

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ROMANIA

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

## **EXECUTIVE SUMMARY**

Piracy continued almost unabated in Romania during 2006, with the problems of Internet piracy (including peer-to-peer filesharing) gradually replacing the traditional optical disc piracy (including burning) and affecting almost all the copyright industries. Border enforcement remains weak and pirated product from other countries easily enters the Romanian market. Industry cooperation with police authorities during 2006 was good, but prosecutions were few and deterrent criminal sentences scarcer. Most disturbingly, the administrative oversight by the Copyright Office (ORDA) continues to work in ways that do not foster effective enforcement. ORDA still has a stranglehold over the objectionable hologram system and produces substantial delays in criminal investigations by taking many months to deliver the technical reports on the piratical materials. Copyright reform efforts in recent years seem to be an annual exercise in making small positive amendments and correcting deficiencies, and it looks like another such performance may happen again in 2007.

## **PRIORITY ACTIONS IN 2007**

### **Legislation**

- Closely monitor any proposed legislation or draft “Emergency Ordinance” which will make further amendments to the copyright law.
- Abolish the mandatory ORDA-regulated hologram decree, including the related phonogram and videogram registration procedure.
- Repeal ORDA’s exclusive mandate for issuing expert reports in copyright infringement cases and the related obligation to pay fees for ORDA’s expertise.
- Amend Law No. 161 of 2003 to provide that the mere verification of the existence of software installed on the computers should not require such a search warrant, or provide clarity on this issue in an amendment to the Copyright Law adopted by the Emergency Ordinance, mentioned above.

### **Enforcement**

- Have senior levels of Romanian Government officials express a strong political will and a commitment to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment in-practice.
- Have the police, including the anti-organized crime directorate, continue the positive trend of undertaking regular and consistent anti-piracy enforcement actions. The police have been doing a good job. Now they should increasingly engage and tackle the root source of the problem: the suppliers of pirate discs to the small-scale retail and street vendors.
- Make sure that the appointed special IPR prosecutors start providing results by actively and swiftly initiating criminal infringement cases. Reports indicate the Central IPR Department in the General Prosecutors Office has nine members – one heading the office, three having executive powers and five of them undertaking coordinating activity.

- Instruct prosecutors to stop dismissing copyright cases. This undermines the motivation of the police to take actions. Prosecutors should expeditiously pursue criminal cases, even small-scale infringement 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.
- 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).
- 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. Also establishing specialized courts with criminal jurisdiction should be considered.
- 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.

<b>ROMANIA</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Sound Recordings &amp; Musical Compositions<sup>2</sup></b>	<b>12.0</b>	<b>60%</b>	17.0	80%	18.0	78%	18.0	80%	15.0	75%
<b>Business Software<sup>3</sup></b>	<b>66.0</b>	<b>69%</b>	61.0	72%	32.0	74%	28.0	73%	20.7	70%
<b>Entertainment Software<sup>4</sup></b>	<b>NA</b>	<b>77%</b>	NA	75%	NA	65%	NA	NA	35.2	97%
<b>Motion Pictures<sup>5</sup></b>	<b>NA</b>	<b>NA</b>	12.0	NA	8.0	55%	8.0	35%	6.0	55%
<b>Books</b>	<b>NA</b>	<b>NA</b>	2.0	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>78.0</b>		<b>92.0</b>		<b>60.0</b>		<b>56.0</b>		<b>78.9</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Romania under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> The legitimate market for recorded music in 2006 saw a sharp decline, which was not only due to piracy. Physical piracy also dropped sharply, but retained a relative importance against the dropping legitimate sales. In addition, Internet and mobile piracy grew exponentially and very seriously affected international repertoire. These elements are reflected in a lower piracy percentage and a correspondingly lower loss figure compared to 2005.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> 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.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

On January 1, 2007, Romania joined the European Union. When the Commission confirmed Romania's accession, it noted progress on key issues, which included Romania's fighting corruption and improving judicial reform.<sup>6</sup> 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.<sup>7</sup>

