

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2006.

Actions Which the Romanian Government Should Take in 2006:

- Have senior levels of Romanian government officials express a strong political will and a commitment to eradicate copyright piracy and instruct all enforcement authorities to make the fight against copyright piracy a priority and to take sustained and concrete actions to support that commitment in-practice.
- Have the police, including the anti-organized crime directorate, undertake tough and consistent anti-piracy enforcement actions. The police must engage and tackle the root source of the problem: the suppliers of pirate discs to the small-scale retail and street vendors.
- Request that the General Prosecutor's Office maintain consistent quality of IPR prosecutors by not constantly reassigning them. (Reports indicate the Central IPR Department in the General Prosecutors Office will soon have ten members, five already appointed and working on statistics and other coordination efforts, and the other five will have executive powers.)
- Instruct prosecutors to stop dismissing copyright cases. This undermines the motivation of the police to take actions. Prosecutors should expeditiously pursue criminal cases to the fullest extent of the law, including requesting that the courts issue deterrent level penalties.
- 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 right holders' organizations.
- Reform the structure and competence of the State Copyright Office (ORDA).
- Eliminate the mandatory ORDA-regulated hologram system for all copyright industries.
- 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, or in software cases by the raiding agents) and stop dismissing cases involving repeat offenders.
- Establish a system at the borders to track the importation of blank optical media products. This should involve the coordination between enforcement authorities (police, customs).

ROMANIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	17.0	80%	18.0	78%	18.0	80%	15.0	75%	14.0	70%
Business Software ²	41.6	75%	32.0	74%	28.0	73%	20.7	70%	15.7	75%
Entertainment Software ³	NA	NA	75%	65%	NA	NA	35.2	97%	NA	95%
Motion Pictures ⁴	NA	NA	8.0	55%	8.0	35%	6.0	55%	6.0	65%
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	60.6+		60.0		56.0		78.9		37.7	

In addition to its multilateral IPR obligations under the WTO, Romania has bilateral IPR/trade obligations related to copyright and enforcement with the U.S.⁵ The European Union also has raised concerns about the adequacy of copyright enforcement in Romania in the context of its possible accession to the EU in 2007.

COPYRIGHT PIRACY IN ROMANIA

Optical media piracy: Optical disc piracy in 2005 remained widespread throughout Romania. There are several factors implicating optical media piracy. First, pirated pre-manufactured discs (contain all types of copyrighted content) continue to enter from Russia and the Far East, often via the Ukraine and Moldova borders, and are subsequently found in all major cities. For example, the Entertainment Software Association (ESA) reports that pirated entertainment software for play on personal computers appear to all originate from Ukraine; games for play on consoles continue to be shipped in from Asia or otherwise are locally burned CD-Rs. Pirated entertainment software for all

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ 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. For more details on Romania's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Romania are posted at <http://www.iipa.com/countryreports.html>. During the first 11 months of 2005, \$248.9 million worth of Romanian goods (or 22.6% of Romania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 25.2% increase over the same period in 2004.

platforms continue to be widely available on the street, flea market venues, some retail locations, through Internet websites and newspaper advertising.

Second, the major problem with the copyright industries in Romania is the substantially increased amount of CD-R and DVD-R burning, and burning operations are often controlled by organized criminal groups.

Third, local pirate optical disc production at the industrial level is not the primary OD problem the copyright industries face in Romania (see CD-burning, above). There is now a second optical disc plant in Romania, bringing the total of production lines up to three and the annual estimated capacity up to 14 million optical discs per year. There is no local blank CD-R production. Rather, blank CD-Rs and DVD-Rs are imported, which has substantially increased the volume of illegal local CD-R and DVD-R burning of copyrighted products in Romania. Given the continued – albeit increased – low levels of local production of optical media, it is premature at this time for the industries to suggest that the Romanian government adopt a comprehensive optical disc regulatory regime. In fact, the music industry acknowledges the support of ORDA in convincing the government to issue Ordinance No. 25/2006 (adopted on January 30, 2006, and will enter into force on March 1, 2006); this new ordinance obliges plants to use SID Codes. Furthermore, in light of the massive CDR/DVD-R burning, establishing a system at the borders to track the importation of blank optical media products is strongly recommendable.

