

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Italy be retained on the Watch List for 2003.¹ Estimated trade losses in Italy in 2002 were \$800.8 million.

Overview of key problems in Italy: Incorporating meaningful deterrence into the Italian enforcement system has been, and still remains, the key issue for the copyright industries. The passage of the Anti-Piracy Law amendments to the Copyright Law in 2000 has, however, finally led, in 2002, to important improvements in enforcement with the promise of further gains if the course begun in 2001 continues in 2003 at increased levels. The nature of piracy is changing in Italy, with organized criminal syndicates assuming even more importance, with CD-R and DVD-R burning increasingly becoming the major problem, with manufacturing and distribution migrating to even smaller, harder to detect forms, and with Internet piracy growing. There remains the continued threat that courts will be reluctant to take on software end-user piracy cases. Piracy rates in Italy continue to exceed 20% and are high across the board—still among the highest rates in Western Europe. There is no question that the new tougher penalties, if they continue to be imposed at these new levels, will eventually result in a drop in these rates.

A recent Supreme Court case may have removed the threat that the absence of SIAE “stickers” will prevent enforcement against software piracy. However, Italy continues to fail to completely exempt software from this stickering requirement and, despite procedures put into place designed to prevent seizures of unstickered legitimate software, these seizures continued in 2002. Judicial reform is still needed to speed up both criminal and civil enforcement, so that Italy can meet its TRIPS enforcement obligations. While higher penalties have been imposed for piracy in 2002, many judges, and the public as a whole, continue to believe that piracy is not a serious offense and need not carry deterrent penalties.

Actions to be taken by the Italian government:

- Announce a nationwide anti-piracy campaign focusing on all types of piracy, including Internet piracy;
- Fully implement the AP Law with increased raids, prosecutions, and in particular the imposition of deterrent penalties;
- Institute judicial reform to speed up criminal and civil proceedings and to remove backlogs;
- Eliminate the stickering requirement on computer software;
- Fully implement the provisions of the EU Copyright Directive.

¹ For a history of Italy's involvement in the Special 301 process, see Appendix E.

ITALY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	140.0	20%	140.0	20%	140.0	20%	160.0	25%	200.0	30%
Records & Music	42.0	23%	40.0	23%	50.0	25%	60.0	25%	60.0	20%
Business Software Applications ³	380.4	45%	338.8	45%	327.0	46%	338.4	44%	276.5	45%
Entertainment Software	215.4	55%	NA	74%	NA	65%	60.9	52%	58.2	50%
Books	23.0	NA	23.5	NA	23.5	NA	23.0	NA	21.0	NA
TOTALS	800.8		542.3		540.5		642.3		615.7	

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Piracy Levels Remain Too High Across All Industry Sectors; Optical Disc and Internet Piracy Grows

While piracy rates in Italy across all industries remain at 20% or higher, as has been true for the last 10 years, 2002 was the first year that the 2000 Anti-Piracy (AP) Law saw meaningful implementation. The result has been generally more aggressive raiding, more seizures and, most importantly, the beginnings of the imposition of deterrent penalties by the judicial system. As IIPA noted in its previous submissions, the 2000 AP Law contains all the elements necessary to start a downward trend in piracy rates and losses, with higher maximum criminal penalties making it a “serious” crime, clarification of the criminality of business end-user piracy, the addition of administrative sanctions, and a number of other provisions specifically targeted at copyright piracy. Last year, IIPA and its members praised the Italian government for finally taking this important legislative action and for beginning the process of implementing the law. At that time, the copyright industries remained concerned about such implementation and the failure to fix certain deficiencies that seriously impact on the business software industry. These deficiencies continue to plague the business software industry, but, on the positive side, enforcement actions by the authorities in 2002 have not only increased, but stiffer penalties have actually been imposed (see enforcement section, below).