## **COPYRIGHT PIRACY IN ROMANIA**

**Optical media piracy and street piracy:** Optical disc piracy in 2006 decreased significantly. Whilst there are still pirate Russian optical discs entering Romania through its eastern borders, their number is relatively small. Pirates nowadays use imported pirate discs from Russia as master copies for their underground CD-R burning. There is a substantial increase of CD-R and DVD-R burning are the main sources of physical piracy in Romania, and burning operations are often controlled by organized criminal groups. Pirate discs are sold via Internet sites or press advertisements and then delivered by mail or personally on the streets. Given the massive CD-R/DVD-R burning, establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

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 are two optical disc plants in Romania, having three production lines with an annual estimated capacity of 10.5 million units/year. Blank CD-Rs and DVD-Rs are imported. Last year, the Government issued Ordinance No. 25/2006 (entered into force on March 1, 2006) which obliges plants to use SID Codes, a helpful tool in monitoring OD plant operations. As a result, it remains premature at this time for the industries to suggest that the Romanian Government adopt a comprehensive optical disc regulatory regime.

**Internet piracy:** Internet piracy, both in the form of websites offering pirate goods for sale and the use of peer-to-peer systems, has increased significantly. Many websites have advertised their service to burn copyright content onto CD-Rs and DVD-Rs on-demand. Physical products (including pressed discs) are sold using the Internet. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Due to a significant penetration of broadband Internet services and falling prices, provided by regular ISPs or LAN (local area network) companies that are offering subscription prices even cheaper than those of regular ISPs, the Internet piracy on P2P networks grew significantly. Large amounts of video files are shared over the networks, mainly in Bucharest and other several important countryside cities like Galati, Timisoara, Cluj, Ploiesti, Iasi, Suceava. Such networks activities were somehow affected / slowed down during the summer of 2006, as at the end of the spring 2006, a successful peer-to-peer investigation, with very good media coverage at national level, took place in Iasi. Even so, peer-to-peer

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<sup>6</sup> Press Release IP/06/1257 of the European Commission, 26 September 2006, "Commission confirms Bulgaria's and Romania's EU accession on 1 January 2007, completed by a rigorous package of accompanying measures," link at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1257&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>7</sup> 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/2007SPEC301HISTORICALSUMMARY.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 2006, \$247.5 million worth of Romanian goods (or 23.3% 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 0.5% decrease over the same period in 2005. Now that it has entered the EU, Romania's eligibility status for GSP has ended.

piracy increasingly became an issue. There are about 681 local networks all over the country, out of which 373 are located only in Bucharest. Torrent sites represent another type of emerging piracy. Many of them are maintained, at least at first sight, by individuals or the same smaller companies selling cheaper Internet connections.

Local industries continue to report in 2006 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 computer search warrant must be issued in order to search a private computer, 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. The ISPs are generally responsive when it comes to software industry requests to shut down websites promoting copyright infringing content.

**Record and music piracy:** The recording industry reports a significant drop in physical piracy in 2006. Very few stores, commercial centers or markets sell pirated music. The fact that more severe penalties were introduced played a role. The operating method of selling pirate products changed and concentrated around illegal burning studios in private apartments. The illegal goods are advertised on Internet or specific closed circuit channels. Russian-made pirate products have become quite rare and, as a result, relatively expensive (currently priced around US\$12 instead of the usual \$3-7). Close cooperation between recording industry group UPFR and police resulted in the closure of 25 illegal duplicating studios. All pirate products are CD/DVD-R's, and are either sold over the Internet or by intermediaries roaming around with the products in bags in commercial centers, offices, banks, etc.. Such intermediaries will not venture beyond a limited group of well-known clients, which makes it very difficult for UPFR and law enforcement agents to penetrate the system. The same is true for pirate distribution based on Internet advertising.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that piracy rates for its members' products in Romania have not dramatically changed in Romania over the last year. For 2006, the pirated game software product available is almost all burned, with very little replicated product found in the market. Pirated entertainment software products continue to be available on the streets, as well as being advertised on the Internet and in newspapers. Internet café piracy remains a problem in Romania, although the situation continues to improve because police and right holder enforcement actions continue against unlicensed cafés. With increased broadband availability, Internet piracy via P2P and torrent downloads of videogames is also on the rise.

**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. DVD piracy has reached a level of about 80% of total disc sales. 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). 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.

