

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ITALY

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

## **EXECUTIVE SUMMARY**

Italy continued to have one of the highest overall piracy rates in Western Europe in 2006. Estimated trade losses due to copyright piracy in Italy in 2006 were conservatively estimated to be at least \$1.4 billion. In recent years, the nature of piracy has changed in Italy: organized criminal syndicates are assuming more importance; CD-R and DVD-R burning is a major problem; manufacturing and distribution are migrating to smaller, harder-to-detect forms; Internet piracy is significantly increasing; and commercial photocopying of books and journals has remained steady, if not worsened. Furthermore, over the past two years, three general legislative developments in the criminal law have had a tremendous adverse impact on enforcement: the first is the recent Pardon Law (2006) which granted amnesty for all prison sentences of 3 years or less; the second is the "Cirelli Law" (2005) which reduced the statute of limitations causing many pending piracy cases to be dismissed; and the third is the "Pecorella Law" (2006) which eliminated the right of the Public Prosecutor and the offended party to appeal against acquittal sentences issued at the trial level (Fortunately the Pecorella Law has recently been judged partially unconstitutional by the Constitutional Court). These three laws have had an extremely negative impact on anti-piracy activities. It is clear that the Italian Government's decriminalization policy, which has cross-party support for varied reasons, has severely damaged proper enforcement against piracy in Italy.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Continue to implement the Anti-Piracy Law and other recent enforcement improvements with increased raids, prosecutions, and in particular the development of effective codes of conducts between ISPs and right holders.
- 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 commercial scale piracy controlled by organized criminal syndicates, appropriately covers all types of Internet piracy, and also includes unauthorized commercial photocopying of academic materials.
- Foster sustained coordination between the DNA (National Anti-Mafia Direction), the local DIAs (Direzione Investigativa Anti-Mafia) in order to provide updated information on the existing links between counterfeit/pirate products and organized crime, with special reference to the Camorra.
- Have the Government develop positive messaging on the value and importance of copyright, including in the on-line environment, and of intellectual property as a whole.
- Institute overall judicial reform to speed up criminal and civil proceedings.

## Legislation

- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Eliminate the stickering requirement on software by revising the copyright law to state that all software programs containing less than 50% of audio or video materials are not to be marked or declared to SIAE.
- Correct deficiencies in implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions.

<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: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	48.0	27%	40.0	20%	45.0	23%	42.0	22%	42.0	23%
Business Software <sup>2</sup>	716.0	50%	812.0	53%	779.0	50%	642.0	49%	363.4	47%
Entertainment Software <sup>3</sup>	647.7	40%	639.2	30%	NA	34%	168.5	47%	215.4	55%
Books	20.0	NA	20.0	NA	23.0	NA	23.0	NA	23.0	NA
Motion Pictures <sup>4</sup>	NA	NA	161.0	22%	160.0	15%	140.0	20%	140.0	20%
<b>TOTALS</b>	<b>1,431.7</b>		<b>1,672.2</b>		<b>1,007.0</b>		<b>1,015.5</b>		<b>783.8</b>	

## COPYRIGHT PIRACY IN ITALY

Organized crime: Organized criminal groups (mainly in southern Italy) continued in 2006 to dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell their products. The organized criminal syndicates belonging to the so-called “Alleanza di Secondigliano” have full control over counterfeiting and piracy in the Campania Region. This information collected and analyzed by the DNA (National Anti-mafia Direction) is supported by the outcome of some important trials involving the Camorra families, such as the Contini-Licciardi

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. 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.

<sup>2</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Italy, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</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.

<sup>4</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

and other organized groups linked to the Camorra. In addition to the production centers managed directly by the Camorra, such criminal groups created a vast network of local poor families that run small private duplication facilities that manufacture limited quantities of pirate products. The products are 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:** Internet piracy (of music, sound recordings, movies, entertainment and business software and books) particularly as a means to deal in hard goods and circumvention devices continued to be a major problem in 2006. As broadband penetration expanded, so too did Internet downloading, including via peer-to-peer filesharing systems, of pirated materials.<sup>5</sup> Internet piracy, particularly as a means to deal in hard goods and circumvention devices, is also increasing. Particularly worrying is the situation of Internet downloading of pirate copyrighted products, especially via peer-to-peer systems. This continued growth is fostered by the lack of cooperation by Internet service providers who take advantage of a loophole in the implementation of the E-Commerce Directive (see below, under Challenges with civil Internet cases). One of the major challenges in Italy is addressing a wide-spread perception that illegal downloading is not harmful to the creative community and educating politicians on the need and value of protecting copyright on the Internet.