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$285.0 million at 43% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

The recording industry was particularly pleased with progress in 2002, as detailed in the enforcement section. Piracy continues to impact a now-declining audiocassette market and an increasing CD market characterized by the production of pirate CDs moving from larger operations to much smaller venues using commercial CD-R burners. The local anti-piracy organization, FPM, believes that there are at least ten copies of burned CDs for every legitimate copy sold in Italy. Organized criminal operations continue to control a sizable portion of the production/distribution chain but the growth of only 8% in the number of CD burners seized in 2002 suggests that CD-R production that is controlled by these syndicates may not be growing as fast as in prior years. The newest phenomenon is the wholesale downloading and burning of copies of CDs in offices, with employees then selling burned copies to their colleagues. There is a growing sense that the Internet may be replacing street vendors and markets as the major source of pirate product, though this is by no means the case yet. Piracy accounts overall for 23% of the market in Italy, but in the south of Italy, the figure is closer to 50%. Most important, however, is that the authorities increased raiding operations by 124% and the number of CDs seized in 2002 rose 74% to more than 2 million.⁴

Video piracy before and during the film's Italian theatrical release continues to cause the film industry's highest losses in Western Europe. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Italy are estimated to be \$140 million in 2002, the same as in 2001, though enforcement has certainly improved. The video piracy rate is around 20%, and increasingly this is not piracy of VHS cassettes but CD-Rs and DVD-Rs that began to appear at the end of 2001 and showed major growth in 2002. The piracy rate continues to remain in the 30%-40% range in southern Italy. Organized criminal groups continue to dominate the pirate OD market, from production to distribution. However, due to pressure from increased enforcement, the crime gangs have centered their activities in a larger number of small private duplication facilities, including private homes, using commercial CD-R and DVD-R burners. These appear to be located in poorer areas and the output of each site is relatively low, though the number of such sites has increased significantly. As in so many other countries, the pirate product is then picked up by couriers, or "postmen" who then pass them on for sale, usually through street and local market sales by illegal immigrants. This insulates the pirates somewhat from the large seizures that in 2002 have resulted in some significant and deterrent convictions. As an example, in June 2002, a raid was run on a small apartment in Casorla and 80 CD burners were seized, as were 63,000 optical discs and approximately 20,000 DVDs.

DVDs—produced by the syndicates using DVD-R technology—are now quickly supplanting traditional VHS piracy, though the latter is still prevalent in rental outlets. A good example is three raids run in March and April 2002 in Naples which resulted in the seizure of 135,000 optical discs (this was one of the larger operations described above) of which 58,000 were DVDs. 37 people were arrested. The operations were all linked and clearly established the connection between the criminal gangs and the illegal immigrant distribution and sale network they run. MPA expects DVD piracy to grow over the next year, necessitating increased vigilance by the police and deterrent sentences by the courts.

While Internet piracy is prevalent as a source of pirate product (using the Internet as a source of pirate DVDs and videocassettes and circumvention devices, like pirate smart cards), it has not yet become as damaging to the film industry as to the recording industry. Abundant pirate video product remains widely available through street vendors, kiosks and local markets.

⁴ "Italian Pirates were hit hard in 2002," *Billboard*, February 1, 2003, p. 53

Back-to-back copying in video shops continues as a problem both in the south of Italy (Campania and Lazio) and in the north (Veneto and Lombardia). However, this type of piracy is in rapid decline.

Other problems facing the motion picture industry include unauthorized public performances in social centers and broadcast TV piracy. Unauthorized public performances in social centers and private clubs remain a problem. Such clubs exhibit first release theatrical films to their “members” during, or even in advance of, legitimate theatrical release. They also exhibit videos rented from nearby shops, and in some cases, purchase sell-through videos, which they then rent to their clients. This type of piracy is also all too common in hotels, cruise ships, and ferries. Obviously, such violations increase during the summer months and the tourist season.

Broadcast television piracy, among the almost 700 local private television stations, is a continuing concern, particularly in southern Italy and Sicily. These companies engage in the practice of transmitting motion pictures without having previously acquired the rights and sometimes even airing illegally copied VHS tapes or DVDs of first-run films. It appears that the TV stations are being duped by phony licensing agreements and “ghost” companies. FAPAV, the local anti-piracy organization, works with the Authority for Guaranties in Communication and has been making steady progress in reducing this type of piracy, particularly following the creation by that agency of Regional Communication Committees.

With the introduction of commercial pay television in Italy, satellite signal theft piracy grew at a strong rate. The Telepiù terrestrial and satellite channels, as well as other encrypted satellite channels from abroad, were being received and descrambled without authorization using illegal decoders and smart cards. Italian satellite television magazines and some newspapers market these illegal materials with numerous pages of advertising. While the trade in illicit smart cards had increased significantly over recent years, the recent introduction of a new encryption system (Seca 2 Media Guard) following the merger between Telepiù and Stream, is likely to reduce this kind of piracy significantly in the next few years.

