

# ROMANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Romania remain on the Watch List in 2009.

**Executive Summary:** Piracy continued to be a serious problem in Romania during 2008, with the problems of Internet piracy, especially peer-to-peer file-sharing and hub sites, growing rapidly. Optical disc piracy (including local burning), a pervasive phenomenon several years ago, has declined somewhat over the two years. While unlicensed business application programs and hard disk loading remain a key challenge for the business software industry, the Romanian government continued to take efforts to legalize software within its offices. Industry cooperation with police authorities during 2008 remained generally good, with Romanian authorities taking raids and actions against both hard goods piracy and piracy online. Recent implementation of the EU Data Retention Directive was also accomplished, and the industries hope that this will continue to support Internet investigations. Unfortunately, the hard work of the police is diminished because enforcement breaks down at the prosecutorial level. Several sound recording and business software piracy cases were closed by prosecutors in 2008 based on a perceived "lack of social harm," among other reasons. Furthermore, actions by the Romanian Copyright Office (ORDA) continues to undermine enforcement; ORDA still supervises the objectionable stickering system and causes substantial delays in delivering its forensic technical reports on pirated materials to the police. A recent government decision, done without any consultation with the private sector, was issued that increases fees rights holders have to pay to ORDA, only making an already broken system worse. For the first time, some deterrent criminal sentences (including jail) in physical piracy cases were issued in 2008, a positive improvement, although more sentences are needed, especially in online cases. Finally, discussions have been held over the past two years regarding possible copyright reform efforts, and rights holders request that their input and expertise be heard in order to close important gaps in the current legislation.

**Priority actions requested to be taken in 2009:** The copyright industries again recommend that the following actions be taken in the near term in Romania in order to improve protection of copyrighted materials:

### Legislation

- It is imperative that: (1) the statutory stickering (hologram) system administered by ORDA be abolished; (2) ORDA's track recordation system for sound recordings should be made voluntary and free of charge; and at the very least, (3) ORDA's tariffs must be substantially reduced;
- Rights holders' organizations should be permitted to serve as court experts in copyright infringement cases.
- Solve the issue related to the need to get a computer search warrant from a judge for searching computers, even in raids targeting companies. 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 clarification on this issue in an amendment to the Copyright Law adopted by the Emergency Ordinance or by Law, mentioned above.
- Avoid any changes to the copyright law and other relevant legislation that will weaken the enforcement tools available to rights holders. Rights holders should be included in any legislative consultation process.

### Enforcement

- Senior levels of Romanian Government officials must develop strong political will and express a commitment to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment.
- Have the police, including the anti-organized crime directorate, continue to take consistent anti-piracy enforcement actions against hard goods and online piracy. They should increasingly engage and tackle the roots of the problem: the suppliers of pirated products to the small-scale retail and street vendors and, in the case of business software, the companies distributing unlicensed software pre-installed on PCs. At the same time, authorities should continue in a more determined manner and as a matter of day-to-day activity to pursue big end-users of unlicensed software.
- Continue to support police investigations and actions involving piracy on the Internet.
- Get prosecutors to give high priority to the prosecution of Internet copyright piracy cases in particular, and of IPR cases in general. Ensure that the appointed special IPR prosecutors operate in a transparent manner, retain close contact with



rights holders' representatives and provide results by actively and swiftly initiating criminal infringement cases and forwarding them to courts by instituting indictments, rather than dropping the cases for lack of social harm. Coordination and instructions should be received by the police officers prior to the raids so that weak cases can be avoided. Prosecutors should request that the courts issue deterrent level penalties.

- Instruct judges and prosecutors to cease dismissing criminal cases for "lack of social harm."
- Impose deterrent, non-suspended sentences (in criminal courts) and fines and stop dismissing cases involving repeat offenders.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are overburdened to handle IPR cases. Establishing specialized courts or at least panels with criminal jurisdiction should also be considered.
- 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 rights holders' organizations.
- Establish a system at the borders to track the importation of blank optical media products. This should involve coordination among all enforcement authorities (police, customs).

