

ROMANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:¹ IIPA recommends that Romania remain on the Watch List in 2012.

Executive Summary: Piracy remains widespread in Romania for all forms of copyright works, and the problem has largely moved online, where even international pirates seek safe haven from more unwelcoming terrain elsewhere in Europe. In a country increasingly indifferent to copyright enforcement, reports of cooperative attitudes of police and piracy experts are appreciated, but ultimately negligible within the overall challenging enforcement environment in Romania. Leadership is needed from the highest level of the Romanian Government to adapt Romania's laws to the modern environment, to encourage a national policy of cooperation against online infringement, to ensure police officials are competent and well-equipped to conduct raids and investigations more efficiently, and to give prosecutors and courts the authority and training to bring piracy cases to speedy conclusion, with deterrent sentences and penalties.

PRIORITY RECOMMENDED ACTIONS FOR ROMANIA IN 2012

- Senior levels of the Romanian Government must express a coordinated commitment to fighting copyright piracy, providing the necessary resources and authority to all enforcement authorities to take sustained and concrete actions to support that commitment, and monitoring progress over an extended period of time.
- Provide adequate resources and high-priority support for police investigations and actions, including those involving piracy on the Internet, by reinforcing the IP investigation and prosecution task force within the Prosecutor General's Office.
- Impose deterrent, non-suspended sentences and fines for criminal copyright convictions, and avoid dismissing cases, especially those involving high-level damages or repeat offenders.
- Permit rights holders' organizations to serve as court experts in copyright infringement cases.
- Reauthorize IPR-trained Tribunal-level prosecutors with jurisdiction over copyright criminal cases, and instruct public prosecutors' offices and 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.
- 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; (3) ORDA's tariffs should be substantially reduced; and (4) intricate and bureaucratic procedures should be simplified.
- Remove the warrant requirement for searching computers in public facilities by amending Law no. 161 of 2003 or Copyright Law no. 8 of 1996 or, alternatively, expressly provide for the principle that the premises search warrant also covers the PCs and digital media in the premises.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

COPYRIGHT PIRACY IN ROMANIA

Internet piracy: Like many countries in the region, Romania was once plagued by hard goods piracy, but in recent years has experienced a significant shift to Internet piracy. Although Romanian users increasingly access

¹For more details on Romania's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



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 Motion Picture Association of America (MPAA) reports that for the last year, the scope of Internet piracy of audiovisual content in Romania took on new dimensions, with a significant increase in number and visibility of illicit downloading and streaming websites. Some of these websites, for example vplay.ro, are accessible only from Internet Protocol addresses originating from Romania, while other, internationally available sites have sought safe haven for hosting services from within Romania. The lack of Internet enforcement in the face of these problems, report film industry representatives, has played a major role in deterring investors from developing a legal online market for audiovisual products.

The independent segment of the film and television industry (IFTA) reports that independent producers and distributors are especially concerned with the impact of Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Since Internet piracy instantly exports troubled marketplaces and high piracy rates to other markets, this type of copyright infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

The Entertainment Software Association (ESA) has seen an increase in the prevalence of peer-to-peer (P2P) piracy in Poland in 2011. For 2011, Romania placed tenth in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from its 13th place ranking position in 2010.

The Business Software Alliance (BSA) reports that Internet-based piracy of business software applications remained steady in Romania in 2011 compared to 2010, appearing most commonly via the illicit use of P2P file sharing and Torrents.

The level of Internet piracy in Romania in recent years has become so high that the music industry has struggled to develop new legitimate online 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.

End-user business software piracy: BSA representatives in Romania report that business end-user piracy is the most damaging to the industry. Under-licensing of software products is a significant problem. BSA reports that the commercial value of pirated U.S.-vendor software in Romania rose to \$195 million in 2010.² 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.

Hard goods piracy: The levels of optical disc piracy in Romania have declined somewhat in recent years, as Internet piracy has become more popular. Remaining hard goods piracy consists of sales in street markets and unauthorized use of pirated copies of games in Internet cafes. ESA reports that piracy in Romania is quickly

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Romania was 64%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$117 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

migrating online as Romanians have turned to downloading pirated PC 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 abilities of rights holders to protect their content and of the authorities (both criminal and administrative) to enforce the law.

No legal framework for online anti-piracy investigations: Romania is currently considering a new draft law to implement the EU Data Protection Directive, under discussion for adoption in 2012. The Romanian Ministry of Information Society and Communication (MCSI) submitted the draft for public comments in June of 2011, and in October 2011 the European Commission issued a statement pressing Romania to move forward with implementation of the directive. Adoption of a legal framework for data retention could allow enforcement authorities to collect needed evidence in anti-piracy investigations, by clarifying that ISPs should retain online activity to be supplied to authorities in penal cases.