Piracy of entertainment software has continued at high levels, both in sales of hard copies of PC and console games, and through persistent Internet piracy. This piracy is also under the tight control of organized crime, not just in the south (like Naples) but also throughout Italy. Illegal immigrants are also used to distribute these pirated products. The entertainment software industry also experiences the highest levels of imported pirated product from production centers in Eastern Europe, the C.I.S. and Asia, particularly Ukraine, Russia, and Malaysia, with Malta and Croatia continuing as transshipment points for pirate game product. CD-R piracy of entertainment software products has also greatly increased. With increasing access to high-speed Internet connections, Internet piracy is likely to become a significant problem as well. Estimated trade losses due to videogame piracy are not available.

Piracy of business applications software by corporate end-users (end-user piracy)—the major focus of the business software industry in Italy—remains among the highest in Europe. As described below, however, there have been recent positive developments on the enforcement front since passage of the AP Law. However, these gains could be substantially eroded, if not nullified, by a burdensome and TRIPS-inconsistent provision of the law that Italian officials are interpreting to require that certain software products bear a sticker of the Italian collecting society, SIAE, or be subject to seizure by law enforcement. This issue is discussed in greater detail below. Estimated 2002 trade losses due to software piracy in Italy amounted to \$380.4 million, with a 45% piracy level.

Wide-scale photocopying piracy has been a consistent problem in Italy, due primarily to the failure of the enforcement authorities to take action. Frustrated by the breadth of the problem and the failure of the government to combat it, the publishing community sought and received in the new AP Law the authority to require remuneration for the act of photocopying. Thus, the new AP Law now allows photocopying of up to 15% of a work but only upon payment of remuneration to SIAE that is used by publishers to collect these royalties. An accord was signed between the copy shops and the Italian Publishers' Association on December 18, 2000, setting payments at \$0.029 per page after January 1, 2001. This increased to \$0.038 per page from September 1, 2000 and increases every year until 2005, when it will be \$0.061 per page. In June 2001 an agreement was reached with the Ministry of Education over photocopying in state school libraries open to the public and finally, after months of negotiation, an agreement was signed with the university libraries. Both deals involved lump-sum payments based on a fee per student. Despite these welcome and long-sought-after arrangements (solidified in the AP Law), illegal photocopying of excerpts far exceeding the 15% quota, including in many cases entire texts continues at high rates, due in part to lack of enforcement of the SIAE agreements. Estimated losses due to book piracy in Italy last year were \$23 million.

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While piracy levels remain high in Italy, and optical disc and Internet piracy are making rapid inroads, the AP Law has already started to work a major change in the attitude of law enforcement toward piracy. More raids are being run, more pirate product is being seized and more prosecutions brought. There has been increased media coverage and greater public awareness of piracy crimes. Even some judges, historically unwilling to impose serious penalties on pirates, have begun to see the light and have imposed some significant sentences on pirates. However, despite these positive signs, the judicial system is still in dire need of reform so that caseloads can be reduced and both criminal and civil cases more quickly brought to final judgment. More Italian judges and magistrates must take seriously the need to set deterrent-level fines and, in particular, significant jail time for major organized crime figures. With the increased penalties in the AP Law, the judges have the tools. The question is whether they will be used to their fullest extent.

Because of high piracy rates, low penalties imposed on pirates and a woefully slow and inefficient judicial system, Italy has not been in compliance with its WTO TRIPS enforcement obligation for years. The full implementation of the AP Law and judicial reform are key: First, the new higher penalties must be applied in practice. Second, judicial reform and public education must be taken seriously. As IIPA has recommended for the last two years in its Special 301 submission, Italy should pursue and maintain a national, well coordinated anti-piracy campaign. Such campaigns can help in establishing a proper atmosphere, as would the establishment of regional coordination groups in each prefecture with the participation of special IPR-trained prosecutors. Italy should conduct an extensive public information campaign to emphasize with enforcement authorities and the public of the damage being done to the Italian economy from failing to effectively fight piracy.

Criminal Enforcement

The new AP Law raised maximum fines from US\$1,450 to US\$14,500. Minimum prison terms are increased from three months to six months, but still may be suspended at this higher level. Maximum prison terms are raised from three to four years, rendering piracy a more

serious crime as a result. In a precedent-setting decision, the Parliament established consumer fines in the law for possessing infringing material, to be imposed instantly, of US\$168.