ROMANIA										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 <sup>1</sup>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	10.0	40%	15.0	65%	12.0	60%	17.0	80%	18.0	78%
Business Software <sup>3</sup>	115.0	70%	91.0	68%	63.0	69%	61.0	72%	32.0	74%
Entertainment Software <sup>4</sup>	NA	NA	NA	89%	NA	77%	NA	75%	NA	65%
Motion Pictures <sup>5</sup>	NA	NA	NA	NA	NA	NA	12.0	NA	8.0	55%
Books	NA	NA	NA	NA	NA	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>125.0</b>		<b>106.0</b>		<b>75.0</b>		<b>92.0</b>		<b>60.0</b>	

## COPYRIGHT PIRACY IN ROMANIA

**Internet piracy:** There are about 12.0 million Internet users in Romania, about 53.9% of the country's population (as of March 2008, according to [www.internetworldstats.com](http://www.internetworldstats.com)). Broadband penetration continued to grow last year, offering cheaper and faster ways to connect to the Internet. Peer-to-peer (P2P) file-sharing phenomenon grew accordingly, and the most popular systems are Torrents, DC++, Stron DC, and Torrents. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Large amounts of video files are shared over the networks, mainly in Bucharest (463) and other several important cities like Galati, Timisoara, Cluj, Ploiesti, Iasi, Suceava.

The recording industry notes that while mobile business-to-consumer (B2C) piracy has basically stopped, Internet piracy increased in 2008, although at what might be at a slightly slower rate than 2007. The development of the Romanian

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of our Special 301 submission at [www.iipa.com/pdf/2009spec301methodology.pdf](http://www.iipa.com/pdf/2009spec301methodology.pdf). For information on Romania under Special 301 review, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of IIPA's submission. For a summary of IIPA's 2009 global issues, see our cover letter at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

<sup>2</sup> RIAA reports that its 2008 estimated loss figure only concerns physical piracy. Loss estimates in 2008 for digital piracy, which is almost 100%, are currently not available. The 2007 estimate does cover both physical and the then-new digital piracy, and took into account the lower U.S. dollar value.

<sup>3</sup> BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at [www.bsa.org](http://www.bsa.org). 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.

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

<sup>5</sup> MPAA's 2005 estimated losses reflected a methodology that analyzed both physical/"hard goods" and Internet piracy.

infrastructure of fiber optics and broadband continued in 2008, and that continued to drive Internet piracy. The main segment of Internet piracy involves P2P (peer-to-peer) file-sharing. During anti-piracy actions taken against user and hub cases in 2008, the recording industry noticed a slight drop in users connecting to DC++ or sharing music materials. However, musical content is still largely made available through DC++ networks in Bucharest (56.3%), Constanza (4.9%), Prahova (2.9%) and Cluj (2.4%). In 2008 alone, the industry brought 74 DC++ user cases in just Bucharest. In fact, Bucharest has the highest concentration of pirate activity. In order to tackle this, much depends on good cooperation with law enforcement and, in particular, the judiciary. However, the industry reports substantially better cooperation in other cities than in Bucharest. This is an area where there is much room for improvement.

The business software sector reports that in 2008, it witnessed a growth of Internet-based piracy of business software applications in Romania, with the most common methods being P2P and Torrents. 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.

**Hard goods piracy / optical media piracy:** There remains widespread CD-R and DVD-R burning which serves as the main sources of physical piracy in Romania. 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. It seems the levels of optical disc piracy in Romania have declined in the past two years, as internet piracy has grown.

There are no indications that pressed disks are any longer imported into or transshipped through Romania. Three years ago, the Government issued Ordinance No. 25/2006 (entered into force on March 1, 2006) which was approved by Law 364/2006 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. 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. Interestingly, there are indications of activities of illegal studios outside Romania that send their products to accomplice sellers in Romania, who in turn sell these pirate copies through mail order or via alleged "personal collection sales." In 2008, one of these illegal studio cases pointed to a connection in Hungary.

**Business software piracy:** The Business Software Alliance (BSA) in Romania reports that its market is most adversely affected by end-user piracy (both in companies and in private homes) and illegal distribution (such as hard-disk loading and distribution of home burned ODs). BSA appreciates the work of the Government in taking significant steps to legalize its own software. Hard goods piracy appears to have decreased lately, for two reasons: an increase of Internet piracy and concerted enforcement actions. Internet piracy of software products was fast growing in 2008. BSA reports that estimated trade losses for business software piracy in Romania in 2008 rose to \$115 million with a 70% piracy level.

