

ROMANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2011.

Executive Summary: The high level of commitment that the Romanian Government demonstrated five years ago to reduce copyright piracy, by charging police, prosecutors, and the courts to take sustained and concrete enforcement actions, has all but disappeared. A government decision in 2010 to give jurisdiction over IPR crimes to a lower set of courts is indicative of a newly lax attitude toward intellectual property enforcement in general. At the same time, the tools to take action against increasing levels of Internet piracy are not available. The Romanian Government needs to implement the EU Data Retention Directive in a manner that clarifies data privacy procedures for online enforcement authorities while facilitating the collection of crucial evidence in cases of copyright infringement, including in cases of peer-to-peer (P2P) piracy.

Piracy is widespread in Romania for all forms of copyright materials, and much of it now is taking place largely on online. Copyright industries reported generally good cooperation with Romanian police authorities during 2010, but the number of raids and actions against hard goods piracy, end user piracy, and Internet piracy have decreased significantly due to lack of resources and a visible de-prioritization of IPR enforcement on the part of the government. Unfortunately, what results the police have produced are undermined by enforcement breakdowns at the prosecutorial level. Although cooperation with prosecutors is good, they continue to close many piracy cases based on a perceived "lack of social harm," among other reasons. Prosecutions, which already face delays and result in non-deterrent sentencing, could be further weakened by the November 2010 law moving the competence for criminal copyright cases to the lower First Instance Courts, which benefit from none of the IPR expertise or training that has been invested in the Tribunal-level prosecutors and Tribunals over the years. While the Romanian Copyright Office (ORDA) has improved its turnaround time in forensic examinations for enforcement activities, copyright industries remain troubled by other ORDA administrative practices, including its ineffective hologram requirements. 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.

PRIORITY RECOMMENDED ACTIONS FOR ROMANIA IN 2011:¹

- Senior levels of the Romanian Government should express a coordinated commitment to eradicate copyright piracy, providing the necessary resources and authority to all enforcement authorities to take sustained and concrete actions to support that commitment.
- 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.
- Give courts with IPR-trained Tribunal-level prosecutors and judges jurisdiction over copyright criminal cases and instruct courts to prioritize IPR cases, including Internet piracy cases.
- Ensure that appointed specialized IPR prosecutors operate in a transparent manner, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.

¹For more details on Romania's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Impose deterrent, non-suspended sentences (in criminal courts) and fines, and avoid 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.
- With respect to ORDA, (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.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

COPYRIGHT PIRACY IN ROMANIA

Internet piracy: As the Romanian population became more Internet savvy in 2010,² peer-to-peer (P2P) file-sharing continued to grow, and was the primary cause for a recent decline in hard goods piracy. Although more online pirates in Romania are accessing illegal content at home, 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 business software sector reports again in 2011 that it has seen a growth of Internet-based piracy of business software applications in Romania, most commonly via the illicit use of peer-to-peer (“P2P”) filesharing and Torrents. Online ordering of pirated goods continues, in which customers respond to online advertisements by submitting orders via e-mail, or through websites promoting pirated software for downloads.

The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 2.52 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through Internet Service Providers (“ISPs”) located in Romania, placing Romania thirteenth in overall volume of detections in the world.³ Breakdowns by ISP show that Romania Data Systems subscribers account for approximately 53% of this activity occurring in Romania.

The level of Internet piracy in Romania in recent years has become so high that the music industry has struggled to develop new legitimate on-line services, while existing services face unfair competition from the massively available pirated free offer. The main segment of music Internet piracy has involved the illicit use of P2P file-sharing, yet the growing use of cyberlocker sites to distribute infringing music files is close behind. Encouragingly, the administrators of such sites typically cooperate in taking down infringing links.

In 2009 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. 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 end-user piracy (both in companies and in private homes) and illegal distribution (such as hard-disk loading and distribution of home burned ODs) continue to do the most damage to the industry. Under-licensing of software products is a significant problem. Overall, the level of piracy in the sector remained steady between 2009 and 2010 at 65%. BSA reports that, based on preliminary data, the commercial value of pirated US-vendor software in Romania

²There are about 7.8 million Internet users in Romania, about 35.5% of the country's population (as of June 2010, according to www.internetworldstats.com).