These salutary changes accomplished by the 2000 Anti-Piracy Law must compete against years of enforcement neglect, non-deterrence and judicial stagnation. These problems remain despite recent improvements.

Before the new AP Law, Italian courts did not impose even close to the maximum penalties then available, resulting in minimal deterrence to infringement. This was often the result of plea bargains agreed to by prosecutors anxious to remove cases from their workload. Before the new law, penalties *actually* imposed on pirates remained among the lowest in the EU. When jail terms were imposed, they were nearly always suspended or, in past years, pirates were subject to general amnesties, reducing the deterrent effect of these actions. Perhaps most pernicious was that recidivism was rampant, with examples of pirates being convicted numerous times with no increases in penalties. IIPA reported in past submissions a recording industry example of one person in Naples having been denounced 84 times. And the software industry still reports that, to the best of their knowledge, although the law extending copyright protection to software was adopted in 1992, Italian courts have to date never imposed a prison sentence on an end-user pirate. In order for Italy to meet its TRIPS obligations, the prosecutors and judges must ensure that the new penalty structure is *actually* implemented.

It still can take many months following a raid before charges are filed commencing a criminal case in court. Indeed, in some software industry cases, criminal proceedings were not begun until *four years* after the raids against the defendants. It is often difficult or impossible for right holders to obtain any information about the progress of cases or learn of plea bargains months or years after the fact, with few opportunities for comment. This is reflected in the absence of reports from industry on the actual progress of criminal cases. Once filed, these cases can drag on, often taking two to three years or more, significantly reducing the deterrent value of any increased raiding activity undertaken by the police. When the case gets too old (five years), it is barred or simply dismissed. Defendants are aware of this five-year limit within which to conclude the case, and their lawyers merely delay the proceedings until this limit is reached. This failure violates TRIPS Article 41. However, the picture is not wholly negative. Reported below are a number of recent cases that proceeded quickly to judgment with deterrent penalties. This must continue.

Criminal Enforcement in Practice Under the AP Law

The recording industry reports that 2002 was one of their best years ever with almost 1500 arrests—an almost three-fold increase from 2001 when 510 people were arrested, which itself was a 431% increase over 2000. As noted above, raids increased by 124% and the number of CDs seized increased by 74% to over 2 million, up from 1.23 million in 2001.

Most of these actions were taken by using both the criminal and administrative provisions of the AP Law. These actions have had a noticeable, positive impact on resellers, businesses and websites. The impact on reducing the extent of street vendor sales has not been as visible; however, the new AP Law has been used to produce arrests. The police can arrest infringers where more than 50 infringing copies are found. The recording industry reports that there were many more arrests followed by immediate administrative fines during 2002, 78% of which involved street vendors. In cases of recidivists, jail terms of one year have also been imposed. The fast track procedures have meant the immediate convictions of the defendants with sentences imposed of more than six months in jail. However, almost all first convictions will

be, and have been, suspended. Most of the defendants dealt with in this way have been immigrant street vendors.

In December 2002, a court in Naples convicted an infamous crime family, the Frattasio Brothers, to four and one half years in jail for music piracy and for participating in a criminal enterprise. The Frattasio father received three years. A total of 17 people were sentenced in one of the biggest investigations in Italy in the last ten years. Sentences totaled 39 years. The Frattasios ran a major pirate network supplying the whole of Southern Italy with pirated audiocassettes and CDs. The lab was located in Naples. The CDs were imported from Eastern Europe and Southeast Asia. The family's revenue was reported to exceed \$50,000 per week! This action will send a strong message to the crime syndicates that they can expect severe punishment if they stay in the piracy business.

MPA reports that since the AP Law was passed, the amount of raids by the police on video stores, laboratories, and street vendors has risen dramatically. In addition, the statistics show that judges are assessing higher fines and even issuing imprisonment in 100% of the cases involving FAPAV (the local anti-piracy organization). The media coverage and greater awareness by the public has been an unexpected bonus. In the 14 criminal cases in which FAPAV appeared as a civil party in 2002, 100% of them resulted in a prison term (the 17 defendants received an average of 6 months imprisonment). Fines of up to \$1,000 were also imposed in all 14 cases.