**Record and music piracy:** The recording industry (which is represented by the national trade organization AIMR and the collecting society UPFR) reports that the level of Internet piracy in Romania is so high that the music industry is struggling to develop its legitimate on-line services. With respect to physical piracy, very few stores, commercial centers or markets sell pirated music. The street ban appears to be working, as less pirated materials appear on the streets, but there were indications of more couriers selling products on the street, slightly more than the previous year. The operating method of selling pirate products changed and is now concentrated around illegal burning studios in private apartments and related sales of burned disks locally and through mail order. A few test purchases indicated that the products sold this way are indeed made at local underground studios. Unauthorized music is also advertised on Internet or specific closed circuit channels. The recording industry reports that in 2008 they were in the exact same situation regarding digital piracy as they were in 2007. The digital music piracy rate is almost 100%. The situation is exacerbated by the fact that, even those cases that have been conducted successfully by the police, have been sent to the court. Sales dropped about 20% in 2007 compared to 2006 and with 35% in 2008 compared to 2007. Simply said, piracy is the main cause of the drop in sales.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that the predominant piracy problems faced by game publishers in the market is the continued use of pirated games at Internet cafés, and retail sales of locally burned pirated video game product (though at levels less than that in 2007). An ESA member company reports that 114 new criminal cases were initiated on its behalf in 2008, less than the number of cases (190) it supported in 2007. 20 of the

cases begun in 2008 reached the trial stage, 6 of which resulted in a verdict/judgment. 34 cases initiated in 2007 or earlier also achieved disposition in 2008.

**Audiovisual piracy:** The Motion Picture Association (MPA) reports that optical disc piracy remains a significant problem in Romania. 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. Moreover, peer to peer piracy has increased with deepening broadband penetration. Illicit blue ray discs are also readily available.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Given the depth of piracy problems in Romania and the importance of rule of law, senior levels of Romanian Government officials need to commit to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment in-practice. The main agencies responsible for criminal enforcement are the police and the prosecutors (the Public Ministry). The General Police Inspectorate – Antifraud Department includes a unit dedicated to intellectual property rights, and other agencies include the Border Police and the Gendarmerie. The Romanian Copyright Office (ORDA) has the responsibility to provide forensic examinations/expertise reports, to store the pirate products during trial and destroy them after the trial is concluded, as directed by the court or prosecutor.

An Intellectual Property Working Group has been in place since 2006; is a formal structure of private-public partnership. Led by the IP Department of the Public Ministry (General Public Prosecutor's Office), this group includes all the public authorities having IPR enforcement jurisdiction along with representatives from the private sector, and meets almost every month.

**Business software reports good work with police and prosecutors during 2008:** BSA reports that its relationships with the Romanian enforcement authorities was good in 2008, resulting in some excellent raids against large targets. The enforcement authorities became more receptive to industry's needs and requirements during the EU accession process. However, BSA is concerned that the level of attention and prioritization may have slackened off a bit, and currently is not as strong as it was in 2006. For instance, there was a discussion inside the General Public Prosecutor's Office about dissolving the coordination side of the IPR department; fortunately, this did not happen, proving that the authorities did consider the importance of anti-piracy work. BSA also believes that for much of 2008, ORDA improved its capacity for conducting expert reports.

BSA reports that the authorities took *ex officio* actions and were receptive to private industry's referrals. In 2008, BSA had more than 470 new raids involving end-user and reseller cases. Big companies were targeted (for instance, there was a raid targeting a company that had three office locations and more than 700 PCs) and there was a constant number of raids against hard disk loaders (another BSA priority). In fact, there were 3 cases of resellers convicted and sent to jail for software copyright infringement (one of them to 6 years and 7 months). BSA reports that there were 41 convictions in software cases in 2008, with the average sentence being 1 year of suspended imprisonment. BSA notes that last year the number of suspended imprisonment sentences outnumbered the criminal fines sentences, which is a plus, compared to prior years.

For 2009, BSA believes that actions against large end-users (companies) and hard-disk loading cases need to continue. In addition, time is long overdue to address a longstanding problem. When preparing for a raid, a computer search warrant must be issued in order to search computers at businesses (not in private houses) 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 has been reported since 2005 and four years later it is still unsolved.

**Recording industry has good rapport with the police, but problems continue with prosecutions:** In 2008, the recording industry reports good cooperation with police officers both in Bucharest and outside Bucharest on physical piracy cases, and have obtained positive results. As most police officers now have good knowledge regarding investigatory

procedures in physical piracy cases, they now start *ex officio* cases, most of which end up in court. However, there still are occasional problems involving establishing the ownership of rights in the various music tracks on the illegal physical products during trial; as a result, the courts often dismisses these cases even though the copies in question are clearly illegal.

