

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ITALY

Special 301 Recommendation: Italy should remain on the Special 301 Watch List, and an out-of-cycle review should be conducted later in 2008 to review progress made by the Italian government regarding matters such as: increasing enforcement activities, in both the physical and online environments; enhancing cooperation between law enforcement authorities and magistrates by holding comprehensive training sessions on IPR for magistrates; maintaining strong levels of protection and anti-piracy enforcement measures in the laws; expanding judicial training on IPR issues; and developing and funding pro-copyright public awareness and educational campaigns.

EXECUTIVE SUMMARY

Italy continued in 2007 to have one of the highest overall piracy rates in Western Europe. The Italian market faces exponential growth in online piracy and has a serious street piracy problem. Organized criminal syndicates remain deeply involved in distribution networks. CD-R and DVD-R burning is rampant and camcording in theaters and the commercial photocopying of books and journals continues to be a significant concern. Responsibility for copyright enforcement is fragmented. In addition to an almost anti-copyright (pro-piracy) attitude by consumers, legislators and courts, inadequate legislation, both in-force and likely to be proposed, will continue to make it extraordinarily difficult for right holders to protect their intellectual property and combat piracy.

Due to the fall of the government and early elections set for April 13-14, 2008, it is unclear at the time of this submission how the political situation will evolve and how it will affect the copyright industries' work in Italy. In 2007, however, the Italian Government was considering a number of proposals to reform the Copyright Law, each of which would take Italy farther away from achieving effective copyright protection. It is imperative that the government satisfy its international obligations and foster new, legal businesses. During recent years, the Italian Government's weak position on illegal peer-to-peer file sharing has severely damaged proper enforcement. In addition, Three enforcement-related criminal laws adopted in recent years have had a serious negative impact on enforcement: the first is the Pardon Law (2006) which granted amnesty to pirates with 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 aggrieved party to appeal against acquittal sentences issued at the trial level (this law was found unconstitutional in part, and some appeal powers have been restored). Italy's data protection laws also hamper effective enforcement, especially in civil cases involving online infringement.

PRIORITY ACTIONS IN 2008

Enforcement

- Improve enforcement, increasing raids and prosecutions, in both the hard goods and online environment.
- 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.
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.

- 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.
- Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, take appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.
- Take action to support the development of effective codes of conducts between ISPs and right holders.
- 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

- Discourage legislative proposals that may undercut copyright protection.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Eliminate the sticker requirement on software.
- Correct deficiencies in the implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions.

ITALY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	890.0	50%	729.0	51%	812.0	53%	779.0	50%	642.0	49%
Entertainment Software³	817.0	64%	647.7	40%	639.2	30%	NA	34%	168.5	47%
Sound Recordings & Musical Compositions	45.0	23%	48.0	27%	40.0	20%	45.0	23%	42.0	22%
Books	20.0	NA	20.0	NA	20.0	NA	23.0	NA	23.0	NA
Motion Pictures⁴	NA	NA	NA	NA	161.0	22%	160.0	15%	140.0	20%
TOTALS	1,772.0		1,444.7		1,672.2		1,007.0		1,015.5	

¹ 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/2008spec301methodology.pdf. For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Italy, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." See Appendix B of this report.

⁴ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this report.

COPYRIGHT PIRACY IN ITALY

Internet piracy: The biggest Internet piracy challenges are: (1) combating the common misperception that illegal downloading is not harmful to the creative community and (2) educating politicians on the need and value of protecting copyright on the Internet. There are an estimated 33.1 million Internet users in Italy, about 57% of the country's population (according to internetworldstats.com). 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 present major problems in 2007. As broadband penetration expanded, so too did Internet downloading, including via peer-to-peer file-sharing systems, of pirated materials. This continued growth is fostered by the lack of cooperation by Internet service providers (ISPs) who take advantage of a loophole in the implementation of the E-Commerce Directive (see below).

Right holders contemplating legal action against Internet pirates in Italy face difficulties in identifying infringers due to restrictions imposed by the Privacy Code. Right holders may not obtain from Internet Service Providers (ISPs) the identity of an infringing end-user through a civil procedure. Such information may only be secured through the police or the courts in criminal actions, which is time consuming and cumbersome. Moreover, in September 2007, the Data Protection Authority (Garante) issued regulations prohibiting ISPs from disclosing information about their subscribers for civil or administrative purposes. If this issue is not solved, civil enforcement against online piracy may become totally impossible.