On December 14, 2001, the Court of Naples imposed immediate sentences of imprisonment on a number of the defendants in a case of organized commercial piracy. This contrasts, however, with the indulgence with which immigrant vendors of pirate material are treated. As mentioned above, this leniency plays into the hands of organized crime.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In 2002, the *Guardia di Finanza*, the national fiscal police, continued its strong support, conducting 223 criminal raids nationwide (mostly on a regionalized basis), and seizing over 108,000 illegal products. Local police also engaged in substantial criminal enforcement activities. In November 2002, the *Guardia di Finanza* conducted synchronized raids across nine Italian provinces, closing down an Internet piracy ring with revenues estimated at over \$60 million per year.⁵ All types of pirated products were seized including millions of dollars worth of pirated business software including CAD/CAM software worth \$5000 to \$20,000 per title. BSA reports that this ring is known to have links to organized networks in other countries. The three websites being used to advertise this pirate material have been shut down and replaced with the *Guardia's* logo!

BSA continues to experience difficulties with judges in criminal cases, however. Magistrates still occasionally rule that criminal remedies do not apply to end-user cases even though the AP Law was written to clarify this point. Magistrates have found other reasons to deny criminal relief in end-user cases. For example: Following raids by the GdF in Parma, magistrates refused to allow three of the cases to proceed. The cases are especially disturbing, as they all arise under the AP law. One magistrate ruled that architects could not be pursued for criminal end-user piracy under the law because architects are not organized as corporate commercial entities under Italian law. A second magistrate ruled that the law's criminal end-user provisions do not apply to ordinary business, but only to organized crime. There is no support in the law for either of these conclusions. A third magistrate ruled that the GdF lacks

⁵ "Busting Software Pirates" Time/Europe, November 18, 2002.

competence to pursue criminal end-user piracy under the new law, as that power is granted to SIAE, the royalty collections agency. The latter is another disturbing example of the adverse impact on the software industry of the SIAE stickering requirement.

BSA is also concerned about the continuous threat of further legislative efforts to decriminalize certain acts of piracy or to issue further amnesties excusing defendants from punishment for piracy offenses for which they have been convicted.

The SIAE stickering program has long been a thorn for the software industry in conducting effective criminal enforcement. When the AP Law was passed, it was feared that Article 171*bis* of the AP Law might be misinterpreted to legalize all pirate software that merely uses an SIAE sticker. Fortunately, a recent Supreme Court opinion has held that unauthorized copying of unstickered software constitutes copyright infringement. This stickering requirement violates several provisions of the TRIPS Agreement by constituting an impermissible formality to copyright protection, denying the availability of efficient criminal remedies in cases of copyright piracy, and erecting a costly barrier to legitimate trade.

The stickering program has also resulted in the authorities seizing unstickered legitimate software products. The regulations allow right holders to declare that standard business software products are exempt from the stickering requirement, but in December 2002 (and in December 2001 as well), the police, in coordination with SIAE officers, seized legitimate software despite a valid declaration having been made. BSA has urged that software be completely exempt from any stickering requirement.

The enforcement statistics below give an idea of the state of criminal enforcement in Italy in 2002.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002				
ACTIONS	MOTION PICTURES	SOUND RECORDINGS	BUSINESS SOFTWARE	TOTALS
Number of Raids conducted	137	796	223	1,156
Number of cases commenced	8	NA	81	89
Number of defendants convicted (including guilty pleas)	17	1,496		1,513
Acquittals and Dismissals	-	NA		
Number of Cases Pending	34	NA	81	
Total number of cases resulting in jail time	14	1,496		1,510
Suspended Prison Terms	5	80% (estimated)		
Maximum 6 months	5	5% (estimated)		
Over 6 months	-	15% (estimated)		
Over 1 year	-	5% (estimated)		
Total Suspended Prison Terms	2 years and 8 mo.	NA		
Prison Terms Served (not suspended)	8 years and 4 mo.	NA		
Maximum 6 months	9	NA		
Over 6 months	5	NA		
Over 1 year	-	NA		
Total Prison Terms Served (not suspended)	5 years and 8 mo	NA		
Number of cases resulting in criminal fines	14	NA		
Up to \$1,000	14	NA		
\$1,000 to \$5,000	-	NA		
Over \$5,000	-	NA		
Total amount of fines levied	\$ 7,000	NA		

COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CRIMINAL CASES						
ACTIONS	MPA		IFPI		BSA	
	2000	2001	2000	2001	2000	2001
Number of Raids conducted			151	355	257	233
Number of indictments filed			309	1056	130	105
Number of defendants convicted (including guilty pleas)	19	26		670	NA	6
Ratio of convictions to the number of raids conducted					NA	NA
Ratio of convictions to the number of indictments				85%	NA	NA
Total number of cases resulting in jail time		26		620	NA	NA
1 to 12 months	12	13				
13 to 24 months	5	13		1		
25 to 36 months				3		
37 to 60 months						
Over 61 months						
Number of cases resulting in criminal fines	2	14		4		
Total amount of fines levied						
US\$0-\$1,000		13				
\$1,001-\$5,000		1				9
\$5,001-\$10,000						3
\$10,000 and above				5		2
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)						

Civil Enforcement Needs Continued Improvement

In 2002, major amendments were made to the Italian Civil Procedure Code to set strict time limits on processing civil litigation. While proceedings started under the previous law could drag on for years with defendants obtaining specious continuances and other postponements, the new law imposes specific and stricter deadlines. Further, the law provides for effective interim measures, including, particularly, civil search and seizure orders, which are usually granted one to two weeks after the petition has been filed. The law also provides that first instance decisions are enforceable. Yet despite the above-mentioned improvements, in some cases—depending on the workload and the attitude of the judge—civil copyright cases continue to be too slow, and in some cases, cumbersome and difficult. Furthermore, many Italian courts still award civil damages based on the amount of a “reasonable royalty” or “license fee” that the right holder should have expected to receive. This criterion lacks any deterrent effect and actually rewards the defendant for not purchasing legal software. Fortunately, however, other courts in Italy have recognized this critical flaw and have awarded damages based on the full retail price of the software and an additional amount for compensation for moral damages.

A bill was introduced into the Parliament in the summer of 2002 to create 12 specialized IPR courts under the auspices of the Justice Ministry. The Bill was then adopted and the provisions are now Articles 15 and 16 of Law December 12, 2002 n. 273 in the O.J. of December 14, 2002. While this development is positive in theory, in practice it is likely to prove less than useful. It is our understanding that the designated courts will still be able to continue to handle existing (non-IP) cases while also assuming responsibility for IP matters—and will take all this on without any allocation of new resources. This could result in even further delays in rulings in copyright cases. BSA also is concerned about the location of these courts’ not reflecting the locus of major infringements and otherwise not meeting the needs of industry.

Civil case statistics from the business software industry are shown below.

COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CIVIL CASES

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002	
ACTIONS	2002 BSA
Number of civil raids conducted	6
Post Search Action	4
Cases Pending	6
Cases Dropped	1
Cases Settled or Adjudicated	7
Value of loss as determined by Right holder (\$USD)	\$ 255,000
Settlement/Judgment Amount (\$USD)	\$106,000

ACTIONS	2000 BSA	2001 BSA
Number of civil raids/searches conducted	7	8
Post-Search Action		
Cases Dropped	2	2
Cases Settled	8	3
Cases Adjudicated	4	4
Value of loss as determined by Court (\$USD)	\$20,900 ⁶	\$106,851
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	\$20,900; 4	\$106,851; 3
US\$0-\$1,000		
\$1,001-\$5,000		
\$5,001-\$10,000		1
\$10,001-\$20,000		
\$20,001-\$50,000		
\$50,001-\$100,000		1
\$100,000 and above		
Settlement Amount (\$USD) in how many cases	\$105,000	\$96,000

COPYRIGHT LAW DEVELOPMENTS

Italy Should Properly and Fully Adopt the EU Copyright Directive

A legislative decree was adopted on December 20 to implement the Directive and submitted to the Parliament. As of this submission, it appears that all the controversial issues have been eliminated. Italy should complete this process as soon as possible. However, Italy's implementation of the E-Commerce Directive risks hampering online enforcement efforts by requiring a court order before takedown can occur. This renders impossible the expeditious takedown of infringing material and violates Italy's obligations under the Directive and, to the extent effective Internet enforcement cannot be undertaken, violates Italy's TRIPS enforcement obligations as well.

⁶ Inclusive of cost awards; also note that one of four judgments reported provided for no damages, as discussed in the accompanying text.

Need to Eliminate the SIAE Sticker Requirements for Software

As discussed in passing above, the AP Law contains a provision that could essentially nullify many of the law's otherwise helpful provisions with respect to the software industry. Article 181*bis* of the law contains an extremely burdensome requirement that could require software producers either to physically place a sticker on each work sold in Italy or to file complex "product identification declarations." Legitimate right holders who fail to sticker their software products may find their products subject to seizure and their being subject to criminal fines. As described above, the Italian police have on a number of occasions seized such shipments of legitimate product.

