

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Special 301 recommendation: Italy should remain on the Special 301 Watch List.¹

Overview of key problems in Italy: Italy continues to have one of the highest overall piracy rates in Europe. Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000 has led to improvements in enforcement, but incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. The nature of piracy is changing in Italy, with organized criminal syndicates assuming more importance, CD-R and DVD-R burning growing rapidly as a major problem, manufacturing and distribution migrating to smaller, harder-to-detect forms, and Internet piracy significantly increasing. However, more traditional forms of piracy, such as commercial photocopying of books and journals, persist, with devastating effects on the publishing industry. Additionally, courts remain reluctant to take on software end-user piracy cases. Piracy rates in Italy continue to exceed 20% across all copyrighted products. With the new law and higher administrative penalties adopted in 2003, it is hoped that these tougher penalties, if they continue to be imposed at the new levels, will eventually result in a drop in these rates.

The software industry has continued, unsuccessfully, to seek an exemption to an SIAE “stickering” requirement which is extremely burdensome for this type of product. Judicial reform is still needed to speed up criminal and civil enforcement, so that Italy can meet its TRIPS enforcement obligations. It remains an unfortunate cultural fact that many judges, and the public, 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 piracy by organized criminal syndicates, and on all other types of piracy, including Internet piracy and unauthorized commercial photocopying;
- Continue to 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 remove backlogs;
- Eliminate the stickering requirement on computer software;
- Fully implement the provisions of the EU Copyright Directive effective in April 2003.

¹ For more details on Italy's Special 301 history, see IIPA's "History" appendix to filing, at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

ITALY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level								
Motion Pictures	140.0	20%	140.0	20%	140.0	20%	140.0	20%	160.0	25%
Records & Music	42.0	22%	42.0	23%	40.0	23%	50.0	25%	60.0	25%
Business Software Applications ³	NA	NA	363.4	47%	338.8	45%	327.0	46%	338.4	44%
Entertainment Software ⁴	168.5	47%	215.4	55%	NA	74%	NA	65%	60.9	52%
Books	23.0	NA	23.0	NA	23.5	NA	23.5	NA	23.0	NA
TOTALS	NA		783.8		542.3		540.5		642.3	

COPYRIGHT PIRACY IN ITALY

Piracy levels remain too high across all industry sectors; CD and DVD-R “burning” and Internet piracy grow

While piracy rates in Italy across all industries have remained at 20% or higher for the last 10 years, there was continuing, improved implementation of the 2000 Anti-Piracy (AP) Law in 2003. The result has been more aggressive raiding, more seizures and, most important, the imposition of deterrent penalties by the judicial system. That law made piracy a “serious” crime, subject to higher criminal penalties, clarified the criminality of business end-user piracy, and added administrative sanctions. The level of administrative sanctions was then further increased in 2003. Enforcement actions have increased and stiffer penalties have generally been imposed (see enforcement section, below).

Organized criminal groups, centered primarily in the south of Italy, dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell both factory-produced CDs and DVDs as well as CD-Rs, DVD-Rs and entertainment software product in PC and console formats. Increasingly, this piracy is organized “burning” onto OD formats in primarily smaller venues and less in larger labs. Imported pirated product, including CDs, VCDs and DVDs from China and other countries in Asia and from Eastern Europe, has

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

also been seized in 2003. As a result of the mid-2003 increase in the administrative fine (imposed on the spot by the police) from €52 (US\$65) up to €154 (US\$193), the mostly immigrant street vendors have increasingly pulled pirate product from plain view and now provide it on order. As a result of this more effective enforcement, distribution has moved increasingly to the Internet.

Internet piracy—of music, movies and entertainment software – particularly as a means to deal in hard goods and circumvention devices, is also increasing, as is Internet downloading, including via peer-to-peer systems. One massive Guardia di Finanza operation – Operation Mouse – resulted in the charging of 181 persons with illegally copying products and selling them using websites and mailing lists. The annual revenue of this criminal ring was estimated at US\$125 million. Another 10,300 persons are under further investigation for similar offenses. While Italy was one of the first countries to implement the EU Copyright Directive and to adopt its prohibitions against trafficking in circumvention devices, a recent lower court decision from the north of Italy held that mod chips used in modified Sony Playstation® consoles (allowing them to play pirate games) were not illegal under Italian law—a decision directly contrary to the Directive. This decision is on appeal and hopefully will be reversed at the earliest opportunity. This decision opens the door to the wholesale trafficking on the Internet in all manner of circumvention devices.

Furthermore, rightholders contemplating legal action against Internet pirates in Italy will face difficulties in identifying infringers due to restrictions imposed by the Privacy Code that came into effect on January 1, 2004. Rightholders will reportedly not be able to obtain from Internet Service Providers, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Rightsholders may, however, be able to secure such information through the police or the courts in criminal actions. There is also concern over a new bill, concerning “Interventions for the Administration of Justice” (AC 4954) which, in Amendment 3.13, appears to prevent, for privacy reasons, access to traffic data, thus undermining online enforcement.

