

**Council for Trade-Related Aspects
of Intellectual Property Rights**

Original: French

REVIEW OF LEGISLATION ON ENFORCEMENT

ROMANIA¹

The present document reproduces the introductory statement made by the delegation of Romania, the questions put to it and the responses given in the review of legislation on enforcement at the Council's meeting of 17-21 November 1997.²

I. INTRODUCTORY STATEMENT

Japan has put questions to Romania on enforcement. Before replying to these questions, in conformity with the agreed working procedure, I should like to make some introductory remarks concerning the review of enforcement and the relevant regulations in Romania by the TRIPS Council.

Romania replied to the Check-List of Issues on Enforcement³ in the same spirit in which it notified its intellectual property laws and regulations and it is participating in the review process without prejudice to its right to utilize the transitional period for application of the TRIPS Agreement. The replies to the Check-List provide an overview of the relevant elements concerning enforcement contained in the general legislation (for example, the Civil Code, the Criminal Code, and the relevant Codes of Procedure), and in the special legislation on certain types of rights (for example, copyright and related rights, patents, industrial designs, topographies of integrated circuits).

The Romanian delegation believes that the information given in Romania's replies to the Check-List meets the objective of transparency fixed in the TRIPS Agreement and at the same time shows that the Agreement's requirements on respect for rights are already covered to a large extent in Romania's legislation. We are nevertheless aware that some elements are missing. This is the case, for example, for border measures; the preparation of draft regulations is already well advanced and it is hoped that the adoption procedure will be speedy so that these measures can be implemented before the end of the transitional period allowed under the TRIPS Agreement. In preparing these draft regulations, Romania took into account the relevant requirements in the TRIPS Agreement and the experience gained by certain Members, as well as the European Union. Romania will notify these regulations to the TRIPS Council as soon as they have been approved. The same applies to other intellectual property regulations that are currently before Parliament, for example, the new law on trademarks and geographical indications.

¹ As regards laws and regulations relevant to the areas under review and notified by Romania under Article 63.2 of this Agreement, reference is made to documents IP/N/1/ROM/1 (Annex II) and IP/N/6/ROM/1.

² The minutes of this meeting are contained in document IP/C/M/16.

³ Document IP/N/6/ROM/1.

The preparation of Romania's replies to the Check-List of Issues on Enforcement and to the questions from Japan has been facilitated by the knowledge and expertise Romania has gained as a result of the technical assistance programmes from which it has benefited in recent years. The Romanian Delegation did not take the floor when the developed countries and international organizations submitted their reports on technical assistance under another item of the TRIPS Council's agenda, but we would like to seize the opportunity to thank them warmly. The delegation of Romania would like to express its particular gratitude to the United States of America, the European Union and its member States for the technical assistance given to it in recent years in the area of intellectual property. We are confident that this technical assistance will continue and be strengthened.⁴

II. REPLIES TO QUESTIONS POSED BY JAPAN

1. Please indicate the "competent authorities" stipulated in Article 51 of the TRIPS Agreement.

The legislation in effect does not contain any "special requirements related to border measures", but a draft law on the responsibilities of the customs authorities for enforcing intellectual property rights is being finalized. This draft contains provisions that are in conformity with those in the TRIPS Agreement and Council Regulation (EC) No. 3295/1994 of the European Communities.

2. Please explain whether "proceedings leading to a decision on the merits of the case" stipulated in Article 55 of the TRIPS Agreement, are judicial or administrative.

See the reply to question 1.

3. Are there any ways other than the application stipulated in Articles 51 and 52 of the TRIPS Agreement (hereafter referred to as "the Application") which enable a right holder to request the competent authorities to suspend the release of the goods which infringe IPRs or which are suspected to infringe IPRs?

See the reply to question 1.

4. Please explain what term your country regards as "a reasonable period within which the competent authorities shall inform the applicant whether or not they have accepted the Application" stipulated in Article 52 of the TRIPS Agreement.

See the reply to question 1.

5. Please explain the term during which the application is effective.

See the reply to question 1.

6. Please explain whether a right holder is obliged to pay any fees to lodge the Application.

See the reply to question 1.

⁴ The replies to the questions on enforcement of intellectual property rights do not include trademarks and geographical indications because a new law on these aspects will enter into force shortly.

7. Please indicate provisions of laws and ordinances which prescribe the "proceedings leading to a decision on the merits of the case" stipulated in Article 55 of the TRIPS Agreement. And please summarize their contents.