In December 2006, the President of the Culture Commission of the Chamber of Deputies announced the development of a survey (*indagine conoscitiva*) on “Internet, the net, IT and copyright”, which will produce a White Paper with the conclusions of the Chamber drawn from a set of hearings. The paper should serve as the basis for a bill to go forward from the Government for Parliamentary approval. Because of ambiguous messages from various Government and Opposition representatives on the need to ‘reconcile copyright and new technologies’, this proposal will be followed closely by the right holder community. Criminal actions against Internet piracy are moving forward (see enforcement discussion, below), but additional resources must be given to the criminal authorities to combat online infringements. Problems remain, however, with respect to civil actions against Internet piracy (see civil enforcement discussion, below).

**Business software piracy:** The Business Software Alliance (BSA) reports there was no major change in the nature of piracy in Italy during 2006. 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, this industry also faces the challenges associated with Internet piracy, the distribution of pirated CD-Rs of software and local “burning” of software onto optical media. The sale of counterfeit software products by street vendors continues, often involving people coming from Arab nations who are exploited by criminal organizations to market such illegal products); reports also indicated that more people of Chinese nationality are involved in this distribution process. Preliminary estimated losses in Italy due to business software piracy in 2006 dropped to \$716 million, with the piracy levels also dropping to 50%.

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<sup>5</sup> For instance, the Entertainment Software Association reports that Italy, along with Spain and France, are consistently among the top five countries in Internet piracy (particularly through P2P networks). In addition, the ISPs in Italy are generally non-responsive to the notices of infringement sent to them by the ESA.

**Entertainment software:** Entertainment software publishers report that pirated video game products continue to be widely available at flea market type venues and through street vendors. There is, however, very little enforcement action taken against street vendors trafficking in pirated video game products. For instance, Nintendo of America, Inc. reports that there were no police or customs seizures of counterfeit cartridges in 2006. Growing online piracy, due to increasing broadband penetration, is becoming a significant threat to the entertainment software industry. Italy, along with Spain and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Italy are generally non-responsive to the notices of infringement sent to them by the ESA. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace for 2006 is \$647.7 million, with a 40% piracy rate.

**Piracy of sound recordings and musical works:** The recording industry reports that CD-R burning is still a serious problem, but that piracy of records and music over the Internet is now worse. The level of traditional piracy remains at 25 % where online (P2P) piracy accounts for 26% of the market (source: Luigi Einaudi Foundation 2006). Large illegal burning centers are active all over Italy (especially in the South) and consolidated street vendor networks run the distribution network for pirate products. Italy has one of the highest rates for the piracy of sound recordings and music in Western Europe. Estimated 2006 losses due to record and music piracy in Italy rose to \$48 million with a 27% piracy rate.

**Book piracy:** Wide-scale photocopying continued to be a serious problem in Italy during 2006. In 2000, the publishing community sought and received in the new Anti-Piracy 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 arrangements were made for both educational institutions and copy shops. Industry reports that, while the arrangements are being implemented with some success as to educational institutions (namely libraries), it is not being applied to copy shops, which continue unauthorized activities unabated. 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. Copy facilities are reportedly using increasingly sophisticated digital equipment in undertaking their activities—a growing trend that will make copying harder and harder to detect and prosecute (as files are stored for printing on demand, stockpiles will cease to exist). Authorities should work to enforce payment under the Anti-Piracy Law, and to promote use of legitimate materials on university and school campuses. Estimated losses due to book piracy in Italy were \$20 million in 2006.

**Audiovisual piracy:** The Motion Picture Association also reports no major improvements in the overall piracy situation in Italy during 2006. The problem of Internet downloads and sale of pirate DVD-Rs continues. Theft of audio tracks from films being exhibited in theatres is a major problem; the Italian soundtrack is added to illegal copies downloaded from the Internet and distributed through P2P networks as well as through street vendors. Unauthorized public performances and local signal theft are prevalent, albeit on a decreasing scale and predominantly in the Campania region. Satellite signal theft and smart card piracy remains at low levels, due to the new Seca 2<sup>®</sup> encryption system.

