

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Special 301 Recommendation: Italy should remain on the Special 301 Watch List.

Actions to be Taken by the Italian Government in 2006:

- Continue to implement the Anti-Piracy Law and other recent enforcement improvements with increased raids, prosecutions, and in particular the imposition of deterrent penalties;
- Effectively enforce the 2005 anti-P2P-related provisions to curb infringing uses and provide criminal authorities with appropriate resources and training;
- Invigorate a nationwide anti-piracy campaign which focuses on piracy by organized criminal syndicates, and covers all types of piracy (including Internet piracy and unauthorized commercial photocopying);
- Eliminate the sticker requirement on software;
- Institute judicial reform to speed up criminal and civil proceedings;
- Correct deficiencies in implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions;
- Introduce anti-camcording legislation.

ITALY										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2001-2005 ¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	161.0	22%	160.0	15%	140.0	20%	140.0	20%	140.0	20%
Records & Music	40.0	20%	45.0	23%	42.0	22%	42.0	23%	40.0	23%
Business Software ³	760.8	48%	779.0	50%	642.0	49%	363.4	47%	338.8	45%
Entertainment Software ⁴	639.2	30%	NA	34%	168.5	47%	215.4	55%	NA	74%
Books	20.0	NA	23.0	NA	23.0	NA	23.0	NA	23.5	NA
TOTALS	1621.0		1007.0		1015.5		783.8		542.3	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Italy, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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.

COPYRIGHT PIRACY IN ITALY⁵

In 2005, Italy continued to have one of the highest overall piracy rates in Western Europe. In recent years, the nature of piracy has changed in Italy: organized criminal syndicates are assuming more importance; CD-R and DVD-R burning are a major problem; manufacturing and distribution are migrating to smaller, harder-to-detect forms; and Internet piracy is significantly increasing. Other forms of piracy, such as commercial photocopying of books and journals, have stayed the same, with devastating effects on the publishing industry.

Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000, amendments implementing the EU Copyright Directive in 2003 and the 2005 anti-P2P (peer-to-peer) provisions originally introduced by the 2004 Urbani Decree have led to improvements in enforcement in some copyright sectors. However, incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. Additionally, while some industries report some improvement in the civil courts, judges are sometimes still reluctant to take on software end-user piracy cases. It is hoped that the tougher penalties in the Anti-Piracy Law amendments, if regularly imposed, will eventually result in a drop in piracy rates. Now that the 2005 anti-P2P provisions have been passed, it is essential that Italy undertakes aggressive enforcement against online piracy.

Piracy levels remain high across all industry sectors, with Internet piracy growing and the influence of organized crime continuing.

Organized crime: Organized criminal groups (mainly Camorra) dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell their products, 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 component parts) continue to be imported from Asia, and are also distributed through networks run by organized criminal syndicates. Due to pressure from increased enforcement, the mostly immigrant street vendors have increasingly pulled pirate product from plain view and now provide it on order. The organized criminal syndicates confine their pirate production to a large number of small private duplication facilities in which families (generally located in poorer areas of the country) manufacture limited quantities of pirate product (mostly DVD-Rs). The products are then collected by special “postmen” and are distributed to illegal immigrants, who in turn sell the products at street and local markets. This strategy enables organized criminal groups to avoid large seizures of pirate material and to obtain the help of a large, impoverished population economically dependent on piracy. According to Italian anti-Mafia prosecutors, there is evidence of the Napoli-based Camorra’s growing interest in the trade in pirated goods and there are signs of their increased connections with Chinese criminal gangs.

Internet piracy in general: In 2005, 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. Internet piracy is growing as a result of increased broadband penetration (6 million connections in 2005). Additional resources must be given to the criminal authorities to combat online infringements.

⁵ For more details on Italy’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. For a full listing of prior IIPA Special 301 filings on Italy, visit the country page at <http://www.iipa.com/countryreports.html> and scroll to Italy.