³These figures do not account for downloads that occur directly from hosted content, such as infringing games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

rose to \$127 million in 2010.⁴ Hard goods piracy was on the decline in the past year, which can be attributed to the heavy increase in Internet piracy and determined enforcement actions. BSA appreciates the work of the police in taking anti-piracy actions and the government in taking significant steps to legalize its own software. However, one issue that law enforcement has not yet confronted is the phenomenon of pirated software installation performed by retail PC shops. Because the service is offered at the home after purchase, raids and prosecutions of the activity are very difficult.

Hard goods piracy: Widespread CD-R and DVD-R burning serves as the main source of physical piracy in Romania. Burning operations are often controlled by organized criminal groups. As has been the trend for several years, pirate discs are sold via Internet sites or press advertisements, then are delivered by mail or personally on the streets. The levels of optical disc piracy in Romania have declined somewhat in recent years, as Internet piracy has become more popular.

The Entertainment Software Association (ESA) reports that the piracy its members face in Romania is quickly changing. While physical piracy still appears in street markets, retail stores, and Internet cafés, the problem is quickly migrating online as Romanians have turned to downloading pirated games at home. With respect to audiovisual piracy, pirate content can now be purchased in high definition, and sold stored on hard discs through online auction website advertisements and e-mail offers. Pirate DVDs, even of new releases, continue to appear on the streets and in flea markets.

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: Local industries remain unable to enforce their rights in copyright works against online infringement in the aftermath of a now-defunct Data Retention Law (no. 298 of 2008), which in October 2009 the Constitutional Court found unconstitutional due to the fact that "it allowed Police Officers to commit abuses." The law was enacted to implement the EU Data Retention Directive, and created a new "serious crime" warrant requirement that hindered the ability of Romanian police authorities to seek the identities of online infringers. Since the law was repealed, however, as a practical matter rights holders are now unable to gather the evidence needed to bring effective Internet piracy cases. Although the Copyright Law and Law on Electronic Commerce contain elements that should establish a role for ISPs in online anti-piracy actions, currently ISPs in Romania will not cooperate in such actions until new legislation is adopted to address data retention. Romania will need to adopt new legislation to transpose the Data Retention Directive, which should be clear 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.

The Romanian Copyright Law addresses the unauthorized sharing of copyright works through both uploading to and downloading from the Internet, but is not clear as to the responsibility of ISPs specifically.⁵ Meanwhile, Romania's Law on Electronic Commerce (Law No. 365 of 2002) provides that an ISP should suspend Internet access of a client upon notification by the authorities that the client has engaged in an act of infringement.

⁴BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Romania. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

⁵See Article 1432 of the Copyright Law (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.)

The ISP can suspend a client's services only through the disposition of the designated public authority (ANRCTI) or through a court order, based on a complaint of an interested party. Unfortunately, the authority (ANRCTI) cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law. Further, the E-Commerce Law is ambiguous. It provides for the liability of ISPs in cases where they do not take action if (a) they learn about the illegal/infringing nature of information stored, or (b) they facilitated access to such information (by search instruments and links). In the case of facilitation, however, such illegal/infringing nature must be confirmed by a competent public authority. With respect to hosted information, it is not clear on what criteria the ISPs must consider the information to be illegal or infringing, which 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.

Copyright law reform: The 1996 Romanian Copyright Law has been amended a number of times in the past decade, including in 2004, 2005, and 2006,⁶ often to bring the law into compliance with EU Directives. The overall legal structure is generally good but unfortunately Romanian law is not yet fully compliant with the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), the EU Copyright and Enforcement Directives, or the WTO Trade Related Aspects of Intellectual Property Rights ("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.

The Constitutional Court recently resolved a concern with Article 121(2) of the Copyright Law in an April 29, 2011, decision. The article in question would have denied protection in the form of retransmission royalties to audiovisual works broadcast on must-carry television stations and retransmitted by cable operators; an approach that would violate protections required under Berne Convention's Article 11*bis*(2) and the WTO TRIPS Agreement. The Court declared those provisions as not being in compliance with Article 53 of the Romanian Constitution, prohibiting limitations on the exercise of property rights.

Most recently, in August 2010, the Ministry of Culture requested comments on draft amendments to the Copyright law that contains both good and bad provisions for the copyright industries. The draft would solve an issue long faced by the business software industry that computer search warrants must be requested in addition to location search warrants.⁷ Unfortunately, the draft also includes decreases of penalties for some copyright crimes. It is not yet clear when or how the draft will go forward.