See the reply to question 1.

8. Please explain the specific procedure, if any, to be applied to the goods which are not evident whether or not they infringe IPRs, in Article 55 of the TRIPS Agreement.

See the reply to question 1.

9. Please explain the responsibility that the competent authorities and other related authorities take to the right holders when they fail to suspend the release into free circulation of goods which infringe IPRs with regard to the suspension based on the Application or the Ex Officio Action stipulated in Article 58 of the TRIPS Agreement.

See the reply to question 1.

10. Please explain the responsibility that the competent authorities and other related authorities take to the right holders when they examine goods which infringe IPRs and nevertheless release them into free circulation with regard to the suspension based on the Application or the Ex Officio Action stipulated in Article 58 of the TRIPS Agreement.

See the reply to question 1.

11. Please explain the responsibility that the competent authorities and other related authorities take to the importers when they suspend the release into free circulation of goods which do not infringe IPRs with regard to the suspension based on the Application or the Ex Officio Action stipulated in Article 58 of the TRIPS Agreement.

See the reply to question 1.

12. Is the right holder informed of identities of the importers and consignors when the competent authorities "suspend" the goods which infringe on IPRs or which are suspected to infringe IPRs, as well as the case where the right holder is informed of identities of the importers and consignors stipulated in Article 57 of the TRIPS Agreement?

See the reply to question 1.

13. Please explain the measures to protect confidential information in the course of the inspection stipulated in Article 57 of the TRIPS Agreement. And please indicate provisions of laws and ordinances which prescribe such measures.

See the reply to question 1.

14. Please explain the procedures of detentions and seizures to be ordered by the competent authorities based on Articles 51 and 55 of the TRIPS Agreement

See the reply to question 1.

15. Please explain the procedures to appeal against any decisions ordered by the competent authorities based on Articles 51 and 55 of the TRIPS Agreement.

See the reply to question 1.

16. Please explain the basis for calculating the security or equivalent assurance stipulated in Article 53 of the TRIPS Agreement that the competent authorities may require an applicant when they suspend the release into free circulation.

See the reply to question 1.

17. Please explain who shall pay the cost of detentions based on Article 51 of the TRIPS Agreement or destruction stipulated in Article 59 of the TRIPS Agreement.

See the reply to question 1.

18. Please explain what kind of cases are regarded as "the exceptional circumstances" in which the competent authorities may allow re-exportation of counterfeit trademark goods stipulated in Article 59 of the TRIPS Agreement.

See the reply to question 1.

19. Please indicate names of laws and ordinances and their provisions in which the suspension of the release of goods which infringe IPRs or which are suspected to infringe IPRs is prescribed, as stipulated in Article 51 of the TRIPS Agreement.

See the reply to question 1.

20. Please indicate which IPRs are protected based on the Application by a right holder.

See the reply to question 1.

21. Please explain kinds and contents of documents which shall be provided by the applicant to lodge the Application.

See the reply to question 1.

22. Please explain the remedies which the judicial authorities order regarding a copyright and other related rights, patents, industrial designs, trademarks and layout-designs (topographies) of integrated circuits, including injunctions, damages, expenses, destruction or other disposal of infringing goods and materials/implements for their production.

See the reply to question 5 in the Check-List of Issues on Enforcement.⁵

23. Please explain whether the amount of damages which judicial authorities order the person who infringes IPRs to pay the right holder is adequate compensation for the injury the right holder has suffered, and what criteria and the way for calculation to decide the amount for compensation.

Under Article 999 of the Civil Code, a person who causes injury must provide full compensation. This means that the perpetrator of the injury must not only cover the actual damage (*damnum emergens*) but also the profits lost by the injured party (*lucrum cessans*), as a result of the action that caused the injury.

According to judicial practice, the criterion for fixing the amount of damages is the extent of the injury. Damages are fixed by the judge in relation to the injury suffered by the victim and in the light of the evidence presented.

⁵ Document IP/N/6/ROM/1.

24. Please explain whether the amount of damages which judicial authorities order the person who infringes IPRs to pay the right holder includes investigations expense and appropriate attorney's fees.

After the injury has been caused, the person whose rights have been infringed may request the courts to order that the offender pay the costs of the case (legal stamp duties, lawyers' fees, the cost of procuring evidence). According to Article 274 of the Code of Civil Procedure, the party which loses the case will be obliged, if so requested, to pay the cost of the proceedings.

