

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### ITALY

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** Italy should remain on the Special 301 Watch List.<sup>1</sup>

**Overview of Key Problems in Italy:** Italy continues to have one of the highest overall piracy rates in Western Europe. Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000, amendments implementing the EU Copyright Directive in 2003 (increasing administrative sanctions) and the adoption of the Urbani Decree in 2004 (dealing with the online environment) have led to improvements in enforcement in some copyright sectors; but incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. The nature of piracy has changed 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, other forms of piracy, such as commercial photocopying of books and journals, have stayed the same, with devastating effects on the publishing industry. Additionally, while some industries report some improvement in the civil courts, judges are sometimes still reluctant to take on software end-user piracy cases. With the new Anti-Piracy Law and with 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 piracy rates. It is also essential that Italy adopts effective legislation/decrees dealing with online piracy and undertakes aggressive enforcement in that environment.

The software industry fought, unsuccessfully, for a full exemption to an SIAE “stickering” requirement, which is extremely burdensome for this type of product. Rather than resolving the issue, however, the Italian government has compounded the problem with its adoption of provisions in the Urbani Decree that impose a “virtual stickering” obligation, which would pose particular problems for business and entertainment software. 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**

- Ensure that a imminent (or just begun) nationwide anti-piracy campaign which focuses on piracy by organized criminal syndicates, covers all types of piracy, including Internet piracy and unauthorized commercial photocopying, and is effectively carried forward;
- Continue to implement the Anti-Piracy Law and other recent enforcement improvements 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;

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<sup>1</sup> For more details on Italy's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>.

- Eliminate the stickering requirement on software;
- Correct deficiencies in implementing amendments to the EU Copyright Directive and the E-Commerce Directive;
- Ensure that the amendments to the Urbani Decree are consistent with effective enforcement in the online environment.

<b>ITALY</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2000-2004<sup>2</sup></b>										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Motion Pictures</b>	160.0	15%	140.0	20%	140.0	20%	140.0	20%	140.0	20%
<b>Records &amp; Music</b>	45.0	23%	42.0	22%	42.0	23%	40.0	23%	50.0	25%
<b>Business Software<sup>3</sup></b>	567.0	47%	642.0	49%	363.4	47%	338.8	45%	327.0	46%
<b>Entertainment Software<sup>4</sup></b>	NA	34%	168.5	47%	215.4	55%	NA	74%	NA	65%
<b>Books</b>	23.0	NA	23.0	NA	23.0	NA	23.5	NA	23.5	NA
<b>TOTALS</b>	795.0		1015.5		783.8		542.3		540.5	

## **COPYRIGHT PIRACY IN ITALY**

### **Piracy levels remain too high across all industry sectors; CD and DVD-R burning and Internet piracy grow.**

Until 2004, piracy rates in Italy across all industries had remained at 20% or higher for the last 10 years. As a result of continuing, improved implementation of the 2000 Anti-Piracy Law (AP Law) in 2003 and 2004, piracy rates dipped below 20% for the first time in some sectors. The AP Law and the 2003 increases in administrative penalties have resulted in 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 (OD) piracy market, from production to distribution, using illegal immigrant networks to sell, primarily, CD-Rs and DVD-Rs as well as factory-produced CDs and DVDs and entertainment software product in PC and console formats. Cartridge-based video games (and their

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>3</sup> BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Italy, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$1.127 billion) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>4</sup> 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.

component parts) continue to be imported from Asia, and are also distributed through networks run by organized criminal syndicates.

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 also been seized in 2004. As a result of the mid-2003 increase in the administrative fine (imposed on the spot by the police) from €52 (US\$67) up to €154 (US\$198), 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, entertainment and business software and books—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. In a first action of its kind, a massive Guardia di Finanza (GdF) operation—Operation Mouse—was conducted in 2003, resulting 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. The GdF has confirmed that 90% of the people charged in this operation with piracy have been convicted by local courts. In February 2004, in the first such raid against a portal site, the GdF conducted a raid in Bergamo against an e-Donkey portal site offering links to files of pirate works of all kinds (movies, business and entertainment software, music, books and TV programs) on the e-Donkey network. The portal had an estimated 20,000 users. The GdF closed the site and arrested two persons operating the site. The GdF conducted 30 other such raids in other provinces.