**Business software piracy:** The Business Software Alliance (BSA) reports that even if the high levels of software piracy basically remained unchanged in Romania, the authorities have taken important steps in enforcing the law and addressing the industry's priorities in terms of the type of cases investigated and the size of the infringers targeted. The market is mostly affected by end-user piracy and the illegal distribution, including hard-disk loading and the distribution of home-burned CDs). Although the police have taken serious action against hard disk loaders, the police continued to focus on 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 under Decree H.G. Number 470/01-04-2004, and reports that Government ministries have undergone training to develop software asset management policies to promote legal software use within Government entities and local public authorities. BSA reports its preliminary 2006 estimates for business software piracy in Romania were \$66 million, at a slightly lower 69% rate.

**Book piracy:** Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Other than the police force, which has been increasingly helpful and active, anti-piracy efforts remain an overall low to medium priority for other 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 lead to the imposition of deterrent penalties. Although the police have been conducting an increasing number of raids, these too often have been targeted at the "soft" end of pirate operations (i.e. the small operators, street vendors). Even more importantly, prosecutors have failed to push for deterrent sentences and courts have failed to impose such sentences.

An "IPR Working Group," consisting of right holder representatives and steered by the IPR department in the General Prosecutor's Office (GPO), was officially established in July 2006 and is working to improve communication between private industry and enforcement on various legislative and enforcement problems. There are 32 institutions, both public and private, in this Working Group, including: the General National Police Inspectorate, Romanian General Prosecutor's Office, Justice Ministry, Culture Ministry, European Integration Ministry, National Institute of Magistrates, ORDA, and private groups such as UPFR, BSA, RoAct, Credidam, Vivendi Universal Games, Electronic Arts and HBO. However, proposals for amending the Copyright Law still need to be imposed and the Group should work on it. The group continues to meet with the GPO to address enforcement and legislative problems, and is reportedly currently addressing the requirement of obtaining a search warrant before a computer hard drive may be searched for pirated software. The law apparently requires that a criminal investigation be first initiated before such a warrant will be issued. This is slowly leading to some improvement.

Corruption among enforcement officials remains a recurring and severe problem in Romania (and was noted by the EU during Romania's accession process). Moreover, there is minimal prosecution of corrupt acts

### **Criminal Enforcement**

The business software, music and film industries report good cooperation with local enforcement authorities, in particular the police forces. The police have assigned two officers in each county to deal with IPR cases. Each county should have a specially-assigned prosecutor for IPR. Even though there are specialized IPR prosecutors appointed in each district, they keep changing frequently. The problem remains that the personnel with IP training — especially with prosecutors — are constantly being shifted to other jobs. There are only specialized civil IPR courts in Bucharest; more are needed in the country and in the criminal area as well.

**Police actions and prosecutions:** During 2006, MPA reports that there was a noticeable improvement in the cooperation of law enforcement bodies. ROACT's relationship with the Police, Anti Fraud Departments, works smoothly (as confirmed by enforcement activities results that have tripled in terms of raids and seizures). Also the quality of files showed significant improvements in certain areas of enforcement mainly large-scale actions. The Public Order Police increased the number of their actions in street sales. The Border Police became more active compared to Customs in their *ex officio* actions. Perhaps such a boost in police activity is a positive result of the copyright law amendments made in 2005 via the Emergency Ordinance No 123/2005, which enabled the police to conduct more domicile searches and ORDA's supervisory role over copyright criminal cases.

MPA reports improved police enforcement efforts took place in 2006. By the end of November 2006, there were almost 350 raids on film piracy compared to almost 130 raids in 2005. In the same period, the number of criminal court actions rose to 34 compared to 7 in 2005 and 13 in 2004. As an example of increased cooperation, the Police in Iasi took first action against file-sharers in May 2006 (executing 14 search warrants against users sharing between 100GB and 500GB of pirate files on the file-sharing hubs UNITED and ARM). The raids provoked a storm of press and public interest, while the prosecutor received serious threats from Internet users. The Anti Fraud Police and Border Police increased the number of *ex officio* actions.