The local music industry organizations (both UPFR and AIMR) report the following legal actions taken in 2008. UPFR filed for damages in 221 criminal files. This is a procedural possibility for rights holders through which their damage claim gets addressed in connection with the criminal infringement case. In addition, AIMR reported the following enforcement actions with law enforcement officials: 52 raids (on both illegal studios and DC++ user homes) through which a total of over 48,000 products were seized (pirate CDs, DVDs, inlays), 5 laptops, 16 central units possessing multiple optical writing devices and 26 hard disk drives.

Despite all these raids, far fewer went forward to the prosecutorial stage. With respect to physical piracy cases involving recorded music, AIMR reports that during 2008, 236 music piracy (hard goods) cases were dropped, discontinued by the prosecutors. 89% of those 236 cases concerned cases from 2007, 7% cases from 2006 and 4% cases from 2008. Aside from those, 39 criminal cases introduced in 2008 have been sent to the court and are under trial. Of all the criminal music piracy cases sent to the court in 2006-2008, there were 43 convictions and 4 acquittals. The most successful cases included sentences of between 1 and 5 years with a 6-year suspension. One important case concerned repeat offender Adalbert Daniel Kiss, who was convicted to 5 years and 6 months of prison and fined civil damages of 2444,04 lei (~US\$745) to be paid to UPFR. This case is important because the court imposed the execution of the prison time as opposed to the judicial practice of suspending the sentence.

**Entertainment software industry also works well with police but not so with prosecutions:** ESA member companies report that local police (in the criminal fraud investigation unit under the prosecutor's office) continue to initiate criminal cases on their behalf. Relationships with law enforcement continue to be positive and cooperative, with police actively seeking member company assistance in the course of investigations. Although settlements are permitted (though procedurally only the civil damages aspect of a criminal case), there were less requests made by defendants and thus, fewer settlements entered into in 2008. Typically, an investigator, prosecutor, and at times, even the judge, will encourage the defendant to seek a settlement with the complainant. Although the settlement should pertain only to the civil aspect of the criminal case, when such a settlement is entered into, in practice, the entire case will typically be dismissed for "lack of social harm." Prosecutors also continue to dismiss cases for "lack of social harm," even where no settlement is entered into – though this number has decreased when compared to previous years. In 2008, 40 such dismissals occurred, about 50% more than the number of cases settled. Unfortunately, there is little recourse for complainants when a prosecutor dismisses a case for "lack of social harm." A member company reports that all of its appeals (since 2002) against the dismissal of cases at the prosecutor level have been rejected by the courts. Another problem involves the lack of coordination at the prosecutor level. An ESA member company reports that the same defendant or infringer may be the subject of multiple proceedings before different prosecutors, but there is no systematic procedure for consolidating the different cases under investigation. Notwithstanding this lack of coordination, a prosecutor did consolidate five (5) investigations against an Internet café operator and instituted a criminal case against the operator on the basis of the five separate criminal investigations. Transparency, or the lack thereof, continues to be problematic. Rights holders are rarely informed of the status of a case, even though more than half the cases have been pending for several months, some even years. The government should make more transparent its enforcement efforts, and improve communication with rights holders particularly as they are likely to be of great help in supporting a case.

**Criminal Internet cases are being investigated but no completed prosecutions yet:** Internet investigations may take place only in the course of a criminal investigation (which, according to the law, may be opened based on some evidence).

With respect to criminal Internet actions involving business software applications, BSA believes there are two overarching problems. First, it is very difficult to gather evidence, as the traffic data (e.g. Internet protocol addresses) may be obtained as part of a criminal investigation, based on an order, and such criminal investigations may not be opened unless there is sufficient proof of infringement. It is not always easy to gather such evidence while complying with all the regulations on privacy, in order to get the criminal investigation opened and a judge order. Second, Internet piracy is still perceived as an infringement lacking the level of social harm necessary to start a criminal investigation, and this is a huge roadblock for both prosecutors and judges.

The recording industry reports varying results in different cities. In Bucharest, the enforcement problems arise once the police require the identity of the infringer. The ISPs do whatever they can to delay providing this information, even though the IP address is made available. Even with all the relevant data at their disposal, prosecutors there are still reluctant to provide a search warrant. It also happens that the case advances so slowly that the user can no longer be found and, as a result, the case is dropped. Because most of the major piracy problem is in Bucharest, much is at stake and police cooperation is important. The industry filed 74 DC++ user cases in 2008 in Bucharest alone. More positive results were obtained by the music industry in other Romanian counties. For example, AIMR has had successful P2P user and hub cases, most notably: (a) 5 raids in Cluj; (b) 19 raids in Sibiu; (c) 8 raids in Hunedoara; (d) one HUB takedown involving about 500 users in Prahova; and (e) 2 raids in Botosani. The industry has numerous other Internet cases underway.

