

# ROMANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2010.

**Executive Summary:** The new Romanian government needs to express a commitment to enforce the law and reduce copyright piracy and instruct all enforcement authorities (from police to prosecutors to the courts) to take sustained and concrete actions to support that commitment.

The music industry reports that the problems of Internet piracy, especially peer-to-peer file-sharing and hub sites, continue to grow. Optical disc piracy (including local burning), a pervasive phenomenon several years ago, has declined over the last three years. Still, infringing copies of films and videogames can be found on the streets. While unlicensed business application programs and hard disk loading remain a key challenge for the business software industry, the Romanian government has taken efforts to legalize software within its offices.

Both the music and recording and the business software industries reported generally good cooperation with Romanian police authorities during 2009, as the police took raids and actions against hard goods piracy, end user piracy and internet piracy. Unfortunately, the hard work of the police is diminished because enforcement breaks down at the prosecutorial level. Although cooperation with prosecutors is good, many music piracy and some business software piracy cases continue to be closed by the prosecutors based on a perceived "lack of social harm," among other reasons. For the first time, two convictions against companies (apart from convictions for the owners thereof) for business software infringement were issued last year, making it through a usually challenged criminal process. However, much more needs to be done to ensure full prosecutions and deterrent sentencing. To complicate matters, the Romanian Copyright Office (ORDA) continues to undermine enforcement, especially in the music area; it still supervises the objectionable and expensive stickering system and causes some delays in delivering its forensic technical reports on pirated materials to the police; however, the situation has improved from the previous years, when such delays were substantial thus impeding a due course of action. ORDA did initiate several meetings last year to address these longstanding problems but so far there had been no resolution; this delay is also due to the political situation which made it difficult to have legislative drafts promoted and adopted. Finally, discussions have been held over the past two years regarding possible copyright reform efforts, and the Ministry of Culture is reviewing matters; rights holders request that their input and expertise be heard in order to close important gaps in the current legislation.

The Romanian government needs also to address the issues that concern the data retention legislation. We had hoped that a revised version of the data retention law would be introduced in January 2009. However, the ongoing delay in the introduction of this legislation has provided ISPs with an excuse to obstruct cooperation. After this law was struck down by the court, we are back to square one, i.e. the police can request disclosure, which is good. Romania must transpose the EU Data Retention Directive. It is imperative that new legislation to achieve this is clear in that "serious crimes" must encompass copyright violations, regardless of whether or not they were performed by a criminal organized group, and that peer-to-peer (P2P) infringements are included.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following actions be taken in the near term in Romania in order to improve protection of copyrighted materials:

### Enforcement

- Senior levels of the Romanian government must develop strong political will and express a commitment to eradicate copyright piracy and instruct all enforcement authorities to 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.
- Rights holders' organizations should be permitted to serve as court experts in copyright infringement cases.
- Get prosecutors to give high priority to the prosecution of IPR cases, including Internet cases. 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.
- Impose deterrent, non-suspended sentences (in criminal courts) and fines, and stop dismissing cases, especially those involving repeat offenders.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are overburdened by IPR cases. Establishing specialized courts or at least panels with criminal jurisdiction should also be considered.

### Legislation

- With respect to ORDA (the Copyright Office), (1) the statutory stickering (hologram) system should be abolished; (2) ORDA's track recordation system for sound recordings should be made voluntary and free of charge; and (3) ORDA's tariffs should be substantially reduced.
- Remove the warrant requirement for search of computers in public areas; this could be accomplished by amending 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.
- 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.

## COPYRIGHT PIRACY IN ROMANIA<sup>1</sup>

Internet piracy: There are about 7.4 million Internet users in Romania, about 33% of the country's population (as of September 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++, and Stron DC. 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.

