

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2005.

Overview of Key Problems: Poor enforcement remains an ongoing problem resulting in high piracy levels in Romania. Optical disc piracy is widespread; pirated products enter from Russia and the Far East, often via the Ukraine border, and are subsequently found in all major cities. CD-R piracy is growing rapidly and is controlled by organized criminal groups. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Also in 2004 for the first time, high quality pirated software was discovered, entering Romania through its western border. Romanian anti-piracy efforts are often uncoordinated and a low priority for the police, prosecutors, and courts. For years the Romanian government has pledged to raise the level of commitment for criminal cases to target large-scale operations and impose deterrent penalties. Instead, the police conduct raids, but largely against small targets, and prosecutors often refuse to follow through with indictments or fail to press for deterrent sentences in those cases they do decide to prosecute. The software industry reported fewer dropped cases in 2004, and, in a positive legal reform development, copyright amendments added clear civil *ex parte* search authority, a TRIPS requirement. IIPA looks forward to decreases in software piracy levels (along with new criminal penalties) if these provisions are properly implemented. Other copyright industries were less sanguine about new enforcement provisions because they contradict existing provisions (which will confuse the courts), and contain other provisions which over-regulate collective management. The copyright industries are generally frustrated with the constant reassignment of police, including those trained by the industries, and often after taking action against pirates.

In 2004, the Romanian government published a national intellectual property strategy which seeks to strengthen local law by harmonizing it with European Union and international standards, enhancing the government's administrative capacity to protect IPR, and raising public awareness of the importance of IPR.¹ Border enforcement must be made a priority because pirate products easily enter the country for sale in the local market. All of these issues have seriously undermined the effectiveness of numerous industry and U.S.-funded training programs.

¹ The National Strategy is available at http://www.osim.ro/strate_en.htm, or in Romanian at <http://www.orda.ro>.

Actions which the Romanian Government Needs to Take in 2005

Regarding Enforcement

- High-level government officials must instruct 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.
- Encourage the economic police (including anti-fraud departments) to increase substantially the number of anti-piracy raids especially against larger-scale targets and to extend their actions to the distribution networks supplying illegal street sellers, and bring more cases to the prosecutors.
- Provide training to police officers in order to improve the quality of the investigation 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 those 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.
- Ensure that the General Prosecutor directs prosecutors to move criminal cases to their completion and push for deterrent penalties, especially aimed at large-scale operations and repeat offenders. Some positive steps undertaken in 2004 need to continue: appointing lead prosecutors for IPR enforcement in each county, authorizing prosecutors with executive powers, and establishing a special IPR department in the General Prosecutor's office.
- 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.
- ORDA needs to focus its resources on a number of specific areas—in particular on proper and effective enforcement of the hologram decrees and providing expert reports. In addition, ORDA needs to ensure that it makes more thorough checks on companies before providing holograms, and that it substantially improves its inspections and verifications of the end-use of holograms.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are too overburdened to handle IPR cases.
- Impose 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.

Legislative Activity

- Further amend the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties obligations (and obligations arising from EU directives). This includes revising the Romanian copyright law amended effective August 1, 2004 (No. 285/2004) to delete the counterproductive provisions regarding enforcement and collective management of rights (noted later in this report).
- 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).
- Abolish the "musical stamp" tax.
- Introduce and enforce a general prohibition of street sales of optical discs.

- Refrain from introducing changes in the criminal code that would lower the level of penalties, including imprisonment provided for copyright infringements.

ROMANIA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2000-2004²										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	8.0	55%	8.0	35%	6.0	55%	6.0	65%	6.0	60%
Records & Music	18.0	78%	18.0	80%	15.0	75%	14.0	70%	11.0	55%
Business Software ³	32.0	74%	28.0	73%	20.7	70%	15.7	75%	17.1	77%
Entertainment Software ⁴	NA	65%	NA	NA	35.2	97%	NA	95%	6.9	91%
Books	2.0	NA								
TOTALS	60.0		56.0		78.9		37.7		43.0	

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.⁵ 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 2007.⁶

COPYRIGHT PIRACY

The Growing Problem of Optical Media Piracy

The copyright industries in Romania are increasingly 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

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Romania, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$49 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ For more details on Romania's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>. During the first 11 months of 2004, \$199 million worth of Romanian goods (or 25.3% of Romania's total exports to the U.S. from January to November 2004) entered the U.S. under the duty-free GSP code, representing a 93.1% increase over the same period in 2003.