Organized crime: Organized criminal groups (mainly in southern Italy) dominate the optical disc market, from production to distribution, often 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 southern Campania Region. Other organized groups, such as the Camorra and its affiliates, directly manage production centers, also involving a vast network of local poor families that run small private duplication facilities. 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.

In the summer of 2007, Italian anti-piracy police cracked an illicit distribution network operating in Catania, Sicily, in raids that uncovered a significant seizure of arms and bombs. Officers from the First GdF Operational Unit of Catania were involved in a series of seizures. During the search of one home, the police discovered eight guns, five rifles, ammunition for rifles and machine guns, two kilograms of TNT and bomb making equipment. More than 2,000 CDs and DVDs were seized during the raids as well as several stolen archaeological treasures, such as ancient Roman and Greek pottery. Police arrested two men and are investigating the connection between them and members of criminal organizations closely linked to mafia families.

Business software piracy: The Business Software Alliance (BSA) reports that there was no major change in the nature of piracy in Italy during 2007. 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. For example, more than 50% of companies criminally raided in 2007 used illegal software. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Italian economy could be even bigger if Italy's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 6,169 jobs, \$4 billion in local industry revenues, and \$1.1 billion in additional tax revenues for federal, regional, and local governments.⁵ 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

⁵ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

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 U.S. trade losses in Italy due to business software piracy in 2007 rose to \$890 million, with a piracy level of 50%.

Entertainment software: Entertainment software publishers report that growing online piracy, due to increasing personal computer and broadband penetration, is becoming a significant threat to the industry. Italy, along with Spain and France, are consistently among the top five countries in which infringing activity occurring online (particularly through the BitTorrent and eDonkey P2P networks) is persistently high. Industry monitoring of ongoing infringing activity online found that with greater incidence of game piracy through P2P networks, there appeared to be a corresponding and dramatic decrease in legitimate sales of entertainment software for PCs (the estimated rate of decline was 20% over a 12-month period). For example, for at least one popular PC game title, the number of downloads on just the BitTorrent and eDonkey protocols appeared to have exceeded the legitimate sell-through numbers of the same title for the first eight (8) weeks after release. In a member company's monitoring of four (4) top game titles, Italy accounted for approximately 2-3 percent of all BitTorrent downloads and 6-10 percent of eDonkey downloads. A substantial percentage of the downloads are hacked versions of the localized (Italian) version of the game. Industry monitoring also indicates that a lot of this activity appears to be occurring on the networks of a number of Italian universities. ISPs in Italy are also generally unresponsive to the notices of infringement sent to them by the Entertainment Software Association (ESA).

In addition to online piracy, elevated levels of hard goods piracy also continues to be problematic. Pirated video game products continue to be widely available at flea market type venues and through street vendors, though predominantly in the Southern Region. Pirated product on optical media, now predominantly domestically burned rather than industrially produced imports, continue to be available. Counterfeit Nintendo video game products remain readily available in several cities. Circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in console hardware, also remain prevalent. This situation is not helped by the lack of clarity in Italy's law governing the status of circumvention devices and mod chips. The recent Supreme Court decision overturning the Bolzano Court (which found that mod chips were not illegal) was a step forward; the Court found that circumvention devices are illegal under Italian law.⁶ The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace for 2007 is \$817 million, with a 64% piracy rate.

Piracy of sound recordings and musical works: The recording industry reports the online distribution of music files is now the most problematic form of piracy in this market. P2P distribution is the most serious; more than 7 million Italians are now using P2P networks for illegal uploading and downloading of music files. According to research carried out in 2006 by the Fondazione Einaudi, more than 30% of the people interviewed replied they have reduced the purchase of music CDs by using P2P networks. FIMI, the local recording industry group, confirms that more than €70 million (US\$101 million) have been lost in 2006 due to P2P piracy alone. In southern Italy, physical piracy of CDs remains high. Large illegal burning centers are active all over Italy and consolidated street vendor networks run the distribution network for pirate products. Camorra gangs in Naples are very active in the production and distribution of pirate optical discs. Also, the failure to pay for broadcasting and public performance rights for music still remains unacceptably high. Music piracy still remains around 23% of the market with a drop in physical and an increase in online piracy. FIMI studies show there was a further decrease of the legitimate market of about 36% due to online piracy. With a piracy level of 23% for U.S. right holders, the estimated losses due to music piracy in Italy in 2007 were \$45 million.