The music recording industry (which is represented by the national trade organization AIMR and the music collecting society UPFR) reports that the level of Internet piracy in Romania is so high that the music industry is struggling to develop more legitimate on-line services and the existing ones are facing unfair competition from the massively available pirated free offer. The main segment of music Internet piracy involves P2P (peer-to-peer) file-sharing yet cyber locker sites are catching up. An encouraging point is that the administrators of such sites almost always cooperate in taking down infringing links. Online services are developing to sell legitimate digital products in collaboration with the recording industry labels. It is difficult to establish the losses in sales due to the increased piracy, but the labels are turning to the digital sector and are making efforts to concentrate legitimate sales here. Recent public awareness efforts

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<sup>1</sup> For more information on Romania under the Special 301 review process, see Appendices D and E of IIPA's submission at <http://www.iipa.com/pdf/2010PEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010PEC301HISTORICALSUMMARY.pdf>. For a summary of IIPA's 2010 global issues, see our cover letter at <http://www.iipa.com/pdf/2010PEC301COVERLETTER.pdf>.

to communicate some of the music piracy to the public resulted in a large number of users eliminating music content from their shared folders (e.g. reduced music content shared on DC++ hubs).

The business software sector reports that it too has seen 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.

The Entertainment Software Association (ESA) also reports an escalating online piracy problem in Romania. ESA estimates there to have been approximately 217,840 infringing copies<sup>2</sup> made of select games through P2P file sharing by ISP subscribers in Romania during December, 2009. This comprises approximately 2.26% of the total number of illegal copies made by P2P users globally during this period. These figures place Romania as number 11 in highest overall volume of P2P game downloads, and number 9 in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Romania Data Systems and ROMTelecom were responsible for approximately 85% of this activity occurring in Romania—more than 186,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

Last year, the Romanian copyright Office (ORDA), along with the Ministry of Culture, initiated a dialogue with the copyright rights holders and the Internet service providers to find ways to promote the legitimate usage of protected content and effective protection of copyrighted content on their online networks. These discussions are still at an early stage but it is critically important that the new Administration give these discussions its backing and make them a priority. Rights holders have expressed hope for better collaboration with the authorities having control attributions in the digital domain and with the ISPs to find more effective solutions to protect the content and products on the Internet.

**End-user 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). Under-licensing of software product is a significant problem. 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 last year, but BSA acknowledges that is not the most harmful form affecting its sector in Romania. BSA appreciates the work of the police in taking anti-piracy and the government in taking significant steps to legalize its own software. BSA reports that its preliminary estimated trade losses for business software piracy in Romania in 2009 rose to \$156 million, while the estimated piracy level fell to 66%.<sup>3</sup> BSA members reported a major decline in sales of software products in Romania last year, but are not able to clearly relate such trend to crisis conditions, to software piracy or to another reasons.

**Hard goods 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 three years, as Internet piracy has become more popular. Street piracy as of music piracy is very low, although there have been identified cases in Mehedinti, Braila and Arad. The motion picture industry is also negatively impacted by street piracy. Street piracy also affects other industries in Timisoara, Mehedinti, Caras-Severin, Constanta, Iasi, Craiova, Dolj, Arad (but decreasing), and Cluj.

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<sup>2</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

<sup>3</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), 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. Final 2009 BSA data will be issued in mid-2010.

The music and sound recording industry reports that, with respect to physical piracy, very few stores, commercial centers or markets sell pirated music. The street ban appears to be working, as fewer pirated materials appear on the streets. There are indications, however, of slightly more couriers selling products on the street. 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. For example, the local sound recording industry group has identified at least 94 such illegal studios all over the country (București, Alexandria, Alba, Cluj, Constanța, Bacău, Brașov, Bistrița Năsăud, Brăila, Cîmpulung, Craiova, Drobeta T. Severin, Giurgiu, Hunedoara, Iași, Ilfov, Gorj, Năvodari, Piatra Neamț, Prahova, Reșița, Săcele, Sibiu, Târgoviște, Teleorman, Tîrgu Mureș, Timiș). The digital music piracy rate in 2009, as in 2008, 2008 was almost 100%. The situation is exacerbated by the fact that, even those cases that have been conducted successfully by the police, few have been sent to the court.

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 2008). An ESA member company reports that 48 new criminal cases were initiated on its behalf in 2008, less than the number of cases (114) it supported in 2008. However, only five of the cases initiated in 2008 reached the trial stage, each resulting in a verdict/judgment. 27 cases initiated in 2008 or earlier also achieved disposition in 2009.

