

ROMANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:¹ IIPA recommends that Romania remain on the Watch List in 2014.

Executive Summary: In the midst of steady and significant piracy rates in Romania, enforcement conditions have only deteriorated. High-level Romanian authorities support the private sector in promoting anti-piracy messages, but their efforts have not translated into concrete steps to bring copyright criminals to justice, and enforcement actions in the past year have dropped. As a result, piracy remains widespread in Romania for all forms of copyright works, especially in the online space, where international pirates seek safe haven from better-enforced terrain elsewhere in Europe. Making matters worse, in 2013 the Court of Appeal held that the making available right in Romania is subject to mandatory collective administration, contradicting Romania's obligations under the WIPO Treaties to provide an exclusive making available right and the means to enforce it. We encourage the Romanian Government to address this troubling development, adapt the country's laws to the modern environment, encourage a national policy of cooperation against online infringement, ensure police officials are competent and well-equipped to conduct raids and investigations efficiently, and give targeted prosecutors and courts the authority and training to bring piracy cases to speedy conclusion, with deterrent sentences and penalties. The support and assistance of the U.S. Embassy in Bucharest continues to be an invaluable part of the continued effort to address these crucial issues.

PRIORITY ACTIONS REQUESTED IN 2014

- 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, high-priority support, and instructions to prioritize IPR cases for all specialized police as well as local law enforcement for investigations and actions involving piracy on the Internet.
- Ensure that specialized IPR prosecutors are tenured in IPR expertise, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.
- Impose swift, deterrent, non-suspended sentences and fines for criminal copyright convictions, and avoid dismissing cases, especially those involving high-level damages or repeat offenders.
- Amend the law to resolve obstacles to search warrants in enterprise end-user software piracy cases.
- Permit rights holders' organizations to serve as court experts in copyright infringement cases.
- Amend the law to clarify that the making available right is not subject to mandatory collective administration.
- Amend the Copyright Law to reauthorize IPR-trained Tribunal-level prosecutors in criminal copyright cases, and instruct public prosecutors' offices and courts to prioritize IPR cases, including Internet piracy cases.
- With respect to the Romanian Copyright Office (ORDA), (1) abolish the statutory stickering (hologram) system; (2) make ORDA's track recordation system for sound recordings voluntary and free of charge; (3) substantially reduce ORDA's tariffs; and (4) simplify intricate and bureaucratic procedures.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

¹For more details on Romania's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Romania's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN ROMANIA

Online Piracy: For several years now, Romania has developed into a significant European haven for Internet piracy. A number of well-known illegal websites choose Romanian ISPs for hosting services with little risk, such as the linking sites *hdmusic.me* and *downloadbox.me*, and the cyberlocker *share-byte.net*. Romanian users increasingly access illegal content at home and download and burn copyrighted materials — music, videogames, films and software. Legitimate distributors of these products struggle in the face of the unfair competition that such widely available pirated content represents. The problem has so pervaded Romania's webspace that pirate services there are now serving users both in and out of Romania.

Each industry can attest to the damaging levels of online piracy in Romania. In 2013, Romania ranked 13th in the world in the number of connections by peers participating in the unauthorized file-sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer (P2P) networks. The software industry reports a growing presence of pirate software on file-sharing networks including BitTorrent networks. This illegal downloading of software typically occurs from users on home computers, who then distribute the pirated works further online or bring the illegal software to work for use in enterprise settings. Unauthorized credentials used to access cloud software services are also becoming more prevalent.

Local film distributors report a significant increase of online piracy in the country in 2013, including via BitTorrent networks and other P2P formats, as well as websites that offer streamed pirate audiovisual works. The most prominent of these sites is *vplay.ro*, which offers Romanian users access to streaming television series for free or even for subscription payment. These illegal services based in Romania are the source of audio and video camcords that have a direct impact on the legitimate online market in Romania and in other countries, and serve as the foundation of a still-present illegal DVD market worldwide. There are reports of the appearance of illegal digital content with Romanian subtitles in Moldova, both online and on broadcast networks, creating a substantial problem for film distributors there. There are also reports of unauthorized retransmission of television programs in the countryside of Romania.