Audiovisual piracy: The Motion Picture Association (MPA) also reports no major improvements in the overall piracy situation in Italy during 2007. 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

⁶ *Corte di Cassazione*, Judgment no. 1602, General Register No. 35598/2006. Unfortunately, the Court did state that this finding was based on its determination that entertainment software products were "multimedia and complex copyrighted works" and applied the criminal provisions with respect to audiovisual works, instead of a straightforward finding that mod chips are illegal. This, unfortunately, is the effect of the protections for software versus that for audiovisual works being found under different sections of the criminal code. It is hoped that the law on software will be soon be revised to give the same level of protection to technological measures whether used on software or audiovisual works.

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 remain at low levels, due to the new Seca 2[®] encryption system.

Book and journal piracy: Unauthorized and uncompensated photocopying continued to plague academic publishers during 2007. Italy's Anti-Piracy law allows a certain amount of photocopying, but only upon payment of remuneration to a collecting society. Industry reports some success with licensing educational institutions (namely libraries), but not to copy shops which continue unauthorized activities unabated. Altogether, abuse of the law's provisions is common, costing Italian and foreign publishers alike substantial sums. 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 2007.

COPYRIGHT ENFORCEMENT IN ITALY

There is weak political support due to a lack of understanding and fragmented responsibility for copyright within the Italian government. For example, there are 19 offices that deal with the fight against counterfeiting and piracy. The High Commissioner for Anti-Piracy is supposed to coordinate this issue with all the offices concerned but it lacks the power and authority to do so effectively.

Industry cooperation with police on both physical piracy and Internet actions remained generally good in 2007. However, the severity of the piracy problems merits much more attention. In particular, 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, as well as move cases more expeditiously through the courts. In this regard, the industries believe that the passage and application of the 2005 "Cirelli Law," the 2006 "Pecorella Law" and the Pardon Law have undermined the possibility of any effective deterrence in the Italian system.

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 the Polizia Postale) during 2007.

The recording industry, as represented by its local anti-piracy organization FIMI, reports that coordination with Italian enforcement agencies continued on a positive basis. The relationship with local enforcement authorities is getting better on the criminal side (a specific agreement was entered into with the Milan and Rome Municipal Police, while specific training activities have been requested and agreed with the Government Commissioner in Sicily. Some local administrations have launched public awareness campaigns, in particular in Florence and in Milan. In 2007, the number of anti-piracy raids in the music sector was 237, with the seizure of more than 1.4 million CD-Rs and more than 2,370 CD burners. The police also arrested more than 290 individuals for copyright infringement. Regarding P2P cases, 34 people were criminally prosecuted for copyright infringement in 2007, with two major operations carried out by the GdF against heavy up-loaders and file-sharing hubs. Problems continue with the courts, which tend to underestimate the seriousness of copyright violations and, in some cases, issue unclear or not well reasoned decisions which have disruptive consequences on the enforcement of rights. Criminal courts do not have any kind of specialization on IP issues. The music industry's relationship with ISPs is still developing; it is clear, however, that in many cases the ISPs could be much more cooperative than they currently are.

The motion picture industry, through its local anti-piracy group FAPAV, reports that the police are generally supportive of FAPAV's efforts. The source piracy represented by theatrical camcording (and theft of the film-dubbed audio track) is increasing and requires significant engagement by law enforcement. FAPAV took a successful anti-camcording operation in 2007 with the assistance of the GdF. FAPAV also uncovered a

corrupt law enforcement official who was dealing in counterfeit DVD distribution. In spite of a major effort to strengthen training of, and relationships with, law enforcement, this industry also remains frustrated by the poor attention given to its cases by prosecutors and the courts. The primary bottleneck is the dismissive attitude of the Italian judges towards piracy in general. In addition, ISPs are generally not cooperative although there were some positive signals from some ISPs in 2007 which many provide some hope for positive, concrete collaboration in 2008.