The September 2001 regulation implementing the stickering scheme does not resolve these problems. Under the law, computer and multimedia programs containing less than 50% of a music, film or audiovisual work, as well as computer and multimedia programs exclusively containing music, film or audiovisual works expressly realized to be inserted into such programs, are to be excused from the stickering requirement. The Italian government had assured industry that when this provision of the law was implemented in the regulation, it would exempt business software across the board. The exemption as set out in the regulation is not unconditional, however. Instead, the regulation provides that works meeting the "50% test" can be exempted *only* with SIAE's consent. The regulation does not define the circumstances under which SIAE may grant or withhold its consent, the timelines under which SIAE must act, or how often such consent must be obtained.⁷ Nor is receiving consent adequate to trigger the exemption or ensure criminal protection of unstickered programs. A party that has obtained SIAE's consent must file with SIAE a "product identification declaration" and a sample of the products that it intends to distribute at least 10 days prior to the date upon which the products enter the market. The declaration must also include detailed information regarding the products, as well as a listing of all works of art that the products contain and information regarding the company's distribution channels. Distribution of such products is arguably illegal and subject to seizure (and has been seized) by Italian authorities.

The stickering regime established in the law and its implementing regulation may violate the TRIPS Agreement, namely Articles 9 and 41. Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the "enjoyment and the exercise" of copyright rights to any formality. Italy's stickering requirement, as well as its associated fee and declaration requirement, represents a prohibited formality. Finally, the burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.

The stickering requirement has absolutely no logical relationship to the business software industry. There is no collective administration of business software copyrights in the EU. The industry is not represented by SIAE (the quasi-public royalty collections agency charged with implementing the stickering regime), nor do business software copyright owners receive any royalties from this agency. In addition, it appears that SIAE has distributed this sticker without conducting any investigation into the legitimacy of the products to be stickered—

⁷ The SIAE issued a circular letter in December 2001 stating that the consent should be deemed granted if not expressly refused within 10 days following the filing of the declaration. However, such circular cannot replace the silence of the law; also, it has been proved that the prior filing of the declarations with SIAE does not guarantee protection against criminal seizures.

meaning that counterfeiters have been able to obtain stickers, granting their products a seal of legitimacy and undermining the entire objective of the stickering regime. As opposed to that, legitimate non-stickered (albeit regularly declared) software products have been seized.

A broad coalition of high-technology industries in Italy has held extensive discussions with representatives of the Italian government and with SIAE officials over the past two years to develop a consensus that would implement the exemption contemplated in the AP Law. Industry has also sought the support of USTR, the U.S. Embassy, and representatives of the European Union. Intensive negotiations in early 2002 resulted in assurances from the Italian government that the Regulation would be amended to exempt software. The proposed amendments were subsequently rejected, however, with the accompanying explanation that the regulation could not be changed without a parallel amendment of the Copyright Act itself. BSA proposed a further compromise designed to minimize the burden of filing a product identification declaration. This compromise was ultimately adopted by the government and came into force in January 2003. The compromise does not exempt software across the board, however, and Italy's proposed legislation implementing the EU's 2001 Copyright Directive does not include any changes to the 2000 Copyright Act provisions governing stickering.

In one positive development, also discussed above, the Italian Supreme Court recently held that unauthorized copying of unstickered software is a copyright infringement. This ruling is useful, as the act itself could be interpreted to suggest that right holders who do not sticker their product forfeit their right to pursue criminal remedies against those who infringe their works. This is obviously not a solution to the problems outlined above, however.

Stickering Cost Concerns

The Italian government continues to move forward on the issue of mandatory SIAE stickering. In addition to questions surrounding the exemption for computer software, there continue to be critical issues concerning the costs for such stickers. SIAE wants a unified fee of 60 lire per sticker, which could produce annual revenue of some US\$9 million. SIAE defends the amount by arguing that it has to cover not just the administration of the sticker, but also the cost of its planned anti-piracy activities. SIAE is planning a US\$3 million anti-piracy program, but all local attempts to date to secure details of what it plans to do with such a budget have been unsuccessful. It is feared that SIAE may interpret its anti-piracy function under Law 248/00 as limited to the inspection of stickers. The funds set aside for anti-piracy work should be applied in the reduction of piracy, and not be limited to merely checking stickers.