Corporate end user piracy of business software, unauthorized commercial photocopying and broadcast, cable and satellite piracy continue to damage U.S. copyright owners

The level of piracy of business applications software by corporate end-users—the major focus of the business software industry in Italy—remains among the highest in Europe. Prior procedural difficulties in bringing cases against end users in the Italian courts appear to have subsided, but the industry still faces challenges with regard to the SIAE “sticker.” This unfortunate situation did not change with the passage of the amendments implementing the EU Copyright Directive in April 2003. A regulation was adopted in January 2003 providing an option of a “declaration” for software as opposed to stickering, but the industry reports that this process is unduly burdensome and, because the contents of the declarations are not available to police forces when carrying out raids, the system is of little practical use in fighting piracy.

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, which is used by publishers to collect these royalties. Financial arrangements, described in IIPA's 2003 submission,⁵ were arrived at for both educational institutions and copyshops, but these institutions routinely fail to pay royalties due, and the government has taken little or no action to collect. Furthermore, copying beyond that which is compensable in the law persists at high levels, causing, according to the Italian publishers association, AIE, over €300 million (US\$ 376 million) annually in losses to all publishers, which includes U.S. publishers. In October 2003, a major educational campaign was initiated to seek to reduce these losses.

The motion picture industry continues to face broadcast piracy particularly in the south of Italy, but consistent enforcement has reduced this somewhat. However, recent directives issued by the Authority for the Guaranties in Communication prevent the use of video recordings to prove copyright violations, and require a long period of monitoring activity in order to check on possible violations. Such a new procedure undermines the fight against TV piracy and is inconsistent with current practice.

Similarly, unauthorized public performances continue in private clubs that exhibit both first release films as well as pre-release DVDs and rented videos without licensing the public performance. This piracy also exists in hotels, cruise ships, and ferries, especially during the summer months and the tourist season. Again, fortunately, 2003 has seen improvements in these areas. Similarly, satellite signal theft and smart card piracy, discussed in IIPA's 2003 submission,⁶ has been reduced to 2% and appears to be under better control due to the new Seca 2[®] encryption system.

COPYRIGHT ENFORCEMENT IN ITALY

Though piracy levels continue to remain high in Italy, the AP Law has continued to have a positive impact on the attitude of law enforcement toward piracy. More raids are conducted, more pirate product is seized and more prosecutions brought. There has been increased media coverage and greater public awareness of piracy crimes. Judges historically unwilling to impose serious penalties on pirates have begun to impose more significant sentences. Despite these positive signs, the judicial system is still in dire need of reform so that caseloads can be reduced and cases more quickly brought to final judgment. More judges and magistrates must take seriously the need to set deterrent-level fines and impose 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.

Criminal enforcement: The new AP Law raised maximum fines from €1,549.30 (US\$1,967) to €15,493.17 (US\$19,670). 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. However, getting the authorities and judges, in all but the most serious organized crime cases, to take effective and deterrent action remains an ongoing challenge. 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. Once filed, cases can still drag on, often taking two to three years or more,

⁵ See IIPA's 2003 Special 301 country report on Italy, page 503, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

⁶ See IIPA's 2003 Special 301 country report on Italy, page 502, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

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.

The recording industry reported that 2003 was again one of their best years ever with almost 1400 CD-R burners seized -- a 69% increase over 2002. The focus on CD-R production led to a decrease in burned CD-Rs available on the pirate market (down 41% compared to 2002). The industry cooperated in 598 raids and over 1800 individuals have been arrested and/or charged with copyright offenses. In 2003 the Guardia di Finanza seized 496 DVD-R and CD-R burners from an underground facility. This is one of the largest seizures of recordable machines ever. In addition, Customs authorities seized around 5 million blank CD-Rs imported from China and destined for the pirate market.

Most of the actions referred to above were taken by using both the criminal and administrative provisions of the AP Law and have had a positive impact. There was also an increase in arrests followed by immediate fines levied against street vendors; 78% of the arrests in 2003 were of 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 defendants with sentences imposed of more than six months in jail. However, almost all first convictions will be, and have been, suspended.

In a hearing in a Naples Court, a well-known Mafia boss for the first time publicly exposed the role of Italian organised crime gangs in music piracy. The court was given a unique insight into the extent to which crime syndicates exploit piracy in Italy. The hearing resulted from an investigation into the Naples Mafia Giuliano family, who were active in controlling music piracy under the direct control of the court witness. The infamous Camorra boss from Naples was initially arrested two years ago and offered immunity to turn state's evidence, providing information on organized crime activities and strategies in Naples over the past 20 years. He described how the Camorra gang earned millions of dollars each week dealing in drugs, extortion and involvement in the manufacture and distribution of illegal copies of, mainly, sound recordings. He detailed how his organization managed their illegal operations in Naples and how separate gang members controlled the drugs sales, illegal betting, and the massive production of counterfeit CDs in the city's suburbs. The local gangs were allowed to keep part of the illegal income, after depositing money in Camorra gang leaders' accounts. The gangs controlled all aspects of the criminal enterprise and violence was often used to ensure a continuing source of illegal revenue.