⁶ 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=20031209163752osnohojac1.789492e-02&t=xarchives/xarchitem.html>.

pirate music CD material comes from Russia, shipped through Moldova and Ukraine, and is sold throughout Romania. The share of CD-Rs containing illegal music in the Romanian pirate market is rapidly growing. The main entry points for pirate material are Siret and Dornesti (by truck and train) on the Ukrainian border, Calafat and Giurgiu on the Bulgarian border, and Albita, Giurgiulesti and Lasi on the Moldovan border. In 2004, the recording industry identified two cases of illegal transshipment through Romania where pirate product was shipped from Bulgaria to Moldova. In both cases the quantity of illegal product exceeded 100,000 units; this appears to be a growing trend. Another problem, relatively recent, is the increasing availability of high quality pirate copies imported to Romania by the organized criminal groups from the former Soviet republics (CIS), including Moldova. The Entertainment Software Association (ESA) continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) are produced in or shipped mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

Local pirate optical disc production is not the main problem of the copyright industries in Romania. There is, however, one known optical disc plant in Romania; the plant has two lines and an annual capacity of 7 million discs per year. 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 primarily comprises 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.⁷ Internet café piracy remains a problem, although there has been some improvement in the café situation because the police have cooperated and stepped up their enforcement efforts directed against unlicensed cafés. A few ESA companies have taken enforcement actions against smaller establishments, some of which have resulted in settlements. Online anti-piracy efforts have also been undertaken by companies sending takedown notices to Romanian Internet service providers, but there are no estimates as to the compliance rate at this time. Despite these efforts, Internet piracy continues to grow. 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.

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

The recording industry faces the constant problem of large quantities of illegal material (CDs and cassettes) continuing to enter Romania due to weak border enforcement, from Russia as well as previously produced inventory from Ukraine. 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 78%, representing trade losses for the U.S. industry of around \$18 million. The estimated overall piracy level for sound recordings (local and foreign) is 52%, which is down slightly from 2003. 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 is increasingly confronted with problems caused by local CD-R burning of recorded music. Illegal CD-Rs are burned (and converted to MP3 files) in private apartments. The pirate catalogue is then advertised on the Internet and distributed via regular postal services upon individual order, or physically distributed by network of youngsters (underage to avoid prosecution) in markets and commercial zones controlled by organized criminal groups. Payment is made via postal service due on delivery. Prices of these CD-Rs vary a great deal and range between 10% and 90% of the genuine product. Prosecution of these illegal traders is extremely difficult due mainly to privacy laws, since enforcement authorities cannot enter private premises without a court order. Without jeopardizing privacy rights, some simplification of the procedures for searches is needed, perhaps in the current package of amendments to the copyright law. An emerging problem is the uploaded and downloaded of files on the Internet via computers in Internet cafés; however, it is estimated that illegal file-sharing is currently low overall. In 2004, the recording industry identified 315 websites containing illegal files and offering illegal CD-Rs for sale. Of these, 160 are based on servers of Romanian ISPs. The music industry (UPFR) contacted or sent cease and desist notices to these websites and was successful in getting the content removed, or the sites closed down after the notification.

The recording industry reports a small increase in 2004 in the number of raids undertaken, 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 competence 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. Furthermore, the recently amended copyright law provides that illegal distribution cases should be subject to administrative proceedings and a fine — which needs to occur twice before a case can be recognized as a criminal action. Thus, the new amendments make it harder to deter crimes; plus, the system does not have any technological set-up or registry capable of monitoring administrative infringements, so it is unlikely to work.