Furthermore, right holders 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. Right holders 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. Right holders 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.

Finally, to assist in dealing with the Internet piracy problem, the Motion Picture Association (MPA) sought and obtained a decree criminalizing uploading on the Internet. The Urbani Decree dealt with P2P infringement and went into force on May 23, 2004. Aspects of the Decree were opposed by ISPs, which gave rise to efforts to water it down. Hearings on amending the Decree (the so-called Ascitti Bill) were held in fall 2004 before the Italian Senate, and that bill is due to be voted on soon. The outcome is uncertain.

The decree contains at least one potentially problematic provision. This would impose a “virtual stickering” requirement whereby uploaders must display a “notice regarding the due fulfilment of obligations under author’s right legislation and related rights, specifying the sanctions provided under the Copyright Law.” Because it is unclear how this is to operate, a committee (the “Stanca” committee) has been formed to deal with it and has proposed deleting it. The outcome, as noted above, is uncertain.

One of the amendments proposed to the decree in the so-called “Asciutti Bill” would distinguish between acts done for lucrative purposes (“lucro”) and acts done “for gain” (“profitto”); the latter broader standard is now part of the Urbani Decree. The Asciutti Bill would limit criminal penalties to acts done for direct lucrative purposes, rather than indirect “for gain” purposes. At least portions of the copyright industries would oppose this change.

## **Unauthorized commercial photocopying, corporate end user piracy of business software, and broadcast, cable and satellite piracy continue to damage U.S. copyright owners.**

Wide-scale photocopying piracy is an enormous problem in Italy, due to the failure of the enforcement authorities to take aggressive action against it. In 2000, the publishing community sought and received in the new AP Law the authority to require remuneration for the act of photocopying, primarily out of frustration from lack of government enforcement action and as a “second-best” solution. 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,<sup>5</sup> were arrived at for both educational institutions and copy shops, but these institutions routinely fail to pay royalties due, and SIAE and the government continue to take 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, millions of dollars in annual losses to all publishers, including U.S. publishers. Action must be taken to crack down on illegal photocopying activity, to enforce payment under the AP law, and to promote use of legitimate materials on university and school campuses.

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. A recent study put the piracy rate in Sicily at 70% of the market there. Prior procedural difficulties in bringing cases against end users in the Italian courts appear to have lessened somewhat, 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. Moreover, as noted, the Urbani Decree compounds the problem by extending the stickering obligation to those uploading content to the Internet.

The motion picture industry continues to face broadcast piracy particularly in the south of Italy and in Sicily, but consistent enforcement has reduced this somewhat. The creation of regional communication committees within the Authority for Guaranties in Communication (AGC) will hopefully lead to further reductions in broadcast piracy levels.

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 and 2004 have seen

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

improvements in these areas, with piracy rates now estimated at 5%. Similarly, satellite signal theft and smart card piracy, discussed in IIPA's 2003 submission<sup>6</sup> has been reduced to 2% and appears to be under better control due to the new Seca 2<sup>®</sup> encryption system.

## **COPYRIGHT ENFORCEMENT IN ITALY**

Though piracy levels continue to remain high in Italy, the AP Law continues 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, though the principal impediment to more deterrent enforcement continues to be the attitude of many judges that piracy is not a serious crime and who, as a result, impose the lightest sentences. Despite these gains, the judicial system remains in dire need of reform. Case loads must be lightened, and 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.

**Criminal enforcement:** The AP Law raised maximum fines from €1,549.30 (US\$1,996) to €15,493.17 (US\$19,957). Minimum prison terms increased from three months to six months, but still may be suspended at this higher level. Maximum prison terms were 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. This problem is particularly acute when the right holder is a large corporation. Judges tend to discriminate in sentencing when companies are involved. It also 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, 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 2004 was again one of their best years ever with 1,672 CD-R burners seized and almost 1,400,000 CD-Rs seized. The focus on CD-R production led to a decrease in burned CD-Rs available in the pirate market. The industry cooperated in 355 raids, and over 1,350 individuals have been arrested and/or charged with copyright offenses. The biggest CD-R burner seizure took place in Naples, with 321 units seized. This is one of the largest seizures of recordable machines ever in Italy. In addition, the first criminal actions against Internet piracy have been carried out by the GdF with the technical assistance of the music industry anti-piracy unit. More than 50 people have been criminally charged for copyright law violations. They were all illegally sharing music files over the most popular P2P platforms like KaZaA and E-Donkey.