While criminal actions against Internet piracy are moving forward, the same cannot be said on the civil side. Right holders considering legal action against Internet pirates in Italy are facing challenges in identifying infringers due to restrictions imposed by the Privacy Code that came into effect on January 1, 2004. Right holders have not been 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 law concerning “Interventions for the Administration of Justice” (Law 45/04 of February 26, 2004). There, Article 3 modified Article 132 of the Legislative Decree No. 196 of 2003, limiting the obligation of the communication companies to keep the data of the telephone traffic for 24 months. These provisions have been changed with the approval of the Law Decree 144 of July 27, 2005 (which became Law No. 155 of July 31, 2005) that provides, in Article 6, for the compulsory retention of telecommunication data, up to December 31, 2007).

Audiovisual piracy: The Motion Picture Association reports no major improvements in the overall piracy situation in Italy during 2005. The problem of Internet downloads and pirate DVD-Rs continues. MPA reports that the pirate DVD problem is predominantly a local burning problem, although there has been one operation concerning pirate replication of DVDs. (On September 22, the Guardia di Finanza carried out an operation at a facility in Avellino, with the collaboration of FPM and FAPAV. The GdF officers seized over 270,000 pirate discs and three DVD lines. The illegal activities emerged through the examination by FAPAV and FPM of license documents and optical disc production contracts.) Reduced seizures seem to indicate that off-line piracy has at least stabilized, but the overall rate, inclusive of Internet piracy, appears to be growing. In addition, there have been increasing numbers of camcording incidents in Italian theaters during 2005. MPA also reports that unauthorized public performance, satellite television piracy and broadcast television piracy by local private television stations continued in 2005. However, these concerns decreased somewhat in 2005 as a result of local enforcement efforts or of technological improvements. The creation of regional communication committees within the Authority for Guaranties in Communication (AGC) has helped in combating broadcast piracy. 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. Satellite signal theft and smart card piracy remains at low levels, due to the new Seca 2[®] encryption system. For 2005, MPA’s methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Italy (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Italy due to audiovisual piracy (including both hard goods and internet) were \$161 million, and the estimated piracy level was 22%.

Business software piracy: The Business Software Alliance (BSA) reports there was no major change in the nature of piracy their companied faced in Italy in 2005. 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. In addition, widespread distribution of pirated CD-Rs and DVD-Rs, optical disc burning (mostly in small laboratories) and Internet piracy continue. The use of the Internet to circulate illegal or counterfeit software product is becoming more widespread. The sale of counterfeit software products by street vendors continues, and there is a connection to criminal organizations with this distribution. Preliminary estimated losses in Italy due to

business software piracy were \$760.8 million, with a 48% piracy level, in 2005. Lowering the business software piracy rates in Italy could significantly improve the local economy.⁶

Entertainment software: Entertainment software publishers face piracy at Internet cafés, with few of the 500 establishments being licensed by the video game companies. Pirated video game products also continue to be widely available at flea market-type venues. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace was \$639.2 million in 2005, with a 30% piracy rate. ESA member company Nintendo of America (NOA) reports that its enforcement experience in Italy for 2005 was mixed. While the company obtained good court judgments with infringers receiving tougher penalties and more jail time, police seizures were nonetheless down. The company also reports that for cartridge-based entertainment software products, the market is relatively clean.

Music and record piracy: The recording industry reports that CD-R burning is still the main problem and the most common type of music piracy in the country. Large illegal burning centers are active all over Italy (especially in the South) and consolidated street vendor networks are in charge for the distribution of the pirate products. Italy has one of the highest piracy rates in Western Europe. Approximately 50% of the national music market is local repertoire and the rest is international repertoire. In 2005 there was a 28% increase in the number of seized pirated CD-Rs. Furthermore, Internet piracy of music is a dramatically growing problem. Recent surveys showed that almost 5 million people are downloading music from the most famous P2P platforms. The estimated music piracy level in Italy for 2005 was 20%, a slight decline from the prior year. Estimated 2005 losses due to record and music piracy in Italy amounted to \$40 million.