In 2009, a group of collecting societies 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 following subjects, which were included in the proposal, remain of concern to rights holders: (1) 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; (2) the amendment of several articles regarding the collective management system for the related rights in the case of radio broadcasting; and (3) the elimination of the search warrant prerequisite for raids at companies.

ORDA, the hologram system and ineffective administrative enforcement: The music industry has for many years called for an abolition of the ORDA registration and hologram system, given its historical ineffectiveness regarding enforcement and its penchant for corruption. ORDA issues holograms for every optical disc (audio, video,

⁶For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

⁷A search warrant can be issued only by a court after the commencement of the criminal investigation (Law No. 161 of 2003). But 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, which can limit the number of *ex officio* police raids dramatically because police raids depend upon input from the rights holders. The solution is simple—the law should be amended to provide that the mere verification of the existence of software installed on computers should not require such a search warrant. BSA hopes that this issue can be included in the copyright law reform process.

software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities and, for a variety reasons, is a model that has proven over time and in many countries to be ineffectual. 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, while for example other additional fees (3% added to the sale price of DVDs or other tangible supports) are paid by the film distributors for the film fund administered by the Film Office. The copyright industries also have voiced concerns with a November 2008 decision regarding ORDA that added more provisions regarding tariffs, the use of expert reports, and the use of the "encouragement" fund for ORDA personnel. 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' organizations to act as court experts in copyright infringement and piracy cases.⁸

Government software legalization: BSA reports that in July 2010, the National Authority for Regulating and Supervising Public Procurement (ANRMAP) issued a draft amendment of the secondary legislation of public procurement (Government Ordinance no. 925 of 2006) for which the business software sector submitted a proposed revision that would allow contracting authorities to ask for statements of licenses for software used by bidders for public procurement contracts, and actual documentation of licenses upon winning a bid. Previous efforts were underway to amend the Ordinance to require software distributors to inform customers about software piracy risks. However, the current legislative draft was promoted without this provision. The process of amending the Ordinance is currently blocked, but should be encouraged to move forward including the contemplated requirements for distributors.

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.

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 October 1st, 2011. In a positive move, Law No. 278 of 2006 introduces 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

We have seen what Romanian law enforcement authorities can accomplish when the government prioritizes intellectual property enforcement at a high level. However, particularly in the past year, the country has shown noticeable disinterest in the face of continuously problematic levels of piracy. While the police and administrative enforcement authorities remain cooperative (if short on resources), problems in the judiciary increased in 2010.

Of particular concern, a new law went into effect on November 26, 2010 in Romania, providing that all criminal copyright cases will be heard by courts of lower instance than the courts having jurisdiction in the past. The First Instance Courts will hear initial cases rather than the Tribunal courts, the latter having been the beneficiary of considerable prosecutorial training from the private sector, which will now go to waste. Moreover, the last instance court will be one of the 15 Romanian Appeal courts, rather than the High Court of Cassation and Justice. All civil copyright cases will continue to be heard by the Tribunal courts. The maneuver might have been intended to simplify

⁸For further details, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

and accelerate the movement of IP cases through the judiciary, but the lasting effect will be to reduce the level of appreciation for the seriousness of copyright crimes by presenting cases before an inexperienced judiciary. This development is a quite literal indication that copyright crimes are of a lessening priority to the Romanian government.

The Intellectual Property Working Group, formed in 2006 as a form of private-public partnership, in recent years has become less active and is in need of more engaged leadership. 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. 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. 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. The entertainment software industry and the business software industry report, on a positive note, that ORDA has supported forensic operations in 2010 with almost no delays.

In 2010, BSA reports that the number of raids conducted by the police dropped significantly, and the public prosecutors continued to drop cases. Although the industry reports a positive relationship with low and mid-level enforcement authorities (who take on *ex officio* actions as well as industry referrals), generally speaking IPR enforcement is clearly no longer a priority for the Romanian authorities. Many of the police officers specifically appointed to handle IPR cases reduced their attention to IPR cases in 2010, partly for economic reasons. Furthermore, the department of IPR crimes within the General Inspectorate of Police was without a director beginning in mid-2010; this vacancy makes organized actions less likely and sends a message to the field that IPR is not a priority. Direction within the agency is needed to retain a police force focused on specialized IPR actions.