If costs have been requested, but the court fails to take a decision, the party in question may request payment of the costs in a separate petition.

25. Please describe to what extent the amount of damages has been estimated by courts since 1 January 1996. Please explain whether the amount of damages is adequate compensation for the injury the right holder has suffered, and how such civil procedures are consistent with Article 45 of the TRIPS Agreement.

- (a) The judicial authorities do not have any statistical information concerning the amount of damages during the period in question;
- (b) The provisions of Article 45 of the TRIPS Agreement are covered by the existing domestic laws and regulations.

See the replies to questions 23 and 24 above and Romania's reply to question 5.B in the Check-List of Issues on Enforcement.⁶

[Follow up question from Japan]

With respect to Romania's response to question 25 from Japan and Romania's answer to question 5 in the Checklist (IP/N/ROM/1) on damages for the infringement of IPR, please describe the way of calculating "the actual damage and the non-realized benefit of the injured party". And, please explain whether or not "the actual damage and the non-realized benefit of the injured party" include the IPR holder's lost profits, infringer's profits from the unlawful utilization of the IPR or reasonable royalty for utilization of the IPR.

Under Article 998 of the Civil Code, a person who causes injury must provide full compensation. This means that the perpetrator of the injury must not only cover the actual damage (*damnum emergens*) but also the profits lost by the injured party (*lucrum cessans*), as a result of the action that caused the injury.

According to judicial practice, the criterion for fixing the amount of damages is the extent of the injury. Damages are fixed by the judge in relation to the injury suffered by the victim and in the light of the evidence presented.

The calculation of the actual losses and non-realized benefits of the injured party is therefore based on any type of evidence.

The Civil Code provides that:

- A party that makes a proposal to the court must provide evidence (Article 1169);

⁶ Document IP/N/6/ROM/1.

- the evidence must be in writing, there must be witnesses, presumptions and a confession by the defendant (Article 1170).

The injury is estimated using any type of evidence and the actual prejudice suffered is covered in the first place by the profits earned by the infringer who has unlawfully utilized intellectual property rights; if these profits do not cover the injury, the infringer is liable to the full extent of his assets.

26. Please explain the kinds and amounts of penalties (imprisonment or fines) in criminal cases. Please also explain whether these penalties are consistent with Article 61 of the TRIPS Agreement which requires provisions for a sufficient deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

Types of infringement of rights and respective penalties:

Patents

- (1) Unlawful assumption of the status of inventor (Article 58 of Law No.64/1991);

Penalty: term of imprisonment of six months to two years or a fine of lei 50,000 to lei 100,000.
- (2) The offence of infringement (Article 59 of Law No. 64/1991);

Penalty: term of imprisonment of three months to two years or a fine of lei 50,000 to lei 100,000; confiscation of the counterfeit goods.
- (3) The offence of disclosing an invention (Article 60 of Law No. 64/1991);

Penalty: term of imprisonment of three months to two years or a fine of lei 50,000 to lei 100,000.

Industrial designs

- (1) Unlawful assumption of the status of creator of an industrial design (Article 41 of Law No. 129/1992);

Penalty: term of imprisonment of six months to two years or a fine.
- (2) The offence of infringement (Article 42 of Law No. 129/1992);

Penalty: term of imprisonment of six months to two years or a fine.
- (3) The offence of disclosing an industrial design (Article 43 of Law No. 129/1992);

Penalty: term of imprisonment of three months to two years or a fine.

According to Article 63.3 of the Criminal Code, where the law prescribes a fine without determining the amount, as an alternative to a term of imprisonment exceeding one year, the minimum special amount is lei 350,000 and the maximum lei 30 million.

Topographies of integrated circuits

The offence of infringement specified in Article 40 of Law No. 16/1995 is punished by a term of imprisonment of three months to three years or a fine of lei 500,000 to lei 1 million. Another penalty that may be applied is the confiscation of the counterfeit goods.

Copyright and related rights

Concerning copyright and related rights as well as the different types of infringement of these rights, see the reply to question 21.A in the Check-List of Issues on Enforcement.⁷ See also the reply to question 5.B in the same document.

As they are set out in the legislation in effect, the penalties are dissuasive (particularly the alternative penalty of imprisonment).

The criteria used to adapt the penalty to the offence are set out in the Criminal Code for all offences, namely: the extent of the social threat posed by the offence committed, the offender himself and the circumstances that attenuate or increase criminal liability (Article 72.1 of the Criminal Code).