The recording industry reports in 2006 that it worked with enforcement agencies filing 211 criminal cases. It requested damages in 131 of these cases. UPFR was notified that 19 of these actions were dropped (apparently another 31 cases were dropped as well, but UPFR was not notified). 22 cases were before the courts (this included raids conducted by the Police in 2004 and 2005). Case results included 2 fines, 3 (suspended) terms of imprisonment and 1 acquittal. In addition to these cases, UPFR filed 19 criminal complaints. The recording industry reports a positive development in this sense that most prosecutors no longer drop cases against infringers that have caused serious damages to the music industry. Such cases have been sent to the Court for sentencing. However, the practice of dismissing smaller cases remains a serious problem. With respect to cases involving collective licensing issues, 653 criminal cases were brought in 2006 (147 broadcasting and 506 public performance). 145 of these cases were dropped, with one case resulting in an administrative fine and one acquittal, 26 settlement agreements. Seven cases were before the courts (this included raids conducted by the police in 2005).

For 2006, BSA reports that the authorities took *ex officio* actions but proved opened to private industry's referrals also. There were more than 600 new raids in End-Users and Resellers cases (in 2005 there were only 350 cases); dramatic increase of HDL raids – 18 successful raids in 2006 – please note that during the calendar year 2005 there were only six successful HDL raids; in June 2006, a case was reported where a reseller was convicted to imprisonment for software copyright infringement; other 15 convictions were reported until November 2006; in October 2006, an important End-User raid happened in Bucharest where illegal software amounting to more than 100,000 USD was found on the PCs. Also, the police has taken action against OD resellers. The relationship with the local enforcement authorities was significantly improved. They became more receptive to industry's needs and requirements. As a highlight, at the end of June 2006, a high-level cooperation protocol was signed between the Romanian authorities and the private industries, aiming at institutionalizing a working group meant to take concrete steps of improving both legislation and enforcement thereof. In July, the Government also organized a regional congress focused on anti-counterfeiting and anti-piracy. In addition, BSA notes that big end-users still need to be targeted next year. In general, the relationship with the law enforcement is considerably improved and no major bottlenecks can be reported. One of the major issues is the need to have a computer search warrant issued in order to search computers with a view to identifying the software installed on them; such 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 initiated only if sufficient evidence exists. In practice it has proved difficult to gather such evidence necessary for having the criminal investigation initiated. This issue was also reported last year and it is still unsolved.

ESA reports that the number of raids taken by the enforcement authorities has increased substantially in the last year, but the majority of targets were small (i.e., mostly against Internet game rooms and street/internet vendors). Given the nature of the piracy problem, this is good news.

Unfortunately, piracy levels remain high and raids are not being initiated against larger companies and organizations involved in piratical activities. Ineffectiveness by the police may be caused by several factors:

- Police are just beginning to consider taking actions against large-scale piracy cases. It remains important to target both large- and small-scale pirate traders with anti-piracy actions. Very often, a small case leads to bigger illegal networks.
- Police are not motivated to take actions because the prosecutors and/or the courts keep dismissing the copyright cases. This problem lies with the constant staff turnover among the prosecutors and the lack of specialized judges/panels in criminal cases.

Although ROACT reports improved prosecution activity in certain areas of the country (thanks to the establishment of a special IP prosecutor and an IP Department at the Prosecutor General's Office), prosecutors in some other areas of the country are still reluctant to send piracy cases to courts and remain too ready to drop cases, due to a lack of understanding of the damage caused by copyright offenses and of social harm caused.

**Non-deterrent sentences:** Finally, Romanian courts are still reluctant to impose deterrent penalties. They typically will only impose fines or suspended jail sentences and are opposed to publicity of their sentences. So far ROACT has secured four favorable court decisions in 2006, out of eighteen sent to the Courts (the rest still pending). Some reports indicated that the number of cases actually reaching the court system has nearly doubled in the last year, but the number of cases dismissed by the court for "lack of social harm" has also increased by a large percentage. There are still many cases where the decision is never communicated to the right holder. 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).

**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 whatsoever was reported in 2006. 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 2006 were rejected by the courts.

### **Administrative Enforcement**

The Romanian Copyright Office (ORDA) is an independent Government agency which still has some enforcement authority. The good news is that, during 2006, ORDA hired more personnel, acquired more modern equipment, and organized training seminars for their own staff. It also increased its transparency, all these efforts being welcome and long overdue.