Unauthorized photocopying: Wide-scale photocopying continued to be a serious problem in Italy during 2005. 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; the law 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 arrangements⁷ were made for both educational institutions and copy shops, and the first payments have been made to SIAE under these arrangements. SIAE is, in turn, facilitating remuneration to authors and publishers under this less-than-optimal agreement. However, users are refusing to enter into new agreements under the scheme, claiming lack of government funding, so what was a promising, if inadequate, solution, is coming to a grinding halt. Furthermore, copying beyond that which is compensable in the law persists at high levels causing, according to the Italian publishers association AIE, tens of 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. Estimated losses due to book piracy in Italy dropped slightly to \$20 million in 2005.

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: A 10-point drop in Italy's piracy rate (from 50% to 40%) could create nearly 15,000 jobs and pump \$8.5 billion into the economy. It could also increase local industry revenues by more than \$6.7 billion and generate \$2.4 billion in additional tax revenues for the Italian government. See <http://www.bsa.org/idcstudy/pdfs/Italy.pdf>.

⁷ For more details on these financial arrangements in the publishing industry, see IIPA's 2003 Special 301 report on Italy, page 503, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

COPYRIGHT ENFORCEMENT IN ITALY

Though piracy levels continue to remain high in Italy, the Anti-Piracy Law continues to have a positive impact on the attitude of law enforcement toward piracy. The AP Law raised maximum fines from €1,549.30 (US\$1,844.90) to €15,493.17 (US\$18,450). 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. In 2005, more raids were conducted, more pirate product was seized and more prosecutions were 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. Judges and magistrates must impose deterrent-level fines and significant jail time for major organized crime figures involved in copyright piracy.

Criminal enforcement: The recording, audiovisual and business software industries all report continued good cooperation with the Italian police forces (including the Guardia di Finanza and Polizia Postale) in 2005.

The business software industry continues to report positive developments on the criminal enforcement front in 2005. BSA directly supported, with its technical experts, more than 170 raids carried out by the GdF, and 75% of these actions had positive results. The GdF appears to be much more willing to take *ex officio* actions in software cases. BSA reports that a very positive development in July 2005 when a court sentenced the owner of a publishing company using illegal software to imprisonment and a fine. This is one of the first decisions involving a criminal end-user case.

The recording industry, as represented by its local anti-piracy organization FIM, reports their coordination with Italian enforcement agencies continued on a positive basis during 2005. The police continue to take *ex officio* actions. In 2005, the industry reports the following: 1.7 million CD-Rs seized, almost 1,500 CD-burners seized, 504 people arrested, and 1,085 people prosecuted. The largest seizure was of 80,000 CD-RS and the largest number of CD-burners seized in one raid was 179. 2005 saw also a big increase in the Internet anti-piracy enforcement; 123 file sharers have been prosecuted for copyright law infringement and the first criminal sentence has been delivered to a P2P user (6 months of jail – suspended – and €3,660 fine).

The motion picture industry anti-piracy group, FAPAV, reports that 351 raids were conducted by law enforcement agencies in 2005, resulting in the seizures of 3,085,680 discs (550,712 DVD-Rs, 132,956 DVDs and 2,402,012 blank DVD-Rs). FAPAV was involved in 78 raids and assisted law enforcement agencies in 28 of them. Concerning court actions, FAPAV reports that in the 12 criminal cases in which it assisted the prosecutor and that ended in 2005, 5 cases resulted in a prison term (with an average of 11 months' imprisonment). Fines of up to US\$1,000 were also imposed in 7 cases. As was the case in 2004, police enforcement of audiovisual piracy in 2005 continued at a similar pace, but the problem remained that many Italian judges are 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.