Despite many positive legislative developments in 2004, the Business Software Alliance (BSA) continues to report high levels of piracy in Romania. Computer shops continue to install unlicensed software on PCs sold to customers (known as “hard disk loading”); the police have only recently begun to take action against this form of piracy. To date, only a few HDL targets have been raided. In principle, the police continue to focus on small companies suspected of using unlicensed software (known as “end-user” piracy). However, larger end-user targets remain completely safe from enforcement. Internet piracy (reselling CD-Rs) is increasing, with online advertisements and potential customers submitting orders via e-mail, or it is operated

through websites promoting pirated software for downloads. Although the number of prosecuted cases and convictions has increased, there are, unfortunately, still several public prosecutors who refuse to prosecute software infringement cases because there is a “perceived lack of social harm.” BSA is very pleased to report that the Romanian enforcement agencies are finally starting to make progress with reseller enforcement. Further, BSA praises the government for taking significant steps to legalize its own software use and reports that government ministries have undergone training to develop software asset management policies to promote legal software use within government entities.

The motion picture industry (MPA) 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. Additionally, the motion picture industry reports that Poland has become a new source of pirate DVD-Rs. According to the MPA, DVD piracy has increased to a level of over 80% 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. Internet cafés, which are present all over Romania, also allow their customers to download and burn movies. The local anti-piracy organization, ROACT, is gathering information to organize raids on Internet cafés and private locations. Due to ROACT’s collaboration with the Transport Police and the Bucharest police, about 110,000 DVDs were confiscated in the first six months of 2004. ROACT is also increasing its focus on border areas and airports. The level of videocassette piracy in Romania has dropped to about 20%, and 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 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. MPA estimates the combined OD/video piracy rate in Romania at 55%. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania have increased to \$8 million in 2004.

MPA 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 almost 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 2004.

COPYRIGHT ENFORCEMENT

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 and courts have failed to impose such sentences. The Romanian government should allocate more human and financial resources to support ORDA's activity (which needs to do a better job of monitoring illegal products according to some industries), and efforts in enforcing the law. Constant staff changes within 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.

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. Reports indicate, however, that in 2004, the General Prosecutor's Office kept a prosecutor (appointed in 2003) to coordinate IPR cases, and did appoint specialized IPR prosecutors in each district. The central IPR prosecutor was very active in various training programs organized with the U.S. Embassy in 2004. However, very few IPR cases were actually prosecuted—the recording industry has noted only one significant case concerning parallel import in Deva. In September 2003, the police raided the premises of a company TopTrade and seized 10,400 illegal CDs and audiocassettes with international repertoire. The pirate product originated from Austria; its destination was unclear. The case is ongoing.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the National Control Authority. ORDA needs to start using its resources in a concentrated manner by refocusing its activities on a limited number of specific areas, in particular on proper and effective enforcement of the holograms' decrees as well as providing expert reports. ORDA reports that it has increased its staff size to 50 or 60 persons with the aim of being responsible for everything relating to IPR. This is an impossible task, and one which diminishes ORDA's effectiveness. Instead of being effective in copyright enforcement, ORDA has created an unnecessary bureaucracy frustrating the relevant enforcement authorities and copyright organizations. The recording industry reports that ORDA continues to pursue its prior policy aimed at excluding the local recording industry association (UPFR) from joint enforcement actions with the police.

ORDA reports that through September 2004, it took a total of 278 actions to combat sound recording and audiovisual piracy, down from 288 in 2001, but up from 240 in 2003. Similarly, 23,179 pirate products were seized through September 2004, down from 24,294 in 2001 but up from 15,310 in 2003. A grand total of 9.4 billion Romanian lei (ROL) (US \$324,696) in fines were imposed through September 2004, up from 6.8 billion ROL (US\$234,886) in 2003, and 5.8 billion ROL (US\$200,344) in 2001.

ORDA likewise reports that in April 2004, it publicly destroyed 60,000 pirated products seized by Romanian authorities in 2003. In November 2004, media reported that over 150,000

pirated CDs and DVDs seized by authorities through October 2004 and containing music, films, computer software and games, were destroyed in Bucharest at the Obor market.⁸ The business software industry reports that in 2004, ORDA did undertake raids against street pirates resulting in misdemeanor fines (and favorable public awareness on piracy). However, since ORDA does not involve the copyright industries in its actual raids, there is little additional information available on the specifics of its actions. The industries do report considerable delays by ORDA in preparing expert reports—anywhere from 3 months to 14 months, which delays criminal enforcement proceedings.