Internet piracy: In Romania, the Internet provides huge opportunities to download music, video and software. Many websites have advertised their service to burn copyright content onto CVD-Rs and DVD-Rs on-demand. Many physical products (including pressed discs) are now sold using the Internet as it offers a more secure solution for the vendor. Local industries report that although the copyright law covers both uploading and downloading, there are problems regarding ISP liability and the criminal procedure law. The Criminal Procedure Law requires that a search warrant must be issued in order to search a private home, and such a warrant may be issued only by a judge and only if the criminal investigation is officially initiated. At the same time, the criminal investigation may be commenced only if sufficient evidence exists. As a result, it has been difficult to gather the evidence necessary to commence a criminal investigation before a search warrant can be issued. ROACT has faced no problems in investigations developed with the fraud investigation police. ISPs may incur criminal liability only for aiding and abetting. This means that the ISP's intention must be proven.

The industries report good cooperation with the ISPs. The local recording industry group, UPFR, reports generally a positive response from ISPs to their notices. In 2005, the recording industry identified 282 websites containing illegal files and offering illegal CD-Rs for sale. Of these, 144 are based on servers of Romanian ISPs. The recording industry 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. In 2005, the local film industry group, ROACT, initiated a collaboration program with the Ministry of Communications and Information Technology to develop law enforcement efforts aimed at e-commerce and Internet crimes. ROACT managed to increase the number of hard goods investigations done by the Police, the Fraud Investigation Department and the Organized Crime Police. With only one exception, all ISPs requested by the film industry to block URLs have responded positively. ROACT enjoys good cooperation with about half of the country's ISPs. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. The ISPs are generally responsive when it comes to software industry requests to shut down websites promoting copyright infringing content. In 2004, a few ESA companies took enforcement actions against smaller Internet cafés, some of which resulted in settlements.

Record and music piracy: The recording industry faced a continuing battle in 2005 against piracy in Romania. First, the CD-R piracy has increased considerably and now constitutes 80% of the overall piracy, compared to the 55% share in 2004. Illegal CD-Rs are burned (and converted to MP3 files) in private apartments; this 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. Second, there is 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. Third, a problem is the rapidly growing use of illegal peer-to-peer services that has had a direct impact on the increased use of blank CD-Rs and DVD-Rs. 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 (both local and foreign) is 50%. 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. For example, the price of a legitimate CD at \$15 cannot compete with the price of a pirate product at \$4 or of a blank CD-R at \$0.15.

Business software piracy: The Business Software Alliance (BSA) reports that the high levels of software piracy basically remained unchanged in Romania in 2005, despite the positive legislative developments accomplished in 2004. The market is mostly affected by end-user piracy and the illegal distribution, including hard-disk loading and the distribution of home-burned CDs). Lowering the level of software piracy in Romania could contribute to the local economy.⁶ Although the police have taken some action against hard disk loaders, the police continue to focus on only small companies suspected of using unlicensed software (known as “end-user” piracy), not larger ones. Internet-based piracy continues to increase, with online advertisements and potential customers submitting orders via e-mail, or it is operated through websites promoting pirated software for downloads. There are, unfortunately, still several public prosecutors who refuse to prosecute software infringement cases because there is a “perceived lack of social harm.” BSA appreciates the work of the government toward 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.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy is a big problem, with product entering Romania from the Far East and Russia via the border with Ukraine and through Bucharest airport. In fact, Poland has become a new source of pirate DVD-Rs. 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 level of videocassette piracy in Romania has dropped, and most blatant retail piracy has been eliminated. The most popular distribution methods are now Internet sites and street markets (here are over 400 regular markets in Romania and 250 other markets open at various times). MPA also notes that falling prices for Internet connections and DVD

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Romania's piracy rate (rom 74% to 64%) could add nearly \$670 million to its economy, increase local industry revenues by more than \$430 million, create 3,000 new jobs, and generate over \$75 million in additional tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Romania.pdf>.