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

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. Around 80% of the arrests in 2004 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, sentences in almost all first convictions will be, and have been, suspended.

MPA reports that in 2004, 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. Deterrent sentencing continues to be a problem 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. It was hoped that a new law on immigration, passed in July 2002, which provided for the deportation of illegal immigrants convicted of copyright law violations, would help. Experience to date has been disappointing; the law has had little impact.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In November 2004, Operazione Corsaro 2 took place, the largest operation against enterprise end user piracy ever conducted in Italy, even larger than Operazione Corsaro I, a year earlier. More than 1,000 officers from the GdF raided 412 companies. The GdF found over 9,000 copies of illegal software and seized over 800 PCs; 268 individuals were ultimately charged.

The enforcement statistics below display criminal enforcement in Italy in 2004.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004				
ITALY				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	53	573*	355	981
NUMBER OF VCDs SEIZED	34			34
NUMBER OF DVDs SEIZED	912,842			912,842
NUMBER OF CD-Rs SEIZED		5,965*	1,390,017	1,395,982
NUMBER OF INVESTIGATIONS	126		355	481
NUMBER OF VCD LAB/FACTORY RAIDS				
NUMBER OF CASES COMMENCED	126			126
NUMBER OF INDICTMENTS	11			11
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	10			10
ACQUITTALS AND DISMISSALS	1			1
NUMBER OF CASES PENDING	21			21
NUMBER OF FACTORY CASES PENDING				
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	10		45	55
SUSPENDED PRISON TERMS	3		4	7
MAXIMUM 6 MONTHS	3		4	7
OVER 6 MONTHS				
OVER 1 YEAR				
TOTAL SUSPENDED PRISON TERMS	3		4	7
PRISON TERMS SERVED (NOT SUSPENDED)	7		41	48
MAXIMUM 6 MONTHS	3		29	32
OVER 6 MONTHS	4		6	10
OVER 1 YEAR	3		6	9
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	7		41	48
NUMBER OF CASES RESULTING IN CRIMINAL FINES	1	310*	45	356
UP TO \$1,000			25	25
\$1,000 TO \$5,000	1		18	19
OVER \$5,000			2	2
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	6,508.55		62,641.39	69,149.94

\*These data refer only to the raids where BSA provided technical support

**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 continue to 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. The Business Software Alliance (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 and motion picture industries are shown below.

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 ITALY</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS SOFTWARE</b>	<b>TOTALS</b>
NUMBER OF CIVIL RAIDS CONDUCTED	0	6	6
POST-SEARCH ACTION		6	6
CASES PENDING	10	3	13
CASES DROPPED	0	7	7
CASES SETTLED OR ADJUDICATED	0	8	8
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)		200,000	200,000
SETTLEMENT/JUDGMENT AMOUNT (\$USD)		200,000	200,000

## **COPYRIGHT LAW DEVELOPMENTS**

**The EU Copyright and E-Commerce Directives.** 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 the recent lower court case from Bolzano, Italy, finding mod chips (and modified videogame consoles) to be legal, has cast doubt on Italy’s implementation of the prohibition against trafficking in circumvention devices required by the Directive and the WIPO Treaties.<sup>7</sup> 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.

<sup>7</sup> An update on this case was not received before publication of this submission.

**Need to eliminate the SIAE sticker requirements for software:** The SIAE stickering obligations remain an issue for the software industry in Italy. Article 181*bis* of Italy's AP 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 have found their products subject to seizure.

The September 2001 regulation implementing the stickering scheme failed to resolve these problems. The Italian government had assured industry that 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. Ultimately, industry and the government negotiated a compromise that 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. Instead, the Urbani Decree expanded the stickering regime to cover products uploaded to the Internet.

The software industries believe that the stickering 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 stickering, 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.

These issues remain to be resolved. The Senate is currently considering amendments to the Urbani Decree that would address some, although not all, of these concerns.