## COPYRIGHT ENFORCEMENT IN ITALY

Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000,<sup>6</sup> 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. During 2006, hundreds of criminal anti-piracy raids were conducted, resulting in the seizure of numerous pirated products and the initiation of more prosecutions. 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. Finally, the industries believe that the passage and application of both the 2005 "Cirelli Law," the 2006 "Pecorella Law" and the Pardon Law will severely undermine the possibility of any effective deterrence in the Italian system as well as challenge the viability of the role of the Court of Cassation in copyright cases (discussed further, below).

**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) during 2006, in actions involving hard goods as well as the Internet.

The recording industry, as represented by its local anti-piracy organization FIM, reports that coordination with Italian enforcement agencies continued on a positive basis. There have been several major actions in recent months. First, from January 18 to 22, 2007, 30 suspected counterfeiters were arrested by police in Naples after a two-year investigation. Officers from the Guardia di Finanza (GdF) acted on arrest warrants issued by the public prosecutor. The suspects were identified as alleged members of a major criminal network involving the production and distribution of pirate music and films. A total of 550 CD burners have been seized over the course of the investigation in addition to 120,000 pirate CDs and DVDs. The police have collected evidence that suggests the group made an annual illegal turnover of income amounting to €75 million (US\$97.5 million). Second, in November 2006, seven people of Chinese nationality were arrested during police raids against eight Internet cafes in Tuscany that were involved in a massive piracy case. The cafés were used to reproduce, store and distribute millions of files of copyright works through file-sharing networks. The users of the service were allowed to upload and download music, films and business software after the payment of a fee. The operation, carried out by the GdF of Prato (a town near Florence) led to the raids on eight cafes and a total of 462 computers containing more than one million music tracks, movies, videogames and computer programs. The arrests of the Internet cafe owners were ordered by the Public Prosecutor of Prato and the raids were conducted with the assistance of music, movie and software anti-piracy associations, FPM, FAPAV and BSA as well as the Italian authors' society SIAE. An additional 23 people were indicted for the violation of several administrative laws and for illegal immigration.

Third, during the summer of 2006, the GdF from Udine, assisted by industry's anti-piracy body FPM as well as FAPAV, executed several search warrants in a nationwide operation against the online sales of pirate CDs and DVDs on eBay. During the operation, the police seized music and

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<sup>6</sup> The Anti-Piracy 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.

video compilations offered by illegal traders. Twenty individuals were indicted for copyright infringement and are facing up to four-year prison sentences as well as administrative fines of millions of Euros. Equipment including computers, burners and printers were also seized. During the investigation, aimed at stopping a major ring of online vendors, the police and the anti-piracy federations received cooperation from the anti-fraud office of eBay. Most of the vendors were found with dozens of packages ready for shipment and some of them were discovered downloading music and movies from file sharing networks. Bank accounts have been seized by the GdF and an investigation into the customers of the illicit traffic is underway.

The motion picture industry anti-piracy group, FAPAV, reports that in the first half of 2006, police authorities report seizures of 8,560,732 DVDs and 3,489 audiovisual burner equipment. FAPAV was involved in 59 raids and undertook civil add-ins for eight criminal cases in 2006 (claim for damages, parallel to prosecution). Full-year data is not available at this time. Italian judges continue to be 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 business software industry continues to report positive developments with its cooperation and results achieved with the Italian authorities. As far as criminal proceedings are concerned, BSA directly supported with its technical experts more than 170 raids carried out by GdF in 2006 and 75% had positive results. It is also the growing attitude of the GdF to proceed *ex officio*. The BSA continues to work with the agencies and offered eight training courses to the GdF and Polizia Postale last year.

**Problems with prosecutions and the courts:** There are numerous 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, many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. The situation has been seriously aggravated by the passage in July 2006 of the "Pardon Law" which has resulted in the dismissal of a large number of piracy-related cases

In another example of the lack of judicial support for anti-piracy efforts, the Court of Cassation by Sentence No. 1872 of January 9, 2007, ruled that the unauthorized downloading of copyrighted movies, music and video games is not a crime if the downloader does not obtain a financial gain from the action. As background, in April 2002, the Court of Turin sentenced two men to respectively four and five years in jail and fined them several hundred euros for using a computer (FTP) server at the Turin Polytechnic Institute to store and distribute copies of video games, films and CDs in 1999. The jail time was cut to three months on appeal. But last month, a Supreme Court judge overturned the sentence completely, saying the act was not criminal because the duo saw no financial gain. This ruling was distorted in certain press accounts, adding to the already problematic misconception of the public that unauthorized downloading and filesharing is not illegal. In a public statement, FIMI, the music industry's trade group, downplayed the Supreme Court decision, saying it would have little impact on the anti-piracy law as the two men were charged under an older, weaker law, not on the grounds of Law 128/2004, which contains stiff penalties for copyright infringement. The heads of the

entertainment associations (Anica, Univideo, Agis, members of FAPAV) as well as the author's society SIAE also issued public statements against the misinterpretation of the ruling by the press. All Italian anti-piracy associations are continuing to develop strategies to address this problem, including TV interviews and national press advertising.