With respect to audiovisual piracy, pirate burned DVDs, even of new releases, are sold on the streets due to a rapid adaptation of infringers to a new legal business model (whereby legitimate videos are sold with newspapers in special projects developed by licensees). Pirates are using the Internet to market and sell illegal hard goods and illicit Blue Ray discs are available. Online piracy, particularly P2P piracy, is also negatively impacting legal business models.

## COPYRIGHT LAW AND RELATED ISSUES

There are a variety of Romanian laws that affect the ability of rights holders to protect their content and for the authorities (both criminal and administrative) to enforce the law.

**Problems with the data retention law and Internet anti-piracy enforcement:** 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). 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.<sup>4</sup> 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 notified by the authorities that his client is performing an infringement.<sup>5</sup> The Constitutional Court ruled in October 2009 that the law regarding data retention (published in 2008) was unconstitutional due to the fact that "it allowed Police Officers to commit abuses". This was because the terminology of the technical terms was not correctly worded. The Romanian data retention law treated two distinct elements under the same form. One element was the traffic data (which basically is what flows on the "pipe" when the user is connected to the Internet) and the other element was the identity of

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<sup>4</sup> For example, there is an unclear reference of such liability in the copyright law. (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.)

<sup>5</sup> 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 unspecific obligation is unenforceable.

the user that could be obtained by associating an IP address to a name, based on the investigated activity. Obviously, these two elements are separated, where the last one should be considered “traffic data” because nothing is “traffic” on an identity.

Before, when the former law was in force, the ISP would simply refuse to offer the identity to the police officers on claims that this is traffic data, and the police officer needed to go to the prosecutor who needs to go to a judge and ask for a search warrant. It had to be shown that the case represents a “serious crime”, as the procedural law required. In practice, this was almost impossible to obtain, because judges do not issue warrants for such issues as they do not consider Internet piracy cases as “serious crimes”. After the law was declared unconstitutional, the situation reversed to the initial state that existed before, wherein the ISP could not claim anything and was forced to give the requested identity to the police officers directly. It is important for the Romanian Government to separate the terms in the data retention law, because it allows ISPs to refuse (based on a bad wording of the text) any request from the police officers as per internet infringers’ identity. Also, the “serious infraction” limitation should be removed.

The data retention law is now being held back for further modifications because it was vague and allowed the interpretation that the Internet user’s identity is to be considered traffic data. This raised the issue that police officers could commit abuses in one’s private life when requesting the associated identification data of an IP address being investigated. However, at this point, with the data retention law set aside, the practical procedure involving Internet piracy case investigations is reversed from the situation before this law where police officers were very much entitled to request identity information from the ISP based on investigated internet protocol addresses. So, at this moment the situation is better than before when it comes to the practical way of handling Internet piracy cases. What the next iteration of legal provisions on data protection is not yet known. However, since Romania is obligated to properly transpose the EU data retention directive, and hence new legislation on this will have to be introduced, it is critical that this legislation be worded in such terms that make it clear that copyright infringements are serious offenses for which the police will have the authority to request disclosure of user identity data.

**Copyright law reform:** Last year, a large group of copyright rights holders developed proposals to refine the Romanian copyright law. This proposal was submitted to the Romanian Copyright Office and the Ministry of Culture, and the consultation is still underway. The scope of this proposal covered four subjects: (1) the elimination of the articles that establish the remuneration for the related rights not being able to exceed one-third of the remuneration for the authors’ rights; (2) the elimination of the articles that establish that for the cable retransmission of the “must-carry” programs, there are no remunerations for the authors rights or for the related rights; (3) the amendment of several articles regarding the collective management system for the related rights in the case of radio broadcasting; (4) the expansion of the definition of importation in order to include the acquisitions from EU countries for private copying; and (5) eliminating the search warrant prerequisite for raids at companies.

BSA reports that ongoing efforts to draft amendments to the Government Ordinance No. 25 of 2006 reportedly includes an obligation for software distributors to inform customers about software piracy risks; this proposal was accepted by the Romanian Copyright Office in its official draft.