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). 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.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that pirated PC game market appears to now be sourced exclusively from Ukraine. In fact, 2005 saw a significant increase in the imports of pirated products from Ukraine. Pirated entertainment software for console platforms, primarily factory produced silvers are imported from Asia or are locally produced CD-R burns; pirated cartridge-based videogames also continue to be shipped from Asia. Pirated entertainment software products continue to be available on the streets, at flea market-type venues, and in specialized retail shops, as well as being advertised on the Internet and in newspapers. Internet café piracy remains a problem, although the situation continues to improve because police and right holder enforcement actions continue against unlicensed cafés. Of the 5,000 Internet cafés in the country, about 30% are now legitimately licensed by entertainment software publishers. This increase in the number of licensed cafés stems from ESA member companies having taken a significant number of enforcement actions against these establishments, which have resulted in settlements that have been beneficial not only to the publishers but also the cafés, whose operations now use legitimately licensed entertainment software. 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.

Book piracy: 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 2005.

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 an overall low priority for Romanian enforcement authorities. 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, these have been targeted at the "soft" end of pirate operations, failing to challenge the production and distribution systems involved. Prosecutors have failed to push for deterrent sentences and courts have failed to impose such sentences. In particular, the Romanian government should completely reform the capacity and responsibilities of the copyright office (ORDA). Constant staff changes within the National Police offices and customs have contributed to an overall lack of efficiency.

National IP Strategy: 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.⁷ Indeed, under this campaign, the police took action, customs simplified their procedures, and competence on IPR matters before the courts improved. Industry reports that another national strategy plan was adopted in October 2005, but to date, few

⁷ The National Strategy is available at http://www.osim.ro/strate_en.htm, or in Romanian at <http://www.orda.ro>.

concrete results have been produced (although it should be noted that some of the internal deadlines for results do extend into 2006).

The copyright industries continue to believe, as stated before, that 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, and the National Anti-Fraud Crimes Unit (the economic police), 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. In 2005, the prosecutor in charge of IPR for two consecutive years inside the General Public Prosecutor's Office was promoted and was replaced. Even though there are specialized IPR prosecutors appointed in each district, the General Prosecutor keeps changing them frequently. As a result, only very few IPR cases are ever fully prosecuted. The business software, music and film industries report good cooperation with local enforcement authorities. The problem remains that the personnel with IP training — especially with prosecutors — are constantly being shifted to other jobs. There are only specialized IPR courts in Bucharest; more are needed in the country.

Difficulties with ORDA: The state body responsible for copyright enforcement, ORDA, is an independent government agency. ORDA needs internal reform, including the establishment of a proper supervision by another state institution over its activities, in particular in the field of enforcement. ORDA's enforcement responsibilities still cover several areas, which complicate the bureaucratic layer to all parties involved (right holders in particular), rather than acting as an effective state copyright enforcer. To give a few examples of the ineffectiveness of ORDA's enforcement activities, the recording industry reports the following:

- (a) ORDA issues holograms for every optical disc (audio, video, software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities. It has been confirmed in the practice of other countries that holograms simply do not work as effective anti-piracy tools. To the contrary, they may even end up on pirate products, as has happened several times in Romania. Holograms must not be mandatory and state-administered (the latter point was introduced by the Government Ordinance No. 25/2006), and their usage should be decided voluntarily by the copyright industries. In sum, the industries strongly oppose the unhelpful state hologram system and recommend repealing it fully.
- (b) ORDA registers every sound recording that is released to a commercial circle for the purposes of issuing holograms. This is a new requirement introduced by the Government Ordinance No. 25/2006. As expected, the procedure is extremely complicated and time-consuming. Worse yet, the registration of each recording is taxed by ORDA, which is another state fee alongside the hologram fee. This system must be repealed alongside the holograms system.
- (c) ORDA issues expert reports in copyright cases. This happens at a very slow pace, which results in major delays in criminal investigations (up to 14 months). The solution here is to follow the prevalent practice in Europe and other countries, and to transfer this task to the copyright industries, who are true experts in their respective products.
- (d) ORDA supervises collecting societies. Again, ORDA has historically been more unhelpful than productive in this field. It has extensive intervention powers and has tried to over-regulate the activities of collecting societies several times. This practice has shown that collecting societies are like any other commercial business and should not fall under an overly detailed special regulation. Examples such as royalty caps and unique collectors have clearly illustrated how

they bring the market development into a complete chaos and halt it. ORDA has shown poor results in fulfilling its duty as a coordinator in the filed of collective licensing. For example, in a recent case of recording industry versus cable operators, ORDA failed to inform the industry organization that the court decision overruled ORDA's decision favoring the cable operators.

