovisual works. However, 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. 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.⁸ The Ordinance should be revised to be consistent with the concerns of the motion picture and software (both business and entertainment) industries. The BSA remains opposed to extending the stickering regime to business software.

⁸ The hologram 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 move forward.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996

Reports indicate that in 2003, the Romanian government began its process to amend its 1996 Copyright Act. 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. The 1996 copyright law needs to be amended to reflect comprehensive integration of TRIPS and the WIPO treaties' obligations into national law. Local industry colleagues inform IIPA that ORDA has prepared the amendments' package to the copyright law, which were introduced to the parliamentary Cultural Committee in 2003. This Committee has held several discussions on the draft amendments together with interested parties from private sector. After the discussions, the Cultural Committee will prepare the draft amendments for the discussions in the parliamentary Plenary. Although this copyright package is at the beginning of its legislative journey, the industries note already some negative and seriously concerning developments with the draft law.

For example, the recording industry reports that ORDA has designed two following proposals: (a) to replace the phonogram producers' exclusive broadcasting, cable retransmission and communication to the public rights with the right to remuneration, and (b) to establish in the law that phonogram producers and performers should operate through one collecting society. These proposals are unreasonable and clearly frustrate the still fragile collective management of neighboring rights in Romania and, therefore, the Romanian Government should refrain from these proposals. Furthermore, the Romanian Government should also refrain from the cable operators' initiative to introduce the following amendments to the Copyright Law: (a) to establish one collecting society for all rightsholders for collecting royalties from the cable retransmission, and (b) to exclude cable operators from the obligation to pay royalties for cable retransmission and keep this obligation only for cable TVs.

Examples of some of the problems (and the solutions needed) in the current Romanian copyright law follow:

- Although the current copyright law does correctly provide that the right of reproduction covers temporary copies, it is limited to only computer programs, so it must be amended to include all works in order to provide the necessary protections against digital piracy.
- There are no express provisions in the copyright act to actually provide for civil *ex parte* search orders (as required by TRIPS). The government of Romania refers to Civil Procedure 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.
- Adopt a more complete right of communication to the public, including a right of making available.
- Provide 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.

- Protect “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.
- Make clear that the law provides full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement.⁹
- Delete the maximum levels of the statutory license fees for the use of rights as set in Article 133(1) of the current Copyright Law. The international rule is that the license fees are subject to negotiations between rights holders (or their collecting society) and the users.
- 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.

Turning to enforcement-related reform, the Copyright Act of 1996 did improve certain enforcement measures, including: *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 defines unauthorized satellite and cable retransmissions as copyright infringements. The Act also strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian ROL to 10 million ROL (US\$6 to \$307) and imprisonment of one month to five years (Articles 140-142). 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 weakened by inflation and are now too low to effectively deter piracy, particularly by criminal organizations in Romania. The criminal procedure code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed.

The copyright industries have advocated that 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. Rightsholder industries accept ORDA’s authority in this field, but taking into consideration that they have only 62 people total (including the general director) and only one office in Bucharest, insist that the police retain general authority in the area of copyright infringement. Third, the act of “offering” pirate product for commercial sale should be sanctioned with criminal penalties (currently, a sale has to be completed). In recent years, the local copyright industry representatives have submitted proposed amendments to extend

⁹ For the recording industry, the most serious, historical legal deficiency—lack of protection for pre-existing materials—was corrected when Romania acceded to the Geneva Phonograms Convention (effective October 1, 1998). 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.

copyright enforcement activities to organizations other than ORDA to officially act in IPR enforcement activities. These proposals have been ignored (e.g., they were excluded from the two “emergency ordinances” — administrative decrees — passed in 2000).

Criminal Code

In early 2003, the Ministry of Justice was preparing to amend the Criminal Code in ways which might undermine existing penalties (for example, lowering jail sentences down to 2 years instead of the 5 years in current law). Reports indicate that the possibility of such deleterious amendments remains.

The Romanian criminal code 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.

The current wave of amendments to the copyright system also threatens to include the introduction of a private complaint as a pre-condition for starting enforcement action and subsequent prosecution. This would constitute a very serious negative development in a system that is already affected by a lack of law enforcement initiative, not to mention the continued poor performance of the judiciary. Finally, the recording industry also notes that Law 543/2002 a full pardon for prison sentences of up to five years (even for suspended sentences) as well as the fines pronounced by courts. This amnesty law applies to all convictions issued through April 3, 2003.