The music industry faces high levels of Internet piracy in the form of P2P file-sharing, yet the growing use of cyberlocker sites to distribute infringing music files is close behind.

Enterprise End-user Software Piracy: BSA | The Software Alliance (BSA) reports that the software piracy rate in Romania was 63% in 2011, representing a commercial value of unlicensed software of US\$207 million.² This includes continued widespread use of unlicensed software among small businesses.

Hard Goods Piracy: The levels of optical disk piracy in Romania have declined somewhat in recent years, a trend attributable to both the increase in Internet piracy and enforcement actions against places of sale. Hard-disk loading, an activity that involves resellers installing pirated or unlicensed software onto PCs that are then sold on to consumers, was for a short time on the decline as a result of private sector efforts combined with deterrent sanctions issued by law enforcement. However, in the aftermath of some dismissed hard-disk loading cases, a new wave of this type of illegal software distribution has crept back on the scene.

COPYRIGHT ENFORCEMENT IN ROMANIA

Romania's copyright enforcement suffered from a significant decline in 2013, reflecting a de-prioritization of copyright crimes among police, prosecutors, and judges. Despite positive interactions with higher level officials within the Romanian Police, the General Public Prosecutor's Office, and the Romanian Copyright Office in 2013, the law

²Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

enforcement officials in the field continue to look past many piracy cases and have poor results in the cases they do address. Difficulties in civil and criminal litigation include obstacles to gathering evidence in raids and investigations, and prosecutorial dismissal of cases.

Meanwhile, the Intellectual Property (IP) Working Group is an important but under-utilized part of Romania's IPR public-private cooperation and enforcement regime. It was formed in 2006 as a form of public-private partnership for the organization of training programs and intra-governmental cooperation, led by the IP Department of the Public Ministry within the General Public Prosecutor's Office. The IP Working Group includes all the public authorities having IPR enforcement jurisdiction along with representatives from the private sector, and should increase its efforts to communicate among enforcement bodies the importance of reducing piracy in the year to come.

Cooperation for the Removal of Infringing Material Online: The government has taken no action to encourage service providers that host or direct traffic to infringing materials to cooperate in taking down infringing content, and there are no mandatory or voluntary established procedures for takedown notices to service providers. With no negotiations underway to develop an understanding among these parties for the handling of infringement notices, ISPs in Romania typically decline to take voluntary measures even in response to rights holder requests.

The music industry reports very low levels of cooperation with Romanian hosting providers even with respect to the most rudimentary form of cooperation (notice & takedown). The film industry reports that notices sent in 2013 to Voxility, the main hosting provider for copyright infringing websites, have gone without response, and direct communications with the service's management confirms their unwillingness to cooperate with rights holders in anti-piracy measures. Instead, rights holders have been forced to take the matter to litigation in what could be a lengthy process if preliminary injunction proceedings are unsuccessful. The local music industry also initiated a civil action against a hosting provider for the refusal to remove/take down infringing links or block access to the infringing materials. The court recently granted damages against the provider. However, given the general inaction of the Government of Romania to enforce the law, this decision does little to affect the perception that Romania is a favorable climate for hosting providers to supply services to those who infringe copyright. Government leadership is needed to bring the relevant parties together for an agreed solution.