III. REPLIES TO QUESTIONS POSED BY SWITZERLAND

1. Please explain whether international treaties which contain detailed provisions addressed to the (judicial) authorities and not to the State itself are considered as self-executing in your system? If not, when there is a divergency between the intellectual property legislation/practices and the international agreement in your country, does the latter automatically prevail? If not, please explain the means allowing your country to fulfil the international obligations? Please cite the relevant texts or jurisprudence.

According to Article 11 of Romania's Constitution "the Romanian State is obliged to fulfill scrupulously and in good faith the obligations incumbent upon it under treaties to which it is party. Under the law, treaties ratified by Parliament form part of domestic law".

This means that the provisions of international treaties that Romania has signed have the same legal status as domestic rules of law without it usually being necessary to incorporate them into domestic law.

This principle is also set out in Article 63 of Law No. 105/1992 regulating relations under private international law, according to which "copyright and the industrial property rights of foreign natural and legal persons shall be protected in Romania in conformity with Romanian law and with the international conventions to which Romania is party".

Conversely, if a treaty contains provisions that differ from domestic law or oblige the signatory to adopt certain domestic regulations, it naturally becomes necessary to incorporate the treaty's rules into the domestic legal structure.

2. Article 55 of the TRIPS Agreement provides that "... in appropriate cases, this time limit (of ten days) may be extended by another ten working days". Is such time extension foreseen in your laws? If yes, please cite the relevant provisions. If not, please explain how an applicant can avail himself of this possibility as provided by the TRIPS Agreement?

See Romania's reply to questions 15-19 in the Check-List of Issues on Enforcement.⁸

⁷ Document IP/N/6/ROM/1.

⁸ Document IP/N/6/ROM/1.

IV. REPLIES TO QUESTIONS POSED BY THE UNITED STATES

1. Please provide statistical information related to civil copyright, trademark, geographical indication, industrial design, patent, integrated-circuit layout design, and trade secret enforcement for each of the years 1996 and 1997, including the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded.

At the moment there is no mechanism for the systematic collection of statistical data related to the aspects mentioned in the question.

According to statistical information collected on an ad hoc basis, although it is not broken down by type of intellectual property, the situation is the following:

	Cases brought before the courts	Cases resolved	Petitions admitted
1996	249	107	41
I – III quarters 1997	206	60	16

2. Please provide statistical information related to criminal enforcement in the area of copyright piracy and trademark infringement for each of the years 1996 and 1997, including the number of raids, prosecutions, convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended) and any other information establishing that your criminal system operates effectively to deter copyright piracy and trademark counterfeiting.

The information given below only concerns copyright and was collected on an ad hoc basis as there is no systematic collection mechanism, as already mentioned in the reply to the first follow-up question from the United States.

The following statistical information has been provided by the authorities responsible for applying the law, namely, the Ministry of Justice, the Ministry of the Interior – General Inspectorate of Police, and the Romanian Copyright Office – the specialized Government body that has nationwide authority for monitoring and controlling the application of the copyright law:

June 1996 –December 1997	
Number of controls carried out	470
Proceedings brought	136
Amount of the fines	lei 800 million

Due to the way in which they were collected, the statistics above may only be partial. It is intended to set up a mechanism for systematic collection, but special assistance from Members interested, including the necessary resources, would be welcome.

3. With respect to Romania's answers to Check-List questions 15 to 199, please describe the time-frame the Government of Romania expects for adoption of the bill described therein.

The intention is that the adoption process for the law on border measures should be as speedy as possible so that the measures can be put in place before the expiry of the transitional period allowed under the TRIPS Agreement.

⁹ Document IP/N/6/ROM/1.

ANNEX

Criminal Code

Article 63

[...]

"Where the law provides for a penalty in the form of a fine without determining the amount, as an alternative to a term of imprisonment of up to one year, the minimum special amount of the fine shall be lei 250,000 and the maximum lei 15,000,000, and where the law provides for a penalty in the form of a fine as an alternative to a term of imprisonment exceeding one year, the special minimum amount shall be lei 350,000 and the maximum lei 30,000,000."

Article 72

"When defining and applying penalties, the provisions in the general part of this Code, the limits of the penalty fixed in the special part, the extent of the social threat posed by the offence committed, the offender himself and the circumstances that attenuate or increase his criminal liability shall be taken into account."

[...]

Civil Code

Article 999

"A person shall be responsible not only for injury caused by his action, but also for injury caused by his negligence or imprudence."