More stickering problems. In addition to the recording industry, other copyright-based industries are adversely affected by a stickering (hologram) program in Romania. 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. The initiative affecting software was later dropped, and this stickering decree currently applies only to audiovisual works. In 2002, the Ordinance was approved with modifications (by passing Law No. 213 without consulting with industry). The motion picture industry was and remains opposed to this law (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 rating certificates for every title) to purchase stickers. Each sticker cost 500 lei, or approximately two cents. This type of a state-mandated sticker system is counterproductive to anti-piracy efforts because it results in "legalizing" pirate material once the stickers are themselves forged. Additionally, there is the problem of corrupt government officials giving the pirates the legitimate stickers to place on their product. Stickers also prevent the legal distributor from getting product into the marketplace, because ORDA's bureaucracy works very slowly and inefficiently. Rather than accept a state-organized system, ROACT worked to amend the ordinance so that it or another non-governmental organization can manage it. Being out of stock of film holograms stickers, ORDA issued certificates for sound recordings to film distributors and allowed the application of the recording holograms on videograms that were put on the market. It is important to keep in mind that the business software industry and BSA remain opposed to extending any stickering regime to business software.

Police, prosecutions and few deterrent judgments: The copyright industries continue to report that in 2005, the Romanian police generally exhibit a positive attitude in cooperating with industry representatives on investigations and raids (although raids usually take place only 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. Ineffectiveness by the policy may be caused by several factors:

- Police are reluctant to take any actions against small-scale piracy cases. This became a problem with the last Copyright Law amendments, whereby the small-scale cases were "downgraded" to a level of contraventions (administrative infringements). As contraventions are not part of an internal "points system" in the police to measure their effectiveness, police officers are simply not interested in taking actions against the small-scale pirate traders. Such a system should be reviewed so as to include administrative infringements alongside criminal cases to the evaluation system of police officers. The recording industry reiterates that it is important to target both large- and small-scale pirate traders with anti-piracy actions. Very often, a small case leads to a bigger illegal networks.
- Police are unmotivated by the prosecutors who keep dismissing the copyright cases. This problem lies with the constant staff turnover among the prosecutors tutored by the General Prosecutor's Office.

However, a significant activity boost for the police was provided by the amendments to the Copyright Law which were introduced by the Emergency Ordinance No 123/2005 and adopted on

September 19, 2005. In particular, this new law repealed ORDA's supervisory role over copyright criminal cases and enabled the police to conduct more domicile searches. So far, the police have achieved successful results notably in Arad, Timisoara and Sibiu counties, where the police instigated several large-scale criminal cases against the involved persons, which are pending resolution.

For 2005, BSA reports that the law enforcement authorities were very active, taking many *ex officio* software cases. Between January and November 2005, 261 raids were run, and 34 convictions were obtained. BSA reports that there remains some reluctance by law enforcement to conduct raids in hard disk loading and big end-user cases. BSA has filed official raid referrals with the police; this forces them to give an official answer to the referral request.

MPA reports improved police enforcement efforts took place in 2005. Internet piracy cases were investigated that resulted in some large seizures. However, a large number of files still await decisions by local IP prosecutors in the country, and there was a reduction of over 40% in the number of files actually sent to the courts. In general terms, however, ROACT reports good cooperation with the Prosecutor General's Office.

The recording industry reports in 2005 that it worked with enforcement agencies to file 50 criminal cases, and requested damages in 37 of these cases. The industry group UPFR was notified that 18 of these actions were dropped (and were not notified that 31 other actions were dropped). 27 cases were before the courts (this included raids conducted in 2003 and 2004). Case results included 7 fines, 1 term of imprisonment issued (and suspended) and 1 acquittal. With respect to cases involving collective licensing issued, 63 criminal cases were brought in 2005. 27 of these cases were dropped, with 1 case resulting in an administrative fine and another case with a term of imprisonment (suspended).