MPA reports that in 2003, raids by the police on video stores, laboratories, and street vendors continued to increase. However, while police enforcement of the law has been significantly improved, many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where the copyright is owned by a large corporation. It can still take months between a raid and the filing of charges to commence a criminal case in court. In addition, once filed, the cases often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police. Especially in cases involving immigrant street vendors where the "state of necessity" concept has been invoked, some Italian judges have shown a great deal of indulgence. This may change, however, as a new law on immigration, passed in July 2002,

provides for the expulsion of illegal immigrants convicted of copyright law violations. So far, industry has no experience with this new law's operation.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In June, Operazione Corsaro took place, the broadest operation against enterprise end user piracy ever conducted in Italy. More than 1,000 officers from the Guardia di Finanza raided 416 companies. The GdF found over 8,000 copies of illegal software and seized over 1,000 PCs. 254 individuals were ultimately charged. Subsequently, in October, the GdF raided a key Southern Italian criminal organization in the black market for illegal software, music and films. More than 60,000 illegal CDs were seized.

The enforcement statistics below display criminal enforcement in Italy in 2003.

ITALY CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
Number of raids conducted	53	613	598	1,264
Number of VCDs seized	32,934			32,934
Number of DVDs and DVD-Rs seized	202,275			202,275
Number of CD-Rs seized	-	8,808	1,282,000	1,290,808
Number of investigations	114			114
Number of VCD lab/factory raids	-		19	19
Number of cases commenced	38	-		38
Number of Indictments	N/A			
Number of defendants convicted (including guilty pleas)	12			12
Acquittals and dismissals	1			1
Number of cases Pending	14	-		14
Number of factory cases pending	N/A			
Total number of cases resulting in jail time	12	NA	858	870
Suspended prison terms	1		80% (estimated)	645 (estimated)
Maximum 6 months	1		5% (estimated)	43 (estimated)
Over 6 months	-		15% (estimated)	130 (estimated)
Over 1 year	-		5% (estimated)	43 (estimated)
Total suspended prison terms	1			1
Prison terms served (not suspended)	11			11
Maximum 6 months	4			4
Over 6 months	4			4
Over 1 year	3			3
Total prison terms served (not suspended)	11			11
Number of cases resulting in criminal fines	12	613	598	1,223
Up to \$1,000	12			12
\$1,000 to \$5,000	-			
Over \$5,000	-			
Total amount of fines levied (in US\$)	6,900			6,900

Civil enforcement needs continued improvement. The new Civil Procedure Code amendments made in 2002—setting strict time limits on civil litigation—have improved the ability of right holders to conclude cases in civil court. However, despite these 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 award civil damages in software cases 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.

In IIPA’s 2003 submission, we reported on the adoption of a Law (Articles 15 and 16 of Law December 12, 2002 n. 273 in the O.J. of December 14, 2002) to create 12 specialized IPR courts under the auspices of the Justice Ministry. While we reported that this development is positive in theory, in practice it would be likely to prove less than useful. To date, that characterization seems accurate. 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. BSA also remains concerned that the location of these courts’ does not reflect the locus of major infringements and that they otherwise do not meet the needs of industry.

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

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2003	
ACTIONS	BSA
Number of civil raids conducted	3
Post Search Action	3
Cases Pending	9
Cases Dropped	4
Cases Settled or Adjudicated	5
Value of loss as determined by Right holder (\$USD)	US\$220,000
Settlement/Judgment Amount (\$USD)	US\$162,000

COPYRIGHT LAW DEVELOPMENTS

Italy should properly and fully implement the EU Copyright Directive. Legislative Decree of 9 April 2003 n. 68, which entered into force on April 29, 2003, implemented the EU Copyright Directive and for the most part implemented it correctly. However, as noted above, the recent lower court case from Bolzano, Italy, legalizing mod chips and modified videogame consoles, has cast doubt on Italy’s implementation of the prohibition against trafficking in circumvention devices required by the Directive and the WIPO treaties. In contrast to its implementation of the Copyright Directive, however, Italy’s implementation of the E-Commerce Directive was not as salutary and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. This renders impossible the expeditious removal of infringing material from the Internet 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.

Need to eliminate the SIAE sticker requirements for software: As discussed above, the AP Law contains a provision that could 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 become subject to criminal fines. As described above, the Italian police have on a number of occasions seized such legitimate shipments.

The September 2001 regulation implementing the sticker scheme does not resolve these problems. The Italian government had assured industry that business software would be exempted across the board. Instead, the exemption as set out in the regulation is not unconditional and, in practice, remains onerous and unnecessary, given that there is no collective administration system for software.

BSA believes that the sticker regime established in the law and its implementing regulation may violate Articles 9 and 41 of the TRIPS Agreement. 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 sticker, associated fee and declaration requirements represent prohibited formalities. 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.

A coalition of high-technology industries has held extensive discussions with representatives of the Italian government and SIAE officials over the past two years to develop a consensus that would implement the exemption contemplated in the AP Law. BSA proposed a compromise designed to minimize the burden of filing a product identification declaration. This compromise was adopted by the government and came into force in January 2003. The compromise does not exempt software across the board, however, and the new 2003 copyright amendments made no change to this system.