Police conduct 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 (although raids usually only take place after industry complaints). Unfortunately, despite such cooperation, piracy levels remain high and raids are not being initiated against larger companies and organizations involved in piratical activities. Police ineffectiveness is caused by several factors: (1) police are under-equipped and under-financed; (2) internal reassignments of personnel are high, diminishing the effectiveness of training; (3) inconsistent anti-piracy activity; (4) prosecutorial bottlenecks hampering follow-up of police actions (undermining police motivation); and (5) a centralized and burdensome enforcement bureaucracy created by ORDA, which confuses and undermines police activity. Last, it is unfortunate that the specialized anti-organized crime group in the police (created in 2000) has reportedly been instructed to limit its actions against copyright crime.

In 2004 (as in 2003) the police continued to exclude IPR actions among the criteria they used in internal orders to gauge their effectiveness. The copyright industries again request that intellectual property criteria be included, both the quality and quantity of cases investigated, as a criteria for police evaluations, 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 2004 for the software (but not the music) industry, 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 as well as in other regions (e.g., Craiova and Timisoara) did not pursue any cases in 2004. Ineffective prosecution is caused mostly by procedural restrictions, such as limited search and investigative authority, and the need for a court ruling before undertaking most steps. Further, there continues to be a lack of general prosecutorial knowledge about copyright cases and piracy. Against this backdrop, the small number of cases, their constant dismissal and the overall absence of criminal convictions is easily explained. Perhaps the large number of training programs in 2004 will yield better results in 2005. The business software industry reports that despite a high number of police raids against end-user companies, there has to date been only a single case sent to a court in Bucharest. The motion picture industry (ROACT) reports that ten criminal files have been sent to the courts in 2003, compared with only one in 2002. Two convictions were obtained in 2003 that resulted in fines. ROACT initiated 60 criminal cases in 2003.

BSA 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

⁸ Medifax News Brief Service, "Thousands pirate CDs and DVDs destroyed in Obor market" (Nov. 3, 2004).

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, (although such communication is mandatory, according to the Criminal Procedure Code), thus not allowing them to file a complaint against the decision in due time.

As noted, the prosecutor charged with IPR (Mr. Dragos Dumitru) retained his position in 2004 and has been lauded by the industries for appointing, as promised, at least one IPR prosecutor in each county and training these prosecutors, and notably re-opening some of the previously closed files (i.e., cases dismissed by other prosecutors for lack of social harm). This positive trend needs to be enhanced: Mr. Dumitru needs to be vested with sufficient executive power to enforce IPR cases; he currently lacks the necessary authority — for example, he could not re-open the files himself, but merely proposed such. Despite the prosecutor's efforts, many obstacles remain — most notably a general attitude that IPR cases are not a priority (i.e., do not cause “social harm”).

Concerns over corruption: Corruption among enforcement officials remains a severe problem in Romania. Moreover, there is minimal prosecution of corrupt acts. Indications 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, or against other (larger) targets.

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 several years have begun to receive additional cooperation from the police to conduct raids and seizures of infringing product, as well as some support from public prosecutors in promoting the cases to court, and in spite of recent amendments to the law (which increase penalties for software piracy offenses).

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. Unfortunately, the Prosecutor General claimed the decision to be in compliance with procedural rules and refused to file an extraordinary appeal, which is the proper next step under the Criminal Procedure Code. The recording industry could not take any further actions and lost the case.