The business software industry also notes that positive developments with its cooperation and results achieved with the Italian authorities. Relationships with local enforcement authorities are improving with criminal officials, including the GdF. A specific agreement was entered into with the Milan Municipal Police and specific training activities have been requested and agreed with the Government Commissioner in Sicily. In 2007, BSA provided technical assistance to 229 GdF raids on companies. 126 of such raids discovered illegal software, for a total value of €3.25 million (US\$4.7 million). Other raids were carried out by police forces without BSA support or knowledge. According to the information currently available, the raids carried out in 2007 should be more than 400. In some cases the raid were carried out *ex officio*. The main problems are experienced with courts, which tend to underestimate the seriousness of software violations.

As an example of a raid that affected many industries, in October 2007, officers from the Guardia di Finanza (GdF) in Milan took part in Operation Genux which resulted in the arrest of four individuals (ages 30-45) for illegally uploading copyright infringing music onto the Internet. They had been sharing more than 120,000 files containing copyright infringing music using the DC++ peer-to-peer network. The police seized six computers, seven external hard discs and more than 2,300 CD-ROMs during the raids. The products seized included catalogue from artists such as Madonna, Vasco Rossi, U2 and Elisa, as well as copies of business application programs and videogames. In addition to pressing criminal charges, the police have imposed on uploaders an administrative fine of €12 million (US\$17.4 million), levied under Article 174bis of the Italian Copyright Act.

Problems with prosecutions: 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 has 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.⁷ 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 was 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.

Transparency must also be introduced into the investigative and prosecutorial process, for while the police to take *ex officio* actions against pirate entities, right holders remain uninformed about the status of the proceedings. Where information is sought by the right holder, it is difficult to obtain this information from police and prosecutors while the matter is pending.

The courts and the press: However, 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.⁸ The press stated that this ruling meant that "P2P is legal," a clear

⁷ An entertainment software publisher notes that it has several cases which have been pending with the courts since 2000.

⁸ 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 in January 2007, 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 file-sharing 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.

misrepresentation of a case which had been dismissed on the grounds that it targeted technology/systems rather than infringers/infringements. In response, the heads of the various entertainment associations (Anica, Univideo, Agis, members of FAPAV) as well as the author's society SIAE, issued public statements against the misinterpretation of the ruling by the press. In addition, FIMI and FPM sent letters to all the attorney circuits explaining the media's wrong interpretation of the case. All Italian anti-piracy associations continue to develop strategies to address this problem, including TV interviews and national press advertising. The lack of an official Government-supported awareness campaign on what is legal and what is not in the area of Internet still leaves a lot of confusion among the general public.

On a brighter note, a very good decision of the Court of Cassation issued in 2007 will help in increasing the criminal enforcement against illegal public performances of broadcasts and music.

Problems with civil enforcement against Internet piracy: Right holders considering civil internet anti-piracy actions in Italy continue to face 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 No. 70 of 2003 are inconsistent with Article 14 of the EU Directive which 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 continue to seek any opportunity to address and amend this deficiency in the law.

Another serious situation is that an Italian court has issued an overly restrictive interpretation of the Privacy Code, which is hampering the possibility of effective enforcement.⁹ This involves the approach taken by the Rome High Court in the Peppermint case and the Italian Data Protection Authority in relation to the processing of traffic data to carry out civil enforcement. If the issue is not resolved, civil enforcement against online piracy may become totally impossible, with extremely serious consequences in the marketplace. It is even possible that the data processing/investigation needed to support criminal cases may be at risk in the future. Some Italian courts are deciding to deny requests for end user data, in support of the hard-line position by the Garante. The Italian anti-piracy copyright associations are meeting with the Garante, with the aim of obtaining approval for specific Internet anti-piracy cooperation (similar to the authorization granted to the French ALPA by the French CNIL). Enforcement authorities themselves are not allowed to carry out certain activities (e.g. undercover online operations). A recent legislative proposal by the Anti-Piracy High Commissioner—that would address this problem—is unlikely to pass due to the weakness of the current government.

Civil searches and business software litigation: As far as civil enforcement against end users is concerned, BSA reports that the problems it encountered in 2007 were not different from prior years. Most