Police Enforcement: The Romanian Police is a cooperative partner with the private sector. For example, BSA and the police renewed the cooperation Protocol in September 2013, and continued conducting joint awareness campaigns, both to the public generally as well as specific efforts to inform enterprises of the various risks associated with the use of unauthorized software. Unfortunately, the police suffers from insufficient resources and in 2013 the number of actions taken and resulting convictions declined sharply. Some local police forces are organized efficiently and manage to proceed with cases despite these limitations, according to the music industry. The police have specially appointed officers for IPR matters, and conduct *ex officio* raids, particularly in enterprise end-user software piracy cases. However, the superiors of the General Inspectorate of Police should retain specialized officers and ensure resources are adequate for their dedication to IPR cases. Since 2009, copyright enforcement actions by the Romanian Police have dwindled. For example, in 2013, BSA reports that the police conducted 238 enterprise end-user piracy raids, a significant drop from 430 conducted in 2009. Internet piracy raids numbered 25 during 2013, a decline from 38 in 2012.

A major obstacle in enterprise end-user software piracy enforcement is the need to have both a physical location warrant and a computer search warrant with strict identification of the computers and of the digital data media that are to be searched for unlicensed software. In practice this causes the police to conduct twice as many actions: first obtaining the physical location search warrant to visit the site, and second, having retrieved the computer identification information, they can request the search warrant for the PCs themselves. This process is time- and resource-consuming and it can also lead to unsuccessful raids if a company shows misleading licensing information or is tipped-off before the initial search. This issue dates back to 2005 and still remains unsolved. It has been the subject of discussion for amendments to the copyright law currently under consideration.

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 below. 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 self-defeating limitation that prevents the collection of necessary evidence to initiate the case.

Judicial Enforcement: As reported in IIPA's past submissions,³ Romania's courts remain a bottleneck for copyright enforcement. Prosecutors continue to view IP offenses as trivial and lacking "social harm," leading to dismissals that are generally upheld on appeal. Romania's courts lack specialized IPR judges or panels, making it difficult to provide targeted training for judges. Non-deterrent sentences, after an average of three years at trial, are a common result. Prioritization of IP crimes in general needs to be instilled in the judiciary from the highest levels.

Romania's local public prosecutor's offices each include one public prosecutor appointed for IP cases, among other responsibilities. However, the requirement to hand over IP cases to specialized prosecutors is not strictly followed, and inexperienced prosecutors may be called upon to handle these highly technical cases. The problem is compounded under the 2010 reorganization of court jurisdiction of copyright cases, by which all initial criminal copyright cases would be heard by First Instance Courts, courts of lower instance than the Tribunal courts that had this jurisdiction in the past. The reorganization dispersed IP competence from 42 Tribunal courts to as many as 188 Courts of First Instance, making training and capacity building in copyright crimes extremely difficult. Recent informal surveys of IP prosecutors revealed that the vast majority have only a few months of experience handling these matters, and are likely to rotate to other fields. Historical IP cases that were still queued before the Tribunals were finally resolved by 2013, and the inability of the lower courts to bring new cases to conviction is starkly evident. Only four cases involving enterprise software piracy have resulted in convictions in 2013, a drop from 15 in 2012 and 24 in 2009.

Local industry now reports that the General Prosecutor's Office is considering abolishing its IP department in 2014. Further, the section of the Bucharest Court of Appeal handling IP cases is expected to be dissolved in March 2014, with no published plan indicating whether the judges to be handed redirected IP cases will have any specialization in the field. These developments clearly demonstrate that Romania's judicial system is taking a step in the wrong direction and indicate a general lack of appreciation for the importance of IP crime enforcement.

Anti-Piracy Activities of the Romanian Copyright Office (ORDA): 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. In addition to its administrative duties, ORDA conducts forensic examination of seized goods in software piracy cases and issues a technical report certifying which goods are pirated. However, the verification process is not transparent and there are no independent experts in the copyright domain. Further, ORDA has been less than transparent in its interactions with the IP Working Group. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) allow rights holders' organizations to conduct forensic examination and act as court experts in copyright infringement and piracy cases.⁴

The software industry notes that ORDA does supervise the activity of professionals involved in the software business, such as importers, producers, distributors, and resellers. ORDA applies administrative sanctions in cases where registrations, administrative measures and obligations are not observed. ORDA served as an important partner to BSA in 2013, promoting the use of licensed software among public authorities and publicly financed entities, and emphasizing the security and other risks associated with software piracy. An ORDA-BSA cooperation protocol was signed in 2012. In 2013, BSA and the police also organized a high school piracy awareness project with ORDA support.