The music industry (UPFR) reports that in 2008 there were 128 criminal complaints for music Internet piracy, of which 13 have been dropped. Interestingly, as concerns Internet piracy -- in particular P2P piracy -- it seems that users avoid having music content in their share folders. They noticed that several distinct users we were monitoring had their music content removed, while other protected materials were still present in their share folders. However, as in previous years, no digital piracy cases made it to the court in 2008.

BSA reports that one criminal complaint was filed in 2008, and there were preparatory discussions with authorities on several other cases. Romanian authorities showed interest in addressing software Internet cases, but as the legislation is in course of changing, it is a matter of time and procedures.

Local industries report that although the Romanian copyright law covers both uploading and downloading, there is some lack of clarity regarding the responsibility of Internet service providers. For example, there is an unclear reference of such liability in the copyright law.<sup>6</sup> However, Romania's Law on Electronic Commerce (Law No. 365 of 2002) provides that the ISP should suspend Internet access for the client when the ISP is being notified by the authorities that his client is performing an infringement. At their request, the ISP is obliged to suspend the Internet account of the respective subscriber. The ISP can suspend a client's services only through the disposition of the public authority defined as such (ANRCTI) or through a court order, based on a complaint of one interested party. However, this authority (ANRCTI) cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law. The E-Commerce Law is, unfortunately, ambiguous. It provides for the liability of ISPs in cases where they do not take action if they learn about the illegal/infringing nature of information stored or if the access to such information has been facilitated (by search instruments and links). Such illegal/infringing nature, however, needs to be confirmed by a competent public authority, in the case of the information to which access is facilitated. With respect to hosted information, it is not very clear what are the criteria upon which the ISPs have to consider the information as being illegal/infringing; local counsel indicates that this uncertainty may cause problems in practice. The law also provides for the general obligation of ISPs to alert authorities about the apparently illegal activities of their clients; should an ISP fail to do so, they are subject to administrative liability. Rights holders are concerned that this very broad and un-specific obligation is unenforceable.

BSA reports that the ISPs are rather indifferent to the problem of Internet piracy on their networks. No official negotiations were started between the rights holders and the ISPs. The recording industry filed one civil action against an ISP and is awaiting the court decision.

**Recent action worsens ORDA's problems with stickers and forensic examinations:** The Romanian Copyright Office (ORDA) is an independent Government agency that has had various administrative enforcement powers rise and wane over recent years. The copyright industry has objected to two particular practices of ORDA for years.

First, ORDA has had a strangle-hold over the objectionable hologram system and tracking system. The copyright industries, led especially by the music industry, have argued that this dysfunctional and outdated hologram system and track registration system for sound recordings should be abolished. 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

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<sup>6</sup> See Article 143<sup>2</sup> -- a crime punishable with imprisonment from 6 months to 3 years includes the act of the person who, without the consent of the rights owner and knowing or having to know, permits, facilitates, provokes or hides an infringement of a right provided for in this Law.

anti-piracy activities.<sup>7</sup> In addition, ORDA registers every sound recording and videogram that is released to a commercial circle for the purposes of issuing holograms (this requirement was introduced by the Government Ordinance No. 25/2006). As expected, the procedure is extremely complicated and time-consuming. The registration of each recording and videogram is taxed by ORDA, and the amount includes an additional 10% fee for a national cultural fund which is another state fee alongside the hologram fee. In March 2008, ORDA organized public consultations on the matter of either preserving or setting aside the hologram system. During the meetings it is questionable as to whether or not opinions were in favor of the system, however the informal message after the process was that the market wishes to continue with the system. There is no summary of the survey taken by ORDA on the matter publicly available and drafting of the survey does not reflect that of the respondent's true answer.

Second, ORDA does have some enforcement authority. After raids are conducted, the police send the seized product to ORDA for verification (forensic examination). ORDA examines the seized products and issues its technical report certifying which goods are pirated. This technical procedure with ORDA is still often lengthy; however, rights holders reports that these delays are not as long as they used to be. The average seems to be in the 2-3 months' timeframe, although in one unusual case, the verification process and the issuance of the technical report took only 10 days.