The 1996 Romanian Copyright Law has been consistently amended a number of times in the past decade. Various amendments were made in 2004 <sup>6</sup>, 2005 <sup>7</sup>, and 2006 <sup>8</sup>, many of which were aimed at coming into compliance

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<sup>6</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>7</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

with EU Directives. 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. Some problematic provisions reported by local industry colleagues remain. Article 143, which provides protection for technological protection measures, 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, Article 121(2) 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).

**ORDA, the hologram system and ineffective administrative enforcement:** The music 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. This industry has objected to this entire hologram system for more than five years. Last year ORDA initiated several meetings with industry to correct or modify these problems, but there has been no modifications of the system, pending revision of the law.

In November 2008, Decision No. 1086 of 2008 added more 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. It also showed that the government intended to remove this entire regulatory systems. The 2008 decision regulates the procedure of registering recorded music titles and videograms in the National Phonogram Registry.<sup>9</sup> It also regulates ORDA's performance of forensic examinations and the two types of expert analyses and reports. Both activities have prohibitively high tariffs, which constitutes a serious impediment to copyright 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. ORDA does have administrative enforcement abilities and does not do a very good job there (see further discussion below)

**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). This street ban has been a positive move. However, retail piracy has moved from the streets to the newspaper stands or to closed circles in housing compounds and offices.

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

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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 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>8</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 offense 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.

<sup>9</sup> 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); (c) 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.

**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 should be amended to provide that the mere verification of the existence of software installed on computer should not require such a search warrant. BSA hopes that this issue can be included in the copyright law reform process.

ESA also reports that the burdensome warrant requirements have had the effect of impending enforcement actions, particularly in the case of Internet cafés that utilize pirated copies of entertainment software. Because these computers are in public areas, and indeed are provided explicitly for public use, a search requirement should not be required in order to verify the existence of pirated software on these systems.

**Criminal Code reform delayed:** A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008 then, until September 1, 2009, and then, again, until January 1<sup>st</sup>, 2011. 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.

## COPYRIGHT ENFORCEMENT IN ROMANIA

Given the depth of piracy problems in Romania and the importance of rule of law, senior levels of Romania's government need to commit to eradicate copyright piracy and instruct all enforcement authorities to 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--Anti-fraud 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 it used to meet almost every month. Lately, however, there has been a decrease of the public authorities' (i.e. the Public Ministry) interest in organizing such meetings.

**Business software reports good work with police and prosecutors during 2009, and obtained first-ever criminal convictions against companies:** BSA reports that its relationships with the Romanian enforcement authorities was good in 2009, resulting in some excellent raids against large targets. 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 when Romania was readying to join the EU.

BSA reports that the Romanian authorities took *ex officio* actions and were receptive to private industry's referrals. In 2009, BSA had more than 500 new raids (more than 430 end-users, more than 50 for resellers and about 15 for hard-disk loading). Large companies were targeted (for instance, there was a raid targeting a company that had seven office locations and more than 600 PCs) and there was a constant number of raids against hard disk loaders (another

BSA priority). BSA indicated that although prosecutors did continue to drop some of their cases for lack of social harm, in general the prosecutors were transparent in their activities and in their contacts with rights holders.

There were 24 convictions in software cases in 2009 (a slight decrease compared to 2008, due likely to the two-month magistrate's strike where no judicial actions took place) Also, on a very positive note, BSA reports that in 2009, the first two convictions against companies were achieved (the defendant received fines and a criminal record, on top of criminal penalties for their administrators and damages). In 2009, with the average sentence was 1.25 years of suspended imprisonment for persons (illegal distributors and administrators of companies infringing software copyrights) and €4,700 (US\$6,450) criminal fine for companies. 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 2010, BSA believes that actions against large end-users (companies) and hard-disk loading cases need to continue.

With respect to criminal Internet actions involving business software applications, BSA believes there are several 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. (The recent Constitutional Court decision will have an impact on this matter; it is too early to evaluate what exactly that impact might be). Second, the longstanding problem involving the need for a computer search warrant still cause problems and delays (see discussion above) 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 five years later it is still unsolved. Third, 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. Moreover, ISPs have no legal obligation or incentive to cooperate with rights holders.