The motion picture industry also reports some progress on the Internet piracy front. In June 2005, the Postal Police of Pescara dismantled a private and complex pirate network named

“Cucciolandia” that was exchanging copyrighted content throughout the country. The operation involved 54 individuals who were operating 9 different websites over 5 regions in Italy. The Postal Police seized 5,000 pirate discs, 74 computers and 36 burners (one server seized in Rome contained 90 GB of recent theatrical releases). The individuals were charged not only with copyright violations but also with conspiracy offenses. There is also an ongoing investigation against a pirate forum named “Lordylandia” that started at the end of 2005. Lordylandia is a new pirate forum (www.lordylandia.org) that was opened in September/October 2005 and that started to be advertised in some hacker forums as the first to provide a new kind of pirate “service” linking to pirate movies and television series. The case was reported to the Postal Police of Milan, and has recently been submitted to the Public Prosecutor, who appears to be willing to proceed against the owner of the domain, seizing the website and searching the premises of the person to which the website belongs.

Roadblocks with the prosecutors and judiciary continue: There is a variety of roadblocks in the Italian criminal enforcement system, including perhaps the most pervasive problem, which is the unfortunate cultural fact that many judges, and the public, believe that piracy is not a serious offense and need not carry deterrent penalties. First, while police enforcement of the law has been significantly improved at the raiding level, it can still take months between a raid and the filing of charges to commence a criminal case in court. Second, once the case is 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. Third, the industries have seen that, 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. Fourth, the lack of prosecutorial discretion to decide whom to prosecute and the inability of Italian prosecutors to offer small offenders immunity or lower sentences in exchange for testimony against major pirates also hamper IPR enforcement in Italy (although it appears that article 171-nonies of the AP Law enables sentences to be lowered. However, FAPAV reports that it has only been used once). Getting the authorities and judges, in all but the most serious organized crime cases, to take effective and deterrent action remains an ongoing challenge. Fifth, another historical problem has been that 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. In late 2005, a law was passed (over the opposition of the copyright industries) which shortened the statute of limitations for criminal copyright cases, and this could result in the dismissal of, for example, 75% percent of all pending music piracy cases (see discussion in Law section, below).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	28		505	
NUMBER OF VCDs SEIZED	2000			
NUMBER OF DVDs SEIZED	132,956			
NUMBER OF CD-Rs AND DVD-Rs SEIZED	550,712		1785000	
NUMBER OF INVESTIGATIONS	126		505	
NUMBER OF VCD LAB/FACILITY RAIDS	4			
NUMBER OF CASES COMMENCED	8			
NUMBER OF INDICTMENTS	11			
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	14			
ACQUITTALS AND DISMISSALS	-			
NUMBER OF CASES PENDING	8			
NUMBER OF FACTORY CASES PENDING	-			
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	12		51	
SUSPENDED PRISON TERMS	6		15	
MAXIMUM 6 MONTHS	5		8	

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY				
OVER 6 MONTHS	1		4	
OVER 1 YEAR	-		3	
TOTAL SUSPENDED PRISON TERMS	6		15	
PRISON TERMS SERVED (NOT SUSPENDED)	6		36	
MAXIMUM 6 MONTHS	4		21	
OVER 6 MONTHS	2		10	
OVER 1 YEAR	-		5	
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	5		36	
NUMBER OF CASES RESULTING IN CRIMINAL FINES	12		51	
UP TO \$1,000	7		26	
\$1,000 TO \$5,000	5		17	
OVER \$5,000	-		8	
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	-		113000	
<i>*These data refer only to the raids where BSA provided technical support</i>				

Civil enforcement needs improvement. The situation regarding civil litigation did not improve noticeably in 2005. The Civil Procedure Code amendments in 2002 established strict time limits on civil litigation. It was hoped that these limits would improve the ability of right holders to conclude cases in civil court. However, BSA reports that in 2005, 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, difficult. In addition, 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.

Civil case statistics from the business software and motion picture industries are shown below.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
NUMBER OF CIVIL RAIDS CONDUCTED	0		
POST-SEARCH ACTION	0		
CASES PENDING	5		
CASES DROPPED	1		
CASES SETTLED OR ADJUDICATED	4		
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	n.a.		
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	122,720		

Specialized IPR courts: In 2003, IIPA 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 civil courts under the auspices of the Justice Ministry. While IIPA then 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.