Rights holders, however, are still not involved in the verification process. After ORDA finishes its examination of the products, the prosecutor decides whether to file charges and prosecute the case if he/she considers there to be sufficient evidence for conviction. The simple solution here is to follow the prevalent practice in Europe and other countries, and to transfer this forensic examination task to the copyright industries, who are true experts in their respective products.

Rather than take action to minimize bureaucracy, delay and costs, the Government of Romania made matters worse late last year. Without any rights holders consultation, the government passed Decision No. 1086 of November 14, 2008, which reinforces the already troubling ORDA system of prohibitive tariffs (see further discussion in legal section, below).

**The need for deterrent sentences:** Many criminal copyright cases over the years have been terminated with the prosecutor dismissing the case. Common reasons used by the authorities have included: perceived difficulties in presenting appropriate evidence to get a search warrant or to make a case; the lack of "social harm" involved; fear that taking a particular case might trigger a negative reaction in the media; and fear and reluctance to bring the first Internet case. During 2008, the recording industry reported that many pending cases were dismissed, and at the same time, more cases in the physical piracy realm were filed. Now, as more cases make it to court, it is hoped that more convictions will be issued. Above are a few examples of recent deterrent decisions issued last year. However, those appear to be more the positive exception to a problem rule -- still prosecutions are few and deterrent sentences rare. Romanian courts must take action to fully enforce their laws.

Romanian courts remain reluctant to impose deterrent penalties, with small fines, minimal damages, and suspended jail sentences continuing to be the norm. There was, however, one case where the court imposed a 3-year jail sentence, which was not suspended, for illegal reproduction of copyrighted materials. Although in this particular case, the defendant was a recidivist, having been previously convicted of copyright infringement, and under a suspended jail sentence. In another case, which remains pending, a non-suspended jail sentence was imposed on repeat infringer, though this was later commuted to the mere payment of a fine. Notwithstanding the convictions, and the corresponding award of damages contained in the judgment and sentence, none of the defendants have complied with the order and collection of damages remains difficult given the need to initiate a separate garnishment proceeding.

**Lengthy court proceedings:** Criminal judgments of even minor fines against copyright infringers still require considerable time and effort in Romania. The time from the police raid to the transfer of the case to the court is never less than

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<sup>7</sup> 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. Moreover, considering the expected decrease in physical piracy, the justification for having any hologram system is disappearing. 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 over how the holograms it issues are actually applied by the users. This reinforces the futility of the system as it currently stands.

3-4 months, and on occasion may exceed ten months. The average amount of time needed to obtain a criminal court decision is between 1 and 1½ years. At least two or three hearings are needed before reaching a court sentence. Some companies report that they have a number of cases initiated in 2006 or earlier in which no decision has yet been communicated to its local counsel. There was, however, an exceptional case before the Timis County Court where the proceedings were concluded in just over 5 months, with only three hearings before the judge issued a verdict against the defendant for illegal commercialization – though the prison sentence was suspended. Appeals take even longer.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Data retention and ISPs:** In November 2008, Romania passed Law No. 298 of 2008 on data protection in order to implement the EU Data Retention Directive. This law addresses data retention issues, including data processed by providers of electronic communication services meant for the public or for communication networks. The law entered into effect on January 20, 2009. The copyright industries view this law as favorable because it obligates Romanian ISPs to retain their subscriber and network data for six months and to communicate it to the authorities, upon court order, in cases of crimes committed on the Internet or through other communication systems. These data crimes are considered “serious crimes” regardless of whether or not they were performed by a criminal organized group.<sup>8</sup> It is expected that P2P cases are covered by this law.

**New Decision on ORDA actions (new high fees for enforcement functions):** There is a new Government Decision No. 1086 of 2008, which entered into force on November 14, 2008. This Decision contains various provisions regarding tariffs, the use of expert reports, and the use of the “encouragement” fund for the personnel of the Romanian Copyright Office (ORDA). This unfortunate decision was adopted without any consultation inside the IPR Working Group, and the copyright sectors were not notified.