**Challenges with civil Internet cases:** 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. (In comparison, right holders may, however, be able to secure such information through the police or the courts in criminal actions.) Article 16 let. (b) of Legislative Decree No. 70 of 9 April 2003, implementing the E-Commerce Directive, requires take-down procedures to be subject to a prior notice by the "relevant authorities." This referral to the intervention of an undefined judicial or administrative authority is contrary to the E-commerce Directive and prejudicial to cross-industry agreements on take-down procedures. As a result, the industries believe that the Italian provisions of Legislative Decree # 70 of 2003 are inconsistent with Article 14 of the EU Directive 2000/31/CE where it requires a decision of the administrative or judicial authorities in order to remove the illicit contents or disable the access to them. EU legislation requires only the knowledge by the ISPs of an existing infringement committed by any third party to oblige the former to act expeditiously so to remove/disable the access to such illicit information. The anti-piracy associations will seek any opportunity to address and amend this deficiency in the law.

**Civil searches and litigation:** With respect to request for civil *ex parte* searches, BSA reports that this procedure works quite well in Italy. BSA's experience in 2006 was positive, and all its petitions were granted by the civil courts. Unfortunately, the overall situation with actual civil infringement litigation did not improve noticeably in 2006. Although the 2002 amendments to the Civil Procedure Code did establish strict time limits on civil litigation, civil cases continue to be too slow. Furthermore, many Italian Courts continue to award civil damages based on the amount of a "reasonable royalty" or "license fee" but this criterion lacks any deterrent effect.

**Specialized IPR courts:** In late 2002, a law was adopted which would create 12 specialized IPR civil courts. To date, the designated courts still have to also handle non-IP cases while also assuming responsibility for IP matters without any allocation of new resources. As a consequence, IP proceedings (including urgent measures) have become in some cases very slow, especially before some more loaded Courts. For instance, urgent measures may now take up to eight to ten months (when the infringement needs the completion of a Court Expert report and the plaintiff requests an injunction or similar remedies; while search orders proceedings still remain rather quick).

## **COPYRIGHT LAW AND RELATED DEVELOPMENTS IN ITALY**

**Trouble for criminal enforcement in the courts:** Three recent laws, combined in effect, will severely undermine even the possibility of effective deterrence and criminal copyright infringement. The operation of these bills will also worsen an already ineffective judicial system.

**The 2005 "Cirelli Law" and shortening the statute of limitations:** Following the decriminalization policy of the previous government and the desire to relieve the inefficiencies of the Italian judicial system (including a huge backlog of cases), a Bill (know 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 Pardon Law of 2006:** In July 2006, a "Pardon Law" (aka 'Indulto', Law No. 241 of 2006) was issued. This is a general law providing an amnesty of all imprisonment sentences of three years or less. In other words, all those who had been sentenced to a jail term of three years or less before May 2, 2006, for almost all kind of crimes (including copyright piracy), were set free. Taking into account that IPR crimes have a maximum level of imprisonment sanctions of up to three to four years (which is furthermore rarely reached), the "Pardon Law" has nullified virtually all anti-piracy criminal sentences imposed in the last few years. According to the Supreme Council of Italian Magistrates (CSM), 80% of trials between 2006 and 2010 dealing with crimes committed before May 2006 will be, or have already been, dismissed due to this law. The number of piracy cases dismissed will be around 100% since most involve a potential final sentence between six months and three years. This bill was extremely controversial but passed with a clear majority because of cross-party agreement.

The impact of this law goes also beyond the simple ending of trials and freeing of criminals. The pardon law decreases the perceived probability of punishment for future crimes and thereby reduces the incentive not to commit crimes. This law sadly reinforces the general perception in Italy that the probability of being actually punished for a crime is relatively low.