Trainings: The local motion picture (FAPAV), recording (FPM) and business software industries together offer approximately 10-12 training courses to the Italian police forces (Police, Guardia di Finanza, Customs, etc.) all across the country (through “road shows”). An average of 50-60 police forces officers are trained in each seminar. In addition, the industries also assist the U.S. Embassy in the organization of a yearly IPR off-site workshop for judges, prosecutors and law enforcement officials. FAPAV, FPM, BSA, and the Ministry of Education, University and Research together launched a Sensitization Campaign (Scuola Project) in Italian primary schools in December 2004. During 2005, FAPAV has also distributed 5,000 copies of its updated legal guide listing and describing important legal decisions on audiovisual protection from 1998 to date (400 pages) to magistrates and heads of police forces.

COPYRIGHT LAW AND RELATED DEVELOPMENTS IN ITALY

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. In late 2004, there was a lower court case from Bolzano, Italy, finding mod chips (and modified videogame consoles) to be legal.⁸ That decision has cast doubt on Italy’s implementation of the prohibition against trafficking in circumvention devices required by this Directive and the WIPO Treaties.

There was an effort to undermine the current Italian Copyright Act’s provisions implementing this Directive. During the fall of 2005, the president of the “Advisory Copyright Committee” (*Comitato Consultivo Permanente per il Diritto d’autore*) presented a draft bill that was supposedly aimed to “update” and conform the Italian Copyright Act to the EU Directives and bring it in line with technological developments. Following pressure from right holders and from the Prime Minister’s Office, the draft was shelved due to major controversy over the content of the proposal and on grounds of competency. This bill reportedly included a variety of objectionable provisions, such as extending the private copying levy to peer-to-peer uses, mandating that certain kinds of software are free, and eliminating *ex officio* authority. It appears that most of the proposal was in conflict with relevant international treaties, including WTO TRIPS Agreement, the WIPO Internet treaties, and certain EU Directives. A paper was prepared by local right holder groups highlighting industry concerns, in particular that the work of sub-committees specifically appointed to review different sections of the Copyright Law had been disregarded, stakeholders had not been consulted and changes were being proposed with economic and financial consequences falling outside the competence and responsibility of the Committee.

The EU E-Commerce Directive: In contrast to its implementation of the Copyright Directive, however, Italy’s implementation of the E-Commerce Directive was not as well done, 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. A proper notice and takedown procedure remains to be developed in Italy.

Internet Piracy and the Urbani Law Decree (2004) as Amended (2005): In 2004, legislation criminalizing uploading on the Internet was adopted in the Urbani Law Decree. The Urbani Law Decree was first issued on March 22, 2004; it amended the Italian Copyright Act so as to criminalize certain online infringements of the copyright in cinematographic works, and specifically when those

⁸ An update on this case was not received before publication of IIPA’s February 2006 Special 301 submission.

are committed by use of file-trading networks. During subsequent parliamentary proceedings, the law was extended in scope to cover all copyright works and was confirmed by parliament on May 22, 2004. However, during this process the Italian government was compelled by opponents of the law to undertake to introduce changes to prevent it from applying to domestic peer-to-peer users. This law also contained a very objectionable provision for the software industry which imposed a “virtual stickering” obligation, which would pose particular problems for business and entertainment software.