Local industries have been 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 P2P infringements are included.

Internet cooperation: There are currently no plans in Romania to develop a clear framework for cooperation with Romanian ISPs to enforce copyright online, in the absence of which ISPs are reluctant to take any action. Rights holders in the film industry began working with Romanian hosting service providers in 2011, and report varied responses to notices of instances of piracy and efforts to collaborate. Some host providers responded rapidly, but most took no action in response to repeated notices. There is currently no effort on the part of the Romanian Government to facilitate an agreement for voluntary cooperation among rights holders and ISPs.

The Romanian Copyright Law addresses the unauthorized uploading and downloading of copyrighted works from the Internet, but is not clear as to the responsibility of ISPs specifically.³ 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. 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, leaving copyright violations out of the purview of this ISP liability mechanism. Further, the E-Commerce Law 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 such illegal/infringing nature must be confirmed by a competent public authority. However, with respect to hosted information, it is not clear on

³See 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.)

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 2006,⁴ 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), 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.

In August 2010, the Ministry of Culture requested comments on draft amendments to the Copyright law, but the draft has not progressed since comments were submitted in 2010. As published in 2010, the draft contained both good and bad provisions for the copyright industries. It would solve an issue long faced by the business software industry that computer search warrants must be requested in addition to location search warrants. A 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 a 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. Alternatively, it could be provided that the search of the computers is covered under the premises search warrant. BSA hopes that this issue can be included in the copyright law reform process. Unfortunately, the draft also includes decreases of penalties for some copyright crimes. A needed revision would implement Article 8.3 of the EU Copyright Directive to allow rights holders to seek injunctions before civil courts against intermediaries whose services are used by a third party to infringe copyright. Meanwhile, in 2012 new criminal and procedural codes are expected to come into force, although it has been reported that the new criminal code could be delayed until 2013. However, while the new criminal procedural code is to address computer searches in detail, it is not expected to resolve the issue that specific computers must be identified in warrants for subsequent search.

Also in 2009, the Romanian Copyright Office supported a legislative amendment to require resellers of software to inform customers about the legal risks of piracy at the point of sale. However, the legislative draft amending Government Ordinance no. 25 of 2006 was put forward without this provision. The concept should be retained in future efforts to increase public awareness about piracy.

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, 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 of 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

⁴For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

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.⁵

Government software legalization: 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 continued to be stalled in 2011, but should be encouraged to move forward including the contemplated requirements for distributors.

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 1, 2011 and now is not expected until late 2012 or even early 2013. 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

Copyright industries report some improvements in relationships with Romanian Police in 2011, but overall enforcement authorities have not prioritized combating piracy. Obstacles to gathering evidence in physical raids and Internet investigations continue to prevent cases from moving forward, and those that do reach prosecutors’ desks are often subject to dismissal. The generally poor economic situation, together with the lowering in late 2010 of jurisdiction over criminal copyright cases from tribunals to first-level prosecutors’ offices and courts, proved to have negative consequences for copyright enforcement efforts.

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.

Police enforcement: In 2011, BSA reports that its relationship with the Romanian Police has substantially improved. A cooperation protocol was signed at the highest level, and the Inspector General of the Romanian Police personally participated in actions, bringing weight and visibility to a nationwide public awareness campaign. Authorities take *ex officio* actions, as well as new cases based on referrals from the private sector. However, in 2011 the number of raids conducted by the police dropped significantly, and the public prosecutors continued to drop cases. Police officers who have been specifically appointed to handle IPR cases again in 2011 reduced their attention to IPR cases or took on other types of cases, due to economic pressures. The superiors of the General Inspectorate of Police should retain specialized officers and ensure resources are adequate for their dedication to

⁵For further details on this long-standing problem, see the IIPA’s 2010 Report at <http://www.iipa.com/rbc/2010/SPEC301ROMANIA.pdf>.

IPR cases. Further, amendments to the copyright law to authorize police to verify software installed on computers, as described above, could provide the needed authority for police to move forward with raids in cases of software piracy.

In 2011, BSA had 248 new raids (more than 190 for end-users cases, more than 15 for resellers/distribution, six for hard-disk loading cases, and 34 for Internet piracy)—a significant decrease from the 319 raids conducted in 2010 and far below the 500 raids conducted in 2009. By the end of 2011, 30 cases resulted in convictions (11 of these were for end-user piracy, 16 in resellers/distribution cases, and three for hard-disk loading piracy, one of which resulted in a jail term for a second-time offender).