⁹ The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, beginning 2007, on the controversial issue of P2P networks monitoring and privacy in Italy. It started with an injunction issued by the Court of Rome (Procedure n. 81901/2006) that required Telecom Italy to disclose about 3,636 names (the letters were no more than 1,000, according to Peppermint's lawyers) of Italian Internet customers/infringers (thus overruling a previous ruling). The case was based on the use of an anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially in IP numbers of the customers sharing copyrighted files through platforms like eMule or BitTorrent. Peppermint proceeded to send letters to some of the identified infringers with a settlement proposal of €330.00 (~US\$480), in exchange for a pledge to refrain from any further legal steps. There were a number of other similar proceedings under way involving requests of information to the ISPs brought by Peppermint as well as by a Polish company called Techland. The issue was exacerbated by anti-copyright politicians joining forces with consumer associations. The result was a wave of protest among the 'Internet people' drawing the attention of press and the Privacy Watchdog (Garante), which joined the proceedings and initiated its own investigation in anti-piracy activities and use of 'Internet monitoring' tools/software.

cases involved under-licensing in corporate contexts. In many cases, general managers do not have policies to keep software licenses under control, and employees install and use unlicensed software. While software piracy in the retail channel is still a problem, it appears to be slightly decreasing, especially in the north of the country, where enforcement tends to be more commonly and frequently applied. Media also played a very negative role in 2007, by reporting only decisions which are negative for IP enforcement, and in some cases also providing incomplete reporting. The business software industry's relationships with ISPs are still at the early stages, though clearly more cooperation from ISPs would be useful.

With respect to requests for civil *ex parte* searches, BSA reports that this procedure works relatively well in Italy. During 2007, 10 civil actions were directly commenced by BSA; 9 were granted and 8 resulted in finding of illegal software. However, there remain some difficulties. In a few cases, the competent court does not grant the order *ex parte*, thereby the possibility to enforce the measure is lost (when the other party knows of the order prior to executing it, that party can change the local situation, making the execution more risky for the plaintiff). Recently, BSA has had cases where the competent court was reluctant to grant more than one order at a time, thereby causing consistent delays in obtaining all the requested measures.

Customs enforcement: Customs authorities must be more vigilant in targeting suspected infringing goods. ESA member companies report that despite the continuing influx of counterfeit games, there was only limited seizure activity in 2007. Entertainment software publishers report that the customs seizure process presents problems for its companies; for example, even though right holders have registered their products with the Customs authorities, there have been very few actions or seizures of pirated products. It appears that despite complying with the registration process, and even though customs authorities have limited *ex officio* powers, these right holders must still obtain a final seizure order for the goods from the courts. Further training in identifying pirated and counterfeit products would also be beneficial for customs authorities.

Specialized civil IPR courts: In late 2002, a law was adopted which would create 12 specialized IPR civil courts. BSA reports that in 2007, some Specialized IP Courts do not appear to be keen on receiving software search order requests; timing to obtain the orders is longer; in at least one case the order was not granted. To date, the designated courts still have to 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 very slow in some cases. 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

Due to the forthcoming April 2008 elections, it is unclear how the political situation will evolve. However, in 2007, the Italian Government was considering a number of proposals to reform the copyright law and, while unlikely, it reportedly remains possible that the Culture Minister may push through certain proposals through a government decree amending the Copyright Act. There are two working groups operating within the Permanent Consultative Committee on Copyright (PCCC). Reportedly the various proposals they are considering include:

- 1- A requirement to obtain approval from a governmental body prior to applying digital rights management;
- 2- De-criminalization of P2P file sharing;
- 3- Adoption of a global license for file sharing (in effect, a form of compulsory licensing for Internet distribution);
- 4- Expansive extensions of the range of permissible exceptions and limitations of copyright protection.

It is possible that these proposals may be forwarded by the PCCC to the Parliament in the future. Both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) require member countries to provide the right of making available (which is an exclusive right not subject to compulsory licensing). Similarly, a requirement that a copyright owner obtain government approval prior to employing a

DRM is certainly not required by the Treaties' provisions on technological protection measures and anti-circumvention.

Over the past year, a number of 'anti-copyright' MPs have actively presented amendments in the context of unrelated legislation (in particular the so-called 'liberalization bill') aiming to decriminalize online infringements, weaken the legal protection for use of DRM technologies, and expand the notion of private and educational use. Although these proposals have been repeatedly defeated, thanks to pressure from right holder associations, the level of attention remains high. For example, on June 11, 2007, three "orders of the day" were approved by the Chamber, requesting the government to "repeal criminal sanctions for 'knowledge sharing,' liberalize copies for personal use, and allow reproduction solely for personal and non-lucrative purposes."