Aspects of the Urbani Law Decree were opposed by the Internet service provider community, which gave rise to efforts to water it down. Hearings on amending the Decree (then known as the so-called Ascitti Bill) were held in fall 2004 before the Italian Senate. On March 23, 2005, the Italian parliament finally approved a compromise on the anti-P2P provisions originally introduced by the Urbani Law-Decree. The law was published on April 1, 2005 and entered into force on April 2, 2005. Several content industries worked to preserve a criminal penalty for uploaders. Article 171 of the Copyright Act is now amended to create criminal liability for any act of making a work available to the public on the Internet. Liability is imposed on anyone who without authorization “makes a copyright work or part thereof available to the public by entering it into a system of telematic networks [i.e., the Internet], through connections of any kind”. The maximum penalty is a fine of €2,065. If the infringer pays a sum equal to half the maximum prior to his conviction, together with the expenses of the proceedings, the offense is expunged. Although this is a very mild penalization, it should be noted that it applies whether or not the infringement is committed for reasons of gain. It thus preserves the criminal nature of the violation, allowing for investigation by the police. Commercial Internet pirates are dealt with more harshly. Under Article 171ter, anyone who for financial benefit communicates a work or part thereof to the public via a “telematic network” is liable to a fine of some €15,000 and a sentence of 4 years’ imprisonment. This amendment raises the threshold of liability from infringement “for gain” to one of “financial benefit”, excluding the idea of the mere exchange of files as a sufficient basis for heavy sanctions.

This represents a retreat from the version of the law passed in 2004, though it does offer a substantial criminal remedy against financially-motivated online infringers. This 2005 amendment to the Urbani law also resulted, fortunately, in the removal of the troublesome provisions to the software industries which required a kind of “virtual sticker” on all online websites. Uncertainty remains as to how the Italian government’s criminal enforcement of this law will work.

Furthermore, an initiative sponsored by an inter-ministerial commission aimed at promoting cooperation among the various stakeholders (e.g., copyright owners, telecommunication companies, internet service providers, etc.) has stalled. This so-called Vigeveno Commission, after its former Chairman, Paolo Vigeveno) was established by the Ministry for Innovation and Technology in cooperation with the Ministry of Culture and Ministry of Communications in July 2004 to “draw up proposals for the development of offer and consumption of digital content, while guaranteeing the protection of intellectual property.” This commission fostered the negotiations between right holders and Internet Service Providers and telecommunications companies which led to a final compromise on the Urbani Law Decree, and also developed a “pact” between Government and Industry operators calling for the development of Codes of Conduct. The Pact was officially signed during the 2005 Italian Music “Sanremo” Festival, thus its consecration as the “Sanremo Pact.” Unfortunately, this Pact, announced with some fanfare when it was signed as a pact to address the challenges of the internet by all concerned parties, has had no real concrete follow-up so far. In 2006, this Commission should develop Codes of Conduct, as per the commitment made in the San Remo Pact. Furthermore, cooperation with the ISPs is poor; the Commission needs to follow up and focus on the cooperation between IP industries and ISPs in order to bring about effective measures against infringing uses of p2p networks as a priority.

Eliminate the SIAE Sticker Requirement for Software: This problem remains a major concern for the software industries. Specifically, Article 181*bis* of Italy's Anti-Piracy 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. Notwithstanding this 2002 understanding with the Italian Government, this stickering obligation is still in force and it does not appear that it will be eliminated anytime in the near future. In 2004, the Urbani Law Decree actually made this situation worse; fortunately, however, the 2005 amendments eliminated one of the problems, the one requiring a "virtual sticker" (see discussion above). The fact remains that 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.

Ex Cirelli Law and Shortening the Statute of Limitations: Following the decriminalization policy of the current government and the desire to relieve the inefficiencies of the Italian judicial system (including a huge backlog of cases), a Bill (known as Ex Cirielli) was developed to reduce the duration of certain proceedings involving first offenders. All the copyright industries were concerned that its adoption could have the detrimental effect of potentially causing the dismissal of a large number of criminal copyright cases in Italy. The recording and movie industries, who have a large number of pending cases, urged Italian legislators to reconsider the approach in this Bill in order to prevent cases being dismissed en masse before they could be completed. Despite these concerns, the Italian government adopted this law in November 2005. The law continues to be very controversial, and it remains to be seen as to how the law will be interpreted and applied.