**ORDA and new expensive tariffs for stickers (holograms):** This decision regulates the procedure of registering recorded music titles and videograms in the National Phonogram Registry. The recording industry has for many years called for an abolition of the entire ORDA registration and hologram system, given its historical ineffectiveness regarding enforcement and its penchant for corruption (note: registration is required before being able to obtain the necessary holograms). However, this government decision shows that the Romanian government (and in particular, ORDA, which see this new measure as a welcome source of income) has no intention of getting rid of this cumbersome and, from a practical point of view, ineffective system. So for example, the new tariff to register a sound recording produced in Romania is 50 RON each (~US\$15) (per Article 7 of this Decision). To register sound recordings imported or otherwise introduced into commerce have different tariffs according to volume: (a) up until 20 phonogram titles – 50 RON (~US\$15); (b) between 21 and 50 titles – 75 RON (~US\$23); (cc) between 51 and 100 titles – 100 RON (~US\$30); and (d) over 100 phonogram titles – 150 RON (~US\$45). Simply put, the copyright industries believe that this latest decision by ORDA to line its coffers should be ended. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) substantially reduce ORDA’s tariffs and allow rights holders’ organisations to act as court experts in copyright infringement and piracy cases.

**ORDA and expert reports and high costs:** This Decision No. 1086 also regulates ORDA’s performance of forensic examinations and the provision of expert reports. Both activities have prohibitively high tariffs, which in turns constitutes a serious impediment to copyright enforcement. This Decision provides for two types of expert analyses and reports:<sup>9</sup>

(1) *The ones requested by the criminal enforcement authorities* -- Such forensic studies should be paid, according to the decision adopted by the Government, “by the person indicted, in case his/her guilt was proved” and the expert analyses should aim at clarifying the genuine or non-genuine nature of the product. Unfortunately, this provision is not enforceable, as it provides for several contradictions: the guilt is proved only at the end of the trial; the indictment is passed later in the criminal investigation and not in the beginning, when such expert analyses are necessary; and one cannot consider

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<sup>8</sup> This outcome was the result of a coordinated private sector effort to inform the legislative process when the matter was under consideration.

<sup>9</sup> Here is another way to look at these two kinds of reports. Point (1) refers to what local representatives used to call “technical minutes” which are requested by the prosecutor to check if seized goods are genuine or not in 100% of the cases. When the person under investigation is found guilty, he/she must pay, otherwise the state is responsible for payment. The legal language states precisely at the request of the prosecutor. Point (2) is the situation where the rights holder and any third party are in the position to pay if they ask for forensic exams. In Romanian criminal procedure, there is a clear difference between technical minutes, technical reports, and forensic examination.

a person to be guilty or even to pass an indictment against him/her until the genuine or pirated nature of the goods is clarified (while, according to the provision, first you need to have a guilt proved and only afterwards the products are analyzed if they are genuine or not). It is very unclear how this would apply in practice, and because so far no practical experience on the matter exists, uncertainty reigns as of early 2009.

(2) *The ones requested by the interested parties (including the rights holders)* -- These are examinations that should be paid for by the requesting parties. This element revises existing practice, and adds the new element of price. Industries' concerns and fears here are that, since the first case (above-mentioned) seems to be unclear and, thus, unenforceable, the only applicable case of expert analyses and reports would be this second one. In such situation, the rights holders might be asked to pay for the expert analyses and reports, which will result in a high financial burden for protecting their rights. According to Article 18 of this decision, ORDA specialists perform forensic examinations, at the parties' expense, on various subject matter.<sup>10</sup> For example, the charge ranges from 5 RON (US\$1.50t) for every since optical disk examined (CD, DVD, etc), 500 RON (US\$150) for a single computer hard drive, and 1000 RON (US\$300) for each computer software program. Also, the decision allows the option that, if the interested parties request ORDA's examinations to be conducted at other cities, that is possible and the rights holders must pay all travel expenses. So, in a raid in a city other than Bucharest that results in seizures of several hundred or several thousands of suspected infringing products, the forensic examination by ORDA not only takes time, but imposes significant financial burdens on rights holders as part of a criminal investigation undertaken by Romanian criminal law enforcement.

During discussions inside the IPR Working Group, after the Government Decision No. 1086 was adopted, the authorities (the General Public Prosecutor's Office and the Romanian Copyright Office) clarified that the industries shall not be charged for the forensics reports, unless they expressly request re-examination. The costs shall be advanced from the state budget and, in case of conviction, they shall be recovered from the infringer.

**Search warrants:** For many years, BSA has reported that one of its major enforcement obstacles is the legal prerequisite regarding search warrants. The search warrant can be issued only by the court and only after the commencement of the criminal investigation (Law No. 161 of 2003). The catch here is that the criminal investigation can only be commenced if sufficient evidence exists, and in-practice it is difficult to gather the evidence on suspect's premises in the first place. BSA has been concerned that this will reduce or limit the number of *ex officio* police raids will decrease dramatically because police raids depend upon input from the rights holders. This problem is still unresolved. The solution is simple -- the law amendment should provide that the mere verification of the existence of software installed on computer should not require such a search warrant.