The EU Copyright Directive: Legislative Decree No. 68, which entered into force on April 29, 2003, implemented the EU Copyright Directive. For the most part, this decree properly implemented the directive. In late 2004, there was a lower court case from Bolzano, Italy, finding mod chips (that modified videogame consoles) to be legal, and that decision cast doubt on Italy's implementation of the Directive. As noted above, the Supreme Court in September 2007 overturned the Bolzano Court's ruling, and held that circumvention devices are in fact illegal under Italian law.¹⁰

The EU E-Commerce Directive: In contrast to its implementation of the Copyright Directive, Italy's implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) was deficient. The law requires take-down procedures to be subject to a prior notice by the 'relevant authorities.' This referral to an intervention by an undefined judicial or administrative authority is contrary to the E-Commerce Directive and prejudicial to cross-industry agreements on take-down procedures. It violates Article 14 of this Directive, and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. EU legislation requires only that the ISP knows of the infringement to be obligated to takedown the infringing content. Clearly a proper notice and takedown procedure remains to be developed in Italy.

The EU Enforcement Directive: Italy's implementation of the EU Enforcement Directive provides a number of benefits for civil action against piracy, particularly obtaining information about infringers. However, Italy's data protection law is an obstacle to efficient enforcement (see detailed discussion above). Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, appropriate steps should be taken to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.

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, 2004.¹¹ However, on March 23, 2005, the Italian Parliament weakened the anti-P2P provisions in the Urbani Law Decree, and these amendments entered into force on April 2, 2005. Several content industries worked hard to preserve a criminal penalty for uploaders. These 2005 amendments sadly represent 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. Specifically, Article 171 of the Copyright Act now creates 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

¹⁰ See discussion at footnote 6 regarding this court case.

¹¹ 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 file-sharers. This law also contained a very objectionable provision for the software industry which imposed a "virtual sticker" 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.

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.

ISP code of conduct: 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 2005.¹² 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 copyright right holders. Following the French example in its "Olivennes Agreement," the Italian right holder associations are pressing the Italian authorities to adopt a similar initiative.

Eliminate the SIAE Sticker Requirement for Software: This problem remains a major concern for the business software industry. 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 business software publishers who fail to sticker their 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 business software industry representatives 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, the business software industry and the Government negotiated a compromise that came into force in January 2003. The compromise did 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 Agreement¹³ 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, event if such products are original. As a consequence, it is necessary to amend the provision eliminating the reference to the SIAE sticker. There was a recent decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) that had a relevant impact on the application of this rule. Italy will be under the duty to notify the rule to EU Commission. Enforcement against those who do not sticker will probably be weakened.

¹² 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."

¹³ 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.

Anti-camcording legislation (2006): 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.

Administrative fines in the Consumer Law (2005): 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 (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.

The 2005 "Cirielli Law": 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 (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. Recent data relating to Cirielli application is not available, but it is known that some prosecutors do tend to drop IP cases.

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. 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. 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 copyright industries have been concerned about the possible effects of this law, including: (1) it might increase the length of time it takes for the Supreme Court to render its judgment (which is already very long); (2) it might multiply the tools available to the defendant on appeal and cause further delays to the sole benefit of the defendant, and (3) it might make the Supreme Court even more unmanageable than it already is.

The 2006 "Pardon" Law: 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), this "Pardon Law" 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 would be dismissed due to this law. Virtually all piracy cases were dismissed because most involved a potential final sentence between six months and three years. The impact of this law goes beyond the simple ending of trials and freeing of criminals. The Pardon Law decreases the perceived probability of punishment for future crimes and thereby reduced the incentive not to commit crimes. This law sadly reinforced the general perception in Italy that the probability of being actually punished for a crime is relatively low.

IPR TRAINING

The industry groups are active in training Italian officers. The Italian Federation against Music Piracy (FPM) is providing training seminars to the fiscal police on a monthly basis in cooperation with the local BSA and FAPAV. In 2007, more than 12 seminars were carried out in Italy and more than 500 police officers were trained. The local motion picture group, FAPAV, organizes roadshows, by itself and also with other IP organizations, throughout the year for local law enforcement. FAPAV also began to organize Internet piracy seminars in 2007 and plans to increase this activity in 2008, as well as adding specific training for theatrical employees in respect to anti-camcording efforts. For the last two years, BSA has an agreement in place with the GdF to provide trainings on software piracy. The agreement foresees 10 trainings in various cities. Upon request, BSA offers special further trainings. In 2007, BSA held a total of 15 trainings.