Administrative Fines in New Consumer Law: Although not directed to deal specifically with copyright violations, a new law was adopted in the summer of 2005 which introduced new administrative fines for consumers of counterfeit and pirate goods. Law 80/2005 is aimed at protecting the products "made in Italy." According to Article 1, paragraph 7, of this law, anyone who purchases or accepts counterfeit or pirate products faces an administrative fine of up to 10,000.00 Euros (€ 3,333 if paid within 60 days). Some local administrations already apply this bill in order to fight the sales of pirate CDs, DVDs and trademark goods. Rome, Florence, and Venice have already implemented the provisions and sanctioned many consumers. More needs to be done in order to increase the adoption of this strategy by the more reluctant local administrations like Milan and Naples.

EU Enforcement Directive: The EU adopted the Directive for the Enforcement of Intellectual Property Rights in April 2004, and Member States have two years to implement the text into national law. The Directive provides a number of improvements in pursuing civil actions against piracy, in particular in regard to obtaining information about infringers and injunctions against

intermediaries. Effective implementation should facilitate enforcement efforts, particularly in the digital environment. Implementation of this Enforcement Directive was planned for 2005 but the process was delayed and is expected to be completed before the April elections. The local copyright industries are closely monitoring the process.

Need to Introduce Anti-Camcording Legislation: The illicit recording of movies at theaters (camcording) is a major source for pirate motion pictures available on the Internet, as well as on street corners and at flea markets. There have been 14 occurrences of illegal camcording (or sound recording) traced to Italy during 2005. In order to facilitate prosecution of illegal camcording, anti-camcording legislation should be adopted in Italy to require jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film's ability to recoup the investment made in its production. Therefore, the result is exponentially greater economic harm than what is traditionally experienced as a result of a single act of "theft."

MARKET ACCESS ISSUES

Broadcast Quota: Law No. 122/98 and the "Gasparri Law" of May 2004 require that over 50% of monthly transmission time be reserved, "in any case," for EU works, including prime-time programming. The method of calculating programming that qualifies as EU works excludes newscasts, sports, game shows, advertising, teletext services, teleshopping. The law ignores the "where practicable" language of the EU Broadcast Directive and includes references to prime-time programming and talk shows that are not included in the EU Directive. In addition, this 50% quota must be applied to the various categories of EU works, such as children's animation product, and at least 50% of these EU works must have been produced within the last five years. Law 122/98 requires broadcasters to allot programming time to independent EU producers as follows: (1) private national broadcasters are required to reserve at least 10% of the program quota to works made by independent EU producers and (2) the public service broadcaster, RAI, must reserve at least 20% of the program quota to works made by independent EU producers. Furthermore, following a Regulation of the Communications Authority (Resolution no. 9/99), the 50% quota also must be respected during the specific time band with the largest audience (between 6:30 p.m. and 10:30 p.m.). Exemptions to this rule are only permitted if the Authority is notified in advance by the broadcaster. Italy's broadcast quotas discourage investment, and subsequent growth, in the Italian television industry. Their programming quotas go well beyond those of the 1989 EU Broadcast Directive and eliminate language that provides right holders the flexibility to negotiate content quotas.

Production Quota: Effective January 1, 1999, Law No. 122/98 – as amended by the Gasparri Law of May 2004 — stipulates that the public service broadcaster, RAI, must invest at least 15% of its total revenues in the production of EU works. Private and pay television broadcasters, under Italian jurisdiction, must invest at least 10% of net advertising revenues into the production and acquisition of EU works. This quota is an arbitrary investment requirement that limits the ability of Italian broadcasters to purchase MPA member company television programming.

Taxation: Pursuant to the 2004 revision of the Italian film subsidy law, legislative decree #28/2004, exhibitors in Italy continue to enjoy a number of fiscal benefits linked to the promotion of European Union (EU) and national film productions, including low interest rate loans or subsidies on interest. To enjoy such benefits, implementation decree of June 10, 2004 provides for a 20% EU quota for single-screen theatres and 30% for multi-screen theaters. MPA continues to protest the discriminatory and protectionist nature of these incentive schemes and advocates their revocation.

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