Another important case illustrating the complete lack of understanding and the arbitrary approach of some prosecutors to copyright crimes, is a case launched on July 5, 2002 after police raided a warehouse in Slatina in Olt County. UPFR (the local music industry's anti-piracy

organization) filed a claim for approximately US\$157,800 in damages. On February 21, 2003, the Prosecutor's Office in the Olt Court dismissed the case based on the incomprehensible argument that the pirate products were found in a warehouse, not in a specialized music shop! UPFR filed an immediate appeal (complaint) and the criminal case was reopened. However, in October 2004, the Prosecutor's Office weighed in by noting that the prosecution had been fully compliant with procedural rules (in favor of the defendant). UPFR filed a subsequent complaint to the more senior Prosecutor's Office at the Craiova Appeals Court, and is currently awaiting a response.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 ROMANIA		
ACTIONS	BUSINESS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	372	
BY ORDA	NA	340
LED BY POLICE	372	5,778 (for all industries)
LED BY CUSTOMS	0	7 (thru June)
NUMBER OF CRIMINAL FILES PRODUCED (COMPARE WITH NUMBER OF CASES ACTUALLY COMMENCED)		
NUMBER OF (NEW) CASES COMMENCED	245	150
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	42	8
ACQUITTALS AND DISMISSALS	~70	1
NUMBER OF CASES PENDING	~500	4
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	12	2
SUSPENDED PRISON TERMS	12	2
MAXIMUM 6 MONTHS	8	2
OVER 6 MONTHS	0	0
OVER 1 YEAR	4	0
TOTAL SUSPENDED PRISON TERMS	All (8 yrs, 7 mos)	2
PRISON TERMS SERVED (NOT SUSPENDED)	0	0
MAXIMUM 6 MONTHS	0	0
OVER 6 MONTHS	0	0
OVER 1 YEAR	0	0
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	0	0
NUMBER OF CASES RESULTING IN CRIMINAL FINES	30	6
UP TO \$1,000	30	6
\$1,000 TO \$5,000	0	0
OVER \$5,000	0	0
TOTAL AMOUNT OF FINES LEVIED	ROL 108.1 million (~US\$3,700)	

Civil *Ex Parte* Search Authority

IIPA applauds the Romanian government for finally adopting copyright amendments, effective August 1, 2004, expressly providing civil *ex parte* search authority. Such a provision is a requirement of TRIPS and especially important for the business software community. With this added capability, IIPA looks forward to seeing strengthened copyright enforcement in Romania, if the provision is properly implemented. To date, no such civil *ex parte* searches have been conducted.

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.

In January 2005, the Customs Administration was transferred from the National Control Authority to the Ministry of Finance. In 2004, a protocol was signed by the business software (BSA), motion picture (MPA) and recording industry (IFPI/UPFR) adopting steps for cooperation in a Memorandum of Understanding with the National Control Authority. No concrete steps were reported to have resulted from this agreement.

Still inconsistent enforcement by ORDA of the Hologram Decrees.

Almost five years ago (in 2000), two decrees were issued requiring the affixation of holograms to certain copyrighted products; the various copyright industries have different views on the usefulness of these hologram decrees.

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 21,168,943 holograms in 2004, compared to 17,928,781 in 2003. 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, in 2003 the industry 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 current manpower focused on 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 is essential that UPFR, the local recording industry group, remain in control of the administration of the hologram program as the recording industry initiated this program and must be permitted to continue to administer it.

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.⁹ 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.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996 Amended in 2004

In June 2004, Romania passed amendments to its 1996 copyright law which sought to bring it into compliance with European Union law¹⁰ and the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonogram Treaty (WPPT), which Romania ratified in February 2001.¹¹ The new law, effective August 1, 2004, seeks to amend a number of deficiencies that IIPA had identified in previous 301 submissions.¹²

The amendments include:

- Within the right of reproduction for works, protection for temporary copies. However, there is an exception for transient copying;

⁹ 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.

¹⁰ Directive 96/9/EC (data bases); Directive 92/100/EEC (renting/lending); Directive 2001/29/EC (copyright directive); Directive 2001/84/EC (resale right directive); Directive 93/98/EEC (term of protection); Directive 93/83/EEC (satellite, broadcasting and cable retransmission).

¹¹ See Law no. 285/2004 for the amendment and supplement of the Law No. 8/1996 on copyright and neighboring rights, published in the Official Journal No. 587/30.06.2004.

¹² For example, see IIPA’s 2004 Special 301 Report on Romania, available at <http://www.iipa.com/rbc/2004/2004SPEC301ROMANIA.pdf>.