Romanian prosecutors often drop copyright cases. 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. Furthermore, there continues to be a lack of general prosecutorial knowledge about copyright cases and piracy. 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).

Civil *ex parte* search authority: The copyright law amendments, effective August 1, 2004, in addition to the most recent amendments (effective September 19, 2005), expressly provided civil *ex parte* search authority. Such a provision is a requirement of TRIPS and especially important for the business software community. Unfortunately, BSA confirms that no such civil *ex parte* searches have been conducted to date.

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 improvement was reported in 2005. Furthermore, the new Criminal Procedure Code enables the right holders to file counter claims against the actions that the prosecutors have taken in court. However, the practical experience with this provision has been negative – for example, all such claims submitted by UPFR in 2005 were rejected by the courts.

Border enforcement: It remains critical that Romania's border enforcement system improve, because it remains far too easy for pirate product to be imported into and exported out of Romania. In December 2005, Romania adopted a new Law No. 344/2005 that implemented the EU Council Regulation No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and measures to be taken against goods found to have infringed such rights (the EU Customs Regulation). This law entered into force on February 3, 2006. In general, the law introduced several positive amendments to the customs procedure against copyright infringements, in particular:

- The customs measures can be taken also against illegal goods in free trade zones;
- The right holders' application fee was repealed;
- The requirement for right holders' guarantee to cover the value of detained goods was repealed;
- The goods can be destroyed through a simplified procedure without a court order.

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. The recording industry continues to report that no concrete steps have resulted from this agreement.

Establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

Concerns over corruption: Corruption among enforcement officials remains a recurring and 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. In fact, concerns over corruption were prominently raised in the EU's 2005 Country Accession Report on Romania.⁸

Training Programs: The recording industry (UPFR) participated and made presentations at three trainings organized by the U.S. Embassy for the IPR-responsible prosecutors and judges and one organized by National Police Inspectorate for the police officers. BSA organized trainings for the police, the border police, the customs inspectors, the public prosecutors and judges in 2005. Romanian police have organized their own trainings and invited BSA and ROACT experts to give presentations. In addition, the copyright industries also participated in a series of six training organized by the U.S. Embassy in Bucharest. These training sessions are important because they help educate law enforcement and introduce them to industry experts who are investigating cases.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Emergency Ordinance (2005): On September 19, 2005, the Romanian Government adopted the Emergency Ordinance No. 123/2005, further amending its Copyright Law, in anticipation of

⁸ See European Commission, *Romania: 2005 Comprehensive Monitoring Report* {COM (2005) 534 final}, dated October 25, 2005), posted at http://europa.eu.int/comm/enlargement/report_2005/pdf/SEC1354_CM_MASTER_RO_COLEGE.pdf.

implementing the EU Enforcement Directive (EC/48/2004). The ordinance entered into force in September 2005. Although far from being ideal, there are some positive elements, for example, as summarized for IIPA by industry colleagues:

- ORDA no longer has direct enforcement authority in criminal cases, or a central role vis-à-vis other enforcement authorities. It does retain the ability to draft expert reports in specific cases. (Concerns do remain over whether requisite expert reports can be drafted expeditiously; note that some industries would prefer that the State get out of producing expert reports altogether).
- The penalties for copyright infringement were increased as follows:
 - The reproduction or import of pirate goods: imprisonment 2 to 5 years or a criminal fine of 2,500 RON to 25,000 RON (US\$846 to US\$8,460);
 - The distribution, possession, or storage and transportation, for the purpose of distribution, of pirate goods, as well as the possession of them for the purpose of utilization through the communication to the public at the working locations of the legal persons: imprisonment of 1 to 5 years or a criminal fine of 2,000 RON to 20,000 RON (US\$677 to US\$6,770);
 - In cases where the identified actions (above) are committed for commercial purpose, they are to be sanctioned with imprisonment of 3 to 12 years. The same offenses, if they produced extremely serious consequences, will be punishable by 5 up to 15 years of imprisonment;
 - The promotion of the pirate goods through any means and in any modality, including the utilization of public announcements or electronic means of communication or through the exhibiting or presentation to the public of the lists or catalogues of products: imprisonment of 6 months to 3 years or a criminal fine of 2,000 RON to 20,000 RON (US\$677 to US\$6,770);
 - The making available to the public without the consent of the right holders: imprisonment of 1 to 4 years or a criminal fine of 2,500 RON to 40,000 RON (US\$845 to US\$13,535).
- Jurisdiction for criminal piracy cases were moved to the higher level tribunals. It is hoped that this will assist in expediting cases, in part because these tribunals have a lighter caseload than courts of first instance. It will also allow some expertise to develop on IPR matters.
- The principle of having a unique collecting society for all right holders was eliminated.
- The statutory royalty caps for the broadcasting and cable retransmission rights of copyright and related right holders were eliminated.