**Music industry reports cooperation and raids, but cases continue to be dropped:** The music and recording industry has good rapport with the police and prosecutors, in both hard goods and Internet cases; still some hard good cases are dropped. Civil actions are also underway in the Internet realm, although too many are closed by the prosecutors based on a perceived "lack of social harm," among other reasons. The local music industry organizations (both UPFR and AIMR) report the following legal actions taken in 2009.

The music industry reports good cooperation with police officers both in Bucharest and outside Bucharest on physical piracy cases, and have obtained positive results. Most police officers now have good knowledge regarding investigatory procedures in physical music piracy cases, work well with industry representatives, and also start *ex officio* cases, most of which end up in court. Hard goods piracy consists more of mail order piracy and burned products. Street vendors are not as frequent as before, but there have been such cases mostly outside Bucharest. With respect to physical music piracy cases in 2009, 28 criminal complaints were filed by AIMR, and in 186 criminal investigations, AIMR asked for damages (the damages totaled 1,335,880 lei, ~ €324.360 (US\$442,100). However, in 133 criminal cases, the prosecutors dropped the case due to lack of social harm and applied administrative fines (between 150-500 lei each ~ €36 – €121 each ~ US\$50 – US\$165 each), without any damages being paid to AIMR/UPFR. Furthermore, 29 cases of physical piracy cases have been sent to the court. Only 7 of those have been concluded, in which it has been decided a penalty of up to 2 years of imprisonment, suspended.

Internet action are a priority for the music industry and efforts have concentrated on DC++ cases. The main issue regarding Internet piracy is the lack of response from the ISP to the police officers as related to identifying a user behind an IP address. It takes a lot of time to obtain a response and sometimes the ISP responds evasive claiming that it cannot be established who used the respective IP at that time indicated in the complaint.

During the past year, the music industry anti-piracy organizations have developed and maintained good relations with 12 prosecutors in Bucharest, Sibiu, Arad, Constanta, Calarasi, Arges, Botosani, Cluj, and Suceava. All of them have been properly trained in the IPR issues and fully cooperate with our inspectors on digital piracy cases. None of them drop

the cases based on lack of social harm. The most frequent collaboration was with DC++ user cases which were treated seriously and all of them lead to successful raids. There are still some counties where this is not the case, and it is difficult to present digital piracy cases, but overall there was an improvement in the way prosecutors treat this issue. New piracy cases have been identified in Giurgiu and Alexandria after almost 2 years in which there have been no cases identified in those counties. This lead to a better relationship with the local police officers and the new prosecutors. Also, in Giurgiu after several discussions on the IPR subject, the police officers have developed a better understanding, and an advantage is that they have good informal relationships with ISPs and are able to obtain information with more ease. In Tulcea, there are new and young police officers and they manifested positively. Overall, the collaboration level for 2009 was the same as in 2008, and slightly better with the Police officers and Prosecutors in Tulcea, Olt, Alexandria, Giurgiu, Bistrita Nasaud and Bacau. Industry collaboration remains excellent with police officers in Alba, Arges, Galati, Suceava, Gorj, Dolj, Mehedinti, Călărași, Cluj, Timis, Brasov, Iasi, Constanta and Mures. The authorities are also taking ex officio actions in Arad, Timisoara, Mehedinti, Bistrita Nasaud, Sibiu, Constanta, Brasov, Galati and Braila. This is applied to both hard good piracy and Internet piracy cases. In these countries, the prosecutors have a good relationship with the judges in promoting our interests further. Regarding physical music piracy, there are over 50 criminal cases in court.

Regarding Internet piracy cases, in 2009 AIMR filed 102 criminal complaints and asked for damages in 15 cases (the damages total being approximately 200,000 lei ~ €48,560 ~ US\$66,150). In 69 criminal cases, the prosecutors' office dropped the case with only an administrative fine. In 7 cases, the industry was informed that it was impossible to identify the infringer from traffic data. In the criminal court there are only 2 Internet music piracy cases, without a solution. .