**Copyright Act of 1996, as amended:** The 1996 Romanian Copyright Law has been consistently amended a number of times in the past decade. Various amendments were made in 2004<sup>11</sup>, 2005<sup>12</sup>, and 2006<sup>13</sup>, many of which were aimed at

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<sup>10</sup> Here is a listing of the subject matter and costs in Article 18 of this Decision: (a) optical disk (CD, DVD and other similar supports) – 5 RON per piece; (b) audio cassette – 3 RON per piece; (c) video tape – 4 RON per piece; (d) inlay (phonogram, video or software product) – 2 RON per piece; (e) hard disk – 500 RON per piece; (f) portable storage device (flash drive, memory card and other similar products) – 300 RON per piece; (g) computer programs – 1000 RON per piece; (h) works written on paper support (excepting computer programs) – 4 RON per page; (i) newspapers, magazines and other periodic publications, Internet pages – 200 RON per page; (j) photographic works, as well as any other works expressed through a photographic like procedure, no matter the support – 150 RON per picture; (k) music works with or without text – 300 RON per piece; (l) dramatical works, musical-dramatical, choreographic and pantomime works – 500 RON per piece; (m) cinematographic works as well as other audio-visual works – 350 RON per piece; (n) graphic or plastic art works – 400 RON per piece; (o) architectural works – 1000 RON per piece; (p) canvas, graphical works and miniatures that form architectural works – 200 RON per page or piece; (q) maps and topographical, geographical or general science drawings, no matter the support – 300 RON per piece; and (r) access control devices – 250 RON per piece.

<sup>11</sup> In 2004, Romania passed amendments to its 1996 Copyright Law (Law 285/2004) which came into force on August 1, 2004. 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.

<sup>12</sup> In 2005, the copyright law was revised through an Emergency Ordinance No. 123/2005 which entered into force on September 21, 2005. Although these amendments were far from ideal, there were some positive elements, such as: (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 rights 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. For example the withdrawal of the

coming into compliance with EU Directives. However, some problematic provisions reported by local industry colleagues remain, such as 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 11*bis*(2) and the Trade Related Aspects of Intellectual Property Rights (TRIPS). As a result, the overall legal structure is generally good but unfortunately 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.

**Street piracy ban:** In 2006, a street ban was adopted; Government Ordinance No. 25 of 2006 prohibits street commerce of copyrighted goods (original or pirated). According to the copyright industries, this street ban was a positive move at that time and remains so. Legitimate sales dropped substantially during the last years and they are still dropping. In this context, if this measure would be abolished, it would not improve the situation for the industry in terms of sales. In Romania there are no longer any specialized stores selling recorded music. Music is nowadays sold in supermarkets, hypermarkets and gas stations. Retail piracy moved from the streets to the newspaper stands or to closed circles in housing compounds and offices.

**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.

**Criminal Code reform:** A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008 and now, again, until September 1, 2009. In a positive move, Law No. 278 of 2006 introduced criminal liability for legal entities and also provides for the general limits of criminal fines. However, there were some problems in this law. For example, the criminal code still does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material.

**Government software legalization (2004):** BSA appreciates the work the Government has undertaken to legalize its own software use under Decree H.G. Number 470/01-04-2004. The business software industry looks forward to continuing to work with the Government in 2009 and beyond to ensure that the gains made through this effort continue into the future.

## IPR TRAINING AND PUBLIC AWARENESS

In May 2008, Business Software Alliance organized a training seminar for 50 Romanian police officers and prosecutors. The results were positive, as the quantity and the quality of software raids improved. In addition, BSA representatives also participated in trainings organized by the authorities. The recording industry offered several seminars for police officers and prosecutors, and also provided training materials and in-depth explanations of the process of evidence gathering, which is particularly important in Internet piracy cases. In addition, the music collecting society UAMI launched an anti-piracy campaign on radio and television aimed at informing the general public about the issues of music piracy.

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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. 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*."

<sup>13</sup> The 2005 Emergency Ordinance was voted in the Parliament and became Law No. 329 of 2006, which was aimed at making the Copyright Law compliant with the new Romanian Criminal Code. The copyright law now provides that criminal offenses are also punishable by criminal fines, and the level of such fine is to be established according to the Criminal Code provisions. This 2006 law also expressly introduced the competence of the Romanian Gendarmerie to conduct raids.