The entertainment software and motion picture industries report that relationships with law enforcement continue to be positive, although delays in case reporting continue due to lack of resources. As reported in 2011, both police and prosecutors would benefit greatly from better training and the necessary tools to gather evidence for the identification of online infringements. Local police initiate cases involving cross-industry pirated product, often actively seeking member company assistance in the course of investigations. One ESA member reports a considerable decrease in the number of criminal cases referred to prosecutors, from 104 in 2010 to just 35 in 2011. Unfortunately, enforcement efforts continue to focus on small cases, with the majority of video game cases involving between 4 and 80 infringing copies.

Gathering evidence in Internet piracy cases is significantly more challenging since the Constitutional Court brought down the legal framework on data retention in 2009, as explained above. Moreover, under legislation still in force, traffic data may be obtained by order as part of a criminal investigation, but such a case may not be opened without existing evidence sufficient to prove infringement – a limitation that in practice allows Internet copyright criminals to remain active without fear of detection.

Judicial enforcement: Romania's courts remain a bottleneck for copyright enforcement due to a longstanding problem of court officials dismissing cases referred by enforcement officials, unhelpful jurisdiction adjustments at the end of 2010, training needs for specialized prosecutors, and a need for search warrant reform and the issuance of deterrent sanctions. Public prosecutors continue with the long-problematic practice of closing cases for lack of "social harm."

Romania's local public prosecutor's offices each include one public prosecutor appointed for IPR cases, among other responsibilities. Due to a recent reorganization of court jurisdiction of copyright cases, however, their effectiveness has been diminished. A new law went into effect on November 26, 2010 in Romania, providing that all initial criminal copyright cases would be heard by First Instance Courts, courts of lower instance than the courts having jurisdiction in the past. The Tribunal courts had been the beneficiary of considerable prosecutorial training from the private sector, which will now go to waste. Since the competence for these cases moved to a lower level, the assigned prosecutors changed and required new training, a task made more difficult as training resources were stretched among several assigned prosecutors per country, rather than one per county at the higher level. 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 and accelerate the movement of IP cases through the judiciary, but without the needed emphasis in the lower courts of the seriousness of copyright crimes, 2011 showed none of the badly needed improvements in judicial enforcement for copyright crimes in Romania. Underscoring the fact that copyright crimes receive diminishing attention in Romania's courts, the National Institute for Magistrates (where future prosecutors and judges receive mandatory training) has removed intellectual property law from the mandatory curriculum beginning in 2011. The full impact of the change in jurisdiction remains to be seen; however, in 2011 the First Instance court issued three sentences in piracy cases, including one for effective jail imprisonment of three and a half years for a repeat infringer. Industry representatives recommend considering reinstating authority to the courts above, to be sure that the training invested in experts at the Tribunal level does not unnecessarily go to waste. Prioritization of IPR crimes in general needs to be instilled in the judiciary from the highest levels.

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. One recent case regarding a repeat offender associated with damages of over US\$130,000 was dismissed for lack of social harm. An ESA member reported that of nine cases dismissed in 2011, only one was overturned 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 an average of 3 years for completion of the trial. In one case a sentence was not issued until five and a half years after the initial raid took place. Typical penalties issued consist of suspended imprisonment of about 21 months, a court fine of up to US\$1,000, and occasionally damages amounting to a no more than a few hundred U.S. dollars. Such nominal fines result in very little deterrence.

On a positive note, BSA reports the support of the General Public Prosecutor’s Office and the General Inspectorate of Police in issuing a Software Copyright Enforcement Methodology Guide, to serve as a tool for enforcement agencies in tackling software piracy.

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.

Enforcement activities of ORDA: In addition to its administrative duties (explained above), ORDA has some competencies in criminal enforcement matters. Industry reports that, following a change in management of ORDA in the past year, there has been a positive trend in the average processing time to receive piracy expertise from ORDA officials, now down from about two to three months to just 16 days in 2011. 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. 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.

IPR trainings and public awareness: In 2011 BSA conducted nationwide campaigns to raise awareness of software piracy risks. These included a program conceived and carried out together with the General Inspectorate of Police targeted to businesses entitled “Unlicensed software is a luxury you cannot afford!” with press event, direct mailing, and telemarketing to 13,000 targets along with a dedicated website, www.softwarculicenta.ro. BSA also launched a campaign for public sector local authorities. Both campaigns proved to be a success and thus will continue in 2012. Industry representatives recommend further training and capacity building is needed, and that exchanges with international counterparts on successful treatment of piracy cases could be beneficial.