However, the Emergency Ordinance also included some negative developments. First, the withdrawal of the holograms' administration from the private sector was transferred to ORDA. From the perspective of the recording industry, this is another reason to justify eliminating the hologram system altogether. Second, the text of the Ordinance is unclear in certain places and leaves much room for adverse interpretations. For example, the texts providing for criminal offenses and penalties are not very clear, as they mention also "producing of pirated goods, for *distribution purposes*" as one offense, and, as another, more serious offense, the "producing of pirated goods, for *commercial purposes*."

Because the Emergency Ordinance is due to be voted in the Parliament to become a law, it must be ensured that those changes are maintained in the law. There is a strong users' lobby (broadcasters, cable operators) to re-introduce objectionable provisions regarding collective management. Furthermore, the Ministry of Justice, along with the police and prosecutors, is lobbying

for the downgrading the classification of small-scale copyright cases, including small piracy cases and unauthorized broadcasting and public performance from crimes to contraventions. This is motivated by the lack of personnel and the need to focus on large-scale illegal operations. The recording industry considers this as an excuse to de-prioritize the criminal investigations in copyright cases. Considering the high piracy levels in Romania, the downgrading of copyright infringements sends the message that those crimes are not serious, the opposite that is required for an improvement.

Copyright Act of 1996, as amended in 2004 and 2005: In June 2004, Romania passed amendments to its 1996 copyright law which sought to bring it into compliance with European Union directives and the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonogram Treaty (WPPT), which Romania ratified in February 2001. These amendments were also aimed at harmonizing Romanian legislation with the EU Copyright Directive and the EU E-Commerce Directive. Nevertheless, further reform of the copyright law, is still needed in Romania, particularly with respect to: (1) transient copying exception in the reproduction right; (2) producers of sound recordings not having exclusive rights of broadcasting or communication to the public, but rather a limited right of remuneration; (3) the law clearly providing full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement; (4) amending two provisions regarding ownership and performance royalties which adversely affect the distribution of films; (5) the law requiring 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 even to monitor this otherwise non-deterrent system, making it completely unworkable.

Criminal Code: The Romanian Government is working on a new Criminal Code which is likely to come into force September 2006. To review, in 2004, Romania completed an overhaul of its criminal code, effective in July 2004 as Law No. 285/2004. Note that the sanctions provided in the Criminal Code are lower than those established with the new Emergency Ordinance No. 123/2005, as described above. Previously we have noted that the provisions concerning the copyright crimes were copied directly from the copyright law, including the level of penalties and prison sentences. One highlight of the revision is the added provisions establishing criminal liability of legal entities (companies and institutions). However, there were some problems. For example, 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 (such as software piracy), a private complaint is needed as a pre-condition for starting an enforcement action and subsequent prosecution.

Search Warrants: Verification of computer systems and of the computing data carriers requires a search warrant, according to Law No. 161 of 2003. The search warrant can be issued only by the court and only after the commencement of the criminal investigation. This law will have a significant impact on the market if not amended quickly. BSA expects that the consequence will be that the number of *ex officio* police raids will decrease dramatically, as will police raids upon response to right holder leads. The amendment should provide that the mere verification of the existence of software installed on the computers should not require such a search warrant.

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