However, ORDA still has a stranglehold over the objectionable hologram system and produces substantial delays in criminal investigations by delivering the technical reports on the pirate products in months (between three and twelve months). These lengthy delays continued despite the fact that in 2005, ORDA lost its criminal enforcement jurisdiction and should have focussed its efforts on improving its examination procedures to support criminal investigations. To outline a few continuing examples of the continuing problems involving ORDA:

- **The stickering program.** 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. This type of a state-mandated sticker system, attempted in other countries (Malaysia, Ukraine, Russia), is counterproductive to anti-piracy efforts because it often results in “legalizing” pirate material where the stickers are themselves forged. In addition, there is the potential for Government officials to provide pirates with the legitimate stickers to place on their product. Alternatively, it may prevent the legal distributor from getting product into the marketplace in a timely fashion, due to bureaucratic delays. Pirate material may incongruously become more readily available than legal material because of the sticker program itself. In this context it should be noted that ORDA, other than issuing the holograms as part of this highly bureaucratic system, fails to exercise any meaningful control of how the issued holograms are actually applied by the users. This reinforces the futility of the system as it currently stands.
- **Registering sound recordings and fees:** 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.
- **Expert reports and fees:** ORDA issues expert reports in copyright cases. This happens at a very slow pace, which results in major delays in criminal investigations (up to 12 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.

- **Collective management:** ORDA supervises collecting societies. It should be once again stressed that collecting societies, as is the case in the majority of jurisdictions world-wide, should be treated like any other commercial business and should not fall under an overly detailed special regulation

### **Border enforcement**

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. However, the borders remain porous. It remains critical that Romania's border enforcement system improve, because it is far too easy for pirate product to be imported into and exported out of Romania. Establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

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.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Copyright Act of 1996, as amended:** The 1996 Romanian Copyright Law has been amended a number of times in the past decade. Unfortunately, the resulting legal structure continues to contain a number of key gaps and deficiencies, and as a result, Romanian law is not yet fully compliant with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, nor the EU Copyright and Enforcement Directives nor the WTO TRIPS Agreement.

To summarize, among the current problematic provisions reported by local industry colleagues are the following. Article 143 does not appear to prohibit acts of circumvention, but only preparatory acts of circumvention and therefore fails to implement the WIPO Treaties and the EU Copyright Directive. Also of concern is Article 121(2) which would deny protection in the form of retransmission royalties to audiovisual works broadcast on must carry television stations and retransmitted by cable operators. This approach would violate protections required under Berne Convention's Article 11bis(2) and the Trade Related Aspects of Intellectual Property Rights (TRIPS). Reports suggest that a new draft Emergency Ordinance (now in the legislative lineup) includes a provision which could be interpreted as to subject the making available right of authors to compulsory collective management. This proposal would be contrary to the principles enshrined in the Berne Convention and the WIPO Treaties. Finally, the "right of information" referred to in Article 8 of the EU Enforcement Directive does not seem to be correctly implemented.

**2004 Amendments:** Romania passed amendments to its 1996 Copyright Law (Law 285/2004) which came into force on August 1, 2004. This legislative package sought to bring it into compliance

with European Union directives and the WIPO Treaties (which Romania ratified in February 2001). Nevertheless, this package was inadequate, and the industries then argued that further reform of the copyright law, was still needed, 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; and (4) amending two provisions regarding ownership and performance royalties which adversely affect the distribution of films.

**2005 Emergency Ordinance:** The copyright law was further revised through an Emergency Ordinance that entered into force on September 21, 2005. Looking at implementing the EU Enforcement Directive, (EC/48/2004) on September 19, 2005, the Romanian Government adopted the Emergency Ordinance No. 123/2005, which accomplished additional amendments to the Copyright Law. Although far from being ideal, there are some positive elements, for example, as summarized for IIPA by industry colleagues: (1) ORDA no longer has direct enforcement authority in criminal cases, or a central role vis-à-vis other enforcement authorities; (2) penalties for copyright infringement were increased; (3) jurisdiction for criminal piracy cases were moved to the higher level tribunals in hopes of expediting cases; (4) the principle of having a unique collecting society for all right holders was eliminated; (5) 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. IIPA colleagues identified these issues before and they remained accurate in 2006. 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*."