- Full reproduction rights for producers of audiovisual works and sound recordings, including for temporary copies;
- Civil *ex parte* search authority;
- An exclusive right of communication to the public, including a right of making available, for works and audiovisual, as well as for sound recording producers;
- Exclusive rental and lending rights for works and for producers of audiovisual works and sound recordings;
- Technological protection measures (including remedies and sanctions). These are tools that rights holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement needs to include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. A new provision in the law provides some anti-circumvention protection, but it is not as comprehensive as it should be for effective enforcement. For example, there are no criminal penalties for the act of circumventing technological protection measures;
- Protection, albeit limited, for “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. However, this provision could be strengthened.

Further reform of the copyright law is still needed in Romania, particularly with respect to

- Transient copying: while the reproduction right now clearly includes temporary copies, the new law exempts from the reproduction right the act of making “transient” copies, that is, copies made in the process of enabling transfers between third parties, or for a lawful use of a copyrighted work, and which have no separate economic value. This provision may weaken enforcement of the reproduction right for temporary copies, which would severely hamper effective protection of rights in the digital environment;
- Exclusive rights for sound recording producers: the new law does not give sound recording producers exclusive rights of broadcasting or communication to the public, but rather a limited right of remuneration;
- Cable retransmission: while unclear, the new amendments appear to exclude cable operators from the obligation to pay royalties for cable retransmission;¹³
- Pre-existing sound recordings: the law needs to clearly provide full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement;¹⁴
- Statutory license fees: the law needs to delete the maximum levels of the statutory license fees for the use of rights as set in Article 131(2) of the new Copyright Law. The international norms are that 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

¹³ See Law No. 285/2004 Article 121.

¹⁴ 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.

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.

- Regarding collective management: the new law forces representative organizations of different right holders to jointly collect for cable retransmission, private copying and public performance royalties and sets a limit of 30% in administration fees for all collecting societies. Such an over-regulatory statutory system is against the basic principles of collective management (and the principles of freedom of association).
- The new law requires that illegal distribution cases in public should be processed through administrative proceedings and fines—which must be applied two times before a case can be recognized as a criminal matter. As noted, there is no technology or registry to even monitor this otherwise non-deterrent system, making it completely unworkable.

With regard to enforcement-related reforms, the 2004 amendments strengthened penalties for copyright infringement.¹⁵ The new provisions provide varied criminal fines and imprisonment for different activities. For example, the law provides criminal fines ranging from 25 million Romanian ROL to 400 million ROL (US\$864 to US\$13,817) and imprisonment of one to four years (Article 139) for the unauthorized making available of copyrighted works or works protected by neighboring rights. Unfortunately, Romanian judges have interpreted these sanctions as requiring fines for first offenses, and imprisonment only for subsequent offenses. ORDA reports that these penalties have increased and will thus deter piracy. The criminal procedure code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed. BSA commends the government (ORDA, and the Commission for Culture, Arts and the Media) for its cooperation with proposed legislative reforms.

The copyright industries continue to advocate a few miscellaneous actions to improve the current dearth of prosecutions and absence of deterrent sentences. Fines should be tied to more stable figures to avoid the effects of hyperinflation. ORDA's "exclusive" authority to investigate and identify pirate product in both criminal and administrative cases [Article 137(1)] needs to be revoked since it is not applied in practice and is thus counterproductive to effective enforcement. As noted, ORDA has a small staff (ten 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 (as well as providing expert reports for criminal cases). 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. Last, 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 copyright enforcement activities to organizations other than ORDA to officially act in IPR enforcement activities; these proposals have been ignored.

Criminal Code

In 2004, a total overhaul of the criminal code was enacted, effective in July 2005. The provisions concerning the copyright crimes were copied verbatim from the copyright law, including the level of penalties and prison sentences. If these provisions are applied by the courts in actuality, these provisions will serve as deterrent penalties. One highlight of the revision are the provisions establishing criminal liability of legal entities (companies and institutions). There are lingering problems: the criminal code does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material. In addition, for certain actions (software piracy), a private complaint is need as a pre-condition for starting an enforcement action and subsequent prosecution. This will have a detrimental impact on effective enforcement which has already been weak due to overall poor implementation of IPR enforcement by the judiciary.

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