³See last year's IIPA Special 301 submission on Romania at <http://www.iipa.com/rbc/2013/2013SPEC301ROMANIA.PDF>.

⁴For further details on these long-standing problems, see IIPA's 2010 submission on Romania at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

IPR Trainings and Public Awareness: In 2013, BSA participated in three programs organized by Romanian authorities to increase awareness and technical support for enforcement officers. These included events with the Supreme Council of Magistrates for a variety of law enforcement officials, with the Romanian Police for internal training, and with the General Public Prosecutor's Office and the Romanian Police for a variety of law enforcement officials. MPA also participated in the third listed event. The U.S. Embassy provided valuable support as well. In late 2013, BSA organized three training sessions for police officers, public prosecutors, and technical experts of ORDA. One hundred twenty-five participants received a day and a half of technical and legal training.

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.

Copyright Law Reform: The 1996 Romanian Copyright Law has been amended a number of times in the past decade, including in 2004, 2005, and 2006,⁵ 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), or the EU Copyright and Enforcement Directives, and may not fully implement the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. For example, Article 143, which provides protection for technological protection measures (TPMs), 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.

Following a recent and troubling decision of the Court of Appeals, amendments to the copyright law are now needed to clarify that the making available right is an exclusive right not subject to mandatory collective management. The 2013 decision was made in a case regarding the on-demand streaming of sound recordings over the Internet, and held that the activity was subject to collective management with a mere right of equitable remuneration. This holding is a misinterpretation of the right of communication, as set forth under Article 8 of the WCT and the making available right, as set forth under Articles 10 and 14 of the WPPT, which in both cases are exclusive rights.

A set of draft amendments to the Copyright Law is being considered for adoption possibly by the first half of 2014. If adopted, the draft would finally implement the EU Directive 2011/77, regarding the term of protection of copyright and certain related rights, an obligation that was due to be completed by November 1, 2013. The draft is also expected to resolve the issue of computer search warrants that has created a long-standing problem for the software industry to conduct raids regarding enterprise end-user software piracy. Unfortunately, the draft includes decreases of penalties for some copyright crimes and could reduce the scope of cases in which police and law enforcement may engage in *ex officio* actions. The draft also fails to correct the detrimental allocation of competence of copyright crimes to the Courts of First Instance. Another 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.

No Legal Framework for Online Anti-piracy Investigations: A Constitutional Court decision from October 2009, finding that the now-defunct Data Retention Law (no. 298 of 2008) was unconstitutional, has continued to hinder the ability of Romanian police authorities to seek the identities of online infringers. Law no. 298 was enacted to implement the EU Data Retention Directive (2006/24/EC), and required Romanian ISPs to retain their subscriber and network data for six months and to communicate it to the authorities, upon court order, in cases of crimes committed on the Internet or through other communication systems.

⁵For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

In June 2012, Romania adopted Law no. 82 of 2012 to replace Law no. 298/2008 and to implement the EU Data Retention Directive. The new law grants to the authorities the ability to require ISPs to implement data retention policies, so that such data may be disclosed to authorities in cases of severe criminal offenses – but copyright crimes are not clearly within the scope of the new provision. Unfortunately, because the data retention obligations and the requirements to make such data available to the competent authorities only apply to limited cases and under limited conditions, ISPs in Romania have remained uncooperative and it remains difficult for the authorities to obtain the necessary user information for effective enforcement. Further amendments are needed to allow the collection and use of needed evidence (data retained under Law no. 82/2012) in anti-piracy investigations.

Intermediary Liability for Online Piracy: 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.⁶ 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, 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 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 support this provision in principle; however, it requires clarification to make it workable and enforceable.

⁶See Article 1432 of the Copyright Law (a crime punishable with imprisonment from six months to three 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.)