During 2006, the local copyright industries noted that there were other groups trying to re-introduce provisions objectionable to the copyright industries (for example: user groups wanting to add collective management provisions and the Ministry of Justice lobbying to downgrade the classification of small-scale copyright cases from crimes to contraventions/misdemeanors).

**2006 Amendments:** The 2005 Emergency Ordinance was voted in the Parliament and became Law No. 329 of 2006. Law No. 329 of 2006 made the Copyright Law compliant with the new Romanian Criminal Code.<sup>8</sup> This 2006 law also expressly introduced the competence of the Romanian Gendarmerie to conduct raids. There is a current another emergency ordinance draft to again amend the copyright; the full scope of the proposals or when it might be introduced in 2007 is not yet known.

**Street piracy:** Also adopted last year was Government Ordinance No. 25 of 2006 (adopted with amendments by Law no. 364 of 2006) which provides for a new legal framework of the Romanian Copyright Office's activity, which includes onerous registration requirements (discussed above, in the administrative enforcement section). This ordinance also prohibited street commerce of copyrighted goods (original or pirated).

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<sup>8</sup> By compliance this means that, according to the Criminal Code, the level of criminal fines is not be established anymore in the special laws (like the copyright law), but instead such laws should merely provide that the criminal offense is also punishable by criminal fine, and the level of such fine is to be established according to the Criminal Code provisions. Also, the new Criminal Code was initially due to enter into force in September 2006; however, its entry into force was postponed until September 2008. Nevertheless, several provisions were adopted by Law No. 278 of 2006 and entered into force this year

**Future work in 2007:** Reports indicate that the Copyright Law may again be amended, as mentioned above. Reports suggest that this might include a dangerous provision which could be interpreted as to subject the making available right of authors to compulsory collective management.

As mentioned above, one of the major issues is the legal prerequisite to have a computer search warrant issued in order to search computers with a view to identifying the software installed on them; such 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 initiated only if sufficient evidence exists. In practice it has proved difficult to gather such evidence necessary for having the criminal investigation initiated. This issue was also reported last year and it is still unsolved. However, the current emergency ordinance draft for amending again the Copyright Law provides for a solution in this respect, but it is still to be adopted.

**Criminal Code reform:** A large part of the Criminal Code reform, including the intellectual property chapter, has been postponed until September 1, 2008. However, in a notable change, Law no 278 of 2006 introduces criminal liability for legal entities and also provides for the general limits of criminal fines. 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:** BSA reports that a continuing problem in 2006 is that the 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. 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. Industry reports suggest that the Romanian IPR Working Group has been lobbying to amend the law with respect to the requirement of obtaining a search warrant before checking a computer hard drive for pirated software. The amendment should provide that the mere verification of the existence of software installed on the computers should not require such a search warrant.

## **IPR TRAINING AND PUBLIC AWARENESS**

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, and the public prosecutors in 2006. Romanian police have organized their own trainings and invited BSA and ROACT experts to give presentations. These training sessions are important because they help educate law enforcement and introduce them to industry experts who are investigating cases.

## **MARKET ACCESS**

**Broadcast quotas:** MPA reports that the Audiovisual Law of June 2002 introduced a quota of “a majority proportion” of EU works from the day Romania accedes to the EU. Such a provision should include a degree of flexibility to respond to market realities. Regulation no. 39 of July 14, 2005 (effective August 1, 2005) imposes a 3% levy on the advertising revenues of all public and private TV stations in support of domestic film production.

**Discriminatory tax treatment of U.S. audiovisual works:** The Regulation of July 2005 (includes new taxes on box-office and on video/DVD sales to finance subsidies for Romanian and European films. These taxes, besides having a detrimental effect on the Romanian audiovisual market, unfairly burden MPA member companies with the cost of financing the Government’s cultural policy.

**Screen quota:** The new Regulation of July 2005 obliges Romanian cinemas to devote 5% of their screen time to Romanian films, of which at least 1% must be during the highest attendance show times. MPA opposes any type of quota restrictions that limit the ability to distribute film products on based market demand.