**The 2006 "Pecorella" Law:** The Pecorella Law establishes that if a defendant is found not guilty or is acquitted (e.g. due to expiration of the statute of limitations), the public prosecutor and the offended party cannot appeal the sentence but can only take the case to the Supreme Court. However, a defendant who has been found guilty retains the right to appeal and if the appeal fails, to then appeal to the Supreme Court. The industry believes that this limitation on the power of the prosecutor and the offended party is a grave violation of the Italian Constitution. Finally, this law would allow the Supreme Court to review the "merits" of the case (e.g. retry the case), not just review matters of law.

In sum, the Pecorella Law may have the following effect: (1) it will turn upside-down the role of the Supreme Court; (2) it will increase the length of time it takes for the Supreme Court to render its judgment (which is already very long); (3) it will multiply the tools available to the defendant on appeal and cause further delays to the sole benefit of the defendant, and (4) it will make the Supreme Court even more unmanageable than it already is.

The recording industry reports that this new law is already having its predicted undesirable impact. In two cases in Naples, two major gang members involved in piracy cases were found not guilty in first instance decisions because of procedural errors by the Public Prosecutor, although the defendants were blatantly infringing the copyright law. The public prosecutor and the industry (as plaintiff) will be unable to appeal and restore the trial courts decision of guilty on the merits.

It should be noted, however, that the Constitutional Court has recently declared the Pecorella Law partially in violation of the Italian Constitution, which has restored to the Public Prosecutor certain powers to appeal acquittals.

**The EU Copyright Directive:** Legislative Decree of 9 April 2003 No. 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. That decision cast doubt on Italy's implementation of the

prohibition against trafficking in circumvention devices required by this Directive and the WIPO Treaties. In the same proceeding, there have been recent additional rulings with contradictory elements, so that the doubts as to the implementation of the Directive have been further deepened.

**The EU E-Commerce Directive:** In contrast to its implementation of the Copyright Directive, however, Italy's implementation of the E-Commerce Directive 2000/31/CE in Legislative Decree No. 70 of 2003 was deficient, violated Article 14 of the Directive, and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. This requirement is contrary to that Directive and prejudicial to cross-industry agreements on take-down procedures. EU legislation requires only that the ISP know of the infringement to be obligated to takedown the infringing content. A proper notice and takedown procedure remains to be developed in Italy. (See civil internet cases above)

**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 the infringement is committed through 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 filesharers. 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 the fall of 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 (US\$2,685). 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 penalty, 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 171, 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 (US\$19,500) 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 provisions troublesome 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.

Unfortunately, there still has not been any concrete guidance from the Government on the ISP code of conduct process, i.e. the Sanremo Pact launched by the Innovations Ministry in cooperation with the Culture and the Communications Ministries in 2005.<sup>7</sup> The only outcome so far has been a unilateral publication of a self-regulatory code by the ISP groups, which almost totally ignores the concerns of rightsholders.

**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."

Article 181*bis* of the Copyright Law providing for the stickering duty conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement<sup>8</sup> and Italian Constitution. As a consequence, BSA urges that Article 181*bis* be revised to expressly state that all software programs containing less than 50% of audio or video materials are not to be marked or declared to SIAE. The criminal provision for software products (Article 171*bis* of the Copyright Law) was amended by Law 248/2000 to take into account the stickering duty. That rule may now be construed as applicable to original manufacturer, for the mere absence of the SIAE sticker on the products, even if such products are original. As a consequence, it is necessary to amend the provision eliminating the reference to the SIAE sticker.

**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.

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<sup>7</sup> 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."

<sup>8</sup> 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. 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.

Euros (US\$13,000), or €3,333 (US\$4,335) if paid within 60 days. Some local administrations already apply this law in order to fight the sale 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.

**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. In March 2006, the Italian Government issued the first anti-camcording legislation in Europe (incorporated into implementation of Enforcement Directive, Legislative Decree No. 140/2006). The law adds a provision to Decree No. 733 of 18 June 1931 (law on public safety), prohibiting the use of recording equipment in a place of public entertainment. Violations are punishable with up to 3 months' imprisonment or a small fine.

## **IPR TRAINING AND PUBLIC AWARENESS**

The local motion picture (FAPAV), recording (FPM) and business software (BSA) industries together held various training courses for Guardia di Finanza and Polizia officers. During these trainings new IP laws and the most updated methods to conduct investigations against criminal organizations, which are more and more updated under a technical point of view, are presented and illustrated to the officers. It is important to continue to generating awareness of IPR to be able to obtain the major support both from criminal and civil enforcement authorities. It remains an unfortunate cultural fact that common people and in many cases also judges believe that piracy is not a serious offense.