Currently there are more than 7 civil cases pending, the object of the litigation aimed at having the parties pay damages for acts of infringement online (e.g. posting files in P2P networks, selling ringtones, developing digital platforms on which illegal content is posted etc.) Without precedent in Romania, there has been a solution to UPFR's request of damages resulted from piracy actions on the Internet (making available to the public through a DC++ share from one user). Through a civil sentence, the defendant was forced to pay material damages in quantum of approximately 3,000 EUR. Evidence included the materials resulting from the criminal pursuit from the case against the respective infringer where the prosecutor dropped the case due to lack of social harm and set an administrative fine. Currently pending there are 4 more similar cases in the Civil Court. There are two 2 criminal cases in Court regarding the liability of the Internet providers for the content made available to the public.

The entertainment software industry also received cooperation from law enforcement authorities. 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. Unfortunately, cooperation did not extend to all phases of prosecutions. Prosecutors continued to dismiss cases for "lack of social harm," at a similar rate in 2009. In 2009, almost 40 such dismissals occurred, about 10 times 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. One ESA member 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. 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.

**Problems with ORDA and its stickers and forensic examinations:** ORDA is an independent Government agency that has had various administrative enforcement powers rise and wane over recent years. The copyright industries have objected to two particular practices of ORDA for years.

First, ORDA still has 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 anti-piracy activities.<sup>10</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.

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. In practice, only ORDA provides expert reports, and there are not independent experts in the copyright domain. 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.<sup>11</sup>

**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. Romanian courts remain reluctant to impose deterrent penalties, with small fines, minimal damages, and suspended jail sentences continuing to be the norm.

As noted above, the music and recording industries reports that in 2009 many pending cases were dismissed and others are still pending. BSA reports that its first two criminal convictions against companies in end-user piracy cases occurred in 2009.<sup>12</sup>

Aside from the Bucharest Tribunal and the Appeal Court in Bucharest, there are no panels specialized on Intellectual Property issues, reason for which the IPR cases are processed by legal panels for civil causes or criminal depending on the case, without the judges to have a specialization in the IPR domain. In this context, there is the risk of a non-unitary practice at national level regarding the applicability of the legal provisions within the IPR domain (contradictory solutions or passed on a wrong interpretation of the IPR legislation).

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<sup>10</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.

<sup>11</sup> Of course, there are rules of incompatibility that are provided for by the criminal and civil procedure. This would mean, for example, that music experts (like AIMR) would be incompatible in cases where AIMR is part of the trial. They must be authorized as a judicial expert. More generally, it would be very useful and more fasten for our cases if right holders would make the expert reports but the statutory incompatibility is very difficult to change. For rights holders serving as court experts, the civil procedure code should be amended.

<sup>12</sup> BSA has obtained convictions since the 1999-2000 timeframe, but those were against natural persons. It was only in 2006 that the criminal liability of companies was adopted in the legislation and three years later, BSA has its first set of convictions.

The Romanian judicial system should be more receptive as in regards with the measures of insuring the evidence within the Internet and also in the case of Piracy and counterfeiting goods, sense in which the legal frame should be improved in the sense of involving the state authorities in the applying such measures. At this time, the procedure forces the press of legal charges against the defendant in order to ask the court to apply insuring measures on the evidence. In this situation, when the defendant is practically warned of the intentions of the right holder, he destroys the evidence (e.g. music files, uploaded or made available on the Internet, or any counterfeited goods he holds in a certain place), without having the possibility to prove the infringement. Securing the evidence in the informatics system is one of great importance, given the extraordinary degree of piracy on the Internet; indeed, the hesitation and reticence of police investigators and prosecutors in applying searches or securing the evidence on computer systems is startling.

**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 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. Appeals take even longer.

**IPR trainings and public awareness:** The music and recording industry reports that although it did not have any formal organized seminars in 2009, it did work directly with police officers on collaborating on anti-piracy investigations, and that was a positive experience. This sector does plan to organize regional seminars in 2010. 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. The BSA organized a training in October 2009 for 75 police officers and prosecutors, and inspectors from ORDA were also invited.