In 2010, BSA had 319 new raids (more than 271 end-users, more than 29 for resellers/distribution, and 19 for Internet piracy)—a major decrease from the 500 raids conducted in 2009. At the end of 2010, 34 cases resulted in convictions, and over 20,000 optical discs were seized. Unfortunately, raids against large companies were down. On a brighter note, there were frequent raids against hard disk loaders, which is a BSA priority in Romania.

On a very positive note, BSA reports that Romanian courts passed the first conviction in a torrents-related case in 2010. Although the court did not find adequate evidence for charges against an end-user for unauthorized making available to the public of copyrighted material, the court was able to convict the target on the basis of advertising revenues from the use of pirated material. In less positive developments, BSA reports that prosecutors dropped two major cases in 2010. In one case, the Public Prosecutor's Office of Timis found there to be no social harm despite damages amounting to more than US\$170,000. In another case, the Public Prosecutor's Office of Cluj dropped a case with damages of over US\$80,000 because the defendant company's representatives did not appear at the hearing.

BSA is now promoting a tax police initiative in Romania, to draw the attention of fiscal authorities to the value of tax revenue that could be recuperated by legitimizing software use. A BSA-IDC study released in November 2010 demonstrated that a drop of 10% in the software piracy rate could add US\$573 million to Romania's GDP and US\$87 million to state tax revenue.

The music and recording industry has a 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. There are currently two civil cases pending regarding the liability of the Internet providers for the content made available to the public.

The film industry reported that two pilot enforcement initiatives were launched in 2010. In one of the cases, a search warrant resulted in seizure of computers and high capacity hard discs, from which illegal content was used to load hard disks that were then offered for sale.

The entertainment software industry reports continued cooperation from local police in Romania, although both the police and prosecution need significantly more training and resources. Relationships with law enforcement continue to be positive and cooperative, and local police initiate cases involving cross-industry pirated product, often actively seeking member company assistance in the course of investigations. Unfortunately, cooperative efforts with law enforcement were often undermined once cases were referred to prosecutors. Because prosecutors view IP offenses as trivial, cases are all too often dismissed for "lack of social harm," and such dismissals are almost always upheld on appeal. When cases are not dismissed, prosecutors tend not to pursue deterrent penalties, even for repeat offenders. In the rare event that an investigation results in a case brought before a court, it generally takes between two and four years for completion of the trial. Moreover, courts typically only impose suspended sentences combined with nominal fines, resulting in very little deterrence.

Enforcement activities of ORDA: In addition to its administrative duties (explained above), ORDA has some competencies in criminal enforcement matters. After raids are conducted, the police send seized product to ORDA for forensic examination. ORDA examines the seized products and issues a technical report certifying which goods are pirated. This technical procedure has been a lengthy one in years past; however, rights holders report that there were fewer delays in 2010. The average processing time is about two to three months, although in one unusual case, the verification process and the issuance of the technical report took only ten 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 or she considers there to be sufficient evidence for conviction. In practice, only ORDA provides expert reports, and there are no 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.

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 establish a case; the lack of "social harm" involved; and fear that taking a particular case might trigger a negative reaction in the media. Romanian courts remain reluctant to impose deterrent penalties. Small fines, minimal damages, and suspended jail sentences continue to be the norm. The entertainment software industry reports that for one member, only 20 cases resulted in a court verdict and penalty in 2010, which amounts to 40% of cases brought. The usual penalty is suspended imprisonment of about 18 months and a small fine, a decrease of 6 months from the previous year. The same member also reported no effective jail sentences in 2010, and that defendants ordered by court to pay damages typically do not comply.

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. Industry representatives have observed an average amount of time needed to obtain a criminal court decision of 29 months, the shortest period being about one year and the longest over four years.

IPR trainings and public awareness: The film industry participated in an Internet enforcement training seminar organized in Bucharest in 2010 by the Romanian Police Inspectorate and Prosecutor General Office. BSA plans to organize a training seminar for police officers and prosecutors in early 2011, when new prosecutors and judges to be handling IPR crimes will be appointed. Private sector members of the IP Working Group also plan to organize a training seminar for newly appointed IP prosecutors.